5 Bail Hearings

I. Introduction

One of Parliament's explicit goals when introducing the *Youth Criminal Justice Act* (YCJA) was to reduce Canada's incarceration rate for young persons at all stages of the youth criminal justice process—including the pre-trial detention phase.[1] Although the incarceration rate of young people had seen modest declines in the few years prior to the enactment of the YCJA, the rate fell more clearly once it came into force.[2] While the incarceration rate for sentenced young people fell quite dramatically, the incarceration rate of young people in pre-trial detention has not declined as significantly.[3] In addition, the YCJA's original bail provisions, which were in place from April 1, 2003, to October 23, 2012, were also subject to widespread criticism for being confusing, ineffective, and in dire need of reform.[4] The provisions had been designed to place limits on the applicability of the secondary grounds to youth bail hearings and to draw a distinction with sections of the *Criminal Code*. But they offered little clarification beyond that and incorporated references to the sentencing provisions of the YCJA, which resulted in very convoluted and complicated hearings.

As a result, a great deal of conflicting jurisprudence arose. A series of reforms to the YCJA contained in Bill C-10, the *Safe Streets and Communities Act* (SSCA)[5] were directed at simplifying the rules surrounding pre-trial detention. As will be discussed in this chapter, the new bail provisions are much clearer and simpler, and will, we hope, ensure that fewer young persons are held in pre-trial detention. The amendments came into effect on October 23, 2012.

Readers should keep in mind the above-mentioned dates when reviewing any jurisprudence. Cases decided under the YCJA's original bail regime must be approached cautiously because they may have limited value in light of the amendments contained in the SSCA.

"Detention before sentencing" is dealt with in sections 28-31 of the YCJA. This chapter explores the judicial interim release provisions of the YCJA, and also

1 *R v RD*, 2010 ONCA 899 at para 41.

2 This issue is discussed further in Chapter 10, Sentencing. See also Department of Justice, "The Youth Criminal Justice Act Summary and Background" (14 October 2015), online: *Government of Canada* <www.justice.gc.ca/eng/cj-jp/yj-jj/tools-outils/back-hist.html>.

3 See Correctional Services Program, *Juristat*, "Adult and Youth Correctional Statistics in Canada, 2016/2017" (19 November 2018), online: *Statistics Canada* <www150.statcan.gc.ca/n1/pub/85-002-x/2018001/article/54972-eng.htm#n14-refa>.

4 See e.g. D Merlin Nunn, "Spiralling Out of Control: Lessons Learned from a Boy in Trouble: Report of the Nunn Commission of Inquiry" (December 2006), online: *Government of Nova Scotia* <gov.ns.ca/just/nunn_commission.asp>.

5 SC 2012, c 1 [SSCA].

offers strategic advice for counsel. The chapter will address the following questions, among others:

- What fundamental values animate the YCJA's pre-trial detention provisions?
- What court has jurisdiction to hear a young person's bail hearing?
- What requirements must be met before the Crown can seek a detention order for a young person?
- What happens if a young person's parents refuse to come to bail court?
- How do the primary, secondary, and tertiary grounds for detention apply in youth bail hearings?
- What is a bail *de novo* and when is a bail *de novo* hearing available? How is it different from a bail review?
- What is a surety?
- What is a "responsible person"?
- What are the qualities of a good surety or responsible person?
- What terms and conditions are appropriately placed on a young person's form of release?
- How do I prepare parents to testify at their child's bail hearing?
- If my client is detained in secure custody, is it possible to have him or her transferred to open custody instead?

II. Fundamental Principles

Pre-trial detention is not to be used as a form of punishment. It is only to be used to address the specific grounds of concern held by the Crown, and only if it is in fact the least restrictive alternative in all the circumstances capable of meeting the goals of the YCJA.

The same constitutionally protected right to liberty and cautious approach to bail that has been recognized by the courts in the adult system applies to young people. In *R v Morales*, the Supreme Court of Canada noted that section 11(e) of the Charter, which provides that "[a]ny person charged with an offence has the right … not to be denied reasonable bail without just cause," makes it clear that "pre-trial detention is extraordinary in our system of criminal justice."[6]

Iacobucci J echoed these sentiments in his dissent in *R v Hall*:[7]

> At the heart of a free and democratic society is the liberty of its subjects. Liberty lost is never regained and can never fully be compensated for; therefore, where the potential exists for the loss of freedom for even a day, we, as a free and democratic society, must place the highest emphasis on ensuring that our system of justice minimizes the chances of an unwarranted denial of liberty.[8]

6 [1992] 3 SCR 711, 77 CCC (3d) 91 at 101.
7 2002 SCC 64, [2002] 3 SCR 309.
8 *Ibid* at para 47.

In *R v Antic*,[9] the Supreme Court reiterated the importance of these principles. As stated by Wagner J, as he then was:

> The right not to be denied reasonable bail without just cause is an essential element of an enlightened criminal justice system. It entrenches the effect of the presumption of innocence at the pre-trial stage of the criminal trial process and safeguards the liberty of accused persons.[10]

Parliament has made it clear that these concerns are all the more significant when dealing with young persons. The YCJA makes it explicitly clear that Canada's youth justice system must reduce "the over-reliance on incarceration for non-violent young persons,"[11] must be "separate from that of adults," and based on the "principle of diminished moral blameworthiness or culpability."[12] It must emphasize the "greater dependency of young persons and their reduced level of maturity,"[13] and provide "enhanced procedural protections" to ensure that their "rights … are protected."[14] These rights are to be "liberally construed."[15]

As the Ontario Court of Appeal noted in *R v RD*, the overarching goal of the YCJA was to "reduce reliance on incarceration for young persons at all stages of proceedings and to give the youth court alternatives to imprisonment."[16]

III. Canada's Criminal Code and the YCJA

The relationship between the *Criminal Code* and the YCJA with respect to judicial interim release is explained by section 28 of the YCJA:

> 28. Except to the extent that they are inconsistent with or excluded by this Act, the provisions of Part XVI (compelling appearance of an accused and interim release) of the *Criminal Code* apply to the detention and release of young persons under this Act.

To the extent that there are gaps in the YCJA's legislative provisions on judicial interim release, this provision allows reference to the *Criminal Code*'s bail provisions to fill those gaps. Following the amendments to the YCJA contained in the SSCA, the YCJA now has an almost entirely self-contained bail regime.[17] Thus, reference to part XVI of the *Criminal Code* to address bail matters will be rarely necessary, and

9 2017 SCC 27, [2017] 1 SCR 509.
10 *Ibid* at para 1.
11 SC 2002, c 1, preamble [YCJA].
12 YCJA, s 3(1)(b).
13 YCJA, s 3(1)(b)(ii).
14 YCJA, s 3(1)(b)(iii).
15 YCJA, s 3(2).
16 *Supra* note 1. Note that *R v RD* was decided under the original version of the YCJA, before the amendments contained in the SSCA came into effect.
17 See *R v SB*, 2013 ONCJ 505; *R v RLB*, 2013 CanLII 60982 (NL Prov Ct).

arguably generally inappropriate, given the different principles and values underlying the two different statutes.

As Gorman J of the Newfoundland Provincial Court held in *R v RLB* with respect to section 515(10):

> The *Youth Criminal Justice Act* contains a comprehensive scheme for determining the issue of judicial interim release in relation to young people. … Thus, resort to sections 515(10)(a) to (c) of the *Criminal Code* when dealing with the judicial interim release of young offenders is prohibited because of the comprehensive nature of section 29(2) of the *Youth Criminal Justice Act* and because the *Criminal Code*'s bail provisions are inconsistent with those contained within section 29(2) of the *Youth Criminal Justice Act*.[18]

IV. Jurisdiction of the Court

A youth justice court judge or justice must decide a young person's judicial interim release hearing.[19] As discussed in Chapter 4, Jurisdiction of the Youth Justice Court, this means a justice or judge from the relevant provincial or territorial court of justice in each jurisdiction. In provinces or territories where justices of the peace preside over bail hearings, this means that a young person's first bail hearing will normally occur before a justice of the peace.

This general rule is subject only to an exception for *Criminal Code* section 469 offences such as murder. Section 33(8) of the YCJA provides that if a young person has been charged with an offence referred to in section 522 of the *Criminal Code* (which references section 469 of the *Criminal Code*), only a youth justice court *judge* may release the young person. Whether a provincial court of justice judge or a superior court of justice judge should hear the application for release has been a matter of some debate.

Section 13 of the YCJA does grant the superior court of justice jurisdiction over youth justice matters in some limited cases. Because adult accused persons charged with offences under section 469 of the *Criminal Code* must bring their bail hearings before a judge of the superior court of criminal justice for the province in which the accused is charged,[20] some early decisions held that young people facing these charges may also have their bail hearings at the superior court of justice. Others held that a youth court judge must be restricted to a judge of the provincial court of justice.

A point of clarification is therefore in order. Sections 13(2) and 13(3) of the YCJA state that when a young person is tried in the superior court of justice, the judge is deemed to be a "youth justice court judge and the court is deemed to be a youth justice court for the purpose of the proceeding." "Proceeding" in this subsection

18 *Supra* note 17 at para 17.
19 YCJA, s 29.
20 RSC 1985, c C-46, s 522(1).

has been held to include bail matters.[21] But that section *is not triggered* until the young person *elects* his or her mode of trial in the superior court.[22]

Prior to the young person electing his or her mode of trial, the superior court is not deemed a "youth justice court."[23] However, upon the triggering of the superior court's jurisdiction via the young person's election as to his or her mode of trial, that court retains exclusive jurisdiction over the young person's bail matters. Molloy J of the Ontario Superior Court of Justice explained the intersection of these various legislative provisions in *R v JB*:

> This is not a situation in which there is concurrent jurisdiction between the provincial and superior courts. A provincial court judge has no jurisdiction to deal with bail once the conditions in ss. 13(2) and 13(3) deeming the superior court to be a youth justice court have been met. The terms of s. 522(1) of the *Criminal Code* are clear. Only a judge of the superior court has jurisdiction to grant bail from that point on.[24]

Counsel should be mindful of these provisions and ensure that bail applications in murder cases are brought in the appropriate court. However, given that most bail applications are brought far in advance of the young person's election as to mode of trial, the practical implications of these rulings are likely to be limited.[25] Murder bail hearings for young persons will therefore almost always take place before a judge of the local provincial or territorial court of justice, as these courts are designated youth justice courts.

