NEW BRUNSWICK LEGAL AID SERVICES COMMISSION

COMMISSION DES SERVICES D'AIDE JURIDIQUE DU NOUVEAU - BRUNSWICK

Duty Counsel Manual

Version Date: March 24, 2021

Table of Contents

Introduction ... 4
What is in the Manual? ... 4
About the New Brunswick Legal Aid Services Commission ... 4
Right to Information and Protection of Privacy Act ... 4
Solicitor-client privilege and confidentiality ... 5
French language services ... 5
Our Duty Counsel Services ... 5
Specialized Duty Counsel ... 5
Objective of the Duty Counsel Program ... 6
Availability of Duty Counsel ... 7
Criminal Duty Counsel ... 7
Functions of criminal duty counsel ... 7
Advice ... 8
Adjournments ... 8
Adjournments to obtain counsel ... 8
Reasons for adjournment ... 9
Avoiding needless adjournments ... 9
Publication Bans ... 9
Bail Hearings ... 10
Preparation time ... 10
Judicial Interim Release ... 11
Principle of Restraint ... 12
515(10)(a): Ensuring court attendance ... 13
515(10)(b): Public safety ... 13
515(10)(c): Confidence in the administration of justice ... 14
Section 516 adjournments ... 14
Evidence at the bail hearing ... 15
Bail hearing procedure ... 16
If bail is denied ... 17
Role of Duty Counsel in Diversion Programs ... 18
Diversion programs ... 19
Adult Alternative Measures Program ... 19

Diversion Program for Youth 21
Diversion of mentally disordered accused 23
Guilty Pleas 23
Guilty plea instructions when a defence is possible 24
Guilty plea for represented accused 24
Guilty plea to a serious charge 24
Sentencing 25
Sentencing Principles 25
Mandatory Minimums and Maximum Penalties 26
Concurrent or Consecutive? 27
Aggravating and Mitigating Factors 27
Order authorizing the taking of bodily substances for forensic DNA analysis 28
Youth Court 29
Parent/child conflict 29
Order for appointment of counsel 30
Mental Health Issues 31
What does "fit to stand trial" mean? 32
What happens if accused is found fit to stand trial? 33
What if accused is found unfit to stand trial? 33
Court ordered psychiatric assessments under the Mental Health Act 34
Services for Aboriginal People 34
Gladue Considerations 35

Introduction

What is in the Manual?

This manual is a practical guide to navigating the responsibilities and procedures for criminal duty counsel lawyers. It includes sections on general advice to clients, seeking adjournments, bail hearings, diversion programs, guilty pleas, and sentencing. It also contains sections on youth, mentally ill, and aboriginal accused persons.

About the New Brunswick Legal Aid Services Commission

In 1971, the New Brunswick Legal Aid plan was legislated to help low income individuals obtain the services of a lawyer. Over the next 30 years, the New Brunswick Law Society provided legal aid services, thanks in large part to the legal community who accepted certificates from legal aid clients at reduced rates. In December 2005, the New Brunswick Legal Aid Services Commission (NBLASC) was created to oversee the development and delivery of criminal defence services and family legal services. The NBLASC provides legal services through staff lawyers and private lawyers who accept certificates and provide duty counsel services. The Commission is a publicly funded and accountable institution. It operates at arm’s length from the government to ensure a balanced and impartial system of justice for the people of New Brunswick. Services include legal information, advice, education, advocacy, and representation.

The New Brunswick Legal Aid Services Commission operates under the framework of the *Legal Aid Act* and Regulations.

On April 15, 2017, NBLASC implemented new financial eligibility criteria for Criminal Law and Family Law certificate services. Financial eligibility is now determined using an Income Grid defining income brackets per household size.

Right to Information and Protection of Privacy Act

New Brunswick Legal Aid services are covered by the *Right to Information and Protection of Privacy Act*.

Solicitor-client privilege and confidentiality

Section 42 of the *Legal Aid Act* holds that communications between an applicant for legal aid made to employees or those contracted to work with legal aid and which would be privileged if made between a client and his or her solicitor, are privileged in the same manner and to the same extent as solicitor and client communications.

French language services

New Brunswick Legal Aid acts in compliance with s. 27 of New Brunswick's *Official Languages Act*, which holds that "Members of the public have the right to communicate with any institution and to receive its services in the official language of their choice."

New Brunswick Legal Aid Services offers advocacy and support in both official languages.

Our Duty Counsel Services

For eligible matters, Duty Counsel provides an explanation of court processes and advice regarding entering a plea, asking for an adjournment, appearing at bail hearings, and sentencing.

NBLASC is responsible for assigning Duty Counsel lawyers to criminal and youth courts to advise and assist anyone who must appear before a Provincial Court judge on eligible charges and is without counsel.

Eligible matters for duty counsel include:

- Plea courts;
- Bail hearings;
- Speak to sentence on first appearances;
- Attendance on sentencing when pre-sentence report had been requested by a duty counsel.

Specialized Duty Counsel

Additionally, New Brunswick has several specialized criminal courts around the province that deal exclusively with specific kinds of issues. These include:

- **Mental Health Review Board**: Representation for individuals who have been found unfit to stand trial and/or not criminal responsible who appear periodically before the Board.
- **Mental Health Court** (Saint John): This involves representation at case conferences where treatment plans are established and monitored for individuals who are accepted into the voluntary program. Duty counsel coordinates with an interdisciplinary team of professionals and acts in case conferences across multiple appearances until the case is resolved.
- **Domestic Violence Court** (Moncton): Representation for individuals facing criminal charges that occur in the context of an intimate relationship.
- **Elsipogtog Healing to Wellness Court** (Elsipogtog First Nation)**:** Representation of members of the Elsipogtog First Nation before the Healing to Wellness Court for those who are eligible to participate based on the type of offence and are willing to take responsibility for their actions while complying with a treatment plan as ordered by the court. Participants of the program must comply with a supervised plan where their progress is monitored regularly by health professionals and elders.

Objective of the Duty Counsel Program

The objective of the duty counsel program is to provide legal aid services province-wide to individuals, through legal advice, representation in court and other legal assistance through a duty counsel program, in accordance with the policies and priorities established by the New Brunswick Legal Aid Services Commission.

To meet the overall objective set out above, the duty counsel program has the following subsidiary objectives:

- To provide professional guidance to clients requesting assistance to move through the judicial system as quickly and effectively as possible, by
    - reaching an appropriate resolution of as many issues as possible for each client;
    - where a final resolution is not feasible, referring the client to the most appropriate resource (mediation, certificate lawyer, or private bar) at the earliest possible intervention point; and
    - planning the client's options and next steps with the client to fully utilise available community resources.
- To reduce each client's time wastage and frustration, thereby contributing to the over-all administration and functioning of the court process, by
    - encouraging individual duty counsel to be as organized and efficient as possible in dealing with their daily client workload; and

- communicating and exchanging information with court administration and the judiciary, and with the local legal aid area office.

