File number: 37869

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA)

BETWEEN:

COREY LEE JAMES MYERS

Appellant
(Respondent)

AND:

HER MAJESTY THE QUEEN

Respondent
(Applicant)

FACTUM OF THE APPELLANT

(Pursuant to 42 of the *Rules of the Supreme Court of Canada*)

Counsel for the Appellant
Justin V. Myers
Lawrence D. Myers Q.C.
Zack Myers
610 – 1111 Melville Street,
Vancouver, B.C. V6E 3V6
Telephone: (604) 688-8331
Facsimile: (604) 688-8350
Email: justin@myerscolaw.com

Agent for the Appellant

Michael J. Sobkin
Barrister & Solicitor
331 Somerset Street West
Ottawa, ON K2P 0J8
Telephone: (613) 282-1712
Facsimile: (613) 288-2896
Email: msobkin@sympatico.ca

Counsel for the Respondent

John R.W. Caldwell
Nicholas Reithmeier
Ministry of the Attorney General
Criminal Appeals and Special Prosecutions
Vancouver, B.C. V6Z 2G3
Telephone: (604) 660-4222
Facsimile: (604) 660-1133
Email: john.caldwell@gov.bc.ca
Email: nicholas.reithmeier@gov.bc.ca

Agent for the Respondent

Robert E. Houston, Q.C.
Gowling WLG (Canada) LLP
Suite 2600, 160 Elgin Street
Ottawa, ON K1P 1C3
Telephone: (613) 783-8817
Facsimile: (613) 788-3500
E-mail: robert.houston@gowlingwlg.com

TABLE OF CONTENTS

PAGE

PART I – OVERVIEW OF POSITION AND STATEMENT OF FACTS

A. Overview of Position

1. Section 525 of the *Criminal Code* requires a judge to hold a hearing to determine whether a person who is in custody charged with an offence should be released from custody. In the case of an indictable offence the hearing must be held within 90 days of certain stipulated events (such as 90 days from the day an order was initially made detaining the accused in custody), while in the case of proceedings by way of summary conviction the hearing must be held within 30 days.

2. Subsection 525(4) provides that if, following the hearing, the judge is not satisfied that the continued detention of the accused in custody is justified within the meaning of subsection 515(10), the judge shall order that the accused be released from custody pending the trial of the charge on his giving an undertaking or entering into a recognizance with conditions the judge considers desirable. Subsection 515(10) sets out the grounds upon which an accused's initial detention in custody is justified, including the maintenance of confidence in the administration of justice.

3. Subsection 525(3) provides that the judge "may, in deciding whether or not the accused should be released from custody, take into consideration whether the prosecutor or the accused has been responsible for any unreasonable delay in the trial of the charge."

4. There is considerable disagreement in the lower courts as to the proper approach to take in a hearing convened under s. 525. One line of authority is known as the one-step approach. According to the one-step approach, the factors set out in subsection 515(10) are addressed pursuant to subsection 525(4) and the presiding judge may consider as a factor whether there has been any unreasonable delay on the part of the prosecutor or the accused in bringing the matter to trial, as stated in subsection 525(3).

5. According to the other line of authority, known as the two-step approach, the court first considers as a threshold issue whether the accused has shown there has been an unreasonable delay in bringing the matter to trial. Only if unreasonable delay is found does the court then go on to consider whether the accused's detention is justified under subsection 515(10). The two-step approach places an onus on the accused to show "unreasonable delay".

6. The one-step approach is the correct approach because it best accords with the plain meaning of the words of section 525 read in their entire context and in their grammatical and ordinary sense. This interpretation also best gives effect to the protections afforded by the *Canadian Charter of Rights and Freedoms* ("*Charter*") for it provides a broad judicial discretion to balance all of the relevant factors in a particular case in order to determine whether the continued detention of the accused is justified.

7. The case on appeal brings into sharp focus the disagreement between the lower courts that prefer the two-step approach (which favours expediency in the administration of justice) and those that prefer the one-step approach (which best safeguards *Charter* rights).

8. In the case at bar, Mr. Justice Riley held that the correct approach is the two-step approach, but articulated the test differently from what had been previously held. Justice Riley modified the two-step approach (the "modified approach") by reformulating the threshold issue. At the first stage the accused must either show that the passage of time has had a material impact on the initial decision to detain, or there has been unreasonable delay on the part of the Crown.

9. The modified approach was born out of Justice Riley's concern that the two-step approach improperly made unreasonable delay the sole threshold issue. Justice Riley's decision is problematic because it has the effect of creating a test that limits the circumstances in which judges can exercise their discretion to order an accused person

released. Justice Riley has also created a threshold test, just a different threshold than the one found in the two-step cases.

10. The two-step approach, and modified approach, is a marked departure from the plain meaning of the words in section 525 and reflects a shift in the procedure to be followed on a section 525 bail review. This shift is much to the benefit of the state and at the expense of the individual. It is inconsistent with the principles enshrined in the *Charter*.

11. Parliament's intention was to mandate a proactive judicial inquiry into an accused person's detention status, and provide a remedy in appropriate circumstances.

12. This Court in *R. v. Jordan*, 2016 SCC 27 denounced a culture of complacency towards delay that has pervaded the criminal justice system in recent years. Delay may be properly considered under section 525 but it is not a threshold requirement that must be satisfied before the court may have regard to other circumstances that militate against continued detention.

13. The two-step approach also distorts the plain meaning of section 525 by placing the onus on the accused to demonstrate unreasonable delay, in an application that is to be made by his gaoler (though in practice brought by the Crown).

14. While a hearing under the one-step approach is more comprehensive, a concern for scarce judicial and prosecutorial resources should not be made to trump fundamental *Charter* rights or subvert the intention of Parliament. The correct reading of section 525 is one with the most expansive protection of individual rights as recognized by our *Charter*.

15. Section 525 is an essential safeguard against accused persons languishing in custody while awaiting trial, and courts must remain vigilant so as to ensure its continued vitality.

B. Statement of Facts[1]

16. The Appellant was charged with occupying a motor vehicle knowing a firearm was present in the vehicle, using a firearm while committing an indictable offence, assault, intentional discharge of a firearm, possession of a stun gun, and possession of a loaded prohibited or restricted firearm. The Appellant was also charged with possession of a weapon and/or ammunition contrary to a lifetime firearms ban.

17. The Appellant was detained on this matter. On January 4, 2016 the Appellant was taken into custody on these matters when he was arrested.

18. On March 27, 2016 the first trial dates of this matter were set. The trial was scheduled for October 3-6, 10-13, 2016 and November 21-24, 2016. The Appellant was at all material times prepared to proceed to trial on these dates.

19. On September 16, 2016 the Crown swore a new information in Surrey Provincial Court File Number 214670-5-C.

20. On October 3, 2016 the co-accused, Mr. Richardson, filed a *Charter* notice that alleged late disclosure and applied for an adjournment of the trial on the basis that the majority of the disclosure had been received within the month leading up to trial and his counsel was not in a position to proceed. The court denied Mr. Richardson's application for an adjournment.

21. On October 4, 2016 the court brought to the attention of Mr. Richardson that an election had not been taken on the new information 214670-5-C. The co-accused Mr. Richardson elected to be tried by Supreme Court judge with a preliminary inquiry. The

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[1] The following review is based on Crown Counsel's "Key Dates in the history of R. v. Myers" filed at the hearing (Appellant's Record ("AR"), Tab 12), and the Affidavit of Samuel Williams sworn July 21, 2017 and filed at the hearing (AR, Tab 11).

co-accused Mr. Blakeslee plead guilty and the proceeding was adjourned for sentencing. The Appellant elected to be tried by Provincial Court Judge.

22. The Appellant asked the Provincial Court Judge to record the differing elections and to allow the Appellant to proceed with the trial as scheduled, separately from the co-accused Mr. Richardson. Crown Counsel opposed the court recording the differing elections.

23. On October 6, 2016 the court heard submissions from both Crown Counsel and the Appellant on section 567 of the *Criminal Code* and the recording of the election.

