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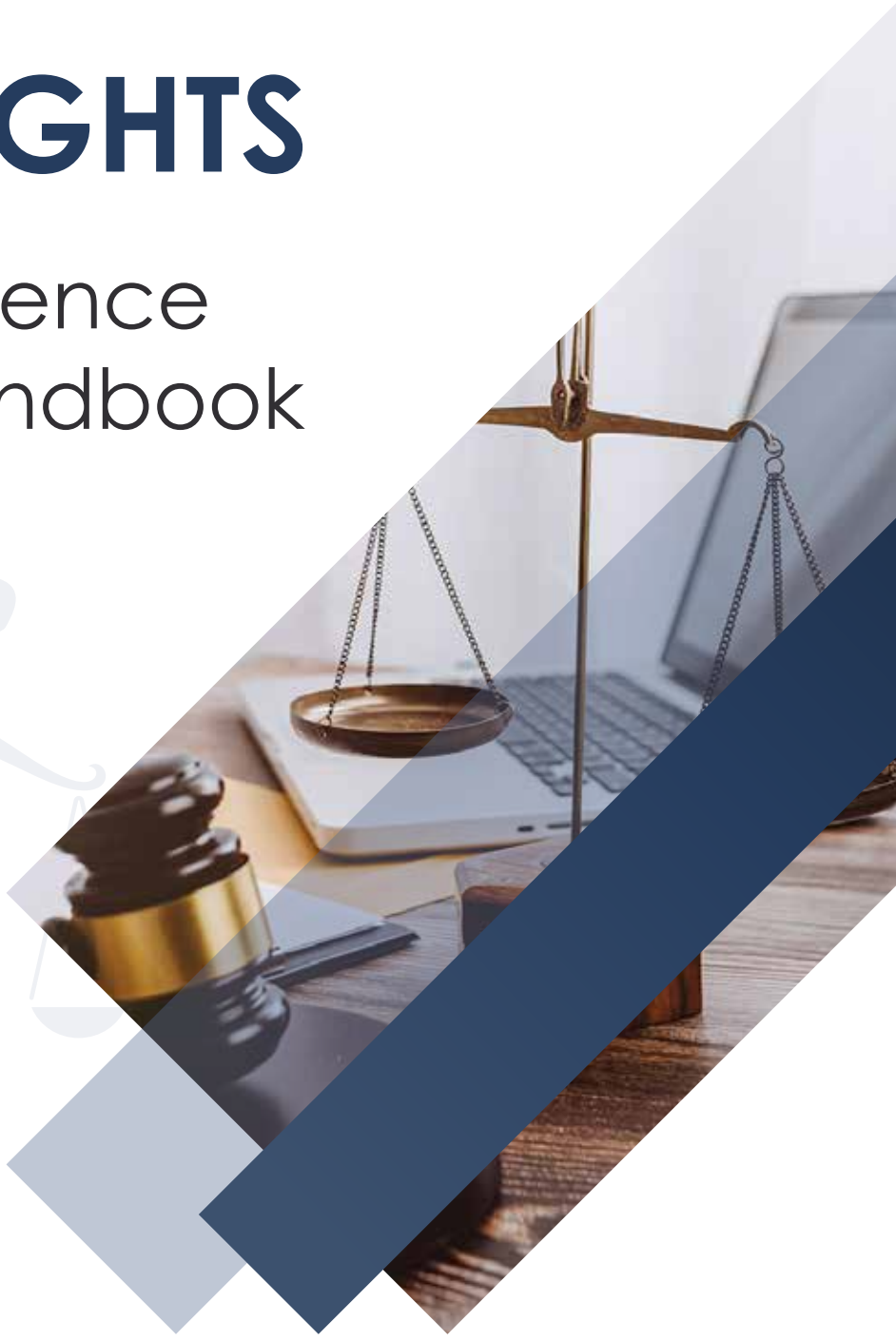
A Sexual Violence Survivor's Handbook



Chapter 9: Pre-Trial Proceedings

Pre-Trial Proceedings

You will notice that the section below refers to victims rather than survivors. This is because during legal proceedings plaintiffs in sexual violence cases will be referred to as victims.

