



Why people charged with serious offences sometimes get out on bail

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In Canada the presumption that everyone is innocent unless they are proved to be guilty is more than just a saying. It is the principle on which our justice system is based, and one that protects us all from being imprisoned without valid reasons.

Because we are presumed to be innocent when we are charged with a criminal offence the Canadian Charter of Rights guarantees that we are “not to be denied reasonable bail without just cause” (see section 11(1)(e)).

“...it is important not to overlook the fact that, in Canadian law, the release of accused persons is the cardinal rule and detention, the exception: R. Morales, at p. 728... These fundamental rights require the justice (or judge) to ensure that interim detention is truly justified having regard to all the relevant circumstances of the case.” Supreme Court of Canada in R v St Cloud

In fact, the Criminal Code, a law passed by our elected representatives in the federal Parliament, says that the judge or judicial justice conducting a bail hearing shall order that a person accused of most crimes be released without conditions, unless the prosecutor establishes that either a guarantee of good behaviour or detention in jail is justified.

Section 515 of the Criminal Code creates a “ladder” of increasingly onerous forms of bail. An accused person is entitled to be released on the least restrictive form of bail (a release order without conditions) unless the prosecutor can show the need for a more stringent form (a release order with conditions which may be guaranteed by a promise to pay, a cash deposit or “a surety”).

The purpose of bail generally is to make sure an accused person attends court when required, to ensure they will not interfere with witnesses, and to protect the public by ensuring they don’t commit criminal offences.

Section 515(10) of the Criminal Code says that keeping an accused person in custody until their trial will only be justified where it is necessary:

- To ensure they attend court
- For the protection or safety of the public, including victims, witnesses, and those under 18, considering all the circumstances including any substantial likelihood that if released the accused will commit a crime or interfere with the administration of justice
- To maintain confidence in the administration of justice, considering all the circumstances, including the strength of the prosecution's case, the seriousness of the offence, the circumstances surrounding its commission including whether a firearm was used, and the possibility of a long jail term if the accused is convicted

A justice or judge conducting a bail hearing will pay close attention to an accused person's criminal record. However, because the Criminal Code uses the words "substantial likelihood" they cannot deny bail to people who pose less than a substantial risk of committing an offence, or when that risk can be adequately minimized by appropriate release conditions.

The Criminal Code says a judge or justice must pay particular attention to the circumstances of Aboriginal accused persons and those belonging to vulnerable populations that are over-represented in the criminal justice system. Other circumstances a judge or justice might consider include the accused's age, employment, roots in the community, family support, mental condition, membership in a criminal organization, and the circumstances of a victim.

"Liberty lost is never regained and can never be fully compensated for; therefore, where the potential exists for the loss of freedom of one day, we, as a free and democratic society, must place the highest emphasis on ensuring that our system of justice minimizes the chances of an unwarranted denial of liberty." Ontario Supreme Court in R v AB.

Parliament has reversed the burden of proof in some circumstances. Criminal Code section 515(6) states that people charged with certain offences must be kept in jail unless they can show their detention is not justified. Those offences include:

- An indictable offence committed while on a previous bail order for an indictable offence
- An offence involving terrorism or a criminal organization

- An offence involving a firearm
- Disobeying a bail order
- Drug trafficking, importing or production offences with a maximum penalty of life in prison
- Violence against an intimate partner if the accused person has a previous conviction involving violence against an intimate partner
- An offence with a maximum penalty of at least 10 years involving violence if the accused person has a previous conviction involving violence within the last five years
- Serious offence (an offence with a maximum penalty of at least 10 years) involving violence if the accused person has a previous conviction involving violence within the last five years

If a person is released on an undertaking or release order, they may have conditions (rules) imposed on their behaviour. These can include a curfew, living in a drug treatment centre and obeying its rules, not entering specified areas, and prohibitions on consuming alcohol and/or drugs, driving, or possessing weapons or break-in tools.

Most bail hearings take place in Provincial Court, but a person charged with murder will have bail decided by a Supreme Court judge. A person charged with murder also faces the “reverse onus” of showing their detention is not justified.

The law requires a judge or justice to give reasons for detaining someone, and for various other decisions made at a bail hearing. This includes a statement that the judge or justice has considered the safety and security of the community when making a bail order. However, if the accused requests it, the judge or justice must order that evidence presented in the bail hearing and the reasons for decision not be published until after the trial. This ensures that potential jurors won’t be prejudiced by hearing allegations that haven’t been proven.

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