24. On October 7, 2016 the co-accused Mr. Blakeslee was sentenced on the matter, and is no longer before the court.

25. On October 14, 2016 the Provincial Court Judge declined to record the Appellant's election and deemed the Appellant to have elected trial by Supreme Court judge and jury.

26. On November 9, 2016 the Appellant sought his release and on November 10, 2016 the Provincial Court Judge detained the Appellant.[2]

27. The preliminary inquiry completed on November 24, 2016.

28. The Complainant was unable to testify as to any of the factual underpinnings of the allegations that the Appellant faces on these matters. The Complainant only recalled being arrested by the police, and speaking to the police but was unable to recall any details of what he said to the police and was unable to adopt his statement previously made to the police.

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[2] Ruling on Judicial Interim Release Application (Appellant's Record ("AR"), p. 1).

29. The Appellant applied for judicial interim release again on November 24, 2016 before the Provincial Court Judge at the preliminary inquiry judge. The Appellant's detention was confirmed.[3]

30. The matter was first set for a Fix Date in the Supreme Court of British Columbia in New Westminster on December 8, 2016.

31. On December 8, 2016 Crown Counsel had sworn but not yet filed an indictment with the court. The Crown takes the position that the matter was adjourned on this date due to not finding mutually agreeable dates. The Crown for instance advised it was not available until November 2017.

32. On December 9, 2016 the assigned Trial Crown contacted the New Westminster Registry via e-mail with respect to what dates had been offered. Trial Division advised that the court could offer a 2-3 week trial starting March 2017. Trial Crown then asked if there were any other three week blocks available, and that they would have to see whether another Crown Counsel needed to be assigned to the file. Trial Division then advised that the next start date would be June 19, 2017. Trial Crown then asked about available dates in October or November, 2017. Trial Division advised that a two week trial could be scheduled to commence October 2, 10, 16, 23, or 30; or if for three weeks then November 20 or 27.

33. On December 13, 2016 trial Crown forwarded the court's available dates to defence counsel, and asked for their availability. Counsel for Mr. Richardson advised that he was available for the June dates but not in October or November. The Appellant's counsel was not available.

34. On December 15, 2016 the presiding justice refused to set the matter for trial as the proposed dates in March 2018 dates were too far off into the future.

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[3] Transcript of Proceedings at Bail Review (AR, p. 73).

35. The Appellant's counsel asked that the fix date hearing be adjourned one week; however, the matter was adjourned to January 5, 2017 since that was the next earliest date available for the court.

36. On January 5, 2017 the matter was adjourned to January 12, 2017.

37. Scheduling advised counsel that the Supreme Court of British Columbia in New Westminster does not sit regularly in July and August.

38. Scheduling offered dates for the trial in October 2017. The Appellant's counsel was available for the October 2017 dates.

39. Mr. Richardson's counsel was in a lengthy jury trial commencing September 2017 and was not again available until March 2018.

40. Crown Counsel was also unavailable until March 2018.

41. The Appellant's counsel provided additional dates that would require him to reschedule or assign other matters should the matter be set down.

42. The Appellant's counsel was willing to make considerable admissions based on the evidence at the preliminary inquiry for the purposes of shortening the time estimate of the trial.

43. Scheduling also canvassed setting the matter for trial in Vancouver since the court there has more sittings in July and August.

44. On January 12, 2017 all counsel attended for the purposes of setting the matter down for trial. The presiding justice proposed to set the matter for trial in March 2018. The Appellant's counsel applied to the court requesting that the Appellant's trial be set for the dates in October 2017. The presiding Justice refused to hear the application and

advised Appellant's counsel that the Appellant should make the application within the two weeks that followed and accordingly trial division would hold the October 2017 dates open pending the outcome of that application.

45. On February 3, 2017 the Appellant's counsel applied for severance of the Appellant from his co-accused Mr. Richardson. At the time the Appellant's counsel had confirmed the October 2017 dates remained available for the Appellant's trial. The application was denied.

46. The Appellant's trial was scheduled for March 2018.

47. On July 27, 2017 the Appellant's counsel and Crown counsel made submissions as to the correct legal test to be applied in a section 525 bail review. The matter was adjourned for the presiding justice to render a decision. On September 27, 2017 Riley J. released reasons for judgment.[4]

48. The bail review proceeded on October 5, 2017. Counsel for the Appellant made no submissions in light of Justice Riley's formulation of the legal test to be applied.[5] The detention order was confirmed.[6]

49. On January 29, 2018 the Appellant disposed of this matter with a guilty plea to one count of occupying a motor vehicle knowing a firearm is present under section 94(1) of the *Criminal Code*, and on a separate provincial court information arising from the same circumstances the Appellant entered a plea to one count of possession of ammunition contrary to a prohibition under section 117.01(1) of the *Criminal Code*. On January 31, 2018 the Appellant was sentenced to 30 months incarceration globally (24

[4] Reasons for Judgment of Riley J. (AR, p. 14).
[5] See Transcript of Proceedings in Chambers (Judicial Interim Release Hearing), October 5, 2017 (AR, p. 76).
[6] Order of Riley J. (AR, p. 28).

months on this matter and 6 months on the count under 117.01(1) of the *Code*), and the Crown entered a stay of proceedings on all of the remaining counts on the indictment.[7]

PART II – STATEMENT OF ISSUES

50. What is the correct interpretation of section 525 of the *Criminal Code*?

PART III – STATEMENT OF ARGUMENT

A. The Current State of Affairs: A Lack of Clarity and Uniformity in the Law and a High Rate of Pre-Trial Custody in Canada

51. The purpose of section 525 is to ensure the court carries out a supervisory role over the continued detention of the accused to ensure the accused does not languish in custody needlessly detained, and to ensure there is not an unreasonable delay in proceeding with the trial.[8]

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[7] The application for leave to appeal in this matter was filed when the Appellant was in pre-trial custody. The Crown raised the issue of mootness in its response to the leave application and the Appellant addressed this subject in its reply. Leave to appeal was granted following consideration of these submissions on mootness. The Appellant submits that despite the fact that he is no longer in pre-trial custody this Court should address the proper test for s. 525 hearings as the matter is of significant public importance and would otherwise be evasive of review by this Court: see *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 SCR 3, 2003 SCC 62 at paras. 17-22.

[8] *Fraser Regional Correctional Centre v. Canada (Attorney General)*, [1993] B.C.J. No 2348, para. 4; *R. v. Gill*, [2005] O.J. No. 2648, para. 3; *R. v. Sawrenko*, 2008 YKSC 27, para. 26; *R. v. Sarkozi*, 2010 BCSC 1410 [*Sarkozi*], paras. 8-11; *R. v. Haleta*, 2015 BCSC 850 [*Haleta*], paras. 8-10.

52. The issue on appeal, and the nationwide disparity in the law amongst the lower courts, concerns the test to be applied in a section 525 bail hearing, in particular when subsection (3) dealing with unreasonable delay should be considered by the court.[9]

53. The question of statutory interpretation in this case arises against a backdrop of statistics which indicate a very high rate of pre-trial detention in Canada. In *R. v. McCormack* Mr. Justice O'Neill of the Ontario Superior Court of Justice cited statistics regarding the rates of pre-trial detention that were provided by the Canadian Civil Liberties Association:[10]

> Provincial and territorial jails hold individuals detained before their trial and anyone sentenced to a custodial sentence under two years; federal prisons incarcerate those who are convicted and sentenced to two or more years in custody.
>
> On an average day in 2012/2013, there were 25,208 people behind bars of provincial and territorial jails; 54.5% of these people were in a pre-trial custody, legally innocent, awaiting trial or determination of bail.
>
> Over the past 30 years, the pre-trial detention rate has tripled; 2005 was the first time Canada's provincial and territorial jails held more people who were legally innocent than they did sentenced offenders.
>
> There are significant differences between different provinces and territories. Manitoba has the highest proportion of pre-trial incarceration: 66% of people incarcerated in that province are in pre-trial detention. Other provinces with high percentages of pre-trial detention include Alberta (61%), Yukon (60%) and Ontario (60%). Prince Edward Island has the lowest ratio of pre-trial to sentenced population; 18% of its jailed population is in pre-trial custody.
>
> Two-thirds of those in pre-trial detention are charged with non-violent offences. Violation of a previous bail condition is the most common reason for people to be held for a bail appearance, accounting for just over 1 in 10 cases.

