Court File No.: 36162

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N :

HER MAJESTY THE QUEEN

Appellant (Appellant)

- and -

HAMIDREZA SAFARZADEH-MARKHALI

Respondent (Respondent)

- and -

ATTORNEY GENERAL OF CANADA,
THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION,
THE CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO,
THE WEST COAST PRISON JUSTICE SOCIETY,
THE JOHN HOWARD SOCIETY OF CANADA, AND
THE ABORIGINAL LEGAL SERVICES TORONTO INC.

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TABLE OF CONTENTS

PART I – STATEMENT OF FACTS

1. The Criminal Lawyers' Association of Ontario ("CLA") accepts the facts as summarized by the parties.

PART II – THE CLA'S POSITION ON THE QUESTION IN ISSUE

2. The CLA's position is that the decision of the Court below was correct and that the portion of s. 719(3.1) of the *Criminal Code* ("subs. 3.1") that restricted credit for pre-sentence custody ("PSC") to a ratio of one day for each day served ("1:1 credit") for those detained "primarily because of a previous conviction" pursuant to s. 515(9.1) ("subs. 9.1") is unconstitutional.

3. The CLA agrees with the arguments presented by the Respondent. In addition, the CLA submits that subs. 3.1 violates s. 7 of the *Charter* due to its arbitrariness. This arbitrariness manifests in two ways:

1. The provision is arbitrary in **principle** by making the crediting of PSC contingent on irrelevant factors, and;
2. The provision creates an arbitrary **process** by making the crediting of PSC contingent on the unreviewable, subjective reasons for the detention of the offender at his bail hearing.

4. The constitutional question in this case was broadly worded: "Does s. 719(3.1) [...] infringe s. 7 of the [*Charter*]?" Subsection 3.1 contains several distinct provisions all of which require separate constitutional analyses. The CLA submits that the portion of subs. 3.1 which limits PSC credit to 1:1 for those detained pursuant to s. 524 is likely unconstitutional.[1] However, while it is superficially appealing to deal with this issue now so that an unconstitutional provision will be struck down as soon as possible, this Court ought not to rule on the constitutionality of an issue that was not raised on the facts of the case, ruled on by the courts below, or fully developed in argument before this Court.

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[1] See *R. v. Dinardo*, [2015] O.J. No. 1387 (Sup. C.J.)

5. This Court should certainly leave for a future case the constitutionality of the limitation of PSC credit to a ratio of 1.5:1, also contained in subs. 3.1. This issue was not raised by the parties in this case.

6. The CLA takes no position on the appropriate length of the Respondent's sentence.

PART III – STATEMENT OF ARGUMENT

A. Arbitrariness and the Purpose of Pre-Sentence Custody Credit

7. The Court below found that the subs. 9.1/subs. 3.1 regime lengthened sentences for reasons that had nothing to do with the determination of a fit sentence. This violated the principle of proportionality in sentencing, a concept "closely associated" to arbitrariness. The CLA agrees, but further submits that subs. 3.1 is more fundamentally arbitrary because it **reduces PSC credit for reasons that have nothing to do with a just crediting of PSC**. In other words, by operation of subs. 3.1, those deserving of (at least) 1.5:1 credit are deprived of it **for an arbitrary reason**. Subsection 3.1 and the Crown's defence of it are grounded in a faulty concept of PSC and its significance in Canadian law.

R. v. Safarzadeh-Markhali, [2014] O.J. No. 4194 (C.A.) at para. 85

1. The Purpose of PSC Credit

8. Offenders receive credit for their PSC because PSC is served in jail. Jail – the almost complete deprivation of liberty – is the harshest punishment our law permits. PSC is served in the same institutions where 95 percent of offenders serve their sentences.[2] In almost every way, PSC provides the same experience as serving a sentence of incarceration. In the few ways PSC inmates are treated differently, they are treated worse. PSC is usually served before the accused is convicted, when he is still presumed to be innocent. It is always served before the correct sentence for the offender's crime has been determined.

R. v. Summers, 2014 SCC 26, [2014] 1 S.C.R. 575 at paras. 21, 22

9. PSC is not a punishment for the offence not yet proven or for the failure to obtain bail. PSC is not something that anyone **deserves** in the way punishment is deserved. An offender,

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[2] See note 3 below

including a recidivist offender, does not **deserve** to be denied bail when charged with an offence. His detention may be necessary to ensure that he comes to court or does not commit further offences. His criminal record may be one of the pieces of evidence relied on by a bail court to reach this conclusion. He may thus be in a situation of his own making. But he is presumed innocent and nothing he has done in the past has rendered him deserving of any manner of punishment or deprivation of liberty at this stage. His detention is only a necessary evil. To suggest otherwise is utterly offensive to the principle of the presumption of innocence.

