MOCK BAIL HEARING
ROLE PREPARATION

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For this OJEN Mock Bail Hearing, there are three packages:

- **An OJEN Mock Bail Hearing Scenario**
- **OJEN Mock Bail Hearing Role Preparation Package**
- **OJEN Mock Bail Hearing Justice Sector Volunteer Package**

Youth need the **Scenario,** and **Role Preparation** packages.

Justice sector volunteers/ teachers/organizers need all three packages.

PREPARING FOR A MOCK BAIL HEARING

Mock bail hearings are designed to help you learn more about the justice system. Many of you may have some idea about what a bail hearing is from what you have seen on television or in movies. Some of what you have seen might be accurate, but a lot of what is shown in courtroom dramas is not. In reality, many witnesses say things that are not planned, and lawyers have to think quickly on their feet.

Now is your moment to try playing one of the many important roles in the bail process. Get into character and have fun with it. Those of you who are playing the role of lawyers, proposed sureties and witnesses will have a lot of work to do up front. Those who are playing the justice of the peace and court staff will play an important role on the day of the hearing.

WHAT IS THE DIFFERENCE BETWEEN A BAIL HEARING AND A TRIAL?

The type of court proceeding usually seen on television and in movies is a criminal trial. There, the Crown lawyer (or prosecutor) is acting as an agent for the government to try someone accused of a crime (like robbery, assault, murder among others). In a criminal trial, the Crown must convince the judge or jury that the accused is guilty *beyond a reasonable doubt*.

A bail hearing is very different. First, the purpose of a bail hearing is not in any way to determine the guilt or innocence of the accused, but rather for the court to decide whether the accused should remain free or be incarcerated while waiting for their trial. Second, there is no jury, and bail hearings may be argued before a justice of the peace or a judge[1]. Finally, when deciding the outcome, the justice of the peace must be convinced *on a balance of probabilities*. This standard is lower than *beyond a reasonable doubt*. To meet the "balance of probabilities test", the justice of the peace must believe that it is **more likely than not** that the accused will miss their set trial date, OR pose a risk to the public, OR that public confidence in the judicial system would be harmed, if that person were released.

[1]In Canada, bail hearings may be presided over by either a judge or a justice of the peace. References to the "justice of the peace" in this package imply either title. Remember that judges and justices of the peace are addressed differently: judges are referred to as "Justice (Name)", or as "Your/ Her/ His Honour", while justices of the peace are never referred to as "Justice", and are addressed in court as "Your/ Her/ His Worship".

BACKGROUND: THE BAIL PROCESS

WHAT IS BAIL?

Bail is the word used for when a person charged with an offence is allowed to remain in the community during the time between the laying of the charge and the trial.

When people are arrested they are usually taken to the police station. Once there, the police can either release them (after signing a *Promise to Appear* for trial) or hold them in custody. If they are being held in custody, the police must bring them to a *bail hearing* within 24 hours.

Most people are released on bail, and in fact, bail is only supposed to be denied on one of three grounds:

- Primary ground: **A concern that the accused person will not show up for court** (if there is a history of not obeying court orders of if there is a risk that the person will run away and not show up for court).
- Secondary ground: **A concern that the accused person will commit further crimes while on bail** (for the protection of the public and in particular, complainants or victims of offences).
- Tertiary ground: **A concern that the public would be shocked and their confidence in the justice system diminished** (this ground is rarely used and only used in very serious cases such as murder cases, paedophilia charges, gun crimes, etc.).

WHAT IS A BAIL HEARING?

A bail hearing is a procedure where a justice of the peace determines whether a person charged with an offence should be released or held in custody until trial.

The Crown attorney will read a brief summary of the allegations against the accused. The defence lawyer, or the duty counsel, or sometimes even the accused person, will then present information about the accused.

The justice of the peace looks at some of the following factors:

- A past criminal record or other current charges;
- A steady job;
- Family life or community life;

- Any information about character;
- How serious the charge is and whether there was any violence used

At the bail hearing, both the Crown and defence present legal arguments and evidence as to why the accused should or should not get bail. Generally, the Crown goes first and has the obligation of showing why the accused should not be released. However, in some cases (those involving more serious offences, or ones where the accused has previous charges, or previously failed to appear in court) the responsibility – or "onus" – is switched and the defence must explain why the accused should be released; this is called a "reverse onus". An accused who is not released will be held in a detention centre until the trial.

If the accused is a youth (defined by the Youth Criminal Justice Act [*YCJA*] as between the ages of 12 and 17), the burden is always on the Crown to show why he or she should be detained until trial.

