

BAIL HEARINGS

ISSUES FOR DISCUSSION

Saskatoon Criminal Defence Lawyers Association
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Fall Seminar, 1998:
Bail Hearings and Sentencing

Bail Hearings

The provisions relating to Judicial Interim Release are set out in sections 515-520 of the Criminal Code.

Normal Situation: Onus on Crown to Show Cause for Detention

515. (1) Subject to this section, where an accused who is charged with an offence other than an offence listed in section 469 is taken before a justice, the justice shall, unless a plea of guilty by the accused is accepted, order, in respect of that offence, that the accused be released on his giving an undertaking 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 and where the justice makes an order under any other provision of this section, the order shall refer only to the particular offence for which the accused was taken before the justice.

(2) Where the justice does not make an order under subsection (1), he shall, unless the prosecutor shows cause why the detention of the accused is justified, order that the accused be released

(a) on his giving an undertaking with such conditions as the justice directs;

(b) on his entering into a recognizance before the justice, without sureties, in such amount and with such conditions, if any, as the justice directs but without deposit of money or other valuable security;

(c) on his entering into a recognizance before the justice with sureties in such amount and with such conditions, if any, as the justice directs but without deposit of money or other valuable security;

(d) with the consent of the prosecutor, on his entering into a recognizance before the justice, without sureties, in such amount and with such conditions, if any, as the justice directs and on his depositing with the justice such sum of money or other valuable security as the justice directs; or

(e) 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, on his entering into a recognizance before the justice with or without sureties in such amount and with such conditions, if any, as the justice directs, and on his depositing with the justice such sum of money or other valuable security as the justice directs.

(2.1) Where, pursuant to subsection (2) or any other provision of this Act, a justice, judge or court orders that an accused be released on his entering into a recognizance with sureties, the justice, judge or court may, in the order, name particular persons as sureties.

(2.2) Where, by this Act, the appearance of an accused is required for the purposes of judicial interim release, the appearance shall be by

actual physical attendance of the accused but the justice may, subject to subsection (2.3), allow the accused to appear by means of any suitable telecommunication device, including telephone, that is satisfactory to the justice.

(2.3) The consent of the prosecutor and the accused is required for the purposes of an appearance if the evidence of a witness is to be taken at the appearance and the accused cannot appear by closed-circuit television or any other means that allow the court and the accused to engage in simultaneous visual and oral communication.

(3) 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.

Conditions

(4) The justice may direct as conditions under subsection (2) that the accused shall do any one or more of the following things as specified in the order:

- (a) report at times to be stated in the order to a peace officer or other person designated in the order;
- (b) remain within a territorial jurisdiction specified in the order;
- (c) notify the peace officer or other person designated under paragraph (a) of any change in his address or his employment or occupation;
- (d) abstain from communicating with any witness or other person expressly named in the order, or refrain from going to any place expressly named in the order, except in accordance with the conditions specified in the order that the justice considers necessary;
- (e) where the accused is the holder of a passport, deposit his passport as specified in the order; and
- (f) comply with such other reasonable conditions specified in the order as the justice considers desirable.

(4.1) Before making an order under subsection (2), in the case of an accused who is charged with an offence in the commission of which violence against a person was used, threatened or attempted or an offence described in section 264 of this Act, or in subsection 5(3) or (4), 6(3) or 7(2) of the Controlled Drugs and Substances Act, the justice shall consider whether it is desirable, in the interests of the safety of the accused or of any other person, to include as a condition of the order that the accused be prohibited from possessing any firearm or any ammunition or explosive substance for any period of time specified in the order and that the accused surrender any firearms acquisition certificate that the accused possesses, and where the justice decides that it is not desirable, in the interests of the safety of the accused or of any other person, for the accused to possess any of those things, the justice may add the appropriate condition to the order.

(4.2) Before making an order under subsection (2), in the case of an accused who is charged with an offence described in section 264, or an offence in the commission of which violence against a person was

used, threatened or attempted, the justice shall consider whether it is desirable, in the interests of the safety of any person, to include as a condition of the order that the accused abstain from communicating with any witness or other person expressly named in the order, or be prohibited from going to any place expressly named in the order.

(5) Where the prosecutor shows cause why the detention of the accused in custody is justified, the justice shall order that the accused be detained in custody until he is dealt with according to law and shall include in the record a statement of his reasons for making the order.

Notes:

Reverse Onus

(6) Notwithstanding any provision of this section, where an accused is charged

(a) with an indictable offence, other than an offence listed in section 469,

(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, or

(ii) that is an offence under section 467.1 or an offence under this or any other Act of Parliament alleged to have been committed for the benefit of, at the direction of or in association with a criminal organization for which the maximum punishment is imprisonment for five years or more,

(b) with an indictable offence, other than an offence listed in section 469 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 subsection 5(3) or (4), 6(3) or 7(2) of the Controlled Drugs and Substances Act or the offence of conspiring to commit such an offence,

the justice shall order that the accused be detained in custody until he is dealt with according to law, unless the accused, having been given a reasonable opportunity to do so, shows cause why his detention in custody is not justified, but where the justice orders that the accused

be released, he shall include in the record a statement of his reasons for making the order.

(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.

(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.

(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 relating to the taking of evidence at preliminary inquiries.

Notes:

Grounds for Detention

(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, 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) 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.** *[1997 amendment]*

(11) Where an accused who is charged with an offence mentioned in section 469 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.

Non-communication clause

(12) A justice 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 with any witness or other person named in the order, except in accordance with such conditions specified in the order as the justice deems necessary.

Notes:

Adjourning the Bail Hearing

Very often clients find themselves being remanded in custody for the purpose of a bail hearing. This remand cannot be for more than three clear days except with the accused's consent (s. 516):

516. A justice may, before or at any time during the course of any proceedings under section 515, 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.

