Bail

Prepared For: Legal Education Society of Alberta
Criminal Advocacy – Judicial Interim Release

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Bail: An Introduction to This Module[1]

The determination of whether an accused is released or detained upon arrest for criminal charges is of fundamental importance to Counsel's work on a criminal file. The Law surrounding bail applications, bail review applications and detention review applications presents a detailed and intricate approach to maintaining public confidence in the administration of justice. The goal of bail legislation is to provide procedural checks and balances to ensure that in each and every case, *Charter*-based protections against unjustified detention are not overlooked, while also considering issues regarding the safety of the public. Practically speaking, the importance of whether an accused is released or detained should never be overlooked: either a pre-trial detention Order or an Order for Release will impact not only decisions made regarding the continuation and outcome of the trial, but may also, in certain circumstances, set forth a course of events which leads to undesirable results, and further charges.

In many ways, bail is an *art,* requiring counsel to have not only an understanding of the rationale of the law of bail, including its legal underpinnings and procedural requirements, but also an understanding of the particular circumstances of the case itself (including the accused's antecedents), and the ability to creatively and carefully prepare for an approach in a strategic and timely manner, with a reasonable result in mind. Effective advocacy in this area, therefore, not only requires *preparation*, *presentation* and *review*, it also requires Counsel to reassess an accused's detention or release if circumstances change.

The focus of this module is to invite you to conceptualize an overall *approach* to judicial interim release on your files. To be effective, such an approach must be systematic and efficient, while allowing for strategic flexibility, according to the unique circumstances of the case and the particular accused. As part of this approach, you will be provided a *tool kit*, which contains standardized forms, precedents and checklists. This tool kit is designed not only to make your analysis and approach to judicial interim

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release issues within your files more effective, but also to maximize the efficient use of your time, while concurrently reducing or eliminating unnecessary use of court time. How you use or further adapt this toolkit to your practice is up to you.

Part I: The Law of Bail: History and Overview

The concept of "bail" for those accused of committing certain criminal offences can be found early in recorded English common law, becoming more formalized with the enactment of the *Statute of Westminster, I* in 1275, where it remained consistent for the next 550 years. "Factors" for consideration of an accused's release from custody included the nature or seriousness of the crime, the possibility of the accused's guilt, and a consideration of the overall criminal status or reputation of the accused – along with an overall determination as to whether the accused would, in fact, attend court. With passage of subsequent statutory enactments, bail hearings continued to focus on hearings to ensure the accused's attendance before the court, with other factors becoming subsumed within this ultimate question. Bail favored release, and sureties[2] were predominantly utilized to ensure attendance.

In Canada, as a result of legislation enacted in 1869, the issue of bail, for all offences, was entirely within the purview of judicial discretion, with little direction or standardized criteria, but for those found in case law. Such would remain the approach for over a century, until the enactment of the *Bail Reform Act* of 1972. The new *Bail Reform Act* represented a fundamental shift in how we consider the issue of bail – toward a conceptually different approach which continues, despite legal challenges arising from the *Canadian Charter of Rights and Freedoms* and subsequent legislative amendments. The changes arising from the *Bail Reform Act* continue as the foundation of bail legislation today. Such changes include the creation of a codified set of criteria where police have legal authority to release an accused; where judicial discretion is guided by use of definitive criteria, and perhaps the most drastic shift of all – by introducing grounds other than ensuring attendance: creating a legal test for *denying* bail. Pretrial

[2] Interestingly, the use of sureties has gained favour in the Province of Ontario, and is a much more common practice than in Alberta. A review of Ontario cases provides a useful analysis of the factors which the Court considers in accepting a surety as an appropriate option to supervise the accused while on release. To be effective, Release may involve supervision by one person or an entire community. See ***R.v.Sivagnanasuntharam*** 1996 CarswellOnt 2871 (Ont.Gen.Div.)