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The Impact of the Supreme Court of Canada on the Law of Bail

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The Supreme Court of Canada, through a series of judgments, has had a significant impact on the law of judicial interim release (or "bail") in Canada. As will be seen, this impact has occurred in relation to the law of bail at both the trial and appellate level and includes two decisions rendered this year. In this column I intend to examine this impact by briefly reviewing the law of bail in Canada and then illustrating the significant impact of the Supreme Court of Canada's decisions in this area.

The starting point is that in Canada, bail is entirely a creature of statute. It is solely governed by the provisions of Canada's Criminal Code, R.S.C 1985, c C-46 (Can.) at both the trial and appellate level. It also has constitutional status.

THE CRIMINAL CODE OF CANADA'S BAIL PROVISIONS-TRIAL LEVEL

Section 515(10) of the Criminal Code sets out the only grounds upon which a trial judge can deny judicial interim release to an accused person in Canada. For bail to be denied it must be established that (1) the accused will fail to appear in court; (2) it is necessary to protect the public; or (3) it is necessary to maintain the public's confidence in the administration of justice. These grounds are described in sections 515(10)(a) to (c), and they indicate that:

> [T]he 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, having regard to all the circumstances including any substantial likelihood that the accused will, if released from custody, commit a criminal offence or interference 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.[1]

There is no inherent or incidental judicial authority in Canada in relation to the granting or denying of bail. The onus to establish that bail should be denied is generally on the Crown[2], but there are situations where the accused person must establish that their release is warranted.[3] The same provisions apply to both.

Bail hearings are heard in the Provincial Court (or by a justice of the peace in some provinces) unless the accused is charged with an offence listed in section 469 of the Criminal Code.[4] If so, the bail hearing is held in the Superior Court. The list of offences set out in section 469 includes the offences of murder, treason, piracy, and "alarming Her Majesty."

BAIL REVIEW

If bail is denied in the Provincial Court, an accused person can seek to have this decision reviewed by the Superior Court of the province.

In *R. v. St-Cloud*, 2015 SCC 27, the Supreme Court of Canada considered the role of a superior court judge in reviewing a bail decision made by a provincial court judge. In *St-Cloud* the accused was denied release by a justice of the peace. The accused applied for review by a Superior Court Judge pursuant to section 520 of the Criminal Code.[5] The reviewing judge concluded that the accused should be released on the basis that his detention was not necessary under section 515(10)(c). The Crown appealed to the

Footnotes

1. If the accused is a "young person" (i.e., 12 to 17 years of age) bail is governed by the Youth Criminal Justice Act, S.C. 2002, c C-1 (Can.). This Act contains its own bail provisions, which are similar but not identical to the Canadian Criminal Code (see sections 28 and 29). In addition, a bail judge who decides that a young person should otherwise be detained can release the accused into the "care of a responsible person" (see section 31).
2. Criminal Code, R.S.C. 1985, c C-46, s 515(2) (Can.).
3. Code, R.S.C. 1985, c C-46, s 515(6) (Can.).
4. Criminal Code, R.S.C. 1985, c C-46, s 522 (Can.).
5. Section 520 of the Criminal Code states as follows:

> If a justice, or a judge of the Nunavut Court of Justice, makes an order under subsection 515(2), (5), (6), (7), (8) or (12) or makes or vacates any order under paragraph 523(2)(b), the accused may, at any time before the trial of the charge, apply to a judge for a review of the order.

Supreme Court of Canada. The appeal was allowed and the detention order restored.

On the issue of bail review the Supreme Court held that the exercise of the review power contained within section 520 of the Criminal Code is prescribed and "will be appropriate in only three situations" (at paragraph 6):

> (1) where there is admissible new evidence; (2) where the impugned decision contains an error of law; or (3) where the decision is clearly inappropriate. In the last of these situations, a reviewing judge cannot simply substitute his or her assessment of the evidence for that of the justice who rendered the impugned decision. It is only if the justice gave excessive weight to one relevant factor or insufficient weight to another that the reviewing judge can intervene.

The Supreme Court noted, at paragraph 92 of *St-Cloud*, that section 520 of the Criminal Code does "not confer an open ended discretion on the reviewing judge to vary the initial decision concerning the detention or release of the accused. Nonetheless, they establish a hybrid remedy and therefore provide greater scope than an appeal for varying the initial order." The Court indicated that section 520 does "not provide for a *de novo* hearing" (at paragraph 94). The Supreme Court concluded that the reviewing judge "does not have the power to interfere with the initial decision simply because he or she would have weighed the relevant factors differently," but a reviewing judge "may vary the initial decision if that evidence shows a material and relevant change in the circumstances of the case" (at paragraph 121).

