

LEGEND — NA = Not applicable L = Lawyer LA = Legal assistant ACTION TO BE CONSIDERED	NA	L	LA	DATE DUE	DATE DONE
<p style="text-align: center;">INTRODUCTION</p> <p>Purpose and currency of checklist. This checklist is designed to be used with the CLIENT IDENTIFICATION AND VERIFICATION PROCEDURE (A-1) checklist. This checklist is intended for use by defence counsel, but item 2.15 (preparation of defence submissions) is also a useful reference for Crown counsel. The checklist should also be used with the CRIMINAL PROCEDURE (C-1) checklist. This checklist is current to August 31, 2016.</p> <p>New developments:</p> <ul style="list-style-type: none"> • Evidence at bail hearings. In <i>R. v. Cheung</i>, 2016 BCCA 221 (Chambers), the judge discussed the process at bail hearings, which generally proceed by submissions, and held that, in order to require the Crown to call evidence at a bail hearing, the defence must make a clear and unequivocal challenge to a particular allegation or circumstance. The defence cannot “make a blanket challenge to every fibre of the Crown’s narrative” (para. 70). • Model order for bail in extradition appeals. In a Practice Note issued May 13, 2016, the Court of Appeal created a model order allowing for bail pending an appeal from committal to continue without a further application in chambers, should the Minister of Justice order the person sought surrendered. The granting of such an order is within the discretion of the judge hearing the application for bail pending an appeal from committal. <p>Of note:</p> <ul style="list-style-type: none"> • Articled students permitted to act as commissioners for taking affidavits. Effective September 1, 2015, articled students and temporary articled students are prescribed as persons who are commissioners for taking affidavits in British Columbia (B.C. Reg. 142/2015, made pursuant to s. 60(1) of the <i>Evidence Act</i>, R.S.B.C. 1996, c. 124). Principals remain responsible for students’ actions and will need to ensure that students understand the effect of acting as commissioner. • Code of Professional Conduct for British Columbia (the “BC Code”). In July 2015, rule 3.7-9 was amended to require that a lawyer promptly notify the client, other counsel, and the court or tribunal of the lawyer’s withdrawal from a file. • Law Society Rules. On July 1, 2015, revised and consolidated Law Society Rules came into effect. See www.lawsociety.bc.ca/page.cfm?cid=4089&t=Law-Society-Rules-2015. 					

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<p style="text-align: center;">CONTENTS</p> <ol style="list-style-type: none"> 1. Interview Client 2. Prepare for Bail Hearing 3. Attend Bail Hearing 4. After Bail Hearing 5. Variation of Bail Terms <p style="text-align: center;">CHECKLIST</p> <p>1. INTERVIEW CLIENT</p> <p>1.1 Confirm compliance with the Law Society Rules 3-98 to 3-109 on client identification and verification, and complete the CLIENT IDENTIFICATION AND VERIFICATION PROCEDURE (A-1) checklist. Collect the following additional information:</p> <p>.1 Personal information:</p> <ol style="list-style-type: none"> (a) Aboriginal status, considering principles set out in <i>R. v. Gladue</i>, [1999] 1 S.C.R. 688. <i>Criminal Code</i>, s. 718.2 (and in particular, s. 718.2(e)) sets out factors a judge must consider when setting bail for, or sentencing, an Aboriginal person (youth or adult). Judges must take into account that Aboriginal offenders face special circumstances (residential schools, poverty in the communities, FASD), and should consider all options other than jail. <p>Further information on Aboriginal law issues is available on the “Aboriginal Law” page in the Practice Points section of the Continuing Legal Education Society of British Columbia website (www.cle.bc.ca) and in other CLEBC publications.</p> <ol style="list-style-type: none"> (b) Citizenship and immigration status, with place and date of birth. (If the client was 12 to 17 years old at the time of the commission of the offence, refer also to the <i>Youth Criminal Justice Act</i>, S.C. 2002, c. 1 (the “YCJA”).) (c) Address(es) for the past 10 years, names of people the client lives with presently, and alternate means of contacting the client if he or she were to move (e.g., parents). (d) Education, including any current schooling or training, licences, or ticketed trade skills. (e) Employment history, including: <ol style="list-style-type: none"> (i) Current employment: employer’s name, address, and phone number (obtain permission to contact the employer); job title; length of employment with that employer; name of immediate supervisor; hours regularly worked; approximate income; typical duties; and future prospects. (ii) Previous employment: same details as in (i); reasons for leaving. (iii) If currently unemployed, employment prospects: likelihood that any prospective employer will hire the client. 					