Availability of Duty Counsel

Reasonable efforts should be made by the court to inform all those appearing without representation of the availability, role, and function of duty counsel. Duty counsel should announce their presence prior to the commencement of court, both in the corridor and in the court itself. The announcement should make it clear that duty counsel is: a lawyer who is available for advice and assistance in court, provided free of charge and located in and around court.

Duty counsel should attend between half an hour and an hour before court so they can interview people as they arrive at court. Cell interviews should also commence at least an hour before court, depending upon inmate arrival time.

Unfortunately, many accused attend just before or after court commences. Unless the court automatically adjourns in recognition of the problem, duty counsel should request that a client's matter be stood down to give duty counsel an opportunity to meet with the client.

Duty counsel should never force their services on an accused, as every person has the right to act on their own behalf. In advising an unrepresented accused, duty counsel should review all the options including the possible benefits associated with an early resolution.

Criminal Duty Counsel

Functions of criminal duty counsel

- Attend the Provincial Court as scheduled.
- Assist persons in custody or who have been charged with offences by advising them of their rights and by taking any steps that may be appropriate to protect those rights.
- Represent persons during pleas, first appearances, and bail hearings.
- Speak to sentence on first appearance.
- Attend to sentencing where a pre-sentence report has been requested on first appearance.

Advice

- Duty counsel should be prepared to answer questions about courtroom procedure, legal aid, bail, offences, possible penalties and defences. Advice can be provided at any stage of the proceedings.
- Duty counsel should be able to advise an accused where to apply for legal aid and how to appeal an employee's refusal to issue a certificate.
- Duty counsel should be well acquainted with the *Criminal Code* and related statutes such as the *Youth Criminal Justice Act* and the *Controlled Drugs and Substances Act*.
- Duty counsel should also be able to answer questions involving related *Provincial Offences Procedure Act* proceedings.
- Duty counsel must alert the accused as to the effect a Criminal Code conviction has on other statutes.
- Duty counsel should advise clients that a "discharge" still creates a criminal record. A conditional or absolute discharge may still result in a prohibition of entry into the United States.
- Advice given by duty counsel should clearly be resolution oriented and include a clear explanation of the role of duty counsel in arranging diversions and entering guilty pleas.
- Duty counsel should note aggravating circumstances such as theft from an employer which increase the probability of incarceration, and the local area employee should be notified of the circumstances as to why a certificate should be issued.
- Duty counsel should be familiar with mandatory minimum jail sentences.

Adjournments

Adjournments to obtain counsel

- Most courts allow two to four weeks following first appearance for a client to obtain a lawyer either privately or through Legal Aid.
- Duty counsel should be able to inform the court as to the reason for the delay. At this point the court may grant a further adjournment to set a date for trial or preliminary hearing.
- If an accused does not have counsel on a trial date, it is very difficult to obtain an adjournment, as witnesses are inconvenienced, and trial time wasted.

Reasons for adjournment

An adjournment request can be made by an accused's counsel who has contacted the duty counsel office with information that is reliable or verifiable. It is important that the accused understand that duty counsel is relaying a request and not appearing as agent without the client. The accused must also understand that they (or their lawyer) are responsible for finding out the result, including the return date. The judge may deny the adjournment request and issue a bench warrant for an accused who is not in attendance.

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

- To retain counsel privately (ascertain time needed to complete retainer);
- To complete legal aid application (direct the client to courthouse location or area office);
- To obtain a trial date;
- For pre-trial with Crown;
- For judicial pre-trial;
- Disclosure not available;
- Crown brief not in court;
- To have officer in charge determine if complainant would accept a peace bond or if restitution has been made;
- To have a resolution meeting with the Crown;
- To have the accused meet with diversion worker.

Avoiding needless adjournments

Duty counsel should always ask the question "how can I make the accused's next appearance more productive?" If the matter is adjourned to obtain legal aid, the accused should be directed to contact the Legal Aid office. By doing so, even though the adjournment was not a disposition, it was handled in a dispositive manner, as a decision regarding legal aid should be made by the next court appearance.

Publication Bans

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

before, or during, the course of the bail hearing. If the accused is committed to stand trial, the ban may last until the trial is over.

Bail Hearings

Conducting bail hearings and advocating for the early release of accused persons is one of the most important functions of duty counsel because it is often significant to subsequent decisions about how a case proceeds. If an accused is detained, they could spend several months in custody while awaiting a bail review or a trial.

Duty counsel must be aware that conditions in a release order that cannot be met might result in a period of incarceration longer than the actual sentence. Such "dead time" is not always fully considered at the sentencing stage. Further, remanded inmates are allowed fewer privileges than inmates serving a sentence.

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

Duty counsel in bail court also needs to advise an accused on a possible guilty plea and request a position on disposition from the Crown. Duty counsel should be alert to matters that are suitable for an early plea. Also, duty counsel should be aware that the Crown often agrees to withdraw minor charges resulting from the same transaction or series of transactions.

Preparation time

Due to the short time frame that duty counsel must work within (usually half an hour to an hour before court begins each morning), and the volume of accused to represent each day, preparation time can be limited. Preparation therefore, must be efficient, precise, and accurate.

The interview with the accused may be the only source of information for conducting the bail hearing. Essential questions include, but are not limited to, those dealing with the three grounds under s 515 of the Criminal Code (see below), criminal record (especially convictions for failure to appear or failure to comply), evidence of stability, and the existence of mental or physical health issues.

In some courthouses, duty counsel is allowed access to Crown briefs that usually contain a wealth of background information, the record of the accused and prior release history, as well as a copy of the synopsis of the offence charged.

At the interview, duty counsel should first inform the accused who they are, what they are there to do for the accused, and that what is said will be confidential. Duty counsel should then garner information about the time of arrest, and whether the accused has private counsel. If the accused indicates that their lawyer is coming to conduct a bail hearing, the assistance of duty counsel may not be necessary. If the accused indicates that he or she would prefer to use duty counsel, duty counsel can then assist and continue the interview.

In the interview, duty counsel should ask the accused whether or not they are in need of medical assistance, if there is a history or current difficulties with alcohol or drug abuse, and whether there are psychiatric issues. Sometimes accused persons cannot or will not tell duty counsel the truth.

If an interpreter is needed, this should be clearly made known to the judge and an interpreter ordered. Finally, the accused must be informed of the general process of a bail hearing, so they can be prepared, hopefully minimizing unexpected outbursts.

The term “duty counsel” and “legal aid” are often used interchangeably by clients and Judges. Duty counsel do not have a “Duty counsel office” and duty counsel do not usually share information with other duty counsel or retained counsel, whether privately or by way of Legal Aid Certificate.

Judicial Interim Release

The burden remains on the prosecution to show the necessity for any of these orders. Section 515(2.01) states that 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 why any less onerous form of release would be inadequate.

