



SUPREME COURT OF CANADA

CITATION: R. v. Myers, 2019 SCC 18

APPEAL HEARD: October 18, 2018

JUDGMENT RENDERED: March 28, 2019

DOCKET: 37869

BETWEEN:

Corey Lee James Myers
Appellant

and

Her Majesty The Queen
Respondent

- and -

Attorney General of Ontario and Canadian Civil Liberties Association
Interveners

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

REASONS FOR JUDGMENT: Wagner C.J. (Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ. concurring)
(paras. 1 to 68)

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R. v. MYERS

Corey Lee James Myers

Appellant

v.

Her Majesty The Queen

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and

**Attorney General of Ontario and
Canadian Civil Liberties Association**

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Indexed as: R. v. Myers

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Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown,
Rowe and Martin JJ.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA

Criminal law — Interim release — Detention review — Accused denied interim release pending trial — Detention status confirmed by judge conducting review under s. 525 of Criminal Code — Proper approach to detention review hearing under s. 525 of Criminal Code — Criminal Code, R.S.C. 1985, c. C-46, s. 525.

On January 4, 2016, M was arrested and charged with several firearm offences. He sought bail for the first time in respect of these charges on November 9, 2016, but his application was dismissed, as the judge was not satisfied that any terms of release would adequately address the risk that M would, if released, commit other offences or interfere with the administration of justice. Later that month, M sought a review of his detention order under s. 520 of the *Criminal Code*, which was denied on the basis that the judge saw no significant change that would justify releasing M. In March 2017, Crown counsel asked the defence whether M wished to pursue a 90-day bail review under s. 525 of the *Criminal Code*. Given the existence of competing lines of authority, the British Columbia Supreme Court heard submissions from both parties on the correct approach to the review under s. 525. It concluded that the correct test at a s. 525 hearing involves a two-step process: the accused must first convince the reviewing judge either that there has been an unreasonable delay in the proceedings on the Crown's part or that the passage of time has had a material impact on the initial basis for detaining the accused, and, if either

of these thresholds is met, the judge must then determine whether the detention of the accused remains justified within the meaning of s. 515(10) of the *Criminal Code*. Because of the formulation of the test, M made no submissions and his detention order was confirmed.

M pled guilty on January 29, 2018 to reduced charges and was sentenced to 30 months' imprisonment. Since M is no longer in pre-trial custody, his appeal to the Court is moot; however, as guidance is needed to establish the correct approach to a detention review hearing under s. 525 of the *Criminal Code*, the Court exercised its discretion to hear the appeal on the merits.

Held: The appeal should be allowed.

In this case, the Court must apply the principles of statutory interpretation to determine the correct approach to a detention review under s. 525, and to explain the place of such a review within the larger context of pre-trial custody in Canada. In Canadian law, the pre-trial release of accused persons is the cardinal rule and detention, the exception. Yet practices vary widely in terms of when s. 525 detention review hearings happen, whether they are mandatory, what factors are considered and which test is applied.

The purpose of the s. 525 hearing is to prevent accused persons from languishing in pre-trial custody and to ensure a prompt trial. Parliament sought to achieve this purpose by subjecting lengthy pre-trial detentions to judicial oversight at

set points in time, by affording an opportunity to have a judge consider whether the continued detention of an accused person is justified, and by conferring on the judge a discretion to expedite the trial of an individual in pre-trial detention. The right not to be denied reasonable bail without just cause, which is enshrined in s. 11(e) of the *Canadian Charter of Rights and Freedoms*, operates as a key organizing principle of Part XVI of the *Criminal Code*. Release is favoured at the earliest reasonable opportunity and on the least onerous grounds. The experience of pre-trial detention can have serious detrimental impacts on an accused person's ability to raise a defence. It also comes at a significant cost in terms of their loss of liberty, the impact on their mental and physical well-being and on their families, and the loss of their livelihoods. Parliament intended s. 525 to operate as a safeguard. This section imposes an independent responsibility on the reviewing judge to consider whether the continued detention of the accused is justified, and establishes a discretionary mechanism designed to prevent unreasonable delay and to expedite the trials of individuals in remand.

The correct approach to the s. 525 detention review is as follows. First, the jailer has an obligation to apply for the detention review hearing immediately upon the expiration of 90 days following the day on which the accused was initially taken before a justice under s. 503 of the *Criminal Code*. Where there is an intervening detention order under s. 520, 521 or 524 of the *Criminal Code* following the initial appearance of the accused and before the end of the 90-day period, the 90-day period begins again. Accused persons who have not had a full bail hearing are

also entitled to a review under s. 525, since the fundamental purpose of s. 525 is to afford an opportunity to have a judge scrutinize the detention itself, and these individuals should not be denied that safeguard. Upon receiving the application from the jailer, the judge must fix a date and give notice for the hearing. The s. 525 hearing is an automatic procedure, and the mandatory obligations to make the application and to fix a date lie with the jailer and the judge respectively. Form letters that place the burden on the accused to pursue a s. 525 hearing are inconsistent with the law. The hearing must be held at the earliest opportunity. At the hearing, the reviewing judge may refer to the transcript, exhibits and reasons from any initial judicial interim release hearing and from any subsequent review hearings, and should show respect for any findings of fact made by the first-level decision maker if there is no cause to interfere with them. Both parties are also entitled to make submissions on the basis of any additional credible or trustworthy information which is relevant or material to the judge's analysis, and pre-existing material is subject to the criteria of due diligence and relevance.

At the hearing, unreasonable delay is not a threshold that must be met before the detention of the accused is reviewed. Parliament did not intend to restrict the court's ability to review the detention of an accused at a s. 525 hearing to situations in which there has already been an unreasonable delay. The overarching question is only whether the continued detention of the accused in custody is justified within the meaning of s. 515(10), which sets out three possible grounds on which the detention of an accused in custody may be justified: where it is necessary in order to

ensure the attendance of the accused in court; where it is necessary for the protection or safety of the public; and where it is necessary in order to maintain public confidence in the administration of justice. In determining whether the detention of the accused is still justified, the reviewing judge may consider any new evidence or change in the circumstances of the accused, the impact of the passage of time and any unreasonable delay on the proportionality of the detention, and the rationale offered for the original detention order, if one was made. If there was no initial bail hearing, the s. 525 judge is responsible for conducting one, taking into account the time the accused has already spent in pre-trial custody. Ultimately, s. 525 requires a reviewing judge to provide accused persons with reasons why their continued detention is — or is not — justified. Finally, the judge should make use of his or her discretion under ss. 525(9) and 526 to give directions for expediting the trial and related proceedings where it is appropriate to do so. Directions should be given with a view to mitigating the risk of unconstitutional delay and expediting the trials of accused persons who are subject to lengthy pre-trial detention.

Cases Cited

By Wagner C.J.

