



Bail Basics

Introduction

The Public Legal Information Association of NL (PLIAN) is a non-profit organization dedicated to educating the public throughout Newfoundland and Labrador about the law. We provide public legal education and information services with the intent of increasing access to justice.

Since 1982, *The Canadian Charter of Rights and Freedoms* has been a cornerstone of Canadian life, protecting the personal liberties and fundamental rights of Canadians in their homes, workplace, and within the legal system. However, exactly what the rights included in the *Charter* mean may sometimes be difficult to understand. For example, section 11(e) reads:

Any person charged with an offence has the right . . . not to be denied reasonable bail without just cause.

What exactly is bail? What determines if the bail is reasonable? What constitutes just cause? Is this an automatic right, or is there a process involved? This brochure will give you an overview of the bail hearing process and clarify what you should know about this very important pre-trial procedure.

Thank you to our readers for their interest in this topic and for their continued support of PLIAN. Thank you in particular to our Pro Bono student, Ryan Belbin, for his excellent work in researching and preparing this informative brochure.

Executive Director

“Any person charged with an offence has the right...not to be denied reasonable bail without just cause”

- Canadian Charter of Rights and Freedoms, section 11(e)



Inside

- What is bail?
- Bail hearings
- Common conditions on release
- Bail denied
- Bail and youth

Bail

When most people think of bail, they usually think of a sum of money paid to ensure a person's release from jail. However, bail actually refers to the right of an accused individual to be released from police custody. Money may be involved, but this is only one form of bail, and if the accused complies with the conditions of release, this money is refunded.

Following arrest for a criminal offence under the *Criminal Code*, which applies across Canada, an accused person may simply be released until their next scheduled court appearance. However, depending on the circumstances, it is possible the person may have to remain in police custody until he or she can appear before a judge. Section 503 of the *Criminal Code* states that a person who has been arrested must appear before a judge within 24 hours, or as soon as possible if a judge is not available within 24 hours (s. 503(1)(a) and (b)). The purpose of this first appearance is to have the charges against the accused person read out in court and to make sure that the accused person understands the charges against him or her.

At this appearance before the judge, or at an appearance soon after, a bail hearing, or judicial interim release hearing, will be held. If the bail hearing is not held at the first appearance, it must be held within three days of the accused's arrest, unless the accused person agrees to stay in police custody longer. This sometimes occurs so that the accused person has more time to gather witnesses and prepare for his or her bail hearing. The purpose of the bail hearing has nothing to do with assessing the accused's guilt in relation to the alleged crime. Instead, this procedure is the legal way of determining whether the accused may be released in the public until the actual trial.

With the exception of very serious crimes, such as treason, murder, and crimes against humanity, the judge has the immediate power to release an accused until the actual court hearing, with or without conditions. However, there are certain situations where an accused person would be required to remain in custody. These situations are listed in section 515(10) of the *Criminal Code*:

- When detention is necessary to ensure the accused will actually attend his or her hearing in court
- When detention is necessary to ensure public safety, or if there is a high likelihood of the accused committing a criminal offence on release
- When detention is necessary to maintain confidence in the administration of justice due to the seriousness and the circumstances of the alleged crime and the strength of the prosecution's case against the accused person

The *Charter* includes the right that all accused are presumed innocent until proven guilty. Thus, the Crown prosecutor will need to have a strong case, involving a serious crime, in order to prove that releasing an accused person will make the public lose confidence in the criminal justice system.

The Bail Hearing Process

Like a trial, a bail hearing involves lawyers, judges, and evidence, but there are significant differences. Because it takes place so soon after an arrest, the bail hearing is not the time for lawyers to argue about a person's guilt or innocence. Instead, a bail hearing is meant to determine if it is appropriate to release the accused person into the public before his or her trial, based on the Crown's evidence and any relevant information about the accused's background, including psychiatric reports or a prior criminal record.

The accused may give evidence to the court, and in turn be questioned by the prosecutor, but this testimony is only meant to determine if he or she should be released prior to trial, not to determine the details of the alleged crime. Many people who are eventually convicted of a crime may be released on bail, just as being kept in police custody does not mean that the accused is guilty.

A typical bail hearing looks similar to a short trial. The accused person may be self-represented, but is entitled to have a lawyer, either one obtained privately or assigned through Legal Aid.

In general, it is up to the prosecutor to demonstrate that the accused should not be released – hence, the accused only has to defend him or herself. However, there are a limited number of cases where the accused actually has to demonstrate why he or she should be released (referred to as a reverse onus bail hearing). Some scenarios where this rule applies include a charge under section 469 of the *Criminal Code*, or a charge of an indictable offence while already released on bail for a separate offence.

Bail Denied - Remanded Into Custody

The judge in the bail hearing may also rule that an accused is to remain in police custody until the trial date. In the event that the accused is eventually convicted and sentenced to a prison term, his or her sentence may be reduced based on the length of time he or she spent in custody before the trial.



Common Conditions on Release

After the bail hearing, if the judge decides that the accused can be released from custody, this release may be without conditions. However, certain limitations upon release are often imposed on the accused person, based on the offence, evidence, and circumstances of the case. The *Charter* ensures that any conditions imposed on the accused must be reasonable ones. Although there is no set formula in determining which conditions will apply, some common ones are:

- Staying away from the victim of the crime
- Checking in with the police on a regular basis
- Notifying a designated person (often a probation officer) of any employment or address changes
- Refraining from the use or possession of alcohol or drugs
- Surrendering one's passport
- Remaining within the province
- Turning over any weapons in their possession and refraining from possessing other weapons

These conditions may be enforceable either through an **undertaking** or by **entering into a recognizance**. An undertaking is a signed agreement to abide by conditions, while a recognizance includes monetary penalties for any breach of the conditions. If a recognizance is ordered, then a refundable deposit may have to be paid.

For both undertakings and recognizances, breaking any of the conditions of the bail hearing will result in the bail being revoked. The accused will be charged with the additional criminal offence of failing to comply with an undertaking or recognizance (s. 145(3) of the *Criminal Code*). This offence can result in imprisonment for up to two years, in addition to any punishment imposed for the original charges.

Bail and Youth

The *Youth Criminal Justice Act* is another important Canadian law that applies to people younger than eighteen at the time of an alleged criminal offence. The provisions from the *Criminal Code* about bail hearings generally apply to youth as well, although there are some major differences:

- If appropriate child protection, mental health care, or other social measures are necessary for the rehabilitation of the accused youth, these will take precedence over custody (s. 29(1))
- A young person who has been arrested may be placed in the care of a responsible person instead of custody, if both the youth and the responsible person are willing (s. 31(1)).
- Unless in special circumstances (including the lack of a youth facility within a reasonable distance), a youth will be kept in detention separate from adults. However, once the youth reaches eighteen years of age, this may be reconsidered if it is in the best interests of the youth or the public. Once the youth turns twenty, he or she will automatically be detained in a provincial correctional facility for adults (ss. 30(3)-(5))

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Contacts and More Information

Sections 515-523 of the *Criminal Code*, and sections 28-31 of the *Youth Criminal Justice Act*, provide extensive information on the bail hearing process, and the specific situations an accused person may find him or herself in prior to trial. Both of these laws are available on the Government of Canada Justice website: <http://laws-lois.justice.gc.ca/eng/>

A person brought into custody will be given full access to Legal Aid contacts if necessary. The website for the Newfoundland and Labrador Legal Aid Commission is <http://www.legalaid.nl.ca/>, which also provides contact information for the various provincial offices.