V. Detention Not to Be Used as a Substitute for Child Protection, Mental Health, or Other Social Measures

There are cases where young people who are before the court may seem to be in desperate need of assistance, support, and guidance. For example, they are not attending school regularly, appear to be abusing drugs, may have turbulent family or home lives, may seem to be running away from home, or may be in the care of a child protection or child welfare agency. If the young person's circumstances seem to be contributing to anti-social behaviour, or if parents or guardians seem unable to "control" the young person, some may wonder whether the young person would perhaps be better off remaining in a youth detention centre, at least temporarily.

Such a decision, even if well-intentioned, would be unlawful. Section 29(1) of the YCJA prohibits the use of pre-trial detention for young persons as a "substitute for

21 *R v JB*, 2012 ONSC 4957; *R v F (M)*, 2006 ONCJ 161.

22 *R v JB*, *supra* note 21 at para 30.

23 See also *R v EEW,* 2004 SKCA 114, 188 CCC (3d) 467 and *R v K (T)*, 2004 ONCJ 410, 192 CCC (3d) 279.

24 *Supra* note 21 at para 32; *contra R v TRM*, 2013 ABQB 571.

25 *R v F (M)*, *supra* note 21 at paras 51-52.

appropriate child protection, mental health or other social measures." Crown counsel cannot seek a detention order, even with the best intentions, simply because it is believed that upon his or her release back into the community, the young person will not receive adequate care, attend school, seek social supports, or seek medical attention.[26] Those concerns should be properly addressed by the relevant provincial child welfare, social services, health care, and education services.

In cases where Crown counsel are concerned about the welfare of a young person, in the sense that child protection services should be initiated, resort should be made to section 35 of the YCJA, which authorizes the youth justice court, at any stage of the proceedings, to "refer the young person to a child welfare agency for assessment to determine whether the young person is in need of child welfare services."

Defence counsel must be mindful of their ethical duties of confidentiality and solicitor–client privilege. If a young person instructs counsel to do so, defence counsel could ask the court to make a section 35 referral. If defence counsel is concerned about the welfare of a young person, they should establish what their legal and ethical obligations are, but more importantly, they should discuss their concerns with their client, and assist the young person in connecting with any supports the young person may wish to engage. While some actors in the youth criminal justice system will have obligations to make reports to child protection agencies, and the court could make a section 35 referral over the objections of the young person, it must be said that child protection services are not a panacea, and a young person may have very well-founded reasons not to want to be involved with child protection/welfare services. In addition, although counsel may be concerned for their client's well-being, child protection services may not necessarily be available. This issue is discussed further below.

VI. When Parents Do Not Attend Bail Court

What if a young person must be released by law but his or her parents refuse to attend court or allow him or her back in their home? Some parents wish to leave their child in custody for a period of time—perhaps out of frustration or to send them a message about their behaviour.

Parental refusal to attend court, however, cannot make lawful what is otherwise an unlawful detention of a young person. If the youth justice court is satisfied that the young person must be released, the young person must be released on his or her own recognizance either without conditions, or with appropriate terms and conditions. If the youth justice court determines that such a release is not suitable, it may be necessary to contact the local child protection agencies. If a young person is not detainable under the YCJA, and yet the parent or guardian refuses to come and pick up the young person, and the youth justice court is not willing to release the young person

26 See e.g. *R v AB*, 2015 CanLII 4883 (Ont Ct J).

without an adult to meet them, then the child protection agency must be contacted. The young person cannot be kept in custody for child welfare or social services reasons. Most jurisdictions in Canada have child protection provisions that provide for intervention where a parent or guardian is unwilling or unable to care for a child and has not made other arrangements. These circumstances may be seen to be met when a parent refuses to assist a young person in being released from detention.

The age at which a young person may have access to child protection services differs across jurisdictions. For instance, in Ontario, once a young person is 16 years old, he or she cannot involuntarily be brought into care. Recent legislative changes in Ontario allow a 16- or 17-year-old who is not already subject of a child protection proceeding to enter into an agreement with provincial welfare agencies, known as a Voluntary Youth Services Agreement, or VYSA, but this can only be done with the young person's consent. In contrast, in British Columbia, a child may receive protection services until he or she is 19 years old. Counsel will want to be aware of the child protection legislation in their province or territory, and the alternatives for young people who do not have access to protection services.

If the youth justice court considers it necessary to have a parent present in order to release the young person, the court can order the parent to appear before the court, pursuant to section 27 of the YCJA and, if necessary, a warrant can be executed to compel that attendance. If the young person does not have a parent, guardian, or other supportive adult who is willing to attend in order to ensure the young person's release from custody, the Crown counsel may be required to contact child protection services, or ask the court that a referral be made under section 35 of the YCJA.

VII. Is a Detention Order Lawfully Available?

Section 29(2)(a) of the YCJA now places restrictions on when a youth justice court may order that a person be detained in custody. It establishes a threshold test for the pre-trial detention of a young person. A detention order may only be lawfully granted in two situations:

1. where the young person has been charged with a *serious offence*; or
2. where the young person is charged with an offence other than a serious offence, if they have a *history that indicates a pattern of either outstanding charges or findings of guilt*.[27]

When reviewing a young person's case for bail, counsel must determine whether either or both of these requirements have been met. If neither branch of this threshold test has been met, the young person must be released at the earliest possible opportunity. Although it may seem obvious, it must be said that the fact that the young

27 YCJA, ss 29(2)(a)(i), (ii).

person cannot be lawfully detained means that he or she must be released *without* conditions. It is not lawful for Crown counsel to agree or consent to the release upon certain conditions.

A. Requirement 1: The Young Person Is Charged with a "Serious Offence"

"Serious offence" is defined in the YCJA as:

> an indictable offence under an Act of Parliament for which the maximum punishment is imprisonment for five years or more.[28]

Many criminal offences that young persons are commonly charged with meet this definition, including assault, robbery, firearms and weapons offences, drug trafficking, and break and enter.

But many other criminal offences that are commonly laid against young persons do not meet this definition, such as theft and mischief under $5,000, failure to attend court, failure to comply with a recognizance, failure to comply with a disposition under the YCJA, and causing a disturbance.

Crown counsel should confirm that the penalty for any offence the young person is facing meets the definition of "serious offence" before seeking a detention order on that basis.

B. Requirement 2: The Young Person Has a "History That Indicates a Pattern of Either Outstanding Charges or Findings of Guilt"

If the offence the young person is facing does not meet the definition of "serious offence," a detention order can only be sought if the young person has a "history that indicates a pattern of either outstanding charges or findings of guilt."

There is no statutory definition to the terms "history" or "pattern." However, this same language appears in YCJA section 39(1)(c), which addresses one of the options for when a custodial sentence may be available to a youth justice court when sentencing a young person. In this context, the phrase "history that indicates a pattern" was explained by the Supreme Court in *R v SAC*[29] to mean that the Crown must lead evidence of at least three prior findings of guilt to establish a pattern, unless the court finds that the offences are so similar that a pattern may be found in only two prior findings of guilt.[30] The court made clear that the charges currently before the court cannot form part of the "pattern."

28 YCJA, s 2. Hybrid offences are deemed indictable offences until the Crown's election is made pursuant to the *Interpretation Act*, RSC 1985 c I-21, s 34(1)(a).

29 2008 SCC 47.

30 *Ibid* at para 22.

Because section 29(2)(a)(ii) of the YCJA also references "outstanding charges," the Supreme Court's decision in *R v SAC* should be interpreted in the bail context to mean that a pattern may be found where the Crown can lead evidence that the youth has three prior findings of guilt and/or outstanding charges. In some circumstances, where the outstanding charges and/or findings of guilt are very similar, the Crown may be able to establish a pattern upon leading evidence of only two such matters.

VIII. Who Bears the Onus?

Under the YCJA, the Crown always bears the onus of demonstrating that the young person should be detained. Reverse-onus bail hearings, which require an accused person to demonstrate why he or she should be released back into the community, apply to adult persons via section 515(6) of the *Criminal Code* in certain circumstances. Prior to the amendments to the YCJA contained in the SSCA, there was some debate about whether they also applied to youth justice matters.

However, the SSCA created a new section in the YCJA, section 29(3), which states, clearly and unequivocally:

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

Thus, in all youth bail hearings, the onus falls on the Crown to justify any terms and conditions of a release order, and any detention order. There are no exceptions to this provision.[31]

IX. The Test for a Detention Order: Part I—Grounds of Concern

When setting out the three-part test for arguing for detention, counsel commonly refer to the test as "primary, secondary, and tertiary grounds." Counsel must be mindful that these are not the same grounds as in an adult bail, and, as previously referenced, the test in a youth bail is distinct. Therefore, we recommend using the terms "first part," "second part," or "third part," or "modified primary, secondary, and tertiary" grounds in order to prevent any confusion.[32]

Section 29(2)(b) of the YCJA sets out a very strict test to be met before a detention order may be issued on any of the modified primary, secondary, or tertiary grounds. In each case, the youth justice court must be satisfied on a balance of probabilities that the test for each potential ground for detention has been met.

31 *R v JT*, 2013 ONCJ 397 at paras 32-33.

32 The use of the terms "modified primary, secondary and tertiary grounds" is also used by Justice Renwick in *R v KK*, 2018 ONCJ 751.

A. Modified Primary Grounds

The modified primary grounds address concerns that a young person will not return to court when required to do so. A youth justice court may only issue a detention order on the modified primary grounds where:

> there is a substantial likelihood that, before being dealt with according to law, the young person will not appear in court when required by law to do so.[33]

Prosecutors may lead evidence of the young person's prior failure to attend court, or of the young person's weak ties to the community to establish modified primary ground concerns. However, given that this section is typically concerned with an accused person fleeing the jurisdiction before his or her trial date, it is unusual for it to be applied in youth justice court. Most young people simply do not have the means or wherewithal to abandon the jurisdiction of the court, which is where they live and are growing up.

What is generally inappropriate, however, is for the prosecution to rely on evidence that the young person does not attend school or runs away from home. This is particularly the case for youth who are in the care of child protection services or child welfare agencies. Where young people run away from home or leave their group homes and do not return when expected, it does not follow that they will fail to attend court as required. While running away, or other domestic turmoil, may be troubling in the context of the young person's social circumstances, it is of limited or no value when establishing modified primary ground concerns. The section is concerned with a failure to appear *in court*, not a failure to appear at home, school, or elsewhere. The latter concerns are "social measures" as defined in section 29(1), and must not be addressed via an overly restrictive youth criminal justice court bail term or a detention order.

