SCC 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

APPELANT

A N D

HER MAJESTY THE QUEEN

RESPONDENT

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CANADIAN CIVIL LIBERTIES ASSOCIATION

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PART I – OVERVIEW

1. Today, as before, three months is a long time for a person who is presumed innocent to be held in jail awaiting trial. That fact has not changed – no matter how long the modern trial takes to get on the rails. Nor, for that reason, has s. 525 of the *Criminal Code*.

2. Provincial remand facilities are not well suited to accommodate long-term remands. The longer a person spends in custody awaiting trial, the more likely they are to plead guilty. Long-term remands – to the extent they are not strictly necessary – are entirely unacceptable.

3. Section 525 is part of Parliament's solution to that problem. The provision clearly states that if a person is in custody solely because of a charge for which they are awaiting trial, and if the trial has not commenced after the passage of a set period of time, a hearing is to be held "to determine whether or not the accused should be released from custody". But s. 525 can only assist if the courts interpret it in accordance with its clear purpose.

4. Given that the mandatory review hearing is *only* held at the 90-day mark[1], and not at any later point in time when the delay may be deemed to have become "unreasonable" in the circumstances of the given case or "where the trial is delayed", 90 days should be understood as the point in time chosen by Parliament for a re-assessment of whether the pre-trial detention continues to be justified. After having detained a person who is presumed innocent in a custodial setting for three months, *are we still justified in withholding their liberty?* That is the question a court must answer on a s. 525 review. That is what s. 525 and our Constitution require.

5. The Canadian Civil Liberties Association ("CCLA") submits that there is no preliminary threshold that needs to be met before reviewing whether a person's detention remains justified. Parliament has already set out that threshold in express terms: 90 days.

PART II – QUESTIONS IN ISSUE

6. The CCLA takes the position that the proper approach to a s. 525 bail review is a "one-step" approach that focuses on whether continued detention in the face of delay remains justified.

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[1] Because "indictable" offences include all hybrid offences, the 30-day threshold applies only to pure summary conviction offences. However, few individuals charged only with a pure summary conviction offence will spend that much time in custody, and Bill C-75 proposes to remove the 30-day review period. Given this context, the focus should be on the 90-day review period.

PART III – ARGUMENT

7. Section 525 of the *Criminal Code* provides for an automatic and mandatory review of an accused person's detention pending trial on an indictable offence 90 days after being taken into custody. This Honourable Court is asked to determine what test should apply on that review.

8. The court below concluded that the accused must first identify either unreasonable delay on the part of the Crown *or* a basis on which time in custody has had a material impact on the initial grounds for the accused's detention (step one), before considering whether further detention is justified under s. 515(10) of the *Code* (step two). The CCLA submits that the review hearing should proceed in a single stage, without any preliminary finding of unreasonable delay.

9. The various iterations of a two-step approach are contrary to the intention of Parliament and render s. 525 void of any practical purpose. Section 525 addresses real concerns raised by prolonged pre-trial detentions. A robust 90-day bail review acts as a safeguard against unjustified detentions and unreasonable trial delay.

The Proper Interpretation of s. 525: Then and Now

(A) Section 525 should be read as Parliament's attempt to ensure that there is sufficient justification to prolong a very serious deprivation of liberty

10. The CCLA submits that there is only one interpretation of s. 525 that allows it to meet its twin purposes of guarding against accused persons "languishing for lengthy periods of time in custody" pending trial and incentivizing prompt trials:[2] a one-step review that focuses on whether continued detention in the face of the passage of time remains justified.

11. By contrast, the Crown's interpretation eviscerates any role for s. 525. The 90-day bail review is a one-time affair. It therefore cannot be that Parliament, while stating "90 days", in fact meant some later point in time once the delay becomes unreasonable, *because there will be no s. 525 hearing at a later point in time*. The provision would fail to ever achieve its stated purpose, as articulated by the Crown: to review the accused's detention *where trial is delayed*. It would have no application at all. A statute cannot be interpreted in a way that renders it nugatory.[3]

12. The interpretation proposed by the court below also has the potential to gut the provision of any practical application. Requiring the accused to show that the passage of time has had a material impact on the grounds for detention would make s. 525 superfluous to s. 520.

