

CANADA / JUDGMENT

R. v. Morales

[1992] 3 SCR 711

COURT

Supreme Court of Canada

DECIDED

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R. v. Morales

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Report

[1992] 3 SCR 711

Case number

22404

Judges

Lamer, Antonio; La Forest, Gérard V.; L'Heureux-Dubé, Claire; Sopinka, John; Gonthier, Charles
Doherty; McLachlin, Beverley; Iacobucci, Frank

On appeal from

Quebec

Subjects

Constitutional law

Criminal law

Notes

SCC Case Information: 22404

Decision Content

R. v. Morales, [1992] 3 S.C.R. 711

Her Majesty The Queen Appellant

v.

Maximo Morales Respondent

and

The Attorney General of Canada,

the Attorney General for Ontario,

the Attorney General of Manitoba,

the Attorney General for Alberta,

the Association des avocats de la défense de Montréal

and the Criminal Lawyers' Association Intervenors

Indexed as: R. v. Morales

File No.: 22404.

1992: May 28; 1992: November 19.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, McLachlin and Iacobucci JJ.

on appeal from the superior court for quebec

Constitutional law -- Charter of Rights -- Right to bail -- Reverse onus provision -- Order of detention -- Accused required under circumstances set out in ss. 515(6) (a) and 515(6) (d) of Criminal Code to show cause why detention pending trial not justified -- Whether ss. 515(6)(a) and 515(6)(d) infringe s. 11 (e) of Canadian Charter of Rights and Freedoms -- Criminal Code, R.S.C., 1985, c. C-46, ss. 515(6) (a), 515(6) (d).

Constitutional law -- Charter of Rights -- Right to bail -- Justification for detention in custody -- Detention of accused justified under s. 515(10) (b) of Criminal Code when necessary in the public interest or for the protection or safety of the public -- Whether criteria of public interest and public safety in s. 515(10) (b) infringe s. 11 (e) of Canadian Charter of Rights and Freedoms -- If so, whether infringement justifiable under s. 1 of Charter -- Vagueness -- Criminal Code, R.S.C., 1985, c. C-46, s. 515(10) (b).

Constitutional law -- Charter of Rights -- Fundamental justice -- Presumption of innocence -- Right to bail -- Detention of accused justified under s. 515(10) (b) of Criminal Code when necessary in the public interest or for the protection or safety of the public -- Accused required under circumstances set out in ss. 515(6)(a) and 515(6)(d) of Code to show cause why detention pending trial not justified -- Whether ss. 515(6)(a), 515(6)(d) and 515(10)(b) infringe s. 7 of

Canadian Charter of Rights and Freedoms -- Criminal Code, R.S.C., 1985, c. C-46, ss. 515(6) (a), 515(6) (d), 515(10) (b).

Constitutional law -- Charter of Rights -- Presumption of innocence -- Reverse onus -- Bail -- Detention of accused justified under s. 515(10) (b) of Criminal Code when necessary in the public interest or for the protection or safety of the public -- Accused required under circumstances set out in ss. 515(6)(a) and 515(6)(d) of Code to show cause why detention pending trial not justified -- Whether ss. 515(6)(a), 515(6)(d) and 515(10)(b) infringe s. 11 (d) of Canadian Charter of Rights and Freedoms -- Criminal Code, R.S.C., 1985, c. C-46, ss. 515(6) (a), 515(6) (d), 515(10) (b).

Constitutional law -- Charter of Rights -- Arbitrary detention -- Detention of accused justified under s. 515(10) (b) of Criminal Code when necessary in the public interest or for the protection or safety of the public -- Accused required under circumstances set out in ss. 515(6)(a) and 515(6) (d) of Code to show cause why detention pending trial not justified -- Whether ss. 515(6)(a), 515(6) (d) and 515(10)(b) infringe s. 9 of Canadian Charter of Rights and Freedoms -- Criminal Code, R.S.C., 1985, c. C-46, ss. 515(6) (a), 515(6) (d), 515(10) (b).

Criminal law -- Judicial interim release -- Order of detention -- Accused required under circumstances set out in ss. 515(6) (a) and 515(6) (d) of Criminal Code to show cause why detention pending trial not justified -- Whether ss. 515(6)(a) and 515(6)(d) infringe ss. 7 , 9 , 11 (d) or 11 (e) of Canadian Charter of Rights and Freedoms -- Criminal Code, R.S.C., 1985, c. C-46, ss. 515(6) (a), 515(6) (d).

Criminal law -- Judicial interim release -- Justification for detention in custody -- Detention of accused justified under s. 515(10) (b) of Criminal Code when necessary in the public interest or for the protection or safety of the public -- Whether criteria of public interest and public safety in s. 515(10) (b) infringe ss. 7 , 9 , 11 (d) or 11 (e) of Canadian Charter of Rights and Freedoms -- Criminal Code, R.S.C., 1985, c. C-46, s. 515(10) (b).

The accused was charged with narcotics offences under ss. 4 and 5 of the Narcotic Control Act and s. 465(1) (c) of the Criminal Code . He is alleged to have participated in a major network to import cocaine into Canada. At the time of his arrest, he was awaiting trial for assault with a weapon, an indictable offence. The accused was denied bail and was ordered detained in custody until trial. Under the bail provisions of the Criminal Code , an accused is normally granted bail but pre-trial detention is justified when the "detention is necessary in the public interest or for the protection or safety of the public, having regard to all the circumstances including any substantial likelihood that the accused will, if he is released from custody, commit a criminal offence or interfere with the administration of justice" (s. 515(10) (b)). Under s. 515(6), the onus is on the accused to show cause why the detention is not justified when he is charged with an indictable offence "that is alleged to have been committed while he was at large after being released in respect of another indictable offence" (s. 515(6) (a)), or charged with having committed a drug offence under s. 4 or 5 of the Narcotic Control Act or with conspiracy to commit any of these offences (s. 515(6) (d)). The accused's application for a review of the detention order, made to a superior court judge pursuant to s. 520 of the Code, was granted and

he was released subject to a number of conditions. The judge held that pre-trial detention is only justified where it is established that the accused will not appear for trial or would represent a danger to public safety if released. The Crown appealed to this Court. This appeal is to determine whether ss. 515(6) (a), 515(6) (d) and 515(10) (b) of the Criminal Code infringe ss. 7 , 9 , 11 (d) or 11 (e) of the Canadian Charter of Rights and Freedoms ; and, if so, whether the infringement is justified under s. 1 of the Charter .

Held: The appeal should be allowed.

Per Lamer C.J. and La Forest, Sopinka, McLachlin and Iacobucci JJ.: For the reasons given in Pearson, the "public safety" component of s. 515(10) (b) is constitutionally valid. Section 11 (d) of the Charter creates a procedural and evidentiary rule which operates at the trial requiring the prosecution to prove the guilt of the accused beyond a reasonable doubt. It has no application at the bail stage where guilt or innocence is not determined and where punishment is not imposed. The "public safety" component of s. 515(10) (b) therefore does not infringe s. 11 (d). With respect to s. 7 of the Charter , the accused's challenge should be determined under s. 11 (e) of the Charter because that section offers a highly specific guarantee which covers precisely his claim. The presumption of innocence is a principle of fundamental justice which applies at all stages of the criminal process, but its procedural requirements at the bail stage are satisfied whenever the requirements of s. 11 (e) are satisfied. This section creates a basic entitlement to be granted reasonable bail unless there is "just cause" to do otherwise. There is just cause to deny bail under s. 11 (e) if two criteria are met: the denial of bail must occur only in a narrow set of circumstances, and the denial of bail must be necessary to promote the proper functioning of the bail system and must not be undertaken for any purpose extraneous to the bail system. The "public safety" component of s. 515(10) (b) meets these criteria. First, bail is denied only for those who pose a "substantial likelihood" of committing an offence or interfering with the administration of justice, and only where this "substantial likelihood" endangers "the protection or safety of the public". Moreover, detention is justified only when it is "necessary" for public safety. Second, the bail system does not function properly if an accused interferes with the administration of justice or commits crimes while on bail. While it is impossible to make exact predictions about recidivism and future dangerousness, exact predictability of future dangerousness is not constitutionally mandated. It is sufficient that the bail system establish a likelihood of dangerousness. The bail provisions of the Code also provide for substantial procedural safeguards against the inefficacy of predictions about dangerousness. Finally, with respect to s. 9 of the Charter , while the "public safety" component of s. 515(10) (b) provides for persons to be "detained" within the meaning of s. 9 , those persons are not detained "arbitrarily". Detention under the "public safety" component of s. 515(10) (b) is not governed by unstructured discretion. The "public safety" component sets out a process with fixed standards and sets specific conditions for bail. Furthermore, the bail process is subject to very exacting procedural guarantees. It follows that the "public safety" component of s. 515(10) (b) does not violate s. 9 .

The "public interest" component as a basis for pre-trial detention under s. 515(10) (b) violates s. 11 (e) of the Charter , however, because it authorizes detention in terms which are vague and imprecise and thus authorizes a denial of bail without just cause. The term "public interest", as currently defined by the courts, is incapable of framing the legal debate in any meaningful manner or structuring discretion in any way. Nor would it be possible to give that term a constant or settled meaning. The term gives the courts unrestricted latitude to define any circumstances as sufficient to justify pre-trial detention but creates no criteria for defining these circumstances. No amount of judicial interpretation of the term "public interest" would be capable of rendering it a provision which gives any guidance for legal debate. Such unfettered discretion violates the doctrine of vagueness. This doctrine applies to all types of enactments and is not restricted to provisions which define an offence or prohibit certain conduct. The principles of fundamental justice preclude a standardless sweep in any provision which authorizes imprisonment. A standardless sweep does not become acceptable simply because it results from the discretion of judges and justices of the peace rather than the discretion of law enforcement officials.

