Provincial Court of Nova Scotia

Judicial Referral Hearings

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Background and Overview

Administration of Justice (AOJ) offences affect profoundly the efficient functioning of our justice system by increasing the number of offences before the Courts. AOJ offences have also contributed to an increase in pre-trial detention (remands) and the overrepresentation of Indigenous, African Nova Scotians, and individuals from vulnerable populations.

On June 21, 2019, Bill C-75 was enacted to, among other things, provide a process to help Police and Courts deal more effectively with bail related AOJ offences thereby reducing the number of charges. The most common include failing to comply with conditions (i.e., breaking a curfew, drinking) and failing to attend Court. **When the breach has not caused harm to a victim**, including physical, psychological, or financial harm (e.g., property damage or economic loss), the Police and the Crown can direct these breaches to a judicial referral hearing (JRH) as an alternative to charging the accused with an AOJ offence.

A JRH under section 523.1 of the *Criminal Code* (the "Code") allows a Judge to respond to an AOJ offence without additional criminal charges being laid. If a Judge is satisfied that the accused failed to comply with some order but did not thereby cause harm, they can:

1. Take no action.
2. Cancel the previous document and make a new release order; or
3. Order the accused detained in custody pending trial.

The new process does not impact current Police powers to lay charges. Rather, it enhances Police and Crown discretion to allow them, where appropriate, to compel an accused to appear at a JRH as an alternative to laying charges.

Since a JRH involves the review of the conditions imposed after an accused is charged with an offence, there is no conviction, and it does not appear on a criminal record following a hearing.

If an accused does not attend their JRH, they cannot be charged with the offence of failure to appear, but the Police have the choice of not pursuing the matter; offering the accused another hearing; or charging the accused for the breach what was to be addressed at the JRH.

Practice Standards and Process

Background

In 2019, the principle of restraint was codified in Section 493.1, and the JRH provision in Section 523.1 was introduced. As found in *R v Zora, 2020 SCC 14* at paragraph 27, these revisions to Part XVI of the Code were intended to address the over-criminalization of minor bail breaches, and to reduce the burden on already strained judicial resources.

Moreover, breach offences disproportionately affect the most marginalized persons in the justice system. At paragraph 57 in *Zora*, the Court recognized that typical bail conditions have a disproportionally negative impact upon Indigenous people and other vulnerable marginalized people who struggle with substance use, poverty, and mental health challenges.

Despite these noble intentions of Parliament, there has been little uptake in the new process in Nova Scotia, as elsewhere. As Judge Atwood held in *R v Morrison*, 2021 NSPC 39, "*it is unfortunate that these provisions [523.1], which would help to reduce the numbers of minor cases getting added to already burgeoning dockets, are being under-used. Or not used at all*."

Law

Section 493.1 of the Code states that:

> **Principle of restraint**
> 493.1 In making a decision under this Part, a peace officer, justice or judge shall give primary consideration to the release of the accused at the earliest reasonable opportunity and on the least onerous conditions that are appropriate in the circumstances, including conditions that are reasonably practicable for the accused to comply with, while taking into account the grounds referred to in subsection 498(1.1) or 515(10), as the case may be.

Section 496 of the Code states that:

> **Appearance notice for judicial referral hearing**
> 496 If a peace officer has reasonable grounds to believe that a person has failed to comply with a summons, appearance notice, undertaking or release order or to attend court as required and that the failure did not cause a victim physical or emotional harm, property damage or economic loss, the peace officer may, without laying a charge, issue an appearance notice to the person to appear at a judicial referral hearing under section 523.1.

Section 523.1 of the Code states that:

Judicial referral hearing
523.1 (1) When an accused appears before a justice in any of the circumstances described in subsection (2), the justice shall

(a) if the accused was released from custody under an order made under subsection 522(3) by a judge of the superior court of criminal jurisdiction of any province, order that the accused appear before a judge of that court so that the judge may hear the matter; or

(b) in any other case, hear the matter.

Circumstances
(2) The circumstances referred to in subsection (1) are the following:

(a) An appearance notice has been issued to the accused for failing to comply with a summons, appearance notice, undertaking or release order or to attend court as required and the prosecutor seeks a decision under this section; or

(b) A charge has been laid against the accused for the contravention referred to in paragraph (a) and the prosecutor seeks a decision under this section.

Powers — Judge or Justice
(3) If the judge or justice who hears the matter is satisfied that the accused failed to comply with a summons, appearance notice, undertaking or release order or to attend court as required and that the failure did not cause a victim physical or emotional harm, property damage or economic loss, the judge or justice shall review any conditions of release that have been imposed on the accused and may, as the case may be,

(a) take no action;

(b) cancel any other summons, appearance notice, undertaking or release order in respect of the accused and, as the case may be,

(i) make a release order under section 515, or

(ii) if the prosecutor shows cause why the detention of the accused in custody is justified under subsection 515(10), make an order that the accused be detained in custody until the accused is dealt with

according to law and if so detained, the judge or justice shall include in the record a statement of the judge's or justice's reasons for making the order; or

(c) remand the accused to custody for the purposes of the *Identification of Criminals Act.*

Dismissal of charge
(4) If a charge has been laid against the accused for the failure referred to in paragraph (2)(a) and the judge or justice, as the case may be, makes a decision under subsection (3), the judge or justice shall also dismiss that charge.

No information or indictment
(5) If the judge or justice makes a decision under subsection (3), no information may be laid nor indictment be preferred against the accused for the failure referred to in paragraph (2)(a).

Process and Standards

1. The discretion to refer a breach to a Section 523.1 JRH is within the purview of the Police[1] and the Crown.[2] However, in both cases, the Crown must want to 'seek a decision' through a JRH.[3] The Court does not have statutory power to make this referral under the provision, and the Police cannot unilaterally make the referral and should only do so if the Crown seeks a decision on the breach through the JRH.[4] The Police are encouraged to contact the Crown before issuing an appearance notice for a JRH to ascertain whether the Crown will want to seek a decision under this section.

2. While the Court does not have power to order a JRH, the Court can and should, where appropriate, make inquires of the Crown upon arraignment, or at any other stage prior to disposition, as to whether the Crown may wish to seek a decision under section 523.1. Factors that may guide the Court's inquiry are breaches that appear trivial, duplicitous or may not *prima facie* have caused a victim physical or emotional harm, property damage or economic loss.

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[1] Section 523.1(2) (a) *states that the Police may refer to a JRH when: "an appearance notice has been issued to the accused for failing to comply with a summons, appearance notice, undertaking or release order or to attend court as required and the prosecutor seeks a decision under this section."*

[2] Although some cases have held the discretion lies only with the Crown. Per Judge Flewelling in *R. v. Walkus*, 2020 BCPC 242, at para. 36: "[…] *the judicial referral process for release orders, although the s. 523.1 hearing is commenced only upon the request of a prosecutor*."

[3] While Section 523.1(2) (a) permits the Police to initiate the referral, it must still be with the support of the Crown. Again, see footnote 5 above.

[4] Supra, note 2, note 3.