BAIL ON APPEAL

If an accused person is convicted of an offence he or she can seek bail in the Provincial Court of Appeal if they have appealed against conviction or sentence. Section 679(3) of the Criminal Code allows a Court of Appeal to grant bail when an appeal against conviction has been filed in the following circumstances:

> In the case of an appeal referred to in paragraph (1)(a) or (c), 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.

On March 23, 2017, the Supreme Court of Canada released its decision in *R. v. Oland*, 2017 SCC 17. In *Oland* the accused was convicted of second-degree murder. He appealed and applied to the Court of Appeal for judicial interim release. His application was denied.

Reasonable bail in Canada is protected by the Canadian Constitution.

On appeal to the Supreme Court of Canada it was held that the accused should have been released by the Court of Appeal. The Supreme Court considered section 679(3) and concluded that the appeal court judge (at paragraph 69):

> [D]id not apply the correct test in assessing the strength of Mr. Oland's appeal and the implications flowing from it. Much as he was satisfied that Mr. Oland had raised "clearly arguable" grounds of appeal, this was not enough. . . . [H]is reasons show[], he required more, something in the nature of unique circumstances that would have virtually assured a new trial or an acquittal.[6]

THE CONSTITUTIONAL CONTEXT

Reasonable bail in Canada is protected by the Canadian Constitution. Section 11(e) of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, indicates as follows: "Any person charged with an offence has the right . . . . (e) not to be denied reasonable bail without just cause."

In *R. v. Morales*, [1992] 3 S.C.R. 711, the Supreme Court of Canada considered this constitutional requirement and stated that bail "is not denied for all individuals who pose a risk of committing an offence or interfering with the administration of justice while on bail. Bail is denied only for those who pose a 'substantial risk' of committing an offence or interfering with the administration of justice, and only where this 'substantial likelihood' endangers 'the protection or safety of the public'" (at paragraph 39).

On June 1st, 2017, the Supreme Court of Canada rendered its judgment in *R. v. Antic*, 2017 SCC 27, in which it once again considered section 11(e) of the Charter. The Supreme Court indicated that the words "just cause" in section 11(e) of the Charter is used in "two contexts" (at paragraphs 33 and 34):

> First, as used in s. 11(*e*) of the *Charter*, "just cause" relates to the circumstances in which denying bail is constitutional: an accused has a constitutional entitlement to be granted bail unless there is "just cause" to deny it.
>
> Second, the expression "just cause" is also commonly used to describe the statutory grounds that justify the pre-trial detention of an accused. These

6. In *R. v. Adem*, [2017] 2017 ABCA 242, [2017] CarswellAlta 1310, para. 27 (Can. Alta.), *Oland* was considered and the Alberta Court of Appeal held that *Oland* suggests that "unless there are other considerations that call for continued incarceration, including the seriousness of the offence, residual public safety concerns or flight risk, the law appears to favour release once an applicant has established that his appeal clearly surpasses the 'not frivolous' hurdle."

The Supreme Court cautioned against setting the amount of a surety or cash deposit "so high as to effectively constitute a detention order."

grounds, which are enumerated in s. 515(10) of the *Code*, are flight risk, public safety and public confidence in the administration of justice. In most cases, it is presumed that the accused should be released, and he or she will not be detained unless the Crown can show on the basis of these statutory criteria that detention is warranted.

The Court stated, at paragraph 40 of *Antic*, that:

> A provision may not deny bail without "just cause[.]" The right not to be denied bail without just cause imposes a constitutional standard that must be met for the denial of bail to be valid. . . . [T]here is just cause to deny bail only if the denial (1) occurs in a "narrow set of circumstances" and (2) the denial of bail "is necessary to promote the proper functioning of the bail system and is not undertaken for any purpose extraneous to the bail system."

The Court also indicated that (at paragraph 41):[7]

> [The] right not to be denied reasonable bail without just cause protects accused persons from conditions and forms of release that are unreasonable. The French version of s. 11(*e*) bears this out: a person charged with an offence has the right to a release "assortie d'un cautionnement raisonnable" ("in conjunction with reasonable bail[.]")