The violation of s. 11 (e) is not justified under s. 1 of the Charter . Even if the term "public interest" is not too vague to constitute a limit "prescribed by law", it cannot be justified under the Oakes test. While the objectives of preventing crime and preventing interference with the administration of justice by those who are on bail are of sufficient importance to warrant overriding a constitutionally protected right, the "public interest" component of s. 515(10) (b) does not meet the proportionality test. There is no rational connection between the measure and the objectives. The provision is so vague that it does not provide any means to determine which accused are most likely to commit offences or interfere with the administration of justice while on bail. It accordingly authorizes pre-trial detention in many cases which are not related to the objectives of the measure. Further, the measure does not impair rights as little as possible. The vague and overbroad concept of public interest permits far more pre-trial detention than is required to meet the objectives. Finally, there is no proportionality between the effects of the measure and its objectives. By authorizing excessive pre-trial detention, the effects of the limit far exceed the objectives of the measure. The "public interest" component of s. 515(10) (b) is thus unconstitutional. The offending words, specifically "in the public interest or", are severable and should be struck down pursuant to s. 52 of the Constitution Act, 1982 . The criteria of "public interest" and "public safety" in s. 515(10) (b) are disjunctive and striking down the specific offending provision does not defeat the unitary scheme envisaged by Parliament. The balance of the provision can stand as a functioning whole.

In light of Pearson, s. 515(6)(d) of the Code, to the extent that it requires the accused to show cause why detention is not justified, does not violate ss. 7 , 9 , 11 (d) or 11 (e) of the Charter .

This conclusion is also applicable to s. 515(6)(a) of the Code. Since s. 11(d) of the Charter is not applicable at the bail stage, s. 515(6) (a) therefore does not infringe s. 11 (d). With respect to s. 7 of the Charter , the accused's case should be analysed under s. 11 (e) rather than the more general provisions of s. 7 . While s. 515(6)(a) requires the accused to demonstrate that detention is not justified, thereby denying the basic entitlement under s. 11 (e) to be granted bail unless pre-trial

detention is justified by the prosecution, s. 515(6) (a) provides just cause to deny bail. First, the denial of bail occurs only in a narrow set of circumstances. Section 515(6) (a) applies only to indictable offences and denies bail only when the persons who have been charged with an indictable offence while on bail for another indictable offence do not show cause why detention is not justified. Second, the denial of bail is necessary to promote the proper functioning of the bail system. The special bail rules in s. 515(6) (a) do not have any purpose extraneous to the bail system, but rather merely establish an effective bail system in circumstances where there are reasonable grounds to believe that the normal bail system is permitting continuing criminal behaviour. By requiring the accused to justify bail, s. 515(6) (a) seeks to ensure that the objective of stopping criminal behaviour will be achieved. The scope of these special rules is thus carefully tailored to achieve a properly functioning bail system. With respect to s. 9 of the Charter, s. 515(6) (a) does not provide for "arbitrary" detention. Like s. 515(6)(d), s. 515(6)(a) sets out a process which is not discretionary and which is subject to fixed standards. Section 515(6) (a) contains highly structured criteria and sets out specific conditions for bail. In addition, the bail process is subject to very exacting procedural guarantees and subject to review by a superior court.

The Superior Court did not err in holding that pre-trial detention is only justified where it is established that the accused will not appear for trial or would represent a danger to public safety if released. These two grounds are the only grounds specified in s. 515(10) which survive Charter challenge. However, the Superior Court did err in refusing to apply the procedure mandated by ss. 515(6) (a) and 515(6) (d), both of which are constitutionally valid. As a result, the matter must be remitted to the Superior Court for a new bail review under s. 520 in which ss. 515(6) (a) and 515(6) (d) are applied and s. 515(10) (b) is applied after severance of the words "in the public interest or".

Per L'Heureux-Dubé and Gonthier JJ.: The reasons of Lamer C.J. were agreed with, except for his finding that the criterion of "public interest" in s. 515(10)(b) of the Code is unconstitutional on grounds of vagueness. Public interest, as referred to in s. 515(10) (b), falls within the purview of the concept of "just cause" in s. 11 (e) of the Charter and is intended to be one particularization of just cause. It is thus in terms of the entire concept that the meaning of public interest must be understood. The evaluation and elaboration of a "public interest" criterion must also proceed with reference to the particular context in which it is to operate. The identification of a measure of discretion conferred by means of a legislative provision cannot alone provide the basis for a constitutional evaluation of that provision.

The general sense of the phrase "public interest" refers to the special set of values which are best understood from the point of view of the aggregate good and are of relevance to matters relating to the well-being of society. Public interest is at the heart of our legal system and inspires all legislation as well as the administration of justice. The breadth of the concept is a necessary aspect of a notion which accommodates a host of important considerations which permit the law to serve a necessarily wide variety of public goals. At the same time, the notion of public interest operates as a reference for the rules of law which bear upon legal determinations of when the

interest of the public will be specially considered, the relationship which those interests will have to other interests which fall to be considered, and the extent to which the public interest is to be protected by the law.

A bail application does not involve a finding of guilt as to past conduct. It is rather concerned with governing future conduct during the interim period awaiting trial. What is at issue are the reasons for detention. The criterion set by the Charter is that of just cause. This implies (1) a cause or reason and (2) a proportionality between the reason and the deprivation of liberty that makes the cause "just". Public interest, as used in s. 515(10), must be understood in this context and considered in relation to two main elements: the element of necessity, which involves a causal link between the public interest and the detention such as to make the detention necessary and not merely convenient or desirable and which is also an element of importance, weight or seriousness of the public interest such as to outweigh the accused's right to personal liberty; and the element of seriousness of the public interest, which serves to qualify the other element, namely the content of the considerations that may be included within the public interest criterion. The considerations to be weighed in determining the public interest are those which are consistent with the safeguarding of the fundamental values of the rule of law and the Charter, including the maintenance of order and security and a respect for the fundamental individual and collective rights of others. Also important is the consideration that the criterion of necessity is capable of encompassing circumstances which have not been foreseen, or are unforeseeable, but which undoubtedly provide just cause for denying bail within the meaning of s. 11 (e) of the Charter. Public interest, as used in s. 515(10), thus provides for flexibility, not vagueness. Its dual requirements of public interest and necessity, which itself predicates a public interest of a serious nature, have meaning, give rise to legal debate and, though broad, are not vague but provide an adequate framework and limit for the exercise of judicial discretion and a means for controlling such exercise while at the same time allowing for the flexibility required for an effective administration of justice and implementation of the rule of law. It must be underlined that the bail process is subject to very exacting procedural guarantees which both structure and guide the exercise of judicial discretion.

Cases Cited

By Lamer C.J.

Applied: *R. v. Pearson*, [1992] 3 S.C.R. 000; *R. v. Oakes*, [1986] 1 S.C.R. 103; *R. v. Hufsky*, [1988] 1 S.C.R. 621; considered: *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606; referred to: *R. v. Perron* (1989), 51 C.C.C. (3d) 518, [1990] R.J.Q. 1774; *R. v. Lamothe* (1990), 58 C.C.C. (3d) 530, [1990] R.J.Q. 973; *R. v. Bray* (1983), 2 C.C.C. (3d) 325; *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.), [1990] 1 S.C.R. 1123; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892; *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139; *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69; *R. v. Butler*, [1992] 1 S.C.R. 452; *Re Powers and the Queen* (1972), 9 C.C.C. (2d) 533; *R. v. Demyen* (1975), 26 C.C.C. (2d) 324; *R. v. Kingwatsiak* (1976), 31 C.C.C. (2d) 213; *R. v. Morenstein* (1977), 40 C.C.C. (2d)

131; R. v. Dakin, [1989] O.J. No. 1348 (Q.L. Systems); R. v. Dickie (1979), 14 C.R. (3d) 110; R. v. Ghannime (1980), 18 C.R. (3d) 186; R. v. Garcia, [1984] C.S. 162; Adam v. La Reine, Sup. Ct. Montreal, No. 500-27-005960-804, May 7, 1980; R. v. Mendelsohn, Sup. Ct. Montreal, No. 500-27-009188-824, March 15, 1982; Procureur général du Canada v. Fuoco, Sup. Ct. Montreal, No. 500-27-034260-820, November 11, 1982; Procureur général du Canada v. Zelman, Sup. Ct. Montreal, No. 500-36-000349-871, June 19, 1987; R. v. Caruana, J.E. 85-918; Procureur général du Canada v. Solitiero, R.J.P.Q. 88-181; R. v. St-Cyr, Sup. Ct. Hull, No. 550-36-000021-863, August 5, 1986; R. v. Sarvghadi, Sup. Ct. Montreal, No. 500-36-000348-873, June 17, 1987; R. v. Seaboyer, [1991] 2 S.C.R. 577; R. v. Lyons, [1987] 2 S.C.R. 309; R. v. Ladouceur, [1990] 1 S.C.R. 1257; R. v. Wilson, [1990] 1 S.C.R. 1291; R. v. Wholesale Travel Group Inc., [1991] 3 S.C.R. 154; R. v. Bradley (1977), 38 C.C.C. (2d) 283; R. v. Lebel (1989), 70 C.R. (3d) 83; Rocket v. Royal College of Dental Surgeons of Ontario, [1990] 2 S.C.R. 232.

By Gonthier J.

Referred to: R. v. Pearson, [1992] 3 S.C.R. 000; R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606; R. v. Ghannime (1980), 18 C.R. (3d) 186; R. v. Dickie (1979), 14 C.R. (3d) 110; Attorney-General v. Times Newspapers Ltd., [1973] 3 All E.R. 54; Hilton v. Braunskill, 481 U.S. 770 (1987).

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1 , 7 , 8 , 9 , 10 , 11 (b), 11 (d), 11 (e).

Constitution Act, 1982, s. 52(1) .

Criminal Code, R.S.C., 1985, c. C-46, ss. 465(1) (c), 504 , 515(6) (a) [rep. & sub. c. 27 (1st Supp.), s. 83(3)], 515(6)(d), 515(10)(a), 515(10)(b), 516, 518 [am. idem, ss. 84 and 185], 520 [am. idem, s. 86], 521 [am. idem, s. 87], 523(2) [rep. & sub. idem, s. 89], 525 [am. idem, s. 90], 526 [rep. & sub. idem, s. 91].

Narcotic Control Act, R.S.C., 1985, c. N-1, ss. 4, 5.