B. Modified Secondary Grounds

The modified secondary grounds address concerns that a young person represents a substantial likelihood of reoffending if released from custody. A youth justice court may only issue a detention order on the modified secondary grounds where:

> detention is necessary for the protection or safety of the public, including any victim of or witness to the offence, having regard to all the circumstances, including a substantial likelihood that the young person will, if released from custody, commit a *serious offence*.[34]

Parliament explicitly referenced "serious offence" in this section. The concerns on the modified secondary ground are concentrated on the youth court's determination

33 YCJA, s 29(2)(b)(i).
34 YCJA, s 29(2)(b)(ii) [emphasis added].

that a young person may commit subsequent *serious* offences. Thus, should the prosecutor lead evidence that there is a substantial likelihood that the young person, if released from custody, will commit an offence other than a serious offence, that will not carry the same weight in favour of the granting of a detention order.[35] Defence counsel should address these distinctions in their submissions and draw the court's attention to the supporting case law.

Prosecutors typically lead evidence of outstanding charges or prior findings of guilt to establish a substantial likelihood of reoffending. But these are not necessarily required to establish modified secondary ground concerns. In cases where a young person is alleged to have committed particularly serious offences, the evidence in support of the prosecution's case may be sufficient in and of itself that the young person represents a danger to the community.[36] For example, in *R v JT*,[37] a young person was charged with possessing two handguns (one loaded and with readily accessible ammunition) and possession of drugs for the purposes of trafficking. The circumstances of the offences—that is, the combination of drugs and guns—were held to significantly contribute to the court's concerns that he represented a "substantial likelihood" to reoffend if released from custody.

C. Modified Tertiary Grounds

It must be noted up front that consideration of the modified tertiary grounds issues will function differently in youth court than they do in adult court, but this may not be well understood. It is important that Crown and defence counsel understand the differences. Generally speaking, the modified tertiary grounds represent Parliament's determination that there are circumstances in which releasing an accused person could undermine confidence in the administration of justice. As shown in *R v St-Cloud*,[38] this is typically restricted to those cases where allowing a person charged with a serious crime to be released into the community pending trial in the face of overwhelming evidence might cause significant concern to members of the public that some accused persons may be able to evade justice.

YCJA section 29(2)(b)(iii) established the modified tertiary grounds for young people, but it is worded slightly differently than its equivalent section for adult accused persons found in section 515(10)(c) of the *Criminal Code*. Section 29(2)(b)(iii) reads:

> (iii) in the case where the young person has been charged with a *serious offence* and detention is not justified under subparagraph (i) or (ii), that there are *exceptional circumstances* that warrant detention and that detention is necessary to maintain confidence in

35 *R v AB*, *supra* note 26.
36 *R v Guylas*, 2013 ONCA 68.
37 *Supra* note 31.
38 2015 SCC 27, [2015] 2 SCR 328.

the administration of justice, having regard to the principles set out in section 3 and to all the circumstances, including:

(A) the apparent strength of the prosecution's case,

(B) the gravity of the offence,

(C) the circumstances surrounding the commission of the offence, including whether a firearm was used, and

(D) the fact that the young person is liable, on being found guilty, for a potentially lengthy custodial sentence.[39]

In *R v St-Cloud*, the Supreme Court addressed the scope of the tertiary grounds in the context of an adult accused person facing a charge of aggravated assault for a very serious attack on a bus driver caught on video. The Supreme Court held that factors that are relevant under the tertiary grounds may also include:

- whether the offence is a violent, heinous, or hateful one;
- that it was committed in a context involving domestic violence, a criminal gang, or a terrorist organization;
- that the victim was a vulnerable person; and
- in cases where the offence was committed by several people, the extent to which the accused participated.[40]

A justice must balance all the circumstances under this section and must always be guided by the perspective of the public. In *R v St-Cloud*, the Supreme Court clarified that the "public" should be considered through the lens of a reasonable person who is properly informed about the philosophy of the legislative provisions, the values of the Charter, and the actual circumstances of the case. The person in question is a thoughtful person, not one who is prone to emotional reactions, whose knowledge of the circumstances of the case is inaccurate, or who disagrees with our society's fundamental values.[41]

R v St-Cloud was, however, an adult case, and several important distinctions are found in the text of section 29(2) of the YCJA as compared to section 515(10)(c) of the *Criminal Code*. These distinctions are crucial and significantly attenuate the essence of the *St-Cloud* decision when applied to youth court.

First, for young persons, the modified tertiary grounds are only applicable where the offence before the court is a "serious offence." As previously noted, the definition of "serious offence" is given in section 2 as "an indictable offence under an Act of Parliament for which the maximum punishment is imprisonment for five years or more."

39 YCJA, s 29(2)(b)(iii) [emphasis added].

40 *R v St-Cloud*, *supra* note 38 at para 61.

41 *Ibid* at paras 80, 87.

Second, the modified tertiary grounds are only to apply for young persons in "exceptional circumstances." This stands in stark contrast to the application of the tertiary grounds for adult persons where there is no requirement for "exceptional circumstances."[42] Yet there is no statutory definition of "exceptional circumstances" in the YCJA, nor are there any expressly stipulated legislative criteria. Indeed, the phrase "exceptional circumstances" does not exist in the rest of the YCJA.

However, section 39(1)(d), which deals with sentencing, does contain language that custodial sentences are possible in "exceptional *cases*." Exceptional cases are those "where the young person has committed an indictable offence, [and] the aggravating circumstances of the offence are such that the imposition of a non-custodial sentence would be inconsistent with the purpose and principles set out in section 38."

If the same test determined by the courts under sentencing decisions relating to section 39(1)(d) is applied to the application of the tertiary grounds under the new section 29(2)(b)(iii), the burden for the Crown to justify such a detention order will be a significant one. In *R v REW*,[43] the Ontario Court of Appeal held that section 39(1)(d) applies only:

> in those very rare cases where the circumstances of the crime are so extreme that *anything less than custody would fail to reflect societal values*. It seems to me that one example of an exceptional case is when the circumstances of the offence are shocking to the community.[44]

The court went on to state that section 39(1)(d) can be "invoked only because of the circumstances of the offence, not the offender, or the offender's history."[45] It is to be used for those "*rare, non-violent* cases where applying the general rule against a custodial disposition would undermine the purpose of the YCJA."[46] Such an interpretation was endorsed by the British Columbia Court of Appeal in *R v ST*.[47]

R v REW should therefore assist Crown counsel with determining what constitutes "exceptional circumstances," with appropriate modifications. One such modification that Crown counsel should note is that the Court of Appeal's holding in *REW* that "exceptional cases" are confined to "non-violent" offences seems misplaced in a bail context;[48] the modified tertiary grounds are commonly applied in cases of extreme violence.[49]

42 *Ibid* at para 54.
43 2006 CanLII 1761, 205 CCC (3d) 183 (Ont CA).
44 *Ibid* at para 43 [emphasis added].
45 *Ibid* at para 44.
46 *Ibid* [emphasis added].
47 2009 BCCA 274.
48 *R v REW*, *supra* note 43 at para 44.
49 See e.g. *R v Hall*, *supra* note 7.

Counsel should also note that section 29(2)(b)(iii) of the YCJA states the application of the modified tertiary grounds should have "regard to the principles set out in section 3 [of the YCJA]." In *R v St-Cloud*, the Supreme Court noted that the tertiary grounds must be applied in the context of the philosophy of the legislative provisions.[50] That philosophy is entirely different in youth court as opposed to adult criminal court.[51] Indeed, the section references the principles found in section 3 of the YCJA, which include:

- section 3(1)(a)(i), addressing the circumstances underlying a young person's offending behaviour;
- section 3(1)(a)(ii), emphasizing rehabilitation and reintegration;
- section 3(1)(b), addressing a separate criminal justice system for young persons based on a presumption of diminished moral blameworthiness or culpability;
- section 3(1)(b)(ii), recognizing the greater dependency of young persons and their reduced level of maturity; and
- section 3(1)(b)(iii), addressing enhanced procedural protections to ensure fair treatment.

X. The Test for a Detention Order: Part II—Assessing the Plan of Release

If Crown counsel convinces the youth justice court that it has satisfied the requirements of section 29(2)(b) of the YCJA, the court must then consider the requirements contained in section 29(2)(c). It is clear that once the court has determined that the strict test under section 29(2)(b) has been met, a determination under section 29(2)(c) must then be made. That section requires the youth justice court to determine, again on a balance of probabilities, whether the proposed plan of release can meet the court's concerns on the modified primary, secondary, or tertiary grounds.

Specifically, it requires the court to consider whether:

> (c) the judge or justice is satisfied, on a balance of probabilities, that no condition or combination of conditions of release would, depending on the justification on which the judge or justice relies under paragraph (b),
>
> (i) *reduce, to a level below substantial*, the likelihood that the young person would not appear in court when required to do so,
>
> (ii) *offer adequate protection* to the public from the risk that the young person might otherwise present, or
>
> (iii) *maintain confidence* in the administration of justice.[52]

50 *Supra* note 38 at para 74.

51 *R v SJL*, 2009 SCC 14, [2009] 1 SCR 426 at para 56.

52 YCJA, s 29(2)(c) [emphasis added].

Thus, after weighing and evaluating the evidence heard at the bail hearing, the youth justice court must apply the proposed plan of release to the specific concerns the court has on each applicable ground, and determine whether the plan is capable of meeting the requirements in this subsection.

Counsel should note that no plan is expected to address the court's possible concerns to an absolute certainty. Rather, on the modified primary grounds, it must "reduce to a level below substantial" the risk that the young person will not attend court, and on the modified secondary grounds, "offer adequate protection to the public" from the risk of reoffending. For the modified tertiary grounds, it must be determined whether the conditions and plan of release can "maintain confidence in the administration of justice."[53] The quality of the plan is key to that determination.[54] Counsel would be wise to ensure that the proposed plan is well-suited to the individual young person, and addresses his or her unique circumstances. Additionally, counsel must ensure that the plan does not unreasonably set the young person up with conditions with which he or she will not be able to comply and will inevitably breach.

XI. What Is a "Surety"?

A surety is a person who comes to youth court and makes a solemn vow to the youth justice court to supervise an accused young person while they are released on a recognizance in the community. Sureties are not required for a young person's release under the YCJA. In fact, they should only be required by the youth justice court when the court has determined that the Crown has met its onus that a concern under any of the modified primary, secondary, or tertiary grounds can only be adequately addressed by a bail order involving a surety.