Section 515(3) states that in making an order, the justice shall consider any relevant factors, including whether the offence involved the use or threat of violence, violence against an intimate partner, or whether the accused has previously been convicted of a criminal offence.

When a release order under subsection (2) is made, an accused can be released with any one or more of the following authorized conditions listed in subsection (4):

(a) Report to a peace officer or specified person at specified times;
(b) Remain within a specified territorial jurisdiction;
(c) Notify a peace officer or designated person of any change in address, employment, or occupation;
(d) Abstain from communicating, directly or indirectly with any victim, witness, or person specified in the order, except in accordance with specified conditions;

(e) Abstain from going to a location or area specified in the order, except in accordance with specified conditions;
(f) Deposit all passports as specified in the order;
(g) Comply with specified conditions that the justice considers necessary to ensure safety and security of any victim or witness to the offence; and
(h) Comply with any other reasonable conditions specified in the order that the justice considers desirable.

When a person has been arrested and has not been released by either the arresting police officer or the officer in charge, s 83.3(6) of the *Criminal Code* requires that the person be taken before a provincial court judge within 24 hours of their arrest (where a justice is available), or as soon as possible.

Unless the accused pleads guilty, when the accused appears before the judge, they are entitled to a judicial interim release pending trial. The outcome of the judicial interim release hearing (also described as a show cause hearing or bail hearing) will be either the accused remaining in custody until their trial or released in accordance with s 515.

In most circumstances, the onus will be on the Crown to justify detaining the accused. However, s 515(6) details some circumstances where the onus is on the accused to show why they *should not* be detained:

- Section 515(6)(a) places an onus on the accused to show cause as to why detention is not justified where they have been charged with certain indictable offences.
- Per s 515(6)(b), the same onus is on the accused where the offence is indictable and the accused is not ordinarily resident in Canada.
- Per s 515(6)(b.1), the onus is on the accused when the alleged offence involves the use, threat, or attempt of intimate partner violence and the accused has previously been convicted of an offence involving intimate partner violence.
- Per s 515 (6)(c), the onus is also on an accused charged with offences under s 145 (2) to (5) of the Code – failure to appear or failure to comply with an undertaking condition.
- Under s 515(6)(d) the onus arises where the accused has been charged with committing an offence punishable by imprisonment for life under sections 5 to 7 of the *Controlled Drugs and Substances Act*, or with conspiracy to commit such an offence.

Principle of Restraint

The recent amendments to the *Criminal Code* include an addition of s 493.1 which provides for the "principle of restraint" when making a decision under Part XVI.

Section 493.1 provides that the primary consideration is the release of the accused at the earliest reasonable opportunity and on the least onerous conditions that are appropriate in the circumstances. The peace officer, judge, or justice must also take into account the grounds set out in s 515(10) in making this determination.

Additionally, in deciding on interim release, section 493.2 also requires particular consideration to the circumstances of an Aboriginal accused and an accused who is a member of a group that has been disadvantaged and overrepresented in the criminal justice system.

The Crown must justify keeping the accused in custody under at least one of three grounds found in s 515(10):

515(10)(a): Ensuring court attendance

The first ground for detention is that detaining the accused is necessary in order to ensure his or her attendance in court. This includes the consideration of such factors as:

- Whether the accused has a fixed address;
- Their living arrangement;
- Whether the accused is employed;
- Their family or community roots in the area;
- Their previous criminal record;
- The proximity of close friends and relatives;
- Whether they have character witnesses;
- Whether they have breached a court order in the past;
- The personal history of the accused.

515(10)(b): Public safety

The concept of public safety includes the public's physical safety and the need for protection from property offences such as theft. Importantly, neither the gravity of the offence nor the fact that violence was involved should be, by themselves, conclusive against release. Public safety often can be assured through the release order preventing contact with certain individuals or places. The following factors can be considered under this ground:

- The circumstances of the offence. This can include the seriousness of the offence, whether violence was involved, the degree of planning or deliberation, the number of offences committed, and the extent of the accused's involvement;
- Whether the accused has any issues;
- The accused's criminal record;

- The likelihood of a lengthy sentence;
- The risk of harm to a victim;
- Whether the accused has any mental health or addictions issues.

515(10)(c): Confidence in the administration of justice

Section 515 (10)(c) creates a broader basis for detention than is found in either of the preceding subsections. This ground does not arise as frequently as the first two, but it is not a residual category that can only be considered when the first two have been rejected. Rather, it involves situations where bail should not be granted in order to maintain the public's confidence in the administration of justice. Section 515(10)(c) enumerates some of the circumstances that can be considered:

i. Strength of the prosecution's case;
ii. Gravity of the offence;
iii. Circumstances of the offence;
iv. The potential for a lengthy prison term, including the possibility of a three-year mandatory minimum for the use of a firearm.

Section 516 adjournments

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

In *The Law of Bail in Canada*, 2d ed. (Toronto: Carswell, 1999), Gary Trotter writes that, since time is of paramount concern when it comes to bail, it is essential that the hearing be conducted as soon as possible. This goal would be undercut if the court were permitted to delay matters by granting adjournments on its own initiative or at the request of the prosecution.

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

Adjournments may also be required if the hearing cannot be concluded on the same day on which it commences. The Crown does not, however, have an automatic right to a three-day adjournment. Valid reasons must be provided to the court.

Duty counsel should obtain and make a note of a client's instructions when they are seeking an adjournment.

Evidence at the bail hearing

Evidentiary matters at bail hearings are governed by section 518 of the Criminal Code. It holds that the judge is able to make inquiries of and concerning the accused. However, they cannot examine the accused regarding the offence. The only way an adverse party can cross-examine the accused about the offence is if the accused testifies about it first. Despite this disallowance, other witnesses may be asked to testify about the circumstances of the offence. However, these circumstances are only relevant to the extent that they show a reason as to why the accused should or should not be held in custody pending trial. Duty counsel conducting bail hearings should exercise caution that they do not inadvertently open up the issue by inquiring of the alleged facts of the offence from an accused. Duty counsel should argue that even with the different standard of a reverse-onus hearing there remains a presumption in favour of release.

The Crown is also able to lead evidence that the accused has previously been convicted of an offence, has been charged or is awaiting trial for another offence, or has previously committed an offence under s 145. They are also able to lead evidence relating to the circumstances of the offence, particularly as they relate to the probability of conviction.

The judge is specifically authorized under this section to be able to receive specific kinds of evidence beyond their usual authority to admit relevant evidence:

- They can take into consideration any relevant matters agreed upon by the prosecutor and the accused or his counsel.
- They can receive evidence obtained as a result of an interception of a private communication under and within the meaning of Part VI.
- They can take into consideration any evidence submitted regarding the need to ensure the safety or security of any victim of or witness to an offence.

Section 518(e) gives the judge the authority to receive and base their decision on evidence they consider "credible or trustworthy" in the circumstances of a given case.