3. If the Crown does not seek a decision through a JRH, the residual discretion of the Police lies in the charging decision, as it always has, applying several factors.[5]

4. Once the Crown decides to seek a decision through a JRH, the procedure and standards are:

a. The Crown will consult with Defence counsel about whether the accused is willing to admit the breach and, if yes, what (if any) change of release conditions the Crown may seek.

b. If the accused admits the breach, the Crown will schedule a JRH hearing. If there is agreement on release conditions, Counsel will present new conditions to the Court. If there is no agreement, the accused may still admit the breach but contest the change in conditions.

c. If the accused does NOT admit the breach, the Crown may still proceed to a JRH hearing and seek a decision.

d. If a charge is laid and the accused is held for the hearing, the JRH becomes dual process. It constitutes both the JRH hearing and a judicial interim release (bail) hearing.

e. The Crown must establish the breach on the balance of probabilities.[6] Section 523.1(3) states that a Judge or Justice must be *"satisfied that the accused failed to comply […]."* This test implies the civil standard of proof, which is consistent with the standard applied in bail generally, bail review hearings,[7] and Conditional Sentence Order (CSO) breach hearings.[8]

f. Reference to a JRH does NOT invoke the reverse onus provisions of section 515(6), and the burden of proof is on the Crown. Where the accused is detained by the Police on the breach and a JRH is held, once the Court is *satisfied that the accused failed to comply*, the reverse onus of 515(6) does NOT operate and the

[5] Such as: the duration of breach, the location of the breach, the purpose of breach, other circumstances of the breach, the wording of the bail condition itself, failure to seek a bail variation, any evidence, or lack of evidence, regarding his intentions at the time of the breach, and the seriousness of the underlying charges (See: *R. v. Thompson*, 2021 ONCJ 361 at para. 19).

[6] *Infra*, note 7 and note 9.

[7] The standard of proof at bail is 'balance of probabilities.' See Hon. G. Trotter, *The Law of Bail in Canada*, 3rd ed. (Toronto: Thomson Reuters, 2022), §5.4 and is the same on bail review, see: *R. v. Chia*, 2012 BCSC 2099, at para. 4: "*On the bail review, the onus is on the Defence. The standard of proof is a balance of probabilities*."

[8] Section 742.6(9) of the Code

Crown still has the onus[9] to demonstrate, on a balance of probabilities,[10] that the accused's detention, as outlined in s. 515(10), is justified, on one or more of the following grounds:

(1) to ensure attendance at court.

(2) where detention is necessary for the protection and safety of the public; and/or

(3) where detention is necessary to maintain confidence in the administration of justice.

g. The rules of evidence are that of the judicial interim release hearing, which is: evidence can be considered if it is *credible or trustworthy* as provided in s. 518(1)(e).

h. The Crown must establish, on a balance of probabilities, that the accused committed the *actus reus* of the breach and had the subjective *mens rea* of the breach.[11]

i. Once the hearing is held, the Judge or Justice will decide if they 'are satisfied' that the breach has occurred. If satisfied, the parties to the proceedings will make submissions on whether the Court should:

(a) take no action.

(b) cancel any other summons, appearance notice, undertaking or release order in respect of the accused and (i) make a new release order under section 515, or (ii) make an order that the accused be detained in custody and, if so detained, the Judge or Justice shall include in the record a statement of the Judge's or Justice's reasons for making the order; or

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[9] Section 523.1(3)(b)(ii) states, in part, that if the Judge is satisfied that a breach has occurred, then: "[…] *the prosecutor[must] show[s] cause why the detention of the accused in custody is justified under subsection 515(10), make an order that the accused be detained in custody* […]."

[10] *R. v. Jacquard*, 1993 NSCA 135; *R. v. Sanchez*, 1998 NSCA 6 at para. 3 citing *R. v. Bray* (1983), 1983 CanLII 1981 (ONCA); *R. v. Gibb*, 177 Sask R 318 (SKCA) at para. 3; *R. v Arnakallak*, 2013 NUCJ 29 at para. 141; *R. v. Bonin*, 2006 NSSC 354 at para. 6.

[11] In *Zora,* supra, the SCC finally settled that the *mens rea* for s. 145(3) is subjective. As the Court held, a subjective fault standard would focus on what was in the accused's mind at the time they breached their bail condition. It directs a court to consider whether the accused "*actually intended, knew or foresaw the consequence and/or circumstance as the case may be. Whether [they] 'could', 'ought' or 'should' have foreseen or whether a reasonable person would have foreseen is not the relevant criterion of liability.*"

(c) remand the accused to custody for the purposes of the *Identification of Criminals Act* (the ICA).

j. If the Judge or Justice orders the accused be detained in custody, it is a statutory requirement that reasons for making that order be included on the record.

k. Prior to ordering the accused be remanded for compliance with the ICA, the Judge or Justice shall consider whether compliance can be reasonably achieved with a report-comply condition in a release order (instead of remanding the accused).

l. If remanded solely for the purposes of the ICA, the Judge or Justice shall endorse the warrant of remand for the accused to be appropriately identified (viz., fingerprinted) at the courthouse or appropriate police detachment and shall order the accused to reappear before the Court for judicial interim release following compliance with the ICA.[12]

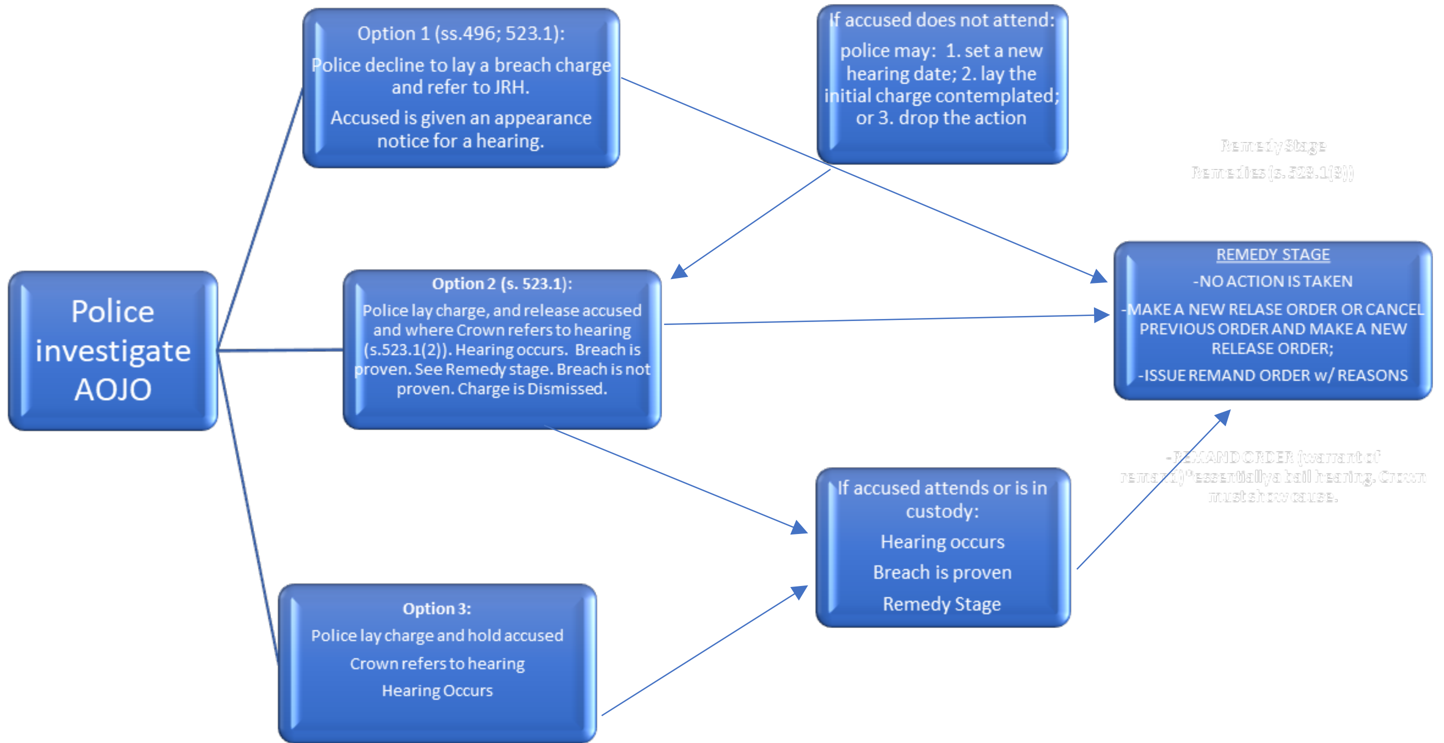
m. If the accused was charged with a failure to comply offence, the judicial official must dismiss the charge after making their decision.[13]

Note: Please refer to the attached *Judicial Referral Hearing Flow Chart* for the process at different stages of referral, adjudication, and disposition.