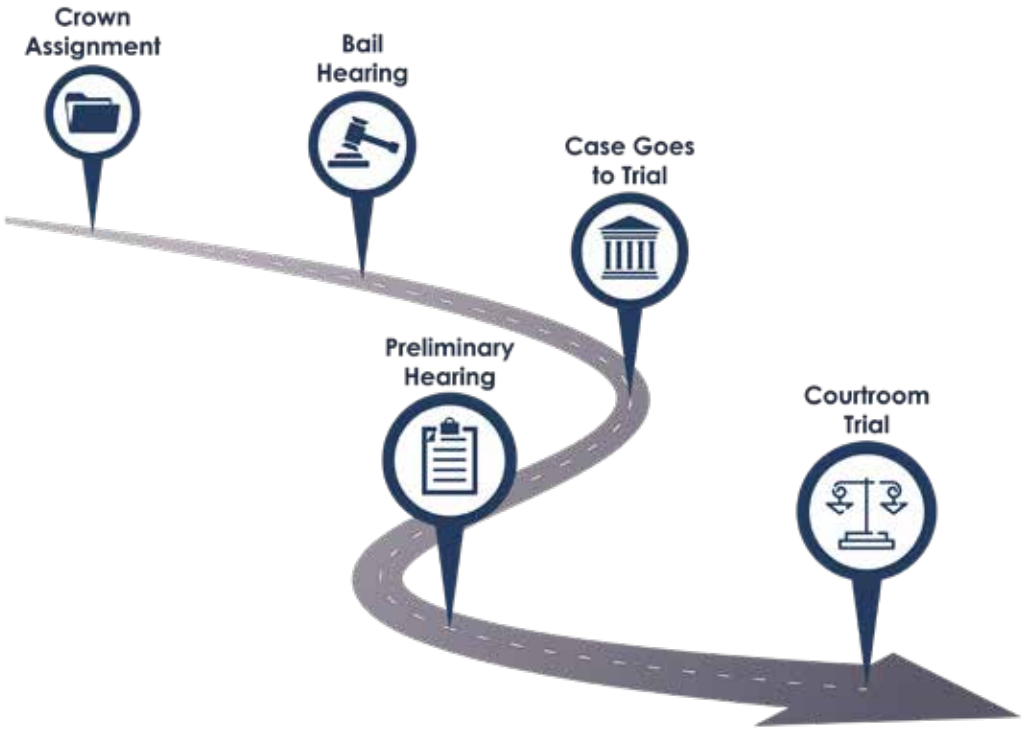
The term **"victim"** focuses on the harm that was caused whereas the term **"survivor"** is often used to describe people who have started or completed their recovery and reclaimed their power despite the trauma and victimization that they experienced. **If the word "victim" does not resonate with you, please know there is nothing wrong with that.**

To learn more about the difference between these terms, visit our blog post **"The Power of Labels: Survivor and Victim."**

When Will a Crown Be Assigned to My Case?

A Crown counsel is the lawyer for the Queen and the government during the trial. In Canadian criminal cases, the harm is perceived to have been committed against the State. The Crown is representing the society, of which you are a part of. **Crown counsel is not and can never function as the victim's lawyer.**

The Crown counsel will usually be assigned to your case as soon as possible following the laying of charges. In some cases, however, Crowns are not assigned until late in the process. A case may have a couple of different Crowns before it goes to trial.



What's a Bail Hearing? Can Everyone Get Bail? Can the Accused Get Bail at a Later Time if They Were Initially Refused?

