Bail and Pre-Trial Detention
Judge James Burrill
Nova Scotia Provincial Court
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Introduction

When individuals are arrested and charged with a crime, will they be released pending their trial or will they be held in custody? Who decides? On what basis are the decisions made? These are questions that the following article is intended to address. It is not intended to be an exhaustive examination of the law of bail, but instead is designed to give the reader a brief overview of the issues that face those who must make decisions regarding the release or detention of an accused pending trial.

Why have a System of Bail?

In a free and democratic society where individuals are presumed innocent until proven guilty why have a system of bail at all?

The answer to this question lies in the reality that a portion of individuals charged with crimes pose an undue risk to society. When individuals are charged society needs to be assured that the accused will appear before the court to be dealt with in accordance with the rule of law and that it will be protected from any danger posed by the accused. The accused also has an interest in ensuring that his or her liberty not be unduly restricted.

Since trials cannot be held instantaneously to determine issues of guilt or innocence there will always be a period of time between arrest and trial. The rights of the accused and society need to be balanced. A system of bail can provide that balance.

The Legislative Framework

The importance of having a system of bail was recognized by the drafters of the constitution. Section 11(e) of the Canadian Charter of Rights and Freedoms reads:

s. 11(e) Any person charged with an offence has the right not to be denied reasonable bail without just cause.

When an individual is arrested and is to be charged with an offence, it is generally the arresting officer or the officer in charge of the police station that makes the first decisions regarding issues of bail.

Part XVI of the Criminal Code (ss 493 - 529.5) is entitled Compelling Appearance of Accused before a Justice and Interim Release. These sections deal, in part, with police powers of arrest and apply to both adults and youth.

For most offences the police are directed, by law, to release a person who has been arrested unless they believe on reasonable grounds that it is “necessary to the public interest” to detain that person, having regard to:

(i) the need to establish the identity of the person;
(ii) the need to secure or preserve evidence;
(iii) the need to prevent further offences by the person
(iv) the need to ensure the safety of witnesses or victims of an offence and
(v) concern that the person, if released, will fail to attend court.

For less serious offences the individual may be released on a document that simply requires the person to appear in court on a specific date. Documents that achieve this purpose are a summons, an appearance notice, or a promise to appear.

When the police decide that something further is required to ensure attendance or ensure the good behaviour of the person, they may attach conditions to a recognizance or an undertaking given to an officer in charge. For example, conditions may require the person to not consume alcohol or to refrain from communicating with victims or witnesses.

If the police decide that the person should not be released with or without conditions, the person will be brought before a justice of the peace or a judge within twenty-four hours. In some cases the person will be taken directly to a court and appear before a judge while in other cases, especially on weekends, the person may have a telephone appearance before a justice of the peace.

When the person appears before the judge or justice of the peace a hearing will be held to determine whether the accused should be detained in custody or released pending trial. This hearing is often called the “bail” hearing or the “show cause” hearing. The bail hearing does not always proceed on the first appearance before the judge or justice of the peace. It may be adjourned to allow the parties time to prepare their case, but without the consent of the accused, the hearing cannot be adjourned for more than three clear days.

When the person appears before the court for their bail hearing, both sides are usually represented by lawyers. The Crown prosecutor will represent the state and decides whether to seek an order for detention pending trial or what conditions to request if they are of the view that the person can be released. Duty counsel will generally be available to represent the interests of the accused if they have not arranged for the services of another lawyer. Duty counsel may negotiate with the Crown prosecutor to secure the release of the accused.

The Crown prosecutor and counsel for the accused may reach agreement as to what the conditions of release should be. In such cases they will announce this agreement to the court and the accused will generally be released on the terms agreed to. The

conditions may require the accused, as an example, to agree to do or not to do certain things, and/or post a cash bail.

If agreement is not reached, a bail hearing is held and the presiding judge or justice of the peace will decide whether the accused is to be released (with or without conditions) or detained pending trial.

The Bail Hearing

The bail hearing is not a trial of the charge, but is essentially a hearing to assess "risk" - on the issue of whether it has been shown that the detention of the accused is required on any of three grounds set out in S. 515(10) of the Criminal Code. These grounds are as follows:

s. 515(10)
(a) Where the detention is necessary to ensure his or her attendance in court in order to be dealt with according to law;

(b) Where the detention is necessary for the protection or safety of the public, including any victim of or witness to the offence, having regard to all the circumstances including any substantial likelihood that the accused will, if released from custody, commit a criminal offence or interfere with the administration of justice;

(c) ...where the detention is necessary in order to maintain confidence in the administration of justice, having regard to all the circumstances, including the apparent strength of the prosecution's case, the gravity of the nature of the offence, the circumstances surrounding its commission and the potential for a lengthy term of imprisonment.

Footnote

While the tertiary ground listed above in clause "c" is preceded in the Criminal Code by the words "or any other just cause being shown and, without limiting the generality of the foregoing..." the Supreme Court of Canada in the case of R. v. Hall (2002), 167 C.C.C. (3d) 449 ruled that those words violated provisions of the Charter and were accordingly held to be inoperative.

