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Judicial Interim Release / Bail

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Introduction

Where a person is held in custody by police who decide not to release them, the accused must be brought before a judge to determine if they should be released on bail.

Meaning of Bail

Bail is a form of contract between the crown and the surety or accused, where the crown releases the accused in exchange for the guarantee that the accused will abide by the terms of release.[1]

Pre-trial custody affects the "mental, social, and physical life" of the accused and his family as well as impacting the trial itself.[2]

Burden to Detain

Under s. 515(1), a judge or justice must release a person held in custody on an undertaking without conditions unless the Crown can show cause to do otherwise.

It is on the Crown to show why anything other than unconditional release is "necessary".[3] The burden increases with an increase in the restrictiveness of the terms of release.[4]

Power to Expedite

Where the court sees fit, s. 526 permits the judge to "give directions for expediting any proceedings in respect of the accused".

Duty of Surety

When a person is released on a recognizance under s. 515, the accused and his surety will continue to be bound by the terms of the recognizance after each appearance.[5]

Power to Remand and Order Attedance

A person who is in police custody or in the custody of a correctional facility can be ordered to attend court and ordered to be remanded into custody under s. 527.[6]

1. Ewaschuk, Criminal Practice and Procedure in Canada at 6:0010 where the terms are violated the surety will incur a debt with the crown.
2. *R v Antic*, 2017 SCC 27 (CanLII), [2017] 1 SCR 509, *per* Wagner J, at para 66
3. *Antic*, *supra*, at para 67 ("If the Crown proposes an alternative form of release, it must show why this form is necessary.")
4. *Antic*, *supra*, at para 67 ("The more restrictive the form of release, the greater the burden on the accused")
5. s. 763, 764(1)
6. see Procuring the Attendance of a Prisoner for details

History

Traditionally, tracing back to English common law, the "sole purpose" of bail was to "ensure that accused persons who were released would attend their trials".[1]

Canadian bail originates from 1869 legislation that made it discretionary for all offences. There was little guidance prior to 1972 as to the standard to meet.[2]

Prior to 1972 the bail system was primarily based on a cash bail.[3] It was also "highly discretionary" with a presumption of detention unless bail was applied for.[4] The only forms of release was the release (a) by recognizance with surety or sureties (b) release on cash deposit, or (c) release on entering a recognizance.[5]

Bail Reform Act 1972

The modern regime of bail arose from the 1972 Bail Reform Act, S.C. 1970-71-72, c. 37, which included the addition of s. 457 (2) (now s. 515 (2)).

The *Bail Reform Act* was designed to "do away with the requirement ... to deposit money unless [the accused was] not normally resident in or near the jurisdiction in which they were in custody".[6] It created a system where "[b]ail must be granted unless pre-trial detention is justified by the prosecution".[7]

The Act was meant to Codify what is referred to as the "ladder principle" that is found in s. 515(1) to (3).[8]

Subsequent Reforms

In 1975, the *Criminal Law Amendment Act*, S.C. 1974-75-76, c. 93, added s. 515(2)(c.1) (now s. 515(2)(d)), which allows an accused to be released with consent by entering a recognizance without a surety by depositing money or property as security.

Enactment of the Charter

With the enactment of the *Charter*, the statutory right to bail became a constitutional right.[9]

Bill C-75 Revamp

On December 18, 2019, the bail provisions of the Code were changed as follows:

- removal of a Promise to Appear method of compelling attendance
- removal of the police power to issue a Recognizance
- the undertaking is now the only method of release, replacing the promise to appear and recognizance
- there will be a Release Order as the main form of judicial release.

Appearance notices and summons are still available.

1. *R v Antic*, 2017 SCC 27 (CanLII), [2017] 1 SCR 509, *per* Wagner J, at para 22
2. *Antic*, *ibid.*, at para 23
3. *R v Folkes*, 2007 ABQB 624 (CanLII), 228 CCC (3d) 284, *per* Marceau J, at para 15
   R v Rowan, 2011 ONSC 7362 (CanLII), *per* Ramsay J, at para 9 ("One of the main purposes of the Bail Reform Act was to get away from the common law's preoccupation with cash deposit")
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4. *Antic*, *ibid.*, at para 23
5. *Antic*, *ibid.*, at para 24
6. *Folkes*, *supra*, at para 15
   Antic, *supra*, at paras 26 to 28 See Gary Trotter, The Law of Bail in Canada, 2nd ed. (Toronto: Carswell, 1999) [Trotter] at 247
7. *R v Pearson*, 1998 CanLII 776 (SCC), [1998] 3 SCR 620, *per* Lamer CJ
8. *Antic*, *supra*, at para 29
9. *Antic*, *supra*, at para 31 ("In 1982, the enactment of the Charter transformed the

statutory right to bail into a constitutional right...")

Charter Right to Bail (s. 11(e))

Section 11(e) of the *Charter of Rights and Freedoms* states that "Any person charged with an offence has the right ... not to be denied reasonable bail without just cause". [1] This means that the accused cannot be denied bail without reason and only where necessary.[2]

The rights under s. 11(e) of the *Charter of Rights and Freedoms* consist of two aspects:[3]

1. the right not to be denied bail without "just cause" and
2. the right to "reasonable bail".

The meaning of "just cause" relates to the circumstances in which it is constitutionally permissible to deny bail as well as the statutory grounds to justify detention enumerated under s. 515(10).[4]

Default Position

The "default position in most cases" should be release.[5] That release is presumed to be unconditional.[6]

Presumption of Innocence

The right to bail under s. 11(e) of the Charter is a corollary to the presumption of innocence.[7]

1. Section 11(e) of The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11
2. *R v Antic*, 2017 SCC 27 (CanLII), [2017] 1 SCR 509, *per* Wagner J
   R v Hall, 2002 SCC 64 (CanLII), [2002] SCJ No 65, *per* McLachlin CJ
   R v Villota, 2002 CanLII 49650 (ON SC), 163 CCC (3d) 507, *per* Hill J
   R v Morales, 1992 CanLII 53 (SCC), [1992] 3 SCR 711, *per* Lamer CJ
   R v Hall, 2000 CanLII 16867 (ON CA), 147 CCC (3d) 279, *per* Osborne ACJ
3. *Antic*, *supra*, at paras 36 and 67
4. *Antic*, *supra*, at paras 33 to 34
5. *Antic*, *supra*, at para 21 ("Although release is the default position in most cases, a judge or a justice also has the authority to deny the release of an accused or to impose conditions on the accused when he or she is released, provided that the Crown justifies the detention or the conditions. ")
6. *Antic*, *ibid.*, at para 67 ("Save for exceptions, an unconditional release on an undertaking is the default position when granting release: s. 515(1)")
7. *Antic*, *supra*, at para 67 ("Accused persons are constitutionally presumed innocent, and the corollary to the presumption of innocence is the constitutional right to bail.")

Method of Release

Section 515 permits a justice to release an accused who is brought to him:

> **Release order without conditions**

> 515 (1) Subject to this section, when an accused who is charged with an offence other than an offence listed in section 469 [*exclusive jurisdiction offences*] is taken before a justice, the justice shall, unless a plea of guilty by the accused is accepted, make a release order in respect of that offence, without conditions, unless the prosecutor, having been given a reasonable opportunity to do so, shows cause, in respect of that offence, why the detention of the accused in custody is justified or why an order under any other provision of this section should be made.
>
> [*omitted (2), (2.01), (2.02), (2.03), (2.1), (2.2), (2.3), (3), (4), (4.1), (4.11), (4.12), (4.2), (4.3), (5), (6), (6.1), (7), (8), (9), (9.1), (10), (11), (12), (13) and (14)*]
> R.S., 1985, c. C-46, s. 515; R.S., 1985, c. 27 (1st Supp.), ss. 83, 186; 1991, c. 40, s. 31; 1993, c. 45, s. 8; 1994, c. 44, s. 44; 1995, c. 39, s. 153; 1996, c. 19, ss. 71, 93.3; 1997, c. 18, s. 59, c. 23, s. 16; 1999, c. 5, s. 21, c. 25, s. 8(Preamble); 2001, c. 32, s. 37, c. 41, ss. 19, 133; 2008, c. 6, s. 37; 2009, c. 22, s. 17, c. 29, s. 2; 2010, c. 20, s. 1; 2012, c. 1, s. 32; 2014, c. 17, s. 14; 2015, c. 13, s. 20; 2018, c. 16, s. 218; 2019, c. 25, s. 225.
> [*annotation(s) added*]
>
> – CCC

An accused may be released by any one of these release mechanisms:

- appearance notice
- summons
- undertaking

Ladder Principle

Part XVI of the Code on bail sets out a structure of bail known as the "ladder principle".[1] This principle dictates that "release is favoured at the earliest reasonable opportunity" and "on the least onerous grounds" in light of the "risk of flight and public protection".[2] The analysis should consider in order. First, whether to release on undertaking with conditions under s. 515(1). If this is not sufficient to "secure the aims of Part XVI" then the Crown "may seek to show cause for other, non-monetary conditions" under s. 515(2)(a). Third, as a last resort, the release should consider a "requirement for cash by deposit or recognizance" under s. 515(3).[3] A cash condition can come in different forms under s. 515(2)(b) through (e), which should be viewed in favour of the least onerous conditions.[4]

Antic Principles

The case of *Antic* re-established the principles and guidelines required for bail that are modelled around the "ladder principle".[5]

The principles include:

- the guarantee under s. 11(e) not to be denied bail without just cause and release must be one "reasonable terms".
- absent one or more exceptions, unconditional release is the default position
- release should be at the earliest possible opportunity on the least onerous grounds
- where the crown requests conditions, it must show that the conditions are necessary.
- the more restrictive the term the greater the onus of proof.
- before a judge can order some form of restriction, they must explicitly reject all lesser forms of restriction.

Each rung of the ladder must be considered in order. A more restrictive form of release cannot be considered until a lesser form is rejected.[6]

The ladder principle must be strictly adhered to.[7]

A recognizance with surety is one of the most restrictive forms of release.[8]

A recognizance is functionally equivalent to cash bail.[9]

Cash bail should only be applied in "exceptional circumstances" where a surety is unavailable.[10]

1. *R v Antic*, 2017 SCC 27 (CanLII), [2017] 1 SCR 509, *per* Wagner J *R v O'Connor*, 2015 ONSC 1256 (CanLII), *per* Price J, at para 46
2. *Antic*, *supra*, at para 67
   O'Connor, *ibid.*, at para 46
   R v Anoussis, 2008 QCCQ 8100 (CanLII), 242 CCC (3d) 113, *per* Healy J
3. *O'Connor*, *ibid.*, at para 46
   Anoussis, *supra*
4. *O'Connor*, *ibid.*, at para 46
   Anoussis, *supra*
   R v Horvat, 1972 CanLII 1371 (BC SC), 9 CCC (2d) 1 (B.C.S.C.), *per* Verchere J
5. *Antic*, *supra*, at para 67
6. *Antic*, *supra*, at para 67 ("Each rung of the ladder must be considered individually and must be rejected before moving to a more restrictive form of release. Where the parties disagree on the form of release, it is an error of law for a justice or a judge to order a more restrictive form of release without justifying the decision to reject the less onerous forms.")
7. *Antic*, *supra*, at para 67 ("This principle must be adhered to strictly.")
8. *Antic*, *supra*, at para 67
9. *Antic*, *supra*, at para 67
10. *Antic*, *supra*, at para 67 ("cash bail should be relied on only in exceptional circumstances in which release on a recognizance with sureties is unavailable.")

Consent Release

Where the Crown and accused agree to a release plan a the court should not "second-guess" the joint proposal, but retains the ability to reject one.[1]

The "Antic principles" do not apply strictly when the release is by consent.[2]

1. *R v Antic*, 2017 SCC 27 (CanLII), [2017] 1 SCR 509, *per* Wagner J, at para 68
2. *Antic*, *ibid.*, at para 68

Duration of Release Mechanism

Period for which appearance notice, etc., continues in force

523 (1) If an accused, in respect of an offence with which they are charged, has not been taken into custody or has been released from custody under any provision of this Part [*Pt. XVI – Compelling Appearance of an Accused Before a Justice and Interim Release (s. 493 to 529.5)*], the appearance notice, summons, undertaking or release order issued to, given or entered into by the accused continues in force, subject to its terms, and applies in respect of any new information charging the same offence or an included offence that was received after the appearance notice, summons, undertaking or release order was issued, given or entered into,

(a) where the accused was released from custody pursuant to an order of a judge made under subsection 522(3) [*release of accused on s. 469 offences*], until his trial is completed; or
(b) in any other case,

(i) until his trial is completed, and
(ii) where the accused is, at his trial, determined to be guilty of the offence, until a sentence within the meaning of section 673 [*Pt. XXI — appeals — definitions*] is imposed on the accused unless, at the time the accused is determined to be guilty, the court, judge or justice orders that the accused be taken into custody pending such sentence.

When new information is received

(1.1) If an accused is charged with an offence and a new information, charging the same offence or an included offence, is received while the accused is subject to an order for detention, release order, appearance notice, summons or undertaking, section 507 [*process on justice receiving an information*] or 508 [*justice to hear informant and witnesses*], as the case may be, does not apply in respect of the new information and the order for detention, release order, appearance notice, summons or undertaking applies in respect of the new information.

When direct indictment preferred

(1.2) If an accused is charged with an offence, and an indictment is preferred under section 577 [*direct indictments*] charging the same offence or an included offence while the accused is subject to an order for detention, release order, appearance notice, summons or undertaking, the order for detention, release order, appearance notice, summons or undertaking applies in respect of the indictment.
[*omitted (2)*]

Provisions applicable to proceedings under subsection (2)

(3) The provisions of sections 517 [*Order directing matters not to be published for specified period*], 518 [*Inquiries to be made by justice and evidence*] and 519 [*release of accused after show cause hearing*] apply, with such modifications as the circumstances require, in respect of any proceedings under subsection (2)

[*power to vacate previous orders*], except that subsection 518(2) [*release on guilty plea pending sentence*] does not apply in respect of an accused who is charged with an offence listed in section 469 [*exclusive jurisdiction offences*].
R.S., 1985, c. C-46, s. 523; R.S., 1985, c. 27 (1st Supp.), s. 89; 2011, c. 16, s. 2; 2019, c. 25, s. 233.

[*annotation(s) added*]

– CCC

Consent Variation of Release Order

Variation of release order with consent

519.1 A release order under which an accused has been released under section 515 [*judicial interim release provisions*] may be varied with the written consent of the accused, prosecutor and any sureties. The order so varied is considered to be a release order under section 515 [*judicial interim release provisions*].

2019, c. 25, s. 229.
[*annotation(s) added*]

– CCC

Irregularities or Variance in Release Mechanism

Irregularity or variance not to affect validity

546. The validity of any proceeding at or subsequent to a preliminary inquiry is not affected by

(a) any irregularity or defect in the substance or form of the summons or warrant;
(b) any variance between the charge set out in the summons or warrant and the charge set out in the information; or
(c) any variance between the charge set out in the summons, warrant or information and the evidence adduced by the prosecution at the inquiry.

R.S., c. C-34, s. 473.

– CCC

Adjournment if accused misled

547 Where it appears to the justice that the accused has been deceived or misled by any irregularity, defect or variance mentioned in section 546 [*irregularity or variance not to affect validity*], he may adjourn the inquiry and may remand the accused or grant him interim release in accordance with Part XVI [*Pt. XVI – Compelling Appearance of an Accused Before a Justice and Interim Release (s. 493 to 529.5)*].
R.S., c. C-34, s. 474; 1974-75-76, c. 93, s. 59.1.
[*annotation(s) added*]

– CCC

Release on Section 469 Offences

- Release on Section 469 Offences

Consideration of Victim's Safety and Security

When ordering the release of a detainee, the justice is required to state on the record that they have considered the "safety and security" of all victims in the case.

515
[*omitted (1), (2), (2.01), (2.02), (2.03), (2.1), (2.2), (2.3), (3), (4), (4.1), (4.11), (4.2), (4.3), (5), (6), (6.1), (7), (8), (9), (9.1), (10), (11) and (12)*]

Consideration of victim's safety and security

(13) A justice who makes an order under this section shall include in the record of the proceedings a statement that he or she considered the safety and security of every victim of the offence when making the order.
[*omitted (14)*]
R.S., 1985, c. C-46, s. 515; R.S., 1985, c. 27 (1st Supp.), ss. 83, 186; 1991, c. 40, s. 31; 1993, c. 45, s. 8; 1994, c. 44, s. 44; 1995, c. 39, s. 153; 1996, c. 19, ss. 71, 93.3; 1997, c. 18, s. 59, c. 23, s. 16; 1999, c. 5, s. 21, c. 25, s. 8(Preamble); 2001, c. 32, s.

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– CCC

Topics

- Release by Police on Undertaking
- Continued Detention After Appearing Before a Justice
- Bail Hearings
  - Bail Hearing Evidence
- Grounds for Detention
- Order of Detention
- Release With and Without Sureties and Deposits
- Terms of Release
- Release on Section 469 Offences
- Breach of Release Conditions
- Revoking, Terminating, or Replacing Bail or Remand Orders
- Bail Pending Appeal
- Bail Review
- Bail for Young Accused

See Also

- Judicial Interim Release (Until December 18, 2019)
- Compelling the Accused to Attend Court
- Bail (Cases)
- Bail Hearing (Model Examination)
- Out of Province Arrest Warrants

Judicial Interim Release (Prior to December 2019

< Procedure and Practice < Judicial Interim Release

Introduction

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>
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> R.S., 1985, c. C-46, s. 515; (...) 2010, c. 20, s. 1; 2012, c. 1, s. 32; 2014, c. 17, s. 14. [*annotation(s) added*]
>
> – CCC

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- promise to appear
- summons
- undertaking
- recognizance

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Part XVI of the Code on bail sets out a structure of bail known as the "ladder principle".[1] This principle dictates that "release is favoured at the earliest reasonable opportunity" and "on the least onerous grounds" in light of the "risk of flight and public protection".[2] The analysis should consider in order. First, whether to release on undertaking with conditions under s. 515(1). If this is not sufficient to "secure the aims of Part XVI" then the Crown "may seek to show cause for other, non-monetary conditions" under s. 515(2)(a). Third, as a last resort, the release should consider a "requirement for cash by deposit or recognizance" under s. 515(3).[3] A cash condition can come in different forms under s. 515(2)(b) through (e), which should be viewed in favour of the least onerous conditions.[4]

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3. *O'Connor*, *ibid.*, at para 46
   Anoussis, *supra*
4. *O'Connor*, *ibid.*, at para 46
   Anoussis, *supra*
   R v Horvat, 1972 CanLII 1371 (BC SC), (1972) 9 CCC (2d) 1 (B.C.S.C.), *per* Verchere J
5. *Antic*, *supra*, at para 67 ("Each rung of the ladder must be considered individually and must be rejected before moving to a more restrictive form of release. Where the parties disagree on the form of release, it is an error of law for a justice or a judge to order a more restrictive form of release without justifying the decision to reject the less onerous forms.")
6. *Antic*, *supra*, at para 67 ("This principle must be adhered to strictly.")
7. *Antic*, *supra*, at para 67
8. *Antic*, *supra*, at para 67
9. *Antic*, *supra*, at para 67 ("cash bail should be relied on only in exceptional circumstances in which release on a recognizance with sureties is unavailable.")

Consent Release

Where the Crown and accused agree to a release plan a the court should not "second-guess" the joint proposal, but retains the ability to reject one.[1]

The "Antic principles" do not apply strictly when the release is by consent.[2]

1. *R v Antic*, 2017 SCC 27 (CanLII), [2017] 1 SCR 509, *per* Wagner J, at para 68
2. *Antic*, *ibid.*, at para 68

Duration of Release Mechanism

> **Period for which appearance notice, etc., continues in force**
>
> 523 (1) Where an accused, in respect of an offence with which he is charged, has not been taken into custody or has been released from custody under or by virtue of any provision of this Part, the appearance notice, promise to appear, summons, undertaking or recognizance issued to, given or entered into by the accused continues in force, subject to its terms, and applies in respect of any new information charging the same offence or an included offence that was received after the appearance notice, promise to appear, summons, undertaking or recognizance was issued, given or entered into,
>
> (a) where the accused was released from custody pursuant to an order of a judge made under subsection 522(3) [*release of accused on s. 469 offences*], until his trial is completed; or
> (b) in any other case,
>
> (i) until his trial is completed, and
> (ii) where the accused is, at his trial, determined to be guilty of the offence, until a sentence within the meaning of section 673 [*Pt. XXI —*

appeals — definitions] is imposed on the accused unless, at the time the accused is determined to be guilty, the court, judge or justice orders that the accused be taken into custody pending such sentence.

Where new information charging same offence

(1.1) Where an accused, in respect of an offence with which he is charged, has not been taken into custody or is being detained or has been released from custody under or by virtue of any provision of this Part and after the order for interim release or detention has been made, or the appearance notice, promise to appear, summons, undertaking or recognizance has been issued, given or entered into, a new information, charging the same offence or an included offence, is received, section 507 [*process on justice receiving an information*] or 508 [*justice to hear informant and witnesses*], as the case may be, does not apply in respect of the new information and the order for interim release or detention of the accused and the appearance notice, promise to appear, summons, undertaking or recognizance, if any, applies in respect of the new information.

When direct indictment is preferred charging same offence

(1.2) When an accused, in respect of an offence with which the accused is charged, has not been taken into custody or is being detained or has been released from custody under or by virtue of any provision of this Part and after the order for interim release or detention has been made, or the appearance notice, promise to appear, summons, undertaking or recognizance has been issued, given or entered into, and an indictment is preferred under section 577 [*direct indictments*] charging the same offence or an included offence, the order for interim release or detention of the accused and the appearance notice, promise to appear, summons, undertaking or recognizance, if any, applies in respect of the indictment.
...

Provisions applicable to proceedings under subsection (2)

(3) The provisions of sections 517 [*Order directing matters not to be published for specified period*], 518 [*Inquiries to be made by justice and evidence*] and 519 [*release of accused after show cause hearing*] apply, with such modifications as the circumstances require, in respect of any proceedings under subsection (2) [*power to vacate previous orders*], except that subsection 518(2) [*release on guilty plea pending sentence*] does not apply in respect of an accused who is charged with an offence listed in section 469 [*exclusive jurisdiction offences*].
R.S., 1985, c. C-46, s. 523; R.S., 1985, c. 27 (1st Supp.), s. 89; 2011, c. 16, s. 2.
[*annotation(s) added*]

– CCC

Irregularities or Variance in Release Mechanism

Irregularity or variance not to affect validity

546. The validity of any proceeding at or subsequent to a preliminary inquiry is not affected by

(a) any irregularity or defect in the substance or form of the summons or warrant;
(b) any variance between the charge set out in the summons or warrant and the charge set out in the information; or
(c) any variance between the charge set out in the summons, warrant or information and the evidence adduced by the prosecution at the inquiry.

R.S., c. C-34, s. 473.

– CCC

Adjournment if accused misled

547 Where it appears to the justice that the accused has been deceived or misled by any irregularity, defect or variance mentioned in section 546 [*irregularity or variance not to affect validity*], he may adjourn the inquiry and may remand the accused or grant him interim release in accordance with Part XVI.
R.S., c. C-34, s. 474; 1974-75-76, c. 93, s. 59.1.
[*annotation(s) added*]

– CCC

Release on Section 469 Offences

Under s. 522 only a superior court justice may consider the release of someone charged with an offender under s. 469.[1]

Interim release by judge only

522 (1) Where an accused is charged with an offence listed in section 469 [*exclusive jurisdiction offences*], no court, judge or justice, other than a judge of or a judge presiding in a superior court of criminal jurisdiction for the province in which the accused is so charged, may release the accused before or after the accused has been ordered to stand trial.

Idem

(2) Where an accused is charged with an offence listed in section 469 [*exclusive jurisdiction offences*], a judge of or a judge presiding in a superior court of criminal jurisdiction for the province in which the accused is charged shall order that the accused be detained in custody unless the accused, having been given a

reasonable opportunity to do so, shows cause why his detention in custody is not justified within the meaning of subsection 515(10) [*justification for detention in custody*].

Order re no communication

(2.1) A judge referred to in subsection (2) [*order detention for 469 offences unless accused shows cause*] who orders that an accused be detained in custody under this section may include in the order a direction that the accused abstain from communicating, directly or indirectly, with any victim, witness or other person identified in the order except in accordance with such conditions specified in the order as the judge considers necessary.

Release of accused

(3) If the judge does not order that the accused be detained in custody under subsection (2) [*order detention for 469 offences unless accused shows cause*], the judge may order that the accused be released on giving an undertaking or entering into a recognizance described in any of paragraphs 515(2)(a) to (e) [*release order with conditions – required obligations*] with such conditions described in subsections 515(4) [*permissible conditions on release order*], (4.1) [*condition prohibiting possession of firearms, etc.*] and (4.2) [*additional conditions re protecting victims or witnesses*] as the judge considers desirable.

Order not reviewable except under section 680

(4) An order made under this section is not subject to review, except as provided in section 680 [*review by court of appeal*].

Application of sections 517, 518 and 519

(5) The provisions of sections 517 [*Order directing matters not to be published for specified period*], 518 [*Inquiries to be made by justice and evidence*] except subsection (2) [*order detention for 469 offences unless accused shows cause*] thereof, and 519 [*release of accused after show cause hearing*] apply with such modifications as the circumstances require in respect of an application for an order under subsection (2) [*order detention for 469 offences unless accused shows cause*].

Other offences

(6) Where an accused is charged with an offence mentioned in section 469 [*exclusive jurisdiction offences*] and with any other offence, a judge acting under this section may apply the provisions of this Part respecting judicial interim release to that other offence.
R.S., 1985, c. C-46, s. 522; R.S., 1985, c. 27 (1st Supp.), s. 88; 1991, c. 40, s. 32; 1994, c. 44, s. 48; 1999, c. 25, s. 10(Preamble).
[*annotation(s) added*]

– CCC

Onus

The onus is upon the accused to show cause for release on a 469 offence.[2]

Detention by Provincial Court Judge

A person charged with an offence under s. 469 will be required to attend before a justice of the peace or provincial court judge under s. 503, however s. 515(11) requires them to detain the accused.

> 515
> ...
>
> **Detention in custody for offence listed in section 469**
>
> (11) Where an accused who is charged with an offence mentioned in section 469 [*exclusive jurisdiction offences*] is taken before a justice, the justice shall order that the accused be detained in custody until he is dealt with according to law and shall issue a warrant in Form 8 for the committal of the accused.
> ...
>
> [*annotation(s) added*]
>
> – CCC

1. 469 offences consist of treason, intimidating Parliament or legislature, inciting mutiny, sedition, piracy, piratical acts, and murder

2. see s.522(2)

Consideration of Victim's Safety and Security

When ordering the release of a detainee, the justice is required to state on the record that they have considered the "safety and security" of all victims in the case.

> 515
> ...
>
> **Consideration of victim's safety and security**
>
> (13) A justice who makes an order under this section shall include in the record of the proceedings a statement that he or she considered the safety and security of every victim of the offence when making the order.
> ...
> [[List of Criminal Code Amendments|R.S., 1985, c. C-46, s. 515; R.S., 1985, c. 27 (1st Supp.), ss. 83, 186; ... 2001, c. 32, s. 37, c. 41, ss. 19, 133; 2008, c. 6, s. 37; 2009, c. 22, s. 17, c. 29, s. 2; 2010, c. 20, s. 1; 2012, c. 1, s. 32; 2014, c. 17, s. 14; 2015, c. 13, s. 20; 2018, c. 16, s. 218.]]

– CCC

Topics

- Release by Police
- Continued Detention After Appearing Before a Justice
- Bail Hearings
- Grounds for Release
- Release With and Without Sureties and Deposits
- Terms of Release
- Breach of Release Conditions
- Revoking, Terminating, or Replacing Bail or Remand Orders
- Bail Pending Appeal
- Bail Review
- Bail for Young Accused

See Also

- Compelling the Accused to Attend Court
- Bail (Cases)
- Bail Hearing (Model Examination)
- Out of Province Arrest Warrants

Bail Hearings

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< Procedure and Practice < Judicial Interim Release

General Principles

The purpose of a "show cause" hearing (or "bail hearing") is to provide an expeditious hearing that is flexible and procedurally informal while still protecting the liberty interests and security of the public.[1]

A bail hearing is not is not meant to like a trial or adopt a sort of complexity.[2]

The key elements of bail hearings are that they are done in a timely manner. This requires a "certain level of informality" including relaxed rules of evidence and expansive application of relevance.[3]

1. *R v Ghany*, 2006 CanLII 24454 (ON SC), 40 CR (6th) 290, *per* Dunro J, at para 59
2. *Ghany*, *ibid.*, at para 59 ("Third, bail hearings are not meant to be trials, nor should this "summary proceeding assume the complexities of trials". The show cause hearing is meant to be expeditious, with a degree of flexibility and procedural informality

sufficient to protect the liberty interests and security of the public")

3. *Ghany*, *ibid.*, at para 62 citing Law of Bail in Canada

Jurisdicton

Section 493 defines a "judge" within the provisions of bail as:

> 493 In this Part [*Pt. XVI – Compelling Appearance of an Accused Before a Justice and Interim Release (s. 493 to 529.5)*],
>
> ...
>
> **"judge"** means
>
> (a) in the Province of Ontario, a judge of the superior court of criminal jurisdiction of the Province,
> (b) in the Province of Quebec, a judge of the superior court of criminal jurisdiction of the province or three judges of the Court of Quebec,
> (c) [Repealed, 1992, c. 51, s. 37]
> (d) in the Provinces of Nova Scotia, New Brunswick, Manitoba, British Columbia, Prince Edward Island, Saskatchewan, Alberta and Newfoundland and Labrador, a judge of the superior court of criminal jurisdiction of the Province,
> (e) in Yukon and the Northwest Territories, a judge of the Supreme Court, and
> (f) in Nunavut, a judge of the Nunavut Court of Justice;
>
> ...
>
> R.S., 1985, c. C-46, s. 493; R.S., 1985, c. 11 (1st Supp.), s. 2, c. 27 (2nd Supp.), s. 10, c. 40 (4th Supp.), s. 2; 1990, c. 16, s. 5, c. 17, s. 12; 1992, c. 51, s. 37; 1994, c. 44, s. 39; 1999, c. 3, s. 30; 2002, c. 7, s. 143; 2015, c. 3, s. 51; 2019, c. 25, s. 209.
>
> – CCC

A bail judge is not a "court of competent jurisdiction" for the purpose of Charter violations.[1] Thus, a bail hearing is not the forum for s. 24 Charter relief. Evidence going towards a breach is not relevant.[2] Similarly, applications for prerogative writs such as habeas corpus do not apply.[3]

1. See Criminal Code and Related Definitions
2. *Ghany*, *supra*, at para 62
   R v Reimer (1987) 2 WCB (2d) 94 (MBCA)
   (*no CanLII links)
3. *R v Pearson*, 1992 CanLII 52 (SCC), [1992] 3 SCR 665, *per* Lamer CJ
   R v Morales, 1992 CanLII 53 (SCC), [1992] 3 SCR 711, *per* Lamer CJ

Burden of Proof

The burden of proof is presumed to be on the crown on a balance of probabilities.[1] The burden is upon the Crown to establish that one of the three grounds for denying bail has been made out unless the offence is one that engages the reverse onus.

