The Law Society of Manitoba

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CRIMINAL PROCEDURE

Chapter 2

Arrest, Release and Pre-Trial Matters

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TABLE OF CONTENTS

A. ARREST AND RELEASE

1. Arrest Defined

The power to arrest an individual in Canada is given to all persons, although peace officers are given wider powers of arrest.

An arrest involves the taking of physical control or custody of a person with the intent to detain. This may involve forceful contact if the subject of the arrest resists. A person may willingly accompany the person arresting them without the necessity of physical contact, by acknowledging that they are in custody. If there is no acknowledgment, physical contact is necessary.

Section 494(1) of the *Criminal Code* gives anyone the right to arrest a person without a warrant if that person is found committing an indictable offence or the person who is doing the arresting believes on reasonable grounds that the person has committed a criminal offence **and** is escaping from and is freshly pursued by persons with lawful authority to arrest.

Property owners are given powers of arrest without a warrant against persons they find committing a criminal offence on or against their property, provided they arrest the person at that time or within a reasonable time after the offence is committed and they believe it is not feasible in the circumstances for a peace officer to make the arrest (s. 494(2)).

Anyone other than a peace officer who arrests a person without a warrant shall forthwith deliver that arrested person to a peace officer (s. 494(3)).

2. Arrest Without Warrant by a Peace Officer

Section 495 gives a peace officer broader powers to arrest a person without a warrant. A peace officer may arrest a person without warrant where:

a) the person has committed an indictable offence; or

b) on reasonable grounds, the peace officer believes the person has committed an indictable offence; or

c) on reasonable grounds, the peace officer believes the person is about to commit an indictable offence; or

d) the person is found committing <u>any</u> criminal offence; or

e) on reasonable grounds, the peace officer believes there is a warrant outstanding against the person that is valid within the jurisdiction where the person is found (s. 495(1)).

3. Limitations on the Power of a Peace Officer to Arrest

Section 495(2) sets out the limitations on the power of a peace officer to arrest someone without a warrant.

A peace officer shall not arrest a person without a warrant for an indictable offence mentioned in section 553 (those offences within the absolute jurisdiction of a Provincial Court Judge); or a hybrid offence (any offence which may proceed by indictment or summary conviction at the option of the Crown); or a summary conviction offence in any case where the peace officer has reasonable grounds to believe the public interest may be satisfied without arresting the person without a warrant and the peace officer has no reasonable grounds to believe that the suspect will fail to appear in court if the suspect is not arrested without a warrant.

When considering the public interest, the peace officer must have regard to all the circumstances including the need to establish the identity of the person, or secure or preserve evidence of or relating to the offence, or prevent the continuation or repetition of the offence or the commission of another offence.

If the peace officer cannot arrest the person without a warrant, the peace officer has only three other options available.

The peace officer may:

1) issue an appearance notice to the person and release them;
2) release the person and then swear an information and apply to a justice for a summons after the charges are laid; or
3) release the person unconditionally.

For example, assume a peace officer is called to a shop where the owner alleges a suspect has shoplifted some goods. The peace officer may arrest the suspect for shoplifting without a warrant although it is an absolute jurisdiction offence under section 553 if the peace officer reasonably believes that the need to establish the identity of the suspect cannot be satisfied without arresting the person.

However, section 495(2) mandates that once the peace officer has confirmed the suspect's identity, the peace officer must release the suspect unless there is some other reasonable ground to detain the suspect or the peace officer has reasonable grounds to believe that the suspect will fail to appear in court unless the suspect is arrested. The peace officer must either issue an appearance notice and release the suspect or release the suspect and then attend at a later time before a justice to swear an information and seek the issuance of a summons to appear.

4. Appearance Notice, Section 501

If the peace officer elects to issue an appearance notice to an accused under section 500, the appearance notice must:

- set out the name of the accused; and
- set out the substance of the offence; and
- state the time and place of the court appearance; and
- if an indictable or hybrid offence is alleged, state the time and place where the accused is to attend to be photographed and fingerprinted according to the *Identification of Criminals Act*; and
- be signed in duplicate by the accused.

One of the signed copies of the appearance notice must be given to the accused at that time.

The purpose for requiring the accused's signature on the appearance notice is to make the accused more aware of the responsibility to comply with the conditions of release, to prevent possible abuse in any subsequent identification process, to assist in the identification of the accused at trial, and possibly to make it easier to issue a warrant if the accused fails to appear. If the accused fails to sign the appearance notice, that failure does not invalidate the appearance notice but can be a reason for detention.

> If an appearance notice has been issued to an accused, an Information (relating to the offence as set out in the notice, or some included or other offence) should be laid before a justice as soon as possible. In any event, the information charging the accused with the offence must be laid before the time stated in the appearance notice for the attendance of the accused in court (s. 505).

5. Release After Arrest by Peace Officer

Where a peace officer has arrested a person without a warrant and the person has not been taken before a justice or released from custody under any other provision, the peace officer shall release that person as soon as practicable (s. 498) if the peace officer intends to compel the person's appearance in court by way of a summons or the peace officer issues an appearance notice or the person gives an undertaking to appear to the peace officer.

There are exceptions to this obligation to release the person. The peace officer shall not release the person if the peace officer believes on reasonable grounds:

- that having regard to all the circumstances it is necessary in the public interest to detain the person in custody or deal with their release from custody under another Code provision, or
- that, if released, the person would fail to appear in court.

When considering the public interest, under section 498(1.1)(a) the peace officer must have regard to all the circumstances including the need to:

- establish the identity of the person, or
- secure or preserve evidence of or relating to the offence, or
- prevent the continuation or repetition of the offence or the commission of another offence, or
- ensure the safety and security of any victim of or witness to the offence.

Note that even if the peace officer decides that the public interest may be satisfied without detaining the person in custody, the officer must still consider whether detention is necessary to ensure the person's appearance in court (s. 498(1.1)(b)).

According to section 499, where a person is arrested on a warrant which has been endorsed by a justice, the peace officer may release the person upon an undertaking.

The decision of whether or not the accused ought to be released is clearly within the discretion of the peace officer after the arrest.

6. Form of Release by a Peace Officer

If the peace officer does decide to release a person who has been arrested without a warrant, the officer shall do so as soon as practicable, usually after the person has signed a written appearance notice. Occasionally, a recognizance or a cash deposit is also required.

Like an appearance notice, an undertaking must set out the name of the accused, the substance of the offence, and the time and place at which the accused is to attend court (s. 501). If the offence is indictable, the undertaking may require the accused to attend in a named place at a given time for identification according to the *Identification of Criminals Act*. The undertaking must be signed in duplicate by the accused and the accused must be given one of the copies.

Where the accused has been released by a peace officer on an appearance notice or undertaking, the conditions may be varied by a justice. The application to vary the conditions is made to the Provincial Court and can be made before the first appearance date. Often the first appearance is weeks later and the conditions imposed may be unreasonable for the accused. The application to vary the conditions should be filed and is normally returnable a few days after filing. The Crown will often not have the file at the time of the application to vary the conditions, so, commonly they are given some time to prepare. The hearing takes the form of a hearing under section 515. The justice may vary and/or impose any conditions that are required in the circumstances.

7. "Justices" are Justices of the Peace or Provincial Court Judges in Manitoba

The *Criminal Code* uses the term "justice" and, in Manitoba, that person is called a justice of the peace or a Provincial Court judge. Section 1 of *The Provincial Court Act* defines justice of the peace and the term includes a judicial justice of the peace appointed under section 40, a staff justice of the peace or a community justice of the peace.

On appointment, a judicial justice of the peace (JJP) is directed to reside in an area of the province, but the JJP has jurisdiction throughout Manitoba to perform the duties conferred or imposed on justices of the peace by or under provincial or federal Acts, including conducting trials and sentencing hearings under *The Provincial Offences Act*, making protection orders under *The Domestic Violence and Stalking Act*, and issuing search warrants.

8. Information, Summons and Warrants

Criminal proceedings may be initiated by the laying of an information before a justice.

The justice is required to hold an *ex parte* hearing to determine whether or not a summons or a warrant for the arrest of the accused should be issued to compel the accused to answer to the charge.

A **warrant to arrest** is a written order of the court directing peace officers within the jurisdiction of the issuer to forthwith arrest the person who is named or described, for the offence(s) set out in the warrant and bring that person before a justice with jurisdiction (s. 511(1)).

If the justice considers that a case is made out for compelling the accused to answer to the charge, the justice must issue a **summons**. However, if the allegations and the evidence before the justice disclose reasonable grounds to believe that it is necessary in the public interest to issue a warrant for the arrest of the accused, then instead of a summons, the justice will issue a warrant (s. 507(4)).

Even if the peace officers have previously decided not to detain an accused, or the accused has been released on a promise to appear, an appearance notice, a recognizance, or an unconditional summons, the justice can still issue a summons or a warrant for the arrest of the accused if a justice has reasonable grounds to believe it is necessary in the public interest to do so.

If the accused fails to comply with the terms of the original release documents (referred to as "failing to comply with the process"), a justice may issue a warrant for the arrest of the accused. For example, a warrant would be sought and issued where an accused fails to

appear for identification according to the *Identification of Criminals Act* or where the accused fails to attend court on the appearance date.

A justice may issue a warrant for the arrest of the accused where it appears that a summons cannot be served because the accused is evading service (s. 512(2)(c)).

A warrant for arrest remains in force until it is executed and need not be made returnable at any particular time (s. 511(2)). A warrant for arrest is executed by arresting the accused (s. 514).

The preferred practice is that the peace officers have the warrant in possession when executing the warrant where it is feasible to do so, and produce it when requested to do so. However, given that there are telewarrants and circumstances without warrants (discussed below), not doing so is not fatal as long as the warrant can be produced later.

A justice may issue a warrant authorizing a peace officer to enter a dwelling-house to arrest or apprehend a person identified or identifiable by the warrant if certain conditions are met (s. 529.1).

A peace officer may apply for a warrant under section 529.1 on information submitted by telephone or other means of telecommunication (**Telewarrant** s. 529.5).

Generally, a peace officer may not enter a dwelling-house without prior announcement, but a justice may authorize a peace officer to enter a dwelling-house without announcement if the justice is satisfied by information on oath that there are reasonable grounds that such announcement would expose the peace officer or any other person to imminent bodily harm or death, or result in the imminent loss or destruction of evidence relating to the commission of an indictable offence (s. 529.4).

Even if authorized by the justice to enter without announcement, a peace officer must still make a prior announcement unless, immediately before entering the dwelling-house, the peace officer has reasonable grounds to suspect that prior announcement of the entry would expose the peace officer or any other person to imminent bodily harm or death, or reasonable grounds to believe that prior announcement of the entry would result in the imminent loss or imminent destruction of evidence relating to the commission of an indictable offence.

If there are exigent circumstances, the peace officer may enter a dwelling house without a warrant (s. 529.3). Exigent circumstances include circumstances set out in subsection 529.3(2).

Similar to the obligation when the peace officer has a warrant, the peace officer without a warrant may not enter a dwelling-house without a prior announcement unless, immediately before entering the dwelling-house, the peace officer has reasonable grounds to suspect that prior announcement of the entry would expose the peace officer or any other person to imminent bodily harm or death, or reasonable grounds to believe that prior announcement of the entry would result in the imminent loss or imminent destruction of evidence relating to the commission of an indictable offence.

9. Arrest for Offence Committed Outside the Province

Generally, a warrant may be executed only within the jurisdiction of the issuer. However, in the case of fresh pursuit, a warrant may be executed wherever the accused is found in Canada (s. 514).

As well, a warrant issued in one jurisdiction may be executed in another jurisdiction within Canada where the accused is or is believed to be situated (s. 528) but it requires the authorization of a justice of that jurisdiction. To get such an authorization, an application must be made to the justice in that different jurisdiction. The application must be supported by sworn proof of the signature of the justice who originally issued the warrant. With that proof, the justice in the different jurisdiction may authorize the arrest of the accused by making an endorsement (which may be in Form 28) on the original warrant.

The justice in the different jurisdiction is essentially backing up the authority of the justice who originally issued the warrant. If the accused is arrested in that different jurisdiction, the endorsement upon the original warrant is sufficient authority to return the accused for an appearance before the justice who originally issued the warrant or another justice for that territorial division (s. 528).

> Where a person has been arrested without a warrant for an indictable offence alleged to have been committed in another jurisdiction in Canada, that person may not be released by a peace officer but must be taken before a justice (s. 503(3)). If the justice is satisfied that there are reasonable grounds to believe that the person arrested is the person alleged to have committed the offence, the justice may remand the accused to the custody of a peace officer to await execution of a warrant from the other province, but if the warrant is not executed within six days, then the person must be released (s. 503(3)(b)).

It may be necessary to apply for a writ of *habeas corpus* to secure release.

With the consent of the Crown, a justice may release an accused unconditionally or on a recognizance (Form 32) with conditions pending the execution of the out of province warrant.

B. JUDICIAL INTERIM RELEASE (BAIL)

1. Introduction

Every person charged with an offence has the right not to be denied reasonable bail without just cause under section 11(e) of the *Canadian Charter of Rights and Freedoms.*

> The issue of whether or not the accused is released from custody will have a significant impact on the rest of the defence case. An accused who is denied bail and detained in custody may be reluctant to proceed to trial because the delay will simply result in a longer period of detention. Even if the accused is prepared to waive a preliminary inquiry and proceed directly to trial, detention is likely to be several months. If there is a preliminary inquiry and then a subsequent order to stand trial, the wait in detention can turn into several additional months.

The terms relating to the forms of release are defined in section 2, the interpretation section of the *Criminal Code* and include:

- appearance notice means a notice in Form 9 issued by a peace officer;
- recognizance means a recognizance in Form 32 entered into before a judge or justice;
- release order means an order in Form 11 made by a judge as defined in section 493 or a justice;
- summons means a summons in Form 6 issued by a judge or justice or by the chairperson of a Review Board; and
- undertaking means, unless a contrary intention appears, an undertaking in Form 10 given to a peace officer.

Be aware of *Bill C-48: Proposed changes to strengthen Canada's bail system*, which proposes significant changes to the requirements for bail. Bill C-48 would make targeted changes to the *Criminal Code*'s bail regime to address serious repeat violent offending with firearms, knives, bear spray and other weapons. Bill C-48 also proposes changes at the bail stage to address the enhanced risks posed by intimate partner violence (IPV). At the time of writing, Bill C-48 had been introduced, the report stage had been completed in the Senate on October 26, 2023, and third reading was in progress. You can check the status of the Bill *here*.

2. Release by the Police

As discussed earlier in the section on arrest, the *Criminal Code* provides that in certain situations peace officers may release an accused. This is normally done by the peace officer releasing the accused after issuing an appearance notice or by the peace officer releasing the accused and then later laying an information and seeking a summons from a justice.

If an appearance notice is issued, it is issued before the formal charge is laid by information. A summons means that a charge has been laid by the swearing of an information and the accused is being summoned to attend court on a particular date. An appearance notice or a summons is often used for minor offences. Sections 495 to 497 set out the circumstances when these documents are appropriate.

As a practical matter, it is important for defence counsel to ask the peace officer if they intend to seek a summons or to release the accused with an appearance notice. If the accused is released with an appearance notice, even though no charge has been formally laid, the accused must comply with all attendance dates set out in the document or a warrant for the accused's arrest can be issued for non-appearance.

> If the charge is an indictable offence, the appearance notice may contain a direction to the accused to attend under the *Identification of Criminals Act* for finger-printing and photographing in addition to the specified court appearance date. If this portion of the appearance notice document is filled in, it is important for defence counsel to remind the client about the requirement to attend for identification. That is a separate appearance from the court attendance on the charges, and may be on the same or a different date.
>
> Clients do not always realize they must attend on two different occasions at two different locations for two different purposes. If the client is unable to attend the identification appointment they can contact the police in advance to re-schedule their appointment.

Failure to attend for identification will result in a warrant being issued for the client's arrest. Identification procedures in Winnipeg are done at the Winnipeg Police Service Headquarters and Service Centre at 245 Smith Street. In other areas of Manitoba, they will be done at the local police station or detachment.