REASONABLE BAIL AND CASH DEPOSITS

In *Antic*, the Supreme Court made a number of comments concerning the problems caused by requiring an accused person to make a cash deposit to secure their release. The Court noted that the "central purpose of the *Bail Reform Act* was to avoid the harsh effects on accused persons of requiring cash deposits where other avenues of release are available" (at paragraph 48). The Supreme Court cautioned against setting the amount of a surety or cash deposit "'so high as to effectively constitute a detention order'" (at paragraph 56). It held that a bail judge has a "positive obligation 'to make inquiries into the ability of the accused to pay'" (at paragraph 56). The Supreme Court indicated that the requirement for cash can result in "increased incarceration of accused persons" (at paragraph 59):

> [R]equiring cash as a condition of release has the potential to result in increased incarceration of accused persons. Cash bail does not give impecunious persons greater access to bail. Rather, requiring a cash deposit will often prevent an accused person from being released, as it did for many months in Mr. Antic's case. Professor Friedland observed in his study that a majority of accused persons who were required to deposit security as a condition of release were unable to raise the necessary funds: *Detention before Trial*, at pp. 130 and 176. An accused person's release should not be contingent on his or her ability "to marshal[] funds or property in advance."

SECTION 515(10)(C)

As we have seen, section 515(10)(c) of the Criminal Code allows bail to be denied if it "is necessary to maintain confidence in the administration of justice." In *R. v. Hall*, 2002 SCC 64, the Supreme Court considered section 515(10)(c) of the Criminal Code. As we saw earlier the present wording of section 515(10)(c) is very specific as regards the four factors to be considered. An earlier version of this section was drafted in much broader terms. The wording at the time *Hall* was decided was as follows (at paragraph 64):

> For the purposes of this section, the detention of an accused in custody is justified only on one or more of the following grounds:
> . . . .
> (c) on any other just cause being shown and without limiting the generality of the foregoing, where the detention is necessary 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.

The Court's decision in *Hall* forced Parliament to enact the present wording found in section 515(10)(c) because the Supreme Court of Canada concluded in *Hall* that the

7. In *United States v. Salerno*, 481 U.S. 739, 755 (1987), the Supreme Court of the United States upheld the constitutionality of the *Bail Reform Act* concluding:

> In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception. We hold that the provisions for pretrial detention in the Bail Reform Act of 1984 fall within that carefully limited exception. The Act authorizes the detention prior to trial of arrestees charged with serious felonies who are found after an adversary hearing to pose a threat to the safety of individuals or to the community which no condition of release can dispel. The numerous procedural safeguards detailed above must attend this adversary hearing. We are unwilling to say that this congressional determination, based as it is upon that primary concern of every government —a concern for the safety and indeed the lives of its citizens—on its face violates either the Due Process Clause of the Fifth Amendment or the Excessive Bail Clause of the Eighth Amendment.

words "on any other just cause being shown" in the former section 515(10)(c) of the Criminal Code violated section 11(e) of the Charter were, "void" and therefore "severed" from the section (see paragraphs 44 and 45).

"ANY OTHER JUST CAUSE"

In *Hall* the Court quickly concluded that these words violated section 11(e) of the Charter and could not be "saved" by section one.[8] The Court summarized its conclusion in the following manner (at paragraph 22):

> The first phrase of s. 515(10)(c) which permits denial of bail "on any other just cause being shown" is unconstitutional. Parliament cannot confer a broad discretion on judges to grant bail, but must lay out narrow and precise circumstances in which bail can be denied: *Pearson* and *Morales*, *supra*. This phrase does not specify any particular basis upon which bail could be denied. The denial of bail "on any other just cause" violates the requirements enunciated in *Morales*, *supra*, and therefore is inconsistent with the presumption of innocence and s. 11(*e*) of the *Charter*.

"NECESSARY TO MAINTAIN CONFIDENCE IN THE ADMINISTRATION OF JUSTICE"

However, the Supreme Court reached the opposite conclusion in *Hall* as regards the effect of the words "confidence in the administration of justice" in section 515(10)(c). The Court concluded that it is appropriate in particular circumstances to deny bail on this basis alone (at paragraph 31):

> [A] provision that allows bail to be denied on the basis that the accused's detention is required to maintain confidence in the administration of justice is neither superfluous nor unjustified. It serves a very real need to permit a bail judge to detain an accused pending trial for the purpose of maintaining the public's confidence if the circumstances of the case so warrant. Without public confidence, the bail system and the justice system generally stand compromised. While the circumstances in which recourse to this ground for bail denial may not arise frequently, when they do it is essential that a means of denying bail be available.