In his text, *The Law of Bail in Canada, supra*, Gary Trotter writes that, due to the necessity of determining the issue of bail expeditiously, bail hearings reflect a certain level of procedural informality. This informality translates into the relaxation of certain formal rules regarding the presentation of evidence. Trotter states that the most important measure for assessing the admissibility of evidence at bail hearings is provided by the phrase "credible or trustworthy" in s 518 (1)(e).

This approach envisages several ways in which evidence may be challenged. It may be confronted directly, through cross-examination, or it may be attacked

collaterally by an accused who leads independent evidence that contradicts the evidence led by the prosecutor.

Bail hearing procedure

Given the fast-paced atmosphere of some bail courts, it is important that duty counsel understand the bail hearing procedure.

Duty counsel may act for any accused who does not have counsel, even if the accused appears in court without a duty counsel interview completed. It is appropriate to ask for the matter to recess for duty counsel to interview the accused. Duty counsel should then endeavour to negotiate a release and its applicable conditions. At the bail hearing, the court decides whether to release the accused by considering the three grounds set out in section 515(10) of the Criminal Code. Duty counsel does not record whether this is a Crown onus or reverse onus. Duty counsel should argue that even in a reverse-onus hearing there remains a presumption in favour of release.

Duty counsel must learn to anticipate the concerns of the court and address them with a strong plan of release. Conditions for release may include requiring that the accused:

- Abstain from alcohol;
- Respect curfews;
- Have no contact with a complainant or co-accused;
- Stay some distance from a certain address;
- Reside at a specific address;
- Attend counselling or treatment;
- Surrender a passport; and
- Report to the police station.

It is essential that duty counsel play close attention to these conditions. Often the accused is so eager to be released that they accept conditions of release, which are too onerous, unrealistic, and likely to be breached. For example, an accused could lose employment because of a strict curfew, or present release conditions may conflict with prior release conditions. Note that the terms of release should not be tantamount to a detention order.

If the accused's own counsel requests an adjournment and the Crown approaches duty counsel offering a consent release, efforts must be made to contact counsel. If counsel is unavailable, duty counsel should canvass the proposal with the accused to make sure the suggested conditions of release are acceptable. Duty counsel should then proceed as it is in the best interest of the accused to be released.

Duty counsel should remind anyone released subject to a "no-contact" Order, that only a Judge can change that condition even if the person protected by that Order wishes or initiates contact. This is a frequent misunderstanding that often results in new charges and custody resumed.

Duty counsel should also be aware of section 524 of the *Criminal Code*, which enables the Crown to conduct a revocation hearing if a subsequent charge is laid (in addition to the charges that are the subject of the bail hearing). However, notice must be provided to the accused of the Crown's intent to conduct a revocation hearing.

If bail is denied

If the accused is denied bail and wants to be released, they need to hire a private lawyer to conduct a bail review. A bail review is much more complicated than a bail hearing because several legal documents need to be prepared. As well, bail reviews take place in Superior Court and can take several days or weeks to be heard.

Duty counsel should be aware of the changes to bail contained in Bill C-75, which came into force in December 2019, and include:

(a) increasing the types of conditions police can impose on accused, to divert unnecessary matters from the courts and reduce the need for a bail hearing when one is not warranted;
(b) providing guidance to police on imposing reasonable, relevant and necessary conditions that are related to the offence and consistent with the principles of bail;
(c) legislating a "principle of restraint" for police and courts to ensure that release at the earliest opportunity is favoured over detention, that bail conditions are reasonable, relevant to the offence and necessary to ensure public safety, and that sureties are imposed only when less onerous forms of release are inadequate;
(d) to require that circumstances of Indigenous accused and of accused from vulnerable populations are considered at bail, in order to address the disproportionate impacts that the bail system has on these populations;
(e) the creation of a new process, the "judicial referral hearing", to streamline certain administration of justice offences out of the traditional court system where no harm has been caused to victims; and,
(f) the consolidation of various forms of police and judicial pre-trial release to modernize and simplify the release process.

Role of Duty Counsel in Diversion Programs

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

Diversion is available at both the pre-charge and post-charge stage. Some programs apply to a charge that has been laid but avoid a court appearance upon completion of the alternative measures.

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

Since successful completion results in the charges being withdrawn or stayed, the process does not result in a criminal record. Participation should be encouraged unless the accused denies responsibility for the offence or there is insufficient evidence to secure a conviction. However, the accused must be made aware of the options and potential consequences and must make the final decision. Some programs require the accused to admit responsibility (although not criminal responsibility), while others (e.g. mental health diversion), do not.

Although diversion is totally dependent on Crown discretion, duty counsel plays a vital, proactive role in identifying candidates. Even if the charge screening rejects diversion, duty counsel may succeed in persuading the Crown to offer diversion. For instance, a dated conviction for impaired driving should not prevent entry into a “shoplifting” diversion program.

Although serious offences such as break and enter are not normally diverted, duty counsel may stress that the criminal activity was minor, e.g.: that a young person charged with theft was alleged to have taken a bicycle from a garage.

Often an adjournment is required to consider factors such as the consent of the victim or restitution.

It is important that duty counsel maintain close contact with court workers in diversion programs, such as probation officers, mental health caseworkers, aboriginal court workers, and representatives of various agencies, whether or not they have an office at court. Service providers often must be put in contact with the Crown to facilitate the process.

Diversion benefits the accused by making the accused take greater responsibility for their actions while avoiding a criminal record. The increased use of diversion also results in cost savings to the court system as well as Legal Aid NB.

Diversion programs

The following is a list of some of the diversion/alternative measure programs available. Some programs result in an automatic withdrawal or staying of the charge upon entry. Others require proof of compliance, with or without a further court appearance. The development of new diversion initiatives with the approval of all stakeholders may be a useful activity for supervisory duty counsel.

Adult Alternative Measures Program

The Alternative Measures Program (AMP) is usually offered to adult first offenders charged with minor offences such as shoplifting (theft under $5,000), causing a disturbance or mischief. However, aggravating factors such as the degree of planning and sophistication, gang involvement etc., may preclude entry.

Section 717 of the Criminal Code allows for AMP when the accused is at least 18 years old, there is sufficient evidence that the accused committed the offence, the accused takes responsibility for the act, and AMP is in the best interests of the accused and not against the best interests of the victim and society. An adult can be referred to AMP at the pre-charge or post-charge stage in the proceedings.

The accused must sign an agreement acknowledging responsibility and identifying the course of action to be followed. Program co-ordinators will develop an appropriate plan for accountability and intervention at the community level. The participant may be required to perform a set number of hours of community service work, make restitution (e.g. replace a vandalized car door mirror), make a monetary donation to a charity, prepare a letter of apology, or attend counselling. When AMP is successfully completed, no charges will be laid in the pre-charge program or the charges will be withdrawn in the post-charge program.