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Kiselbach, Daniel. "Pre-trial Criminal Procedure: Preventive Detention and the Presumption of Innocence" (1988-89), 31 Crim. L.Q. 168.

Landreville, Pierre, et Danielle Laberge. Détention sous garde et dangerosité, 1991.

Morris of Borth-Y-Gest, Lord. "The Interaction of Public Interest, Public Policy and Public Opinion in Relation to the Law" (1979), 10 Cambrian L. Rev. 29.

APPEAL from a judgment of the Quebec Superior Court* ordering the release of the accused under certain conditions. Appeal allowed.

Pierre Sauvé, for the appellant.

Christian Desrosiers, for the respondent.

Bernard Laprade, for the intervener the Attorney General of Canada.

J. A. Ramsay, for the intervener the Attorney General for Ontario.

Brian G. Wilford, for the intervener the Attorney General of Manitoba.

Goran Tomljanovic, for the intervener the Attorney General for Alberta.

Francis Brabant, for the intervener the Association des avocats de la défense de Montréal.

Bruce Duncan and Aimée Gauthier, for the intervener the Criminal Lawyers' Association.

//Lamer C.J.//

The judgment of Lamer C.J. and La Forest, Sopinka, McLachlin and Iacobucci JJ. was delivered by

Lamer C.J. -- This appeal was argued along with *R. v. Pearson*, [1992] 3 S.C.R. 000. Both cases involve the constitutionality of the bail provisions of the Criminal Code, R.S.C., 1985, c. C-46, and for the first time require this Court to examine the scope of the right to bail under s. 11 (e) of the Canadian Charter of Rights and Freedoms .

I - Facts

The respondent Maximo Morales was arrested in December 1990. He was charged with trafficking in narcotics, possession of narcotics for the purpose of trafficking, importing narcotics and conspiracy to import narcotics, contrary to ss. 4 and 5 of the Narcotic Control Act, R.S.C., 1985, c. N-1, and s. 465(1) (c) of the Criminal Code . He is alleged to have participated in a major network to import cocaine into Canada. At the time of his arrest, Morales was awaiting trial for assault with a weapon, an indictable offence. He has subsequently been convicted of that offence.

A bail hearing was held shortly after Morales was arrested. Bail was denied and Morales was ordered detained in custody until trial. Morales then made an application under s. 520 of the Criminal Code for a review of this order. This application was heard by Boilard J. of the Quebec Superior Court on February 1, 1991. Boilard J. ordered Morales released, subject to a number of conditions.

On June 20, 1991, this Court granted the Crown leave to appeal the final judgment of Boilard J., [1991] 1 S.C.R. xiii. The Attorney General of Canada, the Attorney General for Ontario, the Attorney General of Manitoba and the Attorney General for Alberta have intervened in support of the position taken by the appellant Crown. The Association des avocats de la défense de Montréal and the Criminal Lawyers' Association have intervened in support of the position taken by the respondent.

II - Relevant Statutory and Charter Provisions

At issue in this appeal is the validity of ss. 515(6) (a), 515(6) (d) and 515(10) (b) of the Criminal Code , which read as follows:

515. ...

- (6) Notwithstanding any provision of this section, where an accused is charged
 - (a) with an indictable offence, other than an offence listed in section 469, that is alleged to have been committed while he was at large after being released in respect of another indictable offence pursuant to the provisions of this Part or section 679 or 680,

...

- (d) with having committed an offence under section 4 or 5 of the Narcotic Control Act or the offence of conspiring to commit an offence under section 4 or 5 of that Act,

the justice shall order that the accused be detained in custody until he is dealt with according to law, unless the accused, having been given a reasonable opportunity to do so, shows cause why his detention in custody is not justified, but where the justice orders that the accused be released, he shall include in the record a statement of his reasons for making the order.

- (10) For the purposes of this section, the detention of an accused in custody is justified only on either of the following grounds:

...

- (b) on the secondary ground (the applicability of which shall be determined only in the event that and after it is determined that his detention is not justified on the primary ground referred to in paragraph (a)) that his detention is necessary in the public interest or for the protection or safety of the public, having regard to all the circumstances including any substantial likelihood that the accused will, if he is released from custody, commit a criminal offence or interfere with the administration of justice.

The relevant provisions of the Charter read as follows:

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
9. Everyone has the right not to be arbitrarily detained or imprisoned.
11. Any person charged with an offence has the right
- ...
- (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
- (e) not to be denied reasonable bail without just cause;

III - Judgment Below

Quebec Superior Court (Montreal, No. 500-36-000036-917, February 1, 1991)

Boilard J. reviewed the evidence and held that he was satisfied that Morales was an important member of a Columbian cocaine importing network. Boilard J. stated that in the not too distant past, such evidence would have been sufficient to justify ordering the accused to be detained in custody until trial. However, since *R. v. Perron* (1989), 51 C.C.C. (3d) 518, [1990] R.J.Q. 1774 (C.A.), and *R. v. Lamothe* (1990), 58 C.C.C. (3d) 530, [1990] R.J.Q. 973 (C.A.), the situation in Quebec had become "troubled". Boilard J. expressed disagreement with Perron and Lamothe, but held that those decisions had to be followed until they were modified by the Quebec Court of Appeal, or until another Canadian court of appeal had examined the situation and proposed another solution. Boilard J. made it clear that he was following Perron and Lamothe without enthusiasm.

According to Perron and Lamothe, pre-trial detention is only justified where it is established that the accused will not appear at trial or that release of the accused would represent a danger for the public. Beyond these situations, regardless of the nature of the offence, all accused must be granted bail. Boilard J. stated that he had no choice but to follow the rule which had been set down by the Quebec Court of Appeal.

As a result, Boilard J. ordered Morales released, subject to a number of conditions.

IV - Issues

The following constitutional questions were stated on July 10, 1991:

1. Does s. 515(10)(b) of the Criminal Code, which permits the preventive detention of an accused in the public interest or for the protection or safety of the public, limit ss. 7, 9, 11 (d) and 11 (e) of the Canadian Charter of Rights and Freedoms?
2. If the answer to this question is affirmative, is s. 515(10) (b) of the Criminal Code a reasonable limit in a free and democratic society and justified under s. 1 of the Canadian Charter of Rights and Freedoms?

3. Do ss. 515(6)(a) and 515(6)(d) of the Criminal Code limit ss. 7, 9, 11(d) and 11(e) of the Canadian Charter of Rights and Freedoms?

4. If the answer to this question is affirmative, are ss. 515(6)(a) and 515(6)(d) of the Criminal Code a reasonable limit in a free and democratic society and justified under s. 1 of the Canadian Charter of Rights and Freedoms?

V - Analysis

A. Validity of Section 515(10)(b)

Section 515 of the Criminal Code sets out "a liberal and enlightened system of pre-trial release" (see *R. v. Bray* (1983), 2 C.C.C. (3d) 325 (Ont. C.A.), at p. 328) under which an accused must normally be granted bail. There are only two grounds under which pre-trial detention of an accused is justified. The primary ground, set out in s. 515(10)(a), is that "detention is necessary to ensure [the accused's] attendance in court in order to be dealt with according to law". The validity of this primary ground is not at issue in this appeal. The secondary ground, set out in s. 515(10)(b), is that "detention is necessary in the public interest or for the protection or safety of the public, having regard to all the circumstances including any substantial likelihood that the accused will, if he is released from custody, commit a criminal offence or interfere with the administration of justice". The validity of this secondary ground is at issue in this appeal.

As the appellant submits, the secondary ground contains two separate components. Detention can be justified either in the "public interest" or for the "protection or safety of the public". In my view each of these components entails very different constitutional considerations. As a result, the following analysis considers the public interest and public safety components of s. 515(10)(b) separately.

(1) Public Interest

For the reasons which I gave in *Pearson*, I am of the view that the respondent's challenge to the grounds upon which bail may be denied, specifically the public interest and public safety criteria should be considered under the specific guarantees set out in s. 11(e) rather than under s. 7. However, as will appear in what follows, the analysis under s. 11(e) will draw considerable support from the constitutional doctrine of vagueness which has been articulated as a principle of fundamental justice.

(i) Section 11(e)

In *Pearson*, I noted that, pursuant to Charter s. 11(e), there will be just cause for denial of bail if the denial can occur only in a narrow set of circumstances and if the denial is necessary to promote the proper functioning of the bail system.

In my view, the criterion of "public interest" as a basis for pre-trial detention under s. 515(10) (b) violates s. 11 (e) of the Charter because it authorizes detention in terms which are vague and imprecise. D. Kiselbach, "Pre-trial Criminal Procedure: Preventive Detention and the Presumption of Innocence" (1988-89), 31 *Crim. L.Q.* 168, at p. 186, describes "public interest" as "the most nebulous basis for detention". I agree with this characterization of the public interest component of s. 515(10) (b) and view it as a fatal flaw in the provision.

A very thorough review of the constitutional "doctrine of vagueness" was recently undertaken by Gonthier J. in *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606. Gonthier J., speaking for the Court, held at p. 626 that the doctrine of vagueness is a consideration both as a principle of fundamental justice under s. 7 and in applying s. 1 :

Vagueness can be raised under s. 7 of the Charter , since it is a principle of fundamental justice that laws may not be too vague. It can also be raised under s. 1 of the Charter in limine, on the basis that an enactment is so vague as not to satisfy the requirement that a limitation on Charter rights be "prescribed by law". Furthermore, vagueness is also relevant to the "minimal impairment" stage of the Oakes test....

After noting at p. 632 that "the threshold for finding a law vague is relatively high", Gonthier J. held at p. 643 that "a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate." The rationale for this conclusion was as follows (at pp. 639-40):

A vague provision does not provide an adequate basis for legal debate, that is for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria. It does not sufficiently delineate any area of risk, and thus can provide neither fair notice to the citizen nor a limitation of enforcement discretion. Such a provision is not intelligible, to use the terminology of previous decisions of this Court, and therefore it fails to give sufficient indications that could fuel a legal debate. It offers no grasp to the judiciary.

Thus the inability of a vague law to frame the legal debate in a coherent manner violates the principles of fundamental justice in s. 7 and affects the analysis under s. 1. In the same way, there cannot be just cause for the denial of bail where the statutory criteria for denial are vague and imprecise.

