

PRETRIAL RELEASE

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The right not to be denied reasonable bail without just cause is an essential element of an enlightened criminal justice system. It entrenches the effect of the presumption of innocence at the pre-trial stage of the criminal trial process and safeguards the liberty of accused persons.

R v Antic 2017 SCC 27

HISTORY

Bail has deep historical roots in Canada as well. Canadian law reflected the English law of bail until Parliament enacted legislation in 1869 that made bail discretionary for all offences

It was presumed that an accused person would be detained prior to trial unless he or she applied for bail

HISTORY

Prior to 1971 there were three forms of release:

- (a) release with sufficient sureties upon entering into a recognizance,
- (b) release upon making a cash deposit, and
- (c) release upon entering into a recognizance without a cash deposit

HISTORY

1971 Bail Reform Act amended provisions of the Criminal Code, most importantly:

- (a) Giving police limited power to release a person on an appearance notice rather than arrest
- (b) Giving police limited powers to release an arrested person
- (c) The ladder principle

Constitutional Protection for Bail Pending Trial

1982 – Canada repatriated it's constitution from Great Britain

Charter of Rights and Freedoms enshrined individual rights including

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

Constitutional Protection for Bail Pending Trial

This created a basic entitlement to be granted reasonable bail unless there is just cause to do otherwise.

A major change in our law – from presumed detention to presumed release.

Release on Arrest and Charge

(a) By the Police

(b) By a Judicial Officer (Judge or Justice of the Peace)

CANADIAN CRIMINAL TRIAL COURT STRUCTURE

- SUPERIOR COURT OF CRIMINAL JURISDICTION – Highest trial court in each province – Made up of federally appointed judges – they are courts of inherent jurisdiction – the King's Court (High Court)
- COURT OF CRIMINAL JURISDICTION – Lower trial court in each province – made up of judges and justices of the peace appointed by the Province

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POLICE MAY RELEASE ON ARREST

- (a) Summons (s.509)
- (b) Appearance Notice (s. 500)
- (c) Undertaking to an Office (s.501)

SUMMONS

- Police commence a proceeding by swearing that an offence has occurred (Information)
- Justice of the Peace on the strength of the Information may issue a summons
- Summons is directed to the accused, it is to briefly set out the nature of the offence alleged and it is to order them to attend court

APPEARANCE NOTICE

- Prepared by the police
- Provided to the accused
- Describes the substance of the offence
- Requires the accused to attend court at a specified date and time and thereafter as required

UNDERTAKING

- (a)** report at specified times to the peace officer or other specified person;
- (b)** remain within a specified territorial jurisdiction;
- (c)** notify the peace officer or other specified person 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 undertaking, except in accordance with any specified conditions;
- (e)** abstain from going to any specified place or entering any geographic area related to any person referred to in paragraph (d), except in accordance with any specified conditions;

UNDERTAKING

(f) deposit all their passports with the peace officer or other specified person;

(g) reside at a specified address, be at that address at specified hours and present themselves at the entrance of that residence to a peace officer or other specified person, at the officer's or specified person's request during those hours;

(h) abstain from possessing a firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, and surrender those that are in their possession to the peace officer or other specified person and also any authorization, licence or registration certificate or other document enabling them to acquire or possess them;

UNDERTAKING

(i) promise to pay an amount specified in the undertaking, which shall not be more than \$500, if they fail to comply with any condition of the undertaking;

(j) deposit, with the peace officer specified in the undertaking, money or other valuable security whose value does not exceed \$500 if, at the time of giving the undertaking, the accused is not ordinarily resident in the province or does not ordinarily reside within 200 kilometres of the place in which they are in custody; and

(k) comply with any other specified condition for ensuring the safety and security of any victim of or witness to the offence.

BAIL HEARINGS

HEARD BY:

- JUSTICE OF THE PEACE (Court of Criminal Jurisdiction)
- JUDGE (Court of Criminal Jurisdiction)
- JUDGE (Superior Court of Justice) for specific offences like murder, treason

BAIL HEARINGS

Accused persons have the right to a bail hearing within 24 hours of being arrested if a judge or justice of the peace is available, or as soon as possible thereafter if one isn't.