It is very important to remember that a person is presumed innocent until proven guilty and guilt is determined at trial.

WHAT ARE BAIL CONDITIONS?

Usually a person is released on bail with strict conditions. Failure to keep the bail conditions may mean that bail is revoked (taken away) and the person waits for the trial in jail. The accused may also be charged with another offence: breaching bail conditions. This is a separate charge and if convicted, can add to a criminal record. This can also affect the likelihood of the person getting bail again in the future.

Bail conditions must relate specifically to the charge (e.g. if the offence involved alcohol, a condition which prohibited the accused from drinking alcohol may be imposed). If the condition does not relate to the charge, then it should not be included in the bail (e.g. for an offence involving alcohol, a condition of house arrest may not be related).

Here are some examples of possible bail conditions:

- Not having contact with certain people (such as the complainants, or other witnesses, or co-accused); contact includes letters and phone calls, even through friends.
- Staying away from a certain place, such as the home address or school of the complainant/victim.

- A surety agreeing that they or someone else will pay money into court if the accused does not show up at the next court hearing.
- Submitting passports to the court.
- Reporting to the police or a bail supervisor at set times.
- Attending school or work.
- Following a curfew.
- Not using drugs or alcohol.
- Keeping the peace (e.g. no other fights or criminal involvement).
- If the alleged offence involved violence, a weapon or criminal harassment the judge must also add a condition prohibiting the accused from possessing a weapon or residing in a house where weapons are kept.

HOW CAN BAIL CONDITIONS BE CHANGED?

Bail conditions can be changed by ***bail variations***. Bail variations should be requested if there are unreasonable conditions in the bail (e.g. conditions which do not relate to the offence at all) or if the circumstances changed. For example, if bail conditions include a curfew and the accused person gets a new job that requires them to stay out later than the curfew, this condition could be changed. Often, accused persons are on bail for many months as it can take up to a year for a charge to proceed to trial. During this year, it is understood that circumstances can change for both the accused person and their sureties.

Bail variations can be requested by a defence lawyer or duty counsel who can then ask the Crown to consent to the change in condition(s). If the Crown does not consent, the request must then go before a judge of a higher level court, who will determine whether or not to grant the bail variation.

In order to obtain a bail variation, the accused needs:

- The consent of the Crown or the consent of the justice of the peace;
- The original bail documents;
- The surety or sureties from the original bail to sign the new bail.

Many people do not request a bail variation, hoping instead that they will not get caught in breach of their conditions, or plan to explain their reasons if they get caught. This approach does not protect someone from further charges and perhaps a longer criminal record.

WHAT IS A SURETY?

A surety is someone who agrees to take responsibility for a person accused of a crime. Unlike what is portrayed on U.S. television, where large sums of money in cash or bond are involved, bail in Canada is not supposed to be related to financial factors, and if money is involved at all the amount is usually small. Instead of cash bail, Canadian courts usually require sureties who pledge an amount to the court, with the understanding that they may lose that money if they fail to fulfill their responsibilities. Rather than an emphasis on money, in Canada, a surety must show responsibility, respect for the procedure and a strong relationship to the accused person.

WHAT ARE THE RESPONSIBILITIES OF A SURETY?

- Making sure the accused person comes to court on time and on the right dates.
- Making sure that the accused person obeys each condition of the bail order, which is also known as a recognizance.
- Sign the recognizance, acknowledging that the surety agrees to pay a specified amount of money to the court if the accused person fails to obey any of the bail conditions. In actuality, this money is never paid up front and is only asked for by the court in rare circumstances.

QUALIFICATIONS OF A SURETY

The surety may have to give evidence in court and be examined about their qualifications. These will vary depending on the allegations against the accused. When deciding whether a proposed surety is suitable, the justice of the peace may consider their:

- Finances;
- Personal character and background;
- Life circumstances;
- Relationship to the accused person.

ENDING THE OBLIGATIONS OF A SURETY

If a surety decides that he or she is no longer willing or able to supervise the accused person, there are two options:

1. Bring the accused to court and ask to be relieved of the responsibilities; or
2. Come to court and apply in writing to be relieved of the duties.

At this point, the court will issue an order for the arrest of the accused person or consider a different person as a surety.

BAIL AND YOUTH

The *YCJA* was passed in 2003. One of its basic principles is that society will take a different approach to young people (defined as ages 12 to 17) who commit crimes than it does with adults. This recognizes the fact that young people are still maturing and that the community benefits more from their rehabilitation and reintegration within society than from punishment or incarceration (jail).

