Legal Aid Alberta

LAA Duty Counsel Manual – v.7.6 – August 2021

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Part 1: OBJECTIVES, TYPES AND FUNCTIONS OF DUTY COUNSEL

Objectives of the Duty Counsel Program

The objective of the Duty Counsel program may be summarized as follows:

> To provide consistently high-quality legal aid services province-wide in a cost-efficient manner to any Albertan by providing legal advice, court representation and other legal assistance in accordance with the policies and priorities established by Legal Aid Alberta.

Providing consistently high-quality legal aid services

Duty Counsel tasks must be performed in a professionally acceptable manner. This means balancing the pressures created by volume and needs of clients requiring service as well as the limited time in which those services can be performed.

Providing services to low-income individuals

Legal Aid Alberta will ensure that Duty Counsel are assigned where and when required. Each Duty Counsel is expected to contribute their full professional skill and judgment to the services for which he/she is being paid, and to submit accounts and report statistics that are accurate and completed in a timely fashion.

Duty Counsel are expected to supply summary legal services (adjournments, etc.) to all people having business at the court; however, the primary target for Duty Counsel services are low income individuals and/or vulnerable Albertans who are therefore within the LAA mandate for service delivery.

Providing legal advice, court representation and legal assistance

All services provided by Duty Counsel must fall within LAA's priorities for the types of cases and types of proceedings for which we provide legal aid services as specified in Administrative Policy 01 - Service Eligibility.

All Duty Counsel providers must be able to recognize which services do/do not fall within Duty Counsel's mandate and to provide services in accordance with those priorities. Duty Counsel must also be aware of other types of LAA service delivery and in a general way be able to refer proper cases to the proper service delivery method (e.g. refer to Legal Aid for appointment of Counsel or refer to community resources like Student Legal Services).

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Providing Statistics and Reports on Services Rendered

Duty Counsel are accountable to LAA and must fulfil reporting requirements on the Duty Counsel activities they provide, including correct billing procedures, data or information collection, and other administrative tasks in accordance with the policies and directions of LAA. This reporting is done through the Outcome Reporting on the Lawyer Portal when billing your Duty Counsel Certificates.

Duty Counsel are expected to complete the invoicing, and reporting, on their Duty Counsel certificates within a reasonable timeframe. While the certificate itself allows up to 6 months for billing, LAA strongly recommends that Duty Counsel certificates be billed and the services reported within 7 days of completion of the shift.

The information provided through the Lawyer Portal is essential for the local and provincial management of LAA's resources. Accurate reporting also provides a measure of the needs of the communities that LAA serves and informs how Duty Counsel services should be provided across Alberta. For these reasons, LAA requires Duty Counsel to provide timely reporting on the services that are being rendered in each court location.

Other objectives

To meet the overall objective set out above, the Duty Counsel program has the following subsidiary objectives:

- To provide professional guidance to clients requesting assistance to move through the judicial system as quickly and effectively as possible, by:
    - reaching an appropriate resolution of as many issues as possible for each client;
    - where a final resolution is not feasible, referring the client to the most appropriate resource (mediation, certificate or private bar) at the earliest possible intervention point; and
    - planning the client's options and next steps with the client to fully utilize available community resources.

- To reduce each client's time wastage and frustration, thereby contributing to the over-all administration and functioning of the court process, by:
    - ensuring that the optimum number of Duty Counsel are scheduled each day;
    - encouraging individual Duty Counsel to be organized and as efficient as possible in dealing with their daily client workload; and
    - Communicating and exchanging information with court administration and the judiciary.

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Joining the Duty Counsel Roster

A lawyer may apply to LAA to have his or her name entered on a list of qualified Duty Counsel by submitting a request to LAA which specifies the court locations and the areas of law for which they are interested in performing Duty Counsel services. Lawyers may submit their application for different areas of the province and indicate their preferences.

In the application, the lawyer must provide information concerning his or her practice, qualifications and experience and the status of his or her Law Society of Alberta membership. LAA may manage Roster Duty Counsel by applying additional standards, such as experience in a particular field, e.g.: refusing to put a lawyer in a specialized Youth Court even though the lawyer is on the larger Criminal Duty Counsel list.

The “applicable standards” required of Duty Counsel are evolving, but LAA will take into consideration factors such as previous courtroom experience and training, or educational programs completed. LAA may make any other enquiries as it deems necessary.

Duty Counsel Training:

New Duty Counsel are required to attend a half day training session hosted by LAA. These sessions are offered periodically, or roster counsel can view a pre-recorded session and sign an acknowledgement to that effect.

In addition, roster Duty Counsel are also required to complete a day of Duty Counsel shadowing.

Shadowing Requirements:

Once an application for Duty Counsel is accepted by LAA as eligible, LAA will require that Duty Counsel to successfully complete a probationary period. During the probationary period, the applicant is scheduled and paid at normal Duty Counsel rates while “shadowing” an experienced Duty Counsel. Shadowing will require a minimum of 2 (two) days completed. The probationary period will not expire until both shifts, and any other requirements LAA deems necessary, have been completed.

Types of Duty Counsel

Once the probationary period is concluded to LAA’s satisfaction, eligible Duty Counsel can then be scheduled individually for their preferred court locations. This shadowing requirement is applicable to all areas of law as described below. Generally speaking, there are three broad areas of law which require Duty Counsel services:

1. Family,

2. Criminal, and
3. Mental Health Law.

Family Duty Counsel

Functions of Family Duty Counsel:

- Attend the Provincial Court of Alberta Family Division and the Court of Queen's Bench of Alberta as scheduled.
- In Provincial Court and the Court of Queen's Bench:
    - Advise persons about their rights and any immediate urgent steps they may need to take at court to protect them;
    - Advise persons about court procedures;
    - Briefly review documents filed with the court and advise on documents the client needs to file to respond;
    - Assist in obtaining adjournments and scheduling further court dates such as interim hearings, JDRs and trials (Provincial Court) or Early Intervention Case Conferences and Special Chambers (QB);
    - Represent unrepresented persons at applications in Provincial Court docket, and QB Family Docket or Chambers concerning , custody, access, child protection, child support, spousal/partner support and EPO QB Review Hearings; and
    - Assist persons in the negotiation of settlements and consent orders;
    - If required, assist with making a *Rowbotham* [*New Brunswick v. G. (I)*] application for Court Ordered Counsel in child protection proceedings.

Types of Criminal Duty Counsel

There are several different types of Criminal Duty Counsel and the functions of Criminal Duty Counsel vary slightly depending on the location. Overall, the function of Criminal Duty Counsel is to advise persons of their rights and support their navigation through the Criminal Justice System.

1. **Provincial Court Criminal Duty Counsel**:

Functions of Provincial Court Criminal Duty Counsel:

- Attend the Provincial Court of Alberta Criminal Division as scheduled;
- In the Provincial Court of Alberta Criminal Division, assist unrepresented persons who have been taken into custody or summoned and charged with offences, by advising them of their rights and by taking any steps that may be appropriate, including:
    - Advise them regarding procedure prior to appearing in court and procedure once they begin to appear.

- Assist with adjournments, reservations of plea to seek counsel, judicial interim release applications, entering an election and plea, setting trial dates, having plea negotiations on their behalf with the Crown, entering a guilty plea, speaking to sentence, and admission into diversion programs.
- Advising them on how to obtain Disclosure and an Early Case Resolution offer from the Crown Prosecutor's office if they wish to proceed on their own.
- Assist with admission into specialized courts such as Drug Treatment, Mental Health and Indigenous Court.
- If required, assist with making a referral to LAA, by providing an assessment on likelihood of incarceration, and then directing the accused to client contact services personnel to complete the application.
- If required, assist the accused with making a *Rowbotham* application for Court Ordered Counsel.

2. Youth Court Duty Counsel

Youth can particularly benefit from the experience and knowledge of Duty Counsel and may not need to work with a lawyer other than Duty Counsel.

Functions of Youth Court Duty Counsel:

- Attend the Provincial Court of Alberta, Youth Division as scheduled;
- In the Provincial Court of Alberta, Youth Division, assist Youths who have been taken into custody or summoned and charged with offences, by advising them of their rights and by taking any steps that may be appropriate to protect those rights, including:
  - Advise them regarding procedure prior to appearing in court.
  - Assist with adjournments, reservations of plea to seek counsel, judicial interim release applications, entering an election and plea, setting trial dates, having plea negotiations on their behalf with the Crown, entering a guilty plea, speaking to sentence, and admission into diversion and extra judicial sanction programs.
  - Advising them on how to obtain Disclosure and an Early Case Resolution offer from the Crown Prosecutor's office if they wish to proceed on their own.
  - If required assist with making an application to LAA.

3. JP Bail Duty Counsel:

Functions of JP Bail Duty Counsel:

- Attend JP Bail Court via CCTV locations in Edmonton and Calgary Legal Aid offices
  - Provide Duty Counsel service to clients in custody via phone, CCTV or in person, at bail hearings at the Justice of the Peace hearing office;
  - Provide preliminary legal advice and information;

- Represent clients at the Justice of the Peace hearings, including conducting contested and consent release hearings; and possible resolution and/or resolution planning;
- Refer clients to community resources or other recommended programs;
- Liaise with various business units within Legal Aid Alberta to assist with the client's application process;
- Communicate with other Legal Aid Alberta staff as necessary to assist clients with their upcoming appearances in docket court; and
- Attend the Provincial Court of Alberta as required and perform the duties of a Criminal Duty Counsel as outlined above.

4. Court of Appeal Duty Counsel (Not currently a Provided Service):

Functions of Court of Appeal Duty Counsel:

- Attend the Court of Appeal of Alberta and perform duties in connection with criminal sentence appeals as may be appropriate, including:
  - Helping an inmate in preparing a sentence appeal;
  - Helping an appellant to complete a notice to the court that an application has been made for legal aid services in relation to the appeal;
  - Helping an appellant who is represented by counsel to complete a notice of withdrawal of an inmate appeal;
  - Representing an appellant on an application for judicial interim release.

5. Brydges Duty Counsel:

Legal Aid Alberta provides *Brydges* Duty Counsel Services on behalf of the Minister of Justice and Attorney General, according to R v. Brydges and the Legal Aid Governance Agreement (2018). The *Brydges* service ensures access to immediate and free summary legal advice by telephone for all persons detained by police and peace officers in Alberta, regardless of their financial status. The number for the toll free *Brydges* line is posted in police stations and detention centres across the province.

Additionally, the *Brydges* Duty Counsel Service offers a 24 hour language translation program. CanTalk Canada Inc. assures confidentiality and provides communication in almost all languages, including Cree and Dene.

When counsel receive telephone calls seeking advice from detained persons it should be borne in mind that the main purpose of such calls is to provide the callers with a summary of

their rights, most importantly, the right not to answer questions other than those as to name and address.

Functions of Brydges Duty Counsel:

- Answer telephone calls from detained individuals across Alberta
    - Advise detained persons of their rights when dealing with the police – most importantly, the right to remain silent and not answer questions other than those for identification (name and address);
    - Advise the detained persons of procedure when being charged with an offence and what may happen next (i.e. attending at court);
    - If required, advise how to make application to LAA once charges are laid.

6. Institutional Disciplinary Hearings Duty Counsel:

Inmates can be charged with violating rules of the institution and will face internal disciplinary hearings in the institution. These hearings and its procedures are governed by the Corrections Act, it's regulations and the common law. If the allegation is proven at the hearing, penalties can include reprimands, fines, suspension of privileges, solitary confinement or loss of remission good conduct time.

Due to the potential loss of liberty for the inmate, or reduced liberty, Legal Aid Alberta provides a Duty Counsel program for anyone in an institution wishing to have a lawyer present at an institutional disciplinary hearing. Duty Counsel will be provided with the inmate's name, date of birth and date of hearing.

Functions of Institutional Duty Counsel:

- Attend at the Institution in Alberta as scheduled;
    - Review disclosure and provide preliminary legal advice;
    - Advise the inmate of their rights and any steps needed to be taken immediately to protect those rights;
    - Represent the inmate's rights throughout the hearing;
    - Help the inmate to respond to the allegations and evidence presented at the hearing;
    - Helping the inmate to understand hearing procedures, punishments and next steps;

7. Mental Health Review Duty Counsel

The Mental Health Act allows authorities to hospitalize and treat people with mental illness. In some cases, authorities may deem it necessary to hospitalize and treat an individual without their consent. People who are detained (formal patients) can ask for a review of the decision. Mental Health Review Panels (Review Panels) conduct hearings to protect the rights of patients.

The Criminal Code allows for a finding of Not Criminally Responsible by reason of Mental Disorder (NCRMD) which allows the Courts to hospitalize and treat people with mental illness. While most NCRMD cases are diverted to a Review Board (separate from a Review Panel), the court which renders the verdict also has the authority to order a disposition if it is satisfied that it could readily do so and that a disposition should be made without delay. A hearing to confirm the disposition will still be held before the Review Board.

Due to the potential loss of liberty for the patient, or reduced liberty, Legal Aid Alberta provides a Duty Counsel program for anyone in an institution wishing to have a lawyer present at the Review Panel Hearing. Duty Counsel will be provided with the patient's name, date of birth and date of hearing.

Functions of Review Panel or Board Hearing Duty Counsel:

- Attend for the Review Panel or Board Hearing as scheduled;
    - Review disclosure and provide preliminary legal advice;
    - Advise the patient of their rights and any steps needed to be taken immediately to protect those rights;
    - Represent the patient's rights throughout the hearing;
    - Help the patient to respond to the allegations and evidence presented at the hearing;
    - Helping the patient to understand hearing procedures, outcomes and next steps;

Part 2: ACTING AS PROVINCIAL COURT CRIMINAL - ADULT DUTY COUNSEL

The provision of Duty Counsel services in Provincial Court locations across Alberta is a cornerstone of the essential services that LAA provides. Our Duty Counsel provide invaluable assistance not only to unrepresented accused but also to the Court. The "feet on the ground" perspective Duty Counsel can provide and report back to LAA about court proceedings and client needs is integral to ensuring that adequate resources can be scheduled throughout the Province.

The following sections provide guidance for Duty Counsel acting in provincial court rooms:

1. Availability of Duty Counsel;
2. Interviewing the Accused;
3. Providing Advice;
4. Agency Requests;
5. Adjournments;
6. Judicial Interim Release (Bail) Hearings;
7. Role in Diversion Programs;
8. Guilty Pleas;
9. Speaking to Sentence;
10. Referring a Client for LAA Coverage (Duty Counsel Referrals);
11. *Rowbotham* Applications;

Availability of Duty Counsel:

Reasonable efforts should be made by the court to inform all those appearing without representation of the availability, role and function of Duty Counsel. Duty Counsel should announce their presence prior to the commencement of court, both in the corridor and in the body of the court itself. The announcement should make it clear that Duty Counsel are:

- Lawyers;
- Available for advice and assistance in court;
- Free of charge; and
- Located in or around the courtroom.

Court starting times are set out in the Alberta Court Calendar and Indigenous Court Worker and Resolution Services Programs booklet available at https://albertacourts.ca/pc/court-practice-and-schedules/court-calendar . Duty Counsel should attend between half an hour and

an hour before court so they can interview people as they arrive at court. CCTV interviews should also commence at least one half hour before court, depending upon inmate availability time.

Unfortunately, many accused attend just before or after court commences. Unless the court automatically adjourns in recognition of the problem, Duty Counsel should request that a client's matter be stood down to give Duty Counsel an opportunity to meet with the client. Once court commences, the judge should either make a general announcement as to the availability of Duty Counsel or enquire whether each unrepresented individual would like to consult with Duty Counsel.

Duty Counsel should never force their services on an accused, as every person has the right to act for himself/herself. In advising an unrepresented accused, Duty Counsel should review all the options including the possible benefits associated with an early resolution.

If Duty Counsel are appearing in a Required Appearance Courtroom (RAC) Duty Counsel must remain in attendance until the warrants from the CMO (Case Management Office) have been dealt with.

Interviewing the Accused:

Due to the short time frame that Duty Counsel have to work within (usually 1 hour before court begins each morning), and the volume of accused to represent each day, preparation time can be limited. Preparation, including interviewing the Accused, therefore, must be efficient, precise and accurate to ensure maximum efficiency.

The interview with the accused may be the only source of information for conducting the bail hearing or guilty plea. It is therefore essential that Duty Counsel conduct a detailed and complete interview which addresses and records all essential matters for use by another Duty Counsel or retained counsel. Essential questions include, but are not limited to:

- If the Accused wishes to speak to release, those dealing with the three grounds under s.515 of the Criminal Code, surety contact information, criminal records (including convictions for "failing to appear" or "failing to comply" (FTA & FTC), evidence of stability in the community, personal circumstances including education, employment, addiction issues, Indigeneity and the existence of mental or physical health issues.

- If the Accused has expressed an interest in resolving their matters, s.606(1.1) of the Code must be canvassed and antecedent information about the Accused collected to assist in negotiation with the Crown, entering the guilty plea(s), or sentencing.

In some courthouses the Crown may provide Duty Counsel access to the Crown brief or parts of their brief that usually contain a wealth of background information, the record of the accused and prior release history, as well as a copy of the synopsis of the offence charged.

At the interview, Duty Counsel should first inform the accused who they are, what they are there to do for the accused, and that what is said will be confidential. Information about the charges, and whether the accused has private counsel, should then be garnered. If the accused indicates that his lawyer is coming to assist them then the assistance of Duty Counsel may not be necessary, and you can end the interview. If the accused indicates that he or she would prefer to use Duty Counsel, Duty Counsel can then assist and continue the interview.

If an interpreter is needed, this should be clearly noted, and the court informed. Finally, the Accused must be informed of the general processes for what will be happening, so he/she is prepared, and unexpected outbursts are minimized.

When interviewing an Indigenous offender for the purpose of making *Gladue* submissions in bail or sentencing, Duty Counsel should keep some over-riding principles in mind:

- Stay organized
- Stay neutral
- Be patient and listen

Duty Counsel must obtain all relevant information in a short amount of time, in a clear detailed and legible fashion. This information may be recorded on the standard Duty Counsel worksheet. An example of a worksheet is included in the Appendices and Forms section of this manual. Sometimes accused persons cannot or will not tell Duty Counsel the truth. Relevant personal observations of the Accused should be recorded on the interview sheet as well.