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[2] *R. v. Quinn*, 2014 BCSC 2529, at para. 25; *Piazza v. R.*, 2015 QCCS 707, at paras. 39-47

[3] P.A. Côté, *The Interpretation of Legislation in Canada*, 4th ed. Toronto: Carswell, 2011, at p. 479

13. The Crown's proposed interpretation is also contrary to the wording of s. 525. The provision does not say that after 90 days, the court should consider whether the accused should remain in custody only "where there is unreasonable delay in getting the matter to trial." Instead, s. 525 specifically states that the reviewing court is to consider whether the accused should remain in custody or be released where, after 90 days, "the trial has not commenced."

14. A s. 525 review is distinct from s. 520 or s. 521 reviews, considered by this Court in *R. v. St-Cloud*, 2015 SCC 27. In particular, ss. 520 and 521 require the accused or Crown to "show cause." There is no threshold onus on the accused in s. 525. Instead, s. 525 stipulates that the purpose of the review is to determine, in light of the delay, "whether or not the accused should be released from custody" and whether or not "*continued* detention" is justified. The provision appears to place a responsibility *on the court* to ensure that the detention remains justified.

15. Another telling difference is that ss. 520 and 521 prescribe what evidence – including from the earlier bail hearing – the judge may consider; s. 525 is silent on this point. That is because there is no evidentiary threshold to be met for a judge to reconsider whether the detention order should stand under s. 525. Unlike the "material change in circumstances" pre-condition for a s. 520 review,[4] Parliament dictated in s. 525 that the passage of time *in and of itself* constitutes a material change in circumstances warranting review. No further threshold need be met.

16. Taken as a whole, these differences suggest that s. 525 should be interpreted as a systemic judicial check on pre-trial detentions after the passage of a certain period of time. Compelling the accused to meet an added preliminary threshold of undue delay or "a material impact on the initial decision" is inconsistent with such a purpose.

17. In particular, s. 525 "was **meant to facilitate the obtaining of bail** and the review of bail applications when originally refused, so that an accused, who is still under the presumption of innocence, **should not be kept under detention for lengthy periods of time**."[5] Parliament set this mark at 90 days. It may take longer to get to trial than it did when the provision became law, but by any measure, then or now, three months in a provincial jail is a "lengthy period of time."

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[4] Or in the alternative, an error of law or a "clearly inappropriate" decision: *R. v. St-Cloud*, *supra*, at paras. 121-22, 137-39

[5] Respondent's factum, at para. 24, citing *R. v. Dass*, [1978] M.J. No. 19 (C.A.) at para. 2

18. Having never been amended, the provision benefits from the presumption of stability and thus should not be interpreted differently today than it would have been back in 1972. In particular, laws should not be re-interpreted to *narrow* rights absent clear Parliamentary intent.[6]

19. Parliament has determined that, after three months, a court should re-examine the basis for ongoing detention and assess whether a lengthier stay in pre-trial custody is justifiable. If so, the court may provide directions to accelerate proceedings. If not, the accused should be released pending trial. Parliament's decision not to amend the provision is no oversight.

(B) Parliament's original intent has been maintained and remains relevant

20. Despite the reality that the modern trial takes a long time to complete, the current government – who has now seen fit to revisit s. 525 in the pending Bill C-75 – has maintained an automatic bail review at 90 days. This sends a clear message: 90 days continues to be a substantial period of time to be held in custody pending trial.

21. Of particular note, Bill C-75 removes the 30-day timeline for summary conviction offences and provides that an accused can waive the right to a review hearing. It also attempts to clarify that there is no assessment of whether the delay to date amounts to "unreasonable delay": rather, the judge is to consider whether the proceedings are "progressing slowly" such that "an unreasonable delay may result."[7]

22. The Crown relies on *Dynar* to state that, "[a]t best, [subsequent legislative evolution] may 'reveal the interpretation that the present Parliament places upon the work of a predecessor,' but 'it is the judgment of the courts and not the lawmakers that matters.'"[8] But beyond any consideration for how Parliament currently interprets the provision, the proposed amendments are significant in that they undermine the Crown's argument that the 90-day threshold is outdated and due for review, and that the provision ought to be interpreted on that basis. Parliament has specifically turned its mind to amending the section, and has not reconsidered the threshold.[9]

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[6] See Côté, *supra*, at pp. 498-99 and 538-39

[7] The proposed amendments, as they read on Second Reading, are included herein at Appendix A.