54. Mr. Justice O'Neill goes on to comment on those statistics:[11]

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[9] *Sarkozi*, para. 12; *Haleta*, paras. 4, 26.
[10] *R. v. McCormack*, 2014 ONSC 7123 [*McCormack*], para. 21.
[11] *McCormack*, para. 22.

> In my view, those statistics are shocking, and contrary to the values underlying this country's Constitution. Countless appellate court authorities, the *Morales* decision included, speak to the spirit and intent of Canada's bail laws and the underlying rationale behind s. 515(10) of the *Criminal Code*.

55. These high rates of pre-trial custody exist at a time when the crime rate has been on a steady decline for decades, and in 2012 the crime rate was at its lowest since 1972 with violent crime being at its lowest since 1987. Further, 79% of reported crime in 2012 was property crime and other non-violent offences (eg. breaching court orders, mischief).[12]

56. The statistics also demonstrated the disproportionate representation of vulnerable sectors of the population: the aboriginal population who were just 4% of the population in 2011/2012 made up 25% of admissions to remand, 37% of women admitted to remand were aboriginal, and black accused were more likely to be detained pending trial than accused from other backgrounds. An Ontario study of people being supervised by bail programs showed an overwhelming majority of those studied had substance use issues, 40% had mental health issues, 31% had concurrent mental health and substance use issues, and approximately one-third reported being homeless.[13]

57. In *McCormack*, Justice O'Neill ordered the release of Ms. McCormack under section 525. He provided powerful and guiding language, in conjunction with the compelling statistics cited above, that echo the sentiments of then Justice Minister Turner when he was speaking in the House of Commons[14] in support of the *Bail Reform Act*[15] (discussed later in this factum) which brought these provisions into force:

> It is important to always remember that in the context of a formal bail hearing, the issue is never bail or jail. Rather, the issue is whether a bail order, with required terms and conditions, highly restrictive if necessary, can be justified under the legislation and the appellate court decisions, as

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[12] *McCormack*, Schedule B.
[13] *Ibid*.
[14] Canada, Parliament, *House of Commons Debates*, 28th Parl, 3rd Sess, Vol 3 (February 5, 1971) [*House of Commons Debates*].
[15] S.C. 1970-71-72, c. 37.

> opposed to a denial of bail and consequent incarceration for an unknown period of time. It should also never be lost sight of that given the authority of the Court to place conditions upon sureties, and to obtain cash or the pledge of equity in property, a restrictive bail order pre-trial and conviction, can be as or more restrictive and protective of personas [*sic*] and the community, than can be a suspended sentence with probation, or a conditional sentence order, post-conviction.
>
> In my view, s. 525 deserves the same progressive and liberal interpretation, as do ss. 515 and s. 520 of the *Code*.[16]

58. It is submitted that this Court should adopt a similar approach. This Court must provide the certainty to accused persons detained in custody that their voice will be heard and that they will not languish there under a restricted interpretation of s. 525.

B. Why the one-step approach is the correct approach

59. The one-step approach best achieves the purpose of the *Bail Reform Act*. The one-step approach affirms the Court's supervisory role in ensuring that accused persons do not languish unnecessarily in prison, with a mandated timely inquiry into the status of accused persons detained in custody that includes as a relevant factor any delay in the trial of the charge.

60. The language in section 525 is clear that the person having the custody of the accused shall, forthwith on the expiration of the designated times, apply to a judge having jurisdiction in the place in which the accused is in custody to fix a date for a hearing to determine whether or not the accused should be released from custody (subsection 525(1)).

61. This application must take place at this time, otherwise the accused is being unlawfully held in custody.[17]

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[16] *McCormack*, paras. 23-24.
[17] *Burton v. British Columbia (Surrey Pre-Trial Centre, Director)*, [1993] B.C.J. No 892 (C.A.) [*Burton*], para. 35.

62. The hearing occurs only after the prerequisite criteria are met: that the accused is charged with an offence other than one under section 469,[18] is not detained on any other matters, and has been detained on the matter pending trial.

63. The language in subsection 525(1) is unequivocal and leads to a further obligation on the part of the judge under subsection 525(2) to fix a hearing date.

64. The nature of the hearing is clearly set out in subsection 525(1): it is to determine whether the accused should be released from custody. Consistent with the heading of the section – Review of Detention where Trial Delayed – subsection 525(3) authorizes the judge to consider whether the prosecutor or accused has been responsible for any unreasonable delay in the trial of the charge. Contrary to the two-step approach, subsection 525(3) does not identify delay as a threshold issue and does not place the onus on the accused to establish that the delay is unreasonable.

65. Subsection 525(4) provides further context as to the nature of the hearing that takes place. The reviewing judge must be satisfied the continued detention is justified, which is suggestive of the onus being on the Crown to establish this.

66. In *Burton*, the British Columbia Court of Appeal, in the course of giving reasons on an appeal of a *habeas corpus* application, made findings as to the purpose of a section 525 bail review ("to ensure an accused person is not unnecessarily detained and that directions are given for expediting his or her trial") and the legal effect of the accused not being provided such a review (the detention is unlawful).[19]

67. *Burton* adopted the reasoning in *Neill v. Calgary Remand Centre*.[20] In *Neill*, the Alberta Court of Appeal was considering an appeal from the Director of a court ordered mandamus compelling the Director to set a date for the accused to have a bail review

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[18] Section 469 includes offences such as treason and murder.
[19] *Burton*, paras. 30, 35.
[20] *Neill v. Calgary Remand Centre*, 1990 ABCA 257.

pursuant to section 525. In the course of giving reasons for dismissing the appeal Kerans J.A. provided ample support for the proposition that the purpose of section 525 is to provide for a bail review and to ensure a prompt trial.[21] Kerans J.A.'s reasons included addressing Parliament's intentions by considering and citing the Minister's statement at introduction.[22]

68. All of these decisions were rendered long before this Court's pronouncements on a culture of complacency towards delay in the seminal *Jordan* case.

69. *Burton* and *Neill* are important because they do not support a truncated bail hearing dedicated to determining as a threshold issue whether there has been unreasonable delay on the part of the Crown. A purposive interpretation of s. 525 also does not support such an approach.

70. The fundamental starting point of any exercise in interpretation is to look at the language of the statutory provision itself. This starting point is the same, and of enhanced assistance, when working within the context of the present situation where there are two competing lines of authority.[23]

71. This fundamental approach to determining the correct statutory interpretation of section 525 was endorsed by Mr. Justice Truscott in *Haleta*:[24]

> I return to the fundamental rule of statutory interpretation that the words of a statute are to be read in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

72. In *R. v. Vandewater*, the British Columbia Supreme Court provided the appropriate guide to statutory interpretation where two conflicting lines of authority have emerged:[25]

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[21] *Ibid*. para. 7.
[22] *Ibid*. para. 9.
[23] *R. v. Vandewater*, 2014 BCSC 2502 [*Vandewater*], para. 15 (Appellant's Book of Authorities ("ABA"), Tab 3).
[24] *Haleta*, para. 27.

> When one is faced with competing authorities, it is helpful to do a number of things. The first thing that is helpful to do is to review the language of the law, the actual enactment; in this case s. 525(3). Secondly, it is important to consider the analysis of the two different authorities and see why judges came to the decisions they did. Additionally, one must always remind oneself that as a matter of statutory interpretation, words are important and words must be given their usual and apparent meaning. I have followed this process in coming to my decision today.

73. The approaches in *Vandewater* and *Haleta* appear to be well informed by this Court's pronouncement in *Re: Rizzo & Rizzo Shoes Ltd.,* [1998] 1 S.C.R. 27.

74. The heading of section 525(3) clearly states "matters to be considered on hearing." The provision stipulates that the judge may consider unreasonable delay in the trial of the charge, and who is responsible for the delay, in determining whether the accused should be released from custody.[26]

75. Justice Groves quite succinctly stated the problem with the two-step approach:[27]

> Again, with respect, no rationale or explanation is provided as to why or how one can interpret Parliament's language of "the judge may" to read, "the judge shall as a threshold to review only".