R. v. Wust, 2000 SCC 18, [2000] 1 S.C.R. 455 at para. 39
R. v. McDonald, [1998] O.J. No. 2990 (C.A.) at para. 48

2. *The Purpose of Credit Above 1:1*

10. It has long been recognized that crediting PSC at a rate of only 1:1 would result in those jailed while presumed innocent (PSC) being treated more harshly than those who receive bail and are jailed only as sentenced offenders, even when they receive the same sentence. Because, as confirmed by this Court in *Summers*, the offender's ability to obtain bail is irrelevant to the determination of a fit sentence, such inequality is unfair and undeserved. The purpose of granting PSC credit is to equalize the sentences between those who receive and those who are denied bail. The common-law credit ratio of 2:1 was arrived at through a combination of credit for lack of remission (about 1.5:1) and some additional credit for lack of access to parole, harsh conditions and lack of programming compared to sentenced offenders.

Summers, supra at paras. 21, 49, 60-61, 63, 65, 82
Wust, supra at para. 45

11. The *Truth in Sentencing Act* did not change the reasons that inform PSC credit, only the maximum credit that is available. The purpose remains to achieve parity between bailed and unbailed offenders. Thus in *Summers*, this court made it clear that lack of access to remission remains a "circumstance" that "justifies" credit above 1:1. The Court acknowledged that lack of remission alone generally justifies credit of 1.5:1, leaving no more credit available to compensate for harsh conditions, but suggested other remedies may be available to address that issue.

Summers, supra at para. 7, 70-73, 80

3. Just Credit For Most Offenders

12. For the vast majority of offenders, only credit of at least 1.5:1 fairly puts an offender serving PSC in the same position regarding remission as a sentenced offender. The overwhelming majority of offenders, as sentenced inmates, earn remission at a rate of one day for each two days served. In other words, they serve 2/3 of their sentence and are released. The only offenders for whom 1.5:1 credit is **too high to be fair** in this regard are those likely to be held to their warrant expiry date, a very rare circumstance.[3] There may also occasionally be non-remission-based reasons to reduce credit, such as to avoid double-counting when an offender is serving a sentence at the same time as serving PSC, or when full 1.5:1 credit would unduly inflate the sentence of an offender in a "time-served" situation or bring about adverse immigration consequences. Thus the CLA does not take the position that reduced credit can never be justified, only that that justification is uncommon.

13. As a side note, in light of the above, the CLA submits that "enhanced credit" (a term historically used to refer to credit **beyond 2:1**, applied in exceptional circumstances of hardship) is misleading as applied to 1.5:1 credit. 1.5:1 credit is not "enhanced," which implies a benefit. It is, in almost all circumstances, equal to the remission received by sentenced offenders and creates parity. 1:1 credit is lower than the rate of remission. Therefore, the CLA submits that a more accurate description of 1.5:1 credit would be "remission-based credit" or "equal credit." An apt description of 1:1 credit would be "reduced credit."

4. The Reason for Detention is Irrelevant to Crediting PSC

14. Because the purpose of PSC credit is to equalize the treatment of offenders who serve only sentenced custody and those who serve PSC, **determining PSC credit on bases that have nothing to do with that equalization is irrational**. As discussed above, the crediting of PSC is a paramount matter of fairness and parity in sentencing.

Summers, supra at para. 82

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[3] See *Summers*, *supra* at para. 25 and *R. v. Johnson*, [2011] O.J. No. 822 (C.J.) at paras. 13-14. Approximately 95% of imprisoned offenders receive reformatory-length sentences, of which the "very vast majority" are released on remission at 2/3 of their sentence. Of the remaining 5% of offenders (those who receive penitentiary sentences), about one half are released on "statutory release" at 2/3 of their sentence, and about one half are released earlier on parole. Only 2-3% of federal inmates are held to warrant expiry. Thus only about **.1%** of all offenders are held to warrant expiry.

15. It is not sufficient for a reduction in PSC credit to be based on any factors generally relevant to the sentencing of the offender. Many factors can be relevant to sentencing generally speaking, but have nothing to do with the crediting of PSC. For example, the fact that a crime was planned and deliberate, that it caused injury, or that an offender has made restitution or shown remorse are issues that affect the length of sentence, but they are irrelevant to the fair crediting of PSC. There is simply no rational connection between the crediting of PSC and these concepts.