1. *R v Julian* (1972) 20 CRNS 227 (NSSC)(*no CanLII links)

Reverse Onus

- Reverse Onus Provisions Under Section 515

Application to Adjourn Bail Hearing

On application of the prosecutor, a judge has the discretion to delay a bail hearing by up to three days *without* the consent of the accused. (s. 516)

> **Remand in custody**
>
> 516 (1) A justice may, before or at any time during the course of any proceedings under section 515 [*judicial interim release provisions*], on application by the prosecutor or the accused, adjourn the proceedings and remand the accused to custody in prison by warrant in Form 19, but no adjournment shall be for more than three clear days except with the consent of the accused.
>
> **Detention pending bail hearing**
>
> (2) A justice who remands an accused to custody under subsection (1) [*three-day remand on adjourning bail*] or subsection 515(11) [*detention in custody for offence listed in section 469*] may order that the accused abstain from communicating, directly or indirectly, with any victim, witness or other person identified in the order, except in accordance with any conditions specified in the order that the justice considers necessary.
> R.S., 1985, c. C-46, s. 516; 1999, c. 5, s. 22, c. 25, s. 31(Preamble).
> [*annotation(s) added*]
>
> – CCC

Where an accused has been brought before a judge within the 24 hour window and both the defence and Crown are prepared, the judge must begin the hearing "forthwith". The accused should not have to "make an appointment" to have a bail hearing.[1]

"[U]nreasonably prolonged custody awaiting a bail hearing" can be a form of unjustified detention.[2] Routine adjournments that are not at the request of Crown or defence are "unacceptable threat to constitutional rights, a denial of access to justice, and an unnecessary cost to the court system".[3]

Pleading "lack of resources" is not an answer to imperilling such rights.[4]

1. *R v Villota*, 2002 CanLII 49650 (ON SC), 163 CCC (3d) 507, *per* Hill J, at para 66
2. *Villota*, *ibid.*, at para 66
3. *Villota*, *ibid.*, at para 67
4. *Villota*, *ibid.*, at para 68

Evidence

- Bail Hearing Evidence

Publication Ban

Section 517 permits a publication ban upon all evidence presented at a bail hearing:

> **Order directing matters not to be published for specified period**
>
> 517 (1) If the prosecutor or the accused intends to show cause under section 515 [*judicial interim release provisions*], he or she shall so state to the justice and the justice may, and shall on application by the accused, before or at any time during the course of the proceedings under that section, make an order directing that the evidence taken, the information given or the representations made and the reasons, if any, given or to be given by the justice shall not be published in any document, or broadcast or transmitted in any way before such time as
>
> > (a) if a preliminary inquiry is held, the accused in respect of whom the proceedings are held is discharged; or
> > (b) if the accused in respect of whom the proceedings are held is tried or ordered to stand trial, the trial is ended.
>
> **Failure to comply**
>
> (2) Every one who fails without lawful excuse, the proof of which lies on him, to comply with an order made under subsection (1) [*order directing matters not to be published for specified period*] is guilty of an offence punishable on summary conviction.
> (3) [Repealed, 2005, c. 32, s. 17]
> R.S., 1985, c. C-46, s. 517; R.S., 1985, c. 27 (1st Supp.), s. 101(E); 2005, c. 32, s. 17.
> [*annotation(s) added*]
>
> – CCC

This section was found to violate s. 7 of the Charter for violating the freedom of expression but was saved by s. 1 of the Charter and is therefore constitutional.[1]

Application to s. 680 Bail Review

The scope of s. 517 publication bans does not extend to cover the publication of decisions arising from a s. 680 hearing.[2]

1. *Toronto Star Newspapers Ltd. v Canada*, 2009 ONCA 59 (CanLII), 239 CCC (3d) 437, *per* Feldman JA (3:2)

2. *R v JA*, 2020 ONCA 695 (CanLII), *per curiam*

Release on Guilty Plea During Bail Hearing

> 518
> [*omitted (1)*]
>
> **Release pending sentence**
>
> (2) Where, before or at any time during the course of any proceedings under section 515 [*judicial interim release provisions*], the accused pleads guilty and that plea is accepted, the justice may make any order provided for in this Part [*Pt. XVI – Compelling Appearance of an Accused Before a Justice and Interim Release (s. 493 to 529.5)*] for the release of the accused until the accused is sentenced.
> R.S., 1985, c. C-46, s. 518; R.S., 1985, c. 27 (1st Supp.), ss. 84, 185(F); 1994, c. 44, s. 45; 1999, c. 25, s. 9(Preamble).
> [*annotation(s) added*]
>
> – CCC

See Also

- Grounds of Denying Bail
- Bail Hearings (Until December 18, 2019)

Reverse Onus Provisions Under Section 515

This page was last substantively updated or reviewed *January 2020*. (Rev. # 79490)

General Principles

That is, unless the charge falls within the offences listed in s.515 (6):

515
[*omitted (1), (2), (2.01), (2.02), (2.03), (2.1), (2.2), (2.3), (3), (4), (4.1), (4.11), (4.12), (4.2), (4.3) and (5)*]

Order of detention

(6) Unless the accused, having been given a reasonable opportunity to do so, shows cause why the accused's detention in custody is not justified, the justice shall order, despite any provision of this section, that the accused be detained in custody until the accused is dealt with according to law, if the accused is charged

(a) with an indictable offence, other than an offence listed in section 469 [*exclusive jurisdiction offences*],

(i) that is alleged to have been committed while at large after being released in respect of another indictable offence pursuant to the provisions of this Part or section 679 [*release pending appeal*] or 680 [*review by court of appeal*],
(ii) that is an offence under section 467.11 [*participation in activities of criminal organization*], 467.111 [*recruitment of members by a criminal organization*], 467.12 [*commission of offence for criminal organization*] or 467.13 [*instructing commission of offence for criminal organization*], or a serious offence alleged to have been committed for the benefit of, at the direction of, or in association with, a criminal organization,
(iii) that is an offence under any of sections 83.02 to 83.04 and 83.18 to 83.23 or otherwise is alleged to be a terrorism offence,
(iv) an offence under subsection 16(1) or (2), 17(1), 19(1), 20(1) or 22(1) of the *Security of Information Act*,
(v) an offence under subsection 21(1) or 22(1) or section 23 of the *Security of Information Act* that is committed in relation to an offence referred to in subparagraph (iv),
(vi) that is an offence under section 99 [*weapons trafficking*], 100 [*possession for purpose of weapons trafficking*] or 103 [*importing or exporting firearms knowing it is unauthorized*],
(vii) that is an offence under section 244 [*discharging firearm*] or 244.2 [*discharging firearm – recklessness*], or an offence under section 239 [*attempted murder*], 272 [*sexual assault with a weapon or causing bodily harm*] or 273 [*aggravated sexual assault*], subsection 279(1) [*kidnapping*] or section 279.1 [*hostage taking*], 344 [*robbery*] or 346 [*extortion*] that is alleged to have been committed with a firearm, or
(viii) that is alleged to involve, or whose subject-matter is alleged to be, a firearm, a cross-bow, a prohibited weapon, a restricted weapon, a prohibited device, any ammunition or prohibited ammunition or an explosive substance, and that is alleged to have been committed while the accused was under a prohibition order within the meaning of subsection 84(1) [*firearms and other weapons — definitions*];

(b) with an indictable offence, other than an offence listed in section 469 [*exclusive jurisdiction offences*] and is not ordinarily resident in Canada,
(b.1) with an offence in the commission of which violence was allegedly used, threatened or attempted against their intimate partner, and the accused has been previously convicted of an offence in the commission of

which violence was used, threatened or attempted against any intimate partner of theirs;
(c) with an offence under any of subsections 145(2) to (5) [*provisions re failure to comply*] that is alleged to have been committed while they were at large after being released in respect of another offence under the provisions of this Part or section 679 [*release pending appeal*], 680 [*review by court of appeal*] or 816 [*release order for appellant*]; or
(d) with having committed an offence punishable by imprisonment for life under any of sections 5 to 7 of the *Controlled Drugs and Substances Act* or the offence of conspiring to commit such an offence.

Reasons

(6.1) If the justice orders that an accused to whom subsection (6) applies be released, the justice shall include in the record a statement of the justice's reasons for making the order.

Release order

(7) If an accused to whom subsection (6) [*reverse onus offences*] applies shows cause why their detention in custody is not justified, the justice shall make a release order under this section. If the accused was already at large on a release order, the new release order may include any additional conditions described in subsections (4) to (4.2) that the justice considers desirable.
(8) [Repealed, 2019, c. 25, s. 225(7)]

Sufficiency of record

(9) For the purposes of subsections (5) [*detention in custody*] and (6) [*reverse onus offences*], it is sufficient if a record is made of the reasons in accordance with the provisions of Part XVIII [*Pt. XVIII – Procedure on Preliminary Inquiry (s. 535 to 551)*] relating to the taking of evidence at preliminary inquiries.

Written reasons

(9.1) Despite subsection (9) [*sufficiency of record*], if the justice orders that the accused be detained in custody primarily because of a previous conviction of the accused, the justice shall state that reason, in writing, in the record.
[*omitted (10), (11), (12), (13) and (14)*]
R.S., 1985, c. C-46, s. 515; R.S., 1985, c. 27 (1st Supp.), ss. 83, 186; 1991, c. 40, s. 31; 1993, c. 45, s. 8; 1994, c. 44, s. 44; 1995, c. 39, s. 153; 1996, c. 19, ss. 71, 93.3; 1997, c. 18, s. 59, c. 23, s. 16; 1999, c. 5, s. 21, c. 25, s. 8(Preamble); 2001, c. 32, s. 37, c. 41, ss. 19, 133; 2008, c. 6, s. 37; 2009, c. 22, s. 17, c. 29, s. 2; 2010, c. 20, s. 1; 2012, c. 1, s. 32; 2014, c. 17, s. 14; 2015, c. 13, s. 20; 2018, c. 16, s. 218; 2019, c. 25, s. 225.

– CCC

For the purpose of reverse onus, "indictable offences" includes hybrid offences, but not those in which there was a summary election.[1]

Where a person is charged with multiple offences, only some of which are reverse onus offences, the non-reverse onus offences do not change onus.[2]

When the accused is a young person. The YCJA governs the onus on bail.

Constitutionality

The reverse onus for offences under s. 469 is constitutional.[3]

Criminal Organization Offences

Section 515(6)(a)(ii) provides that the following offences are subject to a reverse onus:

- s. 467.11,
- s. 467.111,
- s. 467.12
- s. 467.13,
- a "serious offence" committed "for the benefit of, at the direction of, or in association with, a criminal organization".

The term "serious offence" is defined in s. 467.1:

> 467.1 (1)...
> **"serious offence"** means an indictable offence under this or any other Act of Parliament for which the maximum punishment is imprisonment for five years or more, or another offence that is prescribed by regulation. ...
> [*omitted (2), (3) and (4)*]
> 1997, c. 23, s. 11; 2001, c. 32, s. 27; 2014, c. 17, s. 8.
>
> – CCC

The term is expanded by the Regulations Prescribing Certain Offences to be Serious Offences, SOR/2010-161, which adds the following offences:

> (a) keeping a common gaming or betting house (subsection 201(1) and paragraph 201(2)(b));
> (b) betting, pool-selling and book-making (section 202); (c) committing offences in relation to lotteries and games of chance (section 206);
> (d) cheating while playing a game or in holding the stakes for a game or in betting (section 209); and
> (e) keeping a common bawdy-house (subsection 210(1) and paragraph 210(2)(c)).
>
> ...

> (a) trafficking in any substance included in Schedule IV (paragraph 5(3)(c)); [Barbiturates ...]
> (b) trafficking in any substance included in Schedule II in an amount that does not exceed the amount set out for that substance in Schedule VII (subsection 5(4)); [Cannabis...]
> (c) importing or exporting any substance included in Schedule IV or V (paragraph 6(3)(c)); and [Barbiturates or Propylhexedrine (stimulant related to methamphetamine)]
> (d) producing any substance included in Schedule IV (paragraph 7(2)(d)); [Barbiturates...]
>
> – Regs

1. *R v Cooper*, 2007 NSSC 224 (CanLII), (2007) 256 NSR (2d) 200 (NSSC), *per* Coughlan J
   R v Hopkins, 2004 BCSC 1383 (CanLII), [2004] BCJ No 2273 (BCSC), *per* Barrow J
   R v Taylor, [2001] OJ No 2625(*no CanLII links) - crown elected summary conviction but still treated as "indictable" for purpose of bail
2. see *R v Villota*, 2002 CanLII 49650 (ONSC), 163 CCC (3d) 507, *per* Hill J, at para 78
3. *R v Sanchez*, 1999 CanLII 4220 (NSCA), 136 CCC (3d) 31, *per* Chipman JA

Section 469 Offences

- see Release on Section 469 Offences

See Also

- Reverse Onus Provisions Under Section 515 (Until December 18, 2019)

Reverse Onus Provisions Under Section 515 (Until December 18, 2019)

< Procedure and Practice < Judicial Interim Release

General Principles

That is, unless the charge falls within the offences listed in s.515 (6):

> 515
> [*omitted (1), (2), (2.1), (2.2), (2.3), (3), (4), (4.1), (4.11), (4.12), (4.2), (4.3) and (5)*]
>
> **Order of detention**

(6) Unless the accused, having been given a reasonable opportunity to do so, shows cause why the accused's detention in custody is not justified, the justice shall order, despite any provision of this section, that the accused be detained in custody until the accused is dealt with according to law, if the accused is charged

(a) with an indictable offence, other than an offence listed in section 469 [*exclusive jurisdiction offences*],

(i) that is alleged to have been committed while at large after being released in respect of another indictable offence pursuant to the provisions of this Part or section 679 or 680,
(ii) that is an offence under section 467.11 [*participation in activities of criminal organization*], 467.111 [*recruitment of members by a criminal organization*], 467.12 [*commission of offence for criminal organization*] or 467.13 [*instructing commission of offence for criminal organization*], or a serious offence alleged to have been committed for the benefit of, at the direction of, or in association with, a criminal organization,
(iii) that is an offence under any of sections 83.02 to 83.04 and 83.18 to 83.23 or otherwise is alleged to be a terrorism offence,
(iv) an offence under subsection 16(1) or (2), 17(1), 19(1), 20(1) or 22(1) of the *Security of Information Act*,
(v) an offence under subsection 21(1) or 22(1) or section 23 of the *Security of Information Act* that is committed in relation to an offence referred to in subparagraph (iv),
(vi) that is an offence under section 99 [*weapons trafficking*], 100 [*possession for purpose of weapons trafficking*] or 103 [*importing or exporting firearms knowing it is unauthorized*],
(vii) that is an offence under section 244 [*discharging firearm*] or 244.2 [*discharging firearm – recklessness*], or an offence under section 239 [*attempted murder*], 272 [*sexual assault with a weapon or causing bodily harm*] or 273 [*aggravated sexual assault*], subsection 279(1) [*kidnapping*] or section 279.1 [*hostage taking*], 344 [*robbery*] or 346 [*extortion*] that is alleged to have been committed with a firearm, or
(viii) that is alleged to involve, or whose subject-matter is alleged to be, a firearm, a cross-bow, a prohibited weapon, a restricted weapon, a prohibited device, any ammunition or prohibited ammunition or an explosive substance, and that is alleged to have been committed while the accused was under a prohibition order within the meaning of subsection 84(1);

(b) with an indictable offence, other than an offence listed in section 469 [*exclusive jurisdiction offences*] and is not ordinarily resident in Canada,
(c) with an offence under any of subsections 145(2) to (5) that is alleged to have been committed while he was at large after being released in respect of another offence pursuant to the provisions of this Part or section 679, 680 or 816, or
(d) with having committed an offence punishable by imprisonment for life under any of sections 5 to 7 of the *Controlled Drugs and Substances Act* or the offence of conspiring to commit such an offence.

Reasons

(6.1) If the justice orders that an accused to whom subsection (6) applies be released, the justice shall include in the record a statement of the justice's reasons for making the order.

Order of release

(7) Where an accused to whom paragraph 6(a), (c) or (d) applies shows cause why the accused's detention in custody is not justified, the justice shall order that the accused be released on giving an undertaking or entering into a recognizance described in any of paragraphs (2)(a) to (e) with the conditions described in subsections (4) to (4.2) or, where the accused was at large on an undertaking or recognizance with conditions, the additional conditions described in subsections (4) to (4.2), that the justice considers desirable, unless the accused, having been given a reasonable opportunity to do so, shows cause why the conditions or additional conditions should not be imposed.

Idem

(8) Where an accused to whom paragraph (6)(b) applies shows cause why the accused's detention in custody is not justified, the justice shall order that the accused be released on giving an undertaking or entering into a recognizance described in any of paragraphs (2)(a) to (e) with the conditions, described in subsections (4) to (4.2), that the justice considers desirable.

Sufficiency of record

(9) For the purposes of subsections (5) and (6), it is sufficient if a record is made of the reasons in accordance with the provisions of Part XVIII [*Pt. XVIII – Procedure on Preliminary Inquiry (s. 535 to 551)*] relating to the taking of evidence at preliminary inquiries.

Written reasons

(9.1) Despite subsection (9), if the justice orders that the accused be detained in custody primarily because of a previous conviction of the accused, the justice shall state that reason, in writing, in the record.
[*omitted (10), (11), (12), (13) and (14)*]
R.S., 1985, c. C-46, s. 515; R.S., 1985, c. 27 (1st Supp.), ss. 83, 186; 1991, c. 40, s. 31; 1993, c. 45, s. 8; 1994, c. 44, s. 44; 1995, c. 39, s. 153; 1996, c. 19, ss. 71, 93.3; 1997, c. 18, s. 59, c. 23, s. 16; 1999, c. 5, s. 21, c. 25, s. 8(Preamble); 2001, c. 32, s. 37, c. 41, ss. 19, 133; 2008, c. 6, s. 37; 2009, c. 22, s. 17, c. 29, s. 2; 2010, c. 20, s. 1; 2012, c. 1, s. 32; 2014, c. 17, s. 14; 2015, c. 13, s. 20; 2018, c. 16, s. 218.

– CCC

For the purpose of reverse onus, "indictable offences" includes hybrid offences, but not those in which there was a summary election.[1]

Where a person is charged with multiple offences, only some of which are reverse onus offences, the non-reverse onus offences do not change onus.[2]

When the accused is a young person. The YCJA governs the onus on bail.

Constitutionality

The reverse onus for offences under s. 469 is constitutional.[3]

Criminal Organization Offences

Section 515(6)(a)(ii) provides that the following offences are subject to a reverse onus:

- s. 467.11,
- s. 467.111,
- s. 467.12
- s. 467.13,
- a "serious offence" committed "for the benefit of, at the direction of, or in association with, a criminal organization".

The term "serious offence" is defined in s. 467.1:

> 467.1 (1) The following definitions apply in this Act.
> ...
> **"serious offence"** means an indictable offence under this or any other Act of Parliament for which the maximum punishment is imprisonment for five years or more, or another offence that is prescribed by regulation.
> [*omitted (2), (3) and (4)*]
> 1997, c. 23, s. 11; 2001, c. 32, s. 27; 2014, c. 17, s. 8.
>
> – CCC

The term is expanded by the Regulations Prescribing Certain Offences to be Serious Offences, SOR/2010-161, which adds the following offences:

> (a) keeping a common gaming or betting house (subsection 201(1) and paragraph 201(2)(b));
> (b) betting, pool-selling and book-making (section 202); (c) committing offences in relation to lotteries and games of chance (section 206);
> (d) cheating while playing a game or in holding the stakes for a game or in betting (section 209); and
> (e) keeping a common bawdy-house (subsection 210(1) and paragraph 210(2)(c)).
>
> ...
>
> (a) trafficking in any substance included in Schedule IV (paragraph 5(3)(c)); [Barbiturates ...]
> (b) trafficking in any substance included in Schedule II in an amount that does not exceed the amount set out for that substance in Schedule VII

(subsection 5(4)); [Cannabis...]
(c) importing or exporting any substance included in Schedule IV or V (paragraph 6(3)(c)); and [Barbiturates or Propylhexedrine (stimulant related to methamphetamine)]
(d) producing any substance included in Schedule IV (paragraph 7(2)(d)); [Barbiturates...]

– Regs

1. *R v Cooper*, 2007 NSSC 224 (CanLII), (2007) 256 NSR (2d) 200 (NSSC), *per* Coughlan J
   R v Hopkins, 2004 BCSC 1383 (CanLII), [2004] BCJ No 2273 (BCSC), *per* Barrow J
   R v Taylor, [2001] OJ No 2625(*no CanLII links) - crown elected summary conviction but still treated as "indictable" for purpose of bail
2. see *R v Villota*, 2002 CanLII 49650 (ONSC), 163 CCC (3d) 507, *per* Hill J, at para 78
3. *R v Sanchez*, 1999 CanLII 4220 (NSCA), 136 CCC (3d) 31, *per* Chipman JA

Bail Hearing Evidence

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General Principles

Presentation of Evidence

Depending on the jurisdiction, there may be a practice of presenting Crown evidence by verbal statements from the Crown. In some jurisdictions, verbal statements from the Crown is only permitted where there the evidence is not subject to "controversy or contradiction".[1]

In jurisdictions where controversial evidence cannot be presented orally, the evidence may be presented in affidavit.[2]

1. *R v Woo*, 1994 CanLII 16629 (BC SC), 90 CCC (3d) 404, *per* Fraser J
2. *Woo*, *ibid.*

Examinations

The accused cannot be questioned about the offence by the Crown unless the defence counsel opens the issue in direct examination.[1]

1. *R v Ghany*, 2006 CanLII 24454 (ON SC), 40 CR (6th) 290, *per* Durno J, at para 60

Rules of Evidence

A bail hearing is an informal process where the strict rules of evidence do not apply.[1]

Section 518 addresses the issues of admissibility, relevance and jurisdiction:

> **Inquiries to be made by justice and evidence**
>
> 518 (1) In any proceedings under section 515 [*judicial interim release provisions*],
>
> (a) the justice may, subject to paragraph (b) , make such inquiries, on oath or otherwise, of and concerning the accused as he considers desirable;
> (b) the accused shall not be examined by the justice or any other person except counsel for the accused respecting the offence with which the accused is charged, and no inquiry shall be made of the accused respecting that offence by way of cross-examination unless the accused has testified respecting the offence;
> (c) the prosecutor may, in addition to any other relevant evidence, lead evidence
>
> (i) to prove that the accused has previously been convicted of a criminal offence,
> (ii) to prove that the accused has been charged with and is awaiting trial for another criminal offence,
> (iii) to prove that the accused has previously committed an offence under section 145, or
> (iv) to show the circumstances of the alleged offence, particularly as they relate to the probability of conviction of the accused;
>
> (d) the justice may take into consideration any relevant matters agreed on by the prosecutor and the accused or his counsel;
> (d.1) the justice may receive evidence obtained as a result of an interception of a private communication under and within the meaning of Part VI [*Pt. VI – Invasion of Privacy (s. 183 to 196.1)*], in writing, orally or in the form of a recording and, for the purposes of this section, subsection 189(5) does not apply to that evidence;
> (d.2) the justice shall take into consideration any evidence submitted regarding the need to ensure the safety or security of any victim of or witness to an offence; and
> (e) the justice may receive and base his decision on evidence considered credible or trustworthy by him in the circumstances of each case.
>
> ...
> R.S., 1985, c. C-46, s. 518; R.S., 1985, c. 27 (1st Supp.), ss. 84, 185(F); 1994, c. 44, s. 45; 1999, c. 25, s. 9(Preamble).
> [*annotation(s) added*]
>
> – CCC

Section 518(1)(e) establishes the primary standard of the acceptance of evidence where it is "credible or trustworthy". The practice in many provinces is for the Crown to "narrate the circumstances of the alleged [offences] and to produce a CPIC printout regarding any prior criminal record." Consequently, the Crown does not normally need to have witnesses present for bail.[2]

A judge's power over its own process can permit the judge to prohibit the use of the hearing for discovery.[3]

1. *R v Kevork et al*, 1984 CanLII 3455 (ON SC), 12 CCC (3d) 339, *per* Ewaschuk J
2. *R v John*, [2001] OJ No 3396(*no CanLII links)
3. *R v Ghany*, 2006 CanLII 24454 (ON SC), 40 CR (6th) 290, *per* Durno J, at para 61

Hearsay Evidence

The court is permitted to consider hearsay evidence.[1] This includes admissions and confessions by the accused, and does not require a voir dire for voluntariness.[2]

Evidence by Submission of Counsel

The reading of unsworn police summaries from the disclosure package requires that the source be "fair and balanced, without vagueness or unstated or unsupported conclusions and inclusive of factors capable of detracting from the reliability of the accumulated evidence".[3] This should include:

- known bias or interest of principal witnesses,
- the circumstantial limits of investigative facts in possession crimes,
- identification evidence frailties, and
- without concealment of acts suggesting constitutionally questionable evidence-gathering techniques.

However, there is some dispute over whether defence must consent to unsworn allegations being admissible. Certain courts have stated that narration of alleged facts cannot be accepted as evidence without consent of the accused.[4] Others have found hearsay readings of summaries is sufficient.[5]

In certain exceptional cases, the liberty interests of the accused warrants that the defence may demand oral evidence that can be cross-examined.[6]

1. *Re Powers and the Queen*, 1972 CanLII 1411 (ON SC), 9 CCC 533 (Ont. H-CJ.), *per* Lerner J
   R v Zeolkowsh, 1989 CanLII 72 (SCC), 50 CCC (3d) 566, [1989] 1 SCR 1378, *per* Sopinka J (5:0), at p. 569
2. *R v Bouffard*, 1979 CanLII 2953 (QC SC), (1979) 16 C.R (3d) 373, *per* Hugessen J
3. *John*, *supra*
4. *John*, *supra* ("A factual narration as to the circumstances of the alleged offence(s), by the prosecutor without consent of the accused, does not constitute evidence")
   R v Hajdu, 1984 CanLII 3517, 14 CCC (8d) 568 (Ont. H.C.), *per* Barr J, ("A justice of the peace cannot, acting judicially, save perhaps in very exceptional circumstances, hold hearsay evidence on a material point to be trustworthy where it is untested by cross-examination.")
   R v West, 1972 CanLII 547 (ON CA), (1972) 9 CCC (2d) 369 (ONCA), *per* Gale CJ
5. *R v Kevork*, 1984 CanLII 3455 (ON SC), [1984] OJ No 926 (H.C.J.), *per* Ewaschuk J ("In my opinion, a statement by Crown counsel, whether oral or in writing of the alleged material facts of the charges should

provide sufficient evidence upon which a justice may act as a bail hearing.")

6. *John*, *supra* (" In certain cases, which may be few in number, protection of liberty requires the defence demand oral evidence and a meaningful opportunity for cross-examination")

Types of Evidence

Documentary Evidence

A prior criminal record is admissible as well as any acquittals on similar charges.[1]

Audio Evidence

A telephone calls alleged to be made by the accused are admissible without proof of voice identification.[2]

Wiretap Evidence

Evidence from a intercepted communications (i.e. wiretaps) can be admitted without notice.[3]

News and Publications

A bail court may consider news clipping and articles as a manner of reflecting certain segments of the Canadian public.[4]

1. *R v Larsen* (1976) 34 CRNS 399 (BCSC)(*no CanLII links)
2. *R v Lesage*, 1975 CanLII 1315 (QC CQ), (1975) 25 CCC (2d) 173, *per* LaGarde J
3. *R v Ghany*, 2006 CanLII 24454 (ON SC), 40 CR (6th) 290, at para 60
   R v Kevork, 1984 CanLII 3455 (ON SC), 12 CCC (3d) 339, *per* Ewaschuk J
   s. 518(1)(d.1)
4. *R v St-Cloud*, 2015 SCC 27 (CanLII), [2015] 2 SCR 328, at para 84 ("I wish to point out that this does not mean the courts must automatically disregard evidence that comes from the news media. It must be recognized that the media are part of life in society and that they reflect the opinions of certain segments of the Canadian public. ... The media have a vitally important role to play in a democratic society. It is the media that, by gathering and disseminating news, enable members of our society to make an informed assessment of the issues which may significantly affect their lives and well-being. Such opinion evidence can therefore be considered by the courts when it is admissible and relevant. This will be the case where it corresponds to the opinion of the reasonable person I described above." [*quotation marks removed*])

Relevancy

Section 518(1)(c) permits the admission of relevant evidence on previously convicted offences, pending charges, convicted under s. 145, and the circumstances of the alleged offence.

Bad character evidence may be relevant.[1]

The Crown can admit most any evidence as long as it is "credible and trustworthy".[2] This can include:[3]

- cautioned statement irrespective whether voluntary or Charter compliant;
- bad character evidence;
- wiretap evidence;
- hearsay;
- ambiguous post-offence conduct;
- untested similar fact evidence;
- prior record;
- untried charges; or
- personal information on social and living habits.

Domestic Offences

In offences of spousal and intimate partner violence the crown may adduce evidence including: [4]

1. Whether there is a history of violence or abusive behaviour, and, if so, details of the past abuse;
2. Whether the complainant fears further violence if the accused should be released and, if so, the basis for that fear;
3. The complainant's opinion as to the likelihood of the accused obeying terms of release, in particular no contact provisions; and
4. Whether the accused has any drug or alcohol problems, or a history of mental illness.

1. *R v Gamelin*, [1994] OJ No 1113(*no CanLII links) ("In my view, evidence of alleged acts of violence in previous long term relationships would be relevant to these issues and, in some circumstances, evidence of prior charges, which had been withdrawn, may also be relevant to these issues.")
2. *Toronto Star Newspapers Ltd. v Canada*, 2010 SCC 21 (CanLII), [2010] 1 SCR 721, *per* Deschamps J (8:1), at para 28 ("...There are practically no prohibitions as regards the evidence the prosecution can lead to show cause why the detention of the accused in custody is justified. According to s. 518(1)(e) Cr.C., the prosecutor may lead any evidence that is "credible or trustworthy", which might include evidence of a confession that has not been tested for voluntariness or consistency with the Charter, bad character, information obtained by wiretap, hearsay statements, ambiguous post-offence conduct, untested similar facts, prior convictions, UNTRIED CHARGES, or personal information on living and social habits. The justice has a broad discretion to "make such inquiries, on oath or otherwise, of and concerning the accused as he considers desirable" (s. 518(1)(a)). The process is informal; the bail hearing can even take place over the phone (s. 515(2.2)).")
3. *Toronto Star*, *ibid.*, at para 28
4. *R v EMB*, 2000 CanLII 28260 (AB QB), 31 CR (5th) 275, *per* Martin J, at para 11

Grounds for Release

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General Principles

Section 11(e) of the *Charter of Rights and Freedoms* requires that any basis for the denial of bail is only be permitted where (1) it occurs in a "narrow set of circumstances" and (2) the denial is "necessary to promote the proper functioning of the bail system and is not undertaken for any purpose extraneous to the bail system".[1]

Section 515(10) of the *Criminal Code* provides that bail may be denied in three situations:

1. where it is "necessary to ensure his or her attendance in court";
2. where it is "necessary for the protection or safety of the public" or
3. where it is "necessary to maintain confidence in the administration of justice".

Section 515(10) states:

> 515
> [*omitted (1), (2), (2.01), (2.02), (2.03), (2.1), (2.2), (2.3), (3), (4), (4.1), (4.11), (4.12), (4.2), (4.3), (5), (6), (6.1), (7), (8) and (9)*]
>
> **Justification for detention in custody**
>
> (10) For the purposes of this section, the detention of an accused in custody is justified only on one or more of the following grounds:
>
> (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, or any person under the age of 18 years, 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; and
> (c) if the detention is necessary to maintain confidence in the administration of justice, having regard to all the circumstances, including
>
> (i) the apparent strength of the prosecution's case,
> (ii) the gravity of the offence,
> (iii) the circumstances surrounding the commission of the offence, including whether a firearm was used, and
> (iv) the fact that the accused is liable, on conviction, for a potentially lengthy term of imprisonment or, in the case of an offence that involves, or whose subject-matter is, a firearm, a minimum punishment of imprisonment for a term of three years or more.
>
> [*omitted (11), (12), (13) and (14)*]
> R.S., 1985, c. C-46, s. 515; R.S., 1985, c. 27 (1st Supp.), ss. 83, 186; 1991, c. 40, s. 31; 1993, c. 45, s. 8; 1994, c. 44, s. 44; 1995, c. 39, s. 153; 1996, c. 19, ss. 71, 93.3; 1997, c. 18, s. 59, c. 23, s. 16; 1999, c. 5, s. 21, c. 25, s. 8(Preamble); 2001, c. 32, s. 37, c. 41, ss. 19, 133; 2008, c. 6, s. 37; 2009, c. 22, s. 17, c. 29, s. 2; 2010, c. 20, s. 1; 2012, c. 1, s. 32; 2014, c. 17, s. 14; 2015, c. 13, s. 20; 2018, c. 16, s. 218; 2019, c. 25, s. 225.
>
> – CCC

Burden and Standard of Proof

The burden is upon the Crown to justify detention on the balance of probabilities unless the offence is subject to a reverse onus.[2]

Due to the use of the term "including" in reference to the suggested factors. No listed factors are dispositive of any determination on bail.[3]

Prohibited Purpose

There is an accepted prohibition against using remand as a means to punish accused persons prior to a fair trial.[4]

History

Prior to the Bail Reform Act, the criteria for bail were a matter of the common law.

At common law, bail was not intended to be punitive.[5] The primary consideration was to secure attendance at trial.[6]

Factors considered would include the flight risk posed by the accused.[7]

1. *R v Antic*, 2017 SCC 27 (CanLII), [2017] 1 SCR 509, *per* Wagner J, at para 40
   R v Pearson, 1992 CanLII 52 (SCC), [1992] 3 SCR 665, *per* Lamer CJ at p 693
2. see Judicial Interim Release#Reverse Onus
3. *R v Manasseri*, 2017 ONCA 226 (CanLII), OJ No 1460, *per* Watt JA, at para 91
   R v St Cloud, 2015 SCC 27 (CanLII), [2015] 2 SCR 328, *per* Wagner J, at para 68
4. *R v James*, 2010 ONSC 3160 (CanLII), *per* Hill J, at para 22
5. *R v Lagus*, 1964 CanLII 391 (SK QB), 42 CR 288, *per* MacPherson J, at para 9
6. *Lagus*, *supra*, at para 9
7. *R v Gottfriedson*, 1906 CanLII 96 (BC SC), 10 CCC 239 (B.C. Co. Ct.), *per* Bole J
   R v Fortier, 1902 CanLII 119 (QC CA), 6 CCC 191 (Que. K.B.), *per* Wurtele JA

Primary Grounds: Flight Risk

Under s. 515(10)(a) bail can be denied "where the detention is necessary to ensure [the accused's] attendance in court". This ground addresses whether the accused is a *flight risk*.

Anyone charged with a serious criminal offence has some likelihood of choosing to flee. This alone is not enough to justify detention.[1]

1. *R v Falls*, [2004] OJ No 5870(*no CanLII links) , *per* Nordheimer J

Factors

This can include factors such as:[1]

- Accused's Local Connections vs Connections to Another Jurisdiction
  - family or community roots in the jurisdiction
  - citizenship / ownership of a passport
  - current residence, history of residences
  - living arrangement (partner or roommate), marital status
  - current connection with the community
  - employment history and ability to work if released
  - amount of assets and connection with the community (ie. property ownership such as house and car)
- Accused's Character
  - age and maturity
  - history of substance abuse
  - education
  - history of flight
  - history of untrustworthiness
  - criminal record for breaching court orders
  - association with persons with criminal record
- Level of Potential Supervision
- Motives to Flee
  - outstanding criminal charges
  - possibility of lengthy sentence
  - links to criminal organization
- Plans for release
- Availability of sureties
- Potential sureties / ability to supervise / character witnesses
  - their criminal record
  - employment
  - money or property that can be pledged to the court
  - familiarity with the accused
  - familiarity with criminal record of accused
  - familiarity of accusations against accused
  - ability and willingness to monitor the accused

The Court should compare the accused's connection with the local community as well as those with another country or province.[2]

Factors "employment, links with community or with family, quality of the evidence against him, severity of the consequences of the accusation and links with other countries, along with links with a criminal organization".[3]

The accused's trustworthiness is of importance as it indicates his likelihood of appearing.[4]

A history of breaching Court Orders can be used to infer a likelihood of breaching orders in the future.[5] Breach of any type of court order is relevant, particularly in light of their recency and frequency. However, breaches alone should not be determinative.[6]

1. *R v Powers*, 1972 CanLII 1411 (ONSC), (1972), 20 CRNS 23 (Ont. S.C.), *per* Lerner J, at para 26 ("detention for the purpose of ensuring attendance in court for the trial includes consideration of such things as residence, fixed place of abode, employment or occupation, marital and family status, and if applicable, previous criminal record, proximity of close friends and relatives, character witnesses, facts relating to the allegations of the offences, personal history or vitae, would appear to become pertinent.")
2. *R v Ellahib*, 2005 ABQB 565 (CanLII), *per* Wittmann J
3. *Bulaman c United States of America*, 2013 QCCS 2383 (CanLII), *per* Cohen J , at para 35
4. e.g. *Jackson v United States of America*, 2012 ONSC 2796 (CanLII), *per* Thorburn J, at para 32
5. see *R v Parsons*, 1997 CanLII 14679 (NL CA), Nfld. & PEIR 145 (NLCA), *per* Green JA, at para 54, ("the fact that an accused has breached an order in the past may well be predictive of a predisposition to flouting any future court order")
   R v General, 2007 ONCJ 693 (CanLII), [2007] OJ No 5448 (C.J.), *per* Bourque J, at para 53
   R v Cox, 2009 NSCA 15 (CanLII), NSR (2d) 364 (CA), *per* Fichaud JA, at paras 13 and 14
   R v Barton, 2010 BCCA 163 (CanLII), [2010] BCJ No 576 (CA), *per* Kirkpatrick JA
6. See Trotter, The Law of Bail in Canada, at pp. 131-132
   R v Noftall, 2001 CanLII 37611 (NLSCTD), 608 APR 162, *per* Rowe J, at para 21

Prohibited Factors

The seriousness of the offence is not a valid consideration for the primary grounds.[1]

1. *R v Prince*, [1998] OJ No 3727 (ONSC)(*no CanLII links)

Specific Offences and Cases

Drug Trafficking

It is recognized that in cases of drug trafficking there is a greater risk of absconding.[1]

Extradition Cases

When applying s. 515 in an extradition hearing, "the court must look at the risk of non-appearance even more cautiously than might be the case in domestic proceedings".[2]

1. *R v Pearson*, 1992 CanLII 52 (SCC), 77 CCC (3d) 124, *per* Lamer CJ
   Jackson v United States of America, 2012 ONSC 2796 (CanLII), *per* Thorburn J
2. United States of *America v Edwards*, 2010 BCCA 149 (CanLII), 288 BCAC 15, *per* Low JA, at para 18
   Jackson v USA, *ibid.*, at para 14

Secondary Grounds: Risk of Re-Offence

Under s. 515(10)(b), bail can be denied "for the protection or safety of the public ... including any substantial likelihood that the accused will...commit a criminal offence or interfere with the administration of justice".[1]

This ground can be assessed by considering the following questions:[2]

1. If released, is there a risk the accused will commit an offence?
2. Does the magnitude of that risk amount to a “substantial likelihood”?
3. Does that risk constitute a danger to public safety? and
4. Can that danger to public safety not be prevented or reduced to an acceptable level by bail conditions (such as reporting to authorities, curfew, no-contact, mobility restrictions, sureties or cash bail)?

