

CANADA / JUDGMENT

R. v. Duncan

2020 BCSC 590

COURT

Supreme Court of British Columbia

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2020 BCSC 590 R. v. Duncan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Duncan,

2020 BCSC 590

Date: 20200416

Docket: 30574-1-W

Registry: Vancouver

Between:

Regina

v.

Brandon Travis Duncan

Before: The Honourable Mr. Justice Kent

Oral Reasons for Judgment

(Section 525 Detention Review)

Counsel for Crown:

Jacqueline M. Madden

Counsel for Accused:

Mo Vayeghan

Place and Date of Hearing:

Vancouver, B.C.

April 7, 2020

Place and Date of Judgment:

Vancouver, B.C.

April 16, 2020

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I. introduction and overview

- [1] The accused, Mr. Duncan, is before this Court for a detention review hearing pursuant to section 525 of the Criminal Code, R.S.C. 1985, c. C-46 [Criminal Code]. He has been in custody since June 14, 2019, essentially ten months to the date of this decision.
- [2] Mr. Duncan's detention in custody relates to multiple alleged offences, the first of which was breaking and entering ("B&E") into a dwelling house and committing theft therein contrary to section 348(1)(b) of the Criminal Code, an event which allegedly occurred on November 30th, 2017, some 28 months ago.
- [3] Subsequent alleged offences with respect to which Mr. Duncan has been charged include two further B&E's, failing to report and attend court, and mischief (willful damage to property at the North Fraser Pre-Trial Center). He was initially released on bail subject to increasingly restrictive conditions on three separate occasions. Finally, on October 11, 2019, at Mr. Duncan's fourth bail hearing before the Provincial Court, he was ordered into custody. At that time, he was confronting no less than seven Informations including a total of three B&E's and various non-appearances or breaches of bail conditions.
- [4] Since Mr. Duncan has been in custody in excess of 90 days and remains detained on three separate Informations (the other four have since been resolved by way of guilty pleas or a stay), he now applies for a detention review pursuant to section 525 of the Criminal Code. At this detention review hearing Mr. Duncan asks this Court to release him on bail--this time invoking the prospect of a COVID-19 pandemic in jails, amongst other grounds. This is Mr. Duncan's fifth bail hearing.
- [5] For the reasons that follow, Mr. Duncan's application to be released on bail is granted subject to certain stringent conditions.

II. alleged facts and history of proceedings

- [6] With the exception of certain matters related to Information 249411-1 (the November 30, 2017 B&E incident), counsel for Mr. Duncan does not object to the accuracy of the Crown's recitation of facts set out in the latter's written submissions. For the purposes of the present hearing, with some minor corrections and amplifications, I repeat and adopt the written submissions provided by the Crown. I have excised the paragraphs to which objection was taken by counsel:
 - (1) Facts alleged on Information 249411-1 [sworn Dec 1, 2017]
- 17. On Information 249411-1, Mr. Duncan is charged with one count of breaking and entering into a dwelling house with intent to commit an indictable offence therein, contrary to s. 348(1)(b) of the Code. The Crown alleges that on November 30, 2017 Mr. Duncan and the three other co-accused broke into a dwelling house located at 628 Empress Avenue in Burnaby, British Columbia.

18. At the time of the offence, Mr. Duncan was on parole following his completion of a three year sentence for a residential break-in. Mr. Duncan was subject to a 9:00 p.m. curfew as part of his parole conditions.
22. Finally, at around 5:55 p.m., the police followed Mr. Duncan and his co-accused to the property located at 628 Empress Avenue. The suspects wore gloves, placed hoods over their heads, and masked their faces. The police observed one male walk up to the front door and knock. At 5:56 p.m., police saw two males exit the rear yard. At 5:59 p.m., police observe three males run up the driveway. One male knocked on the front door, while another two males went to the side of the house. All three males were then seen going to the rear of the house. Within 10-15 seconds, police heard banging and smashing sounds coming from the rear of the residence. At 6:03 p.m., the police saw lights go on inside the residence upstairs. At 6:06 p.m., three males are seen running out the front door. The males were observed carrying bags that were not in their possession initially.
23. All three males returned to the known vehicle, which police continued to follow until it was pulled over at 7:15 p.m. Police took into custody the three suspects observed entering the residence (Mr. Duncan, Mr. Johnson and Mr. Sparrow), in addition to the driver (Ms. Philbrick). Upon searching the vehicle, police located various items belonging to the resident of 628 Empress Street, including jewellery, clothing and bags. The police also found masks and break-in instruments. Police later executed a search warrant at the motel which yielded other property reported stolen from other break and enters in November 2017.
24. Following Mr. Duncan's arrest on November 30, 2017, Information 249411-1 was sworn on December 1, 2017. The Crown proceeded by Indictment. Mr. Duncan remained in custody until January 24, 2018 when he was released on a \$3,000 Recognizance of Bail, with no deposit and no surety. Mr. Duncan was ordered to comply with twelve bail conditions, including that he reside at It's Up to You Recovery House in Surrey, British Columbia, and refrain from possessing any weapons, knives, or tools.
25. Eleven days later, on February 16, 2019 Mr. Duncan's bail was varied to allow him to reside at Choices Recovery House. Mr. Duncan's next court date was scheduled for February 26, 2019 which he failed to attend. The Crown did not lay charges for his failure to attend court on that date.
- (2) Facts alleged on Information 254610-1 [sworn Nov 27, 2019]
26. On Information 254610-1, Mr. Duncan is charged with three counts. On count one, he is charged under s. 348(1)(b) for breaking and entering into a dwelling house on April 23, 2018 and committing the indictable offence of theft. On count two, he is charged under s. 351(2) for having masked his face with the intent to commit an indictable offence. On count three, he is charged with a further break and enter into a dwelling house on April 26, 2018 and committing the indictable offence of theft, contrary to s. 348(1)(b).