Summers, supra at paras. 82-83

16. Likewise, the fact that an offender has a criminal record is relevant to sentencing and is almost always taken into account in determining the quantum of his sentence. However, **the fact that an offender has a criminal record does not have an impact on the fair crediting of his PSC**. There is no evidentiary basis to think that having a criminal record has any impact on the remission of a sentence when the overwhelming majority of all offenders receive remission.

17. And most importantly, **the reason that the offender was detained in PSC has no connection whatsoever to the determination of just credit for PSC** in his situation. There is no reason whatsoever to believe that the reason one was detained, be it "primarily because of a criminal record" or some other reason, has any effect on the conditions of an offender's detention, his access to remission, or any other factor that could influence the fair crediting of his PSC.

18. Making the crediting of PSC contingent on the reason the offender was detained cannot be justified on the basis that the offender, by amassing a criminal record, does not **deserve** equal credit for his PSC.[4] PSC credit, both generally and at any particular rate, is not a prize for good conduct or life choices. It is not a reward to be earned or a benefit benevolently bestowed. It is a rational response to a parity problem, and only reasons related to that issue can rationally determine just credit. It is not fair for such an offender to have his PSC limited as an *ad hoc* additional punishment, beyond the sentence he receives for the offence.[5] Having a criminal record, or being detained because of it, cannot justify being treated unfairly.

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[4] Factum of the Attorney General of Canada (AGC) at para. 20

[5] The reduction of PSC credit for having been detained "primarily because of a previous conviction" is, in a sense, the third time the offender is punished for that previous conviction, the first being when he was actually sentenced

Summers, supra at paras. 82-83

19. The Attorney General of Canada (AGC) further attempts to establish a connection between the two concepts as follows: Being detained "primarily because of a criminal conviction" means that the offender is in need of rehabilitative programs.[6] PSC does not feature rehabilitative programs but sentenced custody does. The limiting of PSC credit to 1:1 means those offenders will serve a higher percentage of their sentence as sentenced inmates (because the actual time served will be longer). Therefore, detention due to a criminal conviction is a rational reason to limit PSC.

20. The CLA submits that this justification is flawed for two reasons. First, as addressed by the Respondent, a criminal conviction for failing to comply with bail or for failing to appear in court could justify detention, but does not necessarily point to any need for rehabilitation. (Nor are rehabilitative programs likely to be directed at failure to appear or failure to comply, as opposed to anger management, sexual offending, drug abuse, etc.). A previous criminal conviction is therefore not *per se* indicative of a need for extra rehabilitation.

21. Second, as discussed above, there is no **direct** connection between the rationale for crediting PSC and the reason for detention in PSC. The AGC is attempting to rely on an **indirect** connection, asserting that those who are detained primarily because of a previous conviction **tend to be** those who need rehabilitative programs. This is a mere speculative assertion of correlation, not a rational connection. *Bedford* defines arbitrariness as follows:

> Arbitrariness asks whether there is a **direct** connection between the purpose of the law and the impugned effect on the individual, in the sense that the effect on the individual bears some relation to the law's purpose. There must be a **rational connection** between the object of the measure that causes the s. 7 deprivation, and the limits it imposes on life, liberty, or security of the person. A law that imposes limits on these interests in a way that bears no connection to its objective arbitrarily impinges on those interests.
>
> *R. v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101 at para. 111 (emphasis added, citations removed)
> *R. v. Michaud*, [2015] O.J. No. 4540 (C.A.) at para. 69

22. To make clear why the connection must be direct and rational, as opposed to a mere speculative correlation, consider the following hypothetical example. The government wishes to

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for the offence and the second being when he was denied bail and deprived of his liberty as a result of the conviction.

[6] Factum of the AGC at para. 41

address the problem of accessing illegal content on the Internet, and proposes two possible solutions. The first proposal is to ban all use of the Internet. This proposal would be **overbroad**, because, while use of the Internet is rationally connected to accessing illegal content via the Internet, a blanket ban would, without just cause, affect the liberty of the majority of people who use the Internet without accessing illegal content. The second proposal is to ban all people over six feet tall from using the Internet. Presumably, some of the people accessing illegal content are over six feet tall. In that sense, the legislation may be indirectly effective at lowering the number of people accessing illegal content. However, the law is not merely overbroad; it is **arbitrary**, because height has nothing to do with the crime of accessing illegal content. There is simply no connection between the goal of the government and the targeting of a particular group.

23. Likewise, the need for rehabilitation may be a factor in determining the correct sentence for an offender. An offender more in need of rehabilitation may justly receive a longer sentence than an offender who has no such need. But this is an issue rationally connected to the **length of sentence**. The need for rehabilitation has nothing logically to do with the just crediting of PSC. It is arbitrary for the government to act indirectly, by lengthening the sentences of people detained because of a criminal conviction through an unequal allocation of PSC, rather than directly, through lengthening the sentence of those in need of rehabilitation.