A bail hearing is where a Justice of the Peace or Judge determines if a person who is charged should be released or stay in custody until trial. Consideration for bail is a serious issue in Canada, and **the accused is presumed innocent until they have been found guilty in a court of law.**

An arrest doesn't mean that the accused will be found guilty, and bail is often granted in many cases. Generally speaking, the accused will only be detained if they are seen as a flight risk, a threat to public safety, or their release would undermine the confidence in the administration of justice.

It is up to the Crown to make sure that an accused is denied bail. In order to do so they must show just cause (or legally sufficient reason). If the accused has no previous criminal record, the Crown may have to disclose some of the case evidence in order to detain the accused. A bail hearing will generally happen shortly after an arrest. **You may not even be aware of the hearing, but if you are and want to attend, be prepared to hear details of the assault.**

If the accused is refused bail, they may be able to get bail at a later time. He or she can apply to a higher court for a review of the detention order and can do so many times. A bail hearing may also be referred to as a show cause hearing. The Crown must show cause as to why the accused should not be released.

Do All Accused Have a Bail Hearing?

No. An accused may be released by police with an appearance notice, a promise to appear, a recognizance, or a summons without a bail hearing. All of these are agreements that the accused enters into, stating that they will appear in court at a later date. The accused may also waive a bail hearing.

I Am Fearful of the Person Who Is Asking For Bail. What Is the Best Way to Express My Fears to the Court?

If you are afraid of the person who is asking for bail, tell the Crown ahead of time. Arrange for a meeting with the Crown before the bail hearing so that you may communicate your concerns effectively. Your fears must be taken into consideration by the judge or officer of the court when determining if bail should be denied to protect the safety of the public. The police and Crown may ask for a provision in the accused's bail to prohibit him or her from contacting you, either directly or indirectly. If the offender is released on bail, you may want to apply for a peace bond.

A peace bond is a court order under section 810 of the Criminal Code that requires the defendant to "keep the peace" for a certain length of time and to obey any other conditions of the peace bond. A peace bond does not cost anything, and a person can get one without a lawyer. Peace bonds are enforceable by police across Canada and are supervised like a probation order.

What Conditions Can Be Placed on an Accused Released on Bail to Ensure the Safety of the Victim?

The safety of the victims and witnesses to the offence must be a primary consideration in bail decisions. Amendments to the Criminal Code in December1999 requires:

- That the responsible judicial officer (officer-in-charge, justice of the peace or judge) consider the safety and security of the victim in any decision about an accused's bail.
- Where an accused is released pending trial, the judge will consider including as a condition to bail that the accused abstain from any direct or indirect communication with the victim and any other condition necessary to ensure the safety and security of the victim.
- The particular concerns of the victim will be considered and highlighted in decisions on the imposition of special bail conditions, including firearms prohibitions and in criminal harassment offence.

What Happens if the Accused Violates the Bail Conditions?

If you become aware that the accused has violated the bail conditions, contact the police. Anyone who fails to comply with bail conditions, without lawful excuse, may be found guilty of a summary offence. If the accused is arrested and charged with breach of bail conditions they can be held in jail until a bail revocation hearing is held. Depending on the type of breach, a judge may release the person, increase the bail money, or impose a sentence. Once that sentence is served, the accused will be released again. If, however, the breach is serious, bail will usually be revoked.

Will My Case Go to Trial?

Most criminal cases are settled by negotiated plea. This means no trial and a sentencing hearing will usually follow. Victims who wish to submit a victim impact statement can do so even without a trial. Your impact statement is important to the court in sentencing, the judge must consider any harm you have suffered when choosing an appropriate sentence for the offender. Your impact statement is also important to the paroling authorities, who will use it to determine if the offender is ready to return to the community. As soon as possible, victims should discuss when and how to submit their statement to the Crown or the victim services provider.

What Is a Plea Bargain? Do I Have a Say?

Plea bargaining occurs when the Crown and the defence come to an agreement wherein the accused pleads guilty. The guilty plea usually comes in exchange for a benefit such as reducing the charge against the accused or where the two sides agree upon a sentence.