All of the cases in which vagueness has been considered by this Court have involved provisions which define an offence or prohibit certain conduct: see *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Reference re ss. 193 and 195.1(1) (c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 ("Prostitution Reference"); *R. v. Keegstra*, [1990] 3 S.C.R. 697; *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892; *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139; *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69; *R. v. Butler*, [1992] 1 S.C.R. 452, and *Nova Scotia Pharmaceutical Society*, *supra*. Section 515(10) (b) is somewhat different. It does not define an offence or prohibit conduct, but rather provides grounds on which pre-trial detention is authorized. The intervener the Attorney General for Ontario submits that this difference is sufficient to conclude that the

doctrine of vagueness should not apply to s. 515(10) (b).

In my view, the doctrine of vagueness is applicable to s. 515(10) (b) because there cannot be just cause for denial of bail within the meaning of s. 11 (e) if the statutory criteria for denying bail are vague and imprecise. *Nova Scotia Pharmaceutical Society*, at p. 632, identified two rationales for the doctrine of vagueness, namely fair notice to the citizen and limitation of law enforcement discretion. Fair notice is "an understanding that certain conduct is the subject of legal restrictions" (p. 635), a factor which is not relevant to a provision like s. 515(10) (b) which does not prohibit conduct. However, limitation of law enforcement discretion is still a relevant factor. In the *Prostitution Reference* at p. 1157, I explained this rationale in terms of a "standardless sweep": "is the statute so pervasively vague that it permits a 'standardless sweep' allowing law enforcement officials to pursue their personal predilections?". In my view the principles of fundamental justice preclude a standardless sweep in any provision which authorizes imprisonment. This is all the more so under a constitutional guarantee not to be denied bail without just cause as set out in s. 11 (e). Since pre-trial detention is extraordinary in our system of criminal justice, vagueness in defining the terms of pre-trial detention may be even more invidious than is vagueness in defining an offence.

I would also note that in *Nova Scotia Pharmaceutical Society*, at p. 642, this Court expressly stated that the doctrine of vagueness applies to all types of enactments:

Finally, I also wish to point out that the standard I have outlined applies to all enactments, irrespective of whether they are civil, criminal, administrative or other. The citizen is entitled to have the State abide by constitutional standards of precision whenever it enacts legal dispositions.

If the doctrine of vagueness aims to ensure that all dispositions are framed in terms which permit meaningful legal debate, then all dispositions are subject to this doctrine regardless of their form.

I am also unable to accept the submission of the intervener the Attorney General for Ontario that the doctrine of vagueness should not apply to s. 515(10) (b) because it does not authorize arbitrary practices by law enforcement officials but rather merely authorizes judicial discretion. A standardless sweep does not become acceptable simply because it results from the whims of judges and justices of the peace rather than the whims of law enforcement officials. Cloaking whims in judicial robes is not sufficient to satisfy the principles of fundamental justice.

A provision does not violate the doctrine of vagueness simply because it is subject to interpretation. To require absolute precision would be to create an impossible constitutional standard. As I stated in the *Prostitution Reference* at p. 1157:

The fact that a particular legislative term is open to varying interpretations by the courts is not fatal. As Beetz J. observed in *R. v. Morgentaler*, [1988] 1 S.C.R. 30, at p. 107, "(f)lexibility and vagueness are not synonymous". Therefore the question at hand is whether the impugned sections of the Criminal Code can be or have been given sensible meanings by the courts.

It seems apparent that, at the very least, the term "public interest" is subject to interpretation. It accordingly becomes necessary to determine whether it is capable of being given a constant and settled meaning by the courts.

The intervener the Attorney General for Ontario submits that the term "public interest" has been given a "workable meaning" by the courts. The Attorney General for Ontario cites a number of authorities which are said to establish this workable meaning. In *Re Powers and the Queen* (1972), 9 C.C.C. (2d) 533 (Ont. H.C.), at pp. 544-45, Lerner J. defined "public interest" as follows:

"Public interest" involves many considerations, not the least of which is the "public image" of the Criminal Code, the Bail Reform Act amendments, the apprehension and conviction of criminals, the attempts at deterrence of crime, and ultimately the protection of that overwhelming percentage of citizens of Canada who are not only socially conscious but law-abiding.

In *R. v. Demyen* (1975), 26 C.C.C. (2d) 324 (Sask. C.A.), at p. 326, Culliton C.J.S. stated that the term "public interest" gives an unfettered discretion to the court:

In my opinion, in the determination of what may constitute the public interest Parliament intended to give to the Judge a wide and unfettered discretion. To attempt to define with particularity what constitutes public interest would not only be difficult but would likely result in restricting by judicial pronouncement the unfettered discretion which Parliament intended to confer. The proper application, in my view, is to give to public interest a comprehensive meaning and to decide in the circumstances of each case whether or not the public interest requires the prisoner's detention.

In *R. v. Kingwatsiak* (1976), 31 C.C.C. (2d) 213 (N.W.T.C.A.), Tallis J. used virtually the same wording to describe the concept of "public interest". Tallis J.'s formulation was cited with approval by Wilson J.A. (as she then was) in *R. v. Morenstein* (1977), 40 C.C.C. (2d) 131 (Ont. C.A.) at p. 133. In *R. v. Dakin*, Ont. C.A., August 8, 1989, [1989] O.J. No. 1348 (QL Systems), "public interest" was defined as circumstances which would "adversely affect the public perception of, and confidence in, the administration of justice".

The intervener Association des avocats de la défense de Montréal notes that until *Perron*, *supra*, and *Lamothe*, *supra*, a number of judges of the Quebec Superior Court used the "public interest" criterion as a justification for a highly subjective denial of bail to certain persons accused of narcotics offences: see *R. v. Dickie* (1979), 14 C.R. (3d) 110 (Que. Ct. S.P.); *R. v. Ghannime* (1980), 18 C.R. (3d) 186 (Que. Sup. Ct.); *Adam v. La Reine*, Sup. Ct. Montreal, No. 500-27-005960-804, May 7, 1980; *R. v. Mendelsohn*, Sup. Ct. Montreal, No. 500-27-009188-824, March 15, 1982; *Procureur général du Canada v. Fuoco*, Sup. Ct. Montreal, No. 500-27-034260-820, November 11, 1982; *R. v. Garcia*, [1984] C.S. 162; *R. v. Caruana*, Sup. Ct. Montreal, No. 500-36-000526-858, August 22, 1985, J.E. 85-918; *Procureur général du Canada v. Solitiero*, Sup. Ct. Montreal, No. 500-36-000066-863, February 6, 1986, R.J.P.Q. 88-181; *R. v. St-Cyr*, Sup. Ct. Hull, No. 550-36-000021-863, August 5, 1986; *R. v. Sarvghadi*, Sup. Ct. Montreal, No. 500-36-000348-873, June 17, 1987; *Procureur général du Canada v. Zelman*, Sup. Ct. Montreal, No. 500-36-000349-871, June 19, 1987.

In my view, these authorities do not establish any "workable meaning" for the term "public interest". On the contrary, these authorities demonstrate the open-ended nature of the term. Demyen, Kingwatsiak and Morenstein expressly recognized that "public interest" imports a standard which is completely discretionary. Powers and Dakin relied on an imprecise notion that the public interest justifies denying bail whenever the public image of the criminal justice system would be compromised by granting bail. The cases in the Quebec Superior Court relied on an imprecise notion that drug traffickers with no apparent defence should be denied bail. In my view, these authorities demonstrate that the term "public interest" has not been given a constant or settled meaning by the courts. The term provides no guidance for legal debate. The term authorizes a standardless sweep, as the court can order imprisonment whenever it sees fit. According to Nova Scotia Pharmaceutical Society, at p. 642, such unfettered discretion violates the doctrine of vagueness:

What becomes more problematic is not so much general terms conferring broad discretion, but terms failing to give direction as to how to exercise this discretion, so that this exercise may be controlled. Once more, an impermissibly vague law will not provide a sufficient basis for legal debate; it will not give a sufficient indication as to how decisions must be reached, such as factors to be considered or determinative elements.

As currently defined by the courts, the term "public interest" is incapable of framing the legal debate in any meaningful manner or structuring discretion in any way.

Nor would it be possible in my view to give the term "public interest" a constant or settled meaning. The term gives the courts unrestricted latitude to define any circumstances as sufficient to justify pre-trial detention. The term creates no criteria to define these circumstances. No amount of judicial interpretation of the term "public interest" would be capable of rendering it a provision which gives any guidance for legal debate.

As a result, the public interest component of s. 515(10) (b) violates the s. 11 (e) of the Charter because it authorizes a denial of bail without just cause.

(ii) Section 1

In my view, this violation is not justified under s. 1. The limit cannot be justified under the test in *R. v. Oakes*, [1986] 1 S.C.R. 103, and may be too vague even to constitute a limit which is "prescribed by law" under s. 1.

Although the term "public interest" may well be so vague that it does not constitute a limit which is "prescribed by law" under s. 1, as Gonthier J. noted in *Nova Scotia Pharmaceutical Society*, at p. 627, "[t]he Court will be reluctant to find a disposition so vague as not to qualify as 'law' under s. 1 in limine, and will rather consider the scope of the disposition under the 'minimal impairment' test". Accordingly, I prefer to proceed immediately to the *Oakes* test.

Even if the term "public interest" is capable of passing the threshold test under s. 1 of being a limit which is "prescribed by law", I am of the opinion that it cannot be justified under the *Oakes* test. I am prepared to accept that the term "public interest" could be justified under the first

branch of the Oakes test. In my view, s. 515(10) (b) has two objectives, both of which are apparent from the wording of the provision. The first objective is to prevent those who have been arrested from committing criminal offences. The second objective is to prevent those who have been arrested from interfering with the administration of justice. This second objective is extremely important. The criminal justice system cannot function properly if it is subverted by the accused's interference with the administration of justice. In my opinion, the objective of preventing such interference is sufficiently important to warrant overriding a constitutionally protected right. The first objective of s. 515(10) (b) is also important. The prevention of crime is one objective of all criminal law. I am prepared to accept that the objective of preventing crime by those who have already been accused of criminal conduct is sufficiently important to warrant overriding a constitutionally protected right.

