R. v. Bode-Harrison, 2017 NWTSC 15 S-1-CR-2016-000108

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- v -

DOLAPO BODE-HARRISON

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Transcript of the Decision on Bail Review delivered by

The Honourable Justice L. A. Charbonneau, sitting in

Yellowknife, in the Northwest Territories, on the 20th day

of January, 2017.

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APPEARANCES:

Ms. M. Zimmer: Counsel for the Crown

Mr. P. Harte: Counsel for the Accused

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prohibiting publication, broadcast or transmission

of information contained herein pursuant to s. 517,

520(9) and 525(8) until the trial has ended

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1 THE COURT: On December 19th, 2016, I

2 heard the Applicant's application for a review of

3 the decision that was made by a Justice of the

4 Peace on August 2nd, 2016, ordering that he be

5 detained pending his trial.

6 The Applicant has sought review of that

7 decision. He is also seeking release pursuant to

8 Section 525 of the Criminal Code. By operation

9 of Section 525, the Applicant was entitled, quite

10 apart from the bail review application that he

11 filed, to an automatic review of his bail. Both

12 hearings proceeded together.

13 I will first speak about the show cause

14 hearing that was held back in August because it

15 is an important part of what I had to examine in

16 my deliberations on this matter.

17 First, dealing with the allegations. The

18 Applicant faces a charge of conspiracy relating

19 to trafficking cocaine and possessing cocaine for

20 the purpose of trafficking. A number of other

21 individuals are charged with him of this count

22 and some of these individuals also face distinct

23 charges aside from the conspiracy charge.

24 The Applicant was charged as a result of a

25 major investigation which targeted a network that

26 was believed to be responsible for high-level

27 trafficking in the City of Yellowknife. During

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1 the course of that investigation, the RCMP

2 obtained an authorization pursuant to Part VI of

3 the Criminal Code to intercept and monitor

4 private communications of one Norman Hache. He

5 is one of the Applicant's co-accused. Through

6 these intercepted communications, police were

7 able to obtain evidence implicating Mr. Hache as

8 controlling a drug trafficking network and

9 conspiring to carry out this activity with a

10 number of people. It is alleged that the

11 Applicant is one of these people. The operation

12 involved planning to move drugs from southern

13 Canada up to the Northwest Territories for

14 distribution and resale.

15 At the show cause hearing held in August, a

16 number of those intercepted conversations were

17 played. They were conversations between

18 Mr. Hache and, it is alleged, the Applicant. In

19 this decision, I am going to refer to those calls

20 as calls between Mr. Hache and the Applicant

21 without using the words "alleged" each time, but

22 I do realize the Applicant does not concede that

23 he is, in fact, the person talking to Mr. Hache

24 during those intercepted phone calls.

25 I am not going to refer to the calls in

26 detail here because they are a matter of record

27 from the transcript of the proceedings before the

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1 Justice of the Peace. Suffice it to say that

2 those conversations suggest that the person

3 Mr. Hache was speaking to was above Mr. Hache in

4 the trafficking organization. And, again, I am

5 going to use "the Applicant" without using the

6 word "alleged". But if, in fact, he was the

7 person speaking to Mr. Hache, he was the one who

8 was coordinating the shipment of drugs from the

9 southern suppliers to Mr. Hache, and Mr. Hache

10 would in turn redistribute the drugs to be resold

11 in various communities in the Northwest

12 Territories. In some of the calls, the Applicant

13 is giving directions to Mr. Hache.

14 The quantities of drugs talked about in some

15 of those conversations are substantial and the

16 evidence suggests an organized drug trafficking

17 network and ongoing activities. There is

18 reference in some of the calls about how busy

19 things are getting as far as drug sales.

20 The intercepted conversations also include

21 discussions that took place shortly before a

22 delivery of drugs was to take place to someone in

23 Fort Resolution. That upcoming delivery is

24 discussed on the calls. Police had surveillance

25 on the residence and, after delivery, executed a

26 search warrant in the residence in question and

27 seized the drugs. This was in March 2016.

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1 Conversations intercepted between Mr. Hache

2 and the Applicant after the execution of that

3 search warrant show them discussing things like

4 "How could this happen?" and trying to figure out

5 who "ratted them out". The Applicant expresses

6 serious concern about owing money to his

7 suppliers, says on a number of occasions that he

8 is "fucked". There are subsequent conversations

9 between the two to the same effect.