3. Release by the Judicial Justice of the Peace (JJP)

In the City of Winnipeg, when the peace officers decide not to release an accused upon process (such as an appearance notice), they will hold the accused in custody until the accused's appearance to seek release before a JJP via a video link can be arranged.

Section 503 of the *Criminal Code* requires that a peace officer who has arrested and not released an accused, must cause that accused to be taken before a justice without unreasonable delay and within 24 hours, or, if the justice is not available within 24 hours, as soon as possible. (Remember that the *Criminal Code* term "justice" in Manitoba, means a justice of the peace, a JJP or a Provincial Court judge.)

Outside of Winnipeg, when an accused is in custody the defence commonly contacts the JJP electronically or by telephone. A JJP is always available at some location in the province. The peace officer then swears the information before the JJP via fax and the issue of release is considered. In cases where the JJP decides not to release the accused, it is common for the accused to be remanded in custody to a nearby location where a Provincial Court Judge can hear the matter. Because of court schedules, occasionally that hearing before a judge will be a few days after the arrest. Arrangements can normally be made to have an accused appear for a hearing the next court day in the centre in which the person is being held.

In Winnipeg, the accused will be detained at a district station until the officers have completed the paperwork, and then transferred to a holding area at the Winnipeg Police Headquarters and Service Centre at 245 Smith Street known as the Arrest Processing Unit. The number for the unit is 204-986-8188 or 204-986-4688. Between 11:00 p.m. and 7:00 a.m. adult accused are detained at the Remand Centre and young offenders are detained at the Manitoba Youth Centre. Outside of Winnipeg, there are other remand facilities.

In Winnipeg, the accused appears before a JJP via video link.

If the peace officer is not opposed to the release of the accused, they will advise the JJP but sometimes they still request that the JJP impose sureties or conditions. Section 515 of the *Criminal Code* states that the justice shall, unless a plea of guilty by the accused is accepted, make a release order in respect of an accused charged with an offence other than an offence listed in section 469.

That release order should be made without conditions unless the prosecutor shows cause why the detention of the accused in custody is justified, or why an order with conditions should be made. The practical reality is that certain conditions, (i.e. the condition to abstain from use of alcohol), seem to be requested and imposed almost as a matter of routine.

Most accused persons are prepared to consent to the imposition of conditions upon their release because the alternative to consenting to the condition may be continued detention. Defence counsel must discuss any request for conditions with the accused in advance to be sure that the accused is being realistic about their ability to meet the conditions before accepting them. For example, if the accused is addicted to alcohol and accepts a condition to abstain from using alcohol, failure to comply is likely and the accused will end up back in custody and charged with breaching the condition.

Where conditions are imposed, they remain in effect until varied by the Provincial Court or removed on a bail review, or varied. A release order under which an accused has been released under section 515 may be varied with the written consent of the accused, prosecutor and any sureties (s. 519.1). The order so varied is considered to be a release order under section 515.

Where a peace officer indicates to the JJP that they do not consent to the release of the accused, the accused will be advised of that fact and of their right to retain and instruct counsel. Where an accused has requested counsel but has not yet had an opportunity to contact counsel, the accused will be allowed to do so.

Once the accused has decided whether or not to retain counsel and has been given an opportunity to do so, the JJP will deal with the issue of release.

An accused who wishes to make a contested release application before the JJP is entitled to do so. However, in Winnipeg, the police will often process accused persons at night and then book them into a remand facility as a direct lock-up after 11:00 p.m. The JJP will not have the information about the accused, and release before the next day court appearance will be virtually impossible.

In Winnipeg, the JJPs are located at 408 York Avenue and have a video hook-up to the detention facility. They may be reached at 204-945-1699. A JJP is on duty from 7:00 a.m. to 11:00 p.m. and on-call after that time. If defence counsel secures the client's release, the information will be sworn and the recognizance (Release Order Form 11 of *Criminal Code*) will be transmitted by fax from 408 York Avenue to be signed by the client.

On weekends, all rural and City of Winnipeg arrests appear on a docket. A Provincial Crown, Legal Aid duty counsel and a Federal Crown attorney are on-call on weekends, but the telephone number is available only to the police and JJP.

If the contested release application takes place in front of a JJP, it is reviewable only in the Court of King's Bench, which will take some time to arrange. In Winnipeg, these reviews are normally held on Monday afternoons and Thursday mornings and require two clear days' notice to the Crown. The effect of this means, for example, that if defence counsel is unsuccessful on a release application on Friday night, the client cannot appear for a review of the application until Thursday morning at the earliest to allow for the two clear days' notice. If the matter is a Legal Aid matter, authorization for a review is required in advance.

Transcripts may take days or weeks to prepare. In other locations, the trial coordinator will have to be contacted to set a hearing date.

> Generally, defence counsel should consider delaying a release application until the appropriate preparations to support the application are done rather than risk a potential denial of release caused by rushing the hearing.

There are many reasons why an accused might decide not to apply for release before the JJP. These might include the inability to adequately prepare the release application because of the lack of information available, or the inability to make arrangements for a program or a surety because of the hour. The accused may have other charges pending and not be entitled to bring an application for release until all of the charges are before the court. An accused who elects not to make a contested release application in front of the JJP will be remanded to the next regular sitting of the Provincial Court.

In Winnipeg, if the accused has been held in custody to appear on a docket, the case will appear on the docket in courtroom 301 (referred to as "bail court" or "triage court") at 9:30 a.m. The accused will not be present at this triage court. The court does not have a sitting judge and is not a court of record. Instead, counsel line up to speak to the appropriate Crown attorney about the accused's release.

The courtroom has three areas. On one side is a Crown from the domestic violence (DV) section, together with a Crown support staff member. The Court staff dealing with DV cases are also present. The other side of the room has a Crown, a Crown support staff and the Court staff for the non-DV cases. A prosecutor from the Federal Prosecution Service will also be present to deal with drug cases. The court will sit until about 11:00 a.m.

If the release is by consent, the matter will appear before a judge to make arrangements for release. If the matter is being adjourned by consent, counsel must tell the staff and a JJP. Crown and defence counsel complete the appropriate documents.

If the matter is contested, it is transferred to a different court. The DV matters go to courtroom 304; the other matters go to courtroom 306. Normally, in courtroom 304 or 306, the accused will appear through a video link to the jail. The application will be on the record, with both parties speaking while on camera to allow the accused to follow the proceedings

Youth matters are heard at the Manitoba Youth Centre at 2:00 p.m. Youth matters are done in person. The criteria for judicial interim release of youth are set out in the *Youth Criminal Justice Act*. The requirements are different than those for the judicial interim release of adults.

In Winnipeg, defence counsel may speak to the accused by telephone from a small area at the courthouse with limited privacy. The area is not to be used for full interviews. Practically speaking, if you are defence counsel, you must see your clients in custody earlier because you cannot interview your client fully there, with limited time and privacy. The small area should only be used for counsel to clarify a point with the accused or to provide limited information quickly.

4. Release by Provincial Judge

a) Issues on Judicial Interim Release Applications

Judicial interim release for adults starts with section 515 of the *Criminal Code*. There is a presumption in subsection 515(1) in favour of release of the accused without conditions.

> ***Release order without conditions***
> ***515 (1)*** *Subject to this section, when an accused who is charged with an offence other than an offence listed in section 469 is taken before a justice,* ***the justice shall, unless a plea of guilty by the accused is accepted, make a release order in respect of that offence, without conditions,*** *unless the prosecutor, having been given a reasonable opportunity to do so, shows cause, in respect of that offence, why the detention of the accused in custody is justified or why an order under any other provision of this section should be made.*

In 2019, the *Criminal Code* was amended to add sections 515(2.01- 2.03) to make it clear that the justice must impose the least onerous form of release and the onus is on the prosecution to show cause why any less onerous form of release would be inadequate.

> ***Imposition of least onerous form of release***
> ***(2.01)*** *The justice shall not make an order containing the conditions referred to in one of the paragraphs (2)(b) to (e) unless the prosecution shows cause why an order containing the conditions referred to in the preceding paragraphs for any less onerous form of release would be inadequate.*
>
> ***Promise to pay favoured over deposit***
> ***(2.02)*** *The justice shall favour a promise to pay an amount over the deposit of an amount of money if the accused or the surety, if applicable, has reasonably recoverable assets.*

Restraint in use of surety
(2.03) *For greater certainty, before making an order requiring that the accused have a surety, the justice shall be satisfied that this requirement is the least onerous form of release possible for the accused in the circumstances.*

If the justice does not release the accused without conditions under subsection 1, subsection 515(2) provides that the justice shall make a release order with conditions unless the prosecutor can show cause why the detention of the accused is justified.

Release order with conditions
(2) *If the justice does not make an order under subsection (1), the justice shall, unless the prosecutor shows cause why the detention of the accused is justified, make a release order that sets out the conditions directed by the justice under subsection (4)…*

The basic release conditions that a justice might impose are set out in paragraphs 515(2)(a-e):

(a) an indication that the release order does not include any financial obligations;

(b) the accused's promise to pay a specified amount if they fail to comply with a condition of the order;

(c) the obligation to have one or more sureties, with or without the accused's promise to pay a specified amount if they fail to comply with a condition of the order;

(d) the obligation to deposit money or other valuable security in a specified amount or value, with or without the accused's promise to pay a specified amount if they fail to comply with a condition of the order; or

(e) if the accused is not ordinarily resident in the province in which they are in custody or does not ordinarily reside within 200 kilometres of the place in which they are in custody, the obligation to deposit money or other valuable security in a specified amount or value, with or without the accused's promise to pay a specified amount by the justice if they fail to comply with a condition of the order and with or without sureties.

Before the court will consider whether any of the conditions set out in section 515(4) should be imposed, subsections 515 (1) and (2) make it clear that the onus is on the Crown to show cause why the detention of the accused is justified on one or more of the grounds specified in subsection 515(10):

Justification for detention in custody
(10) *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;

(b) where the detention is necessary for the protection or safety of the public, including any victim of or witness to the offence, or any person under the age of 18 years, 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; and

(c) if the detention is necessary to maintain confidence in the administration of justice, having regard to all the circumstances, including:

(i) the apparent strength of the prosecution's case;
(ii) the gravity of the offence;
(iii) the circumstances surrounding the commission of the offence, including whether a firearm was used; and
(iv) the fact that the accused is liable, on conviction, for a potentially lengthy term of imprisonment or, in the case of an offence that involves, or whose subject-matter is, a firearm, a minimum punishment of imprisonment for a term of three years or more.

These are the only issues on a judicial interim release application. The Crown must establish that there is a concern about one of these issues to either have the accused detained or have conditions placed upon release.

The following factors are relevant to the primary ground of ensuring the accused's attendance in court (s. 515(10)(a)):

- the nature of the offence and the potential penalty; (The argument is that if the charge is serious with a potentially severe penalty, the accused may have an incentive to flee the jurisdiction);
- whether the accused has any ties to the community. (The argument is that an accused will be less inclined to flee if the accused has family, friends, property, or a job in the jurisdiction);
- the accused's history of complying with court orders to attend court on previous occasions.

Factors relevant to the secondary ground of protecting the public (s. 515(10)(b)) include:

- the criminal record of the accused (particularly past similar offences or offences of violence);
- whether the accused was already on bail or probation at the time of the alleged offence;
- the nature of the offence and the strength of the evidence;
- the personal circumstances of the accused; and
- any alleged interference with witnesses or destruction of evidence.

Where the judge orders that the accused be detained in custody primarily because of a previous conviction, the judge must state that reason, in writing, on the record. (s. 515(9.1)).

b) Conditions on Release

Subsection 515(4) sets out different types of conditions that may be imposed on an accused when released on bail under subsection 515(2).

> ***Conditions authorized***
> ***(4)*** *When making an order under subsection (2), the justice may direct the accused to comply with one or more of the following conditions specified in the order:*
>
> *(a) report at specified times to a peace officer, or other person, designated in the order;*
>
> *(b) remain within a specified territorial jurisdiction;*
>
> *(c) notify a peace officer or other person designated in the order of any change in their address, employment or occupation;*
>
> *(d) abstain from communicating, directly or indirectly, with any victim, witness or other person identified in the order, except in accordance with any specified conditions that the justice considers necessary;*
>
> *(e) abstain from going to any place or entering any geographic area specified in the order, except in accordance with any specified conditions that the justice considers necessary;*
>
> *(f) deposit all their passports as specified in the order;*
>
> *(g) comply with any other specified condition that the justice considers necessary to ensure the safety and security of any victim of or witness to the offence; and*
>
> *(h) comply with any other reasonable conditions specified in the order that the justice considers desirable.*

Further, subsection 515(4.1) requires that when the accused is charged with specified offences, including where violence is involved, a justice must impose a condition prohibiting the possession of firearms or other specific weapons, devices or ammunition unless the justice considers it unnecessary for the safety or security of others. Subsection 515(4.12) requires the justice who does not impose a condition on release as outlined in subsection 515(4.1) to record reasons for not adding the condition.

In the case of an accused who is charged with any offence referred to in subsection 515(4.3) (i.e., s. 264 Criminal harassment), additional conditions may be imposed when making an order under subsection 515(2) for release with conditions, in the interests of the safety and security of any person, particularly a victim of or witness to the offence or a justice system participant. Those additional conditions are set out in subsection 515(4.2) and include:

(a) that the accused abstain from communicating, directly or indirectly, with any victim, witness or other person identified in the order, except in accordance with any specified conditions that the justice considers necessary;

(a.1) that the accused abstain from going to any place or entering any geographic area specified in the order, except in accordance with any specified conditions that the justice considers necessary; or

(b) that the accused comply with any other condition specified in the order that the justice considers necessary to ensure the safety and security of those persons.

In Manitoba, the judges will often place conditions on release. If the accused fails to abide by the conditions, a warrant to arrest will issue, so defence counsel should ensure that the accused seriously considers whether compliance with a condition is realistic before agreeing to it.

The Manitoba Provincial Court uses standardized conditions for release designed to be clear and easily understood. The forms are found in the precedents for this chapter.

c) Domestic Abuse Cases

Manitoba does not have a zero-tolerance policy *per se* on spousal or domestic abuse or abuse of an intimate partner. However, in virtually all cases where a complaint of criminal conduct in a domestic situation is made, the alleged offender will be arrested (even where the complainant opposes police involvement or arrest at the scene). If the police cannot determine the aggressor in the situation or if there is a mutual incident both parties may be arrested.

Where charges are laid in such circumstances, the police will not simply release the accused on an appearance notice. Normally, they will require an undertaking or recognizance with conditions such as:

- the accused is prohibited from having any contact or communication whatsoever with the complainant;
- the accused is prohibited from attending at the residence of the complainant;
- the accused must satisfy the court that the accused has another address at which to live;
- no firearms, ammunition, explosives (or sometimes weapons) are permitted to be in the accused's possession;
- the accused must surrender any firearms authorizations, licences and registration certificates (see s. 515(4.11)).

Sometimes the accused has not considered the full implication of the conditions before agreeing to their imposition. Conditions prohibiting contact, in particular, are often breached in domestic situations (i.e. where the contact involved transferring care of children between parents) and can result in arrest and detention of the accused on a new charge of breaching the condition. In cases where it can be done, defence counsel should try to have any conditions that are likely to be breached removed as soon as possible so that the accused is less likely to face additional charges for breaching the conditions.

Complainants in domestic cases (whether represented by counsel or not) often contact counsel for the accused. If the complainant has counsel, it is unethical to speak to the complainant in the absence of the complainant's counsel. Female complainants who are without counsel may contact the Women's Advocacy Program at 204-945-6851, where they can voice their opposition to the detention or conditional release of the accused.

d) Sureties

A release may be granted with or without a surety. A surety is a person who agrees to take responsibility for the accused and to ensure the accused obeys the conditions of the release and attends court as required. The surety agrees to forfeit a set sum of money to His Majesty the King if the accused breaches the conditions or fails to attend court for trial.

The surety must be a Canadian citizen. Ideally, a surety should not have a criminal record, but if a surety has a record, the Justice will consider the nature of the convictions and when those convictions occurred. A person can act as a surety for more than one accused if the surety meets the financial criteria (*R. v. Shrupka*, 1977 CanLII 2230 (MBPC)).