1. See also *R v Morales*, 1992 CanLII 53 (SCC), 77 CCC (3d) 91, *per* Lamer CJ
   R v Pearson, 1992 CanLII 52 (SCC), [1992] 3 SCR 665, *per* Lamer CJ
   R v Samuelson, 1953 CanLII 454 (NL SC), 109 CCC 253 (Nfld. T.D.), *per* Winter J
   R v Groulx, 1974 CanLII 1620 (QC CS), 17 CCC (2d) 351 (Que. S.C.), *per* Chevalier J
2. *R v Abdel-Rahman*, 2010 BCSC 189 (CanLII), *per* Halfyward J
   R v Duncan, 2020 BCSC 590 (CanLII), *per* Kent J, at para 19

"Substantial Likelihood"

The Court must consider the risk of the accused committing another crime "in the context of the circumstances of the offence with which he is charged and his personality".[1]

Substantial likelihood means "substantial risk". It is not the same as proof beyond a reasonable doubt or balance of probability.[2]

A tendency or proclivity to commit offences short of it being a "substantial likelihood" is not sufficient to deny bail.[3]

1. See *Re Keenan and The Queen*, 1979 ABCA 278 (CanLII), 57 CCC (2d) 267, *per* McGillivray JA
2. *R v Link*, 1990 ABCA 55 (CanLII), 105 AR 160, *per* Harradence JA
   cf. *R v Walsh*, [2000] PEIJ No 63 (PEISC)(*no CanLII links)
3. *R v Noftall*, 2001 CanLII 37611 (NLSCTD), 608 APR 162, *per* Rowe J, at paras 23 to 24

Factors

Denial of bail can include factors such as:

- the circumstances of the offence:
  - seriousness and nature of the offence
  - duration of the offence, number of offences

    - surrounding circumstances of the offence and offender
    - accused's potential culpability
    - involvement of firearms
    - degree of planning and deliberation
- mental health issues (observable by witnesses or in video statement)
- addiction issues
- any other issues that suggest dangerousness
- suicidal tendencies
- consciousness of guilt
- physical and emotional impact of the incident upon the victim
- likelihood of lengthy sentence
- strength of the Crown's case[1]
- risk or harm to victim
- accused's criminal record
- previous outstanding release conditions
- history of abiding by court orders and conditions

Where there is a risk the court must consider whether it can be nullified by imposing conditions. [2]

Where it is reasonably foreseeable that the accused will not comply with the conditions without monitoring, then a surety should be required.[3] If it is likely that the accused will not comply then bail should not be granted.[4]

1. *R v Baltovich*, 1991 CanLII 7308 (ON CA), 68 CCC (3d) 362, *per* Doherty JA
2. *R v Peddle*, [2001] OJ No 2116 (S.C.)(*no CanLII links) , at paras 11 to 12
3. *Peddle*, *ibid.*, at para 11
4. *Peddle*, *ibid.*, at para 11

Non-Factors

The existence of health risks to the persons detained, such as during a pandemic, is generally not a factor that is considered on detention for secondary grounds unless it goes to the accused willingness to comply with conditions.[1]

1. *R v CKT*, 2020 ABQB 261 (CanLII), *per* Lema J, at paras 6 to 7 ("...while the pandemic is undeniably an unprecedented and globe-shaking phenomenon, it is not a factor in the secondary-ground exercise i.e. gauging whether detention is necessary to protect the public, with one exception ... The exception is where Covid-19 concerns bear on an accused's willingness to comply with release conditions, as some cases have found. If the argument is narrower (as here) i.e. anchored solely on the accused's concerns (with no spillover effect on "compliance attitude" and thus on public protection), it does not achieve lift-off. It instead seeks to introduce a "protection of the accused" element i.e. to rewrite the secondary ground.")

Types of Offences

The drug trade "occurs systematically, usually within a highly sophisticated commercial setting", it is lucrative and a way of life for many and as such creates strong incentives to continue in the criminal conduct while on bail.[1]

1. Pearson, *per* Lamer CJ, at p. 144
   Morales, *per* Lamer CJ, at p. 107

Tertiary Grounds: Public Confidence

Under 515(10)(c), bail can be revoked "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."[1]

The key consideration is the effect of release on the confidence in the administration of justice.[2]

This ground should be considered in all circumstances of bail not simply when the offence is particularly serious.[3] Nevertheless, situations where this ground is relied upon "may not arise frequently"[4] and only in "limited circumstances".[5]

The tertiary ground is not a "residual ground" to be considered after the first two grounds have rejected.[6]

This ground "must not be interpreted narrowly or applied sparingly".[7]

1. See also *R v Hood* (1992), 130 AR 135 (Q.B.) (*no CanLII links)
   R v Rondeau, 1996 CanLII 6516 (QC CA), 108 CCC (3d) 474, *per* Proulx JA
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   R v LaFromboise, 2005 CanLII 63758 (ON CA), 203 CCC (3d) 492, *per* Cronk JA, at para 31 ("the nature of the offence charged, by itself, cannot justify the denial of bail.")
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5. see *R v Heyden*, 2009 ONCA 494 (CanLII), 252 CCC (3d) 167, *per curiam* (3:0), at para 21
   LaFromboise, *supra*, at para 23
6. *R v St-Cloud*, 2015 SCC 27 (CanLII), [2015] 2 SCR 328, *per* Wagner J (7:0)
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Seriousness of the Offence

If the offence is "serious or very violent", if there is "overwhelming evidence" and the victims were vulnerable, then detention will usually be ordered.[1]

This consideration should include the maximum and minimum penalties permitted upon convicition.[2]

1. *R v St-Cloud*, 2015 SCC 27 (CanLII), [2015] 2 SCR 328, *per* Wagner J (7:0), at para 88
2. *R v Manasseri*, 2017 ONCA 226 (CanLII), OJ No 1460, *per* Watt JA, at para 98
   St-Cloud, *ibid.*, at para 60

Strength of the Crown case

The consideration of the strength of the crown's case includes consideration of the "quality, and to some extent, the quantity of the evidence available to the Crown to prove its case."[1] This should also include the "defence advanced by the accused".[2]

1. *R v Manasseri*, 2017 ONCA 226 (CanLII), OJ No 1460, *per* Watt JA, at para 97

2. *Manasseri*, *ibid.*, at para 97
   St-Cloud, *supra*, at paras 58 to 59

Surrounding Circumstances

The factor concerning the circumstances surrounding the commission of the offence considers the "nature of the offence", including the presence of violence, the context, the involvement of others, the accused's role, and the vulnerability of the victim.[1]

The factor can also include consideration of the accused's personal circumstances.[2]

1. *R v Manasseri*, 2017 ONCA 226 (CanLII), OJ No 1460, *per* Watt JA, at para 99
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Confidence of the Public

The concern should be upon the confidence of a "reasonable, informed and dispassionate public".[1] The reasonable person consists of a "reasonable member of the community is one properly informed of the philosophy of the relevant legislative provisions, Charter values, and the actual circumstances of the case". As well, they should have an awareness of the presumption of innocence, and the prohibition against punishment through pre-trial custody before a fair trial.[2]

The perspective of an "excitable" or "irrational" citizen should *not* be taken into account.[3]

Who is the "Public"

The "public" perspective is the "reasonable person who is properly informed about the philosophy of the legislative provisions, Charter values and the actual circumstances of the case". It should be not be treated as a "legal expert" who can appreciate the "subtleties of the various defences".[4]

Public concern and fear as well as public safety are valid considerations on the tertiary grounds.[5]

Confidence can be undermined not only by a failure to detain but also "if it orders detention where detention is not justified".[6]

1. *R v Dhillon*, 2002 CanLII 45048 (ON CA), [2002] OJ No 345 (CA), *per* Goudge JA, at para 28

2. *R v James*, 2010 ONSC 3160 (CanLII), *per* Hill J, at para 22
3. *R v White*, 2007 ABQB 359 (CanLII), 221 CCC (3d) 393, *per* Brooker JA, at para 18
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6. *St-Cloud*, *supra*, at para 87

Enumerated Factors

In cases where the crime is heinous and the evidence overwhelming bail must be denied to preserve the public's confidence in the administration of justice.[1] The consideration of the public's confidence in the administration of justices does not take into account "excitable" or "irrational" views of the public.[2] The perspective must be "reasonable, informed and dispassionate".[3] He must also be properly informed of the philosophy of the legislative provisions, Charter and full circumstances of the case.[4] AS well as aware of the presumption of innocence and prohibition against pre-trial punishment.[5]

None of the factors are determinative in the analysis which should look at the entire context of the circumstances.[6] The court must consider all four factors and weigh their combined effect.[7]

The four circumstances listed in s. 515(10)(c) are not exhaustive.[8]

Where the four circumstances suggest detention, it is not automatic that detention will follow. No single circumstance is determinative. It must be based on the "all the circumstances of each case" and must involve a "balancing [of] all the relevant circumstances".[9]

1. *R v Hall*, 2002 SCC 64 (CanLII), [2002] 3 SCR 309, *per* McLachlin CJ, at para 26
   R v EWM, 2006 CanLII 31720 (ON CA), [2006] OJ No 3654, *per* Juriansz JA, at para 25
2. *R v White*, 2007 ABQB 359 (CanLII), [2007] AJ No 608, *per* Brooker J, at para 18
3. *R v Dhillon*, 2002 CanLII 45048 (ON CA), [2002] OJ No 3451 (ONCA), *per* Goudge JA, at para 28
4. *Hall*, *supra*
   White, *supra*, at paras 17 to 18
5. *White*, *supra*, at para 17
6. *Mordue*, *supra*, at para 13
   BS, *supra*, at paras 10, 16
   R v James, 2010 ONSC 3160 (CanLII), [2010] OJ No 2262, *per* Hill J
7. *James*, *ibid.*, at para 22
8. *R v St-Cloud*, 2015 SCC 27 (CanLII), [2015] 2 SCR 328, *per* Wagner J (7:0), at para 87
9. *St-Cloud*, *ibid.*, at para 87

Constitutionality

This section was added after s. 515(10)(b) was found unconstitutional due to violating s. 11(e) of the Charter for vagueness.[1] the addede section 515(10)(c) was found to be constitutional.[2]

However, the portion of s. 515(10)(c) stating "on any other just cause being shown and without limiting the generality of the foregoing" was found to be unconstitutional and should be struck from the provision.[3]

1. *R v Morales*, 1992 CanLII 53 (SCC), [1992] 3 SCR 711, *per* Lamer CJ
2. *R v MacDougal*, 1999 BCCA 509 (CanLII), 138 CCC (3d) 38, *per* Hall JA (3:0)
R v Hall, 2000 CanLII 16867 (ON CA), 147 CCC (3d) 279, *per* Osborne ACJ (3:0)
3. see *R v Hall*, 2002 SCC 64 (CanLII), [2002] 3 SCR 309, *per* McLachlin CJ

Types of Offences

Gun Offences

The presence of guns or weapons do not automatically satisfy the tertiary grounds on the basis of public safety.[1]

1. *R v Ouellet*, [2006] OJ 1785 (ONSC)(*no CanLII links) - court found it to be an error of law for the JP to infer public safety risk simply because of possession of a weapon

Inapplicable Grounds

A person should not be denied bail only on account the limit financial means of either the surety or the accused.[1]

1. see *R v Dyke*, 2001 CanLII 37610 (NLSCTD), Nfld. & PEIR 1 (NLSC), *per* Russell J, at para 47

See Also

- Bail (Cases)
- Grounds for Release (Until December 18, 2019)

Grounds for Release (Until December 18, 2019)

< Procedure and Practice < Judicial Interim Release

General Principles

Section 515(10) of the *Criminal Code* provides that bail may be denied in three situations:

1. where it is "necessary to ensure his or her attendance in court";
2. where it is "necessary for the protection or safety of the public" or
3. where it is "necessary to maintain confidence in the administration of justice".

Section 515(10) states:

> 515.
> ...
>
> **Justification for detention in custody**
>
> (10) For the purposes of this section, the detention of an accused in custody is justified only on one or more of the following grounds:
>
> (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, or any person under the age of 18 years, 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; and
> (c) if the detention is necessary to maintain confidence in the administration of justice, having regard to all the circumstances, including
>
> (i) the apparent strength of the prosecution's case,
> (ii) the gravity of the offence,
> (iii) the circumstances surrounding the commission of the offence, including whether a firearm was used, and
> (iv) the fact that the accused is liable, on conviction, for a potentially lengthy term of imprisonment or, in the case of an offence that involves, or whose subject-matter is, a firearm, a minimum punishment of imprisonment for a term of three years or more.
>
> ...
> R.S., 1985, c. C-46, s. 515; R.S., 1985, c. 27 (1st Supp.), ss. 83, 186; 1991, c. 40, s. 31; 1993, c. 45, s. 8; 1994, c. 44, s. 44; 1995, c. 39, s. 153; 1996, c. 19, ss. 71, 93.3; 1997, c. 18, s. 59, c. 23, s. 16; 1999, c. 5, s. 21, c. 25, s. 8(Preamble); 2001, c. 32, s. 37, c. 41, ss. 19, 133; 2008, c. 6, s. 37; 2009, c. 22, s. 17, c. 29, s. 2; 2010, c. 20, s. 1; 2012, c. 1, s. 32.
>
> – CCC

Burden and Standard of Proof

The burden is upon the Crown to justify detention on the balance of probabilities unless the offence is subject to a reverse onus.[1]

Due to the use of the term "including" in reference to the suggested factors. No listed factors are dispositive of any determination on bail.[2]

Prohibited Purpose

There is an accepted prohibition against using remand as a means to punish accused persons prior to a fair trial.[3]

History

Prior to the Bail Reform Act, the criteria for bail were a matter of the common law.

At common law, bail was not intended to be punitive.[4] The primary consideration was to secure attendance at trial.[5]

Factors considered would include the flight risk posed by the accused.[6]

1. see Judicial Interim Release#Reverse Onus
2. *R v Manasseri*, 2017 ONCA 226 (CanLII), OJ No 1460, *per* Watt JA, at para 91
   R v St Cloud, 2015 SCC 27 (CanLII), [2015] 2 SCR 328, *per* Wagner J, at para 68
3. *R v James*, 2010 ONSC 3160 (CanLII), *per* Hill J, at para 22
4. *R v Lagus*, 1964 CanLII 391 (SKQB), 42 CR 288, *per* MacPherson J, at para 9
5. *Lagus*, *supra*, at para 9
6. *R v Gottfriedson*, 1906 CanLII 96 (BC SC), 10 CCC 239 (B.C. Co. Ct.), *per* Bole J
   R v Fortier, 1902 CanLII 119 (QC CA), 6 CCC 191 (Que. K.B.), *per* Wurtele JA

Primary Grounds

Under s. 515(10)(a) bail can be denied "where the detention is necessary to ensure [the accused's] attendance in court". This ground addresses whether the accused is a *flight risk*.

Anyone charged with a serious criminal offence has some likelihood of choosing to flee. This alone is not enough to justify detention.[1]

1. *R v Falls*, [2004] OJ No 5870(*no CanLII links) , *per* Nordheimer J

Factors

This can include factors such as:[1]

- Accused's Local Connections vs Connections to Another Jurisdiction
  - family or community roots in the jurisdiction
  - citizenship / ownership of a passport
  - current residence, history of residences
  - living arrangement (partner or roommate), marital status
  - current connection with the community
  - employment history and ability to work if released
  - amount of assets and connection with the community (ie. property ownership such as house and car)
- Accused's Character
  - age and maturity
  - history of substance abuse
  - education
  - history of flight

    - history of untrustworthiness
    - criminal record for breaching court orders
    - association with persons with criminal record
- Level of Potential Supervision
- Motives to Flee
    - outstanding criminal charges
    - possibility of lengthy sentence
    - links to criminal organization
- Plans for release
- Availability of sureties
- Potential sureties / ability to supervise / character witnesses
    - their criminal record
    - employment
    - money or property that can be pledged to the court
    - familiarity with the accused
    - familiarity with criminal record of accused
    - familiarity of accusations against accused
    - ability and willingness to monitor the accused

The Court should compare the accused's connection with the local community as well as those with another country or province.[2]

Factors "employment, links with community or with family, quality of the evidence against him, severity of the consequences of the accusation and links with other countries, along with links with a criminal organization".[3]

The accused's trustworthiness is of importance as it indicates his likelihood of appearing.[4]

A history of breaching Court Orders can be used to infer a likelihood of breaching orders in the future.[5] Breach of any type of court order is relevant, particularly in light of their recency and frequency. However, breaches alone should not be determinative.[6]

1. *R v Powers*, 1972 CanLII 1411 (ONSC), (1972), 20 CRNS 23 (Ont. S.C.), *per* Lerner J, at para 26 ("detention for the purpose of ensuring attendance in court for the trial includes consideration of such things as residence, fixed place of abode, employment or occupation, marital and family status, and if applicable, previous criminal record, proximity of close friends and relatives, character witnesses, facts relating to the allegations of the offences, personal history or vitae, would appear to become pertinent.")
2. *R v Ellahib*, 2005 ABQB 565 (CanLII), *per* Wittmann J
3. *Bulaman c United States of America*, 2013 QCCS 2383 (CanLII), *per* Cohen J , at para 35
4. e.g. *Jackson v United States of America*, 2012 ONSC 2796 (CanLII), *per* Thorburn J, at para 32
5. see *R v Parsons*, 1997 CanLII 14679 (NL CA), Nfld. & PEIR 145 (NLCA), *per* Green JA, at para 54, ("the fact that an accused has breached an order in the past may well be predictive of a predisposition to flouting any future court order")
   R v General, 2007 ONCJ 693 (CanLII), [2007] OJ No 5448 (C.J.), *per* Bourque J, at para 53

R v Cox, 2009 NSCA 15 (CanLII), NSR (2d) 364 (CA), *per* Fichaud JA, at paras 13 and 14
R v Barton, 2010 BCCA 163 (CanLII), [2010] BCJ No 576 (CA), *per* Kirkpatrick JA

6. See Trotter, The Law of Bail in Canada, at pp. 131-132
R v Noftall, 2001 CanLII 37611 (NL SCTD), 608 APR 162, *per* Rowe J, at para 21

Prohibited Factors

The seriousness of the offence is not a valid consideration for the primary grounds.[1]

1. *R v Prince*, [1998] OJ No 3727 (ONSC)(*no CanLII links)

Specific Offences and Cases

Drug Trafficking

It is recognized that in cases of drug trafficking there is a greater risk of absconding.[1]

Extradition Cases

When applying s. 515 in an extradition hearing, "the court must look at the risk of non-appearance even more cautiously than might be the case in domestic proceedings".[2]

1. *R v Pearson*, 1992 CanLII 52 (SCC), 77 CCC (3d) 124, *per* Lamer CJ
Jackson v United States of America, 2012 ONSC 2796 (CanLII), *per* Thorburn J

2. United States of *America v Edwards*, 2010 BCCA 149 (CanLII), 288 BCAC 15, *per* Low JA, at para 18
Jackson v USA, *ibid.*, at para 14

Secondary Grounds

Under s. 515(10)(b), bail can be denied "for the protection or safety of the public ... including any substantial likelihood that the accused will...commit a criminal offence or interfere with the administration of justice".[1]

1. See also *R v Morales*, 1992 CanLII 53 (SCC), 77 CCC (3d) 91, *per* Lamer CJ
R v Pearson, 1992 CanLII 52 (SCC), [1992] 3 SCR 665, *per* Lamer CJ
R v Samuelson, 1953 CanLII 454 (NL SC), 109 CCC 253 (Nfld. T.D.), *per* Winter J
R v Groulx, 1974 CanLII 1620, 17 CCC (2d) 351 (Que. S.C.), *per* Chevalier J

"Substantial Likelihood"

The Court must consider the risk of the accused committing another crime "in the context of the circumstances of the offence with which he is charged and his personality".[1]

Substantial likelihood means "substantial risk". It is not the same as proof beyond a reasonable doubt or probability.[2]

A tendency or proclivity to commit offences short of it being a "substantial likelihood" is not sufficient to deny bail.[3]

1. See *Re Keenan and The Queen*, 1979 ABCA 278 (CanLII), 57 CCC (2d) 267, *per* McGillivray JA
2. *R v Link*, 1990 ABCA 55 (CanLII), 105 AR 160, *per* Harradence JA

cf. *R v Walsh*, [2000] PEIJ No 63 (PEISC)(*no CanLII links)

3. *R v Noftall*, 2001 CanLII 37611 (NLSCTD), 608 APR 162, *per* Rowe J, at paras 23 to 24

Factors

Denial of bail can include factors such as:

- the circumstances of the offence:
  - seriousness and nature of the offence
  - duration of the offence, number of offences
  - surrounding circumstances of the offence and offender
  - accused's potential culpability
  - involvement of firearms
  - degree of planning and deliberation
- mental health issues (observable by witnesses or in video statement)
- addiction issues
- any other issues that suggest dangerousness
- suicidal tendencies
- consciousness of guilt
- physical and emotional impact of the incident upon the victim
- likelihood of lengthy sentence
- strength of the Crown's case[1]
- risk or harm to victim
- accused's criminal record
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Where there is a risk the court must consider whether it can be nullified by imposing conditions. [2]

Where it is reasonably foreseeable that the accused will not comply with the conditions without monitoring, then a surety should be required.[3] If it is likely that the accused will not comply then bail should not be granted.[4]

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Where the four circumstances suggest detention, it is not automatic that detention will follow. No single circumstance is determinative. It must be based on the "all the circumstances of each case" and must involve a "balancing [of] all the relevant circumstances".[9]

1. *R v Hall*, 2002 SCC 64 (CanLII), [2002] 3 SCR 309, *per* McLachlin CJ, at para 26
   R v EWM, 2006 CanLII 31720 (ON CA), [2006] OJ No 3654, *per* Juriansz JA, at para 25
2. *R v White*, 2007 ABQB 359 (CanLII), [2007] AJ No 608, *per* Brooker J, at para 18
3. *R v Dhillon*, 2002 CanLII 45048 (ON CA), [2002] OJ No 3451 (ONCA), *per* Goudge JA, at para 28
4. *Hall*, *supra*
   White, *supra*, at paras 17 to 18
5. *White*, *supra*, at para 17
6. *Mordue*, *supra*, at para 13
   BS, *supra*, at paras 10, 16
   R v James, 2010 ONSC 3160 (CanLII), [2010] OJ No 2262, *per* Hill J
7. *James*, *ibid.*, at para 22
8. *R v St-Cloud*, 2015 SCC 27 (CanLII), [2015] 2 SCR 328, *per* Wagner J (7:0), at para 87
9. *St-Cloud*, *ibid.*, at para 87

Constitutionality

This section was added after s. 515(10)(b) was found unconstitutional due to violating s. 11(e) of the Charter for vagueness.[1] the addede section 515(10)(c) was found to be constitutional.[2]

However, the portion of s. 515(10)(c) stating "on any other just cause being shown and without limiting the generality of the foregoing" was found to be unconstitutional and should be struck from the provision.[3]

1. *R v Morales*, 1992 CanLII 53 (SCC), [1992] 3 SCR 711, *per* Lamer CJ
2. *R v MacDougal*, 1999 BCCA 509 (CanLII), 138 CCC (3d) 38, *per* Hall JA (3:0) *R v Hall*, 2000 CanLII 16867 (ON CA), 147 CCC (3d) 279, *per* Osborne ACJ (3:0)
3. see *R v Hall*, 2002 SCC 64 (CanLII), [2002] 3 SCR 309, *per* McLachlin CJ

Types of Offences

Gun Offences

The presence of guns or weapons do not automatically satisfy the tertiary grounds on the basis of public safety.[1]

1. *R v Ouellet*, [2006] OJ 1785 (ONSC)(*no CanLII links) - court found it to be an error of law for the JP to infer public safety risk simply because of possession of a weapon

Inapplicable Grounds

A person should not be denied bail only on account the limit financial means of either the surety or the accused.[1]

1. see *R v Dyke*, 2001 CanLII 37610 (NLSCTD), Nfld. & PEIR 1 (NLSC), *per* Russell J, at para 47

See Also

- Bail (Cases)

Release With and Without Sureties and Deposits

This page was last substantively updated or reviewed *January 2020*. (Rev. # 79490)

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General Principles

Guarantees of Section 11(e)

Section 11(e) guarantees two rights. Those are the "right not to be denied bail without just cause" and "the right to bail on reasonable terms".[1]

The right to bail is a "corollary to the presumption of innocence".[2]

Statutory Principles

515
[*omitted (1) and (2)*]

Imposition of least onerous form of release

(2.01) The justice shall not make an order containing the conditions referred to in one of the paragraphs (2)(b) to (e) [*release order with conditions – required obligations (select)*] unless the prosecution shows cause why an order containing the conditions referred to in the preceding paragraphs for any less onerous form of release would be inadequate.

Promise to pay favoured over deposit

(2.02) The justice shall favour a promise to pay an amount over the deposit of an amount of money if the accused or the surety, if applicable, has reasonably recoverable assets.

Restraint in use of surety

(2.03) For greater certainty, before making an order requiring that the accused have a surety, the justice shall be satisfied that this requirement is the least onerous form of release possible for the accused in the circumstances.

Power of justice — sureties

(2.1) If, under subsection (2) [*release order with conditions*] or any other provision of this Act, a judge, justice or court makes a release order with a requirement for sureties, the judge, justice or court may name particular persons as sureties.

[*omitted (2.2), (2.3), (3), (4), (4.1), (4.11), (4.12), (4.2), (4.3), (5), (6), (6.1), (7), (8), (9), (9.1), (10), (11), (12), (13) and (14)*]
R.S., 1985, c. C-46, s. 515; R.S., 1985, c. 27 (1st Supp.), ss. 83, 186; 1991, c. 40, s. 31; 1993, c. 45, s. 8; 1994, c. 44, s. 44; 1995, c. 39, s. 153; 1996, c. 19, ss. 71, 93.3; 1997, c. 18, s. 59, c. 23, s. 16; 1999, c. 5, s. 21, c. 25, s. 8(Preamble); 2001, c. 32, s. 37, c. 41, ss. 19, 133; 2008, c. 6, s. 37; 2009, c. 22, s. 17, c. 29, s. 2; 2010, c. 20, s. 1; 2012, c. 1, s. 32; 2014, c. 17, s. 14; 2015, c. 13, s. 20; 2018, c. 16, s. 218; 2019, c. 25, s. 225.
[*annotation(s) added*]

– CCC

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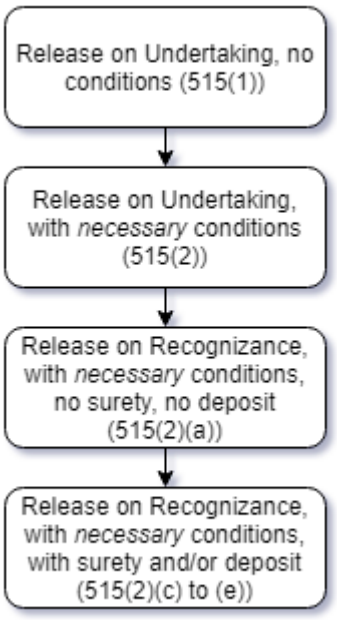
1. *R v Antic*, 2017 SCC 27 (CanLII), [2017] 1

SCR 509, *per* Wagner J, at para 67 2. *Antic*, *ibid.*, at para 67

Ladder Principle

The common law "ladder principle" of bail was codified in s. 515(3). It prohibits the imposition of a "more onerous form of release unless the Crown shows why a less onerous form is inappropriate".[1]



Default Release

The *default* position on all bail matters, with some exception, under s. 515(1) is for the "unconditional release on an undertaking".[2]

Strict Application of Ladder Principle

Where the default unconditional release does not apply, the "ladder principle" must be "strictly" followed.[3]

Must Release at Earliest Reasonable Opportunity

The ladder principle also states that "release is favoured at the earliest reasonable opportunity".[4]

Burden

Whenever the Crown seeks to impose conditions or more onerous forms of release beyond an undertaking, it must "show why this form is necessary".[5]

The burden of proof will increase where the conditions becomes more onerous upon the accused.[6]

Standard of Proof

A restrictive condition can only be imposed where "the Crown has shown it to be *necessary* having regard to the statutory criteria for detention".[7]

Analysis

To comply with the "ladder principle" the judge imposing conditions must reject each form of less restrictive release before they may consider any further restriction.[8] Failure to reject a lesser form of release is an error of law.[9]

Ladder Principle In Consent Releases

The principles and guidelines for bail as set out by case law "do[es] not apply strictly to consent release plans".[10]

The judge has discretion to reject a joint proposal on release, however should not "routinely second-guess" them.[11]

 1. *R v Antic*, 2017 SCC 27 (CanLII), [2017] 1

SCR 509, *per* Wagner J, at para 47 ("The ladder principle is codified in s. 515(3), which prohibits a justice or a judge from imposing a more onerous form of release unless the Crown shows why a less onerous form is inappropriate. […]")
R v Anoussis, 2008 QCCQ 8100 (CanLII), 242 CCC (3d) 113, *per* Healy J, at para 23
2. *Antic*, *ibid.*, at para 67
3. *Antic*, *ibid.*, at para 67 ("This principle must be adhered to strictly.")
4. *Antic*, *supra*, at para 67
5. *Antic*, *supra*, at para 67
6. *Antic*, *supra*, at para 67
7. *Antic*, *supra*, at para 67 - emphasis added
8. *Antic*, *supra*, at para 67
9. *Antic*, *supra*, at para 67
10. *Antic*, *supra*, at para 68
11. *Antic*, *supra*, at para 68

Enabling Release Conditions

Section 515(2) permits the judge release the accused on either an undertaking (515(2)(a)) or a recognizance with conditions (515(2)(b) to (e)).