10 If this evidence is admitted at trial and if

11 the Crown establishes that the person speaking to

12 Mr. Hache is the Applicant, it will establish

13 that the Applicant was the highest in the

14 hierarchy of those charged in relation to this

15 conspiracy.

16 The Applicant has a criminal record. He has

17 a number of Youth Court convictions starting in

18 1998 and then a series of convictions as an

19 adult. He has two convictions for simple

20 possession of drugs in 2003 and 2005. Both times

21 he received fines. He has a large number of

22 convictions for breaching Court orders between

23 1998 and 2003. There is a gap in his record from

24 2005 to 2013, and in 2013 he was convicted for

25 refusing to provide a breath sample.

26 At the original bail hearing, the Applicant

27 proposed to go live with his girlfriend in

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1 Calgary. She was willing to act as a surety and

2 to commit a sum of $1,000, without deposit, in

3 support of his release. The Applicant's brother

4 was also willing to act as a surety and to commit

5 that same amount, $1,000, without deposit, in

6 support of his release. The Applicant's brother

7 operates a work placement agency and was prepared

8 to have the Applicant continue working for him at

9 that agency.

10 The Applicant himself was proposing to

11 deposit $10,000 in cash to demonstrate his

12 commitment to comply with his release terms.

13 The circumstances of the Applicant's arrest

14 are also relevant. The charge was sworn and a

15 warrant issued for the Applicant's arrest in

16 2016. I understand that this warrant had not

17 been extended to Alberta. The Applicant, after

18 having learned of the existence of this warrant,

19 sought legal advice and ultimately travelled to

20 Yellowknife in July and surrendered himself to

21 the custody of the RCMP.

22 The Justice of the Peace concluded that the

23 Applicant had met his onus on the primary ground.

24 He concluded, however, that he had not met his

25 onus on the secondary and tertiary grounds. He

26 concluded that based on the things the Applicant

27 said to Hache after the execution of the search

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1 warrant, including the fact that he was "fucked",

2 there was a substantial likelihood that he would

3 commit further drug offences upon release given

4 the financial pressures that he was under to

5 reimburse his suppliers.

6 The Justice of the Peace also noted the

7 Applicant's history for failing to comply with

8 Court orders and the uncertainty in the release

9 plan as far as his residency was concerned. This

10 was because the Applicant's girlfriend testified

11 at the hearing that she would be moving out of

12 her residence in the fall.

13 On the tertiary ground, the Justice of the

14 Peace noted the Crown's case appeared strong,

15 that the allegations were serious, and that the

16 Applicant faced a potentially lengthy sentence of

17 imprisonment. He noted the effect that drug

18 trafficking has on the community and concluded

19 that the public's confidence in the

20 administration of justice would be undermined if

21 the Applicant were to be released even with cash

22 bail and sureties.

23 I will now turn to the evidence that was

24 adduced at the December 19th bail review.

25 At that hearing, the Crown relied on

26 essentially the same allegations as those that

27 were presented at the initial bailing hearing

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1 with one addition. Since the original show cause

2 hearing, the Crown has received a voice

3 identification report. It is alleged that a

4 comparison was done between the intercepted

5 conversations and a known voice sample of the

6 Applicant. This was done by using conversations

7 he had with family members while he was in

8 custody and were recorded at the jail. The

9 conclusion of that report is that the Applicant

10 is the person who was talking to Mr. Hache in the

11 intercepted calls. As I recall what the

12 prosecutor said in the bail review hearing, the

13 person who prepared the report is also of the

14 opinion that the Applicant's voice has some

15 unique features.

16 The release plan presented in December has

17 some things in common with the one presented in

18 August but also has some differences. The

19 Applicant's brother is continuing to be proposed

20 as one of the sureties and is continuing to say

21 that the Applicant can work for his company, but

22 he is now prepared to be named as a surety and

23 commit $20,000 to his brother's release. This is

24 substantially more than what he was prepared to

25 commit to in August. The second proposed surety

26 is now the Applicant's mother. She lives in

27 Coquitlam, B.C., and is prepared to have the

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1 Applicant reside with her. She is prepared, in

2 other words, to be the residential surety, as

3 opposed to the Applicant's girlfriend being the

4 residential surety. She lives in a housing co-op

5 and has resided there for the last eight years.

6 She is casually employed and appears to be of

7 relatively modest means. She is prepared to

8 commit a sum of $1,000, without deposit, to

9 support her son's release application. She

10 deposes that that is a substantial sum amount of

11 money for her.

12 The two differences in the release plan are

13 the change in the proposed place of residence for

14 the Applicant and who his residence surety will

15 be, and the increase of the amount that his other

16 surety, his brother, is prepared to risk by

17 supporting his release.

