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## **COVID-19: Ontario Court of Justice Protocol Re Bail Hearings**

*Effective Date May 11, 2020; Revised April 22, 2021*

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### **1. Introduction**

The objective of this protocol is to ensure that bail proceedings are dealt with justly and efficiently, taking into account the following:

- i. Bail proceedings must protect the liberty rights of an accused person – including the constitutional right to reasonable bail and the right to a timely bail hearing – and protect the public.
- ii. Unless the matter is a “special bail hearing”, that cannot be accommodated immediately, and subject to good faith requests for adjournment in serious and evolving investigations, all reasonable steps should be taken to permit a recently arrested accused person who appears before the Court for the first time and is prepared to proceed with his or her bail hearing, to proceed with the hearing that same day, whether or not it is on consent, without requiring that accused person to be remanded into custody at a correctional facility. This principle applies to both weekday bail courts and Weekend and Statutory Holiday (WASH) bail courts.

- iii. The COVID-19 pandemic has emphasized the need for parties and the Court to work cooperatively and flexibly to maximize the proper and efficient use of court hearing time, particularly in proceedings involving accused persons who are in custody. Procedures to achieve this include (i) restricting the information and evidence presented at a bail hearing to what is relevant to the limited issues that must be determined at the hearing; (ii) where possible, having the parties discuss bail proceedings in advance of the hearing to resolve and/or focus issues; and (iii) having hearings proceed on the basis of documentary, rather than oral, evidence.
- iv. Where a strict application of the procedures outlined in this protocol could cause delay or an adjournment in a particular bail proceeding, judicial officials may dispense with them.

In this protocol, the term “defence counsel” includes duty counsel.

## **2. Pre-Court Preparations and Discussions**

Video and audio resources for in-custody accused persons remain extremely limited. It is critical that all preparation and discussions that can occur outside of court take place before a court appearance wherever possible.

The Crown and defence counsel should make reasonable efforts to communicate prior to a bail appearance to determine whether the matter will proceed as a consent release or a contested hearing and, if contested, which issues are in dispute. The parties should also make efforts to narrow the issues as much as possible and discuss the nature of any evidence to be heard and how it will be presented.

Advance discussions are also important because current technological constraints may make it difficult for defence counsel and the accused person to have a private conversation during a remote appearance, although this should be accommodated wherever possible should the need arise.

## **3. Written materials**

To ensure an expeditious hearing, bail proceedings should proceed on a written record. Where possible, counsel should share written materials with one another and file the materials with the Court in advance of the hearing. However, when an accused person was recently arrested or if it is otherwise not

feasible for counsel to exchange and file written materials in advance, the presiding justice may proceed on the basis of oral submissions and evidence, rather than delaying proceedings so that written materials can be provided.

Where counsel have spoken in advance of the hearing and are proposing a consent release for the Court's consideration, counsel should jointly complete and [email to the Court](#) the following documents:

- i. the proposed terms and conditions of release; and
- ii. the surety declaration, where required (see below).

Where the bail hearing is a contested hearing, the Crown will share the following documents with defence counsel and email them to the Court in advance of the hearing:

- i. the synopsis or summary of allegations; and
- ii. the accused's criminal record (if any); and
- iii. any other synopsis, witness statement or summary the Crown intends to introduce at the hearing.

Materials will be exchanged and filed electronically (by email) in accordance with section 5 of the Court's [COVID-19 Notice to Counsel and the Public re: Criminal Matters in the Ontario Court of Justice](#) unless otherwise ordered by a judicial official.

The written materials will be made exhibits and thus be retained as part of the record of the bail hearing and, as such, need not be read onto the record.

#### **4. The Hearing**

Bail hearings will be conducted by audioconference or videoconference, or a combination, at the direction of a judicial official.

In a contested bail hearing where the evidence of a witness will be heard, the accused may appear by audioconference only if the accused and Crown consent.

It is anticipated that, in most cases, issues of bail can be determined based on the written materials and focused oral submissions.

The parties should be prepared, at the beginning of the bail hearing, to identify whether it is a Crown onus or reverse onus and also outline the following:

Crown:

- the Crown's position regarding what ground(s) for detention are at issue and why
- the Crown position regarding the appropriate form of release or whether a detention order is being sought and, where it is a Crown onus hearing, why that form of release or a detention order is justified
- what additional evidence, if any, the Crown will rely upon to support their position with respect to detention or form of release.

Defence:

- the defence position regarding the appropriate form of release
- in reverse onus situations, the proposed plan of release and what evidence, if any, they intend to call to satisfy their onus

After hearing these submissions, the presiding judicial official may direct how the hearing will proceed to ensure that the hearing proceeds both fairly and efficiently.