24. The rights enshrined in s. 7 of the *Charter* are complex and often overlapping. It can sometimes be difficult to perfectly categorize a breach of the principles of fundamental justice. However, as stated in *Bedford*, "[t]he law has not developed by strict labels, but on a case-by-case basis, as courts identified laws that were inherently bad because they violated our basic values." Subsection 3.1 is such a law.

Bedford, supra at para. 116

B. Arbitrary Process

25. The provision at issue in this case is unjustifiable in principle as set out above. But it also creates an entirely arbitrary **process**, one without review mechanisms or any appearance of fairness, which contradicts other bail provisions. These issues alone are sufficient to overturn the provision.

26. Under the subs. 9.1/subs. 3.1 regime, the decision on whether to reduce credit to 1:1 is not made by the sentencing judge. Nor does subs. 3.1 mandate that, where an accused has a criminal record or a particular type of criminal record, he must receive reduced credit. Rather, subs. 3.1 requires that an offender receive reduced credit based on the **primary reason for his detention** in the mind of the justice[7] at his bail hearing.

27. It should be noted that s. 515(10) of the *Criminal Code* mandates that detention is "justified only on one or more" of three enumerated grounds (flight risk, protection of the public, and confidence in the administration of justice). Section 515(10) does not permit detention on the ground that an accused has previously been convicted of an offence. A criminal record can be evidence, even the most compelling evidence, but it cannot by law justify detention. Detention "primarily because of a previous conviction" is therefore arguably **always arbitrary** and without basis in law.

28. Even if one assumes that a justice can lawfully detain "primarily because of a previous conviction," the structure of the provision remains fatally flawed for two reasons: 1) it provides no mechanism to review a subs. 9.1 "state[ment] in the record" even if it was made arbitrarily and 2) it bases a legal test on the subjective reasoning in a justice's mind rather than on objectively discernible facts.

1. Lack of Review

29. Neither the bail nor the sentencing provisions of the *Criminal Code* provide any mechanism for review of "state[ments] in the record" made pursuant to subs. 9.1 [hereafter "subs. 9.1 endorsements"]. Bail review in a superior court pursuant to s. 520 is available for

[7] The AGC refers throughout their factum to the "bail judge." In Ontario, bail courts are presided over by justices of the peace, who hear the vast majority of bail hearings. Provincial court judges only rarely hear bail hearings.

detention or release orders[8] and even for non-communication orders[9] but not for subs. 9.1 endorsements, despite the significant impact they can have on an offender's sentence.

30. The unavailability of review mechanisms leads to bizarre and arbitrary results. Consider an accused that is detained at first instance "primarily because of a previous conviction." He spends several months in custody, but then conducts a bail review under s. 520. The bail review judge finds that the bail justice committed an error in principle and that the accused ought never to have been detained at all, "primarily because of a previous conviction" or otherwise. Despite the bail review judge's finding that the original detention, and by extension any reason for that detention, was flawed and unreasonable, subs. 3.1 requires a sentencing judge to reduce the credit to 1:1 for the accused's months of PSC. The operative issue for subs. 3.1 remains the bail justice's reasons for detention as "stated in the record," clearly an arbitrary reason to deny equal credit to the offender in these circumstances.

Goodwin v. British Columbia (Superintendent of Motor Vehicles), 2015 SCC 46 at paras. 75, 77

31. The restriction on PSC would even persist in situations where the conviction that had motivated detention was overturned on appeal between the bail hearing and the sentencing. In such a situation the sentencing judge would be forced to reduce PSC credit because of a detention that was made "primarily because of a previous conviction" that no longer exists and can no longer aggravate sentence. The same would be true of a detention mistakenly made because of a conviction that later proved to relate to someone else or to be otherwise inaccurate. The sentencing judge would be constrained by a misapprehension of fact by the bail justice.

32. This Court need look no further than the case at bar for an example of the potentially unprincipled application of subs. 9.1. The Respondent began a reverse-onus bail hearing. He decided partway through to abandon his application to show cause for his release. Detention in such a circumstance where the accused has not shown cause for release is mandated by law.[10] Surely it was the failure of the Respondent to show cause for his release that was the "primary" reason for his detention. And yet, as set out in the judgment of the Court of Appeal, the bail justice nonetheless made a subs. 9.1 endorsement because, to paraphrase the reasons of the bail

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[8] *Criminal Code*, ss. 515(2), (5), (6), (7), and (8)
[9] *Criminal Code*, s. 515(12)
[10] *Criminal Code*, s. 515(6)

justice, he had seen the Respondent's criminal record. Subsection 3.1 provides no mechanism to prevent this arbitrary application of the subs. 9.1 endorsement.