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<p>(f) Family:</p> <ul style="list-style-type: none"> (i) Marital status: date and place of marriage; degree to which the spouse, partner and any children rely on the client financially or emotionally. (ii) Children: names, ages, sexes, and custodial status. (iii) Dependants: whether the client is under an obligation to pay maintenance; if so, whether the client is current with payments. (iv) Parents: names, addresses, and occupations of any parents still living; nature of the client’s relationship with parents. (v) Persons who raised the client, if not the client’s parents: same information as for parents in (iv). (vi) Siblings: ages, addresses, and occupations. (vii) For Aboriginal clients, consider whether the client or other family members are survivors of residential schools, have addictions, have FASD, or face other barriers that might have affected the client’s situation. <p>(g) Names, addresses, and occupations of friends, employers, or family members who will attest to the client’s good character.</p> <p>(h) Roots in the community, such as:</p> <ul style="list-style-type: none"> (i) Membership in clubs, participation in organized sports, etc. (ii) Financial roots (e.g., whether the client owns a home, has a business, has immovable assets). (iii) For Aboriginal clients: consider their connection to a First Nations community. <p>(i) The client’s future plans (e.g., education, career, marriage, family); whether there is any reason that the client needs to remain out of custody.</p> <p>(j) The client’s general behaviour and disposition, such as:</p> <ul style="list-style-type: none"> (i) Addiction to alcohol or drugs or participation in any ongoing treatment program. (ii) Propensity for violence; if so, whether the violence is associated with alcohol or drugs. <p>(k) State of health (e.g., whether the client has HIV, diabetes, or any condition that could be affected by potential custody).</p> <p>(l) Whether the client possesses any firearms or other specified items that he or she may be required to surrender pursuant to <i>Criminal Code</i>, s. 515(4.1), and what arrangements can be made for their surrender. (For Aboriginal clients, consider if there is an Aboriginal right to hunt that should be raised.)</p> <p>.2 Raising bail:</p> <ul style="list-style-type: none"> (a) Client’s financial circumstances. (b) Names, addresses, and phone numbers of possible sureties. (c) Other sources of funds for raising cash bail, including an employer or family members. <p>.3 Pre-existing charge(s) and number of appearances to date. Review the particulars provided by the Crown.</p>					

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<p>.4 Outstanding charge(s):</p> <ul style="list-style-type: none"> (a) Details, including details of the arrest and any time in custody. (b) Details regarding bail. If the client is presently on bail, find out: <ul style="list-style-type: none"> (i) Where and when it was posted; who posted it. (ii) The form of bail. (iii) The terms of bail. (iv) Whether there have been any breaches of bail conditions; if so, the reasons. Note: under s. 515(6), an allegation of the commission of an indictable (including hybrid) offence while the client is on bail for an indictable (including hybrid) offence results in a reverse onus for release. <p>.5 Criminal record:</p> <ul style="list-style-type: none"> (a) Accuracy of the Crown’s information regarding: offences, places, dates, penalties (including convictions recorded in CPIC or provincial government data banks—sometimes these systems contain incorrect information, or provide information on individuals with the same or similar names). (b) Discuss the circumstances of the offences, especially any mitigating circumstances. (For Aboriginal clients, find out if <i>Gladue</i> principles were considered at previous sentencing.) (c) Discuss any breaches of probation or parole, escapes, failures to appear in court, and note why this will not happen again. (d) Whether the client is in prison now; if so, the release date. (e) Whether the client is on probation or parole now; if so, the expiry date. <p>1.2 Advise the client on the likelihood and type of bail; discuss willingness and ability to comply with possible terms of release (e.g., no-contact orders, area restrictions, curfews, abstention from alcohol or drugs).