The presumption that an accused should usually be released on bail applies even more strongly in the case of youths - there is a very strong ***presumption against detention*** for young people. For a justice of the peace to detain a young person accused of a crime, the Crown must show that:

- The young person has committed a serious offence (one for which the maximum punishment is imprisonment for five years or more); or
- The young person has failed to comply with non-custodial sentences in the past; or
- It is likely that the young person will not appear in court when required by law to do so;
- Detention is necessary for the protection or safety of the public; or
- Detention is necessary to maintain confidence in the administration of justice.

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COURTROOM ETIQUETTE FOR A MOCK BAIL HEARING

The courtroom is a formal setting, and there are some specific etiquette rules to follow that may not be familiar to you. Here are some pointers:

REMEMBER TO:

» Speak clearly

» Use an appropriate volume

» Try not to say "um", "ah" or "okay"

» Do not go too fast

- When facing the justice of the peace, Counsel for the accused usually sits at the table to the left and counsel for the crown sits at the table to the right.
- When the justice of the peace enters, all counsel, and everyone else in the courtroom, must stand-up. Counsel then bow to the justice of the peace. Sit down when the clerk instructs everyone to do so.
- When you are getting ready to address the justice of the peace, either stand at your table, or by the podium (if there is one). Wait until the justice of the peace seems ready to proceed. They may nod or may say that you can proceed. If you are not sure, ask if you may proceed.
- The first counsel to address the court should introduce other counsel. For example, you might say: "Good afternoon, Your Worship; my name is _____ and my co-counsel are _____, _____, _____. We will be presenting the Crown's case (or the case for the defence).
- Every other counsel should introduce themselves again before starting to address the court.
- If it is not your turn to address the justice of the peace, pay attention to what is happening. Take notes that you can use during your submissions or closing statements.
- Try not to distract the justice of the peace. If you need to talk with your co-counsel, write a note.
- Stand every time you are addressing or being addressed by the justice of the peace.

- Refer to your co-counsel as "my colleague" or "my co-counsel". Opposing counsel should be referred to as "my friend" or "counsel for [position or name of the client]".
- Address the justice of the peace formally: "Your/ His/ Her Worship"
- Do not interrupt the justice of the peace, and if they interrupt you, stop and wait until they are finished before replying. Never interrupt or object while an opposing counsel is addressing the court. Wait until you are specifically asked by the justice of the peace to respond to a point argued by opposing counsel.
- If the justice of the peace asks you a question, take your time to think about it before replying. If you do not hear the question, or are confused by it, ask them to repeat or restate the question. If you do not know the answer, say so. Once a question has been answered, pick up from where you were before the question.

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MOCK BAIL HEARING SCHEDULE

ORDER	ACTION	TIME LIMIT
1	Crown and defence lawyers robe and take their seats in the courtroom	1 min
2	Justice of the peace is escorted into the courtroom	1 min
3	Clerk opens court	2 mins
4	Crown and defence counsel stand and introduce themselves	1 min
5	Crown lawyer reads in allegations	3 mins
INTERVIEWING WITNESSES & PROPOSED SURETIES		
6	Crown Witness – arresting officer	4 mins
7	Defence examination of arresting officer	4 mins
8	Defence examination of proposed surety	4 mins
9	Crown examination of proposed surety	4 mins
CLOSING ARGUMENTS		
10	Crown lawyer gives closing arguments	3 mins
11	Defence lawyer gives closing arguments	3 mins
THE DECISION		
12	Justice of the peace leaves. Court is adjourned (by clerk) until he or she returns	5 mins
13	Justice of the peace returns; clerk calls court back to order. Justice of the peace explains the bail decision and discusses surety provisions if applicable	10 mins
TOTAL		45 mins

Steps 6-9 can be repeated to accommodate multiple witnesses and proposed sureties for the Crown and/or defence.

ROLE PREPARATION FOR CROWN LAWYERS

In OJEN Mock Bail Scenarios, the role of Crown lawyers is to argue that the accused should be held in custody while awaiting trial. After the lawyers on both sides have been introduced, one Crown lawyer will need to stand up and read in the allegations against the accused. S/he will also need to indicate if it is a reverse onus case, and on what grounds the Crown is seeking detention.