Safarzadeh-Markhali (C.A.), *supra* at paras. 29-31

2. *Subjectivity*

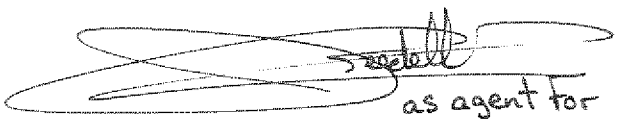
33. The subjective nature of the subs. 9.1 endorsement makes it all but immune to review. A reviewing court can examine reasons for judgement and determine if a court of first instance applied the correct legal test or properly understood the evidence. But how could a reviewing court review or even question the assertion that a justice made a decision primarily for a particular reason? Again, it must be remembered that the issue is not the objective presence of a criminal record, the objective failure to show cause on a particular ground, or a finding based on evidence that the offender requires rehabilitation programs that initiates a subs. 9.1 endorsement. Rather, it is the bail justice's weighing of the importance of the various evidence she hears, and her **subjective determination** that the presence of a criminal record is the most important factor **to her** in making the choice to detain that governs the application of subs. 9.1.

34. The CLA is not aware of any other example in Canadian criminal law where the statutory rights of an accused are dependent, not on objectively discernable facts or the decision of a trier of fact, but on the fact that the trier reached a decision for a particular, subjective reason.

PARTS IV and V – COSTS AND ORDER REQUESTED

35. The CLA does not request costs and seeks leave to make 10 minutes of oral submissions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 20th day of October, 2015



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PART VI – TABLE OF AUTHORITIES

CASES	CITED AT PARAGRAPH(S)
Goodwin v. British Columbia (Superintendent of Motor Vehicles), 2015 SCC 46	30
R. v. Bedford, 2013 SCC 72, [2013] 3 S.C.R. 1101	21, 24
R. v. Dinardo, [2015] O.J. No. 1387 (Sup. C.J.)	4
R. v. Johnson, [2011] O.J. No. 822 (C.J.)	12
R. v. McDonald, [1998] O.J. No. 2990 (C.A.)	9
R. v. Michaud, [2015] O.J. No. 4540 (C.A.)	21
R. v. Safarzadeh-Markhali, [2014] O.J. No. 4194 (C.A.)	7, 32
R. v. Summers, 2014 SCC 26, [2014] 1 S.C.R. 575	8, 10, 11, 12, 14, 15, 18
R. v. Wust, 2000 SCC 18, [2000] 1 S.C.R. 455	9, 10

PART VII – STATUTORY PROVISIONS

Criminal Code, R.S.C. 1985, c.C-46, ss. 515 (1), (2), (5), (6), (7), (8), (9.1), (10), (12) and 520(1)

Order of release

515. (1) Subject to this section, where an accused who is charged with an offence other than an offence listed in section 469 is taken before a justice, the justice shall, unless a plea of guilty by the accused is accepted, order, in respect of that offence, that the accused be released on his giving an undertaking without conditions, unless the prosecutor, having been given a reasonable opportunity to do so, shows cause, in respect of that offence, why the detention of the accused in custody is justified or why an order under any other provision of this section should be made and where the justice makes an order under any other provision of this section, the order shall refer only to the particular offence for which the accused was taken before the justice.

Release on undertaking with conditions, etc.

(2) Where the justice does not make an order under subsection (1), he shall, unless the prosecutor shows cause why the detention of the accused is justified, order that the accused be released

- (*a*) on his giving an undertaking with such conditions as the justice directs;
- (*b*) on his entering into a recognizance before the justice, without sureties, in such amount and with such conditions, if any, as the justice directs but without deposit of money or other valuable security;
- (*c*) on his entering into a recognizance before the justice with sureties in such amount and with such conditions, if any, as the justice directs but without deposit of money or other valuable security;
- (*d*) with the consent of the prosecutor, on his entering into a recognizance before the justice, without sureties, in such amount and with such conditions, if any, as the justice directs and on his depositing with the justice such sum of money or other valuable security as the justice directs; or
- (*e*) if the accused is not ordinarily resident in the province in which the accused is in custody or does not ordinarily reside within two hundred kilometres of the place in which he is in custody, on his entering into a recognizance before the justice with or without sureties in such amount and with such conditions, if any, as the justice directs, and on his depositing with the justice such sum of money or other valuable security as the justice directs.