The following offences are normally admitted into AMP (subject to change):

Offence	**Restrictions**
False statement of passport – s 57(2)	
Unlawful assembly – s 66	
Unauthorized possession of firearm – s 91(1)(a)	
Obstructing/resisting police officer – s 129	Discuss with Crown; Crown approval required
Public mischief – s 140	
Indecent acts – s 173(1)	

Causing a disturbance – s 175	
Disturbing religious worship – s 176(2), s 176(3)	
Trespassing at night – s 177	
Offensive/volatile substance – s 178	
Vagrancy – s 179	
Fail to watch; water skiing at night – s 250	
Uttering threats – s 264.1	
Assault – s 266	
Assault officer; resist arrest – s 270	
Theft – s 322 to 332, s 334(b)	
Take motor vehicle without owner's consent – s 335	
Theft; forgery credit card – s 342	
Unauthorized use of computer – s 342.1	
Unlawful possession of a device to commit s 342.1 – s 342.2	Discuss with Crown; Crown approval required
Break and enter – s 348	Under $2000 for business Crown approval required
Unlawfully in a dwelling house – s 349	Discuss with Crown; Crown approval required
Possession of property obtained by crime – s 354, 3 355(b)	Under $2000
False pretenses – s 362(2)(b)	Under $2000
Obtain food; lodging by fraud – s 364	
Pretend to practice witchcraft – s 365	
Forgery – s 366, s 367(1)	Under $2000
Utter forged document – s 368	Under $2000 if definable otherwise discuss with Crown and obtain approval
Fraud – s 380(1)(b)	Under $2000
Indecent/harassing telephone calls – s 372(2), s 372(3)	Except in domestic violence cases
Obtain transportation by fraud – s 393(3)	Under $5000
Personation with intent – s 403	
Mischief – s 430(3), 430(4), 430(5)	Under $5000 if definable otherwise discuss with Crown and obtain approval
False alarm of fire – s 437(b)	
Injure/endanger animals – s 445	
Cause unnecessary suffering to animals or birds – s 445.1	
Attempt/accessories – s 463(c), 463(d)	Related to offences in this list only
Counsel to commit an offence/offence not committed – s 464(b)	Related to offences in this list only
Conspiracy to commit summary conviction offence – s 465(1)(d)	Related to offences in this list only
Possession of a substance – CDSA s 4(4)(b)	

Diversion Program for Youth

Accused young persons and their parents are encouraged to contact duty counsel at the time of the charge by consulting duty counsel prior to the first court appearance. Duty counsel should assist the young person by discussing with the Crown if they would consider diversion.

The Extrajudicial Sanctions Program (EJS) is provided for under section 10 of the *Youth Criminal Justice Act* (YCJA). EJS is an option for youth between age 12 and 17 and it operates in the same way as AMP. EJS will be considered when an Extrajudicial Measure, such as a police caution or referral to a community program, is insufficient to hold the young person accountable.

The young person must consent to participate in the program. If the young person is younger than 16, parental consent is also required. The young person must accept responsibility for the act and complete the intervention plan in a timely manner.

Duty counsel can provide legal advice and representation throughout the diversion process. Even if the Crown has not offered diversion, duty counsel may be able to convince the Crown to reconsider.

As per s 4(c) and 4(d) of the YCJA, an offence committed by a young person will normally be admitted to the diversion program subject to the following restrictions:

- Extrajudicial measures should be used in all cases where they would be adequate to hold the young person accountable;
- Extrajudicial measures are presumed to be adequate to hold first-time, non-violent offenders accountable;
- Extrajudicial measures may be used if the young person had previously been dealt with by extrajudicial measures or has been found guilty of an offence;
- Extrajudicial measures will not be considered adequate to hold the young person accountable for a Serious Violent Offence in the commission of which a young person causes or attempts to cause serious bodily harm;
- Extrajudicial measures will not be considered adequate to hold the young person accountable for an impaired driving offence.

The *Youth Criminal Justice Act* gives increased impetus to the use of extrajudicial resolution of offences involving youths including community justice committees for pre-charge diversion.

As per public prosecution policy, the following offences are never considered for alternative measures when committed by a young person:

- First and second-degree murder (section 231);
- Murder reduced to manslaughter (section 232);
- Manslaughter (section 234);
- Attempt to commit murder (section 239); or

- Aggravated sexual assault (section 273).

A prior young offender record does not preclude the Crown from considering a young person for diversion, but the presumption in favour of diversion for first offenders does not apply. A prior EJS program entered into more than one year before the present matter does not preclude eligibility for admission into the program again.

Crown attorneys are familiar with offences that are expected to be diverted and the accused may be invited to enter the EJS program, in which case a stay of proceedings will be directed at the first court appearance.

The Crown should be canvassed to see if the views of the victim in relation to the EJS program are contained in the Crown brief, or whether the police are recommending the program.

Duty counsel should provide the Crown with information about the young person and the offence that may assist in determining the appropriateness of diversion. In some instances, an adjournment may be necessary to obtain information or make restitution.

The Crown must review and consider all requests for diversion even in cases where a negative determination has initially been made. New information or persuasion may result in an offer of admission to the EJS program.

Although admission to the EJS program often depends upon the exercise of Crown discretion, it is duty counsel's role to be proactive in recruiting candidates for admission to the program. Most candidates for admission to the program are better off taking part in diversion than they would be going through the normal court process.

In advising potential applicants to EJS, the following areas should be canvassed:

- Details of the offence including the right to full disclosure;
- Any prior record including prior EJS involvement and outstanding charges;
- The requirement of admission of responsibility;
- Right to retain counsel and availability of legal aid;
- Right to have a trial, including potential consequences;
- Types of alternative measures that may be imposed, such as a verbal or written apology, community service, restitution, charitable donation, counselling, etc.

Like AMP, the successful completion of youth diversion results in the charges being withdrawn.

Diversion of mentally disordered accused

When an accused is facing a minor charge resulting from a mental disorder, they may be referred to a person, service, or hospital to obtain treatment. A stay of proceedings is entered. This process bypasses the "fitness" or "not criminally responsible" provisions of the code for minor charges. The accused is not required to accept responsibility but must agree to the referral.

If a mental health caseworker is not available, duty counsel should contact the appropriate facility to obtain their consent.

Often the court uses the Mental Health Act to obtain admission or involuntary civil commitment to a psychiatric facility at which time the charge is often stayed.

Guilty Pleas

One of the main responsibilities of duty counsel is to advise and represent those who wish to enter a guilty plea. Duty counsel are often able to negotiate a fair disposition on an early guilty plea. The possibility of a plea should be canvassed with most unrepresented accused.

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

- The accused committed the act which constitutes the offence;
- The accused possessed the requisite mens rea;
- The Crown is in a position to prove the above beyond a reasonable doubt;
- There is no possible defence at trial;
- There are no defects in the information;
- There are no Charter arguments prior to trial (delay, warrantless search, right to counsel denied, etc.);
- There are no special pleas (autrefois acquit, autrefois convict) or defence of res judicata or multiple convictions.

