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)

REPLY TO RESPONSE TO THE APPLICATION FOR LEAVE TO APPEAL, COREY LEE JAMES MYERS
(Pursuant to Rule 28 of the *Rules of the Supreme Court of Canada*)

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The applicant does not require an extension of time

1. The applicant has not filed out of time because the proposed appeal is from the Riley J.'s final order under s. 525(4) of the *Criminal Code* as made on October 5, 2017, not Riley J.'s ruling of September 27, 2017.

2. It is well-established that appeals are from orders or formal judgments, not reasons for judgment. Hence where a court pronounces judgment with reasons to follow, the appeal period starts from the date of judgment not the date of release of reasons for judgment. In this case, the opposite occurred. A preliminary ruling was given on the proper approach to follow at an upcoming bail review hearing. An order was then made at that hearing. That order was in error in the applicant's submission because it was pronounced in accordance with the wrong legal approach to s. 525. In hearing an appeal this Court will be required to determine the correct approach. This will necessarily involve consideration of Riley J.'s ruling of September 27, 2017 and indeed of all of the conflicting authority rendered under s. 525 by Canadian courts. But the formal appeal remains an appeal from the order of October 5, 2017.

3. Appeals to this Court under s. 40 of the *Supreme Court Act* are from a "final" judgment. The only judgment on the section 525 application is the order of Justice Riley dated October 5, 2017 confirming the applicant's detention status.

The unsettled state of the law

4. The respondent's argument that the one-step approach seeks a *de novo* hearing is one that advocates of the two-step approach have developed as a means of rejecting the one-step approach.

5. This Court in *St-Cloud* affirmed Justice Trotter's point that, "a true *de novo* hearing is conducted as if there were no previous proceedings."[1]

6. The applicant does not contend that there should be a *de novo* hearing. The applicant's memorandum of argument does not contain the words *de novo* hearing. The reasons for judgment in *Haleta, Goudreau,* and *R. v. V.* do not contain the words *de novo*

[1] *R. v. St-Cloud,* 2015 SCC 27 at para. 91,

hearing. The reasons for judgment in *Quinn* mention the idea of a *de novo* hearing, however the presiding Justice in that case later reversed his own reasons to endorse the two-step approach in a subsequent case.[2]

7. This argument arises from the controversy that existed amongst the lower courts with respect to the procedure on a s. 520 and s. 521 bail review: some considered it an appellate review available upon demonstration of an error in law or principle, some considered it an appeal in law or principle, and some exercised full discretion to vary the initial order or a "*de novo*" hearing. Additionally, some Courts treated these review provisions as a hybrid remedy that includes the presentation of new evidence and errors in law to justify a review.

8. In *St-Cloud*, this Court acted in response to nationwide disparity amongst the lower courts in the interpretation of a section pertaining to bail and in the case of section 520, in relation to a review of the detention order.[3]

9. Sections 520-521 do not specifically articulate anything about the nature of the review, but merely that a review takes place. The language in ss. 520-521 is broad. Section 525 has a stated purpose that sets out the nature of the review as well as the procedure on the hearing. The stated purpose of s. 525 and the specific consideration of delay distinguish it from ss. 520-521.

10. The preconditions for a review pursuant to sections 520 and 521 had been imposed and developed through judicial interpretation of those sections because of the lack of statutory guidance on the issue. *St-Cloud* was the first time this Court had been called upon to determine the extent of the power provided for in ss. 520 and 521.[4]

11. Section 525 was legislated for a different purpose than sections 520 and 521. The language contained in section 525 is reflective of this different context within which the detention order is being reviewed. This is also why there are only really two different

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[2] *R. v. Haleta,* 2015 BCSC 850; *R. v. Quinn*, 2014 BCSC 2529; *R. v. V.*, 2014 BCSC 2502; *R. v. Goudreau*, 2015 BCSC 1227.
[3] *R. v. St-Cloud, supra,* at para 91.
[4] *R. v. St-Cloud, supra,* at para 91.

"approaches" to section 525 rather than the four different approaches to sections 520-521 outlined in *St-Cloud*.[5]

12. Section 525 brings an accused person's detention status to the attention of the court as an automated and mandatory process in accordance section 525(1); this is reflective in the originating notice.[6] The language of the notice is affirmative wording that "the Crown will make an application pursuant to s. 525 of the *Criminal Code* for a review of Mr. Myers' detention status." The notice goes on to state that, "the application *will* be heard by the presiding judge" and sets out the place, date and time of the hearing, and the material that the applicant *will* rely on.

13. The accompanying letter,[7] much like the current two-step approach, neutralizes the obligatory nature of the review to the extent that the detained person, "*may* be entitled to a bail review pursuant to s. 525 of the *Criminal Code*."