Providing Advice:

Duty Counsel should be prepared to answer questions about courtroom procedure, legal aid, bail, offences, possible penalties and defences. Advice can be provided at any stage of the proceedings.

Duty Counsel should be able to advise an accused where to apply for legal aid and if necessary how to appeal a refusal to issue a certificate or make a *Rowbotham* application. (See below and Appendix for application materials)

LAA only issues a certificate to a financially eligible accused if there is a likelihood of incarceration. Indictable charges are automatically issued a certificate once client completes their application with LAA. An accused facing a charge that does not involve a probability of incarceration upon conviction should be advised that they are unlikely to succeed in obtaining a legal aid certificate unless there are extenuating circumstances. Accused persons should be reminded that they need to complete their application to LAA and speaking to Duty Counsel in court is not enough. Provide the Legal Aid contact number of 1-866-845-3425 to the Accused or direct them to in-court support staff to complete their application.

When providing an opinion on likelihood of incarceration, Duty Counsel should note aggravating circumstances such as theft from an employer which increase the probability of incarceration, and LAA should be notified of the circumstances as to why a certificate should be issued.

Duty Counsel should be well acquainted with the Criminal Code and related statutes such as the Youth Criminal Justice Act and the Controlled Drugs and Substances Act. Duty Counsel should also be able to answer questions involving related Provincial Offences Procedure Act proceedings such as prosecutions under the Traffic Safety Act.

Duty Counsel must alert the accused as to the effect a Criminal Code conviction has on other statutes. For instance, being charged for impaired operation of a conveyance or operating a conveyance while prohibited will trigger an automatic suspension under the Traffic Safety Act. Also, a conviction may result in incarceration under another statute such as the Corrections and Conditional Release Act or deportation under the Immigration and Refugee Protection Act.

Duty Counsel should advise clients that a “discharge” still creates a criminal record. A conditional or absolute discharge may still result in a prohibition of entry into the United States.

Advice given by Duty Counsel should clearly be resolution oriented and include a clear explanation of the role of Duty Counsel in arranging diversions and entering guilty pleas.

Agency Requests for Lawyers on a LAA Certificate:

The primary function of Duty Counsel is to assist unrepresented accused who have been taken into custody or summoned and charged with offences, by advising them of their rights and assisting them regarding procedure, adjournments, reservations of plea, judicial interim release applications, entering an election and plea, setting trial dates, plea negotiations with the Crown, entering a guilty plea, speaking to sentence and admission into diversion programs. Duty Counsel, time and circumstances permitting, will make every effort to assist counsel acting on a LAA certificate in obtaining **a docket court adjournment or standing a matter down** until counsel can attend.

Often counsel for an accused request Duty Counsel to act as agent to request adjournments or set trial dates. LAA encourages this procedure when the accused is a Legal Aid client. It is acceptable for Duty Counsel to appear as agent for counsel and provide a reasonable list of suggested trial dates. Duty Counsel are not entitled to any additional compensation from LAA or from private counsel for acting as an agent while appearing as Duty Counsel.

Duty Counsel should not appear as agent if the accused is not present.

Duty Counsel should not appear as agent with respect to a motion to change a trial date if the motion is contested, nor should Duty Counsel act as agent for counsel to conduct a trial or speak to sentence.

If you are requesting Duty Counsel assistance for these purposes, counsel must:

- Ensure that Duty Counsel is provided with adequate information to complete the task requested;
- Contact LAA to determine who the Duty Counsel is for the location and date in question and contact that Duty Counsel directly, or
- If permitted, you can fax your request to the courthouse in question if the Clerks will accept them. But please note that not all courthouses will accept agency requests via fax, and many would prefer counsel to contact Duty Counsel directly.

Duty Counsel will not perform agencies in the following circumstances:

- **Where inadequate information has been provided to complete the requested task.**
- **Where the client is not in attendance.**
- When asked to speak to Bail or Sentencing for counsel.
- When asked to set trial dates or summary disposition dates for counsel.
- When asked to complete forms, get paperwork signed or file documents for counsel.

- When asked to collect or forward disclosure to counsel.
- When asked to make disclosure applications on behalf of counsel.
- When asked to make agency appearances at the Case Management Office (CMO) for counsel.
- When asked to provide legal advice to a client where counsel has been retained.
- When asked to speak to forfeiture at the request of counsel.

Duty Counsel is not responsible for reporting back to retained counsel as to the outcome of an agency. In most cases, the client must be instructed beforehand by their Counsel to report back to them the outcome of their court appearance.

It is up to individual Duty Counsel whether or not they wish to appear as an agent for privately retained lawyers, but the conditions above are still applicable.

As a general rule, roster Duty Counsel should not act in their own cases or matters to the detriment of their duties as Duty Counsel, nor should any Duty Counsel attempt to act beyond the limits of his/her own professional judgment.

Adjournments in Court:

Most courts allow an adjournment following first appearance for a client to obtain a lawyer either privately or through Legal Aid. If the accused does not have a lawyer on the return date, the judge may enquire as to the reason.

Duty Counsel should be able to inform the court as to the reason for the delay and may require an update on the client's application status with LAA which may require further investigation on behalf of Duty Counsel. Duty Counsel can call the intake line, 1-866-845-3425, press "5" and identify themselves as Duty Counsel . The Certificate and Tariff Officer (CTO) will provide any information required by Duty Counsel to advise the client or Court of next steps needed.

After determining next steps needed, the Court may grant a further adjournment to finish arrangement of Counsel, to set a date for trial or preliminary hearing or may order that a date be set immediately. If an Accused does not have counsel on a trial date, it is very difficult to obtain an adjournment, as witnesses are inconvenienced and trial time wasted and the Accused should be advised that they must make every effort to arrange Counsel for their scheduled date, which may include further application to LAA.

Reasons for adjournment:

The following is a list of acceptable reasons for Duty Counsel to request that a matter be adjourned on behalf of a client:

- To retain counsel privately (ascertain time needed to complete retainer);
- To complete legal aid application (direct the client to courthouse location or area office);
- To obtain a trial date;
- For pre-trial with Crown;
- For judicial pre-trial;
- Disclosure not available (ask when it will be ready);
- Crown file not in court (*Jordan* clock running);
- To have Crown determine if complainant would accept a peace bond or if restitution has been made;
- For an accused who is ill, in custody elsewhere or otherwise cannot attend court.

An adjournment request can be made on behalf of an accused's counsel or an accused who has contacted the Duty Counsel office with information that is reliable or verifiable (see above section regarding Agency Requests). It is important that the accused understand that Duty Counsel is relaying a request and not appearing as agent without the client. The accused must also understand that he or she (or his/her lawyer) is responsible for finding out the result, including the return date. The justice may deny the adjournment request and issue a warrant for an accused who is not in attendance.

Reasons for "standing matters down":

The following is a list of acceptable reasons for Duty Counsel to request that a matter be stood down on behalf of a client:

- For counsel to attend;
- To attend at Case Management Office to obtain a trial date;
- To have a resolution discussion with the Crown;
- To have the accused meet with diversion worker;
- To have the client complete paperwork for a diversion program or for extra-judicial sanctions.

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Avoiding needless adjournments:

Duty Counsel should always ask the question “how can I make the Accused’s next appearance more productive?” or “how can I reduce the number of court appearances needed by the Accused?”

If the matter is adjourned to obtain legal aid, the Accused should be directed to the Legal Aid contact the main number of 1-866-845-3425 to complete their application. If you believe a Duty Counsel Referral will be necessary for the client to obtain coverage (i.e. likelihood of imprisonment needs to be confirmed), send the referral in the required format as in the Appendix to lsc@legalaid.ab.ca

If the Accused is in custody, LAA will prioritize those appointments if the client is service eligible. If the charges are not indictable, likelihood of incarceration may need to be confirmed and can be done through a Duty Counsel Referral, in the proper format, sent to lsc@legalaid.ab.ca

Judicial Interim Release (Bail) Hearings:

Conducting bail hearings and arranging the early release of accused persons is one of the most important functions of Duty Counsel as it is often a significant consideration in subsequent decisions made by the accused about how to proceed with their charges. If an accused is detained, he or she could spend several months in custody while awaiting a bail review or a trial.

Duty Counsel must be aware that a denial of bail or a surety release that cannot be met might result in a period of incarceration longer than the actual sentence. Such “dead time” is not always fully considered at the sentencing stage. Further, remanded inmates are allowed fewer privileges than inmates serving a sentence.

Time to prepare for a bail hearing is often very brief. As part of that preparation, Duty Counsel must interview the accused, confirm potential sureties, review the synopsis and criminal record of the accused and when necessary, contact community resources. Duty Counsel must then conduct the bail hearing or attempt to negotiate a release with the Crown.

When interviewing for the purposes of a bail hearing Duty Counsel should also advise an accused on a possible guilty plea and request a position on disposition from the Crown. Duty

Counsel should be alert to matters that are suitable for an early plea. Also, Duty Counsel should also be aware of the circumstances in which the Crown may agree to withdraw minor charges resulting from the same transaction or series of transactions.

Evidence at the bail hearing:

In Alberta, most bail hearings are informal and proceed based on allegations and verbal submissions by the Crown and Defence without the need to call evidence. In his text, The Law of Bail in Canada, 2nd ed. (Toronto: Carswell, 1999), Gary Trotter writes that, due to the necessity of determining the issue of bail expeditiously, bail hearings reflect a certain level of procedural informality. This informality translates into the relaxation of certain formal rules regarding the presentation of evidence. Trotter states that the most important measure for assessing admissibility of evidence at bail hearings is provided by the phrase "credible or trustworthy" in s. 518 (1)(e).

However, if evidence needs to be called at a bail hearing, it is governed by section 518 of the Criminal Code.

Subsection (1) provides as follows:

> In any proceedings under section 515,
>
> (a) the justice may, subject to paragraph (b), make such inquiries, on oath or otherwise, of and concerning the accused as he considers desirable;
>
> (b) the accused shall not be examined by the justice or any other person except counsel for the accused respecting the offence with which the accused is charged, and no inquiry shall be made of the accused respecting that offence by way of cross examination unless the accused has testified respecting the offence;
>
> (c) the prosecutor may, in addition to any other relevant evidence, lead evidence
> (i) to prove that the accused has previously been convicted of a criminal offence,
> (ii) to prove that the accused has been charged with and is awaiting trial for another criminal offence,
> (iii) to prove that the accused has previously committed an offence under section 145, or
> (iv) to show the circumstances of the alleged offence, particularly as they relate to the probability of the conviction of the accused;
> (v) to prove that the accused has previously committed an offence under section 145, or

(vi) to show the circumstances of the alleged offence, particularly as they relate to the probability of the conviction of the accused;

(d) the justice may take into consideration any relevant matters agreed upon by the prosecutor and the accused or his counsel;

(d.1) the justice may receive evidence obtained as a result of an interception of a private communication under and within the meaning of Part VI, in writing, orally or in the form of a recording and, for the purposes of this section, subsection 189(5) does not apply to that evidence;

(d.2) the justice shall take into consideration any evidence submitted regarding the need to ensure the safety or security of any victim of or witness to an offence; and

(e) the justice may receive and base his decision on evidence considered credible or trustworthy by him in the circumstances of each case.

The purpose of the bail hearing is not to determine the guilt or innocence of the accused, but rather to determine whether there is any reason the accused should not be released pending trial. It is in this context that the circumstances of the offence are relevant. Duty Counsel conducting bail hearings should exercise caution that they do not inadvertently open up the issue by inquiring of the alleged facts of the offence from an accused.

Application for release (burden of proof; reverse onus provisions):

When a person has been arrested and has not been released by either the arresting police officer or the officer in charge, s.503 of the Criminal Code requires that the person be taken before a justice of the peace within 24 hours of the arrest (where a justice is available), or as soon as possible.

When the accused appears before the justice, he or she is entitled to apply for judicial interim release pending trial, unless the accused intends to plead guilty and may choose not to speak to judicial interim release. Following the judicial interim release hearing (also described as a show cause hearing or bail hearing), the accused is either released (with or without sureties, conditions, etc.), or else he or she is ordered detained in custody until the time of the trial.

Subject to specified exceptions contained in s. 515(6), the onus at the bail hearing is on the Crown to show why the accused should not be released from custody pending the trial. The accused may either be released on his own recognizance without conditions (s. 515(1)), or on a recognizance with conditions, sureties or cash deposits (s. 515(2)).

Section 515 has been described as a “ladder” which the Crown must climb from the lowest rung (accused to be released without conditions) to the highest (accused to be detained in custody). The primary duty of the justice, if the Crown cannot show that detention is justified or that some other order under s.515 should be made, is to release the accused without conditions, on his or her own undertaking to appear as required.

The next “rungs” on the ladder are found in s. 515(2). In order, they consist of the accused being released:

- On an undertaking with such conditions as the justice directs;
- On a recognizance without sureties, in such amount and with such conditions, if any, as the justice directs, but with no cash deposit;
- On a recognizance with sureties in such amount and with such conditions, if any, as the justice directs, but with no cash deposit;
- With the prosecutor’s consent, on a recognizance without sureties and with or without conditions, with a cash deposit;
- Where the accused is not ordinarily resident in the province or does not reside within 200 kilometres of the place where he is in custody, on a recognizance with or without sureties and with or without conditions, with a cash deposit.

Finally, one comes to the highest rung on the ladder - detention. Per *Myers*, pretrial detention is to be the exception and not the rule. If the Crown meets the onus upon it to show that detention pending the trial is required, the accused is detained in custody pursuant to s. 515 (10). (See below: Grounds for Detention).

Duty Counsel when speaking to bail should be familiar with the Supreme Court of Canada decisions in *R. v. Antic*, 2017 SCC 27 and *R. v. Myers*, 2019 SCC 18. In *Antic* the SCC stated:

> Save for exceptions, an unconditional release on an undertaking is the default position when granting release. Alternative forms of release are to be imposed in accordance with the ladder principle, which must be adhered to strictly: release is favoured at the earliest reasonable opportunity and on the least onerous grounds. If the Crown proposes an alternate form of release, it must show why this form is necessary for a more restrictive form of release to be imposed. Each rung of the ladder must be considered individually and must be rejected before moving to a more restrictive form of release. Where the parties disagree on the form of release, it is an error of law for a judge to order a more restrictive form without justifying the decision to reject the less onerous forms. A recognizance with sureties is one of the most onerous forms of release, and should not be imposed unless all the less onerous forms have been

> considered and rejected as inappropriate… Cash bail should be relied on only in exceptional circumstances in which release on a recognizance with sureties is unavailable.

In *Myers*, the Court stated:

> Today, the right not to be denied reasonable bail without just cause, which is enshrined in s. 11 (e) of the Canadian Charter of Rights and Freedoms , operates as a key organizing principle of Part XVI of the Criminal Code : *R. v. Pearson*, [1992] 3 S.C.R. 665, at p. 691. This right has also been affirmed repeatedly by this Court, most recently in *St-Cloud* [2015 SCC 27], in which the Court held that "in Canadian law, the release of accused persons is the cardinal rule and detention, the exception", and in *Antic*, in which it stated that '"release is favoured at the earliest reasonable opportunity and . . . on the least onerous grounds".

Again, the burden is on the prosecution to show the necessity for any of these orders. Section 515 (3) states that the justice shall not make any of the above orders unless the prosecution shows why an order under the immediately preceding paragraph should not be made.

The burden is also on the prosecution to show the necessity of conditions that are placed on an accused that is released. The Supreme Court in *R v Zora*, 2020 SCC 14, further clarified the principles of bail following the landmark decisions of *Myers* and *Antic*:

> [79] A third reality of bail is that onerous conditions disproportionately impact vulnerable and marginalized populations (CCLA Report at pp. 72-79). Those living in poverty or with addictions or mental illnesses often struggle to meet conditions by which they cannot reasonably abide (see, e.g., *Schab*, at paras. 24-5; *Omeasoo*, at paras. 33 and 37; *R. v. Coombs*, 2004 ABQB 621, 369 A.R. 215, at para. 8; M. B. Rankin, "Using Court Orders to Manage, Supervise and Control Mentally Disordered Offenders: A Rights-Based Approach" (2018), 65 C.L.Q. 280). Indigenous people, overrepresented in the criminal justice system, are also disproportionately affected by unnecessary and unreasonable bail conditions and resulting breach charges (see, e.g., *R. v. Murphy*, 2017 YKSC 34, at paras. 31-34 (CanLII); *Omeasoo*, at para. 44; CCLA Report, at pp. 75-79; J. Rogin, "Gladue and Bail: The Pre-Trial Sentencing of Aboriginal People in Canada" (2017), 95 Can. Bar. Rev. 325; *Ewert v. Canada*, 2018 SCC 30, [2018] 2 S.C.R. 165, at paras. 57-60; also s. 493.2, as of December 18, 2019). The oft-cited CCLA Report provides the following trenchant summary:
>
> > Canadian bail courts regularly impose abstinence requirements on those addicted to alcohol or drugs, residency conditions on the homeless, strict check-in requirements in difficult to access locations, no-contact conditions between family members, and rigid curfews that interfere with employment and daily life.

> Numerous and restrictive conditions, imposed for considerable periods of time, are setting people up to fail — and failing to comply with a bail condition is a criminal offence, even if the underlying behaviour is not otherwise a crime. [p. 1]

Gladue Factors for Bail

The over-representation of Indigenous persons in pre-trial custody is well known and documented. As noted in *Zora*, "Indigenous people, overrepresented in the criminal justice system, are also disproportionately affected by unnecessary and unreasonable bail conditions and resulting breach charges". It is appropriate and necessary to address *Gladue* factors during a judicial interim release hearing.

Reverse Onus Provisions

The exception to the general rule that the burden of proof is on the prosecution is found in section 515 (6). Section 515(6)(a) places an onus on the accused to show cause why, "on the balance of probabilities" detention is not justified where he or she has been charged with an indictable offence (other than a s.469 offence) alleged to have been committed while the accused was out on bail with respect to another indictable offence, or where the accused has been charged with a s. 467.1 offence (participation in criminal organization).

The same onus is on the accused, pursuant to s. 515 (6)(b), where the offence is a non-section 469 indictable offence and the accused is not ordinarily resident in Canada. According to section 515 (6)(c), the onus is also on an accused charged with offences under section 145 (2) to (5) of the Code (failing to appear or failing to comply).

