
CANADA / JUDGMENT

R. v. Ibanez

2020 BCSC 233

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Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Ibanez,

2020 BCSC 233

Date: 20200221

Docket: 29822W

Registry: Vancouver

Regina

v.

Benny Ibanez

Before: The Honourable Madam Justice Devlin

Reasons for Judgment re: 525 Detention Review

Counsel for the Crown:

N.M.D. Reithmeier

Counsel for the Accused:

K. Westell

C.D. Rose

Place and Dates of Hearing:

New Westminster, B.C.

January 6, 9, 2020

February 4, 2020

Place and Date of Ruling given to Parties with Reasons to Follow:

New Westminster, B.C.

February 12, 2020

Place and Date of Judgment:

New Westminster, B.C.

February 21, 2020

INTRODUCTION

- [1] The issue before me on this application is whether s. 525 of the Criminal Code, R.S.C. 1985, c. C-46 [Code], mandates the court to hold successive detention review hearings every 90 days for an accused charged with an indictable offence following the first detention review hearing. This inquiry is limited to a consideration of s.525 as it was prior to the amendments that came into force on December 18, 2019 by virtue of An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts, S.C. 2019 c. 25 [Bill C-75].
- [2] The parties agree that a determination of this issue involves an exercise in statutory interpretation. Counsel for Mr. Ibanez submits that a plain reading of s. 525, particularly in light of R. v. Myers, 2019 SCC 18 [Myers], supports a finding of successive reviews. He submits Myers has displaced the older authorities in which courts explicitly rejected the view that successive reviews are required under s. 525. Counsel also relies on the contents of the Charter Statement respecting Bill C-75 by the Minister of Justice and tabled in the House of Commons on March 29, 2019 (the "Charter Statement") as well as the recent amendments to s. 525 in support of his position.
- [3] The Crown submits that the pre-Myers cases have not been overturned and that there is nothing in Myers to support the interpretation urged by counsel for Mr. Ibanez. In support of its position, the Crown points to the recent amendments to s. 525 which grant the court discretion to order a further detention review hearing in relation to an accused person. The Crown acknowledges the Charter Statement seems to indicate that Parliament contemplated successive reviews under s. 525, but argues that that document is neither binding nor determinative of the issue.
- [4] On February 12, 2020, I advised counsel of my finding that s. 525 in its pre-amendment form does not mandate successive 90-day detention review hearings, with written reasons to follow. These are those reasons.

PROCEDURAL HISTORY

- [5] On January 15, 2019, Mr. Ibanez was charged with attempted murder in connection with an incident which occurred on January 14, 2019.
- [6] On March 11, 2019, Mr. Ibanez appeared before the Honourable Judge Gaffar in Provincial Court on a judicial interim release application. On April 18, 2019, Gaffar P.C.J., ordered Mr. Ibanez detained on the tertiary ground pursuant to s. 515(10)(c) of the Code.
- [7] On May 6, 2019, a new Information against Mr. Ibanez was sworn which modified the wording of the charge.
- [8] On July 24, 2019, Mr. Ibanez appeared before Madam Justice Fitzpatrick for a s. 525 detention review hearing. On July 31, 2019, Fitzpatrick J. ordered Mr. Ibanez's continued detention.
- [9] On August 22, 2019, the Honourable Judge Bowry ordered Mr. Ibanez to stand trial in the Supreme Court.
- [10] On September 6, 2019, an Indictment charging Mr. Ibanez with attempted murder was preferred. On September 19, 2019, a 15-day judge-alone trial was set for September 8, 2020, in New Westminster.
- [11] On November 20, 2019, the person having custody of Mr. Ibanez applied under s. 525 for a detention review hearing.
- [12] On January 6, 2020, the hearing commenced before me and continued on February 4, 2020.

RELEVANT STATUTORY PROVISIONS

- [13] Prior to the December 18, 2019 amendments, s. 525 stated:

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.

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.

[14] Following the December 2019 amendments, s. 525 now states:

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.

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.

Directions for expediting proceedings

526 Subject to subsection 525(4), a court, judge or justice before which or whom an accused appears under this Part may give directions for expediting any proceedings in respect of the accused.

ISSUE

- [15] The sole issue on this application is whether s. 525 of the Code as it read before December 18, 2019, mandates successive detention reviews every 90 days for an accused person charged with an indictable offence (or every 30 days for an accused person charged with an offence in proceedings by way of summary conviction).

ANALYSIS

- [16] While I am guided by the statutory interpretation of s. 525 conducted by the Supreme Court of Canada in Myers, I will begin my analysis with a review of the pre-Myers decisions which considered whether s. 525 mandated successive detention review hearings.

Interpretation of s. 525 prior to Myers

- [17] In *R. v. Yiu*, [1996] O.J. No. 3807 (Ont. C.J.) [Yiu], the Court heard a writ of habeas corpus in which the accused argued he had been denied a series of 90-day reviews of his detention as required under s. 525 of the Code. Mr. Yiu's counsel argued that although s. 525 was silent with respect to successive review, Parliament intended to guarantee a detention review every 90-days. The Court rejected this interpretation and concluded at para. 11:

With respect I do not agree that the section requires successive reviews every 90 days. There is no ambiguity with reference to s.525(1) and if parliament intended successive reviews it could easily have been incorporated into the legislation.