18 The Applicant says that the door is open for

19 this Court to intervene on his bail review for

20 two reasons. First, he says the Justice of the

21 Peace committed errors in his decision. Second,

22 he says changes in the release plan constitute a

23 change in circumstances that is a basis for this

24 court to make a fresh assessment of whether or

25 not he should be released. With respect to the

26 Section 525 review, the Applicant asks the Court

27 to conclude that this a case where there is going

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1 to be significant delay and that he is entitled

2 to release for that reason also.

3 The Crown argues that the Justice of the

4 Peace did not commit any errors in his decision.

5 The Crown further argues that the new release

6 plan is not substantially different from the

7 first one and, in some respects, is weaker

8 because the Applicant would not be living

9 anywhere near one of the two sureties as his

10 brother lives in Calgary and the Applicant would

11 be living in British Columbia. The Crown

12 questions whether the Applicant's mother, despite

13 her best intentions, will be in a position to

14 supervise her adult son in a meaningful way.

15 I will deal first with the Section 525

16 review.

17 Section 525 is a mechanism intended to

18 ensure that accused persons who are on remand

19 have the benefit of regular review of their bail

20 status. In some jurisdictions, the approach

21 followed is the accused must first establish as a

22 condition precedent to the Court engaging in any

23 review under that provision that there has been

24 unreasonable delay in proceedings. If the Court

25 finds that there has been, it moves on to examine

26 the release plan in the circumstances; but if

27 delay is not established, that is the end of the

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1 matter and nothing else is considered.

2 In this jurisdiction, the test applied has

3 not historically been as rigid as that as far as

4 delay being a condition precedent to review. The

5 approach followed for many years in this

6 jurisdiction was the one described in R. v. Caza,

7 [1999] NWTJ 73, where the Court said:

8 It seems to me that, having regard

to the purpose of Section 525, one

9 would necessarily have to examine

whether there have been

10 unreasonable delays in coming to

trying, whether the prosecutor or

11 the accused is responsible for any

such delay, the original reasons

12 for detention, and any new

circumstances that may be

13 relevant; so, it is a mixture of a

hearing de novo and an appeal.

14 The ultimate issue, absent

extraordinary delay, however, is

15 still the three-pronged test set

out in Section 515(10).

16

17 Under that approach, delay is an important

18 factor to consider, but not at the complete

19 exclusion of other things. Admittedly, this

20 approach gives rise in some instances to somewhat

21 of an overlap between the considerations that

22 would apply in the Section 525 review and those

23 that would apply in the 520 review. This

24 particular review was not argued before me in

25 this particular hearing. I know that there have

26 been criticisms of this approach. This Court was

27 recently invited to depart from it and adopt the

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1 more strict two-step test. It has declined to do

2 so.

3 R. v. Stiopu, 2017 NWTSC 7 (currently under

4 a publication ban).

5 Whatever approach is adopted, as far as

6 delay is concerned, in my view, Section 525 is a

7 curative provision. It does not entail assessing

8 delay yet unknown in a prospective way. In other

9 words, the delay to be considered on a 525

10 application is the delay that has elapsed to

11 date. This was what the Court said in Stiopu and

12 I completely agree.

13 In this case, there has not yet been any

14 significant delay. Given the nature of this

15 case, the number of accused, the nature of the

16 evidence, the likelihood that several pre-trial

17 motions may be filed, it may well be that there

18 will be considerable delay before this matter

19 proceeds to trial. But, at this point,

20 projecting into the future when this matter may

21 go to trial is speculative. This leaves as the

22 only potential reasons to intervene alleged

23 errors by the Justice of the Peace and changes in

24 circumstances. Those are the very issues raised

25 in the context of the Section 520 bail review

26 and, in the circumstances of this case, are

27 better addressed in the context of that

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1 application.

2 Now, I turn to the Section 520 application

3 for review.

4 The scope of intervention of this Court at a

5 Section 520 bail review has long been the subject

6 of debate and some controversy. That debate has

7 been put to rest in R. v. St-Cloud, 2015 SCC 27.

8 It is now very clear that on a bail review this

9 Court's role is limited. It is appropriate for

10 this Court to intervene (a) if the Justice of the

11 Peace has erred in law, (b) if the Justice of the

12 Peace's decision was clearly inappropriate; that

13 is, excessive weight was given to a factor or

14 insufficient weight was given to another, or (c)

15 if the evidence shows a material and relevant

16 change in circumstances. St-Cloud, para. 129.