Under section 515(6)(d) the onus arises where the accused has been charged with committing an offence punishable by imprisonment for life under certain sections of the *Controlled Drugs and Substances Act*, or with conspiracy to commit such an offence.

If the accused fails to meet the onus upon him or her to show that detention is not justified, the Accused is detained in custody pursuant to s. 515(10).
Grounds for detention:

Section 515(10) provides: For the purposes of this section, the detention of an accused in custody is justified only on one or more of the following grounds:

(a) where the detention is necessary to ensure his or her attendance in court in order to be dealt with according to law [commonly referred to as the primary ground];

(b) where the detention is necessary for the protection or safety of the public, including any victim of or witness to the offence, having regard to all the circumstances including any substantial likelihood that the accused will, if released from custody, commit a criminal offence or interfere with the administration of justice [commonly referred to as the secondary ground]; and

(c) on any other just cause being shown and, without limiting the generality of the foregoing, where the detention is necessary in order to maintain confidence in the administration of justice, having regard to all the circumstances, including the apparent strength of the prosecution's case, the gravity of the nature of the offence, the circumstances surrounding its commission and the potential for a lengthy term of imprisonment [commonly referred to as the tertiary ground].

Primary Ground:

The first ground for detention is that detaining the accused is necessary in order to ensure his or her attendance in court. This includes the consideration of such factors as: residence; fixed place of abode; employment or occupation; marital or family status; previous criminal record; proximity of close friends and relatives; character witnesses; facts relating to the allegations of the offence; personal history.

The weight to be accorded to these factors varies, according to the circumstances of each case. However, one factor that often appears to be determinative in the accused's being denied bail is the fact that he or she is not ordinarily resident in Canada. Still, there are cases in which non-residents have been granted interim release.

Secondary Ground:

The concept of public safety is not restricted to the public's physical safety, and includes the need for protection from property offences such as theft. However, neither the gravity of the offence nor the fact that violence was involved should be, by themselves, conclusive against release. Public safety often can be assured by crafting a release order that would prevent contact with any of the complainants or co-accused.

Section 515(10)(b) directs the court, in determining whether detention is required in the interest of public safety, to have regard "to all the circumstances", including any "substantial likelihood" of the accused committing criminal offences or interfering with the administration of justice while he or she is on bail.

Tertiary Ground:

The third justification for detention in custody is found in s. 515 (10)(c) and creates a much broader basis for detention than is found in either of the preceding subsections; it refers to detention on the grounds of “any other just cause being shown”. Specifically, but “without limiting the generality” of the “any other just cause” criterion, the subsection refers to detention that is “necessary in order to maintain confidence in the administration of justice”.

Section 516 adjournments:

Section 516 of the Criminal Code permits a justice, before or at any time during the course of section 515 proceedings, and on an application by either the prosecutor or the accused, to adjourn the proceedings and remand the accused in custody. The section specifies, however, that no adjournment is to exceed three clear days without the consent of the accused.

In The Law of Bail In Canada, Gary Trotter wrote that, since time is of paramount concern when it comes to bail, it is essential that the hearing be conducted as soon as possible. This goal would be undercut if the court were permitted to delay matters by granting adjournments on its own initiative or at the request of the prosecution.

However, he went on to indicate that there may be times when it is not in the interest of the accused or the prosecution to proceed with the hearing on the first appearance. For instance, the Crown may wish to make further inquiries regarding the offence or the accused, and the accused may need more time in order to retain counsel or make arrangements for sureties.

Adjournments may also be required if the hearing cannot be concluded on the same day on which it commences. PLEASE NOTE: The Crown does not, have an automatic right to a three-day adjournment. Valid reasons must be provided to the court. Duty Counsel should obtain and make a note of a client’s instructions when they are seeking an adjournment of a bail hearing.

Publication Bans:

The power to delay the publication or broadcast of what goes on at a bail hearing is contained in s.517 (1) of the Code. The court has a discretionary power to impose a ban on its own initiative or at the request of the prosecution. However, where the application for a ban comes from the accused, the section states that imposing the ban is mandatory rather than

discretionary. The ban may be imposed at any time before, or during, the course of the bail hearing. If the accused is committed to stand trial, the ban may last until the trial is over.

Role of Duty Counsel in Diversion Programs:

Both the Criminal Code and the Young Offenders Act refer to alternative measures as a method of resolving charges without resorting to judicial intervention. A wide variety of programs exist which stress restorative justice, mediation, accountability, and increased community involvement.

Duty Counsel mainly deal with post-charge diversion programs. Often the Crown will already have decided to offer diversion and the role of Duty Counsel is to explain the process to the accused, including the contract and available options. Duty Counsel should be watchful for cases that are overlooked and could benefit from diversion.

Since successful completion results in the charges being withdrawn or stayed, the process does not result in a criminal record. Participation should be encouraged unless the accused denies responsibility for the offence or there is insufficient evidence to secure a conviction. However, the accused must be made aware of the options and potential consequences and must make the final decision.

Although diversion is totally dependent on Crown discretion, Duty Counsel plays a vital, proactive role in identifying candidates. Even if the Crown initially rejects diversion, Duty Counsel may succeed in persuading the Crown to offer diversion. Diversion benefits the accused by making him/her take greater responsibility for his/her actions while avoiding a criminal record. The increased use of diversion also results in cost savings to the court system as well as LAA.

Guilty Pleas:

One of the main responsibilities of Duty Counsel is to advise and represent those who wish to enter a guilty plea. Duty Counsel are often able to negotiate a very fair disposition on an early guilty plea.

Duty Counsel may assist anyone in custody with a guilty plea without consideration of eligibility guidelines. The possibility of a plea should be canvassed with most unrepresented accused as a full representation certificate may not be needed where Duty Counsel can assist. The ability of Duty Counsel to assist in guilty pleas and sentencing reduces court delay and “dead time” for the accused.

Duty Counsel can provide additional information based on the interview with the accused to the Crown which may result in a more favorable position and negotiate on the accused's behalf. Aspects of the negotiation could include:

- Often diversion may not be available, but a peace bond may be acceptable, so that a criminal record is still avoided.
- The Crown may accept a plea to a lesser and included offence or agree to withdraw other charges in return for a guilty plea.
- The Crown may agree not to oppose a discharge or probation or may agree to a range of sentence or a specific sentence.
- It is important to consider that the sentence currently under discussion on the day of court may not be available at a later date.

However, the accused should always be informed that the judge is not bound by a joint submission or negotiations between Duty Counsel and the Crown. The judge may impose a different sentence but must provide Duty Counsel and Crown an opportunity to address the judge's concerns with the joint submission (*R v Anthony-Cook*, 2016 SCC 43).

Prior to providing assistance with a guilty plea, Duty Counsel must be satisfied of the following:

- The accused committed the act which constitutes the offence;
- The accused possessed the requisite *mens rea*;
- The Crown is in a position to prove the above (e.g.: no possible defence at trial);
- There are no defects in the information;
- There are no Charter arguments prior to trial (delay etc.);
- There are no special pleas (*autrefois acquit, autrefois convict*) or defence of *res judicata* or multiple convictions.
- Section 606(1.1) must be canvassed and understood by the accused. It may be preferable to address the sections of 606(1.1) on the record in open Court.

The timing of the plea can be important. The accused may wish to take steps beneficial to sentencing. For instance, the accused may wish to make restitution without a court order or may wish to obtain employment, enroll in school or register in an alcohol rehabilitation program. Duty Counsel should be aware of the sentencing patterns of each judge in the area. However, any request for an adjournment must have a reasonable basis. All pertinent information related to the accused and the negotiated resolution should be documented.

Duty Counsel should discourage an accused with counsel from pleading guilty in the absence of his/her counsel. Every reasonable effort must be made to contact the retained lawyer to see if he or she can attend later that day. If counsel cannot appear, Duty Counsel should inform the court of the situation and obtain the accused's consent on the record.

Guilty plea to a serious charge:

Occasionally, an accused insists on entering a guilty plea to an offence that will attract a lengthy penitentiary term. Duty Counsel should carefully explain the probable penalty to the accused. Where extensive preparation is required, Duty Counsel should recommend an adjournment to allow for a private lawyer to be retained.

If the accused insists on proceeding, Duty Counsel should obtain written instructions, and the court should be informed of the situation. (see below and the appendix for the Plea Comprehension Form). Duty Counsel can handwrite the Plea Comprehension Form if a blank form is not available. This written acknowledgment from the accused ought to be collected in the case of an Appeal.

Acknowledgement and Direction

I _____, charged with the offence of _____, acknowledge that I have been advised by Duty Counsel of my right to request an adjournment which would enable me to apply for legal aid to retain a lawyer of my choice.

I further acknowledge that Duty Counsel has informed me that the offence is a serious one and that entering a guilty plea will likely result in a lengthy period of incarceration.

I hereby acknowledge that Duty Counsel has advised me not to enter a plea of guilty at this time, but notwithstanding said advice, I have decided to enter a guilty plea.

I further direct Duty Counsel to make representations as to sentence although a lawyer of my choice would have more time for research and preparation.

I hereby acknowledge that I have read this direction and fully understand same.

_____

_____

Date *Signature of Accused*

The judge will probably adjourn sentencing in any event. Duty Counsel may still feel that he or she cannot adequately represent the accused and may exercise discretion not to act. Duty Counsel should then advise LAA that a counsel needs to be appointed to act for the accused on the date the matter is adjourned to.

Speaking to Sentence:

Duty Counsel must consider all types of sentencing options such as: discharge (absolute or conditional), fine, suspended sentence with probation, conditional sentence or incarceration. Community service orders, orders for restitution, intermittent sentences and recommendations for temporary absence should also be canvassed.

Duty Counsel should inform the court of any difficulties that might flow from the imposition of a particular sentence. For example, a loss of license may result in a loss of employment. A conviction may have immigration consequences. A sentence may affect the total time to be served by an accused on parole or subject to mandatory supervision or may result in the deportation of a permanent resident. Similarly, a probation order with a curfew could affect a youth's employability. Duty Counsel must bring this information to the attention of the accused and the court.

In speaking to minimum sentences, Duty Counsel must know the notice requirements, when a conviction is properly treated as a second or subsequent offence, and how prior convictions may be proved.

Often a Pre-Sentence Report or a Gladue Report will be requested or already been prepared with respect to the accused. The accused must read the report prior to sentencing. If the accused disputes the report, Duty Counsel can insist upon the attendance of the author who prepared the report.

Sentencing Principles: Section 718 and 718.2:

Duty Counsel must be aware of the basic principles of sentencing to ensure proportionality between the moral culpability of the offender and the gravity of the offence. The sentencing principles of denunciation and deterrence must be weighed alongside other primary principles such as rehabilitation, which is often particularly important to address with Duty Counsel clients. Further sentencing considerations include totality and appropriate weighing of mitigating and aggravating factors.

718.2 A court that imposes a sentence shall also take into consideration the following

principles:

> *(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,*
>
> > *(i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor,*
> > *(ii) evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner or child,*
> > *(iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim, or*
> > *(iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization shall be deemed to be aggravating circumstances;*
>
> *(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;*
>
> *(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;*
>
> *(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and*
>
> *(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Indigenous offenders.*

Mitigating factors might include an early guilty plea, pre-trial incarceration, lack of a criminal record, co-operation with police, restitution, youthfulness of the offender, employment, conduct of the victim, provocation, stress and the influence of an addiction. Aggravating factors might include a substantial criminal record, violence, the use of a weapon, breach of trust, racial motivations and prevalence of the offence in the community. For instance, there may have been recent publicity over similar incidents such as assaults on taxi drivers.

Rehabilitation must be considered together with general and specific deterrence. One of the key factors in successfully speaking to sentence is the formation of a “plan” with the accused. For instance, enrolment in a school, drug treatment program, or anger management program or obtaining a residence or employment may give the judge a reason to impose a lenient penalty. Duty Counsel should try to be familiar with community outreach resources available in the court location.

Special attention must be paid to Indigenous accused. Duty Counsel should be familiar with s.718.2(e) and the case law regarding sentencing of Indigenous offenders. This should include, but is not limited to:

- *R. v. Gladue*, [1999] 1 SCR 688
- *R. v. Ipeelee*, [2012] 1 SCR 433
- *R v. Kakekagamick*, 2006, 214 OAC 127
- *R v Laboucane*, 2016 ABCA 176
- *R. v. Okimaw*, 2016 ABCA 246
- *R v. Predham*, 2016 ABCA 371
- *R v Matchee*, 2019 ABCA 5

From our Court of Appeal in *R v Laboucane*, 2016 ABCA 176:

> [57] The Supreme Court of Canada notes that many "Aboriginal offenders find themselves in situations of social and economic deprivation with a lack of opportunities and limited options for positive development," and "the reality is that their constrained circumstances may diminish their moral culpability": *Ipeelee* at para 73. See for example, *R v Skani*, 2002 ABQB 1097 at para 60, 331 AR 50 where Greckol J notes that "few mortals could withstand such a childhood and youth without becoming seriously troubled."
>
> [58] *Ipeelee*, at para 73, says that if such circumstances exist, "[f]ailing to take these circumstances into account would violate the fundamental principle of sentencing – that the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender." And, the existence of such circumstances "may also indicate that a sanction that takes account of the underlying causes of the criminal conduct may be more appropriate than one aimed at punishment per se," referencing para 69 of *Gladue*:
>
> > In cases where such factors have played a significant role, it is incumbent on the sentencing judge to consider these factors in evaluating whether imprisonment would actually serve to deter, or to denounce crime in a sense that would be meaningful to the community of which the offender is a member. In many instances, more restorative sentencing principles will gain primary relevance precisely because the prevention of crime as well as individual and social healing cannot occur through other means.
>
> [59] Second, the type of sanctions which may be appropriate for the offender because of his or her particular Aboriginal heritage or connection "bears not on the degree of culpability of the offender, but on the effectiveness of the sentence itself." Gladue principles direct sentencing judges to "abandon the presumption that all offenders and all communities share the same values when it comes to sentencing and

> to recognize that, given these fundamentally different world views, different or alternative sanctions may more effectively achieve the objectives of sentencing in a particular community": *Ipeelee* at para 74.

When interviewing an Indigenous offender for the purpose of making Gladue submissions without the assistance of a formal Gladue Report, Duty Counsel should keep some over-riding principles in mind:

- Stay organized
- Stay neutral
- Be patient and listen

When making verbal Gladue sentencing submissions, be prepared to make recommendations on treatment and counseling for your client.

Recommendations for rehabilitation must:

- be accessible
- be achievable
- be meaningful
- be culturally appropriate
- be relevant to the client's community traditions

Order authorizing the taking of bodily substances for forensic DNA analysis:

Duty Counsel are often faced with a request to obtain an order to obtain a blood sample immediately after conviction. The section of the Criminal Code that designates the types of offences for which this order can be made is s. 487.04.

The offences are divided into "primary designated offences" and "secondary designated offences". Duty Counsel must determine whether the offence is a "primary" or "secondary" designated offence, as the latter places the burden on the Crown to justify the order. The procedure and considerations involved in making the order are set out in section 487.051 of the Criminal Code:

> *(1) Subject to section 487.053, if a person is convicted, discharged under section 730 or, in the case of a young person, found guilty under the Young Offenders Act, of a designated offence, the court*
>
> *(a) shall, subject to subsection (2), in the case of a primary designated offence, make an order in Form 5.03 authorizing the taking, from that person, for the*

purpose of forensic DNA analysis, of any number of samples of one or more bodily substances that is reasonably required for that purpose, by means of the investigative procedures described in subsection 487.06(1); or

(b) may, in the case of a secondary designated offence, make an order in Form 5.04 authorizing the taking of such samples if the court is satisfied that it is in the best interests of the administration of justice to do so.

Exception

(2) The court is not required to make an order under paragraph (1)(a) if it is satisfied that the person or young person has established that, were the order made, the impact on the person's or young person's privacy and security of the person would be grossly disproportionate to the public interest in the protection of society and the proper administration of justice, to be achieved through the early detection, arrest and conviction of offenders.

(3) In deciding whether to make an order under paragraph (1)(b), the court shall consider the criminal record of the person or young person, the nature of the offence and the circumstances surrounding its commission and the impact such an order would have on the person's or young person's privacy and security of the person and shall give reasons for its decision.

The general body of case law suggests that courts more often than not impose DNA data bank orders on offenders to whom such orders are applicable, especially if they are adults. In many cases, one finds that the orders are imposed with the consent of or without any apparent objection from defence counsel. Furthermore, the DNA data bank legislation has not been successfully challenged under the Charter of Rights and Freedoms. In fact, courts have upheld the constitutionality of parts of the legislation.

Arguing against the imposition of a DNA data bank order in a particular case does not necessarily involve an onerous level of preparation. Duty Counsel should, for example, gather information on his or her client's background and circumstances because this information is useful to the court when it applies the relevant statutory criteria. Duty Counsel will likely have to obtain this kind of information in any event for the purposes of the sentencing hearing.

The DNA data bank legislation provides for four types of orders:

- Prospective/primary (person convicted or discharged of a primary designated offence like sexual assault or murder);

- Prospective/secondary (person convicted or discharged of a secondary designated offence like robbery or breaking and entering);
- Retrospective (person convicted or discharged of any designated offence committed prior to the establishment of the DNA data bank);
- Retroactive (person who, prior to the establishment of the national DNA data bank, was declared dangerous offender, convicted of more than one sexual offence for which he or she is serving a sentence of imprisonment of at least two years for one or more of those offences, or convicted of more than one murder committed at different times).

Prospective orders involving a primary designated offence are mandatory. The court is required to make such an order, unless the offender satisfies the court that the impact on the person or the person's privacy and security of the person would be grossly disproportionate to the public interest in the protection of society and the proper administration of justice, to be achieved through the early detection, arrest and conviction of offenders.

Prospective orders involving a secondary designated offence, retrospective orders involving any designated offence, and retroactive orders are discretionary. Except for retroactive orders, the court must be satisfied that it is in the best interests of the administration of justice to make the order.

The particular statutory factors which a court must consider in deciding whether to grant an order are the same for prospective applications involving secondary designated offences, retrospective applications and retroactive applications:

- The criminal record of the person or young person;
- The nature of the offence and the circumstances surrounding its commission; and
- The impact such an order would have on the person's or young person's privacy and security of the person and shall give reasons for its decision.

