

Fact Sheet: THE BAIL PROCESS



Canada's bail system promotes public safety, maintains confidence in the administration of justice, and ensures respect for the *Canadian Charter of Rights and Freedoms*. It is an important component of the criminal justice system.

Learn more about how our bail system works below.

1. WHAT IS BAIL AND WHAT IS ITS PURPOSE?

Bail is when a person charged with a criminal offence is released from custody while awaiting their trial. An individual can be released with or without conditions that they must follow during their release. Not everyone who is charged with a crime receives bail.

The *Charter of Rights and Freedoms* recognizes reasonable bail as a constitutional right. The law of bail must be understood in that context.

Today, the law of bail, as outlined in the *Criminal Code*, has three main purposes:

1. to ensure those charged with an offence appear in court when required
2. to maintain public safety by assessing and managing any potential risks if an accused person is released
3. to maintain the public's confidence in the justice system

When police detain an accused person, the decision to grant bail is made by a judge or justice of the peace at a bail hearing. These are legal proceedings where the court (judge or justice of the peace) determines whether a person should be granted bail or detained in custody until their trial, based on the considerations set out above.

Persons who are released on bail are usually subject to conditions of release that are tailored to their specific situation and/or case. This is done to address any specific risks that they pose to the public or to specific individuals.

For example, one condition could be "house arrest", which could require the accused to remain in their home at all times except in limited circumstances while awaiting trial.

2. WHAT THE CHARTER OF RIGHTS AND FREEDOMS SAYS ABOUT BAIL

Under the Charter, all accused persons have the right to liberty and are presumed innocent until they are proven guilty. This means that an individual charged with an offence has the right not to be denied reasonable bail without just cause.

Canada's criminal laws reflect this. "Just cause" requires consideration of whether detention is required to make sure the accused comes to court, or to keep the public, including victims, safe or to maintain the public's confidence in the administration of justice

3. BAIL IS A SHARED RESPONSIBILITY

Canada's criminal justice system is a shared responsibility between the provinces and territories and the federal government. The federal government is responsible for enacting criminal law and procedure, including the *Criminal Code* provisions that govern the law of bail, criminal prosecutions of all federal offences (other than the *Criminal Code*) and certain specified offences in the *Criminal Code*, and prosecution of all offences in the territories.



The provincial and territorial governments are responsible for the administration (management) of justice. The provinces are responsible for prosecuting most criminal offences in their jurisdictions, conducting bail hearings in relation to those offences, and enforcing any conditions attached to a person who has been released on bail, including if there is a breach of bail conditions.

4. WHAT THE SUPREME COURT OF CANADA SAYS ABOUT BAIL

The Supreme Court of Canada (SCC) is the highest court in Canada. Its decisions have the utmost importance in Canadian law and ensure that laws enacted by Parliament, including the *Criminal Code*, respect the Charter.

The SCC has provided significant recent guidance on bail and relevant Charter considerations.

The SCC noted in the *St-Cloud* (2015) decision that “in Canadian law, the release of accused persons is the cardinal rule and detention, the exception.”

In the *Antic* (2017) and *Zora* (2020) decisions, the SCC ruled that for most alleged crimes, release on bail at the earliest reasonable opportunity with minimal conditions is the default position.

These decisions make clear that the principles operate alongside the grounds for detention and do not replace them. This means that detention is still permitted where it can be established that there is “just cause” for it and there are no appropriate other ways of addressing risk if the accused is released, such as risk of flight or public safety risk, or where public confidence in the administration of justice would be undermined.

5. HOW BAIL FUNCTIONS UNDER THE *CRIMINAL CODE*

What is the procedure for bail following arrest?

Role of Police

After initially arresting an individual for a criminal offence, police officers also have the authority, in most cases, to either detain or release an accused person charged with an offence.

A police officer may release an accused person with or without conditions, so long as the accused person is aware that they must appear in court at a later date to respond to their charges.

Police are required to detain an accused person if they believe it is necessary to protect the safety of the public or that there is a risk of the accused person re-offending.

There are also a number of serious offences, such as murder, where a police officer cannot release an accused but rather must bring them before a court for a bail hearing.

Bail Hearing

If an accused person is not released by police, the accused must be brought before the court for a bail hearing. The court (judge or justice of the peace) decides, based on the evidence and submissions of the parties, whether to detain or release the accused, with or without conditions.

The court considers any evidence brought forward by the prosecution in order to ensure public safety, as well as the safety of victims or witnesses. This can include information on the seriousness of the charge, whether it involved violence, weapons or firearms, and details about the past criminal behaviour of the accused.