> 515
> [*omitted (1)*]
>
> **Release order with conditions**
>
> (2) If the justice does not make an order under subsection (1) [*release order without conditions*], the justice shall, unless the prosecutor shows cause why the detention of the accused is justified, make a release order that sets out the conditions directed by the justice under subsection (4) [*permissible conditions on release order*] and, as the case may be,
>
> > (a) an indication that the release order does not include any financial obligations;
> > (b) the accused's promise to pay a specified amount if they fail to comply with a condition of the order;
> > (c) the obligation to have one or more sureties, with or without the accused's promise to pay a specified amount if they fail to comply with a condition of the order;
> > (d) the obligation to deposit money or other valuable security in a specified amount or value, with or without the accused's promise to pay a specified amount if they fail to comply with a condition of the order; or
> > (e) if the accused is not ordinarily resident in the province in which they are in custody or does not ordinarily reside within 200 kilometres of the place* in which they are in custody, the obligation to deposit money or other valuable security in a specified amount or value, with or without the accused's promise to pay a specified amount by the justice if they fail to comply with a condition of the order and with or without sureties.
>
> [*omitted (2.01), (2.02), (2.03), (2.1), (2.2), (2.3), (3), (4), (4.1), (4.11), (4.12), (4.2), (4.3), (5), (6), (6.1), (7), (8), (9), (9.1), (10), (11), (12), (13) and (14)*]
> R.S., 1985, c. C-46, s. 515; R.S., 1985, c. 27 (1st Supp.), ss. 83, 186; 1991, c. 40, s. 31; 1993, c. 45, s. 8; 1994, c. 44, s. 44; 1995, c. 39, s. 153; 1996, c. 19, ss. 71, 93.3;

> 1997, c. 18, s. 59, c. 23, s. 16; 1999, c. 5, s. 21, c. 25, s. 8(Preamble); 2001, c. 32, s. 37, c. 41, ss. 19, 133; 2008, c. 6, s. 37; 2009, c. 22, s. 17, c. 29, s. 2; 2010, c. 20, s. 1; 2012, c. 1, s. 32; 2014, c. 17, s. 14; 2015, c. 13, s. 20; 2018, c. 16, s. 218; 2019, c. 25, s. 225.
> [*annotation(s) added*] [* see "Constitution", below]
>
> – CCC

An accused can be released in the following circumstances:

- personal undertaking without conditions (515(1))
- personal undertaking with conditions (515(2)(a))
- recognizance with conditions and without surety or deposit (515(2)(b))
- recognizance with conditions and with surety without deposit(515(2)(c))
- recognizance with conditions without surety with deposit (515(2)(d))
- recognizance with conditions with surety and deposit (515(2)(e))

These options are listed in order of escalating risk.[1]

1. *R v O'Connor*, 2015 ONSC 1256 (CanLII), *per* Price J, at para 43

Undertaking With or Without Conditions (515(2)(a),(b))

Recognizance With Conditions and Without Surety or Deposit (515(2)(b)

A recognizance is "functionally equivalent" to cash bail.[1]

1. *Antic*, *supra*, at para 67

Recognizance With Surety (515(2)(c))

A surety takes on the role of "civilian jailer of the accused". They are responsible to ensure the accused's attendance at court and ensure they abide by their conditions.[1] The public interest and its faith in the bail system requires them to act promptly and faithfully in their duties.[2]

Sureties

A recognizance with a surety is "one of the most onerous forms of release" and must be considered last after rejecting all other forms of release.[3]

A recognizance is "functionally equivalent" to cash bail.[4]

With Deposit (515(2)(d))

Cash bail should only be applied in "exceptional circumstances" where a surety is unavailable.[5]

The purpose of 515(2)(d) has been described as adding "some flexibility into this situation by permitting an accused with some personal resources to gain his/her own release".[6]

Section 515(2)(d) has been read down to exclude the phrase, "with the consent of the prosecutor", allowing the judge to release the accused on cash bail.[7]

Cash Bail

Cash bail should not be imposed where the accused or their surety "have reasonably recoverable assets and are able to pledge those assets to the satisfaction of the court to justify their release".[8] It should *only* be imposed in "exceptional circumstances" where "release on a recognizance with sureties is unavailable".[9]

Cash bail is considered one of the "most onerous" rungs of the ladder.[10]

Cash bail is considered "merely a limited alternative to a pledge" which should not be used where the accused or sureties have "reasonably recoverable assets to pledge".[11]

Amount of Cash

The amount set for cash bail must be "no higher than necessary to satisfy the concern that would otherwise warrant detention and proportionate means of the accused nad the circumstances of the case".[12] It should not be set so high as to effectively amount to a detention order.[13]

Obligation to Inquire into Ability to Pay

Where the court imposes cash bail, the court *must* inquire into the accused's ability to pay. The cash bail order cannot be "set so high that it effectively amounts to a detention order".[14]

1. *R v Jacobson*, 2005 CanLII 63779 (ON SC), 31 CR (6th) 106, *per* GP Smith J, at para 18 *Quilling v Canada (Attorney General)*, 2007 BCSC 1008 (CanLII), *per* Parrett J, at paras 55 to 57 - discussion on history of sureties as jailers
2. *Jacobson*, *ibid.*, at para 19
3. *R v Antic*, 2017 SCC 27 (CanLII), [2017] 1 SCR 509, *per* Wagner J, at para 67
4. *Antic*, *supra*, at para 67
5. *R v Antic*, 2017 SCC 27 (CanLII), [2017] 1 SCR 509, *per* Wagner J, at para 67 ("cash bail should be relied on only in exceptional circumstances in which release on a recognizance with sureties is unavailable.")
6. Gary Trotter, The Law of Bail in Canada, 2nd ed. (Toronto: Carswell, 1999), at p. 248
7. *R v Saunders*, 2001 BCSC 1363 (CanLII), 159 CCC (3d) 558, *per* MacKinnon J
8. *Antic*, *supra*, at para 67
9. *Antic*, *supra*, at para 67
10. *Antic*, *ibid.*, at para 48
11. *Antic*, *ibid.*, at para 4
12. *Antic*, *ibid.*, at para 67
13. *Antic*, *ibid.*, at para 67
14. *Antic*, *ibid.*, at paras 56, h41w467

With Surety and Deposit (515(2)(e))

The circumstances described in s. 515(2)(e) is the only case where the accused can be released with both a surety and cash deposit.[1] This form of release is designed to be the most secure as it requires both forms of commitment.[2]

Constitution

The part of this section that reads "if the accused is not ordinarily resident in the province in which the accused is in custody or does not ordinarily reside within two hundred kilometres of the place in which he is in custody" has been found constitutional and does not s. 11(e) of the Charter.[3]

Assignment of Funds

The funds held as cash deposit for bail cannot be assigned to legal counsel pay for fees.[4]

1. *R v Folkes*, 2007 ABQB 624 (CanLII), 228 CCC (3d) 284, *per* Marceau J, at para 17
2. *Folkes*, *ibid.*, at para 27
3. *R v Antic*, 2017 SCC 27 (CanLII), [2017] 1 SCR 509, *per* Wagner J
   cf. *Folkes*, *supra*, at para 40
4. *R v Webster*, 1994 CanLII 9166 (AB QB), 94 CCC (3d) 562, *per* Veit J

Procedure

It is not always necessary to have the surety to appear in court.[1]

The surety and accused continue to be bound by the recognizance after every court appearance until the completion of the matter.[2]

Naming Surety on Order

> 515
> [*omitted (1), (2), (2.01), (2.02) and (2.03)*]
>
> **Power of justice — sureties**
>
> (2.1) If, under subsection (2) [*release order with conditions*] or any other provision of this Act, a judge, justice or court makes a release order with a requirement for sureties, the judge, justice or court may name particular persons as sureties.
> [*omitted (2.2), (2.3), (3), (4), (4.1), (4.11), (4.12), (4.2), (4.3), (5), (6), (6.1), (7), (8), (9), (9.1), (10), (11), (12), (13) and (14)*]
> R.S., 1985, c. C-46, s. 515; R.S., 1985, c. 27 (1st Supp.), ss. 83, 186; 1991, c. 40, s. 31; 1993, c. 45, s. 8; 1994, c. 44, s. 44; 1995, c. 39, s. 153; 1996, c. 19, ss. 71, 93.3; 1997, c. 18, s. 59, c. 23, s. 16; 1999, c. 5, s. 21, c. 25, s. 8(Preamble); 2001, c. 32, s. 37, c. 41, ss. 19, 133; 2008, c. 6, s. 37; 2009, c. 22, s. 17, c. 29, s. 2; 2010, c. 20, s. 1; 2012, c. 1, s. 32; 2014, c. 17, s. 14; 2015, c. 13, s. 20; 2018, c. 16, s. 218; 2019, c. 25, s. 225.
> [*annotation(s) added*]

– CCC

Video Appearance Permitted

515
[*omitted (1), (2), (2.01), (2.02), (2.03) and (2.1)*]

Appearance of the accused

(2.2) If, by this Act, the appearance of an accused is required for the purposes of judicial interim release, the accused shall appear personally but the justice may allow the accused to appear by videoconference or, subject to subsection (2.3) [*when consent required for audioconference*], by audioconference, if the technological means is satisfactory to the justice.

When consent required for audioconference

(2.3) If the accused cannot appear by closed-circuit television or videoconference and the evidence of a witness is to be taken at the appearance, the consent of the prosecutor and the accused is required for the appearance of the accused by audioconference.

Factors to consider

(3) In making an order under this section, the justice shall consider any relevant factors, including,

> (a) whether the accused is charged with an offence in the commission of which violence was used, threatened or attempted against their intimate partner; or
> (b) whether the accused has been previously convicted of a criminal offence.

[*omitted (4), (4.1), (4.11), (4.12), (4.2), (4.3), (5), (6), (6.1), (7), (8), (9), (9.1), (10), (11), (12), (13) and (14)*]
R.S., 1985, c. C-46, s. 515; R.S., 1985, c. 27 (1st Supp.), ss. 83, 186; 1991, c. 40, s. 31; 1993, c. 45, s. 8; 1994, c. 44, s. 44; 1995, c. 39, s. 153; 1996, c. 19, ss. 71, 93.3; 1997, c. 18, s. 59, c. 23, s. 16; 1999, c. 5, s. 21, c. 25, s. 8(Preamble); 2001, c. 32, s. 37, c. 41, ss. 19, 133; 2008, c. 6, s. 37; 2009, c. 22, s. 17, c. 29, s. 2; 2010, c. 20, s. 1; 2012, c. 1, s. 32; 2014, c. 17, s. 14; 2015, c. 13, s. 20; 2018, c. 16, s. 218; 2019, c. 25, s. 225.
[*annotation(s) added*]

– CCC

1. *R v Brooks*, 2001 CanLII 28401 (ON SC), 153 CCC (3d) 533, *per* Hill J

2. see s. 763, 764

Amount of Deposit

Under s. 515(2)(d), a cash bail can be required from the accused. It may only be returned to the accused who deposited.

The "test for financial security is whether the pledge will bind the conscience of the surety and the accused".[1] This is irrespective of whether the amount would cause "mere hardship and loss" or "total financial calamity".[2]

The constitutional right to bail requires that the amount of security needed for bail should not "be set so high as to amount to a detention order".[3] The bail judge has an obligation to make inquiries "into the ability of the accused to pay".[4]

1. *R v Gaete*, 2011 CanLII 28500 (ONSC), *per* Corbett J, at para 32
   R v MacDonald, 2011 NSCA 46 (CanLII), 957 APR 185, *per* Bryson JA, at para 25
2. *Gaete*, *supra*, at para 32
3. *R v Saunter*, 2006 ABQB 808 (CanLII), *per* Veit J
   R v Brost, 2012 ABQB 696 (CanLII), 552 AR 140, *per* Hughes J, at para 40
4. *Brost*, *ibid.*, at para 40

Surety

Declaration of surety

515.1 (1) Before a judge, justice or court names a particular person as a surety, the person shall provide the judge, justice or court with a signed declaration under oath, solemn declaration or solemn affirmation in Form 12 [*forms*] that sets out

(a) their name, date of birth and contact information;
(b) information demonstrating that they are suitable to act as a surety for the accused, including financial information;
(c) their relationship to the accused;
(d) the name and date of birth of any other accused for whom they act as a surety;
(e) their acknowledgment of the charge, and of any other outstanding charges against the accused and the contents of the accused's criminal record, if any;
(f) their acknowledgment of the amount that they are willing to promise to pay or deposit to the court and that may be forfeited if the accused fails to comply with any condition of the release order;
(g) their acknowledgment that they understand the role and responsibilities of a surety and that they assume these voluntarily; and
(h) a description of the contents of their criminal record and any outstanding charges against them, if any.

Exception

(2) Despite subsection (1) [*declaration of surety*], a judge, justice or court may name a person as a surety without a declaration if

(a) the prosecutor consents to it; or
(b) the judge, justice or court is satisfied that

(i) the person cannot reasonably provide a declaration in the circumstances,
(ii) the judge, justice or court has received sufficient information of the kind that would be set out in a declaration to evaluate whether the person is suitable to act as a surety for the accused, and
(iii) the person has acknowleged that they have received sufficient information with respect to the matters referred to in paragraphs (1)(e) to (g) [*declaration of surety – surety's acknowledgements*] to accept the role and responsibilities of a surety.

Means of telecommunication

(3) A person may provide the judge, justice or court with the declaration referred to in subsection (1) [*declaration of surety*] by a means of telecommunication that produces a writing.

[*annotation(s) added*]

– CCC

A surety has the obligations of a jailer in the community and is responsible for ensuring that the accused appears in court when required and abides by his conditions. [1] The surety must exercise "utmost due diligence" and take "all reasonable steps" to live up to their responsibilities.[2]

It will usually be a relative, friend, or neighbour of the accused. Generally, it should not be someone who is:

- someone with a criminal record,
- a co-accused in a outstanding charge, or has unrelated criminal charges
- a person not resident in the jurisdiction,
- underage
- acting as a surety for someone else,
- receiving financial compensation for being a surety

The surety is to render the accused back into the custody of the court once he has lost ability or desire to control the accused compliance with the conditions of release.

Undertaking or release order binding on accused

764 (1) If an accused is bound by an undertaking or release order to appear for trial, their arraignment or conviction does not cancel the undertaking or release order, and it continues to bind them and their sureties for their appearance until the accused is discharged or sentenced, as the case may be.

Committal or new sureties

(2) Despite subsection (1) [*responsibility of sureties*], the court, provincial court judge or justice may commit an accused to prison or may require them to furnish new or additional sureties for their appearance until the accused is discharged or sentenced, as the case may be.

Effect of committal

(3) The sureties of an accused who is bound by a release order to appear for trial are discharged if the accused is committed to prison under subsection (2) [*court may order detained or order additional sureties upon conviction*].

Summary of certain provisions

(4) A summary of subsections (1) to (3) [*effect of arraignment or conviction on undertaking or release*] must be set out in any undertaking or release order.

R.S., 1985, c. C-46, s. 764; R.S., 1985, c. 27 (1st Supp.), s. 203; 2019, c. 25, s. 310. [*annotation(s) added*]

– CCC

See *R v Scosky*, 1955 CanLII 463 (BC SC), (1955) 114 CCC 294, *per* Sasrget J

Rendering Surety

Where a surety no longer wishes to be responsible as a surety for the accused, he may render surety under s. 766(1) and 767 to have the accused rendered into custody thus relieving him of his obligations.

The surety ceases to be bound once the accused in committed into custody by s. 764(2).[3]

Render of accused by sureties

766 (1) A surety for a person who is subject to a release order or recognizance may, by an application in writing to a court, provincial court judge or justice, apply to be relieved of their obligation under the release order or recognizance, and the court,

provincial court judge or justice shall then make an order in writing for committal of that person to the prison named in that order.

Arrest

(2) An order issued by a court, provincial court judge or justice under subsection (1) [*render of accused by sureties*] must be given to the surety and, on receipt of it, the surety or any peace officer may arrest the person named in the order and deliver that person with the order to the keeper of the prison named in the order, and the keeper shall receive and imprison that person until the person is discharged according to law.

Certificate and entry of render

(3) If a court, provincial court judge or justice issues an order under subsection (1) [*render of accused by sureties*] and receives from the sheriff a certificate that the person named in the order has been committed to prison under subsection (2) [*render of accused by sureties – arrest warrant*], the court, provincial court judge or justice shall order an entry of the committal to be endorsed on the release order or recognizance, as the case may be.

Discharge of sureties

(4) An endorsement under subsection (3) [*procedure on rendering by sureties*] cancels the release order or recognizance, as the case may be, and discharges the sureties.

R.S., 1985, c. C-46, s. 766; R.S., 1985, c. 27 (1st Supp.), s. 203; 2019, c. 25, s. 310. [*annotation(s) added*]

– CCC

Render of accused in court by sureties

767 A surety for a person who is subject to a release order or recognizance may bring that person before the court where the person is required to appear or where the person entered into the recognizance at any time during the sittings of that court and before the person's trial, and the surety may discharge their obligation under the release order or recognizance by giving that person into the custody of the court. The court shall then commit that person to prison until the person is discharged according to law.

00R.S., c. C-34, s. 701; 2019, c. 25, s. 310.

– CCC

When a surety renders under s. 766 or 767 and the accused is then committed to prison under s. 767(2), only then is the recognizance vacated and the surety completely discharged.[4] In this circumstance, s. 767.1 does *not* apply and would not permit re-release with a new surety under the same terms.[5]

Rights of surety preserved

768 Nothing in this Part [*Pt. XXV – Effect and Enforcement of Recognizances (s. 762 to 773)*] limits any right that a surety has of taking and giving into custody any person for whom they are a surety under a release order or recognizance.

R.S., c. C-34, s. 702; 2019, c. 25, s. 310.

– CCC

Application of judicial interim release provisions

769. Where a surety for a person has rendered him into custody and that person has been committed to prison, the provisions of Parts XVI [*Pt. XVI – Compelling Appearance of an Accused Before a Justice and Interim Release (s. 493 to 529.5)*], XXI [*Pt. XXI – Appeals – Indictable Offences (s. 673 to 696)*] and XXVII [*Pt. XXVII – Summary Convictions (s. 785 to 840)*] relating to judicial interim release apply, with such modifications as the circumstances require, in respect of him and he shall forthwith be taken before a justice or judge as an accused charged with an offence or as an appellant, as the case may be, for the purposes of those provisions. R.S., c. C-34, s. 703; R.S., c. 2(2nd Supp.), s. 14.

– CCC

After the surety has rendered and the accused is taken back into custody, s. 769 requires a new bail hearing for any future release.[6]

1. *R v Jacobson*, 2005 CanLII 63779 (ON SC), 31 CR (6th) 106, *per* GP Smith J, at para 18
   R v Tymchyshyn, 2015 MBQB 23 (CanLII), *per* Bond J, at para 34
2. *Jacobson*, *supra*, at para 18
   Tymchyshyn, *supra*, at para 34
3. s. 764(3)
4. *R v Mott*, 2013 ONSC 1768 (CanLII), *per* Gauthier J, at para 46

5. *Mott*, *ibid.*, at para 46
6. *Mott*, *supra*, at para 46

Change of Surety

Where a surety no longer wishes to be responsible as a surety for the accused and there is a suitable substitution available, the surety will render surety under s. 766(1) and 767, but rather than render the accused into custody, the court may substitute the previous surety with a new one under s. 767.1. The new surety is in place once he has signed the recognizance.

> **Substitution of surety**
>
> 767.1 (1) If a surety for a person who is subject to a release order or recognizance has given the person into the custody of a court under section 767 [*render of accused in court by sureties*], or a surety applies to be relieved of their obligation under the release order or recognizance under subsection 766(1) [*render of accused by sureties*], the court, justice or provincial court judge, as the case may be, may, instead of committing or issuing an order for the committal of the person to prison, substitute any other suitable person for the surety under the release order or recognizance.
>
> **Signing of release order or recognizance by new sureties**
>
> (2) If a person substituted for a surety under a release order or recognizance under subsection (1) [*substitution of surety*] signs the release order or recognizance, the original surety is discharged, but the release order or recognizance is not otherwise affected.
>
> R.S., 1985, c. 27 (1st Supp.), s. 167; 2019, c. 25, s. 310.
> [*annotation(s) added*]
>
> – CCC

Continuation of Recognizance

> **Undertaking or release order binding on person**
>
> 763 (1) If a person is bound by an undertaking, release order or recognizance to appear before a court, provincial court judge or justice for any purpose and the session or sittings of that court or the proceedings are adjourned or an order is made changing the place of trial, that person and their sureties continue to be bound by the undertaking, release order or recognizance as if it had been entered

into or issued with respect to the resumed proceedings or the trial at the time and place at which the proceedings are ordered to be resumed or the trial is ordered to be held.

Summary of certain provisions

(2) A summary of section 763 [*undertaking or release order binding on person*] must be set out in any undertaking, release order or recognizance.

R.S., 1985, c. C-46, s. 763; R.S., 1985, c. 27 (1st Supp.), s. 203; 2019, c. 25, s. 310. [*annotation(s) added*]

– CCC

Effect of Arrest on New Charges

An arrest on new charges does not affect the recognizance, including the obligations of the surety:

Effect of subsequent arrest

765 If an accused is bound by an undertaking or a release order to appear for trial, their arrest on another charge does not cancel the undertaking or release order, and it continues to bind them and their sureties for their appearance until the accused is discharged or sentenced, as the case may be, in respect of the offence to which the undertaking or release order relates.
R.S., c. C-34, s. 699; 2019, c. 25, s. 310.

– CCC

See Also

- Breach of Release Conditions
- Estreatment of Recognizance
- Bail Checklist
- Release With and Without Sureties and Deposits (Until December 18, 2019)

Terms of Release

General Principles

Despite the presumption of innocence the court is entitled to deprive the accused of liberty before any findings of guilt.[1]

The restrictions on liberty through bail may be made "in accordance with the principles of fundamental justice where there are reasonable grounds for doing so, rather than only after guilt has been established beyond a reasonable doubt."[2]

The release powers of a Justice is given in sections 515(1) and (2) which state:

> **Release order without conditions**
>
> 515 (1) Subject to this section, when an accused who is charged with an offence other than an offence listed in section 469 [*exclusive jurisdiction offences*] is taken before a justice, the justice shall, unless a plea of guilty by the accused is accepted, make a release order in respect of that offence, without conditions, unless the prosecutor, having been given a reasonable opportunity to do so, shows cause, in respect of that offence, why the detention of the accused in custody is justified or why an order under any other provision of this section should be made.
>
> **Release order with conditions**
>
> (2) If the justice does not make an order under subsection (1) [*release order without conditions*], the justice shall, unless the prosecutor shows cause why the detention of the accused is justified, make a release order that sets out the conditions directed by the justice under subsection (4) [*permissible conditions on release order*] and, as the case may be,
>
> (a) an indication that the release order does not include any financial obligations;
> (b) the accused's promise to pay a specified amount if they fail to comply with a condition of the order;
> (c) the obligation to have one or more sureties, with or without the accused's promise to pay a specified amount if they fail to comply with a condition of the order;
> (d) the obligation to deposit money or other valuable security in a specified amount or value, with or without the accused's promise to pay a specified amount if they fail to comply with a condition of the order; or
> (e) if the accused is not ordinarily resident in the province in which they are in custody or does not ordinarily reside within 200 kilometres of the place in which they are in custody, the obligation to deposit money or other valuable security in a specified amount or value, with or without the accused's promise to pay a specified amount by the justice if they fail to comply with a condition of the order and with or without sureties.
>
> **Imposition of least onerous form of release**

(2.01) The justice shall not make an order containing the conditions referred to in one of the paragraphs (2)(b) to (e) [*release order with conditions – required obligations (select)*] unless the prosecution shows cause why an order containing the conditions referred to in the preceding paragraphs for any less onerous form of release would be inadequate.
[*omitted (2.02), (2.03), (2.1), (2.2), (2.3), (3), (4), (4.1), (4.11), (4.12), (4.2), (4.3), (5), (6), (6.1), (7), (8), (9), (9.1), (10), (11), (12), (13) and (14)*]
R.S., 1985, c. C-46, s. 515; R.S., 1985, c. 27 (1st Supp.), ss. 83, 186; 1991, c. 40, s. 31; 1993, c. 45, s. 8; 1994, c. 44, s. 44; 1995, c. 39, s. 153; 1996, c. 19, ss. 71, 93.3; 1997, c. 18, s. 59, c. 23, s. 16; 1999, c. 5, s. 21, c. 25, s. 8(Preamble); 2001, c. 32, s. 37, c. 41, ss. 19, 133; 2008, c. 6, s. 37; 2009, c. 22, s. 17, c. 29, s. 2; 2010, c. 20, s. 1; 2012, c. 1, s. 32; 2014, c. 17, s. 14; 2015, c. 13, s. 20; 2018, c. 16, s. 218; 2019, c. 25, s. 225.
[*annotation(s) added*]

– CCC

This provision came into force on December 18, 2019.

1. *R v Pearson*, 1992 CanLII 52 (SCC), 77 CCC (3d) 124, *per* Lamer CJ

2. *Pearson*, *ibid.*

Issuance of a Release Order

Release of accused

519 (1) Where a justice makes an order under subsection 515(1) [*release order without conditions*], (2) [*release order with conditions*], (7) [*release order*] or (8) [*release of person not resident to Canada*],

(a) if the accused thereupon complies with the order, the justice shall direct that the accused be released

(i) forthwith, if the accused is not required to be detained in custody in respect of any other matter, or
(ii) as soon thereafter as the accused is no longer required to be detained in custody in respect of any other matter; and

(b) if the accused does not thereupon comply with the order, the justice who made the order or another justice having jurisdiction shall issue a warrant for the committal of the accused and may endorse thereon an authorization to the person having the custody of the accused to release the accused when the accused complies with the order

(i) forthwith after the compliance, if the accused is not required to be detained in custody in respect of any other matter, or

(ii) as soon thereafter as the accused is no longer required to be detained in custody in respect of any other matter

and if the justice so endorses the warrant, he shall attach to it a copy of the order.
[*omitted (c)*]

[*omitted (2) and (3)*]
R.S., 1985, c. C-46, s. 519; R.S., 1985, c. 27 (1st Supp.), s. 85.
[*annotation(s) added*]

– CCC

Conditions

The crown must establish the evidentiary basis that underlies the condition sought.

There must be some "real purpose" behind the imposition of the condition.[1]

515
[*omitted (1), (2), (2.01), (2.02), (2.03), (2.1), (2.2), (2.3) and (3)*]

Conditions authorized

(4) When making an order under subsection (2) [*release order with conditions*], the justice may direct the accused to comply with one or more of the following conditions specified in the order:

(a) report at specified times to a peace officer, or other person, designated in the order;
(b) remain within a specified territorial jurisdiction;
(c) notify a peace officer or other person designated in the order of any change in their address, employment or occupation;
(d) abstain from communicating, directly or indirectly, with any victim, witness or other person identified in the order, except in accordance with any specified conditions that the justice considers necessary;
(e) abstain from going to any place or entering any geographic area specified in the order, except in accordance with any specified conditions that the justice considers necessary;
(f) deposit all their passports as specified in the order;
(g) comply with any other specified condition that the justice considers necessary to ensure the safety and security of any victim of or witness to the offence; and
(h) comply with any other reasonable conditions specified in the order that the justice considers desirable.

> [*omitted (4.1), (4.11), (4.12), (4.2), (4.3), (5), (6), (6.1), (7), (8), (9), (9.1), (10), (11), (12), (13) and (14)*]
> R.S., 1985, c. C-46, s. 515; R.S., 1985, c. 27 (1st Supp.), ss. 83, 186; 1991, c. 40, s. 31; 1993, c. 45, s. 8; 1994, c. 44, s. 44; 1995, c. 39, s. 153; 1996, c. 19, ss. 71, 93.3; 1997, c. 18, s. 59, c. 23, s. 16; 1999, c. 5, s. 21, c. 25, s. 8(Preamble); 2001, c. 32, s. 37, c. 41, ss. 19, 133; 2008, c. 6, s. 37; 2009, c. 22, s. 17, c. 29, s. 2; 2010, c. 20, s. 1; 2012, c. 1, s. 32; 2014, c. 17, s. 14; 2015, c. 13, s. 20; 2018, c. 16, s. 218; 2019, c. 25, s. 225.
> [*annotation(s) added*]
>
> – CCC

This provision came into force on December 18, 2019.

Firearms Prohibition

Under s. 515(4.1), the court shall order a firearm prohibition on persons released for certain charges including:

- offences where violence is used, threatened, or attempted
- criminal harassment
- intimidation of a justice system participant
- terrorism offences
- certain firearms offences
- certain CDSA offences
- certain offences under Security of Information Act

Where the judge refuses to do so he must give reasons.(s. 515(4.12))

Contact

The court may order that that there be no contact with named individuals, if a person is ordered detained (s.515(12)) or remanded (s.516(2)). Note that these orders are not stand-alone orders and only last up until the next court appearance. Thus, it must be renewed at each time the matter is in court.[2]

The purpose of "no contact" conditions prior to trial is to balance the right of the accused to be in the community and the right of the complainant or witnesses to privacy and safety.[3]

1. *R v Hill* (1989), 9 WCB (2d) 3 (ONCJ)(*no CanLII links) , *per* Greco J
2. *R v Brown*, 2000 NSCA 147 (CanLII), 151 CCC (3d) 85, *per* Roscoe JA - re 515(12) orders
   R v Kalashnikoff, 2004 CanLII 20454 (ONSC), , [2004] OJ No 113 (ONSC), *per* Pierce J - re 516(2) orders
   see also Imprisonment#No Contact Orders while in Prison
3. *R v JF*, [2001] O.J. No. 2054 (Ont. SCJ)(*no CanLII links) , *per* Hill J
   R v Lofstrom, 2016 ABPC 197 (CanLII), 39 Alta LR (6th) 367, *per* Saccomani J, at para 92 ("the imposition of a “no contact” provision

in a court order is intended to strike a balance by allowing an accused person to be in the community pending trial while providing complainant(s) with some measure of protection and reasonable assurance that their privacy and individual security concerns are not at risk.")

"Other Reasonable Conditions"

Section 515(4)(f) permits the court to impose “other reasonable conditions”.

The condition must relate "to a purpose which would otherwise justify the accused's pre-trial detention." which means they must relate to ensuring attendance in court, to the protection or safety of the public or to maintaining confidence in the administration of justice.[1]

Where the offence involves the use of alcohol or the accused has a history of committing offences while intoxicated and there is a risk that further offences may be committed due to substance abuse, a condition requiring the accused to abstain from alcohol or intoxicating substances should be imposed.[2] However, there is some suggestion that an alcoholic should not be put on unreasonable conditions to abstain entirely from alcohol.[3]

1. *R v Keenan*, 1979 ABCA 278 (CanLII), 12 CR (3d) 135, *per* Lamer JA
   R v Merasty, 2008 SKPC 28 (CanLII), 313 Sask R 157, *per* Kalenith J
2. *R v Peddle*, [2001] O.J. No.2116 (S.C.)(*no CanLII links) , at para 12
3. Runciman and Baker, "Final report on the Standing Senate Committee on Legal and Constitutional Affairs" (June 2017), at p. 6

Mandatory Conditions for Certain Offences

> 515
> [*omitted (1), (2), (2.01), (2.02), (2.03), (2.1), (2.2), (2.3), (3) and (4)*]
>
> **Condition prohibiting possession of firearms, etc.**
>
> (4.1) When making an order under subsection (2) [*release order with conditions*], in the case of an accused who is charged with
>
> (a) an offence in the commission of which violence against a person was used, threatened or attempted,
> (a.1) a terrorism offence,
> (b) an offence under section 264 (criminal harassment),
> (b.1) an offence under section 423.1 (intimidation of a justice system participant),
> (b.2) an offence relating to the contravention of any of sections 9 to 14 of the *Cannabis Act*,
> (c) an offence relating to the contravention of any of sections 5 to 7 of the *Controlled Drugs and Substances Act*,
> (d) an offence that involves, or the subject-matter of which is, a firearm, a cross-bow, a prohibited weapon, a restricted weapon, a prohibited device, ammunition, prohibited ammunition or an explosive substance, or

(e) an offence under subsection 20(1) of the Security of Information Act, or an offence under subsection 21(1) or 22(1) or section 23 of that Act that is committed in relation to an offence under subsection 20(1) of that Act,

the justice shall add to the order a condition prohibiting the accused from possessing a firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, or all those things, until the accused is dealt with according to law unless the justice considers that such a condition is not required in the interests of the safety of the accused or the safety and security of a victim of the offence or of any other person.

Surrender, etc.

(4.11) Where the justice adds a condition described in subsection (4.1) [*condition prohibiting possession of firearms, etc.*] to an order made under subsection (2) [*release order with conditions*], the justice shall specify in the order the manner and method by which

(a) the things referred to in subsection (4.1) [*condition prohibiting possession of firearms, etc.*] that are in the possession of the accused shall be surrendered, disposed of, detained, stored or dealt with; and
(b) the authorizations, licences and registration certificates held by the person shall be surrendered.

Reasons

(4.12) Where the justice does not add a condition described in subsection (4.1) [*condition prohibiting possession of firearms, etc.*] to an order made under subsection (2) [*release order with conditions*], the justice shall include in the record a statement of the reasons for not adding the condition.
[*omitted (4.2), (4.3), (5), (6), (6.1), (7), (8), (9), (9.1), (10), (11), (12), (13) and (14)*]

R.S., 1985, c. C-46, s. 515; R.S., 1985, c. 27 (1st Supp.), ss. 83, 186; 1991, c. 40, s. 31; 1993, c. 45, s. 8; 1994, c. 44, s. 44; 1995, c. 39, s. 153; 1996, c. 19, ss. 71, 93.3; 1997, c. 18, s. 59, c. 23, s. 16; 1999, c. 5, s. 21, c. 25, s. 8(Preamble); 2001, c. 32, s. 37, c. 41, ss. 19, 133; 2008, c. 6, s. 37; 2009, c. 22, s. 17, c. 29, s. 2; 2010, c. 20, s. 1; 2012, c. 1, s. 32; 2014, c. 17, s. 14; 2015, c. 13, s. 20; 2018, c. 16, s. 218; 2019, c. 25, s. 225.

– CCC

Conditions on Terrorism-type Offences

515
[*omitted (1), (2), (2.01), (2.02), (2.03), (2.1), (2.2), (2.3), (3), (4), (4.1), (4.11) and (4.12)*]

Additional conditions

(4.2) Before making an order under subsection (2) [*release order with conditions*], in the case of an accused who is charged with an offence referred to in subsection (4.3) [*additional conditions re protecting victims or witnesses – eligible offences*], the justice shall consider whether it is desirable, in the interests of the safety and security of any person, particularly a victim of or witness to the offence or a justice system participant, to include as a condition of the order

> (a) that the accused abstain from communicating, directly or indirectly, with any victim, witness or other person identified in the order, except in accordance with any specified conditions that the justice considers necessary;
> (a.1) that the accused abstain from going to any place or entering any geographic area specified in the order, except in accordance with any specified conditions that the justice considers necessary; or
> (b) that the accused comply with any other condition specified in the order that the justice considers necessary to ensure the safety and security of those persons.

Offences

(4.3) The offences for the purposes of subsection (4.2) [*additional conditions re protecting victims or witnesses*] are

> (a) a terrorism offence;
> (b) an offence described in section 264 [*criminal harassment*] or 423.1 [*intimidation of justice system participant*];
> (c) an offence in the commission of which violence against a person was used, threatened or attempted; and
> (d) an offence under subsection 20(1) of the *Security of Information Act*, or an offence under subsection 21(1) or 22(1) or section 23 of that Act that is committed in relation to an offence under subsection 20(1) of that Act.

[*omitted (5), (6), (6.1), (7), (8), (9), (9.1), (10), (11), (12), (13) and (14)*]
R.S., 1985, c. C-46, s. 515; R.S., 1985, c. 27 (1st Supp.), ss. 83, 186; 1991, c. 40, s. 31; 1993, c. 45, s. 8; 1994, c. 44, s. 44; 1995, c. 39, s. 153; 1996, c. 19, ss. 71, 93.3; 1997, c. 18, s. 59, c. 23, s. 16; 1999, c. 5, s. 21, c. 25, s. 8(Preamble); 2001, c. 32, s. 37, c. 41, ss. 19, 133; 2008, c. 6, s. 37; 2009, c. 22, s. 17, c. 29, s. 2; 2010, c. 20, s. 1; 2012, c. 1, s. 32; 2014, c. 17, s. 14; 2015, c. 13, s. 20; 2018, c. 16, s. 218; 2019, c. 25, s. 225.
[*annotation(s) added*]

– CCC

This provision came into force on December 18, 2019.

Variation and Review of Conditions

The terms of a release order can be varied according to s. 523(2) of the Code:

> 523
> [*omitted (1), (1.1) and (1.2)*]
>
> **Order vacating previous order for release or detention**
>
> (2) Notwithstanding subsections (1) [*duration that release conditions apply on replacement information*] and (1.1) [*consequences on new information is received*],
>
> > (a) the court, judge or justice before which or whom an accused is being tried, at any time,
> > (b) the justice, on completion of the preliminary inquiry in relation to an offence for which an accused is ordered to stand trial, other than an offence listed in section 469 [*exclusive jurisdiction offences*], or
> > (c) with the consent of the prosecutor and the accused or, where the accused or the prosecutor applies to vacate an order that would otherwise apply pursuant to subsection (1.1) [*consequences on new information is received*], without such consent, at any time
> >
> > > (i) where the accused is charged with an offence other than an offence listed in section 469 [*exclusive jurisdiction offences*], the justice by whom an order was made under this Part or any other justice,
> > > (ii) where the accused is charged with an offence listed in section 469 [*exclusive jurisdiction offences*], a judge of or a judge presiding in a superior court of criminal jurisdiction for the province, or
> > > (iii) the court, judge or justice before which or whom an accused is to be tried,
>
> may, on cause being shown, vacate any order previously made under this Part for the interim release or detention of the accused and make any other order provided for in this Part for the detention or release of the accused until his trial is completed that the court, judge or justice considers to be warranted.
>
> **Provisions applicable to proceedings under subsection (2)**
>
> (3) The provisions of sections 517 [*Order directing matters not to be published for specified period*], 518 [*Inquiries to be made by justice and evidence*] and 519 [*release of accused after show cause hearing*] apply, with such modifications as the circumstances require, in respect of any proceedings under subsection (2) [*power to vacate previous orders*], except that subsection 518(2) [*release on guilty plea pending sentence*] does not apply in respect of an accused who is charged with an offence listed in section 469 [*exclusive jurisdiction offences*].

R.S., 1985, c. C-46, s. 523; R.S., 1985, c. 27 (1st Supp.), s. 89; 2011, c. 16, s. 2; 2019, c. 25, s. 233.
[*annotation(s) added*]

– CCC

This section has been interpreted by most courts as meaning that a provincial court judge cannot vary the conditions on demand without the consent of the crown.[1] A Superior Court judge, however, will have jurisdiction to change conditions on application.

See also 520, 521, 522, 524, 525.