[12] Intention: Court House Sheriffs will have means to take fingerprints and send to enforcement agencies.
[13] *Zora*, supra, at para. 27.

Judicial Referral Hearing Flow Chart

Where stand-alone Breach Allegation occurs.



Routes To a Judicial Referral Hearing

Preamble

Below is a framework that incorporates policy considerations for Police and Crown that will require approval by those entities before possible implementation.

There are three general scenarios that may give rise to seeking a JRH. In arriving at a decision whether to seek a referral, the Police and Crown must balance several considerations.

Before outlining these scenarios, one thing should be clearly understood: where Police decide that a caution is not appropriate (with or without Crown consultation), it is expected that Police consult with the Crown about the propriety of a summons or a charge and seeking a JRH. Ideally, where it is agreed that the Crown will seek a JRH, Police should summons a person without charge unless they are faced with the need to seek a remand per scenario #3.

Scenarios

1. Police arrest/detain a person for a breach that may qualify for a JRH where the person is not supported by community bail supervision.

Police have been recognized for properly exercising their discretion to caution detainees and **not** charge for minor breaches in appropriate circumstances. This appears to be quite common and is strongly encouraged to continue.

There may be cases, however, where Police investigate a breach that falls into the JRH eligibility criteria and the discretion to charge is not appropriate. For example, a person with one or several release orders that are on the low end of the bail ladder, but who have previously been detained for similar minor breaches but not charged. A summons for a JRH, with an appearance date in **three weeks**, can enable a Court to inquire into the reasons for the continued difficulties with breaches, impress upon the accused person the importance of abiding and meaningfully address the current bail conditions.

To repeat – the ability to seek a JRH should not be seen as removing the discretion to caution and not charge. This protocol should not be construed to change the default to (over) using the JRH process where a caution would currently be given. A good example may be urging a person to seek a variation where an accused needs to change the name of their employer as part of their house arrest exceptions.

2. Police arrest/detain a person for a breach that may qualify for a JRH where the person is subject to bail supervision, but there are no safety concerns.

Practice tells us that Police will be called for apparent breaches by the responsible community supports that provide bail supervision where the person does not pose a present safety threat to staff or others. This is part of the agreement by those community supports to take their support and roles seriously and not to unilaterally decide which apparent breaches do/do not merit reporting.

In such cases, a caution and no more may, again, be appropriate. Where it is not, the summons process per scenario #1 should be followed.

It is inevitable there will be discussion with the community support group to determine whether there are present safety concerns. This discussion should also involve consideration of potential alterations to existing bail conditions for the Crown to consider in advance of the JRH. It should also consider a short turnaround for a hearing date so that the changes can be meaningfully implemented before other, more serious problems arise. This turnaround time should, however, build in the likely NSLA application process. A summons would, therefore, be approximately **two weeks** down the road.

3. Police arrest/detain a person for a breach that may qualify for a JRH where the person is subject to bail supervision and there are safety concerns – but the supervision group is willing to work on a plan.

This scenario has perhaps been the one of most concern because of a lack of consistency in response. It is also a scenario for which a JRH can be very useful. Community supports/bail supervision groups call the Police for removal as a last resort. This is done when safety concerns prevail over the client/provider relationship. Sometimes, the community group needs to remove the person from their program and residence with no plan to have them back. Other times, a cooling off and time to tweak conditions, etc. are what is sought.

A JRH may be appropriate in the second above instance.

But it is impractical to expect all necessary stakeholders to be aligned before a decision is made to arrest, charge and remand. Those three decisions would inevitably be made by Police and the matter would go to Bail Court. Then, with Crown, Defence, and community support consultation, a plan is eventually agreed upon.

In these circumstances, Crown and Defence can agree that the Crown seek the bail hearing to be converted to a JRH hearing. At the end, the charges would be dismissed by the Court. There would be no need to worry about inconsistent Crown practices, etc.

It also removes unnecessary and impractical burdens on Police and Crown to consult other stakeholders before a decision to refer is made.

Other Orders

Any consideration of changes to a person's release conditions should include exploring whether the person is subject to other court orders, whether release orders or orders associated with sentencing. A change in any conditions should not create inconsistency among orders. And, if a person is either on probation or a CSO, for example, the Crown should consult with the probation officer/supervisor to ensure that a JRH is appropriate and that necessary changes are okay for all orders.

Where there is a need to bring other matters into a JRH, Code provisions that give rise to such variations will need to be followed. Notices to vary will have to be filed and, where variation involves other bail orders, a s.524 motion should be made. Where there are probation orders, CSOs, or other ancillary orders, proper Code provisions should be incorporated into a notice document.

One area over which the Provincial Court may not have jurisdiction is for matters in the Supreme Court or decided by the Supreme Court. Should any such orders require amendment to conform with the proposed release order arising from a JRH, appropriate motions should be made in that Court as soon as is practicable.

Policy

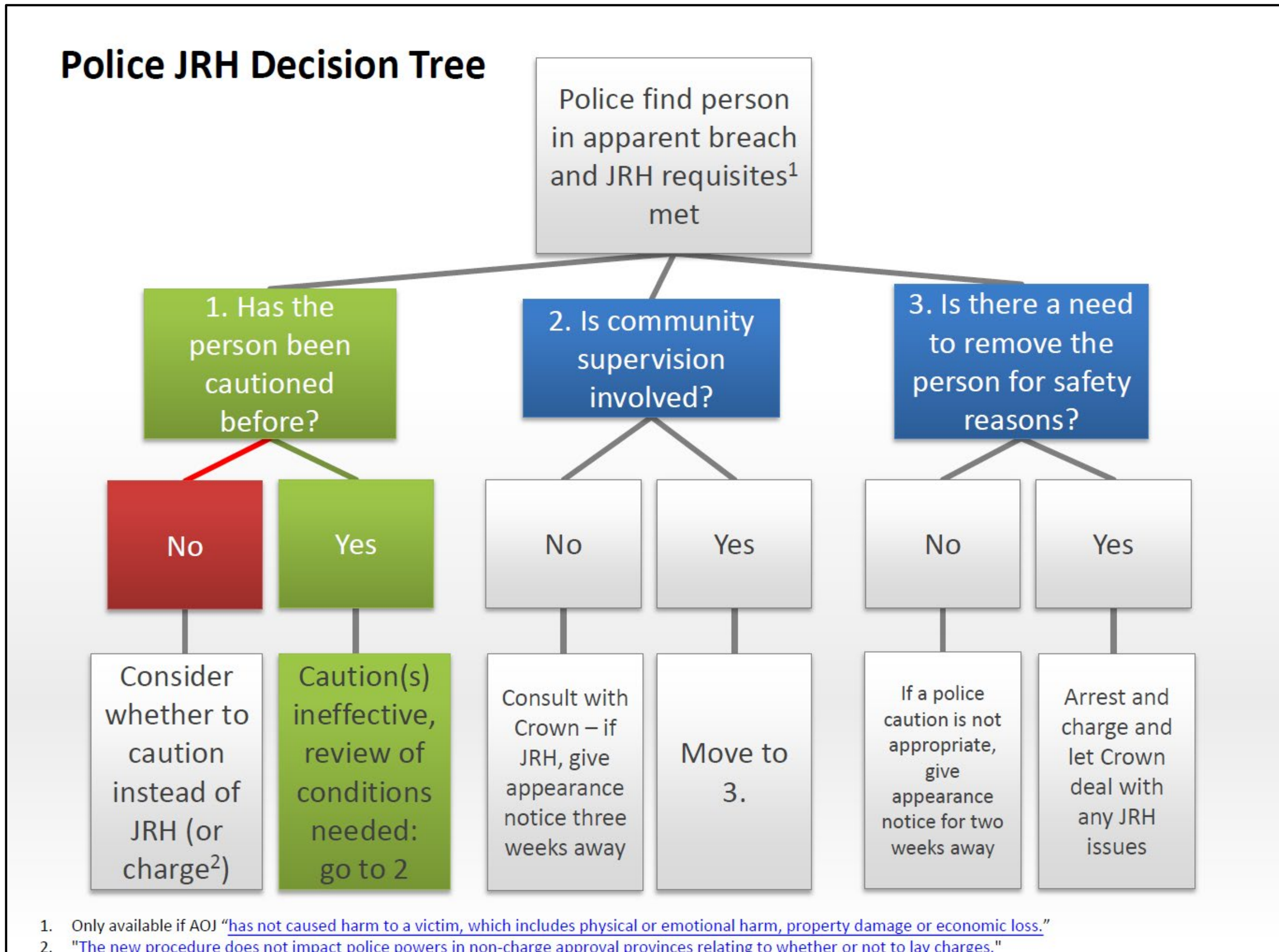
The Police and the Crown must develop policies that capture the intent and provide guidance for front line Police and Crown to exercise their discretion in seeking a JRH for all of the above scenarios. It will be imperative that officers are reminded that these routes to a JRH should not:

