Court File No. 37869

IN THE SUPREME COURT OF CANADA
(On Appeal from the Supreme Court of British Columbia)

B E T W E E N:

COREY LEE JAMES MYERS

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

- and -

ATTORNEY GENERAL FOR ONTARIO
CANADIAN CIVIL LIBERTIES ASSOCIATION

Interveners

FACTUM OF THE INTERVENER THE ATTORNEY GENERAL OF ONTARIO

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FACTUM OF THE INTERVENER ATTORNEY GENERAL FOR ONTARIO

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PART I: OVERVIEW AND STATEMENT OF FACTS

1. This appeal raises the issue of the proper interpretation and application of s.525 of the *Criminal Code*, colloquially known as a 90-day detention review. The Attorney General of Ontario asks this Court to adopt the two-step approach in which unreasonable delay is a prerequisite to a reconsideration of bail by the superior court. AG Ontario will argue that the two-step approach is consistent with the modern principle of statutory interpretation in which the whole of s.525 is read in its ordinary sense harmoniously with the scheme and objects of the Act as well as Parliament's intent.[1] AG Ontario will argue that the text of s.525 itself provides for a staged approach in which the intended purpose of the 90 day prescribed period is to oblige the jailor to bring the accused before the superior court forthwith following its expiry. Once this first step is fulfilled, the timing of the hearing ~ the second step ~ falls within the court's discretion. This allows the court to set and conduct a hearing once unreasonable delay exists.

PART II: QUESTIONS IN ISSUE

2. AG Ontario will make submissions on the single issue raised, namely the correct interpretation of s.525 of the *Criminal Code*. AG Ontario will argue that the correct interpretation is a two-step approach.

PART III: ARGUMENT

A. The One-Step Approach Leads to Redundancy and Absurdity

3. The one-step approach, in which unreasonable delay is simply ***a*** factor to be considered alongside the factors set out in s.515(10) in a *de novo* review mandated upon the expiry of the prescribed periods, would transform s.525 into the primary review mechanism with unparalleled powers; a purpose unintended by Parliament, and inconsistent with the wording of s.525, the other bail review provisions, the *Act* as a whole, and the legislative history of s.525.

4. The one-step approach conflates the jailor's obligations under s.525(1) with those of the court under s.525(2). Significantly, the only obligation that Parliament linked to 90 days (for

[1] *Re Rizzo & Rizzo Shoes Ltd.*, [1998] S.C.J. No. 2, 1 S.C.R. 27 at para. 21; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, 2 S.C.R. 559 at para. 26.

indictable offences) is found in s.525(1) which requires the jailor to "forthwith" apply to a judge to fix a date for a hearing following its expiry. Once the accused is brought before the court, s. 525 is silent with regards to the timing of the detention review. Accordingly, the prescribed periods serve no purpose other than to trigger the jailor's obligation to bring the accused before the superior court. Had Parliament intended for the detention review hearing to also be subject to the 90 day period, it could have easily mandated that the hearing be held "forthwith." Instead, s.525(2) is silent on the timing of the detention review. Parliament did, however, provide courts with the power to issue directions to expedite the trial under s.525(9) whenever an accused is "before" the court under s.525. Interpreted in this manner, s.525 provides the court with flexibility to conduct the hearing and reconsider the issue of bail when unreasonable delay exists.

5. A review of s.525 in its entirety demonstrates that Parliament did not consider the prescribed periods determinative of "unreasonable delay". In fact, under s.525(3) the court may consider whether the prosecutor or accused are responsible for any "unreasonable delay." In circumstances where an accused is found responsible for unreasonable delay, it is illogical that this could then be used to mandate a *de novo* review that may result in the accused's release.[2] As recognized by Smith J., in *R. v. Richards*:[3]

> If institutional reasons … which are primarily driven by decisions made by the accused, are allowed to trigger a renewed bail review, it lends itself to an abuse of process and possibly brings the administration of justice into disrepute, because of the decisions that are made for very good reasons by the defence and by the accused.