## **5. Sureties**

### **a. Alternatives to surety releases**

The ladder principle, as set out in ss. 515(1) to (2.01) of the *Criminal Code* and explained in *R. v. Antic*, 2017 SCC 27, and section 515(2.03) of the *Code* mandate that a surety release be required only where the court is satisfied that it is the least onerous form of release possible in the circumstances, regardless of onus. In addition, there are significant challenges associated with meeting with sureties and having them complete documentation during the COVID-19 pandemic. All parties are therefore encouraged to consider and propose alternatives to surety releases whenever possible and appropriate.

### **b. Surety declarations**

Where the accused is proposing one or more sureties, defence counsel should prepare surety declarations and share them with the Crown and file them with the Court in advance of the hearing,

unless the Crown is consenting to the Court dispensing with the surety declaration(s) under s. 515.1(2)(a) of the *Criminal Code*.

Where it is not feasible for the proposed surety to swear or affirm a surety declaration, defence counsel is expected to do the following before the hearing:

- i. communicate with the surety and complete the surety declaration; and
- ii. take reasonable steps to ascertain the identity of the proposed surety, for example, by reviewing the surety's photo identification and comparing it to the proposed surety's appearance, either in person or by video (e.g. Facetime, Skype), or by other means.

The Court recognizes that, because duty counsel's ability to interact with a proposed surety may be particularly restricted due to the COVID-19 pandemic, it may not be feasible for duty counsel to complete a surety declaration and ascertain the surety's identity in some cases.

Where (i) a sworn / affirmed surety declaration has not been provided and (ii) the Crown is not consenting to dispense with the surety declaration under s. 515.1(2)(a), the proposed surety is expected to attend the bail hearing by audioconference or videoconference. The proposed surety may be asked to confirm their identity and, where the surety declaration was completed but not sworn or affirmed, confirm the truth and accuracy of the contents of the surety declaration under oath or affirmation during the hearing. Where no surety declaration was completed, the surety or counsel may be required to present evidence or information to allow the Court to determine the suitability of the surety.

**c. Reviewing allegations and accused's criminal record (if any) with the surety**

Where the accused is proposing one or more sureties, defence counsel should review the synopsis / summary of allegations and the accused's criminal record (if any) with the surety in advance of the hearing. Defence counsel may be asked to confirm, on the record, that they have done so.

**d. Cross-examination of sureties**

It is anticipated that, in many cases where a surety declaration has been filed, cross-examination of the surety(ies) will not be needed.

The judicial official may also take measures to ensure that any such cross-examination is focused and directly relevant to the limited issues live at the bail hearing, and to avoid unduly prolonging the hearing. This may include asking the Crown to identify what area(s) and for what purpose(s) cross-examination is directed and how it will inform the specific issues live at the bail hearing.

#### **e. Surety releases**

Sureties are encouraged to make themselves available by audioconference or videoconference for the bail hearing so that, if a surety release is ordered, the release can be effected immediately.

Where the Court orders a surety release, defence counsel may witness the surety signing the release order, either in person or through remote means. Where it is not feasible for the surety to sign the release order in the presence of the Court or defence counsel, the presiding judicial official may dispense with having the surety physically sign the release order, provided that the judicial official is satisfied that the surety has committed to fulfilling their obligations as a surety, including the financial obligation, as set out in the release, and that they understand that they are bound by the terms and conditions of the release order even if they do not sign it.

To assist the Court in being satisfied as to the identity of the surety, defence counsel may be asked to outline the steps they have taken to ascertain the surety's identity, as described above.

## **6. Procedure for Effecting Release**

The court clerk will email the release order to the correctional facility or the police station where the accused is being detained, so that the accused person can sign the order.

Once the accused person has signed the release order, the correctional facility or police station will give a copy of the signed release order to the accused, and email a copy of the signed release order to the Court.

The court clerk will email copies of the completed, signed release order to the Crown, defence counsel and surety (where applicable). Defence counsel will facilitate delivery of the release order to the surety (if any) where feasible.

The court clerk will distribute and file a copy of the release order in accordance with normal practice.

## **7. Remote Fly-In First Nation Communities**

Consideration should be given to the unique circumstances of an accused arrested in a remote First Nation community, including the additional prejudice and barriers caused by an adjournment, which would require the accused to be flown out of the community to be admitted into custody on remand. In addition, if released on bail, the accused may not be able to return home or may face significant barriers in returning home, due to the risk of having been exposed to COVID-19 and transmitting it back into the community. In these circumstances, every reasonable effort should be made to make a bail determination at the first appearance, while the accused is still in their home community.

## **8. Special Bail Hearings**

The procedures set out in subsections 1 to 7 of this Notice apply to special bail hearings, except as modified below. In addition, the Court's [Direction for Scheduling Special Bail Hearing Courts](#) continues to apply to special bail hearings, except as modified below.

