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CANADA / JUDGMENT

## R. v. Quinn

2014 BCSC 2529

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COURT

Supreme Court of British Columbia

DECIDED

19 December 2014

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2014 BCSC 2529 R. v. Quinn

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Quinn,

2014 BCSC 2529

Date: 20141219

Docket: X078038-1

Registry: New Westminster

Regina

v.

**Daniel Patrick Quinn**

Corrected Judgment: The text of the judgment was corrected at paragraphs 1, 2, 3, 4, 7, 8, 9, 11, 12, 13, 14, 15, 22, 23, 25, 26, 27, 28, and 29 on February 5, 2015

Before: The Honourable Mr. Justice G. P. Weatherill

Oral Reasons for Judgment

Counsel for the Crown:

N.M.D. Reithmeier

Counsel for the Accused:

J.V. Myers

Place and Dates of Hearing:

New Westminster, B.C.

December 16 and 19, 2014

Place and Date of Judgment:

New Westminster, B.C.

### **December 19, 2014**

[1] THE COURT: The matter before me is a review of the accused's detention pending trial pursuant to s. 525 of the Criminal Code, R.S.C. 1985, c. C-46 [Code]. Where an accused has been detained in custody pending a trial for an indictable offence, s. 525 provides an accused with an automatic review hearing after the expiration of 90 days to determine whether or not the accused should be released from custody.

[2] The relevant portions of s. 525 are as follows:

525. (1) Where an accused who has been charged with an offence other than an offence listed in section 469 and who is not required to be detained in custody in respect of any other matter is being detained in custody pending his trial for that offence and the trial has not commenced

(a) in the case of an indictable offence, within ninety days from

(i) the day on which the accused was taken before a justice under section 503, or

(ii) where an order that the accused be detained in custody has been made under section 521 or 524, or a decision has been made with respect to a review under section 520, the later of the day on which the accused was taken into custody under that order and the day of the decision, or

(b) in the case of an offence for which the accused is being prosecuted in proceedings by way of summary conviction, within thirty days from

(i) the day on which the accused was taken before a justice under subsection 503(1), or

(ii) where an order that the accused be detained in custody has been made under section 521 or 524, or a decision has been made with respect to a review under section 520, the later of the day on which the accused was taken into custody under that order and the day of the decision,

the person having the custody of the accused shall, forthwith on the expiration of those ninety or thirty days, as the case may be, apply to a judge having jurisdiction in the place in which the accused is in custody to fix a date for a hearing to determine whether or not the accused should be released from custody.

...

- (3) On the hearing described in subsection (1), the judge may, in deciding whether or not the accused should be released from custody, take into consideration whether the prosecutor or the accused has been responsible for any unreasonable delay in the trial of the charge.
- (4) If, following the hearing described in subsection (1), the judge is not satisfied that the continued detention of the accused in custody is justified within the meaning of subsection 515(10), the judge shall order that the accused be released from custody pending the trial of the charge on his giving an undertaking or entering into a recognizance described in any of paragraphs 515(2)(a) to (e) with such conditions described in subsection 515(4) as the judge considers desirable.
- [3] There are two different lines of authority in this Court with respect to the interpretation of the scope of a s. 525 review hearing.
- [4] The first line of authority interprets s. 525 as a de novo hearing in which the Court will consider both the existence of any unreasonable delay in the trial and the justification for the accused's continued detention pursuant to the factors articulated in s. 515(10) of the Code (i.e. whether the detention is necessary to ensure the accused's attendance in court, for the protection or safety of the public, and to maintain confidence in the administration of justice). These are known as the primary, secondary, or tertiary grounds.
- [5] The second line of authority endorses a two-step approach where the existence of an unreasonable delay is a threshold requirement in order to reconsider the justification for an accused's detention. Absent this finding, no review takes place.
- [6] The decision of Mr. Justice Gaul in *R. v. Sarkozi*, 2010 BCSC 1410 reflects the formal de novo review approach. It is consistent with a number of decisions that predate it in Alberta, the Yukon, and Manitoba, and has been followed in Newfoundland and Nova Scotia (see for example *R. v. Saulnier*, 2002 NSSC 45).
- [7] Subsequent decisions in British Columbia have tended to prefer the two-step approach as was articulated by Mr. Justice Bernard in *R. v. Jerace*, 2012 BCSC 2007. *Jerace* has been followed in *R. v. Andreychuk*, 2013 BCSC 1743; *R. v. Widalko*, 2013 BCSC 2077; *R. v. Brown*, 2013 BCSC 677; *R. v. Sharma*, 2013 BCSC 2389; *R. v. Wallace*, 2013 BCSC 1706 and *R. v. Sutherland*, 2013 BCSC 1686.
- [8] I note also that in the recent case of *R. v. Bowden*, 2013 ABQB 178, the learned Associate Chief Justice in Alberta presented a well-reasoned discussion of the issue and came to the same conclusions as Bernard J. in *Jerace*.
- [9] However, in the most recent decision of this Court dealing with s. 525, *R. v. Vandewater* (November 13, 2014), New Westminster X077835 (B.C.S.C.), Groves J. declined to follow the two-step approach and chose instead to follow the *Sarkozi* line of authority.
- [10] As such, the law remains unsettled.