The major criterion to accept a person as a surety is whether the proposed surety has sufficient assets to satisfy the possible forfeiture. The Justice will consider the proposed surety's income and monthly expenses, including the number of the surety's dependents. Generally, a surety must be employed full-time or own real property or liquid assets such as bonds or mutual funds. The proposed surety should be able to produce documentary evidence of employment such as identification, pay stubs and income tax returns as well as documentary evidence of ownership of land or liquid assets, such as the title to property or bonds. Assets like jewelry will not normally be considered.

When a proposed surety attends at the justice's office, the justice will enquire whether the person has sufficient assets and/or funds to meet the financial obligation that has been imposed. If the justice accepts the person as a surety, the surety then attends with the accused and signs the appropriate documents and the accused is released on a recognizance (Form 32).

The surety is expected to monitor the accused up until the time of trial. A surety's responsibility is to check on the accused periodically and to generally keep informed of the accused's whereabouts so that the surety is satisfied that the accused is meeting the conditions of bail and will attend the trial hearing.

However, a surety is not expected to be an insurer. If at any time before trial the surety feels that the accused is no longer a good risk, the surety may apply to the justice to terminate the surety's obligations on the accused's recognizance. If the surety is terminated, a warrant for the arrest of the accused will issue and the accused's bail with the surety will be revoked. New terms for bail can be set by the justice.

If the surety does not apply to withdraw and the accused violates the bail conditions or absconds before trial, then, under subsection 771(1)(b) of the *Criminal Code* the surety will be required to attend a hearing where the surety is allowed to show cause why the recognizance should not be forfeited in its entirety. The procedure where a surety is called upon to account after an accused's bail is revoked is known as an estreatal proceeding. The estreatal proceeding is initiated by the Crown.

Section 771(2) provides that a judge has the discretion to grant or refuse the surety's application to be relieved of the obligation to pay the sum owed and may make any order for the forfeiture of the amount set out in the recognizance as is considered proper. The surety's diligence in supervising the accused is just one factor to take into account.

See *R. v. Uxbridge Justices, ex parte Heward-Mills*, [1983] 1 All E.R. 530 at 532 (Q.B.D.):

> *The real pull of bail, the real effective force that it exerts, is that it may cause the offender to attend his trial rather than subject his nearest and dearest who has gone surety for him to undue pain and discomfort.*

And see *Canada (Minister of Justice) v. Mirza*, 2009 ONCA 732 (CanLII):

> *[41] … the "pull of bail" is an important factor that serves as a reminder that, in attempting to do what is just and fair towards the sureties, the courts must be careful not to undermine the effectiveness of the bail system. Our system depends upon accused attending court and if accused came to believe that they could fail to attend court without their sureties suffering any penalty, the surety system would be ineffective.*

A review of the case law regarding the factors to be considered by a judge assessing a surety's case for forfeiture is found in *R v. Tymchyshyn*, 2015 MBQB 23 (CanLII).

If you are acting for the accused, you must be careful to be clear to the person who is considering acting as a surety that you are not representing the surety or offering any legal advice about whether to act as a surety.

Many accused persons are simply unable to have a surety act on their behalf. This may be as a result of poverty or personal circumstances. Accordingly, if your client has been granted release on the requirement that a surety be present and a surety cannot be located, the accused will remain in custody.

> It is important to know your client's circumstances before you suggest any particular terms to the court to secure bail for the accused. Do not offer a surety if the chances are minimal that such a person will come forward. Similarly, do not offer conditions if your client will not be able to meet them. For example, abstaining from alcohol might be impossible for an alcoholic and agreeing to that as a condition of bail might set the accused up for a breach.

Subsection 515(2) of the *Criminal Code* allow cash deposits as a condition of release in certain circumstances. This is not a very popular condition of release for the courts because where an accused facing major charges can produce the cash, there may be too much incentive for that accused to pay the money and then disappear.

However, if an accused is not ordinarily resident in the province in which the accused is in custody or ordinarily resides more than 200 kilometres away, the chance that the accused will know someone in the community who will be willing to act as a surety is not likely, so the cash deposit option may be the only chance for bail for that accused. Subsection 515(2)(e) specifically allows for the cash deposit option in that situation.

The courthouse at 408 York in Winnipeg has in-house representatives from the Behavioral Health Foundation (telephone 204-269-3430) and an Aboriginal court worker (telephone 204-945-1939). These workers will interview potential program participants at the Winnipeg Remand Centre and then send the information to their boards for approval. There are also program and court representatives available at the Manitoba Youth Centre. Note that generally, it can take days or weeks before the approval from a program is received. Therefore, if you are acting for the accused, you should wait until you get the approval to accept the accused into the program before you bring a release application suggesting that condition.

5. Reverse Onus

The onus is generally on the Crown to show why the detention of the accused is required. However, the onus is reversed and the accused must show cause why detention in custody is not justified if the accused is charged with certain offences as set out in section 515(6)(a)–(d).

Check subsection 515(6) for the full list of offences that attract the reverse onus. The section includes offences such as committing an indictable offence while on release for another indictable offence, or committing an indictable offence other than an offence under section 469 when the accused is not ordinarily resident in Canada, or committing one of the more serious charges under the *Controlled Drugs and Substances Act*, such as trafficking, possession for the purpose of trafficking, importing, and exporting of controlled drugs.

When determining whether the accused is subject to the reverse onus, you should note that a hybrid offence is deemed to be an indictable offence for procedural purposes, until the Crown announces it is proceeding summarily (see s. 34(3)(a) of the *Interpretation Act*).

If you are in a hearing where the reverse onus under subsection 515(6) applies, in Manitoba, the practice is that the Crown generally makes its submission first even though the accused has the onus to show cause why detention in custody is not justified. The purpose of having the Crown present first is a practical one. The Crown's submission will give the justice the information about the circumstances of the offence that the justice will need as the context for the accused's bail submission.

6. The Hearing

In Manitoba, the procedure for judicial interim release applications is extremely informal. Representations are made by counsel on behalf of the Crown and by counsel on behalf of the accused without evidence being called. Most accused in Manitoba can apply for release within 24 hours of arrest. In many other Canadian jurisdictions, there are often adjournments of several days while evidence is compiled.

It is important to note, however, that if there is a dispute as to the facts relating to the bail application, the only way the justice can resolve that dispute is by hearing evidence. Either party has the option of requiring the other side to prove facts being alleged to support the bail application. The Provincial Court now requires that lengthy bail applications be arranged in advance by booking a time through the trial coordinator (204-945-5657).

For example, if defence states that the accused's psychiatrist says the accused is not dangerous and is currently under that doctor's psychiatric care, the Crown does not have to accept that statement as true and can require that the accused bring evidence to prove it. The accused may be able to prove the fact with evidence as simple as a signed letter from the accused's psychiatrist but it is also possible that the evidence required will be the testimony of the accused's psychiatrist in court where the Crown can cross-examine the doctor.

Having evidence in hand is always best but not always possible at the early stage of a bail application. That is why, at the very least, it is advisable that defence counsel personally confirm all information such as the accused's employment status, the availability of treatment and counselling, the address and fact that the accused has an alternative residence, and the existence of a viable surety before making any representations of those matters as facts in support of a submission for release on behalf of the accused.

7. Offences Under Federal Statutes

If the accused is charged and detained under a federal statute, usually the *Controlled Drugs and Substances Act*, a Crown attorney from the Federal Prosecution Service will appear at the bail application before the provincial judge.

8. Adjourning the Application

Before or at any time during any proceedings under *Criminal Code* section 515, on an application by the prosecutor or the accused, a justice may remand the accused in custody under section 516 for no more than three clear days. It is this section that allows a justice of the peace sitting on the weekends to adjourn the case until a Monday morning sitting, though it is now possible to have a contested bail hearing during the weekend.

Either side may request the adjournment under this section.

The Crown may request an adjournment "on reasonable grounds", which usually means that there is still an ongoing investigation into the accused's involvement in the current offence or other offences. If defence counsel is not satisfied that there are good and sufficient reasons behind the requested adjournment, the defence can object to the adjournment at the time the Crown asks for it.

If defence counsel needs more time to confirm or set up a program for the accused or to get necessary supporting documentation, then the accused will be the party requesting an adjournment under the section.

Occasionally the court may suggest that the matter be adjourned. This will happen when the court feels that better information is required. If the court makes this suggestion counsel should take advantage of the judge's invitation to get the better information necessary for the success of the bail application.

The Crown may seek an adjournment to bring forward other charges for revoking the existing recognizance. In those situations, a one-day adjournment is usually requested and granted, unless defence counsel can argue that there has been ample opportunity to bring the charges forward.

9. Publication Ban

If the accused applies for a publication ban, section 517 provides that a justice shall make an order directing that the evidence that is taken, the information that is given or the representations that are made and the reasons that are given by the justice shall not be published in any document (like a newspaper) or broadcast or transmitted in any way (such as social media or video) before the accused is either discharged after a preliminary inquiry, or if the accused is ordered to stand trial, then after the trial has ended. The justice also has the power to make the order without an application by either party. Breach of the order is a summary conviction offence.

Defence counsel uses this provision in cases where the public reporting of the offence at this early stage might harm the accused. Crown might ask the judge to consider such an order where there is a desire to protect the identity of the complainant. Often the order is given when the parties are youths. Notwithstanding an order under section 517, the result of the bail application, as well as any information provided by the police outside of the hearing, may still be published.

10. Otherwise Detained

Sections 519(1) and (2) indicate that an accused has the right to apply for judicial interim release, notwithstanding that the accused is a sentenced prisoner or has been denied bail on other offences, or has had parole suspended.

In many cases, it is advisable for the accused to apply for judicial interim release on a new charge, notwithstanding that the accused may still have to remain in custody on other charges. For example, an order of release on a new charge may be considered at a subsequent parole hearing. In another situation, the accused may be near the completion of a prior sentence and as soon as the prior sentence expires, the judicial interim release order on the new charge takes effect.

If the accused is detained on other charges and a bail review to the Court of King's Bench is contemplated, an order of release on any new charges will be relevant at that bail review.

If the accused is a sentenced prisoner serving a conditional sentence order (CSO), the defence must consider subsections 742.6 (10), (11) and (12). It may be appropriate to ask for an order of detention to have the sentence continue to run if the accused is not going to be released otherwise. The sentence may remain suspended until a warrant is executed or release has been denied. This can be done with the consent of the accused. Similar considerations apply to a youth with a deferred sentence.

11. Interim Release by a King's Bench Judge

The interim release section 522(1) provides that when an accused is charged with an offence listed in section 469, an application for release may only be made to a judge of the Court of King's Bench.

In Manitoba, the Court of King's Bench is the superior court of criminal jurisdiction and has jurisdiction to try any indictable offence and sole jurisdiction to try section 469 offences. Section 469 lists the indictable offences which can only be tried in the Court of King's Bench. The long list includes offences like treason, crimes against humanity, and intimidating Parliament or a legislature, but the offence of murder is the most common.

In practical terms, this means that all release applications on charges of murder in Manitoba must be made before a judge of the Court of King's Bench.

> Section 522(2) is a reverse onus provision. It says that the judge shall order that the accused be detained in custody unless the accused shows cause why detention in custody is not justified within the meaning of subsection 515(10).

The procedure for an application for release in the Court of King's Bench is more formal than in the Provincial Court.

The Criminal Proceedings Rules of the Manitoba Court of King's Bench require the applicant to file a copy of the accused's criminal record and other documents. The Court of King's Bench requires that an affidavit be filed setting out the facts on which the accused relies in support of the release. It is important to take note of section 518 of the *Criminal Code*. The accused is not required to give any evidence concerning the offence, but the accused may be cross-examined on any of the accused's filed affidavit evidence.

12. Review of the Order of the Justice for Release

Either the accused under section 520 or the prosecutor under section 521 may apply to a judge for a review of an order made by a justice under section 515 to release or detain the accused. If the accused's matter is a Legal Aid matter defence counsel will require authorization from Legal Aid in advance to seek a review.

1. **Obtain an up-to-date copy of the front and back of the informations.** These are obtained by filling out a Request for Information form and leaving it at the clerk's counter of the Provincial Court. It usually takes at least a day or two to get the informations. These are now often provided electronically automatically as part of the disclosure.

2. **Complete a Request for Transcript form and submit it, with payment and a copy of the informations to the transcript office of Royal Reporting. The transcript company will give you a date when the transcript will be ready.**

   It generally takes a few days to a few weeks to obtain the transcript.

   Court transcripts in Manitoba are produced by a contract transcription company, Royal Reporting which is located at Unit 120-330 St. Mary's Avenue, Winnipeg, MB R3C 3Z5 Phone: (204) 306-9149 Fax: (204) 306-9154 Email: *transcripts@royalreporting.com*.

   Transcript fees are set under the Court Services Fees Regulation of the *Court Services Fees Act*. For transcript fees, *click here*. Payment for a transcript must be made directly to Royal Reporting by money order, certified cheque, bank draft, or major credit card. When attending the Royal Reporting Office in person, payment can be made in cash or by debit. Royal Reporting will provide payment details at the time they process the transcript request.

   To request a paper or electronic transcript or to obtain a cost estimate for a transcript, you must complete a transcript request form and submit it to Royal Reporting by regular mail, email or fax. You may also request it by phone. The transcript request form can be obtained from your nearest court office, the Royal Reporting website, or in person at Royal Reporting's office. To download a transcript request form or for further information please visit Royal Reporting's website at *http://royalreportingmanitoba.com*.

3. **Attach a copy of your transcript order request form to your notice of application. It must show the date when the transcripts will be ready.**

   The hearing date will be set based on when the transcripts will be available.

4. **Prepare a notice of motion and serve it on the other side. The applicant seeking a review of a justice's order must give two clear days' notice in writing to the other party.**

   Bail reviews are held in the Court of King's Bench on Monday afternoons and Thursday mornings for adults and youths.

   The notice of motion must be filed and served on the other side before Thursday at 4:00 p.m. for a bail review to be heard on the following Monday afternoon, or filed and served on the other side before Monday at 4:00 p.m. for a bail review to be heard on the following Thursday morning.

   Rules respecting criminal proceedings do not exist for the Provincial Court but do exist for the Court of Appeal and the Court of King's Bench. These rules were created under the *Criminal Code* section 482 and are referenced as the *Manitoba Criminal Appeal Rules* and the *Criminal Proceedings Rules of the Manitoba Court of King's Bench*. These rules are published in the Canada Gazette and available online. For the Rules on Manner of Service on counsel, see Criminal Proceedings Rules 7.04 and 7.05 in Manitoba Court of King's Bench or Criminal Appeal Rule 7 in the Court of Appeal for Manitoba.

5. **Applicant's counsel must confirm with the King's Bench criminal motion coordinator (by email at *QBBails@gov.mb.ca*) that the matter will be proceeding on the scheduled date.** (Note that this remains the email address at the time of writing. The email address may change in future, at which time users should be redirected and be notified.)

   The deadline for this email confirmation is the same as for the filing of the motion. Send the required email confirmation to the coordinator before Thursday at 4:00 p.m. for a bail review to be heard on the following Monday afternoon and to the coordinator before Monday at 4:00 p.m. for a bail review to be heard on the following Thursday morning.

   Failure to comply with the guidelines will constitute a valid waiver of the accused's appearance and generally, the matter will not proceed.

6. **Prepare affidavit evidence in support of the application for review.**

   Affidavit evidence must be filed in support of the motion by 2:00 p.m. on the day immediately preceding the motion hearing date. At that time, the court registry will accept the filing of an unsigned copy of the affidavit for an in-custody accused but a sworn signed copy of the affidavit will have to be provided to the court and Crown before the hearing commences. Since COVID the court is now accepting Attestations from counsel for unsigned affidavits indicating they have been reviewed over the phone or by video with the client.

If an unsigned affidavit is being filed at the court registry, the Defence counsel must give the registry a signed undertaking with respect to the provision of the sworn, signed copy of the affidavit before the hearing. Be aware that you cannot give an undertaking that the accused will swear and sign the affidavit because you can not control that fact, but you may undertake to provide the court before the hearing with either the perfected affidavit or advice to the court that the affidavit will not be available.

Always check for Notices and Practice Directions on the Court of King's Bench website relating to bail reviews. You will be expected to be familiar with all of them.