1. *R v Mukpo*, 2012 NSSC 107 (CanLII), 994 APR 285, *per* Rosinski J
   R v Arkison, [1996] BCJ No. 2549(*no CanLII links)
   R v Hill, 2005 NSPC 50 (CanLII), 760 APR 153, *per* Ross J
   cf. *R v Greener*, 2003 NSPC 58 (CanLII), 694 APR 9, *per* WD MacDonald J

See Also

- Probation Orders
- Release With and Without Sureties and Deposits
- Bail Checklist
- Terms of Release (Until December 18, 2019)

Judicial Referral Hearings

This page was last substantively updated or reviewed *January 2020*. (Rev. # 79490)

< Procedure and Practice < Judicial Interim Release

Proceedings Respecting Failure to Comply with Release Conditions
Judicial referral hearing

523.1 (1) When an accused appears before a justice in any of the circumstances described in subsection (2) [*circumstances where referral hearings apply*], the justice shall

> (a) if the accused was released from custody under an order made under subsection 522(3) [*release of accused on s. 469 offences*] by a judge of the superior court of criminal jurisdiction of any province, order that the accused appear before a judge of that court so that the judge may hear the matter; or
> (b) in any other case, hear the matter.

Circumstances

(2) The circumstances referred to in subsection (1) [*power of justice to hear judicial referrals*] are the following:

> (a) an appearance notice has been issued to the accused for failing to comply with a summons, appearance notice, undertaking or release order or to attend court as required and the prosecutor seeks a decision under this section; or
> (b) a charge has been laid against the accused for the contravention referred to in paragraph (a) and the prosecutor seeks a decision under this section.

Powers — Judge or Justice

(3) If the judge or justice who hears the matter is satisfied that the accused failed to comply with a summons, appearance notice, undertaking or release order or to attend court as required and that the failure did not cause a victim physical or emotional harm, property damage or economic loss, the judge or justice shall review any conditions of release that have been imposed on the accused and may, as the case may be,

> (a) take no action;
> (b) cancel any other summons, appearance notice, undertaking or release order in respect of the accused and, as the case may be,
>
> > (i) make a release order under section 515 [*judicial interim release provisions*], or
> > (ii) if the prosecutor shows cause why the detention of the accused in custody is justified under subsection 515(10) [*justification for detention in custody*], make an order that the accused be detained in custody until the accused is dealt with according to law and if so detained, the judge or justice shall include in the record a statement of the judge's or justice's reasons for making the order; or
>
> (c) remand the accused to custody for the purposes of the *Identification of Criminals Act*.

Dismissal of charge

(4) If a charge has been laid against the accused for the failure referred to in paragraph (2)(a) [*circumstances where referral hearings apply – charge with failing to comply with conditions*] and the judge or justice, as the case may be, makes a decision under subsection (3) [*powers of judge or justice in referral hearing*], the judge or justice shall also dismiss that charge.

No information or indictment

(5) If the judge or justice makes a decision under subsection (3) [*powers of judge or justice in referral hearing*], no information may be laid nor indictment be preferred against the accused for the failure referred to in paragraph (2)(a) [*circumstances where referral hearings apply – charge with failing to comply with conditions*].

– CCC

This provision came into force on December 18, 2019.

Hearing

524 (1) When an accused is taken before a justice in any of the circumstances described in subsection (2) [*power of justice to hear breach allegations – circumstances*], the justice shall

> (a) if the accused was released from custody under an order made under subsection 522(3) [*release of accused on s. 469 offences*] by a judge of the superior court of criminal jurisdiction of any province, order that the accused be taken before a judge of that court so that the judge may hear the matter; or
> (b) in any other case, hear the matter.

Circumstances

(2) The circumstances referred to in subsection (1) [*power of justice to hear breach allegations*] are the following:

> (a) the accused has been arrested for the contravention of or having been about to contravene, a summons, appearance notice, undertaking or release order and the prosecutor seeks to have it cancelled under this section; or
> (b) the accused has been arrested for having committed an indictable offence while being subject to a summons, appearance notice, undertaking or release order and the prosecutor seeks to have it cancelled under this section.

Cancellation

(3) The judge or justice who hears the matter shall cancel a summons, appearance notice, undertaking or release order in respect of the accused if the judge or justice finds that

> (a) the accused has contravened or had been about to contravene the summons, appearance notice, undertaking or release order; or
> (b) there are reasonable grounds to believe that the accused has committed an indictable offence while being subject to the summons, appearance notice, undertaking or release order.

Detention

(4) If the judge or justice cancels the summons, appearance notice, undertaking or release order, the judge or justice shall order that the accused be detained in custody unless the accused, having been given a reasonable opportunity to do so, shows cause why their detention in custody is not justified under subsection 515(10) [*justification for detention in custody*].

Release order

(5) If the judge or justice does not order that the accused be detained in custody under subsection (4) [*breach allegations – remand after cancellation*], the judge or justice shall make a release order referred to in section 515 [*judicial interim release provisions*].

Reasons

(6) If the judge or justice makes a release order under subsection (5) [*breach allegations – release after showing cause*], the judge or justice shall include in the record a statement of the reasons for making the order, and subsection 515(9) [*sufficiency of record*] applies with any modifications that the circumstances require.

Release

(7) If the judge or justice does not cancel the summons, appearance notice, undertaking or release order under subsection (3) [*breach allegations – cancellation of prior order*], the judge or justice shall order that the accused be released from custody.

Provisions applicable to proceedings under this section

(8) The provisions of sections 516 to 519 [*select provisions relating to bail process*] apply with any modifications that the circumstances require in respect of any proceedings under this section, except that subsection 518(2) [*release on guilty plea pending sentence*] does not apply in respect of an accused who is charged with an offence mentioned in section 469 [*exclusive jurisdiction offences*].

Review — order by judge

(9) An order made under subsection (4) [*breach allegations – remand after cancellation*] or (5) [*breach allegations – release after showing cause*] respecting an accused referred to in paragraph (1)(a) [*power of justice to hear breach allegations – where released on 469 offence*] is not subject to review except as provided in section 680 [*review by court of appeal*].

Review — order of justice

(10) An order made under subsection (4) [*breach allegations – remand after cancellation*] or (5) [*breach allegations – release after showing cause*] respecting an accused other than the accused referred to in paragraph (1)(a) [*power of justice to hear breach allegations – where released on 469 offence*], is subject to review under sections 520 and 521 as if the order were made under section 515 [*judicial interim release provisions*].

...

– CCC

This provision came into force on December 18, 2019.

Breach of Release Conditions

This page was last substantively updated or reviewed *January 2020*. (Rev. # 79490)

< Procedure and Practice < Judicial Interim Release < Breach of Release Conditions

General Principles

A violation any terms of release conditions issued under s. 515 can result in one or more of the following:[1]

1. arrest for violating a summons, appearance notice, promise to appear, undertaking or recognizance (524(1)(a) or (b));
2. cancellation of the release order and order that the accused be kept in custody for a further bail hearing (524(4));
3. Release on new undertaking or recognizance (524(5)); and/or
4. A charge for breach of undertaking or recognizance (145(5.1)).
5. a application for estreatment of recognizance.

Where an accused is arrested for an offence while released on a recognizance, the recognizance will remain in place.[2]

A recognizance remains in effect from the sureties remain bound by the conditions under section 764 (1) despite the breach allegation and arrest warrant being issued.[3]

Burden of Proof

When restrictive conditions contain exceptions, there is no burden upon the Crown to *dis*prove the applicability of any of the conditions.[4] The burden to prove the applicability of an exception to a condition lies on the accused on a balance of probabilities.[5]

1. *R v O'Connor*, 2015 ONSC 1256 (CanLII), *per* Price J, at para 43
2. s. 765
3. *R v Lowingali*, 2009 ABPC 185 (CanLII), *per* Daniel J
4. *R v Ali*, 2015 BCCA 333 (CanLII), 326 CCC (3d) 408, *per* Stromberg-Stein J, at paras 26 to 30
5. *Ali*, *ibid.*, at para 30

Topics

- Arrest Warrants for Accused Persons
- Revoking, Terminating, or Replacing Bail or Remand Orders

- Release After Breach of Release Conditions
- Breach of Undertaking, Recognizance, or Probation (Offence)
- Estreatment of Recognizance

See Also

- Release With and Without Sureties and Deposits
- Breach of Undertaking, Recognizance, or Probation (Offence)

Bail Revocation and Termination

This page was last substantively updated or reviewed *August 2021*. (Rev. # 79490)

General Principles

Where the accused is out of custody on pending charges, either by virtue of an appearance notice, promise to appear, summons, undertaking or recognizance, the court may order the accused to be taken into custody after trial.(s. 523)

The "duration of any release order ... is governed by s. 523."[1]

1. *R v Wright*, 2014 ONSC 3035 (CanLII), OJ No 2181, *per* Nordheimer J, at para 4

Duration of Release Mechanisms

> **Period for which appearance notice, etc., continues in force**
>
> 523 (1) If an accused, in respect of an offence with which they are charged, has not been taken into custody or has been released from custody under any provision of this Part [*Pt. XVI – Compelling Appearance of an Accused Before a Justice and Interim Release (s. 493 to 529.5)*], the appearance notice, summons, undertaking or release order issued to, given or entered into by the accused continues in force, subject to its terms, and applies in respect of any new information charging the same offence or an included offence that was received after the appearance notice, summons, undertaking or release order was issued, given or entered into,
>
> (a) where the accused was released from custody pursuant to an order of a judge made under subsection 522(3) [*release of accused on s. 469 offences*], until his trial is completed; or
> (b) in any other case,
>
> (i) until his trial is completed, and
> (ii) where the accused is, at his trial, determined to be guilty of the offence, until a sentence within the meaning of section 673 [*Pt. XXI —*

appeals — definitions] is imposed on the accused unless, at the time the accused is determined to be guilty, the court, judge or justice orders that the accused be taken into custody pending such sentence.

[*omitted (1.1), (1.2), (2) and (3)*]
R.S., 1985, c. C-46, s. 523; R.S., 1985, c. 27 (1st Supp.), s. 89; 2011, c. 16, s. 2; 2019, c. 25, s. 233.
[*annotation(s) added*]

– CCC

Section 469 Offences

Under s. 523(1), release granted under s. 522(3), including s. 469 offences, only lasts until the trial is complete.[1] The judge had no discretion to continue bail.[2]

1. *R v Wright*, 2010 ABQB 83 (CanLII), *per* Veit J, at paras 5, 7
2. *Wright*, *ibid.*, at para 8

Consequence of a "Replacement" Information or Indictment

523
[*omitted (1)*]

When new information is received

(1.1) If an accused is charged with an offence and a new information, charging the same offence or an included offence, is received while the accused is subject to an order for detention, release order, appearance notice, summons or undertaking, section 507 [*process on justice receiving an information*] or 508 [*justice to hear informant and witnesses*], as the case may be, does not apply in respect of the new information and the order for detention, release order, appearance notice, summons or undertaking applies in respect of the new information.

When direct indictment preferred

(1.2) If an accused is charged with an offence, and an indictment is preferred under section 577 [*direct indictments*] charging the same offence or an included offence while the accused is subject to an order for detention, release order, appearance notice, summons or undertaking, the order for detention, release order, appearance notice, summons or undertaking applies in respect of the indictment.

[*omitted (2) and (3)*]
R.S., 1985, c. C-46, s. 523; R.S., 1985, c. 27 (1st Supp.), s. 89; 2011, c. 16, s. 2; 2019, c. 25, s. 233.
[*annotation(s) added*]

– CCC

Modifying and Vacating Bail Absent Misconduct

The general power to make an order vacating a release order and replace the order with a remand order or new release order is found in s. 523(2).

Bail can be revoked "on cause being shown" on the basis of reasons set out in s. 515(10).[1]

Section 523(2) permits a release or detention order to be vacated and replaced with new one:

523
[*omitted (1), (1.1) and (1.2)*]

Order vacating previous order for release or detention

(2) Notwithstanding subsections (1) [*duration that release conditions apply on replacement information*] and (1.1) [*consequences on new information is received*],

(a) the court, judge or justice before which or whom an accused is being tried, at any time,
(b) the justice, on completion of the preliminary inquiry in relation to an offence for which an accused is ordered to stand trial, other than an offence listed in section 469 [*exclusive jurisdiction offences*], or
(c) with the consent of the prosecutor and the accused or, where the accused or the prosecutor applies to vacate an order that would otherwise apply pursuant to subsection (1.1) [*consequences on new information is received*], without such consent, at any time

(i) where the accused is charged with an offence other than an offence listed in section 469 [*exclusive jurisdiction offences*], the justice by whom an order was made under this Part [*Pt. XVI – Compelling Appearance of an Accused Before a Justice and Interim Release (s. 493 to 529.5)*] or any other justice,
(ii) where the accused is charged with an offence listed in section 469 [*exclusive jurisdiction offences*], a judge of or a judge presiding in a superior court of criminal jurisdiction for the province, or
(iii) the court, judge or justice before which or whom an accused is to be tried,

> may, on cause being shown, vacate any order previously made under this Part [*Pt. XVI – Compelling Appearance of an Accused Before a Justice and Interim Release (s. 493 to 529.5)*] for the interim release or detention of the accused and make any other order provided for in this Part [*Pt. XVI – Compelling Appearance of an Accused Before a Justice and Interim Release (s. 493 to 529.5)*] for the detention or release of the accused until his trial is completed that the court, judge or justice considers to be warranted.
>
> **Provisions applicable to proceedings under subsection (2)**
>
> (3) The provisions of sections 517 [*Order directing matters not to be published for specified period*], 518 [*Inquiries to be made by justice and evidence*] and 519 [*release of accused after show cause hearing*] apply, with such modifications as the circumstances require, in respect of any proceedings under subsection (2) [*power to vacate previous orders*], except that subsection 518(2) [*release on guilty plea pending sentence*] does not apply in respect of an accused who is charged with an offence listed in section 469 [*exclusive jurisdiction offences*].
> R.S., 1985, c. C-46, s. 523; R.S., 1985, c. 27 (1st Supp.), s. 89; 2011, c. 16, s. 2; 2019, c. 25, s. 233.
> [*annotation(s) added*]
>
> – CCC

An application may be made to revoke bail under s. 523 after it has been granted pursuant to ss. 515 or 522 of the Code or after a bail review under s. 520 of the Code.

Section 523(2)(c)(iii) Vacating Old Order and Making New Order

Section 523(2)(c)(iii) provides that "the court, judge or justice before which or whom an accused is to be tried, may, on cause being shown, vacate any order previously made under this Part [*Pt. XVI – Compelling Appearance of an Accused Before a Justice and Interim Release (s. 493 to 529.5)*] for the interim release or detention of the accused and make any other order provided for in this Part [*Pt. XVI – Compelling Appearance of an Accused Before a Justice and Interim Release (s. 493 to 529.5)*] for the detention or release of the accused until his trial is completed that the court, judge or justice considers to be warranted."

The provincial court, Youth Justice court and Superior courts have jurisdiction to revoke old orders and make new orders.[2]

1. *R v Green*, 2006 CanLII 27306 (ON SC), 210 CCC (3d) 543, *per* T Ducharme J, at para 8
2. *R v XX*, 2018 ONCJ 820 (CanLII), *per* Cohen J, at para 46

Revoking Bail Upon Finding of Guilt/Conviction

Upon finding of guilt the judge has discretion in whether to revoke bail.[1]

Period for which appearance notice, etc., continues in force

523 (1) If an accused, in respect of an offence with which they are charged, has not been taken into custody or has been released from custody under any provision of this Part [*Pt. XVI – Compelling Appearance of an Accused Before a Justice and Interim Release (s. 493 to 529.5)*], the appearance notice, summons, undertaking or release order issued to, given or entered into by the accused continues in force, subject to its terms, and applies in respect of any new information charging the same offence or an included offence that was received after the appearance notice, summons, undertaking or release order was issued, given or entered into,

(a) where the accused was released from custody pursuant to an order of a judge made under subsection 522(3) [*release of accused on s. 469 offences*], until his trial is completed; or
(b) in any other case,

(i) until his trial is completed, and
(ii) where the accused is, at his trial, determined to be guilty of the offence, until a sentence within the meaning of section 673 [*Pt. XXI — appeals — definitions*] is imposed on the accused unless, at the time the accused is determined to be guilty, the court, judge or justice orders that the accused be taken into custody pending such sentence.

[*omitted (1.1), (1.2), (2) and (3)*]
R.S., 1985, c. C-46, s. 523; R.S., 1985, c. 27 (1st Supp.), s. 89; 2011, c. 16, s. 2; 2019, c. 25, s. 233.
[*annotation(s) added*]

– CCC

The power to revoke bail post-conviction arises from s. 523(2).[2]

The burden remains on the Crown to establish that the accused should be incarcerated immediately.[3]

Discretion can be exercised where:[4]

- new facts emerge about the index offence;
- new facts emerge about other offences;
- likelihood of jail term;

A judge may, on his own accord, revoke bail on conviction.[5]

The lost of the presumption of guilt, alone, does not constitute reason to revoke bail.[6]

1. *R v Yassin*, 2012 ONCJ 783 (CanLII), *per* Renaud J

2. *R v Tsega*, 2021 ONSC 1129 (CanLII), *per* S. Gomery J, at para 8
3. *Tsega*, *ibid.* at para 8
4. *Yassin*, *ibid.*
5. *Yassin*, *ibid.* ("In this regard, Justice Ducharme added a valuable comment at footnote 4: 'While s. 523(2)(a) would seem to permit a trial judge to act sua sponte, the requirement to show cause means, as a practical matter, that this would rarely be done.'")
6. *R v Green*, 2006 CanLII 27306 (ON SC), 210 CCC (3d) 543, *per* T Ducharme J, at para 15

Bail Revocation or Cancellation Upon Alleged Misconduct

The term "revocation" refers to the "process of dealing with alleged misconduct of an accused on judicial interim".[1]

Application of Bail Procedure

> 524
> [*omitted (1), (2), (3), (4), (5), (6) and (7)*]
>
> **Provisions applicable to proceedings under this section**
>
> (8) The provisions of sections 516 to 519 [*select provisions relating to bail process*] apply with any modifications that the circumstances require in respect of any proceedings under this section, except that subsection 518(2) [*release on guilty plea pending sentence*] does not apply in respect of an accused who is charged with an offence mentioned in section 469.
>
> [*omitted (9) and (10)*]
> R.S., 1985, c. C-46, s. 524; 1999, c. 3, s. 33; 2019, c. 25, s. 234.
> [*annotation(s) added*]
>
> – CCC

Revoke or Cancel Release on Other Charges

> 524
> [*omitted (1) and (2)*]
>
> **Cancellation**
>
> (3) The judge or justice who hears the matter shall cancel a summons, appearance notice, undertaking or release order in respect of the accused if the judge or justice finds that

(a) the accused has contravened or had been about to contravene the summons, appearance notice, undertaking or release order; or
(b) there are reasonable grounds to believe that the accused has committed an indictable offence while being subject to the summons, appearance notice, undertaking or release order.

[*omitted (4), (5), (6), (7), (8) (9) and (10)*]
R.S., 1985, c. C-46, s. 524; 1999, c. 3, s. 33; 2019, c. 25, s. 234.
[*annotation(s) added*]

– CCC

Burden Standard of Proof

The standard of proof under s. 524 is on proof of "reasonable ground" while under s. 524(b) is on proof of balance of probabilities.[2] The burden is upon the Crown.[3]

Effect of Cancellation

524 [*omitted (1), (2) and (3)*]

Detention

(4) If the judge or justice cancels the summons, appearance notice, undertaking or release order, the judge or justice shall order that the accused be detained in custody unless the accused, having been given a reasonable opportunity to do so, shows cause why their detention in custody is not justified under subsection 515(10) [*justification for detention in custody*].
[*omitted (5), (6), (7), (8) (9) and (10)*]
R.S., 1985, c. C-46, s. 524; 1999, c. 3, s. 33; 2019, c. 25, s. 234.
[*annotation(s) added*]

– CCC

Once a judge cancels a prior release order, they must make a detention order. No show cause hearing is needed before doing so.[4]

Once cancelled the "second stage" of the 524 process says that the accused must be given reasonable opportunity to show cause as to why his detention should not be justified within the meaning of s. 515(10).[5]

A 524 detention order is different from a 516 order of remand whereby a 524 detention order does not have a 3 day limit in the same way as a 516 remand order.[6]

Section 469 Offences

When an accused is granted bail in relation to any charge of murder (or any s 469 offences) and the accused is subsequently arrested for breach of recognizance, "the superior court has jurisdiction, whether under section 524(4) or under section 521 of the Criminal Code, to revoke the accused's bail on the murder charges".[7]

1. *R v Rhodes*, 2013 MBQB 248 (CanLII), 297 Man R (2d) 114, *per* Mainella J, at para 1
2. *R v Garnier*, 2017 NSSC 102 (CanLII), *per* Rosinski J, at paras 18 to 19
3. *R v Parsons*, 1997 CanLII 14679 (NL CA), 497 APR 145, *per* Green JA, at para 21
4. *R v Ibrahim*, 2015 MBCA 62 (CanLII), 327 CCC (3d) 86, *per* Cameron JA, at para 43
5. *Parsons*, *supra*, at para 21
   R v Le, 2006 MBCA 68 (CanLII), 240 CCC (3d) 130, *per* Hamilton JA
6. *Ibrahim*, *supra*, at paras 49to 52
7. *Wright*, *ibid.*

Refusal to Cancel Prior Release

524
[*omitted (1), (2), (3) and (4)*]

Release order

(5) If the judge or justice does not order that the accused be detained in custody under subsection (4) [*breach allegations – remand after cancellation*], the judge or justice shall make a release order referred to in section 515 [*judicial interim release provisions*].

Reasons

(6) If the judge or justice makes a release order under subsection (5) [*breach allegations – release after showing cause*], the judge or justice shall include in the record a statement of the reasons for making the order, and subsection 515(9) [*sufficiency of record*] applies with any modifications that the circumstances require.

Release

(7) If the judge or justice does not cancel the summons, appearance notice, undertaking or release order under subsection (3) [*breach allegations – cancellation of prior order*], the judge or justice shall order that the accused be released from custody.

[*omitted (8), (9) and (10)*]
R.S., 1985, c. C-46, s. 524; 1999, c. 3, s. 33; 2019, c. 25, s. 234.
[*annotation(s) added*]

– CCC

Reviewing Order

524
[*omitted (1), (2), (3), (4), (5), (6), (7) and (8)*]

Review — order by judge

(9) An order made under subsection (4) [*breach allegations – remand after cancellation*] or (5) [*breach allegations – release after showing cause*] respecting an accused referred to in paragraph (1)(a) [*power of justice to hear breach allegations – where released on 469 offence*] is not subject to review except as provided in section 680 [*review by court of appeal*].

Review — order of justice

(10) An order made under subsection (4) [*breach allegations – remand after cancellation*] or (5) [*breach allegations – release after showing cause*] respecting an accused other than the accused referred to in paragraph (1)(a) [*power of justice to hear breach allegations – where released on 469 offence*], is subject to review under sections 520 [*accused-requested bail review*] and 521 [*crown-requested bail review*] as if the order were made under section 515 [*judicial interim release provisions*].

R.S., 1985, c. C-46, s. 524; 1999, c. 3, s. 33; 2019, c. 25, s. 234.
[*annotation(s) added*]

– CCC

Vacating Recognizance

Attorney General may direct stay

579 (1) The Attorney General or counsel instructed by him for that purpose may, at any time after any proceedings in relation to an accused or a defendant are commenced and before judgment, direct the clerk or other proper officer of the court to make an entry on the record that the proceedings are stayed by his

direction, and such entry shall be made forthwith thereafter, whereupon the proceedings shall be stayed accordingly and any recognizance relating to the proceedings is vacated.
[*omitted (2)*]
R.S., 1985, c. C-46, s. 579; R.S., 1985, c. 27 (1st Supp.), s. 117.

– CCC

See Also

- Estreatment of Recognizance
- Bail Revocation and Termination (Until December 18, 2019)

Estreatment of Recognizance

< Procedure and Practice < Judicial Interim Release < Breach of Release Conditions

General Principles

The Crown may apply under s. 770 for "estreatment" (i.e. forfeiture) of the property pledged in the agreement to enter into a recognizance.

Default to be endorsed

770 (1) If, in proceedings to which this Act applies, a person who is subject to an undertaking, release order or recognizance does not comply with any of its conditions, a court, provincial court judge or justice having knowledge of the facts shall endorse or cause to be endorsed on the undertaking, release order or recognizance a certificate in Form 33 [*forms*] setting out

(a) the nature of the default;
(b) the reason for the default, if it is known;
(c) whether the ends of justice have been defeated or delayed by reason of the default; and
(d) the names and addresses of the principal and sureties.

Transmission to clerk of court

(2) Once endorsed, the undertaking, release order or recognizance must be sent to the clerk of the court and shall be kept by them with the records of the court.

Certificate is evidence

(3) A certificate that has been endorsed on the undertaking, release order or recognizance is evidence of the default to which it relates.

Transmission of deposit

(4) If, in proceedings to which this section applies, the principal or surety has deposited money as security for the performance of a condition of an undertaking, release order or recognizance, that money must be sent to the clerk of the court with the defaulted undertaking, release order or recognizance, to be dealt with in accordance with this Part [*Pt. XXV – Effect and Enforcement of Recognizances (s. 762 to 773)*].
R.S., 1985, c. C-46, s. 770; R.S., 1985, c. 27 (1st Supp.), s. 203; 1997, c. 18, s. 108; 2019, c. 25, s. 311.
[*annotation(s) added*]

– CCC

Proceedings in case of default

771 (1) If an undertaking, release order or recognizance has been endorsed with a certificate and has been received by the clerk of the court,

> (a) a judge of the court shall, on the request of the clerk of the court or the Attorney General or counsel acting on the Attorney General's or counsel's behalf, as the case may be, fix a time and place for the hearing of an application for the forfeiture of the amount set out in the undertaking, release order or recognizance; and
> (b) the clerk of the court shall, not less than 10 days before the time fixed under paragraph (a) for the hearing, send by registered mail, or have served in the manner directed by the court or prescribed by the rules of court, to each principal and surety, at the address set out in the certificate, a notice requiring the person to appear at the time and place fixed by the judge to show cause why the amount set out in the undertaking, release order or recognizance should not be forfeited.

Order of judge

(2) If subsection (1) [*proceedings in case of default*] has been complied with, the judge may, after giving the parties an opportunity to be heard, in the judge's discretion grant or refuse the application and make any order with respect to the forfeiture of the amount that the judge considers proper.

Judgment debtors of the Crown

(3) If a judge orders forfeiture of the amount set out in the undertaking, release order or recognizance, the principal and their sureties become judgment debtors of the Crown, each in the amount that the judge orders them to pay.

Order may be filed

(3.1) An order made under subsection (2) [*proceedings in case of default – order of judge*] may be filed with the clerk of the superior court and if one is filed, the clerk shall issue a writ of fieri facias in Form 34 and deliver it to the sheriff of each of the territorial divisions in which the principal or any surety resides, carries on business or has property.

Transfer of deposit

(4) If a deposit has been made by a person against whom an order for forfeiture has been made, no writ of fieri facias may be issued, but the amount of the deposit must be transferred by the person who has custody of it to the person who is entitled by law to receive it.
R.S., 1985, c. C-46, s. 771; R.S., 1985, c. 27 (1st Supp.), s. 168; 1994, c. 44, s. 78; 1999, c. 5, s. 43; 2019, c. 25, s. 311.
[*annotation(s) added*]

– CCC

This provision came into force on December 18, 2019.

The Court has broad discretion under s. 771(2) to grant an order of this nature.[1]

One of the purposes of the surety system is to encourage the accused to attend for the sake of avoiding the surety to be subject to "undue pain and discomfort".[2]

The Court's ability to enforce attendance at court "would be seriously diluted by widespread knowledge that the procedure is only invoked sporadically."[3]

Standing

The surety will always standing to challenge a forfeiture hearing but a third party who loaned money to the accused or surety may not necessarily have standing.[4]

Burden

Before the court can order forfeiture the Crown must establish that the failure to comply with the underlying recognizance. (s. 770(1)(c))

Once a failure to comply has been shown, the onus is upon the respondent to show why the property should not be forfeited in its entirety.[5] The standard of proof is on the balance of probabilities.[6]

A party seeking to avoid forfeiture have an "obligation to adduce credible evidence to support their position".[7]

"Ends of Justice"

The “ends of justice” are defeated where “the loss of confidence in the general practice of releasing offenders from custody until their trial is held.”[8]

Simply arriving late does not necessarily amount of a "delay" of the ends of justice.[9]

Misc Definitions

> 762
> [*omitted (1)*]
>
> **Definitions**
>
> (2) In this Part [*Pt. XXV – Effect and Enforcement of Recognizances (s. 762 to 773)*],
> **"clerk of the court"** means the officer designated in column III of the schedule in respect of the court designated in column II of the schedule; (greffier du tribunal)
> **"schedule"** means the schedule to this Part [*Pt. XXV – Effect and Enforcement of Recognizances (s. 762 to 773)*]. (annexe)
> R.S., c. C-34, s. 696.
> [*annotation(s) added*]
>
> – CCC

1. *R v Tymchyshyn*, 2015 MBQB 23 (CanLII), *per* Bond J, at para 7 - the court has "broad discretion"
   Canada (Attorney General) v Horvath, 2009 ONCA 732 (CanLII), 248 CCC (3d) 1, *per* Rosenberg JA, at paras 42 to 44
2. *Tymchyshyn*, *supra*, at para 12
   Horvath, *supra*, at para 40
3. *Horvath*, *supra*, at para 41
4. *R v Thomas*, 2016 CanLII 15472 (NLSCTD), *per* McGrath J, at paras 11 to 30
5. *R v Jacobson*, 2005 CanLII 63779 (ON SC), 31 CR (6th) 106, *per* GP Smith J, at para 16
   Tymchyshyn, *supra*, at para 6
   Horvath, *supra*, at para 27
6. *R v Wilson*, 2017 ONCA 229 (CanLII), OJ No 1459, *per* Epstein JA, at para 22
7. *Wilson*, *supra*, at para 22
   Horvath, *supra*, at para 52
8. *R v Aw*, 2008 ABQB 261 (CanLII), 443 AR 151, *per* Sanderman J, at para 19
9. *Nanooch*, *supra*

Considerations

The most important factor to consider is the "pull of bail" or in simpler terms the incentive of the surety and accused to comply with the terms of release.[1]

Diligence of the Surety

The court should consider the "extent the surety was at fault".[2] Where the surety assisted by aiding or abetting the accused is fleeing, then the security should be forfeited.[3] A mere lack of due diligence may warrant forfeiture of some or most of it, variable on the "degree of fault".[4] Where the surety made "every effort to secure the appearance" of the accused, then they should keep the security.[5]

Traditionally, the driving factor was the level of diligence exercised by the surety to supervise the accused.[6] However, has been noted as being potentially unfair as last-minute absconding would render the surety faultless in most cases.[7]

It's important that courts not overemphasize consideration of the "lack fault" element of the surety or else adversely affect the integrity of the system.[8]

Factors to Forfeiture

The Courts are recommended to consider factors including:[9]

1. the circumstances under which the surety entered into the recognizance, particularly if there was coercion or duress;
2. the nature of the relationship between the surety and the accused;
3. whether the surety had day-to-day contact with the accused;
4. what steps were taken by the surety to ensure the accused's attendance at court and compliance with the conditions of the recognizance;
5. any circumstances that might have alerted the surety that the accused was likely to abscond or otherwise breach;
6. whether the surety assisted the accused in defaulting;
7. what steps were taken by the surety after he or she determined the accused may have breached or was about to breach;
8. the amount of the recognizance;
9. the means of the surety at the time of the hearing, and any change in his or her financial circumstances since signing the recognizance of bail, and since the breach.

It is *not* appropriate to consider challenges to the validity of the recognizance order as a factor in whether to issue the order of forfeiture.[10]

Degree of Breach

The breach will be serious where the accused flees the jurisdiction.[11]It has even been called the most serious form of breach.[12]

Failure to Attend

Applications for forfeiture of bail "should not proceed on the basis of technical failures to attend".[13]

But where the accused does not appear, then it "presumed that the proceedings have been at least delayed if not defeated".[14]

It does not always follow that the consequence of a failure to appear that there has been at least a minimal delay of justice.[15]

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Legal Counsel owed money does not get priority in claim over the money to be forfeited.[16]

1. *R v Hanif*, 2016 ONSC 7720 (CanLII), *per* Edwards J, at para 34
2. *R v Jacobson*, 2005 CanLII 63779 (ON SC), 31 CR (6th) 106, *per* GP Smith J, at para 14
   R v Andrews (1975), 34 CRNS 344 (Nfld. T.D.), (1975), 9 Nfld. & PEIR 168, [1975] NJ No 26 (Nfld. S.C. (T.D.)(*no CanLII links)
3. *Jacobson*, *supra*, at para 14
   R v Huang, 1998 CanLII 4545 (ON CA), 127 CCC (3d) 397, *per* McMurtry CJ
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5. *Jacobson*, *supra*, at para 14
   Huang, *supra*
6. *R v Tymchyshyn*, 2015 MBQB 23 (CanLII), *per* Bond J, at paras 10 to 11
   e.g. *Andrews*, *supra*
7. *Tymchyshyn*, *supra*, at para 11
8. *Horvath*, *supra*, at para 41
9. *Tymchyshyn*, *supra*, at para 18
   Wilson, *supra*, at para 22
   Horvath, *supra*, at para 51
10. *Tymchyshyn*, *supra*, at para 19
11. *Hanif*, *supra*, at para 37
12. *Romania v Iusein*, 2014 ONSC 623 (CanLII), 307 CCC (3d) 266, *per* Speyer J, at para 26
13. *R v Taylor*, 2002 CanLII 20632 (ON SC), [2002] OJ No 4246 (ONSC), *per* Zelinski J
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14. *Nanooch*, *ibid.*, at para 13
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16. *Ducharme v Iftikhar*, 2015 ONSC 1639 (CanLII), *per* Goodman J

Quantum of Forfeiture

To determine the amount of forfeiture, the court "Must balance societies need to have an effective system of Bill with the financial consequences for the individual who posted that bail".[1]

Where the amount pledged is significant is may only be necessary to forfeit some of the property to protect the integrity of the bail system.[2] By contrast, lesser amounts are more likely to be forfeited in their entirety.[3]

In many cases the "pull of bail" can be achieved by "something less than total forfeiture".[4]

Where the subject of the forfeiture are larger amounts, a court should perform a "more searching examination of the circumstances".[5]

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   Canada (Attorney General) v Horvath, 2009 ONCA 732 (CanLII), 248 CCC (3d) 1, *per* Rosenberg JA, at paras 45 to 46
3. *Horvath*, *ibid.*, at paras 45 to 46
4. *Wilson*, *supra*, at para 24
   Horvath, *supra*, at paras 44 to 45
5. *Wilson*, *supra*, at para 26
   R v Jackson, 2013 ONSC 7761 (CanLII), *per* Durno J, at para 20

Conditions on Forfeiture

The discretion to issue an order of forfeiture includes a discretion to allow for a temporary stay of forfeiture and further conditions to forfeiture that should the accused return to custody within the stay period, the surety can apply in writing for relief from the order.[1]

1. *R v Hanif*, 2016 ONSC 7720 (CanLII), *per* Edwards J, at para 40

Horvath, *supra*

Procedure

The court should endorse the recognizance with a certificate of default under Form 33. (s. 770)

Once there has been a finding of default, whether by way of guilty plea or other means, the Court *must* certify the recognizance in default at the request of the Crown.[1]

> **Applications for forfeiture**
>
> 762 (1) Applications for the forfeiture of an amount set out in an undertaking, release order or recognizance must be made to the courts designated in column II of the schedule of the respective provinces designated in column I of the schedule.
> [*omitted (2)*]
> R.S., c. C-34, s. 696; 2019, c. 25, s. 309.
>
> – CCC

1. *R v Hassan*, 2016 ONSC 1285 (CanLII), *per* McCoombs J

Executing Estreatment

> **Levy under writ**
>
> 772 (1) Where a writ of fieri facias is issued pursuant to section 771 [*proceedings in case of default*], the sheriff to whom it is delivered shall execute the writ and deal with the proceeds thereof in the same manner in which he is authorized to execute and deal with the proceeds of writs of fieri facias issued out of superior courts in the province in civil proceedings.
>
> **Costs**
>
> (2) Where this section applies, the Crown is entitled to the costs of execution and of proceedings incidental thereto that are fixed, in the Province of Quebec, by any tariff applicable in the Superior Court in civil proceedings, and in any other

province, by any tariff applicable in the superior court of the province in civil proceedings, as the judge may direct.