Before making any bail decision, police and courts must take into account whether the accused person is Indigenous or belongs to a vulnerable group that is overrepresented in the criminal justice system and faces disadvantages in obtaining bail due to systemic discrimination (for example, members of Black and racialized communities). This consideration reflects Supreme Court of Canada decisions about the overrepresentation of certain groups in the criminal justice system, particularly Indigenous persons, who are disproportionately refused bail.

Denial of Bail

The *Criminal Code* sets out the three grounds upon which an accused may be denied bail:

1. To ensure the accused will attend court when required (referred to as the “**primary ground**”)
2. To protect the public, victims and witnesses by considering whether there is a likelihood that the accused will commit another offence or interfere with the administration of justice if released from custody (referred to as the “**secondary ground**”)

3. To maintain confidence in the administration of justice, bearing in mind specific circumstances such as the strength of the prosecution's case, the gravity of the offence, the sentencing range for the offence, and whether a firearm was used (referred to as the "tertiary ground")

The burden of proof or "onus" in bail proceedings

The general rule is that when a Crown prosecutor seeks the detention (denied bail) of an accused person, they must demonstrate to the court that there is just cause (sufficient reasons) to detain the accused.

This is referred to as the "onus", meaning that the Crown has the responsibility to show that the accused should not be granted bail. The Crown is required to show cause under one of the three grounds mentioned above for an accused to be denied bail.

However, the *Criminal Code* also provides that in some circumstances, such as where an accused is charged with more serious offences like murder or sexual assault with a firearm, the burden of proof shifts from the prosecution to the accused, meaning that the accused must show why they should be granted bail. This is referred to as a "reverse onus". In a reverse onus situation, the presumption is that the accused ought to be detained while awaiting their trial unless they can demonstrate to the court that they should not be denied bail by showing that there is no just cause for their detention. It is always a judge or justice of the peace who makes the decision on granting bail.

A **reverse onus** occurs when the accused is charged with offences that involve serious conduct and that are of a particular concern for the public, such as:

- murder or attempted murder
- an indictable offence (the most serious category of criminal offence, such as aggravated assault or robbery) committed while they were released on bail for another indictable offence
- an indictable offence, if the accused is not ordinarily resident in Canada
- drug trafficking, importing or exporting
- weapons trafficking, possession of weapons for the purpose of trafficking, unauthorized import/export of a firearm or weapon, discharging a firearm with intent or while being reckless
- unlawful possession of a loaded prohibited or restricted firearm, breaking and entering to steal a firearm, robbery to steal a firearm or making an automatic firearm
- offences alleged to have been committed with a firearm, such as sexual assault (while threatening a third party or while causing bodily harm), aggravated sexual assault, kidnapping, hostage taking, robbery or extortion
- indictable offences alleged to involve firearms or other weapons where the accused is subject to a weapons prohibition order
- offences relating to criminal organizations and terrorism
- certain types of re-offending, such as where the accused is charged with failing to attend court or to comply with a previous bail order or summons
- an offence involving violence against an intimate partner where the accused has a prior conviction or discharge for an offence involving violence against an intimate partner
- a serious offence (punishable by 10 years imprisonment or more) involving violence (used, threatened or attempted) and the use of a weapon where the accused was previously convicted (within the past five years) of an offence with the same criteria

6. BAIL CONDITIONS UPON RELEASE

When an accused person is released on bail, the court can impose conditions that they must follow. The purpose of imposing conditions is to address risks posed by the accused and ensure they do not commit new criminal offences while awaiting trial.

a. What types of bail conditions can be imposed?

The "ladder principle" is a longstanding principle of bail which has been repeatedly recognized by the courts, including the Supreme Court of Canada. It is an approach

that guides how a judge or justice determines the level of restrictions that should be placed on an accused person if they are released while awaiting trial. The starting point is that courts must impose the least restrictive conditions necessary to address the specific risks posed by the accused. The greater the risk that an accused poses to society, the more their freedom will be restricted (and the higher they will go on the ladder).

Examples of conditions that may be imposed include:

- Attend court as directed
- Report to a peace officer
- Remain within a particular territorial jurisdiction
- Notify any change of address and employment
- Deposit a passport to prevent travel
- Have a surety (a person who agrees to act as the accused's supervisor while they are released in the community, and a person they may be required to reside with at a certain address)
- Do not to possess or use a device capable of accessing the internet
- Be under house arrest and/or keep a curfew, except with written permission from a designated person, such as a probation officer or a surety, who is tasked with supervising the accused while out on bail
- Wear electronic monitoring equipment, such as an ankle bracelet

To address public safety concerns, there are certain circumstances when the court must impose, or consider imposing, specific conditions, including:

- a condition prohibiting the accused from possessing a firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, or explosive substance, or all those things, unless the court considers that such a condition is not required in the interests of safety of the accused or the safety and security of a victim or any other person
- whether it is desirable or not to order that the accused not communicate with any victim, witness or other person identified in the order

- whether it is in the interests of the safety and security of a victim, witness, justice system participant, or any other person to include a condition that the accused refrain from going to any place specified in the order (for example, where the offence occurred and/or a victim is living)

b. Consequences of not following bail conditions (a breach of conditions)?

