

Existing Standard	Proposed Standard	Rationale
NEW	<p><b><i>BAIL HEARINGS (CONDUCT OF INTERIM RELEASE HEARINGS)</i></b><sup>1</sup></p> <p><b>STANDARD (including commentary and resources)</b></p> <p>Once retained, a lawyer who conducts an interim release hearing must protect an accused’s right not to be denied reasonable bail without just cause.<sup>2</sup></p> <p><b>COMMENTARY</b></p> <p><b><u>General</u></b></p> <p>1. The bail release provisions are generally contained in Part XVI of the Criminal Code.<sup>3</sup></p> <p>2. Counsel should refer to the three grounds that determine whether an accused can be bound by conditional release or will be denied interim release.<sup>4</sup> There are also possible cultural or compassionate reasons that would dictate release orders that might otherwise result in the detention of an accused. See <i>R. v. Sek</i> 2022 NSSC 11 (Coady J).</p> <p>3. Counsel should also be aware of situations when the reverse onus provisions are applicable.<sup>5</sup> In cases where an accused is alleged to have breached an existing bail order, counsel need to be aware of possible</p>	

<sup>1</sup> Counsel should also refer to the Cultural Competence Standard

<sup>2</sup> Section 11(e) of the Charter of Rights and Freedoms

<sup>3</sup> See generally Part XVI of the Criminal Code, particularly s. 515

<sup>4</sup> S. 515(10) Criminal Code. See *R. v. Antic*, [2017] 1 SCR 509; *R. v. Hall* [2002] 3 SCR 309; *R. v. St-Cloud* [2015] 2 SCR 328; *R. v. AB* [2006] OJ No. 394; *R. v. Huggins* [2011] OJ No 4676; *R. v. Charter* [2008] NSJ No 442 (NSSC-Beveridge J)

<sup>5</sup> S. 515(6) Criminal Code; *R. v. Antic* [2017] 1 SCR 509 & *R. v. Tunney* [2018] OJ No 767

	<p>revocation of the existing order and additional requirements that may be involved.</p> <p>4. Counsel will need to understand that bail is not available in Provincial Court for s. 469 Criminal Code offences.<sup>6</sup></p> <p>5. Counsel should also consider ss. 502(2) of the Criminal Code, when clients ask to vary release conditions before first appearance and bear in mind that the usual rules do not apply. Variations of this kind are heard as a matter of right in provincial court. Otherwise, the current view is that crown consent is otherwise required to vary bail in provincial court.<sup>7</sup> Section 502(2) Criminal Code permits variation applications to be made prior to the first arraignment of an accused. It may be made without consent and the court does not require that there be consent to jurisdiction. In the context of domestic violence situations, this procedure will allow for speedy requests to vary non-communication and non-contact provisions made in OIC undertakings and avoids the requirement that crown must consent to jurisdiction after an accused has been arraigned.</p> <p>6. Counsel should be aware that unless raised by the accused, they may not be asked about the circumstances of the alleged offence. Counsel will need to make a strategic decision whether they will call their client to testify and if they will ask their client about the circumstances of the allegations.<sup>8</sup></p> <p>7. Counsel will need to consider the customary request for publication ban before beginning a bail hearing.<sup>9</sup> Counsel, generally, should seek a non-publication of bail hearings under S. 517(1) Criminal Code.<sup>10</sup></p>	
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<sup>6</sup> Ibid and ss. 469; 515(11) & 522 Criminal Code

<sup>7</sup> S. 502(2) Criminal Code. *R. v. Evans* (unreported-Sherar J) & *R. v. Arkinson* [1996] BCJ No. 2549 (BC Prov Ct) See also a contrary opinion in *R. v. Greener* [2003] NSJ N. 486 (NS Prov Ct-Macdonald J)