If the accused is guilty of the offence but disputes aggravating factors, the Crown should be informed to determine whether a "sentencing hearing" is necessary to resolve the facts in dispute. If relevant facts are disputed, the judge either strikes the plea and sets a trial date or conducts a trial of the issue in dispute.

The timing of the plea can be important. The accused may wish to take steps beneficial to sentencing. For instance, the accused may wish to make restitution without a court order or may wish to obtain employment, enrol in school or register in an alcohol rehabilitation program.

It is important to consider that the sentence currently under discussion may not be available at a later date. Duty counsel should be aware of the sentencing patterns of each judge in the area. However, any request for an adjournment must have a reasonable basis.

Duty counsel should check to see if a charge approval has been completed. This statement of the Crown's position may not be definitive and should not be treated as inflexible. Duty counsel can provide additional information to the Crown which may result in a more favourable position.

- Often diversion may not be available, but a peace bond may be acceptable, so that a criminal record is still avoided.
- The Crown may accept a plea to a lesser included offence or agree to withdraw other charges in return for a guilty plea.
- The Crown may agree not to oppose a discharge or probation or may agree to a range of sentence or a specific sentence. However, the accused should always be informed that the judge is not bound by a joint submission.

Guilty plea instructions when a defence is possible

An accused may disclose a defence to a charge in discussions or a defence may be evident on the face of disclosure. Notwithstanding the advice of duty counsel, the accused may insist on pleading guilty "to get it over with." Duty counsel cannot assist the accused with this kind of plea. Quite often, the accused disagrees with the facts and the judge strikes the plea in any event. If the plea and sentencing occur separately, duty counsel may speak to sentence but should advise the court that duty counsel did not take part in the plea.

Guilty plea for represented accused

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

Guilty plea to a serious charge

Occasionally, an accused insists on entering a guilty plea to an offence that will attract a lengthy penitentiary term. Duty counsel should carefully explain the probable penalty to the accused. Where extensive preparation is required, duty

counsel should recommend an adjournment to allow for a private lawyer to be retained, or, for the accused to apply for legal aid.

If the accused insists on proceeding, duty counsel should obtain written instructions, and the court should be informed of the situation. The judge will likely adjourn sentencing in any event.

Sentencing

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

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

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

Often a pre-sentence report has been prepared by a probation officer. The accused must read the report prior to sentencing. If the accused disputes the report, duty counsel can insist upon the attendance of the probation officer who prepared the report.

Sentencing Principles

The principles that inform sentencing are contained sections 718 to 718.2 of the *Criminal Code*. Denunciation and deterrence are the two most significant. **Denunciation** refers to society's condemnation of the conduct of the offence, based on the idea that people should be punished for encroaching on society's basic code of values. A custodial sentence is not necessarily required to meet this goal.

Deterrence refers to the intention of sentencing to dissuade the offender and the public from committing an offence in the future. Deterring the offender being sentenced in the case at bar is known as "specific deterrence" and deterring the

general public from committing the offence is known as "general deterrence." Crimes that involve highly individualized facts, like a crime committed out of desperation or addiction are ones where general deterrence will not have much effect. Conversely, crimes motivated by profit or committed against people in a vulnerable class will be the target of general deterrence.

Rehabilitation of the offender must be considered together with general and specific deterrence. This is especially true of young offenders.

Section 718.1 holds that "a sentence must be **proportionate** to the gravity of the offence and the degree of responsibility of the offender." Sentencing is very individualized to the exact circumstances of the offence and the offender and should reflect the degree of moral culpability that exists. However, it is also important that similar crimes are punished with similar sentences. This is entrenched in s 718.2(b), which holds that "a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances."

A relevant component of the principle of proportionality is the **totality** principle, and is engaged when your client has been charged with multiple offences. This principle is codified in s 718.2(c) of the *Criminal Code*, holding that "where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh. In effect, this means that after a judge has calculated the sentence to be served for each offence, they must also look at what the total combined sentence (also known as the "global sentence") to make sure the total sentence imposed is not out of proportion to the gravity of the offences committed or the culpability of the offender.

When the offender has a criminal record, one of several principles may be engaged when determining sentence. The "step" principle refers to the idea that a sentence imposed on someone with prior convictions should not be disproportionate to what was imposed for those offences; rather it should be an incremental increase that is proportionate to the frequency of the repeated offence. This is to ensure that the offender is not being re-punished for their prior actions. The principle does not apply when the new offence is more serious than the prior one.

The "gap" principle is engaged when there is a long time period in between committing similar offences. It militates towards the offender receiving a sentence that is not proportionally higher than their previous sentence.

Mandatory Minimums and Maximum Penalties

Duty counsel should be mindful of the mandatory minimums and the maximum penalties specified in the *Criminal Code* for the relevant offence when preparing arguments on sentencing and negotiating with the Crown.

It should be noted that the recent amendments to the *Criminal Code* include an addition of s 718.3(8), pertaining to the maximum penalty for intimate partner violence (IPV) offences. In this subsection, the court has discretion to impose a term of imprisonment that is longer than the maximum term of imprisonment prescribed by the relevant offence if the accused has been previously convicted of an IPV offence. The term can be extended by either 5 years, 10 years, 14 years, or even up to life, depending on the prescribed maximum term.

Concurrent or Consecutive?

Sentences for multiple charges are either served concurrently or consecutively, based on a judicial assessment of when the crimes were committed and whether they were related. Concurrent sentences can be imposed when the offences arise out of the same criminal transaction. Rather, concurrent sentences can be imposed when there is a reasonably close nexus between the offences charged. This does not mean that the crimes must have been committed during the same moment or on the same day. Concurrent sentences mean that the offender serves their sentences for multiple crimes simultaneously, whereas consecutive sentences are served one after another. A judge, in sentencing an offender, can impose both concurrent and consecutive sentences.

Aggravating and Mitigating Factors

Certain factors surrounding the offence, the offender, and the victim can point towards justification of a lesser or greater sentence. Mitigating factors might include:

- An early guilty plea;
- Pre-trial incarceration (the total time in pre-trial custody is multiplied by 1.5 and subtracted from the global sentence);
- Lack of a criminal record;
- Cooperation with police;
- Whether the offender has made restitution;
- Youthfulness of the offender. This does not necessarily mean that the offender is under the age of majority – depending on the judge, somebody in their 20’s or 30’s could be considered youthful;
- Employment status;
- Conduct of the victim;
- Whether the offender has any mental health issues;
- Whether the offender is an addict, or whether the influence of drugs or alcohol played a role in the commission of the offence.