(i) become a default or replace current practices that exercise discretion to caution and not charge; or,

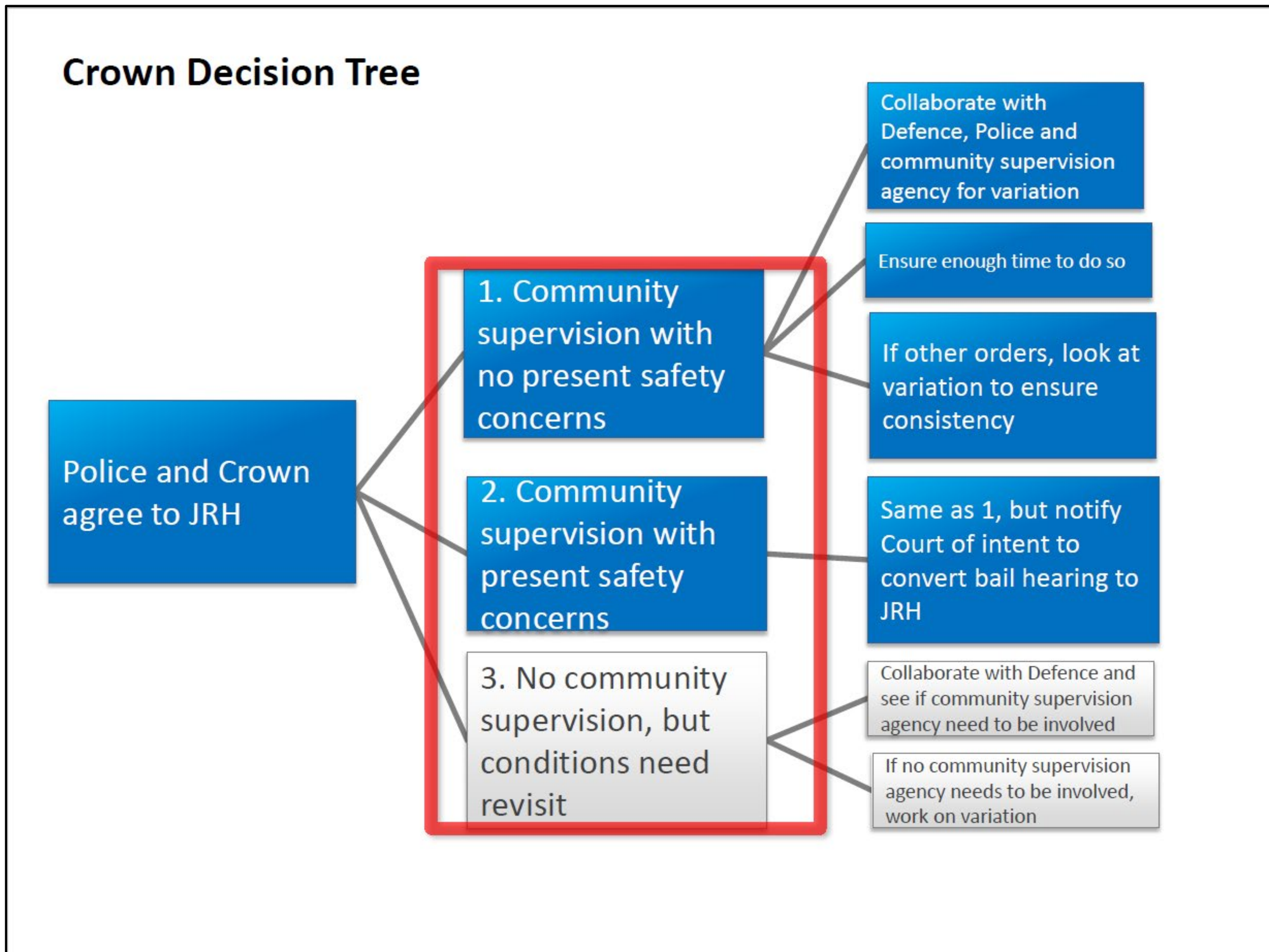
(ii) become a default that increases remands where they would not have been appropriate before.

Note: A JRH Checklist (Appendix 'A') has been created to help guide referral considerations for Police.