<sup>8</sup> S. 518(1) (b) Criminal Code

<sup>9</sup> S. 517(1) Criminal Code

<sup>10</sup> Ibid

	<p>8. Counsel should be aware of the relaxed evidentiary rules applicable to bail hearings.<sup>11</sup></p> <p>9. Counsel will also need to bear in mind that in the case of s. 469 Criminal Code offences, the Court has special powers which may allow for “non-communication” orders.<sup>12</sup> The court may impose non-communication orders at the interim release stage of the proceedings, whether bail is granted or not.<sup>13</sup></p> <p><b>LADDER PRINCIPLE</b></p> <p>10. Persons charged with Criminal offences have a constitutional right to reasonable bail, at the lowest level.<sup>14</sup> Unless circumstances exist to warrant restrictions, the court ought not to impose them. Practically, though, accused will often agree to restrictions to secure their release. Counsel receiving such instructions should advise their clients accordingly.<sup>15</sup></p> <p>11. Summary advice and cells duty counsel face challenges due to the limitations inherent to the process. Counsel will often be faced with a paucity of reliable information respecting the substantive charge(s) involved, the person in custody and possible release plans. This does not relieve counsel from their obligations to strive to seek reasonable bail for them.<sup>16</sup></p> <p>12. Counsel should further be aware of the consequences of remand on</p>	
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<sup>11</sup> S. 518(1) Criminal Code

<sup>12</sup> S. 522(1) Criminal Code and section 515(12) Criminal Code

<sup>13</sup> S 515 (12) & 522 (2.1) Criminal Code

<sup>14</sup> Section 11(e) of the Charter of Rights and Freedoms & *R. v. Antic*, [2017] 1 SCR 509

<sup>15</sup> *Ibid*

<sup>16</sup> *Ibid*

	<p>the African Nova Scotian and Indigenous population and should receive advice on whether to seek a Gladue Report or Impact on Race and Culture Assessment – or an expedited version of same – in preparing for a bail plan or bail hearing. Even an expedited report may take time, and this should be discussed with the client.</p> <p>13. Counsel should further be aware that the principle of restraint has been codified, particularly for Indigenous people and other vulnerable groups.<sup>17</sup></p> <p>14. Counsel must be mindful that once a determination has been made by the court, review or variation of the determination may be difficult, costly and time consuming. Adjournments may be required to ensure that an accused receives a meaningful bail hearing at first instance, which cannot exceed three days.<sup>18</sup></p> <p><b>SECTION 516 ADJOURNMENTS</b></p> <p>15. Counsel should consider s. 516 of the Criminal Code, in cases where the crown seeks an adjournment of bail requests. The authority of the court to adjourn is discretionary, and Counsel may oppose such requests, if circumstances warrant.<sup>19</sup></p> <p>16. Also, when considering possible sureties as part of the bail plan for an accused, Counsel will need to review Section 515.1 Criminal Code and ensure the surety can comply with that section.<sup>20</sup></p> <p><b>RELEASE ORDERS AND SURETIES<sup>21</sup></b></p>	
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<sup>17</sup> Ss. 493.1, 493.2; *R. v. Zora*, 2020 SCC 20

<sup>18</sup> Section 516(1) Criminal Code

<sup>19</sup> *Ibid*

<sup>20</sup> *Ibid*

<sup>21</sup> *Ibid*

17. Counsel should bear in mind that on those occasions where proposed releases are not unconditional, there may be requirements to obtain sureties. Counsel should refer to the crown form currently in use which is entitled "Release Order Conditions" in order to be familiar with possible terms crown counsel may be seeking in order to agree to release. Sureties may be required to justify with personal property or real property.

18. Where sureties are required, counsel should review with them, their obligations and confirm that they understand their liability in the event of default and their right to render an accused, if they decide to do so. Also, sureties ought to be advised that crown counsel will wish to conduct background enquiries which will generally include criminal records checks.

19. Also, counsel must be aware that sureties can only act for one accused at a time, and any criminal record or behaviour will potentially exclude them from acting as a surety. Counsel should also bear in mind that there will often be a supervisory role imposed upon a surety by the court.

20. Where sureties are required to justify with real property, the court will expect them to verify their ownership of that property. This can be done by Property-On-Line documentation (POL). POL allows access to copies of deeds and has ownership information.

21. Where proposed release conditions are being considered, counsel must ensure that the client understands what they are; counsel must ensure that the client is willing to obey them and is capable of doing so. This can be problematic where release conditions are for the abstention from substances or alcohol and the client has addictions or substance abuse difficulties.