17 As I already noted, the Applicant argues that

18 this Court can intervene for two reasons:

19 because the Justice of the Peace made errors and

20 because the evidence presented at the bail review

21 hearing show material and relevant change in

22 circumstances.

23 I will deal first with the alleged errors

24 made by the Justice of the Peace.

25 The Applicant says that the Justice of the

26 Peace erred in that, first, he failed to

27 meaningful consider the presumption of innocence

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1 and actually only paid it lip service. Second,

2 that he overemphasized the strength of the

3 Crown's case. Third, that he underemphasized the

4 fact that the Applicant surrendered himself to

5 this jurisdiction even though there was no

6 warrant for his arrest in effect in Alberta where

7 he was at the time.

8 The Justice of the Peace said in his Reasons

9 that he was taking into consideration the

10 presumption of innocence and the right to bail

11 and that he considered those before reaching his

12 decision. The Applicant's submission that the

13 Justice of the Peace did not actually take the

14 presumption of innocence into account is based,

15 in essence, on his decision to detain him. It

16 seems to me the argument boils down to "the

17 Justice of the Peace cannot possibly have

18 sufficiently taken into account the presumption

19 of innocence, otherwise he would have released

20 me." That is not what counsel said, but that is

21 what I think the argument boils down to. This

22 seems to me to be somewhat of a circular

23 argument. It uses an unfavourable outcome for

24 the basis of saying there was an error in the

25 reasoning process. I do not find this argument

26 convincing, especially when considering as a

27 whole the various things that the Justice of the

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1 Peace said in his decision. The Justice of the

2 Peace said he was mindful of the presumption of

3 innocence, and his careful review of the evidence

4 and the applicable principles suggest to me that

5 he indeed was.

6 The next alleged error is the overemphasis

7 of the apparent strength of the Crown's case.

8 Clearly, the Crown's case against the

9 Applicant rests on the wiretap evidence and on

10 the Crown's ability to establish that the

11 Applicant is the person speaking with Mr. Hache.

12 In assessing the strength of the Crown's

13 case at the bail stage, one must always be

14 cautious because the evidence is not tested.

15 This is especially so with something like wiretap

16 evidence. On its face, it can be very

17 compelling. We also know that wiretap evidence

18 is often, if not always, the subject of

19 challenge. These hearings can take weeks. How

20 then should a court approach this type of

21 evidence in the context of bail?

22 I agree with the comments made in R. v.

23 Amer, 2016 ABQB 689, one of the cases that the

24 Applicant brought to my attention. At paragraph

25 42 of that decision, the Court said that the

26 content of the wiretap evidence should be

27 considered as it exists in considering the

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1 strength of the Crown's case. The Court noted

2 that the judicial authorization to intercept the

3 calls, like a judicial authorization for a search

4 warrant, is valid until it is sit aside and

5 successfully challenged.

6 R. v. Abdllahi, 2013, ONSC 4873, which was

7 referred to by the Crown, is to the same effect.

8 At paragraph 21, the Court says:

9 The fact that there are aspects of

admissibility to be addressed

10 later in the proceeding, does not,

in my mind, alter the fact that a

11 bail hearing, the wiretap evidence

must simply be accepted as it is

12 for what it evidently says and for

the inferences it reasonably

13 permits to be drawn when it is

being considered. It ought not to

14 be discounted on the basis that it

will be found to be inadmissible

15 and the absence of evidence on

that hearing that seriously calls

16 its admissibility into question,

evidence that was not advanced at

17 this hearing.

18 I agree with those comments.

19 As for the voice identification evidence,

20 the Applicant says he will challenge its

21 admissibility because of how the police obtained

22 the sample of his voice for comparison. Even

23 more, he says he will bring an application for a

24 judicial stay of proceedings based on abuse of

25 process because of this. He says the

26 authorities' conduct is egregious particularly

27 because they were on notice through a letter from

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1 counsel that the Applicant would not be speaking

2 to them and, if I recall correctly, that he would

3 not agree to being recorded.

4 The Crown points out that the voice sample

5 that was obtained was obtained in conversations

6 that the Applicant was having while incarcerated

7 using a system in the jail that has a

8 pre-recorded message that warns inmates before

9 each call that the call is being monitored and

10 recorded. Now is not the time for the Court to

11 be assessing the merits of these arguments or

12 purport to assess the chances of success of

13 Charter applications that have not yet been

14 filed. It comes down to this: If the wiretap

15 evidence is excluded or if the Crown fails to

16 demonstrate that the person having the

17 conversations with Mr. Hache is the Applicant,

18 the Crown will not have a case against him. If

19 the wiretap evidence is admitted and the voice

20 identification evidence is admitted and accepted,

21 the case against the Applicant will be very

22 compelling.