Referring a Client for Legal Aid Coverage (Duty Counsel Referrals):

Duty Counsel lawyers are **in the best position** to assess a potential client's likelihood of incarceration based on experience, education, discussion with the Crown as required, and knowledge of the court system. This assessment of likelihood of incarceration by Duty Counsel is necessary for the decision to provide coverage to clients charged with summary offences per LAA Rules.

This assessment of likelihood of incarceration is also vital to ensuring adherence to our governance agreement and responsibility to public funders. LAA is an independent organization– this is one of our values – and having Duty Counsel provide these assessments is integral to LAA operations. The process for providing referrals remains the same, all referrals for Likelihood of Imprisonment should be sent to lsc@legalaid.ab.ca

Duty Counsel are expected to consider all factors that could establish a probable risk of incarceration and not rely solely on a Crown position on ECR. The Criteria for Likelihood of Incarceration include:

- The Charge is Hybrid and Crown has proceeded by Indictment
- Crown has indicated intention to seek custodial sentence, verbally or through resolution offer/discussion and Duty Counsel believes the court will agree with the Crown
- Client has been denied bail and is being held in custody
- Client did not speak to bail and is being held in custody
- Client is facing a mandatory minimum sentence of imprisonment, a starting point sentence or a sentencing range which begins at imprisonment
- Client has already received custodial sentence for same or similar offence
- Client receiving another non-custodial sentence for similar offence is unlikely
- Based on known facts, violent/sexual offence involving bodily harm or weapon
- Based on known facts, violent/sexual offence involving domestic partner, child or another vulnerable complainant
- Other

The Appendix contains the Duty Counsel Referral form that should be used when submitted Duty Counsel Referrals. In order to process the referral, LAA requires all of the information contained within the form including the reasons why incarceration is probable:

1. Client Name and DOB;
2. Docket number(s);
3. Reasons for Positive Assessment of Likelihood of Incarceration.

The client also may be going through the Duty Counsel Triage. If the client is currently being handled by Triage, deference should be given to that process as it needs to be completed. In other words, Duty Counsel should not be sending emails or referrals to try and circumvent the Triage process unless there has been a change in circumstances for the client (i.e. now in

custody). If there has been a material change of circumstances, a Duty Counsel Referral can be provided in the form descried above and via email to lsc@legalaid.ab.ca

Please note that while an Early Case Resolution (ECR) from the Crown was previously accepted in lieu of a Duty Counsel referral, Legal Aid Alberta will no longer be accepting ECR's for service eligibility on summary offenses, and clients must receive a Duty Counsel referral even if an ECR has already been provided. An assessment on likelihood of jail can be made with or without a resolution offer, but the decision making should be made by lawyers performing the important role of Duty Counsel.

Remember that an assessment that there is no likelihood of incarceration does not mean that the client must self-represent. LAA offers Duty Counsel services on an ongoing basis and the client may take advantage of the Out of Court Duty Counsel Program even if full representation coverage is not recommended or cannot be extended.

LAA Financial Eligibility Guidelines:

2020/21 Detailed

Family Size	**1**	**2**	**3**	**4**	**5**	**6+**
Monthly Income	1,701.36	2,107.32	2,998.80	3,241.56	3,484.32	3,728.10
Annual Income	20,421.42	25,283.76	35,980.50	38,896.68	41,814.90	44,732.10

2020/21 Rounded

Family Size	**1**	**2**	**3**	**4**	**5**	**6+**
Monthly Income	1,701	2,107	2,999	3,242	3,484	3,728
Annual Income	20,421	25,284	35,981	38,897	41,815	44,732

***Rowbotham* Applications:**

If a client has been denied LAA coverage and gone through all internal appeals within LAA, they may need to pursue a *Rowbotham* application.

A *Rowbotham* application is an application for a stay of proceedings, conditional upon the appointment of state-funded counsel. (A court can't *directly* order the government to pay for an accused's lawyer in most cases, so the Court tells the Crown that it needs to provide a lawyer or there will be a stay of proceedings.) In essence, to succeed on a *Rowbotham* application, the unrepresented accused must show that:

- They are indigent (*unable to afford to hire counsel privately*);
- They have been denied Legal Aid coverage;
- The matter is sufficiently serious to justify the appointment of counsel (*which almost always turns on (a) the prospect of incarceration, (b) immigration consequences, or (c) child custody consequences*); and
- The matter is sufficiently complex that there is a real risk they would not receive a fair trial if they were unrepresented (*i.e. could this person competently run the trial themselves, with the judge's assistance?*).

We have a helpful information package on our website for unrepresented accused considering a *Rowbotham* application:

- Information for Accused Making *Rowbotham* Applications
- Notice of Motion and Affidavit

<u>What can (or should) duty counsel do to help unrepresented individuals who want to make a *Rowbotham* application?</u>

This is going to be driven by your time and caseload. Obviously, in a busy courtroom, Duty Counsel might be limited in what assistance you can provide. But even when Duty Counsel does not have time to provide "substantive" representation for the application itself, it is very helpful if Duty Counsel can:

- Tell the accused about the possibility of a *Rowbotham* application;
- Direct them to the resources on our website;
- Provide summary advice about whether they have any prospect of success on a *Rowbotham* application (i.e. do they obviously make too much money? or is the charge clearly too minor because there is no risk of jail, immigration consequences, etc.?);
- Quickly review the accused's draft *Rowbotham* affidavit and supporting documents for obvious deficiencies;
- Confirm the client's identity and commission the *Rowbotham* affidavit for the accused, and
- Please review the materials

So, when the conditions precedent exist what do you do?

You must always remember that in these situations you are acting as Duty Counsel, never, under any circumstances go on the record when assisting someone with respect to *Rowbotham*. The procedure to follow is:

1. Advise,
2. Provide,
3. Assist,
4. Advocate, but only under certain circumstances.

Advise:

If the conditions for a *Rowbotham* application are present, your first step is to advise the client that there is an application that can be made before the court for an order of court appointed counsel. The client may or may not wish to bring this application. Always remember, even if the client lacks the competency to run their own defence, you are not their guardian, and if they don't wish to bring the application then you must abide by those instructions.

Provide:

If the client is capable of completing the necessary Notice and Affidavit on their own, then you provide them with the documents and instruct them how to do so, and what to do with the documents once they are complete.

Assist:

If the client is incapable of completing the paperwork on their own, or they wish your assistance, then you can assist them with completing the paperwork and providing notice to the court and to the crown, and with filing their affidavit, and with setting a date for the application.

Advocate:

You will only advocate for the clients under certain conditions. First, if the hearing for the application is being held in a docket courtroom where Duty Counsel is present and the applicant asks for your assistance. Remember, you never go on the record. Secondly, if the hearing for the application is being held in a non-docket courtroom, but the judge requests the assistance of Duty Counsel from another courtroom. If the matter is being held in a non-docket courtroom, and the judge does not ask for the assistance of Duty Counsel, you cannot take it upon yourself to assist the applicant.

Legal Aid Alberta

Conflicts

Most importantly, if you are in a position of advocating for the client, and the Crown calls a witness from Legal Aid Alberta, you must immediately advise the court that you are now in a conflict of interest, and you cannot cross examine the Legal Aid witness. If the court wishes to ask the witness questions that is within the courts' discretion. After the Legal Aid witness has testified you are free to continue advocating for the applicant. It is important that you understand the nature of the potential conflict if you were to cross-examine a Legal Aid Alberta employee. In addition to your duty to the profession, and your duty to the client, you also have a duty to Legal Aid Alberta as they are paying for your services and to be on Legal Aid's payroll while cross-examining another employee would be no different than trying to remain counsel of record after you have been made a witness.

If you do any of the above; that is if you provide advice, provide documents, assist with documents or advocate on behalf of an accused in our capacity as Duty Counsel, you must provide LAA with the following information:

1. Name of the client you assisted,
2. The nature of the assistance,
3. If you helped file documents or provide service, then the date, courthouse and time of assistance.
4. If you advocated for the client, then the date, time, courthouse, Judge and result of the application.

Part 3: ACTING AS PROVINCIAL COURT CRIMINAL – YOUTH DUTY COUNSEL

Duty Counsel for Youth involves many of the same basic activities that are completed in adult provincial court. Youth Duty Counsel is in attendance to ensure that all youth charged in Alberta have the benefit of preliminary legal advice and support through the court process. Youth Duty Counsel can assist with adjournments, diversion referrals, setting trial dates or guilty pleas and sentencing.

Youth charges are governed by the Youth Criminal Justice Act which codifies the unique procedural and substantive principles that apply to Youth charged with a criminal offence. The overriding principle of the Youth Criminal Justice Act is that youth are given the presumption of reduced moral culpability due to their youth and therefore rehabilitation is a primary sentencing principle when dealing with young persons. For that same reason, there are arguably more diversion options available to young persons and youth charges are particularly amendable to reasonable resolution, negotiated by Duty Counsel, in the docket stage compared to the adult system.

As there are unique principles at play when dealing with youth, this section will outline the specific principles that need to be taken into account by Duty Counsel when performing various functions:

1. Declaration of Principles from the Youth Criminal Justice Act;
2. Interviewing the Young Person;
3. Traffic Tickets;
4. Judicial Interim Release (Bail) Hearing;
5. Adjournments;
6. Agency Requests;
7. Extra Judicial Sanctions;
8. Guilty Pleas;
9. Speaking to Sentence;

Like adult court, Youth Duty Counsel are expected to be available prior to the court commencement time and to explain their presence and purpose to the Young Person. Youth Duty Counsel should be prepared to answer questions about courtroom procedure, legal aid, bail, offences, possible penalties and defences. Advice can be provided at any stage of the proceedings.

Please note that all young persons will be represented by a lawyer either through Duty Counsel or a full representation certificate. Young Persons are automatically service eligible for LAA coverage regardless of financial status or their parents' income. There is no need for a Duty Counsel Referral or assessment of likelihood of incarceration like in adult court. All the young person has to do for coverage is call the intake number or see in-court support staff (if available) to complete their application. There should never be a time that a youth is refused Legal Aid coverage. Of course, the young person can also retain counsel privately.

This "automatic eligibility" for LAA is supported by Section 25 of the Youth Criminal Justice Act which makes clear that all youth should be represented by Counsel.

> 25(4) When a young person at trial or at a hearing or review referred to in subsection (3) wishes to obtain counsel but is unable to do so, the youth justice court before which the hearing, trial or review is held or the review board before which the review is held
>
> > (a) shall, if there is a legal aid program or an assistance program available in the province where the hearing, trial or review is held, refer the young person to that program for the appointment of counsel; or
> > (b) if no legal aid program or assistance program is available or the young person is unable to obtain counsel through the program, may, and on the request of the young person shall, direct that the young person be represented by counsel.

25(5) Appointment of counsel

> 25(5) When a direction is made under paragraph (4)(b) in respect of a young person, the Attorney General shall appoint counsel, or cause counsel to be appointed, to represent the young person.

<u>Declaration of Principles for Young Persons</u>

3(1) Policy for Canada with respect to young persons

The following principles apply in this Act:

> (a) the youth criminal justice system is intended to protect the public by
>
> > (i) holding young persons accountable through measures that are proportionate to the seriousness of the offence and the degree of responsibility of the young person,
> > (ii) promoting the rehabilitation and reintegration of young persons who have committed offences, and

(iii) supporting the prevention of crime by referring young persons to programs or agencies in the community to address the circumstances underlying their offending behaviour;

(b) the criminal justice system for young persons must be separate from that of adults, must be based on the principle of diminished moral blameworthiness or culpability and must emphasize the following:

(i) rehabilitation and reintegration,
(ii) fair and proportionate accountability that is consistent with the greater dependency of young persons and their reduced level of maturity,
(iii) enhanced procedural protection to ensure that young persons are treated fairly and that their rights, including their right to privacy, are protected,
(iv) timely intervention that reinforces the link between the offending behaviour and its consequences, and
(v) the promptness and speed with which persons responsible for enforcing this Act must act, given young persons' perception of time;

(c) within the limits of fair and proportionate accountability, the measures taken against young persons who commit offences should

(i) reinforce respect for societal values,
(ii) encourage the repair of harm done to victims and the community,
(iii) be meaningful for the individual young person given his or her needs and level of development and, where appropriate, involve the parents, the extended family, the community and social or other agencies in the young person's rehabilitation and reintegration, and
(iv) respect gender, ethnic, cultural and linguistic differences and respond to the needs of aboriginal young persons and of young persons with special requirements; and

(d) special considerations apply in respect of proceedings against young persons and, in particular,

(i) young persons have rights and freedoms in their own right, such as a right to be heard in the course of and to participate in the processes, other than the decision to prosecute, that lead to decisions that affect them, and young persons have special guarantees of their rights and freedoms,
(ii) victims should be treated with courtesy, compassion and respect for their dignity and privacy and should suffer the minimum degree of inconvenience as a result of their involvement with the youth criminal justice system,
(iii) victims should be provided with information about the proceedings and given an opportunity to participate and be heard, and

> (iv) parents should be informed of measures or proceedings involving their children and encouraged to support them in addressing their offending behaviour.

3(2) Act to be liberally construed

This Act shall be liberally construed so as to ensure that young persons are dealt with in accordance with the principles set out in subsection (1).

Interviewing the Young Person

At the interview, Duty Counsel should first inform the young person who they are, what they are there to do for the accused, and that what is said will be confidential. Information about the charges, and whether the young person has private counsel, should then be garnered. If the young person indicates that his lawyer is coming to assist them then the assistance of Duty Counsel may not be necessary, and you can end the interview. If the accused indicates that he or she would prefer to use Duty Counsel, Duty Counsel can then assist and continue the interview.

Dealing with Parent/Child Conflict:

Youth Criminal Justice Act section 25:

> 25(8) If it appears to a youth court judge or a justice that the interests of a young person and his parents are in conflict or that it would be in the best interest of the young person to be represented by his own counsel, the judge or justice shall ensure that the young person is represented by counsel independent of the parent.

It may become obvious that the interests of the young person and his or her parents differ substantially. For example, they may indicate that, although their child did not commit the specific offence alleged or a Charter defence exists, they feel their child should enter a guilty plea for “getting into trouble” or “associating with the wrong crowd”.

A significant portion of the interview should be conducted in the parents’ absence to discuss the offence and ascertain the instructions of the young person. Duty counsel acts for the young person only and will only share information with the parents, or other guardians, with the express consent of the young person.

Traffic Tickets

If a young person wishes to plead guilty on a traffic ticket remember that the fines can be substituted for community service hours and the fine amount can often be negotiated down following discussion with the Crown. If the young person wishes to dispute the ticket or the Crown is not willing to resolve, it is often best to set the matter for trial if the young person can make that next date.

Adjournments

Matters may need to be adjourned in Youth court because the youth has not applied to Legal Aid or is making other arrangements. A matter can also be adjourned so that Duty Counsel can continue to assist the young person in resolving their matters, including through consideration of eligibility for diversion programs.

Duty Counsel should be able to inform the court as to the reason for the delay and may require an update on the client's application status with LAA which may require further investigation on behalf of Duty Counsel. Duty Counsel can call the intake line, 1-866-845-3425, press "5" and identify themselves as Duty Counsel . The Certificate and Tariff Officer (CTO) will provide any information required by Duty Counsel to advise the client or Court of next steps needed.

Reasons for adjournment:

The following is a list of acceptable reasons for Duty Counsel to request that a matter be adjourned on behalf of a young person:

- To complete legal aid application (direct the client to courthouse location or area office);
- To confirm appointment of Counsel (application done but offer hasn't been sent);
- For the Crown to consider if the young person is eligible for diversion;
- For ECR consideration by the Crown;
- Disclosure not available (ask when it will be ready) or Crown file not in court (*Jordan* clock running);
- For a young person who is ill, in custody elsewhere or otherwise cannot attend court.

Reasons for "standing matters down":

The following is a list of acceptable reasons for Duty Counsel to request that a matter be stood down on behalf of a young person:

- For counsel to attend;
- To attend at Case Management Office to obtain a trial date;

- To have a resolution discussion with the Crown;
- To have the accused meet with diversion worker;
- To have the client complete paperwork for a diversion program or for extra-judicial sanctions.

Agency Requests for Lawyers on a LAA Certificate:

Duty Counsel, time and circumstances permitting, will make every effort to assist counsel acting on a LAA certificate in obtaining **a docket court adjournment or standing a matter down** until counsel can attend.

If you are requesting Duty Counsel assistance for these purposes, counsel must:

- Ensure that Duty Counsel is provided with adequate information to complete the task requested;
- Contact LAA to determine who the Duty Counsel is for the location and date in question and contact that Duty Counsel directly, or
- If permitted, you can fax your request to the courthouse in question if the Clerks will accept them. But please note that not all courthouses will accept agency requests via fax, and many would prefer counsel to contact Duty Counsel directly.

Duty Counsel will not perform agencies in the following circumstances:

- **Where inadequate information has been provided to complete the requested task.**
- **Where the client is not in attendance.**
- When asked to speak to Bail or Sentencing for counsel.
- When asked to set trial dates or summary disposition dates for counsel.
- When asked to complete forms, get paperwork signed or file documents for counsel.
- When asked to collect or forward disclosure to counsel.
- When asked to make disclosure applications on behalf of counsel.
- When asked to make agency appearances at the Case Management Office (CMO) for counsel.
- When asked to provide legal advice to a client where counsel has been retained.
- When asked to speak to forfeiture at the request of counsel.

Duty Counsel is not responsible for reporting back to retained counsel as to the outcome of an agency. In most cases, the client must be instructed beforehand by their Counsel to report back to them the outcome of their court appearance.

It is up to individual Duty Counsel whether or not they wish to appear as an agent for privately retained lawyers, but the conditions above are still applicable.

As a general rule, Roster Duty Counsel should not act in their own cases or matters to the detriment of their duties as Duty Counsel, nor should any Duty Counsel attempt to act beyond the limits of his/her own professional judgment.

Judicial Interim Release

Duty counsel should be aware of the unique bail and sentencing provisions that apply to young people. The sections governing bail are found in ss. 28-31 of The Youth Criminal Justice Act. S. 28 indicates that the Criminal Code bail provisions apply to such extent that they are not inconsistent with the YCJA. However, unlike adult bail there is no reverse onus at any time including bail revocation s. 29(3).