[8] Respondent's factum, at para. 70, citing *United States v. Dynar*, [1997] 2 S.C.R. 462 at para. 45

[9] Moreover, unlike *Dynar*, this case is not about interpreting a substantive offence provision and determining whether, at the time of the events, the accused's actions were a crime. In the context

23. The Crown on the one hand suggests that the provision should not be interpreted as it was originally conceived because the threshold is outdated; yet on the other hand submits that this Court should ignore Parliament's current interpretation as it is reflected in the proposed bill. It cannot have it both ways. In the CCLA's respectful submission, this Court should take Bill C-75 into account when assessing whether 90 days still means 90 days. By all indications, it does.

(C) Parliament's one-step approach is logical and recognizes the adverse effects of prolonged pre-trial custody

24. Parliament's intent was not, as the Crown claims, to capture "cases where there was truly some significant and unusual delay."[10] Parliament's intent was to trigger review of lengthy pretrial detentions – where the time that we as a society deem reasonable for a person presumed innocent to sit in custody without having the opportunity to have their day in court has been met.[11] The 90-day marker for that has not moved, nor should it.

25. First, Parliament's selection of 90 days as the threshold for review factors in the adverse effects of pre-trial custody. Pre-trial custody is utterly disruptive to a person's life. It can impact child care obligations, employment, schooling, housing, support networks, and physical and psychological welfare. The majority of this Court in *Toronto Star* noted that "[a] day in the life of an accused may have a lifelong impact."[12] In *R. v. Hall*, Iacobucci J. wrote:

> At the heart of a free and democratic society is the liberty of its subjects. Liberty lost is

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of this case, which relates to the proper procedure to adopt on a bail review, the Court should not entirely disregard this proposed piece of legislation. The proposed legislation is at least *some evidence* of how this provision is viewed, even if it does not yet carry the weight of a Parliamentary act: see Côté, *supra*, at p. 568 for the proposition that there is no *prima facie* prohibition on relying on "subsequent legislative history" as an indication of Parliament's opinion.

[10] Respondent's factum, at para. 45

[11] In *R. v. A.J.O.*, 2004 CanLII 66304, at paras. 14-17 (Ont. S.C.J.), citing O'Sullivan J.A.'s concurring opinion in *R. v. Dass*, *supra*, the Court explained how s. 525 originated from a *Habeas Corpus Act* provision which entitled prisoners to release if not tried or traversed to the Assizes within a set period of time, as "**it was thought to be unjust to detain a felon in custody indefinitely unless he was proved to be probably guilty**, through a preliminary inquiry."

[12] *Toronto Star Newspapers Ltd. v. Canada*, 2010 SCC 21, [2010] 1 S.C.R. 721, at para. 51

> never regained and can never be fully compensated for; therefore, where the potential exists for the loss of freedom for even a day, we, as a free and democratic society, must place the highest emphasis on ensuring that our system of justice minimizes the chances of an unwarranted denial of liberty.[13]

26. In *Ell v. Alberta*, a unanimous Court endorsed Professor Friedland's commentary regarding the importance of bail and the impact of pre-trial detention *on the trial process*:

> The period before trial is too important to be left to guess-work and caprice. At stake in the process is the value of individual liberty. Custody during the period before trial not only affects the mental, social, and physical life of the accused and his family, **but also may have a substantial impact on the result of the trial itself**. The law should abhor any unnecessary deprivation of liberty and positive steps should be taken to ensure that detention before trial is kept to a minimum.[14]

27. A key factor in assessing the acceptable length of time for accused persons to be detained pending trial is the increasing motivation to plead guilty, regardless of guilt or potential defences. When custody is prolonged, accused persons are more likely to plead guilty in an effort to be released.[15] Most concerning is "the perverse fact that, for some accused persons, a guilty plea can actually result in a better outcome than an acquittal."[16] Section 525, when interpreted

