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Our Freedom is Bound Together: Supporting the Release, Transition, and Care of People Impacted by Incarceration During COVID-19

Session 1 Bail 101: Adult

**Presented by Legal Aid Ontario and Nikki Knows/Project
OASIS, in collaboration with the City of Toronto**

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Basics on Bail



- What is bail?
 - The process of release, by a justice, of an accused person pending determination of their criminal charges
- What is a bail hearing?
 - A Court hearing where a decision is made by a Judge or Justice of the Peace to release an accused person on bail or deny their release so that they have to remain in custody
- When will the accused be brought to court?
 - An accused must be brought to court as soon as practicable and, if a justice is available, within 24 hours of arrest

Why is it important to get released on bail?

- Avoid punishment before conviction
- Avoid excess punishment
- Prepare a defense and avoid pleading guilty unnecessarily

Preliminary Issues on Bail

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- Crown Onus vs. Reverse Onus
 - Crown onus: the court's starting assumption is that the individual is to be released from custody unless the Crown can prove otherwise
 - Reverse onus: the court's starting assumption is the individual will be detained unless they can satisfy the court why they should be released

Preliminary Issues on Bail

■ S.524 Application

- This is made by the Crown, under the *Criminal Code*, to cancel all or some of an accused persons outstanding releases and address bail on all of the individual's outstanding charges
- Also known as a Global Bail Hearing
- Crown may not seek to cancel an outstanding bail if the bail is outside of Toronto.

■ Outstanding Charges

- Includes consideration of any outstanding charges and associated releases.

Defence Decisions on Bail

Preliminary Steps of Defence decision-making on Bail

- Conduct interview with accused and assess community supports available to support them upon their release
- Obtain Crown position and documentation
 - e.g. synopsis (allegations), criminal record, etc.
- Assess whether the onus position taken by the Crown is accurate

Preliminary Steps of Defence decision-making on Bail

- Determine if the s.524 application should be conceded or argued
- Assess all information and determine appropriate position on the Ladder of Release
 - This includes both the appropriate form and terms of release should they apply
- Review case with the accused, offer advice, answer questions, and obtain instruction

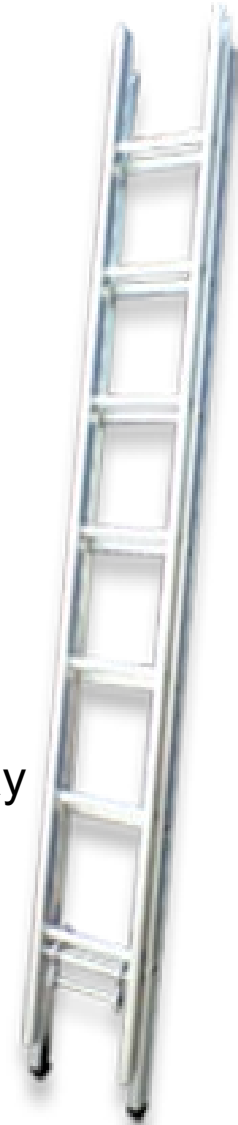
Ladder Principle of Release

Ladder Principle

- The *Criminal Code* creates a “ladder” system where the Crown must show cause (i.e. convince the justice) why a less restrictive form of bail is not appropriate.
- The default position is that a person should be released on the *least restrictive form of bail* with the *least restrictive conditions*, unless the Crown can convince the justice that a more restrictive release is *necessary*.

The Ladder of Release

- **Step 9:** Detention
- **Step 8:** Release to surety with house arrest
- **Step 7:** Release to surety with curfew
- **Step 6:** Release to surety (residential)
- **Step 5:** Release to surety (non-residential)
- **Step 4:** Release on own with community support
- **Step 3:** Release on own with conditions and promise to pay
- **Step 2:** Release on own with conditions
- **Step 1:** Release on own without conditions



Grounds for Detention



Grounds for Detention

- There are three (3) grounds for granting or denying bail:
 1. Primary: Is the individual considered a flight risk?
 2. Secondary: Is there a “substantial likelihood” the individual will commit further offences while on release?
 - Community safety and safety of complainant are considered on this ground
 - Majority of arguments on bail are made on this ground
 3. Tertiary: Are there exceptional circumstances that would cause the loss of confidence in our justice system?