27. The allegations on counts one and two are that on April 23, 2018 at around 4:00 p.m., Mr. Duncan entered a laneway home located at 6246 Brooks Street in Vancouver. One of the residents, Wei Chen, was present at the time. Mr. Chen confronted the suspect, whom Mr. Chen located inside one of the bedrooms. Mr. Chen told police that the suspect brandished a "spray" but did not deploy it. Mr. Chen let the suspect pass by him and exit the residence. Mr. Chen then told the suspect he would phone police, and he heard the suspect yell "run". Mr. Chen said the suspect wore a black bandana and provided a description to police that matched Mr. Duncan's physical characteristics.
28. The police obtained video evidence from neighboring properties which show Mr. Duncan and the co-accused Mr. Hart in the laneway before the break-in, and in the yard of the residence committing the break-in (see Exhibit 2 of the bail hearing for the video stills captured). In the video from the yard of the targeted residence (video 1), Mr. Duncan's face was masked and he wore gloves. Though the mask obscured his mouth and lower face, he is identifiable by his eyes, build, and hairstyle. The co-accused who kept watch had also masked his face and wore gloves.
29. In addition, police obtained a second video from another residence located at 6289 Butler Street, which is a three-minute walk from the offence location (video 2). In that video, Mr. Duncan is recognized by several police officers walking with another male approximately three to five minutes before the break-in. The males are wearing the same clothes as the males identified in video 1. The Crown submits that the video is very clear and a trier of fact would be able to recognize Mr. Duncan. In addition, the Crown will rely on recognition evidence from three police officers, including one officer who spent an entire day with Mr. Duncan in December 2016 when the officer accompanied Mr. Duncan to his father's funeral. On another occasion--approximately five months before he provided his recognition evidence--the officer had spent one hour with Mr. Duncan at a circle ceremony. The officer described Mr. Duncan's prominent lower jaw which is rounded and protruding. He also described Mr. Duncan as being stocky, muscular, and walking with a distinctive strut where his shoulders sway from side to side.
30. Stolen from the residence was \$140.00 US, a camera worth \$400, a watch, a wallet containing Taiwanese currency, as well as Mr. Chen's driver's licence, visa and debit cards. None of the property was recovered.
31. Count three relates to another residential break-in that occurred on April 26, 2018 at 5:10 a.m. The owner of the residence believes he accidentally left his back door open. The homeowner was sleeping inside the residence with his two children. He woke up when he heard a door close and went downstairs to investigate the noise. The owner later discovered that his wife's wallet had been stolen, which was found in a neighboring street.
32. One of the many cards stolen was a MasterCard, which was used in four transactions before 10:00 a.m. on May 2, 2018. Mr. Duncan was identified by police during two of those transactions, which were captured on video. In addition, the co-accused Mr. Hart made a

statement to police advising that he and Mr. Duncan were responsible for the break and enter. Mr. Hart said that Mr. Duncan had entered the residence armed with bear spray, and had re-appeared with a wallet and a number of cards, one of which he gave to Mr. Hart. He described Mr. Duncan's use of the card which was corroborated by various bank records.

33. On April 30, 2018 Mr. Duncan failed to report to his bail supervisor, which resulted in a warrant being issued pursuant to s. 524 of the Code. The warrant remained outstanding until May 5, 2018 when Mr. Duncan was arrested for breaching his bail after he was located in a stolen vehicle while in possession of a knife.
 34. Mr. Duncan remained in custody until he was released by the Honourable Judge St. Pierre on May 22, 2018 on a \$3,000 Recognizance with a cash deposit of \$750.00, with no surety. Mr. Duncan was ordered to comply with ten conditions, including that he reside with his mother in Richmond, not possess any weapons, and abide by a curfew seven days per week.
 35. One June 5, 2018 trial dates were set on Information 249411-1 [the November 30, 2017 B&E]. A seven day trial was set to begin on March 4, 2019. On February 8, 2019 Mr. Duncan's counsel withdrew from the record as he had lost contact with Mr. Duncan sometime in October 2018. On February 28, 2019 a warrant issued pursuant to s. 524 of the Code when Mr. Duncan failed to report to his bail supervisor. Mr. Duncan had not reported on any occasion between September 4, 2018 and February 28, 2019.
 36. On March 4, 2019 Mr. Duncan failed to appear for his seven day trial on Information 249411-1. A bench warrant was issued and he was charged with failure to attend court on Information 249411A-8. Mr. Duncan pled guilty to that offence on February 14, 2020.
- [3] Facts alleged on Information 254110-1 [sworn March 22, 2019]
37. On Information 254110-1, Mr. Duncan is charged with obstructing a police officer on March 21, 2019 [contrary to s. 129(a) of the Criminal Code]. On that date, at around 3:00 p.m., police officers saw a vehicle known to be associated with Mr. Duncan's co-accused, Mr. Brunet. Police were aware there was an outstanding warrant for Mr. Brunet in relation to charges of break and enter and possession of break-in tools.
 38. Police waited until they observed Mr. Brunet and two other males enter the vehicle. Police then followed the vehicle with the intention of initiating a traffic stop to execute the warrant on Mr. Brunet.
 39. Lights and sirens were activated by Sgt. De Sousa, who was driving a marked police vehicle directly behind Mr. Brunet's vehicle, in the 800 block of Nelson Street. Mr. Brunet's vehicle did not stop. Rather, the vehicle took a sharp right turn onto Howe Street, and proceeded southbound at a high rate of speed. Sgt. De Sousa was unable to pursue the vehicle at a close distance given the traffic congestion. As Mr. Brunet attempted to drive between occupied lanes, he struck three other vehicles. The driver and passengers then got out of the vehicle and began to run. Sgt. Desousa chased after one of the males, later identified as Mr. Duncan, and caught up with him.