6. The one-step approach effectively renders ss.520 and 521 redundant by transforming the nature of reviews under s.525 from that of a shield or safety net into a sword; a purpose never intended by Parliament. It also encourages micro-management and undoubtedly adds significantly to the over-burdened caseload of courts.[4] It also creates the potential for absurdity.

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[2] *R. v. Whiteside*, 2016 BCSC 131 at para. 12.
[3] *R. v. Richards*, [2015] O.J. No. 5271 at para. 35.
[4] For instance, the September 2017 Report by Howard Sapers states at p.86 that in 2015/16 Ontario held on average 5222 adults on remand in pre-trial detention [*i.e.* approx. 66% of Ontario's adult incarcerated population]. At p.91, the Report notes that in 2013/14, there were 11, 592 individuals who were detained for over 91 days, who were regularly appearing in bail court and eventually had all of their charges withdrawn, stayed, or dismissed: Ontario, Report on

For instance, an accused subject to a reverse onus bail could simply await the expiry of the prescribed period and have a substantive hearing in the superior court. This has the potential to encourage practices that could undermine public confidence in the criminal justice system, such as judge-shopping, intentional defence delays, and accused dragging out their application for release.[5] As stated by Bernard J., in *R. v. Jerace:*

> It would be … an odd result if s.525 were read so as to afford an accused an avenue of review which requires neither proof of any of the aforementioned grounds in s.520 nor the finding of unreasonable delay.[6]

7. Moreover, if s.525 is interpreted as requiring an automatic substantive review after the expiry of 90 days, the fact that s.520 reviews have been held and dismissed within the prescribed period is irrelevant, as is the fact that the accused may be responsible for all or some of the delay.[7] This is inconsistent with the deference required under other pre-trial bail review provisions. As stated by Cullen, A.C.J., in *R. v. Elmi*, "to treat s.525 as conferring the right to a *de novo* hearing simply on the basis that 90 days has expired is not to read it in context or harmoniously with s.520 and 521."[8]

8. Further, an automatic substantive review triggered by the expiry of the prescribed periods fails to fulfill Parliament's objective in enacting s.525. Specifically, there appears to be no issue that the purpose of s.525 is to guard against accused persons languishing forgotten in jail. Given that an accused is only entitled to one review under s.525 (unlike reviews under ss. 520 and 521 which can be renewed), Parliament must have intended that the review occur when it will serve this purpose. In practical terms, a detention review is likely an exercise in futility if held shortly

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Corrections in Ontario, Direction for Reform (Toronto: Queen's Printer, September 2017), Independent Advisor: H. Sapers.

[5] *R. v. St-Cloud*, 2015 SCC 27, 2 S.C.R. 328, at para. 134.
[6] *R. v. Jerace*, 2012 BCSC 2007 at para. 15.
[7] *Burton v. British Columbia (Surrey Pre-Trial Centre, Director)* (1993), 28 B.C.A.C. 233, 84 C.C.C. (3d) 311, 25 C.R. (4th) 167 at paras. 26-31). In *The Law of Bail in Canada*, 3rd ed. (Toronto: Thomson Reuters, 2010, updated 2018) at p. 8-54, Justice Trotter notes that the "overwhelming weight of authority supports access to the s.525 procedure even after an application under s.520."
[8] *R. v. Elmi*, 2016 BCSC 376 at para. 13.

after a s.520 review has been heard and dismissed. The two step approach proposed by AG Ontario, in which courts have flexibility as to when the review and reconsideration of bail occurs, ensures that any hearings conducted are meaningful; not a perfunctory exercise.

B. The Two-Step Approach Achieves Harmony and Consistency

9. Interpreting s.525 as requiring a two-step approach does not render the review superfluous or devoid of any practical significance as suggested by the Appellant. Rather, it ensures that s.525 is used for the purpose intended by Parliament; to prevent accused from languishing in custody on account of delayed trials. Section 525 can also be particularly important for unrepresented accused. While s.520 provides the accused with a mechanism to challenge a detention order, the availability of s.520 is likely illusory for unrepresented and/or impecunious accused. Consequently, s.525 provides an avenue of relief through judicial oversight that operates independently of the parties with the timing of the detention review hearing left to the court's discretion, having regard to what constitutes unreasonable delay in that jurisdiction.