A surety will pledge an amount of money to the court by signing a recognizance of bail. The specific amount pledged does not need to be large—lack of access to financial resources should not be a barrier to a young person getting bail—the amount should be meaningful to the surety and in proportion to the seriousness of the charges. The surety risks losing that money should the young person fail to attend court on a future date or if the surety doesn't meet his or her obligation to report to the police if the young person violates the terms of the bail order. A surety should generally be an adult Canadian citizen or permanent resident, and not have a prior criminal record. However, youth justice courts have discretion about whom to accept as an appropriate surety.

Typically, a parent or other adult who is close to the young person will step forward to act as a surety. The most important qualifications of a surety are that the

53 *R v RWK*, 2013 BCCA 387 at para 5.

54 *R v Dang*, 2015 ONSC 4254 at para 58.

person is well-suited to and capable of supervising the young person while he or she remains in the community, pending his or her trial, and that the surety is willing to take on the responsibilities of the supervision required by the plan and any reporting requirements. The responsibilities of a surety continue until the case is completely over. In busy urban jurisdictions, cases can take up to a year to come to a conclusion.

It is a criminal offence for a surety to accept a fee or any form of indemnification from any person.[55] Sureties must agree to participate for no improper purpose.

Caution must be exercised, however, against the unnecessary use of sureties. In many cases, the appropriate form of release for a young person is simply their own undertaking or recognizance. In *R v Antic*, the Supreme Court noted a risk aversion culture in adult bail court has resulted in an overreliance on sureties.[56]

The Supreme Court further explained that a "ladder principle" should be followed in bail court. A release on an undertaking is the starting point, and accused persons should be granted the least onerous form of release reasonable in the circumstances. If the Crown proposes an alternative form of release, it must show why this form is necessary. Each rung of the ladder must be considered individually and rejected by the court before a new, more restrictive form of release should be evaluated.[57] Should a young person be released on his or her own recognizance, the amount also does not need to be large. Youth commonly have a lack of access to financial resources, so the amount should be meaningful to the young person and in proportion to the seriousness of the charges. An amount of $50 or $100 should normally suffice.

The Supreme Court also held that a recognizance with sureties is one of the most onerous forms of release. It should only be imposed where all the other less onerous forms of release have been considered and rejected as inappropriate. These forms of release must be evaluated in light of the statutory considerations that apply. As *R v Antic* was an adult case, it should be borne in mind that the provisions of the YCJA addressing bail place an even greater emphasis on the importance of preserving the liberty of young persons and not burdening them with excessively restrictive bail conditions.

Sureties can be approved in court, by giving live testimony under oath. But this not a requirement. Rather, sureties can be approved using out-of-court procedures to simply the process and reduce delay.[58] Prosecutors should request the opportunity to cross-examine a surety in court only where there is a serious dispute about the appropriateness of the form of release being proposed. In other cases, a simplified procedure should be encouraged.

55 *Criminal Code*, s 139(1)(b).
56 *Supra* note 9 at para 65.
57 *Ibid* at para 67; *R v Tunney*, 2018 ONSC 961 at paras 30-37.
58 *R v Tunney*, *supra* note 57 at paras 39-42.

XII. What Is a "Responsible Person"?

Section 31 of the YCJA requires that the presiding jurist inquire about the possible availability of a "responsible person" to provide an alternative to detaining the young person, if detention would otherwise be required. This is a section that is entirely unique to the YCJA and has no analogue in the *Criminal Code*. It is a higher level of supervision than a surety, where the responsible person undertakes to the court that he or she will supervise the young person as required.

Both the responsible person and the young person must agree to the arrangement. The responsible person must undertake in writing to "take care of the young person," ensure that the young person attends court as required, and comply with any other conditions set by the court. Wilful failure by the responsible person to comply with such an undertaking is an offence under section 139(1) of the YCJA. The maximum punishment is imprisonment for two years.

The young person, the responsible person, or anyone else may apply to the court for an order that the young person should not remain in the custody of the responsible person. If the order is made, the court must also issue a warrant for the arrest of the young person.

However, section 31(6) clarifies that the failure of one responsible person arrangement does not preclude the possibility of *another* responsible person. The provision in fact requires the court to address this possibility.

In *R v RD*,[59] the Ontario Court of Appeal noted that the responsible person provisions may apply to cases involving the modified primary, secondary, or tertiary grounds. The court further noted that a responsible person undertaking contemplates a "closer level of supervision" than a surety bail, and that the "statutory requirements imposed upon a responsible person are considerably greater than the obligations imposed upon a surety."[60]

The Court of Appeal made the following observations about section 31 of the YCJA:

> Section 31 contributes to achieving the broader purpose of the Act, … to reduce reliance on incarceration for young persons at all stages of proceedings and to give the youth court alternatives to imprisonment. In that respect, I agree with the comments of De Filippis J. in *R. v. A. (S.),* 2004 ONCJ 184, at para. 10 as to the purpose of s. 31:
>
> > Parliament has directed judges not to incarcerate young people pending trial unless it is absolutely necessary or to put it another way, unless there is no other alternative available to the court and that, in my opinion simply mirrors Parliament's direction in the *Youth Criminal Justice Act* as to what should be done with young people who are found guilty after trial. Those provisions are also loud and clear and they direct judges to incarcerate young persons only as a last resort, subject to obvious exceptions.[61]

59 *Supra* note 1.
60 *Ibid* at para 38.
61 *Ibid* at para 41.

The inquiry contemplated by section 31 of the YCJA is mandatory. The section states that the "youth justice court … shall inquire as to the availability of a responsible person." Counsel must ensure this is done at each bail hearing. Failure to do so constitutes an error of law.

However, a strict two-stage procedure, where witnesses are called as potential sureties, and then a detention order is made, and then (new) witnesses are called as potential responsible persons, was decried as "artificial and could prove time-consuming"[62] by the Court of Appeal. Counsel should canvass from potential sureties whether they would also be willing to act as responsible persons while they are on the witness stand. The youth justice court may then consider whether the evidence before it supports a release plan with or without sureties, or with a responsible person undertaking. Following the "ladder principle" in *R v Tunney*,[63] the responsible person undertaking should be considered last as an appropriate form of release, due to the potential consequences to the young person should it be breached.

Counsel should be mindful that to give potential responsible persons legal advice on the nature of this undertaking, while simultaneously representing the young person, places counsel in a conflict of interest. Counsel cannot properly advise a potential responsible person of the potential risk of serving a custodial sentence should the young person breach his or her release, while still advocating for the young person's release. Whenever a responsible person release is being proffered, counsel should always direct the potential responsible person to get independent legal advice.

XIII. The Qualities of a Good Plan of Release and a Good Surety or Responsible Person

A. The Plan of Release

A good plan of release should address the youth court's specific concerns about releasing the young person, and in turn should meet the needs of the young person. It must not contain conditions by which the young person cannot abide. If the court is concerned that the young person may not attend court, then it may be necessary to have terms that require the young person to reside at a certain address, report any change of living situation, and possibly have a surety. In extreme cases, a term that the young person report to a local police division regularly may be imposed. All of these are preferable to a detention order.

If the court has modified secondary ground concerns, then terms that reduce the young person's risk to reoffend are required. For example, if the young person is alleged to be targeting victims in a certain area of his or her community, he or she

62 *Ibid* at para 46.

63 *Supra* note 57.

could be ordered to stay away from that specific area,[64] or at least only attend while in the presence of a responsible adult. If the young person is alleged to have committed his or her crimes in one place in particular—such as thefts from a specific store—a term requiring him or her to not attend at the specific location is reasonable. A term requiring him or her to not attend any similar stores whatsoever is unduly restrictive. Counsel will want to be sure that restrictions on attendance at specific places or areas will not limit the young person's access to needed resources, or his or her ability to travel to important destinations. For instance, conditions will have to be made very clear: if the Crown is suggesting that there be a prohibition from being within 500 metres of a mall, but the young person needs to pass the mall every day on his or her way to school, provisions will have to be made. Public transit routes should also be considered should a boundary condition be imposed, and an exception while travelling on public transit may be necessary.

If the young person is alleged to be victimizing a particular person, a term ordering him or her to have no contact with that person directly or indirectly and to remain within a reasonable distance away from him or her may be seen to address the modified secondary ground. In cases alleging weapons, a term prohibiting the young person from possessing weapons should always be imposed.

In cases where the young person is alleged to have committed crimes online, such as criminal harassment or threatening, or the unlawful distribution of intimate images of another young person, the Crown may seek to have a condition that would significantly limit his or her access to the Internet.[65] Defence counsel must consult with their client to assess what access to the Internet the young person requires. It can be generally assumed that students will require access to the Internet for the purposes of education. A blanket prohibition may be unduly restrictive, unrealistic, and, in fact, counterproductive.[66] However, a term that requires the young person to be subject to adult supervision while using the Internet may be appropriate. A term that requires the young person to possess no handheld communication devices (for example, a smartphone) under any circumstances or to abstain from social media entirely may similarly be too restrictive, unrealistic, possibly counterproductive, and simply too difficult to enforce.

64 For example, see the following cases that were decided in the context of adult sentencing proceedings and appropriate terms for a probation order. In *R v Rowe* (2006), 212 CCC (3d) 254 (Ont CA) and *R v Taylor* (1997), 122 CCC (3d) 376 (Sask CA), the appellate courts held that a term banishing an adult offender from a geographic area should be viewed as an extreme measure, and should only be imposed where the order represents an individualized measure designed to influence the offender's future behaviour. In *R v Griffith* (1998), 128 CCC (3d) 178 (BCCA), the court held that such a term on a probation order should only be imposed after all relevant evidence is heard and considered.

65 See *R v Brar*, 2016 ONCA 724 and *R v Schulz*, 2018 ONCA 598 on the importance of striking the correct balance when drafting court orders to restrict access to the internet.

66 Conditions that would serve to limit access to school, pro-social activities, and supportive services should be avoided at all costs. The young person's access to rehabilitative and socially supportive community services is to be encouraged.

Young people may be facing charges for offences alleged to have been committed by a group, such as robbery or break and enter. In these cases where the co-accused parties are friends or are known to each other, contact between those parties may be curtailed to prevent future reoffending. Again, counsel must be diligent to ensure that conditions are structured so that the young person's reality is accounted for; for example, if the co-accused are related, will there be family gatherings at which both young people expect to be in attendance? A blanket clause that the young person have no contact with "anyone who has a youth court record" casts too wide a net and may also prove to be too difficult to follow. In fact, under the YCJA, young people should not know who among their peers has prior youth court involvement, because protecting the anonymity of young persons is a fundamental value of the youth justice system.