23 The Justice of the Peace was entitled to

24 consider the contents of the intercepted calls

25 and did not err in his conclusion that the calls

26 are very incriminating for the Applicant and

27 cumulatively present strong evidence for the

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1 Crown in support of the charge. He focused on

2 the intercepted calls because that is what the

3 Crown's case rests on. In my view, he did not

4 overemphasize the strength of the Crown's case.

5 The last error that the Applicant alleges is

6 that the Justice of the Peace placed insufficient

7 weight on the fact he came to the Northwest

8 Territories to voluntarily surrender himself. I

9 disagree with that submission as well for a few

10 reasons. The first is that the Justice of the

11 Peace did refer to the fact that the Applicant

12 came to the Northwest Territories to surrender

13 himself. Moreover, it seems to me that if the

14 Justice of the Peace had not placed weight on

15 that factor, it is difficult to see how he could

16 have found that the Applicant met his onus on the

17 primary ground. As noted by the Justice of the

18 Peace, the Applicant has absolutely no ties to

19 the Northwest Territories. He has several

20 convictions, albeit many of them dated, for

21 breaches of Court orders, including a failure to

22 attend Court. The Justice of the Peace noted

23 that this was a concern but then also noted that

24 the Applicant surrendered himself into custody.

25 Ultimately, he concluded that the Applicant has

26 discharged his onus, that his detention was not

27 necessary to ensure that he would attend court.

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1 This demonstrates, in my view, that contrary to

2 what the Applicant asserts, the Justice of the

3 Peace did attach considerable weight to the fact

4 that the Applicant surrendered himself into

5 custody. That fact weighed a lot less in the

6 analysis of the two other grounds for detention

7 and I do not find any error in that either.

8 On the whole, having carefully reviewed the

9 Justice of the Peace's Reasons, I am not

10 satisfied that he committed any error that would

11 open the door to this Court's intervention.

12 That leaves me to consider the changes in

13 circumstances. More specifically, the changes in

14 the release plan.

15 As I said, the plan presented at the bail

16 review was not identical to the one presented to

17 the Justice of the Peace and the main differences

18 are the increase in the amount pledged by the

19 Applicant's brother from $1,000 to $20,000,

20 without deposit, and the change of the proposed

21 place of residence of the Applicant and the

22 changes to who will be his residential surety.

23 The Crown argues that despite those

24 differences, the proposed plan boils down to

25 something very similar to what was presented in

26 August and overall is not a stronger plan. The

27 plan is not dramatically different. The

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1 Applicant proposes the same amount of cash bail

2 and he is still proposing sureties who will not

3 deposit any money. But one of the sureties is

4 willing to commit $20,000 instead of $1,000.

5 There is no question there is a difference. The

6 Applicant proposes to reside with his mother in a

7 house where she has lived for eight years as

8 opposed to with his girlfriend who the Justice of

9 the Peace found did not have stable housing.

10 I am not convinced that the change in surety

11 amount, especially when there is no deposit,

12 would on its own constitute a sufficient change

13 for me to reassess the Applicant's situation.

14 But the change in the proposed residential surety

15 and the residential stability that it now offers

16 is an important difference that goes to an issue

17 that the Justice of the Peace specifically

18 expressed concerns about at the original show

19 cause hearing.

20 The Justice of the Peace was understandably

21 concerned about the fact that the Applicant would

22 be living with his girlfriend and that she was

23 planning on moving in the fall. There

24 essentially was no residential stability in the

25 proposed plan. The Justice of the Peace

26 concluded that the plan was not strong enough to

27 overcome the concerns he had.

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1 In my view, the change in the proposed

2 residential surety does constitute a material

3 change in circumstances and I must now examine

4 whether, on the basis of this plan, the Applicant

5 has demonstrated that his detention is not

6 necessary. Here, of course, I am speaking only

7 of whether his detention is necessary under the

8 secondary or tertiary ground because the Crown is

9 no longer relying on the primary ground.

10 Before I turn to those grounds themselves

11 and my assessment, I want to say something about

12 the case law. Counsel have placed before me

13 several cases where bail principles relating to

14 these two grounds of detention were applied.