History and Context of Section 525

10. Section 525 formed part of Parliament's overhaul of the bail system in the early 1970's through the enactment of the *Bail Reform Act.*[9] This legislation is credited with creating "a liberal and enlightened system of pre-trial release."[10] The fact that the *Bail Reform Act* predates the *Charter* and the jurisprudential developments under s.11(b) cannot be over emphasized. Prior to its enactment, the law of bail had remained relatively static since Confederation. As noted by this Court in *R. v. Antic* [quoting the dissenting reasons of Iacobucci J., in *R. v. Hall,* at para. 56]:

> Before 1972, the law of bail was a highly discretionary matter. It was presumed that an accused person would be detained prior to trial unless he or she applied for bail under s. 463(1) of the *Criminal Code* and s. 463(3) gave virtually no guidance to the bail judge charged with determining whether to detain an accused committed for trial ... [references omitted][11]

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[9] *Bail Reform Act*, S.C. 1970-71-72, c.37.
[10] *R. v. Bray*, [1983] O.J. No. 2509 (C.A.), 40 O.R. (2d) 766, 2 C.C.C. (3d) 325, 32 C.R. (3d) 316 at para. 10.
[11] *R. v. Antic*, 2017 SCC 27, 1 S.C.R. 509 at para. 23.

11. Today, the right to reasonable bail is constitutionally enshrined under s.11(e) of the *Charter* and forms an essential element of our enlightened criminal justice system. A corollary of this is that a denial of bail is only justified on just cause.[12] If denied, the *Criminal Code* provides mechanisms for the review of such orders. Section 525 is one such provision. It provides the superior court with an independent power to guard against accused persons languishing in jail. When enacted in 1972, it served as a critical safety net, particularly for impecunious and/or unrepresented accused. Section 525 is undoubtedly of diminished importance today given the "ominous presence" of s.11(b) of the *Charter,* which serves as "a constant reminder that time is of the essence in prosecuting crime,"[13] As stated in *R. v. Cardinal* "… it would be fair to consider s.525 of the Code as the pre-Charter, pre-Askov, method of ensuring that every individual charged with a crime is tried within a reasonable time."[14]

12. Another important aspect of the pre-*Bail Reform Act* history is the role of *habeas corpus* which once served as the principal method of obtaining bail.[15] As described by Justice Sharpe in *The Law of Habeas Corpus:*

> … an accused person was able to test the validity of the warrant and charges from the moment of incarceration, but if these preliminary grounds for detention were found to be sufficient, the accused was then able to demand to be either brought quickly to trial, bailed, or released.[16]

13. Related to its historical role in securing bail, *habeas corpus* was also used to ensure speedy trials. As noted by Lamer J. (as he then was) dissenting in *R. v. Mills*:

> Historically, the concept of trial within a reasonable time has been closely associated with the remedy of habeas corpus and bail and has thus focused on the liberty interest of the accused, specifically, on preventing unduly lengthy detention prior to trial. Dicey wrote of the *Habeas Corpus Act*, 1679 (Engl.) 31 Cha. II, c. 2:
>
> > … If, on the other hand, he is imprisoned under a legal warrant, the object of his detention is to ensure his being brought to trial ... In the case of the lighter offences ... he has, generally speaking, the right to his liberty on giving security with proper sureties that he will in due course surrender himself to custody and appear ... In the case ... of the

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[12] *R. v. St-Cloud*, *supra* at para. 70; *R. v. Antic*, *supra* at paras. 1-3, 31-32, 39-42, 67.
[13] Trotter, Gary T., *The Law of Bail in Canada*, *supra* at p. 8-66.
[14] *R. v. Cardinal*, 1999 ABQB 205, 241 A.R. 97 at para. 31.
[15] J. Farbey and R.J. Sharpe, *The Law of Habeas Corpus* (Oxford: Oxford University Press, 2011) at p.153.
[16] *Ibid.* at p.157. See also: *R. v. Chapman and Currie*, [1970] O.J. No. 1701 (Dist.Ct.), 1 O.R. 601 at paras. 39, 44, 69-70.