However, in my view the public interest component of s. 515(10) (b) does not meet the second branch of the Oakes test, the proportionality test. None of the three components of the proportionality test is met. First, there is no rational connection between the measure and the objectives of preventing crime and preventing interference with the administration of justice. As the respondent submits, the provision is so vague that it does not provide any means to determine which accused are most likely to commit offences or interfere with the administration of justice while on bail. It accordingly authorizes pre-trial detention in many cases which are not related to the objectives of the measure. Second, the measure does not impair rights as little as possible. In both *R. v. Keegstra*, supra, at pp. 785-86, and *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at p. 626, vagueness was a factor relevant to determining whether there had been a minimal impairment of rights. *Nova Scotia Pharmaceutical Society* noted at p. 627 that "vagueness as it relates to the 'minimal impairment' branch of s. 1 merges with the related concept of overbreadth". The vague and overbroad concept of public interest permits far more pre-trial detention than is required to meet the limited objectives of preventing crime and preventing interference with the administration of justice by those who are on bail. Accordingly, it does not constitute a minimal impairment of rights. Third, there is no proportionality between the effects of the measure and its objectives. By authorizing excessive pre-trial detention, the effects of the limit far exceed the objectives of the measure.

As a result, the violation of s. 11 (e) is not justified under s. 1 of the Charter .

(2) Public Safety

It remains to determine whether the public safety component of s. 515(10) (b) is constitutionally valid. The respondent submits that the public safety component of s. 515(10) (b) violates ss. 7 , 9 , 11 (d) and 11 (e) of the Charter . I will consider each of these provisions in turn.

As stated in my reasons in *R. v. Pearson*, supra, released simultaneously with these reasons, I am of opinion that s. 11 (d) of the Charter creates a procedural and evidentiary rule which operates at the trial requiring the prosecution to prove the guilt of the accused beyond a reasonable doubt. However, as in *Pearson*, s. 11(d) has no application at the bail stage where guilt or innocence is not determined and where punishment is not imposed. I conclude, therefore that the public safety component of s. 515(10) (b) does not infringe s. 11 (d) of the Charter .

With respect to the arguments on this branch of the case advanced under s. 7 , I am of the view that, for the reasons given in *Pearson*, the respondent's challenge should be determined under s. 11 (e) because that section "offers "a highly specific guarantee" which covers precisely the respondent's complaint" (p. 000).

(i) Section 11 (e)

In *Pearson*, I made some general remarks about the nature of the right under s. 11 (e). I noted that s. 11 (e) contains two distinct elements, namely a "reasonable bail" element and a "just cause" element. Reasonable bail relates to the terms of bail, while just cause relates to the grounds on which bail is granted or denied. The public safety component of s. 515(10) (b) defines the grounds on which bail can be denied, and accordingly its validity depends on the just cause element of s. 11 (e).

In *Pearson*, I noted that s. 11 (e) creates a basic entitlement to bail. Bail must be granted unless pre-trial detention is justified by the prosecution. In *Pearson*, the issue was the validity of a provision which departs from this basic entitlement. The validity of the public safety component of s. 515(10) (b) involves a more fundamental question, namely the scope of the basic entitlement to bail under s. 11 (e). Section 515(10) (b) defines the basic entitlement to bail under the Criminal Code by establishing grounds on which pre-trial detention is justified. The issue is to determine whether the basic entitlement to bail under the Criminal Code is consistent with the basic entitlement to bail under s. 11 (e) of the Charter . In other words, the issue is to determine whether the public safety component of s. 515(10) (b) provides just cause to deny bail in accordance with the requirements of s. 11 (e).

The public safety component of s. 515(10) (b) provides that pre-trial detention is justified where it is necessary "for the protection or safety of the public, having regard to all the circumstances including any substantial likelihood that the accused will, if he is released from custody, commit a criminal offence or interfere with the administration of justice". The appellant concedes, quite properly in my opinion, that danger or likelihood that an individual will commit a criminal offence does not in itself provide just cause for detention. In general, our society does not countenance preventive detention of individuals simply because they have a proclivity to commit crime. The appellant accepts this proposition but submits that there is just cause for preventive detention where an individual who presents a danger of committing an offence is already awaiting trial for a criminal offence.

In Pearson, I identified two factors which in my view are vital to a determination that there is just cause under s. 11 (e). First, the denial of bail must occur only in a narrow set of circumstances. Second, the denial of bail must be necessary to promote the proper functioning of the bail system and must not be undertaken for any purpose extraneous to the bail system. In my opinion, the public safety component of s. 515(10) (b) provides just cause to deny bail within these criteria.

I am satisfied that the scope of the public safety component of s. 515(10) (b) is sufficiently narrow to satisfy the first requirement under s. 11 (e). Bail is not denied for all individuals who pose a risk of committing an offence or interfering with the administration of justice while on bail. Bail is denied only for those who pose a "substantial likelihood" of committing an offence or interfering with the administration of justice, and only where this "substantial likelihood" endangers "the protection or safety of the public". Moreover, detention is justified only when it is "necessary" for public safety. It is not justified where detention would merely be convenient or advantageous. Such grounds are sufficiently narrow to fulfil the first requirement of just cause under s. 11 (e).

I am also satisfied that the public safety component of s. 515(10) (b) is necessary to promote the proper functioning of the bail system and is not undertaken for any purpose extraneous to the bail system. In my view, the bail system does not function properly if an accused interferes with the administration of justice while on bail. The entire criminal justice system is subverted if an accused interferes with the administration of justice. If an accused is released on bail, it must be on condition that he or she will refrain from tampering with the administration of justice. If there is a substantial likelihood that the accused will not give this cooperation, it furthers the objectives of the bail system to deny bail.

In my view, the bail system also does not function properly if individuals commit crimes while on bail. One objective of the entire system of criminal justice is to stop criminal behaviour. The bail system releases individuals who have been accused but not convicted of criminal conduct, but in order to achieve the objective of stopping criminal behaviour, such release must be on condition that the accused will not engage in criminal activity pending trial. In Pearson, the reality that persons engaged in drug trafficking tend to continue their criminal behaviour even after an arrest was one basis for concluding that there is just cause to require persons charged with certain narcotics offences to justify bail. Similarly, if there is a substantial likelihood that the accused will engage in criminal activity pending trial, it furthers the objectives of the bail system to deny bail.

The respondent submits that the public safety component of s. 515(10) (b) is flawed because it is based on the premise that potential recidivism can be predicted but recidivism is in fact impossible to predict. The respondent cites a number of studies, including a study by Professor Landreville of the École de criminologie de Montréal and a number of studies from the United States. These studies demonstrate that the art of predicting recidivism and future dangerousness is, at the very least, a somewhat inexact process.

While it is undoubtedly the case that it is impossible to make exact predictions about recidivism and future dangerousness, exact predictability of future dangerousness is not constitutionally mandated. In *R. v. Lyons*, [1987] 2 S.C.R. 309, at pp. 364-65, La Forest J. considered the validity of the dangerous offender provisions of the Criminal Code :

However, as Holmes has reminded us, the life of the law has not been logic: it has been experience. The criminal law must operate in a world governed by practical considerations rather than abstract logic and, as a matter of practicality, the most that can be established in a future context is a likelihood of certain events occurring....

It seems to me that a "likelihood" of specified future conduct occurring is the finding of fact required to be established; it is not, at one and the same time, the means of proving that fact. Logically, it seems clear to me that an individual can be found to constitute a threat to society without insisting that this require the court to assert an ability to predict the future. [Emphasis in original.]

The bail system has always made an effort to assess the likelihood of future dangerousness while recognizing that exact predictions of future dangerousness are impossible. The Report of the Canadian Committee on Corrections (Ouimet Report (1969)), one of the studies which led to the current bail system, recognized the impossibility of precise predictions at p. 110:

It has been argued that there is no accurate way of predicting the accused's behaviour pending trial. Even if a measure of predictability could be achieved, any fact-finding process for determining this issue would be so time-consuming as to nullify the purpose of bail.

We think the issues [sic] involved are no more difficult than others which courts are constantly called upon to resolve in other areas of the law. Some reasonable assessment of the probability of the accused's behaviour pending trial is not impossible. If the prosecution does not make out a reasonable case for denial of bail, it follows that it should be granted.

The bail system does not aim to make exact predictions about future dangerousness because such predictions are impossible to make. However, *Lyons* demonstrates that it is sufficient to establish a likelihood of dangerousness, and that the impossibility of making exact predictions does not preclude a bail system which aims to deny bail to those who likely will be dangerous.

Furthermore, as the intervener the Attorney General for Ontario submits, there are substantial procedural safeguards against the inefficacy of predictions about dangerousness. Bail cannot be denied unless there is a "substantial likelihood" that the accused will commit a criminal offence while on bail or will interfere with the administration of justice. Such a determination can only be made after an adversarial proceeding, which takes place under exacting procedural protections (see s. 518). If an accused is detained, there are numerous provisions for review (see ss. 520, 523(2) and 525). There are provisions to expedite the trial of an accused who is detained (see ss. 525(9) and 526). An accused who is detained is also protected by s. 11 (b) of the Charter , which guarantees the right to be tried within a reasonable time.

The public safety component of s. 515(10) (b) establishes narrow circumstances in which bail is denied. Those circumstances are necessary to promote the proper functioning of the bail system and are not undertaken for any purpose extraneous to the bail system. Accordingly, the public safety component of s. 515(10) (b) does not violate s. 11 (e).

(ii) Section 9

In *Pearson*, I dealt with s. 9 very briefly. The validity of the public safety component of s. 515(10) (b) under s. 9 can also be dealt with very briefly. There is no question that the public safety component of s. 515(10) (b) provides for persons to be "detained" within the meaning of s. 9 of the Charter. The sole issue is to determine whether those persons are detained "arbitrarily". *Le Dain J.* discussed the meaning of "arbitrarily" in *R. v. Hufsky*, [1988] 1 S.C.R. 621. He held at p. 633 that detention is arbitrary if it is governed by unstructured discretion: "discretion is arbitrary if there are no criteria, express or implied, which govern its exercise."