The *Notice to the Profession* dated November 14, 2014 Re: Bail Reviews in Court of King's Bench provides that:

> *Where the prosecutor or an accused makes an application for review of an order for judicial interim release, in the absence of a reasonable excuse for not complying with the following timelines, the application will not be heard on a contested basis unless the application and all supporting material are filed, and counsel confirms by email to the Criminal Motion Coordinator that the matter will be proceeding on the scheduled date, by:*
>
> - *4:00 p.m. Monday for an application scheduled to be heard the following Thursday; or*
> - *4:00 p.m. Thursday for an application scheduled to be heard the following Monday.*
>
> *Failure to comply with these guidelines will constitute a valid waiver of the accused's appearance.*

The *Practice Direction* of December 7, 2015 Re: Exhibits on Bail Reviews provides that:

> *When an applicant seeks to review a judicial interim release order made previously, the notice of motion must be accompanied by a legible copy of any exhibits, capable of reproduction, that were filed in the judicial interim release hearing or in any previous review proceeding. If counsel require access to the exhibits filed at the judicial interim release hearing, they may contact the Exhibit Officer (204-945-3028). If these exhibits are not filed as directed, it may be that the hearing does not proceed on a contested basis. The Practice Direction titled "Exhibits on Bail Reviews in Court of Queen's Bench" issued May 27, 2015, is revoked. This Practice Direction comes into effect immediately.*

The Supreme Court of Canada in *R. v. Myers*, 2019 SCC 18 (CanLII) determined that section 525 means that reviews of detention are mandatory every 90 days when an individual is awaiting trial. This provision has always been in the *Criminal Code* but was not being used.

In December 2019 Bill C-75 replaced the former *Criminal Code* section 525 with the reworded section below.

Review of Detention where Trial Delayed
Time for application to judge
525 (1) *The person having the custody of an accused — who has been charged with an offence other than an offence listed in section 469 [i.e. murder], who is being detained in custody pending their trial for that offence and who is not required to be detained in custody in respect of any other matter — shall apply to a judge having jurisdiction in the place in which the accused is in custody to fix a date for a hearing to determine whether or not the accused should be released from custody if the trial has not commenced within 90 days from*

(a) the day on which the accused was taken before a justice under section 503; or

(b) in the case where an order that the accused be detained in custody has been made under section 521 [application by a prosecutor to review bail order under section 515], paragraph 523.1(3)(b)(ii) [prosecutor shows cause for detention after the breach of an appearance notice] or section 524, [accused commits an indictable offence while on bail] or a decision has been made with respect to a review under section 520 [application by accused to review bail order under section 515] the later of the day on which the accused was taken into custody under that order and the day of the decision.

The person shall make the application immediately after the expiry of those 90 days.

Under the current section 525, the wording makes it clearer that the onus is on the person having the custody of an accused to apply to a judge to fix a date for a hearing to determine whether the accused should be released from custody if the trial of the accused has not commenced within 90 days of the last bail hearing where accused was kept in custody.

Subsection 525(1.1) permits an accused to waive the right to a review of their detention if there is no trial within 90 days of the last detention, provided the waiver is in writing and the judge receives it before the 90 days in subsection 525(1) expires.

Waiver of right to hearing
However, the person having the custody of the accused is not required to make the application if the accused has waived in writing their right to a hearing and the judge has received the waiver before the expiry of the 90-day period referred to in subsection (1)

Immediately after *R v. Myers* was decided, the Crown's office circulated the *Notice re: Section 525* applications which is reproduced (and updated) below.

In response to the Supreme Court of Canada's decision in *R. v. Myers*, 2019 SCC 18 (CanLII), the Court of King's Bench has determined that matters will continue to be triaged on a section 525 assignment list after the regular Criminal Assignment Court list in Winnipeg, which takes place the 2nd Wednesday of every month.

The proceedings will commence in courtroom 410 at 408 York Avenue, Winnipeg, for all accused in custody in the province of Manitoba to be triaged. For counsel appearing from outside of Winnipeg, they may call 204-945-4118 to appear via teleconference.

EXCLUSIONS

In addition to not applying to section 469 offences and where the accused is required to be detained for other reasons (e.g. serving a jail sentence), section 525 does not apply where:

1) The trial has started

The determination of when a trial commences "will vary according to the circumstances and the language of the section of the *Criminal Code* under consideration". *Spek v. The Queen*, 1982 CanLII 216 (SCC), [1982] 2 SCR 730. As it relates to other bail sections:

- where an accused is being tried by a judge alone, the trial commences at the opening of the trial – that is, when the evidence is called. *R. v. Mayen*, 2014 MBQB 29 (CanLII) (para. 35);
- where it is a jury trial, the trial starts when the accused is put in the charge of the jury. *R. v. McCreery*, 1996 CanLII 17941 (BCSC).

2) Guilty plea(s) entered and sentencing pending

R. v. Bhullar, 2016 BCSC 2506 (CanLII).

3) Bail has been granted but not perfected (e.g. surety issues)

R. v. Burgar, 2003 BCCA 426 (CanLII).

Note: An accused is not eligible for release under section 525 even where the trial has started or guilty pleas entered for only some charges. That is because they are "required to be detained in custody in respect of" the charges for which the trial has started or the guilty pleas have been entered.

THE CLOCK

The clock starts when the accused appears before a justice pursuant to section 503, which occurs within 24 hours of being detained by police (or as soon as practicable). Clock resets if one of these three things occur:

1) Accused seeks a Bail Review in King's Bench

This is pursuant to section 520 of the *Criminal Code*:

> ***Review of order***
> ***520(1)*** *If a justice, or a judge of the Nunavut Court of Justice, makes an order under subsection 515(2), (5), (6), (7), (8) or (12) or makes or vacates any order under paragraph 523(2)(b), the accused may, at any time before the trial of the charge, apply to a judge for a review of the order.*

2) Prosecutor seeks a Bail Review in King's Bench

This is pursuant to section 521 of the *Criminal Code*:

> ***Review of order***
> ***521(1)*** *If a justice, or a judge of the Nunavut Court of Justice, makes an order under subsection 515(1), (2), (7), (8) or (12) or makes or vacates any order under paragraph 523(2)(b), the prosecutor may, at any time before the trial of the charge, apply to a judge for a review of the order.*

3) The Accused is Ordered Detained under Section 524 in Provincial Court

Criminal Code section 524 deals with situations where an accused may have his/her prior release revoked and may be detained pending trial. Additionally, the section deals with the exceptional situation in the bail context where the accused is subject to a reverse onus, and therefore must show cause why his/her detention is not justified. The clock runs from "where an order that the accused be detained in custody has been made" NOT from the time that the prior bail is revoked.

Note: The clock does not reset upon a decision made after an initial bail hearing in Provincial Court, nor is such an initial bail application a pre-requisite for section 525 to be engaged:

> *…there may be certain anomalous situations in which an accused person who appears before a judge under section 525 did not undergo a full initial bail hearing at the time of his or her arrest…*

R. v. Myers, 2019 SCC 18 (CanLII) (para. 56).

Clock does not reset after the section 525 hearing. In other words, an accused whose detention continues after a section 525 hearing is not entitled to another section 525 hearing 90 days later. An accused is only entitled to one hearing:

R. v. Jerace, 2013 BCSC 1944 (CanLII), *R. v. Thorsteinson*, 2006 MBQB 184 (CanLII) (para. 21).

An example of a calculation is found in *R v. Myers*, 2019 SCC 18 (CanLII) (para. 37).

By way of example, if an accused person is taken before a justice under section 503 and detained in custody on day 1, then applies to a judge for a review of that decision under section 520 on day 50 and the detention is confirmed, the jailer's obligation to make the application will not arise until 140 days following the day on which the person was first detained in custody.

Various courts have held that where mandatory hearings have not been held the appropriate remedy is to hold such a review hearing as opposed to releasing the accused forthwith, including *R. v. Pomfret,* 1990 CanLII 11035 (MBCA).

On the assignment list, the following approach will be employed:

1) Waive the right to a section 525 hearing

This can be done by filing a written waiver, signed by both the accused and their lawyer. Section 525(1.1) reads:

> *However, the person having the custody of the accused is not required to make the application if the accused has waived in writing their right to a hearing and the judge has received the waiver before the expiry of the 90-day period…*

2) Set the matter down for hearing

Typically, 45 minutes will be made available absent any other request from counsel. A 21 business day transcript request will be made by Crown if a prior bail hearing has taken place.

Where a review hearing is to be set in the Winnipeg judicial centre, the judge will set the hearing date for 45 minutes, either on the weekly Thursday bail list at 2 p.m. or another day, with a maximum of three such hearings scheduled each day.

Where a hearing is to be set in a judicial centre outside the Winnipeg judicial centre, this date will be set on that other judicial centre's bail list and should be pre-arranged with the trial coordinator of the region.

In scheduling this review hearing date, the presiding judge will canvass filing timelines, including the production of any transcripts, exhibits, reasons from any initial judicial interim release hearing and from any subsequent review hearings, and any additional evidence to be filed (such as affidavit evidence), including who will be responsible for filing these materials.

Deadline for the accused to file materials will usually be two business days prior to the hearing. Counsel is reminded that the Court exhibit officer must be contacted if there are exhibits filed from any other bail application that should form the record before the reviewing Judge.

These will generally be set on the appropriate judicial centres bails and motions list or arranged in advance with the trial coordinator.

3) Adjourn the matter sine die (to no fixed date)

Winnipeg

- At the time of the adjournment, the court clerk will complete a disposition sheet with the individual accused's name, noting the matter has been adjourned sine die. After court, data entry staff will add the accused's name to the Title of Proceedings and Parties screens in Registry.

- When counsel is ready to have the matter set down, they will file a Requisition with KB and serve the Crown with a copy.
- The Deputy Registrar will place the Requisition in the Criminal tray.
- The Criminal Motions Coordinator will:
    - perform a name search in Registry;
    - retrieve the file;
    - make a copy of the Application;
    - open a new criminal file, adding the copy of the Application and Requisition to the file and to Registry;
    - set the matter onto the bail list to be heard or to have a future date set, depending on if additional material or transcript are required.

Regions

- At the time of the adjournment, the court clerk in Winnipeg will complete a disposition sheet with the individual accused's name, noting the matter has been adjourned sine die.
- The court clerk in Winnipeg will:
    - scan a copy of the Application and disposition sheet;
    - email the application and disposition sheet to the appropriate regional court location.
- Upon receipt of the copy of the Application and disposition sheet, the Deputy Registrar in the regional court location will:
    - open a new criminal file, adding the copy of the Application and disposition sheet to the file and to Registry.
- When counsel is ready to have the matter set down, they will file a Requisition with KB and serve the Crown with a copy.
- The Deputy Registrar will:
    - add the Requisition to the file and to Registry;
    - set the matter onto the appropriate bail/assignment list to be heard or to have a future date set, depending on if additional material or transcript are required.

Note this option is only available at the assignment list stage of proceedings as *R. v. Meyers* allows for an adjournment of the application if there is a meaningful event that could impact the hearing. Once the hearing is set, the matter must proceed or the right to the section 525 hearing be waived. Of course, section 520 reviews are still available.

13. Release Pending Appeal

Appeals of Summary conviction offences are taken to the Court of King's Bench which has the jurisdiction to grant a release of an accused pending the appeal under section 816.

Appeals related to Indictable offences are taken to the Manitoba Court of Appeal. An application for release pending appeal may be brought whether the appeal is against conviction or sentence or both. These applications are brought by notice of motion with supporting affidavit in the Court of Appeal.

The applicant must show the judge in the hearing that the appeal is not frivolous and that there is at least some arguable point to be made. The reason behind this is that the accused has now been convicted of the offence and the presumption of innocence has ended. Therefore the court wants to know that there is some real merit to the appeal before it will grant release of the applicant who is in custody. Normally this will require a transcript of the decision or the alleged legal errors.

An application for judicial interim release is appropriate if the appellant will ultimately be asking the court not to impose jail on the sentence appeal.

An application for judicial interim release is not appropriate if the appellant is appealing the jail sentence imposed on the basis it was too long. In those cases, defence counsel can contact the registrar of the court and ask for an early date for the sentence appeal seeking a reduction in the jail time. The court officers are extremely accommodating in such circumstances and the accused can likely have a sentence appeal heard within six weeks of conviction, subject to court availability.

A stay of sentence pending appeal may also be available for lesser offences.

C. PLEA BARGAINING: A PROCESS OF DISCUSSION AND AGREEMENT

1. The Plea Bargaining Process

Plea bargaining is a necessary part of the criminal justice system. It recognizes the vagaries and weaknesses inherent in some cases.

While some may find this unseemly, it is a reality. Trials are lengthy and expensive, and the results are often unpredictable. Plea bargaining helps to limit the backlog of criminal prosecutions. Plea bargaining is essentially a negotiation between Crown and defence counsel over the nature of the criminal charges laid and/or the sentence to be imposed on a guilty plea.

Pre-plea negotiations can cover a variety of topics. Some of the matters that might be the subject of negotiation include:

a) Charge Bargaining

- reduction of charges to a lesser or included offence;
- withdrawal or stay of other charges or the promise not to proceed on other possible charges;
- promises not to charge or proceed against other defendants.

b) Sentence Bargaining

- promises to proceed summarily rather than by indictment;
- the promise of a certain sentence recommendation by the Crown;
- promises not to oppose defence counsel's sentence recommendation;
- promises not to apply for a more severe penalty where the Code allows for one in the event of a prior conviction for the same offence.

c) Fact Bargaining

- promises concerning the nature of the submissions to be made to the judge.

The wide variety of topics that can be covered during a negotiating session indicates how important it is to plan and prepare before undertaking such discussions.

Preparation is, of course, key to any successful negotiation. One aspect of preparation is a thorough understanding of the case. There are times when an accused will want to deal with a matter quickly in a bail court or early disposition court, but plea negotiations should not be commenced until the Crown has made full disclosure to the defence. It is only then that it is possible to realistically assess the case and determine the likelihood of conviction or acquittal.

Preparation also involves assessing why it is in the interests of both sides to reach an agreement. A good negotiator considers both their case and, more importantly, analyzes the case of the other side. It is necessary to assess why the party opposite might want to reach an agreement. It might be that there is a witness who is too young or vulnerable to endure the trial process. There might be a weakness in the case that makes the result difficult to predict. There might be an enormous backlog of cases pending and this matter needs to be cleared. Whatever the reason, if you can identify why it is important for your client to reach an agreement and why it is important for the other side as well, you will be a more effective negotiator.

It is also important to prepare for negotiating sessions by developing alternative options for the opposite side to consider. The skilled negotiator decides in advance what options are available to address the appropriate charges for the facts, and the possible reasonable sentences to be imposed. For example, on the set of facts, there may be alternative *Criminal Code* or other statutory offences that would be appropriate, although different from the initial charges laid.

A creative sentencing proposal may satisfy both sides' interests and concerns. The negotiation might address the details of the facts of the offence, the number and type of charges, the type and length of sentence and/or the timing of the final plea. It is much more likely that you can reach an agreement if there are realistic proposals to consider. Remember that some issues might be more important to one side than other issues. The trade-offs can make for a successful negotiation.

A good negotiator is also prepared to support the suggestions advanced with intelligent and articulate arguments demonstrating the benefits to each side of the solution proposed. Negotiation requires strong advocacy and skills of persuasion. You are trying to find a solution that takes into account the specific facts of the situation and the underlying interests of the other side.

The negotiator must be familiar with:

- the facts of the case and where each side's versions of the facts differ;
- the strengths and weaknesses in their case , and those in the other side's case; and
- the relevant sentencing precedents. The negotiator must know both the usual sentencing range and what factors have led the courts to deviate from them in the past that might relate to this case.

The successful negotiator, like any successful advocate, needs to be able to persuade the other side that this particular situation warrants a certain treatment and that the result being sought will meet the interests of both sides.

