

# POLICE POWERS OF RELEASE: Training Materials

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## MINISTRY OF THE ATTORNEY GENERAL

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***NOTE: TRAINING TO BE DELIVERED BY CROWNS - NOT FOR STAND-ALONE USE***

# What We Will Cover

1. The ladder principle & overview of bail principles
2. Options for release by police
  - (a) Release from scene by arresting officer (s.497)
  - (b) Arrested without a warrant (s. 498)
  - (c) Arrested with a warrant (s. 499)
  - (d) The rest (s. 503)
3. Youth Releases
4. Release Documents
5. New Crown Bail Directive
6. Practical Reminders
7. Scenarios

The Ministry of the Attorney General (MAG) & the Ministry of Community Safety and Correctional Services (MCSCS) commissioned a report on bail and remand that was released in early 2017 (the Wyant Report). That report recognized that too many accused are on remand awaiting a bail determination, and set out recommendations to improve bail and remand in Ontario, including:

- the expansion of education for police on their powers of release

<https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/wyant/>

# ***R. v. Antic***

2017 SCC 27

*“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 the accused persons. The right has two aspects: a person charged with an offence has the right not to be denied bail without just cause and the right to reasonable bail”*

# 1. Where to Start: The Ladder Principle

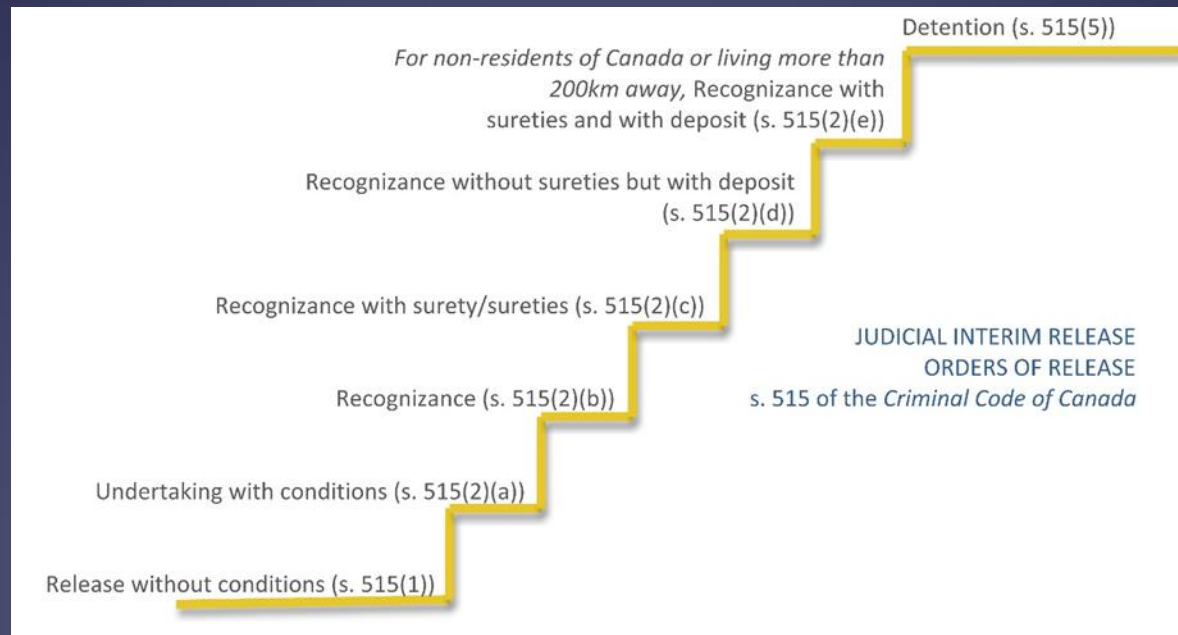
- The decision of whether or not to release an accused person pending trial, and on what conditions, is one of the most significant decisions made in the criminal process
- The decision making starts with the police
- The *Charter* guarantees that an accused not be denied reasonable bail without just cause – section 11(e)

# The Ladder

- The ladder sets out the options for pre-trial release of an accused
- Legal presumption is that an accused will be released on an undertaking without conditions
- Unless it is demonstrated that a more onerous form of release is required