In my view, detention under the public safety component of s. 515(10) (b) is not arbitrary in this sense. The public safety component of s. 515(10) (b) is not discretionary. It sets out a process with fixed standards and sets specific conditions for bail. Unlike the completely random detention which was held to violate s. 9 in *Hufsky*, *R. v. Ladouceur*, [1990] 1 S.C.R. 1257, and *R. v. Wilson*, [1990] 1 S.C.R. 1291, detention under the public safety component of s. 515(10) (b) is not random. Furthermore, the bail process is subject to very exacting procedural guarantees which I reviewed in my reasons in *Pearson*.

Accordingly, I conclude that the public safety component of s. 515(10) (b) does not violate s. 9.

(iii) Section 1

The parties and interveners have made extensive submissions about the application of s. 1. Given that I have found no violation of ss. 7, 9, 11 (d) or 11 (e), it is not necessary to consider s. 1.

(3) Severance

Thus the public interest component of s. 515(10) (b) is constitutionally invalid but the public safety component is constitutionally valid. It therefore becomes necessary to determine whether this result requires all of s. 515(10) (b) to be struck down, or whether the invalid portion of the provision can be severed from the rest of the provision. In my view, severance is possible.

R. v. Wholesale Travel Group Inc., [1991] 3 S.C.R. 154, at p. 207, held that a severable portion of a statutory provision can be struck down without having to strike down the entire provision, provided that severance would not defeat a "unitary scheme" envisaged by Parliament. Severance does not usurp Parliament's role, but rather is the approach which best fulfils the terms of s. 52(1) of the Constitution Act, 1982, which provides that a law which is inconsistent with the Constitution is of no force and effect "to the extent of the inconsistency". Severance is also least intrusive to the overall statutory scheme.

In my view, removing the criterion of public interest from s. 515(10) (b) would not defeat a unitary scheme envisaged by Parliament. The courts have generally regarded the criteria of "public interest" and "public safety" in s. 515(10) (b) as disjunctive: see *R. v. Bradley* (1977), 38 C.C.C. (2d) 283 (Que. Sup. Ct.), at p. 289, and *R. v. Lebel* (1989), 70 C.R. (3d) 83 (Que. Sup. Ct.), at p. 88. If these two criteria are disjunctive, it would not interfere with a unitary scheme to strike down only one of them. In *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232, at p. 252, McLachlin J. held that severance was not possible because it was impossible to strike down the specific offending provisions and leave the balance of the provision to stand as a functioning whole. By contrast, the words "in the public interest or" can be struck from s. 515(10) (b) and the remaining provision will be a functioning whole.

In *Rocket*, McLachlin J. also rejected the possibility of severance because the structure of the provision, limited exclusions to a general prohibition, would require the Court to supply further exceptions, which was the proper role of the legislature. By contrast, the structure of s. 515(10) (b) presents no such difficulty. Severance would not require the Court to add anything to s. 515(10) (b) to create a viable provision. In this case, severance is the means by which the Court's interference with the legislative function can be minimized. Striking down all of s. 515(10) (b) simply because its public interest component is invalid would eliminate a part of the bail system which is constitutionally valid and which Parliament has decided should be part of the bail system. There is no basis for this Court to interfere with Parliament's view that the public safety component of s. 515(10) (b) should be a part of the bail system. Severance therefore allows the Court to fulfil its judicial role without usurping Parliament's legislative role.

As a result, I conclude that the offending words of s. 515(10) (b), specifically "in the public interest or", are severable and should be struck down. The remaining portion of s. 515(10) (b) is constitutionally valid.

B. Validity of Section 515(6) (a)

The analysis of s. 515(6) (a) parallels the structure of the analysis of s. 515(6) (d) in *Pearson* and the analysis of the public safety component of s. 515(10) (b) in this case. Section 11 (d) of the Charter does not apply and the case should be analysed under s. 11 (e) rather than the more general provisions of s. 7 .

(i) Section 11 (e)

Analysis of s. 515(6)(a) under s. 11 (e) is very similar to the analysis of 515(6)(d) in *Pearson* under s. 11 (e). Once again, the focus is on the just cause element of s. 11 (e). Like s. 515(6)(d), s. 515(6) (a) requires the accused to demonstrate that bail is justified, thereby denying the basic entitlement under s. 11 (e) to be granted bail unless pre-trial detention is justified by the prosecution. This denial of the basic entitlement to bail is constitutionally valid only if it meets the constitutional test of "just cause" in s. 11 (e) or is justified under s. 1 .

As noted in *Pearson* and in my discussion of s. 515(10) (b) under s. 11 (e), there is just cause to deny bail under s. 11 (e) if two factors are present. The denial of bail must occur only in a narrow set of circumstances, and the denial of bail must be necessary to promote the proper functioning of the bail system and must not be undertaken for any purpose extraneous to the bail system. In my opinion, s. 515(6)(a) provides just cause to deny bail within these criteria.

Section 515(6)(a) provides that an accused must justify the granting of bail when the accused is charged with an indictable offence "that is alleged to have been committed while he was at large after being released in respect of another indictable offence". As a preliminary matter, I would like to express agreement with the appellant's submission that the English version of this provision is more accurate than is the French version. The English version uses the phrase "that is alleged to have been committed", while the French version uses the phrase "qui est présumé avoir été commis". The English version is more accurate because it emphasizes that the mere act of charging an accused who is on bail does not prove (or even create a presumption) that the accused committed an offence while on bail. However, charges cannot be laid unless there are reasonable grounds for believing that an offence has been committed (see s. 504 of the Criminal Code). Thus when an accused is charged while on bail, it is neither proven nor presumed that the accused has committed an offence while on bail, but there are reasonable grounds for believing that this has occurred. The fact that s. 515(6) (a) applies only when there are reasonable grounds to believe that recidivism has occurred is a factor which is emphasized by a number of interveners.

As the appellant and several of the interveners submit, the validity of s. 515(6)(a) is easier to establish than is the validity of s. 515(6)(d). Section 515(6)(a) relates to the accused's particular circumstances, while s. 515(6)(d) relates to the nature of the offence. This distinction was relied upon by the Quebec Court of Appeal in *Pearson* as one basis for concluding that s. 515(6)(d) was invalid.

I am satisfied that the scope of s. 515(6)(a) is sufficiently narrow to satisfy the first requirement of just cause under s. 11 (e). Section 515(6)(a) applies only to indictable offences. The number of accused who are charged with an indictable offence while on bail for another indictable offence is, hopefully, rather small. Furthermore, s. 515(6)(a) does not deny bail for all persons who have been charged with an indictable offence while on bail for another indictable offence, but rather denies bail only when these persons do not show cause that detention is not justified. Such grounds are sufficiently narrow to fulfil the first requirement of just cause under s. 11 (e).

I also find that the effect of s. 515(6)(a) satisfies the second requirement of just cause under s. 11 (e). The effect of s. 515(6)(a) is very similar to the effect of s. 515(6)(d). Both provisions establish a set of special bail rules in circumstances where the normal bail system does not function properly. As I noted in my discussion of s. 515(10)(b), one of the objectives of the criminal justice system, including the bail system, is to stop criminal behaviour. As a result, bail is granted on condition that the accused will cease criminal behaviour. Section 515(6)(a) establishes a set of special bail rules where there are reasonable grounds to believe that the accused has already breached this condition. In other words, the special bail rules in s. 515(6)(a) apply where there

are reasonable grounds to believe that one of the objectives of the bail system, namely stopping criminal behaviour, is not being achieved. By requiring the accused to justify bail, s. 515(6)(a) seeks to ensure that the objective of stopping criminal behaviour will be achieved.

Section 515(6)(a) applies in circumstances where there are reasonable grounds to believe that one of the grounds in s. 515(10) (b) is present to justify denying bail. Even the intervener the Criminal Lawyers' Association concedes that the fact that an accused was rearrested while on bail may be a relevant factor in determining whether the grounds in s. 515(10) (b) are met, although it submits that s. 515(6)(a) goes too far in making this factor justify detention in itself. Thus the validity of s. 515(6)(a) under s. 11 (e) is closely related to the validity of the public safety component of s. 515(10) (b) under s. 11 (e). If there is just cause for pre-trial detention where there is a substantial likelihood that the accused will commit an offence while on bail, then there is just cause to establish a set of special bail rules where there are reasonable grounds to believe that the accused has already committed an offence while on bail. As the intervener the Attorney General for Alberta expresses it, one who reoffends while on bail was previously judged to be trustworthy. If there are reasonable grounds to believe that this trust has been violated, some further basis is required to trust the accused again. A lack of representations from the accused leads to a conclusion that the original assessment that there was no substantial likelihood of danger to the public was wrong and that there is just cause to deny bail.

In my view, the special bail rules in s. 515(6)(a) do not have any purpose extraneous to the bail system, but rather merely establish an effective bail system in circumstances where there are reasonable grounds to believe that the normal bail system is permitting continuing criminal behaviour. The scope of these special rules is narrow and carefully tailored to achieve a properly functioning bail system. I therefore conclude that there is just cause for s. 515(6)(a) to depart from the basic entitlement to bail under s. 11 (e) and to deny bail in certain circumstances. Accordingly, s. 515(6)(a) does not violate s. 11 (e).

(ii) Section 9

For the reasons that I set out in my discussion of s. 9 in *Pearson*, I am of the view that s. 515(6)(a) does not provide for detention which is arbitrary in the sense of *Hufsky*, *supra*. Like s. 515(6)(d), s. 515(6)(a) sets out a process which is not discretionary and which is subject to fixed standards. Section 515(6)(a) contains highly structured criteria and sets out specific conditions for bail. The result is that detention under s. 515(6)(a) is not random. In addition, the bail process is subject to very exacting procedural guarantees (see ss. 516, 518(1)(b), 523(2)(b)) and subject to review by a superior court (see ss. 520 and 521).

Accordingly, I conclude that s. 515(6)(a) does not violate s. 9 .