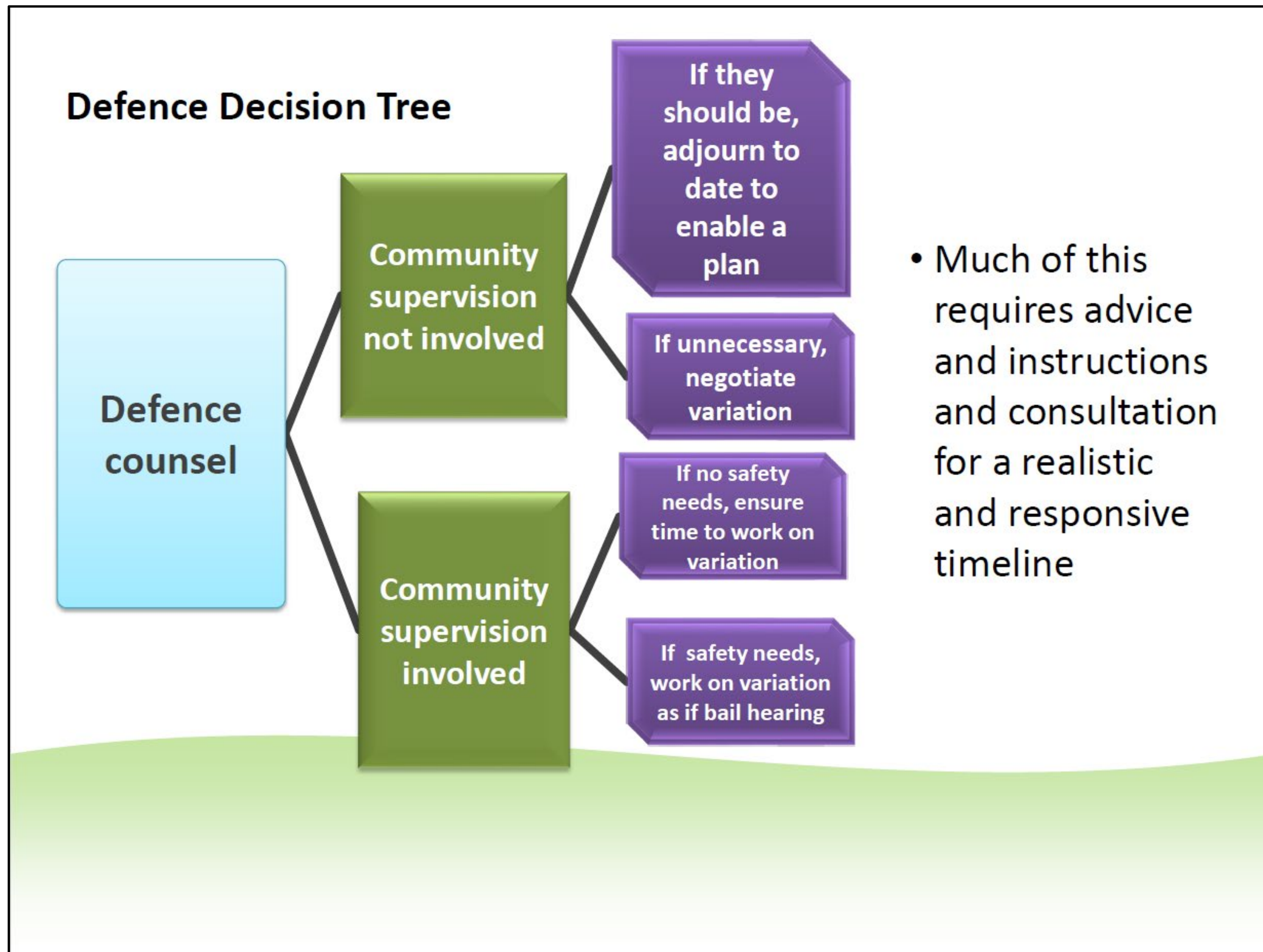
Police JRH Decision Tree



Crown JRH Decision Tree



<u>**Defence JRH Decision Tree**</u>



Police Protocols

Introduction and Background

This protocol outlines police-related responsibilities, authorities, and processes regarding the use of JRHs in Nova Scotia.

On December 18, 2019, provisions related to JRHs in *An Act to Amend the Criminal Code*, SC 2019, c. 25, s 407 (Bill C-75) came into force and effect.

JRHs are a new Code process through which certain AOJ offences may be resolved summarily without the need for an information to be sworn and a trial. Listed offences to which the new provisions apply consist of failing to comply with a summons, appearance notice, undertaking or release order; and failure to attend court as required.

The objectives of Parliament in making these amendments include: (1) decriminalizing non-compliance with bail conditions that is both minor or 'technical' in nature and non-harmful to victims; (2) reducing the substantial burden that AOJ offences place on the criminal justice system; and (3) providing a expedited process for amending release conditions to take into account the particular circumstances of the accused.[14]

Overview[15]

Importantly, JRHs are **only** available if the alleged administration of justice offence has **not** caused harm to a victim, which includes physical or emotional harm, property damage or economic loss.

In addition, the availability of JRH procedures do not impact police powers in relation to whether or not to lay charges; rather, JRH provisions enhance Police and Crown discretion by allowing them to compel an accused to appear at a JRH as an alternative to laying or pursing charges where appropriate, when it is nonetheless believed that an alleged breach should be brought to the attention of a Judge or Justice.

A JRH is essentially a review of an individual's bail status, and the conditions that were imposed when the accused was released after being charged with an earlier offence. Guilt or innocence with respect to the alleged AOJ offence is not considered at a JRH.

At a JRH, the Judge or Justice will review any existing conditions of release and either decide to take no action, release the accused on new conditions, or detain the accused, depending on the circumstances of the accused and the offence.

If an accused fails to attend a JRH, they cannot be charged with an additional offence for failure to appear. The issue can be dropped, the accused can be offered another hearing, or the accused can be charged for the original breach that was to be addressed through the JRH.

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[14] https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p3/ch20.html#section_5
[15] https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p3/ch20.html#section_2

Law
There are two pathways to the JRH process:

1. Police have been given additional discretion to initiate the JRH process by way of an appearance notice, pursuant to s. 496 of the *Criminal Code*.[16] The officer must have reasonable grounds to believe that a person has committed an AOJ offence, and that the failure to comply or appear did **not** cause a victim "physical or emotional harm, property damage or economic loss." A JRH appearance notice is issued "without laying a charge," meaning all that is under review at the hearing is the accused's status on judicial interim release for the original charge.[17]

2. The second route to a JRH is when an information has been sworn charging the accused with an AOJ offence, and the Crown exercises their discretion pursuant to s. 523.1(2)(b)[18] of the Code to seek a JRH as opposed to pursuing the charge and seeking recourse via s. 524.

While the discretion to refer a breach to a JRH is within the purview of the Police and Crown, in both cases the Crown must want to "seek a decision" through a JRH for it to proceed.[19]

If the Crown does not seek a decision via JRH, the residual discretion of the Police lies in their charging decision, as it always has, applying several factors.[20]

At a JRH the Crown must establish the breach on the balance of probabilities pursuant to s. 523.1(3), consistent with the standard applied to bail generally, as well as bail review hearings and CSO breach hearings.

The rules of evidence at a JRH are those of judicial interim release hearings: evidence can be considered if it is "credible or trustworthy" per s. 518(1)(e).[21]

Once the hearing is held, the Judge or Justice will decide if they "are satisfied" that the breach has occurred. If satisfied, the parties to the proceedings will make submissions on whether the court should:

(a) take no action;

[16] https://laws-lois.justice.gc.ca/eng/acts/C-46/section-496.html
[17] https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p3/ch20.html#section_6
[18] https://laws-lois.justice.gc.ca/eng/acts/C-46/section-523.1.html
[19] While Section 523.1(2)(a) permits the Police to initiate the referral, it must still be with the support of the Crown.
[20] Such as: the duration of breach, the location of the breach, the purpose of breach, other circumstances of the breach, the wording of the bail condition itself, failure to seek a bail variation, any evidence, or lack of evidence, regarding the accused's intentions at the time of the breach, and the seriousness of the underlying charges (See: *R. v. Thompson*, 2021 ONCJ 361 at para. 19).
[21] https://laws-lois.justice.gc.ca/eng/acts/C-46/section-518.html

(b) cancel any other summons, appearance notice, undertaking or release order in respect of the accused and

   i. make a new release order under section 515, or

   ii. make an order that the accused be detained in custody and, if so detained, the judge or justice shall include in the record a statement of the judge's or justice's reasons for making the order; or

(c) remand the accused to custody for the purposes of the *Identification of Criminals Act*.

Scenarios of Police Use and Associated Considerations

For JRH processes to be effective, it is critical that Police not be overloaded with unrealistic obligations. However, JRHs provide an additional option to Police when dealing with AOJ offences that did **<u>not</u>** cause harm to any victim, without taking previously available options away from Police.

Please see "Police Judicial Referral Hearing Decision Tree" for a flowchart that helps explain how Police are expected to approach these types of offences in various circumstances. And please see below for more detailed information regarding same.

A JRH Checklist (Appendix "A") has been created to help guide referral considerations for Police.

Cautions

In situations where Police believe that a simple caution or warning to the accused will suffice to prevent subsequent breaches of release conditions, Police are encouraged to continue exercising their discretion to simply issue a caution.

There is no set number of appropriate cautions that Police may issue an individual before pursuing a JRH. In some cases, several cautions may be appropriate. In other cases, it may be immediately obvious that the conditions of release imposed on the accused cannot be complied with—for example, if a homeless person has a curfew as part of their release conditions, it may be impossible for the accused to comply with that condition and Police should consider pursuing a JRH before issuing any cautions.

Where Police decide that a caution is not appropriate, and there are no safety concerns present, it is expected that Police will consult with the Crown about seeking a JRH.

Where it is agreed that the Crown will seek a JRH, Police are to issue an appearance notice (Appendix "B") without charges for a JRH, in accordance with the requirements below. If the Crown do not seek a JRH, Police are to retain the JRH checklist.

JRH Referrals <u>without</u> Community Supervision Involvement
In situations where police have consulted with Crown and are pursuing a JRH, but community-supervision supports for the accused are not currently available, the police should issue a JRH appearance notice for **<u>three</u>** weeks away.