The Canadian Victims Bill of Rights (2015) provides that a prosecutor can be asked if "reasonable steps have been taken to inform the victims of plea agreements for murder or serious personal injury offences. In cases involving an indictable offence with a maximum punishment of 5 years or more:

a) a victim asks to be informed of plea agreements, and

b) whether reasonable steps were taken to inform the victims of the agreement.

Victims appreciate being updated on their cases and can better understand a plea bargain if the reasons are explained to them. It is also important to note that Crowns don't need the victim's permission before proceeding with a plea. A plea bargain can be made at any time including, up to, and during the trial. If you know that there is the potential for a plea bargain in your case, and you wish to be involved, ask the Crown.

Why Would a Crown Want a Plea Bargain?

If a plea bargain occurs in your case, it doesn't mean that the offence is less serious or that the Crown doesn't believe you. Plea bargaining is often used when either the Crown or the defence's case is weak, to save time and money, and to reduce the volume of cases in the court system. Since Crowns have a good idea of typical sentencing for a particular crime, they can negotiate with the accused for a similar term and reduce the need for a trial.

If the Crown Fails to Confer With the Victim's Family Before Offering or Accepting a Plea Bargain, What Is the Family's Recourse?

The Canadian Victims Bill of Rights (2015) provides victims with a right to Information, Protection, Participation or Restitution. It also provides victims with a right to file a complaint for an infringement or denial of any of their rights under the Act. Each Crown's office will have a procedure for victims to file a complaint.

Canadian Victims Bill of Rights

Source: Government of Canada

If I Am Called to a Plea-Bargaining Conference, Will I Be Allowed to Have My Lawyer or a Victim Services Worker Present?

If you would like to have your lawyer or a victim services worker present, speak with the Crown. Most Crowns will not object.

When the Case Is Strong, With Overwhelming Evidence, and I Don't Agree That a Plea Bargain Should Be Offered or Accepted, What Can Be Done to Stop the Process?

There is nothing victims can do to stop the plea-bargaining process. It is often difficult for victims to understand why Crowns would plead down charges against the accused, especially when the case seems so strong. Speak to the Crown and have them explain the reasons, ultimately, it is the judge who has the final discretion in accepting or rejecting a plea. Regardless of a plea bargain, you still have the right to submit a victim impact statement if and when the offender is convicted.

What Is a Preliminary Hearing/Inquiry?

As set out by the Criminal Code, a preliminary hearing is a court proceeding that is held before the trial. Preliminary hearings are similar to trials but are usually much shorter. The inquiry may be conducted by a Provincial Court judge or, in some circumstances, by a justice of the peace. A preliminary inquiry isn't concerned with establishing the guilt or innocence of the accused. It is not a trial. The purpose of the preliminary hearing is to determine whether or not there's enough evidence to proceed with a trial.

During the preliminary hearing the Crown Prosecutor can call witnesses to convince the judge that there's sufficient evidence against the accused to proceed with a trial. During a preliminary hearing, the judge may proceed with the charges, drop the charges, downgrade the charges, or upgrade the charges. In most cases the judge will find there is enough evidence to proceed with the charges and will order a trial. If the judge finds that there's not enough evidence to try the accused on the charges that have been laid, the charges against the accused will be dropped. In some cases, a judge may rule that the evidence does not warrant the actual charges laid and may downgrade the charges or if the evidence warrants it, charges could be upgraded.

If the preliminary hearing does not proceed as planned, it could be for several reasons: The accused may plead guilty; the accused has waived their right to a preliminary hearing; or the Crown has opted to proceed to direct indictment (very rare).

How Is This Different From a Pre-Trial Conference?

A pre-trial conference is a less formal meeting between the Crown, defence and a judicial official (but not the trial judge). It is generally held outside of a courtroom and may take place at any time prior to a trial. Issues addressed in pre-trial conferences vary by province but are generally limited to procedural items. **Victims do not attend pre-trial conferences.**

Is It Important for Me to Attend a Preliminary Hearing?

