



OBA Recommendations to Reduce Delay Arising from the Special Bail Hearing Procedure

Submitted to: Office of the Chief Justice,
Ontario Court of Justice

Submitted by: Ontario Bar Association

Date: April 20, 2021



ONTARIO
BAR ASSOCIATION
A Branch of the
Canadian Bar Association

L'ASSOCIATION DU
BARREAU DE L'ONTARIO
Une division de l'Association
du Barreau canadien



Table of Contents

Introduction.....	3
The Ontario Bar Association	3
Special Bail Hearing Delay and OBA Recommendations.....	3
1. Failure to consider bifurcated proceeding	4
2. Lack of clarity.....	4
3. Time estimates.....	5
4. Bail hearing conferences.....	6
5. Receipt of forms by trial coordinator	6
6. Scheduling by trial coordinator	7
7. Availability of courtrooms.....	7
8. Reading materials on the record	8
9. Approach to section 524 applications.....	8
10. Technological problems	9
11. Logistical challenges with interpreters.....	9
Conclusion	9



Introduction

The Ontario Bar Association (OBA) is concerned about the delay in bail hearings arising from the special bail hearing (SBH) procedure in the Ontario Court of Justice (OCJ). We appreciate this opportunity to provide our recommendations aimed at improving this procedure to ensure all accused persons are granted a bail hearing in a reasonable time as guaranteed by the *Canadian Charter of Rights and Freedoms* and the *Criminal Code*.

The Ontario Bar Association

Established in 1907, the OBA is the largest volunteer lawyer association in Ontario, with over 16,000 members who practice on the frontlines of the justice system and who provide services to people and businesses in virtually every area of law in every part of the province.

Each year, through the work of our 40 practice sections, the OBA provides advice to assist legislators and other key decision-makers in the interests of both the profession and the public, and delivers over 325 in-person and online professional development programs to an audience of over 12,000 lawyers, judges, students and professors.

This submission was prepared by members of the OBA Criminal Justice Section, which includes both Crown and defence counsel practicing in a wide range of criminal justice matters before all levels of Court.

Special Bail Hearing Delay and OBA Recommendations

Under the COVID-19: Ontario Court of Justice Protocol re: Bail Hearings (OCJ Bail Protocol), SBHs are “bail proceedings of such length that they cannot be accommodated in regularly scheduled bail court”¹. These SBHs are subject to enhanced case management procedures intended to streamline

¹ Available at [COVID-19: Ontario Court of Justice Protocol Re Bail Hearings | Ontario Court of Justice \(ontariocourts.ca\)](https://www.ontariocourts.ca/COVID-19-Protocol-re-Bail-Hearings)



the bail hearing, given the more complex issues and serious charges often involved. However, in practice, the SBH procedure frequently results in significant delay, contrary to the right to a timely bail hearing.

Through input from diverse stakeholders, including defence counsel, duty counsel, Crown attorneys, and trial coordinators, we have identified major contributors to the delay, and provide recommendations to remedy these issues.

1. Failure to consider bifurcated proceeding

SBHs are routinely being scheduled without any party having the opportunity to raise the possibility of a bifurcated proceeding, pursuant to *R v Tunney*.²

OBA Recommendation:

The Court should provide a direction requiring Judges and Justices of the Peace to inquire into the possibility of a bifurcated proceeding, and requiring the Crown to consider such a proceeding for all bail hearings.

2. Lack of clarity

There is a lack of clarity over what matters require a SBH. These bails are broadly and vaguely defined in the OCJ Bail Protocol. As a result of this lack of clarity, the defence and Crown often disagree about whether a SBH is required, or whether the matter can proceed in the ordinary course.

² [R v Tunney, 2018 ONSC 961](#) at para. 56: “Similarly, the defence should be free to argue that a bifurcated process is appropriate in any given case. In most cases, it will be appropriate. Where the jurisdiction does not have an out of court surety approval process in place and the sureties are not present in court, the defence must consider the mechanics of proceeding in a bifurcated fashion. When a bail is “set but not met”, an additional appearance may be required in order to address surety approval, which could add to delay and inefficiency. As well, in serious cases, where the circumstances might well support detention, it may well make the most sense for the hearing to proceed in the traditional manner with evidence called from the proposed sureties at the bail hearing.” [Emphasis added].



OBA Recommendation:

We propose the adoption of a uniform guideline as to what constitutes a SBH in each region, given the varying caseloads. For example, an SBH in the Toronto region may be defined as any bail hearing which, due to the complexity of the charges, or the number of witnesses, or for any other reason, is estimated to take more than two hours.

3. Time estimates

As a result of inaccurate time estimates by defence and Crown counsel, SBHs often require continuation dates, which may not be available for days or even weeks following the initial SBH date.

OBA Recommendation:

We recommend the OCJ provide guidelines to assist in ensuring time estimates for SBHs are accurate. For example, each surety may be equated with a minimum of half an hour of court time. Time for submissions may be equated with a minimum of half an hour of court time for each surety (i.e. half an hour total time for submissions for one surety, one hour for two sureties etc.). If an interpreter is required, these minimum estimates should be increased by 50%.

The parties may also jointly agree that a special bail hearing is required due to the nature or complexity of the charges or the accused's history.