40. Mr. Duncan provided a false name of "Joseph Sparrow" and a date of birth. Custody of Mr. Duncan was then transferred to Cst. Brancati. Mr. Duncan provided Cst. Brancati with the same false name and a different date of birth. The officer then read Mr. Duncan the obstruction warning and Mr. Duncan continued to provide a false name.
 41. Police eventually learned of Mr. Duncan's true identity and discovered that there was an outstanding warrant for him for failing to report, and for [failing to attend court]. Mr. Duncan was then taken into custody.
 42. While Mr. Duncan remained in custody, Information 254610-1 was sworn.
 43. In addition, on May 3, 2019 while in custody Mr. Duncan and four other co-accused committed mischief by wilfully damaging property at the North Fraser Pretrial Centre. Those allegations resulted in Information 102646-1 being sworn on September 27, 2019, to which Mr. Duncan pled guilty on February 5, 2020.
 44. Mr. Duncan was then released on June 5, 2019 by the Honourable Judge Dhillon on a \$3,000 Recognizance, with a \$750.00 cash deposit, with no surety. The Recognizance of Bail listed 16 conditions, including that Mr. Duncan reside with his uncle Gary Point, abide by a curfew, abide by an area restriction in the Musqueam Reserve, and wear an ankle bracelet for electronic monitoring.
 45. Two days later, on June 7, 2019 Mr. Duncan failed to report to his bail supervisor. He again failed to report on June 13, 2019 which resulted in Information 249411-A-11 being sworn. As part of a plea resolution, the Crown directed a stay of proceedings on this Information on February 14, 2020.
 46. On June 14, 2019 BC Community Corrections contacted the police when, at 4:30 a.m., the GPS indicated that Mr. Duncan was neither in his residence nor within his area restriction. Mr. Duncan was believed to be traveling in a car due to the fast rate of speed at which he was travelling in the 1500 block of Powell Street in Vancouver.
 47. A police officer attended the area and located Mr. Duncan walking along Powell Street. Mr. Duncan provided the officer with the false name of "Joseph Sparrow". The officer located Joseph Sparrow's photo on the police database which revealed that Mr. Duncan was lying. When asked about the ankle monitor, Mr. Duncan advised that it was a heart rate monitor. The officer eventually confirmed Mr. Duncan's identity through the police database and Mr. Duncan's unique tattoos. Mr. Duncan was charged on Information 249411-AC-10 with two counts of breaching his bail conditions (his curfew and area restriction), and one count of obstructing police. Mr. Duncan pled guilty to breaching his bail conditions on February 14, 2020 and the Crown stayed the remaining count of obstructing police.
- [7] Mr. Duncan's trials are presently scheduled for the following dates with respect to the following Informations:
- Information 254110-1 (March 21, 2019 obstruction of police officer) - May 19-21, 2020;

- Information 254610-1 (April 23 and 26, 2018 B&E's) - August 10-13 and 24-25, 2020; and
- Information 249411-1 (November 30, 2017 B&E) - September 15-October 6, 2020.

[8] To date, none of Mr. Duncan's trial dates have been directly impacted by the COVID-19 pandemic or the Provincial Court Directive issued in that regard.

III. Mr. Duncan's BACKGROUND and criminal record

- [9] Mr. Duncan was born May 30, 1987 in Vancouver and is currently 32 years old. He is a member of the Musqueam First Nation and his formative years were spent on the Musqueam reserve. His life reflects the intergenerational legacy of the horrific historical treatment of Aboriginal peoples in this country: parental neglect; apprehension by social workers; foster homes; early exposure to chronic alcohol and substance abuse, criminality and poverty; vocational and educational marginalization; unemployment, and the like.
- [10] At this hearing, this Court was provided with two Gladue reports for Mr. Duncan. The first report is dated July 17, 2015 (for the sentencing with respect to an earlier B&E conviction) and the second is an "updated" report dated January 11, 2020. Three of Mr. Duncan's four grandparents were residential school survivors. His own parents were chronically dysfunctional alcoholics and drug abusers with poor parenting skills and who were frequently absent from the home. They separated in 2013 and Mr. Duncan's father died of a heroin overdose in 2018.
- [11] Mr. Duncan has an older sister whom he characterizes as "the only one in my family that doesn't use drugs and who leads a normal life". His younger brother also has a history of substance abuse but in the past three years has largely overcome the problem and is now a commercial crab fisherman living on the reserve. Mr. Duncan has worked with his brother in the past and he hopes to do so again in the future. Otherwise, Mr. Duncan's work history is minimal.
- [12] Mr. Duncan has a lengthy criminal history that began in March 2000 as a youth. At the time of his bail hearing before the Provincial Court in October 2019, his adult record included multiple convictions for assault, theft and three B&E's. The three B&E convictions were for events that occurred in March 2007, June 2010, and September 2013 and each resulted in jail sentences of two to three-years. He was on probation following release from jail for his last B&E conviction when the November 30, 2017 B&E occurred.
- [13] As noted above, since the October 11, 2019 bail hearing, Mr. Duncan has received four further convictions for mischief (property damage while in jail), breach of bail on two occasions, and failure to appear.