76. It is submitted this Court should adopt the decision in *Vandewater* as Justice Groves provides a well-reasoned analysis in support of the one-step approach.

77. Proponents of the two-step approach prefer an interpretation that runs in stark opposition to the language of section 525 as a whole, the fundamental rights contained in the *Charter*, and the entire spirit of the bail legislation.[28]

78. The two-step approach asks that the accused establish that there is unreasonable delay in an application made by the person having custody of the accused. The two-step approach reads 'matters that a Judge may consider', which includes but is not limited to

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[25] *Vandewater*, para. 15.
[26] *Ibid*., paras. 17-19.
[27] *Ibid*., para. 17.
[28] *McCormack*, paras. 22, 24, 30.

unreasonable delay, as the only matter that must be considered at the first step.[29] If adopted this would mean that the court might never consider whether the detention is justified within the meaning of subsection 515(10) despite the fact that subsection 525(4) requires the court to do so.

79. The two-step approach defies the intent of Parliament to provide judges with broad discretion to decide whether there is unreasonable delay and further what weight should be given to unreasonable delay as a factor, if any. Parliament intended to leave this factor in the sole discretion of judges because of the variations between jurisdictions at any given time as to what may constitute an unreasonable delay. Only judges in the local jurisdiction are in a position to assess the dual considerations of the specific circumstances of that jurisdiction at that time and what weight should be given to the factor of delay in order to make a reasoned decision as to whether release is warranted under section 525.[30]

80. With the greatest of respect, Justice Riley erred in adopting a modified version of the two-step approach. Justice Riley's modified approach places a more onerous burden on the accused, runs further afield of the plain language of the legislative provisions, and also has the effect of limiting judicial discretion. Justice Riley's decision has the opposite effect of Parliament's intended outcome when enacting section 525 of the *Criminal Code*.

81. According to Justice Riley, the accused can either establish unreasonable delay on the part of the Crown as a threshold matter or can consider whether the passage of time "has had a material impact on the initial grounds for the accused's detention."[31] It remains unclear how in the vast majority of cases the mere passage of time can have the effect of making the basis for the detention fall away or dissipate.

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[29] *Vandewater,* paras. 19, 22-24; *Haleta,* para. 32.
[30] *Haleta,* para 32.
[31] Reasons for Judgment of Riley J. at para. 23(c) (AR, Tab 1).

82. In any event, the question of whether there has been a material change in circumstances is addressed under section 520 of the Criminal Code, as discussed by this Court in *R. v. St-Cloud*.[32] If the modified approach were accepted as the correct approach, section 525 would be rendered redundant.

83. Looking practically at the problem, the modified approach would rarely result in release of the accused. For Riley J. there must be unreasonable delay on the part of the Crown. However, there can be other causes of delay that should be considered. And delay should not be a threshold issue. Parliament did not create a remedial legislative provision that would have utility only in exceptional circumstances and could be achieved through other provisions within the same part of the *Code*. The modified approach creates a restrictive test that further limits the circumstances within which courts can exercise their discretion to order an accused person released. Indeed, one British Columbia judge has declined to follow Justice Riley's decision because it limits the circumstances that can be considered by the court.[33]

84. The two-step and modified approaches thus interfere with the ability of a court to conduct a statutorily mandated inquiry into the circumstances of an accused person's detention.

85. This Court can engage in hypotheticals for the purposes of resolving legal issues. An unrepresented accused person may not even know he is entitled to a 90 day bail review, let alone be aware of the circumstances he has to demonstrate or how to lead that evidence in order to allow that bail hearing to take place. The circumstances of an unrepresented accused person in custody for 90 days or more without having a trial is but one example of the type of issue that Parliament sought to address through an active judicial inquiry.

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[32] *R. v. St-Cloud*, 2015 SCC 27 [*St-Cloud*] at para 121 (holding that the reviewing judge in a section 520 hearing may vary the initial detention decision if new evidence "shows a material and relevant change in the circumstances of the case").

[33] *R. v. M.B.C.*, 2017 BCSC 2561 at paras. 6-9 (ABA Tab 1).

86. Section 525 also covers situations where accused persons are in custody pending trial but have not had a bail hearing. For example: if an accused person goes into custody, was brought before a justice under section 503, adjourned over a number of times to 90 days after his or her initial appearance before a justice, and since that time has not had a bail hearing nor has their trial commenced, such an accused would still meet the prerequisites of section 525. That is one of the situations that Parliament targeted to prevent people from languishing in custody.

87. Parliament's intention was to provide the judiciary with the widest discretion possible and therefore the greatest latitude of power to protect accused persons from needless detentions and delayed trials.

88. The two-step approach encroaches on the role of the legislature and restricts judicial discretion by reading in threshold requirements. A judge's finding on unreasonable delay and the weight that should be attributed to it may be the dominant factor in a judge's decision on a section 525 hearing. Practically speaking, this could amount to the functional equivalent of a threshold requirement in some cases. However, a functional equivalent is not the same as reading in a threshold requirement as a potential bar to a full section 525 hearing. The finding should be made during the hearing itself along with a consideration of all other circumstances before the presiding judge. Parliament's intention was that such a consideration is best left to the sole discretion of the judge presiding over that particular hearing.

89. Proponents of the two-step approach implicitly express a concern about the potential of the one-step approach to open the floodgates to bail reviews for anyone detained after the expiry of 90 days. However, the courts remain the gate-keepers for the release of the accused, and judicial discretion is the most appropriate means by which to evaluate these issues. Accused persons are still required to provide reasons for their release, and those reasons may have to be different than at the original bail hearing (assuming there has been one) in order for the review hearing to be decided differently. However, the initial reasons for the detention must be measured against the delay that has

occurred in the matter. A multi-factorial analysis is thus required, not simply a rubber stamping of the initial decision.

90. The plain language of the provision is what should be followed, as that is an accurate reflection of the intention of Parliament. Had the intention of Parliament been for the accused to meet the threshold test that there had been an unreasonable delay in bringing the matter to trial, then that would not have been difficult for Parliament to state.[34]

91. Section 525 should also be interpreted in light of the *Charter*, that is, with a view to interpreting the legislation in a manner that is the most expansive to safeguarding individuals' rights protected under the *Charter*. This means that if the legislation *prima facie* provides for a fulsome bail review after 90 days, a lack of judicial resources or a concern for expediency are not justifications for interpreting the legislation as saying otherwise.

92. This concern about detained persons' rights to bail was expressed at the time of the *Bail Reform Bill.* Those rights now contained in the *Charter* were live subjects during the House of Commons discussions in support of *Bail Reform Act*, which was reflective of the Parliament of the days' cognizance of *The Canadian Bill of Rights* prior to these principles becoming constitutionally entrenched in the *Charter*. These principles were fundamental considerations of the Parliament of the day at the time of the drafting and passage of Bill C-218.[35]

93. Since Parliament discussed these principles during the enactment of Bill C-218, principles which would later become the supreme law of this land, then it makes sense to interpret this provision in light of those principles:[36]

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[34] *Vandewater*, para. 19.
[35] *House of Commons Debates, supra,* at 3114.
[36] *Ibid.*

> The language of our *Canadian Bill of Rights*, for which the right hon. Gentleman, the hon. member for Prince Albert (Mr. Diefenbaker), deserves the gratitude of this country - and I am delighted to see him in the House - guarantees also that no law of Canada unless it is expressly declared that it shall operate notwithstanding the *Canadian Bill of Rights*, shall be construed and applied so as to deprive a person charged with a criminal offence of the right to reasonable bail without just cause.