Similarly, if the young people involved in an offence all attend the same school, courts should avoid terms that will limit a young person's access to school, or effectively expel a student. Some school boards interpret a clause that the young person "have no contact" with another young person as requiring that the student be transferred to a new school. This may create significant practical difficulties for the young person and his or her parents, and may impair his or her educational progress. There may be a number of issues at play when addressing school issues. Is it lawful (under the YCJA privacy protections) for the school or school board personnel to be informed or aware of the YCJA charges? If there are conditions that limit young people's contact with one another, will the school or school board administrators seek to change the students' circumstances, including enrolment? Counsel should be aware of the young person's school-related circumstances, and ensure that all educational opportunities are supported and disrupted as little as possible. If counsel suspect that proposed conditions may mean that a student will have to change schools, alternative plans must be considered, and plans should be clarified to ensure that a young person's access to appropriate school settings will be ensured. Students have entitlements. Alternatively, counsel may ask for an exception to a no contact provision while the young person is attending at school or participating in supervised school activities.

When crimes occur in the evening or at night, youth courts often consider a curfew, requiring the young person to remain in his or her place of residence during certain hours. In very serious cases, a term of "house arrest" will be imposed, during which the young person will not be allowed out of his or her place of residence. While house arrest terms may be well-intentioned, these terms often place significant obstacles on both the young person and his or her family, and should only be used as a last resort, in the most serious cases. Defence counsel should ensure that they canvass the school, employment, extracurricular, and counselling or other obligations and activities of the young person so that if the court does impose a curfew or house arrest, appropriate exceptions will be clearly included. For instance, if the young person works, plays a sport, or is involved at a community program, then conditions, including any curfew, should be crafted to ensure that the young person can continue to participate in pro-social or supportive programs and activities. That means

structuring curfew hours to ensure that the young person can maintain his or her desirable activities, or including appropriate exceptions, including school, work, and extracurricular activities, to house arrest.

In all cases, youth justice courts should avoid excessive terms that have a minimal impact on improving community safety and can essentially set up the young person to fail.[67] Not every possible interim release condition must be considered,[68] and most will not be necessary. A certain degree of adolescent independence-seeking and even rebelliousness is to be expected of all young persons. Placing conditions on them that are so restrictive that compliance is simply unrealistic will have the unintended consequence of the young person amassing fail-to-comply charges and returning to the criminal justice system unnecessarily. While addressing alleged criminal behaviour is the purpose of the criminal justice system, expecting that a young person will completely revolutionize his or her current behaviour is unrealistic. Bail conditions must be crafted to meet the modified primary, secondary, and tertiary grounds, not to change all of the young person's behaviour in an instant. Imposing a litany of conditions with which the young person is unable to comply, and which will result in administration of justice offences, is contrary to the intent of the YCJA, and may result in further stigmatization as a result of criminal justice system involvement. In fact, the YCJA was crafted to respond to the identified reality that young people are very vulnerable to this stigmatization, and to the risk of the "self-fulfilling prophecy" of criminal justice system involvement, which is seen to undermine rehabilitation.[69]

B. The Surety or Responsible Person

It should be noted that young persons are entitled to be released in cases where the prosecutor cannot establish concerns on the modified primary, secondary, or tertiary grounds. That entitlement to release does not require the presence of an adult acting as a surety or responsible person. If the prosecution cannot show just cause why the young person is lawfully detainable or why any of the grounds for detention are of concern, the young person should be released on his or her own undertaking or recognizance.

Where concerns on one of the three grounds exist, a surety or responsible person will often help formulate a plan of release that addresses those concerns. But not just any adult is acceptable. In *R v JT*, the youth justice court listed the qualities of a good candidate to act as a young person's surety or responsible person.

67 See J Sprott, "How Court Officials 'Create' Youth Crime: The Use and Consequences of Bail Conditions" (2015) 19 Can Crim L Rev 27.

68 *R v RWK*, *supra* note 53.

69 AW Leschied & S Wormith, "Assessment of Young Offenders and Treatment of Correctional Clients" in DR Evans, ed, *The Law, Standards of Practice, and Ethics in the Practice of Psychology* (Toronto: Carswell, 2011) at 387; R Corrado & AW Leschied, "Introduction: Canadian Research Perspectives for Youth at Risk for Serious and Violent Offending: Implications for Crime Prevention Policies and Practices" (2011) Intl J Child, Youth & Family Studies 2 at 162.

These include knowledge of and familiarity with the following information about the young person:

- his or her family and how well he or she gets along with them,
- his or her background,
- his or her neighbourhood,
- his or her friends,
- his or her attendance at school,
- any learning issues,
- any mental health or psychological issues,
- his or her physical health,
- whom he or she loves,
- who loves him or her,
- whom he or she respects,
- what he or she is like as an individual,
- what his or her life was like before his or her arrest,
- what kind of plan of supervision he or she will be likely to accept,
- how he or she will respond to supervision,
- how long he or she has known the proposed surety and in what capacity,
- how much interaction he or she has had with the proposed surety, and
- whether he or she will communicate honestly and openly with the proposed surety.[70]

Supervising adults should know about the particular young person's needs and character. The youth justice court should be concerned "not only with the character of the surety, but also with the quality of the surety's relationship with the young person."[71] Courts have reasonably required that a surety have an established relationship with the young person they propose to supervise. They must have a well-founded opinion about the likelihood that the youth will engage with the supports and services being contemplated.

See Appendix 5.1 for an example of an "Undertaking of a Responsible Person and of a Young Person" form that was filled out based on the fictional fact scenario of Jimmy Johnson. The fact scenario follows.

> Jimmy Johnson (age 15) and Michael Masterson (age 15) are both students at Central High School in Truro. On October 20, 2015, Jimmy robbed Michael Masterson. This occurred on a street near his school and was witnessed by another student, Harry Hooper. Jimmy was seen using a knife during the robbery. The police identified Jimmy and arrested him. He was charged with robbery and held for a bail hearing. The presiding youth court justice chose to release Jimmy on a responsible person undertaking with his mother, Susan Johnson, acting as a responsible person.

70 *R v JT*, *supra* note 31 at paras 47-51.

71 *Ibid* at para 51.

XIV. Bail De Novo Hearings

If a detention order is made under section 29 of the YCJA by a justice of the peace, a new application may brought before a youth justice court judge under section 33(1) of the YCJA. This may be brought by the defence seeking the release of the young person, or by the Crown seeking the young person's detention in custody.[72] The matter will be heard as an original application, or a bail *de novo*.

An application for a bail *de novo* is unique to the youth criminal justice context, and is distinct from an application for a bail review. No new information is required and there is no deference to the justice of the peace. Unlike applications for a bail review under section 520 or 521 of the *Criminal Code*, neither a material change in circumstances nor the presence of new evidence is required.[73]

Two clear days' notice in writing must be given to the opposite party.[74] The notice provision can be waived by either party.[75]

The availability of the bail *de novo* effectively grants a young person two opportunities for a bail hearing. Defence counsel will thus wish to ensure that the young person's first bail hearing is always before a justice of the peace to preserve the right to a bail *de novo* hearing before a youth justice court judge. Counsel can use the opportunity to prepare to address the issues that lead to the finding made by the justice of the peace.

The bail *de novo* process can also be used to vary terms on an existing form of release where the Crown and defence cannot agree to such a variation. For example, where a young person is released by a justice of the peace on certain terms, but later seeks a relaxation of a certain term, a bail *de novo* application may be brought before a youth justice court judge.[76]

XV. Bail Reviews

After a bail *de novo* hearing before a youth justice court judge, a young person or the prosecutor may bring a further bail review to the superior court of justice pursuant to section 520 or 521 of the *Criminal Code*.[77] In the very rare case where the initial application for bail was decided by a superior court judge, a review of that order shall be made to a judge of the Court of Appeal.[78]

For certain offences referenced in section 522 of the *Criminal Code* (such as murder), the YCJA provides that any decision of a youth justice court judge may

72 YCJA, ss 33(2), (3).
73 *R v St-Cloud*, *supra* note 38 at para 94.
74 YCJA, ss 33(2), (3).
75 YCJA, s 33(4).
76 *R v ED*, 2015 ONCJ 495.
77 YCJA, s 33(7).
78 YCJA, s 33(5).

be reviewed "in accordance with section 680 of the *Criminal Code*"—that is, to the Court of Appeal.[79]

However, in *R v XX*,[80] Cohen J analyzed the bail review provisions of the *Criminal Code* and those of the *YCJA* and determined that the most appropriate route for a review of a youth justice court judge's decision to detain a young person who was charged with second degree murder was via section 532(2) of the *Criminal Code*. That provision provides for orders vacating prior orders for release or detention under certain circumstances. Specifically, section 523(2)(c) (iii) allows for an application to vacate a detention order to the court where an accused is to be tried. If the young person is to be tried in the provincial youth justice court (that is, no election to be tried in the superior court has yet been made), then an application for a review of the initial decision may be made to the provincial youth justice court.[81] The test to be applied is whether or not a material change of circumstances has occurred, and the young person bears the onus of satisfying the court in that regard.[82]

Bail reviews are not hearings *de novo*. Rather, they offer a hybrid remedy. The reviewing judge must determine whether it is appropriate to exercise his or her power of review. This will be appropriate in only three situations:

- where there is admissible new evidence, if that evidence shows a material and relevant change in the circumstances of the case;
- where the impugned decision contains an error of law; or
- where the decision is clearly inappropriate.[83]

Unlike at a bail *de novo* hearing, where new evidence can be placed before the court if it is admissible and relevant, new evidence is subject to a stricter test of admissibility at a bail review. In *R v St-Cloud*, the Supreme Court listed the four criteria from *Palmer v The Queen* with respect to fresh evidence applications:

1. The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial … .
2. The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
3. The evidence must be credible in the sense that it is reasonably capable of belief.
4. It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.[84]

These four criteria must be applied, albeit with some flexibility given the expeditious nature of most release hearings.

79 YCJA, s 33(9).
80 2018 ONCA 820.
81 *Ibid* at paras 46-57.
82 *Ibid* at para 60.
83 *R v St-Cloud*, *supra* note 38 at para 139.
84 *Ibid* at para 128, citing *Palmer v The Queen*, [1980] 1 SCR 759, 1979 CanLII 8.