15 Counsel also placed cases that set out principles

16 such as Pearson, [1992] 3 S.C.R. 665 and

17 St-Cloud. But a large number of the cases filed

18 were basically decisions on bail applying these

19 factors. These cases are useful illustrations of

20 how the principles operate, but comparisons are

21 difficult to make from case to case and are not

22 necessarily helpful in assessing the merits of

23 the matter before me. It is a little bit like

24 comparing sentencing decisions. There are so

25 many variables, so many different factors to

26 consider, and no two cases are ever alike.

27 Comparing bail decisions in cases involving

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1 crimes of violence with bail decisions involving

2 drug cases is not all that helpful because the

3 concerns that come into play are very different.

4 But that said, cases are helpful to identify the

5 governing principles and illustrate the

6 ramifications, and I have reviewed all the cases

7 that were submitted to me with that in mind.

8 Speaking first of the secondary ground, this

9 ground is concerned with public safety and

10 potential interferences with the potential

11 administration of justice. Unlike what the

12 situation was in Stiopu where some of the

13 intercepted conversations included discussions

14 about telling witnesses to lie and things of that

15 nature, there is nothing like that here. There

16 are discussions where Mr. Hache and the Applicant

17 are wondering who might have "ratted" on them,

18 there are expressions of concern - one might say

19 near panic - after the execution of the search

20 warrant, but there is nothing in the allegations

21 showing discussions about weapons, violence,

22 intimidation, or other forms of potential

23 interference with the administration of justice.

24 When considering public safety, the issue is

25 whether there is a substantial likelihood that if

26 released, the accused would commit further

27 offences. In that regard, drug offences are

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1 different from any others, as was noted by the

2 Supreme Court in R. v. Pearson. Pearson was a

3 case where the reverse onus provisions and drug

4 cases were reviewed by the Supreme Court of

5 Canada because it was alleged that they violated

6 the Charter, but it gave the Court an opportunity

7 to comment about some of the specificities of

8 drug cases.

9 Unlike many offences, drug offences are not

10 spontaneously committed. They usually fit in an

11 organized and systemic enterprise. It is a very

12 lucrative activity. The incentive for the

13 activity to continue even after arrest and

14 detention is very high.

15 So the risk to the public safety presents

16 itself differently than when dealing with crimes

17 of violence and, more importantly perhaps, the

18 means to prevent the commission of further

19 offences in the form of conditions of the release

20 plan are more limited. Coordinating deliveries

21 of drugs and movement of money, which the

22 Applicant is alleged to have done in this case,

23 can be done from anywhere. The usual conditions

24 of house arrest, reporting conditions, things of

25 that nature may not be as helpful in protecting

26 the public as they can be in other types of

27 cases.

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1 This might be an even more pressing concern

2 if there is suggestions and evidence that the

3 accused person is under financial pressures to

4 reimburse money that he owes to his suppliers, as

5 is the case here. At the same time, the

6 Applicant is presumed innocent and the cardinal

7 rule of bail is release. Detention should be the

8 exception.

9 From the point of view of public safety, the

10 fact that the Applicant faces a serious charge is

11 not in and of if itself reason to detain him

12 under our system, and the risk to public safety

13 cannot be analyzed with an assumption of his

14 guilt as a starting point.

15 The Applicant proposes to abide by a series

16 of conditions and his brother and mother will be

17 on the hook financial if he breaches any of those

18 terms. I have limited information about his

19 relationship with his mother, but I cannot assume

20 that the risk of creating a financial hardship

21 for her would not have any effect on his actions.

22 This is what needs to be balanced: The risk

23 of ongoing criminal activity that is very

24 lucrative, considering the evidence about the

25 financial pressures that the Applicant may be

26 under, versus the proposed release plan and the

27 involvement of his mother and brother.

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1 On the secondary ground, the Applicant's

2 criminal record is also a concern because of

3 several breaches of Court orders, but those

4 breaches are, for the most part, dated and go

5 back to when he was younger. They are not

6 necessarily an indication that he would continue

7 to commit offences in breach of his release terms

8 if such terms were imposed.

9 At the end of the day, the assessment of the

10 secondary ground is a risk assessment. There are

11 no guarantees. No one can ever demonstrate with

12 certainty that they will not commit any offences

13 if released. So on that ground, I am, on the

14 whole, satisfied that based on the release plan

15 now presented, in particular the change in the

16 residential plan, which rests on far more stable

17 ground than was the case in August, the added

18 potential financial consequences to the

19 Applicant's brother if he breaches and potential

20 consequences for his mother, that the Applicant

21 has met his onus and that his detention is not

22 necessary for the protection of the public. That

23 leaves consideration of the tertiary ground.