2. Ethical Considerations

The Law Society has recognized the importance of plea negotiations to the criminal justice system and has dealt with some of the ethical considerations in the *Code of Professional Conduct,* Rule 5.1-7 and Rule 5.1-8. The *Code* states:

> ***Agreement on Guilty Plea***
> ***5.1-7*** *Before a charge is laid or at any time after a charge is laid, a lawyer for an accused or potential accused may discuss with the prosecutor the possible disposition of the case unless the client instructs otherwise.*
>
> ***5.1-8*** *A lawyer for an accused or potential accused may enter into an agreement with the prosecutor about a guilty plea if, following investigation,*
> *(a) the lawyer advises his or her client about the prospects for an acquittal or finding of guilt;*
> *(b) the lawyer advises the client of the implications and possible consequences of a guilty plea and particularly of the sentencing authority and discretion of the court, including the fact that the court is not bound by any agreement about a guilty plea;*
> *(c) the client voluntarily is prepared to admit the necessary factual and mental elements of the offence charged; and*
> *(d) the client voluntarily instructs the lawyer to enter into an agreement as to a guilty plea.*
>
> ***Commentary***
> *[1] The public interest in the proper administration of justice should not be sacrificed in the interest of expediency*

These rules set out some extremely important issues for defence counsel to remember. It is unethical to allow a client to plead guilty unless the client fully admits the *actus reus* and *mens rea* necessary to constitute the offence. It is also important to inform the client that the judge may depart from the agreement reached by counsel, although this is rare. The client must also be aware that a guilty plea means that the client has given up the right to have a trial.

The Crown's conduct during plea negotiations is governed by the general provisions in Rule 5.1-3 of the *Code of Professional Conduct*.

> ***Duty as Prosecutor***
> ***5.1-3*** *When acting as a prosecutor, a lawyer must act for the public and the administration of justice resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy and respect.*

Commentary

[1] When engaged as a prosecutor, the lawyer's primary duty is not to seek to convict but to see that justice is done through a fair trial on the merits. The prosecutor exercises a public function involving much discretion and power and must act fairly and dispassionately. The prosecutor should not do anything that might prevent the accused from being represented by counsel or communicating with counsel and, to the extent required by law and accepted practice, should make timely disclosure to defence counsel or directly to an unrepresented accused of all relevant and known facts and witnesses, whether tending to show guilt or innocence.

Note that Commentary [1] directs the prosecutor to act "fairly and dispassionately" when exercising the discretion and power that are a part of the prosecutor's public function. This direction applies to plea negotiation as well as the conduct of a trial.

The role that judges should play in plea bargaining is not clear. Several pronouncements advocate against any judicial involvement. The concern is that involvement by the judge in plea negotiations is at odds with the judge's role of an impartial adjudicator and would place undue pressure on the parties. However, this position is inconsistent with the institutionalization of court-directed pre-trial, case management and resolution conferences.

These conferences often include discussions of plea and sentence options with significant judicial input. If such discussions take place, judges should ensure that their remarks do not place undue pressure on the accused or the prosecution. In the King's Bench, the resolution conference judge is not the one who will hear the case if a jury is involved unless agreed to by counsel and the Judge.

3. The Court Process

An important aspect of plea negotiations relates to the willingness of the courts to accept the agreement reached by counsel. See the Manitoba Court of Appeal in *R v. Thomas,* 2000 MBCA 148 (CanLII) where Scott C.J.M., on behalf of the court stated, at paragraph 6:

> *Plea bargaining is an important, if not essential, component of the criminal justice process. The integrity of the system requires that judges, before rejecting a negotiated plea in circumstances such as this, have good reasons for doing so.*

One of the difficulties that trial judges face if they contemplate rejecting a plea-bargaining agreement is, they are often unaware of the factors that influenced the agreement. Some factors, such as cost, expediency, and reducing the trauma to the victim, may be easy to surmise. But many factors, such as evidentiary weaknesses, cooperation by the accused in other matters, or witness availability, may not be obvious.

In such situations, it may be important to give the court some indication of the rationale for the agreement. See the comments of Wyant, C.P.J. (as he then was) in *R. v. Harveymordenzenk*, [sic], 2007 MBPC 68 (CanLII) regarding the importance of giving the court a full explanation of the rationale behind the plea bargain:

> *…Much of the misunderstanding and anguish that has arisen in this case could have been avoided, in my opinion, if…a full explanation of the plea bargain and the exigencies of the evidence and the factual basis upon which the plea was entered had been placed before the court for all to see. Failure to do that contributed to misunderstanding and speculation …*

The law is clear that a judge is not bound by the agreement. See Hamilton J.A. in *R. v. Broekaert,* 2003 MBCA 10 (CanLII):

> *29 A joint submission cannot bind the discretion of the sentencing judge. Nonetheless, a joint submission as to sentence is an important consideration in sentencing. The sentencing judge must give it due consideration and must be slow to reject it without good cause (see R. v. Pashe, [1995 CanLII 6256 (MBCA)] and R. v. Thomas [2000 MBCA 148 (CanLII)*]. *The amount of weight to be accorded a joint submission will depend on all of the circumstances. One of the circumstances can be whether the joint submission arises out of a plea bargain situation, or as a result of a joint submission on a guilty plea to the offence charged. By plea bargain I mean a situation where an accused person pleads guilty to the offence charged, or a lesser offence and, by doing so, gives up a viable defence, or provides another "quid pro quo" in exchange for a joint submission on sentence. Here there was no plea bargain in the sense described. Whether a plea bargain or joint submission as here, the circumstances surrounding the agreement are a relevant consideration…*

However, the judge should only depart from it for clear and cogent reasons. See *R v. Lamirande (D.)*, 2006 MBCA 71 (CanLII) at paragraph 19:

> *19 In a true plea bargain such as presented here, a sentencing judge who intends to reject the joint recommendation is obliged to give clear and, as importantly, cogent reasons for such rejection. See R. v. Pashe (S. J.) (1995) 1995 CanLII 6256 (MB CA), 100 Man.R. (2d) 61 (C.A.). Failure to give cogent reasons would constitute, in my opinion, an error in principle. The more substantial the quid pro quo inherent in the bargain, the more weight should be given to an appropriate joint recommendation.*

The Manitoba Court of Appeal has been clear that if a judge is contemplating rejecting a plea agreement this fact should be disclosed to all counsel before sentencing or delivering reasons. In that situation, the judge should allow counsel to make further submissions. See *R v. Thomas*, 2000 MBCA 148 (CanLII). Such a procedure recognizes the importance that plea bargaining has to the system and greatly reduces the possibility that an agreement struck by well-informed counsel will be overridden by the court without allowing counsel to explain and advocate for the court to accept the plea agreement.

4. Enforceability

Another key aspect of plea negotiations is the enforceability of the plea agreements. On occasion, the Crown or an accused may have second thoughts about the agreement that was reached.

There is no automatic right for an accused to repudiate a plea agreement and withdraw a guilty plea. The ability to withdraw a guilty plea is governed by the Supreme Court of Canada's decision in *Adgey v. R.*, 1973 CanLII 37 (SCC), [1975] 2 SCR 426 discussed in detail below, "Withdrawing a Guilty Plea**"**.

If one or the other party does not honour the obligations of the plea agreement, it may be repudiated. In *R. v. MacDonald,* 1990 CanLII 11021 (ON CA) the accused did not fulfill his commitment and the Crown withdrew from a plea agreement. The accused was interviewed regarding his involvement in a murder. Negotiations with the Crown resulted in an agreement that the accused would not be charged with murder if he gave a truthful statement as to his knowledge of the murder and testified to that effect. Subsequently, the Crown repudiated the agreement on the basis that the statement was not truthful. The accused was tried and convicted of murder. The Ontario Court of Appeal rejected the argument that the prosecution was an abuse of process, stating that the agreement required a complete and truthful statement and since the Crown did not get what it had bargained for it was under no obligation to complete the deal.

The obvious corollary of the *MacDonald* case is that the Crown is bound to follow through on an agreement if the obligations undertaken by the accused have been completed. See *R. v. Romolo*, 2002 MBCA 66 (CanLII) where the prosecution agreed to a conditional sentence in exchange for a guilty plea. At the time of the sentencing hearing, the Crown did not inform the judge of the agreement for a conditional sentence; it is unclear whether the Crown's failure to inform happened intentionally or through inadvertence. The judge imposed a custodial sentence on the accused. The Manitoba Court of Appeal substituted a conditional sentence even though the sentence imposed by the trial judge was appropriate in the circumstances, because, the Court of Appeal concluded in paragraph 14 that:

> *it is likely that the sentencing judge would have ordered the accused to serve his sentence in the community had she been informed that the submissions of counsel amounted to a joint recommendation.*

By its actions, the Court of Appeal recognized the important role that plea bargaining has in the administration of justice.

5. Conclusion

While plea bargaining still has its critics, the reality is that the system could not operate without it. The development of pre-trial conferences has institutionalized the practice. Properly done, plea bargaining makes a major contribution to the administration of justice. The reasons for the agreement must be explained in open court to help the public understand the value of the plea bargain. In plea bargaining, decisions are being made that serve the interests of justice.

D. THE PLEA

1. Entering a Plea

In the criminal process, the plea is an integral element. The remainder of the procedure in a criminal trial is very much dependent on the plea. A not guilty plea will result in a complete trial; a guilty plea in a summary process.

An accused person enters the plea after being arraigned. The arraignment involves the accused's name being called, an appearance before the presiding judicial officer, and the charges in either the indictment or the information being read to the accused. The reading of charges may be waived by the accused.

If the accused has any objection to the form of the indictment or the jurisdiction of the court, the objections should be raised before entering the plea. Failure to do so may result in any appellate tribunal refusing to consider the objection.

Following the reading of the charges, the accused will be asked to plead to them. Where there is more than one count in an indictment or information the accused should be asked to plead to each count separately. In Canada, judicial authority indicates that the accused need not plead personally. The plea entered by counsel on the accused's behalf will have the same legal effect as if the accused had entered it personally.

The pleas available to the accused are set out in sections 606 and 607 of the *Criminal Code*. These sections restrict the possible pleas to pleas of guilty, not guilty, or the special pleas of autre fois acquit, autre fois convict, and pardon.

If the accused remains silent or refuses to plead, a plea of "not guilty" will be entered on the accused's behalf under the authority of section 606(2).

Although counsel can enter the plea on behalf of the accused, it is always advisable for defence counsel to have the accused do so. When the accused enters the plea personally, it can reduce concern about whether the accused understands the charges and is entering the plea voluntarily.

2. The Guilty Plea

Section 606(1) allows an accused person to enter a plea of guilty which plea means the accused admits to having committed the offence and consents to a conviction being entered without the necessity of a trial. The guilty plea is an admission by the accused that all material averments of the charge can be proven but precludes the necessity of formal proof.

A plea inquiry will be conducted under section 606(1.1).

> ***Conditions for accepting guilty plea***
> ***(1.1)*** *A court may accept a plea of guilty only if it is satisfied that*
> *(a) the accused is making the plea voluntarily;*
> *(b) the accused understands*
> *(i) that the plea is an admission of the essential elements of the offence,*
> *(ii) the nature and consequences of the plea, and*
> *(iii) that the court is not bound by any agreement made between the accused and the prosecutor; and*
> *(c) the facts support the charge.*

Note however that under 606(1.2) the failure of the court to fully inquire does not affect the validity of the accused's plea.

> ***Validity of plea***
> ***(1.2)*** *The failure of the court to fully inquire whether the conditions set out in subsection (1.1) are met does not affect the validity of the plea.*

The plea inquiry is intended to ensure that guilty pleas are entered voluntarily, that the accused accepts responsibility for the elements of the offence, that the accused waives the right to a trial and that the judge has the final say in sentencing even if a joint recommendation is being put forward by all counsel.

A valid guilty plea must be voluntary, unequivocal and informed. (See *R v. Desrochers*, 2018 MBCA 55 (CanLII) para. 27 and following).

Once the plea has been entered, the trial judge should be made aware of the circumstances of the offence. That happens by representations made by the Crown or can be provided by a material witness.

A plea of guilty means that the accused admits and accepts only such facts as constitute the material elements of the offence. Thus, an accused may plead guilty to an offence and still be at liberty on sentencing to demand that the Crown prove any non-material elements such as aggravating circumstances that the Crown alleges are present. The Crown must prove aggravating facts beyond a reasonable doubt. (See *R. v. Gardiner*, 1982 CanLII 30 (SCC), [1982] 2 SCR 368).

For example, if there is a dispute between the facts of the accused and the Crown, the Crown is not obliged to call evidence, but the sentencing judge must accept the version offered by the accused in the absence of proof of the facts by the prosecution. If the Crown calls evidence to prove the facts being challenged by the accused, the judge will determine the facts based upon the evidence before sentencing.

3. Withdrawing a Guilty Plea

Finality is an important part of the criminal justice system. Once an accused has entered a guilty plea, the accused does not have the right to withdraw that plea without the permission of the court.

However, until the trial judge imposes a sentence on the accused, the trial judge has the discretion to substitute a not guilty plea for the accused or to permit an accused to withdraw the guilty plea.

The Crown may also request that the court withdraw the guilty plea if, for example, the Crown wants the opportunity to raise the issue of the accused's sanity at the time of the offence.

Scott, C.J.M. in *R. v. Jawbone*, 1998 CanLII 6104 (MBCA) paragraph 6 stated, "the essential question to be determined in each case is whether [withdrawal of the guilty plea] is justified in the interests of justice…".

The trial judge's discretion to permit a guilty plea to be withdrawn is fairly broad. *Adgey v. R.,* 1973 CanLII 37 (SCC), [1975] 2 SCR 426 is the seminal case on the issue. If the trial judge exercises the discretion "judicially, [the decision] will not be lightly interfered with" (at page 430).

As set out in *Adgey*, a trial judge should exercise discretion to permit the accused to withdraw a guilty plea:

- if the accused may have misapprehended the effect of the guilty plea or never intended to plead guilty at all;
- if the accused never intended to admit to a fact which is an essential ingredient of the charged offence;
- if, on the facts presented by either party, the accused could not be convicted in law; [the existence of this factor imposes a duty on the trial judge to permit the guilty plea to be withdrawn to prevent a miscarriage of justice];
- if the accused satisfies the Court that there are "valid grounds" for being permitted to withdraw the guilty plea.

The meaning of "valid grounds" is addressed by Dickson, J. writing for the majority where he states on page 431:

> *It would be unwise to attempt to define all that which might be embraced within the phrase 'valid grounds'. I have indicated above some of the circumstances which might justify the Court in permitting a change of plea. The examples given are not intended to be exhaustive.*

Note that the onus is on the accused to show that permitting the withdrawal of the guilty plea is justified in the interests of justice.

See also *R. v. Wong*, 2018 SCC 25 (CanLII), [2018] 1 SCR 696 where the court permitted the withdrawal of a guilty plea on the basis that the accused was unaware of a collateral consequence stemming from that plea. The court found that holding the accused to the plea

amounted to a miscarriage of justice. In *Wong,* the accused was not aware that his conviction and sentence could result in loss of his permanent resident status and removal from Canada without any right of appeal under immigration laws.

If the accused has pled guilty to the charge(s), but the trial judge becomes aware that the facts presented do not, in law, support a conviction on the charges as laid, the judge is duty-bound to order that the matter proceed on a plea of not guilty, notwithstanding the accused's plea of guilty.

Once the sentence is imposed the trial judge is *functus officio* and if the accused wants to withdraw the guilty plea after the sentence, that application must be pursued in the appellate tribunal.

See some Manitoba cases on withdrawing a guilty plea:

- *R. v. Hansen,* 1977 CanLII 2015 (MBCA);
- *R. v. Santos,* 1985 CanLII 3763 (MBCA);
- *R. v. Jawbone,* 1998 CanLII 6104 (MBCA);
- *R. v. Ignacio,* 2005 CanLII 20676 (MBPC) (from para. 25 and following for an overview of the law on withdrawal of guilty plea); and
- *R v. Singh,* 2019 MBCA 105 (CanLII) (accused uninformed of the collateral consequence of a guilty plea which was an immigration removal order with no right of appeal).

As mentioned earlier, under section 606(1.1) Parliament essentially codified the common law by setting out the conditions that must exist for a court to accept a plea of guilty from an accused.

In Manitoba, the trial judges generally do make the plea inquiry of the accused as contemplated under section 606(1.1). If the trial judge is concerned that an accused does not appreciate the guilty plea, the trial judge can exercise discretion to substitute a plea of not guilty.

