File number: _____

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

BETWEEN:

COREY LEE JAMES MYERS

Applicant
(Respondent)

AND:

HER MAJESTY THE QUEEN

Respondent
(Applicant)

MEMORANDUM OF ARGUMENT OF THE APPLICANT, COREY LEE JAMES MYERS

(Pursuant to Rule 25(1)(c) of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW OF POSITION AND STATEMENT OF FACTS

A. Overview of Position

1. Section 525 of the *Criminal Code* requires a bail review to be held in respect of a person who is in custody charged with an indictable offence. This 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. The proposed appeal presents the Court with an opportunity to provide much-needed clarification concerning the test to be applied on a bail review under s. 525. This is a question of law that clearly raises issues of public importance.
2. It has been almost 44 years since s. 525 was legislated.[1] Since that time Canadians have seen the *Canadian Charter of Rights and Freedoms* ("*Charter*") become the supreme law of our land with accompanying changes in the functioning of the judicial system to reflect the principles and protected rights set out in the *Charter*. The judiciary is bound to interpret laws and actions of state officials in light of and subject to the *Charter*.
3. Only the superior courts have jurisdiction to conduct a bail review under section 525. Superior courts may provide an interpretation of the procedure to be followed on the hearing of any given bail review under section 525; however, none of these decisions are binding authority on any other superior court. Appellate courts have jurisdiction to decide on the interpretation of section 525 in the course of ruling on a *habeas corpus* application; however these decisions have not been regarded as binding authority on this particular issue. The Supreme Court of Canada is the only court that can provide authoritative guidance to resolve this issue once for the entire country.
4. One line of authority in the lower courts 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 Justice may consider as a

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1. *Bail Reform Act*, S.C. 1970-71-71, c. 37.

factor whether there has been any unreasonable delay in bringing the matter to trial as per s. 525(3).

5. According to the other line of authority, known as the two-step approach, the court first considers the threshold issue of whether the accused has shown there has been an unreasonable delay in bringing the matter to trial, and only then does the court 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 *Charter* and is supportive of a broad judicial discretion to balance all of the relevant factors in a particular case.
7. The case on appeal brings into sharp focus the disagreement between the lower courts that prefer the two-step approach (which favours efficiency 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 at paragraphs 23 and 25 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') and redefined the threshold issue by requiring the accused to show that the passage of time had a material impact on the decision to detain.
9. Justice Riley's decision does not remedy the problem because it has the effect of creating a test that further limits the circumstances in which judges can exercise their discretion to order an accused person released.
10. Justice Riley's decision, along with the markedly disparate views nationwide, indicate the clear need for guidance on this issue.
11. The two-step approach is a marked departure from the literal 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*.

12. Parliament's intention was to mandate a proactive judicial inquiry into an accused person's detention status, and provide a remedy in appropriate circumstances.
13. 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.
14. The two-step approach distorts the plain meaning of section 525 by placing the onus on the accused to demonstrate unreasonable delay, in an application made by his gaoler.
15. Cost and time efficiency are of course in the public interest but should not be made to trump fundamental *Charter* rights. The correct reading of section 525 is one with the most expansive interpretation of individual rights as recognized by our *Charter*.
16. The current state of the law results in the least efficient use of judicial resources. Currently there is a half-day spent arguing whether the one or two-step approach should be followed, with the possibility of an adjournment for the court to decide the issue. Only then is the bail review held.
17. This means that when the two-step approach is applied the greatest injustice occurs as both judicial efficiency and *Charter* rights are sacrificed.

B. Statement of Facts[2]

18. The Applicant is 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 Applicant is also charged with possession of a weapon and/or ammunition contrary to a lifetime firearms ban.
19. The Applicant is detained on this matter. He has not been released from custody since January 4, 2016 when he was arrested.

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[2] The following review is based on Crown Counsel's "Key Dates in the history of R. v. Myers" filed at the hearing (Applicant's Leave Book ("ALB"), Tab D4), and the Affidavit of Samuel Williams sworn July 21, 2017 and filed at the bail review (ALB, Tab D3).

