

The right to reasonable bail and statutory interpretation: why s 503(2.1)(h) of the *Criminal Code* is not a basket clause

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The Supreme Court of Canada acknowledged in *R v Antic* 2017 SCC 27 that the s 11(e) *Charter* right is an essential element of an enlightened criminal justice system, which “entrenches the effect of the presumption of innocence at the pre-trial stage of the criminal justice process and safeguards the liberty of accused persons.”¹

Importantly, the Supreme Court of Canada confirmed that s 11(e) of the *Charter* has two aspects: the right not to be denied bail without just cause *and* the right to reasonable bail itself. The latter aspect of the s 11(e) right is designed to protect accused persons from unreasonable bail terms and conditions, as well as from unreasonable forms of release.²

Thus, the conditions upon which an accused person is released from custody must be reasonable in order to be constitutionally compliant. Generally speaking, a condition of release may be said to be reasonable if it bears a nexus to the purposes the bail system itself. These purposes include: getting the accused to return to court, preventing the commission of further offences, preserving evidence, and protecting the public safety.³

However, that nexus alone is insufficient to guarantee reasonableness. The conditions imposed upon the accused person must be the least onerous terms possible unless the Crown can prove why that ought not to be the case.⁴ Moreover, a condition of release cannot be said to be reasonable unless it is first and foremost lawful. Legality is a condition precedent of reasonable bail, as “an illegal bail condition would be inherently unreasonable.”⁵

The police officer’s power to impose conditions of release is statutorily authorized by s 503(2.1) of the *Criminal Code*, which enumerates the following conditions:

- (a) to remain within a territorial jurisdiction specified in the undertaking;
- (b) to notify the peace officer or another person mentioned in the undertaking of any change in his or her address, employment or occupation;
- (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 the conditions specified in the undertaking;
- (d) to deposit the person’s passport with the peace officer or other person mentioned in the undertaking;
- (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;
- (f) to report at the times specified in the undertaking to a peace officer or other person designated in the undertaking;
- (g) to abstain from

¹ *R v Antic* at para 1.

² *Antic* at para 36

³ *R v Morales* [1992] 3 SCR 711

⁴ *Antic* at para 4

⁵ *R v L(IM)* 2015 NSPC 60 at para 10

- i. the consumption of alcohol or other intoxicating substances, or
 - ii. the consumption of drugs except in accordance with a medical prescription; or
- (h) to comply with any other condition specified in the undertaking that the peace officer or officer in charge considers necessary to ensure the safety and security of any victim of or witness to the offence.

These conditions, which all have an apparent connection to the purposes of the bail system, are exhaustive. A police officer has no power to impose conditions other than those specifically provided by s 503(2.1).⁶

As a practical matter, this is why any condition imposed pursuant to s 503(2.1)(h) of the *Code* warrants particular scrutiny. Paragraph 503(2.1)(h) of the *Code* has been called an “expansive basket clause,”⁷ and understandably so. At first glance, s 503(2.1)(h) seems to confer broad discretion to the police to create any number of additional bail conditions, thereby expanding indefinitely the so-called ‘exhaustive list’ provided under s 503(2.1)(a)—(g). Some police officers, at least, seem to view s 503(2.1)(h) as conferring such a power. This paragraph has been invoked in a number of cases to prohibit a wide range of conduct on the part of the accused which interferes significantly with their liberty interests pre-trial, including prohibiting the accused from driving a motor vehicle, from sitting in the front seat of a motor vehicle, from using a cell phone, and from entering a defined, albeit broad geographic radius.⁸

A proper reading of s 503(2.1)(h) of the *Code* demonstrates that “expansive basket clause” is not an apt description of that paragraph. While the right to reasonable bail demands a nexus between the condition imposed and one or more of the purposes underpinning the bail system, the language employed in that paragraph makes it clear that any condition imposed thereunder must be specifically invoked to ensure the safety and security of a victim of or witness to the alleged offence. Insofar as s 503(2.1)(c) already empowers the police to prohibit the accused from having contact with a witness or victim, the scope of s 503(2.1)(h) is rather narrow. Otherwise, s 503(2.1)(c) would be redundant and superfluous, and Parliament is presumed to have intended that each provision of the *Criminal Code* be given meaning.⁹

In a similar vein, it is important to recall that the condition imposed under s 503(2.1)(h) is contained in a penal statute, and penal statutes *qua* penal statutes are to be given a narrow interpretation.¹⁰ Indeed, every other condition enumerated under s 503(2.1) is undeniably narrow and specific.¹¹ It would be inappropriate to give s 503(2.1)(h) a broad and liberal interpretation when its counterparts do not admit of a broader reading.

In sum, s 503(2.1)(h) of the *Criminal Code* may only be invoked to restrict the accused’s conduct, and consequently his liberty, when there is a clear nexus between the conduct at issue and the safety or security of victims or witnesses. The condition cannot be intended to fulfil ulterior objectives under the guise of public safety, even if those intended objectives support other purposes of the bail system. Further, the condition must be imposed in the least onerous manner possible.

⁶ *R v L(Y)* 2002 NWTTC A12 at para 17.

⁷ *L(IM)* at para 13.

⁸ See for example *L(IM)* and *R v Khan* 2002 CarswellOnt 5996

⁹ *R v Hutchinson* 2014 SCC 19 at para 16.

¹⁰ *R v Barnett* 2010 ONSC 3720 at para 10.

¹¹ *Khan* at para 12.

Unless s 503(2.1)(h) is given a narrow reading based on its own plain language, any conditions imposed thereunder have the potential to be coercive and restrictive at best, and invalid in law and incapable of passing constitutional muster at worst. Absent judicial oversight, it remains to be seen whether s 503(2.1)(h) conditions will meet the requisite “*Antic* constitutional standard”.¹²

¹² *R v ADM* 2017 NSPC 77 at para 23.