Referred to: *R. v. Antic*, 2017 SCC 27, [2017] 1 S.C.R. 509; *R. v. Oland*, 2017 SCC 17, [2017] 1 S.C.R. 250; *R. v. St-Cloud*, 2015 SCC 27, [2015] 2 S.C.R. 328; *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342; *R. v. Gill*, 2005 CanLII 22214; *R. v. Kissoon*, 2006 CanLII 40493; *R. v. Jerace*, 2012 BCSC 2007; *R.*

v. Whiteside, 2016 BCSC 131; *R. v. Elmi*, 2016 BCSC 376; *R. v. Russell*, 2016 NLTD(G) 208, 34 C.R. (7th) 262; *R. v. Cheeseman*, 2017 NLTD(G) 114; *R. v. Thorsteinson*, 2006 MBQB 184, 2016 Man. R. (2d) 188; *R. v. Sawrenko*, 2008 YKSC 27; *R. v. Sarkozi*, 2010 BCSC 1410; *R. v. McCormack*, 2014 ONSC 7123; *R. v. Vandewater*, 2014 BCSC 2502; *R. v. Haleta*, 2015 BCSC 850; *R. v. Goudreau*, 2015 BCSC 1227; *R. v. Piazza*, 2015 QCCS 707; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *R. v. Morales*, [1992] 3 S.C.R. 711; *R. v. Bray* (1983), 40 O.R. (2d) 766; *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631; *Fraser Regional Correctional Centre v. Canada (Attorney General)*, 1993 CanLII 354; *R. v. Pearson*, [1992] 3 S.C.R. 665; *R. v. Anoussis*, 2008 QCCQ 8100, 242 C.C.C. (3d) 113; *R. v. Summers*, 2014 SCC 26, [2014] 1 S.C.R. 575; *R. v. Hall*, 2002 SCC 64, [2002] 3 S.C.R. 309; *Ell v. Alberta*, 2003 SCC 35, [2003] 1 S.C.R. 857; *R. v. Acera*, 2017 ABQB 470; *R. v. Saulnier*, 2012 NSSC 45, 314 N.S.R. (2d) 203; *R. v. Burgar*, 2003 BCCA 426, 186 B.C.A.C. 15; *R. v. White*, 2010 ONSC 3164; *R. v. Whyte*, 2014 ONCA 268, 119 O.R. (3d) 305.

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Friedland, Martin L. *Detention before Trial: A Study of Criminal Cases Tried in the Toronto Magistrates' Courts*. Toronto: University of Toronto Press, 1965.

Trotter, Gary T. *The Law of Bail in Canada*, 3rd ed. Toronto: Carswell, 2010 (loose-leaf updated 2018, release 2).

APPEAL from a decision of the British Columbia Supreme Court (Riley J.), confirming the accused's detention status. Appeal allowed.

Justin Vladimir Myers, Lawrence D. Myers, Q.C., and Zack Myers, for the appellant.

John R.W. Caldwell and Nicholas Reithmeier, for the respondent.

Joan Barrett and Jessica Smith Joy, for the intervener the Attorney General of Ontario.

Christine Mainville, for the intervener the Canadian Civil Liberties Association.

The judgment of the Court was delivered by

THE CHIEF JUSTICE —

I. Overview

[1] The right to liberty and the presumption of innocence are fundamental tenets of our criminal justice system. In the pre-trial context, release — at the earliest opportunity and in the least onerous manner — is the default presumption in Canadian criminal law. Pre-trial detention is the exception, not the rule.

[2] And yet there are a significant number of individuals in remand custody at any given time in Canada. In some cases, accused persons are detained in provincial jails for the entire length of the pre-trial process, which can amount to hundreds of days in custody. This appeal concerns those individuals, and their right to

what has become known as the “90-day detention review” under s. 525 of the *Criminal Code*, R.S.C. 1985, c. C-46 (“*Cr. C.*”).

[3] This Court has addressed issues related to bail and detention on several occasions in recent years. In *R. v. Antic*, 2017 SCC 27, [2017] 1 S.C.R. 509, it clarified the ladder principle in the law of bail and the framework for authorizing release under s. 515 *Cr. C.* In *R. v. Oland*, 2017 SCC 17, [2017] 1 S.C.R. 250, the Court addressed the issues of release pending appeal under s. 679 *Cr. C.* and the review under s. 680 *Cr. C.* In *R. v. St-Cloud*, 2015 SCC 27, [2015] 2 S.C.R. 328, it considered the test for detention under s. 515(10)(c) and bail review under ss. 520 and 521 *Cr. C.*

[4] In the case at bar, the Court is asked to determine the correct approach to a detention review under s. 525 *Cr. C.*, and to explain the place of such a review within the larger context of pre-trial custody in Canada. For the reasons that follow, I find that Parliament intended s. 525 to operate as a safeguard. This section imposes an independent responsibility on the reviewing judge to consider whether the continued detention of the accused is justified, and establishes a discretionary mechanism designed to prevent unreasonable delay and to expedite the trials of individuals in remand. Given that Mr. Myers’ appeal is moot, I would simply allow the appeal and make no further order.

II. Background

A. *Arrest and Prior Charges*

[5] On January 4, 2016, Mr. Myers was arrested following a high-speed car chase involving gunfire in Surrey and Delta, British Columbia. He was charged with a number of offences, including intentionally discharging a restricted or prohibited firearm; occupying a motor vehicle knowing that there was a firearm in the vehicle; using a firearm in committing an indictable offence; possessing a restricted or prohibited firearm; and possessing a weapon and/or ammunition contrary to a lifetime firearms ban.

[6] Mr. Myers was already on bail for unrelated break and enter charges when he was arrested. He had various prior convictions, was on probation, and was under multiple court-ordered prohibitions against possessing firearms and ammunition. He was also the subject of a Canada-wide warrant for charges that had been laid in Alberta in 2015.

[7] At the time of his arrest, Mr. Myers consented to detention without a bail hearing. About four months later, he pled guilty to the outstanding break and enter charges and was sentenced to 14 months incarceration. His release date in relation to those offences would have been in October 2016, taking time served into account. As of October 2016, Mr. Myers was no longer detained on any matter other than the new charges related to his arrest on January 4.

B. *Ruling on the Judicial Interim Release Application (Sudeyko Prov .Ct. J.)*

[8] Mr. Myers sought bail for the first time in respect of those charges on November 9, 2016. He was in a reverse onus position at the bail hearing: s. 515(6) *Cr. C.* The judge considered the relative strength of the Crown's case, Mr. Myers' criminal record and, to a lesser extent, his other outstanding charges. The judge noted that Mr. Myers had a history of failing to follow court orders, and of then committing other offences. Defence counsel had submitted that Mr. Myers, who was only 26, had an opiate addiction and that it was the root cause of his criminal history. The defence proposed that Mr. Myers therefore be released into a residential drug treatment facility, and suggested cash bail, a daily reporting requirement, an ankle bracelet and electronic monitoring as additional conditions. However, the judge was not satisfied that any terms of release would adequately address the risk that Mr. Myers would, if released, commit other offences or interfere with the administration of justice. He therefore dismissed the application and ordered that Mr. Myers be detained on the basis of the ground set out in s. 515(10)(b).