- In sentencing, whether for adult or youth matters, duty counsel should emphasize the Totality principle, guard against victim positions not properly contained in a Victim Impact Statement

Aggravating factors might include:

- The accused having a substantial criminal record;
- Whether violence or a weapon was used;
- Evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, gender identity or expression, or any other similar factor;
- The nature of the victim, including whether they were an intimate partner of the accused or under the age of 18;
- Whether the accused abused a position of trust or authority in committing the crime;
- Whether the crime had a significant impact on the victim;
- Whether the crime was committed for the benefit of a criminal organization or a terrorist group;
- Whether the crime was committed while the accused was on probation or a conditional sentence order;
- The prevalence of the offence in the community.

If a pre-sentence report has been prepared, it is paramount that you read it thoroughly to take note of any relevant aggravating or mitigating factors.

One of the key factors in successfully speaking to sentence is the formation of a "plan" with the accused. For instance, enrolment in a school, drug treatment program, or anger management program or obtaining a residence or employment may give the judge a reason to impose a lenient penalty.

A list of community outreach resources should be available in the duty counsel office, if possible.

Order authorizing the taking of bodily substances for forensic DNA analysis

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

Anciliary orders, including, but not restricted to DNA orders, should be reviewed and explained by duty counsel – and if discretionary, arguments can be made as to whether they should be ordered at all, or their terms.

Youth Court

Section 3(1)(b) of the *Youth Criminal Justice Act* states that:

> the criminal justice system for young persons must be separate from that of adults, must be based on the principle of diminished moral blameworthiness or culpability and must emphasize the following:
> - (i) rehabilitation and reintegration,
> - (ii) fair and proportionate accountability that is consistent with the greater dependency of young persons and their reduced level of maturity,
> - (iii) enhanced procedural protection to ensure that young persons are treated fairly and that their rights, including their right to privacy, are protected,
> - (iv) timely intervention that reinforces the link between the offending behaviour and its consequences, and
> - (v) the promptness and speed with which persons responsible for enforcing this Act must act, given young persons' perception of time;

Duty counsel should be aware of the unique sentencing provisions that apply to young offenders. Obtain a pre-sentence report if a period of incarceration is likely. This includes open custody.

Duty counsel should provide the court with the youth's date of birth, inform the court if a parent or guardian is present, and whether the child wishes to waive reading of the charges.

Alternative Measures Programs and/or diversion programs should be thoroughly canvassed (see above).

Often the Department of Social Development must be reminded of its responsibilities if the child has nowhere to live. Duty counsel might wish to contact the local office and report the information to the court.

Section 28.1 of the YCJA provides that a young person should not be held in custody or subject to conditions of release as a substitute for the appropriate social services, such as child protection or mental health.

Parent/child conflict

Section 25(8) of the *Youth Criminal Justice Act* holds "If it appears to a youth justice court judge or a justice that the interests of a young person and the interests of a parent are in conflict or that it would be in the best interests of the young person

to be represented by his or her own counsel, the judge or justice shall ensure that the young person is represented by counsel independent of the parent."

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

A significant portion of this interview should be conducted in the parents' absence to discuss the offence and ascertain the instructions of the young person. Duty counsel acts for the young person only.

Order for appointment of counsel

Section 25(4) and s 25(5) of the *Youth Criminal Justice Act* holds:

> (4) Where a young person at his trial or at a hearing or review referred to in subsection (3) wishes to obtain counsel but is unable to do so, the youth court before which the hearing, trial or review is held or the review board before which the review is held:
>
> (a) shall, where there is a legal aid or an assistance program available in the province where the hearing, trial or review is held, refer the young person to that program for the appointment of counsel; or
>
> (b) if no legal aid program or assistance program is available or the young person is unable to obtain counsel through the program, may, and on the request of the young person shall, direct that the young person be represented by counsel.
>
> (5) When a direction is made under paragraph (4)(b) in respect of a young person, the Attorney General shall appoint counsel, or cause counsel to be appointed, to represent the young person.

If the matter cannot be resolved by duty counsel, the young person should be advised to apply for legal aid or retain counsel privately. If the young person applies for legal aid and is refused and the matter cannot be resolved, duty counsel should advise the young person to request a section 4(b) order for the appointment of counsel.

Note that the accused must have applied for legal aid and been refused. If the reason for refusal is failure to provide information, an order will not be considered unless said information is not available to the young person (e.g. parental income when parents refuse to be assessed).

The judge should enter into an inquiry to determine whether to issue an order. Factors to be considered include whether the parents would assist and whether the child has his or her own source of income.

However, at present, all youthful offenders charged with criminal offences are issued a certificate at Legal Aid for full representation.

Special attention should be paid to the pre-conditions for custody set out in the Youth Criminal Justice Act, particularly regarding pre-conditions to a custodial sentence, which

(a) includes deferred custody
(b) do not include breaches of the same probation order, but of previous orders.

Duty counsel in youth court must be familiar with the entire Act, and s 39 in particular.

The limited use that can be made of youth court records must also be accounted for in both youth court and adult sentencings.

In sentencing, whether for adult or youth matters, duty counsel should

- emphasize the Totality principle and,
- guard against victim positions not properly contained in a Victim Impact Statement

Mental Health Issues

Where it is questionable whether an accused is fit to stand trial, the possibility of diversion must be fully canvassed. An involuntary admission to a mental health facility pursuant to the *Mental Health Act* coupled with a withdrawal of the criminal charges is often the best course of action.

The Crown may wish to obtain an assessment order pursuant to s 672.11 of the Criminal Code. The judge must complete Form 48 which specifies the reason for the assessment, whether or not the accused is to remain in custody, and the length of time (30 days maximum). Although the presumption is for out of custody assessments, bail often has not been determined.

Duty counsel should be aware that the primary purpose is observation rather than treatment. Also, a secure hospital setting is custodial and may result in a period of incarceration in excess of the appropriate penalty for the offence itself. Therefore, duty counsel should generally not consent to such a remand unless instructed by the accused.

The threshold level of fitness is extremely low and most individuals are found fit even if mentally ill. Duty counsel may be in a position to convince the court that the accused can in fact understand the nature or object of the proceedings, understand the possible consequences, and communicate with counsel at an early stage.

If a full hearing is ordered with potential dispositions involving the Review Board, private counsel should be retained.

If the accused is unable to complete a legal aid application, the area director may choose counsel or the judge may invoke section 678.24 of the Criminal Code and appoint counsel. The latter would result from a refusal of legal aid for financial reasons and a certificate is not issued.

What does "fit to stand trial" mean?

The Criminal Code contains the following definition of "unfit to stand trial" in s 2:

"unfit to stand trial" means unable on account of mental disorder to conduct a defence at any stage of the proceeding before a verdict is rendered or to instruct counsel to do so, and, in particular, unable to on account of mental disorder to

(a) understand the nature or object of the proceedings,
(b) understand the possible consequences of the proceedings, or
(c) communicate with counsel.