22. In cases where trial dates are delayed, an accused is entitled to have

	<p>detention reviewed.<sup>22</sup></p> <p><b>“90 DAY” HEARINGS</b></p> <p>23. Even where bail has been denied, clients have a right to periodic automatic review. In such cases, notice of hearing will almost always be court generated. Counsel must review the client’s circumstances to determine whether there have been any changes in circumstances which could warrant a hearing. Examples of such circumstances can be delay, cultural assessments or circumstances, health of the accused, a better bail plan or other new information that could be favourable to an accused.<sup>23</sup></p> <p><b>REVIEW HEARINGS</b></p> <p>24. Bail review hearings are considered as hybrid hearings. They are considered “<i>de novo</i>” hearings but in practice, the Accused has the onus to establish another order would be appropriate and review will often depend upon a change in circumstances or improved bail plan.<sup>24</sup> Applications of this nature will almost always require a transcript from the provincial court and can involve dates to assign the hearing date. Practically speaking, affidavits are required and counsel will need to consider whether the accused will swear an affidavit, thereby rendering them liable to cross examination.<sup>25</sup></p> <p>25. Applications will require a transcript of the proceeding under review, certified copies of the information(s) and affidavit evidence. Counsel must consider whether a solicitor’s affidavit and other affidavits are necessary</p>	
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<sup>22</sup> Ibid

<sup>23</sup> *R. v. Gobeil*, [1997] N.S.J. No. 592 (NSSC). See also *R. v. P.M.A.*, [2003] N.S.J. No. 440 (N.S.S.C.) Per MacDonald, A.C.J.S.C., as he then was; *R. v. Durning*, [1992] N.S.J. No. 206; 114 N.S.R. (2d) 75; *R. v. Tolliver*, [1999] N.S.J. No. 480; *R. v. M.W.S.*, [1995] N.S.J. No. 89 (N.S.S.C.). See also *R. v. Myers* 2019 SCC 18

<sup>24</sup> Ibid and also paragraph [19] in *R. v. Carrier* (1979), 51 C.C.C. (2d) 307

<sup>25</sup> Section 520 Criminal Code

to demonstrate a change in circumstances and to properly place the bail plan before the court. Solicitors' affidavits can be used only for non-contentious facts to avoid counsel becoming subject to cross examination.<sup>26</sup>

### **YOUNG PERSONS**

26. Criminal Code versus Youth Criminal Justice Act-counsel should be aware that Part XVI of the Criminal Code applies to bail hearings involving young persons except to the extent that the Criminal Code provisions are inconsistent with the Youth Criminal Justice Act.<sup>27</sup>

27. Custody versus other social measure-counsel should be aware the Youth Criminal Justice Act mandates that the pre-trial detention of young person shall not be used as a substitute for other services, including adequate child protection options, mental health services, or other social measures.<sup>28</sup>

28. Test for judicial interim release-counsel should be aware that the Youth Criminal Justice Act adds an extra layer of consideration when assessing whether Judicial Interim Release is available in the case of a young person. Specifically, a young person may only be detained in pre-trial custody if the conditions outlined in Section 29(2) of the Youth Criminal Justice Act have been met.<sup>29</sup>

29. The onus is on the crown to satisfy the youth court judge that the young person ought to be detained. This is distinguishable from the case

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<sup>26</sup> Ibid

<sup>27</sup> Sections 3, 28, 28.1, 28.2 & 29, 29(4) & 29(5) of the Youth Criminal Justice Act