</p> <p>1.3 For Aboriginal clients, consider the importance of having a plan for release into the community that addresses the unique circumstances of an Aboriginal client, including views of the community, elders, victim, and family members.</p> <p>1.4 Send a letter confirming your retainer, instructions from the client, and instructions to the client. See s. 3.6 of the <i>Code of Professional Conduct for British Columbia</i> (the “BC Code”) for the rules regarding reasonable fees and disbursements. If you are acting under a “limited scope retainer” (a defined term in the <i>BC Code</i>), you must advise the client about the nature, extent, and scope of the services that you can provide and must confirm in writing as soon as practicable what services will be provided. See s. 3.6 of the <i>BC Code</i> for the rules regarding reasonable fees and disbursements, and commentary [1] to rule 3.6-3 regarding the duty of candour owed to clients respecting fees and other charges. Note Law Society Rules 3-59 and 3-70 regarding cash transactions: Rule 3-59 places restrictions on all cash transactions and regulates the circumstances in which a lawyer can accept \$7,500 or more in respect of any one client matter or transaction. There is no limit on cash received for a retainer commensurate with the legal services to be provided. Rule 3-70 contains requirements for recording cash transactions.</p>					

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<p>2. PREPARE FOR BAIL HEARING</p> <p>2.1 Determine the forum of the bail hearing, whether before a judicial justice of the peace (e.g., at night or on the weekend) or before a judge. Under s. 522, if it is a <i>Criminal Code</i>, s. 469 offence, bail hearings can only be held in Supreme Court. In this latter case, advise the client that bail is cancelled on the finding of guilt on such an indictment, even for a lesser or included charge.</p> <p>2.2 Confirm that a bail hearing will actually be held. The client might prefer to remain in custody, so as to delay the bail hearing and improve the chances for release (to set up treatment, arrange cash or surety, or obtain a pre-bail <i>Gladue</i> report, if appropriate). The Crown might apply for a delay of the bail hearing under <i>Criminal Code</i>, s. 516(1). In either case, the Crown may apply under s. 516(2) for an order preventing contact with named persons. Advise the client whether such an order has been made, and if it has, explain the possible consequences of a breach of the order.</p> <p>2.3 Determine whether it might be in the client’s interest to avoid a bail hearing, with a view to the effect on sentencing, if it is likely that a detention order will be made and that the court will state that the order is primarily due to the client’s record, or if the client is facing a bail hearing pursuant to a s. 524 warrant, and a detention order is likely. <i>R. v. Vinepal</i>, 2015 BCCA 349 held that an accused who consents to remain in custody without a bail cancellation hearing, after arrest under s. 524(2) or (3), is not “detained in custody” pursuant to s. 524(4) and (8) and is thus not barred from receiving enhanced credit for that time in custody when sentenced.</p> <p>2.4 Discuss with the Crown whether they are proceeding under <i>Criminal Code</i>, s. 515(10)(a) (to ensure attendance in court), s. 515(10)(b) (to protect the public), or s. 515(10)(c) (to maintain confidence in the administration of justice), or on any combination of the above. Attempt to get an agreement on:</p> <ol style="list-style-type: none"> .1 Whether the Crown will be showing cause, and to what extent. If necessary, suggest terms which may address Crown concerns and avoid the need for detention. .2 What information, if any, regarding the offence and the client will be put in evidence. .3 The extent of prior offences the Crown will be alleging, including any offences that may appear in provincial data banks or systems (e.g., Corrections, ICBC—Driving Record, JUSTIN, CORNET), but are not recorded on CPIC. .4 Whether the Crown is proceeding summarily or by indictment for hybrid offences. .5 Whether there are “victims” whose safety and security will need to be addressed by the bail court under the new <i>Criminal Code</i> provision in s. 515(13). .6 Mutually agreeable bail terms. <p>2.5 If the client is a young person, consider the special provisions of the <i>YCJA</i>, ss. 28 to 33, paying special attention to s. 29(1), which states that detention cannot be ordered as a substitute for caregiving or other social purposes, and s. 29(2), which sets out the conditions for detaining a young person, including that the charge is for a serious offence, or the young person has a history of offences, or that conditional release is not appropriate.</p>					