Detention in custody

(5) Where the prosecutor shows cause why the detention of the accused in custody is justified, the justice shall order that the accused be detained in custody until he is dealt with according to law and shall include in the record a statement of his reasons for making the order.

Order of detention

(6) Unless the accused, having been given a reasonable opportunity to do so, shows cause why the accused's detention in custody is not justified, the justice shall order, despite any provision of this section, that the accused be detained in custody until the accused is dealt with according to law, if the accused is charged

- (*a*) with an indictable offence, other than an offence listed in section 469,
  - (i) that is alleged to have been committed while at large after being released in respect of another indictable offence pursuant to the provisions of this Part or section 679 or 680,
  - (ii) that is an offence under section 467.11, 467.111, 467.12 or 467.13, or a serious offence alleged to have been committed for the benefit of, at the direction of, or in association with, a criminal organization,
  - (iii) that is an offence under any of sections 83.02 to 83.04 and 83.18 to 83.23 or otherwise is alleged to be a terrorism offence,
  - (iv) an offence under subsection 16(1) or (2), 17(1), 19(1), 20(1) or 22(1) of the *Security of Information Act*,
  - (v) an offence under subsection 21(1) or 22(1) or section 23 of the *Security of Information Act* that is committed in relation to on offence referred to in subparagraph (iv),
  - (vi) that is an offence under section 99, 100 or 103,
  - (vii) that is an offence under section 244 or 244.2, or an offence under section 239, 272 or 273, subsection 279(1) or section 279.1, 344 or 346 that is alleged to have been committed with a firearm, or
  - (viii) that is alleged to involve, or whose subject-matter is alleged to be, a firearm, a cross-bow, a prohibited weapon, a restricted weapon, a prohibited device, any ammunition or prohibited ammunition or an explosive substance, and that is alleged to have been committed while the accused was under a prohibition order within the meaning of subsection 84(1);
- (*b*) with an indictable offence, other than an offence listed in section 469 and is not ordinarily resident in Canada,
- (*c*) with an offence under any of subsections 145(2) to (5) that is alleged to have been committed while he was at large after being released in respect of another offence pursuant to the provisions of this Part or section 679, 680 or 816, or
- (*d*) with having committed an offence punishable by imprisonment for life under any of sections 5 to 7 of the *Controlled Drugs and Substances Act* or the offence of conspiring to commit such an offence.

Order of release

(7) Where an accused to whom paragraph 6(*a*), (*c*) or (*d*) applies shows cause why the accused's detention in custody is not justified, the justice shall order that the accused be released on giving an undertaking or entering into a recognizance described in any of paragraphs (2)(*a*) to (*e*) with the conditions described in subsections (4) to (4.2) or, where the accused was at large on an undertaking or recognizance with conditions, the additional conditions described in subsections

(4) to (4.2), that the justice considers desirable, unless the accused, having been given a reasonable opportunity to do so, shows cause why the conditions or additional conditions should not be imposed.

Idem

(8) Where an accused to whom paragraph (6)(*b*) applies shows cause why the accused's detention in custody is not justified, the justice shall order that the accused be released on giving an undertaking or entering into a recognizance described in any of paragraphs (2)(*a*) to (*e*) with the conditions, described in subsections (4) to (4.2), that the justice considers desirable.

Written reasons

(9.1) Despite subsection (9), if the justice orders that the accused be detained in custody primarily because of a previous conviction of the accused, the justice shall state that reason, in writing, in the record.

Justification for detention in custody

(10) For the purposes of this section, the detention of an accused in custody is justified only on one or more of the following grounds:

- (*a*) where the detention is necessary to ensure his or her attendance in court in order to be dealt with according to law;
- (*b*) where the detention is necessary for the protection or safety of the public, including any victim of or witness to the offence, or any person under the age of 18 years, having regard to all the circumstances including any substantial likelihood that the accused will, if released from custody, commit a criminal offence or interfere with the administration of justice; and
- (*c*) if the detention is necessary to maintain confidence in the administration of justice, having regard to all the circumstances, including
  - (i) the apparent strength of the prosecution's case,
  - (ii) the gravity of the offence,
  - (iii) the circumstances surrounding the commission of the offence, including whether a firearm was used, and
  - (iv) the fact that the accused is liable, on conviction, for a potentially lengthy term of imprisonment or, in the case of an offence that involves, or whose subject-matter is, a firearm, a minimum punishment of imprisonment for a term of three years or more.

Order re no communication

(12) A justice who orders that an accused be detained in custody under this section may include in the order a direction that the accused abstain from communicating, directly or indirectly, with any victim, witness or other person identified in the order, except in accordance with such conditions specified in the order as the justice considers necessary.