XVI. Subsequent Adult Charges and Section 524 of the Criminal Code

What if a young person is released on a recognizance, turns 18, and then faces new charges as an adult? The Crown may both seek to detain the young person on the new adult charges but also to cancel the young person's prior form of release on his or her youth charges pursuant to section 524 of the *Criminal Code*. This section, incorporated into the YCJA's bail regime via section 28, allows a bail court to cancel a prior form of release where the Crown presents "reasonable grounds to believe" the accused has committed an indictable offence while on a prior form of release.[85] Where a young person allegedly reoffends before turning 18, a single hearing before a youth justice can be held to determine if bail should be granted on any new charges, and if the prior form of release should be cancelled, as the youth court retains jurisdiction over all the charges before it.[86]

But can a single, "blended" hearing occur when an application to cancel a prior form of release granted by a youth justice court is brought by the Crown on the basis of new *adult* charges?

We advise against the use of these proposed blended hearings. Parliament clearly intended youth and adult proceedings should be kept separate at all times.[87] Furthermore, several key differences between adult and youth bail hearings risk being conflated or ignored if such a procedure were followed:

- The onus is different. In youth court, it is always a "Crown onus" situation—that is, the onus always rests with the Crown to justify a detention order. But in adult court, if an accused person allegedly committed an indictable offence while on a release for another indictable offence, it is by law a "reverse onus" situation where the accused bears the onus to justify his or her release from custody.[88]
- Young persons are entitled to an automatic publication ban on their identities pursuant to section 110 of the YCJA. An adult accused person is not entitled to any automatic publication ban, and the public and press may generally freely report on adult proceedings.
- Youth court proceedings also generate youth records that are entitled to the full spectrum of privacy protections that fall under part VI of the YCJA. Adult proceedings do not generate youth records. Because access to youth records is tightly controlled under the YCJA, if a single blended hearing occurs then the

85 CC, s 524(4), (8).

86 In *R v CMS*, 2017 SKPC 48, the Saskatchewan Youth Court of Justice found that section 524(8) of the *Criminal Code* is not incorporated by reference into the YCJA and thus does not apply to youth bail hearings. This is the only decision to date which seems to suggest the section 524 procedure cannot apply in youth court. In other provinces, this is routinely done.

87 *R v SJL*, 2009 SCC 14, [2009] 1 SCR 426.

88 CC, s 515(6).

risk that access to the adult records in question will inadvertently lead to unlawful access of the concordant youth records is a significant concern.
- There are different routes of review. A young person detained may have a right to a bail *de novo* hearing before a youth court judge. An adult detained can only bring a bail review in the Superior Court of Justice. These are fundamentally different hearings that take place at different levels of court.

Instead, two separate hearings should be conducted. First, if the Crown seeks a detention in adult court on the new charges, that should be addressed. Second, if the Crown seeks to cancel the accused's prior form of release in youth court, a separate hearing in youth court should be held where the allegations of subsequent offending as an adult form part of the evidentiary record.

XVII. Indigenous Young People

Indigenous young people are overrepresented in the youth criminal justice system. This is a systemic problem on many levels, and is to be addressed at every stage of the youth criminal justice system, including the pre-trial detention/bail stage. A fundamental principle of the youth criminal justice system is that it must respond to the "needs of aboriginal young persons."[89]

The youth justice court must consider a young person's Indigenous status when determining whether to grant or deny bail. In *R v Robinson*,[90] the Ontario Court of Appeal held that any "unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts"[91] are relevant. As a requirement of section 3 of the YCJA and *R v Gladue*,[92] the young person's unique cultural circumstances must be addressed at every stage of the process. This means counsel—both Crown and defence—must be aware of the cultural and historical factors that are relevant with every Indigenous young person who comes before the court. Counsel must be well educated and approach cases that involve Indigenous young people in a culturally informed manner. To responsibly represent Indigenous young people, counsel must be well informed and familiar with culturally appropriate supports and services available to Indigenous young people in their community.

Consideration should be given "to the types of release plans, enforcement or control procedures and sanctions that would, because of his or her particular Aboriginal heritage or connections, be appropriate in the circumstances of the offender and would satisfy the primary, secondary and tertiary grounds for release."[93]

89 YCJA, s 3(1)(c)(iv).
90 2009 ONCA 205.
91 *Ibid* at para 13.
92 [1999] 1 SCR 688.
93 *R v Robinson*, *supra* note 90.

XVIII. Young Persons with Involvement in the Child Protection/Child Welfare System: Young People "In Care"

Young people who are involved in the child protection/child welfare system are also vulnerable to increased levels of involvement in the youth criminal justice system. In recognition of this reality, some scholars have begun to refer to young people who are involved with child protection/child welfare as "cross-over youth."[94] We prefer not to further label these young people, and instead identify involvement in the child protection system as a cross-over issue, or say that the young people are involved with multiple systems. These young people are in the care of child welfare agencies and have thus been found by a family court to be children in need of protection. This means that they have typically been the victims of abuse, neglect, or violence in the past by adults entrusted with their care. In many cases, children who are brought into the child protection system, especially if they are older when this first happens, will find themselves living in group care. Group care means living in a group home of one kind or another—a setting where there will be staff who supervise the group of young people who live in the home. Some group homes will have a large number of young people, and some will have only a few, but they generally have a much more institutional approach than would a foster home. Even some foster homes will have multiple young people and have a somewhat institutional feel. Living in group care can present many challenges for young people, including institutional practices such as seeking police involvement in the context of behavioural issues, and the increased likelihood of youth criminal justice system involvement.

The YCJA places an obligation on the youth criminal justice system to "respond to the needs … of young persons with special requirements."[95] The unique circumstances, background, and factors that lead these youth into conflict with the law must be considered.

In the specific context of bail issues, one of the challenges for young people who are "in care" is that they may not have access to people who are willing or able to act as sureties or responsible persons. Recalling that section 29 of the YCJA mandates that detention shall not be used as a substitute for child protection or other social measures, a young person who would be released if a surety were available should not be held in detention only because no surety is available because the young person is in the child protection/child welfare system.

94 Nicolas Bala et al, "Child Welfare Adolescents and the Youth Justice System: Failing to Respond Effectively to Crossover Youth" (2015) 19 Can Crim L Rev 129.

95 YCJA, s 3(1)(c)(iv).

Alternatives to a detention order, whenever possible, must be explored. This may often include a release on the young person's own recognizance, with appropriate terms and conditions. Releasing a young person on his or her own recognizance may be the only possible release option. These are often very workable release plans that can include supervision by the child welfare agency. Young people who are involved with child protection services often do not have parents or guardians who can attend and sign a recognizance of bail or act as a responsible person on their behalf. In many jurisdictions, representatives from the child welfare authorities will not, or cannot, sign as a surety or responsible person, and foster parents, if there are such people, may also not be able to sign. Counsel may need to insist with child protection service providers that they work creatively to offer the young person the supports that would contribute to a bail plan that will see the young person released.

It is important to recognize that young people who are living with multiple vulnerabilities or challenges, such as mental health and developmental issues, child welfare system involvement, family turmoil, immigration issues, other cultural or historical disadvantage including Indigenous heritage, or other forms of discrimination, may require bail plans that meet their needs for support and community connection. Being aware of and seeking access to appropriate community supports will be an important part of effective representation in the youth criminal justice system.

XIX. Transferring a Young Person from Secure to Open Detention

In each province there are two distinct levels of custody for young persons detained prior to trial. They are known as secure detention and open detention. The degree of restraint placed on young persons differs between each level.

Open custody facilities are often smaller residences, akin to group homes, where youth live under supervision. Generally, young people must stay in the facility at all times, unless they have an approved leave. Secure custody facilities place far greater control on detained young persons, and are typically more like adult detention facilities. They are separated from the rest of the community by security fencing and other features. Youth who reside in a secure custody facility do not have regular access to the community.

If a young person is detained by a youth court justice prior to his or her trial, counsel for the young person should understand the process for determining "level of custody" (secure or open) in their jurisdiction, and consider whether the place of temporary detention is appropriate for the client. If the young person is placed in a secure detention facility, it may be possible to either advocate for a change in the level of placement, or possibly seek judicial review of that placement.

Section 30(1) of the YCJA allows places of temporary detention to be designated by the lieutenant governor in council of the province or his or her delegate.

Pre-Trial Detention Classification in Ontario

In Ontario, whether a young person is held in pre-trial detention in either secure or open custody is initially a decision of the provincial director.[96] Section 148 of Ontario's *Child Youth and Family Services Act* (CYFSA)[97] provides the statutory regime that governs that decision-making process. Section 148(1) of the CYFSA states that there is a presumption of placing a young person in a place of open detention unless the provincial director determines that the young person is to be detained in a place of secure temporary detention.

Section 148(2) of the CYFSA lists the criteria that the provincial director is to consider in exercising his or her discretion to place a young person in a place of secure temporary detention:

1. The young person is charged with an offence for which an adult would be liable to imprisonment for five years or more and,
   i. the offence includes causing or attempting to cause serious bodily harm to another person,
   ii. the young person has, at any time, failed to appear in court when required to do so under the [YCJA] or escaped or attempted to escape from lawful detention, or
   iii. the young person has, within the 12 months immediately preceding the offence on which the current charge is based, been convicted of an offence for which an adult would be liable to imprisonment for five years or more.
2. The young person is detained in a place of temporary detention and leaves or attempts to leave without the consent of the person in charge or is charged with having escaped or attempting to escape from lawful custody or being unlawfully at large under the *Criminal Code* (Canada).
3. The provincial director is satisfied, having regard to all the circumstances, including any substantial likelihood the young person will commit a criminal offence or interfere with the administration of justice if placed in a place of open temporary detention, that it is necessary to detain the young person in a place of secure temporary detention,
   i. to ensure the young person's attendance at court,
   ii. for the protection and safety of the public, or
   iii. for the safety or security within a place of temporary detention.