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<p>.1 Determine if there is any resource available as an alternative to custody (e.g., PLEA home, foster placement, group home).</p> <p>.2 Determine if there is a responsible person who could assume care of the young person if so ordered by the court as an alternative to custody (<i>YCJA</i>, s. 31).</p> <p>2.6 Contact potential sureties:</p> <p>.1 Advise them that you represent the client who has asked you to make the request.</p> <p>.2 Ascertain the type of security or maximum amount of cash that each surety could provide.</p> <p>.3 Advise them that they may have to provide specific proof of ownership of property.</p> <p>.4 Advise them of possible proceedings if the client breaches bail conditions.</p> <p>.5 Under <i>BC Code</i> rule 7.2-9 you must urge an unrepresented person to obtain independent legal representation. See the rule for more information.</p> <p>2.7 Where the client is on parole or probation, consult authorities regarding whether the client has complied with the conditions.</p> <p>2.8 Interview potential references, witnesses, and people who might provide release plans (e.g., employers, social workers, doctors, psychiatrists, relatives, staff at group homes, native court workers, elders, Chief, Band Council, First Nation community members, bail supervisors, probation or parole officers, or service organization representatives).</p> <p>2.9 Contact possible accommodation, employment, or social assistance agencies, drug or alcohol recovery centres, etc.</p> <p>2.10 Where possible, confirm information provided by the client (e.g., work situation, availability of treatment facility or a stable residence).</p> <p>2.11 Make a preliminary evaluation of the case. Consider the facts, law, the character of the client, and whether this is a reverse onus situation.</p> <p>2.12 Witnesses:</p> <p>.1 Decide whether to call any witnesses. (Note: this is done infrequently, especially at the Provincial Court level; it generally means the hearing will be adjourned. Any information defence witnesses reveal may be used later.)</p> <p>.2 Prepare witnesses for hearing (e.g., discuss courtroom procedure, how to answer questions, etc.).</p> <p>.3 Advise them of the hearing date, time, and place.</p> <p>.4 Advise the court clerk of any need for a translator.</p> <p>.5 Note <i>BC Code</i> rule 3.2-6 and commentaries [2] to [4] regarding a prohibition against inducement for withdrawal of criminal or regulatory proceedings. In particular, see commentary [4] with regard to when the complainant is unrepresented; as well, see rule 7.2-9, the general rule about dealing with an unrepresented person.</p>					

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<p>2.13 If facts will be alleged by the Crown, be ready to dispute any specific allegation with which the client disagrees. Note, however, that any questions as to the credibility of witnesses are left for the trial judge to determine, not the judge on the bail hearing.</p> <p>2.14 Prepare the client, discussing what will happen and what to do and say (generally it is advisable that the client speak only through counsel).</p> <p>2.15 Prepare defence submissions, taking into consideration probable Crown submissions:</p> <ol style="list-style-type: none"> .1 Refer to <i>Criminal Code</i> Part XVI (especially s. 515(10)), for the factors a judge can take into account in determining whether or not to grant release. .2 For Aboriginal clients, reference circumstances that must be considered when addressing the potential for loss of liberty of an Aboriginal client (see item 1.1.1(a)). .3 Summarize the client’s background, present circumstances, and future plans. .4 Consider s. 515(10)(a): detention to ensure attendance in court, and assess: <ol style="list-style-type: none"> (a) The probability the client will attend for court. (b) Age, education, etc. (c) Present