94. This protection was carried forward in the *Charter* under s. 11(e) which provides that any person charged with an offence has the right "not to be denied reasonable bail without just cause." As this Court explained in *St-Cloud*, this protection flows from another fundamental protection enshrined in the Charter, the presumption of innocence:

> Finally, it is important not to overlook the fact that, in Canadian law, the release of accused persons is the cardinal rule and detention, the exception: *Morales*, at p. 728. To automatically order detention would be contrary to the "basic entitlement to be granted reasonable bail unless there is just cause to do otherwise" that is guaranteed in s. 11(e) of the *Charter*: *Pearson*, at p. 691. This entitlement rests in turn on the cornerstone of Canadian criminal law, namely the presumption of innocence that is guaranteed by s. 11(d) of the *Charter*: *Hall*, at para. 13. These fundamental rights require the justice to ensure that interim detention is truly justified having regard to all the relevant circumstances of the case.[37]

95. These comments were made in the context of the proper approach to the interpretation of s. 515(10)(c) of the *Criminal Code*. It is submitted they should also guide this Court's approach to the interpretation of s. 525. The *Charter* protections engaged by this case counsel in favour of a fulsome interpretation of s. 525 to ensure that every person in pre-trial detention is only held where it is "truly justified".

96. Some courts and commentators have noted that the *Charter* has increased the amount of time it takes to bring a matter to trial and that there are many more pre-trial applications, which has slowed the process.[38]

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[37] *St-Cloud* at para 70.
[38] *R. v. Waniandy*, 2015 BCSC 308 at para. 6.

97. However, this does not mean that an accused in pre-trial custody should languish there beyond the 90 day period prescribed by Parliament without a fulsome review of the circumstances of his or her detention. Such a proposition would be contrary to s. 525 and antithetical to the *Charter*. The rights provided by the *Charter* are not contingent upon the availability of judicial resources. The converse is actually the truth. The state and the courts' actions are subject to the *Charter*, which means that where there is a lack of resources courts must nevertheless uphold the accused's *Charter* rights. If the courts or the Crown do not have the resources to deal properly with accused persons as specified in section 525, then the accused should be released.

98. Such applications may draw upon scarce judicial resources; however, the process should not be truncated or circumvented because of judicial perceptions about the current availability of resources. Availability of resources is determined by priority. The *Charter*, and the decision of this Court, have made it clear that bail and justice without delay are matters of the highest priority. [39]

99. While the two-step approach purports to put delay at the center of the analysis, it actually encourages a culture of complacency towards delay. By putting Crown responsibility for delay as a threshold issue, an accused may be denied the hearing contemplated by subsections 525(1) and (4). However, the prospect of that hearing will compel Crown and courts to deal with matters more expeditiously. *Jordan* and the cases that have followed demonstrate that a judicial stay of proceedings, the most drastic of judicial remedies, is appropriate in order to correct the culture of complacency towards delay. The one-step approach will effect positive change within the justice system by fulfilling the intent of Parliament to prevent accused persons from languishing in custody, and discouraging a culture of complacency towards delay. The one-step approach will facilitate swift administration of justice, timely trials, and appropriate reconsideration of accused persons' detention status.

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[39] In fact, as explained by the court in *R. v. Acera*, 2017 ABQB 470 [*Acera*] at para. 3, "the effective use of s. 525 of the Code also allows the courts to better use their limited resources."

100. Madam Justice J.B. Veit of the Alberta Court of Queen's Bench also described how the appropriate use of section 525 can assist in dealing with delay:[40]

> In earlier decisions on the interpretation of the section, I have called section 525 Parliament's *Askov*; it would now be appropriate to describe the section as Parliament's *Askov* and *Jordan*. Although both Parliament and the courts focus on delays to trial and whether those delays are unconstitutional, there is this important difference between Parliament and the courts: s. 525 gives the courts one opportunity to prevent an unreasonable delay. One can only imagine that it also in an accused's best interests to do what is possible as early as possible rather than waiting in custody until the trial to raise a constitutional argument on delay. As the case law points out, the effective use of s. 525 of the Code also allows courts to better use their limited resources.
>
> Therefore, the importance of this mechanism in the overall assessment of the constitutional right to be tried within a reasonable time cannot be overstated.

101. Madam Justice Veit expanded on this point as follows:[41]

> A second opportunity provided by s. 525, is to require us to focus, in as practical a way as possible, on the future. ***DMS*** also reminded us that, when the constitutional right to a trial within a reasonable time is being assessed, courts must not only review what has happened to date, but must also anticipate the length of time it will take to end the proceedings, i.e. complete the trial. Section 525 is designed to allow, and indeed to force, courts to take whatever pro-active measures are appropriate in light of the total anticipated delay. Someone outside the criminal justice system might think it odd that the Supreme Court of Canada incorporated some crystal-ball gazing into a technical exercise; however, those of us within the system know that, working together, the prosecution, defence bar, and court, are indeed in a position to obtain current information on trial availability and to make informed guesses about the length of individual proceedings. Indeed, some inside the system might be of the view that nothing useful can be done with 30 day and 90 day deadlines. With respect, I am of the view that the Supreme Court's confidence in the stake holders in the criminal justice system is not misplaced and that the Supreme Court's direction to anticipate the future is a manageable task.

102. The language of subsection 525(1) clearly supports Madam Justice Veit's view by the inclusion of the words, "and the trial has not commenced". The trial not commencing

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[40] *Ibid*. paras. 3-4.
[41] *Ibid*., para. 8.

is a prerequisite to the hearing, and the 90 or 30 day periods are triggering events to signal delay. The solutions for the Crown and court are to (1) have the trial commence, or (2) hold a review under section 525 where the person may be granted bail or the matter disposed of in some other way (see subsection 525(9) which empowers the hearing judge to give directions to expedite the trial).

103. These remedial provisions suggest that Parliament's focus was on delay at the time of legislating these provisions. This Court has reaffirmed that unreasonable delay in the administration of justice today remains a paramount concern, and the Respondent is unable to provide any valid reason for why this concern should not be addressed in interpreting this section.

104. This was the clear concern of Parliament at the time of drafting this provision. Evidence of this is found from Justice Minister Turner's speech in the *House of Commons Debates* that refers to the effect of pre-trial custody on the outcome of trials, the opportunity for a reasonable defence, and the opportunity to assemble the evidence necessary for that defence. Justice Minister Turner expressly referred to the fact that "we cannot ignore the high incidence of guilty pleas of persons kept in custody under pre trial detention".[42]

105. Justice Minister Turner went on to say:[43]

> the provisions of the bill also ensure that where an accused is being held in custody pending his trial, or pending an appeal of his conviction, this situation must be reviewed by the courts within set periods of time, and directions may be given by the courts for getting the case onto trial, or for review proceedings by way of appeal.

106. Mr. Turner stated that the objective of Bill C-218 was four fold:[44]

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[42] *House of Commons Debates, at* 3115.
[43] *Ibid*., at 3117.
[44] *Ibid*., at 3116

a. First to avoid unnecessary pre trial arrest and detention.
b. Second in cases where arrest with or without warrant has taken place, the person accused, whatever his means is not unnecessarily held in custody until his trial.
c. Third to ensure an early trial for those who have been detained in custody pending trial.
d. Fourth to provide statutory guidelines for decision making in this part of the criminal law process relating to arrest and bail and thereby preclude the possibility of "discretionary prejudice".

107. The development of the two-step approach works to the disadvantage of an accused. There is an inherent imbalance in resources between the individual and the state, which is further aggravated when an accused person is in custody because this may impede their access to potential resources. The burden on an accused at the s. 525 stage should be lessened. However, the two-step approach imposes a further and onerous burden on the accused of having to pass a certain threshold before the courts will address their custodial status in a legislatively mandated inquiry. The modified approach does not remedy this defect.

108. Mr. Turner spoke about the provisions of the then *Criminal Code* that conferred upon police the power to arrest and authority to release in such broad terms that it led to misuse and unheeded power, albeit Mr. Turner refrained from saying such misuse was deliberate. Mr. Turner went on to say the following, which is equally applicable to the scenario that comes before this Court now:[45]

> The consequence is a widespread, and I do not say deliberate, but unheeding misuse of power and authority. In the nature of things, the impact of this misuse is felt mainly by those, guilty or innocent, who are least equipped to alleviate for themselves the consequences of the unreasonable use of authority because of poverty, a lack of education, or a lack of influence, they are unable to bring the necessary counter pressure to bear on their own behalf. For them, this bill will be a statutory voice equalizing their opportunities before the courts.

[45] *Ibid*., at 3118.