IV. the provincial court's decision to detain Mr. Duncan

- [14] The last bail proceeding in the Provincial Court occurred before Judge M. Giardini on October 11, 2019. Mr. Duncan was represented by the same counsel who appeared before me on this detention review hearing. I have read the transcript of the October 11, 2019 hearing.
- [15] Judge Giardini was not presented with either of the Gladue reports before me. When she inquired why such a report had not been prepared for the bail proceeding, she was advised that issues respecting the funding of such reports, combined with the recent retainer of counsel, prevented such a report being obtained in time. Counsel did suggest, however, that "past sentences received did not fully consider" the earlier Gladue report.
- [16] Notwithstanding the absence of a Gladue report, counsel explained to Judge Giardini Mr. Duncan's very unfortunate family history. He stressed that "the intergenerational effects of poverty, helplessness, residential school, drug addictions, familial fragmentation apply to [Mr. Duncan]". He stated that "the Gladue factors are present here to the extreme" and submitted that the court "has the opportunity to play an important remedial role in the reconciliation process by allowing this young Aboriginal person to seek the necessary rehabilitation that he needs".
- [17] The rehabilitation that was proposed to the Provincial Court is essentially the same release plan before this Court on detention review--namely attendance at the Logan Lake residential facility operated by VisionQuest Recovery Society, for at least six months followed by employment in the fishing business operated by Mr. Duncan's brother. A letter from the VisionQuest Recovery Society was tendered as an Exhibit. Counsel explained the unique nature of their program, their strong relationship with the local RCMP detachment and emphasized that this was a "crucial opportunity" and "basically [Mr. Duncan's] last chance" to turn his life around.
- [18] Judge Giardini delivered her decision denying bail on the same day. She noted the constitutional rights of an accused person to be presumed innocent until proven guilty and also not to be denied reasonable bail without just cause (section 11 of the Canadian Charter of Rights and Freedoms). She noted and explained the "ladder principle" articulated by the Supreme Court in *R. v. Antic*, 2017 SCC 27 (the application of increasingly strict bail conditions), and repeated the three grounds identified in section 515(10) of the Criminal Code as justification for detention in custody (necessary to ensure the accused's attendance in court, necessary for the protection or safety of the public, and necessary to maintain confidence in the administration of justice).
- [19] Judge Giardini referred to and applied the test for detention on the secondary ground (protection or safety of the public, section 515(10)(b)) as articulated in this province by the commonly cited case of *R. v. Abdel-Rahman*, 2010 BCSC 189, namely:
1. If released, is there a risk the accused will commit an offense?

2. Does the magnitude of that risk amount to a "substantial likelihood"?
3. Does that risk constitute a danger to public safety? and
4. Can that danger to public safety not be prevented or reduced to an acceptable level by bail conditions (such as reporting to authorities, curfew, no-contact, mobility restrictions, sureties or cash bail)?

[20] In the result, Judge Giardini found that Mr. Duncan's dismal history of criminality and his repeated inability to abide by past bail conditions required ongoing detention because "the identified danger to the public cannot be prevented or reduced by releasing him on conditions" (para 111). She described the proposed conditions as "sheer lunacy" (para 110).

[21] It should also be noted that in the course of her analysis, Judge Giardini acknowledged that she had to take into account the "Gladue factors regarding Mr. Duncan and the problems that have plagued him which are generational in nature" (para 79). She expressly noted the high regard in which the VisionQuest program was held and the fact that it was "out in a remote setting" (para 110). Notwithstanding these factors, she appears to have been of the view they were trumped by the danger to the public manifested by Mr. Duncan's past behaviour.

V. legal principles re detention reviews

[22] Detention reviews are governed by section 525 of the Criminal Code, the relevant parts of which for present purposes include:

525 (1) The person having the custody of an accused -- who has been charged with an offence other than an offence listed in section 469, who is being detained in custody pending their trial for that offence and who is not required to be detained in custody in respect of any other matter -- shall apply to a judge having jurisdiction in the place in which the accused is in custody to fix a date for a hearing to determine whether or not the accused should be released from custody, if the trial has not commenced within 90 days from

- (a) the day on which the accused was taken before a justice under section 503; or
- (b) in the case where an order that the accused be detained in custody has been made under section 521, paragraph 523.1(3)(b)(ii) or section 524, or a decision has been made with respect to a review under section 520, the later of the day on which the accused was taken into custody under that order and the day of the decision.

The person shall make the application immediately after the expiry of those 90 days.

Cancellation of hearing

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

Consideration of proceeding's progression

- (4) On the hearing described in subsection (1), the judge shall consider whether the prosecutor or the accused has been responsible for any delay and, if the judge is concerned that the proceedings are progressing slowly and that an unreasonable delay may result, the judge may
- (a) give directions for expediting the proceedings; or
 - (b) require a further hearing under this section within 90 days or any other period that the judge considers appropriate in the circumstances.
- (9) [Repealed, 2019, c. 25, s. 235]

[23] The leading case respecting proceedings under section 525 of the Criminal Code is *R. v. Myers*, 2019 SCC 18, in which the Supreme Court of Canada made the following observations:

- "The purpose of the section 525 hearing is to prevent accused persons from languishing in pre-trial custody and to ensure a prompt trial:" headnote;
- "The right not to be denied reasonable bail without just cause is enshrined in section 11(e) of the Canadian Charter, and operates as a key organizing principle of part XVI of the Criminal Code" [Appearance of Accused Before a Justice and Interim Release]: headnote;
- "In Canadian law, the release of accused persons is the cardinal rule and detention the exception," and "release is favoured at the earliest reasonable opportunity and on the least onerous grounds:" headnote;
- "Nonetheless, on any given day in Canada, nearly half of the individuals in provincial jails are accused persons in pre-trial custody:" para. 26;
- "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, healthcare and basic programming:" para. 26;
- "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:" para. 26; and
- "The experience of pre-trial detention can have serious detrimental impact 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:" headnote.