20. 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 Applicant was at all material times prepared to proceed to trial on these dates.
21. On September 16, 2016 the Crown swore a new information in Surrey Provincial Court File Number 214670-5-C.
22. 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.
23. 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 co-accused Mr. Blakeslee plead guilty and the proceeding was adjourned for sentencing. The Applicant elected to be tried by Provincial Court Judge.
24. The Applicant asked the Provincial Court Judge to record the differing elections and to allow the Applicant to proceed with the trial as scheduled, separately from the co-accused Mr. Richardson. Crown Counsel opposed the court recording the differing elections.
25. On October 6, 2016 the court heard submissions from both Crown Counsel and the Applicant on section 567 of the *Criminal Code* and the recording of the election.
26. On October 7, 2016 the co-accused Mr. Blakeslee was sentenced on the matter, and is no longer before the court.
27. On October 14, 2016 the Provincial Court Judge declined to record the Applicant's election and deemed the Applicant to have elected trial by Supreme Court judge and jury.
28. On November 9, 2016 the Applicant sought his release and on November 10, 2016 the Provincial Court Judge detained the Applicant.
29. The preliminary inquiry completed on November 24, 2016.

30. At the preliminary inquiry the Crown had difficulty securing the Complainant's attendance. In the afternoon of the last day scheduled for the preliminary inquiry the Complainant attended.
31. The Complainant was unable to testify as to any of the factual underpinnings of the allegations that the Applicant 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.
32. The Applicant applied for judicial interim release again on November 24, 2016 before the Provincial Court Judge at the preliminary inquiry judge. The Applicant's detention was confirmed.
33. The matter was first set for a Fix Date in the Supreme Court of British Columbia in New Westminster on December 8, 2016.
34. 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.
35. 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.
36. 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 Applicant's counsel was not available.

37. 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.
38. The Applicant'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.
39. On January 5, 2017 the matter was adjourned to January 12, 2017.
40. Scheduling advised counsel that the Supreme Court of British Columbia in New Westminster does not sit regularly in July and August.
41. Scheduling offered dates for the trial in October 2017. The Applicant's counsel was available for the October 2017 dates.
42. Mr. Richardson's counsel was in a lengthy jury trial commencing September 2017 and is not again available until March 2018.
43. Crown Counsel was also unavailable until March 2018.
44. The Applicant's counsel provided additional dates that would require him to reschedule or assign other matters should the matter be set down.
45. The Applicant'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.
46. Scheduling also canvassed setting the matter for trial in Vancouver since the court there has more sittings in July and August.
47. 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 Applicant's counsel applied to the court requesting that the Applicant's trial be set for the dates in October 2017. The presiding Justice refused to hear the application and advised Applicant's counsel that the Applicant 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.
48. On February 3, 2017 the Applicant's counsel applied for severance of the Applicant from his co-accused Mr. Richardson. At the time the Applicant's counsel had confirmed the October 2017 dates remained available for the Applicant's trial. The application was denied.

49. The Applicant's trial is currently scheduled for March 2018.

50. On July 27, 2017 the Applicant'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.

51. The bail review proceeded on October 5, 2017. Counsel for the Applicant made no submissions because in light of Justice Riley's judgment on the legal test to be applied, the Applicant took the position that he had greater prospects of success proceeding under another review provision.

52. On October 5, 2017 the Court confirmed the detention order.

PART II – STATEMENT OF ISSUES

53. Is the proper interpretation of section 525 of the *Criminal Code* a question of law that raises issues of public importance?

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

PART III – STATEMENT OF ARGUMENT

A. The Current State of the Law: A Lack of Clarity and Uniformity

55. 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.

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, paras 8-11
R. v. Haleta, 2015 BCSC 850, paras 8-10

56. 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 review, in particular when subsection (3) dealing with unreasonable delay should be considered by the court.

R. v. Sarkozi, supra, para 12

R. v. Haleta, supra, paras 4, 26

See list of cases cited in Appendix A

57. This division of judicial opinion has produced a pronounced inconsistency in the law that lacks the fundamental certainty required for the efficient functioning of the judicial system.

58. The courts have sought to achieve some element of finality on the appropriate approach to a section 525 bail review, but to no avail. Justices of the superior courts are not bound by one another and have differing opinions on the procedure to be followed.