*R. v. Antic*, 2017 SCC 27, para 67

# The Ladder



- A central part of the Canadian law of bail consists of the ladder principle and the authorized forms of release, which are found in s. 515(1) to (3) of the *Criminal Code*
- Release on an undertaking without conditions is the default position
- Alternative forms of release are to be imposed in accordance with the ladder principle
- Release is favoured at the earliest reasonable opportunity and on the least onerous grounds

*R. v. Antic*, 2017 SCC 27



# Who should be released?

- For most offences the starting point is that the accused person should be released on bail
- Consider if there is any reason not to release the person. Bail decisions are an exercise in risk management
- It is not practical (or legal) to hold everyone in an effort to guarantee that an accused person will not reoffend

*R. v. Van*, 2014 ONCJ 232

# Who should be released?

- The power to release or detain requires assessment of the facts of each individual case
- Consider the criminal record of the accused and grounds for detention (primary and secondary grounds)
- Avoid passing the buck - Consider all options available to you for release before moving to next step on the bail ladder

# Reasonable Bail

“...the right to reasonable bail, relates to the terms of bail, including the quantum of any monetary component and other restrictions that are imposed on the accused for the release period. It protects accused persons from conditions and forms of release that are unreasonable”

*R. v. Antic*, 2017 SCC 27

## 2. OPTIONS FOR RELEASE

### (a) Release by an Arresting Officer (s. 497)

- The arresting officer has a discretion to release an accused person by way of a summons or appearance notice (no conditions)
- If the release requires that conditions be imposed, the accused person must be paraded before an Officer in Charge
- When the arresting officer believes the accused person should be detained in custody, that person must be taken to the station/division for preparation of a bail brief

# Release by an Officer in Charge

- Authority comes from sections 498, 499 & 503 of the *Criminal Code*

## s. 498 – Less serious offences

- Shall release unless...

## s. 499 – Arrest with a Warrant

- May or may not release even if warrant endorsed for release
- May not release if warrant unendorsed

## s. 503 – Most other offences

- Shall detain and bring to a justice unless decision made to release

## (b) Arrest without a Warrant (s. 498)

- Person arrested without a warrant by a peace officer **and**
- Has been taken into custody or detained under s. 503(1)  
**for**
  - An offence described in s. 496(a), (b) or (c)
- or**
  - Any offence that is punishable by imprisonment for 5 years or less

# “Shall Release” (s. 498)

Presumption under s. 498 is that the accused person shall be released

If a person has not been taken before a justice or otherwise been released, the officer **MUST** release that person as soon as practicable:

- a) With the intention of compelling to court by summons;
- b) On a promise to appear;
- c) On a recognizance to OIC (< \$500 without surety or deposit);  
or
- d) If not ordinarily resident in the province or within 200km on a recognizance to OIC (<\$500 without surety but with deposit as officer directs).

# Less Serious Offences (s. 496)

- (a) Indictable offences for which the OCJ has absolute jurisdiction. Includes:
- *property offences under \$5000,*
  - *attempts and conspiracies,*
  - *gaming & betting,*
  - *breach of recognizance (s. 811) ,*
  - *failure to comply with probation (s. 733.1),*
  - *simple possession of schedule II (CDSA s. 4(4)(a)),*
  - *trafficking schedule II < prescribed amount (CDSA s. 5(3)(a.1))*
- (b) All hybrid offences
- (c) All summary conviction offences



# “... as soon as practicable...”

What does this mean?

- s. 498 allows you to wait until it's practical to release the person.
- May include:
  - weather conditions
  - level of intoxication
  - physical condition
  - mental condition
  - presence of family or friend

Also consider the state of the investigation. Does s. 516(1) apply?

