2 Judicial Interim Release

I. Release from the Police Station on an Undertaking and Promise to Appear (Forms 10 and 11)

The most efficient, and typically least onerous, form of bail is a release from the police station on a Promise to Appear and an Undertaking. This form of release is not uncommon in cases of fraud, particularly where the accused has no criminal record.

In circumstances where counsel learns that a client is going to be charged with fraud or a fraud-related offence, counsel should work with the police to arrange a time for the surrender of the client. Hopefully the client's good faith in being willing to surrender voluntarily to the police, and any other relevant factors communicated by counsel (e.g., lack of record, roots in the community, prior cooperation with the authorities, and/or restitution), will be sufficient to persuade the authorities to release the accused from the station on an appearance notice or an undertaking. Given the non-violent nature of the offence, there should be very few instances where detention and a bail hearing are required, unless there are concerns that the offender may flee the jurisdiction or there is a past history of convictions for fraud or fraud-related offences or the person is already out on a release order for a prior fraud, which would make the situation reverse onus.

If the police decide that conditions are required, the terms of an undertaking should be sufficient to satisfy any concerns the police may have about appearing in court (e.g., terms not to travel outside the jurisdiction or to surrender a passport pursuant to section 501(3)(f)) or reoffending (e.g., term restricting the possession of certain items, such as banking documents or credit cards in others' names). However, counsel should be vigilant and work with the police to ensure that any restrictions imposed as a term of the undertaking do not prevent the accused from continuing with any lawful employment (e.g., travel restrictions when the accused must travel for work or prohibition of possessing financial documents when doing so is a necessary part of the accused's employment).

If, despite the best efforts of counsel, the terms of the undertaking are problematic for the accused, then counsel can immediately contact the Crown's office to seek a consent variation, pursuant to section 502(1) of the *Criminal Code*. Hopefully, this will result in an amelioration of the accused's conditions. However, if it does not, counsel can bring an application to a justice for a release order to replace the police undertaking pursuant to section 502(2). This procedure is also available to the Crown if it is not satisfied with the conditions of a police undertaking.

II. Considerations in the Bail Court

If the authorities determine that the accused is not releasable, then the accused will be taken to court for a bail hearing. Once in Bail Court, the parties will communicate with one another to determine if a consent release is possible. The authorities must always remember that amendments made to the *Criminal Code* in 2019 specifically

recommend in section 493.1 that release is the default position, and release with the least onerous conditions is the law. To be sure, in cases where the accused has no prior record, then a release with appropriate terms at the police station is likely. However, for those accused with past convictions (especially for fraud or fraud-related offences), it is unlikely that the Crown will consent to release unless there are excellent sureties with a strong plan of supervision.

The following are major concerns on the part of Crown counsel when charges for a complex fraud have been laid and the issue of whether or not to consent to bail is being analyzed:

- **Operating or controlling minds:** Operating or controlling minds of a complex and large fraud should result in close scrutiny on the part of the prosecutor. If the fraud is of a massive quantum; the participants are a large, well-organized group; and the four pillars of the tertiary grounds favour detention, this may prompt Crown counsel to not consent to release. Even if the bail hearing is not reverse onus, counsel would be wise to prepare extensive materials to support any concerns on the primary, secondary, or tertiary ground. The addition of an allegation of instructing, committing, or participating in a criminal organization fraud charge contrary to sections 467.13, 467.12, 467.11, 467.111, and 380(1) will render the bail hearing a reverse onus pursuant to section 515(6)(a)(ii).
- **Non-association:** Crown counsel will likely require non-association and non-contact clauses if there are allegations that multiple individuals have participated in the fraud.
- **Solicitation cease and cease trading in securities:** Crown counsel will likely request that there be no further solicitation of investors or involvement in the securities industry in situations where there are allegations of Ponzi schemes or fraudulent investment schemes sponsored by a criminal organization.
- **Surrender of the items of the trade:** If phones, computers, or investment "seminars" are alleged to be part of the *modus operandi* of the criminal organization in carrying out the fraud, Crown counsel will likely request that these items be clearly stated as forbidden to the accused during the life of the recognizance.
- **Surrender of passport and travel documents:** If the fraud is a Ponzi scheme, investment scheme, or any scam that involved solicitations of investors across Canada, Crown counsel will likely request that travel to other provinces be refused or carefully monitored by the court. The accused should not be allowed to travel together or communicate during this period. Section 501(3)(f) provides for a surrender of *all* passports.
- **Thorough police check of sureties:** In *R v Neshan*,[1] De Filippis J discussed several sureties that were offered in a plan for the release of one accused at