<u>Note</u>: Police must consult with the Crown on all referrals.

JRH Referrals <u>with</u> Community Supervision Involvement
In situations where Police have consulted with the Crown, are pursuing a JRH, and community-supervision supports for the accused are in place, the most important consideration is whether there is any need to remove the accused from their current community-supervision supports because of safety concerns.

If safety concerns are not present, then Police should issue a JRH appearance notice for **<u>two</u>** weeks away.

If safety concerns are present, it is recommended that Police follow the normal arrest and remand process, and then the Court participants can work out a new plan and invite the Judge to convert a subsequent bail hearing into a JRH.

<u>Please Note</u>: If there is Transition House or Community Agency support, there are new codes in Justice Enterprise Information Network (JEIN) that highlight these supports.

Expediting Transmittal of Appearance Notices from Police to Court
Appearance Notices and JRH checklists shall be sent to the Court via the applicable Provincial Court email address:

Amherst Provincial Court:	AmherstProvincialCourt@courts.ns.ca
Amherst Supreme Court:	AmherstSupreme@courts.ns.ca
Annapolis Supreme Court:	ARSupreme@courts.ns.ca
Antigonish Provincial Court:	AntigonishProvincialCourt@courts.ns.ca
Antigonish Supreme Court:	AntigonishSupreme@courts.ns.ca
Bridgewater Provincial Court:	BridgewaterProvincialCourt@courts.ns.ca
Bridgewater Supreme Court:	BridgewaterSupreme@courts.ns.ca
Dartmouth Provincial Court:	DartmouthProvincialCourt@courts.ns.ca
Digby Provincial Court:	Digbyprovincialcourt@courts.ns.ca
Digby Supreme Court:	SupremeCourtDigbyJC@courts.ns.ca
Halifax Provincial Court:	HalifaxProvincialCourt@courts.ns.ca
Kentville Provincial Court:	KentvilleProvincialCourt@courts.ns.ca
Kentville Supreme Court:	kentvillesupreme@courts.ns.ca
Pictou Provincial Court:	Pictoucourt@courts.ns.ca
Pictou Supreme Court:	PictouSupreme@courts.ns.ca
Port Hawkesbury Provincial Court:	PortHawkesburyProvincialCourt@courts.ns.ca

Port Hawkesbury Supreme Court:	PortHawkesburySupreme@courts.ns.ca
Sydney Provincial Court:	Sydneyprovincialcourt@courts.ns.ca
Sydney Supreme Court:	SydneySupreme@courts.ns.ca
Truro Provincial Court:	TruroProvincialCourt@courts.ns.ca
Truro Supreme Court:	TruroSupreme@courts.ns.ca
Yarmouth Provincial Court	YarmouthProvincialCourt@courts.ns.ca
Yarmouth Supreme Court	SCYarmouth@courts.ns.ca

Note: The subject line of the email must include "JRH Appearance Notice" and the case/order number for the charge alleged to have been breached so the data can be put into JEIN. If the intention is to also vary other existing orders, such as CSOs, probation orders, or other release orders, those case/order numbers must also be noted on the appearance notice.

Culturally Appropriate Conditions

Introduction

Statutory authority to consider systemic factors for Indigenous peoples and African Nova Scotians at the judicial interim release (bail) stage can be found at Section 493.2(b) of the Code:

> 493.2 In making a decision under this Part, a peace officer, justice or judge shall give particular attention to the circumstances of
>
> (a) Aboriginal accused; and
>
> (b) Accused who belong to a vulnerable population that is overrepresented in the criminal justice system and that is disadvantaged in obtaining release under this Part.

This section essentially codifies the principles of *Gladue* and *Ipeellee* at the bail stage and adds consideration for those from "vulnerable populations" with the intent of reducing incarceration of people traditionally marginalized by the criminal justice system.

This application of *Gladue* factors and cultural factors for African Nova Scotians at the bail stage have previously been adopted by some Courts in Nova Scotia.[22]

In *Zora*, the Supreme Court of Canada acknowledges the disproportionate impact of onerous bail conditions:

> [79] **A third reality of bail is that onerous conditions disproportionately impact vulnerable and marginalized populations** (CCLA Report at pp. 72-79). Those living in poverty or with addictions or mental illnesses often struggle to meet conditions by which they cannot reasonably abide (see, e.g., *Schab*, at paras. 24-25; *Omeasoo*, at paras. 33 and 37; *R. v. Coombs*, 2004 ABQB 621, 369 A.R. 215, at para. 8; M. B. Rankin, "Using Court Orders to Manage, Supervise and Control Mentally Disordered Offenders: A Rights-Based Approach" (2018), 65 *C.L.Q.* 280). **Indigenous people, overrepresented in the criminal justice system, are also disproportionately affected by unnecessary and unreasonable bail conditions and resulting breach charges** (see, e.g., *R. v. Murphy*, 2017 YKSC 34, at paras. 31-34 (CanLII); *Omeasoo*, at para. 44; CCLA Report, at pp. 75-79; J. Rogin, "Gladue and Bail: The Pre-Trial Sentencing of

[22] For example, in the unreported decision of *R.* v. *Perry* (March 5, 2017) Nova Scotia CRH 450525 (Supreme Court of Nova Scotia), at p. 24, Justice Muise stated that he could take judicial notice of the "over-representation about aboriginal persons and African Nova Scotians in custody both on remand and serving sentences."

Aboriginal People in Canada" (2017), 95 *Can. Bar. Rev.* 325; *Ewert v. Canada*, 2018 SCC 30, [2018] 2 S.C.R. 165, at paras. 57-60; also s. 493.2, as of December 18, 2019). The oft-cited CCLA Report provides the following trenchant summary:

> **Canadian bail courts regularly impose abstinence requirements on those addicted to alcohol or drugs, residency conditions on the homeless, strict check-in requirements in difficult to access locations, no-contact conditions between family members, and rigid curfews that interfere with employment and daily life. Numerous and restrictive conditions, imposed for considerable periods of time, are setting people up to fail** — and failing to comply with a bail condition is a criminal offence, even if the underlying behaviour is not otherwise a crime.[23]

[emphasis added]

As noted in *Zora*, "Bail is a dynamic, ongoing assessment, a joint enterprise among all parties involved to craft the most reasonable and least onerous set of conditions, even as circumstances evolve."[24]

With respect to Indigenous accused, the Nova Scotia Public Prosecution Service has identified specific considerations around bail:

As with all individuals who come before the court, conditions of release shall not be imposed with intent to change an Indigenous person's behaviour or to punish. Such conditions often relate to therapeutic or rehabilitative measures and are more appropriate following conviction. The Crown Attorney must ensure that any conditions they recommend on a bail release are necessary and appropriate to the circumstances of the Indigenous person and relate to the alleged offence. The Crown Attorney should only request conditions that are necessary to ensure public safety or to ensure attendance, and with which an accused can realistically comply.[25]

A similar policy consideration is set to be released by NSPPS regarding the **Fair Treatment of African Nova Scotians.**

The default form of bail is to release accused persons based on an undertaking to attend trial, without any conditions restricting their activities and actions.

When conditions are required, beyond being the most reasonable, they should be the least onerous, they should be culturally informed and relevant.

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[23] *R. v. Zora*, 2020 SCC 14, at para. 79
[24] *Ibid*, at para. 92
[25] Online, see: Fair-Treatment-of-Indigenous-Peoples.pdf (novascotia.ca) at page 6

This is in accordance with the statutory and common law principles recognizing systemic racism prevalent in the criminal justice system.