A youth may have a bail hearing before a JP, but if denied that youth is entitled to a second attempt de novo before a PCJ at the next court date (unlike adults which will need to appeal to the Court of Queen's Bench). In serious cases like murder, bail may only be attempted in court as a Justice of the Peace does not have jurisdiction to release on s. 469 charges.

Nonetheless, the overarching principle for judicial interim release found in S. 29(1) of the Act states that a youth cannot be detained in custody as a substitute for appropriate child protection, mental health or other social measures. The below section of the Act can be referenced:

s. 29(2) Justification for detention

A youth justice court judge or a justice may order that a young person be detained in custody only if

(a) the young person has been charged with
(i) a serious offence, or
(ii) an offence other than a serious offence, if they have a history that indicates a pattern of either outstanding charges or findings of guilt;

(b) the judge or justice is satisfied, on a balance of probabilities,

(i) that there is a substantial likelihood that, before being dealt with according to law, the young person will not appear in court when required by law to do so,
(ii) that detention is necessary for the protection or safety of the public, including any victim of or witness to the offence, having regard to all the circumstances, including a substantial likelihood that the young person will, if released from custody, commit a serious offence, or
(iii) in the case where the young person has been charged with a serious offence and detention is not justified under subparagraph (i) or (ii), that there are exceptional circumstances that warrant detention and that detention is necessary to maintain confidence in the administration of justice, having regard to the principles set out in section 3 and to all the circumstances, including

(A) the apparent strength of the prosecution's case,
(B) the gravity of the offence,
(C) the circumstances surrounding the commission of the offence, including whether a firearm was used, and
(D) the fact that the young person is liable, on being found guilty, for a potentially lengthy custodial sentence; and

(b) the judge or justice is satisfied, on a balance of probabilities, that no condition or combination of conditions of release would, depending on the justification on which the judge or justice relies under paragraph (b),

(i) reduce, to a level below substantial, the likelihood that the young person would not appear in court when required by law to do so,
(ii) offer adequate protection to the public from the risk that the young person might otherwise present, or
(iii) maintain confidence in the administration of justice.

29(3) Onus

The onus of satisfying the youth justice court judge or the justice as to the matters referred to in subsection (2) is on the Attorney General.

There is also an additional “rung” on the ladder for youth that is not available for adult accused. This is Section 31 of the Act which allows release of the young person to a responsible person in the particular situation where the Crown has otherwise met their burden of establishing that detainment of the young person is necessary on the primary, secondary or tertiary grounds (or combination thereof). As below:

JIR General Practice Notes:

Because all youth are entitled to counsel, regardless of parental income, monetary bail **is not** appropriate. In accordance with the principles set out in case of *R. v Antic* 2017 SCC 27, sureties whether cash or no cash, are not appropriate either:

> "A recognizance with sureties is one of the most onerous forms of release. A surety should not be imposed unless all the less onerous forms of release have been considered and rejected as inappropriate."

Sureties are not appropriate when releasing youth for the following reasons:

1) Many of the youth coming before the system are wards of the province and therefore their social workers are less likely to sign for a cash or no cash surety (see principle regarding detention for social measures)

2) Parents of modest incomes may not be in a position to promise even a no cash surety and thereby refuse to sign the youth out or may wish to keep their child in jail as a disciplinary measure.

If a JP has released a youth on a surety, either seek Crown's consent to vary to an undertaking, or apply to make that application before the PCJ if youth is still detained.

A Crown may seek to revoke outstanding bail if the youth had his JP hearing and was unsuccessful. In this instance the Crown is entitled to their 2 days. If the youth waived his JP hearing he is entitled to speak to bail on the new matter. At all times the onus remains on the Crown.

As a matter of practice defence counsel will often consent to bail revocation if Crown is prepared to release the youth. The purpose of this is to ensure the youth is only out on one bail document and doesn't suffer with contradictory conditions or duplicitous breaches.

Section 31 Release to a responsible adult

31(1) Placement of young person in care of responsible person

A young person who has been arrested may be placed in the care of a responsible person instead of being detained in custody if a youth justice court or a justice is satisfied that

(a) the young person would, but for this subsection, be detained in custody under section 515 (judicial interim release) of the Criminal Code;
(b) the person is willing and able to take care of and exercise control over the young person; and
(c) the young person is willing to be placed in the care of that person.

31(2) Inquiry as to availability of a responsible person

If a young person would, in the absence of a responsible person, be detained in custody, the youth justice court or the justice shall inquire as to the availability of a responsible person and whether the young person is willing to be placed in that person's care.

31(3) Condition of placement

A young person shall not be placed in the care of a person under subsection (1) unless

(a) that person undertakes in writing to take care of and to be responsible for the attendance of the young person in court when required and to comply with any other conditions that the youth justice court judge or the justice may specify; and
(b) the young person undertakes in writing to comply with the arrangement and to comply with any other conditions that the youth justice court judge or the justice may specify.

JIR Practice notes concerning Section 31:

Only when bail is denied can a s.31 hearing be undertaken. It is customary to give the Crown the responsible person's name and DOB so a criminal record search can be done. Duty counsel must then call this person to the stand and extract information lending to the likelihood that the adult is capable and willing to monitor the youth and turn youth in should he or she breach. The adult must be told that charges could be laid against themselves if they do not report breaches or fail to come to court to remove their name from the s. 31.

Where available Justice Navigators can provide support for duty counsel to contact parents or social workers, do bail plans, and connect youth with programs designed to assist them in the community.

If the youth is under the age of 16, and the young person has no place to live, a release on bail would trigger children services intervention: Live at a place approved of by probation in consultation with Children's services.

If the young person is older than 16 he or she can be released to reside a youth shelter and an s.35 YCJA referral to children's services can be ordered to determine supports for youth.

De Novo Bail Review:

Unlike adults, Young persons have the added opportunity of reviewing a denial of judicial interim release at the provincial court level and readdressing bail following a denial. Adults must seek a review of the denial at the Court of Queen's Bench and this remains an option for young persons who continue to be denied judicial interim release however most youth bail is done at the provincial level. Youth Duty Counsel may ask the Docket Crown to reopen bail and consent or proceed on a de novo hearing.

Section 33 of the Youth Criminal Justice Act:

> 33(1) If an order is made under section 515 (judicial Interim Release) of the Criminal Code in respect of a young person by a justice who is not a youth court judge, an application may, at any time after the order is made, be made to a youth court for the release from or detention in custody of the young person, as the case may be, and the youth court shall hear the matter as an original application.

Extra Judicial Sanctions:

Often the Crown will consider whether Extra Judicial Sanctions ("EJS") may be appropriate prior to first appearance. However, do not hesitate to ask for consideration of EJS Before considering a guilty plea, the question should be asked "can this be dealt with by Extra Judicial Sanctions?"

Typical Eligibility Requirements for EJS:

- Must be a low-level offence like shopliftings, minor assaults, or mischiefs (Group or domestic assaults are excluded);
- Young Person has two chances to complete EJS;
- No prior criminal record, though s. 4 and 4.1 explicitly contemplates a prior criminal record;
- If client requires extra guidance to complete EJS, canvass with Crown whether EJS can be done through YRAP or other agency;
- Where EJS is not an option, consider Mental Health Diversion.

In the event the young person is refused the EJS program, counsel may write to director (assistant chief crown) for approval, explaining why client should be the exception and be approved for EJS.

EJS Practice Notes:

- EJS requires an acknowledgment of responsibility and participation in the offence charged 10(3)(a);
- Admissions made in the course of programming for EJS are inadmissible in subsequent proceedings s. 10(4).
- Participation in EJS is not a bar to judicial proceedings, but the YCJA allows for application to the court to dismiss the charge if the court is satisfied on a balance of probabilities of the individual's partial or total completion of extra-judicial programming s. 10(5).
- EJS is not meant to be used in situations where there is insufficient evidence to proceed with the prosecution of the charge. s. 10(2)
- the program requires free and voluntary consent of the participant, and the participant has been informed of their right to be represented by counsel before consenting to participate in the program;

Guilty Pleas:

Even though all young persons are entitled to representation by Counsel (aka a full certificate), there may be situations where Youth Duty Counsel can assist in disposing of a matter while it's in the docket court stages by negotiating a reasonable outcome for the young person based on an early guilty plea. Remember that there are many more sentencing options, including diversion, for young persons compared to adults.

However, the accused should always be informed that the judge is not bound by a joint submission or negotiations between Duty Counsel and the Crown. The judge may impose a different sentence but must provide Duty Counsel and Crown an opportunity to address the judge's concerns with the joint submission (*R v Anthony-Cook*, 2016 SCC 43).

Prior to providing assistance with a guilty plea, Duty Counsel must be satisfied of the following:

- The young person committed the act which constitutes the offence;
- The young person possessed the requisite *mens rea*;
- The Crown is in a position to prove the above (e.g.: no possible defence at trial);

- There are no defects in the information;
- There are no Charter arguments prior to trial (delay etc.);
- There are no special pleas (*autrefois acquit, autrefois convict*) or defence of *res judicata* or multiple convictions.
- Section 606(1.1) must be canvassed and understood by the young person. It may be preferable to address the sections of 606(1.1) on the record in open Court if the young person has insisted in proceeding contrary to Duty Counsel's advice.

Duty Counsel should discourage a young person with counsel from pleading guilty in the absence of his/her counsel. Every reasonable effort must be made to contact the retained lawyer to see if he or she can attend later that day. If counsel cannot appear, Duty Counsel should inform the court of the situation and obtain the accused's consent on the record.

In many cases, the Pre-Sentence Report can be particularly helpful, and it can be commonplace for the sentencing to be adjourned to allow preparation of reports and collection of relevant sentencing documents by Youth Duty Counsel.

Sentencing:

Sentencing for young persons is often considered to be "a slap on the wrist" or "not as important" since the accused is a young person and incarceration is to be used as an absolute last resort per the principles in the Youth Criminal Justice Act. In reality, a simple sentence such as a fine or probation, which may be considered an easy sentence for an adult, may present unique challenges for a young person and has the potential to be disproportionally punitive depending on the young persons' circumstances.

There is also a myth that exists where it's thought that since the criminal record is "sealed" at the age of 18, that convictions acquired before that age do not have real consequences for the young person as an adult. That is not the case and youth convictions need to be treated as seriously as sentencing for adult matters.

While it is true that custody and incarceration is a last resort for young persons, the gateway to custody can quickly open and result in a high needs vulnerable youth spending the vast majority of their formative years in custody. Youth sentencing principles can be briefly summarized as follows:

- youth justice system must reduce its overreliance on incarceration for non-violent YPs (Preamble);

- youth justice system must reserve its most serious interventions (i.e. incarceration) for the most serious crimes (Preamble);
- youth justice system is intended to prevent crime by addressing circumstances underlying offending behaviour (s.3(1)(a)(i));
- youth justice system is intended to rehabilitate and reintegrate YPs who commit offences (s.3(1)(a)(ii));
- youth justice system must emphasize fair and proportionate accountability by taking into account the greater dependency of YPs and their reduced level of maturity (s. 3(1)(b)(2));

In addition to the principles found in s. 3 of the Youth Criminal Justice Act, the court must consider principles and factors found in s. 38 of the Act. The overarching principles and language that can be used from the Youth Criminal Justice Act are bolded below:

38(1) Purpose

The purpose of sentencing under section 42 (youth sentences) is to hold a young person **accountable** for an offence through the imposition of **just sanctions** that have **meaningful consequences** for the young person and that **promote his or her rehabilitation** and reintegration into society, thereby contributing to the long-term protection of the public.

38(2) Sentencing principles

A youth justice court that imposes a youth sentence on a young person shall determine the sentence in accordance with the principles set out in section 3 and the following principles:

(a) the sentence must not result in a punishment that is greater than the punishment that would be appropriate for an adult who has been convicted of the same offence committed in similar circumstances;

(b) the sentence must be similar to the sentences imposed in the region on similar young persons found guilty of the same offence committed in similar circumstances;

(c) the sentence must be **proportionate to the seriousness of the offence and the degree of responsibility of the young person for that offence**;

(d) all available sanctions other than custody that are reasonable in the circumstances should be considered for all young persons with particular attention to the circumstances of aboriginal young persons;

(e) subject to paragraph (c), the sentence must
(i) be the **least restrictive sentence** that is capable of achieving the purpose set out in subsection (1),
(ii) be the one that is **most likely to rehabilitate** the young person and reintegrate him or her into society, and
(iii) **promote a sense of responsibility** in the young person, and an **acknowledgement of the harm** done to victims and the community;

***New section**:* (e.1) if this Act provides that a youth justice court may impose conditions as part of the sentence, **a condition may be imposed only if**:
(i) the imposition of the condition **is necessary to achieve the purpose** set out in subsection 38(1),
(ii) the young person will **reasonably be able to comply with the condition**, and
(iii) the **condition is not used as a substitute for appropriate child protection, mental health or other social measures**; and

(f) subject to paragraph (c), the sentence may have the following objectives:
(i) to denounce unlawful conduct, and
(ii) to deter the young person from committing offences.

38(3) Factors to be considered:

In determining a youth sentence, the youth justice court shall take into account

(a) the degree of participation by the young person in the commission of the offence;
(b) the harm done to victims and whether it was intentional or reasonably foreseeable;
(c) any reparation made by the young person to the victim or the community;
(d) the time spent in detention by the young person as a result of the offence;
(e) the previous findings of guilt of the young person; and
(f) any other aggravating and mitigating circumstances related to the young person or the offence that are relevant to the purpose and principles set out in this section.

Non-Custodial Sentences for Young Persons:

After consideration of EJS, there is a range of non-custodial sentences available to young persons, some of which are not available for adult offenders or considered differently in the context of sentencing for a young person. Any type of monetary penalty or restitution-based

condition must involve an assessment by the Court of the young persons ability to pay – monetary punishments are often not appropriate for young persons and can be unintentionally punitive considering the young persons' circumstances.

a. Reprimands:
    i. Reprimand by the Judge in Court and charges withdrawn;
b. Absolute and Conditional Discharges:
    i. The "Public interest" component is only a consideration for adult sentencing. In the context of sentencing a young person, only the best interests of the young person are explored (R v W(CS), 2004 ABCA 352).
c. Fines not exceeding $1000:
    i. Court must consider the young persons ability to pay.
d. Restitution and Compensation Orders;
    i. Court must consider the young persons ability to pay.
e. Community Service Hours;
    i. Community Service Hours can be exchanged for monetary penalties however the ability of the young person to reasonably complete the community service hours also needs to be considered.
f. Non-Residential Orders;
    i. Community based sentences focusing on rehabilitation and reintegration measured in terms of hours. This type of sentence is currently only available in Edmonton and Calgary due to lack of resources to affect this sentence in rural jurisdictions.
g. Probation Orders:
    i. Remember that any condition imposed must have a specific purpose, be reasonably attainable and necessary.

It bears repeating that the Youth Criminal Justice Act requires that a youth justice court consider all reasonable alternatives to custody (particularly in the case of aboriginal YPs) and must conclude that there are none before it can impose a custodial sentence.

Custody Available s. 39 Youth Criminal Justice Act:

> 39(1) A youth justice court **shall not** commit a young person to custody under section 42 (youth sentences) unless
>
> (a) the young person has committed a violent offence;
> (b) the young person has previously been found guilty of an offence under section 137 in relation to more than one sentence and, if the court is imposing a sentence for an offence under subsections 145(2) to (5) of the Criminal Code or

section 137, the young person caused harm, or a risk of harm, to the safety of the public in committing that offence;
(c) the young person has committed an indictable offence for which an adult would be liable to imprisonment for a term of more than two years and has a history that indicates a pattern of either extrajudicial sanctions or of findings of guilt or of both under this Act or the Young Offenders Act, chapter Y-1 of the Revised Statutes of Canada, 1985; or
(d) in exceptional cases where the young person has committed an indictable offence, the aggravating circumstances of the offence are such that the imposition of a non-custodial sentence would be inconsistent with the purpose and principles set out in section 38.

39(2) Alternatives to custody:

If any of paragraphs (1)(a) to (c) apply, a youth justice court shall not impose a custodial sentence under section 42 (youth sentences) unless the court has considered all alternatives to custody raised at the sentencing hearing that are reasonable in the circumstances, and determined that there is not a reasonable alternative, or combination of alternatives, that is in accordance with the purpose and principles set out in section 38.

39(3) Factors to be considered:

In determining whether there is a reasonable alternative to custody, a youth justice court shall consider submissions relating to

(a) the alternatives to custody that are available;
(b) the likelihood that the young person will comply with a non-custodial sentence, taking into account his or her compliance with previous non-custodial sentences; and
(c) the alternatives to custody that have been used in respect of young persons for similar offences committed in similar circumstances.

39(4) Imposition of same sentence:

The previous imposition of a particular non-custodial sentence on a young person does not preclude a youth justice court from imposing the same or any other non-custodial sentence for another offence.

Custodial Sentences for Young Persons:

Custodial sentences are called Custody and Supervision Orders (CSO) for young persons. It consists of a custodial (in custody) portion as well as a Supervision (out of custody) component. The Supervision portion is always 1/3 of the entire sentence by operation of the Act.

> Example: if the custodial sentence being suggested is 12 months, that means that 8 months is served in custody and the remaining 4 months (1/3 of total sentence) will be served in the community under Supervision.

39(8) Length of custody:

> In determining the length of a youth sentence that includes a custodial portion, a youth justice court shall be guided by the purpose and principles set out in section 38, and shall not take into consideration the fact that the supervision portion of the sentence may not be served in custody and that the sentence may be reviewed by the court under section 94.

Before a young person can be sentenced to a custodial sentence, a pre-sentence report must be ordered unless it is waived by the young person through his or her Counsel. Other reports such as Gladue Reports, s. 34 reports (mental health risk assessment) or use of s. 19 (conference) may be appropriate depending on the circumstances.

39(6) Pre-sentence report:

> Before imposing a custodial sentence under section 42 (youth sentences), a youth justice court shall consider a pre-sentence report and any sentencing proposal made by the young person or his or her counsel.

39(7) Dispensing with Report:

> A youth justice court may, with the consent of the prosecutor and the young person or his or her counsel, dispense with a pre-sentence report if the court is satisfied that the report is not necessary.