VOID FOR VAGUENESS

The accused in *Hall* had also argued that the words "confidence in the administration of justice" were unconstitutionally vague. The Court concluded that this portion of subsection 515(10)(c) provided "an intelligible standard for debate" and was therefore not void for vagueness (at paragraph 38). Similarly, these words were held by the Court not to be overly broad. The Court expressed the basis for this conclusion in the following manner (at paragraph 41):

> The judge cannot conjure up his own reasons for denying bail; while the judge must look at all the circumstances, he must focus particularly on the factors Parliament has specified. At the end of the day, the judge can only deny bail if satisfied that in view of these factors and related circumstances, a reasonable member of the community would be satisfied that denial is necessary to maintain confidence in the administration of justice. . . . For these reasons, the provision does not authorize a "standardless sweep" nor confer open-ended judicial discretion. Rather, it strikes an appropriate balance between the rights of the accused and the need to maintain justice in the community. In sum, it is not overbroad.

The Supreme Court . . . indicated that a judge . . . must before denying release . . . "be satisfied that detention is not only advisable but necessary."

THE TEST TO BE APPLIED PURSUANT TO SECTION 515(10)(C)

In addition to considering the constitutional status of section 515(10)(c), the Supreme Court also considered in *Hall* how the provision was to be applied by bail judges. The Supreme Court of Canada indicated, at paragraph 41, that a judge conducting a bail hearing must before denying release pursuant to this provision "be satisfied that detention is not only advisable but *necessary*." The Court also indicated in *Hall* that the specific factors set out in section 515(10)(c) "delineate a narrow set of circumstances under which bail can be denied on the basis of maintaining confidence in the administration of justice" (at paragraph 40).

After *Hall*, there were decisions suggesting that *Hall* had interpreted 515(10)(c) of the Criminal Code in such a manner that it should be applied sparingly. In *R. v. LaFramboise*, [2005] O.J. No. 5785, 2005 CarswellOnt 8335 (Can. Ont.), for instance, the Ontario Court of Appeal interpreted *Hall* as standing for the proposition that section 515(10)(c) should be used to deny bail "sparingly" and its use "will be justified only in rare cases" (at paragraph 30).

However, in *St-Cloud*, the Supreme Court indicated, at paragraph 5, that section 515(10)(c) has been "unduly restricted by the courts in some cases." It rejected the proposition that the denial of bail pursuant to section 515(10)(c) of the Criminal Code is "limited to exceptional circumstances" (at paragraph 54):

> In conclusion, the application of s. 515(10)(c) is not limited to exceptional circumstances, to "unexplainable" crimes or to certain types of crimes such as murder. The Crown can rely on s. 515(10)(c) for any type of crime, but it must prove — except in the cases provided for in

8. Section one of the Charter states: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Canadian Charter of Rights and freedoms, Part I of the Constitution Act, 1982.

"The ladder principle . . . prohibits a justice or a judge from imposing a more onorous form of release unless the Crown shows why a less onorous form is inappropriate . . . ."

s. 515(6) — that the detention of the accused is justified to maintain confidence in the administration of justice.

This constituted a monumental shift in the law of bail in Canada. In *R. v. A.A.C.*, [2015] 2015 ONCA 483 (Can. Ont.) for instance, the Ontario Court of Appeal indicated that in *St-Cloud*, the Supreme Court rejected "an unduly restrictive interpretation of the section's scope and holds that the tertiary ground for detention is not to be interpreted narrowly or applied sparingly" (at paragraph 47).

The Supreme Court also indicated in *St-Cloud*, at paragraph 69, that:

> The four listed circumstances are simply the main factors to be balanced by the justice, together with any other relevant factors, in determining whether, in the case before him or her, detention is necessary in order to achieve the purpose of maintaining confidence in the administration of justice in the country. This is the provision's purpose. Although the justice must consider all the circumstances of the case and engage in a balancing exercise, this is the ultimate question the justice must answer, and it must therefore guide him or her in making a determination.