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[13] *R. v. Hall*, [2002] 3 S.C.R. 309, at para. 47 *per* Iacobucci J. (dissenting, but not on this point)

[14] *Ell v. Alberta*, 2003 SCC 35, at para. 24 [emphasis added]. Courts have recognized that pre-trial detention occasions "a severe deprivation" and is punitive: *R. v. McDonald* (1998), 127 C.C.C. (3d) 57 (Ont. C.A.) at para. 48 and *R. v. Wust*, 2000 SCC 18, at paras. 8, 28-30 and 41. See also: Martin L. Friedland, *Criminal Justice in Canada Revisited* (2004) 48 C.L.Q. 419; Gary T. Trotter, *The Law of Bail in Canada*, 3d ed. Toronto, Ont.: Carswell, 2010, at pp. 1-45 to 1-46

[15] See: Statistics Canada, *Custodial Remand In Canada, 1986/87 to 2000/01*, Catalogue no. 85-002, Vol. 23, no. 7, at p. 5, reporting several unintended negative consequences of pre-trial detention, including guilty pleas. Statistics also show that 49% of cases that originate in bail court are disposed of by way of guilty plea before any trial date, as compared to 40% of all cases with a final disposition in provincial court: Ontario Court of Justice, *Bail Statistics (By Offence), Provincial Overview* (July 2017 to June 2018). See also Palma Paciocco, *The Hours are Long: Unreasonable Delay after Jordan* (2017) 81 Supreme Court Law Review 233 at 249

[16] Considering that accused persons may spend more time in pre-trial custody than they could expect to serve post-conviction: Paciocco, *supra*, at pp. 250-51, who cites the following quote

correctly, provides a unique opportunity for a court to consider whether a person has been held in pre-trial detention for longer then he or she would likely be sentenced to upon conviction, and therefore whether release should be ordered on this basis.[17]

28. The CCLA identified a number of other adverse effects of detention on both the accused and the entire trial process in its report on the Canadian bail system, cited by this Honourable Court in *R. v. Antic*.[18] For instance, it is more difficult for accused persons in custody to meet with their counsel and properly prepare for trial. Courts should act as a safeguard to these unintended and troublesome effects of pre-trial detention.

29. Provincial remand facilities are not designed to accommodate long-term remands.[19] Detention centres that house prisoners on remand are typically maximum security, are often overcrowded and understaffed, and frequently the subject of lockdowns. The availability of programming and treatment opportunities varies significantly and are often not accessible.[20]

30. It is wrong to characterize three months in pre-trial custody as "a (relatively) short effluxion of time" or to consider it to be "so shortly after" an original bail decision.[21]

31. The proper interpretation of s. 525 needs to take into account the significant adverse effects of prolonged pre-trial detention on the accused and on the entire trial process.

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from a US lawyer: "**People don't want to sit in jail to get their day in court and be vindicated. They would rather have their freedom**."

[17] This was the case, for instance, in *Piazza v. R.*, *supra*, at paras. 20-22, 80-81 and 110

[18] Canadian Civil Liberties Association and Education Trust, *Set Up to Fail: Bail and the Revolving Door of Pre-trial Detention*, by A. Deshman and N. Myers, 2014, cited in *R. v. Antic*, 2017 SCC 27, paras. 48, 65

[19] Statistics Canada, *Custodial Remand In Canada, 1986/87 to 2000/01*, *supra*, at p. 5

[20] While some programming is available in provincial remand centres in several provinces, that is frequently not the case: see *R. v. Summers*, 2014 SCC 26, at paras. 2, 28; *R. v. Wust*, *supra*, at paras. 28, 38 and 45; Independent Review of Ontario Corrections, *Corrections in Ontario: Directions for Reform*, September 2017, at pp. 123, 125, 129-32; John Howard Society of Ontario, Standing Committee on Prison Conditions in Ontario, Second Report to the Board: *Remand in Ontario* (December 1, 2007), at pp. 7-8

[21] Respondent's factum, at paras. 55 and 59

32. Moreover, despite the *Jordan* ceilings,[22] which represent the *outer limits* of the time cases should take to complete, three months is still a significant period of time for a case to progress through the system. In 2015/2016, the median length of time from first court appearance to case completion was 112 days (around 4 months).[23] As such, cases will be sufficiently advanced after 90 days to provide the court with information relevant to the bail review.