C. *Ruling on the Section 520 Detention Review (Sudeyko Prov. Ct. J.)*

[9] At the preliminary inquiry on November 24, 2016, it was revealed that the Crown's key witness was no longer willing to testify and that the Crown would need to seek admission of his police statement at trial instead. Counsel for Mr. Myers immediately sought a review of Mr. Myers' detention under s. 520 on the basis of this new weakness in the Crown's case. That review application was denied on the basis

that the judge saw no significant change that would justify releasing Mr. Myers at that time.

D. *Decision of the Supreme Court of British Columbia (Riley J.), 2017 BCSC 1717*

[10] In a letter dated March 14, 2017, Crown counsel asked the defence whether Mr. Myers wished to pursue a bail review under s. 525. In the resulting hearing on July 21 of that year, given the existence of competing lines of authority, Riley J. of the British Columbia Supreme Court heard submissions from both parties on the correct approach to take under s. 525. His reasons for judgment were released on September 27, 2017.

[11] Riley J. concluded that the correct test at a s. 525 hearing involves a two-step process. He found that the accused must first convince the reviewing judge either that there has been an unreasonable delay in the proceedings on the Crown's part *or* that the passage of time has had a material impact on the initial basis for detaining the accused. If either of these thresholds is met, the judge must then determine whether the detention of the accused remains justified within the meaning of s. 515(10).

[12] The review proceeded on October 5, 2017. Because of the formulation of the test, Mr. Myers made no submissions and his detention order was confirmed.

E. *Mootness*

[13] Mr. Myers filed his application for leave to appeal while he was still in pre-trial custody. However, he pled guilty on January 29, 2018 to one count of occupying a motor vehicle knowing there was a firearm in it under s. 94(1) *Cr. C.*, and one count of possessing ammunition contrary to a prohibition under s. 117.01(1) *Cr. C.* The Crown entered a stay of proceedings on all the remaining counts on the indictment, and Mr. Myers was sentenced to 30 months' imprisonment. As he is no longer in pre-trial custody, the appeal is moot.

[14] This Court recognized in *Oland* that bail-related matters are inherently “evasive of appellate review” owing to their temporary nature: para. 17. Despite the fact that pre-trial detention is governed by federal law, there has been a widespread, and systemic, divergence in the approaches taken to 90-day detention reviews by courts across Canada. All the parties have made submissions to the effect that guidance from this Court is needed in order to determine which of these competing approaches should apply and to establish clarity in the law. The Court has therefore exercised its discretion to hear the appeal on the merits: see *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, at pp. 358-63.

III. Issue

[15] This appeal raises a single question: What is the correct approach to a detention review hearing under s. 525 of the *Cr. C.*?

IV. Analysis

A. *Two Competing Approaches to Section 525*

[16] The parties suggest that the choice before this Court is between two competing approaches to s. 525 hearings. According to the first approach, unreasonable delay in getting the case to trial is a threshold condition. In the absence of an unreasonable delay, the judge at a s. 525 hearing cannot ask whether the detention remains necessary on the basis of the grounds set out in s. 515(10): see, e.g., *R. v. Gill*, 2005 CanLII 22214 (Ont. S.C.J.); *R. v. Kissoon*, 2006 CanLII 40493 (Ont. S.C.J.); *R. v. Jerace*, 2012 BCSC 2007; *R. v. Whiteside*, 2016 BCSC 131; *R. v. Elmi*, 2016 BCSC 376; *R. v. Russell*, 2016 NLTD(G) 208, 34 C.R. (7th) 262; *R. v. Cheeseman*, 2017 NLTD(G) 114.

[17] Under the alternative approach, unreasonable delay is not a threshold condition. Instead, the judge at a s. 525 hearing simply considers whether the continued detention of the accused is necessary on the basis of s. 515(10), and unreasonable delay is one possible factor in that analysis: see, e.g., *R. v. Thorsteinson*, 2006 MBQB 184, 206 Man. R. (2d) 188; *R. v. Sawrenko*, 2008 YKSC 27; *R. v. Sarkozi*, 2010 BCSC 1410; *R. v. McCormack*, 2014 ONSC 7123; *R. v. Vandewater*, 2014 BCSC 2502; *R. v. Haleta*, 2015 BCSC 850; *R. v. Goudreau*, 2015 BCSC 1227; *R. v. Piazza*, 2015 QCCS 707.

[18] Whether or not unreasonable delay operates as a threshold condition is clearly of fundamental importance to this appeal. However, this case requires the Court to do more than simply choose one approach or the other. Like *Antic*, it

concerns a provision of federal law that has been applied inconsistently across the country: paras. 6 and 65-66. Practices vary widely from place to place in terms of when s. 525 hearings happen, whether they are mandatory, what factors are considered and which test is applied. It is up to this Court to apply the principles of statutory interpretation in order to resolve this issue.

[19] The modern approach to statutory interpretation requires the Court to read the words of s. 525, “in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26, both quoting E. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87. When Parliament adopted s. 525, its purpose was clear and unambiguous. A straightforward reading of the provision, viewed properly in its legislative context, is the one which best supports that purpose.

[20] For reference purposes, s. 525 is reproduced in its entirety in the attached Appendix together with ss. 515(10) and 526. While I will generally be referring to the “90-day” review, these reasons apply with equal force, and with any necessary modifications, to the “30-day review”, that is, they apply regardless of whether the accused is being prosecuted in proceedings by way of indictment or by way of summary conviction: s. 525(1).

B. *Parliament’s Intent and the Bail Reform Act*

[21] Section 525 *Cr. C.* was first introduced in the 1972 *Bail Reform Act*, S.C. 1970-71-72, c. 37. In a speech at second reading in the House of Commons, then Justice Minister John N. Turner summarized the purposes of the Act as follows:

The objectives of this bill are fourfold: First, to avoid unnecessary pre-trial arrest and detention; second, to ensure that in cases where arrest with or without warrant has taken place, the person accused, whatever his means, is not unnecessarily held in custody until his trial; third, to ensure an early trial for those who have been detained in custody pending trial; fourth, to provide statutory guidelines for decision making in this part of the criminal law process relating to arrest and bail and thereby preclude the possibility of “discretionary injustice”.