When all parties are ready to proceed:

- Read the synopsis of allegations and any outstanding matters or criminal record;
- State the type of onus (Crown or Reverse) in this case;
- State on what grounds the prosecution is seeking to prevent the release of the accused:
    a. Primary (the accused will not come to court for his/her trial)
    b. Secondary (it is likely that the accused will reoffend and therefore be a danger to society)
    c. Tertiary (the public will be outraged if the accused is released).

Additionally, you

- May call witnesses to give testimony about the events leading to the charge(s) against the accused. If more than one witness is to be called, remember that others must be excused from the courtroom when not being examined.
- May call witnesses to give testimony about why the accused should be detained, or about what conditions should apply if the accused is released.
- Will cross examine witnesses called by the defence.
- Will prepare and deliver a closing statement.

Please consult pages 12–14 to see guidelines for preparing direct and cross examination of witnesses and closing statements.

ROLE PREPARATION FOR DEFENCE LAWYERS

In OJEN Mock Bail scenarios, the role of defence lawyers is to convince the court that the accused should be released. In order to do this, you will need to come up with a plan (a list of specific conditions) which will ensure that the accused will show up for his/ her trial and is not in danger of reoffending. Think about the circumstances which led to the charges and come up with ways in which these circumstances could be prevented.

After the Crown lawyer reads the allegations:

- Stand and respond briefly to the allegations.
- Inform the court of the number of defence witnesses to be called.

Additionally, you:

- May call the accused to give testimony about the events in question and how they will meet any bail conditions the court might demand.
- Will call witnesses to give testimony about why the accused should be released, about what conditions should apply if the accused is released or how they will help the accused to meet those conditions. If more than one witness is to be called, remember that others must be excused from the courtroom when not being examined.
- Will cross examine witnesses called by the Crown, if any.
- Will prepare and deliver a closing statement.

Please consult pages 12–14 to see guidelines for preparing direct and cross examination of witnesses and closing statements.

PREPARING FOR DIRECT AND CROSS EXAMINATION

Lawyers for both the prosecution and the defence try to make their case by asking questions of witnesses that they hope will persuade the court to decide in their favour. **Direct examination** is a lawyer's opportunity to ask questions of a witness for their side of the case, while **cross examination** is a lawyer's opportunity to challenge the testimony of a witness called by the other side.

For example, defence lawyers need to show the court that a proposed surety is a responsible individual who will supervise the accused and ensure that they show up in court for trial. Defence lawyers help sureties by starting with questions that will give the court general information about who they are, and then move on

to questions which show how the surety will be responsible for the accused, that they understand their responsibilities, and that they have a plan to carry them out.

In contrast, Crown lawyers have a duty to test whether the defence's potential surety is suitable to adequately supervise the accused until trial. They must think about concerns they have about a proposed surety and ask questions that address these concerns. Do they have a criminal record or outstanding charges? Have they done enough thinking about how they will supervise the accused? Why should the court believe that they will contact authorities if the accused violates his/ her bail conditions?

HOW TO PREPARE FOR DIRECT EXAMINATION

- Write down all the things that your side is trying to prove.
- Read the witness' fact sheets carefully, several times over.
- Make a list of all the facts that help your case.
- Put a star beside the most important facts that you must make sure that your witness talks about.
- Create questions to ask the witness that will help the witness tell a story:
    - Start with questions that will let the witness tell the court who s/ he is ("What is your name? What do you do? How long have you worked in that job?").
    - Move to the events in question ("What were you doing on the night in question? Where were you? When did you first hear there was a problem?").
    - Move to more specific questions ("What did you see? What did you do after that happened?).
- But remember:
    - Keep your questions short.
    - Use simple language.
- Remember not to ask leading questions. A leading question is a question that suggests the answer.
    - An example of a leading question is "was the man six feet tall and about 25-years old?"
    - Instead you might ask: "please describe what the man looked like." Or, "how old was he? And how tall?"

- When your witness is in the witness box, do not be afraid to ask a question twice, using different words, if you do not get the answer you were expecting.

HOW TO PREPARE FOR CROSS-EXAMINATION

- Make a list of all the facts in the witness' testimony that help your case.
- If there are a lot of facts that don't help your case, can you find a way to challenge the witness' credibility? For example can you show that the witness made a mistake, did not see things clearly, or has a reason for not telling the truth?
- All of your questions should be leading. You don't want to give the witness a chance to explain. You just want the witnesses to answer "yes" or "no."
- Depending on what the witnesses say you might need to come up with different questions on the spot during the trial, to make sure you cover everything.

PREPARING A CLOSING STATEMENT

This is your last opportunity to communicate to the justice of the peace. The closing statement should logically and forcefully summarize your side's position and legal arguments.