Different Forms of Release

- Wide variety of release plans ranging from an unconditional release order to a house arrest bail with multiple sureties
- Each bail condition imposed must have a “causal nexus” to the allegations before the court
 - Causal Nexus - A legal term that in Latin means "to bind." Legally it means to link a cause and effect.

Bail Conditions

- The severity of the conditions of the release plan will depend on:
 - The nature of the allegations against the accused person
 - Any other previous bail release that the accused may already be out on, and
 - The criminal record or history, if any

What is a Surety?

- Surety ensures that accused complies with bail release conditions and attends court
- Surety obligated to call police if accused does not follow bail conditions
- Surety makes a monetary pledge to the court
- Typically a close family member or friend who knows the accused well
- Usually a Canadian Citizen or Permanent Resident (or someone with some permanent status in Canada)
- Usually surety has no criminal record or if they have a criminal record, that record is dated and/or unrelated to relevant bail issues
- Must be 18 years of age or older

Community Support

- The following agencies may be involved in an accused person's release plan:
 - Toronto Bail Program
 - Aboriginal Legal Services
 - Mental Health organizations (e.g. COTA, CMHA, Fred Victor)
 - Other community-based agencies that an accused person has already been connected with prior to their arrest

Community Support

- Other ways community members can support accused persons preparing for bail:
 - Writing letters of support
 - Supporting the development or component of the bail plan (e.g. identifying where accused can reside after release, arranging post-release counselling)
 - Contributing money for cash bail (if necessary)
 - Coordinating with and/or facilitating communications between the accused person, counsel, and any service providers they are working with
 - During COVID, assisting potential sureties with technical issues that might face participating in remote court
 - For in-person appearances - accompanying the accused to court appearances and/or arranging transportation for the accused person to get to court or bail-related appointments post release.

What might a bail look like?

■ Residence conditions:

- Reside with your surety and obey the rules of the house
- Reside at an address approved of by:
 - your surety, or
 - The Toronto Bail Program (shelters)
- Notify the Officer-in-Charge of the case of your address

■ Contact conditions:

- Prohibiting contact or communication with any alleged victims, witnesses or co-accused(s) with exceptions commonly made for communication through counsel

What might a bail look like?

■ Curfew or House Arrest

- Prohibiting the accused from leaving their residence during certain hours (curfew) or entirely (house arrest), except:
 - With designated people – surety, other family members, etc. – must be specified on the bail
 - Or for going directly to, from or while at work or sometimes extracurricular activities like programs and services

■ Other common conditions:

- Attend counselling, radius conditions, weapons prohibitions

The Bail Hearing

The Bail Hearing

- The matter goes before the court
- Bail decisions are generally made by a Justice of the Peace (JP) for the Ontario Court of Justice
 - In some jurisdictions, bail courts are supported by Judges
- The Justice will hear arguments from the Crown and Defence and make the final determination

3 Ways a Hearing Can Proceed

1. Straight Consent Show Cause/Bail Hearing

- Agreement between the Crown and Defence regarding form and conditions of release

2. Contested Show Cause/Bail Hearing

- A typical Contested bail hearing is conducted if the Crown argues for the accused to remain in custody

3. Bifurcated Show Cause/Bail Hearing

- The Crown agrees that the accused should be released, but wishes for a higher step on the Ladder of Release

What is the procedure of a bail hearing?