(iii) Section 1

The parties made extensive submissions about the application of s. 1 . Given that I have found no violation of ss. 7 , 9 , 11 (d) or 11 (e), it is not necessary to consider s. 1 .

C. Validity of section 515(6)(d)

For the reasons I set out in Pearson, I am of the opinion that s. 515(6)(d), to the extent that it requires the accused to show cause that detention is not justified, does not violate ss. 7 , 9 , 11 (d) or 11 (e) of the Charter .

VI - Application to This Appeal

In the specific context of this appeal, the appellant submits that the Superior Court made three errors in conducting its bail review under s. 520 of the Criminal Code . First, the appellant submits that the Superior Court erred in applying the presumption of innocence at the bail stage of the criminal process. Second, the appellant submits that the Superior Court erred in holding that pre-trial detention is only justified where it is established that the accused will not appear for trial or would represent a danger to public safety if released. Third, the appellant submits that the Superior Court erred in refusing to apply the procedure mandated in ss. 515(6) (a) and 515(6) (d) of the Criminal Code .

The determination of the constitutional issues resolves these issues. The presumption of innocence, as I have said in Pearson, is a principle of fundamental justice which applies at all stages of the criminal process, although its procedural requirements at the bail stage are satisfied whenever the requirements of s. 11 (e) are satisfied. The Superior Court did not err in holding that pre-trial detention is only justified where it is established that the accused will not appear for trial or would represent a danger to public safety if released. These two grounds are the only grounds specified in s. 515(10) which survive Charter challenge. However, the Superior Court did err in refusing to apply the procedure mandated by ss. 515(6) (a) and 515(6) (d), both of which are constitutionally valid.

As a result, the matter must be remitted to the Superior Court for a new bail review under s. 520 in which ss. 515(6) (a) and 515(6) (d) are applied and s. 515(10) (b) is applied after severance of the words "in the public interest or".

VII - Disposition

The appeal is allowed and the matter is remitted to the Superior Court for a new bail review under s. 520 of the Criminal Code . The constitutional questions are answered as follows:

1.Does s. 515(10)(b) of the Criminal Code , which permits the preventive detention of an accused in the public interest or for the protection or safety of the public, limit ss. 7 , 9 , 11 (d) and 11 (e) of the Canadian Charter of Rights and Freedoms ?

Answer:With respect to public safety, the answer is no. With respect to public interest, the words "in the public interest or" in s. 515(10)(b) limit s. 11 (e). It is not necessary to answer with respect to s. 9 .

2.If, and to the extent the answer to this question is affirmative in whole or in part, is s. 515(10) (b) of the Criminal Code a reasonable limit in a free and democratic society and justified under s. 1 of the Canadian Charter of Rights and Freedoms ?

Answer:No, but only to the extent that the words "in the public interest or" violate s. 11 (e) and those words are declared of no force or effect. With respect to the provision remaining after severance of the words "in the public interest or", it is not necessary to answer this question.

3.Do ss. 515(6)(a) and 515(6)(d) of the Criminal Code limit ss. 7 , 9 , 11 (d) and 11 (e) of the Canadian Charter of Rights and Freedoms ?

Answer:With respect to ss. 7 , 9 and 11 (d) of the Charter , the answer is no. With respect to s. 11 (e), the answer is yes, but only to the extent that the sections have reference to that part of s. 515(10) (b) which has been held to be of no force or effect.

4.If the answer to this question is affirmative, are ss. 515(6) (a) and 515(6) (d) of the Criminal Code a reasonable limit in a free and democratic society and justified under s. 1 of the Canadian Charter of Rights and Freedoms ?

Answer: It is not necessary to answer this question.

The appellant shall pay the disbursements and costs of the respondent in this Court, according to the Tariff of Fees of the Government of Quebec for counsel retained from outside the Public Service.

//Gonthier J.//

The reasons of L'Heureux-Dubé and Gonthier JJ. were delivered by

Gonthier J. -- I have had the benefit of the reasons of the Chief Justice and am in agreement with them, with the exception of his finding that the criterion of public interest is unconstitutional on grounds of vagueness.

The issue in the present case is governed by s. 11 (e) of the Canadian Charter of Rights and Freedoms which reads:

11. Any person charged with an offence has the right

...

(e) not to be denied reasonable bail without just cause;

and thereby sets the specific requirements of the Charter as to the granting of bail. These criteria thereby define the principles of fundamental justice applicable in this respect under s. 7 of the Charter as well as the accused's right not to be arbitrarily detained or imprisoned pursuant to s. 9 in so far as the bail determination is concerned.

Section 11 (e) provides two criteria, that of reasonable bail which governs the bail conditions, and just cause which governs the reasons for denying bail. We are only here concerned with the

latter.

The concept of just cause, though very broad, is by its very use in the Charter and therefore by definition not so vague as to be unconstitutional. Like many legal concepts which are broad in their scope, it is a concept which is susceptible to particularization in several ways, including particularization by means of legislative provisions, such as s. 515(10) of the Criminal Code, R.S.C., 1985, c. C-46 . All such particularizations must naturally accord with the requirements of the content of the concept of just cause. The concept of just cause governs directly the granting or denial of bail by a judge in the same manner as other qualified legal rights, such as those under ss. 8 , 9 , 10 and elsewhere under s. 11 of the Charter , govern the legal determinations subject to the requirements of those rights.

Public interest as referred to in s. 515(10) (b) therefore falls within the purview of just cause and is intended to be one particularization of just cause. The concept of just cause includes this particularization, and it is in terms of the entire concept that the meaning of public interest must be understood. The issue which has been raised is whether the particularization is so vague as to have no meaning and, consequently, be contrary to the Charter .

I am unable to reach the conclusion that this is so. Public interest is a concept long recognized in our legal system. It is a notion which has traditionally been recognized as affording a means of referring to the special set of considerations which are relevant to those legal determinations concerned with the relationship of the represented private interest or interests and the broader interest of the public. The phrase "public interest" is used to capture substantive law criteria in matters of law ranging, for example, from the boundaries of privilege in relation to the ordering of the production of documents to the formulation of rules governing the restraint of trade. While these substantive rules are not relevant here, it is significant that the accommodation within this phrase "the public interest" of numerous and varied considerations has not been traditionally viewed as grounds for its exclusion from operation in any particular legal domain. To view it in such a way would suggest that it is not appropriate to have recourse to the context in which a concept exists or is applied in the law in order to elaborate that concept properly. Similar to the process of the application of the notions of "due process" in the administration of justice and "fairness" in the exercise of discretionary powers, the evaluation and elaboration of a public interest criterion must proceed with reference to the particular context in which it is to operate.

The Chief Justice rightly does not accept the submission of the Attorney General for Ontario that the doctrine of vagueness should have no application to s. 515(10) (b) of the Criminal Code on the basis that the provision does not authorize arbitrary practices by law enforcement officials, but rather merely authorizes judicial discretion. It is true, further, that the principles of fundamental justice preclude a "standardless sweep" in any provision which authorizes imprisonment.

While these are important considerations, they cannot alone form an adequate basis for judging the value or the nature of the discretion which exists pursuant to the application of a public interest criterion.

The liberty interest of the accused is, undoubtedly, a very important matter which must be brought to bear on any consideration of the process by which bail is granted or denied. Yet, it is also evident that it is only one of several important considerations of this kind which bear on such an inquiry. Indeed, the bail process cannot be accurately described wholly in terms of the discrete aims of the criminal law. While a finding of guilt under the criminal law will often result in a deprivation of the liberty of the guilty party, depending upon the sentence, a finding of criminal guilt also constitutes a recognition of a contravention of one or more of the most important norms which govern our society. It is the breach of rules of this kind which contributes to the justness of the detention. It is partly for this reason that a special stigma is viewed as being attached to a criminal conviction.

Unlike that of the application of the criminal law, the purpose of a denial of bail is neither punishment, nor is it retribution or reform. Rather, it is better understood as a part of the process by which those aims of the law may eventually be achieved by safeguarding the proper functioning of the justice system. Far from obscuring the importance of liberty, a consideration of the administration of justice in these broader terms is necessary for the due recognition of the ways in which the administration of justice allows liberty to be properly respected.

Any narrower treatment of the issue raises the problems inherent in approaching an evaluation of the nature of a conferred discretion in terms of its potential for improper exercise, and proceeding without reference to the matter of its capacity to serve the intended aims of the provision. It must be noted that such an approach has not been the traditional means of addressing the question of the vagueness of a provision in constitutional law. Indeed, to do so would be contrary to the understanding of vagueness formulated by this Court in *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, where it was stated, at p. 627, that:

Factors to be considered in determining whether a law is too vague include (a) the need for flexibility and the interpretative role of the courts, (b) the impossibility of achieving absolute certainty, a standard of intelligibility being more appropriate and (c) the possibility that many varying judicial interpretations of a given disposition may exist and perhaps coexist....

It must also be noted that such an approach also fails to contribute to an understanding of the difference between properly and improperly exercised discretion. The importance of this distinction is manifest in this area of the law where other notions which are both broad as well as proximate in their content to that of the public interest, like the "safety" of the public, must necessarily form a part of the reasons either for a grant or a denial of bail. For example, in *R. v. Dickie* (1979), 14 C.R. (3d) 110 (Que. Ct. S.P.), and in *R. v. Ghannime* (1980), 18 C.R. (3d) 186 (Que. Sup. Ct.), to which the Chief Justice makes reference, Boilard J. discusses the public interest and the safety of the public, and founds the decision to order preventive detention and deny bail both on the grounds of the public interest as well as the safety and security of the public.

Consequently, the identification of a measure of discretion conferred by means of a legislative provision cannot alone provide the basis for a constitutional evaluation of that provision. Nor can the identification of possible parameters of that discretion, for a discretion which is referred to as

being fettered can be one which is limited not only by appropriate constraints but also by those which are inappropriate or unsuitable. The more important issue which remains, therefore, is what kind of discretion is conferred, and the capacity of the words of the legislative provision to support the type of reasoning which the matter under adjudication requires.