R v Simonelli 2021 ONSC 354

- Three accused arrested as part of a major police project
- Because of the length of the bail hearing a special bail hearing date needed to be set. Crown estimated two days.
- Bail hearing held twelve days after arrest – Accused released
- The defence brought an application to stay the prosecution for failure to adhere to the requirement for a timely bail hearing

R v Simonelli 2021 ONSC 354 at para 141

A stay is a drastic, rarely imposed remedy. The “clearest of cases” and the balancing process are both to ensure that only exceptional cases are stayed. To deprive the state of the right to prosecute such serious criminal allegations must be a last resort. In the circumstances of this case, the price of a stay is undeniably steep. Against these considerations, however, a reasonable, informed member of the public would be offended and shocked by the long-standing problem of delays in having special bails heard in Brampton and the probability that these delays will continue.

RELEASE PENDING TRIAL

R v Simonelli 2021 ONSC 354

In view of the fundamental importance of Section 11(e), fair play and decency have not been maintained. Bail delays of the nature and extent demonstrated are a blot on the administration of justice. Pervasive, substantial delays in adjudicating on the accused's liberty after arrest, a vital judicial function, lie very high on the scale of egregiousness. A system that cannot provide an accused with the basic entitlement of a bail hearing with reasonable promptitude is broken on the most fundamental level.

BURDEN AT BAIL

- Prosecutor bears burden to show that the accused should not be released
- For certain designated offences (s.469) the accused must show cause why he should be released – these are offences such as murder, treason – the bail hearing is in the Superior Court of Justice

THE TEST FOR BAIL

1. The primary ground for detention is to ensure attendance in court to be dealt with according to law.
2. The secondary ground for detention is to ensure the protection and safety of the public, including the victims and witnesses.
3. The tertiary ground for detention is to maintain the confidence in the administration of justice, having regard to all the circumstances.

Primary Ground – Securing Attendance

The non-exhaustive factors to be considered for this ground include:

- An accused's connections in their community or in other jurisdictions;
- The accused's character;
- Level of potential supervision;
- Motives to flee – the fact of facing a serious charge alone is insufficient;
- The release plan;
- Presence and availability of sureties;
- The accused's trustworthiness; and
- The accused's history of breaching Court Orders, is not alone determinative.

Secondary Ground – Risk of Re-Offending

Factors to consider for this ground include:

- The circumstances of the offence
- Mental health or addiction issues
- Strength of the Crown's case
- The Accused's criminal record
- The potential length of the sentence
- History of breaching Court Orders

The Court must consider whether any presenting concerns can be managed by terms of release

Tertiary Ground – Maintaining Confidence in the Administration of Justice

- Strength of the Crown's case
- Seriousness of the offence
- Circumstances of the offence: presence of violence, the involvement of other's the circumstances of the alleged victim
- Confidence of a reasonable member of the community properly informed of the philosophy of the relevant legislative provisions, Charter values, the presumption of innocence and the actual circumstances of the case

Indigenous Accused Persons

If the accused person is Indigenous, the Court must take consider:

- Their Indigenous background; and
- The impact and history of discrimination against Indigenous Peoples by Canada and the criminal justice system (systemic discrimination).

This is a factor to consider on bail applications as it reflects the reality that Indigenous persons have been the victims of systemic racism that has resulted in over incarceration

TERMS OF RELEASE (R v Zora 2020 SCC 14 at para 89)

- Principle of restraint – the default is a release without conditions
- If conditions are sought, the court should ask if they are necessary, what is the consequence of not imposing the condition
- Is the condition reasonable
- Is the condition sufficiently linked to the risk posed

TERMS OF RELEASE - (R v Antic 2017 SCC 27 at para 68)

- Accused persons are presumed innocent meaning there is a constitutional right to bail
- The ladder principle must be adhered to – preferencing the least onerous form of release – each rung of the ladder must be considered
- Crown must show its proposed terms are necessary
- Surety should not be imposed unless the other forms of release have been considered and rejected

TYPICAL TERMS OF RELEASE

- Residency requirement
- Reporting requirement
- Weapons prohibition
- No contact with alleged victim(s)
- Surrender travel documents
- Geographic restrictions – use of electronic monitoring

Reviewing The Court of Criminal Jurisdiction Bail Decision

Either party may review bail decision, the review is in the Superior Court:

- s. 520 permits the accused to review
- s. 521 permits the Prosecutor (Crown) to review

The review includes a consideration of the decision to detail/release as well as a review of the terms of release - No further review is permitted for thirty days except with leave of the court