environment and ties to the community: citizenship, permanency of client’s residence, family ties, employment, financial roots and assets in the community. (d) For an Aboriginal client, consider ties to the Aboriginal community. Consider the views of elders, Chief and Council, or First Nations community members. (There need not be ties to a First Nations community in order for Aboriginal considerations established under <i>Gladue</i> to apply.) (e) Whether the client faces a substantial jail term if convicted of the offence charged. (f) Previous criminal convictions and outstanding charges of “failure to attend”; whether the client has lived up to conditions of probation or parole; any failures to appear in court. (g) Circumstances of the arrest, such as: <ol style="list-style-type: none"> (i) Whether the client was fleeing prosecution elsewhere. (ii) Whether the client surrendered; if not, whether the client gave a reasonable explanation for the failure to do so. (h) Distance from the client’s residence to court (if beyond 200 km, cash bail will likely be imposed under <i>Criminal Code</i>, s. 515(2)(e)). .5 Consider s. 515(10)(b): detention to protect the public, and assess: <ol style="list-style-type: none"> (a) The likelihood that the client will reoffend. (b) The client’s criminal record, particularly the general trend of offences, the length of time since the last offence, and the number of convictions for breaches of court orders. 					

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<p>(c) The client’s behaviour when released on prior occasions.</p> <p>(d) The client’s peer group (e.g., whether the client is a leader, the influence the client has on other persons, and the influence others have on the client).</p> <p>(e) The nature of the alleged offences (and how they relate to past offences), e.g.:</p> <p>(i) Violence.</p> <p>(ii) Whether related to alcohol or drugs, and whether the client is less likely to reoffend if treatment is sought.</p> <p>(iii) Victims (e.g., relatives or strangers, and their relative vulnerability, including due to age).</p> <p>(iv) Whether children are involved. The safety of any victim or witness or other person related to the offence who is under 18 years old is a specific consideration for the court.</p> <p>(v) Property damage or loss: amount; whether the property was recovered and, if so, the circumstances; restitution.</p> <p>(f) Whether the alleged offence involved planning.</p> <p>(g) Whether the client has been co-operative with the police investigation.</p> <p>(h) Whether the police investigation is complete.</p> <p>(i) The offence and the community, for example:</p> <p>(i) Attitude of the community to the type of offence and the method by which the client allegedly committed the offence.</p> <p>(ii) Number of similar offences in the community.</p> <p>(j) Possible consequences of the client’s release:</p> <p>(i) Distribution of counterfeit money, drugs, stolen property, etc.</p> <p>(ii) Commission of violent crime.</p> <p>(k) Character witnesses.</p> <p>.6 Consider s. 515(10)(c): detention to maintain confidence in the administration of justice. See <i>R. v. St-Cloud</i>, 2015 SCC 27, with respect to the proper analysis under s. 515(10)(c). Assess:</p> <p>(a) The apparent strength of the Crown’s case, including whether the identification evidence is weak, the client has an alibi, or the case is circumstantial.</p> <p>(b) The gravity of the alleged offence.</p> <p>(c) The circumstances surrounding the commission of the alleged offence, including whether a firearm was used.</p> <p>(d) The potential for a lengthy term of imprisonment.</p> <p>(e) Whether a minimum sentence of three years or more is required for an alleged offence with a firearm.</p> <p>(f) If the crime is serious or very violent, if there is overwhelming evidence against the accused, and if the victim or victims were vulnerable, pre-trial detention will usually be ordered.</p> <p>.7 Availability and financial limits of sureties.</p>					