> more serious offences ... a person who is once committed to prison is not entitled to be let out on bail. The right of the prisoner is in this case simply the right to a speedy trial.
> . . .
> The net result, therefore, appears to be that while the Habeas Corpus Act is in force no person committed to prison on a charge of crime can be kept long in confinement, for he has the legal means of insisting upon either being let out upon bail or else of being brought to a speedy trial.[17]

14. This history supports the view that s.525 was intended to provide the superior court with an independent power to facilitate a review akin to *habeas corpus*. As with *habeas corpus,* the critical first step was to get the accused before the court. Once the accused was before the court, the next step of reviewing an otherwise lawful detention and considering the granting of bail was dependent upon a finding of unreasonable delay resulting in oppression.[18]

15. Under s.525, Parliament has provided a similar mechanism wherein the jailor is obliged to bring the accused before the court within a fixed time. The choice of 90 days for indictable offences and 30 days for summary offences is reflective of what was likely excessive in 1972. In fact, as evidenced by the work of Professor Friedland, pre-trial detention in excess of 90 days was the rare exception in 1972. As detailed in the Respondent AG BC's factum, Professor Friedland's 1965 Study "*Detention before Trial, A Study of Criminal Cases Tried in the Toronto Magistrates Courts,*" established that 99% of in-custody accused facing indictable offences were tried within four to five weeks, with the remaining 1% waiting between six to eight weeks. This Study also demonstrated the rarity of bail reviews in the superior court; only one review occurred in all of Ontario in 1961.[19] While the expiry of the prescribed periods in 1972 may well have triggered ***both*** the jailor's obligation to bring the accused before the court ***and*** the court's obligation to review the grounds of detention due to unreasonable delay, the two no longer coincide. The two-step approach, in which the superior court conducts detention reviews once unreasonable delay exists, ensures that s.525 continues to serve its intended purpose of guarding against accused persons languishing forgotten in custody.

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[17] *R. v. Mills,* [1986] 1 S.C.R. 863, 26 C.C.C. (3d) 481, 52 C.R. (3d) 1 at para. 142.
[18] *R. v. Cordes,* [1976] A.J. No. 577, 31 C.C.C. (2d) 279 (Alta.S.C.A.D.) at paras. 7-20.
[19] Friedland, Martin L. *Detention before Trial, A Study of Criminal Cases Tried in the Toronto Magistrates' Courts,* (Toronto: University of Toronto Press, 1965) at pp.94-100, 148.

Nature of Other Pre-trial Bail Reviews

16. The two-step approach is consistent with the nature of the inquiry as a "review" and achieves harmony with the other review provisions as it limits the application of s.525 to circumstances in which a delayed trial might warrant directions or a reconsideration of bail. Section 525 is titled "***Review*** of Detention ***Where Trial Delayed***." By nature, a "review" is not a repeat hearing and requires deference to the original presumptively valid order, even after the expiry of the prescribed periods.[20]

17. The two-step approach ensures that s.525 works coherently with the other pre-trial bail review powers available under ss.520 and 521 of the *Criminal Code* for adults charged with non-s.469 offences. Applications under ss.520 and 521 are available to the parties to challenge decisions on the issue of bail and can be renewed every thirty days. Both provisions call for deference to the original bail decision.[21] A standard of deference respects the "delicate balancing of all the relevant circumstances" conducted by the bail justice.[22] Unlike ss.520 and 521, s.525 is silent on the materials to be filed and does not require either party to "show cause." Similarly, s.680 of the *Criminal Code,* which is available to both parties to review the granting or denial of bail in respect of s.469 offences, was found by this Court to require deference despite not explicitly imposing a burden on the moving party to "show cause."[23] A two-step process in which unreasonable delay is a prerequisite to a full review of an accused's detention ensures that s.525 fulfills a role distinct from ss.520 or 521. As explained by Rooke A.C.J., in *R. v. Bowden*:

> Accordingly, the focus of s. 525, again in my view, is specifically neither for an initial application for bail under s. 515, nor a reconsideration under s. 520. If it is the former, then an accused should exercise their right in Provincial Court, and if it is the latter then an accused should exercise their right in our Court's Bail Review court - both of which sit in Edmonton every juridical day. The bottom line is that, in my view, it is only if there is a

[20] *R. v. Bowden,* 2013 ABQB 178 at para. 16; *R. v. Cordes, supra* at paras.19-20; *R. v. Dass,* [1978] M.J. No. 19 (C.A.), 39 C.C.C. (2d) 365.

[21] In contrast, s.33 of the *Youth Criminal Justice Act* S.C. 2002, c.1, requires a youth justice court to hear the matter as an "original application."

[22] *R. v. St-Cloud, supra* at paras. 6, 114.

[23] In *R. v. Oland,* 2017 SCC 17, 1 S.C.R. 250 at para. 64 this Court found that a review should only be directed if it is arguable that the bail judge committed material errors of fact or law, or that the decision was clearly unwarranted in the circumstances.

> finding of undue delay under s. 525, that one gets into the consideration of the circumstances of the accused relevant to release.[24]

C. Defining Unreasonable Delay for Purposes of Section 525

18. The current divide in the jurisprudence between the one-step and two-step approach has produced a lack of consensus on the proper interpretation of "unreasonable delay" for purposes of s.525. Some courts favour a strict interpretation wherein the prescribed periods are a hard cap set by Parliament after which delay becomes presumptively unreasonable.[25] Others have adopted a "modified *Morin* guideline."[26] Most often, unreasonable delay has been determined on a case-by-case basis without reference to any specific overarching analytical framework.[27] AG Ontario's position is that under the two-step approach the prescribed periods of 90 or 30 days are irrelevant to determining unreasonable delay for purposes of holding a detention review and reconsidering the issue of bail under s.525. The "modified *Morin* guideline" is similarly an inappropriate measure of unreasonable delay.[28] As Justice Trotter writes in *The Law of Bail*:

> … The many cases decided under s.525 demonstrate a pragmatic approach to determining whether there has been unreasonable delay sufficient to have another look at the accused's bail status. The focus should be on whether, by the date of the s.525 hearing, the case is moving along at an acceptable pace, and, if not, who is responsible for the delay. While s.11(b) is not irrelevant in this context, it should not dominate the inquiry.[29]

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[24] *R. v. Bowden, supra* at para. 18.

[25] See, for instance: *R. v. Hanoman,* 2003 ABQB 24, 373 A.R. 95 at para. 46; *R. v. Adams,* [2001] O.J. No. 2022 (S.C.J.) at para. 3.

[26] In *R. v. Bowden, supra* at paras. 32–33, Rooke A.C.J. relied on the *Morin* guidelines to find that the starting point for the delay under s.525 is 6 to 9 months to trial or preliminary hearing in provincial court, and a further 5 to 8 months to trial in the superior court. See also: *R. v. Doherty,* 2015 BCSC 2573 at para. 7; *R. v. O'Neil*, 2015 NBQB 18 at para. 3; *R. v. Gill*, 2013 ABQB 176 at paras. 26–31.

[27] See for example: *R. v. Andreychuk*, 2013 BCSC 1743; *R. v. Mutama,* [2011] O.J. No. 1475 (S.C.J.) at para. 7; *R. v. Russell*, 2016 NLTD(G) 208, 34 C.R. (7th) 262, at paras. 18–22; *R. v. Caza,* [1999] N.W.T.J. No. 73 at para. 16; *R. v. Stiopu,* 2017 NWTSC 7 at paras. 20–21.