[24] The Court in *Myers* summarized the procedure and analytical framework for a section 525 detention review hearing as follows:

- [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.
- [25] In the context of bail generally and detention reviews in particular, one cannot ignore what the Supreme Court of Canada has called "the staggering injustice currently experienced by Aboriginal peoples with the criminal justice system" in *Canada: R. v. Gladue* [1999] 1 SCR 688 at para. 88. Both *Gladue* and *R. v. Ipeelee*, 2012 SCC 13, are filled with sobering observations regarding the "sad and pressing social problem" giving rise to "the drastic overrepresentation of Aboriginal peoples within both the Canadian prison population and the criminal justice system:" *Gladue*, para 64. While both judgments address the subject of sentencing Aboriginal offenders, much of their commentary applies with equal force to interim release and bail reviews:
- Overincarceration has had a devastating impact on Canada's Aboriginal peoples: *Gladue*, para. 51;

- Placed in an historical context, the prison has become for many younger Aboriginal persons the contemporary equivalent of what Indian Residential School represented for their parents or grandparents: Gladue, para. 60;
 - "The unbalanced ratio of imprisonment for [A]boriginal offenders flows from a number of sources, including poverty, substance abuse, lack of education, and the lack of employment opportunities for [A]boriginal people. It arises also from bias against [A]boriginal people and from an unfortunate institutional approach that is more inclined to refuse bail and to impose more and longer prison terms for [A]boriginal offenders:" Gladue, para. 65;
 - 13 years after Gladue, "statistics indicate that the overrepresentation and alienation of Aboriginal peoples in the criminal justice system" is worse than ever: Ipeelee, para 62;
 - "[T]he history of colonialism, displacement and residential schools continues to translate into lower educational attainment, lower incomes, high unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples:" Ipeelee, para 60; and
 - "When the social, political and economic aspects of our society place Aboriginal people disproportionately within the ranks of the [unemployed, transients, the poorly educated], our society literally sentences more of them to jail. This is systemic discrimination Sentencing judges, as front-line workers in the criminal justice system, are in the best position to ensure that they are not contributing to ongoing systemic racial discrimination:" Ipeelee, para 67.
- [26] Gladue and Ipeelee call upon judges to use a different method of analysis in determining a fit sentence for Aboriginal offenders, one that requires both 1) a recognition of an accused's background factors and the way they may reduce moral culpability and 2) a careful reassessment of the role of retributive and restorative justice in sentencing Indigenous persons. This second part of the analysis invites the court to craft creative sentences, and by extension bail determinations, that respond to the needs, experiences and perspectives of Aboriginal peoples and, where available, to pursue options that are culturally responsive and appropriate.
- [27] It is noteworthy that since the Supreme Court of Canada's trilogy on bail (Myers, Antic, and R. v. St-Cloud, 2015 SCC 27), Parliament has amended the Criminal Code, effective December 18, 2019, to add the following sections:

Principle of restraint

493.1 In making a decision under this Part, a peace officer, justice or judge shall give primary consideration to the release of the accused at the earliest reasonable opportunity and on the least onerous conditions that are appropriate in the circumstances, including conditions that are reasonably practicable for the accused to comply with, while taking into account the grounds referred to in subsection 498(1.1) or 515(10), as the case may be.

Aboriginal accused or vulnerable populations

493.2 In making a decision under this Part, a peace officer, justice or judge shall give particular attention to the circumstances of

- (a) Aboriginal accused; and
- (b) accused who belong to a vulnerable population that is overrepresented in the criminal justice system and that is disadvantaged in obtaining release under this Part.

[28] In the context of restorative justice for Aboriginal offenders seeking bail, the concluding paragraph in Myers may be apposite:

[67] judges and justices presiding over bail hearings should always give very careful consideration to release plans that involves 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. parties' positions on review

[29] Counsel for Mr. Duncan argues that new evidence combines with a change in circumstances to warrant a re-visiting and reassessment of the restrictive and supervised treatment program at VisionQuest as a viable and proportionate alternative to Mr. Duncan's continued detention. These new circumstances and evidence includes the updated Gladue report which recommends VisionQuest as a possible alternative treatment program, additional information regarding the specifics of VisionQuest's culturally relevant programming and high level of supervision, and the elevated risk of exposure to COVID-19 in a jail/detention centre setting. Counsel for Mr. Duncan also proposes a cash deposit of \$500, a modest sum for many but the only amount that Mr. Duncan can put together and which represents "the most restrictive form of bail on the Antic ladder".

[30] The Crown argues that Mr. Duncan's dismal history of release vividly demonstrates his incorrigibility and the inability for him to be managed in the community through a bail regime. While acknowledging that the health risks of COVID-19 are an important consideration, the Crown submits that there is no evidence that the correctional authorities are not taking appropriate steps to respond to the epidemic. According to the Crown, Mr. Duncan's proposed release plan is simply insufficient to allay very valid concerns for the protection and safety of the public. The Crown asks that Mr. Duncan's application for bail be dismissed.

VII. analysis

[31] According to Myers, the overarching question before me is whether the continued detention of Mr. Duncan in custody until his trial(s) is still justified on one or more of the three grounds specified in section 515(10) of the Criminal Code. Those grounds are as follows:

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 (the "primary" grounds);
- (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 (the "secondary" grounds); 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 (the "tertiary" grounds).