# s. 516(1)

- When an investigation is on-going and the investigator requires more time to continue or conclude a vital part of the investigation (example: interviewing principle witnesses, seize vital evidence etc.), the Crown can make an application to the court to delay the bail hearing for up to 3 clear days pursuant to 516(1)
- The accused must be charged with at least one offence and must be present at court for the application to be made
- Adjournment should be for the shortest amount of time required in the circumstances
- Final decision made by Justice or Judge

# When should you not release? (s. 498)

- The presumption under s. 498 is that they shall be released.
- However, the officer in charge shall not release if they believe on reasonable grounds that:
  - (1) If released the person will fail to attend court  
(*primary ground concern*) – s. 498(1.1)(b)

# When should you not release? (s. 498)

(2) It is necessary in the public interest that the person be detained in custody or that the release from custody should be dealt with by other means (bail) having regard to all circumstances including the need to.....

- Establish identity of the person
- Secure or preserve evidence of or relating to the offence
- Prevent the continuation or repetition of the offence or the continuation of another offence
- Ensure the safety or security of any victim or witness to the offence  
(*secondary grounds*) – s. 498(1.1)(a)

# Shall NOT Release (s. 498)

- Where a person has been arrested without a warrant by a peace officer for an indictable offence alleged to have been committed in a different province

(see section 503(3) - 6 day remand procedure)

## (c) Arrest with a Warrant (s.499)

- An accused arrested pursuant to a warrant must be brought before the court to allow for execution of that warrant
  - Includes bench warrants, warrants in the first
- **Exception** is where the warrant is endorsed by judicial officer
  - Pursuant to section 507(6)
- If the warrant is endorsed, an officer in charge may exercise his/her discretion to release from station pursuant to section 499(1)

## (c) Arrest with Warrant (s. 499)

Where the warrant has been endorsed, the officer in charge **MAY** release:

- a) On a promise to appear;
  - b) On a recognizance to OIC (< \$500 without surety or deposit);  
or
  - c) If not ordinarily resident in the province or within 200km on a recognizance to OIC (<\$500 without surety but with deposit as officer directs).
- Allows the OIC to impose conditions (Form 11.1 undertaking)
  - The list of conditions that can be imposed is set out s.499(2)

# Cannot Release (s. 469)

- treason
- alarming Her Majesty
- intimidating Parliament or legislature
- inciting to mutiny
- piracy
- piratical acts
- murder
- accessory after the fact to high treason or treason or murder
- bribery by the holder of a judicial office
- crimes against humanity
- attempting to commit any offence mentioned above
- conspiring to commit any offence mentioned above



# (c) Arrest with a Warrant (s. 499)

Consider:

- What is the risk posed by this accused?
- Can conditions be fashioned which will minimize the risk to an acceptable level?
- Warrant in the First or Bench Warrant?
- Is the warrant endorsed?
  - Endorsement permits the officer to use his/her discretion concerning release

# **(c) Arrest with a Warrant (s. 499)**

## **Consider.....**

- Is the accused charged with a serious offence?
- Has the accused been avoiding contact with police?
- Does the accused have a history of FTA or non-compliance?
- Does the accused have other outstanding charges?
- Is the accused charged with an offence which garners mandatory minimum penalties (MMP)?
- Is the accused involved in Drug Treatment Court (DTC)?
- How long has the warrant been outstanding?

## **(d) Section 503 - Shall Bring to Justice unless...**

- Person must be brought before a Justice within 24 hours unless released
  - 24 hours is the outer limit of what is a reasonable period
  - Police must take the accused before a JP without unreasonable delay
- This section also gives authority to the OIC to attach conditions to a release

# Conditions of Release

- The list of conditions that can be imposed is set out s. 503(2.1) [same conditions as listed in s.499(2)]:
  - Remain in jurisdiction
  - Notify of change of address or employment
  - Non-communication with victims/witnesses
  - Deposit passport
  - Abstain from possessing firearms
  - Report to police
  - Abstain from drugs/alcohol
  - Comply with conditions to ensure safety of victim/witness

# Conditions of Release

- Release conditions should relate to the specific circumstances of the accused and the offence
- Conditions should be realistic - the accused should be able to comply with the condition
  - For example, a condition requiring a homeless or mentally ill person to report to police weekly or monthly may be virtually impossible for them to comply with
  - Consider whether an alcohol or drug prohibition is necessary – it will likely be impossible for an addict to comply with such a condition

# Release Conditions – s. 503(2.1)(a)

To remain within a territorial jurisdiction specified in the undertaking

“Remain in the City of Ottawa”

## Consider:

- Is there reason to believe that the accused will leave the jurisdiction, and NOT RETURN for their court date?

**Yes** – primary ground concern exists, send to bail court

**No** – no reason for this condition

- This condition cannot be used to exclude an accused from an area or jurisdiction. Example: “Do not be in the City of Ottawa.” or “Not to be found within the bounds of ...”

# Release Conditions – s. 503(2.1)(b)

To notify a peace officer or another person mentioned in the undertaking of any change in his or her address, employment or occupation

## Consider:

- Whether we will need to know where the accused is living for service or compliance purposes
- Whether the accused is capable of complying with this condition – accused who are homeless, mentally ill, or addicted may have great difficulty complying with this condition

# Release Conditions – s.503(2.1)(c)

To abstain from communicating, directly or indirectly, with any victim, witness or other person identified in the undertaking, or from going to a place specified in the undertaking, except in accordance with conditions specified in the undertaking

## Consider:

- Are there any people who the accused should not be able to contact?
- Includes victims, witnesses, co-accused

**Yes** – use correct spelling of names and confirm addresses

**No** – no reason for this condition



# Release Conditions – s.503(2.1)(d)

To deposit the person's passport with the peace officer or other person mentioned in the undertaking

## Consider:

- Is there reason to believe that the accused will use his/her passport to leave Canada and not return?

**Yes** – primary ground concerns, send to bail court

**No** – no reason for this condition

# Release Conditions – s.503(2.1)(e)

**To abstain from possessing a firearm and to surrender any firearm in the possession of the person and any authorization, licence or registration certificate or other document enabling that person to acquire or possess a firearm**

## **Consider:**

- Is this an offence of violence or threats of violence or weapons?
- See also: s. 515(4.1)

**...not to possess any weapons including knives and cross-bows...**

## **Consider:**

- Whether the offence involved violence or threats of violence or weapons

**Yes** – include this condition in your release

**No** – no reason for this condition

# Release Conditions – s.503(2.1)(f)

To report at the times specified in the undertaking to a peace officer or other person designated in the undertaking

## Consider:

- Is there reason to believe that the accused will leave the jurisdiction, or is not living in a stable residence?
- Also consider whether this is a condition that the accused can realistically comply with, specifically in cases with a mentally ill accused

# Release Conditions – s.503(2.1)(g)

To abstain from

- i) the consumption of alcohol or other intoxicating substances
- ii) the consumption of drugs except in accordance with a medical prescription

## Consider:

- Are drugs and/or alcohol directly related to this offence?
- Will the accused realistically be able to comply with a “no alcohol/no drugs” condition?

# Additional Release Conditions – s.503(2.1)(h)

To comply with any other condition specified in the undertaking that the officer in charge considers necessary to ensure the safety and security of any victim of or witness to the offence

- Any conditions included in an Undertaking must be directly related to circumstances of the offence, justified and reasonable

## Before including any additional conditions ask:

- Is the condition directly related to the alleged offence?
- Is the condition required to protect the safety of any victim or witness?

# Police cannot impose these conditions

- Do not possess tools
- Do not enter a certain jurisdiction or area
- Do not possess cell phones, pagers etc.
- Do not associate with persons known to you to have a criminal record
- Do not be in a motor vehicle without the owner present
- Keep the peace and be of good behaviour

***These conditions can only be imposed by a court.***

# Release Conditions – Effective Period

- All conditions remain in effect until the final disposition of the associated charges or judicial variation
- If there are conditions given without authority the court will likely not uphold a breach

# Release Conditions

## Intimate Partner Violence (IPV)

- IPV (formerly domestic violence) charges do not bar an accused from a release from the station
- Consideration should be given to the specific circumstances, on a case by case basis

### In cases involving children:

- CAS must be advised in every case where children can be expected to be present in the home
  - Children do not have to be present at the time of the offence or ordinarily resident in the home



# Officer in Charge Notes

- Record why you decided to release:
  - What principles you considered?
  - What risks you perceived?
  - How the conditions you used would mitigate those risks?
- Record why you decided to detain for a bail hearing:
  - Why you thought you could not mitigate the risks with the conditions available?
- Remember that you may be called to give evidence in court or at an inquest concerning the release or detention of an accused person
  - You might be asked to explain your decision to release or detain the accused person and, if released, the rationale behind the release conditions

# Reverse Onus – s.515(6)

- An accused is in a reverse onus position and must “show cause” why he should be released when charged with:
  - An indictable offence committed while out on another release for an indictable offence
  - Certain criminal organization and terrorism offences
  - Enumerated offences under the *Security of Information Act*
  - Trafficking or import/exporting firearms
  - Enumerated offences when committed with a firearm (including attempted murder, aggravated sexual assault, robbery, extortion)
  - Any offence involving a firearm, crossbow, prohibited or restricted weapon, prohibited device or ammunition **when** accused is subject to a prohibition order under section 84(1) of the *Criminal Code*
  - An indictable offence and not ordinarily resident
  - Fail to appear, fail to comply with recognizance or other form of release
  - An offence punishable by life under any of sections 5 to 7 of *CDSA*

# Reverse Onus – s.515(6)

- The *Criminal Code* does not prohibit police from releasing an accused from the station (for non-469 offences) in a reverse onus situation
- Police should pay close attention to the provisions of s.498 (1.1)(a) before deciding to hold a reverse onus case for a bail hearing
- Detention may very well be warranted but should not be automatic but rather the result of a careful application of the principles in s.498 (1.1)
- Crowns will not automatically seek detention of an accused in a reverse onus position
- Crown bail directive recognizes that the obligation to follow the ladder principle continues to exist in reverse onus situations

# Administration of Justice (AOJ) Offences

- Includes fail to appear, fail to comply with condition of release, fail to comply with probation
- Dramatic increase in number of AOJ offences being charged and prosecuted in Ontario
- Consider whether it is appropriate to use your discretion and *not charge* all AOJ offences
- **Consider:**
  - The seriousness of the alleged breach
  - Any apparent reason for the breach
  - The underlying facts

# 3. Youth Releases

- Sections 28 – 33 of the *YCJA*
- Part XVI of the *Criminal Code* still applies
- Detention as a Social Measure is prohibited.
  - “A youth court justice or judge shall not detain a young person in custody prior to being sentenced as a substitute for appropriate child protection, mental health or other social measures”
- Accused persons younger than 16 must be released to a parent or guardian
- Serve the Notice to Parent when releasing a Youth offender

# 3. Youth Releases

- A young person may be detained in custody only if:
  - Young person charged with a serious offence
  - or
  - There is a history that indicates a pattern of either outstanding charges or findings of guilt
- and
- Judge finds that:
  - There is substantial likelihood the accused will not attend court
  - or
  - Detention is necessary for the protection or safety of the public including any victim or witness having regard to the circumstances of the case including whether there is a substantial likelihood that the accused will commit a serious offence if released

## 4. Release Documents

Types of release documents available to an Officer in Charge include:

- Adult Promise to Appear – Form 10
- Adult Recognizance – Form 11
- Adult Undertaking – Form 11.1
- Young Offender Promise to Appear – Form 10 (YCJA)
- Young Offender Recognizance – Form 11 (YCJA)
- Young Offender Undertaking – Form 11.1 (YCJA)

## 4. Release Documents

- Subsection 501(1) of the *Criminal Code* dictates that the release document must include, amongst other things, the *substance of the offence*. Case law requires that the substance of the offence must set out the statute. Short form wordings are acceptable, i.e. *CC 266 – Assault*
- Ensure that the correct region is included on the release
- Double check court dates for statutory holidays, court closures or designated first appearance court schedules



# 5. New Crown Bail Directive

- In effect as of November 14, 2017
- Change in language from the “potential for tragedy at the bail hearing stage” to “one of the fundamental presumptions in Canadian criminal law is that a person arrested and charged with an offence will be out of custody prior to trial”
- The change in tone in the new directive is deliberate
- Moving away from risk aversion that has been the subject of criticism
- To an approach that is in step with the requirements of the *Criminal Code* and the direction from the Supreme Court in *R. v. Antic*, 2017 SCC 27