109. These passages indicate the intention of Parliament at the time, and the spirit of the legislation, as being inclined towards the release of accused person and not their detention. The two-step approach is opposite to the spirit of the bail legislation at issue here and more in line with the general legislative spirit in recent years, which appears to be focused on incarceration. Parliament amended the *Criminal Code* to increase the various circumstances in which accused persons are placed in reverse onus situations, making it more difficult to obtain release. Parliament instituted mandatory minimums for some offences, a number of which have been declared by this Court as unconstitutional. The legislative spirit in recent years seems to reflect a change in policy on treatment of offenders whether alleged or proven, which does not embrace the presumption of innocence, the principle of restraint and imprisonment as a last resort expressed in Mr. Turner's comments.

110. In the Appellant's submission the one-step approach flows from the literal wording of s. 525 and the overall spirit of the bail legislation. However, if there is any doubt recourse may be had to this Court's decision in *R. v. McIntosh* where Lamer C.J. stated:[46]

> It is a principle of statutory interpretation that where two interpretations of a provision which affects the liberty of a subject are available, one of which is more favourable to an accused, then the court should adopt this favourable interpretation.

111. This principle may be applied where there is ambiguity as to the meaning of a provision.[47] The purposive approach to the interpretation of section 525 does not allow for the two-step approach to be the only possible interpretation arising from this section. The judicial history of the two-step approach shows that it is a recent development in the law, just like the modified approach.

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[46] *R. v. McIntosh*, [1995] 1 S.C.R. 686 at para. 29.
[47] *Bell ExpressVu v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 [*Bell ExpressVu*] at para. 28.

112. For there to be ambiguity, the words "must be reasonably capable of more than one meaning."[48] Proponents of the two-step approach have manufactured ambiguity from the words of section 525 in order to support that approach, which is why the Appellant says that *Bell ExpressVu* does not apply. However, if there is ambiguity as to whether the one-step or second-step approach is correct, then this Court will apply other principles of interpretation, "such as strict construction of penal statutes and the '*Charter* values' presumption".[49]

113. A strict construction of this statute and the "*Charter* values" presumption support the one-step approach because they aim to enhance the liberty of those subject to the legislation.

114. An argument that some in favour of the two-step approach has made is that the one-step approach requires a *de novo* hearing.

115. This Court in *St-Cloud* affirmed Justice Trotter's view that "a true *de novo* hearing is conducted as if there were no previous proceedings."[50]

116. The Appellant does not contend that there should be a true *de novo* hearing under s. 525 (where a bail hearing has already been held). The reasons for judgment in *Haleta, R. v. Goudreau*,[51] and *Vandewater* (adopting the one-step approach) do not contain the words *de novo* hearing. The reasons for judgment in *R. v. Quinn* do mention the idea of a *de novo* hearing, [52] however the presiding justice in that case later reversed his own reasons to endorse the two-step approach in a subsequent case.[53]

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[48] *Bell ExpressVu,* para. 29 citing *Westminster Bank Ltd. v. Zang,* [1966] A.C. 182 (H.L.), at p. 222, *per* Lord Reid.
[49] *Bell ExpressVu,* para. 28.
[50] *St. Cloud*, para. 91.
[51] *R. v. Goudreau*, 2015 BCSC 1227.
[52] *R. v. Quinn*, 2014 BCSC 2529 at paras. 25-28.
[53] *R. v. Wheeler,* 2015 BCSC 848 at para. 1 (ABA, Tab 4).

117. The *de novo* hearing argument arises from the controversy that existed amongst the lower courts with respect to the procedure on sections 520 and 521 bail review: some considered it an appellate review available upon demonstration of an error in law or principle, some considered it an appeal in law or principle, and some exercised full discretion to vary the initial order or a "*de novo"* hearing. Additionally some courts treated these review provisions as a hybrid remedy that permitted the reviewing court to intervene where new evidence was presented or where an error of law was made. This Court in *St-Cloud* acted in response to this nationwide disagreement amongst the lower courts.[54]

118. Sections 520 and 521 do not specifically articulate anything about the nature of the review, but merely that a review takes place. However, section 520 does impose an obligation on the accused to "show cause" and section 521 does impose an obligation on the prosecutor to "show cause" in a review proceeding, language that is absent from section 525. Section 525 also has a stated purpose that sets out the purpose of the review. The stated purpose of section 525 and the specific consideration of delay distinguish it from sections 520 and 521.

119. Section 525 brings an accused person's detention status to the attention of the court. This is a mandatory process in accordance with subsection 525(1). The originating notice in this case shows how this is accomplished.[55] The language of the notice is affirmative wording that "the Crown will make an application pursuant to s. 525 of the *Criminal Code* for a review of Mr. Myers' detention status." The notice goes on to state that, "the application will be heard by the presiding judge" and sets out the place, date and time of the hearing, and the material that the applicant will rely on.

120. However, the Crown's position is <u>not</u> that a section 525 hearing is mandatory; rather it is that that a hearing will be held only if defence counsel agrees to move

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[54] *St-Cloud*, para. 91.
[55] Notice of Application (AR, Tab 6, p. 32).

forward.[56] This is contrary to the plain meaning of section 525 and neutralizes the obligatory nature of the review. The Appellant respectfully requests this Court to confirm the mandatory nature of the hearing. Courts have held that where the hearing does not take place the accused is being detained unlawfully.[57]

121. Nor is it possible for an accused person to waive the hearing as has occurred in some proceedings. Madam Justice Veit commented on the concerning aspect of this in *Acera*:[58]

> In this context, I note that one of the matters on the s. 525 detention review list for June 19, File 170076848U1, included a "waiver" of the 525 review. It is not clear to me that any detainee has the capacity to waive the detention review hearing: it may be that a purposive interpretation of the section requires a judge to make an assessment of delays to trial not only in one, isolated, case, but as a result of having the opportunity of assessing a representative sample of the persons in the judge's community who are in jail even though they have not been convicted. Therefore, even if a waiver were technically possible, the use of waivers would deprive the court of the supervisory role which Parliament may have expected courts to provide.

122. As noted, the originating process of a section 525 review occurs by virtue of an application by the Crown on behalf of the gaoler as per subsection 525(1) of the *Criminal Code*. Sections 520 and 521 are optional applications brought on by the accused and Crown.

123. A section 525 review comes to the attention of the Court because the matter has not been dealt with in the statutorily prescribed time period. Sections 520 and 521 are brought on because of something that has happened or changed since the original bail hearing.

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[56] Transcript of Proceedings, p. 1 ll. 35-45 (AR, Tab 10, p. 78); *R. v. M.B.C.*, 2018 BCSC 359 [*M.B.C. II*] at para. 21 (ABA, Tab 2).
[57] *Burton*, para. 35.
[58] *Acera*, *supra*, para 15.

124. The differences between section 525 and sections 520 and 521 militate in favour of a different approach to the manner in which the two kinds of hearing proceed. As submitted above, in a 525 hearing the Court should undertake a multi-factorial analysis of the accused's custodial status in which the reviewing justice engages in a balancing exercise of all relevant considerations where delay is not a threshold to that review. The approach to that exercise will be informed by whether there is delay, a factor that would not have been considered at an earlier bail hearing. The presiding justice must therefore have a sufficient degree of latitude to conduct that exercise independent of the decision previously made where delay was not a factor.

125. Parliament placed a duty on the judiciary to ensure that accused persons do not fall through the cracks. Madam Justice Veit in *Acera* provided us with a real life example of how people do fall through the cracks and are not afforded the protection of section 525.[59] It is submitted that the approach advocated by the Appellant will help prevent that from occurring.

126. In this case the Appellant submits this Court ought to adopt the one-step approach to section 525. The system must react to that decision and make the appropriate accommodations to maintain compliance with the law. This can have the same positive impact as witnessed by this Court's decision in *Jordan*.

127. The effect of this Court's decision in *Jordan* and the cases that followed was that the Crown cannot rely on a lack of resources as an excuse for delay. The effect of the *Jordan* line of authority can be readily observed in courtrooms across the country, where the Crown and courts are reluctant to allow adjournments without express and unequivocal waivers of delay. When delays occur, all counsel are adamant to put on record at whose feet that delay falls. Needless to say judges, Crown counsel and defence counsel are all more live to the issue of delay at all stages of the proceedings than ever before. This Court stripped the culture of complacency of its very foundation and affirmed that resources must be available to counteract this issue.