Primary and Secondary Grounds

[32] Judge Giardini relied on Mr. Duncan's abysmal record of repeated criminal activity (multiple B&E's), failures to report and other breaches of increasingly stringent bail conditions to conclude there existed a substantial likelihood that, if released from custody, Mr. Duncan would commit further criminal offenses of a sort that would constitute a danger to the public. Given that history, and without more, I very likely would have reached the same conclusion.

[33] Where I respectfully disagree with Judge Giardini, however, is whether the risk of Mr. Duncan reoffending in a manner dangerous to the public in general is capable of being prevented or reduced to an acceptable level by restrictive bail conditions. In particular, I am satisfied that the combination of VisionQuest's isolated residential treatment program and strict mobility restrictions, along with Mr. Duncan's genuine intention to deal with his addiction problems (the honesty of which, Judge Giardini accepted) reduces any risk to public safety to an acceptable level, and bail should no longer be denied to Mr. Duncan on

either the primary or secondary grounds set out in s. 515(10) of the Criminal Code.

- [34] The VisionQuest residential program is located on Tunkwa Lake Road several kilometres north of the small township of Logan Lake, approximately 80 km southwest of Kamloops, BC. The facility is a formerly unused corrections camp which houses up to 60 clients. Any clients leaving the property for any reason must be accompanied by staff, unless permission otherwise has been granted. Complete abstinence from all alcohol and drugs is mandatory. Core programs include anger management, relapse prevention, and life skills. Other activities include a GED program, (through School District 73), Alcoholics Anonymous/Narcotics Anonymous meetings on site, a sweat lodge, Talking Circles, and First Nations-related arts and crafts. The program is for a minimum of six months (and up to twelve months) and all clients are required to perform 100 hours of community work.
- [35] Mr. Duncan has already been detained in the North Fraser Pretrial Centre for 10 months. While he has been involved in an incident of property damage at that facility, there is no evidence that his drug habit which formerly fuelled his past B&E offences has continued. His current sobriety and the isolated nature of the VisionQuest facility substantially mitigates the risk of further criminal activity posing any danger to the public. So does the fact that Mr. Duncan faces trial procedures in several months' time which carry the prospect of a multi-year term of consecutive sentences: as a result, he is highly motivated to demonstrate responsible and reliable behaviour in the period of time leading up to any future sentencing procedures.
- [36] Counsel for Mr. Duncan again submits that participation in the VisionQuest program represents a "once-in-a-lifetime opportunity" and provides "one last shot" at Mr. Duncan getting a reduced sentence in the future, by demonstrating that he is on his way to "turning his life around". This is a reference to *R. v. Voong*, 2015 BCCA 285, which holds that in rare and exceptional circumstances, rehabilitation may be better served by a suspended sentence and a probation order rather than incarceration. Such an outcome recently occurred in *R. v. Schneider*, 2019 BCCA 310, where, interestingly enough, one of the terms of probation imposed by the Court of Appeal required residence at the VisionQuest facility near Logan Lake. The Court of Appeal noted with approval that the facility "has strict rules and enforcement policies to assist in rehabilitation:" *Schneider*, para 32.
- [37] As noted earlier, this Court is required to consider creative bail arrangements that are culturally responsive and appropriate to the needs, experiences, and perspectives of Aboriginal peoples generally, as well as to the particular situation of intergenerational abuse manifested in Mr. Duncan's life to date. As stated recently by our Court of Appeal in *R. v. Louie*, 2019 BCCA 257, "Gladue factors are relevant to bail applications:" para. 35. In *Louie*, our Court of Appeal endorsed the proposition that the court must consider "the types of release plans, enforcement or control procedures and sanctions that would, because of [the accused's] particular Aboriginal heritage or connections, be appropriate in the circumstances of the offender and would satisfy the primary, secondary and tertiary grounds for release:" para. 35.

- [38] I am satisfied that a release plan requiring Mr. Duncan's participation in VisionQuest's isolated residential treatment program combined with strict mobility restrictions would be a culturally responsive and appropriate application of the Gladue factors in this particular case.
- [39] There also remains the question of the COVID-19 pandemic. Much of the case law that has developed thus far on this subject deals with the tertiary ground for detention. However, there are an increasing number of cases which have held that the risk of infection posed to inmates while incarcerated in detention centers awaiting trials is also a valid factor when considering the secondary ground for detention specified in section 515(10)(b) of the Criminal Code (see for example, *R. v. T.K.*, 2020 ONSC 1935 at para. 60).
- [40] A number of BC cases have held that COVID-19 concerns in the institutional setting will not warrant release from detention in the absence of an adequate release plan: *R. v. Yaman*, 2020 BCPC 56; *R. v. Peters* (BCSC, VA 30484W, April 3, 2020); *R. v. Leppington*, 2020 BCSC 546; and *R. v. Pavlik* (BCSC, VA 30240W, April 8, 2020). Other cases have held that a satisfactory release plan, combines with COVID-19 concerns, warrants release on bail: *R. v. Janvier-Charland* (BCSC No. KE 91113, April 3, 2020), *R. v. Garcia* (BCPC, Surrey File No. 236955-1, April 3, 2020), (*R. v. Duncan* (BCSC, VA30577W, April 8, 2020).
- [41] In the present case, there was no evidence presented that the COVID-19 infection has spread to the North Fraser Pre-Trial center. The government is well aware of the risks involved and has implemented a number of measures designed to reduce the spread of the infection in jails. Some of the cases referred to above describe the specifics of the measures taken. Notwithstanding these efforts, however, it must be noted that the medium-security prison in Mission, BC is currently experiencing the worst outbreak of COVID-19 in Canada with 42 prisoners and 6 staff members affected so far, and 7 of those prisoners were in the hospital as of April 14, 2020. It is certainly possible, perhaps even probable, that notwithstanding Provincial and Federal government efforts to reduce transmission, the COVID-19 virus will spread to other institutions including North Fraser Pre-Trial Center.
- [42] In this particular case I have already concluded that Mr. Duncan's proposed release plan satisfactorily addresses public safety concerns. Had it been necessary to do so, I would have relied on COVID-19 concerns to tip the balance in favour of interim release rather than continued detention on secondary grounds.