Reviewing The Superior Court of Justice Bail Decision

- The scope of the review is the same but it takes place in the Court of Appeal as follows:
 - With permission (leave) of the Chief Justice of the province
 - Who will then refer the matter to a panel of the Court of Appeal for the province or on consent of the parties a single judge of the Court of Appeal

Reviewing The Court of Appeal Bail Decision

- The Criminal Code does not provide for a further review as the Chief Justice's statutory power is over a Superior Court's decision
- Where there is an important change in circumstance – one should approach the Chief Justice to obtain a hearing – in some instances hearings have been granted

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AFTERMATH

Pierre Poilievre (Conservative Leader): government should "reverse its catch and release bail policy" referring to the 2019 updated bail provisions – January 14, 2023
Toronto Sun (<https://torontosun.com/news/national/premiers-demand-bail-reform-in-letter-to-trudeau-after-killing-of-opp-officer>); Calling our bail laws
Trudeau's broken bail system

Danielle Smith (Premier of Alberta) - Tweeted "All of Canada's Premiers agree: it is time to strengthen Canada's criminal code to better protect all Canadians. Alberta is resolved to see meaningful changes in our bail system, including reverse onus for those charged with firearms-related offences."

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AFTERMATH

Mark Baxter President of the Police Association of Ontario - "Our members have stopped referring to the court and the prison system as a revolving door. For them and for the communities they serve, it no longer feels like the door is revolving. But instead, it is simply wide open." – Toronto Sun Feb 1, 2023 (<https://torontosun.com/news/provincial/ford-says-hell-make-his-own-bail-changeswhile-waiting-on-trudeau>)

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January 13, 2023

The Right Honourable Justin Trudeau
Prime Minister of Canada
Office of the Prime Minister
80 Wellington Street
Ottawa, ON K1A 0A2

Dear Prime Minister Trudeau:

We write to urge that the federal government take immediate action to strengthen Canada's bail system to better protect the public and Canada's heroic first responders.

There have been a growing number of calls for changes to prevent accused persons, who are out on bail, from committing further criminal acts. The justice system fundamentally needs to keep anyone who poses a threat to public safety off the streets. And this starts with meaningful changes to the *Criminal Code*, an area solely within the federal government's jurisdiction.


As you know, this was the subject of an intense discussion at the October 2022 meeting of Federal-Provincial-Territorial Ministers of Justice and Public Safety in Dartmouth. This meeting led to a clear and unified call to action for the federal government to reform Canada's bail system.

A reverse onus on bail must be created for the offence of possession of a loaded prohibited or restricted firearm in s. 95 of the *Code*. A person accused of a s. 95 offence should have to demonstrate why their detention is not justified when they were alleged to have committed an offence where there was imminent risk to the public, as is already the case with several offences involving firearms. A review of other firearms-related offences is also warranted to determine whether they should also attract a reverse onus on bail.

This is just one proposal for much-needed reform, and we would welcome the opportunity to work with you and your government on this pressing and important issue. As premiers, we will continue to do everything in our power to keep the public safe, and it is our hope the federal government will do the same. With that in mind, we are once again calling on the federal government to make this change and commit to a thorough review of the bail system in Canada. The public safety of Canadians and our heroic first responders cannot wait. The time for action is now.

Sincerely,


Doug Ford
Premier of Ontario


François Legault
Premier of Québec



Tim Houston
Premier of Nova Scotia


Blaine Higgs
Premier of New Brunswick


Heather Stefanson
Premier of Manitoba


Caroline Cochrane
Premier of Northwest Territories


David Eby
Premier of British Columbia



Dennis King
Premier of Prince
Edward Island


Ranj Pillai
Premier-designate of Yukon


Scott Moe
Premier of Saskatchewan


Danielle Smith
Premier of Alberta


Dr. Andrew Furey
Premier of Newfoundland and
Labrador


P.J. Akeeagok
Premier of Nunavut

cc:
The Honourable Dominic LeBlanc, Minister of Intergovernmental Affairs, Infrastructure
and Communities
FPT Ministers responsible for Justice and Public Safety

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PREMIERS SEEK

- A REVIEW OF FIREARM OFFENCES TO DETERMINE WHICH SHOULD BE REVERSE ONUS MEANING THE ACCUSED MUST SHOW CAUSE
- VAGUE CALL TO STRENGTHEN THE BAIL SYSTEM TO PROTECT “HERI OC FIRST RESPONDERS”

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CONCLUDING REMARKS