(*House of Commons Debates*, Vol. III, 3rd Sess., 28th Parl., February 5, 1971, at p. 3116)

[22] This Court has recognized that Parliament’s overarching vision of the *Bail Reform Act* was the creation of “a liberal and enlightened system of pre-trial release” in which accused individuals would normally be granted bail: *R. v. Morales*, [1992] 3 S.C.R. 711, at p. 725, quoting *R. v. Bray* (1983), 40 O.R. (2d) 766 (C.A.), at p. 769; *Antic*, at para. 29. The purpose of that Act, which was influenced by both the academic work of Professor Martin L. Friedland and the findings of the Ouimet Report, as delivered by the Canadian Committee on Corrections examining the law on bail, was to reform a system that many experts saw as punitive, arbitrary, and inconsistent with the presumption of innocence: M. L. Friedland, *Detention before Trial: A Study of Criminal Cases Tried in the Toronto Magistrates’ Courts* (1965); *Report of the Canadian Committee on Corrections — Toward Unity: Criminal Justice and Corrections* (1969). There was also particular concern regarding the relationship

between prolonged pre-trial detentions and induced guilty pleas. In Minister Turner's words:

. . . there is an indication that those who are held under pre-trial detention will have, on the basis of statistics, a lesser opportunity for an acquittal and, certainly, they will have less of an opportunity to present a reasonable defence and assemble the evidence necessary for that defence. I think that we cannot ignore, either, Mr. Speaker, the high incidence of guilty pleas by persons who are detained and kept in custody under pre-trial detention. [p. 3115]

[23] The third purpose of the *Bail Reform Act* as articulated by Minister Turner — to ensure an early trial for those who have been detained in custody — is of specific relevance to this appeal. It is a longstanding principle of our criminal justice system that individuals in pre-trial custody should be given a certain priority in scheduling trials. This general guiding premise has not been displaced by *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631. Sections 525(9) and 526, which confer on the reviewing judge a discretion to give directions for expediting the trial of and any proceedings in relation to an accused, continue to operate as a reflection of that principle. In discussing these provisions, Minister Turner stated specifically:

[T]here are important new proposals in the bill which provide that where an accused does not achieve bail after an arrest, there are methods for expediting his trial The provisions of the bill also ensure that where an accused is being held in custody pending his trial, or pending an appeal of his conviction, the situation must be reviewed by the courts within set periods of time, and directions may be given by the courts for getting the case on to trial. . . . [p. 3117].

[24] Regardless of which test is applied, courts across Canada share an overarching consensus that the purpose of the s. 525 hearing is to prevent accused persons from languishing in pre-trial custody and to ensure a prompt trial: see e.g., *Fraser Regional Correctional Centre v. Canada (Attorney General)*, 1993 CanLII 354 (B.C.S.C.), at pp. 2-3; *Gill*, at para. 3; *Sawrenko*, at para. 26 (CanLII); *Sarkozi*, at paras. 8-11 (CanLII); *Haleta*, at paras. 8-10. It is, moreover, clear that Parliament sought to achieve this purpose by subjecting lengthy pre-trial detentions to judicial oversight at set points in time, by affording an opportunity to have a judge consider whether the continued detention of an accused person is justified, and by conferring on the judge a discretion to expedite the trial of an individual in pre-trial detention.

C. *Current Context of Pre-trial Detention in Canada*

[25] Today, the right not to be denied reasonable bail without just cause, which is enshrined in s. 11(e) of the *Canadian Charter of Rights and Freedoms*, operates as a key organizing principle of Part XVI of the *Criminal Code*: *R. v. Pearson*, [1992] 3 S.C.R. 665, at p. 691. This right has also been affirmed repeatedly by this Court, most recently in *St-Cloud*, in which the Court held that “in Canadian law, the release of accused persons is the cardinal rule and detention, the exception” (para. 70 (emphasis added)), and in *Antic*, in which it stated that ““release is favoured at the earliest reasonable opportunity and . . . on the least onerous grounds””: para. 29, quoting *R. v. Anoussis*, 2008 QCCQ 8100, 242 C.C.C. (3d) 113, at para. 23.

[26] Nonetheless, on any given day in Canada, nearly half of the individuals in provincial jails are accused persons in pre-trial custody: Statistics Canada, *Adult and youth correctional statistics in Canada, 2016/2017* (June 2018), at p. 7; Statistics Canada, *Trends in the use of remand in Canada, 2004/2005 to 2014/2015* (January 2017). In 2016-2017, approximately 7 percent of those in remand were still in custody after three months, and some spent upwards of 12 or even 24 months awaiting trial in detention: Statistics Canada, *Table 35-10-0024-01 — Adult releases from correctional services by sex and aggregate time served* (online). It must be said that the conditions faced by such individuals are often dire. Overcrowding and lockdowns are frequent features of this environment, as is limited access to recreation, health care and basic programming: *R. v. Summers*, 2014 SCC 26, [2014] 1 S.C.R. 575, at paras. 2 and 28; 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) (online). Moreover, as is the case elsewhere in our criminal justice system, Indigenous individuals are overrepresented in the remand population, accounting for approximately one quarter of all adult admissions: Statistics Canada, *Trends in the use of remand in Canada, 2004/2005 to 2014/2015*.

[27] As this Court has recognized, the experience of pre-trial detention can have serious detrimental impacts on an accused person's ability to raise a defence: see *R. v. Hall*, 2002 SCC 64, [2002] 3 S.C.R. 309, at para. 59. It also comes at a significant cost in terms of their loss of liberty, the impact on their mental and physical well-being and on their families, and the loss of their livelihoods: Friedland,

at p. 172; *Ell v. Alberta*, 2003 SCC 35, [2003] 1 S.C.R. 857, at para. 24; *Antic*, at para. 66. The high cost of pre-trial detention was recognized at the time the *Bail Reform Act* was before Parliament: *House of Commons Debates*, at p. 3115. The issue remains just as relevant today.

D. *Correct Approach to the Section 525 Detention Review*

[28] In the sections that follow, I will outline the correct approach to the s. 525 detention review, beginning with the application for the hearing. However, it is necessary to first dispose of the argument that a threshold condition of unreasonable delay must be met in order for the judge to review the detention itself.

(1) Unreasonable Delay Is Not a Threshold Requirement for Reviewing the Detention

[29] Parliament did not intend to restrict the court's ability to review the detention of an accused at a s. 525 hearing to situations in which there has been an unreasonable delay. In this case, the Crown relies almost exclusively on the heading under which s. 525 appears ("Review of Detention where Trial Delayed") to support an argument that Parliament did intend to do so. In the Crown's view, although the passage of 90 days might have been synonymous with "unreasonable delay" in 1972, this is no longer the case. The Crown suggests that Parliament has simply failed to amend the legislation in order to reflect the modern life cycle of a trial, and that s. 525

hearings were only ever intended to be held in exceptional circumstances involving unreasonable delay.

[30] In line with this view, some courts have developed a test to the effect that unreasonable delay is a precondition to reviewing the detention of the accused at a s. 525 hearing: see, e.g., *Jerace*, at paras. 8-12 (CanLII). The Crown submits that the result of this interpretation of s. 525 is that the detention of the accused should rarely be scrutinized, because there will rarely have been an unreasonable delay when the 90-day mark is reached. The Attorney General of Ontario argues that the correct approach is one according to which the judge does not schedule a hearing at all unless he or she is satisfied that there has been an unreasonable delay.