- [11] The dominant approach to judicial comity generally requires a trial judge to follow the previous decisions emanating from the same court as articulated in the case of *Re Hansard Spruce Mills Ltd.*, [1954] 4 D.L.R. 590 (B.C.S.C.) [*Spruce Mills*] at 591:
- [3] But, as I said in the *Cairney* case, I think the power, or rather the proper discretionary duty of a trial Judge, is more limited. The Court of Appeal, by overriding itself in *Bell v. Klein*, has settled the law. But I have no power to overrule a brother Judge, I can only differ from him, and the effect of my doing so is not to settle but rather to unsettle the law, because, following such a difference of opinion, the unhappy litigant is confronted with conflicting opinions emanating from the same Court and therefore of the same legal weight. This is a state of affairs which cannot develop in the Court of Appeal.
- [4] Therefore, to epitomize what I have already written in the *Cairney* case, I say this: I will only go against a judgment of another Judge of this Court if:
- (a) Subsequent decisions have affected the validity of the impugned judgment;
  - (b) it is demonstrated that some binding authority in case law, or some relevant statute was not considered;
  - (c) the judgment was unconsidered, a *nisi prius* judgment given in circumstances familiar to all trial Judges, where the exigencies of the trial require an immediate decision without opportunity to fully consult authority.
- [5] If none of these situations exist I think a trial Judge should follow the decisions of his brother Judges.
- [12] This was the approach taken, for example, by Grauer J. in *Widalko* in deciding to follow *Jerace*. He noted that while Bernard J. in *Jerace* did not himself address the requirements of *Spruce Mills*, the decisions of the last five judges of the Court all following *Jerace* outweighed the *Sarkozi* line of authority, and as such he was bound to follow *Jerace*. Quoting from *Widalko* at para. 24:
- [24] It was argued before me that I am not bound by those principles to follow the five judges who have endorsed the interpretation of section 525 that yields the two-step enquiry process. It remains open to me, counsel submitted, to follow the approach taken by Gaul J. Strictly speaking, that is probably correct. But the principles of judicial comity, together with the basic precept of the judicial process that like cases be decided alike, dictate, in my view, that subject to appellate review, the controversy should now be considered at an end in this province. Unless I am convinced that to do so would be an error of law, and I am not (notwithstanding the exceptionally able submissions of counsel for the accused), I should apply the section in the same manner as have the last five judges of this Court to consider the matter.