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[59] *Acera*, para. 10.

128. The Appellant asks this Court to affirm what Madam Justice Veit has held, do once again what it did in *Jordan* in the area of bail, and reiterate that justice delayed is justice denied at all stages of the proceedings. The culture of complacency towards delay has no place in the Canadian justice system.

C. Application of the One-Step Approach to the Case at Bar

129. There are three factors that considered together should have resulted in the Appellant's release from custody if a one-step approach had been applied.

130. First, at the conclusion of the preliminary inquiry there had been significant changes to the Crown's case against the Appellant, particularly an uncooperative complainant. Many of the charges that the Appellant faced could not be proven without the admission of the complainant's evidence.

131. The Crown did not seek the Appellant's detention on the tertiary ground (paragraph 515(10)(c)). The Appellant had a release plan that addressed any secondary ground concerns (paragraph 515(10)(b)) that the Court could have had despite the Appellant's record and the allegations that he had committed offences, including those before the Court, while on bail.

132. The Appellant's release plan included a sophisticated and well run recovery house and residential treatment facility to address the Appellant's substance abuse issues, which were identified as a catalyst to his offending behaviour. The facility was proposed to maintain a secure and stable home environment with supervision and monitoring. The facility required a cash deposit as a condition for the Appellant's acceptance into their program. The facility had the capacity to accommodate electronic monitoring by Community Corrections, which was also a proposed term of bail.[60]

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[60] See Exhibit A to Affidavit of Samuel Williams (AR, p. 90).

133. At the time of Justice Riley's decision on this hearing, the Appellant had spent an additional 10 months in custody since the preliminary inquiry Judge's detention order. Although at that time the Appellant had not been sentenced on his out of province matters, the position provided by the Crown on those matters was 15 months, which would have placed the Appellant in a time served position. The effect of this is that this matter in British Columbia was the only matter keeping the Appellant in custody.

134. The Appellant's trial was unreasonably delayed through no fault of his own. The first trial dates were adjourned because the Crown had sworn a new information and not brought the matter forward to record the accused's elections, then on the day of trial the co-accused elected a preliminary inquiry in order to effect their intention of obtaining an adjournment application that had already been denied by the judge on the same day. The Appellant still elected Provincial Court Judge in hopes of proceeding by effectively being severed from the co-accused. The Appellant's counsel made full submissions on why the matter should proceed for the Appellant and the differing elections recorded. The Appellant was ordered committed to stand trial in Supreme Court at the conclusion of the preliminary inquiry. The Court first offered trial dates of March 2017. Crown Counsel was unavailable for those dates. The Court next offered dates of June 2017, for which the Appellant's Counsel was not available. The Court then offered dates of October and November 2017. The Appellant's Counsel was available. Counsel for the Co-Accused and Crown Counsel were both not available for those dates and not again available until March 2018. The matter was scheduled for trial to commence in March 2018.

135. On February 3, 2017 the Appellant's counsel applied for severance of the Appellant's trial from his co-accused Mr. Richardson. On February 16, 2017 the Court dismissed the Appellant's severance application. Thus, the Appellant's efforts to move this matter along and obtain an early trial date were unsuccessful.

136. The circumstances that give rise to these charges occurred on January 4, 2016. The matter was first scheduled to commence trial in provincial court on October 3, 2016, 10 months after the offence date. This matter was delayed by the action of the

Crown and co-accused to March 2018, 26 months after the offence date. The total delay between the date the matter was first scheduled to commence trial in provincial court and the scheduled trial dates in Supreme Court was 17 months. At most the amount of delay owing to the Appellant would be the time period between June 2017 when the Appellant's counsel was unavailable and October 2017 when the Appellant's counsel was available, which is four months. So then there would be a total of 22 months delay from the date of the offence, and 13 months delay from the date the matter was first scheduled to commence trial in provincial court.

137. The question of what constitutes unreasonable delay is relevant to applying this legal test. The definition of unreasonable delay in the context of section 525 has not been firmly established,[61] likely because of the variance between jurisdictions as to what constitutes unreasonable delay. The presumptive ceiling or test for unreasonable delay under section 525 cannot be the same as that in *Jordan* because otherwise the accused would apply for a judicial stay rather than seek their release in the review of their detention, on a Crown application.

138. On a consideration of the foregoing in a one-step approach it is submitted that the continued detention of the Appellant was not justified within the meaning of section 525.

PART IV – SUBMISSION ON COSTS

139. The Appellant does not seek his costs on this appeal and requests that no costs be awarded against him.

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[61] See *M.B.C. II* at paras 6, 33-39 where some of the factors identified in the case law are discussed (ABA, Tab 2).

PART V – ORDER SOUGHT

140. The Appellant seeks an order that the appeal be allowed and the order of Justice Riley dated October 5, 2017 be set aside.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Vancouver, this 6th day of July, 2018.

Justin V. Myers
Lawrence D. Myers Q.C.
Zack Myers
Counsel for the Appellant

PART VI – TABLE OF AUTHORITIES

	Para#
JURISPRUDENCE	
Bell ExpressVu v. Rex, 2002 SCC 42	111, 112
Burton v. British Columbia (Surrey Pre-Trial Centre, Director), [1993] B.C.J. No 892 (B.C.C.A.)	61, 66, 67, 69, 120
Fraser Regional Correctional Centre v. Canada (Attorney General), [1993] B.C.J. No 2348 (S.C.)	51
Neill v. Calgary Remand Centre (Director), [1990] A.J. No. 690 (Alta. C.A.)	67, 69
R. v. Acera, 2017 ABQB 470	98, 121, 125
R. v. Gill, [2005] O.J. No. 2648 (Ont. S.C.)	51
R. v. Goudreau, 2015 BCSC 1227	116
R. v. Haleta, 2015 BCSC 850	51, 52, 71, 73, 78, 79, 116
R. v. Jordan, 2016 SCC 27	12, 68, 99, 126-128, 137
R. v. M.B.C., 2017 BCSC 2561	83
R. v. M.B.C., 2018 BCSC 359	120, 137
R. v. McCormack, 2014 ONSC 7123	53-55, 57, 77
R. v. McIntosh, [1995] 1 S.C.R. 686	110
R. v. Quinn, 2014 BCSC 2529	116
R. v. Sarkozi, 2010 BCSC 1410	51, 52
R. v. Sawrenko, 2008 YKSC 27	51
R. v. St-Cloud, 2015 SCC 27	82, 94, 115, 117
R. v. Vandewater, 2014 BCSC 2502	70, 72, 73, 76, 78, 90, 116
R. v. Wheeler, 2015 BCSC 848	116
Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27	73

Hansard	
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Statutory Provisions	
Criminal Code, R.S.C. 1985, c C-46, s. 525	en passim
Canadian Charter of Rights and Freedoms	en passim
Bail Reform Act, S.C. 1970-71-71, c. 37	57, 59, 92

PART VII – STATUTORY PROVISIONS

Criminal Code, R.S.C. 1985, c. C-46

Subsection 515(10)

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.

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.

Section 525

Review of Detention where Trial Delayed
Time for application to judge

525 (1) Where an accused who has been charged with an offence other than an offence listed in section 469 and who is not required to be detained in custody in respect of any other matter is being detained in custody pending his trial for that offence and the trial has not commenced

(a) in the case of an indictable offence, within ninety days from

(i) the day on which the accused was taken before a justice under section 503, or

(ii) where an order that the accused be detained in custody has been made under section 521 or 524, or a decision has been made with respect to a review under section 520, the later of the day on which the accused was taken into custody under that order and the day of the decision, or

(b) in the case of an offence for which the accused is being prosecuted in proceedings by way of summary conviction, within thirty days from

(i) the day on which the accused was taken before a justice under subsection 503(1), or

(ii) where an order that the accused be detained in custody has been made under section 521 or 524, or a decision has been made with respect to a review under section 520, the later of the day on which the accused was taken into custody under that order and the day of the decision,

the person having the custody of the accused shall, forthwith on the expiration of those ninety or thirty days, as the case may be, apply to a judge having jurisdiction in the place in which the accused is in custody to fix a date for a hearing to determine whether or not the accused should be released from custody.