[31] With respect, the view that the judge *must* consider unreasonable delay but that the operative word for reviewing the detention of the accused is only “*may*” represents precisely the opposite of what the provision says:

525 (1) . . . 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.

. . . .

(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.

(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

[32] In short, it is perfectly clear from the section that at the hearing, the judge *must* consider whether the continued detention of the accused is justified, and *may* consider whether there has been an unreasonable delay: s. 525(1) and s. 525(3) *Cr. C.; Interpretation Act*, R.S.C. 1985, c. I-21, s. 11. Notably, the heading itself refers only to the trial being “delayed”, and *not* to an “unreasonable delay”, which suggests that Parliament simply intended the word “delayed” to refer to situations in which “the trial has not commenced” before the prescribed time. As well, the use of the word “any” in s. 525(3) makes it clear that there may or may *not* have been an unreasonable delay before the s. 525 hearing. Simply put, it is an error of law to treat unreasonable delay as a precondition for a review of the continued detention of the accused.

[33] There is no principled basis for this Court to “read in” a more restrictive test. It does not frustrate Parliament’s purpose to take the provision at face value, nor does it result in absurdity, waste or redundancy to do so. As the intervener Canadian Civil Liberties Association reminds us, “today, as before, three months is a long time for a person who is presumed innocent to be held in jail awaiting trial”: I.F., at para. 7. The Crown argues that this timeline is no longer realistic given the increased length and complexity of modern criminal trials. But even if that were true, the appropriate solution would be for Parliament to modify these clearly expressed requirements, not for this Court to read in a threshold that was never intended and that the words of the

provision do not support. Circumstances that favour the release of the accused, issues related to unreasonable delay, or the need for a court to intervene to expedite the trial will not always have arisen when the 90-day mark is reached. Instead, 90 days following the last detention order against the accused is simply the point at which Parliament has specified that a judge must determine whether the continued detention of the accused is justified. The impact of the passage of time generally (and of unreasonable delay specifically) may be properly considered in the judge's analysis at that time.

(2) Jailer's Obligation to Apply for a Hearing

[34] Subsection 525(1) makes it clear that the obligation to apply to a judge for a hearing lies with the person having the custody of the accused. In some provinces, this obligation is fulfilled by the prosecution rather than the correctional facility ("the jailer") itself.

[35] In proceedings by way of summary conviction, the obligation to make an application is triggered at the 30-day mark: s. 525(1)(b) *Cr. C.* For indictable offences, as in Mr. Myers' case, the relevant time is 90 days: s. 525(1)(a) *Cr. C.* The precise timing is made somewhat unclear by the use of the word "forthwith" in s. 525(1), which provides that the application must be made "forthwith on the expiration of those ninety . . . days". The French version of the same passage connotes immediacy — "*dès l'expiration de ces quatre-vingt-dix jours*" — and indicates more clearly that the obligation to make the application arises as soon as the 90-day period

has expired. I would therefore take the provision to mean that the application must be made immediately upon the expiration of 90 days following (i) the date on which the accused was taken before a justice under s. 503, or (ii) the later of the date on which the accused was taken into custody and the date of a detention order under s. 520, 521 or 524.

[36] I would pause to note that it has been suggested that an accused person could apply for a s. 520 review at some point before the end of the 90-day period only to have a s. 525 hearing held just weeks or days later, which would be wasteful or redundant: G. T. Trotter, *The Law of Bail in Canada* (3rd ed. (loose-leaf)), at pp. 8-51 to 8-55. While this may have been an issue before amendments made to s. 525 in 1997 introduced a reference to s. 520 into s. 525(1)(a)(ii), it is no longer of concern: *Criminal Law Improvement Act, 1996*, S.C. 1997, c. 18, s. 61(1). Section 525(1)(a)(ii) now indicates that the 90-day period is determined in relation to any order made pursuant to s. 521, 524 or 520.

[37] The rule is therefore as follows: the person having custody of the accused must ordinarily apply to the judge immediately upon the expiration of 90 days following the day on which the accused was initially taken before a justice under s. 503: s. 525(1)(a)(i) *Cr. C.* Where, however, a new detention order is made against the accused — or a decision is made to continue an existing order — under s. 520, 521 or 524 after the initial appearance of the accused under s. 503, the result of s. 525(1)(a)(ii) is that the 90-day period will effectively begin again. By way of

example, if an accused person is taken before a justice under s. 503 and detained in custody on day 1, then applies to a judge for a review of that decision under s. 520 on day 50 and the detention is confirmed, the jailer's obligation to make the application will not arise until 140 days following the day on which the accused person was first detained in custody. In addition to conforming to the words of s. 525(1), this interpretation minimizes the risk of redundancy, addresses any concerns related to the scarcity of judicial resources and limits the applicability of s. 525 to situations in which the accused has actually been in custody for a long period without judicial oversight.

[38] In *R. v. Acera*, 2017 ABQB 470, Veit J. suggested that at least one correctional facility appeared to be systematically failing to meet its obligation under the *Criminal Code* to apply for s. 525 hearings, sometimes by a margin of several months: paras. 10-17 and Appendix A (CanLII). The deadlines imposed by Parliament for an application under s. 525 are known to and foreseeable by all involved, including the correctional facility, the Crown and the court. It may well be that administrative reforms are required in order to ensure that s. 525 applications are made on time every time, for every eligible accused person. Delays in routine bail and detention matters are a manifestation of the culture of complacency denounced by this Court in *Jordan*, and must be addressed.

(3) Judge's Obligation to Fix a Date and Hold the Hearing

[39] Upon receiving the application from the jailer, the judge must fix a date and give notice for the hearing: s. 525(2) *Cr. C.* How much time the judge has after receiving the application before the date must be fixed is not specified. In fixing a date, the judge does not have a statutory discretion to refrain from holding the hearing until there has been an unreasonable delay or until she or he believes that the test for the release of the accused will be met. For a judge to do so would have the effect of creating a threshold condition for the hearing where it is plain that none exists in the language of s. 525. Moreover, such a practice could easily result in longer periods of unnecessary pre-trial detention than there would have been had the accused simply appeared before the judge at a properly conducted review hearing at the time Parliament intended. Thus, in order for the s. 525 hearing to fulfill its purpose of meaningfully safeguarding the accused person's liberty, the jailer must make the application within the appropriate time limit, and the court must fix the date of the hearing without delay. And upon receiving the application from the jailer, the judge must schedule the hearing for the first available date.

[40] On the hearing date, the Crown and the accused must appear before the judge. In oral argument in this Court, it was suggested that the judge could then routinely exercise his or her discretion to adjourn the s. 525 hearing until a later time. With respect, I disagree with this position. I am prepared to accept that occasionally, and in limited circumstances, an adjournment could be compatible with the purpose of s. 525 and with Parliament's intent. However, as with the process of fixing a date for the hearing, it would be improper to adjourn merely because the judge does not

believe that a full review of the detention would result in the release of the accused or because an unreasonable delay has not yet occurred.