[28] The leading case advocating this approach, *R. v. Bowden*, was decided before this Court's ruling in *R. v. Jordan*, 2016 SCC 27, 1 S.C.R. 631, 335 C.C.C. (3d) 403, 398 D.L.R. (4th) 381, and without the benefit of an evidentiary record to support the modified guidelines imposed by the court.

[29] Trotter, Gary T., *The Law of Bail in Canada, supra* at p.8-61.

19. AG Ontario's position is that the inquiry into unreasonable delay under s.525 ought to be a balancing exercise between the continued detention of the accused on a presumptively valid detention order and public confidence in the administration of justice. The case of *R. v. Oland* is instructive in this regard. In *Oland*, this Court considered an application for bail pending appeal under s.679(3)(c) and held that the public interest analysis requires the balancing of public safety considerations and public confidence in the administration of justice.[30] Broken down further, the public confidence analysis involves the "weighing of two competing interests: enforceability and reviewability."[31] This analysis is informed by the factors identified in s.515(10)(c) of the *Criminal Code*: the strength of the prosecution's case, the gravity of the offence, circumstances surrounding its commission, and the potential for a lengthy term of imprisonment.

20. A similar analysis could be used for assessing unreasonable delay for purposes of s.525. The enforceability of the existing valid detention order should be balanced against the reviewability of the ongoing detention of an accused whose trial has been delayed. In fact, this was the approach adopted in *R. v. Gill.*[32] Section 515(10)(c) can inform this analysis, with particular emphasis on the seriousness of the crime and whether the accused is in danger of serving a post-conviction sentence before trial.[33] However, a finding of unreasonable delay will not necessarily mandate the accused's release.

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[30] *R. v. Oland, supra* at paras. 23–33.

[31] *Ibid.* at para. 24.

[32] At para. 6 of *R. v. Gill*, [2005] O.J. No. 2648 (S.J.C), Hill J., citing the decision of *R. v. Cordes,* stated: "Simple delay in the provincial court does not automatically trigger release. The question is whether the delay is objectively unreasonable and so intolerable as to warrant intervention by this court. Even then, the court must have regard to the public interest and the continued validity of the reasons for detention in the first place."

[33] Courts have considered whether an accused is in danger of serving a post-conviction sentence prior to trial as a relevant factor in s.525 applications. See, for example: *R. v. Sawrenko*, 2008 YKTC 31 at para. 43; *R. v. Baggs*, 2008 NLTD 53, 275 Nfld. & P.E.I.R. 173 at para. 9; *R. v. Paul*, 2012 ABQB 431 at para. 14.

21. AG Ontario's position is that the two-step approach is consistent with the wording of s.525 in its entirety and achieves harmony with the other pre-trial bail review provisions as well as Parliament's intent when enacting the *Bail Reform Act*. It also accords with the practical reality of s.525 detention reviews: that those accused most likely to require the judicial oversight mandated by s.525 are unrepresented accused who are at the greatest risk of falling through the cracks or "languishing forgotten in custody while they are detained pending trial."[34] In enacting the *Bail Reform Act*, Parliament sought to increase public confidence in the administration of justice through a coherent framework aimed at reducing the number of accused detained and ensuring speedy trials for those who are while providing a review mechanism to guard against accused persons languishing forgotten in custody. This objective is achieved through a two-step approach to detention reviews under s.525 of the *Criminal Code*.

PART IV: SUBMISSIONS RESPECTING COSTS

22. The intervener makes no submissions on the issue of costs.

PART V: ORDER SOUGHT

23. The intervener makes no submissions as to the outcome of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Joan Barrett Counsel for the Intervener, the Attorney General for Ontario	Jessica Smith Joy Counsel for the Intervener, the Attorney General for Ontario

Dated this 24th day of September

[34] *R. v. Jerace, supra* at para. 7.

PART VI - TABLE OF AUTHORITIES

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Secondary Sources

Legislative Authorities

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