Time limits should encourage all counsel to be efficient and to focus on the live issues. Combined with the other time-saving measures included in these recommendations, bail hearings should be able to be completed within the suggested times.



4. Bail hearing conferences

SBHs are delayed by the requirement of a bail hearing conference, which is often unnecessary. These SBH conferences generally deal with resolution of bail-related issues, hearing time estimates, and procedural and evidentiary issues. Most of the time, the defence and Crown agree on these issues.

OBA Recommendation:

We recommend an option for bail hearing conferences to be bypassed if:

- (1) defence counsel provides the Crown with a proposed plan (i.e., number of sureties, if any etc.); and
- (2) both parties agree on an estimate.

In these circumstances, the parties should fill out a SBH form and submit it directly to the trial coordinator to obtain a SBH date.

Where a bail hearing conference is necessary, we suggest that a Justice of the Peace or Judge be available on standby to accommodate such conferences. Given the remote nature of these conferences, a single Justice of the Peace or Judge could service several courthouses at once.

5. Receipt of forms by trial coordinator

Following the bail hearing conference, SBHs are further delayed by the requirement that the trial coordinator receive forms from the bail hearing conference Justice before scheduling a hearing date.

OBA Recommendation:

Immediately at the conclusion of the bail hearing conference, we propose that the Justice of the Peace note at least three mutually agreeable dates for Crown and defence. Once completed, the supervisory Regional Office of the Justice of the Peace should electronically submit the form to the trial coordinator.



6. Scheduling by trial coordinator

Following receipt of the forms, the trial coordinator takes time to schedule a SBH. Trial coordinators do not always prioritize this task, leading to days of delay.

OBA Recommendation:

Trial coordinators must be instructed to prioritize the scheduling of SBHs above all JPTS, trials, and preliminary inquiries, and to respond to the parties with dates within no more than half a business day.

7. Availability of courtrooms

There are insufficient bail courtrooms to speedily accommodate SBHs.

OBA Recommendation:

We recommend that a system be established to enable each courthouse to avail itself of any Justice of the Peace or Judge available province-wide to run a video or audio SBH. We recognize that there are challenges associated with the availability of other court staff, such as reporters and clerks; however, a pooling of resources for SBHs may assist in scheduling these hearings in a more timely manner.

At the very least, bail courts, which currently conclude at 4.30 pm, should run until 5.00 pm, and court breaks should be strictly adhered to. Further, in addition to securing a SBH date, if counsel are prepared to wait on standby, SBHs should also be placed on trial and preliminary inquiry shadow lists. Finally, if “assist courts” (i.e. courtrooms that have finished their matters for the day and are available to take on new matters from other courtrooms) become available, the OCJ must prioritize bail hearings and SBHs over out-of-custody guilty pleas, preliminary inquiries, and trials.



8. Reading materials on the record

The court time required for SBHs is often unnecessarily lengthened by the need to read out significant portions of both Crown and defence materials on the record.

OBA Recommendation:

We recommend that all parties be required to submit materials, and the Crown be required to submit the synopsis, criminal record and any exhibits, a minimum of 24 hours in advance of the hearing. This includes materials for any outstanding charges that the Crown intends to rely on. The presiding jurist should provide the option to defence counsel of dispensing with the need to read in allegations or any other materials in court. Counsel may do so if they confirm that they have reviewed the allegations with their client in advance, and with the sureties. If defence counsel has questions about the allegations, they should be encouraged to ask them of the Crown in advance of the hearing. Any materials relied upon should then be entered as an exhibit.

9. Approach to section 524 applications

A section 524 application by the Crown will often delay the proceedings due to the time required (a) to obtain the documentation for the underlying charge and (b) to read in the allegations.

OBA Recommendation:

We recommend that the Crown's office be encouraged to take a more selective approach to section 524 applications. In particular, the Crown should consider foregoing the application if the parties can agree to the existence of, and the facts underlying, the outstanding charges, and if the presiding Judge/Justice can be apprised of the form of release to avoid contradicting any release terms. Section 515(6) of the *Criminal Code* will ensure that the onus will be reversed. As such, there may be little added benefit to bringing a section 524 application in some cases.



10. Technological problems

The court time used to run SBHs is often wasted as a result of technological problems in court (e.g., trouble playing video disclosure).

OBA Recommendation:

Counsel should be required to advise trial coordinators, at the time a SBH is booked, if video equipment is necessary. Each courthouse should identify a contact person that is available to assist with technological issues immediately.

11. Logistical challenges with interpreters

There are a myriad of logistical problems that arise when an interpreter is required to participate in a SBH. Sometimes, interpreters do not attend, despite being ordered. Additionally, during remote SBHs, the use of an interpreter slows the proceedings, because simultaneous interpretation is not possible.

OBA Recommendation:

Interpreters for sureties should be required to connect directly with the surety by telephone in order to conduct simultaneous interpretation. The court should canvass with the jail whether a similar option is available for the accused, which may depend on the jail they are housed in.

Conclusion

The OBA appreciates this opportunity to provide these recommendations on how the SBH process can be improved to reduce delay and ensure accused persons' right to a timely bail hearing is respected. We would be happy to provide further information or address any questions you may have, and look forward to continuing the conversations on how to improve existing processes going forward.