[41] That being said, an adjournment should not be precluded where it clearly serves the interests of justice and the underlying purposes of the provision. For example — without limiting the foregoing — where a key piece of information is missing or a key event is pending, it would be entirely appropriate for the judge to adjourn the hearing until such time as the detention of the accused can be meaningfully assessed. The reviewing judge's exercise of this supervisory authority must ultimately be guided by the overarching purpose of the provision, which is to prevent an accused person from languishing in pre-trial custody and to ensure a prompt trial by subjecting lengthy detentions to judicial oversight. As a result, adjournments must always be used in a manner that safeguards and is consistent with the right of the accused to a prompt and thorough review of his or her detention when the 90-day mark is reached. Reviewing judges must rely on good sense and experience in order to ensure that adjournments enhance rather than undermine the purpose of the s. 525 detention review.

(a) *Application of Section 525 Where There Has Been No Initial Hearing*

[42] There may be some instances in which an accused person has not had a full provincial court bail hearing that resulted in a detention order, but remains in custody after 90 days. This would primarily be the case for individuals in a reverse onus position who have consented to remand, but it could also arise in other narrow

circumstances. There is some disagreement over whether such an individual is entitled to a s. 525 hearing: see, e.g., *Sarkozi*, at para. 32; *R. v. Saulnier*, 2012 NSSC 45, 314 N.S.R. (2d) 203, at paras. 10-11; *R. v. Burgar*, 2003 BCCA 426, 186 B.C.A.C. 15, at para. 10.

[43] In my view, there is no principled basis for holding that individuals in this situation are not entitled to a hearing under s. 525. In theory, every accused person in custody will have been “taken before a justice under section 503” within the meaning of s. 525(1) and is therefore entitled to a hearing under s. 525. More to the point, the fundamental purpose of s. 525 is to afford an opportunity to have a judge scrutinize the detention itself, and individuals who find themselves in these exceptional circumstances should not be denied that safeguard. I would echo the view that those who, for whatever reason, do not contest their initial detention “should not be punished for doing so, by depriving them of the potential benefits of s. 525 hearings, especially where their liberty and constitutional right to a trial within ‘a reasonable time’ is implicated”: *Saulnier*, at para. 10.

(b) *No Request Is Required for the Hearing to Take Place*

[44] It is clear from the *Criminal Code* that the s. 525 hearing is an automatic procedure. The mandatory obligations to make the application and to fix a date lie with the jailer and the judge, respectively. In this case, the Crown sent defence counsel a letter in which it invited him to reply in order “to advise whether [Mr. Myers] wishes to pursue a bail review at this time, and if so, to arrange a mutually

convenient date”: Appellant’s Condensed Book, Tab 8. Form letters which place the burden on the accused to pursue a s. 525 hearing are inconsistent with the law. Such letters may disproportionately confuse or discourage unrepresented individuals, who are in particular need of the judicial oversight Parliament intended to ensure when it enacted s. 525. There may be circumstances in which an accused person, fully informed of his or her rights and the purpose of the provision, will decline what is intended to be an automatic hearing under s. 525. However, the words, the context and the purpose of the provision do not support an interpretation to the effect that s. 525 hearings are an “opt-in” affair.

(4) Overarching Question at the Hearing

[45] The overarching question at the s. 525 hearing is clear from the words of the provision. Section 525(1) explicitly states that the judge’s role is “to determine whether or not the accused should be released from custody”. Section 525(3) provides that the judge may, “in deciding whether or not the accused should be released from custody”, take any unreasonable delay into consideration. Section 525(4) instructs the judge to order the accused person’s release if the judge “is not satisfied that the continued detention of the accused in custody is justified within the meaning of subsection 515(10)”.

[46] The question that the judge must answer at a s. 525 hearing is therefore as follows: *Is the continued detention of the accused in custody justified within the meaning of s. 515(10)?* Section 515(10) sets out three possible grounds on which the

detention of an accused in custody may be justified: where it is necessary in order to ensure the attendance of the accused in court; where it is necessary for the protection or safety of the public; and where it is necessary in order to maintain public confidence in the administration of justice.

(5) Nature of the Detention Review

[47] The question in the s. 525 review — whether the continued detention of the accused is justified — is somewhat different in nature than the question at the initial bail hearing or in a review under s. 520 or 521. While ss. 520 and 521 exist for the purpose of reviewing a prior order, a review under s. 525 is more properly characterized as a review of the detention itself. Yet there is no indication that Parliament intended the judge presiding a s. 525 detention review hearing to reconduct the original bail hearing in its entirety simply because 90 days have elapsed. Mr. Myers himself concedes as much: he argues only that a s. 525 hearing requires a “multi-factorial analysis”: A.F., at para. 89. This means that the judge at the s. 525 hearing should in his or her analysis show respect for any findings of fact made by the first-level decision maker if there is no cause to interfere with them. Similarly, any balancing exercise or weighing of factors conducted by the initial bail judge must be reviewed in light of the time that has already elapsed and any other relevant considerations, as will be discussed below.

(6) Material Available to the Judge

[48] Section 525 offers little guidance on the record available to the judge at the hearing. However, as Veale J. pointed out in *Sawrenko*, at para. 31, s. 525(8) serves to incorporate ss. 517, 518 and 519, with any necessary modifications. Under s. 518(1), the prosecutor may show the circumstances of the alleged offence and the judge has a wide discretion to make inquiries, as well as to receive and consider any evidence “considered credible or trustworthy” in the circumstances of the case. The judge at the s. 525 hearing is therefore free to make inquiries about the case, as well as to rely upon the transcript, exhibits and reasons from any initial judicial interim release hearing and from any subsequent review.

[49] Furthermore, both parties are entitled to make submissions on the basis of any additional “credible or trustworthy” information which is relevant or material to the judge’s analysis. The admissibility of any material that existed at the time of the initial bail hearing but was not presented at that point should also be governed by the criteria of due diligence and relevance discussed in *St-Cloud*, at paras. 130-35. In the context of a s. 525 review, the judge must be particularly attentive to any new evidence or material change in the circumstances of the accused and to its impact on the question whether his or her continued detention in custody is justified. For example, the period of pre-trial detention may have afforded the accused person time to make arrangements for a suitable surety, develop a comprehensive release plan or take other steps that would negate the initial basis for his or her detention under s. 515(10).

(7) Impact of the Passage of Time and Unreasonable Delay

[50] In determining whether the detention remains justified under s. 515(10), the judge should also consider whether the time that has already elapsed has had — or the anticipated passage of time will have — an impact on the appropriateness or proportionality of the detention. In particular, it is necessary to be sensitive to whether the continued detention of the accused person could erode public confidence in the administration of justice: see, e.g., *McCormack*, at para. 29 (CanLII).