Special bail hearings are bail proceedings of such length that they cannot be accommodated in regularly scheduled bail courts. Because special bail hearings are lengthier than other bail hearings, and often involve more serious charges and complex issues, enhanced case management procedures apply to special bail hearings, including (i) a bail hearing conference presided over by a judicial official; and (ii) the preparation of a detailed written record for the hearing.

Before identifying a proceeding as requiring a special bail hearing, the Crown and defence counsel will speak to determine whether the matter will proceed as a consent release or a contested hearing and, if contested, which issues are in dispute, the ground(s) on which the Crown is relying to seek or maintain detention, as well as the nature of any evidence and how it will be presented.

### **a. Bail hearing conference**

A bail hearing conference will be held in respect of any hearing that counsel identify as a special bail hearing.

Bail hearing conferences will be held the same day a request is made, unless a different date is requested by counsel and approved by a judicial official. The conference will be arranged according to regional protocols.

The purpose of the bail hearing conference is to provide for a timely, just and efficient bail hearing by effectively addressing the following:

- resolution of bail-related issues;
- accurate hearing time estimates; and
- procedural and evidentiary issues that promote the proper use of hearing time.

To facilitate meaningful discussions at the special bail hearing conference, counsel should exchange and file with the Court as much of the written materials for the bail hearing (described below) as possible in advance of the conference. Where it is not possible to file all of the materials in advance, the judicial official presiding over the conference may, in their discretion, direct that a second bail hearing conference be held once the additional materials have been exchanged and filed. In doing so, the judicial official may direct that a target special bail hearing date be tentatively scheduled before the second conference is held, to be confirmed following the second conference.

The bail hearing conference will be conducted by audioconference or videoconference.

The judicial official conducting the bail hearing conference may make any direction in relation to the conduct of the special bail hearing that would assist in ensuring that the hearing is dealt with justly and efficiently, including the following:

- identifying and, where necessary, limiting the materials to be filed;
- setting timelines for the exchanging and filing of materials;
- confirming how the accused, counsel and any other participants (proposed sureties, witnesses) will appear for the hearing;
- determining a time estimate for the hearing, including setting time limits for the presentation of the evidence (including cross-examination) and/or submissions, which the



parties should expect will apply at the bail hearing, subject to the discretion of the judicial official presiding over the hearing; and

- ordering that a further bail hearing conference be held to address any outstanding matters.

Following the bail hearing conference, the special bail hearing will be scheduled through the trial coordinator's office.

#### **b. Written materials**

Special bail hearings will proceed primarily based on a written record.

The following materials will be exchanged by the parties and then filed with the court, in accordance with the timelines set out below.

Materials to be provided by the Crown:

- Information
- Synopsis
- Criminal record
- Any other relevant evidence to which the Crown will refer at the hearing, including witness statements, synopses or summaries of prior proceedings or outstanding charges, witness transcripts, and photographs
- A brief outline specifying the Crown's concerns under the primary, secondary and/or tertiary grounds
- Any authorities to which the Crown intends to refer at the hearing, with the relevant paragraphs highlighted

Materials to be provided by the Defence:

- A brief outline of the proposed release plan
- Where the proposed release plan includes a surety, a surety declaration and/or supplemental surety affidavit (which can be unsworn if swearing is not feasible)

- Any authorities to which defence counsel intends to refer at the hearing, with the relevant paragraphs highlighted

The materials will be exchanged and filed electronically (by email) in accordance with Section 3 of the Notice.

Where possible, the written materials should be exchanged and filed in advance of the special bail hearing conference. Where it is not possible to do so, the judicial official presiding over the special bail hearing conference will set the timelines for the written materials to be exchanged and filed with the court.

Crown and defence counsel are expected to review and discuss the written materials to further focus and clarify any issues prior to the hearing.

Given the focused and time-sensitive nature of bail hearings, voluminous materials should not be filed other than in exceptional cases. Where appropriate, the judicial official presiding at the special bail hearing conference and/or at the bail hearing may impose restrictions on the written materials that are to be filed, including imposing page limits and/or directing the preparation of summaries.

### **c. Sureties**

Section 5 of this Notice applies to proposed sureties for special bail hearings, in addition to the following directives.

To avoid the need for supplemental oral evidence from the surety during the hearing, defence counsel is encouraged to supplement the information in the prescribed surety declaration with additional written evidence from the surety, including (i) the role that the surety will play in implementing and supervising the release plan; and (ii) information demonstrating the surety's ability to fulfill the financial obligations set out in the surety declaration / affidavit.

Where, following the bail hearing conference, it has been determined that a surety is expected to testify at the special bail hearing, defence counsel should confirm the surety's availability to attend the hearing by audioconference or videoconference at the date and time scheduled for the hearing.