1 2012 ONCJ 4.

the conclusion of a preliminary inquiry for a massive credit card fraud. After months of evidence, De Filippis J decided that one of the offered sureties was suitable when, on the strength of the preliminary inquiry evidence, it was revealed the surety's mother was remotely connected to the fraud. Defence counsel who propose sureties should always agree to provide particulars to the Crown in advance so that the police can canvass the appropriate databases to check for a record of criminal convictions or for other links to the fraud.

With the clarification of the scope of the tertiary ground in *R v St-Cloud*,[2] it is likely that the four-pronged tertiary test will become extremely important to the Crown's analysis in fraud cases. Obviously, the strength of the Crown's case will vary on the facts of each case. However, the second aspect of the test, the objective gravity of the offence charged, becomes even more relevant since the maximum sentence for fraud over $5,000 was increased in September 2004 from 10 years to 14.[3] If criminal organization charges accompany the fraud charges, then this becomes particularly relevant to the third prong of the tertiary test: circumstances of the offence alleged.

The tertiary grounds become more significant if the quantum of the fraud is large (or would have been large had the fraud not been discovered), the fraud is complex, and/or the pool of victims is also large. As Lamer CJ noted when explaining the constitutionality of the reverse onus provisions of the *Criminal Code*, lucrative crimes pose special issues in terms of bail. If one reads the following paragraph from *R v Pearson*[4] and substitutes the words "engaging in fraud" for the words "trafficking in narcotics," it is easy to see why Crown counsel should give serious consideration to whether or not they will consent to the release of individuals who mastermind large and complicated frauds.

> [61] The unique characteristics of the offences subject to s. 515(6)(d) suggest that those offences are committed in a very different context than most other crimes. Most offences are not committed systematically. By contrast, trafficking in narcotics occurs systematically, usually within a highly sophisticated commercial setting. It is often a business and a way of life. It is highly lucrative, creating huge incentives for an offender to continue criminal behaviour even after arrest and release on bail. In these circumstances, the normal process of arrest and bail will normally not be effective in bringing an end to criminal behaviour.[5]

2 2015 SCC 27.

3 The amendment to s 380(1)(a) of the *Criminal Code* was effected by *An Act to Amend the Criminal Code (capital markets fraud and evidence-gathering)*, SC 2004, c 3, s 2 and brought into force 15 September 2004 (see SI/2004-119).

4 [1992] 3 SCR 665.

5 *Ibid* at 695. See also *R v Downey*, [2003] OJ No 4395 (QL) (Sup Ct J) for another decision mandating detention for a fraud on the tertiary grounds.

In light of the *St-Cloud* decision, among others, below is a non-exhaustive list of certain factors that defence counsel will have to analyze when arguing the merits of a consent release:

1. the presumption of innocence;
2. the constitutional right to bail and to reasonable bail;
3. the accused's roots in the community (primary ground);
4. any cooperation with the police in surrendering (primary ground);
5. the accused's age and medical condition (primary and secondary grounds);
6. the accused's criminal record and outstanding charges or bails, if any (secondary ground);
7. the proposed plan of release (secondary ground);
8. the strength of the sureties proposed (primary and secondary grounds);[6]
9. the apparent strength of the Crown's case and any possible defence (tertiary ground); and
10. the objective gravity of the offence.