39(9) Reasons:

> If a youth justice court imposes a youth sentence that includes a custodial portion, the court shall state the reasons why it has determined that a non-custodial sentence is not

adequate to achieve the purpose set out in subsection 38(1), including, if applicable, the reasons why the case is an exceptional case under paragraph (1)(d).

Custodial Sentences can be either “closed” or “open custody” for the custodial portion. Open custody is a justice run residential facility similar to a group home. Deferred Custody is the equivalent of the Adult CSO – custody served in the community.

Breaches of Custodial Orders:

If a young person breaches a Deferred Custody Order or Custodial Sentence Order (a custodial sentence), they are taken immediately into custody without a judicial interim release hearing. The young person must be brought into court for a hearing on the breach within 48 hours (working days) of the breach. A report is then generated outlining the breach, history, sentence details and any witness evidence including interviews with the young person.

The young person can admit the breach and argue for his release (back to deferred custody or community supervision) on the date it is brought into court. If the young person does not want to admit the breach, a hearing date can be set. Judicial Interim Release can be argued for however the young person should be aware that any time spent on bail before the breach hearing will not count towards their overall sentence (i.e. clock stops ticking like an adult CSO).

Deferred Custody Order Breaches:

If a young person has been sentenced to deferred custody (equivalent of a conditional sentence) and is arrested for breaching that order, the Director must generate a breach review within 48 hours of the young person’s apprehension. Duty counsel will receive a copy of the report and should review it with the young person.

Deferred custody breaches work on an all or none principle, meaning if the young person admits the breach the judge may cancel the suspension and release the young person back onto his deferred, or continue the suspension in which case the sentence is converted into a custody and supervision order.

There is no ability to simply have the young person serve a short portion in custody for release. Therefore it is often advantageous to adjourn the matter for the appointment of counsel and to allow a passage of time that counsel could argue that the young person has been held accountable by the length of time the matter had been adjourned.

Custodial Sentence & Supervision Breaches:

If a young person has been breached on his supervision portion of his custody and supervision sentence, the director must generate a breach report and have the matter before the court with 48 hours of the young person's apprehension. If the young person admits the breach, the judge could cancel the suspension immediately, cancel the suspension following a further period in custody, or continue the suspension until the order's expiry.

While in most cases, it need not be before the sentencing judge who hears the breach, in situations where the sentenced offence was in relation to a murder, manslaughter or other very serious offences, that review must go before the sentencing judge to review the breach. In instances like this the young person should have counsel appointed.

If the young person will not admit the breach, then a hearing must be conducted proving the breach. Because this is equivalent to running a trial, the young person would remain in custody until that hearing occurs which could result in the expiry of the order. While there is no provision addressing bail for such breaches, Alberta courts have granted bail where appropriate, pending the hearing. If this occurs time does not continue to tick on the suspension, meaning that at the end of the hearing that delay would be added extending the expiry by the period for which the youth was on bail. Again, this is an instance where counsel should be appointed for the young person.

See also *R v KP*, 2017 ABQB 5 that speaks to granting bail pending the sentence review.

Practice Note on Custodial Sentences for Young Persons:

Beware that there is one key difference between DCO and CSO:

On a CSO the judge can tinker with the sentence by requiring the YP spend part of the supervision in custody before released back into the community

On a DCO there is no tinkering but rather operates on an all or none principle. If the judge refuses to cancel the suspension, the judge then converts the remainder of the deferred custody order into a CSO effective immediately. Depending how much time is left it is usually advantageous to adjourn the determination for a period of time in order to argue the YP has learned their lesson from their recent detention thereby persuading the judge to cancel the suspension and release them

Part 4: FAMILY DUTY COUNSEL

Family Duty Counsel as a category represents a significant portion of LAA's Duty Counsel services. Family Duty Counsel have historically been provided by staff lawyers in the cities of Edmonton and Calgary and by roster lawyers in some select jurisdictions.

Family Duty Counsel must have a thorough knowledge of the ***Divorce Act***, **the** ***Family Law Act***, **the** ***Child, Youth and Family Enhancements Act***, **the** ***Family Property Act***, **the** ***Protection Against Family Violence Act***, **the** ***Maintenance Enforcement Act***, ***Adult Interdependent Relationships Act***, ***Alberta Evidence Act, Vital Statistics Act*** **and the** ***Federal and Alberta Child Support Guidelines***, and all other related legislation and regulations.

In addition, Duty Counsel should be familiar with the Alberta Rules of Court (the Family Law Rules) and the Court of Queen's Bench Practice Notes.

Providing brief legal advice is a key function of all Duty Counsel, and Family Duty Counsel must be able to provide accurate "process-related" advice on topics such as court procedure and the law.

Family Duty Counsel should assist in obtaining an early resolution when the parties are close to settlement so that appointment of a lawyer on a LAA certificate may not be required.

Family Duty Counsel does more than request adjournments and set dates. The summary advice they provide and their assistance in the resolution of relatively simple matters are essential to ensure that limited LAA resources can be concentrated on more complex matters.

The precise duties of court Family Duty Counsel may vary somewhat according to local court practices and depending on which level of Court, namely the Court of Queen's Bench or the Alberta Provincial Court, Family and Youth Division. The type of court may affect the role of the Family Duty Counsel in each jurisdiction.

The following sections are intended as a guideline for Family Duty Counsel in performing their duties in family court. Family Duty Counsel should not feel compelled to act if they do not feel competent due to time pressure or inexperience.

Role of Family Duty Counsel in Family Court:

- Family Duty Counsel is encouraged to be proactive in assisting clients to reach a resolution in appropriate cases and encourage them to seek out non-court based dispute resolution options. If a legal aid certificate is an appropriate option, based on the type of matter in dispute, the Family Duty Counsel should advise the client about Legal Aid's financial eligibility criteria and the application process, and how to apply for legal aid.

- Family Duty Counsel should explain to clients that legal aid does not always provide a full representation lawyer, explain appropriate hour certificates and that legal aid is not free.

- Family Duty Counsel cannot recommend a particular lawyer.

- Private roster lawyers who have acted for a client in a Family Duty Counsel capacity should refrain from later representing persons they have assisted as Family Duty Counsel because of the perceived impropriety of using the high visibility of the position of Family Duty Counsel to obtain clients. It should only occur in unusual circumstances and prior approval must be obtained from LAA, regardless of whether the retainer is private or by way of a legal aid certificate.

- The limited role of Family Duty Counsel should be stressed when Duty Counsel first meets with a client and should be revisited at key points in the interview.

- It should be clear to the client that the limited services available through Family Duty Counsel will not replace retaining their own counsel.

General Functions of Family Court Duty Counsel:

Family Court Duty Counsel deal with persons who are on the docket (Provincial) or Family Docket or Chambers list (QB) and present in court on that specific day. Family Court Duty Counsel appear in the Court of Queen's Bench and the Provincial Court Family Division.

Family Court Duty Counsel may be full-time employees of LAA who are present at court each day or LAA per diem roster Duty Counsel - lawyers in private practice that are paid an hourly rate to take a Family Duty Counsel shift. LAA will use staff Family Duty Counsel first when available.

The functions of Family Duty Counsel include:

- Advising unrepresented parties about their legal rights and obligations as they relate to that court appearance or a future related court appearance that is close in time;

- Assisting unrepresented parties in negotiating and settling issues as they relate to that court appearance or a future related court appearance that is close in time, likely on an interim basis, and helping clients negotiate the terms of consent orders;

- Reviewing court documents and advising clients on their need to prepare court documents as they relate to that court appearance or a future related court appearance such as applications, affidavits and other court based forms in limited circumstances;

- Referring unrepresented parties to other sources of assistance, such as RCAS, dispute resolution services, Early Intervention case conferences, Legal Aid Alberta or a privately retained counsel;

- Appearing for unrepresented parties to request adjournments, obtain consent orders, argue straight forward/non-complex matters, attend child protection docket;

- Speaking to non viva voce applications to vary child support or access for financially eligible clients in non-complex cases as well as spousal/partner support.

Limits on Functions Performed by Family Duty Counsel:

Because of the summary nature of Family Duty Counsel assistance, Family Duty Counsel should refrain from providing services beyond the limits suggested by LAA.
Family Court Duty Counsel should not:

- Deal with significant property disputes/equalization of net family properties and provide advice on Minutes of Settlement;

- Attend at a trial, or any viva voce hearing where the issues are lengthy and/or complex, including EPO oral hearings;

- Attend Case Management conferences or give specific advice regarding witnesses or evidence to be called at trial;

- Assist self-represented persons who are not on the current day's court list unless they are speaking to an emergency application;

- Assist persons who have privately-retained (non-legal aid) counsel of record.

Agency Requests for Lawyers on a LAA Certificate:

Family Duty Counsel may act at the request of retained lawyers (either private or on a LAA certificate) to appear as agent for the purpose of obtaining an adjournment, setting a matter to the end of the list or setting a hearing date, subject to the following conditions:

- For privately retained or staff counsel, the adjournment or setting of a date must be on consent of all parties. If the adjournment or setting of a date is contested but the client has a LAA certificate, Family Duty Counsel has the discretion to refuse to appear as agent if it appears the argument may be complex or lengthy.

- Family Duty Counsel will not appear as agent if the client is not in attendance, unless retained counsel confirms it is impossible for the client to attend court (e.g.: due to illness) and that the client is aware and has consented to use of Family Duty Counsel by their lawyer as an agent.

- Family Duty Counsel is not responsible for reporting back to retained counsel as to the outcome of an adjournment or setting of a date unless it is impossible for the client to attend. In most cases, the client must be advised to notify his/her lawyer.

As a general rule, roster Family Duty Counsel should not act in their own cases or matters to the detriment of their duties as Family Duty Counsel on any scheduled date. Family Duty Counsel should not attempt to act beyond the limits of his/her own professional expertise and judgment.

There is 1 Family Duty Counsel per court in Provincial Court and Queen's Bench in select jurisdictions.

Staff Lawyer Family Duty Counsel duties include:

- Help anyone on court list (no FEG)
- Basic legal advice and procedural information (no property)
- Basic negotiation for consent
- Appear in court – adjournments/basic arguments
- Brief review of client's documentation

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Part 5: MENTAL HEALTH REVIEW PANEL & BOARD DUTY COUNSEL

Mental Health Review Panel

A person becomes a formal patient (involuntary patient) when they are admitted and detained in hospital and two doctors issue admission (Form 1) or renewal (Form 2) certificates. To detain a person as a formal patient, the person must be:

- suffering from a mental disorder
- likely to harm themselves or others or to suffer substantial mental or physical deterioration or serious physical impairment
- unsuitable for admission to a facility other than as a formal patient

Community Treatment Orders (CTOs) (Form 19) are for people with diagnosed mental disorders who require treatment or care but are living in the community, not in a mental health facility. A CTO is defined by the Canadian Mental Health Association as “a doctor’s order to follow a supervised mental health treatment and care plan for a certain period of time while staying in the community rather than being admitted to a hospital or other facility.” Criteria and conditions to issue a CTO are based on a person’s medical and hospitalization history. All the following conditions must be met:

- the person must be suffering from a mental disorder
- the person must be likely to harm themselves or others or to suffer substantial mental or physical deterioration or serious physical impairment if they do not receive community-based treatment or care
- the treatment or care the person requires exists in the community, is available to the person, and will be provided to the person
- the person must be able to comply with the treatment or care requirements in the CTO
- the person must be willing to consent to the CTO or their consent is not needed in a specific case

Procedural Fairness:

The right to a review of a decision is part of procedural fairness. Review panels review decisions to hospitalize and treat a person with mental illness. Review panels consider the application for review and the reasons a person was detained or treated. They also confirm all deadlines have been met.

Failure to manage review requests violates procedural fairness and a person's Charter right to liberty.

Under section 43(1), a patient may appeal a review panel decision to the Court of Queen's Bench. They have 14 days to file that appeal. An appeal is a rehearing on the merits of the patient's case.

There are three review panels in Alberta:

- Calgary and South Mental Health Review Panel
- Central Alberta Mental Health Review Panel
- Edmonton and North Mental Health Review Panel

Review panels are established under section 34 of the Act. Alberta Health describes the review panel role as:

> "… an adjudicative body that hears and makes decisions on applications pertaining to: patients detained in designated facilities under admission and renewal certificates; return of a patient to a correctional facility after treatment, individuals who are subject to community treatment orders; a patient's competence to make treatment decisions; and the administration of treatment to patients who object to it under the Mental Health Act."

Each review panel has 4 members: a chair or vice-chair, a doctor, a psychiatrist, and a member of the public. Whoever chairs a hearing must be a lawyer. There is a province-wide roster of members appointed by the Minister. They are psychiatrists, physicians, and public members who are interested in being on a panel.

Three types of applications for review are related to admission and detention:

- to cancel admission certificates or renewal certificates—Form 12 (section 38)
- to be transferred back to a correctional centre—Form 12 (section 33)
- to review a formal patient's admission or renewal certificates—an automatic review occurs at or after six months if no review has been held earlier (section 39)

Other applications that patients, individuals under a CTO or their representatives can make by completing a Form 12 are:

- to review a doctor's opinion that a formal patient is not mentally competent to make treatment decisions (section 27)
- to cancel a CTO (section 38)

- to cancel a CTO—this is a deemed (automatic) application on the first renewal of a CTO and every second renewal after it unless an application to cancel it has been made in the month before the renewal (section 39)
- for a treatment order—doctors can apply for a treatment order by completing Form 12 if a mentally competent formal patient refuses to consent to treatment, or if a person authorized to make treatment decisions for an incompetent formal patient refuses to consent to treatment (section 29)

Section 40 of the Act requires the chair of the review panel to give all parties 7 days' notice (Form 13) of the hearing date, time, place, and purpose when they receive a review application. For applications under sections 27 and 29, they must give "reasonable notice". A hearing must be held within 21 days from receiving the application form.

The chair can grant one 21-day adjournment and consider requests from a patient or their representative for more adjournments. On sections 27 and 29 applications, the hearing must be held within 7 days after receiving the application form.

After a hearing, a review panel must issue its decision within 24 hours (section 41(2)(a)).

The leading case in Alberta in relation to the Act is *JH v. Alberta Health Services*, 2019 ABQB 540 which found that the Act was overbroad, arbitrary, and grossly disproportionate. The Court declared that the detention provisions ss. 2, 4(1), 4(2), 7(1), 8(1) and 8(3) of the Act are of no force or effect as they infringe sections 7, 9 and 10(a) and 10(b) of the Charter of Rights and Freedoms. The declaration was suspended for 12 months to allow the Legislature to take the necessary steps to bring the Act into compliance.

The Alberta Court of Appeal in *JH v Alberta (Minister of Justice and Solicitor General)***,** 2020 ABCA 317 upheld the lower court's decision and dismissed an appeal by the Minister of Justice and Solicitor General of Alberta and Alberta Health Services.

Mental Health Board of Review Duty Counsel

Not Criminally Responsible on Account of Mental Disorder (NCRMD) - No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.

While an accused found not criminally responsible on account of mental disorder by a court is not convicted in the usual sense, the verdict does not constitute an acquittal; it represents a unique third option. An accused that is found NCRMD is diverted to a provincial or territorial Review Board established pursuant to section 672.38 of the Criminal Code. Review Boards are specialized tribunals chaired by a judge, or an individual qualified for a judicial appointment, and comprised of at least four other members, one of which must be entitled under the laws of the particular province to practice psychiatry.

The rationale for this separate stream is that, while the accused is not criminally responsible for his or her behaviour, the public may still require protection from future dangerous behaviour. Therefore, the goal of a Review Board is to conduct an individual assessment of the accused and subsequently craft a disposition that both protects the public and attempts to provide opportunities to treat the underlying mental disorder.

While most NCRMD cases are diverted to a Review Board, the court which renders the verdict also has the authority to order a disposition if it is satisfied that it could readily do so and that a disposition should be made without delay. Under section 672.54 of the Criminal Code, there are three dispositions available to a court or Review Board:

- an absolute discharge;
- a conditional discharge; or
- detention in custody in a hospital.

If the court orders a conditional discharge or detention, however, the provincial or territorial Review Board is still obligated to hold a hearing and order a new disposition within 90 days. Therefore, with the exception of cases that receive an absolute discharge by the courts, Review Boards are generally responsible for determining the appropriate disposition of an accused found NCRMD.

Under section 672.54, the court or Review Board must order the disposition that is the least onerous and least restrictive to the accused. In determining such a disposition, the court or Review Board must balance the dual roles of protecting the public and treating the accused in a fair and humane manner that respects his or her rights. Section 672.54 states that the court or Review Board shall take into account "the need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused."

In 1999, the Supreme Court of Canada, in *R. v. Winko*, provided guidance on section 672.54 and ruled that if the accused does not pose a significant threat to the safety of the public; the court or Review Board must order an absolute discharge. This decision reflects the basic

principle that the only rationale for using the state's criminal law power to impose restraints on an individual who has been found not criminally responsible for his or her actions is the need to secure the safety of the public.

The Supreme Court of Canada further clarified in *R. v. Winko* that Section 672.54 does not create a presumption of dangerousness. In other words, while the protection of society is paramount, there must be clear evidence of a significant risk to the public before a court or Review Board can maintain control over an accused through the imposition of a conditional discharge or detention order.

In *R. v. Jones*, 2019 ABCA 313, The Alberta Court of Appeal advised that the Board must make one of three dispositions and outlined the analytical framework for making a disposition that is "necessary and appropriate" under section 672.54 as follows:

- if the accused is not a significant threat to the safety of the public, he or she must be discharged absolutely;
- if the accused is a significant threat to the safety of the public, he or she can be discharged with conditions; or
- the accused can be detained in a hospital, subject to any conditions the Board considers appropriate.

If the court or Review Board orders an absolute discharge, the NCRMD accused is released from further involvement with the system for the specific offence that led to the NCRMD verdict.

If the court or Review Board orders a conditional discharge, the accused is supervised in the community through the imposition of restrictions on his or her liberty. Typical conditions ordered by a court or Review Board during a conditional discharge specify that the NCRMD accused must:

- reside in a particular place (e.g., group home);
- abstain from illegal drugs and/or alcohol;
- submit to urinalysis testing for prohibited substances;
- abide by a specified treatment plan;
- report to a designated person (e.g., psychiatrist) on a scheduled basis; and
- refrain from possessing weapons.