An accused person who breaches their bail conditions can have their bail revoked. If an accused breaches their conditions, they may be detained and then have to return to court to establish why they should not remain in custody until their trial. A bail breach can often result in a new criminal charge for that breach and make it more difficult for that person to receive bail in the future. The provinces and territories are responsible for monitoring compliance with bail conditions, as part of their responsibility for the administration of justice.

7. WHY WERE CHANGES MADE TO OUR BAIL SYSTEM IN 2019?

In 2019, the *Criminal Code* was amended to clarify the law of bail and to make bail proceedings more efficient. These amendments were debated in and voted on in Parliament and the changes were informed by extensive consultation with the provinces and territories. In these consultations, the provinces and territories raised issues of delays in the criminal justice system and agreed on the need for targeted criminal law reform.

The amendments also respond to the Supreme Court of Canada's decisions on bail. The *Criminal Code* was changed to modernize the bail regime, while ensuring public safety, and to help maintain public confidence in the criminal justice system.

These *Criminal Code* reforms were designed to:

- streamline the bail process by increasing the types of conditions police can impose on an accused to avoid sending cases to court where this is not necessary
- provide guidance to police on the need to impose reasonable, relevant and necessary conditions that

are related to the offence and consistent with the principles of bail and the Charter

- codify a “**principle of restraint**” that exists in common law for police and courts to ensure that release at the earliest opportunity is favoured over detention, where appropriate, and that only reasonable bail conditions are imposed on an accused, having regard to public safety
- clarify that circumstances of Indigenous accused and accused from vulnerable overrepresented populations, such as Black communities, should be considered at bail in order to address the disproportionate impacts that the bail system has on these populations

Addressing intimate partner violence and repeat offenders

The *Criminal Code* was also amended to address bail in the context where an accused is charged with an offence involving intimate partner violence (violence that is used, threatened, or attempted against a person’s current or former spouse, common-law partner, or dating partner) and to ensure courts have the accused’s criminal history before making a bail decision, so that the full facts can be understood before a decision is reached on bail.

Specifically, the amendments:

- create a **reverse onus** at bail for an accused charged with a violent offence involving an intimate partner where they have a prior conviction for an offence involving violence against an intimate partner
- require courts to consider (a) whether the accused is charged with an offence in which violence was used, threatened or attempted against their intimate partner and (b) whether the accused has been previously convicted of a criminal offence

These amendments make it more difficult for an accused person to get bail where a pattern of violence against an intimate partner is being alleged. They reflect Parliament’s recognition of intimate partner violence as a serious issue and the need to strengthen the way that Canada’s bail system responds to such violence by providing better protection for these victims.

8. WHY WERE CHANGES MADE TO OUR BAIL SYSTEM IN 2023?

In 2023, changes were made to the *Criminal Code*’s bail regime to address serious repeat violent offending, promote community safety, and reinforce public confidence in the administration of justice. These changes were developed in close collaboration with the provinces and territories, who play a critical role in administering the bail system and ensuring that it operates as intended. The amendments were also informed by engagement with law enforcement, community organizations, and other key partners and stakeholders. Furthermore, they were developed while being mindful of Charter rights, including the right not to be denied reasonable bail without just cause. These amendments took effect on January 4, 2024.

Reforms to the bail system

The reforms to the bail system involve targeted amendments to the *Criminal Code*’s bail regime that are designed to enhance public safety and address repeat violent offending at the bail stage.

Specifically, the amendments:

- create a reverse onus (meaning that the onus shifts to the accused person to convince the court that they should be released, rather than detained, while awaiting their trial) to target serious repeat violent offending involving weapons
- expand the list of firearms offences that trigger a reverse onus
- broaden the reverse onus targeting repeat offenders in cases of intimate partner violence
- clarify that the definition of a “prohibition order” under the *Criminal Code* includes a bail release order made by a court that imposes conditions prohibiting an accused from being in possession of firearms and other weapons, to promote greater clarity in the reverse onus provisions
- require courts to consider for any bail decision whether an accused has a history of convictions for violence

- require courts to state on the record that they have considered the safety and security of the community when making a bail order, to ensure that this concern has been evaluated
- require courts to state on the record for any bail decision how they have considered the particular circumstances of Indigenous accused and accused from vulnerable overrepresented populations, as required by section 493.2 of the *Criminal Code*