The last item in this list involves, among other things, a consideration of the minimum and maximum sentences provided for in the *Criminal Code*: the maximum sentence for frauds over $5,000 has been raised from 10 years to 14, and there is now a minimum sentence of 2 years for any fraud over $1 million (tertiary ground). The objective gravity of the offence would also include:

- the fact that fraud is not an offence of violence,
- the quantum of the alleged fraud,
- how much of the fraud can be connected to the specific accused,[7]
- the duration of the alleged fraud,
- the relative sophistication or simplicity of the alleged fraud,
- the role of the accused in the fraud (e.g., was the accused an operating mind, a participant, or a dupe?),
- whether the fraud was perpetrated as part of or on behalf of a criminal organization,
- the number of victims,
- whether the victims were vulnerable people,
- any cooperation provided by the accused in the investigation of the matter,
- any restitution already made,
- the potential for a lengthy term of imprisonment, and
- the time it will take for the matter to be brought to trial.

6 See *R v Neshan*, *supra* note 1.

7 For example, see *R v Bajwa*, 2014 ONSC 1128.

If, on balance, the issues noted above can be addressed through a consent release with appropriate terms, then the Crown and defence counsel can work together to craft an appropriate release with conditions based on the facts of the particular case. Once again, some of the conditions might include:

- no contact with any other person associated with the alleged fraud, except perhaps family members;
- non-possession of any of the items that may have been used as part of the fraud (e.g., credit cards or banking instruments not in the accused's name);
- if the offence is an alleged investment scheme, no further solicitation of investors or involvement in the securities industry; and
- restrictions on travel if there are any primary ground concerns, which could include a requirement to remain within a certain geographical area or even the surrender of travel documents.

However, the parties and the court must be careful not to impose any terms or conditions that are unduly restrictive or onerous. Courts across Canada, and in Ontario in particular, have been the subject of criticism for detaining accused persons too frequently or, when releasing them, imposing overly onerous terms and conditions.[8]

Thankfully, the Supreme Court of Canada reminded bail courts of the guiding principles of our bail system in the case of *R v Antic*.[9] The case arose in somewhat unusual circumstances. Mr Antic was charged with drug and firearms offences. He was detained after an initial bail hearing in large part because the presiding Justice of the Peace was not satisfied that Mr Antic's proposed surety was a sufficient safeguard to keep him in the jurisdiction. Mr Antic had what the Justice of the Peace called a border-straddling lifestyle, and there was concern that the surety would not be able to ensure that Mr Antic would remain for his trial.

Mr Antic brought three separate bail reviews in Superior Court. At the end of his second bail review, the Superior Court judge hearing the application suggested that the combination of a surety and cash bail might be enough to justify a release for Mr Antic, but indicated that such a bail was prohibited by virtue of section 515(2)(e) of the *Criminal Code* since Mr Antic did not reside out of province or more than 200 kilometres from the charging jurisdiction.

Mr Antic's counsel subsequently brought a third bail review (before the same judge who had presided at the second hearing), at which time he challenged section 515(2)(e) on the basis that it violated the right to reasonable bail, as guaranteed

8 See, for example, Canadian Civil Liberties Association and Education Trust, *Set Up to Fail: Bail and the Revolving Door of Pre-trial Detention*, by Abby Deshman and Nicole Myers (July 2014), online (pdf): <https://ccla.org/cclanewsite/wp-content/uploads/2015/02/Set-up-to-fail-FINAL.pdf>.

9 2017 SCC 27.

by section 11(e) of the Charter. In essence, it was argued that Mr Antic was denied access to a form of release that was available to other accused, merely on account of a geographic restriction. The bail review judge, who had the best of intentions in wanting to see Mr Antic released, struck down section 515(2)(e) as unconstitutional. He then granted Mr Antic a bail comprising a $90,000 cash deposit and a $10,000 surety recognizance.

The Crown was granted leave to appeal by the Supreme Court of Canada. On appeal, the Crown argued that the *Bail Reform Act* of 1972[10] had restricted cash bails for good reason—namely, to ensure that those with financial means did not have an unfair advantage in securing bail over those who did not have access to cash. Apropos of this position, it was noted that, despite being formally granted a release, Mr Antic was unable to come up with the cash and "make" bail for almost a year after he was granted bail.