<sup>28</sup> Section 31(1) of the Youth Criminal Justice Act

<sup>29</sup> Section 31(2) of the Youth Criminal Justice Act

	<p>of an adult accused where reverse onus provisions may apply.<sup>30</sup></p> <p>30. Seeking bail – Deferred custody and supervision order breach allegation. Counsel representing a young person must be aware of the difference in the interim release provisions in the Youth Criminal Justice Act.<sup>31</sup></p> <p>31. Aging out-counsel must remain mindful that is possible for a young person to “age out” of the youth justice system. Young people must be detained separately from adults unless the youth court judge determines otherwise having regard to the best interest of the young person.<sup>32</sup></p> <p>32. Counsel should be aware that the provincial director may apply to have a young person moved from a youth facility once that young person attains the age of eighteen years. When a young person attains the age of twenty years it is presumed that the accused will be detained in an adult facility.<sup>33</sup></p> <p>33. Remand “but for” a responsible person-counsel should be aware that after exhausting all bail options available under section 515 of the Criminal Code there is an additional option available when dealing with young persons. Section 31 states that the youth court judge may release a young person who would otherwise be detained into the care of a responsible person. The responsible person ought not to be relied on where a less onerous form of release is available. A responsible person may only be relied on if no other form of release can be imposed. Only then must counsel propose that the responsible person is willing and able to take care and exert control over the young person and is the young person</p>	
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<sup>30</sup> Ibid

<sup>31</sup> S. 31(1)(b) of the Youth Criminal Justice Act requires that the responsible person is aware of their responsibilities and Counsel must be aware that their primary obligation is to their client. This should be compared to s. 515.1 of the Criminal Code

<sup>32</sup> Ibid

<sup>33</sup> S. 515.1 Criminal Code



	<p>willing to be released into their care.<sup>34</sup></p> <p>34. Counsel should be aware that the youth court judge is required to make inquiries into the availability of a responsible person in every case involving a young person before remanding that young person.<sup>35</sup></p> <p>35. Counsel should advise the potential responsible person of their duties and obligations pursuant to the Youth Criminal Justice Act, including but limited to the possibility of charges if they fail to follow through appropriately. Counsel must be mindful of their duty to the young person as their client, as opposed to the responsible person who has different interests, and ought to encourage the potential responsible person to seek independent legal advice before committing to the undertaking.<sup>36</sup></p> <p><b>ACCOUNTING FOR PRE-TRIAL CUSTODY</b></p> <p>36. Counsel must be aware that special rules apply to calculate for time served.<sup>37</sup> Generally, accused are entitled to a 1.5:1 credit. Also, there are cultural considerations that must be taken into account which could increase remand credit for persons in pre-trial custody. Similarly, COVID-19 considerations or institution conditions can affect credit calculations.<sup>38</sup></p> <p><b>BREACH OF CONDITIONS (HEARINGS)</b></p> <p>37. Counsel must understand the nature of these hearing whether they be in the context of breach of conditions or breach of conditional sentences.<sup>39</sup></p>	
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<sup>34</sup> Ibid

<sup>35</sup> Section 525 Criminal Code

<sup>36</sup> Ibid

<sup>37</sup> Sections 719(3) & 719(3.1) Criminal Code, see also *R. v. Safarzadeh-Markhali*, 2016 SCC 14 (CanLII), [2016] SCR 180 which partially struck down s. 719(3.1) Criminal Code

<sup>38</sup> See *R. v. Summers* 2014 SCC 26 & *R. v. SM* 2016 SCC 14

<sup>39</sup> Section 742.6 Criminal Code

	<p>It should be noted that s.523.1 offers an alternative forum for more technical breaches, even for s.469 offences. The practice of “judicial referral hearings” has not yet been uniformly implemented, as the required amount of time and resources are considerable.</p> <p>38. Counsel will be required to review sections 515(6) in the case of breach of conditions and section 742.6 of the Criminal Code which sets out the procedure concerning breach of conditional sentences.<sup>40</sup></p> <p><b>POST CONVICTION HEARINGS</b></p> <p>39. The Charter right to reasonable bail does not end upon conviction or a finding of guilt. Accused persons right to liberty persists until sentence is passed. Counsel may be required to address this if an accused is found guilty or convicted and the sentence hearing is postponed.<sup>41</sup></p> <p>40. Also, after being sentenced to custody, an accused who appeals his conviction and/or sentence may apply for interim release until the appeal is dealt with by the court.<sup>42</sup></p>	
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<sup>40</sup> Ibid

<sup>41</sup> Section 518(2) Criminal Code

<sup>42</sup> Section 679 Criminal Code, *R. v. Al-Rawi*, 2021 NSCA 6; Paragraphs [19]-[22] of *R. v. Oland* 2017 SCC 17, at para 19