- [18] The issue of successive reviews under s.525 was addressed again in *R. v. McCallum*, 2013 ABQB 175 [McCallum]. After canvassing cases that interpreted s. 525, including Yiu, the Court concluded that the proper interpretation of the provision permitted only one application under s.525. However, the Court recognized there may be anomalies where multiple applications may occur. For example, there may be occasions where the s.525 application may be adjourned or may be re-opened under certain circumstances.

- [19] In *R. v. Jerace*, 2013 BCSC 1944 [Jerace], the self-represented accused brought an application for a successive detention review hearing. Mr. Justice Verhoeven followed Yiu and McCallum in concluding that Mr. Jerace was not entitled to a second detention review. Verhoeven J. also concluded that Mr. Jerace's situation presented no exception to the general principle as contemplated for in McCallum.
- [20] Most recently in *R. v. Oake*, 2019 NWTSC 2 [Oake], Madam Justice Charbonneau followed the decisions in Yiu and McCallum and found that s. 525 did not provide for successive 90-day reviews. However, Charbonneau J. expressed concern that this interpretation was not in accordance with the intended purpose of the section which was to ensure that people do not languish in pretrial custody. At the time of the Oake decision, the Court was aware that Myers was pending before the Supreme Court of Canada.
- [21] Although all of these decisions predate Myers, Crown counsel submits there is nothing in Myers that displaces the interpretation of s.525 with respect to the limited availability of 90-day reviews. Counsel for Mr. Ibanez argues these cases are no longer applicable and that this Court is not bound by Jerace given the findings in Myers.
- [22] While I have found these cases to be of some assistance, I must consider them in light of the more recent consideration of s.525 in Myers. I turn now to a consideration of the analysis in Myers, which did not consider the specific issues of successive reviews, but did carry out a comprehensive review of s. 525, including its purpose and the required approach.

The Myers Analysis

- [23] In Myers, the Supreme Court applied the principles of statutory interpretation in order to determine the correct approach to a detention review hearing under s. 525 of the Code. In doing so, the Court "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" (at para. 19). The Court conducted a comprehensive review of the history of s. 525, beginning with its introduction in the 1972 Bail Reform Act, S.C. 1970-71-72, c.37 and the purposes of the Act as identified by the Minister of Justice in the House of Commons. At paras. 24 - 25, the Court held that Parliament's intent was to prevent accused persons from languishing in pretrial custody and to ensure a prompt trial. Parliament sought to achieve this purpose by providing for judicial oversight of pretrial detention and granting judges discretion to expedite the trial of individuals in pretrial detention.
- [24] The Court examined whether Parliament intended to restrict detention review under s. 525 to situations in which there was unreasonable delay. In rejecting that interpretation, the Court found that the wording of the section was perfectly clear. The Court was not prepared to "read in" a more restrictive test. In response to the Crown's submission that the 90-day timeline was no longer realistic given the increased length and complexity of the modern criminal trial, the Court stated the solution was not to "read in a threshold that was never intended and that the words of the provision do not support" but rather, for Parliament to

modify "these clearly expressed requirements" (at para. 33).

[25] The Court also commented upon the significance of the 90-day time frame, stating at para. 33:

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.

[26] At paras. 37-41, the Court clarified the obligations placed upon the person having custody of the accused to apply to a judge for a detention review hearing and the equally important obligation for the judge to schedule a hearing. At para. 37, the Court held:

.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). Where, however, a new detention order is made against the accused - or a decision 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.

[27] Nothing in these passages supports the view that the Court envisioned this procedure to automatically repeat every 90 days. At para. 39, the Court set out the obligation on the judge to fix a date and hold the hearing, explaining:

In fixing the 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.

[Emphasis added.]

[28] In addition to an obligation to review the detention itself, the Court also considered the purpose of s. 525(9) (now repealed by Bill C-75, s. 235) which granted the judge discretion to give directions for expediting the trial and s. 526, which provides the judge with more general authority to give directions to expedite any proceedings in respect of the accused. As explained in para. 63, these 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 pretrial detention."

[29] As this brief review of Myers illustrates, the Court conducted a comprehensive interpretation of s. 525 to guide the proper implementation of the provisions. Despite its careful consideration of each subsection within s. 525, the Court did not suggest that the procedure under s. 525 was required to be applied every 90-days.

[30] In my view, if that was the proper interpretation to be given to s. 525, the Supreme Court of Canada would have identified that requirement as one of the obligations placed on the jailer and the Court when determining the correct approach to detention review. It seems implausible that the Court would have canvassed all the elements of detention review in detail, but then neglected to mention that this process repeats itself every 90 days. In any case, even if there was a reason for the Court to refrain from pronouncing on the question of mandatory, successive reviews, I am not persuaded that I should read into the provision a requirement that does not exist on its face. While a functional approach to bail, grounded in the core concern to safeguard against accused languishing in pretrial custody is integral to s. 525, the potency of that proposition is only as good as the statutory wording will justify. In other words, there is no express wording that prescribes successive 90-day reviews. My consideration of the post-Myers amendments to s. 525 further support this interpretation.