R.S., c. C-34, s. 706.
[*annotation(s) added*]

– CCC

Committal when writ not satisfied

773 (1) Where a writ of *fieri facias* has been issued under this Part and it appears from a certificate in a return made by the sheriff that sufficient goods and chattels, lands and tenements cannot be found to satisfy the writ, or that the proceeds of the execution of the writ are not sufficient to satisfy it, a judge of the court may, upon the application of the Attorney General or counsel acting on his behalf, fix a time and place for the sureties to show cause why a warrant of committal should not be issued in respect of them.

Notice

(2) Seven clear days notice of the time and place fixed for the hearing pursuant to subsection (1) [*committal when writ not satisfied*] shall be given to the sureties.

Hearing

(3) The judge shall, at the hearing held pursuant to subsection (1) [*committal when writ not satisfied*], inquire into the circumstances of the case and may in his discretion

> (a) order the discharge of the amount for which the surety is liable; or
> (b) make any order with respect to the surety and to his imprisonment that he considers proper in the circumstances and issue a warrant of committal in Form 27 [*forms*].

Warrant to committal

(4) A warrant of committal issued pursuant to this section authorizes the sheriff to take into custody the person in respect of whom the warrant was issued and to confine him in a prison in the territorial division in which the writ was issued or in the prison nearest to the court, until satisfaction is made or until the period of imprisonment fixed by the judge has expired.

Definition of "Attorney General"

(5) In this section and in section 771 [*proceedings in case of default*], "Attorney General" means, where subsection 734.4(2) [*when fine proceeds go to receiver general for Canada*] applies, the Attorney General of Canada.

R.S., 1985, c. C-46, s. 773; 1995, c. 22, s. 10.

– CCC

Form 34 is a Writ of Fieri Facias, which authorizes sheriffs to seize property to be forfeited under the estreatment.

Recognizances For Youth

Forfeiture of Recognizances
Applications for forfeiture of recognizances

134 Applications for the forfeiture of recognizances of young persons shall be made to the youth justice court.

– YCJA

Proceedings in case of default

135 (1) When a recognizance binding a young person has been endorsed with a certificate under subsection 770(1) [*default to be endorsed – requirements and contents*] of the *Criminal Code*, a youth justice court judge shall (a) on the request of the Attorney General, fix a time and place for the hearing of an application for the forfeiture of the recognizance; and (b) after fixing a time and place for the hearing, cause to be sent by confirmed delivery service, not less than ten days before the time so fixed, to each principal and surety named in the recognizance, directed to his or her latest known address, a notice requiring him or her to appear at the time and place fixed by the judge to show cause why the recognizance should not be forfeited.

Order for forfeiture of recognizance

(2) When subsection (1) is complied with, the youth justice court judge may, after giving the parties an opportunity to be heard, in his or her discretion grant or refuse the application and make any order with respect to the forfeiture of the recognizance that he or she considers proper.

Judgment debtors of the Crown

(3) If, under subsection (2), a youth justice court judge orders forfeiture of a recognizance, the principal and his or her sureties become judgment debtors of the Crown, each in the amount that the judge orders him or her to pay.

Order may be filed

(4) An order made under subsection (2) may be filed with the clerk of the superior court or, in the province of Quebec, the prothonotary and, if an order is filed, the clerk or the prothonotary shall issue a writ of fieri facias in Form 34 set out in the Criminal Code and deliver it to the sheriff of each of the territorial divisions in which any of the principal and his or her sureties resides, carries on business or has property.

If a deposit has been made

(5) If a deposit has been made by a person against whom an order for forfeiture of a recognizance has been made, no writ of *fieri facias* shall issue, but the amount of the deposit shall be transferred by the person who has custody of it to the person who is entitled by law to receive it.

Subsections 770(2) and (4) of Criminal Code do not apply

(6) Subsections 770(2) (transmission of recognizance) and (4) (transmission of deposit) of the Criminal Code do not apply in respect of proceedings under this Act.

Sections 772 and 773 of Criminal Code apply

(7) Sections 772 (levy under writ) and 773 (committal when writ not satisfied) of the Criminal Code apply in respect of writs of fieri facias issued under this section as if they were issued under section 771 (proceedings in case of default) of that Act.

– YCJA

See Also

- Estreatment of Recognizance (Until December 18, 2019)

Estreatment of Recognizance (Until December 18, 2019)

< Procedure and Practice < Judicial Interim Release < Breach of Release Conditions

General Principles

The Crown may apply under s. 770 for "estreatment" (i.e. forfeiture) of the property pledged in the agreement to enter into a recognizance.

Default to be endorsed

770 (1) Where, in proceedings to which this Act applies, a person who is bound by recognizance does not comply with a condition of the recognizance, a court, justice or provincial court judge having knowledge of the facts shall endorse or cause to be endorsed on the recognizance a certificate in Form 33 [*forms*] setting out

(a) the nature of the default;
(b) the reason for the default, if it is known;
(c) whether the ends of justice have been defeated or delayed by reason of the default; and
(d) the names and addresses of the principal and sureties.

Transmission to clerk of court

(2) A recognizance that has been endorsed pursuant to subsection (1) [*default to be endorsed – requirements and contents*] shall be sent to the clerk of the court and shall be kept by him with the records of the court.

Certificate is evidence

(3) A certificate that has been endorsed on a recognizance pursuant to subsection (1) [*default to be endorsed – requirements and contents*] is evidence of the default to which it relates.

Transmission of deposit

(4) Where, in proceedings to which this section applies, the principal or surety has deposited money as security for the performance of a condition of a recognizance, that money shall be sent to the clerk of the court with the defaulted recognizance, to be dealt with in accordance with this Part.
R.S., 1985, c. C-46, s. 770; R.S., 1985, c. 27 (1st Supp.), s. 203; 1997, c. 18, s. 108.
[*annotation(s) added*]

– CCC

Proceedings in case of default

771 (1) Where a recognizance has been endorsed with a certificate pursuant to section 770 [*default to be endorsed*] and has been received by the clerk of the court pursuant to that section,

(a) a judge of the court shall, on the request of the clerk of the court or the Attorney General or counsel acting on his behalf, fix a time and place for the hearing of an application for the forfeiture of the recognizance; and

(b) the clerk of the court shall, not less than ten days before the time fixed under paragraph (a) for the hearing, send by registered mail, or have served in the manner directed by the court or prescribed by the rules of court, to each principal and surety named in the recognizance, directed to the principal or surety at the address set out in the certificate, a notice requiring the person to appear at the time and place fixed by the judge to show cause why the recognizance should not be forfeited.

Order of judge

(2) Where subsection (1) [*default to be endorsed – requirements and contents*] has been complied with, the judge may, after giving the parties an opportunity to be heard, in his discretion grant or refuse the application and make any order with respect to the forfeiture of the recognizance that he considers proper.

Judgment debtors of the Crown

(3) Where, pursuant to subsection (2) [*default – transmission to clerk of court*], a judge orders forfeiture of a recognizance, the principal and his sureties become judgment debtors of the Crown, each in the amount that the judge orders him to pay.

Order may be filed

(3.1) An order made under subsection (2) [*default – transmission to clerk of court*] may be filed with the clerk of the superior court and if an order is filed, the clerk shall issue a writ of fieri facias in Form 34 and deliver it to the sheriff of each of the territorial divisions in which the principal or any surety resides, carries on business or has property.

Transfer of deposit

(4) Where a deposit has been made by a person against whom an order for forfeiture of a recognizance has been made, no writ of fieri facias shall issue, but the amount of the deposit shall be transferred by the person who has custody of it to the person who is entitled by law to receive it.
R.S., 1985, c. C-46, s. 771; R.S., 1985, c. 27 (1st Supp.), s. 168; 1994, c. 44, s. 78; 1999, c. 5, s. 43.
[*annotation(s) added*]

– CCC

The Court has broad discretion under s. 771(2) to grant an order of this nature.[1]

One of the purposes of the surety system is to encourage the accused to attend for the sake of avoiding the surety to be subject to "undue pain and discomfort".[2]

The Court's ability to enforce attendance at court "would be seriously diluted by widespread knowledge that the procedure is only invoked sporadically."[3]

Standing

The surety will always standing to challenge a forfeiture hearing but a third party who loaned money to the accused or surety may not necessarily have standing.[4]

Burden

Before the court can order forfeiture the Crown must establish that the failure to comply with the underlying recognizance. (s. 770(1)(c))

Once a failure to comply has been shown, the onus is upon the respondent to show why the property should not be forfeited in its entirety.[5] The standard of proof is on the balance of probabilities.[6]

A party seeking to avoid forfeiture have an "obligation to adduce credible evidence to support their position".[7]

"Ends of Justice"

The “ends of justice” are defeated where “the loss of confidence in the general practice of releasing offenders from custody until their trial is held.”[8]

Simply arriving late does not necessarily amount of a "delay" of the ends of justice.[9]

Misc Definitions

> 762
> ...
>
> **Definitions**
>
> (2) In this Part [*Pt. XXV – Effect and Enforcement of Recognizances (s. 762 to 773)*], "clerk of the court" means the officer designated in column III of the schedule in respect of the court designated in column II of the schedule; (greffier du tribunal)
> "schedule" means the schedule to this Part. (annexe)
> R.S., c. C-34, s. 696.
> [*annotation(s) added*]
>
> – CCC

1. *R v Tymchyshyn*, 2015 MBQB 23 (CanLII), *per* Bond J, at para 7 - the court has "broad discretion"
   Canada (Attorney General) v Horvath, 2009 ONCA 732 (CanLII), 248 CCC (3d) 1, *per* Rosenberg JA, at paras 42 to 44
2. *Tymchyshyn*, *supra*, at para 12
   Horvath, *supra*, at para 40
3. *Horvath*, *supra*, at para 41
4. *R v Thomas*, 2016 CanLII 15472 (NLSCTD), *per* McGrath J, at paras 11 to 30
5. *R v Jacobson*, 2005 CanLII 63779 (ON SC), 31 CR (6th) 106, *per* GP Smith J, at para 16
   Tymchyshyn, *supra*, at para 6
   Horvath, *supra*, at para 27
6. *R v Wilson*, 2017 ONCA 229 (CanLII), OJ No 1459, *per* Epstein JA, at para 22
7. *Wilson*, *supra*, at para 22
   Horvath, *supra*, at para 52

8. *R v Aw*, 2008 ABQB 261 (CanLII), 443 AR 151, *per* Sanderman J, at para 19

9. *Nanooch*, *supra*

Considerations

The most important factor to consider is the "pull of bail" or in simpler terms the incentive of the surety and accused to comply with the terms of release.[1]

Diligence of the Surety

The court should consider the "extent the surety was at fault".[2] Where the surety assisted by aiding or abetting the accused is fleeing, then the security should be forfeited.[3] A mere lack of due diligence may warrant forfeiture of some or most of it, variable on the "degree of fault".[4] Where the surety made "every effort to secure the appearance" of the accused, then they should keep the security.[5]

Traditionally, the driving factor was the level of diligence exercised by the surety to supervise the accused.[6] However, has been noted as being potentially unfair as last-minute absconding would render the surety faultless in most cases.[7]

It's important that courts not overemphasize consideration of the "lack fault" element of the surety or else adversely affect the integrity of the system.[8]

Factors to Forfeiture

The Courts are recommended to consider factors including:[9]

1. the circumstances under which the surety entered into the recognizance, particularly if there was coercion or duress;
2. the nature of the relationship between the surety and the accused;
3. whether the surety had day-to-day contact with the accused;
4. what steps were taken by the surety to ensure the accused's attendance at court and compliance with the conditions of the recognizance;
5. any circumstances that might have alerted the surety that the accused was likely to abscond or otherwise breach;
6. whether the surety assisted the accused in defaulting;
7. what steps were taken by the surety after he or she determined the accused may have breached or was about to breach;
8. the amount of the recognizance;
9. the means of the surety at the time of the hearing, and any change in his or her financial circumstances since signing the recognizance of bail, and since the breach.

It is *not* appropriate to consider challenges to the validity of the recognizance order as a factor in whether to issue the order of forfeiture.[10]

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> **Applications for forfeiture of recognizances**
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Costs

(2) Where this section applies, the Crown is entitled to the costs of execution and of proceedings incidental thereto that are fixed, in the Province of Quebec, by any tariff applicable in the Superior Court in civil proceedings, and in any other province, by any tariff applicable in the superior court of the province in civil proceedings, as the judge may direct.

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– CCC

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Notice

(2) Seven clear days notice of the time and place fixed for the hearing pursuant to subsection (1) [*committal when writ not satisfied*] shall be given to the sureties.

Hearing

(3) The judge shall, at the hearing held pursuant to subsection (1) [*committal when writ not satisfied*], inquire into the circumstances of the case and may in his discretion

> (a) order the discharge of the amount for which the surety is liable; or
> (b) make any order with respect to the surety and to his imprisonment that he considers proper in the circumstances and issue a warrant of committal in Form 27 [*forms*].

Warrant to committal

(4) A warrant of committal issued pursuant to this section authorizes the sheriff to take into custody the person in respect of whom the warrant was issued and to confine him in a prison in the territorial division in which the writ was issued or in the prison nearest to the court, until satisfaction is made or until the period of imprisonment fixed by the judge has expired.

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Order for forfeiture of recognizance

(2) When subsection (1) is complied with, the youth justice court judge may, after giving the parties an opportunity to be heard, in his or her discretion grant or refuse the application and make any order with respect to the forfeiture of the recognizance that he or she considers proper.

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(3) If, under subsection (2), a youth justice court judge orders forfeiture of a recognizance, the principal and his or her sureties become judgment debtors of the Crown, each in the amount that the judge orders him or her to pay.

Order may be filed

(4) An order made under subsection (2) may be filed with the clerk of the superior court or, in the province of Quebec, the prothonotary and, if an order is filed, the clerk or the prothonotary shall issue a writ of fieri facias in Form 34 set out in the Criminal Code and deliver it to the sheriff of each of the territorial divisions in which any of the principal and his or her sureties resides, carries on business or has property.

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(7) Sections 772 (levy under writ) and 773 (committal when writ not satisfied) of the Criminal Code apply in respect of writs of fieri facias issued under this section as if they were issued under section 771 (proceedings in case of default) of that Act.

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Bail Pending Appeal

This page was last substantively updated or reviewed *January 2020*. (Rev. # 79490)

< Procedure and Practice < Judicial Interim Release
< Procedure and Practice < Appeals

General Principles

Bail pending appeal may be initiated under the rules of court for the particular province.[1]

Release pending determination of appeal

679 (1) A judge of the court of appeal may, in accordance with this section, release an appellant from custody pending the determination of his appeal if,

> (a) in the case of an appeal to the court of appeal against conviction, the appellant has given notice of appeal or, where leave is required, notice of his application for leave to appeal pursuant to section 678 [*requirements for notice to appeal*];
> (b) in the case of an appeal to the court of appeal against sentence only, the appellant has been granted leave to appeal; or
> (c) in the case of an appeal or an application for leave to appeal to the Supreme Court of Canada, the appellant has filed and served his notice of appeal or, where leave is required, his application for leave to appeal.

[*omitted (2), (3), (4), (5), (5.1), (6), (7.1), (8), (9) and (10)*]
R.S., 1985, c. C-46, s. 679; R.S., 1985, c. 27 (1st Supp.), s. 141; 1997, c. 18, s. 95; 1999, c. 25, s. 14(Preamble); 2002, c. 13, s. 66; 2019, c. 25, s. 279.

[*annotation(s) added*]

– CCC

Where the appeal is against sentence *only* (s. 679(1)(b)), the appellate judge must decide the issue of whether leave should be granted first. In any other circumstances leave does not need to be determined.

Burden

The burden is upon the offender to establish the grounds of release on a balance of probabilities.[2] Each criterion must be met on a balance of probabilities.[3] This shift of burden is because the presumption of innocence is no longer in effect upon conviction.[4]

1. e.g. Rule 19(4) of the Criminal Appeal Rules (BC)
   Rule 91.24 of the Civil Procedure Rules (NS)
2. *R v Chubbs*, 2013 NLCA 30 (CanLII), *per* Hoegg JA, at para 3
   R v Dow, 2013 NSCA 50 (CanLII), *per* Saunders JA, at para 10 citing numerous NS cases
   R v Brown, 2013 ABCA 256 (CanLII), 107 WCB (2d) 703, *per* O'Ferrall JA, at para 2
3. *R v Oland*, 2017 SCC 17 (CanLII), 347 CCC (3d) 257, *per* Moldaver J, at para 19 ("bears the burden of establishing that each criterion is met on a balance of probabilities")
4. *Dow*, *ibid.*, at para 10

Bail on Sentence Appeal

679
[*omitted (1), (2) and (3)*]

Idem

(4) In the case of an appeal referred to in paragraph (1)(b) [*appeal of sentence only*], the judge of the court of appeal may order that the appellant be released pending the determination of his appeal or until otherwise ordered by a judge of the court of appeal if the appellant establishes that

> (a) the appeal has sufficient merit that, in the circumstances, it would cause unnecessary hardship if he were detained in custody;
> (b) he will surrender himself into custody in accordance with the terms of the order; and
> (c) his detention is not necessary in the public interest.

[*omitted (5), (5.1), (6), (7), (7.1), (8), (9) and (10)*]
R.S., 1985, c. C-46, s. 679; R.S., 1985, c. 27 (1st Supp.), s. 141; 1997, c. 18, s. 95; 1999, c. 25, s. 14(Preamble); 2002, c. 13, s. 66; 2019, c. 25, s. 279.

[*annotation(s) added*]

– CCC

Depending on the rules of court of each jurisdiction it may be required that the Court of Appeal grant leave to appeal before they can consider bail pending a hearing on the merits of appeal.[1]

Leave Required

seeking bail on a sentence appeal requires the applicant to obtain leave. The burden is not onerous and does not require showing "sufficient merit" as referenced in s. 679(4)(a).[2]

"sufficient merit"

The standard of "sufficient merit" considers the time spent in jail pending appeal and whether that time is greater than the time in jail for a fit and proper sentence.[3]

1. NS: *R v KMF*, 2018 NSCA 58 (CanLII), *per* Farrar JA in Chambers ("[17] K.M.F. is only appealing her sentence. Before she can seek bail pending appeal I must grant leave to appeal.") -- applying 91.24 (1) of the NS Civil Procedure Rules
2. *R v Mauger*, 2017 NSCA 94 (CanLII), *per* Van den Eynden JA
3. *Mauger*, *ibid.*

Bail on Reference

679
[*omitted (1), (2), (3), (4), (5), (5.1) and (6)*]

Release or detention pending hearing of reference

(7) If, with respect to any person, the Minister of Justice gives a direction or makes a reference under section 696.3 [*definition of court of appeal, powers of minister of justice*], this section applies to the release or detention of that person pending the hearing and determination of the reference as though that person were an appellant in an appeal described in paragraph (1)(a) [*release pending appeal – against conviction*].
[*omitted (7.1), (8), (9) and (10)*]
R.S., 1985, c. C-46, s. 679; R.S., 1985, c. 27 (1st Supp.), s. 141; 1997, c. 18, s. 95; 1999, c. 25, s. 14(Preamble); 2002, c. 13, s. 66; 2019, c. 25, s. 279.

[*annotation(s) added*]

– CCC

Bail on Appeal of Conviction, Conviction and Sentence, or Appeal to Supreme Court of Canada

Section 679(3) sets out the grounds to consider on bail:[1]

679
[*omitted (1) and (2)*]

Circumstances in which appellant may be released

(3) In the case of an appeal referred to in paragraph (1)(a) [*appeal of conviction or conviction and sentence*] or (c) [*appeal to supreme court of canada*], the judge of the court of appeal may order that the appellant be released pending the determination of his appeal if the appellant establishes that

> (a) the appeal or application for leave to appeal is not frivolous;
> (b) he will surrender himself into custody in accordance with the terms of the order; and
> (c) his detention is not necessary in the public interest.

[*omitted (4), (5), (5.1), (6), (7.1), (8), (9) and (10)*]
R.S., 1985, c. C-46, s. 679; R.S., 1985, c. 27 (1st Supp.), s. 141; 1997, c. 18, s. 95; 1999, c. 25, s. 14(Preamble); 2002, c. 13, s. 66; 2019, c. 25, s. 279.
[*annotation(s) added*]

– CCC

1. see also *R v Manasseri*, 2013 ONCA 647 (CanLII), 312 CCC (3d) 132, *per* Watt JA

Not Frivolous

The requirement of a non-frivolous appeal is made out where the appeal raises "arguable issues" that has a "viable ground". This does not require establishment of a "likelihood" of success.[1]

It is only necessary that it be shown that the appeal will "not necessarily fail".[2] Or to put in another way, it is "an appeal that one can say with confidence cannot possibly succeed".[3]

1. *R v HB*, 2014 ONCA 334 (CanLII), *per* Lauwers JA, at para 3
   R v Manasseri, 2013 ONCA 647 (CanLII), 312 CCC (3d) 132, *per* Watt JA, at para 38
2. *R v Passey*, 1997 ABCA 343 (CanLII), 121 CCC (3d) 444, *per* Berger JA, at para 7
   R v Iyer, 2016 ABCA 407 (CanLII), AJ No 1319, *per* Greckol JA, at para 8
3. *Iyer*, *ibid.*, at para 8

Public Interest

The public interests criterion has two components: 1) public safety and 2) public confidence in the administration of justice.[1]

The third factor takes into account the appellant's risk to reoffend, the strength of his case, the nature and circumstances of the offence, the circumstances of the appellant himself, delay and its impact, post-charge conduct, the possible terms of release, and the impact of release on the confidence of the public in the administration of justice.[2]

1. *R v Forcillo*, 2016 ONCA 606 (CanLII), *per curiam*, at para 9
   R v Oland, 2017 SCC 17 (CanLII), [2017] 1 SCR 250, *per* Moldaver J, at paras 23 to 27
   R v Farinacci, 1993 CanLII 3385 (ON CA), 67 OAC 197 (CA), *per* Arbour JA
2. *R v LSR*, 2008 SKCA 77 (CanLII), 311 Sask R 142, *per* Jackson JA
   R v Toy, 2009 SKCA 32 (CanLII), 331 Sask R 1, *per* Wilkinson JA

Public Safety

The risk of re-offence relates to risk to others or the administration of justice.[1]

Consideration will include prior criminal record and history of compliance while on release conditions.[2]

1. *R v Forcillo*, 2016 ONCA 606 (CanLII), *per curiam*, at para 10
   R v Iyer, 2016 ABCA 407 (CanLII), AJ No 1319, *per* Greckol JA, at para 15 ("This

involves the likelihood of re-offence or harm to the public if [accused] is released")

2. e.g. *Iyer*, *ibid.*, at para 15

Confidence in the Administration of Justice

The analysis should balance the need to review a conviction leading to imprisonment and the need to have immediately enforced judgments.[1]

This is characterized as a weighing the two competing interests of enforceability and reviewability.[2] This balancing involves a "qualitative and contextual exercise, with no precise formula".[3]

The interest of reviewability concerns the interests of the accused not to serve "all or a significant part of a custodial sentence only to find out on appeal that the conviction ... was unlawful" and to acknowledge that the system is no infallible.[4]

The public's confidence in the administration of justice requires that judgments to be enforced.[5] So too does it require that judgments be reviewed and errors be corrected.[6]

This element is usually the most important when dealing with more serious offences with greater penalties.[7] A more serious offence who advances an arguable but weak ground, will side on the denial of bail.[8] A murder conviction will "rarely" be granted relief on the public interest branch.[9] But where the grounds are strong and there is a "serious concern" of accuracy of the verdict. The public interest will side on granting bail, even in serious offences.[10]

Where safety and flight are negligible concerns and the grounds are "not frivolous", the interests in reviewability may overshadow the enforceability, even for murder.[11]

Circumstantial Factors

The factors to consider include:[12]

- ensuring fairness in the appeal process, to avoid the prospect of the applicant serving a sentence when the appeal is ultimately allowed[13]
- the fact of conviction, and the public importance of respecting the trial decision and the trial process[14]
- the apparent strength of the grounds for appeal, recognizing that it is not the role of the bail judge to resolve the merits[15]
- the standard of review that will be applied by the appeal court[16]
- any risk that the applicant will reoffend if released[17]
- the applicant’s history of compliance with court orders and legally imposed conditions;[18]
- whether the applicant was released pending trial, and if so if his release was uneventful;[19]
- whether conditions of release could be crafted that would protect the public interest;[20]
- the seriousness of the charges, reflected in the severity of the sentence, although no class of offence is excluded from release[21]
- the effect on the perception of the administration of justice if the applicant is released, including the perception of an informed and reasonable member of society[22]
- the status and state of readiness of the appeal[23]

No single factor should be considered determinative.[24]

1. *R v HB*, 2014 ONCA 334 (CanLII), *per* Lauwers JA, at para 3
   R v Farinacci, 1993 CanLII 3385 (ON CA), 86 CCC (3d) 32, *per* Arbour JA, at pp. 47-48
   R v Manasseri, 2013 ONCA 647 (*no CanLII links)
   R v Sidhu, 2015 ABCA 308 (CanLII), 607 AR 395, *per curiam*, at para 5
2. *R v Oland*, 2017 SCC 17 (CanLII), [2017] 1 SCR 250, *per* Moldaver J, at paras 24, 26
   Farinacci, *supra*, at paras 41, 44
3. *Oland*, *supra*, at para 49
4. *Oland*, *ibid.*, at para 25
5. *Manasseri*, *ibid.*
6. *Farinacci*, *supra*, at para 48
   Manasseri, *supra*
7. *HB*, *supra*, at para 3
8. *Manasseri*, *supra*
   Farinacci, *supra*, at para 48
9. *R v Baltovich*, 2000 CanLII 5680 (ON CA), 144 CCC (3d) 233, *per* Rosenberg JA, at para 20
10. *Baltovich*, *ibid.*, at para 20
    R v Parsons, 1994 CanLII 9754 (NL CA), CR (4th) 169 (Nfld. C.A.), *per* Marshall JA, at pp. 186-187
    Manasseri, *supra*
11. *R v Shlah*, 2017 ABCA 103 (CanLII), AJ No 325, *per* O'Ferrall JA, at para 13
12. *R v Sidhu*, 2015 ABCA 308 (CanLII), 607 AR 395, *per curiam*, at para 12
13. *R v Fox*, 2000 ABCA 283 (CanLII), 8 MVR (4th) 1, *per* Wittmann JA, at paras 18 and 19
    R v Colville, 2003 ABCA 133 (CanLII), 296 WAC 143, *per* Conrad JA, at para 12
14. *R v Nguyen*, 1997 CanLII 10835 (BC CA), 97 BCAC 86, 119 CCC (3d) 269] (BCCA), *per* McEachern JA, at para 18
    Farinacci, *ibid.*, at para 41
    R v Rhyason, 2006 ABCA 120 (CanLII), 208 CCC (3d) 193, *per* Berger JA
15. *R v Heyden*, 1999 CanLII 1934 (ON CA), 127 OAC 190, 141 CCC (3d) 570, *per curiam*, at paras 7 to 8, 12
    Rhyason, *supra*, at paras 13 to 18
    Colville, *supra*, at para 16
16. *R v Sagoo*, 2009 ABCA 357 (CanLII), 464 AR 258, *per* Ritter JA, at para 9
17. *Nguyen*, *supra*, at para 7
    Fox, *supra*, at paras 18, 20 to 21
18. *Sidhu*, *supra*, at para 12
19. *Sidhu*, *supra*, at para 12
20. *Sidhu*, *supra*, at para 12
21. *Nguyen*, *supra*, at paras 13, , at paras 20 to 24
    Heyden, *supra*, at para 12
    R v RDL (1995), 178 AR 142(*no CanLII links) , at para 5
22. *Nguyen*, *supra*, at paras 25 to 26
    Rhyason, *supra*, at para 20
    Fox, *supra*, at para 18
    Colville, *supra*, at para 17
23. *Farinacci*, *supra*, at 48 paras 44, 48{{{3}}}
    Heyden, *supra*, at para 12
    RDL, *supra*, at paras 5, 12
24. *Sidhu*, *supra*, at para 12
    R v Gingras, 2012 BCCA 467 (CanLII), 293 CCC (3d) 100, *per* Donald JA, at para 45

Conditions of Release

679
[*omitted (1), (2), (3) and (4)*]

Conditions of release order

(5) If the judge of the court of appeal does not refuse the appellant's application, the judge shall make a release order referred to in section 515 [*judicial interim release provisions*], the form of which may be adapted to suit the circumstances,

which must include a condition that the accused surrender themselves into custody in accordance with the order.

Immediate release of appellant

(5.1) The person having the custody of the appellant shall, if the appellant complies with the release order, immediately release the appellant.

Applicable provisions

(6) Sections 495.1 [*arrest without warrant – for breach of conditions (524)*], 512.3 [*warrant to appear under section 524*] and 524 [*procedure relating to breach of conditions*] apply, with any modifications that the circumstances require, in respect of any proceedings under this section.
[*omitted (7), (7.1), (8), (9) and (10)*]
R.S., 1985, c. C-46, s. 679; R.S., 1985, c. 27 (1st Supp.), s. 141; 1997, c. 18, s. 95; 1999, c. 25, s. 14(Preamble); 2002, c. 13, s. 66; 2019, c. 25, s. 279.
[*annotation(s) added*]

– CCC

This provision came into force on December 18, 2019.

Procedure

679
[*omitted (1)*]

Notice of application for release

(2) Where an appellant applies to a judge of the court of appeal to be released pending the determination of his appeal, he shall give written notice of the application to the prosecutor or to such other person as a judge of the court of appeal directs.
[*omitted (3), (4), (5), (5.1), (6), (7), (7.1), (8), (9) and (10)*]
R.S., 1985, c. C-46, s. 679; R.S., 1985, c. 27 (1st Supp.), s. 141; 1997, c. 18, s. 95; 1999, c. 25, s. 14(Preamble); 2002, c. 13, s. 66; 2019, c. 25, s. 279.

– CCC

Power to Expedite Appeal

Release pending determination of appeal

679
[*omitted (1), (2), (3), (4), (5), (5.1), (6), (7), (7.1), (8) and (9)*]

Directions for expediting appeal, new trial, etc.

(10) A judge of the court of appeal, where on the application of an appellant he does not make an order under subsection (5) [*release pending appeal – conditions*] or where he cancels an order previously made under this section, or a judge of the Supreme Court of Canada on application by an appellant in the case of an appeal to that Court, may give such directions as he thinks necessary for expediting the hearing of the appellant's appeal or for expediting the new trial or new hearing or the hearing of the reference, as the case may be.
R.S., 1985, c. C-46, s. 679; R.S., 1985, c. 27 (1st Supp.), s. 141; 1997, c. 18, s. 95; 1999, c. 25, s. 14(Preamble); 2002, c. 13, s. 66; 2019, c. 25, s. 279.
[*annotation(s) added*]

– CCC

Revocation

Section 679(6) allows for an application to revoke bail in the same manner as regular bail under s. 525:

679
[*omitted (1), (2), (3), (4), (5) and (5.1)*]

Application of certain provisions of section 525

(6) The provisions of subsections 525(5) [*s. 525 detention review – release order*], (6) [*provisions that apply to s. 525 review hearing*] and (7) [*definition of judge in the Province of Quebec*] apply with such modifications as the circumstances require in respect of a person who has been released from custody under subsection (5) [*release pending appeal – conditions*] of this section.
[*omitted (7), (7.1), (8), (9) and (10)*]
R.S., 1985, c. C-46, s. 679; R.S., 1985, c. 27 (1st Supp.), s. 141; 1997, c. 18, s. 95; 1999, c. 25, s. 14(Preamble); 2002, c. 13, s. 66; 2019, c. 25, s. 279.
[*annotation(s) added*]

– CCC

Upon arrest for an allegation for failure to comply with the provisions of bail pending appeal, a chambers judge may:[1]

1. revoke release order
2. cancel the recognizance; and
3. release on a new recognizance under s. 515(10) where the detainee shows cause;

1. *R v Manasseri*, 2015 ONCA 3 (CanLII), 329 OAC 156, *per* Watt JA, at para 32

Example Offences

Courts have considered bail in the following offences:

- Sexual assault [1]

Homicide

Bail pending appeal for a conviction for murder is "rare".[2]

1. *R v Tcho*, 2011 SKCA 113 (CanLII), *per* Richards JA - released
2. *R v Baltovich*, 2000 CanLII 5680 (ON CA), 144 CCC (3d) 233, *per* Rosenberg JA
   R v Short, 2017 ONCA 153 (CanLII), OJ No 872, *per curiam*, at para 9
   *R v Manasseri*2013 ONCA 647(*no CanLII links)

Bail On Ordering of a New Trial

Where the accused appeals and a new trial is ordered by the appellate court, the accused's release is governed by s. 679(7.1):

> 679
> [*omitted (1), (2), (3), (4), (5), (5.1), (6) and (7)*]
>
> **Release or detention pending new trial or new hearing**
>
> (7.1) Where, with respect to any person, the court of appeal or the Supreme Court of Canada orders a new trial, section 515 [*judicial interim release provisions*] or 522 [*bail for s. 469 offences*], as the case may be, applies to the release or detention of that person pending the new trial or new hearing as though that person were charged with the offence for the first time, except that the powers of a justice under section 515 [*judicial interim release provisions*] or of a judge under section 522 [*bail for s. 469 offences*] are exercised by a judge of the court of appeal.
> [*omitted (8), (9) and (10)*]

> R.S., 1985, c. C-46, s. 679; R.S., 1985, c. 27 (1st Supp.), s. 141; 1997, c. 18, s. 95; 1999, c. 25, s. 14(Preamble); 2002, c. 13, s. 66; 2019, c. 25, s. 279.
> [*annotation(s) added*]
>
> – CCC

This section intends to treat accused directed to a new trial to be treated "as if that person were charged with the same offence for the first time".[1]

The order of release or remand will be ordered under s. 515 for all offences except for s. 469 offences in which case it is governed by s. 522. The function of s. 679(7.1) would transfer these release powers to the Court of Appeal.[2]

The phrase "pending the new trial" includes (1) the period between the order of the new trial and the first appearance in addition to (2) the period between the first appearance and the commencement of the new trial.[3] During the first period of time, the appellate court has exclusive jurisdiction to deal with bail.[4] While in the second period of time both the trial court and the court of appeal share concurrent jurisdiction over bail.[5]

Concurrent Jurisdiction

Where there is concurrent jurisdiction to release an accused under s. 679(7.1), the court of appeal will often decline jurisidiction and refer the matter to the trial judge.[6] The Court of Appeal will take into account numerous factors when deciding whether to take jurisdiction including:[7]

1. the geographic location of the person, the proposed sureties, counsel and where necessary, witnesses.
2. the nature of the hearing, including the reasonable necessity of the introduction of viva voce testimony;
3. the issues in controversy;
4. the anticipated length of the hearing;
5. the need for familiarity with the appellate record and the reasons provided for ordering a new trial;
6. the relationship, if any, between the issue of release and the hearing and scheduling of the new trial;
7. the review mechanism available to any party aggrieved by the decision;
8. the nature of the record required for the hearing; and
9. the timing of the hearing.

