Policy:		
Bail – Adults		
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Every person charged with an offence has the fundamental right to bail on reasonable terms and the right not to be denied reasonable bail without just cause.

The right to bail is inextricably linked to the presumption of innocence. Canadian law presumes that an accused person will be granted bail:

> *… the release of accused persons is the cardinal rule and detention, the exception … To automatically order detention would be contrary to the 'basic entitlement to be granted reasonable bail unless there is just cause to do otherwise'.*[1]

Pre-trial custody can affect the mental, social, and physical life of the accused and their family. An accused is presumed innocent and must not find it necessary to plead guilty solely to secure release. Even when the accused is not detained in custody, unnecessary or unreasonable conditions of release limit the liberty of someone who is presumed innocent and may potentially criminalize otherwise lawful behaviour.[2]

Despite the entrenchment of a constitutional right to reasonable bail, remand populations and the denial of bail have increased dramatically since the enactment of the *Charter of Rights and Freedoms*.[3] Beyond the strain this places on an already overburdened criminal justice system, the increase in the remand population disproportionately affects accused persons from disadvantaged and vulnerable communities and tends to increase the accused's risk of criminalization. It also exacerbates the already unacceptable over-representation of Indigenous persons within the Canadian criminal justice system.[4]

1 *R v St-Cloud*, 2015 SCC 27 at para 70
2 *R v Zora,* 2020 SCC 14 at para 25
3 *R v Antic,* 2017 SCC 27 at para 64; Statistics Canada, "Police Reported Crime Statistics in Canada", by Jillian Boyce in Juristat, Catalogue No 85-002-X (Ottawa: Statistics Canada, 2015) at 3, online: <www. statcan.gc.ca/pub/85-002-x/2015001/article/14211-eng.htm>
4 Statistics Canada, "Adult and youth correctional statistics in Canada, 2017/2018", by Jameil Malakieh in Juristat Catalogue No 85-002-X (Ottawa: Statistics Canada, 2019) at 7, online <www.150.statcan.gc.ca/n1/pub/85-002-x/2019001/article/00010-eng.pdf>

As "ministers of justice", Crown Counsel must exercise principled restraint in all bail matters.

The decision whether to oppose or consent to bail, and on what terms, requires Crown Counsel to consider and weigh the competing interests of the accused, the public, and victims. Crown Counsel cannot predict the future actions of the accused with certainty, and thus cannot eliminate all risks. This is inevitable in a justice system based on the presumption of innocence, in which every accused person has a fundamental right to reasonable bail. When proposing bail conditions, Crown Counsel should take into account the circumstances of the alleged offence and all known risk factors and seek the least restrictive bail conditions that appropriately address the risk posed by the accused.

In order for the justice system to operate fairly and effectively, Crown Counsel are required to make discretionary decisions about bail. As outlined in the *Guiding Principles* (GUI 1) of the Crown Counsel Policy Manual, when Crown Counsel make principled decisions in accordance with this policy, regardless of the outcome, the BC Prosecution Service and the Assistant Deputy Attorney General will support their decisions.

General

To be legally justifiable, pre-trial detention or any conditions placed on the release of an accused person must be necessary for one or more of the three purposes enumerated in section 515(10) of the *Criminal Code*:

- to ensure the accused's attendance in court
- for the protection or safety of the public
- to maintain confidence in the administration of justice

It is not legally justifiable to seek pre-trial detention or bail conditions for any other purpose, including: to punish an accused, to enforce treatment of an accused's underlying mental health or addiction issues, to attempt to expedite the judicial process, or to encourage an accused to plead guilty or make any other concession or admission.[5]

Further, absent exceptional circumstances or a risk to public safety, Crown Counsel should not seek pre-trial detention unless a fit sentence upon conviction for the substantive offence would include incarceration.

In addition to the statutory grounds referred to in section 515(10) of the *Criminal Code*, Crown Counsel's position on bail must be consistent with the "principle of restraint"

5 *R v Zora*, 2020 SCC 14 at para 85

codified in section 493.1. The principle of restraint requires a judge to give primary consideration to the release of the accused at the earliest reasonable opportunity, on the least onerous conditions that are appropriate in the circumstances and are reasonably practicable for the accused to comply with.

Sections 515(1) through 515(2.03) of the *Criminal Code* make very clear that, apart from limited exceptions, the judge presiding at a bail hearing must release the accused on a release order without conditions unless Crown Counsel shows cause why detention of the accused or a conditional release is justified.

Other than conditions which must be imposed or considered under section 515(4.1) to (4.3) of the *Criminal Code,* and a condition that the accused attend court, Crown Counsel should propose only those additional conditions that are necessary and reasonable to advance the statutory grounds set out in section 515(10). In deciding what conditions, if any, to seek, Crown Counsel should consider the personal circumstances of the accused and the cumulative effect of the proposed conditions.