R. v. Widalko, 2013 BCSC 2077, paras 1-2, 4, 21-24

59. The principle of judicial comity has not fettered superior court judges from departing from the decisions of their fellow judges. Many of the decisions discuss the principles set out in *Re Hansard Spruce Mills,* [1954] 4 D.L.R. 590 (B.C.S.C.) concerning the binding effect of previous decisions. However, those principles have not been properly applied, and judges choose to depart from previous decisions of the same level of court without applying those principles.

R. v. Widalko, 2013 BCSC 2077, paras 16-17

R. v. Sutherland, 2013 BCSC 1686, para 6

R. v. Haleta, supra, para 36

60. Many of the decisions endorsing the two-step approach have followed previous decisions while aware of authority to the contrary, yet relied on the fact that there are more authorities, or more recent authorities, to justify such a ruling.

R. v. Sutherland, supra, para 6

R. v. Haleta, supra, para 36

61. To leave the law in this state of disarray and to allow the law to continue to develop in this manner leaves the courts vulnerable to perpetuating errors and defies fundamental principles of the common law. The body of the common law was not developed through a rudimentary evaluation of which side has highest score with the most recent victory, but a principled approach emphasizing an exercise in logic and reasoned development. Allowing the law to remain in the current state of flux reduces

the exercise of deciding this issue to a free-for-all between the two approaches. The current state of the law leaves the decisions on this issue void of precedential value.

R. v. Haleta, supra, para 22-24

62. From a practical standpoint this uncertainty in the law has resulted in an inordinate amount of time and judicial resources spent deciding the law, preliminary to any review as contemplated by either approach being held. Ironically, changes in the availability of judicial resources since the time section 525 was legislated is one of the primary considerations that proponents of the two-step approach have cited as the basis for their interpretation of section 525.

63. At previous hearings of this matter, Crown Counsel has emphasized the need for this matter to be addressed by an appellate court that can provide guidance on this issue, specifically the Supreme Court of Canada.

64. Justice Weatherill in the course of giving his reasons in *R. v. Quinn,* 2014 BCSC 2529 emphasized the need for the resolution of this issue (emphasis added):

> I am told that s. 525 of the *Code* was enacted in 1974, some 40 years ago. The interpretation of s. 525 remains an issue that is unresolved in 2014. The untenable nature of this situation must be dealt with and I urge Crown counsel to take whatever steps necessary to have this decision reviewed at an appellate level so that the divergence of the two lines of authority regarding the interpretation of s. 525 can be resolved.

R. v. Quinn 2014 BCSC 2529, para 29

65. The standard for leave to appeal under section 40(1) of the *Supreme Court Act* is set out by Madam Justice Wilson in the 1989 decision of *R. v. Turpin,* [1989] 1 S.C.R. 1292 at 1331:

> it is important to look not only at the impugned legislation ... but also to the larger social, political and legal context.

66. Mr. Justice O'Neill of the Ontario Superior Court of Justice cites statistics regarding rates of pre trial detention that were provided by the Canadian Civil Liberties Association in *R. v. McCormack,* [2014] O.J. No. 6046 ('*McCormack*').

McCormack, supra, para 21

67. At paragraph 22 of *McCormack*, Justice O'Neill comments on those statistics:

> 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*.

68. The *McCormack* decision provides ample support for the submission that this particular legal issue is a matter of public importance with an inextricable link to the liberty of an accused person, the time within which accused persons are brought to trial, the administration of justice and Canada's constitution.

69. The detention of an accused pending trial is an issue of public importance in the larger social, political and legal context. The matter touches on fundamental freedoms contained in the *Charter* including sections 7, 11(b), 11(d), and 11(e). We trace these freedoms and the principles that underlie sections 510 and 525 back to the common law writ of *Habeas Corpus*. These are fundamental principles of justice in a free and democratic society. Where there is clear uncertainty concerning parliamentary intent and conflicting decisions among courts that have grappled with the problem, it falls to this Court to provide the necessary guidance.

> *R. v. V.*, 2014 BCSC 2502, para 26 (ALB, Tab D2 – redacted by counsel)

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

70. 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.

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

72. 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.

Burton v. British Columbia (Surrey Pre-Trial Centre, Director) (B.C.C.A.), [1993] B.C.J. No 892 (hereinafter '*Burton'*), paras 30, 33-35

73. In deciding the *habeas corpus* application the court was required to look at section 525.The Court's interpretation of section 525 was central to deciding the legal issue in *Burton*; therefore the language contained in paragraphs 30-35 is part of the ratio of that decision and binding on lower courts.

