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Most Accused Persons are "Special" When It Comes to Bail

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Accused persons are presumed innocent, but unless the police or the Crown consent to their release, an accused person must participate in a hearing to determine whether or not they should be allowed to reside in the community pending the determination of their charge. In the past, this bail hearing usually took place within 24 hours of the accused's arrest (as was expected by section 503 of the *Criminal Code*), unless they needed more time to prepare their plan of release. Today, bail hearings for many accused are regularly adjourned for days, if not weeks, against their wishes, for administrative reasons. These administrative reasons have resulted in an entirely new procedure for "special" bail hearings, designed entirely for the benefit of the Crown and not the accused.

The "Special" Bail Hearing Procedure

A "special" bail hearing is a label that the Crowns give contested bail hearings that they believe would take two hours or more of court time. As a result of the amount of time required, the bail hearing needs to be scheduled in advance and cannot take place within 24 hours of the arrest. Initially, any serious indictable offence involving violence or specifically those involving a firearm would fit this criterion from the perspective of the Crown. Over time, matters in which more than one surety was being proposed and those that included electronic monitoring were also being labelled "special" by the Crown.

This label of "special" by the Crown cannot be contested by the defence. It automatically results in an extensive administrative process being triggered. In general, the following process would occur:

1. A special bail hearing conference call between the Crown, defence and Justice of the Peace would need to be scheduled by e-mailing the trial coordinator.
2. During that conference call, the time estimate of the special bail hearing would be determined.
3. The defence and Crown would e-mail the trial coordinators, who would offer available dates.

More often than not, the dates offered for the special bail hearing will be days later or the following week. The hearing resembles a trial. The Crowns (in general) refuted that COVID-19 is a factor that weighs in favour of release. They collectively drafted an "Informational Note" that they tendered at almost every bail hearing in the months following the initial lockdown in

March 2020 as evidence that inmates in jails are not at a heightened risk of contracting COVID-19. In response, defence counsel collectively obtained an affidavit from Dr. Orkin, which they tendered as evidence to contradict the Crown's "Informational Note".

The litigation of the COVID 19 issue only prolonged the "special" bail hearing. Months into the pandemic, the COVID 19 issue has been established in the jurisprudence. The need for litigating this issue has dissipated in most cases; however, these bail hearings are still being delayed, providing time for the police to prepare extensive disclosure prior to the bail hearing. If defence counsel does not consent to an enhanced synopsis or additional summary of evidence the Crown seeks to admit, the Crown will call the police officers as witnesses, which only lengthens the hearing, at the expense of the accused's liberty.

Timely Bail — *R. v. Reilly*, 2020 SCC 27

The Supreme Court of Canada recently dealt with the issue of timely bail in *R. v. Reilly*, 2020 SCC 27. Mr. Reilly had been arrested and held in police custody in downtown Edmonton for 36 hours before being brought before a justice for a bail hearing. Prior to trial, defence filed a *Charter* application alleging breaches of sections 7, 9, 12, and 11(e), the right not to be denied reasonable bail without just cause. At the start of the application, the Crown conceded that there had been a breach of section 503 of the *Code* and that Mr. Reilly's sections 7, 9, and 11(e) *Charter* rights were violated. The Honourable Judge R.R. Cochard held that the evidence reflected a "systemic and ongoing problem" whereby "the state has abrogated its duty to its citizens" and imposed a stay of proceedings.[1]

The Crown appealed the stay of charges. On appeal, Justice Slatter set the stay aside and returned the matter to the Provincial Court for trial. Justice Slatter held that an individual remedy for the breach of Mr. Reilly's Charter rights can be crafted at the conclusion of the proceedings.[2] Mr. Reilly appealed this decision.

On October 13, 2020, the Supreme Court of Canada heard Mr. Reilly's appeal and Justice Brown delivered a unanimous oral judgment on that same day, allowing Mr. Reilly's appeal and restoring the stay of proceedings. Justice Brown specifically included paragraph 63 of the Honourable Judge R.R. Chochard's reasons in his oral judgement, citing "that the breach of s. 503 of the *Criminal Code,* R.S.C. 1985, c. C-46, was an instance of a systemic and ongoing problem that was not being satisfactorily addressed".[3]

"Special Delays" and Defence Counsel Recourse

The Supreme Court did not address "special" bail hearings specifically in *Reilly*; however, they did reinforce the fundamental nature of an accused person's right to a bail hearing within 24

[1] *R. v. Reilly,* 2018 ABPC 85 at para. 63.
[2] *R. v. Reilly,* 2019 ABCA 212 at para. 60.
[3] *R. v. Reilly,* 2020 SCC 27.

hours. An accused person superficially being brought before the court within 24 hours of their arrest does not fulfil their legal right if they are prevented from having their bail addressed for administrative reasons against their will. To solve the problem, the courts must send the message to Parliament that there are consequences to the prosecution of crime if bail is not addressed within 24 hours. Only then will resources be provided to the criminal justice system so that bail hearings can take place within 24 hours if requested.

Defence counsel's only recourse to the problem of delayed "special" bail hearings is a Habeas Corpus application. To defence counsels' misfortune, these are not normally funded by Legal Aid Ontario. They require a lot of preparation including a factum, book of authorities, and application record mirroring that of a section 11(b) application due to the correspondence that needs to be documented. When a Habeas Corpus application is brought in the Superior Court of Justice, the Crown in the past has responded by obtaining an earlier date for the special bail hearing, sometimes the very next day.

Concluding Thoughts

In this new administrative process for special bail hearings, only the Crown benefits from the delay. Duty counsel are not accustomed to running these lengthy bail hearings for multiple matters with a limited ability to properly prepare potential sureties. Private defence counsel are paid a total of two hours (on Legal Aid) no matter the length of the hearing. Many accused persons that fall into the "special" bail hearing category are prevented from running a bail hearing for days after their arrest. When they have their bail hearing, they have the vast resources of the state directed at ensuring their continued detention — they are just that special.