In formulating a position on bail, Crown Counsel should consider the specific guidance regarding bail contained in the policies listed below. Although these policies emphasize the need to have particular regard for the safety of the public, including victims and other family members, they do not supersede or displace the principle of restraint:

- *Child Victims and Witnesses* (CHI 1)
- *Intimate Partner Violence* (IPV 1)
- *Sexual Offences against Adults* (SEX 1)
- *Vulnerable Victims and Witnesses* (VUL 1)

Impoverished and Vulnerable Persons

Impoverished and vulnerable accused persons who lack either a support network of family and friends or financial means are less able to get access to bail.[6] When making a decision about bail, section 493.2(b) of the *Criminal Code* requires a judge to give particular attention to the circumstances of accused who belong to a vulnerable population that is overrepresented in the criminal justice system and that is disadvantaged in obtaining release.

Crown Counsel should not seek any conditions that may tend to criminalize, or penalize, an accused's particular life circumstances (e.g., poverty, homelessness, alcohol or drug addiction, mental or physical illness, or disability). Even where the particular life

6 *R v Summers*, 2014 SCC 26 at para 66

circumstances may relate to the circumstances of the underlying offence, a condition that is not reasonably practicable for the accused to comply with would not be reasonable.

Indigenous Persons

Numerous government commissions and reports, as well as the judgments of the Supreme Court of Canada, have recognized that discrimination experienced by Indigenous persons, whether as a result of overtly racist attitudes or culturally inappropriate practices, extends to all parts of the criminal justice system.

The history of colonialism, displacement, and residential schools in Canada has translated into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and higher levels of incarceration for Indigenous persons. The disproportionately high level of imprisonment also arises from bias against Indigenous people and from an institutional approach that is more inclined to refuse bail to them.[7]

In addition, the rates of victimization of Indigenous persons, especially for Indigenous women and girls, are significantly higher than those for non-Indigenous persons.[8]

The continuing consequences of colonialism for Indigenous persons in Canada provide the necessary context for bail considerations involving an Indigenous accused. These consequences "must be remedied by accounting for the unique systemic and background factors affecting Indigenous peoples, as well as their fundamentally different cultural values and world views."[9]

Indigenous Accused Persons – Bail Considerations

Where Crown Counsel is uncertain of the accused's background, they should inquire of the accused, defence counsel, or the court at the earliest reasonable opportunity, as to whether the accused identifies as an Indigenous person. Crown Counsel should ensure that this information is recorded on the file.

Crown Counsel must consider any information provided throughout the prosecution concerning the unique systemic or background factors that may have played a part in bringing an Indigenous accused before the court and the impact those factors, as well as the continuing consequences of colonialism, will have on the Indigenous accused's ongoing interaction with the criminal justice system.

Factors that might in other circumstances influence a decision to seek detention or more stringent bail conditions or to approve a charge under section 145(2) of the *Criminal Code*,

7 *R v Ipeelee*, 2012 SCC 13
8 *Victimization of Aboriginal People in Canada, 2014*, Statistics Canada, 2016
9 *Ewert v Canada*, 2018 SCC 30 at paras 57 and 58; *R v Barton*, 2019 SCC 33 at paras 198-200

such as unemployment, housing instability, sureties without significant financial means, substance misuse problems unrelated to the alleged offence, or lack of sufficient connection to the community in which the offence allegedly occurred, may reflect the unique systemic or background factors identified in *R v Gladue*.[10] As such, Crown Counsel must exercise principled restraint in all decisions regarding bail and all bail proceedings, with particular attention to the circumstances of Indigenous accused. Crown Counsel should only seek detention of an Indigenous accused where:

- the accused's history of failing to attend court leaves no reasonable prospect that any form of release will enable the matter to conclude on its merits; or
- the alleged offence is one of violence or bodily harm, or where the release on bail would otherwise reasonably result in risk to the safety or security of a victim, a witness, or the public

In assessing possible release plans for Indigenous accused, Crown Counsel:

- should only seek conditions that are reasonably necessary to address a risk to the safety or security of victims, witnesses, or the public or, given the accused's previous history of failing to attend court, to ensure the matter will conclude on its merits;
- should consider the remoteness of the community in which the accused resides as well as the unique cultural connections or traditions within that community, and the challenges these may pose for enforcing what might otherwise be considered appropriate bail conditions in other communities; and,
- must exercise principled restraint in the use of sureties.

Section 493.2(a) of the *Criminal Code* requires a judge to give particular attention to the circumstances of Indigenous accused when deciding bail. In all bail proceedings, Crown Counsel should ensure that all appropriate information that is readily available to them about the circumstances of an Indigenous accused is also made available to the court.

