Bail Hearings Part 1

For those of you who always wondered why a bail hearing is also called a show cause hearing, I hope the answer does not come as a disappointment.

These hearings take place before a justice of the peace and they focus on the issue of whether it is safe and appropriate to release an accused pending a termination of guilt. An arrest by police does not mean you are guilty of an offence. The presumption of innocence is critical to our system of criminal justice and it applies at a bail hearing; the issue is - should you wait in jail until the Crown proves you are guilty?

Bail is a term derived from legal French which, along with Latin, is a source of some of our most archaic legal expressions. Bail refers to a loan and the reference comes from the fact that property would "loaned" to the King to secure release from custody pending a trial. If you showed up for your trial, your property would be returned unless you were convicted in which case the King might get to keep it (along with your head). The concept of bail is ancient and is found in law as far back as the Statute of Westminster passed in 1275.

The form of release when someone "bails you out" is called a recognizance (more legal French) in which the "surety" acknowledges owing her majesty a specified some of money "to be made and levied of their several goods and chattels, lands and tenements, respectively, to the use of Her Majesty the Queen, if the accused fails in any of the conditions hereunder written." The person who bails out the accused is called a surety. Effectively, a surety says I owe the queen a specified sum of money and she can take it from me if the accused breaches the terms of his/her release.

Ironically, the French term for recognizance is "engagement" and a surety is a "caution".

It is also worth noting that sureties who are not able to come up with the money they owe Her Majesty in the event of a breach of recognizance are liable to be imprisoned themselves.

The term "show cause" is used because these hearings involve the Crown or the accused

"showing cause" why a release should or should not take place. In fact, not all releases following a bail hearing involve a recognizance so the more accurate term is show cause hearing.

Police are directed by the Criminal Code to release accused persons unless there are statutory grounds to keep them in custody (for example, the charge is listed in section 469 of the Code, which refers to several serious charges including murder) or there are concerns that an accused cannot be trusted to follow conditions imposed by a police officer. In these cases, a police officer will take the accused before a justice of the peace and request that the justice release the accused on certain conditions, or, if in the view of the police officer the accused should not be released, the justice may be asked to detain the accused in jail pending a determination of guilt. Generally speaking, my experience has been that police officers make appropriate decisions regarding who should be taken before a justice of the peace for a show cause hearing.

Most show cause hearings are conducted by a justice of the peace. Show cause hearings for the offences listed in section 469 of the Code must be conducted by a supreme court judge.

In the North, where show cause hearings sometimes take place in the lunch room at the local RCMP detachment, it is not uncommon to have police officers appear for the Crown but in most courtrooms in Canada lawyers appearing for the Crown present the case for detention to the justice of the peace.

Depending on the offence, it may be a crown onus show cause or an accused onus show cause. For the most part, if you show up in bail court with no outstanding charges, it will be the Crown who has the onus of showing cause for your detention.

However, if you show up in bail court alleged to have breached a release condition, you will usually have the onus of showing a justice why it is appropriate to release you. In addition, certain offences, such as drug trafficking, terrorism offences and spying are declared by the Code to be reverse onus offences. Again, in these instances, unless you have a "00" designation and are acting under M's direction (in which case how did they even catch you?), you will have the onus of showing cause, or justifying, your release.

Not surprisingly, the Criminal Code tells us under what circumstances accused persons should be detained. There are 3 grounds for detaining an accused in custody, pending a determination of guilt (spoiler alert! - they are set out in section 515(10)) and I will be discussing them in my next after this brief pause.

Bail Hearings Part 2:

Curiosity, I am sure, will have compelled most of you to check section 515(10) of the Criminal Code so that you now know what justifies pre-trial detention of accused persons. This part is for those who like to keep some things a surprise.

Detention of an accused is justified on the 3 grounds set out in section 515(10) of the criminal code. The primary ground for detaining an accused is a concern that s/he will not appear in Court. In the normal course, unless you are not a local resident or you have had previous problems (as shown in your criminal record) remembering to show up for Court, primary grounds will not be used as a basis for your detention. Even if your memory problems make this a valid concern, a cash deposit is normally considered to be an effective reminder.

Most accused persons, all of whom are legally innocent, end up behind bars due to the secondary grounds for detention. Secondary grounds include protection of the "victim", witnesses, and the public generally where there is a "substantial likelihood" that the accused will interfere with the administration of justice or commit further offences.

Secondary grounds are frequently at play in situations involving domestic violence where there is a prior history of convictions for breaching releases. It becomes incredibly easy for the Crown to justify the detention of the accused when s/he has a criminal record with a dozen or so prior convictions for breaching court orders of one form or another (this is not uncommon). This kind of a record coupled with an assortment of convictions for offences of violence will usually result in the detention of an accused unless a very convincing release plan can be put before the Court.

Until a recent Supreme Court of Canada decision, tertiary grounds for detention did not arise very often. Now tertiary grounds are to be considered along with all of the other

grounds for pretrial detention. Tertiary grounds justify detention when a Court determines that releasing an accused would affect public confidence in the administration of justice, having regard to factors such as the strength of the Crown's case, the seriousness of the offence and a possible lengthy jail term upon conviction.

Many people seem to think that the fact of an arrest by police alone is sufficient to justify putting someone in jail (although that rule usually does not apply when their own family members are involved). Those people (thank god) are not the benchmark for public confidence in the administration of justice. Maintaining public confidence in the administration of justice means not putting people who are legally innocent in jail except in unusual circumstances. Since the presumption of innocence is such an important concept, jailing someone who does not justify detention on secondary grounds is only rarely appropriate.

It is important to remember that a bail hearing deals only with the likelihood that an accused will not appear for court or get into additional mischief before his/her existing charges are dealt with. It is focused on ensuring that an accused follows the rules that come into play once an individual is charged with an offence. It is not a determination of guilt or innocence and it is most definitely not about punishing the accused. Although pre-trial detention involves jail, the fact of the matter is that there is no better place to ensure the public is safe from an accused than a jail. It is an unfortunate coincidence that jail is also where the accused will end up if s/he is convicted and sent to jail as punishment.

The question of past criminal conduct is not normally admissible for the purpose of determining guilt but it is a variable that a justice of the peace can consider in determining likelihood of further mischief. In demonstrating that the detention of the accused is justified, the Crown will typically rely upon the criminal record of the accused because it is evidence of prior occasions when the accused has been proven beyond a reasonable doubt to have broken the law.

When the laws that have been broken involve Court orders, particularly when there are lots of prior convictions, a justice of the peace is left asking the question - what is going to ensure that the accused in this case is going to obey my order? At times, the accused has

no better answer to that question than "this time I really mean it." Those accused are usually detained.

As I discussed previously, if an accused is before the Court as a result of having breached a condition in a previous release, it is the accused that must show why s/he should be released. Even a few prior breach convictions can create problems in a reverse onus show cause hearing.

Normally, in a reverse onus situation or when you have nothing to offer but "this time I really mean it" without a surety you are going to stay in jail. I would love to tell you exactly how a surety makes a difference but I have run out of time.

For those of you who have pondered why a recognizance is called an "engagement" in French, I am afraid that you will be disappointed to learn that I do know why this is so. You will be even more disappointed to learn that I do not know why a surety is called a caution. I would like, however, to tell you how a surety can help you get out of jail and for that you should check out the FAQs on sureties.