Although a thorough plea inquiry can make it more difficult for an accused to be successful in an application to withdraw a guilty plea, counsel must remember that under section 606(1.2) the failure of the court to fully inquire does not, in itself, affect the validity of the guilty plea.

If the facts do not support the charge, the trial judge is duty-bound not to accept the plea, even if the accused is determined to plead guilty. This distinction is important when the matter is raised on appeal.

If the facts do not support the charge, but the withdrawal of the guilty plea is first raised on appeal, the Court of Appeal is similarly duty-bound. Our justice system will not tolerate a conviction on a guilty plea without the admission of the necessary facts to support the charge. On appeal, the remedy in all but the most unusual cases is the ordering of a new trial so that the Crown then has an opportunity, if possible, to elicit the facts necessary to sustain a conviction.

4. Pleading Guilty to Included or Other Offences

Section 606(4) of the *Criminal Code* permits an accused to plead guilty to offences other than those directly contained in the information or indictment if the prosecution consents. The section states in part:

> *… where an accused or defendant pleads not guilty of the offence charged but guilty of any other offence arising out of the same transaction, whether or not it is an included offence, the court may, with the consent of the prosecutor, accept that plea of guilty …*

The section has undergone several amendments over the years in response to interpretations in judicial decisions. The section currently allows guilty pleas to offences "arising out of the same transaction." This amendment was introduced to override case law which had restricted the section to lesser and included offences.

The section also used to read *"… the court may, in its discretion … accept the plea of guilty."* The words *"in its discretion"* have been removed. This change was made after certain decisions interpreted that phrase to mean that there was a residual power in a trial judge to refuse to accept the guilty plea if the judge felt that the facts did not warrant the reduction.

The court continues to have the discretion to permit withdrawal of a guilty plea or to refuse a guilty plea as set out in *Adgey* and later cases applying it.

5. Conclusion

The guilty plea is an important part of our criminal justice system. Care must be taken to ensure that the accused is pleading guilty only when the facts meet the material provisions of the charge. Safeguards are built into the justice system procedure which include encouraging the accused to enter the guilty plea personally, the court conducting a plea inquiry before accepting the plea, the judge having the discretion to reject the plea if the facts don't support the charge and the appellate court being available to review and also reject any guilty plea where the facts don't support the charge. See *Adgey* on page 440:

> *A plea of guilty carries an admission that the accused so pleading has committed the crime charged and a consent to a conviction being entered without any trial. The accused by such a plea relieves the Crown of the burden to prove guilt beyond a reasonable doubt, abandons his non-compellability as a witness and his right to remain silent and surrenders his right to offer full answer and defence to a charge. It is important, therefore, that the plea be made voluntarily and upon a full understanding of the nature of the charge and its consequences and that it be unequivocal.*

Counsel should always keep in mind that the result of a guilty plea is to take away the accused's rights to a trial. As such, a guilty plea should be entered only with caution and with full knowledge of the consequences of the action.

E. THE PRELIMINARY INQUIRY

1. Introduction

Several sections of the *Criminal Code* that relate to the preliminary inquiry were amended by Bill C-75 and came into force on December 18, 2019.

The holding of a preliminary inquiry used to be automatic when an accused elected a trial in the Court of King's Bench. Now, a preliminary inquiry is only available upon request by the Crown or the accused made at the time of election and ONLY if the accused is charged with an offence punishable by fourteen years imprisonment or more. (s. 536(2)).

If two or more persons are jointly charged in an information, and one or more of them make the request for a preliminary inquiry, a preliminary inquiry must be held for all of them. (s. 536(4.2)).

Once a request is made the justice must hold a preliminary inquiry (ss. 535 and 536(4)). The court does not have the discretion to refuse the request.

If no request for a preliminary inquiry is made, the matter goes directly to trial.

These sections provide:

> ***Section 535***
> *If an accused who is charged with an indictable offence that is punishable by 14 years or more of imprisonment is before a justice and a request has been made for a preliminary inquiry under subsection 536(4) or 536.1(3), the justice shall, in accordance with this Part, inquire into the charge and any other indictable offence, in respect of the same transaction, founded on the facts that are disclosed by the evidence taken in accordance with this Part.*
> **…**
> ***Subsection 536(2)***
> *If an accused is before a justice, charged with an indictable offence that is punishable by 14 years or more of imprisonment, other than an offence listed in section 469, the justice shall, after the information has been read to the accused, put the accused to an election in the following words:*
>
> > *You have the option to elect to be tried by a provincial court judge without a jury and without having had a preliminary inquiry; or you may elect to be tried by a judge without a jury; or you may elect to be tried by a court composed of a judge and jury. If you do not elect now, you are deemed to have elected to be tried by a court composed of a judge and jury. If you elect to be tried by a judge without a jury or by a court composed of a judge and jury or if you are deemed to have elected to be tried by a court composed of a judge and jury, you will have a preliminary inquiry only if you or the prosecutor requests one. How do you elect to be tried?*

Subsection 536(2.1)

If an accused is before a justice, charged with an indictable offence — other than an offence that is punishable by 14 years or more of imprisonment, an offence listed in section 469 that is not punishable by 14 years or more of imprisonment or an offence over which a provincial court judge has absolute jurisdiction under section 553 —, the justice shall, after the information has been read to the accused, put the accused to an election in the following words:

> *You have the option to elect to be tried by a provincial court judge without a jury; or you may elect to be tried by a judge without a jury; or you may elect to be tried by a court composed of a judge and jury. If you do not elect now, you are deemed to have elected to be tried by a court composed of a judge and jury. How do you elect to be tried?*

Several related sections also deal with preliminary inquiries:

Request for preliminary inquiry
Subsection 536(4)

If an accused elects to be tried by a judge without a jury or by a court composed of a judge and jury or does not elect when put to the election or is deemed under paragraph 565(1)(b) to have elected to be tried by a court composed of a judge and jury or is charged with an offence listed in section 469, the justice shall, subject to section 577, on the request of the accused or the prosecutor made at that time or within the period fixed by rules of court made under section 482 or 482.1 or, if there are no such rules, by the justice, hold a preliminary inquiry into the charge.

Endorsement on the information
Subsection 536(4.1)

If an accused elects to be tried by a judge without a jury or by a court composed of a judge and jury or does not elect when put to the election or is deemed under paragraph 565(1)(b) to have elected to be tried by a court composed of a judge and jury or is charged with an offence listed in section 469, the justice shall endorse on the information and, if the accused is in custody, on the warrant of remand, a statement showing

(a) the nature of the election or deemed election of the accused or that the accused did not elect, as the case may be; and
(b) whether the accused or the prosecutor has requested that a preliminary inquiry be held.

The parties to a preliminary inquiry are required to complete and file two forms:

- **Form A**, which is a list of witnesses and issues (prepared by the party requesting the preliminary hearing); and
- **Form B**, which is a list of agreements and admissions of fact. Copies of both forms are found in the precedents in this module. These forms have been prepared according to section 536.3 and section 536.4.

Under section 536.4, the preliminary inquiry judge may order or, on the application of either party, may order that a hearing be held to:

a) assist the parties to identify the issues on which evidence will be given at the inquiry;

b) assist the parties to identify the witnesses to be heard at the inquiry, taking into account the witnesses' needs and circumstances; and

c) encourage the parties to consider any other matters that would promote a fair and expeditious inquiry.

In Manitoba, this is referred to as a focus hearing. Any admission of fact or agreement reached by the parties during a focus hearing is recorded by the presiding justice.

Also, the parties can now agree to limit the scope of the preliminary inquiry to specific issues.

> ***Agreement to limit scope of preliminary inquiry***
> ***536.5***
> *Whether or not a hearing is held under section 536.4, the prosecutor and the accused may agree to limit the scope of the preliminary inquiry to specific issues. An agreement shall be filed with the court or recorded under subsection 536.4(2), as the case may be.*

This is typically done in a pre-trial or case management hearing.

2. Purpose of the Preliminary Inquiry

There are two broadly accepted purposes for a preliminary inquiry. The first is to determine whether there is a case that the accused should be required to meet at a trial. The second is to provide the accused with an opportunity for disclosure and discovery of the Crown's case. The preliminary hearing may also provide the Crown with an opportunity to assess the evidence after observing the witnesses.

Estey J., speaking for the majority in *Skogman v. The Queen,* 1984 CanLII 22 (SCC), [1984] 2 SCR 93 at 171 stated:

> *The purpose of a preliminary inquiry is to protect the accused from the needless, and indeed, improper, exposure to public trial where the enforcement agency is not in possession of evidence to warrant the continuation of the process. In addition, in the course of its development in this country, the preliminary hearing has become a forum where the accused is afforded an opportunity to discover and to appreciate the case to be made against him at trial where the requisite evidence is found to be present.*

The right to an opportunity to discovery is not expressly set out in the *Code*. It was, however, stated by Campbell J. in *R. v. Cover,* 1988 CanLII 7118 (ONSC) on page 36:

> *The accused does have a right to use a preliminary inquiry to test the Crown's case, to get discovery and disclosure, and to set up the evidentiary basis for challenges at a trial to the admissibility of evidence tendered by the Crown at trial.*

The need to use a preliminary inquiry to obtain discovery of the Crown's case was reduced to some extent by the decision in *R. v. Stinchcombe*, 1991 CanLII 45 (SCC), [1991] 3 SCR 326 which held that, at least for indictable offences, the Crown is required to produce to the defence all relevant information whether or not the Crown intends to produce it in evidence, and whether or not the Crown considers it to be exculpatory or inculpatory. There is some discretion to withhold information or delay the release of the information, but the discretion is limited by the right to make full answer and defence.

The practice is that the Crown provides an initial disclosure package as a matter of course and then additional disclosure is usually requested by the defence. Disclosure by the Crown will be made to the accused only after a specific request for information is made. The request, however, can be a broad one, such as a request for the names and addresses of all potential witnesses who have been interviewed by the police and copies of their statements. The request should be written, as verbal requests are often not acted upon and later no record of the request exists.

Disclosure does not allow full discovery, however, since such matters as the reliability or recollection of a witness may only be demonstrated by testimony. If there is no preliminary inquiry the need for the accused to ask for disclosure is critical.

There is no Crown policy requiring preliminary inquiries and in almost all circumstances the Crown will not require one. If the Crown's case will depend on the evidence of one witness, the Crown may request a preliminary inquiry to test the case and see how the witness stands up to cross-examination.

Similarly, while there is no policy on focus hearings, the Crown may request one even on a shorter case if the accused indicates that all matters are at issue.

Rules governing the filing of materials in the Provincial Court can be found on the court website in the *Practice Directives for Contested Applications* in the Provincial Court of Manitoba, issued November 4, 2013.

The King's Bench requires a pre-trial brief to be filed. The Crown brief is to be filed 10 days before the hearing. The defence brief must be filed 5 days before the hearing.

3. Procedure

In some ways, the procedure at a preliminary inquiry is very similar to the trial procedure. After the election has been recorded the Crown is entitled to call such evidence as it has available that touches upon the relevant issues. The accused is allowed to cross-examine in the same fashion as at a trial. Legal issues relating to matters such as the admissibility of evidence, the relevance of evidence and the substantive elements of the charge are dealt with by the judge in the same fashion as at a trial.

While the procedure at a preliminary hearing is outwardly similar to that at a trial, it is fundamentally different, and the differences should be considered carefully. Unlike at trial, the accused is not required to enter a plea and so still retains the right to enter a plea of guilty at a later time if desired. The preliminary inquiry takes place in a public forum but, unlike at a trial, an accused may apply for a ban on publication of proceedings at the preliminary inquiry until the accused is discharged or the trial is at an end. The accused is therefore entitled to have the evidence tested without having it reported in a public forum.

Under section 540(7), the justice presiding over the preliminary inquiry may receive as evidence any information that would not otherwise be admissible but that the justice considers "credible and trustworthy" in the circumstances of the case, including a statement that is made by a witness. Evidence admitted under this section cannot be read in at trial. This allows the Crown to put in their case by filing documents rather than by calling witnesses to testify.

The evidence which is taken at a preliminary inquiry must be recorded and the accused is entitled to receive a transcript of the proceedings on payment of the appropriate fee. At the time of the trial, the accused can use the transcript of the prior sworn evidence of the witnesses to assist in cross-examination.

At the end of the preliminary inquiry, an accused is not required to testify or answer to the charge, but must be advised of the right to make an answer to the charge or call evidence at the inquiry. These rights are set out in section 541 of the *Code*.

Perhaps the most important difference between a preliminary inquiry and a trial is that at the end of the preliminary inquiry there is no determination of guilt.

The judge sitting on a preliminary inquiry has two options at the end of the proceedings. The judge may order the accused to stand trial if the Crown has presented sufficient evidence to put the accused on trial for an indictable offence, or the judge must discharge the accused if no sufficient case is made to put the accused on trial. If counsel agree to limit the scope of the preliminary inquiry, the justice, without recording evidence on any other issues, may order the accused to stand trial.

Where the accused is discharged, the preliminary inquiry (on that count) is ended. In most circumstances where the accused is discharged, no further action will be taken. Potentially, the Crown could cause an information to be laid charging the accused with the same offence, in which case the accused may again request a preliminary inquiry. This is a highly unusual procedure and would likely be the subject of an argument that the accused's rights under the *Charter* have been infringed. Nonetheless, the procedure is available.

However, the Crown can request that the Attorney-General lay a direct indictment under section 577 of the *Code*. This occurs in cases where the Crown attorney involved can convince their superiors that the Provincial Court judge erred in discharging the accused. It has also

occurred in situations where other relevant evidence is discovered after the accused has been discharged.

A direct indictment is a very common procedure in Manitoba, although almost unheard of in other jurisdictions.

Although the *Charter* provides in section 11(h) that a person shall not be tried for an offence after being acquitted of it, that does not apply to a person who is discharged after a preliminary inquiry. Discharge is not an acquittal.

A Provincial Court judge at a preliminary inquiry has the power to continue the inquiry in the absence of the accused if the accused absconds during the inquiry. The procedure followed is usually to issue a warrant for the arrest of the accused. In circumstances where there are co-accused, an accused who does not attend may lose the right to be present at the preliminary inquiry. Under section 544(4) the counsel for the absent accused may be entitled to continue to act for the accused in the proceedings.

4. The Test for An Order to Stand Trial

The test for an order that an accused stand trial is set out in the *United States of America v. Sheppard*, 1976 CanLII 8 (SCC), [1977] 2 S.C.R. 1067, 70 D.L.R. (3d) 136, 30 C.C.C. (2d) 424 at 427, 34 C.R.N.S 207 at 211 as stated by Ritchie J:

> *I agree that the duty imposed upon a "justice" under section 475(1) [now section 548(1)] is the same as that which governs a trial judge sitting with a jury deciding whether the evidence is "sufficient" to justify... withdrawing the case from the jury and this is to be determined according to whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty. The "justice", in accordance with this principle, is, in my opinion, required to commit an accused person for trial in any case in which there is admissible evidence which could, if it were believed, result in a conviction.*

The test is often framed by asking the question "Is there any evidence upon which the accused could be convicted by a reasonable jury properly instructed?" The issue is whether there is sufficient evidence on every essential element of the offence that, if believed, could result in a conviction. See *Skogman v. The Queen,* 1984 CanLII 22 (SCC), [1984] 2 SCR 93 which found that where there is no evidence on one essential element of the charge, the rest of the evidence can never amount to "sufficient evidence" under s. 475 to commit the accused for trial.

The justice, however, is not to weigh the evidence to test its quality or reliability. The Supreme Court in *R. v. Monteleone*, 1987 CanLII 16 (SCC), [1987] 2 SCR 154 at 198:

> *Where there is before the court any admissible evidence, whether direct or circumstantial, which, if believed by a properly-charged jury acting reasonably, would justify a conviction, the trial judge is not justified in directing a verdict of acquittal. It is not the function of the trial judge to weigh the evidence, to test its quality or reliability once a determination of its admissibility has been made. It is not for the trial judge to*

draw inferences of fact from the evidence before him. These functions are for the trier of fact, the jury.

This was in connection with an application at a trial for a directed verdict of acquittal, but the test for an order to stand trial is the same. Directed verdicts used to be extremely rare, but now they occur more often.