1. *R v Manasseri*, 2017 ONCA 226 (CanLII), OJ No 1460, *per* Watt JA, at para 38
2. *Manasseri*, *ibid.*, at para 38
3. *Manasseri*, *ibid.*, at paras 39 to 40
4. *Manasseri*, *ibid.*, at para 41
   R v Vincent, 2008 ONCA 76 (CanLII), OJ No 534, *per* Sharpe JA, at para 7
   R v Geddes, 2012 MBCA 31 (CanLII), 100 WCB (2d) 817, *per* Chartier JA, at para 3
5. *Manasseri*, *ibid.*, at para 41
6. *Manasseri*, *ibid.*, at para 42
7. *Manasseri*, *ibid.*

Interim Release of Appellant
Release order — appellant

816 (1) A person who was the defendant in proceedings before a summary conviction court and who is an appellant under section 813 [*appeal by defendant, informant or Attorney General*] shall, if they are in custody, remain in custody unless the appeal court at which the appeal is to be heard makes a release order referred to in section 515 [*judicial interim release provisions*], the form of which may be adapted to suit the circumstances, which must include the condition that the person surrender themselves into custody in accordance with the order.

Release of appellant

(1.1) The person having the custody of the appellant shall, if the appellant complies with the order, immediately release the appellant.

Applicable provisions

(2) Sections 495.1[*arrest without warrant – for breach of conditions (524)*], 512.3 [*warrant to appear under section 524*] and 524 [*procedure relating to breach of conditions*] apply, with any modifications that the circumstances require, in respect of any proceedings under this section.
R.S., 1985, c. C-46, s. 816; R.S., 1985, c. 27 (1st Supp.) , s. 181(E); 2019, c. 25, s. 323.
[*annotation(s) added*]

– CCC

Recognizance of prosecutor

817 (1) The prosecutor in proceedings before a summary conviction court by whom an appeal is taken under section 813 [*appeal by defendant, informant or Attorney General*] shall, immediately after filing the notice of appeal and proof of service of the notice in accordance with section 815 [*Notice of summary appeal to court of appeal*], appear before a justice, and the justice shall, after giving the prosecutor and the respondent a reasonable opportunity to be heard, order that the prosecutor enter into a recognizance, with or without sureties, in the amount that the justice directs and with or without the deposit of money or other valuable security that the justice directs.

Condition

(2) The condition of a recognizance entered into under this section is that the prosecutor will appear personally or by counsel at the sittings of the appeal court at which the appeal is to be heard.

Appeals by Attorney General

(3) This section does not apply in respect of an appeal taken by the Attorney General or by counsel acting on behalf of the Attorney General.

Form of undertaking or recognizance

(4) [repealed, 2019, c. 25, s. 324(2)]
R.S., c. 2(2nd Supp.), s. 16; 2019, c. 25, s. 324.
[*annotation(s) added*]

– CCC

Application to appeal court for review

818 (1) Where a justice makes an order under section 817 [*recognizance of prosecutor*], either the appellant or the respondent may, before or at any time during the hearing of the appeal, apply to the appeal court for a review of the order made by the justice.

Disposition of application by appeal court

(2) On the hearing of an application under this section, the appeal court, after giving the appellant and the respondent a reasonable opportunity to be heard, shall

> (a) dismiss the application; or
> (b) if the person applying for the review shows cause, allow the application, vacate the order made by the justice and make the order that in the opinion of the appeal court should have been made.

Effect of order

(3) An order made under this section shall have the same force and effect as if it had been made by the justice.
R.S., c. 2(2nd Supp.), s. 16; 1974-75-76, c. 93, s. 91.1.
[*annotation(s) added*]

– CCC

Recognizance

Requiring an Undertaking or Recognizance

Release order or recognizance

832 (1) If a notice of appeal is filed under section 830 [*summary conviction appeal*], the appeal court may, if the defendant is the appellant, make a release order as provided in section 816 [*release order for appellant*] or, in any other case, order that the appellant appear before a justice and enter into a recognizance as provided in section 817 [*recognizance of prosecutor*].

Attorney General

(2) Subsection (1) [*appeal of summary appeal court – imposition of release order*] does not apply where the appellant is the Attorney General or counsel acting on behalf of the Attorney General.
R.S., 1985, c. C-46, s. 832; R.S., 1985, c. 27 (1st Supp.), s. 182; 2019, c. 25, s. 327.
[*annotation(s) added*]

– CCC

Leave to Appeal

679
[*omitted (1), (2), (3), (4), (5), (5.1), (6), (7) and (7.1)*]

Application to appeals on summary conviction proceedings

(8) This section [*release pending appeal*] applies to applications for leave to appeal and appeals to the Supreme Court of Canada in summary conviction proceedings.
[*omitted (9) and (10)*]

– CCC

Dismissal for Failure to Attend or Want of Prosecution

Dismissal for failure to appear or want of prosecution

825 The appeal court may, on proof that notice of an appeal has been given and that

> (a) the appellant has failed to comply with the conditions of a release order made under section 816 [*release order for appellant*] or of a recognizance entered into under section 817 [*recognizance of prosecutor*]; or
> (b) the appeal has not been proceeded with or has been abandoned,

order that the appeal be dismissed.

R.S., c. C-34, s. 757; R.S., c. 2(2nd Supp.), s. 18; 2019, c. 25, s. 325.
[*annotation(s) added*]

– CCC

Bail Review

This page was last substantively updated or reviewed *March 2020*. (Rev. # 79490)

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Superior Court Bail Review

The accused (s. 520) or the Crown (s. 521) may apply to have a superior court judge review an order of release or remand that was made under s. 515 or 523.

A bail review under s. 520 and 521 is a hybrid process between an appeal and a *de novo* hearing.[1]

1. *R v St. Cloud*, 2015 SCC 27 (CanLII), [2015] 2 SCR 328, *per* Wagner J

Accused

Review of order

520 (1) If a justice, or a judge of the Nunavut Court of Justice, makes an order under subsection 515(2) [*release order with conditions*], (5) [*detention in custody*], (6) [*reverse onus offences*], (7) [*release order*], or (12) [*order re no communication on detention*] or makes or vacates any order under paragraph

523(2)(b) [*power to vacate previous orders – when preliminary inquiry completed*], the accused may, at any time before the trial of the charge, apply to a judge for a review of the order.

Notice to prosecutor

(2) An application under this section shall not, unless the prosecutor otherwise consents, be heard by a judge unless the accused has given to the prosecutor at least two clear days notice in writing of the application.

Accused to be present

(3) If the judge so orders or the prosecutor or the accused or his counsel so requests, the accused shall be present at the hearing of an application under this section and, where the accused is in custody, the judge may order, in writing, the person having the custody of the accused to bring him before the court.

Adjournment of proceedings

(4) A judge may, before or at any time during the hearing of an application under this section, on application by the prosecutor or the accused, adjourn the proceedings, but if the accused is in custody no adjournment shall be for more than three clear days except with the consent of the accused.

Failure of accused to attend

(5) Where an accused, other than an accused who is in custody, has been ordered by a judge to be present at the hearing of an application under this section and does not attend the hearing, the judge may issue a warrant for the arrest of the accused.

Execution

(6) A warrant issued under subsection (5) [*power to issue arrest warrant for failing to attend bail review application*] may be executed anywhere in Canada.

Evidence and powers of judge on review

(7) On the hearing of an application under this section, the judge may consider

> (a) the transcript, if any, of the proceedings heard by the justice and by any judge who previously reviewed the order made by the justice,
> (b) the exhibits, if any, filed in the proceedings before the justice, and
> (c) such additional evidence or exhibits as may be tendered by the accused or the prosecutor,

and shall either

> (d) dismiss the application, or
> (e) if the accused shows cause, allow the application, vacate the order previously made by the justice and make any other order provided for in section 515 that he considers is warranted.

Limitation of further applications

(8) Where an application under this section or section 521 has been heard, a further or other application under this section or section 521 shall not be made with respect to that same accused, except with leave of a judge, prior to the expiration of thirty days from the date of the decision of the judge who heard the previous application.

Application of sections 517, 518 and 519

(9) The provisions of sections 517 [*Order directing matters not to be published for specified period*], 518 [*Inquiries to be made by justice and evidence*] and 519 [*release of accused after show cause hearing*] apply with such modifications as the circumstances require in respect of an application under this section.
R.S., 1985, c. C-46, s. 520; R.S., 1985, c. 27 (1st Supp.), s. 86; 1994, c. 44, s. 46; 1999, c. 3, s. 31; 2019, s. 25, s. 230.
[*annotation(s) added*]

– CCC

This provision came into force on December 18, 2019.

Burden

The accused bears the onus on review under s. 520 to show cause on a balance of probabilities why the current order should be vacated.[1] This can be established by showing either an error in principle in the order or a material change in circumstances that would make it "unjust" not to vacate the order.[2]

Crown

Review of order

521 (1) If a justice, or a judge of the Nunavut Court of Justice, makes an order under subsection 515(1) [*release order without conditions*], (2) [*release order with conditions*], (7) [*release order*] or (12) [*order re no communication on detention*] or makes or vacates any order under paragraph 523(2)(b) [*power to vacate previous orders – when preliminary inquiry completed*], the prosecutor may, at any time before the trial of the charge, apply to a judge for a review of the order.

Notice to accused

(2) An application under this section shall not be heard by a judge unless the prosecutor has given to the accused at least two clear days notice in writing of the application.

Accused to be present

(3) If the judge so orders or the prosecutor or the accused or his counsel so requests, the accused shall be present at the hearing of an application under this section and, where the accused is in custody, the judge may order, in writing, the person having the custody of the accused to bring him before the court.

Adjournment of proceedings

(4) A judge may, before or at any time during the hearing of an application under this section, on application of the prosecutor or the accused, adjourn the proceedings, but if the accused is in custody no adjournment shall be for more than three clear days except with the consent of the accused.

Failure of accused to attend

(5) Where an accused, other than an accused who is in custody, has been ordered by a judge to be present at the hearing of an application under this section and does not attend the hearing, the judge may issue a warrant for the arrest of the accused.

Warrant for detention

(6) Where, pursuant to paragraph (8)(e) [*crown-requested bail review – granting application*], the judge makes an order that the accused be detained in custody until he is dealt with according to law, he shall, if the accused is not in custody, issue a warrant for the committal of the accused.

Execution

(7) A warrant issued under subsection (5) [*crown-requested bail review – failure of accused to attend*] or (6) [*crown-requested bail review – warrant for detention*] may be executed anywhere in Canada.

Evidence and powers of judge on review

(8) On the hearing of an application under this section, the judge may consider

> (a) the transcript, if any, of the proceedings heard by the justice and by any judge who previously reviewed the order made by the justice,
> (b) the exhibits, if any, filed in the proceedings before the justice, and
> (c) such additional evidence or exhibits as may be tendered by the prosecutor or the accused,

and shall either

> (d) dismiss the application, or
> (e) if the prosecutor shows cause, allow the application, vacate the order previously made by the justice and make any other order provided for in section 515 [*judicial interim release provisions*] that he considers to be warranted.

Limitation of further applications

(9) Where an application under this section or section 520 [*accused-requested bail review*] has been heard, a further or other application under this section or section 520 [*accused-requested bail review*] shall not be made with respect to the same accused, except with leave of a judge, prior to the expiration of thirty days from the date of the decision of the judge who heard the previous application.

Application of sections 517, 518 and 519

(10) The provisions of sections 517 [*Order directing matters not to be published for specified period*], 518 [*Inquiries to be made by justice and evidence*] and 519 [*release of accused after show cause hearing*] apply with such modifications as the circumstances require in respect of an application under this section.
R.S., 1985, c. C-46, s. 521; R.S., 1985, c. 27 (1st Supp.), s. 87; 1994, c. 44, s. 47; 1999, c. 3, s. 32. R.S., 1985, c. 27 (1st Supp.), s. 88; 1991, c. 40, s. 32; 1994, c. 44, s. 48; 1999, c. 25, s. 10(Preamble); ...
[*annotation(s) added*]

– CCC

This provision came into force on December 18, 2019.

1. *R v Singh Garcha*, 2004 SKQB 92 (CanLII), 246 Sask R 42, *per* Wilkinson J, at para 19
2. *Garcha*, *ibid.*, at para 19

Review Analysis

Once an application for review under s. 520 or 521 has been successful, the original bail instrument is terminated and a new order is in place. This new order cannot subsequently be reviewed under s. 520 or 521.[1]

Type of Review

The review power in s. 520 and 521 are a "hybrid remedy". It does not establish a "de novo proceeding" but it provides a "greater scope than an appeal".[2]

Requirements for Variation

There are only three circumstances where a bail review can vary an order:[3]

1. where the justice has erred in law;
2. where impugned decision was clearly inappropriate, such that "the justice ... gave excessive weight to one factor or insufficient weight to another factor". But *not* on the basis that the justice would have weighed the factors differently; or
3. Where there is a material change in circumstances;

The reviewing court should consider:[4]

- due diligence
- relevance
- credibility
- affect on the result

If the evidence overcomes the four criteria then the reviewing judge may review the order "as if he or she were the initial decision maker".[5]

Material Change in Circumstances

In considering material changes in circumstances, the reviewing court should consider the four criteria in the Palmer fresh evidence test in a "flexible" manner to determine if new evidence for the review should be considered.[6]

Important to the assessment of "material change in circumstances" "depends on the actual considerations that underpinned the first bail judge's refusal of bail".[7]

The change of a proposed surety will not necessarily amount to a change of circumstances.[8] A mere change in release plan is not one either.[9]

1. *R v Smith*, 2003 SKCA 8 (CanLII), 171 CCC (3d) 383, *per curiam* citing *R v Lahooti*, 1978 CanLII 2377 (ON SC), 38 CCC (2d) 481 (Ont.H.C.J.), *per* Reid J
   R v Saracino, 1989 CanLII 7197 (ON SC), 47 CCC (3d) 185, *per* Doherty J
2. *R v St-Cloud*, 2015 SCC 27 (CanLII), [2015] 2 SCR 328, *per* Wagner J, at paras 91, 92
3. *St. Cloud*, *ibid.*, at para 121 ("It will be appropriate to intervene if the justice has erred in law. It will also be appropriate for the reviewing judge to exercise this power if the impugned decision was clearly inappropriate, that is, if the justice who rendered it gave excessive weight to one relevant factor or insufficient weight to another. The reviewing judge therefore does not have the power to interfere with the initial decision simply because he or she would have weighed the relevant factors differently. I reiterate that the relevant factors are not limited to the ones expressly specified in s. 515(10)(c) Cr. C. Finally, where new evidence is submitted by the accused or the prosecutor as permitted by ss. 520 and 521 Cr. C., the reviewing judge may vary the initial decision if that evidence shows a material and relevant change in the circumstances of the case.")
4. *St-Cloud*, *ibid.*, at paras 130 to 138
5. *St-Cloud*, *ibid.*, at para 138
6. *St-Cloud*, *ibid.*, at paras 128, 129
7. *R v Whyte*, 2014 ONCA 268 (CanLII), 310 CCC (3d) 335, *per* Tulloch JA, at para 26
8. *R v Ferguson*, [2002] OJ No 1969 (SC)(*no CanLII links) , *per* Hill J ("Simply re-shuffling the deck of prospective sureties to draw out new ones, or a greater number, does not in itself amount to a material change in circumstances. Only where it can be said that the commitment and nature of the newly proffered suretyship materially calls into question the continued validity of the reasons for detention can it be reasonably be said that the submitted material change in circumstances is relevant to the existing cause of detention. For example, in R v Baltovich, (2000) 2000 CanLII 5680 (ON CA), 131 OAC 29 at para. 33 Rosenberg JA, considered the post-detention changes in surety availability to be significant enough to constitute a material change.")
9. *St. Cloud*, *supra*, at paras 127 to 138

Court of Appeal Bail Review

An accused can seek a review of the court's decision on bail under s. 680

Review by court of appeal

680 (1) A decision made by a judge under section 522 [*bail for s. 469 offences*], a decision made under subsections 524(3) to (5) [*procedure upon appearing after breach*] with respect to an accused referred to in paragraph 524(1)(a) [*power of justice to hear breach allegations – where released on 469 offence*] or a decision made by a judge of the court of appeal under section 261 [*an order staying a driving prohibition order*] or 679 [*release pending appeal*] may, on the direction of the chief justice or acting chief justice of the court of appeal, be reviewed by that court and that court may, if it does not confirm the decision,

(a) vary the decision; or
(b) substitute such other decision as, in its opinion, should have been made.

Single judge acting

(2) On consent of the parties, the powers of the court of appeal under subsection (1) [*review by court of appeal re certain decisions*] may be exercised by a judge of that court.

Enforcement of decision

(3) A decision as varied or substituted under this section shall have effect and may be enforced in all respects as though it were the decision originally made.
R.S., 1985, c. C-46, s. 680; R.S., 1985, c. 27 (1st Supp.), s. 142; 1994, c. 44, s. 68; 2018, c. 21, s. 22; 2019, c. 25, s. 280.
[*annotation(s) added*]

– CCC

The test for leave to review bail requires that:[1]

1. there is a reasonable prospect of success on review; or
2. the court, applying the law, could possibly conclude that the application for release should have been allowed (if bail was denied).

This is a low standard.[2]

This section authorizes the court of appeal to review change in circumstances however where there is no question of error of lower courts, it is best returned to the court of first instance for review.[3]

1. *R v Uppal*, 2003 BCCA 571 (CanLII), 188 BCAC 235, *per* Finch CJ, at para 17
2. *Uppal*, *ibid.*, at para 17
3. *R v Kuol*, 2013 ABCA 380 (CanLII), 561 AR 332, *per curiam*

Bail Review Where Trial is Delayed

- Ninety Day Detention Review

Bail for Young Accused

This page was last substantively updated or reviewed *January 2020*. (Rev. # 79490)

< Procedure and Practice < Judicial Interim Release

General Principles

Sections 28 to 31 of the *Youth Criminal Justice Act* address the law of bail relating to young offenders.

Except where stated in the YCJA, the rules of bail under Part XVI (Compelling Appearance of Accused Before a Justice and Interim Release) of the Criminal Code will equally apply to young offenders.[1]

Detention is not permitted on the basis of that it is a substitute for appropriate child protection, mental health treatment, or other social services:

> **Detention as social measure prohibited**
>
> 29 (1) A youth justice court judge or a justice may impose a condition set out in subsections 515(4) to (4.2) of the Criminal Code in respect of a release order only if they are satisfied that
>
> > (a) the condition is necessary to ensure the young person's attendance in court or for the protection or safety of the public, including any victim of or witness to the offence;
> > (b) the condition is reasonable having regard to the circumstances of the offending behaviour; and
> > (c) the young person will reasonably be able to comply with the condition.
>
> [*omitted (2) and (3)*]
> 2002, c. 1, s. 29; 2012, c. 1, s. 169; 2019, c. 13, s. 163; 2019, c. 25, s. 368.
>
> – YCJA

Review and Appeal

Under s. 33 of the YCJA an order for release can be reviewed.

1. s. 28 YCJA states ("Except to the extent that they are inconsistent with or excluded by this Act, the provisions of Part XVI (compelling appearance of an accused and interim release) of the Criminal Code apply to the

detention and release of young persons
under this Act.")

Procedure

A detained young person must appear before a judge or justice of the peace. (s.32(1)) Once the accused is before the judge or justice, the judge or justice must

1. have the information or indictment read to the accused
2. inform him of his right to counsel;
3. notify accused of possibility of an adult sentence.

See also *R v MTS*, 2006 NSPC 8 (CanLII), *per* Burrill J

Justices of the Peace

Under s. 20(1) and 33(1) of the YCJA a Justice of the Peace has authority to determine interim release:

> **Certain proceedings may be taken before justices**
>
> 20 (1) Any proceeding that may be carried out before a justice under the Criminal Code, other than a plea, a trial or an adjudication, may be carried out before a justice in respect of an offence alleged to have been committed by a young person, and any process that may be issued by a justice under the Criminal Code may be issued by a justice in respect of an offence alleged to have been committed by a young person.
> [*omitted (2)*]
> 2002, c. 1, s. 20; 2019, c. 13, s. 160.
>
> – YCJA

Release

> **Release from or detention in custody**
>
> 33 (1) If an order is made under section 515 (judicial interim release) of the Criminal Code in respect of a young person by a justice who is not a youth justice court judge, an application may, at any time after the order is made, be made to a youth justice court for the release from or detention in custody of the young person, as the case may be, and the youth justice court shall hear the matter as an original application.

Notice to prosecutor

(2) An application under subsection (1) [*application for bail or detention*] for release from custody shall not be heard unless the young person has given the prosecutor at least two clear days notice in writing of the application.

Notice to young person

(3) An application under subsection (1) [*application for bail or detention*] for detention in custody shall not be heard unless the prosecutor has given the young person at least two clear days notice in writing of the application.

Waiver of notice

(4) The requirement for notice under subsection (2) [*application for bail or detention – notice to Crown*] or (3) [*application for bail or detention – notice to youth*] may be waived by the prosecutor or by the young person or his or her counsel, as the case may be.

Application for review under section 520 or 521 of Criminal Code

(5) An application under section 520 [*accused-requested bail review*] or 521 [*crown-requested bail review*] of the Criminal Code for a review of an order made in respect of a young person by a youth justice court judge who is a judge of a superior court shall be made to a judge of the court of appeal.

Nunavut

(6) Despite subsection (5) [*application for bail or detention – application for s. 520/521 review*], an application under section 520 [*accused-requested bail review*] or 521 [*crown-requested bail review*] of the Criminal Code for a review of an order made in respect of a young person by a youth justice court judge who is a judge of the Nunavut Court of Justice shall be made to a judge of that court.

No review

(7) No application may be made under section 520 [*accused-requested bail review*] or 521 [*crown-requested bail review*] of the Criminal Code for a review of an order made in respect of a young person by a justice who is not a youth justice court judge.

Interim release by youth justice court judge only

(8) If a young person against whom proceedings have been taken under this Act is charged with an offence referred to in section 522 [*bail for s. 469 offences*] of the Criminal Code, a youth justice court judge, but no other court, judge or justice, may release the young person from custody under that section.

Review by court of appeal

(9) A decision made by a youth justice court judge under subsection (8) [*interim release by youth justice court judge only*] may be reviewed in accordance with section 680 [*review by court of appeal*] of the Criminal Code and that section

applies, with any modifications that the circumstances require, to any decision so made.

– YCJA

Grounds for Detention

Section 28 of the YCJA incorporates the bail provisions from Part XVI of the Criminal Code, including s. 515:

> **Application of Part XVI of Criminal Code**
>
> 28 Except to the extent that they are inconsistent with or excluded by this Act, the provisions of Part XVI (compelling appearance of an accused and interim release) of the Criminal Code apply to the detention and release of young persons under this Act.
>
> – YCJA

However, there are numerous modifications within the YCJA.[1]

Burden

The onus in bail matters is upon the Crown to establish the basis for detention. Section 29(3) states:

> 29
> [*omitted (1) and (2)*]
>
> **Onus**
>
> (3) The onus of satisfying the youth justice court judge or the justice as to the matters referred to in subsection (2) is on the Attorney General.
>
> 2002, c. 1, s. 29; 2012, c. 1, s. 169; 2019, c. 25, s. 368.
>
> – YCJA

Justification

Section 29(2) sets out the three preconditions that must be satisfied before a youth court justice may order a young person detained.

29
[*omitted (1)*]

Justification for detention in custody

(2) A youth justice court judge or a justice may order that a young person be detained in custody only if

(a) the young person has been charged with

(i) a serious offence, or
(ii) an offence other than a serious offence, if they have a history that indicates a pattern of either outstanding charges or findings of guilt;

(b) the judge or justice is satisfied, on a balance of probabilities,

(i) that there is a substantial likelihood that, before being dealt with according to law, the young person will not appear in court when required by law to do so,
(ii) that 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 a substantial likelihood that the young person will, if released from custody, commit a serious offence, or
(iii) in the case where the young person has been charged with a serious offence and detention is not justified under subparagraph (i) or (ii), that there are exceptional circumstances that warrant detention and that detention is necessary to maintain confidence in the administration of justice, having regard to the principles set out in section 3 and to all the circumstances, including

(A) the apparent strength of the prosecution's case,
(B) the gravity of the offence,
(C) the circumstances surrounding the commission of the offence, including whether a firearm was used, and
(D) the fact that the young person is liable, on being found guilty, for a potentially lengthy custodial sentence; and

(c) the judge or justice is satisfied, on a balance of probabilities, that no condition or combination of conditions of release would, depending on the justification on which the judge or justice relies under paragraph (b),

(i) reduce, to a level below substantial, the likelihood that the young person would not appear in court when required by law to do so,
(ii) offer adequate protection to the public from the risk that the young person might otherwise present, or
(iii) maintain confidence in the administration of justice.

[*omitted (3)*]
2002, c. 1, s. 29; 2012, c. 1, s. 169; 2019, c. 25, s. 368.

– YCJA

The three grounds are similar to those found in s. 515:

1. basis that the offence is "serious" or the history of charges or convictions show a "history that indicates a pattern". (s. 29(2)(a))
2. there is sufficient belief that he would not attend court, he would commit a "serious offence" or it is simply necessary to "maintain confidence in the administration of justice", and
3. no conditions would sufficiently reduce those beliefs.

The term "serious offence" is defined in s. 2 YCJA as "an indictable offence under an Act of Parliament for which the maximum punishment is imprisonment for five years or more."

1. see list of differences in *R v FA*, 2016 ABPC 132(*no CanLII links) , at para 6

Detention

Designated place of temporary detention

30 (1) Subject to subsection (7), a young person who is detained in custody in relation to any proceedings against the young person shall be detained in a safe, fair and humane manner in any place of temporary detention that may be designated by the lieutenant governor in council of the province or his or her delegate or in a place within a class of places so designated.

Exception

(2) A young person who is detained in a place of temporary detention under subsection (1) may, in the course of being transferred from that place to the court or from the court to that place, be held under the supervision and control of a peace officer.

Detention separate from adults

(3) A young person referred to in subsection (1) shall be held separate and apart from any adult who is detained or held in custody unless a youth justice court judge or a justice is satisfied that, having regard to the best interests of the young person,

> (a) the young person cannot, having regard to his or her own safety or the safety of others, be detained in a place of detention for young persons; or

(b) no place of detention for young persons is available within a reasonable distance.

Transfer to adult facility

(4) When a young person is detained under subsection (1), the youth justice court may, on application of the provincial director made at any time after the young person attains the age of eighteen years, after giving the young person an opportunity to be heard, authorize the provincial director to direct, despite subsection (3), that the young person be temporarily detained in a provincial correctional facility for adults, if the court considers it to be in the best interests of the young person or in the public interest.

When young person is twenty years old or older

(5) When a young person is twenty years old or older at the time his or her temporary detention under subsection (1) begins, the young person shall, despite subsection (3), be temporarily detained in a provincial correctional facility for adults.

Transfer by provincial director

(6) A young person who is detained in custody under subsection (1) may, during the period of detention, be transferred by the provincial director from one place of temporary detention to another.

Exception relating to temporary detention

(7) Subsections (1) and (3) do not apply in respect of any temporary restraint of a young person under the supervision and control of a peace officer after arrest, but a young person who is so restrained shall be transferred to a place of temporary detention referred to in subsection (1) as soon as is practicable, and in no case later than the first reasonable opportunity after the appearance of the young person before a youth justice court judge or a justice under section 503 of the Criminal Code.

Authorization of provincial authority for detention

(8) In any province for which the lieutenant governor in council has designated a person or a group of persons whose authorization is required, either in all circumstances or in circumstances specified by the lieutenant governor in council, before a young person who has been arrested may be detained in accordance with this section, no young person shall be so detained unless the authorization is obtained.

Determination by provincial authority of place of detention

(9) In any province for which the lieutenant governor in council has designated a person or a group of persons who may determine the place where a young person who has been arrested may be detained in accordance with this section, no young person may be so detained in a place other than the one so determined.

2002, c. 1, s. 30; 2019, c. 13, s. 164.

– YCJA

Release

Responsible Person

Placement of young person in care of responsible person

31 (1) A young person who has been arrested may be placed in the care of a responsible person instead of being detained in custody if a youth justice court or a justice is satisfied that

(a) the young person would, but for this subsection, be detained in custody under section 515 (judicial interim release) of the Criminal Code;
(b) the person is willing and able to take care of and exercise control over the young person; and
(c) the young person is willing to be placed in the care of that person.

Inquiry as to availability of a responsible person

(2) If a young person would, in the absence of a responsible person, be detained in custody, the youth justice court or the justice shall inquire as to the availability of a responsible person and whether the young person is willing to be placed in that person's care.

Condition of placement

(3) A young person shall not be placed in the care of a person under subsection (1) unless

(a) that person undertakes in writing to take care of and to be responsible for the attendance of the young person in court when required and to comply with any other conditions that the youth justice court judge or the justice may specify; and
(b) the young person undertakes in writing to comply with the arrangement and to comply with any other conditions that the youth justice court judge or the justice may specify.

Removing young person from care

(4) A young person, a person in whose care a young person has been placed or any other person may, by application in writing to a youth justice court judge or a justice, apply for an order under subsection (5) if

(a) the person in whose care the young person has been placed is no longer willing or able to take care of or exercise control over the young person; or

(b) it is, for any other reason, no longer appropriate that the young person remain in the care of the person with whom he or she has been placed.

Order

(5) When a youth justice court judge or a justice is satisfied that a young person should not remain in the custody of the person in whose care he or she was placed under subsection (1), the judge or justice shall

(a) make an order relieving the person and the young person of the obligations undertaken under subsection (3); and
(b) issue a warrant for the arrest of the young person.

Effect of arrest

(6) If a young person is arrested in accordance with a warrant issued under paragraph (5)(b), the young person shall be taken before a youth justice court judge or a justice without delay and dealt with under this section and sections 28 to 30.

– YCJA

In a youth bail hearing, section 31 requires that the judge consider the possibility of placement of the young person in the care of her for her responsible person. Failure to do so will amount to an error of law.[1]

1. *R v RD*, 2010 ONCA 899 (CanLII), 273 CCC (3d) 7, *per* Rosenberg JA

Breach

A breach of a release to a responsible person is prosecutable under s. 139 of the YCJA:

Offence and punishment

139 (1) Every person who wilfully fails to comply with section 30 (designated place of temporary detention), or with an undertaking entered into under subsection 31(3) (condition of placement),

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years; or
(b) is guilty of an offence punishable on summary conviction.

Offence and punishment

(2) Every person who wilfully fails to comply with section 7 (designated place of temporary detention) of the Young Offenders Act, chapter Y-1 of the Revised Statutes of Canada, 1985, or with an undertaking entered into under subsection

7.1(2) (condition of placement) of that Act is guilty of an offence punishable on summary conviction.

Punishment

(3) Any person who uses or authorizes the use of an application form in contravention of subsection 82(3) (application for employment) is guilty of an offence punishable on summary conviction.

– YCJA

Section 469 Offences

Only a youth court judge may issue release of an accused charged with an offence under s. 469.[1]

Section 33(8) addresses release for young persons charged with an offence under s. 469:

33
[*omitted (1), (2), (3), (4), (5), (6) and (7)*]

Interim release by youth justice court judge only

(8) If a young person against whom proceedings have been taken under this Act is charged with an offence referred to in section 522 of the Criminal Code [the section dealing with release of accused charged with a s. 469 offence], a youth justice court judge, but no other court, judge or justice, may release the young person from custody under that section.
[*omitted (9)*]

[*annotation(s) added*]

– YCJA

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1. see s. 33(8) and 522 of the Code
R v FA, 2016 ABPC 132 (CanLII), *per* Ho J, at para 4

Forfeiture of Recognizances

Applications for forfeiture of recognizances

134 Applications for the forfeiture of recognizances of young persons shall be made to the youth justice court.

– [[[:Template:YCJA]] YCJA]

Proceedings in case of default

135 (1) When a recognizance binding a young person has been endorsed with a certificate under subsection 770(1) of the Criminal Code, a youth justice court judge shall

> (a) on the request of the Attorney General, fix a time and place for the hearing of an application for the forfeiture of the recognizance; and
> (b) after fixing a time and place for the hearing, cause to be sent by confirmed delivery service, not less than ten days before the time so fixed, to each principal and surety named in the recognizance, directed to his or her latest known address, a notice requiring him or her to appear at the time and place fixed by the judge to show cause why the recognizance should not be forfeited.

Order for forfeiture of recognizance

(2) When subsection (1) is complied with, the youth justice court judge may, after giving the parties an opportunity to be heard, in his or her discretion grant or refuse the application and make any order with respect to the forfeiture of the recognizance that he or she considers proper.

Judgment debtors of the Crown

(3) If, under subsection (2), a youth justice court judge orders forfeiture of a recognizance, the principal and his or her sureties become judgment debtors of the Crown, each in the amount that the judge orders him or her to pay.

Order may be filed

(4) An order made under subsection (2) may be filed with the clerk of the superior court or, in the province of Quebec, the prothonotary and, if an order is filed, the clerk or the prothonotary shall issue a writ of fieri facias in Form 34 set out in the Criminal Code and deliver it to the sheriff of each of the territorial divisions in which any of the principal and his or her sureties resides, carries on business or has property.

If a deposit has been made

(5) If a deposit has been made by a person against whom an order for forfeiture of a recognizance has been made, no writ of fieri facias shall issue, but the amount of the deposit shall be transferred by the person who has custody of it to the person who is entitled by law to receive it.

Subsections 770(2) and (4) of Criminal Code do not apply

(6) Subsections 770(2) (transmission of recognizance) and (4) (transmission of deposit) of the Criminal Code do not apply in respect of proceedings under this Act.