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<p>.8 Position on appropriate bail, considering alternatives (undertaking, recognizance, conditions, sureties).</p> <p>2.16 Consider other factors:</p> <p>.1 The proposed sentence.</p> <p>.2 Whether an early trial date is available.</p> <p>.3 Whether a reverse onus is involved (see s. 515(6)).</p> <p>.4 <i>Charter of Rights and Freedoms</i>, ss. 9, 10(c), and 11(e).</p> <p>.5 Aboriginal identity or status of the client—<i>Gladue</i> considerations.</p> <p>3. ATTEND BAIL HEARING</p> <p>3.1 Determine whether the client’s bail hearing will be conducted using video links, and, if so, where you can most effectively attend to conduct the hearing.</p> <p>3.2 Ask for a non-publication order (<i>Criminal Code</i>, s. 517).</p> <p>3.3 Decide whether to cross-examine Crown witnesses or respond to circumstances alleged by the Crown, or whether to call any witnesses. (See item 2.12.1.)</p> <p>3.4 Make submissions. (See item 2.15.)</p> <p>3.5 Note the terms of bail if granted by the court.</p> <p>4. AFTER BAIL HEARING</p> <p>4.1 If bail is set:</p> <p>.1 Check bail documents. Ask the court registry for a copy of the release order to confirm the terms of release.</p> <p>.2 Attend in lockup when the client signs an undertaking or recognizance and explain its legal effect.</p> <p>.3 Advise the client of bail conditions and explain them; explain the consequences of failure to appear or of failure to keep the peace, etc, including the impact that s. 524 detention orders have on a sentence.</p> <p>.4 Advise the client in writing of the next court appearance.</p> <p>.5 Advise the client in writing of the next office appointment, and what to bring (e.g., breathalyzer certificate, chronology of events).</p> <p>.6 Advise the client of the effect of committing offences while on bail.</p> <p>.7 Follow up with a letter to the client covering the matters set out above.</p> <p>.8 Diarize dates.</p> <p>4.2 If bail is not set:</p> <p>.1 Attend in lockup and advise the client of any reasons why bail was not granted.</p> <p>.2 Discuss whether the client should apply for a review; discuss the procedure and the time and cost involved.</p> <p>.3 Offer to contact the client’s family, employer, etc.</p>					

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<p>.4 Advise the client of the next court appearance, and discuss whether an early preliminary hearing or trial date is desirable.</p> <p>.5 Arrange to attend remand centre to discuss the case with the client.</p> <p>.6 Follow up with a letter.</p> <p>.7 Diarize dates, including the date of automatic bail review.</p> <p>4.3 Advise the client if an order has been made under s. 515(12) or s. 516(2). If so, explain the possible consequences of a breach of such an order.</p> <p>4.4 Confirm compliance with the Law Society Rules on client identification and verification (see item 1.1).</p>					
<p>5. VARIATION OF BAIL TERMS</p>					
<p>5.1 If the client wishes or needs any bail term varied (e.g., curfew, “no contact”):</p> <p>.1 Determine why the variation is needed or desired. Consider obtaining third-party confirmation of the reason or need for variation (e.g., the employer might confirm that work hours require a curfew to be varied).</p> <p>.2 Before speaking to any party who is the subject of a “no contact” term, consider whether doing so might constitute indirect contact by the client.</p> <p>.3 If the Crown is consenting to a bail variation in Provincial Court, a bail variation by consent form can potentially be used, so there is no need for an application, but the client, and sureties, if any, will need to attend to sign the changed bail documents.</p> <p>.4 Determine the appropriate court in which to make your application, taking into account whether the application is made as of right pursuant to s. 499(3), with the Crown’s consent in Provincial Court, or by way of review application in Supreme Court.</p> <p>.5 Determine whether the Crown will consent to an application being heard in Provincial Court, even if the Crown opposes the variation.</p> <p>.6 Gather any available material to support the application (e.g., employer’s letter, information from bail supervisor, consent of surety, information relating to any party wishing a “no contact” term deleted).</p> <p>.7 Ensure that the client and any surety attend court on the date of the application, in order to sign any amended bail document.</p> <p>.8 Obtain copies of any amended bail document for your file and your client.</p> <p>.9 Advise the client to carry a copy of any amended bail document at all times, in order to show police or other authorities evidence of the amendments, if necessary.</p>					