It is important to attend the preliminary inquiry because this stage often acts as a test of the Crown's case against the accused. It is not uncommon for a guilty plea to be entered following a preliminary hearing. If the accused pleads guilty, there will not be a trial. In these cases, the preliminary hearing is then the only opportunity for victims to hear important evidence, facts, and details of the crime.

The victim should also consider attending the preliminary inquiry because evidence may be introduced during this stage that will not be allowed at trial, as the rules of evidence are less strict at preliminary hearings.

What Is a Voir Dire?

A "voir dire" is a trial within a trial. It is a hearing held, without the presence of the jury, to determine whether an issue of fact or law will be admissible. For example, a voir dire may be used in order to decide whether certain aspects of an expert witness' testimony will be allowed during the trial.

What Is a "Change of Venue?"

Most cases are tried in the community courthouse nearest to where the offence took place. In rare circumstances, a trial can be moved to another location. A 'change of venue' is requested when either party feels that the potential jury pool may have been tainted due to mass media coverage of the case.

According to section 599. (1) of the Criminal Code, an application for change of venue may be made by either the accused or the Crown if the judge is satisfied that:

- The ends of justice so require; or
- That a jury panel will not be available.

The Victim's Role During the Trial

The Canadian Victims Bill of Rights (2015) provides victims with the right to Information, Protection, Participation and Restitution. With respect to Information, it is important to note that victims must request information about their case, such as:

a) Status and outcome of the investigation; and

b) Progress and outcome of proceedings.

With respect to Participation, victims' views are to be considered and victims also have the right to present a victim impact statement.

- Every victim has the right to share their views about decisions to be made by appropriate authorities in the criminal justice system that affect the victim's rights under the Act and to have those views considered.
- Every victim has the right to present a victim impact statement to the appropriate authorities in the criminal justice system and to have it considered.

Some victims will be called as witnesses in the case against the accused. The Crown Attorney/Prosecutor (all provinces) or Public Prosecution Service of Canada (all territories) represents the State in criminal matters.

Who Represents the Victim During the Trial? Do I Have/Need a Lawyer?

Crown counsel is not and can never function as the victim's lawyer. Although the Crown appears to be representing the interests of the victim, the Crown is the lawyer for the Queen and the government during the trial. In Canadian criminal cases, the harm is perceived to have been committed against the State. This is why cases are referred to as Regina v. Smith (or R. v. Smith), Regina being the Queen in Latin. The Crown is truly representing the society, of which you are a part.

It is generally not necessary for victims to hire a lawyer during the trial as they rarely have a legal role in the court process. However, victims may need their own lawyers for specific issues such as publication bans or attempts by the accused to get copies of a sexual assault victim's personal psychiatric records.

Who Advises Me of Court Dates?

The Crown's office should advise victims of upcoming court dates. If they do not, the court-based victim services (available in most provinces/territories) should have the information available for you. If you are called as a witness, you will be issued a subpoena. A subpoena is a court order telling a person specifically when to come to court to testify. If you are subpoenaed, you cannot attend trial before you are called as a witness. If you wish to observe the proceedings after delivering your testimony, you can apply to the judge for permission to remain in the courtroom. Speak with the Crown about this as soon as possible.

Where Do I Sit In the Courtroom?

Victims usually sit on the right-hand side of the courtroom, behind the Crown. Be aware that the courthouse is a public place and seats are not specifically reserved for the victims. You may try speaking to the Crown or police to see if they can reserve some seats for you.

While in Court, if the Accused Makes Threatening Remarks or Signals at Me, What Should I Do?

If you are threatened by the accused in any manner, tell the Crown. Additional charges may be laid.

Will I See and Meet Family Members of the Accused in the Hallways?

You are likely to see the accused's family members in the courtroom and throughout the courthouse, including the washrooms. If you do not wish to interact with them or speak to them, you are not required to do so. You should tell the Crown if members of the accused's family seek you out or harass you.