Sections 772 and 773 of Criminal Code apply

(7) Sections 772 (levy under writ) and 773 (committal when writ not satisfied) of the Criminal Code apply in respect of writs of fieri facias issued under this section as if they were issued under section 771 (proceedings in case of default) of that Act.

– YCJA

See Also

- Sentencing Young Offenders

Extradition

This page was last substantively updated or reviewed *January 2014*. (Rev. # 79490)

< Criminal Law

General Principles

The minister's discretion to extradite is necessary for the effective enforcement of the criminal law and so deserves a high degree of deference.[1]

The decision of the Minister to make a surrender order is reviewed on a standard of reasonableness.[2] Courts should interfere with these political decisions only in the "clearest of cases".[3]

Section 6 of the Charter protects Canadian citizens in matters of extradition. It states that "[e]very citizen of Canada has the right to enter, remain in and leave Canada".[4]

When interpreting any provisions within the Extradition Act, s. 3 requires that any inconsistency between the Act and a treaty, precedence should be taken by the treaty.[5]

1. *Sriskandarajah v United States of America*, 2012 SCC 70 (CanLII), [2012] 3 SCR 609, *per* McLachlin CJ (7:0), at para 11

United States of America v Cotroni, 1989 CanLII 106 (SCC), [1989] 1 SCR 1469, *per* La Forest J, at p. 1497
United States of America v Kwok, 2001 SCC 18 (CanLII), [2001] 1 SCR 532, *per* Arbour J (7:0), at paras 93 to 96
Lake v Canada (Minister of Justice), 2008 SCC 23 (CanLII) [2008] 1 SCR 761], {{{4}}}, *per* LeBel J (9:0), at para 34

2. *Farinha v Canada (Attorney General)*, 2013 BCCA 243 (CanLII), *per* Bennett JA (3:0), at para 15
   See Lake v Canada (Minister of Justice), *supra*, at para 34
3. *Lake*, *ibid.*, at para 30
4. Section 6 of the Charter
5. *Bourgeon v Canada (Attorney General)*, 2000 CanLII 22635 (ON SC), 35 CR (5th) 25, *per* Ewaschuk J, at para 6

Disclosure

The disclosure obligations associated with extradition is different than those of criminal proceedings.[1] Criminal obligations are based on the right to full answer and defence, while extradition is governed by treaty and statute.[2] Extradition does not concern itself with guilt or innocence.[3]

The disclosure obligation covers two categories of materials:[4]

1. those materials upon which the requesting state seeks to rely to establish a *prima facie* case for committal; and,
2. those materials relevant to a Charter issue that is properly justiciable before the extradition judge and to which there is an "air of reality".

Where there is a request for disclosure on the basis that it is relevant to an allegation of state misconduct, the applicant must establish: [5]

1. the allegations must be capable of supporting the remedy sought;
2. there must be an air of reality to the allegations; and
3. it must be likely that the documents sought and the testimony sought would be relevant to the allegations.

An "air of reality" refers to "some realistic possibility that the allegations can be substantiated"[6] The test will not be made out where:[7]

1. the basis of "bald assertions" in the notice of motion;
2. "vague and unsubstantiated suggestions";
3. "conjecture or speculation"; or
4. allegations made in the absence of an "offer of proof"

1. *United States v Dynar*, 1997 CanLII 359 (SCC), [1997] 2 SCR 462, *per* Cory and Iacobucci JJ, at paras 130 to 131
2. *United States of America v Trotter*, 2013 BCSC 813 (CanLII), 298 CCC (3d) 479, *per* Cohen J, at para 16
3. *USA v Kwok*, 2001 SCC 18 (CanLII), [2001] 1 SCR 532, *per* Arbour J (7:0), at para 99
4. *United States v Costanzo*, 2009 BCCA 120 (CanLII), 243 CCC (3d) 242, *per* Rowles JA (3:0), at para 25
5. *R v Larosa*, 2002 CanLII 45027 (ON CA), 166 CCC (3d) 449, *per* Doherty JA (3:0), at para

76
USA v Trotter, *supra*, at para 20

6. *Larosa*, *supra*, at para 78
   USA v Trotter, *supra*, at para 21
7. *United States v Doak*, 2012 BCSC 1788 (CanLII), *per* Ker J, at para 54
   USA v Trotter, *supra*, at para 22

Provisional Arrest

Under s. 12 to 14 of the Extradition Act, a judge may only grant a provisional arrest warrant where the arresting officer has reasonable grounds to believe that:[1]

1. the arrest is necessary in the public interest
2. the person is either an ordinary resident of Canada, is in Canada, or is on his way to Canada;
3. a warrant has been issued by the requesting state.

1. *USA v Quintin*, 2000 CanLII 22657 (ON SC), [2000] O.J. 791, *per* Dambrot J

Order of Committal

An order of committal concerns the power of the superior court judge to order the detention of the person being extradited.

> **Order of committal**
>
> 29 (1) A judge shall order the committal of the person into custody to await surrender if
>
> > (a) in the case of a person sought for prosecution, there is evidence admissible under this Act of conduct that, had it occurred in Canada, would justify committal for trial in Canada on the offence set out in the authority to proceed and the judge is satisfied that the person is the person sought by the extradition partner; and
> > (b) in the case of a person sought for the imposition or enforcement of a sentence, the judge is satisfied that the conviction was in respect of conduct that corresponds to the offence set out in the authority to proceed and that the person is the person who was convicted.
>
> ...
>
> – ExA

Surrendering Detainee for Extradition

Powers of Minister
Surrender

40 (1) The Minister may, within a period of 90 days after the date of a person's committal to await surrender, personally order that the person be surrendered to the extradition partner. When refugee claim
(2) Before making an order under subsection (1) with respect to a person who has made a claim for refugee protection under the Immigration and Refugee Protection Act, the Minister shall consult with the minister responsible for that Act.
1999, c. 18, s. 40; 2000, c. 24, s. 51; 2001, c. 27, s. 250.

– ExA

The minister should make an order to surrender only where he is satisfied that "extradition is more appropriate than domestic prosecution". [1]

The minister should consider factors such as:[2]

- Where was the impact of the offence felt or likely to have been felt?
- Which jurisdiction has the greater interest in prosecuting the offence?
- Which police force played the major role in the development of the case?
- Which jurisdiction has laid charges?
- Which jurisdiction has the most comprehensive case?
- Which jurisdiction is ready to proceed to trial?
- Where is the evidence located?
- Is the evidence mobile?
- How many accused are involved and can they be gathered together in one place for trial?
- In what jurisdiction were most of the acts in furtherance of the crime committed?
- What is the nationality and residence of the accused?
- What is the severity of the sentence that the accused is likely to receive in each jurisdiction?

There is no requirement for alignment between the surrender order and the extradition order.[3]

1. *Sriskandarajah v United States of America*, 2012 SCC 70 (CanLII), [2012] 3 SCR 609, *per* McLachlin CJ (7:0), at para 12
2. *Sriskandarajah v United States of America*, *supra*, at para 12
   United states of america v Cotroni; united states of america v el zein, 1989 CanLII 106 (SCC), [1989] 1 SCR 1469, *per* La Forest J
3. *United States of America v Barbu*, 2010 ONCA 891 (CanLII), 265 CCC (3d) 244, *per* MacFarland JA

Charter Voir Dire

The respondent does not have a right to allege a Charter breach as of right.[1] The court has discretion to allow the respondent to allege a breach. The court must consider whether it will "assist the proper trial of the real issues."[2]

1. *United States of America v Trotter*, 2013 BCSC 813 (CanLII), 298 CCC (3d) 479, *per* Cohen J, at para 47

2. *USA v Trotter*, *ibid.*, at para 47

Request by Canada for Extradition

Section 78 of the Extradition Act authorizes a government agency (a "competent authority") to seek the Minister to file a request for extradition of a person to be brought in for a trial, sentencing, or service of a sentence.

> **Request by Canada for extradition**
>
> 78 (1) The Minister, at the request of a competent authority, may make a request to a State or entity for the extradition of a person for the purpose of prosecuting the person for — or imposing or enforcing a sentence, or making or enforcing a disposition under the Young Offenders Act, chapter Y-1 of the Revised Statutes of Canada, 1985, in respect of — an offence over which Canada has jurisdiction.
>
> – ExA

Provisional Arrest Warrant

A provisional arrest warrant may be issued by a judge at the request of the Minister who has received requests from an extradition partner.

> **Warrant for Provisional Arrest**
> **Minister's approval of request for provisional arrest**
>
> 12. The Minister may, after receiving a request by an extradition partner for the provisional arrest of a person, authorize the Attorney General to apply for a provisional arrest warrant, if the Minister is satisfied that
>
> (a) the offence in respect of which the provisional arrest is requested is punishable in accordance with paragraph 3(1)(a); and
> (b) the extradition partner will make a request for the extradition of the person.
>
> **Provisional arrest warrant**

13 (1) A judge may, on ex parte application of the Attorney General, issue a warrant for the provisional arrest of a person, if satisfied that there are reasonable grounds to believe that

(a) it is necessary in the public interest to arrest the person, including to prevent the person from escaping or committing an offence;
(b) the person is ordinarily resident in Canada, is in Canada or is on the way to Canada; and
(c) a warrant for the person's arrest or an order of a similar nature has been issued or the person has been convicted.

– ExA

When a provisional warrant is issued, Interpol may issue a Red Notice for the arrest of the accused.

Evidence

Section 32 to 37 of the Extradition Act addresses the rules of evidence for extradition process.

Rules of Evidence

31 For the purposes of sections 32 to 38, document means data recorded in any form, and includes photographs and copies of documents.

Evidence

32 (1) Subject to subsection (2), evidence that would otherwise be admissible under Canadian law shall be admitted as evidence at an extradition hearing. The following shall also be admitted as evidence, even if it would not otherwise be admissible under Canadian law:

(a) the contents of the documents contained in the record of the case certified under subsection 33(3);
(b) the contents of the documents that are submitted in conformity with the terms of an extradition agreement; and
(c) evidence adduced by the person sought for extradition that is relevant to the tests set out in subsection 29(1) if the judge considers it reliable.

Exception — Canadian evidence

(2) Evidence gathered in Canada must satisfy the rules of evidence under Canadian law in order to be admitted.
...

Authentication not required

(4) No authentication of documents is required unless a relevant extradition agreement provides otherwise.

Record of the case and supplements

(5) For the purposes of this section, a record of the case includes any supplement added to it.

Oath or solemn affirmation

34 A document is admissible whether or not it is solemnly affirmed or under oath.

No proof of signature

35 A document purporting to have been signed by a judicial, prosecuting or correctional authority, or a public officer, of the extradition partner shall be admitted without proof of the signature or official character of the person appearing to have signed it.

Translated documents

36 A translation of a document into one of Canada's official languages shall be admitted without any further formality.

Evidence of identity

37 The following are evidence that the person before the court is the person referred to in the order of arrest, the document that records the conviction or any other document that is presented to support the request:

> (a) the fact that the name of the person before the court is similar to the name that is in the documents submitted by the extradition partner; and
> (b) the fact that the physical characteristics of the person before the court are similar to those evidenced in a photograph, fingerprint or other description of the person.

– ExA

Section 34 which abolishes the prohibition of accepting evidence that has not been given under oath or affirmation does not violate s. 7 of the Charter.[1]

1. *Bourgeon v Canada (Attorney General)*, 2000 CanLII 22635 (ON SC), 35 CR (5th) 25, *per* Ewaschuk J, at para 46

Hearsay Records

There are a number of means through which the Extradition Act permits hearsay or otherwise inadmissible evidence to be admitted at an extradition hearing.

Section 32(1)(b) permits the admission of evidence that would otherwise be inadmissible where it conforms to the associated extradition treaty or agreement.[1]

Record of The Case

Section 32(1)(a) permits evidence the admission of the "record of the case", which is defined in s. 33(1) as:

> **Record of the case**
>
> 33 (1) The record of the case must include
>
> (a) in the case of a person sought for the purpose of prosecution, a document summarizing the evidence available to the extradition partner for use in the prosecution; and
> (b) in the case of a person sought for the imposition or enforcement of a sentence,
>
> (i) a copy of the document that records the conviction of the person, and
> (ii) a document describing the conduct for which the person was convicted.
>
> **Other documents — record of the case**
>
> (2) A record of the case may include other relevant documents, including documents respecting the identification of the person sought for extradition.
>
> **Certification of record of the case**
>
> (3) A record of the case may not be admitted unless
>
> (a) in the case of a person sought for the purpose of prosecution, a judicial or prosecuting authority of the extradition partner certifies that the evidence summarized or contained in the record of the case is available for trial and
>
> (i) is sufficient under the law of the extradition partner to justify prosecution, or
> (ii) was gathered according to the law of the extradition partner; or
>
> (b) in the case of a person sought for the imposition or enforcement of a sentence, a judicial, prosecuting or correctional authority of the extradition partner certifies that the documents in the record of the case are accurate.
>
> – ExA

Constitutionality

Section 32(1)(a) and (b) violate s. 7 of the Charter but is still valid under s. 1 of the Charter.[2]

1. *Bourgeon v Canada (Attorney General)*, 2000 CanLII 22635 (ON SC), 35 CR (5th) 25, *per* Ewaschuk J, at para 6
2. *Bourgeon v Canada (Attorney General)*, *supra*, at para 69

Youth Matters

Procedure for Young Accused

< Procedure and Practice < Young Persons

General Principles

Jurisdiction of YCJA

The Youth justice court has exclusive jurisdiction over offences allegedly committed by a young person. (s.14(1))

Interpretation of YCJA

Interpretation of the YCJA must be subject to the principles set out in s. 3 of the YCJA. The provisions must be interpreted liberally.[1]

1. s. 3(2)

History

The Juvenile Deliquents Act was the first legislation dealing with offenders under the age of 18. This Act was in effect between 1908 to 1984.

Between 1984 and 2003, the Young Offenders Act was the governing legislation.

- see also List of Legislative Amendments for history of the YCJA and previous Acts.

Application of Criminal Code

> **Application of Criminal Code**
>
> 140 Except to the extent that it is inconsistent with or excluded by this Act, the provisions of the Criminal Code apply, with any modifications that the circumstances require, in respect of offences alleged to have been committed by young persons.
>
> – YCJA

Sections of Criminal Code applicable

141 (1) Except to the extent that they are inconsistent with or excluded by this Act, section 16 (defence of mental disorder) and Part XX.1 (mental disorder) of the Criminal Code apply, with any modifications that the circumstances require, in respect of proceedings under this Act in relation to offences alleged to have been committed by young persons.

Notice and copies to counsel and parents

(2) For the purposes of subsection (1),

> (a) wherever in Part XX.1 (mental disorder) of the Criminal Code a reference is made to a copy to be sent or otherwise given to an accused or a party to the proceedings, the reference shall be read as including a reference to a copy to be sent or otherwise given to
>
> > (i) any counsel representing the young person,
> > (ii) a parent of the young person who is in attendance at the proceedings against the young person, and
> > (iii) a parent of the young person not in attendance at the proceedings who is, in the opinion of the youth justice court or Review Board, taking an active interest in the proceedings; and
>
> (b) wherever in Part XX.1 (mental disorder) of the Criminal Code a reference is made to notice to be given to an accused or a party to proceedings, the reference shall be read as including a reference to notice to be given to a parent of the young person and any counsel representing the young person.

Proceedings not invalid

(3) Subject to subsection (4), failure to give a notice referred to in paragraph (2)(b) to a parent of a young person does not affect the validity of proceedings under this Act.

Exception

(4) Failure to give a notice referred to in paragraph (2)(b) to a parent of a young person in any case renders invalid any subsequent proceedings under this Act relating to the case unless

> (a) a parent of the young person attends at the court or Review Board with the young person; or
> (b) a youth justice court judge or Review Board before whom proceedings are held against the young person
>
> > (i) adjourns the proceedings and orders that the notice be given in the manner and to the persons that the judge or Review Board directs, or
> > (ii) dispenses with the notice if the youth justice court or Review Board is of the opinion that, having regard to the circumstances, the notice may be dispensed with.

(5) [Repealed, 2005, c. 22, s. 63]

Considerations of court or Review Board making a disposition

(6) Before making or reviewing a disposition in respect of a young person under Part XX.1 (mental disorder) of the Criminal Code, a youth justice court or Review Board shall consider the age and special needs of the young person and any representations or submissions made by a parent of the young person.

(7) to (9) [Repealed, 2005, c. 22, s. 63]

Prima facie case to be made every year

(10) For the purpose of applying subsection 672.33(1) (fitness to stand trial) of the Criminal Code to proceedings under this Act in relation to an offence alleged to have been committed by a young person, wherever in that subsection a reference is made to two years, there shall be substituted a reference to one year.

Designation of hospitals for young persons

(11) A reference in Part XX.1 (mental disorder) of the Criminal Code to a hospital in a province shall be construed as a reference to a hospital designated by the Minister of Health for the province for the custody, treatment or assessment of young persons.

Definition of Review Board

(12) In this section, Review Board has the meaning assigned by section 672.1 [*mental disorder definitions*] of the Criminal Code.

2002, c. 1, s. 141; 2005, c. 22, s. 63.

– YCJA

Part XXVII and summary conviction trial provisions of Criminal Code to apply

142 (1) Subject to this section and except to the extent that they are inconsistent with this Act, the provisions of Part XXVII (summary conviction offences) of the Criminal Code, and any other provisions of that Act that apply in respect of summary conviction offences and relate to trial proceedings, apply to proceedings under this Act

(a) in respect of an order under section 83.3 (recognizance — terrorist activity), 810 (recognizance — fear of injury or damage), 810.01 (recognizance — fear of certain offences), 810.011 (recognizance — fear of terrorism offence), 810.02 (recognizance — fear of forced marriage or marriage under age of 16 years) or 810.2 (recognizance — fear of serious personal injury offence) of that Act or an offence under section 811 (breach of recognizance) of that Act;
(b) in respect of a summary conviction offence; and

(c) in respect of an indictable offence as if it were defined in the enactment creating it as a summary conviction offence.

Indictable offences

(2) For greater certainty and despite subsection (1) or any other provision of this Act, an indictable offence committed by a young person is, for the purposes of this Act or any other Act of Parliament, an indictable offence.

Attendance of young person

(3) Section 650 of the Criminal Code applies in respect of proceedings under this Act, whether the proceedings relate to an indictable offence or an offence punishable on summary conviction.

Limitation period

(4) In proceedings under this Act, subsection 786(2) of the Criminal Code does not apply in respect of an indictable offence.

Costs

(5) Section 809 [*costs before summary conviction court*] of the Criminal Code does not apply in respect of proceedings under this Act.

2002, c. 1, s. 142; 2015, c. 20, ss. 33, 36, c. 29, s. 15.
[*annotation(s) added*]

– YCJA

Screening Charges

The Attorney General is authorized to implement a program that pre-screen charges before any charges can be laid.

Consent to Prosecute
Pre-charge screening

23 (1) The Attorney General may establish a program of pre-charge screening that sets out the circumstances in which the consent of the Attorney General must be obtained before a young person is charged with an offence.

Pre-charge screening program

(2) Any program of pre-charge screening of young persons that is established under an Act of the legislature of a province or by a directive of a provincial government, and that is in place before the coming into force of this section, is deemed to be a program of pre-charge screening for the purposes of subsection (1).

– YCJA

Charges

Counts charged in information

143 Indictable offences and offences punishable on summary conviction may under this Act be charged in the same information or indictment and tried jointly.

– YCJA

Election

Multiple Accused

67
[*omitted (1), (2), (3), (4) and (5)*]

Mode of trial where co-accused are young persons

(5) When two or more young persons who are charged with the same offence, who are jointly charged in the same information or indictment or in respect of whom the Attorney General seeks joinder of counts that are set out in separate informations or indictments are put to their election, then, unless all of them elect or re-elect or are deemed to have elected, as the case may be, the same mode of trial, the youth justice court judge

> (a) may decline to record any election, re-election or deemed election for trial by a youth justice court judge without a jury, a judge without a jury or, in Nunavut, a judge of the Nunavut Court Justice without a jury; and
> (b) if the judge declines to do so, shall hold a preliminary inquiry, if requested to do so by one of the parties, unless a preliminary inquiry has been held prior to the election, re-election or deemed election.

[*omitted (6), (7), (7.1), (7.2), (8) and (9)*]
2002, c. 1, s. 67, c. 13, s. 91; 2012, c. 1, s. 178; 2019, c. 13, s. 166.

– YCJA

67
[*omitted (1), (2), (3), (4) and (5)*]

Attorney General may require trial by jury

(6) The Attorney General may, even if a young person elects under subsection (1) or (3) to be tried by a youth justice court judge without a jury or a judge without a jury, require the young person to be tried by a court composed of a judge and jury.
[*omitted (7), (7.1), (7.2), (8) and (9)*]
2002, c. 1, s. 67, c. 13, s. 91; 2012, c. 1, s. 178; 2019, c. 13, s. 166.

– YCJA

Option of Preliminary Inquiry

67
[*omitted (1), (2), (3), (4), (5) and (6)*]

Preliminary inquiry

(7) When a young person elects to be tried by a judge without a jury, or elects or is deemed to have elected to be tried by a court composed of a judge and jury, the youth justice court referred to in subsection 13(1) shall, on the request of the young person or the prosecutor made at that time or within the period fixed by rules of court made under section 17 or 155 or, if there are no such rules, by the youth justice court judge, conduct a preliminary inquiry and if, on its conclusion, the young person is ordered to stand trial, the proceedings shall be conducted

(a) before a judge without a jury or a court composed of a judge and jury, as the case may be; or
(b) in Nunavut, before a judge of the Nunavut Court of Justice acting as a youth justice court, with or without a jury, as the case may be.

Preliminary inquiry if two or more accused

(7.1) If two or more young persons are jointly charged in an information and one or more of them make a request for a preliminary inquiry under subsection (7), a preliminary inquiry must be held with respect to all of them.

When no request for preliminary inquiry

(7.2) If no request for a preliminary inquiry is made under subsection (7), the youth justice court shall fix the date for the trial or the date on which the young person must appear in the trial court to have the date fixed.

Preliminary inquiry provisions of Criminal Code

(8) The preliminary inquiry shall be conducted in accordance with the provisions of Part XVIII (procedure on preliminary inquiry) of the Criminal Code, except to the extent that they are inconsistent with this Act.

Parts XIX and XX of Criminal Code

(9) Proceedings under this Act before a judge without a jury or a court composed of a judge and jury or, in Nunavut, a judge of the Nunavut Court of Justice acting as a youth justice court, with or without a jury, as the case may be, shall be conducted in accordance with the provisions of Parts XIX (indictable offences — trial without jury) and XX (procedure in jury trials and general provisions) of the Criminal Code, with any modifications that the circumstances require, except that

> (a) the provisions of this Act respecting the protection of privacy of young persons prevail over the provisions of the Criminal Code; and
> (b) the young person is entitled to be represented in court by counsel if the young person is removed from court in accordance with subsection 650(2) of the Criminal Code.

2002, c. 1, s. 67, c. 13, s. 91; 2012, c. 1, s. 178; 2019, c. 13, s. 166.

– YCJA

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s. 64(1), (2) and 67 (6), (9), s. 13(2),(3)

Order Parents to Attend

Order requiring attendance of parent

27 (1) If a parent does not attend proceedings held before a youth justice court in respect of a young person, the court may, if in its opinion the presence of the parent is necessary or in the best interests of the young person, by order in writing require the parent to attend at any stage of the proceedings.

No order in ticket proceedings

(2) Subsection (1) does not apply in proceedings commenced by filing a ticket under the *Contraventions Act*.

Service of order

(3) A copy of the order shall be served by a peace officer or by a person designated by a youth justice court by delivering it personally to the parent to whom it is directed, unless the youth justice court authorizes service by confirmed delivery service.

Failure to attend

(4) A parent who is ordered to attend a youth justice court under subsection (1) [*order requiring attendance of parent*] and who fails without reasonable excuse, the proof of which lies on the parent, to comply with the order

(a) is guilty of contempt of court;
(b) may be dealt with summarily by the court; and
(c) is liable to the punishment provided for in the Criminal Code for a summary conviction offence.

Warrant to arrest parent

(5) If a parent who is ordered to attend a youth justice court under subsection (1) [*order requiring attendance of parent*] does not attend when required by the order or fails to remain in attendance as required and it is proved that a copy of the order was served on the parent, a youth justice court may issue a warrant to compel the attendance of the parent.

– YCJA

Subpoena

Issue of subpoena

144 (1) If a person is required to attend to give evidence before a youth justice court, the subpoena directed to that person may be issued by a youth justice court judge, whether or not the person whose attendance is required is within the same province as the youth justice court.

Service of subpoena

(2) A subpoena issued by a youth justice court and directed to a person who is not within the same province as the youth justice court shall be served personally on the person to whom it is directed.

– YCJA

Warrants

Warrant

145 A warrant issued by a youth justice court may be executed anywhere in Canada.

– YCJA

Case Conferences

See Case Management#Youth Justice

Evidence

Admissions

149 (1) A party to any proceedings under this Act may admit any relevant fact or matter for the purpose of dispensing with proof of it, including any fact or matter the admissibility of which depends on a ruling of law or of mixed law and fact.

Other party may adduce evidence

(2) Nothing in this section precludes a party to a proceeding from adducing evidence to prove a fact or matter admitted by another party.

– YCJA

Material evidence

150 Any evidence material to proceedings under this Act that would not but for this section be admissible in evidence may, with the consent of the parties to the proceedings and if the young person is represented by counsel, be given in such proceedings.

– YCJA

Evidence of a child or young person

151 The evidence of a child or a young person may be taken in proceedings under this Act only after the youth justice court judge or the justice in the proceedings has (a) if the witness is a child, instructed the child as to the duty to speak the truth and the consequences of failing to do so; and (b) if the witness is a young person and the judge or justice considers it necessary, instructed the young person as to the duty to speak the truth and the consequences of failing to do so.

– YCJA

Proof of service

152 (1) For the purposes of this Act, service of any document may be proved by oral evidence given under oath by, or by the affidavit or statutory declaration of, the person claiming to have personally served it or sent it by confirmed delivery service.

Proof of signature and official character unnecessary

(2) If proof of service of any document is offered by affidavit or statutory declaration, it is not necessary to prove the signature or official character of the person making or taking the affidavit or declaration, if the official character of that person appears on the face of the affidavit or declaration.

– YCJA

Seal not required

153 It is not necessary to the validity of any information, indictment, summons, warrant, minute, sentence, conviction, order or other process or document laid, issued, filed or entered in any proceedings under this Act that any seal be attached or affixed to it.

– YCJA

Proof of Age

Testimony of a parent

148 (1) In any proceedings under this Act, the testimony of a parent as to the age of a person of whom he or she is a parent is admissible as evidence of the age of that person.

Evidence of age by certificate or record

(2) In any proceedings under this Act,

> (a) a birth or baptismal certificate or a copy of it purporting to be certified under the hand of the person in whose custody those records are held is evidence of the age of the person named in the certificate or copy; and
> (b) an entry or record of an incorporated society that has had the control or care of the person alleged to have committed the offence in respect of which the proceedings are taken at or about the time the person came to Canada is evidence of the age of that person, if the entry or record was made before the time when the offence is alleged to have been committed.

Other evidence

(3) In the absence of any certificate, copy, entry or record mentioned in subsection (2), or in corroboration of that certificate, copy, entry or record, the youth justice court may receive and act on any other information relating to age that it considers reliable.

When age may be inferred

(4) In any proceedings under this Act, the youth justice court may draw inferences as to the age of a person from the person's appearance or from statements made by the person in direct examination or cross-examination.

– YCJA

Guilty Plea

Adjudication
When young person pleads guilty

36 (1) If a young person pleads guilty to an offence charged against the young person and the youth justice court is satisfied that the facts support the charge, the court shall find the young person guilty of the offence.

When young person pleads not guilty

(2) If a young person charged with an offence pleads not guilty to the offence or pleads guilty but the youth justice court is not satisfied that the facts support the charge, the court shall proceed with the trial and shall, after considering the matter, find the young person guilty or not guilty or make an order dismissing the charge, as the case may be.

– YCJA

Reason for Sentence

Reasons for the sentence

48 When a youth justice court imposes a youth sentence, it shall state its reasons for the sentence in the record of the case and shall, on request, give or cause to be given a copy of the sentence and the reasons for the sentence to

> (a) the young person, the young person's counsel, a parent of the young person, the provincial director and the prosecutor; and
> (b) in the case of a committal to custody under paragraph 42(2)(n), (o), (q) or (r), the review board.

– YCJA

Order of Committal

Warrant of committal

49 (1) When a young person is committed to custody, the youth justice court shall issue or cause to be issued a warrant of committal.

Custody during transfer

(2) A young person who is committed to custody may, in the course of being transferred from custody to the court or from the court to custody, be held under the supervision and control of a peace officer or in any place of temporary detention referred to in subsection 30(1) that the provincial director may specify.

Subsection 30(3) applies

(3) Subsection 30(3) (detention separate from adults) applies, with any modifications that the circumstances require, in respect of a person held in a place of temporary detention under subsection (2).

– YCJA

See Also

- Bail for Young Accused
- Sentencing Young Offenders
- Confessions by Young Persons

Appearance Before a Youth Justice

This page was last substantively updated or reviewed *January 2015*. (Rev. # 79490)

< Youth Criminal Justice
< Procedure and Practice

General Principles

Appearance
Appearance before judge or justice

32 (1) A young person against whom an information or indictment is laid must first appear before a youth justice court judge or a justice, and the judge or justice shall

(a) cause the information or indictment to be read to the young person;
(b) if the young person is not represented by counsel, inform the young person of the right to retain and instruct counsel; and
(c) if notified under subsection 64(2) (intention to seek adult sentence) or if section 16 (status of accused uncertain) applies, inform the young person that the youth justice court might, if the young person is found guilty, order that an adult sentence be imposed.
(d) [Repealed, 2012, c. 1, s. 170]

Waiver

(2) A young person may waive the requirements of subsection (1) if the young person is represented by counsel and counsel advises the court that the young person has been informed of that provision.

Young person not represented by counsel

(3) When a young person is not represented by counsel, the youth justice court, before accepting a plea, shall

> (a) satisfy itself that the young person understands the charge;
> (b) if the young person is liable to an adult sentence, explain to the young person the consequences of being liable to an adult sentence and the procedure by which the young person may apply for an order that a youth sentence be imposed; and
> (c) explain that the young person may plead guilty or not guilty to the charge or, if subsection 67(1) (election of court for trial — adult sentence) or (3) (election of court for trial in Nunavut — adult sentence) applies, explain that the young person may elect to be tried by a youth justice court judge without a jury and without having a preliminary inquiry, or to have a preliminary inquiry and be tried by a judge without a jury, or to have a preliminary inquiry and be tried by a court composed of a judge and jury and, in either of the latter two cases, a preliminary inquiry will only be conducted if requested by the young person or the prosecutor.

If youth justice court not satisfied

(4) If the youth justice court is not satisfied that a young person understands the charge, the court shall, unless the young person must be put to his or her election under subsection 67(1) (election of court for trial — adult sentence) or, with respect to Nunavut, subsection 67(3) (election of court for trial in Nunavut — adult sentence), enter a plea of not guilty on behalf of the young person and proceed with the trial in accordance with subsection 36(2) (young person pleads not guilty).

If youth justice court not satisfied

(5) If the youth justice court is not satisfied that a young person understands the matters set out in subsection (3) [*young person not represented by counsel*], the court shall direct that the young person be represented by counsel.

2002, c. 1, s. 32, c. 13, s. 91; 2012, c. 1, s. 170.
[*annotation(s) added*]

– YCJA

Right of Youth to Notify Parents

Notices to Parents
Notice in case of arrest or detention

26 (1) Subject to subsection (4), if a young person is arrested and detained in custody pending his or her appearance in court, the officer in charge at the time the young person is detained shall, as soon as possible, give or cause to be given to a parent of the young person, orally or in writing, notice of the arrest stating the place of detention and the reason for the arrest.

Notice in other cases

(2) Subject to subsection (4), if a summons or an appearance notice is issued in respect of a young person, the person who issued the summons or appearance notice, or, if a young person is released on giving a promise to appear or entering into an undertaking or recognizance, the officer in charge, shall, as soon as possible, give or cause to be given to a parent of the young person notice in writing of the summons, appearance notice, promise to appear, undertaking or recognizance.

Notice to parent in case of ticket

(3) Subject to subsection (4), a person who serves a ticket under the *Contraventions Act* on a young person, other than a ticket served for a contravention relating to parking a vehicle, shall, as soon as possible, give or cause to be given notice in writing of the ticket to a parent of the young person.

Notice to relative or other adult

(4) If the whereabouts of the parents of a young person are not known or it appears that no parent is available, a notice under this section may be given to an adult relative of the young person who is known to the young person and is likely to assist the young person or, if no such adult relative is available, to any other adult who is known to the young person and is likely to assist the young person and who the person giving the notice considers appropriate.

Notice on direction of youth justice court judge or justice

(5) If doubt exists as to the person to whom a notice under this section should be given, a youth justice court judge or, if a youth justice court judge is, having regard to the circumstances, not reasonably available, a justice may give directions as to the person to whom the notice should be given, and a notice given in accordance with those directions is sufficient notice for the purposes of this section.

Contents of notice

(6) Any notice under this section shall, in addition to any other requirements under this section, include

(a) the name of the young person in respect of whom it is given;

(b) the charge against the young person and, except in the case of a notice of a ticket served under the *Contraventions Act*, the time and place of appearance; and
(c) a statement that the young person has the right to be represented by counsel.

Notice of ticket under *Contraventions Act*

(7) A notice under subsection (3) shall include a copy of the ticket.

Service of notice

(8) Subject to subsections (10) and (11), a notice under this section that is given in writing may be served personally or be sent by confirmed delivery service.

Proceedings not invalid

(9) Subject to subsections (10) and (11), failure to give a notice in accordance with this section does not affect the validity of proceedings under this Act.

Exception

(10) Failure to give a notice under subsection (2) in accordance with this section in any case renders invalid any subsequent proceedings under this Act relating to the case unless

(a) a parent of the young person attends court with the young person; or
(b) a youth justice court judge or a justice before whom proceedings are held against the young person

(i) adjourns the proceedings and orders that the notice be given in the manner and to the persons that the judge or justice directs, or
(ii) dispenses with the notice if the judge or justice is of the opinion that, having regard to the circumstances, the notice may be dispensed with.

Where notice is not served

(11) Where there has been a failure to give a notice under subsection (1) or (3) in accordance with this section and none of the persons to whom the notice may be given attends court with the young person, a youth justice court judge or a justice before whom proceedings are held against the young person may

(a) adjourn the proceedings and order that the notice be given in the manner and to the persons that the judge or justice directs; or
(b) dispense with the notice if the judge or justice is of the opinion that, having regard to the circumstances, the notice may be dispensed with.

Exception for persons over the age of twenty

(12) This section does not apply to a person who is alleged to have committed an offence while a young person, if the person has attained the age of twenty years at the time of his or her first appearance before a youth justice court in respect of the offence.

– YCJA

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