Notice of hearing

(2) On receiving an application under subsection (1), the judge shall

(a) fix a date for the hearing described in subsection (1) to be held in the jurisdiction

(i) where the accused is in custody, or

(ii) where the trial is to take place; and

(b) direct that notice of the hearing be given to such persons, including the prosecutor and the accused, and in such manner as the judge may specify.

Matters to be considered on hearing

(3) On the hearing described in subsection (1), the judge may, in deciding whether or not the accused should be released from custody, take into consideration whether the prosecutor or the accused has been responsible for any unreasonable delay in the trial of the charge.

Order

(4) If, following the hearing described in subsection (1), the judge is not satisfied that the continued detention of the accused in custody is justified within the meaning of subsection 515(10), the judge shall order that the accused be released from custody pending the trial of the charge on his giving an undertaking or entering into a recognizance described in any of paragraphs 515(2)(a) to (e) with such conditions described in subsection 515(4) as the judge considers desirable.

Warrant of judge for arrest

(5) Where a judge having jurisdiction in the province where an order under subsection (4) for the release of an accused has been made is satisfied that there are reasonable grounds to believe that the accused

> **(a)** has contravened or is about to contravene the undertaking or recognizance on which he has been released, or
>
> **(b)** has, after his release from custody on his undertaking or recognizance, committed an indictable offence,

he may issue a warrant for the arrest of the accused.

Arrest without warrant by peace officer

(6) Notwithstanding anything in this Act, a peace officer who believes on reasonable grounds that an accused who has been released from custody under subsection (4)

> **(a)** has contravened or is about to contravene the undertaking or recognizance on which he has been released, or
>
> **(b)** has, after his release from custody on his undertaking or recognizance, committed an indictable offence,

may arrest the accused without warrant and take him or cause him to be taken before a judge having jurisdiction in the province where the order for his release was made.

Hearing and order

(7) A judge before whom an accused is taken pursuant to a warrant issued under subsection (5) or pursuant to subsection (6) may, where the accused shows cause why his detention in custody is not justified within the meaning of subsection 515(10), order that the accused be released on his giving an undertaking or entering into a recognizance described in any of paragraphs 515(2)(a) to (e) with such conditions, described in subsection 515(4), as the judge considers desirable.

Provisions applicable to proceedings

(8) The provisions of sections 517, 518 and 519 apply with such modifications as the circumstances require in respect of any proceedings under this section.

Directions for expediting trial

(9) Where an accused is before a judge under any of the provisions of this section, the judge may give directions for expediting the trial of the accused.

R.S., 1985, c. C-46, s. 525;
R.S., 1985, c. 27 (1st Supp.), s. 90;
1994, c. 44, s. 49;

1997, c. 18, s. 61.

Examen de la détention quand le procès est retardé

Délai de présentation d'une demande à un juge

525 (1) Lorsqu'un prévenu qui a été inculpé d'une infraction autre qu'une infraction mentionnée à l'article 469 et dont la détention sous garde n'est pas requise relativement à une autre affaire est détenu sous garde en attendant son procès pour cette infraction et que le procès n'est pas commencé :

a) dans le cas d'un acte criminel, dans les quatre-vingt-dix jours :

(i) à partir du jour où le prévenu a été conduit devant un juge de paix en vertu de l'article 503,

(ii) lorsqu'une ordonnance enjoignant de détenir le prévenu sous garde a été rendue en vertu des articles 521 ou 524 ou qu'il a été statué sur la demande de révision visée à l'article 520, à partir de la date de mise sous garde ou, si elle est postérieure, de celle de la décision;

b) dans le cas d'une infraction pour laquelle le prévenu est poursuivi par procédure sommaire, dans les trente jours :

(i) à partir du jour où le prévenu a été conduit devant un juge de paix en vertu du paragraphe 503(1),

(ii) lorsqu'une ordonnance enjoignant de détenir le prévenu sous garde a été rendue en vertu des articles 521 ou 524 ou qu'il a été statué sur la demande de révision visée à l'article 520, à partir de la date de mise sous garde ou, si elle est postérieure, de celle de la décision,

la personne ayant la garde du prévenu doit, dès l'expiration de ces quatre-vingt-dix jours ou trente jours, selon le cas, demander à un juge ayant juridiction à l'endroit où le prévenu est sous garde de fixer une date pour une audition aux fins de déterminer si le prévenu devrait être mis en liberté ou non.

Avis d'audition

(2) Sur réception d'une demande en vertu du paragraphe (1), le juge doit :

a) fixer une date pour l'audition visée au paragraphe (1), qui aura lieu dans la juridiction, selon le cas :

(i) où le prévenu est gardé sous garde,

(ii) où le procès doit avoir lieu;

b) ordonner qu'avis de l'audition soit donné à telles personnes, y compris le poursuivant et le prévenu, et de telle manière que le juge peut préciser.

Questions à examiner lors de l'audition

(3) Lors de l'audition visée au paragraphe (1), le juge peut, pour décider si le prévenu devrait être mis en liberté ou non, prendre en considération le fait que le poursuivant ou le prévenu a été responsable ou non de tout délai anormal dans le procès sur l'inculpation.

Ordonnance

(4) Si, à la suite de l'audition visée au paragraphe (1), le juge n'est pas convaincu que la continuation de la détention du prévenu sous garde est justifiée au sens du paragraphe 515(10), il ordonne que le prévenu soit mis en liberté en attendant le procès sur l'inculpation pourvu qu'il remette une promesse ou contracte un engagement visés aux

alinéas 515(2)a) à e) et assortis des conditions que prévoit le paragraphe 515(4) et que le juge estime souhaitables.

Mandat d'arrestation décerné par un juge

(5) Lorsqu'un juge ayant juridiction dans la province où a été rendue une ordonnance de mise en liberté d'un prévenu prévue par le paragraphe (4) est convaincu qu'il y a des motifs raisonnables de croire que le prévenu, selon le cas :

a) a violé ou est sur le point de violer la promesse ou l'engagement en raison duquel ou de laquelle il a été mis en liberté;

b) a, après sa mise en liberté sur sa promesse ou son engagement, commis un acte criminel,

il peut décerner un mandat pour l'arrestation du prévenu.

Arrestation sans mandat par un agent de la paix

(6) Nonobstant toute autre disposition de la présente loi, un agent de la paix qui a des motifs raisonnables de croire qu'un prévenu qui a été mis en liberté en vertu du paragraphe (4) :

a) soit a violé ou est sur le point de violer la promesse ou l'engagement en raison duquel ou de laquelle il a été mis en liberté;

b) soit, après sa mise en liberté sur sa promesse ou son engagement, a commis un acte criminel,

peut arrêter le prévenu sans mandat et le conduire ou le faire conduire devant un juge ayant juridiction dans la province où a été rendue l'ordonnance de mise en liberté du prévenu.

Audition et ordonnance

(7) Un juge devant lequel un prévenu est conduit en application d'un mandat décerné en vertu du paragraphe (5) ou en application du paragraphe (6) peut, lorsque le prévenu fait valoir que sa détention sous garde n'est pas justifiée au sens du paragraphe 515(10), ordonner sa mise en liberté sur remise de la promesse ou de l'engagement visés à l'un des alinéas 515(2)a) à e) et assortis des conditions visées au paragraphe 515(4) qu'il estime souhaitables.

Dispositions applicables aux procédures

(8) Les articles 517, 518 et 519 s'appliquent, compte tenu des adaptations de circonstance, relativement à toutes procédures engagées en vertu du présent article.

Instructions visant à hâter le procès

(9) Lorsqu'un prévenu se trouve devant un juge en vertu d'une disposition du présent article, le juge peut donner des instructions pour hâter le déroulement du procès du prévenu.

L.R. (1985), ch. C-46, art. 525;
L.R. (1985), ch. 27 (1er suppl.), art. 90;
1994, ch. 44, art. 49;
1997, ch. 18, art. 61.