Burton, supra, paras 32-35

R. v. Haleta, supra, para 36

74. *Burton* adopted the reasoning in *Neil v. Calgary Remand Centre (Director) (Alta. C.A.),* [1990] A.J. No. 690 (hereinafter '*Neil'*). In *Neil* 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 pursuant to section 525. In the course of giving reasons for dismissing the appeal Kerans J.A. speaking for the Court 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. Kerans J.A.'s reasons included addressing Parliament's intentions by considering and citing the Minister's statement at introduction.

Neil, supra, page 3

75. 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.

R. v. V., supra, para 15

76. This fundamental approach to the correct statutory interpretation of section 525 was endorsed by Mr. Justice Truscott in *R. v. Haleta, supra*, at paragraph 27:

> 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.

77. 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.

R. v. V., supra, paras 17-19

78. 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.

McCormack, paras 22, 24, 30

79. The Applicant concedes that the onus to show cause in a section 525 bail review lies with the party who bore the onus at the original bail hearing.

80. 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 unreasonable delay, as the only matter that must be considered.

R. v. V., supra, paras 19, 22-24

R. v. Haleta, supra, para 32

81. The two-step approach defies the intent of Parliament to provide judges with the sole 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 are in a position to assess the dual considerations of the specific circumstances of that jurisdiction at that time, apply them to the case before them to determine what weight should be given to the factor of delay and make a reasoned decision as to whether release is warranted under section 525.

R. v. Haleta, supra, para 32

82. 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 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.*

83. 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.

84. The modified approach asks the accused not only to demonstrate the passage of time but also that the passage of time has somehow materially changed the circumstances of the initial detention order, which could be achieved through section 520 of the *Code.*

85. Looking practically at the problem, the modified approach would rarely result in release of the accused. 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 refined test that further limits the circumstances within which courts can exercise their discretion to order an accused person released.

86. The Applicant made no submissions at the review hearing and Justice Riley simply confirmed the detention order. This outcome demonstrates the problem with the two-step and modified approaches. Justice Riley confirmed the detention order because no evidence was brought by the Applicant to compel the court to conduct a review of the Applicant's detention.

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

88. 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, and whether the detention is warranted, is but one example of the type of issue that Parliament sought to address through an active judicial inquiry.

89. Parliament's intention is 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.

90. 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 section 525 hearing. The finding should be made during the hearing itself along with consideration of all other facts before the presiding judge. Parliament's intention is that such a consideration is best left in the sole discretion of the judge presiding over that particular hearing.

91. The two-step approach deprives judges of the wide discretion that Parliament intended for them. 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, courts remain the gate-keepers for the release of the accused, and judicial discretion is the most fact sensitive means by which to evaluate these issues. Accused persons are still required to demonstrate reasons for their release, and those reasons will likely have to be different than at the original bail hearing in order for the review hearing to be decided differently. Accused persons are no less likely to seek a hearing merely because they have to meet the threshold test of unreasonable delay before a review is held.

92. The literal wording of the provision is what should be followed, as that is an accurate reflection of the intention of the legislature. Had the intention of the legislature 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.

R. v. Jerace, 2012 BCSC 2007, para 11

R. v. V., supra, para 19

93. Section 525 should 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 bail review after 90 days, a lack of judicial resources is not a justified consideration for interpreting the legislation as saying otherwise.

94. Some of the proponents of the two-step approach have expressed the opposite view and said that the *Charter* has increased the amount of time it takes to bring a matter to trial, the number of pretrial applications, and the amount of judicial resources used in any one particular matter; therefore 90 days does not actually mean 90 days anymore.

R. v. Jerace, supra, para 6

95. Such a proposition is antithetical to all the *Charter* stands for. The *Charter* and the rights flowing from it are not subject to a lack of judicial resources. If anything, those matters concerning persons detained in custody touch directly on *Charter* rights and should be given priority over all others. Such applications may create a lack of judicial resources; however, the process should not be truncated or circumvented because of judicial perceptions about the current availability of resources.

96. The two-step approach encourages a culture of complacency towards delay by reading down the meaning of 90 days. 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. *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.