- How is evidence or information presented to the judge?
 - Testimony
 - Information through your lawyer
 - Documents
 - Letters of support
 - Medical documents
- What evidence or information is permitted?
 - Anything credible and trustworthy
- When can the accused share their side of the story?
 - A lawyer can raise defences and provide context at bail, but need to be tactical as presenting defences at a bail hearing before knowing the whole case may affect what the lawyer can argue at trial

Bail Compliance Unit

- Bail Compliance Unit (BCU) consists of police officers who form part of dedicated unit to ensure accused persons comply with bail orders
- Typically focused on accused persons charged with serious crimes (e.g. drug trafficking, firearms charges, serious offences involving violence)
- BCU can charge accused for not complying with bail conditions

What happens if the accused is detained?

- If denied bail, an accused may spend weeks, months or even years in custody, on remand, awaiting resolution of their case through a trial or guilty plea
- If denied bail, an accused may choose to bring an application for Bail Review at the Superior Court of Justice (SCJ) (not automatic).
 - Requires getting copies of transcripts of original bail hearing, which can be costly.
 - Duty counsel does not necessarily represent clients
 - Takes time to set a date for a bail review hearing
 - 90 days automatic bail review in SCJ
- An accused can move their case forward as follows:
 - Setting a date for trial
 - Plead guilty

Bail in the Time of COVID-19

Bail in the Time of COVID-19

- Bail courts are now being run remotely over the telephone with all parties participating via a conference call
- On their first day in custody, the accused will speak on the phone from the police division to their lawyer or a duty counsel lawyer
- If they do not get released on bail on the first day, the accused will be taken to a jail (in Toronto, either the Toronto South Detention Centre or the Toronto East Detention Centre).
- Their next bail court “appearance” will be remote (by audio or video) from the jail.

Bail in the Time of COVID-19

- Sureties are now being interviewed over the phone by defence counsel. Defence counsel might work with a potential surety to:
 - Complete a “Surety Declaration” form
 - Prepare and email a picture of the surety’s government issued photo identification to the lawyer and
 - A “selfie” photograph of the proposed surety to be emailed to the lawyer.
- Defence counsel may then pass this information to the Crown Attorney and the Justice



Who can represent an accused person at a Bail Hearing?

Private Counsel or Duty Counsel

Why you may want to choose Duty Counsel

- Majority of Duty Counsel work is bail hearings
 - Highly experienced and up to date on case law
- Duty Counsel may be more familiar with the Justice of the Peace or Crown Attorney
- Private counsel may not be readily available

Why you may want to choose Private Counsel

- May be more familiar with the accused's personal history
- Case may be complex or significant evidence to review
- If a special bail hearing is required
- Your surety/sureties have evidence that could compromise your trial

Communicating with Counsel and Preparing for Bail

Importance of Communication and Being Prepared

- Vital that counsel, the accused, and any potential sureties are aware of potential bail plan
- Important for family/friends to let counsel know about any community service providers the accused is working with
- Resources available at the jail to help organize a bail plan
- Counsel may ask family members to actively seek out community services that might assist the accused with underlying issues if released
 - Such as substance abuse or mental health supports

Importance of Communication and Being Prepared

- It is important for anyone seeking to assist someone going for bail to maintain an appropriate level of contact with the accused's lawyer
- The lawyer will need to properly prepare potential sureties to testify
- The accused has only one opportunity at bail
 - Liberty lost is never regained
 - Bail reviews may take time to schedule
 - May be strategic to wait for more evidence to become available to bolster your case

Common Issues with your Lawyer

Common Issues with Your Lawyer

- Pressure to plead guilty and your right to a bail hearing
- Adjourning your bail hearing or arriving too late
- Advice from lawyer about timing of bail
- Choosing your LAO lawyer
- Your lawyer's responsiveness
- COVID-19 complicating access to your lawyer

How to Apply to Legal Aid for a Change of Solicitor

- If the accused has retained a lawyer through a Legal Aid Certificate, in order to change from that lawyer to another lawyer, the accused would have to apply to Legal Aid Ontario (LAO) for a Change of Solicitor (COS) Application.
- If in-custody, the accused can call LAO toll-free at 866-883-9665 to apply for a COS application.
- If out-of-custody, the accused can call LAO toll-free at 1-800-668-8258.



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Any questions?