Notes:

The Show Cause Hearing Procedure

517. (1) Where the prosecutor or the accused intends to show cause under section 515, he 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 newspaper or broadcast 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.

(2) Every one who fails without lawful excuse, the proof of which lies on him, to comply with an order made under subsection (1) is guilty of an offence punishable on summary conviction.

(3) In this section, "newspaper" has the same meaning as in section 297.

518. (1) In any proceedings under section 515,

(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, 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; and

(e) the justice may receive and base his decision on evidence considered credible or trustworthy by him in the circumstances of each case.

(2) Where, before or at any time during the course of any proceedings under section 515, the accused pleads guilty and that plea is accepted, the justice may make any order provided for in this Part for the release of the accused until the accused is sentenced.

519. (1) Where a justice makes an order under subsection 515(1), (2), (7) or (8),

(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.

(2) Where the accused complies with an order referred to in paragraph (1)(b) and is not required to be detained in custody in respect of any other matter, the justice who made the order or another justice having jurisdiction shall, unless the accused has been or will be released pursuant to an authorization referred to in that paragraph, issue an order for discharge in Form 39.

(3) Where the justice makes an order under subsection 515(5) or (6) for the detention of the accused, he shall issue a warrant for the committal of the accused.

Notes:

Judicial Review

520. (1) Where a 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 made by the justice.

(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.

(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.

(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.

(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.

(6) A warrant issued under subsection (5) may be executed anywhere in Canada.

(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.

(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.

(9) The provisions of sections 517, 518 and 519 apply with such
modifications as the circumstances require in respect of an application
under this section.

Expediting the transcript: In moving for judicial review in Queen's Bench, it is important to expedite the preparation of the transcript. Transcript services in Regina will do this in a matter of a few days if you request it. It must be requested, however. Otherwise the transcript will take weeks to prepare, during which time your client will remain in custody.

Release after arrest by Officer or Justice of the Peace

Sections 497-499 and 503 contain most of the provisions relating to release upon arrest. Rather than try to explain the intricacies of these sections, we have prepared a flow chart which graphically shows how it should work (attached).

Notes:

Release of Young Persons

Sections 7, 7.1 and 8 of the **Young Offenders Act** deal with the release of young persons:

7. (1) A young person who is

(a) arrested and detained prior to the making of a disposition in respect of the young person under section 20, or

(b) detained pursuant to a warrant issued under subsection 32(6)

shall, subject to subsection (4), be detained in a place of temporary detention designated as such by the Lieutenant Governor in Council of the appropriate province or his delegate or in a place within a class of such places so designated.

(1.1) A young person who is detained in a place of temporary detention pursuant to 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.

(2) 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 court judge or a justice is satisfied that

(a) the young person cannot, having regard to his 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.

(3) A young person who is detained in custody in accordance with subsection (1) may, during the period of detention, be transferred by the provincial director from one place of temporary detention to another.

(4) Subsections (1) and (2) 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 reasonably practicable, and in no case later than the first reasonable opportunity after the appearance of the young person before a youth court judge or a justice pursuant to section 503 of the Criminal Code.

(5) 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.

(6) 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.

7.1 (1) Where a youth court judge or a justice is satisfied that

- (a) a young person who has been arrested would, but for this subsection, be detained in custody,
- (b) a responsible 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,

the young person may be placed in the care of that person instead of being detained in custody.

(2) 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 such other conditions as the youth court judge or justice may specify; and
- (b) the young person undertakes in writing to comply with the arrangement and to comply with such other conditions as the youth court judge or justice may specify.

(3) Where a young person has been placed in the care of a person under subsection (1) and

- (a) that person 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 be placed in the care of that person,

the young person, the person in whose care the young person has been placed or any other person may, by application in writing to a youth court judge or a justice, apply for an order under subsection (4).

(4) Where a youth court judge or a justice is satisfied that a young person should not remain in the custody of the person in whose care he was placed under subsection (1), the youth court judge or justice shall

- (a) make an order relieving the person and the young person of the obligations undertaken pursuant to subsection (2); and
- (b) issue a warrant for the arrest of the young person.

(5) Where a young person is arrested pursuant to a warrant issued under paragraph (4)(b), the young person shall be taken before a youth court judge or justice forthwith and dealt with under section 515 of the Criminal Code.

7.2 Any person who wilfully fails to comply with section 7, or with an undertaking entered into pursuant to subsection 7.1(2), is guilty of an offence punishable on summary conviction. R.S., 1985, c. 24 (2nd Supp.), s. 5.

8. (1) [Repealed, R.S., 1985, c. 24 (2nd Supp.), s. 6]

(2) Where an order is made under section 515 of the Criminal Code in respect of a young person by a justice who is not a youth court judge, an application may, at any time after the order is made, be made to a

youth court for the release from or detention in custody of the young person, as the case may be, and the youth court shall hear the matter as an original application.

(3) An application under subsection (2) 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.

(4) An application under subsection (2) 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.

(5) The requirement for a notice under subsection (3) or (4) may be waived by the prosecutor or by the young person or his counsel, as the case may be.

(6) An application under section 520 or 521 of the Criminal Code for a review of an order made in respect of a young person by a youth court judge who is a judge of a superior, county or district court shall be made to a judge of the court of appeal.

(7) No application may be made under section 520 or 521 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 court judge.

(8) Where 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, a youth court judge, but no other court, judge or justice, may release the young person from custody under that section.

(9) A decision made by a youth court judge under subsection (8) may be reviewed in accordance with section 680 of the Criminal Code and that section applies, with such modifications as the circumstances require, to any decision so made.

Notes: