

## Section 11(e) of the *Charter* - Brief Guide

Section 11(e) of the Canadian *Charter of Rights and Freedoms* states:

11. Any person charged with an offence has the right:
- e. not to be denied reasonable bail without just cause;

### Introduction to Section 11(e) of the *Charter*

The Canadian *Charter of Rights and Freedoms*, enacted in 1982, changed the law so that Canadians now have constitutionally guaranteed rights that cannot be infringed unless the government can show that such an infringement is demonstrably justified in a free and democratic society.

Section 11(e) talks about the right to reasonable bail. Bail, or, 'Judicial Interim release'. If somebody is out on bail, that means they are not in custody while they are waiting for their charges to be resolved.

Section 11(e) applies to "any person charged with an offence", and has two parts to it. The first is the right to 'reasonable bail' in terms of the amount of money required to be deposited as a condition of release/ The second part involves the right not to be denied bail without "just cause", meaning a legally sufficient reason.

The Supreme Court of Canada (SCC) also said in *R. v. Pearson*, [1992] 3 S.C.R. 665 that the term "bail" in section 11(e) can apply to any term of the release, such as a requirement that the accused person appear in court, that a "surety" vouch for them to ensure they abide by the conditions of the release, or any other conditions which restricts the liberty of the accused person.

The SCC said in *R. v. Antic*, [2017] 1 S.C.R. 509 that the release of accused persons should be the rule, and detaining them should be the exception to that rule. Because

people are presumed to be innocent before the Crown has proven the case against them, the right to reasonable bail is an important part of what it means to be free in Canadian society.

## The right to reasonable bail

“Reasonable bail” refers to the **terms** of the bail, or what the accused person has to agree to do in order to be released until their trial. This can include the amount of money required as a deposit, or any other restrictions the court sees fit to impose on the accused. An accused person may agree to the terms suggested by the Crown attorney, or they may contest the Crown’s recommendations before a judge. The SCC said in R. v. Zora, 2020 SCC 14 that this part of section 11(e) “protects accused persons from unreasonable terms and conditions of bail”. The court said in *Antic* that both a legislated form of release and the specific terms of release ordered by a justice of the peace or a judge can be unreasonable and, as a result, unconstitutional.

Bail conditions must be tailored to the individual risks posed by the accused. This means that the conditions must address the crime the accused is charged with. There is no reason to have a condition that the accused must follow if it doesn’t relate to what they are alleged to have done. If somebody is charged with a weapons offence, it is valid that they would be required to abstain from possessing weapons while they are out on bail as a condition of their release. However, if their charge was nonviolent in nature and the accused has no history of violence, that condition is not appropriate. The Supreme Court has made it clear that bail conditions are intended to be particularized standards of behavior designed to address the specific risks posed by the accused regarding the grounds for detention in the *Criminal Code* (securing attendance in court, ensuring protection or safety of the public, or maintaining confidence in the administration of justice). In *Antic*, the SCC held that courts should exercise restraint when crafting bail conditions. **They must not be used to try to punish somebody for their alleged behaviour.**

In some circumstances, a 'cash bail' is ordered. The amount of money required for a deposit with the courts should not be beyond what is readily available of the accused or their sureties. In other words, the amount should be specific to the ability of the accused to pay it. The court has a duty to find out whether the accused person has that ability. The SCC also said in R. v. Myers, [\[2019\] 2 S.C.R. 105](#) that the right to reasonable bail is ongoing. This means that if a condition of release is reasonable when ordered, but becomes unreasonable, the accused has the right to have the appropriateness of that condition reviewed before the court. For example, if an accused person was ordered as a condition of their release to live at a certain address, but at some point became unable to live at that address, they have the right to go to court to try to change that condition.

There are also certain conditions the courts have said are altogether inappropriate for bail. The SCC decision in *Zora* says that conditions that may be directed at symptoms of mental illness that an accused cannot or almost certainly will not comply with, such as an abstinence requirement for an accused with an alcohol or drug addiction, are unreasonable.

A condition that used to be common required that the accused "keep the peace and be of good behaviour" is not a required condition for bail anymore. The court in *Zora* stopped short of saying it was inappropriate, but stated instead that it should be "rigorously reviewed" before being imposed, and be proportional to the risk posed by the accused.

Finally, the court said in R. v. Reilly, [2020 SCC 27](#) that if somebody is forced to wait for the bail hearing for an unreasonably prolonged period, this can be a breach of their right to reasonable bail.