33. In any case that remains outstanding, a court will be well positioned to evaluate not only the reasonableness of any earlier delays in the case, but also any *anticipated* delays to bring the case to conclusion and whether pre-trial detention has exceeded any reasonable sentence upon conviction. Indeed, by then it would typically be known whether there are disclosure issues, whether the accused intends to plead guilty, what the Crown's case looks like, and what type of defences might be raised or applications brought. All of these circumstances can be taken into account by the reviewing judge in a manner that is not feasible in the very early stages of a case.

(D) The one-step approach does not overburden the system

34. The Crown argues that the consequences of a one-step approach would be "absurd" because the impact would be a "substantial drain on the Judiciary, the prosecution service, court services and defence counsel." This *in terrorem* argument is belied by the Crown's statistics.

35. The reality is that, as cited by the Crown, "*a very significant* proportion" of the remand population experiences short stays in jail.[24] More than three quarters of the remand population is released on bail after spending one month or less in custody.[25] In 2016/2017, only approximately 7% of the national remand population was still in custody after three months had passed.[26]

36. Importantly, there is already a statutory obligation to bring the remaining accused before a judge for the purpose of a s. 525 review. Even where courts have been relying on a two-step approach, time will already have been spent arguing over whether there has been unreasonable delay, and in certain cases such as the present one, what approach should be adopted.

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[22] 18 months in provincial courts, and 30 months in superior courts: *R. v. Jordan*, 2016 SCC 27
[23] Juristat, *Adult criminal court processing times, Canada, 2015/2016* (2018)
[24] Respondent's factum, at para. 67
[25] Respondent's factum, citing Juristat, *Adult and Youth Correctional Statistics in Canada 2016/17*
[26] Statistics Canada, *Adult releases from correctional services by sex and aggregate time served*, Table 35-10-0024-01. See also: Statistics Canada, *Adult correctional statistics in Canada, 2015/2016*; Statistics Canada, *Trends in the use of remand in Canada, 2004/2005 to 2014/2015*

37. In practice, s. 525 reviews will largely take place on the basis of a paper record, with supplementary submissions made by the parties on the basis of the passage of time and any new circumstances. The Crown's alarm at the systemic impact of a one-step approach is misplaced.

The Proper Application of s. 525: Factor in Delay

38. The Crown cites then-Justice Minister John Turner's address to the House of Commons at second reading of the *Bail Reform Act*, that the decision as to whether to grant bail involves a "balance between liberty on the one hand and the security of the state or the maintenance of public order on the other".[27] That is precisely the balancing act that may be impacted the longer liberty is withheld, and that must be revisited in consideration of the passage of time.

39. The CCLA submits that the length of time spent in custody is one of the factors taken into account on a 90-day bail review, including in relation to the likely sentence upon conviction. Section 525 necessarily implies that delay will be factored into the analysis of "whether or not the accused should be released from custody." Indeed, that is the section's purpose: given the delay in getting to trial, should the accused be released? Pursuant to subsection (3), the court may consider responsibility for any unreasonable delay; it follows that delay factors in the analysis.

40. The review provision should be viewed as an attempt by Parliament to ensure that trials for persons held in custody are expedited and that there is sufficient justification to prolong a very serious deprivation of liberty. The CCLA submits that the proper test under s. 525 is for the reviewing judge to determine whether "the delay outweighs the necessity for detention on all three grounds mentioned in s. 515(1))."[28] If detention remains warranted upon the revised balancing, then directions to expedite the trial can be given pursuant to subsection (9).