Under section 148(5) of the CYFSA, if the provincial director places the young person in a place of secure temporary detention, the young person may bring an

96 Pursuant to Order in Council 498/2004.
97 2017 SO 2017, c 14 [CYFSA].

application before a youth justice court for a review of that decision. The youth justice court conducting the review of that decision may, in turn, confirm the provincial director's decision or "may direct that the young person be transferred to a place of open temporary detention."[98]

If the young person brings such an application in youth court, the prosecutor should ensure that reasonable notice was given to both the Crown's office[99] and the provincial director, to enable both parties to respond. In the absence of reasonable notice, prosecutors should request an adjournment of the hearing so that the parties may prepare their responses. Procedural fairness must govern this process.[100]

The legislation creates a presumption in favour of a place of open temporary detention.[101] That presumption may be rebutted upon the provincial director being satisfied that the express criteria in the statute are met.[102]

Upon a review[103] of the provincial director's decision, the youth justice court should consider the "totality of the youth's history and current situation."[104] The provincial director may testify as to why the initial placement decision was made. The Crown and defence may call additional evidence.

Counsel practising in other provinces should determine which legislative regime governs the placement of young persons in places of temporary detention and consider when and if an application to change that placement is lawfully available and appropriate. For assistance in this regard, see Appendix 5.2: Pre-Trial Detention Procedures in Selected Provinces.

XX. Preparing Your Client and the Plan of Release

Preparing for a bail hearing and/or developing a plan of release will require you to get to know the bare bones of the allegation (which is generally all you have), the young person, his or her life circumstances, and, of course, his or her parents and/or other adult supporters. This is a period of time when your client and the adults in his or her life may be in a state of significant distress. They are likely to be distraught, angry, and afraid and may be alienated from one another. Parents or guardians may

98 CYFSA, s 93(6).

99 *R v HM*, 2004 ONCJ 272 at para 10, decided under section 49 of the *Ministry of Correctional Services Act*, RSO 1990, c M.22 [MCSA] (the predecessor section to the current section 148(1) of the CYFSA).

100 *Ibid* at para 10.

101 *Ibid* at para 12; *R v L (S)*, 2006 ONCJ 174, [2006] OJ No 1905 (QL) (also decided under section 49 (now repealed) of the MCSA).

102 *R v HM*, *supra* note 99 at para 12.

103 The standard of review is not expressly stated in the statute and no reported decision to date has addressed the issue.

104 *R v L (S)*, *supra* note 101 at para 9.

react in a variety of different ways—they may be angry at the young person and think that a "few days in jail will do him good," or they may be feeling defensive and angry at the system for suggesting that their niece "would ever do any of those things; the police just have it out for her"; or they may be feeling completely at a loss and frightened: "I've never known anyone who's been arrested; will he get hurt in jail?" The young person may have equally diverse feelings, or may display many feelings at once: yelling in anger, crying, and feeling hopeless. In our experience, the most important approach at this point in the process is to insist that everyone take it one step at a time.

First you have to understand the allegations—there is nothing to be done in terms of responding to them, but understanding the nature of the allegations and finding out the specific crimes and section numbers under which the young person is being charged, the other people involved, whether the people are known to one another or not, and the location at which the allegations are said to have occurred are all going to be important components of assessing whether the allegations meet the requirements in the YCJA, specifically section 29(2)(a). If they do not—it is not a "serious offence" (as defined by the YCJA), nor does the young person have a history indicating a pattern (at least three) of outstanding charges or findings of guilt—then the young person must be released. If the offence does meet these criteria, does the Crown prosecutor have modified primary, secondary, or tertiary grounds concerns—and if so, what are they? The bail plan you develop must address these concerns and any you feel the court might have. Generally, you will want to have a discussion with the Crown at the outset to establish their position.

Next, you need to talk to the young person. Check in with regard to his or her physical and emotional well-being: is he or she hurt, or in distress? Did the young person speak to anyone prior to speaking with you? You will need all of the information outlined below, and possibly more:

- ✓ What is his or her age and date of birth?
- ✓ Where does he or she live, and with whom? If his or her parents live apart, does he or she live at both of their homes?
- ✓ Where does the young person go to school, what grade is he or she in, and how is he or she performing?
- ✓ Are there any problems in school: academically, with peers, or with adults?
- ✓ What extracurricular activities does the young person have: job, community, music, sports, family obligations (for siblings or others)?
- ✓ Is the young person involved in any community programs: counselling, support programs, educational, or otherwise?
- ✓ What things are going the best for the young person: school, friends, extracurricular activities, job?
- ✓ What adults does he or she get along with best?

- ✓ Does he or she have any special accommodations in school: a special class, special help, alternative programming?
- ✓ Who are the supportive adults in his or her life? Are any of them willing to come to court for support? What is their immediate contact information?

You want to ensure that the plan puts adequate supports in place so that the court will be satisfied on a balance of probabilities that any conditions or combination of conditions will reduce, to a level below substantial, any risk that the young person will not come to court, will offer adequate protection to the public from the risk that the young person might otherwise present, and/or will maintain confidence in the administration of justice.[105]

If a reasonable release plan requires a surety, you will need to identify the person and prepare them to testify. As described above, the surety should be someone who knows the young person well and has the time and capacity to supervise the young person and the conditions, someone who the young person respects and with whom the young person will cooperate, especially in the event of conflict. Often a parent or guardian is the proposed surety. The proposed surety must understand the obligations of the surety, that he or she is pledging money and taking a solemn oath that he or she will supervise as directed, and will call the police if the young person should fail to abide by the conditions as agreed to or imposed.

Counsel should advise the young person and the surety that they should not discuss the allegations. This instruction is often counterintuitive to the parent or guardian, but if the parent or guardian is testifying at the bail hearing you can be sure that the Crown prosecutor will ask whether they have discussed the allegations, and what the young person has told him or her. If the parent or guardian has discussed the allegations, the prosecutor will ask about the details of any discussions to elicit evidence. If the surety has not discussed the allegations, the prosecutor may try to suggest that not having done so is evidence of a lack of interest, or that the proposed surety is not taking the allegations seriously. Counsel should prepare the surety that these questions may be asked and that he or she can respond that he or she was told by counsel not to discuss the allegations with the accused young person. That does not mean that families may not respond to the fact that the young person was arrested. However, to protect the young person's rights, including the right not to self-incriminate, they should not discuss the allegations with anyone other than their lawyer.

If you are having a proposed surety testify, you should also have him or her be prepared to answer questions about his or her willingness to act as a responsible person,

105 YCJA, s 29(2)(c).

and he or she should be familiar with the difference between acting as a surety and acting as a responsible person.

You will want to prepare the proposed surety or responsible person for the following questions and understandings, and ask him or her in direct examination:

- ✓ What is your name and relationship to the young person?
- ✓ What is your occupation, or activities if not employed?
- ✓ Where and with whom do you live?
- ✓ What is the history and quality of your relationship with the young person?
- ✓ Do you believe that the young person will cooperate with the supervision?
- ✓ What do you know about any of the young person's vulnerabilities and/or strengths: school, learning disabilities, mental health issues, employment and other activities, relationships with other supportive adults?
- ✓ How will you ensure that the young person will abide by the specific conditions (for example, by picking the young person up after work, being home to ensure the young person goes to school, bringing the young person to court when required)?
- ✓ Confirm that the surety understands what is expected of him or her: to make a solemn oath to the court; to pledge money, and that if the surety fails to abide by his or her duties he or she stands to lose that money; that he or she will be expected to call the police if the young person does not abide by the conditions imposed, and that he or she will do so.
- ✓ If the proposed surety is also testifying that he or she is willing to be a reasonable person, then the surety must be prepared to answer questions about the additional responsibilities of a reasonable person (as noted above), to take care of the young person, and that failure to comply with the duties could result in imprisonment.
- ✓ Confirm whether the surety has acted as a surety in the past. Were there any breaches? If so, what did the surety do as a result of any breach? If he or she has proposed himself or herself as a surety for the same youth, was he or she able to fulfill his or her obligations as a surety?

On the rare occasion that the young person testifies at his or her own bail hearing, he or she needs to know what questions you will ask. The questions should be quite narrow and related only to satisfying the court with respect to the grounds of concern (modified primary, secondary, or tertiary) that cannot be addressed by any other witness. The young person should also be advised that in accordance with section 518 of the *Criminal Code*, he or she cannot be cross-examined by the Crown or questioned by the justice about the allegations unless he or she raises them first.[106] Although this protection against self-incrimination exists, it may nonetheless have limited value in some circumstances.[107]

106 *R v Mallory*, 2007 ONCA 46 at paras 175, 177.
107 *R v Kringuk*, 2008 NUCJ 25 at para 19.

TABLE 5.1 Adult Versus Youth Bail Hearing

Adult Bail Hearing	Youth Bail Hearing
• Provincial or territorial court of justice	• Provincial or territorial court of justice
• Crown/reverse onus	• Crown onus
• 1st, 2nd, and 3rd grounds	• 1st, 2nd, and 3rd grounds
• Own recognizance or a surety release	• Own recognizance or a surety release
	• Responsible person
• Bail reviews take place in Superior Court—*not* as of right	• Bail *de novo* at Ontario Court of Justice
	• Bail review at Superior Court of Justice

XXI. Checklist for Youth Bail Court

1. Remember that every bail hearing is a *Crown onus*.
2. Consideration must be given to the young person's *Indigenous status*. *Counsel must be prepared for the specialized context.*
3. *Counsel must be able to navigate the special issues for young people who are "in care."*
4. Consider whether the young person is facing a "*serious offence*" or the Crown is alleging a "*history that indicates a pattern* of either outstanding charges or findings of guilt" or both.
5. If the young person does not fall into either of the two categories described: (1) serious offence or (2) history indicating a pattern, then the young person *must be released*.
6. If a detention order may lawfully be sought, determine which of the ground(s) the Crown wishes to argue warrant detention.
7. The applicable standard under section 29(2) is a *balance of probabilities*.
8. If the Crown is alleging modified *primary ground concerns*, the court must be satisfied that there is a "substantial likelihood that, before being dealt with according to law, the young person will not appear in court when required by law to do so."
9. If the Crown is alleging modified *secondary ground concerns*, the court must be satisfied that "detention is necessary for the protection or safety of the

public, including any victim of or witness to the offence, having regard to all of the circumstances, including a substantial likelihood that the young person will, if released from custody, commit a *serious offence*."