97. The Parliament of the day legislates with a view to the future. The judiciary is able to interpret and apply legislation that was drafted at an earlier time to contemporary circumstances. The law is resilient and designed in a way that allows for judicial adaptation to changing circumstances to accommodate for the wide variety of unique situations which the courts will be faced with. However, this type of adaptation can only go so far.

98. A purposive interpretation does not include the fundamental alteration of Parliament's literal words as contained in a statute. The two-step approach to the interpretation of section 525 frustrates the express words in subsection (3) and the overall intended effect of the words of the section. This statement remains true on an interpretation of section 525 without reference to the protections afforded by the *Charter*. However, when those protections are factored in the two-step approach cannot be countenanced.

99. The judiciary is not empowered to fundamentally alter the meaning of Parliament's words as contained in the statute. Parliament's intention was to leave decision making in this area to the sole discretion of the presiding judge in a particular hearing, free from the interference wrought by the two-step approach.

PART IV – SUBMISSION ON COSTS

100. The Applicant does not seek his costs on this application and requests that no costs be awarded against him.

PART V – ORDER SOUGHT

101. The Applicant seeks an order granting leave to appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Vancouver, this 4th day of December, 2017.

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Justin V. Myers
Lawrence D. Myers Q.C.
Counsel for the Applicant

PART VI – TABLE OF AUTHORITIES

		Para#
	JURISPRUDENCE	
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Statutory Provisions	
Criminal Code, R.S.C. 1985, c C-46, s. 525	1, 25, 53, 64, 67, 82, 84-85
Canadian Charter of Rights and Freedoms	2, 6-7, 11, 15, 17, 22, 69, 78, 93-95, 98
Bail Reform Act, S.C. 1970-71-71, c. 37	2

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.

APPENDIX A

TWO-STEP APPROACH

1. *R. v. Adams*, [2001] O.J. No. 2022
2. *R. v. Andreychuck*, 2013 BCSC 1743 (ruling is in submissions)
3. *R. v. Bowden*, 2013 ABQB 178
4. *R. v. Brown*, 2013 BCSC 677
5. *R. v. Elmi*, 2016 BCSC 376
6. *R. v. Ghuman*, 2015 BCSC 2082
7. *R. v. Hogan*, 2015 BCSC 1576
8. *R. v. Jerace*, 2012 BCSC 2007
9. *R. v. Kissoon*, [2006] O.J. No. 4800
10. *R. v. Ley*, Unreported 24 March, 2014, Vancouver File 26437[3]
11. *R. v. Middleton*, 2015 BCSC 2621
12. *R. v. Mutama*, [2011] O.J. No. 1475
13. *R. v. Neri*, 2015 BCSC 2478
14. *R. v. Perron*, 2014 QCCS 2149
15. *R. v. Sharma*, 2013 BCSC 2389
16. *R. v. Sutherland*, 2013 BCSC 1686
17. *R. v. Wallace*, 2013 BCSC 1706
18. *R. v. Waniandy*, 2015 BCSC 308
19. *R. v. Wheeler*, 2015 BCSC 848
20. *R. v. Whiteside*, 2016 BCSC 131
21. *R. v. Widalko*, 2013 BCSC 2077

ONE-STEP APPROACH

22. *R. v. Alcantara*, 2009 ABQB 519
23. *R. v. Caza*, [1999] N.W.T.J. No. 73
24. *R. v. Charlebois*, 1995 CanLII 3233 (P.E.I Sup. Ct.)
25. *R. v. Goudreau*, 2015 BCSC 1227
26. *R. v. Haleta*, 2015 BCSC 850
27. *R. v. Kuzmaski*, [1981] O.J. No. 3307
28. *R. v. La*, 2000 ABQB 856
29. *R. v. McCormack*, [2014] O.J. No. 6046
30. *R. v. Quinn*, 2014 BCSC 2529
31. *R. v. Reid*, 2012 NLTD 10
32. *R. v. Sarkozi*, 2010 BCSC 1410
33. *R. v. Saulnier*, 2012 NSSC 45
34. *R. v. Sawrenko*, 2008 YKSC 27
35. *R. v. Thorsteinson*, 2006 MBQB 184
36. *R. v. V.*, 2014 BCSC 2502 (subject to ban on publication)

[3] Case is reproduced at ALB, Tab D1