Subsequently in *Oland*, the Supreme Court indicated that in assessing public confidence concerns pursuant to section 515(10)(c), "the seriousness of the crime plays an important role. The more serious the crime, the greater the risk that public confidence in the administration of justice will be undermined if the accused is released on bail pending trial" (at paragraph 37). Similarly in *St-Cloud* the Supreme Court concluded (at paragraph 88): "In conclusion, if the crime is serious or very violent, if there is overwhelming evidence against the accused and if the victim or victims were vulnerable, [pretrial] detention will usually be ordered."

THE LADDER PRINCIPLE

Sections 515(2)(a) to (e) of the Criminal Code set out the forms of release available to a judge conducting a bail hearing. It is often referred to as the "ladder principle" because it begins with release on "such conditions as the justice directs" and ends with section 515(2)(e), which allows a bail judge to order, if the accused is from out of the province or does not ordinarily reside within two hundred kilometers of the place in which he or she is in custody, that the accused be released with sureties and/or a cash deposit.

In *Antic*, the Supreme Court of Canada considered this provision. In *Antic*, the accused was charged with several offences. He was denied judicial interim release at the trial level. On review, the reviewing judge indicated that he would have released the accused if he could have imposed both a surety and a cash deposit as release conditions but section 515(2)(e) of the Criminal Code did not apply. On a second application for review, the bail review judge held that the geographical limitation in section 515(2)(e) of the Criminal Code violated the right not to be denied reasonable bail without just cause under section 11(e) of the Charter.

The Supreme Court reversed the declaration that section 515(2)(e) of the Criminal Code was unconstitutional. The Supreme Court noted that "[s]ection 515(2)(e) did not have the effect of denying Mr. Antic bail — it was the bail review judge's misapplication of the bail provisions that did so" because "Mr. Antic had offered to provide sureties with a monetary pledge. . . . He could have been released without a cash deposit" (at paragraphs 3-5).

As regards the "ladder principle," the Supreme Court indicated in *Antic* that:

> 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: "The justice shall not make an order under any of paragraphs (2)(b) to (e) unless the prosecution shows cause why an order under the immediately preceding paragraph should not be made'" (at paragraph 47).[9]

The Supreme Court concluded in *Antic* that the application judge made two errors (at paragraphs 52 to 54):

> First, the bail review judge failed to apply the ladder principle properly. Although he purported to apply it, he erred by insisting on cash despite the existence of other forms of release. The bail review judge was fixated on a cash deposit because he believed the erroneous assumption that cash is more coercive than a pledge. But, as I explained above, a recognizance is functionally equivalent to cash bail and has the same coercive effect. The bail review judge should not have insisted on a cash deposit where the accused could have entered into a recognizance with a surety (the effect of which is that the surety joins in acknowledging the debt to the Crown).
>
> The bail review judge's second error may in fact have influenced the first. He expressed concern that the "pull of bail" would not be strong enough without a cash deposit. Because the proposed surety was an elderly

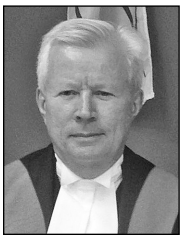
9. In *R. v. Beairsto*, 2017 ABCA 254, para. 9 (Can. Alta.), it was held that the "direction in *R. v Antic*" that "the bail provisions must be applied consistently and fairly throughout Canada relates to the conditions of release, and does not invite comparing the factual backgrounds of individual cases in determining whether release should be granted. Every case depends on its own facts."

woman, the bail review judge was concerned that Mr. Antic might believe that a forfeiture proceeding would not be taken against her if he breached his bail terms.

The bail review judge erred in making his decision on the basis of such conjecture. A justice or a judge cannot impose a more onerous form of release solely because he or she speculates that the accused will not believe in the enforceability of a surety or a pledge. The bail system is based on the promises to attend court made by accused persons and on their belief in the consequences that will follow if such promises are broken. As Rosenberg J.A. rightly observed, "if accused came to believe that they could fail to attend court without their sureties suffering any penalty, the surety system would be ineffective. (Citation omitted.)"

CONCLUSION

As illustrated the Supreme Court of Canada has considered numerous aspects of the law of bail in Canada. The Court has assessed and explained the constitutional context of bail in Canada, and it has conclusively set out the manner in which bail is to be considered by bail judges. In the long term, the most significant impact of the Supreme Court of Canada's decisions on bail may be the importance it has placed upon avoiding pretrial detention based solely on financial means.



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