Although these represent some of the most common conditions, Section 672.54 (b) states that the accused may be discharged subject to any conditions the court or Review Board considers appropriate.

If the court or Review Board orders detention, the accused will be placed in custody within a hospital. There are still times, however, when he or she will be managed within the community under conditions. The court or Review Board can delegate authority to manage the accused to the hospital where the accused has been detained. As such, the hospital administrator has the power to increase or decrease the restrictions on the NCRMD accused. Therefore, it is possible for an accused to leave hospital grounds with permission from the hospital administrator.

Until an NCRMD accused is given an absolute discharge, he or she will remain under the authority of the Review Board. In general, the Supreme Court of Canada has ruled that the indeterminate nature of this scheme does not violate an NCRMD accused's liberties protected under the *Charter of Rights and Freedoms*.

Therefore, the principle of proportionality, which is important in the sentencing of offenders in the criminal justice system, is not a factor in determining an appropriate disposition for an NCRMD accused. That is not to say, however, that the seriousness of the offence committed by an NCRMD accused does not factor into an assessment of his or her dangerousness and ultimately the disposition. Simply, there is no legal requirement for the disposition to be proportionate to the harm caused by the particular offence.

Under Section 672.81, the Review Boards must hold a hearing every year in order to review the disposition. During these annual reviews, Review Boards can impose any of the three available dispositions (i.e., absolute discharge, conditional discharge, detention) and alter any of the conditions previously imposed on the accused. In addition to these annual reviews, additional mandatory reviews do occur within the year if, for example, restrictions on the liberty of an accused have been significantly increased for a period exceeding seven days or if a hospital administrator requests a review. Finally, discretionary reviews are possible upon the request of the accused or any other party.

Legal Aid Alberta

Part 6: LIMITATIONS AND STANDARDS

Solicitor-Client Privilege:

The customary solicitor– client relationship applies to Duty Counsel and LAA clients.
Duty Counsel are often faced with a request from a judge as to the status of a LAA application. Duty Counsel should always get a client's consent before sharing any information regarding an application with the court.

Referrals to Other Lawyers:

Duty Counsel cannot suggest or recommend either directly or indirectly another lawyer to a client, nor should Duty Counsel attempt to dissuade a client from choosing a specific lawyer. If the client does not have the name of a particular lawyer, Duty Counsel may suggest the Lawyer Referral Service offered by the Law Society.

If Duty Counsel is of the opinion that the accused is incapable of choosing counsel and no family member is present to assist, Duty Counsel should contact LAA for a referral. If the client requests a lawyer that speaks a language other than English, Duty Counsel can advise the client to contact LAA with a request for counsel that speaks the required language.

Acting in the Same Matter:

As a general rule, any lawyer who advises or represents a person as Duty Counsel shall not represent that person "in the same matter". Duty Counsel can represent the individual in subsequent matters provided there was no touting while acting as Duty Counsel.

Duty Counsel should not hand out their cards to clients. If requested, a Duty Counsel should inform the client that he/she cannot represent the client either privately or by way of a certificate.

LAA may make exceptions for rural locations where the number of roster lawyers available to serve a client is limited or where the Duty Counsel has acted for the client on a certificate in the past.

Exceptions may also be considered where LAA is satisfied that there is a benefit to the client from a continuation of service by Duty Counsel. Factors that will be taken into account include:

- The disability of the client. For example, if a client has been able to communicate his/her circumstances to Duty Counsel once and to do so again would be onerous or risk missing significant elements;
- The Duty Counsel has performed substantial services for the client, and it would be counterproductive to repeat the established groundwork;

- The inability of the person to access counsel other than Duty Counsel, by reasons of mobility limitations and geographical distance;
- The skills of Duty Counsel to deal with special needs demonstrated by the client;
- The language of the applicant is difficult to match and Duty Counsel speaks that language.

The services provided by Duty Counsel should represent a complete a range of services that Duty Counsel could have discharged in the circumstances. A summary adjournment is not the type of service that would warrant an exemption on the basis of continuity.

An exemption should not create public suspicions of touting or the use of Duty Counsel assignments to solicit clients. Previous requests by the lawyer seeking the exemption will also be taken into consideration. Finally, the application for exemption must be made in a timely manner.

Acting for a Private Client While Retained as Duty Counsel:

As a general rule Duty Counsel should not act in their own cases while serving as Duty Counsel.

In larger metropolitan areas where there are frequent criminal and family court sittings, lawyers should schedule their own private files to avoid court appearances when they are scheduled to be Duty Counsel. Where criminal or family court only sits one or two days a week or month or the roster is small, enforcement of this policy may be relaxed in appropriate circumstances. Exceptions will be made if you have been retained to act as Duty Counsel on short notice or for Duty Counsel in rural areas.

Each Duty Counsel is required to be available for the hours scheduled for him/her as Duty Counsel. Attempting to deal with one's own files while acting as Duty Counsel results in diminished accessibility, efficiency and effectiveness as Duty Counsel.

LAA has the authority to remove a lawyer from the Duty Counsel roster for consistently scheduling his/her own files on days when scheduled as Duty Counsel and the lawyer's ability to carry out his or her Duty Counsel function is adversely affected as a result.

Where a lawyer has no realistic option other than to schedule his or her own private matters for a date when he/she is Duty Counsel, the lawyer should advise LAA in advance of the potentially diminished service.

Duty Counsel may not include any time spent with private clients, including clients on legal aid certificates, in accounts submitted for Duty Counsel services. The time spent on one's own matters is not to be recorded in any way on the Duty Counsel invoice.

Interactions with Clients:

Duty Counsel shall not:

- Solicit clients while acting as Duty Counsel;
- Solicit funds from a client while acting as Duty Counsel:
- Hold monies or chattels in trust (e.g.: bail), or
- Accept a payment or gratuity from a client they assisted while acting as Duty Counsel.

Instructions by Telephone:

Duty Counsel may use their own discretion about taking telephone instructions from individuals identifying themselves as an accused (please keep in mind the Law Society guidelines on determining identification). Telephone calls are generally discouraged and should only be taken if time permits.

Obligations when Submitting an Invoice to LAA / Submitting an Invoice:

When submitting your invoice for Duty Counsel through the Lawyer Portal you must ensure that the Outcomes section for that certificate is has been completed. This is one of the ways LAA can determine how busy a court location or a particular courtroom is, so that it can be adequately staffed. In order to complete the Outcome portion of your invoice you must click on "Add an Outcome" and then enter the appropriate data in the necessary fields.

Once you have entered this data, click the 'Add' button to save the information with your invoice.

Appendix:

1. *Rowbotham* Materials
2. Duty Counsel Interview Sheet
3. *Gladue* Considerations
4. Plea Comprehension Form
5. Likelihood of Incarceration Online Form
6. Surety Bail Checklist
7. Duty Counsel Referral Form (to be developed)

Legal Aid Alberta

Instructions for Duty Counsel Regarding *Rowbotham* Applications

Rowbotham in General:

As discussed in A.I. Nathanson's paper, *Rowbotham* Applications: Leveling the Playing Field, there are basically two types of *Rowbotham* applications. These could be called a Type 1 *Rowbotham* and Type 2 *Rowbotham* applications.

A Type 1 application involves a request for court appointed counsel where the client has been denied legal aid coverage and the application is for an order seeking a Stay of Proceedings until such time as counsel is appointed under the existing tariffs. The other party in these applications is Alberta Justice, not Legal Aid Alberta.

A Type 2 application involves a request for court appointed counsel where the client has been granted legal aid but counsel feels the case cannot be properly conducted at the existing tariff rate, and is seeking a Stay of Proceedings until such time as Alberta Justice pays something in excess of the tariff to existing counsel.

As Duty Counsel, you can only assist a client with a Type 1 application.

Rowbotham application precedents can be found at Legal Aid Alberta's website.

In Criminal matters the Notice can be served on the Prosecutor in the docket court where you are assisting the client. You must provide 2 clear days' notice.

It is strongly suggested that before bringing a *Rowbotham* application you read the *Rowbotham* case itself. It is located at 41 C.C.C. (3d) 1 (Ont.C.A.).

When making a *Rowbotham* application you must keep in mind the following:

1. The order sought is for a Stay of the Proceedings until such time as Alberta Justice (not Legal Aid Alberta) appoints counsel for the accused.
2. Never request that a specific counsel be appointed, as that decision will be made by Legal Aid Alberta (LAA) once Alberta Justice orders LAA to appoint counsel.
3. Duty Counsel must never go on the record for the accused that is being assisted.

Conditions precedent for a *Rowbotham* application:

- Has legal aid coverage been denied,
- Does the accused lack the means to employ counsel,
- Is it an exceptional or complex case,
- Does the accused lack the competence or capacity to represent themselves, and
- Is defense counsel essential to a fair trial?

The Alberta Court of Appeal, in the matter of R. v. Rain, (1994), 157 A.R. 385, provided a list of factors which should be considered in a *Rowbotham* application:

> What evidence might be useful and available? For example, it is entirely possible that the accused could in a few minutes lead evidence of:
>
> - her financial background,
> - her educational background,
> - what she knows of the charge,
> - what particulars she has been able to obtain from the Crown,
> - what efforts she has made to get Legal Aid, with what result,
> - the reasons given by the Legal Aid authorities,
> - whether she has any other access to a lawyer or agent capable of giving her effective defence to this charge, and
> - anything else which would help her make the argument that she cannot fairly meet the charge without counsel.

So when the conditions precedent exist what do you do?

You must always remember that in these situations you are acting as Duty Counsel, never, under any circumstances go on the record when assisting someone with respect to *Rowbotham*. The procedure to follow is:

5. Advise,
6. Provide,
7. Assist,
8. Advocate, but only under certain circumstances.

Advise:

If the conditions for a *Rowbotham* application are present, your first step is to advise the client that there is an application that can be made before the court for an order of court appointed counsel. The client may or may not wish to bring this application. Always remember, even if the client lacks the competency to run their own defence, you are not their guardian, and if they don't wish to bring the application then you must abide by those instructions.

Provide:

If the client is capable of completing the necessary Notice and Affidavit on their own, then you provide them with the documents and instruct them how to do so, and what to do with the documents once they are complete.

Assist:
If the client is incapable of completing the paperwork on their own, or they wish your assistance, then you can assist them with completing the paperwork and providing notice to the court and to the crown, and with filing their affidavit, and with setting a date for the application.

Advocate:

You will only advocate for the clients under certain conditions. First, if the hearing for the application is being held in a docket courtroom where Duty Counsel is present and the applicant asks for your assistance. Remember, you never go on the record. Secondly, if the hearing for the application is being held in a non-docket courtroom, but the judge requests the assistance of Duty Counsel from another courtroom. If the matter is being held in a non-docket courtroom, and the judge does not ask for the assistance of Duty Counsel, you cannot take it upon yourself to assist the applicant.

Most importantly, if you are in a position of advocating for the client, and the Crown calls a witness from Legal Aid Alberta, you must immediately advise the court that you are now in a conflict of interest, and you cannot cross examine the Legal Aid witness. If the court wishes to ask the witness questions that is within the courts discretion. After the Legal Aid witness has testified you are free to continue advocating for the applicant. It is important that you understand the nature of the potential conflict if you were to cross-examine a Legal Aid Alberta employee. In addition to your duty to the profession, and your duty to the client, you also have a duty to Legal Aid Alberta as they are paying for your services and to be on Legal Aid's payroll while cross-examining another employee would be no different than trying to remain counsel of record after you have been made a witness.

If you do any of the above; that is if you provide advice, provide documents, assist with documents or advocate on behalf of an accused in our capacity as Duty Counsel, you must provide Legal Aid Alberta with the following information:

5. Name of the client you assisted,
6. The nature of the assistance,
7. If you helped file documents or provide service, then the date, courthouse and time of assistance.
8. If you advocated for the client, then the date, time, courthouse, Judge and result of the application.

Legal Aid Alberta

CRIMINAL DUTY COUNSEL INTERVIEW FORM

COURTROOM: _____ DOCKET PAGE NUMBER: _____

CLIENT NAME: _____ DOB: _____ AGE: _____

ADDRESS: _____ HOW LONG: _____

BAIL STATUS: _____ GROUNDS: ☐ Primary (Ensure attendance in Court)
☐ Secondary (Necessary to Protect Public)

TIME IN CUSTODY: _____ ☐ Tertiary (Maintain Confidence in System)

CASH AVAILABLE: _____ SURETY: _____

CHARGES:

_____

_____

_____

_____

INSTRUCTIONS: _____

_____

IF GP, **s.606 (1.1)**: ☐ Voluntarily; ☐ Right to Trial; ☐ Admitting Facts; ☐ Consequences; ☐ Penalty up to Judge.

1. ROOTS IN THE COMMUNITY: _____ 1(a). INDIGENOUS: _____
2. EDUCATION: _____ 3. MARITAL STATUS: _____
4. EMPLOYMENT: a) Present _____
   b) Previous _____
5. DETAILS OF OFFENCE (include mitigating): _____

_____

_____

6. PREVIOUS RECORD: _____

ADVICE **POG** **GP LESSER** **RESERVE** **SET DATE** **BAIL** **W/D**

Legal Aid Alberta

GLADUE CONSIDERATIONS

- Where are you from? Do you live in the city or in a rural area (the country)?
- Do you live on reserve? Did you grow up on reserve?
- Have you ever been in foster care? Have other members of your family been in foster care (your parents, brothers and sisters, or your children)?
- Did you or a family member attend an Indian residential school?
- Have you ever struggled with substance abuse (drug or alcohol abuse)? Have you been affected by someone else's substance abuse? For example, did you grow up in a home where there was substance abuse or addictions?
- Did you grow up in a home where there was domestic violence or abuse?
- Is there a program in your community that would help you to address the issues that got you into trouble with the law? For example, is there a counselling program or alcohol or drug rehabilitation program that you feel would be helpful to you?
- Have you participated in community activities such as family gatherings, fishing, longhouse ceremonies, or sweat lodge ceremonies?

<u>*Gladue* considerations for bail</u>

Your *Gladue* report doesn't have to be as detailed or contain as much personal information for your bail hearing as it does for the sentencing hearing. The judge or justice of the peace will need to know that you're Indigenous and the details of your life that would be relevant to bail — employment, education, whether you have a surety, etc. For example:

- Where are you from? Do you live on reserve or off reserve?
- Are you employed? What level of education do you have?
- Do you have a hard time finding work because you lack education or because there are limited opportunities in your community?
- Do you struggle with any addictions?
- Have you been affected by racism?
- Has your life been impacted by colonization in any other significant ways?
- For example, did you attend an Indian residential school?
- Is there someone who can act as a surety for you? (Remember that your Indigenous community can act as a surety.)
- Have you taken part in community traditions, celebrations, or family gatherings as a child or as an adult? For example, have you participated in fishing, longhouse ceremonies, or sweat lodge ceremonies?

Checklist:

1. Do you self-identify as Indigenous? Indigenous can be status or non-status Indian, First Nations, Métis, or Inuit.
2. Where are you from? What community or band are you from? Do you live in the city or in a rural area (the country)?

3. What kind of living arrangements do you have right now? For example, how many people live in your house? Are these people your brothers and sisters or other relatives?
4. What is your home community like? Are there any issues with substandard (second rate) housing, lack of clean water, chronic unemployment, or seasonal employment? Is your community “dry”? Are there any issues with substance abuse?
5. What kind of living arrangements did you have when you were growing up?
6. Have you ever been in foster care? Have other members of your family been in foster care (your parents, brothers and sisters, or your children)?
7. Do you feel dislocated from your community? (Have you been taken away from your community in some way?) Has your community been fragmented (broken apart)? Do you feel isolated or lonely because of this?
8. Did you or a family member go to an Indian residential school?
9. Have you made an application to the Indian Residential School Settlement? If so, has this process been painful for you or caused other problems? If you received a settlement payment, has this caused problems for you or your family?
10. Have you spoken with an Indian residential school counsellor or therapist?
11. Have you ever struggled with substance abuse (drug or alcohol abuse)? Have you ever struggled with addictions to drugs or alcohol?
12. Did you grow up in a home where there were issues with substance abuse or addictions?
13. Did you grow up in a home where there was abuse?
14. Do you have any mental health issues?
15. What level of education do you have? For example, did you finish high school? If not, what’s the last grade you finished?
16. Did you or a family member have any issues that may have affected your opportunities to learn? For example, do you have any issues with trauma, Fetal Alcohol Spectrum Disorder (FASD), or learning disabilities?
17. Have you taken part in community traditions, celebrations, or family gatherings as a child or as an adult? For example, have you participated in fishing, berry picking, longhouse or sweat lodge ceremonies, Hobiyee, sundances or winter dances, Métis dancing, potlatches, shame feasts, friendship centre events, or volunteering for elders or other community members?
18. Have you ever been affected by racism? Please describe what happened and how this affected you.
19. Have you ever been affected by poverty? For example, did you or your family struggle to pay bills or rent, buy food, or pay for healthcare?
20. What are your interests and goals? For example, is there any education or training you’d like to complete? Is there a job or volunteer opportunity that you’re interested in? Do you have goals for your family or community?
21. Have you ever been involved with any Indigenous restorative justice programs, or with community elders or teachings? If so, give examples.

22. Is there someone in your community whom you or your lawyer, Native courtworker, or other advocate can contact if you need help? For example, is there a family member, elder, social worker, chief, or band councillor who can help you?