Tertiary Grounds

- [43] Having concluded that the secondary ground for continued detention has been adequately addressed by Mr. Duncan's proposed release plan, and is thus no longer applicable, the question arises whether detention is nonetheless warranted on the tertiary ground i.e. "to maintain confidence in the administration of justice". This question could perhaps be dealt with summarily since the Crown made no submissions on the point, but for the sake of completeness I will nonetheless address the matter.

- [44] The Supreme Court of Canada exhaustively reviewed the law respecting sections 515(10)(c) of the Criminal Code in *St- Cloud*:
- [87] I would summarize the essential principles that must guide justices in applying s. 515(10)(c) Cr. C. as follows:
- Section 515(10)(c) Cr. C. does not create a residual ground for detention that applies only where the first two grounds for detention ((a) and (b)) are not satisfied. It is a distinct ground that itself provides a basis for ordering the pre-trial detention of an accused.
 - Section 515(10)(c) Cr. C. must not be interpreted narrowly (or applied sparingly) and should not be applied only in rare cases or exceptional circumstances or only to certain types of crimes.
 - The four circumstances listed in s. 515(10)(c) Cr. C. are not exhaustive.
 - A court must not order detention automatically even where the four listed circumstances support such a result.
 - The court must instead consider all the circumstances of each case, paying particular attention to the four listed circumstances.
 - The question whether a crime is "unexplainable" or "unexplained" is not a criterion that should guide the analysis.
 - No single circumstance is determinative. The justice must consider the combined effect of all the circumstances of each case to determine whether detention is justified.
 - This involves balancing all the relevant circumstances. At the end of this balancing exercise, the ultimate question to be asked by the court is whether detention is necessary to maintain confidence in the administration of justice. This is the test to be met under s. 515(10)(c).
 - To answer this question, the court must adopt the perspective of the "public", that is, the perspective of a reasonable person who is properly informed about the philosophy of the legislative provisions, Charter values and the actual circumstances of the case. However, this person is not a legal expert and is not able to appreciate the subtleties of the various defences that are available to the accused.
 - This reasonable person's confidence in the administration of justice may be undermined not only if a court declines to order detention where detention is justified having regard to the circumstances of the case, but also if it orders detention where detention is not justified.
- [88] In conclusion, if the crime is serious or very violent, if there is overwhelming evidence against the accused and if the victim or victims were vulnerable, pre-trial detention will usually be ordered.

- [45] While the court is required to pay particular attention to the four factors listed in sections 515(10)(c)(i)-(iv), it will also take into account all other relevant circumstances when undertaking the necessary "balancing exercise" required in reaching a determination of whether detention is necessary to maintain confidence in the administration of justice. Here, I note that the relevant circumstances before me include concerns respecting 1) the COVID-19 pandemic and 2) the socio-historical context of Aboriginal overincarceration, mistreatment and systemic discrimination.
- [46] The Crown appears to have a reasonably strong case against Mr. Duncan. In one instance, Mr. Duncan was observed by the police entering into the premises. In the others, the Crown relies on video and eyewitness recognition evidence of Mr. Duncan either committing the break-in or using one of the stolen credit cards. Additionally, Mr. Duncan's co-accused, with respect to the April 26, 2018 B&E, admits the event and Mr. Duncan's participation in same.
- [47] The B&E offenses are serious. However, no physical violence was involved. The occupants of the home were actually on the premises for two of the B&E events and one of them was confronted by Mr. Duncan with a spray canister when he was making his escape. There is no evidence of any firearm being used in the commission of the offences.
- [48] Section 348(1)(d) of the Criminal Code makes any person convicted of breaking and entering into a dwelling house for the purpose of theft liable to imprisonment for life. The Crown concedes, however, that if convicted of all three B&E offenses, Mr. Duncan would only be confronting consecutive sentences totaling 7 to 8 years. The defense suggests an even lower range.
- [49] In summary, Mr. Duncan is a drug addict with a criminal history of property crimes fuelled by his addiction. That addiction and most, if not all, of the disadvantages he has suffered in life are the product of the sad social problem that is the legacy of the mistreatment of Aboriginal peoples in Canada. Even though he has the constitutional right to be presumed innocent until proven guilty, his repeated criminal conduct and breach of bail conditions has resulted in him being detained in pre-trial custody for 10 months in a facility which is overcrowded and which provides limited access to recreation and basic programming. That facility may soon become infected by COVID-19. Mr. Duncan's trials on the B&E charges are now 4 to 5 months away. It is proposed that he be released from custody pending those trials based on a plan that involves limited mobility and enrolment in a residential treatment program at a remote location, one which is designed specifically for individuals with Mr. Duncan's unique background.
- [50] In all these circumstances, I conclude that a reasonable person who is properly informed about Charter values, and the principles of reasonable bail, would not consider the administration of justice to be undermined if Mr. Duncan were now to be released on bail under strict terms. The further detention of Mr. Duncan is therefore not justified under section 515(10)(c) of the Criminal Code.