14. The accompanying letter turns an obligation of the Crown into an option for the detained person, should they be deemed eligible. The notice and the letter are reflective of the statute and the position of the two-step approach, respectively.

15. The originating process of a s. 525 review occurs by virtue of an application by the Crown on behalf of the gaoler as per s. 525(1) of the *Code*. Sections 520 and 521 are optional applications brought on by the accused and Crown.

16. A section 525 review comes to the attention of the court through an absence of triggering events, namely, that the matter has not been dealt with in the statutorily prescribed time period. Sections 520 and 521 are brought on because of something that has happened at or changed since the original bail hearing.

17. These differences between sections 525 and 520-521 bring about different considerations during the course of a hearing. The different purposes, language, context, processes, considerations on a hearing, and judicial interpretations that exist between sections 525 and 520-521 lead to the inexorable conclusion that a different judicial pronouncement is required on s. the correct approach to s. 525.

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[5] *R. v. St-Cloud, supra,* at para 91.
[6] Exhibit A to the Affidavit of Justin V. Myers sworn February 1, 2018 (Tab B).
[7] Exhibit B to the Affidavit of Justin V. Myers sworn February 1, 2018 (Tab B).

18. That this Court did not address section 525 in *St-Cloud* and has not yet had the opportunity, supports this application for leave to appeal.

19. The respondent acknowledges that there is a current controversy in the law, but does not provide a sufficient reason as to why this Court should not provide the answer to it. The respondent's position that *R. v. Whiteside*, 2016 BCSC 131 and *St-Cloud* potentially provide an answer to this controversy still requires intervention from this Court before the issue can be settled and binding on the lower courts.

The proposed appeal is now moot[8] but nevertheless should be heard

20. This Court's decision in *Doucet-Boudreau v. Nova Scotia (Minister of Education)* provides the relevant considerations in deciding whether to hear a moot appeal.[9]

21. In this case the appropriate adversarial context exists as the litigants have continued to argue their respective sides vigorously.

22. The proposed raises an important question about superior courts' application of s. 525 that affects the rights of countless accused persons detained in custody across the country.[10] The issue is evasive of review because of the unpredictable nature of criminal proceedings that will often render this issue moot before it can come before this Court. *R. v. Oland*[11] *and R. v. Whiteside*,[12] and now this case, are examples where an issue of bail under appeal has become moot by the time it reaches this Court. Even engaging in the hypothetical scenario in which this matter had gone to trial and completed by March 23, 2018 as anticipated, this application for leave to appeal would unlikely have been decided prior to that date, let alone the hearing of an appeal on the merits.

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[8] See Affidavit of Justin Myers, sworn February 1, 2018 (Tab B).
[9] [2003] 3 SCR 3, 2003 SCC 62 at paras. 17-22 (Tab C).
[10] While the parties have focussed on British Columbia case law, s. 525 has been the subject of judicial scrutiny in other provinces: see, for example, *R v Acera*, 2017 ABQB 470. See also Appendix A to Applicant's Memorandum of Argument (at p. 23).
[11] 2017 SCC 17.
[12] 2016 BCSC 131, leave to appeal application to this Court filed August 24, 2016 (SCC 37152).

23. The expenditure of judicial resources now will result in greater judicial economy amongst the lower courts. The social cost of uncertainty as to the *Charter* rights of people detained in custody is high. This is particularly so where that uncertainty pertains to an unfulfilled obligation of the executive branch of government that section 525 is designed to avoid.

24. This Court would be fulfilling its function as an adjudicator in deciding to hear this case and provide the correct interpretation of this section. This Court's pronouncement on an unresolved and important issue of law will guide the courts, Crown counsel, defence counsel and accused persons going forward in future hearings.

25. The respondent relies on the decision of Justice Coté, in Chambers, in *Whiteside*. The respondent says counsel in that case "sought a ruling that the leave application should be considered notwithstanding that [*sic*] fact that the accused had disposed of the charges" (para. 40).

26. In *Whiteside*, applicant's counsel filed a motion for the proceedings to be continued despite the fact that the applicant had disposed of the matter in dispute, and for an order to appoint counsel as amicus curiae on the basis that counsel had lost contact with the then applicant who did not indicate any further interest in pursuing the leave application. Coté J. dismissed the motion to appoint Justin V. Myers as amicus curiae. The result was that the leave to appeal application was not considered by this Court.[13] This is not a decision not to grant leave because the proposed appeal was moot.

27. As the case at bar demonstrates, the proper interpretation of s. 525 is important and unresolved. The respondent does not seriously quarrel with that characterization. Instead it raises technical arguments about the timing of the filing of the leave application and mootness. This Court should resolve the controversy over s. 525 and bring much needed clarity to the law.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 1st day of February, 2017.

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Counsel for the Applicant

[13] See online docket for SCC 37152.