If at any point during the court proceedings the judge or justice has concerns about an accused's fitness to stand trial, the court can sign Form 48 and order a psychiatric assessment for the purposes of fitness. Some of the questions the psychiatrist asks the accused are:

- Does the accused know what they are charged with?
- Does the accused know what an oath is?
- Does the accused know the penalty for lying under oath?
- Does the accused know the purpose of a trial?
- Does the accused know the people who are in the courtroom and the role of the judge, Crown attorney, and defence/duty counsel?
- Does the accused know which pleas are available?
- Does the accused know the consequences of pleas and convictions on charges?

In certain cases, duty counsel may avoid the assessment by initially posing the above questions to the accused in court to illustrate that the accused is fit even though the facts of the case may be bizarre, and the accused suffers from mental illness.

After the accused has been assessed for the purpose of fitness, he or she returns to court and appears before the judge. The judge makes the final decision about whether the individual is fit to stand trial.

It is important to keep in mind that an individual's mental status can fluctuate greatly and can impact their fitness to stand trial. The issue of fitness can be tried at any point in the proceedings before a verdict is rendered. The judge is not bound by the opinion of a psychiatrist. It is not unusual for a psychiatrist to find the individual unfit and the judge to find the individual fit and vice versa.

An accused may be certifiable under the *Mental Health Act*, present with psychotic symptoms and still be fit to stand trial. The accused only needs a rudimentary understanding of the court process to be found fit to stand trial.

What happens if accused is found fit to stand trial?

If the individual is found fit to stand trial, he or she can then proceed with the regular court process. Even if found unfit, the trial can proceed if and when the accused becomes fit to stand trial.

What if accused is found unfit to stand trial?

If an individual is unfit to stand trial, there are a number of options available depending on the individual's circumstances. The goal of duty counsel is to find any possible means of releasing the individual from custody.

Some possible next steps for unfit individuals are as follows:

- In some situations, an individual may be given bail and released into the community so a mental health worker can work with the individual. In these situations, the pending charges are often minor, and the individual agrees to work with the mental health worker. In many situations, this has proved to be a successful alternative. The individual does not spend any more time in custody, there is no need to access a forensic bed, and quite often the individual completes mental health diversion successfully at a later date.
- If the individual is clearly unfit, the court may decide to adjourn the matter for a few days or a week. During this time, if the individual's state of unfitness was caused by substance abuse, they will have undergone detoxification by the next court date.
- If it is known that the individual has a psychiatric diagnosis, medication may be offered at the detention centre in the hope that this will resolve the fitness issue.

- The criteria for treatment orders are set out in sections 672.59-62 of the Criminal Code (after found unfit but prior to disposition). The forensic psychiatrist is required to testify and give evidence to the court about why a treatment order is appropriate. The treating facility must consent to accepting a treatment order and cannot keep the individual for longer than sixty days.
- If a full fitness hearing (e.g.: more than a 30-day assessment) is scheduled, duty counsel should not act. Even if the accused does not qualify for legal aid, counsel may be ordered by the Court pursuant to section 672.24.
- Duty counsel should not take part in disposition hearings or Review Board Hearings, as substantial preparation is required.
- If an accused is ultimately found unfit to stand trial, there will generally be an inquiry every two years to determine if there is sufficient evidence to put the accused on trial until an acquittal is entered.

Court ordered psychiatric assessments under the Mental Health Act

If an individual is fit to stand trial, but the court remains concerned about the individual's mental status, a psychiatric assessment may be ordered under provincial legislation to obtain a report on the accused's mental condition. The Crown or the defence may request this.

Services for Aboriginal People

When working with aboriginal people as clients, duty counsel should have an understanding of the legislation in both family and criminal law that relates specifically to aboriginal people. Further, duty counsel must recognize that the unique languages, cultural and social backgrounds of their aboriginal clients can have great relevance to the outcome and to the clients' understanding of the court proceeding. Finally, it is important that duty counsel is familiar with the services that are available in the local court and community to assist aboriginal people.

Duty counsel must be sensitive to the fact that many aboriginal people rely on hunting, trapping and fishing for their livelihood or survival. In firearms cases, if rifles are seized or prohibited, the accused loses his whole livelihood and food source. Duty counsel must recognize the severe impact that a firearms prohibition may have on an aboriginal client.

To many aboriginal people, the Canadian justice system is an alien process, operated by strangers in a fashion quite unlike the traditional aboriginal concepts of justice and healing. To a person from a remote community whose first language

is Mi'kmaq or Maliseet, being in custody can be a frightening and bewildering experience.

Conversely, an aboriginal person from an urban centre may have built up deep resentment toward the justice system and may feel it has put his or her life in a "revolving door" pattern of being constantly in and out of custody. In either situation, duty counsel must be familiar with the agencies and services that can assist them and their clients in effectively managing their case.

Gladue Considerations

On April 23, 1999, the Supreme Court of Canada released its decision in *R v Gladue* [1999] 1 S.C.R. 688. The decision provided the Supreme Court's first interpretation of s 718.2 (e) of the Criminal Code. The section, which was part of a comprehensive series of amendments made in 1996 to the sentencing law in Canada, says:

> 718.2 A court that imposes a sentence shall also take into consideration the following principles:
> (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

The court stated that these amendments represented a change in the way judges should approach the sentencing process (para 33). The court noted that Canada, compared to other countries, showed an overreliance on incarceration as a response to criminal activity. This was particularly the case with respect to aboriginal people.

If overreliance upon incarceration is a problem in the general population, it is of much greater concern in the sentencing of aboriginal people. After canvassing numerous studies, commissions and reports on aboriginal people and the criminal justice system, the court concluded:

> These findings cry out for recognition of the magnitude and gravity of the problem, and for responses to alleviate it. The figures are stark and reflect what may fairly be termed a crisis in the Canadian criminal justice system. The drastic overrepresentation of aboriginal peoples within both the Canadian prison population and the criminal justice system reveals a sad and pressing social problem. It is reasonable to assume that Parliament, in singling out aboriginal offenders for distinct sentencing treatment in s. 718.2(e), intended to attempt to redress this social problem to some degree. The provision may properly be seen as Parliament's direction to members of the judiciary to inquire into the causes of the problem and to endeavour to remedy it, to the extent that a remedy is possible through the sentencing process. (para 64).

The Supreme Court of Canada decision in *Gladue* stands as an important reminder for duty counsel to constantly be considering the sentencing provisions of the *Criminal Code* relating to aboriginal offenders as described at s 718.2(e). The disproportionate number of aboriginal persons in correctional facilities has forced the courts to consider the broad range of factors that bring many aboriginal people before the courts, and to respond with more creative sentencing options.

Duty counsel must be knowledgeable and informed of emerging aboriginal justice systems such as restorative justice, sentencing circles, and community accountability conferencing.

Duty counsel face unique issues relating to the availability of police, peacekeepers, relationships within the community amongst families, band council, chief and regular band members.