VIII. terms of release order

- [51] VisionQuest Recovery Society is not before this Court and this Court has no ability to order that entity to do anything in terms of supervising Mr. Duncan or otherwise acting as his "civilian gaoler". The Society has the right to discharge/expel from their program any client who fails to comply with their policies and camp rules. While the Society has agreed to accept Mr. Duncan into their program and is also prepared to pick him up from the North Fraser Pre-Trial Centre for transport to its Lake Logan facility, it assumes no responsibility for transporting clients to court for trial purposes or for any accommodation/supervision requirements during the course of any trial.
- [52] As well, the COVID-19 pandemic has also affected the manner in which provincial bail supervisors manage any accused's release into the community. Some coordination between any bail supervisor assigned to Mr. Duncan and the VisionQuest Recovery Society is thus required, likely with the initial assistance of both Crown and defence counsel. This Court assumes that counsel will provide all necessary assistance to ensure the bail regime is put in place with all appropriate efficiency and practicality.
- [53] The Provincial Court has adjourned all criminal trials currently scheduled for the period concluding May 16, 2020. Given the likely continuation of the COVID-19 quarantine/social distancing regime, it is possible, perhaps probable, that Mr. Duncan's trial on information 254110-1 set for May 19-21, 2020 will be adjourned. It is this Court's expectation, however, that the trials on information's 254610-1 and 249411-1 set in August and September 2020 will proceed and the bail instructions constructed accordingly.
- [54] This Court therefore orders that upon the payment of \$500 cash bail, Mr. Duncan shall be released from custody subject to the following terms and conditions:
1. You must report by telephone to a bail supervisor at 102 - 455 Columbia Street, Kamloops, BC V2C 6K4 and thereafter as directed by the bail supervisor;
 2. You must inform your bail supervisor of your enrolment in the residential rehabilitation program operated by the VisionQuest Recovery Society at 7185 Tunkwa Lake Road, Logan Lake, BC ("VQ Logan Lake") and provide to that supervisor, any additional information that might be requested with respect to the program, including details respecting their proposed transportation of your person from the North Fraser Pre-Trial Centre to the VQ Logan Lake;
 3. You will be released from custody at North Fraser Pre-Trial Centre into the custody of a VQ staff member who will immediately thereafter transport you to the VQ Logan Lake property at 7185 Tunkwa Lake Road for admission into the said residential rehabilitation program;
 4. For the six month period following your admission into the VQ Logan Lake residential rehabilitation program, and thereafter for such further time as VQ Logan Lake requires or the court orders, you must reside at the VQ Logan Lake property and you must not leave that property except (a) for a medical emergency, (b) in the company of a staff member of VQ Logan Lake, or (c) otherwise in accordance with written permission from your bail

supervisor, in which event you must have the written permission in your possession at all times during your absence from the property;

5. You must abide by all the rules and regulations of VQ Logan Lake, including any residence curfew hours as long as they do not conflict with the terms of this order or the directions of your bail supervisor. If any such conflict arises, you must immediately inform your bail supervisor of the same;
6. You must not possess or consume alcohol, drugs or any other intoxicating substance except in accordance with a valid medical prescription;
7. You must attend, participate in and successfully complete any intake, assessment, counselling, activities or programming directed to be completed by VQ Logan Lake or by your bail supervisor. Without limiting the general nature of this condition, this includes any intakes, assessments, counselling, activities or programs that relate to alcohol or drug abuse or mental health;
8. You must provide your contact information to your bail supervisor along with your phone number and you must not change that phone number without written permission in advance from your bail supervisor;
9. You must appear before the court as and when required to do so by the court. Any such court appearance which requires overnight absences from the VQ Logan Lake must be conducted in strict accordance with all conditions imposed by the written permission of your bail supervisor secured at least one week before any such absence is required. In particular, but without limiting the generality of the foregoing, you will strictly comply with all such conditions that may be imposed by the bail supervisor with respect to transportation to and from court, and temporary residence with family members on the Musqueam Indian Reserve No. 2 in Vancouver, BC, including any curfew hours;
10. You must provide to VQ Logan Lake the name and contact information of your bail supervisor including email and telephone numbers. If 1) VQ Logan Lake elects to terminate your further involvement in the residential rehabilitation program for any reason or VQ Logan Lake learns of any breach of these bail conditions, you authorize (and are hereby deemed to have authorized) VQ Logan Lake to immediately inform your bail supervisor and the RCMP and to arrange for the RCMP to take you into custody until further order of the Court (for which detention this bail order is sufficient authority);
11. You must keep the peace and be of good behaviour;
12. Except while attending court or through counsel, you must have no contact directly or indirectly with, and you must not attend any known residence, workplace or educational facility of Jared Rae Daniel Johnson, Corey Lee Philbrick, Christopher Lee Sparrow, Bradley Hart, Andre Brunet, Samantha Chyi-yu Fan, Christopher Fan, John Hua, Connie Huang, Leo Huang, Stanford Chen, Wei Chen or Patricia Com

13. You must not at any time have in your possession or in any way use:

13.1 any type of firearm or other weapon (whether or not prohibited, restricted or as defined in the Criminal Code);

13.2 any bear spray, pepper spray or other substances used for similar purposes;

13.3 any tools capable of being used as a weapon or to physically harm any person, except as permitted by VQ Logan lake as part of their rehabilitation program;

13.4 any knife or similar implement, except for the immediate preparation and consumption of food;

[55] As is apparent from the above, the Court expects that Mr. Duncan will be in residence at VQ Logan Lake and will be participating in their rehabilitation program at that location until the trial of the B&E charges takes place in August and September 2020. If those trials are adjourned, whether from COVID-19 concerns or for any other reason, a further bail review hearing must occur on all outstanding Informations before the expiry of the sixth month period of mandatory residence required by the bail conditions.

"Kent J."

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