- Write down your key arguments and summarize the important facts that you want to stick in the mind of the justice of the peace.
- When delivering the closing arguments, try to speak in short, clear sentences. Be brief and to the point.
- You can only refer to evidence that actually was given during the hearing. This may mean you have to re-write your closing arguments to some degree during the hearing if evidence you were expecting to come out did not actually do so.
- Where a witness for the other side admitted something important to your case, point that out in your closing statement. For example: "The witness says she identified Mr. Smith as the man who ran away. However, she admitted that she was standing far away when she saw Mr. Smith run away. She admitted that it was dark out. There is a real doubt that the witness actually could have identified anyone, let alone someone she had never met before, in the circumstances."

DEFENCE LAWYERS:

- Summarize the evidence that shows why proposed sureties will be suitable.
- Summarize the evidence that shows why the Crown's grounds for denying bail (primary, secondary and/ or tertiary) do not apply in this case.

CROWN LAWYERS:

- Summarize the evidence that shows why proposed sureties will not be suitable.
- Summarize the evidence that demonstrates why each of the grounds on which you have argued for denying bail (primary, secondary and/ or tertiary) apply in this case.

ROLE PREPARATION FOR THE JUDGE OR JUSTICE OF THE PEACE

The role of a judge or justice of the peace in a mock bail hearing is to preside over the hearing and make a decision on the particular case being heard. When this role is filled by a volunteer from the justice sector professional, justices of the peace are also asked to provide comments to each of the lawyers and witnesses after reaching a decision (positive feedback and constructive criticism).

The justice of the peace's role is to:

- Be a referee – preside over the mock bail hearing.
- If a lawyer objects to a question by another lawyer, decide whether or not the witness must answer the question.
- At the end of the hearing, summarize what the law and evidence is relating to this case.
- Decide, based on arguments and evidence introduced during the hearing, whether to release or detain the accused and outline bail conditions and surety decisions as applicable.
- Explain your decision.

ROLE PREPARATION FOR THE COURT CLERK

Your role is to help the justice of the peace to make sure that the bail hearing runs smoothly.

You will:

- Open the court.
- Swear in the witnesses.
- Announce adjournments.
- Close the court.

How to open the court:

When all participants are in their places, the justice of the peace will enter the courtroom. At this point, you will stand up and say:

"Order in the court, all rise."

After the justice of the peace has sat down, you say:

"Ontario Court of Justice is now in session, please be seated."

How to swear in witnesses:

When a witness takes a seat in the witness box, you will swear them in by saying:

"Will you please state your name for the court? Please spell your first and last name."

Ask the witness:

"Do you wish to affirm or swear on a holy book?

If the witness chooses to **affirm**, you ask:

"Do you solemnly affirm that the evidence you are about to give, shall be the truth, the whole truth and nothing but the truth?"

If the witness chooses to **swear** on a holy book, you ask:

"Do you swear that the evidence you are about to give, shall be the truth, the whole truth and nothing but the truth, so help you God?"

Announcing adjournments:

After the lawyers have made their closing arguments and the justice of the peace needs to take a short break (in order to come to a decision), you will stand and say:

> *"All rise please. Court will now recess for ten minutes. "*

Closing the court:

When the justice of the peace is ready to return to the courtroom, you will call the courtroom back to order and ask everyone to rise:

> *"Court is now resumed, please be seated."*

The justice of the peace will announce their decision (release or detain) and provide an explanation of this decision. When they have finished, you will stand and say:

> *"All rise please. Court is adjourned."*

ROLE PREPARATION FOR THE COURT ARTIST

In Canadian courts, cameras are not allowed in the trial level courtroom. Your job is to sketch what is taking place in the courtroom for record keeping and for reporting to the public. Perhaps your sketches might appear in the newspaper or on TV news.

Divide up the roles so that one of you is:

- Sketching the witnesses.
- Sketching the Crown and defence lawyers in action.

ROLE PREPARATION FOR MEMBERS OF THE PRESS

Things for you to think about reporting on:

- What is the name of the case?
- Who are the people involved?
- Which court is the hearing taking place in?
- Is the accused a youth? If so, what things are you not allowed to report?
- Why is the hearing taking place?
- What crime(s) is the accused charged with?
- What are the key facts?
- What is the outcome / decision?
- Is there anything you want to ask the Crown and defence lawyers about after the case?
- Are there any other things you want to say in general in your article about these particular types of charges?