Review of Police or Initial Bail Orders

Police have the power to release an accused on an undertaking under sections 498(1)(c), 499(b), or 503(1.1) of the *Criminal Code*. In exercising that power, police are required by section 493.1 of the *Criminal Code* to give primary consideration to the release of the accused at the earliest reasonable opportunity, on the least onerous conditions that are appropriate in the circumstances and are reasonably practicable for the accused to comply with.

10 *R v Gladue* [1999] 1 S.C.R. 688

On receipt of a Report to Crown Counsel, or on an application for review, Crown Counsel should review the terms of any police-issued undertaking to ensure that they are reasonable, practicable, and restrict the accused's liberty only to the extent necessary to address the grounds enumerated in section 515(10) of the *Criminal Code*, and are enforceable and sufficient to protect the victim, the victim's family, witnesses, and the public. If the conditions do not meet this test, Crown Counsel should:

- where less restrictive terms would be sufficient, consider applying under section 502(2) or not opposing an application by the accused under section 502(2) for a release order with different conditions at the first reasonable opportunity to do so
- where the terms of the police-issued undertaking are unenforceable or insufficient to protect the victim, the victim's family, witnesses, and the public, request a warrant or apply to a justice under section 502(2), for a release order with different conditions
- where, after the initial Crown decision on bail and the initial court release order imposing bail conditions, Crown Counsel receives reliable new information that bears upon the practicability, utility, or likely effectiveness of an existing condition in achieving the purpose of the release order, consider consenting to vary bail under section 519.1 of the *Criminal Code*

Crown Counsel should apply the principles in the preceding paragraphs to applications to review bail brought under sections 520 or 521 of the *Criminal Code* whenever there is reliable new information bearing upon the practicability, utility, or likely effectiveness of an existing condition ordered by the bail judge or justice in achieving the purpose of the bail order.

Charge Assessment of Alleged Breach

Offences against the administration of justice, which include failures to comply with bail orders, continue to increase as a proportion of all reported crime in Canada.[11] These offences result in findings of guilt at significantly higher rates than for other types of offences and, upon conviction, result in sentences of incarceration at much higher rates than for other offences.[12] Convictions for offences against the administration of justice account for a very significant segment of the custodial population in British Columbia.

Some breaches amount to willful defiance of the court and its lawful orders and may also create risk to public or victim safety. When they do, they call for an appropriate response. However, not every breach represents willful defiance or an increased risk to public or victim safety. Many breaches occur as a result of the accused's changing or challenging life circumstances,

11 *Trends in Offences against the Administration of Justice*, Statistics Canada, 2015
12 *Trends in Offences against the Administration of Justice*, Statistics Canada, 2015

which can make strict compliance with conditions difficult. The latter types of breaches often do not raise significant concerns about public or victim safety. Overly stringent enforcement in these circumstances can create or contribute to a cycle of breaches and over-incarceration.

As outlined in *Charge Assessment Guidelines* (CHA 1), even if the evidentiary test is met, justice does not require that every provable offence must be prosecuted. Prosecution should be reserved for cases requiring the full force of the criminal justice system, with all its available sanctions. When it is alleged that an accused has breached a condition of bail, Crown Counsel should consider all available alternatives before approving the laying of an Information charging a breach of bail.

Reasonable alternatives to a prosecution for an alleged breach of bail may include:

- taking no action
- issuing a caution letter
- referring for alternative measures
- reviewing the continued necessity of the condition alleged to be breached for the purposes of section 515(10) and amending or varying as necessary
- applying for the revocation of bail under section 524 of the *Criminal Code*
- alleging the circumstances of the breach of bail as part of the circumstances at the sentencing of a substantive offence arising from the same facts, in accordance with section 725(1)(c)

A charge under section 145(4) or 145(5) should be approved only as a last resort primarily to address harmful intentional breaches of bail conditions, where the remedies available through bail review and revocation would be insufficient.[13]

One exception to the approach outlined above is in regard to matters covered by *Intimate Partner Violence* (IPV 1). Since breach of a court order is an identified risk factor for future instances of intimate partner violence, it is important in those cases for Crown Counsel to consider approving charges, where otherwise appropriate, for breaches of bail.

Where an accused is on multiple bail orders and allegedly breaches one or more of them, Crown Counsel should make every reasonable effort to bring all outstanding files before the court in order to avoid a situation where the accused might be bound by inconsistent bail orders and to ensure in each case that the least restrictive bail order that can reasonably achieve the objectives of section 515(10) is in place.

13 *R v Zora*, 2020 SCC 14 at para 70