Post Myers Amendments to s. 525

- [31] On March 18, 2018, the government introduced Bill C-75. On December 18, 2019, the amendments to s. 525 came into force. The parties agree that a consideration of the recent amendments to s. 525 will assist in my task of statutory interpretation of the pre-amendment provision. Of particular interest in this application is the amendment under s. 525(4)(b) which grants the detention review judge discretion to "require a further hearing under this section within 90 days or any other period that the judge considers appropriate in the circumstances".
- [32] Counsel for Mr. Ibanez argues the amendment supports his interpretation of the pre-amendment s. 525 requiring successive 90-day detention review hearings. Counsel submits the wording of the amendment contemplates that there will be a hearing after each 90-day period of continuous pretrial detention, and in addition to that pre-existing provision, the amendment now provides the judge with discretion to schedule a hearing either before or after the expiry of each 90-day period. Counsel also relies on the following comments contained in the Charter Statement:

The Bill would amend the provisions for mandatory judicial reviews of pre-trial detention order, so that these reviews must occur every 90 days for all accused persons. This would not change the frequency of mandatory review for those charged with indictable offences, but it would decrease the frequency for those charged with an offence prosecutable on summary conviction.

[Emphasis added.]

[33] The Charter Statement also states:

.if the judge is concerned that the proceedings are progressing slowly and that an unreasonable delay may result, the judge can direct that the proceedings be expedited and require that the next mandatory judicial hearing occur sooner than the default 90-day period.

[Emphasis added.]

- [34] Counsel submits the Charter Statement unequivocally states that the law before and after the passing of Bill C-75 required that persons in pretrial detention receive successive reviews under s. 525.
- [35] Crown counsel argues that the amendment serves to enhance the ability of a judge to monitor the progress of those individuals who are in detention but should not be interpreted to support the view that successive 90-day reviews were required under the pre-amendment wording of s. 525. With respect to the Charter Statement, Crown counsel submits it is a misstatement of the law and inconsistent with judicial commentary on the requirements of s. 525 to suggest that the pre-amended s. 525 mandates successive 90-day reviews.
- [36] In my view, the amendments to s. 525 address the concerns over the efficacy of the one time 90-day review, as identified in *McCallum and Oake*, by granting a judge the discretion to set subsequent detention review hearings at any time. In my view, this new provision together with s. 526, adequately equips the courts to safeguard against persons languishing in pretrial custody. These provisions capture the express intent of Parliament, and their effect is apparent. Further, the interplay between these provisions and the discretion it vests in courts, obviates any need to read in regenerative 90-day reviews to avoid the problem of an accused languishing in pretrial custody.
- [37] I do not consider the Charter Statement to be of assistance in my interpretation of the provision. I note that the document does not cite the decision in *Myers*, nor any pre-*Myers* jurisprudence which, as I have discussed, interprets s. 525 as mandating a single detention review. As stated in the explanatory note to the Charter Statement, the document is intended to provide legal information to the public and Parliament, but it is not tantamount to a legal opinion on the constitutionality of a bill. I appreciate that a Charter Statement can be taken as some evidence of Parliament's intent. However, particularly in light of the findings in *Myers*, I do not view this document as persuasive or determinative of the issue (see *R. v. Subramaniam*, 2019 BCSC 1601 at para. 32).

What was Parliament's intent?

- [38] As stated earlier, I am guided in my interpretation of the statute by the analysis conducted by the Supreme Court of Canada in *Myers*. In my view, if Parliament had intended s. 525 to require successive detention review hearings it would have done so expressly. Instead, Parliament provided the Court with discretion under the former s. 525(9) to give directions for expediting the trial to address concerns arising from delay, including lengthy periods of pretrial detention for those whose detention is affirmed by a Court at a s. 525 detention review hearing. In *Myers*, the Court explained at para. 37 that the result of the former s. 525(1)(a)(ii) is that after a decision is made to continue an existing order (s. 520) or a new detention order is made against the accused (ss. 521, 524), the 90-day period will begin again, and the accused is entitled to a s.525 detention review after a period of 90-days. Neither s. 525(1)(a)(i) nor s. 525(1)(a)(ii) include a provision for successive 525 review until the date of trial. No such provision is included in s. 525, and I see no basis to read in a

provision that simply does not exist. In my view, to do so would be to usurp the role of Parliament by reading in a very significant process which was intentionally omitted.

DISPOSITION

[39] I find there is no principled basis for this Court to read in to s. 525 a provision that does not exist. If Parliament intended a detention review to be automatic at the expiry of every 90-day period, it would have worded the provision differently.

[40] Mr. Ibanez is not entitled to a further s. 525 review.

"Devlin J."

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