Review of order

520. (1) If a justice, or a judge of the Nunavut Court of Justice, makes an order under subsection 515(2), (5), (6), (7), (8) or (12) or makes or vacates any order under paragraph 523(2)(*b*), the accused may, at any time before the trial of the charge, apply to a judge for a review of the order.

Code Criminel, R.S.C. 1985, c.C-46, ss. 515 (1), (2), (5), (6), (7), (8), (9.1), (10), (12), 520(1)

Mise en liberté sur remise d'une promesse

515. (1) Sous réserve des autres dispositions du présent article, lorsqu'un prévenu inculpé d'une infraction autre qu'une infraction mentionnée à l'article 469 est conduit devant un juge de paix, celui-ci doit, sauf si un plaidoyer de culpabilité du prévenu est accepté, ordonner que le prévenu soit mis en liberté à l'égard de cette infraction, pourvu qu'il remette une promesse sans condition, à moins que le poursuivant, ayant eu la possibilité de le faire, ne fasse valoir à l'égard de cette infraction des motifs justifiant la détention du prévenu sous garde ou des motifs justifiant de rendre une ordonnance aux termes de toute autre disposition du présent article et lorsque le juge de paix rend une ordonnance en vertu d'une autre disposition du présent article, l'ordonnance ne peut se rapporter qu'à l'infraction au sujet de laquelle le prévenu a été conduit devant le juge de paix.

Mise en liberté sur remise d'une promesse assortie de conditions, etc.

(2) Lorsque le juge de paix ne rend pas une ordonnance en vertu du paragraphe (1), il ordonne, à moins que le poursuivant ne fasse valoir des motifs justifiant la détention du prévenu sous garde, que le prévenu soit mis en liberté pourvu que, selon le cas :

- *a*) il remette une promesse assortie des conditions que le juge de paix fixe;
- *b*) il contracte sans caution, devant le juge de paix, un engagement au montant et sous les conditions fixés par celui-ci, mais sans dépôt d'argent ni d'autre valeur;
- *c*) il contracte avec caution, devant le juge de paix, un engagement au montant et sous les conditions fixés par celui-ci, mais sans dépôt d'argent ni d'autre valeur;
- *d*) avec le consentement du poursuivant, il contracte sans caution, devant le juge de paix, un engagement au montant et sous les conditions fixés par celui-ci et dépose la somme d'argent ou les valeurs que ce dernier prescrit;
- *e*) si le prévenu ne réside pas ordinairement dans la province où il est sous garde ou dans un rayon de deux cents kilomètres du lieu où il est sous garde, il contracte, avec ou sans caution, devant le juge de paix un engagement au montant et sous les conditions fixés par celui-ci et dépose la somme d'argent ou les valeurs que ce dernier prescrit.

Détention

(5) Lorsque le poursuivant fait valoir des motifs justifiant la détention du prévenu sous garde, le juge de paix ordonne que le prévenu soit détenu sous garde jusqu'à ce qu'il soit traité selon la loi et porte au dossier les motifs de sa décision.

Ordonnance de détention

(6) Malgré toute autre disposition du présent article, le juge de paix ordonne la détention sous garde du prévenu jusqu'à ce qu'il soit traité selon la loi — à moins que celui-ci, ayant eu la possibilité de le faire, ne fasse valoir l'absence de fondement de la mesure — dans le cas où il est inculpé :