In this regard, it is not surprising to note that the common law has traditionally allowed special recognition of the fact that the adjudication of questions relating to the process and due administration of the court is to be handled as a matter relating to the administration of justice and, as such, on a case by case basis. This inherent jurisdiction of the court includes not only the common law offence of contempt of court, for example, but also extends to the power of the court in relation to the regulation of process and the exercise of powers by summary process following an abuse of process. (See further: I. H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 C.L.P. 23.) The importance of these rules is evident in their direct relationship with the citizen's right to access to justice, and the multiplicity and breadth of considerations which are brought to bear in this area of the law ought to be understood as a reflection of the fact that "the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority ..." (Jacob, *supra*, at p. 27). The nature of the application of these rules reflects the requirement that they be reasonably flexible and applicable even in unforeseen and unusual circumstances. As is the case with the law governing the granting or denial of bail, they may accurately be contrasted to the codified rules of the criminal law which reflect the requirement that the norms which govern conduct, and the contravention of which may result in incarceration, be both promulgated and formulated so as to allow for a high degree of certainty. Despite these differences, the two types of rules have been viewed as mutually supportive both in relation to each other as well as to the broader aims of the law, and ought to be so viewed. This understanding is consistent with the conclusion of this Court in *Nova Scotia Pharmaceutical Society*, *supra*, at p. 642, where the reference which ought to be made to particular features of the law did not detract from the conclusion that:

... the standard I have outlined applies to all enactments, irrespective of whether they are civil, criminal, administrative or other.

It is in light of these considerations that both the context and the content of the public interest criterion in s. 515 (10(b)) must be viewed.

In this regard, it is, first, significant to recognize the general sense of the phrase, which is a reference to the special set of values which are best understood from the point of view of the aggregate good and are of relevance to matters relating to the well-being of society. Indeed, in this sense it is at the heart of our legal system and inspires all legislation as well as the administration of justice. Its content is in turn expressed by laws, be they the Constitution, the common law or legislation. The Charter is an expression of the fundamental values which direct the public interest. The concept of public interest is indeed broad but it is not meaningless, nor is it vague. The breadth of the concept of the public interest has been viewed as a necessary aspect of a notion which accommodates a host of important considerations which permit the law to serve a necessarily wide variety of public goals. In the words of Lord Morris, when a legal system

operates on the basis that "the law is made for the public and not the public for the law", it is as a matter of course that "[o]ver and again in the substance and in the administration of the law we meet the conceptions of the public interest and of public policy" ("The Interaction of Public Interest, Public Policy and Public Opinion in Relation to the Law" (1979), 10 *Cambrian L. Rev.* 29, at p. 29).

At the same time, it is clear that the notion of public interest also operates as a reference for the rules of law which bear upon legal determinations of when the interest of the public will be specially considered, the relationship which those interests will have to other interests which fall to be considered, and the extent to which the public interest is to be protected by the law. It is therefore important to refer to two aspects of the context in which the criterion of public interest is to be considered. The first relates to the application of a public interest criterion in relation to a matter which involves the power of the state to limit the rights of the individual. I agree with the Chief Justice that cloaking whims in judicial robes is not sufficient to satisfy the principles of fundamental justice, and this concern is of particular weight in matters like the decision to grant bail which involve a liberty interest. However, far from being an alien consideration with respect to the adjudication of matters involving a liberty interest, consideration of the public interest is often a necessary element of the proper articulation of the reasons for a determination. In *Attorney-General v. Times Newspapers Ltd.*, [1973] 3 All E.R. 54, the House of Lords restored an injunction on modified terms against the proprietors of the Sunday Times restraining them from publishing a newspaper article which related to pending litigation for the recovery of loss caused by the drug thalidomide. It was held that it was with reference to the concept of the public interest that the proper considerations ought to be weighed and evaluated. Doing so did not mean that only certain interests would be discussed or only one side of the debate would be considered. Indeed, the public interest was viewed as a suitable means for approaching both, albeit opposed, interests which were put in issue in the litigation. As Lord Reid concluded, the proper approach to the question was as follows (at p. 66):

...I think that a balance must be struck between the public interest in freedom of speech and the public interest in protecting the administration of justice from interference.

The second aspect of the context in which the criterion of public interest must be considered is the specific context in which the provision operates. The decision to grant bail is one which involves a consideration of likely future conduct, and the potential consequences for the applicant, the justice system and society of a grant of bail. The broad nature of these considerations makes a consideration of the public interest appropriate. The bearing of the public interest on a decision regarding the liberty of a potential detainee is recognized not only in Canada, but also in the United States. In *Hilton v. Bruns*, 481 U.S. 770 (1987), the Supreme Court of the United States affirmed that the proper test for whether to stay a district court order granting relief to a petitioner claiming habeas corpus rights, pending the state appeal, is not limited to a consideration of the risk of flight but includes a consideration of "where the public interest lies" (p. 776). Indeed, a consideration of the context in which the Canadian provision appears suggests that the concern that arises is not as to meaning but rather as to potential

broadness.

As the Chief Justice appropriately points out, a bail application differs from other legal determinations in that it does not involve a finding of guilt as to past conduct. Consequently, the general interest of the accused in being able to be informed of which conduct is prohibited by the law does not bear on this type of proceeding. A bail application is rather concerned with governing future conduct during the interim period awaiting trial. What is at issue are the reasons for detention. The criterion set by the Charter is that of just cause. This implies two elements: (1) a cause or reason and (2) a proportionality between the reason and the deprivation of liberty that makes the cause "just". Public interest, as used in s. 515(10), must be understood in this context. Under s. 515(10), two main elements exist in relation to the operation of the public interest criterion. One of them is a constraint upon the type of relationship which must exist between the reasons for a refusal to grant bail and the relevant public interest: it must be one of necessity. This is reflected in s. 515(10) by the requirement not only of a public interest but also of necessity for the detention. This element of necessity involves a causal link between the public interest and the detention such as to make the detention necessary and not merely convenient or desirable but also an element of importance, weight or seriousness of the public interest such as to outweigh the accused's right to personal liberty. This necessity of course can only be and indeed must be, by the terms of s. 515(10) (b) itself, determined having regard to all the circumstances, that is to the full context both of the accused and the community. The element of seriousness of the public interest to be considered serves to qualify the other element, namely the content of the considerations which may be included within the public interest criterion. Some of these considerations may be covered by the words, in s. 515(10) (b), "for the protection or safety of the public". The section expressly includes certain examples of relevant matters. It means that they should relate to the safeguarding of the fundamental values of the rule of law and the Charter which include the maintaining of order and security and respect for the fundamental individual and collective rights of others. However, the concept of public interest is broader than that of protection or safety of the public, and includes interests which may not be properly included within the categories of public health or safety. The aim of avoiding interference with the administration of justice is one such example. Other examples of a public interest which have been mentioned as having been actually experienced are the protection of the accused himself from suicide or from the actions of others, the prevention of activities which involve the possession of or dealing in small quantities of illegal narcotics, or the preparation of reports for the court which require the presence of the accused. Also important is the consideration that the criterion of necessity in the public interest is capable of encompassing circumstances which have not been foreseen or, indeed, which may be unforeseeable, yet when they occur, albeit rarely, they obviously make the detention necessary and undoubtedly provide just cause for denying bail within the meaning of s. 11 (e) of the Charter. The courts must be able to deal with such circumstances. The good governance of society and the rule of law itself require that Parliament be allowed to provide for social peace and order even in unforeseen circumstances. The appropriate instrument for doing this is through the administration of justice by the courts and allowing them a measure of discretion which they are bound to exercise

judicially, that is, for reasons that are relevant, within the limits provided by law and in accordance with the Charter . The importance and the nature of this function of legislative provisions have been recognized by this Court in *Nova Scotia Pharmaceutical Society*, supra, at p. 642. It was there stated that:

One must be wary of using the doctrine of vagueness to prevent or impede State action in furtherance of valid social objectives, by requiring the law to achieve a degree of precision to which the subject-matter does not lend itself. A delicate balance must be maintained between societal interests and individual rights. A measure of generality also sometimes allows for greater respect for fundamental rights, since circumstances that would not justify the invalidation of a more precise enactment may be accommodated through the application of a more general one.

I am in full agreement with the Chief Justice that flexibility and vagueness are not synonymous. The former is a quality necessary to the administration of justice. Section 515(10)(b) provides for this. Its dual requirements of public interest and necessity which itself predicates a public interest of a serious nature have meaning, give rise to legal debate and, though broad, are not vague but provide an adequate framework and limit for the exercise of judicial discretion and a means for controlling such exercise while at the same time allowing for the flexibility required for an effective administration of justice and implementation of the rule of law. I underline, as does the Chief Justice in his reasons both in this case and in the case of *R. v. Pearson*, [1992] 3 S.C.R. 000, that the bail process is subject to very exacting procedural guarantees which both structure and guide the exercise of judicial discretion.

In the result, I would, as the Chief Justice, allow the appeal and remit the matter to the Superior Court for a new bail review under s. 520 of the Criminal Code applying ss. 515(6) (a), 515(6) (d) and 515(10) (b) in accordance with the above principles. I would answer the constitutional questions as follows:

1.Does s. 515(10)(b) of the Criminal Code , which permits the preventive detention of an accused in the public interest or for the protection or safety of the public, limit ss. 7 , 9 , 11 (d) and 11 (e) of the Canadian Charter of Rights and Freedoms ?

Answer: No.

2.If, and to the extent the answer to this question is affirmative in whole or in part, is s. 515(10) (b) of the Criminal Code a reasonable limit in a free and democratic society and justified under s. 1 of the Canadian Charter of Rights and Freedoms ?

Answer: It is not necessary to answer this question.

3.Do ss. 515(6)(a) and 515(6)(d) of the Criminal Code limit ss. 7 , 9 , 11 (d) and 11 (e) of the Canadian Charter of Rights and Freedoms ?

Answer: No.

4.If the answer to this question is affirmative, are ss. 515(6) (a) and 515(6) (d) of the Criminal Code a reasonable limit in a free and democratic society and justified under s. 1 of the Canadian Charter of Rights and Freedoms ?

Answer: It is not necessary to answer this question.

Appeal allowed.

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Sup. Ct. Montreal, No. 500-36-000036-917, February 1, 1991.

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