At a bail hearing the judge can receive evidence that is considered "credible or trustworthy". This usually consists of a summary of the circumstances of the offence charged, any prior record of the accused, any prior releases, any failures in the past to attend court as well as other background information concerning the accused.

The burden at the bail hearing is not the same as at the trial where the Crown must establish guilt beyond a reasonable doubt. At the bail hearing the Crown generally has what is known as the persuasive burden or the burden of proving on the balance of

probabilities that detention is required. This proportion was established in the case of R. vs. Julian (1972), 20 C.R.N.S. 227 (N.S.S.C.).
At the conclusion of the bail hearing the court may determine that the accused should be released without conditions, with conditions, or may decide that the accused should be detained in custody until the trial is heard. If the decision of the court was to order the release of the accused on conditions, in addition to imposing specific conditions the judge can order a specified amount of cash bail (with or without deposit of the cash with the court). The court can also require that a “surety” sign or post bail to guarantee the attendance and good behaviour of the accused. A surety is a third party who will watch over and supervise the accused while they are bound by the bail order.

The decision of the justice of the peace or judge will stand unless it is altered upon review by a superior court.

Special Circumstances
In certain cases the normal rules respecting bail do not apply. In some cases the accused has the burden of showing why they should be released and for certain more serious offences only a judge of the Supreme Court of criminal jurisdiction can grant bail to an accused.

Reverse Onus
Section 515(6) of the Criminal Code lists certain circumstances in which the accused shall be detained unless they have shown cause why their detention is not justified. This is a departure from the normal rule that places the burden on the Crown.

The accused bears the burden under this section when on the following circumstances exist:

1. The accused is charged with an indictable offence committed while at large after having been released on bail in respect of another indictable offence.

2. The accused is charged with certain offences dealing with criminal organizations.

3. The accused is charged with a terrorism related offence or certain offences under the Security of Information Act.

4. The accused is charged with an indictable offence and is not ordinarily resident in Canada.

5. The accused is charged with certain offences of failure to attend court or abide by court-ordered release provisions in respect of another offence.

6. The accused is charged with certain drug offences punishable by imprisonment for life.

Release only by a Superior Court Judge
For certain offences listed in S. 469 of the Criminal Code such as Murder, Treason, Piracy, etc. only a judge of the Supreme Court can order the release of an accused. Even though the police and/or Crown may agree that the accused should be released the accused must be held in custody and taken before a judge of the Supreme Court who will conduct any subsequent bail hearing.

Special Considerations For Young Persons
While the discussion to this point applies equally to adults and youth there are special "bail" provisions of the Youth Criminal Justice Act that also apply to young persons charged with crimes.

No Custody as a Substitute for Social Measures
Section 29 of the Youth Criminal Justice Act indicates that a youth shall not be detained in custody prior to being sentenced as a substitute for appropriate child protection, mental health or other social measures. If the judge feels that the young person is in need of social support the court may refer the young person to a child welfare agency for assessment to determine whether the young person is in need of protective services. While the welfare agency will decide if services will be provided the section provides for an integration between the social welfare and justice systems and attempts to ensure that each system plays an appropriate role in dealing with young persons charged with offences.

Presumption against Pre-trial Custody
Parliament in the pre-amble to the Youth Criminal Justice Act set forth its view that there was an over-reliance on incarceration of non-violent young persons. As a result the Youth Criminal Justice Act [s.29(2)] directs youth justice court judges or a justice to presume that in certain circumstances detention is not necessary for the protection or safety of the public. If they have not committed a violent offence, or have not failed to comply with previous non-custodial sentences, or have not committed an indictable offence for which an adult would be liable to imprisonment for a term of more than two years and have a history that indicates a pattern of findings of guilt, there is a presumption the young person should not be detained in custody.

Placement of a Young Person in Care of a Responsible Person

In circumstances where a youth justice court judge or justice has determined a young person should otherwise be held in custody they must inquire under s. 31 of the Youth Criminal Justice Act as to whether there is a responsible person who is willing and able to take care of and exercise control over the young person. If there is, and should the

young person also be willing to be placed in their care, the young person may be released on a written document known as an Undertaking of a Responsible Person. This document is signed by both the Responsible Person and the Youth. It imposes obligations on each.

Conclusion

Police make initial decisions regarding the detention or release of individuals that have been arrested and are charged. If they decide that the accused should be detained the Crown prosecutor will then be involved and will make decisions about whether the state will agree to release or seek to have a judge order the detention of the accused pending trial. If the Crown prosecutor decides to seek detention of the accused then a bail hearing proceeds before a justice of the peace or a judge who will decide issues of bail. The law that applies may depend on the particular circumstances of the case, the offence charged, the circumstances of the accused and in some cases, whether the accused is a youth or an adult.

Many factors can affect whether bail is granted or denied. With this paper we hope to provide a better understanding of the law and the decisions that must be made relating to this issue.

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