41. The presumptive ceilings set by this Court in *Jordan* do not distinguish between in-custody and out-of-custody accused. Nor do they allow for time spent in pre-trial custody to be factored into the analysis by way of a consideration of actual prejudice suffered by the accused as a result of the delay, or whether the pre-trial process is operating in a more punitive manner than the likely sentence. As pointed out by one commentator, court administrators may thus no

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[27] Respondent's factum, at para. 60, citing House of Commons Debate, 28th Parliament, 3rd. Sess., Vol. III (February 5, 1971) at p. 3116

[28] See *Piazza*, *supra*, at para. 56, *per* Cournoyer, S.C.J. See also paras. 21-22, 49-55, 71-81, 110-12; *R. v. Alcantara*, 2009 ABQB 519, at paras. 36-38, 42

longer be incentivized to give priority to in-custody accused when scheduling matters for trial.[29]

42. When an accused remains in custody after the passage of 90 days, Parliament has provided a mechanism for that to be factored into a judicial assessment of whether, on balance, the accused should be released pending trial, and whether steps can be taken to accelerate the proceedings. Section 525 can therefore be seen as complementing s. 11(*b*) and furthering the *Jordan* movement toward efficiency.

Conclusion

43. A "two-step" approach substantially narrows and virtually eliminates the accused's right to a s. 525 review by creating an unwarranted threshold requirement and placing an undue onus on the accused. This approach fails to take proper account of the true purposes of a 90-day bail review by rendering the review provision superfluous and devoid of any practical significance.

44. Despite this Honourable Court's admonition in *Jordan* to end the culture of complacency, trials may still take up to 18 months to get to trial in provincial court, and 30 months in superior court. In these circumstances, and while the vast majority of accused persons on remand are released in under 90 days, individuals who are presumed innocent and refuse to plead guilty could be held in custody pending trial for more than a year, if not two.

45. The fact that it takes longer to get to trial today than it did when s. 525 was first enacted does not mean that we have become more accepting of people remaining in custody for a prolonged period of time. There is a point in time at which we deem time spent in custody while presumed innocent to be too long. Parliament has deemed that time to be three months. Unless truly necessary under s. 515(10), no longer than that should be tolerated.

PART IV – COSTS

53. The CCLA seeks no costs and asks that no costs be awarded against it.

PART V – ORDER SOUGHT

54. The CCLA takes no position on the disposition of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of September, 2018

Marie-France Major, As Agent for

Christine Mainville
Counsel for the Intervener, CCLA

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[29] Paciocco, *supra*, at pp. 248-50. See also Christopher Sherrin, *Understanding and Applying the New Approach to Charter Claims of Unreasonable Delay*, 22 C.C.L.R. 1 at 20 and 23

PART VI – TABLE OF AUTHORITIES

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*Code criminel***,** L.R.C. (1985), ch. C-46	s.s. 515 , 520, 521, 525

APPENDIX A

237 (1) Subsection 525(1) of the Act is replaced by the following:

Time for application to judge

525 (1) The person having the custody of an accused — who has been charged with an offence other than an offence listed in section 469, who is being detained in custody pending their trial for that offence and who is not required to be detained in custody in respect of any other matter — shall 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, if the trial has not commenced within 90 days from

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

(b) in the case where an order that the accused be detained in custody has been made under section 521, paragraph 523.1(3)(b)(ii) or section 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 shall make the application immediately after the expiry of those 90 days.

Waiver of right to hearing

(1.1) However, the person having the custody of the accused is not required to make the application if the accused has waived in writing their right to a hearing and the judge has received the waiver before the expiry of the 90-day period referred to in subsection (1).

(2) Subsections 525(3) to (9) of the Act are replaced by the following:

Cancellation of hearing

(3) The judge may cancel the hearing if the judge receives the accused's waiver before the hearing.

Consideration of proceeding's progression

(4) On the hearing described in subsection (1), the judge shall consider whether the prosecutor or the accused has been responsible for any delay and, if the judge is concerned that the proceedings are progressing slowly and that an unreasonable delay may result, the judge may

(a) give directions for expediting the proceedings; or

(b) require a further hearing under this section within 90 days or any other period that the judge considers appropriate in the circumstances.

Release order

(5) 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 make a release order referred to in section 515.

Provisions applicable to proceedings

(6) Sections 495.1, 512.3, 517 to 519 and 524 apply, with any modifications that the circumstances require, in respect of any proceedings under this section.

[Emphasis added.]