10. If the Crown is unsuccessful in persuading the court that either the modified primary or secondary ground concerns warrant detention, the Crown may allege modified tertiary ground concerns.
11. If the Crown is alleging modified *tertiary ground concerns*, the youth justice court must first be satisfied that:
    a. the young person is charged with a "*serious offence*," and
    b. there are "*exceptional circumstances that warrant detention*."
12. The Crown must then persuade the court that "detention is necessary to maintain confidence in the administration of justice, having regard to the principles set out in section 3 [of the YCJA] and to all the circumstances, including:
    a. the apparent strength of the prosecution's case;
    b. the gravity of the offence;
    c. the circumstances surrounding the commission of the offence, including whether a firearm was used; and
    d. the fact that the young person is liable, on being found guilty, for a potentially lengthy custodial sentence."
13. The youth justice court must then *assess the proposed plan of release*. Will the plan:
    a. *reduce, to a level below substantial*, the likelihood that the young person would not appear in court when required to do so;
    b. *offer adequate protection* to the public from the risk that the young person might otherwise present; and/or
    c. *maintain confidence* in the administration of justice?
14. If the conclusion is that detention is required, the court *shall make an inquiry as to the availability of a responsible person* under section 31 in whose care the young person can be placed.

XXII. Ethical Considerations for Prosecutors and Defence Counsel

A. Prosecutors

Prosecutors must respect the intent of the YCJA to reduce the number of young people held in pre-trial detention. Where the matter does not meet the requirements of section 29(2)(a), the young person must be released with no conditions. In addition, prosecutors should seek a detention order for a young person only where the

proposed plan of release fails to adequately address their concerns on any of the modified primary, secondary, or tertiary grounds. Often in matters where a detention order could be sought, concerns will be adequately addressed with conditions on a release order. The following factors should be considered:

- ✓ The seriousness of the alleged offence, and the young person's degree of participation in that offence.
- ✓ Any prior youth court record or any outstanding charges.
- ✓ Compliance with any existing plan of release or prior plans of release.
- ✓ Evidence that the young person has the inclination or ability to flee the jurisdiction.
- ✓ Evidence the young person presents a "substantial likelihood" of reoffending.
- ✓ Public confidence in the administration of justice, considered in light of the fundamental principles and values of the YCJA.
- ✓ If the young person will be detained in custody prior to trial, where will he or she be placed? Will the young person's family be able to visit and maintain contact with him or her?
- ✓ Disruptions to the young person's education if removed from his or her current school.
- ✓ The effectiveness of the proposed plan of release.
- ✓ The suitability of any proposed surety or responsible person.
- ✓ Whether the young person is an Indigenous young person.
- ✓ Whether the young person is presently engaged with the child protection system.

When conditions are imposed on a young person's form of release, they should be the least restrictive set of conditions capable of meeting the court's concerns on the modified primary, secondary, or tertiary grounds. Excessive terms that needlessly hinder the young person's liberty or essentially set him or her up to fail should be avoided. As well, any term that would effectively expel a student from his or her place of education, or remove the young person from his or her place of residence, should be carefully scrutinized. Can the term be redrafted to avoid such an outcome? Is it necessary? Are the potentially deleterious effects on the young person and his or her family outweighed by the benefits to public safety and/or the administration of justice?

B. Defence Counsel

The factors relevant to Crown prosecutors are equally important for defence to consider. Defence must be vigilant to ensure that the prosecutor is not seeking to have release conditions imposed where pre-trial detention is not available under the YCJA. In many cases where pre-trial detention is something that the prosecutor may seek,

agreement may be reached about an appropriate release plan. Defence counsel is, however, responsible for putting together a release plan, and counsel must ensure that they have their client's instructions regarding the young person's willingness and capacity to abide by suggested conditions of release.

In the unusual circumstance where a young person refuses to sign a bail plan that has been agreed to or imposed, or other situations where a young person proceeds against counsel's advice, defence counsel should make very sure that the young person understands the advice given, and should consider getting instructions in writing.

In addition, defence counsel must ensure that it is made very clear to parents and other supportive adults that the young person is the client, and while counsel can, with the young person's consent, speak with the parent/adult, counsel can in no way provide legal advice to the parent/adult. For example, if the parent/adult who is a surety were to call and advise the lawyer that the young person is breaching his or her bail conditions, counsel cannot make any comment about what the surety should do, except to suggest that they may wish to seek legal advice.

Appendix 5.1: Undertaking of a Responsible Person and of a Young Person

Canada
Province of Nova Scotia

IN THE YOUTH JUSTICE COURT

NSY Form108
Revised 02/03

Her Majesty the Queen
v.

Jimmy Johnson
(Name of Young Person)

UNDERTAKING OF A RESPONSIBLE PERSON AND OF A YOUNG PERSON

(Section 31 YCJA)

Jimmy Johnson of 100 Anywhere Street, Truro, NS,
(the young person), is charged with the following offence(s):

Case No(s). and Brief Description of Offence(s)	Section	Date	Place
Y10000 Robbery	Criminal Code s 344	20 October 2018	Town of Truro

Responsible Person

I, Susan Johnson of 100 Anywhere Street, Truro, Nova Scotia, am a responsible person, willing and able to take care of and exercise control over the young person.

I undertake to be responsible for the attendance of the young person in the Youth Justice Court at 2000 Justice Street, Truro, Nova Scotia on 1 December, 2018 at 10 a m. and at other times as required by the court.

☒ I undertake to meet the following conditions: *(attach schedule A if needed)*

I understand that failure to comply with the terms of this undertaking may result in a charge under section 139 of the Youth Criminal Justice Act. I understand that if I am no longer willing or able to take care of or control over the young person, I may apply in writing to the court to be relieved of my obligation.

DATED at Town of Truro, Nova Scotia, on 31 October, 2018.

Signature of responsible person

Young Person

I, the young person, am willing to be placed in the care of the responsible person instead of being detained in custody.

I undertake to comply with the arrangement undertaken by the responsible person.

I undertake to attend court at any time and place as required by the court.

☒ I undertake to keep the following conditions: *(attach schedule B if needed)*

I understand that failure to comply with the terms of this undertaking may result in a charge against me under section 139 of the Youth Criminal Justice Act. I understand that if the responsible person is relieved of the obligation, a warrant will be issued for my arrest.

I understand I have the right to be represented by counsel (a lawyer), including the right to apply for legal aid.

DATED at Town of Truro, Nova Scotia, on 31 October, 2018.

Signature of young person

Distribution: *Court, Young Person, Responsible Person, Prosecutor, Defence Counsel, Police*

F:\WP\CourtForms\NSY108-UndertakingRespPerson-Feb-03.wpd

Schedule A

Terms of the Responsible Person Undertaking: Susan Johnson

- Supervise Jimmy Johnson and ensure that he complies with the terms of this undertaking, including those in "Schedule B."
- Reside with Jimmy Johnson at 100 Anywhere Street.
- Ensure that Jimmy Johnson attends court when required to do so for the duration of this undertaking.

Schedule B

Terms of the Responsible Person Undertaking: Jimmy Johnson

- Not to possess any weapons as defined by the *Criminal Code*.
- Not to have any contact, directly or indirectly, with Michael Masterson (victim) or Harry Hooper (witness).

Appendix 5.2: Pre-Trial Detention Procedures in Selected Provinces

Province	Features
British Columbia	• The provincial director designates where a youth will be placed pursuant to YCJA section 88 and a provincial order in council. • Young persons are generally held in secure custody facilities while on remand. • Open custody units are only to be used for remand purposes when: – there is overcrowding in the secure units; – a young person is a "dual status" youth also subject to an open custody sentence; or – a transfer is necessary to ensure the safety of youth or others, or is otherwise appropriate based on the young person's assessed risk and needs. • An internal complaints process allows a youth to have the placement decision reconsidered.
Alberta	• All young persons held on remand are placed in a secure custody facility. • Open custody facilities are reserved for young persons facing treatment issues for substance abuse or mental health concerns.
Saskatchewan	• Placement of a young person on remand is determined by the courts. • All remanded youth are generally placed in secure custody. • If a young person is a "dual status" youth also serving an open custody sentence and then faces new charges, the young person may be placed in open custody.
Ontario*	• There is a presumption under the *Child, Youth and Family Services Act* that young persons on remand are to be held in a place of temporary open detention. • The provincial director may place a young person in a secure temporary detention facility based on certain statutory criteria. • The placement may be reviewed through an internal administrative process, and/or through an application brought before a youth court judge.
Quebec	• The provincial director determines whether the young person on remand will be placed in a secure or open custody facility. • The nature of the young person's charges and any relevant background information is considered. • The placement can only be challenged by way of judicial review.

* Ontario's pre-trial detention placement regime for young persons is governed by sections 148 and 149 of the *Child, Youth and Family Services Act*, 2017 SO 2017, c 14.

Although -- the act is already cited earlier in the chapter...should we just be using the abbreviation?

Appendix 5.3: Bill C-75—Judicial Interim Release

Bill C-75 was introduced into the House of Commons in March 2018. It contains significant amendments to the YCJA. While not in force at the time of this book's publication, we have chosen to highlight some of the Bill's implications for the Canadian youth criminal justice system.

Here, we focus on the amendments that will affect judicial interim release. The preamble to the Bill states the following:

> *The enactment also amends the* Youth Criminal Justice Act *in order to reduce delays within the youth criminal justice system and enhance the effectiveness of that system with respect to administration of justice offences. For those purposes, the enactment amends that Act to, among other things,*
>
> …
>
> *(b) set out requirements for imposing conditions on a young person's release order…*

Bail Amendments

Release order with conditions

29 (1) A youth justice court judge or a justice may impose a condition set out in subsections 515(4) to (4.2) of the Criminal Code *in respect of a release order only if they are satisfied that*

(a) the condition is necessary to ensure the young person's attendance in court or for the protection or safety of the public, including any victim of or witness to the offence;

(b) the condition is reasonable having regard to the circumstances of the offending behaviour; and

(c) the young person will reasonably be able to comply with the condition.

Section 29(1) sets three requirements for the imposition of any bail condition put on a young person's release order. This section is meant to address a concern that many have observed about release orders for young persons for years: that they are too onerous, and often contain unnecessary conditions that are either unrelated to the rest of the requirements found in section 29(2) of the Act, or are simply too difficult for a young person to follow.

The first requirement is that a condition actually be *necessary* to ensure the young person's attendance in court (primary ground concerns) or to ensure the protection or safety of the public, including any victim or witness (secondary ground concerns.) This is a clear legislative direction that bail terms should be narrowly drafted and the party requesting the term be able to articulate how it will be necessary (note: *not simply desirable or even helpful*) to address primary or secondary ground concerns.

The next two conditions require that the conditions be *reasonable* and that the young person will *reasonably be able to comply* with the conditions. The use of complicated, unrealistic conditions that are just setting a young person up to breach his or her bail and be rearrested should be avoided.