# Highlights of the new Bail Directive

- An emphasis on liberty as a guiding principle in bail proceedings and the recognition of detention as an exceptional practice
- A reminder that the fundamental bail principles apply with respect to all charges
- The reinforcement of the “ladder” principle as a basic underpinning of bail
- A statement that surety release is an exceptional measure
- Suggestions to make the bail process more efficient and less time-consuming and, overall
- A balancing of the rights of the accused and the public interest/public safety consistent with the provisions of the *Criminal Code* and related jurisprudence

# 6. Practical Reminders

- Conditions may NOT be attached to an Appearance Notice
- An Undertaking may accompany either a Promise to Appear or Recognizance
- A Promise to Appear, Recognizance or Undertaking may be used for Summary Conviction offences only if an arrest is made
- Recognizance must be used for out-of-province residents or anyone who resides more than 200 km from the jurisdiction in which the offence occurred

## 6. Practical Reminders

- Accused does not have to sign a Promise to Appear or a Recognizance s. 501(4)
- Undertakings must be signed by the accused
- Both sides of the Recognizance must be printed out although it does not have to be completed on the reverse

## 6. Practical Reminders

- The OIC who releases the accused must fill out two copies of the documents (PTA & Undertaking or Recognizance). The accused is to sign both copies
- The signed release documents must then be scanned in to the corresponding file and then sent to local Court Liaison
- Processing and distribution of all release documents should occur prior to the end of the shift
- If releasing on an endorsed warrant immediately provide a copy of the release documents to CPIC

## 6. Practical Reminders

- Where an accused has drug and criminal charges on the same information, the more serious charge takes precedence for first appearance court
- Set all co-accused to the same first appearance date (Youth and adults cannot appear in the same first appearance court)

# 7. Scenarios

## #1

- 38 year old male charged with Impaired driving and over 80
- Arrested on scene after single motor vehicle collision
- BAC readings 195mg & 190mg
- Has criminal record for Impaired driving from 2001
- Promise to appear from another jurisdiction from January 2017 for Impaired driving
- Outstanding warrant in Alberta for theft and theft of a motor vehicle from 1999
- Residence, job and girlfriend in arresting jurisdiction

# #2

- 25 year old male charged with sexual assault and voyeurism
- Accused of photographing and having intercourse with his 24 year old terminally ill girlfriend while she is heavily medicated
- She has also seen photographs on his cellphone of other “younger” females
- No criminal record, no outstanding charges
- Accused has a job but was residing with the victim



# #3

- On May 16, accused was charged with theft from the LCBO and released on an appearance notice
- On June 25, accused was charged with theft from a different LCBO and released on another appearance notice
- On August 6, accused was charged with theft from yet another LCBO and released on a promise to appear and Form 11.1
- On September 12, the accused failed to appear in remand court and a bench warrant was issued and endorsed by the presiding Justice of the Peace
- Accused has a criminal record starting in 1987 for property offences
- Accused ordinarily resides in the shelter system and is an alcoholic

# #4

- Accused is charged with one count of assault against his girlfriend of two years
- Allegation is that accused shoved her and slapped her across the face
- Victim gave a statement to officers on the scene but has declined to come to the station for a video statement
- No children
- No prior occurrences and accused has no criminal record

# Additional Resources: Embedded Crowns

- Crowns are embedded at two police services in Ontario
  - Toronto Police Service, 51 Division
  - Ottawa Police Service
- One of the duties of the embedded Crowns is to support and provide advice to police in their exercise of pre-trial release powers
- If you work in one of these jurisdictions, use this resource

# Additional Resources: Bail Vettors

- Bail vettor Crowns are in place in 10 courthouses across the province:
  - Kenora
  - London
  - Kitchener
  - Newmarket
  - Barrie
  - Brampton
  - Ottawa
  - Hamilton
  - Old City Hall (Toronto)
  - College Park (Toronto)
- Available upon request to provide advice to local police on issues around detention and release