5. The Order to Stand Trial

Section 548 of the *Criminal Code* states in part:

> *(1) When all the evidence has been taken by the justice, he shall*
>
> *(a) if in his opinion there is sufficient evidence to put the accused on trial for the offence charged or any other indictable offence in respect of the same transaction, order the accused to stand trial;*

The justice may not order that the accused stand trial for summary conviction offences. The offence upon which the accused is ordered to stand trial must be in respect of the same transaction.

What constitutes "the same transaction" has been the subject of some comment. In *R. v. Goldstein,* 1988 CanLII 7069 (ONCA) Houlden J. stated at 554:

> *In my opinion, a series of acts or occurrences must be connected or related in order to constitute a transaction. For the purposes of this case, I would define "transaction" as a series of connected acts extending over a period of time. It is most important, as I will endeavour to demonstrate, that "transaction" be distinguished from "offence". See also R v Stewart (1988), 44 C.C.C (3d) 109 (Ont. C.A.).*

Defence counsel needs to be aware that at a preliminary inquiry there is the possibility of a committal for indictable offences other than the initial offence charged. In some circumstances, the position of an accused can be substantially damaged by having a preliminary inquiry and being ordered to stand trial on offences other than those in the original information. By careful analysis of the case before a preliminary inquiry, defence counsel may determine that the accused may be guilty of an offence, but not the one in the information. In that circumstance, it may be wiser for the accused to elect a trial to avoid the risk that those different charges could be laid after a preliminary inquiry.

Notice provisions that may apply to a trial will not apply to a preliminary inquiry.

If the Crown has some evidentiary problems that may be solved at a preliminary hearing, the Crown may want the preliminary hearing to have that opportunity.

In deciding whether to have a preliminary inquiry or not, both the Crown and the accused should also consider the fact that the matter will take a longer time to be resolved if there is a preliminary hearing followed by a trial.

6. The Canadian Charter of Rights and Freedoms

Motions to exclude evidence based on an alleged breach of a person's rights under the *Charter* should be made either before the trial court or by motion before the court of competent jurisdiction before the trial. The Supreme Court of Canada in *Mills v. The Queen,* 1986 CanLII 17 (SCC), [1986] 1 SCR 863 dealt with the definition of 'a court of competent jurisdiction' for a motion seeking relief under the *Charter of Rights and Freedoms*. The court decided that a Provincial Court judge presiding at a preliminary inquiry is not a 'court of competent jurisdiction' under section 24(1) of the *Charter*.

There are specific time limitations for the filing of *Charter* materials in the rules of The Provincial Court, King's Bench, *Criminal Code*, *Charter*, Canadian and Manitoba Evidence Acts, and time limits may be imposed in pre-trial or in case management meetings as agreed by the judge and counsel.

7. Practical Considerations

The decision to require a preliminary inquiry should be made only after careful consideration of the evidence. If there are no specific issues to test, then it may be wiser for an accused to go right to trial keeping in mind that route is quicker and easier financially. An inquiry may be necessary where there are credibility issues or if defence counsel needs to explore matters that are not fully explained by the Crown disclosure, such as the basis for a search or arrest (although that may be a *Charter* issue which can be argued only at trial).

There is no good reason to request a preliminary inquiry on all issues unless they are all in dispute. The Crown can always directly indict the accused after discharge at a preliminary inquiry but the defence should remember that the Crown may not have grounds for an appeal if there is an acquittal on the same point after a trial. Defence counsel should ask themselves whether it is worth raising a crucial issue at a preliminary inquiry if it can be corrected by the Crown afterward.

Far too many defence counsel think of the preliminary inquiry as an opportunity to prepare their case. It is an opportunity for discovery and may affect the ultimate result in the trial. However, the preparation of the case for the accused should be done well in advance of the preliminary inquiry. At the time defence counsel appears at a preliminary inquiry they should be fully aware of the issues and should see it as an opportunity to fully discover the Crown's case.

A preliminary inquiry is useful for learning what the witnesses will say and bringing out evidence that is helpful either to the accused's defence or on sentencing. There is no requirement for the accused's counsel to deal with the same issues at the trial; accordingly, a

possible defence may be raised at the preliminary inquiry to test the evidence but the same defence does not have to be raised at the trial.

At the preliminary inquiry, defence counsel may become aware of frailties in the Crown's case. The accused is not required to alert the Crown to such deficiencies. Counsel for accused might decide that alerting the Crown to the problems when an order to stand trial is given may not be in the accused's best interest. For example, if defence counsel sees that there is a problem with the admissibility of some evidence, but the accused is likely to stand trial in any event, it may be to the accused's advantage to ignore that issue at the preliminary inquiry and save the challenge until the trial.

The defence should choose which issues must be addressed at the preliminary inquiry and which should not. Sometimes issues raised at the inquiry will be explained by the witnesses at the trial in a manner that rehabilitates any perceived problem. If the issue is one which can be straightened out before trial, the accused might choose not to deal with it at the preliminary inquiry, and save it until trial.

One of the benefits of a preliminary inquiry is the transcript. With many witnesses, the most effective tool for successful cross-examination is the transcript of their evidence given at a preliminary inquiry. To use a transcript effectively at a trial the transcript must contain the witnesses' evidence on particular points. Two common problems arise with witness impeachment if counsel is not careful at the preliminary inquiry.

First, counsel often assumes that the answer given to a particular question is clear, but later discover that the answer is ambiguous when read. The monitor only records words without any description of the tone in which it was said or the accompanying gestures or general demeanour of the witness. For example, the answer "You said it" may have meant the witness was agreeing with a statement because the witness nodded at the time. Unless you state on the record that the witness is nodding, those bare words, when read from the transcript to the witness at trial, may credibly be interpreted by the witness as meaning that the lawyer was trying to put words in the witness' mouth.

Second, it is possible to use answers from a preliminary inquiry transcript effectively only if it is clear what point the witness was testifying about. Too often it will be necessary to review several pages of questions and answers to draw the court and the witness's attention to the area counsel seeks to contradict. That leaves far too many opportunities for the witness or the Crown to explain the issue by saying that the point is confused. Accordingly, it is often effective at a preliminary hearing to summarize the witness's evidence by stating precisely the point that is being discussed so that there can be no confusion before the question is put to the witness for an answer.

As *Charter* relief cannot be granted at the preliminary inquiry, many Crown attorneys object to defence counsel raising matters relating to *Charter* issues, such as a search. The Crown will argue the issue is irrelevant to the preliminary inquiry. Most judges will allow the questioning as necessary discovery, even if it is not strictly relevant. However, many judges will not allow defence counsel to call witnesses who will deal exclusively with *Charter* matters.

The practical benefits of electing for a preliminary inquiry mentioned above assume that the Crown will present its case by way of witnesses testifying in-person. If the preliminary inquiry judge is persuaded to receive a witness statement in written form under section 540(7) instead (it permits information that would not otherwise be admissible but that the justice considers "credible and trustworthy" in the circumstances of the case), the benefits described above may be lost.

F. PROVINCIAL COURT

Lawyers practising criminal law should check the court's *website* regularly for updated Practice Directives, Notices and Protocols.

Information about Manitoba Courts is also available on Twitter @MBCourts.

Lawyers should be familiar with:

- *Pre-Trial Coordination Protocol Adult Charges*;
- *Practice Directives for Contested Applications in the Provincial Court of Manitoba*;
- *Practice Directive for Preliminary Hearings*.

G. PRECEDENTS

1. Crown and Defence Agreed Bail Conditions Form

[Document follows on next page]

CANADA
Province of Manitoba

Q.B. Court File No. / N° de dossier - Cour du Banc de la Reine :

CROWN AND DEFENCE AGREED BAIL CONDITIONS

☐ ACCUSED
☐ APPELLANT _____ D.O. B. _____

☐ Provincial Court ☐ Adult ☐ In Person ☐ Telephone
☐ Court of Queen's Bench ☐ Youth ☐ Video ☐ Video phone

CHARGE(S): _____

_____

_____

ADDRESS OF ACCUSED	☐ The address of the accused is provided in the release conditions and is not the same address as any party included in a non-communication order.
BAIL REVOCATION	Existing Bail ☐ Yes ☐ No ☐ s. 524(8) - endorse on record of proceedings ☐ By consent of Crown and Defence, order dated _____ by Judge/Justice _____ ☐ is revoked; or ☐ is vacated only upon the accused entering into the new recognizance.
FIREARMS/WEAPONS PROHIBITION	☐ A firearms/weapons prohibition is required as set out in the agreed upon conditions. **OR** ☐ In our opinion, a firearms/weapons prohibition is not required to address the interests of the safety of the accused or the safety and security of a victim of the offence or any other person.
SAFETY AND SECURITY OF ANY PERSON RELATING TO THESE CHARGES	☐ We have considered the interests of the safety and security of any person relating to these charges, particularly a victim of or witness to the offence or a justice system participant when agreeing to these conditions In our opinion, these conditions address this issue.
REVIEW OF CONDITIONS WITH ACCUSED	☐ Defence counsel has reviewed the agreed upon conditions with the accused.
JUSTIFICATION OF CONDITIONS	☐ Defence counsel, on behalf of the accused is satisfied that the Crown can show cause as to why the agreed upon conditions are justified **AND/OR** (where reverse onus exists) ☐ Crown is satisfied that Defence counsel can show cause as to why the agreed upon conditions are justified.

To be released on the following conditions: ☐ Recognizance $ _____
☐ with surety $ _____
☐ with surety $ _____
☐ with deposit $ _____
☐ Undertaking
☐ Undertaking by Responsible Person _____ (name of responsible person)

REMAND DATE: ☐ Provincial Court - Courtroom _____
☐ Court of Queen's Bench

at _____ Manitoba on the _____ (day) (month) (year) at _____ m

_____ Consent of the Crown

_____ Consent of Defence

_____ Print Name _____ Date

_____ Print Name _____ Date

_____
Judge, Provincial Court Judge, Justice, or Clerk of Court
juge ou juge de la Cour provinciale, juge de paix, greffier de la cour

Domestic Violence: ☐ Yes ☐ No In Custody Non Communication Faxed: ☐ Yes
Police/Detachment: _____

NOTIFICATION SENT TO:

Information No./N° de dossier: _____
Police Agency:/Corps de police : _____
PR#:/N° du rapport : _____

ACCUSED/APPELLANT _____

RELEASE CONDITIONS:

The accused must obey the conditions indicated by a check mark below:

APPEARANCES:

1. ☐ You must come to Court on each of your court dates;
2. ☐ You must come to Court on each of your court dates until a lawyer has told the court that he or she is representing you;
3. ☐ _____

RESIDE:

4. ☐ You must live at _____
   _____;
5. ☐ You must not live at a different address unless a judge has first given you permission to move to that address;
   ☐ or a Crown prosecutor notifies a court official at _____ in writing that the Crown is not opposed to your moving to a different address.
6. ☐ You must tell a court official at _____ or a judge, before you move to a different address;
7. ☐ You must not leave _____ unless a judge has first given you permission to leave;
   (the Province of Manitoba or other designated city/town)
8. ☐ _____
   _____

PROGRAM RELEASE:

9. ☐ You may only be released from custody to a person from _____;
10. ☐ You must live at _____
11. ☐ You must follow all the rules of _____
12. ☐ _____
    _____;

ATTENDANCE/COMMUNICATION/ASSOCIATION:

13. ☐ *Complainant(s) is/are not to be named.*
14. ☐ You must not contact the complainant(s) _____ in person or communicate with him/her/them by telephone, mail, E-mail or in any other way or have another person communicate with the complainant(s) for you.
15. ☐ Except: that you may communicate with the complainant(s) to arrange a time to ☐ visit; or ☐ pick-up/drop off
    _____
    (names of children)
    ☐ as allowed by a court order granting access (dated) _____
16. ☐ Except: that another person may communicate with the complainant(s) for you to arrange a time for you to
    ☐ visit; or ☐ pick-up/drop-off
    _____
    (names of children)
    ☐ as allowed by a court order granting access (dated) _____
17. ☐ Except: _____

Information No./N° de dossier: _____

Police Agency:/Corps de police : _____

PR#:/N° du rapport : _____

ACCUSED/APPELLANT _____

18. ☐ You must stay at least _____ away from the
☐ home ☐ workplace ☐ school ☐ place of worship of the complainant

19. ☐ Except: that you may go to the complainant(s)'s home to ☐ visit; or ☐ pick-up/drop-off
_____
(names of children)
☐ as allowed by a court order granting access (dated) _____

20. ☐ Unless you have first received permission from the complainant(s) to go there to ☐ visit; or ☐ pick-up/drop-off
_____
(names of children)
☐ as allowed by a court order granting access (dated) _____

21. ☐ You must not contact _____
(associates)
in person or communicate with him/her/them by telephone, mail, E-mail or in any other way or have another person communicate with him/her/them for you.

22. ☐ You must not communicate or try to communicate with the complainant(s) by telephone, mail, E-mail or in any other way or have another person communicate with the complainant(s) for you, while you are in custody.

23. ☐ _____
_____;

ABSTENTION

24. ☐ You must not ☐ possess ☐ drink any alcohol, and you must not ☐ possess ☐ use any illegal drug.

25. ☐ You must not use any prescription drug unless you have a prescription for that drug.

26. ☐ You must not use hairspray, gasoline, glue or any substance in a way that will make you intoxicated.

27. ☐ You must not go into any place where liquor is sold ☐ other than a restaurant with a liquor licence.

28. ☐ _____
_____;

CURFEW:

29. ☐ You must be at your home address between _____
_____
_____

30. ☐ You may only be away from your home address during curfew hours:
☐ when you are with _____
☐ when you are working at _____ or travelling directly to or from there
☐ in a medical emergency involving you or a member of your immediate family.
☐ _____

31. ☐ You must come to the door of your home address or answer the telephone if _____ conducts a curfew check.

32. ☐ _____
_____
_____
_____

Information No./Nº de dossier:_____
Police Agency:/Corps de police : _____
PR#:/N° du rapport :_____

ACCUSED/APPELLANT _____

FIREARMS/WEAPONS PROHIBITION:

33. ☐ You must not own, possess or carry any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance,

34. ☐ Except: _____

35. ☐ You must surrender the things specified in the preceding condition and every authorization, licence and registration certificate relating to these prohibited things, to _____

36. ☐ You must not own, possess or carry any weapon. _____

37. ☐ You must not possess knives except for the immediate preparation and consumption of food or in the course of lawful employment.

38. ☐ _____
_____
_____
_____

OTHER:

39. ☐ _____
_____

40. ☐ _____
_____

41. ☐ **FOR THE PURPOSE OF THE *IDENTIFICATION OF CRIMINALS ACT*, you must:**

42. ☐ attend at Forensic Services, Winnipeg Police Service, Main floor - 245 Smith Street, Winnipeg on _____ (day) (month) (year) between 12:30 p.m. and 3:30 p.m., to have fingerprints and photographs taken.

43. ☐ attend at the Identification Section, Brandon Police Service, 1020 Victoria Avenue, Brandon at _____ (time) on

_____ (day) (month) (year), to have fingerprints and photographs taken.

44. ☐ attend at: _____ at _____ (time),

on the _____ (day) (month) (year), to have fingerprints and photographs taken.

DRUG TREATMENT COURT EXPECTATIONS

45. ☐ You must attend and participate actively in treatment.

46. ☐ You must attend for urinalysis as directed.

47. ☐ You must honestly report all drug and/or alcohol use.

48. ☐ You must advise the Court of any new charges that arise while in Drug Treatment Court.

Information No./N° de dossier:_____

Police Agency:/Corps de police : _____

PR#:/N° du rapport :_____

ACCUSED/APPELLANT _____

49. ☐ You must not possess/drink any alcohol and not possess/consume any illegal drug

50. ☐ You must not use any prescription drugs unless you have a prescription for that drug.

51. ☐ You must not use hairspray/gas/glue or other intoxicants.

MENTAL HEALTH COURT EXPECTATIONS

52. ☐ You are to report your WRHA FACT Team Treatment Services Coordinator, _____ no later than _____ and thereafter as directed.

53. ☐ You are to report to Dr. _____ no later than _____ and thereafter as directed.