Indigenous and ANS Over-Representation in Admissions to Remand

Indigenous persons were over-represented in admissions to remand in 2019-20. While they make up 6% of the population of Nova Scotia, they accounted for 13% of admissions to remand in the province.[26]

African Nova Scotians make up about 2% of the Nova Scotian population but represented 10% of admissions to remand.[27]

CCLA Report "Set up to Fail"

In 2014, a report by the Canadian Civil Liberties Association[28] identified specific recommendations around bail:

- Recommendation 6.3: Bail conditions must be clearly related to the purposes of the bail system and the specific facts of the case.
- Recommendation 6.7: Conditions of release must be imposed with significant restraint. Where appropriate, adjudicators should question the necessity and legality of the conditions proposed in consent releases. When necessary, adjudicators should exercise their jurisdiction and decline to impose unnecessary conditions.
- Recommendation 6.8: Conditions related to ensuring the accused appears for court should not be imposed where other administrative methods – such as a phone call to remind the person of an upcoming appearance – are likely to be effective.
- Recommendation 6.9: Conditions relating to the secondary grounds should be reserved for cases where the underlying offence is a violent one with ongoing risk to public safety, or the circumstances give rise to specific concerns regarding future violent acts. Non-violent accused should not be placed under strict bail conditions justified on the grounds of public safety.
- Recommendation 6.10: The requirements to "keep the peace and be of good behaviour" or "be amenable to the rules and discipline of the home" are constitutionally questionable, open to abuse, of limited legal utility and frequently immune from challenge at the prosecution stage. They should not be imposed.

[26] Corrections Key Indicators 2019-20, online, see: https://novascotia.ca/just/publications/docs/2019-20_Corrections_Key_Indicators_Report_2021_03_16_FINAL_002_.pdf at 10
[27] *Ibid*, at page 10
[28] Online, se: https://ccla.org/wp-content/uploads/2021/07/Set-up-to-fail-FINAL.pdf

- Recommendation 6.11: Given the prevalence of addictions, the difficulties accused persons will have openly admitting to addictions and the low likelihood of abstention conditions contributing to public safety or the administration of justice, there should be a moratorium on abstention conditions at the bail stage.

- Recommendation 6.13: Substance abuse treatment conditions are coercive and should not be imposed at the bail stage absent exceptional circumstances.

- Recommendation 8.1: The courts should refrain from imposing bail conditions that are likely to criminalize the symptoms of an underlying mental health or substance abuse problem.

- Recommendation 8.2: A history of failure to comply should be given significantly less weight where these prior incidents are tied to poverty or addiction.

- Recommendation 8.3: Courts should refrain from requiring accused to provide a fixed address or imposing residency conditions where the individual is homeless or has transitory living arrangements.

- Recommendation 8.4: Given the disproportionate barriers imposed by surety requirements, requests for surety releases should be made with restraint, and the Crown and judiciary should be more flexible when determining whether a proposed surety is appropriate.

- Recommendation 8.5: When dealing with an Aboriginal accused, the recommendations found throughout this report – for example, to refrain from imposing abstention conditions; to increase unconditional releases; to carefully tie any conditions to the purposes of bail and actual threats to public safety; to curtail over-policing of bail compliance; and to exercise significant discretion in reporting, charging and prosecuting failure to comply charges – must be applied while also taking into consideration systemic discrimination against Aboriginal people.

Gladue and Bail Conditions

In a Canadian Bar Review article entitled "Gladue and Bail: The Pre-Trial Sentencing of Aboriginal People in Canada"[29], the author makes the following recommendations specific to Indigenous accused:

- Any convictions prior to 1999 should be given reduced weight, as the accused would not have had the benefit of *Gladue* in the determination of the sentence. Sentences imposed prior to 1999 cannot be said to be "fit" or appropriate for full consideration, as they would omit the consideration of *Gladue*.

[29] Online, see: https://cbr.cba.org/index.php/cbr/article/view/4411/4403

- To the extent that the accused's criminal antecedents are attributable to systemic factors deriving from colonialism, such as poverty or substance abuse, Courts should view prior convictions as systemically motivated rather than as intentional disregard for the law, particularly in relation to convictions for failing to attend court or failure to comply with conditions. Any allegation of failing to attend court should be scrutinized to determine whether there was an intention to abscond or evade the law or whether systemic factors prevented the accused from appearing in court.

- The necessity of a surety must be scrutinized carefully, as securing a suitable surety may be disproportionately difficult for Aboriginal accused. Surety suitability should be determined in a manner that acknowledges the systemic barriers facing Aboriginal accused that may otherwise render a person ineligible.

- The quantum of bail must be determined having regard to the disproportionate poverty, and where applicable, the lack of private land ownership faced by Aboriginal people; and

- The imposition of conditions must be approached with restraint, having regard to the necessity of the condition and the ability of the Aboriginal accused to comply. Conditions unconnected to the offences before the court or the three purposes of bail are unconstitutional.

Black Accused and Bail Conditions

While comprehensive data on bail for ANS accused is lacking, there have been studies from other jurisdiction showing the disproportionate impact of bail conditions on Black Canadians.

Once arrested, Black people are more likely to be denied bail. If they are released on bail, they receive significantly more release conditions and are thus subject to greater surveillance by the Court (i.e., curfews, mandatory supervision requirements).[30]

It is recommended that when considering bail conditions for African Nova Scotian or Black accused, the lens applied by our Court of Appeal in *R. v. Anderson* [31] with respect to sentencing, be applied in the bail context.

Conditions enabling attendance at cultural community events in their hometowns or current locations and authorizing attendance at church service and any other cultural event should be considered, and if possible, without immediate supervision.

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[30] Gail Kellough and Scot Wortley, "Remand for Bail: Bail decisions and plea bargaining as commensurate decisions" (2022) 42(1) Brit J Crim 186, as explained in Akawsi Owusu-Bempa & Scot Wortley, "Race, Crime and Criminal Justice in Canada" in Sandra M. Bucerius & Michael H. Tonry eds, The Oxford Handbook of Ethnicity, Crime, and Immigration, (Oxford: Oxford University Press, 2013), at 292.

[31] 2021 NSCA 62

When considering the necessity of bail conditions, it is important to think about risk of re-offending, prior criminal record in light of systemic over-policing and over-charging, and maintaining confidence in the administration of justice.[32]

Other Problematic Conditions for Indigenous and ANS Communities

In addition to the above noted recommendations, there are arguably concerning trends in release conditions for Indigenous and African Nova Scotian accused:

- "No-go" conditions with geographic boundary zones which prevent the accused from returning to their home community or that restrict entry into large portions of a town or city where community members congregate can result in unintended banishment of the accused from their community.

- Restrictive conditions such as curfew and house arrest that do not provide exceptions for attending culturally appropriate counselling or cultural events.

- Pro-charge, pro-arrest, and pro-prosecution domestic violence policies and resultant no-contact conditions have disproportionate impact on African Nova Scotian and Indigenous communities. African Nova Scotians and Indigenous people face different barriers which impact survivors, families and communities and believe their needs have been neglected for too long.[33]

    - While no contact conditions are often necessary to protect survivors, cultural factors related to a no-contact breach should be evaluated in the context of a JRH hearing if there has been no physical or emotional harm suffered.

Culturally Appropriate Bail Supports

A list of culturally appropriate bail supports should be populated from organizations including:

- Mi'kmaw Legal Support Network
- African Nova Scotian Justice Institute
- John Howard Society
- 902 ManUp
- E-Fry Mainland NS
- E-Fry Cape Breton
- Coverdale Justice Society
- Nova Scotia Brotherhood and Sisterhood

[32] *R. v. A.A.*, 2022 ONSC 4310

[33] Ryan, C., Silvio, D., Borden, T., & Ross, N. M. (2022). A review of pro-arrest, pro-charge, and pro-prosecution policies as a response to domestic violence. *Journal of Social Work*, 22(1), 211-238. Online, see: 2021 A Review of Pro-Arrest Pro-Charge and Prosecution Polices.pdf (dal.ca)

Procedure for Consent Variation of Judicial Release Orders

Section *519.1* of the Code provides that the conditions of release (bail) made by the Court can be varied with written consent of the accused, the Crown, and any sureties without having to go to Court in person.