24 How this ground should be applied and what

25 it means was explained in detail in St-Cloud.

26 Cases that pre-date St-Cloud must be read with

27 extreme caution, in particular when they refer to

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1 this ground as one that should be resorted to

2 only in rare and exceptional circumstances. That

3 is not the case.

4 In considering whether the Applicant's

5 detention is necessary under the tertiary ground,

6 I am guided by the principles set out in St-Cloud

7 which are summarized at paragraph 87 of that

8 decision. The Court made it clear this is a

9 stand-alone ground that must be assessed; it is

10 not merely a residual ground. Among other things

11 the Court also said that it must not be

12 interpreted narrowly or applied sparingly, and it

13 should not be applied only in rare or exceptional

14 cases or only to certain types of crime. Rather,

15 all the circumstances must be balanced with

16 special attention to the four factors listed in

17 the Criminal Code, but not exclusively those

18 factors.

19 These circumstances, as I say, all need to

20 be balanced in deciding whether an accused's

21 pre-trial detention is necessary to maintain

22 confidence in the administration of justice.

23 That said, "necessity" remains the threshold as

24 opposed to desirability or "convenience".

25 Release remains the cardinal rule, and the

26 comments underscoring these principles in earlier

27 cases from the Supreme Court of Canada such as R.

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1 v. Hall, [2002] 3 S.C.R. 309 remain relevant.

2 But the Court has to look at the four factors

3 specifically referred to in Section 515(10)(c).

4 The first is the apparent strength of the Crown's

5 case. I go back to what I have already said

6 about the wiretap evidence. If this evidence is

7 admitted and the voice identification is admitted

8 and relied on, the Crown has a strong case. At

9 this stage, as I have said, the wiretap evidence

10 must be considered as it is. The presumption of

11 innocence is there, yes, but at this stage it

12 appears that the evidence that the Crown proposes

13 to rely on to rebut that presumption is strong.

14 The second factor is the gravity of the

15 offence. The facts alleged here involve

16 organized drug dealing in this jurisdiction and

17 the Applicant being high up in the hierarchy; he

18 is the highest of those persons who are charged.

19 Drug trafficking is very serious, it is not a

20 victimless crime, and it causes immense harm in

21 this jurisdiction, as I am sure it does

22 elsewhere, and it is of serious concern to the

23 public. It is a serious problem that leads to

24 the commission of many other offences and many

25 social problems. The severity of that problem

26 cannot be overstated.

27 The third factor relates to the

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1 circumstances of the offence. Here, aside from

2 the inherent seriousness of drug trafficking

3 activities, there are no particular facts that

4 further aggravate matters from the point of view

5 of the tertiary ground. There is no evidence

6 relating to particularly vulnerable people,

7 violence, the use of firearm, for example.

8 The fourth factor pertains to the penalty

9 the accused will face if convicted. It is not

10 for me to say now what the sentence of the

11 Applicant will be if he is found guilty, but it

12 is clear that in this jurisdiction he will face a

13 significant jail term if he is found guilty of

14 this. There will obviously will be a term of

15 imprisonment counting in years, not months, and

16 it will be a far more significant sentence than

17 anything he has received in the past.

18 In the written submissions, his counsel

19 estimates that the sentence that he is likely to

20 face if convicted is between two to six years. I

21 think that the lower end of that range is

22 completely unrealistic given the case law in this

23 jurisdiction and the high end of that range would

24 likely be more at the lower end of the actual

25 range available after trial.

26 To the extent that the prospects of a long

27 jail term could be considered an incentive for

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1 the Applicant to flea, however, it is somewhat

2 counter-balanced by the fact that he did

3 surrender himself into custody, and this is where

4 I think his surrender is relevant to the tertiary

5 ground.

6 So of the four factors that are specifically

7 listed in the Criminal Code, the first two tend

8 to militate towards detention; the third does

9 not; and the fourth, while it does militate

10 toward detention somewhat, is somewhat tempered

11 for the reasons I have already mentioned.

12 In terms of additional non-listed factors,

13 one of the things that is specifically referred

14 to in St-Cloud is the impact of crime on society

15 and on its victims. I mentioned this already

16 when talking about the seriousness of the offence

17 but I will say it again: Drugs cause harm

18 everywhere and certainly have in this

19 jurisdiction. Many lives had been ruined and

20 anyone reading the sentencing decisions of this

21 Court in drug matters over the past 10 to 15

22 years will find multiple examples of it. That is

23 something that has to be considered in assessing

24 whether the Applicant's pre-trial detention is

25 necessary to maintain public confidence in the

26 administration of justice considering the role he

27 is alleged to have played in this organization

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1 and the nature of the evidence that the Crown

2 proposes to adduce to prove his involvement.