54. ☐ You are to attend, participate and complete any assessments, counselling, programming or treatment, which may include but will not necessarily be limited to residential addictions treatment and anger management as directed by _____ and/or the WRHA FACT Team.

55. ☐ You are to attend, participate and complete any peer support programs, vocational or academic programs or leisure programs as directed by _____ and/or the WRHA FACT Team.

56. ☐ You are to accept all medical advice and treatment provided to you by Dr. _____ or his/her designate.

57. ☐ You are to comply with all directions of and take medication prescribed to you by Dr. _____ or his/her designate.

58. ☐ You are to submit to random blood and urine screening and testing to monitor the use of prescribed medication and alcohol, illegal drugs and other intoxicants.

59. ☐ You are not to travel outside of the City of Winnipeg unless accompanied by an adult approved by the WRHA FACT Team.

60. ☐ You are not to travel outside the Province of Manitoba unless you are accompanied by an adult approved by the WRHA FACT Team, you have given prior notice to the Mental Health Court and you will not be outside of the Province for longer than 14 days.

61. ☐ You are to seek and maintain employment at the direction of the WRHA FACT Team and, in the alternative, you are to seek and maintain a regular source of income at the direction of the WRHA FACT Team.

Dated this _____ (day) _____ (month) _____ (year) at _____, Manitoba.

_____ Consent of the Crown

_____ Print Name _____ Date

_____ Consent of Defence

_____ Print Name _____ Date

_____ Judge, Provincial Court Judge, Justice, or Clerk of Court
juge ou juge de la Cour provinciale, juge de paix, greffier de la cour

Information No./N° de dossier: _____

Police Agency:/Corps de police : _____

PR#:/N° du rapport : _____

2. Form A – Counsel Statement Identifying Issues and Witnesses

See *Practice Directive for Preliminary Hearings* – *Form A*

FORM "A"
COUNSEL STATEMENT IDENTIFYING ISSUES AND WITNESSES
SEC. 536.3 C.C.

Name of Accused/Young Person:_____

Charges:

Name of Counsel:_____

Name of Counsel Completing Form:_____

Preliminary Inquiry Requested by: ☐ Prosecution ☐ Defence

Preliminary Inquiry Date:_____

Focus Hearing Requested by: ☐ Prosecution ☐ Defence ☐ Judge

Judge Ordering Resolution Conference:_____

The issues on which the requesting party wants evidence to be given at the Inquiry:

The witnesses that the requesting party wants to hear at the Inquiry:

Dated this _____, at _____, Manitoba.
day month year

Signature: _____
Print Name Legibly:_____

Contact information (all required): Address:

Phone No. _____
Fax No. _____
Counsel for_____

This document must be filed with the Clerk of the Court and a copy provided by the submitting party to other parties and any unrepresented accused at the time the preliminary inquiry is requested.

3. Form B – Agreement and Admissions of Fact

See *Practice Directive for Preliminary Hearings* – *Form B*

FORM "B"
AGREEMENT AND ADMISSIONS OF FACT
SEC. 536.4(2) AND 536.5 C.C.

Name of Accused/Young Person:_____

Charges:

Name of Counsel:_____

Name of Counsel Completing Form:_____

Preliminary Inquiry Requested by: ☐ Prosecution ☐ Defence

Preliminary Inquiry Date:_____

Focus Hearing Requested by: ☐ Prosecution ☐ Defence ☐ Judge

Judge Ordering Resolution Conference:_____

Admissions of Fact agreed to by the parties and any agreements reached by the parties:

Signature: _____
Print Name Legibly: _____

Contact information (all required): Address:

Phone No. _____
Fax No. _____

Counsel for the Accused/Young Person

Signature: _____
Print Name Legibly: _____

Contact information (all required): Address:

Phone No. _____
Fax No. _____

Prosecutor

Pursuant to s. 536.4(2) of the *Criminal Code* I recorded the above agreement to limit the scope of the preliminary inquiry and admissions of fact by the terms herein recorded.

Signature: _____

Print Name Legibly: _____

Judge of the Provincial Court of Manitoba

Dated this _____, at _____, Manitoba.
day month year

This document will be filed with the Clerk of the Court by the judge presiding at the s. 536.4 hearing, or at the time that the preliminary inquiry is set, if no s. 536.4 hearing is ordered.

4. Notice of Application – Bail Review

File No.

THE KING'S BENCH
WINNIPEG Centre

BETWEEN:

HIS MAJESTY THE KING

Respondent

-and-

JANE DOE

(Accused) Applicant

NOTICE OF APPLICATION
TO BE HEARD ON <INSERT DATE>, AT 10:00 AM OR 2:00 PM IN COURTROOM 410

LAW FIRM
Address
Winnipeg, MB Postal Code
E-mail address

LAWYER NAME

Phone: (204) <insert number>
Facsimile: (204) <insert number>

THE KING'S BENCH
WINNIPEG Centre

BETWEEN:

HIS MAJESTY THE KING

Respondent

-and-

JANE DOE

(Accused) Applicant

NOTICE OF APPLICATION (CRIMINAL)

TAKE NOTICE that a Motion will be made on behalf of the above named (Accused) Applicant, **JANE DOE**, before the presiding Justice, at 10:00 AM or 2:00 PM (choose one) or so soon thereafter as the motion can be heard at the Law Courts Building at 408 York Avenue, in the City of Winnipeg, in the Province of Manitoba, on the <insert date>, of <insert month> in the year 20__, in courtroom 410 for charges that she, the said **JANE DOE**:

1. That JANE DOE on or about the <insert date> of <insert month> in the year 20__ at the City of WINNIPEG in the Province of Manitoba did commit <insert each charge in separate paragraphs> contrary to Section <insert section> of the *Criminal Code* of Canada.

THE MOTION IS FOR:

1. An Order granting Jane Doe's judicial interim release.

THE GROUNDS FOR THE MOTION ARE:

1. Pursuant to Section 520 of the *Criminal Code*;
2. On the basis that there has been a change in circumstances; and
3. Such further and other grounds that counsel may request and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. The Affidavit of Ms. Jane Doe;
2. The Transcripts of Proceedings of her Application for Judicial Interim Release from <insert date> 20__;
3. The Affidavit of the surety <insert name>; and
4. Such further and other material as counsel may request and this Honourable Court may permit.

THE APPLICANT MAY BE SERVED WITH DOCUMENTS PERTINENT TO THIS APPLICATION:

1. By service to Law Firm at <insert address>, Winnipeg, Manitoba,

   Tel: 204-<insert number>, Fax 204-<insert number>.

DATED this <insert date> of <insert month>, 20__ at Winnipeg, Manitoba.

THIS matter is scheduled for a half day sitting.

THE client, Jane Doe, wishes to be present.

THE client, Jane Doe, is currently in custody at <insert where in custody> in Headingly, Manitoba.

LAW FIRM
Address
Winnipeg, MB
Postal Code

Per: _____
LAWYER NAME
Counsel for the (Accused) Applicant,
JANE DOE

5. Affidavit – Bail Review

File No.

THE KING'S BENCH
WINNIPEG Centre

BETWEEN:

HIS MAJESTY THE KING

Respondent

-and-

JANE DOE

(Accused) Applicant

AFFIDAVIT OF JANE DOE
AFFIRMED ON: < INSERT DATE>
TO BE HEARD ON: <INSERT DATE>, 20__ AT 10:00 AM OR 2:00 PM IN COURTROOM 410

LAW FIRM
Address
Winnipeg, MB Postal Code
E-mail address

LAWYER NAME

Phone: (204) <insert number>
Facsimile: (204) <insert number>

File No.

THE KING'S BENCH
WINNIPEG Centre

BETWEEN:

HIS MAJESTY THE KING

Respondent

-and-

JANE DOE

(Accused) Applicant

AFFIDAVIT OF JANE DOE

I, JANE DOE, of the City of Winnipeg, in the Province of Manitoba, MAKE OATH AND AFFIRM THAT:

1. I am the Applicant herein, and as such have personal knowledge of the facts and matters hereinafter deposed to me, except where same are stated to be based on information and belief, in which case I verily believe the same to be true;
2. I was born on <insert date> and I am currently <insert age> years of age;
3. I currently reside at <insert address>;
4. I have been in custody since my arrest on <insert date>, 20__;
5. I was residing <insert alone or who residing with> at <insert address>, Winnipeg, Manitoba, at the time of my arrest;
6. In the past 3 years my fixed addresses have also included: <insert addresses>;
7. I am <insert marital status>;
8. I have <insert number> dependants, ages <insert ages> for whom I currently have/do not have parenting responsibilities;
9. I have a grade <insert education> education;
10. I am employed as <insert employment>. It is <insert full-time/part-time/seasonal> work. I work <insert hours/week>. I have worked at this employment for <insert length of time>;

11. I have been employed in the past 3 years as follows: <insert employment>;

12. My criminal record is attached as Exhibit A, and I do verily believe it to be accurate <or I do not have a criminal record>;

13. I was arrested on <insert date> on a number of charges as follows: <insert list charges>. On <insert date> I have a <insert preliminary hearing/trial> on my current charges set for <insert date or date to be set>;

14. I am contesting the charges and maintain my innocence;

15. My plan upon release is to be released on my own recognizance in the amount of <insert amount>;

16. I have been advised and do verily belief that <insert name> will act as a surety in the amount of $<insert amount>;

17. I will provide a cash deposit in the amount $<insert amount>;

18. I will keep the peace and be of good behaviour;

19. I will reside at <insert address>;

20. I will not move without the prior consent of the court;

21. I will have no contact or communication directly or indirectly with the complainant, witnesses or co-accuseds;

22. I will not attend within 200 metres of where the complainant, witnesses or co-accuseds reside, place of employment, school, or place of worship;

23. I will abide by a curfew from <insert hours or absolute>;

24. I will not be away from my residence during my curfew hours unless there is a medical emergency for myself or a member of my immediate family, to travel to and from and to attend work or school or treatment and counselling;

25. I will attend to personal errands at specified hours per week as directed by the Court (in the case of an absolute curfew);

26. I will abide by curfew checks as directed;

27. I will attend the Addictions Foundation of Manitoba for an assessment;

28. I will attend, participate and complete any counselling as directed;

29. I will abstain absolutely from the possession and consumption of any alcohol, non-prescription drugs or intoxicants;

30. I will abide by a weapons prohibition;

31. I will abide by any other conditions this Honourable Court may impose;

32. I make this Affidavit bona fide and in support of my application herein.

AFFIRMED BEFORE me)
at the City of Winnipeg ,)
in the Province of Manitoba,)
this <insert day> day of) _____
<insert month>, <insert year>) JANE DOE

_____
A Barrister and Solicitor entitled to practice
in and for the Province of Manitoba

6. Affidavit of Surety – Bail Review

File No.

IN THE KING'S BENCH
WINNIPEG CENTRE

IN THE MATTER OF: **THE CRIMINAL CODE OF CANADA**

BETWEEN

HIS MAJESTY THE KING,

RESPONDENT,

-and-

JANE DOE,

(ACCUSED) APPLICANT.

AFFIDAVIT OF <INSERT NAME>
BAIL REVIEW
TO BE HEARD ON: Monday <insert date> 20__ at 10:00 a.m. (or 2:00 p.m.)
in Courtroom 410

LAW FIRM
Address
Winnipeg, Manitoba Postal Code
E-mail address

LAWYER NAME

Phone: (204) <insert number>
Facsimile: (204) <insert number>

IN THE KING'S BENCH
WINNIPEG CENTRE

IN THE MATTER OF: **THE CRIMINAL CODE OF CANADA**

BETWEEN

HIS MAJESTY THE KING,

RESPONDENT,

-and-

JANE DOE,

(ACCUSED) APPLICANT.

AFFIDAVIT OF <INSERT NAME>

I, <INSERT NAME>, of the City of <insert city>, in the Province of Manitoba,

MAKE OATH AND SAY THAT:

1. I am the <insert relationship> of the above named Applicant, Jane Doe, and as such have personal knowledge of the facts and matters hereinafter deposed to by me except where same are stated to be based on information and belief and where so stated I verily believe same to be true.
2. I do not have a criminal record.
3. I reside at <insert address>.
4. I am prepared to be a surety for my <insert relation>, Jane Doe, in the amount of $<insert amount> and to have her reside with me at (insert address>.
5. I am prepared to surrender my surety should I lose confidence in my <insert relations>'s ability to follow the conditions of her release.
6. I have been advised of all of my <insert relations>'s pending charges and the alleged facts involved.

7. I understand the significance of agreeing to be a surety and my role as a surety.
8. I verily believe that Jane Doe will abide by any conditions imposed on her by the Court.
9. I have been advised and verily believe that Jane Doe applied for Judicial Interim Release before the Honourable Judge <insert Judge> on <insert date>, 20__ and her release was denied on that date.
10. I have been advised and verily believe that Jane Doe has set her pending charges down for preliminary inquiry or trial, to be heard on <insert date>.
11. I make this affidavit *bona fide* and in support of my <insert relations>'s application for review of the decision of her application for Judicial Interim Release.

Release.

AFFIRMED BEFORE me)
at the City of Winnipeg,)
in the Province of Manitoba,)
this the <insert date> day of)
<insert month>, 20__)

_____
<INSERT NAME>

_____
A Barrister and Solicitor in
The Province of Manitoba.

7. Practice Direction – Detention Review Hearings

Practice Direction – Detention Review Hearings

PRACTICE DIRECTION

COURT OF QUEEN'S BENCH OF MANITOBA

RE: DETENTION REVIEW HEARINGS UNDER SECTIONS 520 AND 525 OF THE *CRIMINAL CODE*

THOMPSON AND THE PAS JUDICIAL CENTRES

As part of the Court of Queen's Bench's ongoing attempts to improve access to justice in all areas of its jurisdiction, the following direction applies to detention review hearings under sections 520 and 525 of the ***Criminal Code*** in the Thompson and The Pas judicial centres. Informing this practice direction are the following reference points:

- To ensure the integrity of the administration of justice, generally, criminal matters are to be adjudicated in the judicial centre most proximate to the community where the alleged offence took place.
- The constitutional obligation that flows from the ***Charter*** right not to be denied reasonable bail without just cause requires that bail review hearings take place without unreasonable delay.
- The Thompson judicial centre has a particularly high volume of criminal cases and in-custody accused.
- There is no remand facility in Thompson.
- It is not unusual that accused in criminal matters originating in Thompson and The Pas judicial centres are held in custody in a facility that is a significant distance from the courthouses in these judicial centres.
- Bail review hearings may take place in person, by video, or by teleconference.

Effective immediately, with the above reference points in mind, detention review hearings under sections 520 and 525 of the ***Criminal Code*** in the Thompson and The Pas judicial centres will be subject to the following procedure:

- The accused will appear either by video or by teleconference from the institution in which they are located, unless the local trial coordinator is advised by counsel or a self-represented accused at least five full business days prior to the scheduled hearing date that an accused is to appear at the hearing in person (to permit sufficient time for transportation).

- Counsel will appear in person in the judicial centre in which the matter originates, unless the local trial coordinator is advised at least one full business day prior to the scheduled hearing date that counsel will appear either by video or by teleconference. When counsel are appearing remotely, they are to contact the local trial coordinator to obtain call-in instructions. Where this remote appearance is from another judicial centre, it will be coordinated through the local trial coordinator and court clerk.
- Where the accused is appearing in person, defence counsel must also appear in person.
- The judge will preside either in person or by video or by teleconference.
- Applications and supporting material must be filed in the judicial centre in which the matter originates. These may be filed by facsimile or email in the manner directed by the local trial coordinator, with an undertaking to file the original documents.
- An application is to be made returnable in the appropriate judicial centre of Thompson or The Pas on any Monday or Thursday at 9 a.m.
- All hearings will take place between 9 a.m. and 10 a.m.
- The hearing will be monitored in the judicial centre in which the matter originates, regardless of the location of the presiding judge, counsel, and the accused.
- The foregoing is subject to any direction by a judge that counsel or an accused is to appear in person.

Coming into effect

This Practice Direction comes into effect immediately.

ISSUED BY:

"Original signed by Chief Justice Joyal"

The Honourable Chief Justice Glenn D. Joyal
Court of Queen's Bench (Manitoba)

DATE: March 5, 2020