Supplemental Questions to Consider:

1. Client's Circmstances:

- What kind of relationship does your client have with his or her family? Consider describing your client's family relationships in a separate paragraph (or more) for each significant family member.
- Is there a history of child protection issues in your client's family? For example, has your client ever been in foster care? Have members of his or her family been in foster care (his or her siblings or children)?
- Was your client raised by a single parent? Is he or she a single parent?
- What is your client's marital status? What was/is the length of your client's marriage or relationship?
- Does your client have any children? How old are they? Do the children live with your client? Have the children ever lived with your client? If not, why not?
- Who are your client's associates (friends)?
- What are your client's past and present living arrangements? For example, how many siblings and relatives lived in the same house while he or she was growing up? How many siblings and relatives does he or she share a home with now?
- What is your client's education? What is your client's reading ability? Does your client face any challenges that would prevent him or her from learning, such as trauma, learning disabilities, or Fetal Alcohol Spectrum Disorder (FASD)?
- What is your client's past and present employment record?
- Does your client have any special training, skills, or talent?
- Is your client a member of any clubs — social, professional, or religious?
- What are your client's interests, goals, and aspirations — educational, professional, or otherwise?
- What is your client's financial situation? Has your client been impacted by poverty? Does he or she have a history with social assistance, employment insurance, food banks, or shelters?
- Does your client have any mental health issues? What is his or her mental, emotional, and behavioural status?
- Is your client in good health? Does he or she have any health or physical problems?
- Has your client ever struggled with addictions or substance abuse (now or in the past)? Did your client grow up in a home where there was a history of addictions or substance abuse?
- Did your client grow up in a home where there was domestic violence or abuse?

- What is the Court History Assessment for your client? (The Court History Assessment is a listing of your client's past criminal record, which is included in the disclosure package from the Crown counsel.) You should review all of the offences listed with your client. Take note of any patterns. For example, you may notice that every December your client is in trouble. This could reflect a trauma, such as the death of a parent. It's also good to note any long periods of time during which your client wasn't charged with any offences. Discuss with your client the positive things that were happening in his or her life at that time.
- What is your client's attitude with regard to the offence?
- If you're preparing a *Gladue* report for a sentencing hearing, is your client receptive to any proposed conditions, such as a curfew or working with an elder?

2. *Gladue* Considerations:

- What is your client's Indigenous affiliation? Is he or she a status or non-status Indian, First Nations, Métis, or Inuit? Does he or she have a band affiliation?
- Where is your client from? Which community or band is he or she from? Does he or she live in an urban or rural area? Does he or she live on reserve or off reserve?
- List the ways in which your client has been negatively impacted by colonization. For example, has your client been affected by racism? Did he or she attend an Indian residential school? This list should be detailed, personal, and specific to your client.
- Has your client been affected by suicides or other deaths of his or her family or friends?
- Does your client have any suicidal tendencies?
- Do you notice a pattern in your client's life that is connected to the anniversary of the death of a loved one (or another trauma)?

3. Client's Indigenous Community:

- What is the general history and overview of your client's Indigenous community?
- Was there an Indian residential school in or nearby the community?
- Ask your client to describe his or her community. Are there issues of substandard housing, lack of clean water, chronic unemployment, or seasonal employment? Is the community "dry," or are there issues of substance abuse within the community? What is the availability of treatment or rehabilitative services for substance abuse?
- How has colonization impacted the community as a whole? For example, are there issues with community health, unemployment, poor economic conditions, addictions, child welfare, etc.?
- How many people in the community speak the Indigenous language?
- What are the positive, healing aspects of the community? What resources are available within the community that could help your client? What are the community's strengths? List any community programs, initiatives, successes, and role models.

- Is there anything your client can do to help his or her community? Are there volunteer opportunities?
- Who are the community elders?
- Are there community activities or cultural traditions that your client can participate in or volunteer for? Examples include potlatches, sweat lodges, winter dances, sundances, feasts, berry picking, gathering firewood, hunting, fishing, big house ceremonies, longhouse ceremonies, etc.
- Is there someone in your client's community whom you can contact if your client needs assistance? (For example, the chief and council, elders, family members, friends, etc.)
- Has your client ever been involved with an Indigenous restorative justice program, or with community elders or teachings? If so, give examples.

4. Client's connection to his or her Indigenous community:

- Was your client raised in or does he or she have an awareness of his or her Indigenous culture/community?
- Is your client connected to his or her Indigenous community?
    - If yes, please explain.
    - If no, please explain why not. For example, was your client part of a "scoop" or otherwise placed in foster care? Does he or she have problems with his or her family or community?
    - If your client lives in an urban area, has he or she made connections in the city with other Indigenous people?
    - If your client has an Indigenous spouse or partner, has your client connected with his or her spouse's or partner's Indigenous community?
- Does your client speak his or her Indigenous language? If not, why not?
- Has your client been affected by dislocation from his or her community, community fragmentation, or loneliness?
- Did your client attend an Indian residential school? Did any of your client's family members attend an Indian residential school?
- Has your client spoken with an Indian residential school counselor or therapist?
- Has your client filed a claim with the Indian Residential Schools Settlement Agreement?
- Has the Indian residential school system — including settlement payments — impacted your client's family or community?
- Has your client participated in Indigenous community traditions, celebrations, or gatherings as a child or as an adult? Examples include sweat lodges, sundances, winter dances, potlatches, funeral feasts, berry picking, gathering firewood, fishing, hunting, long house ceremonies, family gatherings, etc.

Legal Aid Alberta

Community-Based Justice Programs - Alberta

Aiskapimohkiiks Program
Recipient: Siksika Nation

The objective of the Aiskapimohkiiks Program is to assist all Siksika Nation members to resolve disputes. The Program will divert cases away from the formal court system and thereby achieving maximum self-determination while restoring independence, solidarity, unity, peace and harmony.

The Program is a two-phase mediation/arbitration model that incorporates Siksika customs and traditions. The first phase, "Aiipohtsiniimsta," uses mediation and the second phase, "Aiskapimohkiiks," uses arbitration where parties have not been able to agree to a settlement in the first phase. The tribunal is a three-member panel composed of an independent chairperson, an Elder and a community member. The Program also uses an Elders Advisory Committee.

First Nations Custom Advisory Panels Program
Recipient: Yellowhead Tribal Community Corrections Society

The Yellowhead Tribal Community Corrections Society oversees the delivery and ongoing capacity development of the First Nations Custom Advisory Panels Program in the five member First Nations of the Yellowhead Tribal Council. The five member First Nations are Alexander First Nation, Alexis Nakota Sioux Nation, Enoch Cree Nation, O'Chiese First Nation, and Sunchild First Nation. The advisory panels are designed to employ traditional methods of conflict resolution in a manner that is transparent to all members of the participating First Nations communities as well as other organizations that deal with these First Nation governments or institutions.

Kainai Peacemaking Program
Recipient: Blood Tribe

The Kainai Peacemaking Program focuses on restoring personal, family and community relationships within the Kainai community by drawing on traditional Kainai peacemaking practices. The Program has developed partnerships with Blood Tribe agencies which participants utilize depending on their specific needs. Clients may be referred to services for mental health issues, individual and family counselling, stress/anger management, anxiety/depressive disorders, parenting skills, and conflict resolution, as well as traditional Elder counselling geared towards healing individuals and restoring harmony and order within the community.

Métis Settlements Community Justice Program
Recipient: Métis Settlements General Council

The Métis Settlements Community Justice Program provides support to eight communities to establish justice committees, operate youth and adult diversion programs, and develop alternative measures programs for their members. The justice committees use mediation and family group conferencing to address criminal, family and civil matters. Relying on Elders and community members, the Program focuses on families at risk and on victim-offender reconciliation. It also offers training in conflict resolution and communication skills.

Saddle Lake Restorative Justice Program
Recipient: Saddle Lake Boys and Girls Club

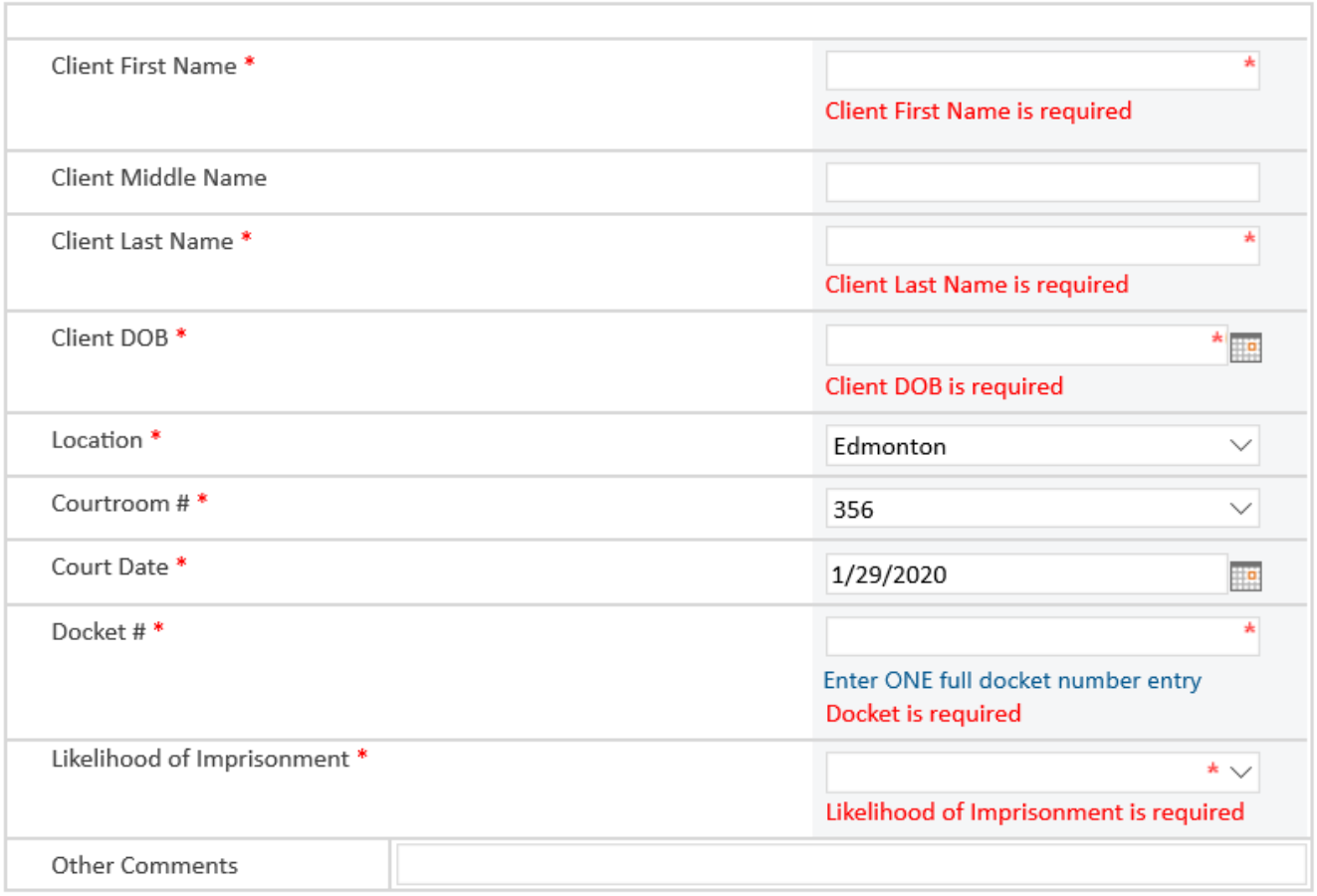
The Saddle Lake Restorative Justice Program is a comprehensive youth- and family-based strategy that includes prevention, diversion and reintegration programs for the residents of the Saddle Lake First Nation. The Program uses family group conferencing and other alternative dispute resolution techniques. A long-term goal is to implement a Circle Hearing Tribunal that would investigate and adjudicate disputes in a manner consistent with the traditional justice values of the community.

The Program strives to identify the causes of anti-social and quasi-criminal behaviour and through education and awareness aims to instil in youth a greater sense of responsibility towards themselves, their peers, families and community. Another aim of the Program is to develop tools to work successfully with at-risk children and families in the community before a crisis occurs.

Tsuu T'ina Peacemaker Program
Recipient: Tsuu T'ina Nation

The objective of the Tsuu T'ina Peacemaker Program is to engage offenders, victims, families, and community members in resolving conflicts, addressing underlying causes of offending behaviour, and promoting a more peaceful community.

The Tsuu T'ina Court is an on-reserve provincial court with an Indigenous judge, Crown prosecutor, and court clerks. The Court deals with criminal matters for both adults and youths and with violations of federal and provincial statutes and First Nation by-laws. The associated Office of the Peacemaker operates a peacemaking program that employs culturally appropriate mediation and alternative dispute resolution techniques.
Likelihood of Imprisonment:



Likelihood of Imprisonment Criteria (Dropdown):

- The Charge is Hybrid and Crown has proceeded by Indictment
- Crown has indicated intention to seek custodial sentence, verbally or through resolution offer/discussion and Duty Counsel believes the court will agree with the Crown
- Client has been denied bail and is being held in custody
- Client did not speak to bail and is being held in custody
- Client is facing a mandatory minimum sentence of imprisonment, a starting point sentence or a sentencing range which begins at imprisonment
- Client has already received custodial sentence for same or similar offence
- Client receiving another non-custodial sentence for similar offence is unlikely
- Based on known facts, violent/sexual offence involving bodily harm or weapon
- Based on known facts, violent/sexual offence involving domestic partner, child or another vulnerable complainant
- Other

Legal Aid Alberta

Plea Comprehension Inquiry

I _____ Date of Birth: _____
(Name)

State that I have instructed counsel that I wish to plead guilty to the following charge(s):

_____

_____

I have instructed Duty Counsel to represent me for this guilty plea. I am aware of the Crown's position on sentence as follows:

_____

_____

I am aware that Counsel, on my behalf, will recommend to the judge that the appropriate sentence is:

_____

_____

I understand that:

- ☐ The judge will not accept my guilty plea if I tell the judge that I did not commit the crime(s) I am charged with committing.
- ☐ Counsel does not recommend that I plead guilty if I am pleading guilty just to get it over with for example, pleading guilty to avoid missing school or work).
- ☐ I cannot withdraw my plea because I do not like the sentence the judge imposes.
- ☐ Counsel has advised me that I should not plead guilty at this time and I am choosing to do so against this advice.
- ☐ I have a right to plead not guilty and to have a trial where the Crown must prove that I am guilty of the charge(s) beyond a reasonable doubt. If, after the trial, the judge finds that the charge(s) was not proven beyond a reasonable doubt, the judge will find me not guilty. I am giving up this right.
- ☐ I am pleading guilty voluntarily, of my own free will, and no one has pressured me to do so or promised me anything in return for pleading guilty.
- ☐ By pleading guilty I admit that I committed the essential elements – or the required parts – of the above criminal offence(s) as explained by counsel.
- ☐ At this time, I have only been able to consult with a lawyer based on a summary of the Crown's evidence against me.
- ☐ I have a right to know in advance of the trial what evidence the Crown has against me and to wait for complete disclosure (the full file of all the evidence against me) to speak with a lawyer about the complete case. This could allow me to learn whether there are any weaknesses (i.e. legal or factual) in the Crown's case against me or whether there are any defence(s) to this charge. I am giving up this right.
- ☐ The Judge will listen to what the lawyers say about what sentence I should receive and anything I wish to say, BUT it is the Judge's decision to sentence me as s/he sees fit which could include jail, or a longer period of jail than what is being proposed. The Judge is not required to follow any agreement made between my Counsel and the Crown Attorney, even if my Counsel and the Crown Attorney agree to suggest to the Judge a particular sentence.
- ☐ I require the assistance of an interpreter in: _____
- ☐ That assistance has been provided to me for the purposes of translating and completing this form.

Furthermore, Counsel has explained the consequences of pleading guilty to me. I understand that:

Legal Aid Alberta

- ☐ An Absolute Discharge or Conditional Discharge is a “finding of guilt” that will result in a temporary criminal record and a permanent police and computer record of the discharge.
- ☐ Any finding of guilt, including an Absolute or Conditional Discharge may affect my current or future employment including losing my current job or stop me getting another or different job.
- ☐ A finding of guilt may affect travel to other countries, including the United States, in particular. It is completely up to the other country to admit me or not.
- ☐ If I am not a Canadian citizen a finding of guilt can affect my immigration status (possibly leading to my deportation from Canada). I have been advised to seek advice from an immigration lawyer before pleading guilty.
- ☐ There may be other consequences of pleading guilty that could last for years or even the rest of my life, including a DNA order, weapons prohibition, Victim Fine Surcharge, possible inclusion on a Sex Offender Registry or restrictions on my mobility and consequences under the Traffic Safety Act.

I understand that the information on this form is to clarify the consequences of a guilty plea. My signature is not a commitment to enter a guilty plea, and I can change my mind about my plea at any time until my plea is actually entered before the court.

_____ _____

Signature of Accused Date

_____

Duty Counsel

Legal Aid Alberta

Sureties Bail Checklist

Name of Accused _____ **Information No.** _____

The Ladder Principle

- Consider least onerous options first, proceed rung by rung
- Conditions must be tied to safety or flight or interference with administration of justice

Option 1 _____ UNDERTAKING WITHOUT CONDITIONS
Option 2 _____ UNDERTAKING WITH CONDITIONS
Option 3 _____ RECOGNIZANCE OF $ _____WITHOUT CONDITIONS
Option 4 _____ RECOGNIZANCE OF $ _____WITH CONDITIONS
Option 5 _____ RECOGNIZANCE OF $ _____WITH SURETY
Option 6 _____ RECOGNIZANCE OF $ _____WITH SURETY AND CONDITIONS
*Option 7 _____ RECOGNIZANCE WITH CASH OF $_____
*Option 8 _____ RECOGNIZANCE WITH CASH OF $_____AND CONDITIONS
** Option 9 _____ RECOGNIZANCE WITH CASH OF $_____AND SURETY AND CONDITIONS

* Only with Crown consent or where accused lives out of province or over 200 kms. away
** Rare and only where accused lives out of province or over 200 kms. away

If Surety Ordered

- Named _____ or un-named _____?
- Number if more than 1 _____
- Name(s)? _____
- Surety vetted by Court? Yes _____ No _____

Conditions **BUT ONLY IF NECESSARY TO MEET PRIMARY OR SECONDARY GROUNDS**

Conditions presumed for offences of violence, weapons, harassment, terrorism, intimidation or drug production/trafficking * [Reasons required if not imposed]

_____ Do not contact _____
_____ Do not attend at _____
_____ Do not possess S.110 weapons, and surrender any by _____ to _____
*only the weapons prohibition is presumptive for the drug charges

Others specifically permitted by Criminal Code

_____ Report [to bail supervisor] by _____ [and thereafter as directed? _____]
_____ Remain in Alberta without prior written approval to leave
_____ Advise of any change in address, employment or occupation
_____ Deposit passport

Other Reasonable and Necessary Conditions