## **The right not to be denied bail without just cause**

As stated earlier, keeping somebody in custody should be the exception, not the rule. That means that if the court decides to keep somebody in custody, 'just cause' to do so is required, and those who are denied bail are entitled to the review of that decision before the courts.

The *Antic* case tells us that there are two requirements for just cause. First, the denial of bail must occur only in a narrow set of circumstances; and second, the denial must be necessary to promote the proper functioning of the bail system.

### **1. Narrow set of circumstances**

Three grounds under which bail may be denied are outlined under section 515(10) of the *Criminal Code*:

- i. where detention is necessary to ensure attendance in court,
- ii. where detention is necessary for public safety, considering any substantial likelihood of reoffending upon release or interference with the administration of justice, and
- iii. where detention is necessary to maintain confidence in the administration of justice, considering: the apparent strength of the prosecution's case, the gravity of the offence, the circumstances surrounding its commission, and the potential for a lengthy prison term.

The first ground means that somebody may be denied bail if there are no conditions that can be crafted to ensure their attendance in court. It is not enough for the Crown to say that an accused may not attend court. Detention must be necessary to ensure their attendance. Those with a history of missing their court dates are more likely to be denied on this ground.

Denying bail on the second ground can only take place if there is a 'substantial likelihood' of the accused committing an offence, and only where public safety is at stake. The court in *Morales* tells us again that the detention must be necessary for public safety, not just convenient.

On the third ground, the court has to consider the perspective of a reasonable person who is properly informed about the legislation, the Charter values, and the circumstances of the case. Would that person's confidence in the administration of justice be shaken if the accused were to be released?

## **2. Necessary to promote the proper functioning of the bail system**

The second requirement for just cause is that it be, as the court states in *Pearson*, "necessary to promote the proper functioning of the bail system and not undertaken for any purpose extraneous to the bail system". There are a few valid purposes that have been identified by the courts. One is the protection of public safety. The court in *Morales* clarified that this is a valid purpose because the bail system does not function properly if an accused interferes with the administration of justice while out on release.

Another is the prevention of reoffending. Section 515(6) of the *Criminal Code*, sets out those offences subject to something called a "reverse onus bail". In some cases, an accused must show why they should be out of custody while their case is worked out. Remember: the normal rule is that the Crown must prove why the accused should be detained, but the opposite is true in a few exceptional circumstances. An example of this is drug trafficking. With this charge there is a high risk of reoffending because of the lucrative nature of the market, so release on bail may lead to further criminal activities.

Another example of a reverse onus can be found in subparagraph 515(6)(a)(i) of the *Criminal Code*, which addresses when the accused is charged with an indictable offence alleged to have been committed while previously released on bail in respect of another indictable offence. This means that in some situations, an accused must prove why they should be released (instead of the other way around) if they are alleged to have already broken their bail conditions before.

The reverse onus is also justified for offences such as murder. This is because the penalty for murder is so high that there is an automatic risk of the accused person not showing up to court.

The SCC in *R. v. Hall*, [\[2002\] 3 S.C.R. 309](#) spoke again about that third Criminal Code ground for which bail may be denied: where detention is necessary to maintain public confidence in the administration of justice, having regard to the apparent strength of the prosecution's case, the gravity of the offence, the circumstances surrounding its commission, and the potential for a lengthy prison term. However this time, it identified it in the context of it being a valid purpose promoting the proper functioning of the bail system. However, this is the only 'just cause' that the SCC said could be used for this purpose. Stating that a denial of bail based "on any other just cause" represented a "standardless sweep" which gave judges too much discretion to deny bail when the right to reasonable bail should be broad.

Several purposes have been identified as "extraneous" to the proper functioning of the bail system. Put another way, they are irrelevant for the purposes of bail. Such purposes include punishment of accused people at the pre-trial stage; trying to encourage accused people to plead guilty where the pre-trial custody time would be longer than their actual sentence if they were found guilty; and applying a reverse onus to offences where little or no time in custody is usually imposed.

## **Important cases**

*R. v. Antic*, [\[2017\] 1 S.C.R. 509](#)

*R. v. Hall*, [\[2002\] 3 S.C.R. 309](#)

*R. v. Myers*, [\[2019\] 2 S.C.R. 105](#)

*R. v. Pearson*, [\[1992\] 3 S.C.R. 665](#)

*R. v. Reilly*, 2020 SCC 27

*R. v. Zora*, 2020 SCC 14