To apply for a variation of a release order by consent under this section, the following steps must be taken.

Step 1

The applicant or counsel for the applicant completes Part 1 of the **Application to Vary Release Order by Consent form** (this is an interactive PDF form that can be filled out on your computer). This step sets out the requested change and the reasons for the change to the current Release Order. (***If the initial release order was a result of a bail hearing, the application must be signed off by the Judge who heard the bail hearing).***

The applicant or counsel for the applicant must sign and date **Part 1** of the form. **Part 2** of the form is signed by the surety(ies) if needed and Counsel for the applicant if represented.

Step 2

The applicant or counsel for the applicant sends the form electronically to the Crown, including copies of the earlier order(s) to be changed. The Crown either consents or does not consent to the request. The Crown then signs and dates **Part 3** of the form and sends it to the Court via the applicable Provincial Court email address:

Amherst Provincial Court:	AmherstProvincialCourt@courts.ns.ca
Antigonish Provincial Court:	AntigonishProvincialCourt@courts.ns.ca
Bridgewater Provincial Court:	BridgewaterProvincialCourt@courts.ns.ca
Dartmouth Provincial Court:	DartmouthProvincialCourt@courts.ns.ca
Digby Provincial Court:	Digbyprovincialcourt@courts.ns.ca
Halifax Provincial Court:	HalifaxProvincialCourt@courts.ns.ca
Kentville Provincial Court:	KentvilleProvincialCourt@courts.ns.ca
Pictou Provincial Court:	Pictoucourt@courts.ns.ca
Port Hawkesbury Provincial Court:	PortHawkesburyProvincialCourt@courts.ns.ca
Sydney Provincial Court:	Sydneyprovincialcourt@courts.ns.ca
Truro Provincial Court:	TruroProvincialCourt@courts.ns.ca
Yarmouth Provincial Court	YarmouthProvincialCourt@courts.ns.ca

Step 3
Upon receipt of the form, Court staff will provide /send it to a Judge for review. If the Judge agrees to the changes, the Judge will sign and date **Part 4** of the form, confirming the changes.

Court staff will contact the applicant or counsel for the applicant to read the terms of the new Release Order and confirm the new Release Order is now in effect. Once Court staff complete this step, the applicant is then bound by the new Release Order and will continue to be bound by that Release Order for the duration of the case or until further changes are made by the Court. Court staff will complete and sign **Part 5** of the form.

Note: The current Release Order remains in effect until the accused has been notified by the Court (or their counsel) that the variation has been granted and the new Release Order has been prepared and signed by the accused.

Court staff will create a new Release Order in JEIN to reflect the changes and distribute the new Release Order to the accused or counsel for the accused signature.

Finally, the accused or counsel for the accused will forward the signed new Release Order to the Court and Court staff will distribute the new Release Order electronically to Crown and other stakeholders.

Assistance from Nova Scotia Legal Aid
If an accused needs help completing this form and does not a have a lawyer, they can contact Nova Scotia Legal Aid online, telephone, or visit your local legal aid office.

Provincial Court of Nova Scotia

Judicial Referral Hearing (JRH) Checklist

To Help Guide Attempted JRH Referrals By Police, And, If Supported By Crown, Be Submitted With Appearance Notice

JRH ELIGIBILITY CRITERIA:

Offence(s) did **not** cause harm to a victim, including physical or emotional harm, property damage or economic loss. ☐

I have considered the possibility of exercising discretion, taking no formal action, and simply issuing a caution/warning instead. ☐

Offence(s) is/are: failing to comply with a summons, appearance notice, undertaking or release order, and/or failing to attend Court. ☐

Indicate which eligible offence(s) occurred: ______

COMMUNITY-SUPERVISION SUPPORT(S) FOR THE SUBJECT AND SAFETY CONCERNS:

NOTE: Community-supervision support(s) for the Subject are identifiable in a variety of ways, including that the support(s) might be the ones who contacted police about the offence(s) in question, and/or that the support(s) are listed on the Subject's release conditions.

Are you aware of any current community-supervision support(s) in place for the Subject as part of their release conditions? ______

If you **are** aware of any support(s), please list them and note result of your attempts to contact them: ______

Are you aware of **safety concerns** to anyone's physical and/or emotional wellbeing with letting the Subject remain at large? ______

NOTE: If safety concerns **are** present, it is recommended that police do **not** pursue a JRH—follow the normal arrest and remand processes.

SUBJECT'S RIGHT TO LEGAL COUNSEL:

Subject was advised of right to legal counsel. ☐ Requested to contact defence? ______ Contact date (YYYY-MM-DD) ______

Time defence was contacted (HH:MM) ______ Defence contact info: ______

OFFICER'S CONSULTATION WITH CROWN:

Crown was consulted about this JRH referral. ☐ Consult date (YYYY-MM-DD) ______ Consult time (HH:MM) ______

Did Crown support this JRH referral? ______ Crown contact info: ______

If Crown **did** support JRH referral, how many weeks away was it agreed that the Appearance Notice should be issued for? ______

NOTE: in situations where community-supervision supports for the subject are **not** currently available, the police should generally issue a JRH Appearance Notice for **three** weeks away, and in situations where community-supervision supports **are** in place, police should generally issue a JRH Appearance Notice for **two** weeks away.

*****If Crown does not support a JRH referral for this incident, then it cannot proceed to Court.*****

EXPEDITING SUBMISSION OF JRH APPEARANCE NOTICES FROM POLICE TO COURT:

I have written the associated JEIN Order number(s) for the eligible offence(s) on the Appearance Notice for this JRH referral. ☐

- The Submission of JRH Appearance Notices should be expedited and **sent via email** to the applicable Courthouse.
- **Only** the submission of the Appearance Notice and this checklist are to be expedited—not the JRH disclosure package.

You can find the applicable Courthouse's email address from this drop-down list: ______

NOTE: Be sure to include the words "JRH REFERRAL" in your email's subject line, along with the Subject's JEIN ID # and any associated Order #. Also be sure to include your organization's standard email privacy notice in the body of your email.

Provincial Court of Nova Scotia

Judicial Referral Hearing (JRH) Checklist

To Help Guide Attempted JRH Referrals By Police, And, If Supported By Crown, Be Submitted With Appearance Notice

OFFICER, SUBJECT, FILE, AND ARREST INFORMATION:

Arresting Officer		Officer ID/Reg #	
Police Service		Date of Offence(s) (YYYY-MM-DD)	
Police File Number(s)		JEIN Order Number(s)	
Subject's Surname		Subject's Given Name(s)	
Subject's DOB (YYYY-MM-DD)		Subject's JEIN ID #	
Subject's Gender			

Best method(s) of contacting Subject for JRH-related purposes:

SELF-IDENTIFICATION INFORMATION:

Suggested wording: "I am going to ask you some self-identification questions. Your answers will be provided to the Court, the Crown prosecutor, and any lawyer assisting in your defence. This helps us identify gaps in the justice system, study systemic issues of racism and discrimination, and streamline services that could be offered to you. You do not need to answer these questions."

"What are your preferred pronouns?"

"Do you identify as Indigenous, First Nation, Mi'kmaq, Métis, or Inuit?"

"Do you identify as Black or African Nova Scotian?"

DISCLOSURE:

JRH disclosure documents are to be submitted through your police service's normal processes **after** this checklist and the Appearance Notice are expedited, and should include the **same** evidence as you would submit for a simple breach charge, such as:

- A summary of the incident by way of a General Occurrence Report to Crown Counsel;
- Applicable/relevant Officer notes;
- Applicable/relevant witness statements;
- Additional copies of any applicable Court Order(s);
- Additional copy of the JRH Appearance Notice;
- Additional copy of this JRH Checklist; and/or
- Any additional information that may help a Judge or Justice decide if they are satisfied that an offence eligible for a JRH has occurred.

Prevent Future Edits