Amicus for Mr Antic argued that having another option for bail would be a positive step and would enhance the right to reasonable bail. Interestingly, the Canadian Civil Liberties Association (CCLA) supported the Crown position, while the Criminal Lawyers' Association supported the position of Mr Antic (the two organizations are typically aligned on criminal justice issues).

The Supreme Court of Canada ultimately decided in favour of the Crown (and CCLA) position and overturned the decision of the bail review judge. The Court found that the judge had erred by ignoring the ladder principle and that it was not section 515(2)(e) that denied Mr Antic reasonable bail, but rather the bail review judge's misapplication of the ladder principle. While the judge's ruling that section 515(2)(e) was unconstitutional was overturned, the Court (with the consent of the Crown) did not return Mr Antic to custody. Rather, his bail was varied to a cash release, and he remained out of custody.

In making its decision, the Supreme Court recognized that bail courts throughout Canada were making inconsistent decisions, detaining too frequently, relying too heavily on surety bails, and/or imposing unnecessarily onerous terms and conditions on accused upon release.[11] To help rectify these concerns, the Court set out the overarching principles that must guide bail courts across Canada:

> (a) Accused persons are constitutionally presumed innocent, and the corollary to the presumption of innocence is the constitutional right to bail.
> (b) Section 11(e) guarantees both the right not to be denied bail without just cause and the right to bail on reasonable terms.
> (c) Save for exceptions, an unconditional release on an undertaking is the default position when granting release: s. 515(1).

10 SC 1970-71-72, c 37.

11 *R v Antic*, *supra* note 9 at para 65.

(d) The ladder principle articulates the manner in which alternative forms of release are to be imposed. According to it, "release is favoured at the earliest reasonable opportunity and, having regard to the [statutory criteria for detention], on the least onerous grounds": *Anoussis* [*R v Anoussis*, 2008 QCCQ 8100, 242 CCC (3d) 113], at para. 23. This principle must be adhered to strictly.

(e) If the Crown proposes an alternative form of release, it must show why this form is necessary. The more restrictive the form of release, the greater the burden on the accused. Thus, a justice of the peace or a judge cannot impose a more restrictive form of release unless the Crown has shown it to be necessary having regard to the statutory criteria for detention.

(f) 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.

(g) A recognizance with sureties is one of the most onerous forms of release. A surety should not be imposed unless all the less onerous forms of release have been considered and rejected as inappropriate.

(h) It is not necessary to impose cash bail on accused persons if they or their sureties have reasonably recoverable assets and are able to pledge those assets to the satisfaction of the court to justify their release. A recognizance is functionally equivalent to cash bail and has the same coercive effect. Thus, under s. 515(2)(d) or s. 515(2)(e), cash bail should be relied on only in exceptional circumstances in which release on a recognizance with sureties is unavailable.

(i) When such exceptional circumstances exist and cash bail is ordered, the amount must not be set so high that it effectively amounts to a detention order, which means that the amount should not be beyond the readily available means of the accused and his or her sureties. As a corollary to this, the justice or judge is under a positive obligation, when setting the amount, to inquire into the ability of the accused to pay. The amount of cash bail must be no higher than necessary to satisfy the concern that would otherwise warrant detention and proportionate to the means of the accused and the circumstances of the case.

(j) Terms of release imposed under s. 515(4) may "only be imposed to the extent that they are necessary" to address concerns related to the statutory criteria for detention and to ensure that the accused can be released. [Footnote omitted.] They must not be imposed to change an accused person's behaviour or to punish an accused person.

(k) Where a bail review is applied for, the court must follow the bail review process set out in *St-Cloud*.[12]

The *Antic* decision is a very significant case for all accused persons at the bail stage. This includes, of course, accused charged with fraud and fraud-related offences. At the bail stage, the parties and the court must ensure that the principles enunciated in *Antic* are respected and followed.

12 *Ibid* at para 67.