[51] This is ultimately a question of proportionality. In some cases, the passage of time will have no impact on the necessity of continued detention. In other cases, it may be a very strong indicator that the accused should be released, with or without conditions. Reviewing judges must be particularly alert to the possibility that the amount of time spent by an accused in detention has approximated or even exceeded the sentence he or she would realistically serve if convicted: see, e.g., *Sawrenko*, at para. 43. The assessment must be informed by the need to reduce the risk of induced guilty pleas, which are profoundly detrimental to the integrity of the criminal justice system. As was noted in *R. v. White*, 2010 ONSC 3164, “public confidence in the administration of justice, and in particular in the judicial interim release regime, would be substantially eroded by pre-trial incarceration of presumptively innocent individuals to the equivalency or beyond the term of what would be a fit sentence if [they were] convicted”: para. 10 (CanLII).

[52] Determining, for the purposes of this analysis, the sentence the accused would potentially receive is not an exact science, nor does it require an exhaustive inquiry. However, the judge's analysis should account for the circumstances of the case that were known at the time of the hearing and reflect the relevant sentencing principles: *St-Cloud*, at para. 65.

[53] In other circumstances, accounting for the elapsed time or anticipated passage of time may require a more nuanced analysis of its impact on the three grounds which justify detention under s. 515(10). In *St-Cloud*, the Court indicated that a lengthy delay between the hearing and the eventual trial may be considered in determining whether detention is necessary to maintain confidence in the administration of justice, which is the tertiary ground: para. 71. In this sense, the analysis is not only retrospective, but also forward-looking. For example, let us consider a scenario in which an individual is detained on the basis of s. 515(10)(c), and at the time of the first detention order his trial is only two months away. If the trial date is then rescheduled for a date two years later and remains many months away at the time of s. 525 hearing, the continued detention of the accused may no longer be proportionate, or necessary, for the purposes of this third ground: see also *R. v. Whyte*, 2014 ONCA 268, 119 O.R. (3d) 305, at paras. 39-43; *Piazza*, at paras. 71-81 (CanLII). In an appropriate case, it may also be possible for the judge to conclude that a hypothetical risk in relation to the primary or secondary ground is simply outweighed by the certain cost of the accused person's loss of liberty or of a loss of public confidence in the administration of justice.

[54] As part of this analysis, the judge may consider whether either party has been responsible for any *unreasonable* delay in the trial of the charge: s. 525(3) *Cr. C.* If an unreasonable delay in getting the case to trial can be attributed to one of the parties, that factor will be relevant in determining whether the continued detention of the accused is proportionate or appropriate. Thus, if the accused appears to have engineered an unreasonable delay in his or her own trial, the basis for making a release order will clearly be weaker, but if the Crown is responsible for an unreasonable delay, this will weigh in favour of release. While the term “unreasonable delay” in s. 525 clearly cannot have the same meaning as it does in the context of s. 11(b) of the *Charter*, the two can be seen to be conceptually related. That being said, not every delay in getting a matter to trial will be unreasonable, and the accused does not have a right to be at any particular point in the process when the 90-day mark is reached. The judge must therefore rely on his or her judgment and experience in determining what impact, if any, the passage of time and an unreasonable delay should have on the continued detention of the accused.

(8) Other Matters Properly Considered in a Section 525 Detention Review

[55] Finally, there may be cases in which it is necessary for the reviewing judge to scrutinize the rationale offered for the original detention order against the accused. While any previous bail decisions will be relevant and will likely inform the proceedings, reviewing judges must be careful not to simply “rubber-stamp” such decisions. As I noted above, s. 525 creates an independent safeguard function that is

particularly important for unrepresented individuals, who may not have had the means, the capacity or the awareness to apply for a s. 520 review but are now appearing before a judge at a s. 525 hearing. For example, if when the accused appears at the s. 525 hearing it becomes clear that the initial bail judge made an error of law — perhaps by failing to apply the bail principles enunciated by this Court in *Antic*, at para. 67 — and that this resulted in an unnecessary detention, it would be wasteful to tell the accused at that point to make a separate application for a different review process under s. 520. The need to revisit an initial detention order will not arise in every case, and in the absence of a basis for judicial intervention, there is no need for a s. 525 hearing to become a protracted or formal proceeding. However, the judge must be alive to these issues when they arise, and must be prepared to respond to them appropriately.

(9) Hearing Where There Has Been No Initial Bail Decision

[56] Since s. 525 calls upon the judge to review the detention itself, the existence of an initial decision is not required in order to achieve the core objective of a s. 525 review. As I mentioned above, there may be certain anomalous situations in which an accused person who appears before a judge under s. 525 did not undergo a full initial bail hearing at the time of his or her arrest. To give proper effect to s. 525 in such situations, the judge is required to conduct the full bail hearing “from the ground up” in accordance with the ladder principle articulated in *Antic*, taking into account the time the accused has already spent in pre-trial custody. I wish to mention

here that it has been suggested that allowing a full bail hearing to proceed before a superior court judge at the s. 525 stage would encourage “judge shopping” or would afford the accused some kind of procedural advantage that would for him or her justify spending three months in custody. In my view, this argument strains credulity. To quote O’Neill J. in *McCormack*, “I am not at all sure that many jailed accused would ever resort to paying the 90 day price for that strategy”: para. 26.

(10) Discretion to Give Directions for Expediting the Trial and Proceedings

[57] Section 525(9) affords the judge a discretion to give directions for expediting the trial of the accused at a s. 525 hearing, and s. 526 confers a more general authority on judges and justices acting under Part XVI of the *Criminal Code* to give directions for expediting any proceedings in respect of the accused. For these provisions to operate as meaningful safeguards against unreasonable delay and excessively long pre-trial detention, all stakeholders — including the prosecution, defence counsel and the courts — must take an active role in ensuring the timely progress of the trial.

[58] First, s. 525 hearings take on a heightened importance in the post-*Jordan* era, because they afford an opportunity to have a reviewing judge evaluate the progress of the trial at an early stage. If the judge believes that the case is at a point at which an unreasonable delay prohibited by s. 11(b) of the *Charter* is likely to result, he or she should consider giving directions for expediting the trial under ss. 525(9) and 526 as a preventative measure.

[59] However, s. 525 must be understood as more than just a “*Jordan* check-up”. Individuals in pre-trial detention, who are presumed innocent, bear a particularly high cost in terms of loss of liberty while awaiting their day in court. The judge should always determine whether the case presents an appropriate occasion to exercise his or her discretion to give directions for expediting the trial and related proceedings under ss. 525(9) and 526. Also, a judge who finds that the continued detention of the accused is justified on the basis of the grounds set out in s. 515(10) must look ahead to ensure that the accused will not be in a “time served” position before the prospective trial date.