3 The tertiary ground is about maintaining

4 public confidence in the administration of

5 justice. I do keep in mind that in this context

6 the public to be considered is not the excitable,

7 impulsive, or particularly rattled public.

8 Without being a public completely versed in the

9 details of criminal law, it is a public who

10 understands the basic tenets of our legal system,

11 including the presumption of innocence and the

12 constitutionally protected right to bail. That

13 public understands that pre-trial detention is

14 not the norm and that deprival of liberty should

15 not normally happen before a person's guilt has

16 been proven to the standard required by our law.

17 As was rightly noted during submissions, the

18 confidence of the public in the administration of

19 justice can be harmed by the release of people

20 who ought not to be, but it can also be

21 undermined by the detention of people who ought

22 not to be. These are not easy things to balance.

23 Because of the seriousness of this offence,

24 the impact that drug trafficking has on our

25 communities, and the apparent strengths of the

26 Crown's case, I do have serious concerns about

27 the effect that the Applicant's release would

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1 have on the public's confidence in the

2 administration of justice.

3 On this application, the Applicant bears the

4 onus of satisfying me that his release plan is

5 strong enough to address these concerns.

6 After much consideration, and anxious

7 consideration, I conclude that the release plan

8 that is being proposed, despite its differences

9 from the one proposed at the original hearing,

10 still does not address the concerns I have on the

11 tertiary ground.

12 The Applicant has work to go back to which

13 he could do from his mother's home even though he

14 will be in a different province, but that in and

15 of itself is not a dramatic change from what his

16 situation was at the time of the allegations. He

17 is in a relationship, but that was also the case

18 when the alleged offence occurred. There are

19 sureties, but there is no surety prepared to

20 commit a cash deposit to secure the Applicant's

21 compliance with his conditions. The Applicant's

22 mother is no doubt well intended, has residential

23 stability, and has deposed that she will report

24 any failures to comply with conditions, but the

25 reality is that she is working herself and I

26 question whether she can be expected to supervise

27 her adult son. The amount of money she is

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1 prepared to commit is no doubt significant for

2 her, but in the grand scheme of things, it is

3 relatively modest. Notwithstanding her good

4 intentions, the evidence, more specifically the

5 Applicant's youth and adult record, does not

6 suggest that her influence in his life has

7 prevented him from committing crimes. How much

8 authority or supervision she can exercise over

9 him at this point remains a large question mark

10 in my mind.

11 The Applicant's counsel invited me to attach

12 very little significance to the criminal record

13 in assessing all this. I am conscious that many

14 of the convictions are dated. Still, the

15 Applicant has convictions for breaching Court

16 orders. This, to my mind, would have an impact

17 on the perception of a reasonably informed member

18 of the public seeing the Applicant released on a

19 serious charge for which he is in serious

20 jeopardy on the strength of his promise to comply

21 with release terms. And even though the

22 Applicant has never been sentenced to lengthy

23 jail terms, some of the entries on his record, I

24 expect, would raise concerns for the reasonably

25 informed member of the public if he were released

26 on the plan currently being proposed. He has

27 convictions as an adult for uttering threats, for

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1 theft, for impersonation with intent, for

2 carrying a concealed weapon, for obstructing a

3 peace officer, and for possession of illicit

4 drugs, including one count of simple possession

5 of a Schedule I drug. So while I agree with the

6 Applicant's counsel that the significance of the

7 record is lessened by reason of it being dated, I

8 do not think it should be discounted entirely

9 either in assessing the tertiary ground.

10 To be clear, I am not saying that no release

11 plan could address the concerns on the tertiary

12 ground, but, on the whole, the one presented at

13 that is point, although in some respects is

14 somewhat stronger than the one proposed in

15 August, still falls short of addressing those

16 concerns in my view, having balanced all the

17 circumstances, all the factors, and on my

18 understanding of the law.

19 For those reasons, I conclude that the

20 Applicant has not met his onus and both the

21 application under 525 and 520 are dismissed.

22 MR. HARTE: Thank you.

23 THE COURT: That is all we have today?

24 Thank you. We will close court.

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3 Certified Pursuant to Rule 723

of the Rules of Court

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Jane Romanowich, CSR(A)

7 Court Reporter

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