- *a*) soit d'un acte criminel autre qu'une infraction mentionnée à l'article 469 :
  - (i) ou bien qui est présumé avoir été commis alors qu'il était en liberté après avoir été libéré à l'égard d'un autre acte criminel en vertu des dispositions de la présente partie ou des articles 679 ou 680,
  - (ii) ou bien qui est prévu aux articles 467.11, 467.111, 467.12 ou 467.13 ou qui est une infraction grave présumée avoir été commise au profit ou sous la direction d'une organisation criminelle, ou en association avec elle,
  - (iii) ou bien qui est une infraction prévue à l'un des articles 83.02 à 83.04 et 83.18 à 83.23 ou une infraction de terrorisme présumée avoir été commise,
  - (iv) ou bien qui est une infraction prévue aux paragraphes 16(1) ou (2), 17(1), 19(1), 20(1) ou 22(1) de la *Loi sur la protection de l'information*,
  - (v) ou bien qui est une infraction prévue aux paragraphes 21(1) ou 22(1) ou à l'article 23 de cette loi commise à l'égard d'une infraction mentionnée au sous-alinéa (iv),
  - (vi) ou bien qui est prévu aux articles 99, 100 ou 103,
  - (vii) ou bien qui est prévu aux articles 244 ou 244.2 ou, s'il est présumé qu'une arme à feu a été utilisée lors de la perpétration de l'infraction, aux articles 239, 272 ou 273, au paragraphe 279(1) ou aux articles 279.1, 344 ou 346,
  - (viii) ou bien qui est présumé avoir mis en jeu une arme à feu, une arbalète, une arme prohibée, une arme à autorisation restreinte, un dispositif prohibé, des munitions, des munitions prohibées ou des substances explosives et avoir été commis alors qu'il était visé par une ordonnance d'interdiction au sens du paragraphe 84(1);
- *b*) soit d'un acte criminel autre qu'une infraction mentionnée à l'article 469 et qui ne réside pas habituellement au Canada;
- *c*) soit d'une infraction visée à l'un des paragraphes 145(2) à (5) et présumée avoir été commise alors qu'il était en liberté après qu'il a été libéré relativement à une autre infraction en vertu des dispositions de la présente partie ou des articles 679, 680 ou 816;
- *d*) soit d'une infraction — passible de l'emprisonnement à perpétuité — à l'un des articles 5 à 7 de la *Loi réglementant certaines drogues et autres substances* ou de complot en vue de commettre une telle infraction.

Ordonnance de mise en liberté

(7) Le juge de paix ordonne la mise en liberté du prévenu visé aux alinéas (6)*a*), *c*) ou *d*), qui fait valoir l'absence de fondement de sa détention sous garde, sur remise de la promesse ou de

l'engagement visés à l'un des alinéas (2)*a*) à *e*) et assortis des conditions visées aux paragraphes (4) à (4.2) qu'il estime souhaitables notamment, lorsque le prévenu était déjà en liberté sur remise de tels promesse ou engagement, les conditions supplémentaires visées aux paragraphes (4) à (4.2), à moins que celui-ci, ayant eu la possibilité de le faire, ne fasse valoir des motifs excluant l'application des conditions.

Idem

(8) Le juge de paix ordonne la mise en liberté du prévenu visé à l'alinéa (6)*b*), qui fait valoir l'absence de fondement de sa détention, sur remise de la promesse ou de l'engagement visés à l'un des alinéas (2)*a*) à *e*) et assortis des conditions visées aux paragraphes (4) à (4.2) qu'il estime souhaitables.

Motifs écrits

(9.1) Malgré le paragraphe (9), si le juge de paix ordonne la détention sous garde du prévenu en se fondant principalement sur toute condamnation antérieure, il est tenu d'inscrire ce motif au dossier de l'instance.

Motifs justifiant la détention

(10) Pour l'application du présent article, la détention d'un prévenu sous garde n'est justifiée que dans l'un des cas suivants :

- *a*) sa détention est nécessaire pour assurer sa présence au tribunal afin qu'il soit traité selon la loi;
- *b*) sa détention est nécessaire pour la protection ou la sécurité du public, notamment celle des victimes et des témoins de l'infraction ou celle des personnes âgées de moins de dix-huit ans, eu égard aux circonstances, y compris toute probabilité marquée que le prévenu, s'il est mis en liberté, commettra une infraction criminelle ou nuira à l'administration de la justice;
- *c*) sa détention est nécessaire pour ne pas miner la confiance du public envers l'administration de la justice, compte tenu de toutes les circonstances, notamment les suivantes :
  - (i) le fait que l'accusation paraît fondée,
  - (ii) la gravité de l'infraction,
  - (iii) les circonstances entourant sa perpétration, y compris l'usage d'une arme à feu,
  - (iv) le fait que le prévenu encourt, en cas de condamnation, une longue peine d'emprisonnement ou, s'agissant d'une infraction mettant en jeu une arme à feu, une peine minimale d'emprisonnement d'au moins trois ans.

Ordonnance de s'abstenir de communiquer

(12) Le juge de paix qui ordonne la détention du prévenu sous garde en vertu du présent article peut lui ordonner, en outre, de s'abstenir de communiquer, directement ou indirectement, avec

toute personne — victime, témoin ou autre — identifiée dans l'ordonnance si ce n'est en conformité avec les conditions qui y sont prévues et qu'il estime nécessaires.

Révision de l'ordonnance du juge

520. (1) Le prévenu peut, en tout temps avant son procès sur l'inculpation, demander à un juge de réviser l'ordonnance rendue par un juge de paix ou un juge de la Cour de justice du Nunavut conformément aux paragraphes 515(2), (5), (6), (7), (8) ou (12), ou rendue ou annulée en vertu de l'alinéa 523(2)*b*).

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