- [13] Given the recent and also well-reasoned decision of Groves J. in Vandewater that declines to follow Jerace, even if I followed the principles in Spruce Mills, I am faced with the difficulty of disagreeing with the reasoning of one or more of my learned colleagues.
- [14] Groves J. in Vandewater points out that when faced with competing lines of authority in one court, rather than relying solely on the principles of judicial comity articulated in Spruce Mills, it might be helpful to review the actual language of the statutory provisions in issue along with the analysis of the competing authorities and the principles of statutory interpretation. Groves J. proceeded to conduct a fresh analysis of s. 525 with those principles in mind and came to the firm conclusion that the decision of Gaul J. in Sarkozi was the correct approach. For the reasons that follow, I agree with his approach and conclusions.
- [15] As Groves J. notes, there is nothing in the wording of s. 525(3) that suggests the subsection serves as a threshold requirement in a s. 525 hearing; in fact, quite the opposite. Subsection (3) states that a "judge may take into consideration" whether there has been any unreasonable delay. The wording "may consider" in most statutory contexts suggests a factor among others to consider, not a threshold test.
- [16] Furthermore, subsection (3) states a judge may consider unreasonable delay "in deciding whether the accused should be released from custody." The wording "in deciding" indicates the judge must make a determination about whether or not to release an accused, and in doing so, is authorized to consider whether there is an unreasonable delay.
- [17] This conclusion is reinforced by the mandatory language of subsection (4), which states that the judge "shall order that the accused be released from custody" if the judge is not satisfied that the continued detention of the accused is justified within the meaning of s. 515(10).
- [18] Again, this suggests that the judge must make a determination about whether or not to release an accused. There is nothing in subsection (4) to suggest that there is a threshold requirement triggering this determination.
- [19] I note that subsection (3) also states that the judge may consider whether "the prosecutor or the accused has been responsible for any unreasonable delay."
- [20] If I were to follow the two-step approach, an unreasonable delay caused by the prosecution could logically be a threshold question triggering a s. 525 review. However, if an accused caused an unreasonable delay, it is illogical that the delay would trigger a substantive review of the justification for the accused's detention that could possibly result in the accused's release. It seems to me that an unreasonable delay in this context can only be one factor to consider amongst others.
- [21] Some of the decisions following the two-step approach take issue with the co-existence of s. 525 and s. 520, which provides an accused with a right to seek a review of an order denying bail in the first instance at any time pending trial.
- [22] In Sutherland at para. 10, Saunders J. observed that:

- [10] it would be an odd result if s. 525 were read so as to afford an accused an avenue of review which does not require any of the preconditions that are laid down in the case law respecting s. 520 .
- [23] Similarly, Bernard J. states at para. 15 of *Jerace* that it would be "an odd result if s. 525 were read so as to afford an accused an avenue of review which requires neither proof of any of the aforementioned grounds in s. 520 nor the finding of an unreasonable delay."
- [24] As "odd" a result as this may be -- and it is odd, because it will require a detained accused to be brought back before the Court on a regular basis and it will consume judicial resources -- the principles of statutory interpretation direct that if the intention of Parliament is clear in the wording of the provision, then it must be followed. On a plain reading of the provision, I can come to no other interpretation.
- [25] In any event, in my view, there is a clear and principled reason why an automatic *de novo* review after 90 days under s. 525 can co-exist with an accused's right to seek renewal of a denial of bail in the first instance at any time. It is uncontested that the purpose of s. 525 is to "prevent the accused from languishing for lengthy periods of time in custody and to ensure a prompt trial" (*The Law of Bail in Canada* (3d ed.), G.T. Trotter at 335).
- [26] Consequently, every accused is entitled to an automatic review of the circumstances of his or her detention after 90 days has elapsed. It appears that under the presumption of innocence, Parliament determined that an accused should not be allowed to languish in prison beyond 90 days without a review of the justification for that detention. Alternatively, if there is some error or change in circumstances in the accused's detention, it is open to an accused to apply for a review under s. 520. Given that this application may be made at any time, i.e. before the expiration of 90 days, it is logical that there is a higher bar of review.
- [27] In *Jerace*, Bernard J stated at para. 11:
- [11] If it had been the intention of the Legislature to entitle an accused to a fresh bail hearing merely upon 90 days elapsing for indictable offences, then such would not have been difficult to clearly state .
- [28] With the utmost respect, it is my view that s. 525 does clearly state an accused is entitled to a fresh bail hearing merely upon 90 days elapsing. Based on the wording of the provision and the principles of statutory interpretation, I am unable to read in a further requirement that there must be a threshold of unreasonable delay before a review can be conducted.
- [29] I am told that s. 525 of the Code was enacted in 1974, some 40 years ago. The interpretation of s. 525 remains an issue that is unresolved in 2014. The untenable nature of this situation must be dealt with and I urge Crown counsel to take whatever steps necessary to have this decision reviewed at an appellate level so that the divergence of the two lines of authority regarding the interpretation of s. 525 can be resolved.

"G. P. Weatherill J."

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