[60] In deciding whether to give directions under s. 525(9) or 526, the reviewing judge must consider all the circumstances of the case and any relevant submissions by the parties. Relevant factors could include the relative complexity of the case, the involvement of co-accused individuals, the completeness of disclosure, problems related to evidence, the presence of any exceptional circumstances and the typical delay in getting comparable matters to trial in the jurisdiction in question. The analysis should be forward-looking. It should also be realistic, as the purpose of s. 525 is not to provide a pretext for judicial micro-management. Usually, the case will be proceeding at an acceptable pace and no directions from the court will be required. However, there may sometimes be a need, for example, to review the state of the Crown’s disclosure to the defence, resolve an outstanding procedural issue or inquire into whether an earlier trial date can be secured. In these circumstances, a considered, principled and proactive intervention of a reviewing judge can have a real impact on

the fairness and efficiency of the criminal justice process, and meaningfully safeguard the liberty interests of the accused.

(11) Right of the Accused to Know the Case to Meet

[61] Finally, I would note that in oral argument, the Attorney General of Ontario remarked that at s. 525 hearings in that province, “[m]ost of the time the accused do not understand why they are there, most of the time they are unrepresented and it simply gets dismissed”: transcript, at p. 92. This can hardly be what Parliament intended in enacting s. 525. There is no question that accused persons have a right to understand the purpose of the hearing, regardless of whether they are represented by counsel. All participants in our criminal justice system bear a fundamental responsibility for ensuring that this is the case. In reality, the individuals who are at the greatest risk of languishing in custody are those who are unrepresented. Where an accused is fully informed and supported by counsel, a s. 525 hearing may be a brief formality or may be waived altogether. However where the state has not provided for some form of legal assistance and the rights of an unrepresented individual are concerned, the judge must take even greater care to safeguard the liberty of the accused in order to maintain public confidence in the justice system.

(12) Summary of the Correct Approach

[62] I would summarize the correct approach to a detention review under s. 525 as follows. First, the jailer has an obligation to apply for the hearing immediately upon the expiration of 90 days following the day on which the accused was initially taken before a justice under s. 503. Where there is an intervening detention order under s. 520, 521 or 524 following the initial appearance of the accused and before the end of the 90-day period, the 90-day period begins again. Accused persons who have not had a full bail hearing are nonetheless entitled to one under s. 525. Upon receiving the application from the jailer, the judge must fix a date and give notice for the hearing. The hearing must be held at the earliest opportunity. In his or her analysis, the judge may refer to the transcript, exhibits and reasons from any initial judicial interim release hearing and from any subsequent review hearings. Both parties are also entitled to make submissions on the basis of any additional “credible or trustworthy” information which is relevant or material to the judge’s analysis, and pre-existing material is subject to the criteria of due diligence and relevance discussed in *St-Cloud*, at paras. 130-35.

[63] At the hearing, unreasonable delay is not a threshold that must be met before reviewing the detention of the accused. The overarching question is only whether the continued detention of the accused in custody is justified within the meaning of s. 515(10). In determining whether the detention of the accused is still justified, the reviewing judge may consider any new evidence or change in the circumstances of the accused, the impact of the passage of time and any unreasonable delay on the proportionality of the detention, and the rationale offered for the original

detention order, if one was made. If there was no initial bail hearing, the s. 525 judge is responsible for conducting one, taking into account the time the accused has already spent in pre-trial custody. Ultimately, s. 525 requires a reviewing judge to provide accused persons with reasons why their continued detention is — or is not — justified. Finally, the judge should make use of his or her discretion under ss. 525(9) and 526 to give directions for expediting the trial and related proceedings where it is appropriate to do so. Directions should be given with a view to mitigating the risk of unconstitutional delay and expediting the trials of accused persons who are subject to lengthy pre-trial detention.

V. Application

[64] I will not carry out the full exercise of applying the foregoing principles to the facts of this case, given that the appeal is moot and the accused has pled guilty. I will, however, make three brief observations.

[65] First, the 90-day period applicable to Mr. Myers' s. 525 hearing should have begun on November 24, 2016, which was the date of his s. 520 review. At that point, his sentence for the unrelated break and enter charges had been served, and he was not detained on any other matter: ruling on judicial interim release application, at para. 34. However, counsel for Mr. Myers was not contacted with regard to a s. 525 hearing until 110 days later (on March 14, 2017): Appellant's Condensed Book, Tab 8. The hearing itself did not take place until October 5, 2017, over 300 days after Mr. Myers' s. 520 review. While it is true that this case is exceptional in that Riley J. was

asked to give a preliminary ruling on s. 525, the fact remains that Mr. Myers waited a very long time for the hearing to occur. I would reiterate that when an accused is not required to be detained in custody in respect of any other matter for 90 days following a review under s. 520, the application for the hearing must be made immediately upon the expiration of 90 days, and the judge has an obligation to schedule that hearing without delay.

[66] Second, I would note that the parties faced various barriers in fixing a date for trial. Dates were offered in March, June, October and November 2017. Counsel for Mr. Myers submits that he offered to re-arrange his caseload to accommodate more dates and proposed to make considerable admissions based on the preliminary inquiry evidence in order to shorten the trial. He also applied unsuccessfully for severance of Mr. Myers from his co-accused, Mr. Richardson. Despite these efforts, a trial that was initially scheduled for late 2016 was ultimately set for March 2018, four months before the presumptive 30-month ceiling: *Jordan*, at para. 5. While this type of scheduling challenge is not uncommon, the delays were, as the Crown concedes, unfortunate. Nevertheless, scheduling issues caused by the fact that the Crown was proceeding jointly against Mr. Myers and Mr. Richardson appeared to have been a more significant factor in the delays than unreasonable behaviour on the part of either the Crown or the accused. It is possible that directions given under s. 525(9) or 526 could have prevented or mitigated the delays.

[67] Third, Mr. Myers was detained exclusively on the basis of the second ground under s. 515(10), despite the fact that he had a release plan involving a closely supervised treatment facility to address his substance abuse problems and multiple proposals to address the concern that he posed a risk to the public. It was within the bail judge's discretion to determine whether the release strategies presented by counsel addressed the risk that if released from custody, Mr. Myers would commit a criminal offence or interfere with the administration of justice within the meaning of s. 515(10)(b). That being said, judges and justices presiding over bail hearings should always give very careful consideration to release plans that involve supervised treatment for individuals with substance abuse and mental health issues. Release into treatment with appropriate conditions will often adequately address any risk raised under s. 515(10), and such a strategy is a less onerous alternative than provincial remand. It may also substantially address the root causes of the accused person's alleged criminal behaviour and reduce the likelihood of future criminal conduct. In accordance with the principles articulated in *Antic*, we must not lose sight of the fact that pre-trial detention is a measure of last resort.

VI. Disposition

[68] As the case is moot, I would simply allow the appeal and make no further order.

APPENDIX

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

Justification for detention in custody

515 (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.

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.

Directions for expediting proceedings

526 Subject to subsection 525(9), a court, judge or justice before which or whom an accused appears pursuant to this Part may give directions for expediting any proceedings in respect of the accused.

Appeal allowed.

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Vancouver.*

*Solicitor for the intervener the Attorney General of Ontario: Attorney
General of Ontario, Toronto.*

*Solicitors for the intervener the Canadian Civil Liberties
Association: Henein Hutchison, Toronto.*