

 [R. v. St-Cloud, \[2015\] 2 S.C.R. 328](#)

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and Abella, Rothstein, Moldaver, Karakatsanis, Wagner and Gascon JJ.

Heard: November 6, 2014;

Judgment: May 15, 2015.

File No.: 35626.

[\[2015\] 2 S.C.R. 328](#) | [\[2015\] 2 R.C.S. 328](#) | [\[2015\] S.C.J. No. 27](#) | [\[2015\] A.C.S. no 27](#) | [2015 SCC 27](#)

Her Majesty The Queen, Appellant; v. Jeffrey St-Cloud, Respondent, and Attorney General of Ontario, Criminal Lawyers' Association (Ontario) and Canadian Civil Liberties Association, Interveners.

(168 paras.)

**Appeal From:**

ON APPEAL FROM THE SUPERIOR COURT OF QUEBEC

## Case Summary

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**Catchwords:**

**Criminal law — Interim release — Grounds justifying detention — Justice of peace ordering detention of accused awaiting trial on ground set out in s. 515(10)(c) of Criminal Code, that is, that his detention "is necessary to maintain confidence in the administration of justice" — Reviewing judge ordering release of accused — Proper interpretation of s. 515(10)(c) of Criminal Code — Restrictive interpretation rejected — Criminal Code, [R.S.C. 1985, c. C-46, s. 515\(10\)\(c\)](#).**

**Criminal law — Interim release — Review of decision of justice of peace — Decision by justice of peace to order detention of accused reversed by reviewing judge — Cases in which review provided for in ss. 520 and 521 of Criminal Code is available in interim release context — Whether reviewing judge erred in exercising his role by simply substituting his assessment of evidence for that of justice of peace — Criminal Code, [R.S.C. 1985, c. C-46, ss. 520, 521](#).**

**Summary:**

S was charged with one count of aggravated assault under s. 268 of the *Criminal Code* for having assaulted a bus driver together with two other individuals. The Crown opposed the interim release of S. The justice of the peace [page329] who heard the initial application for release found that detention was necessary on the basis of s. 515(10)(b) and (c) *Cr. C.*, that is, because the interim detention of S was necessary for the protection or safety of the public, and to maintain confidence in the administration of justice. The justice who heard the second application for release on completion of the preliminary inquiry found that the detention of S was still justified under s. 515(10)(c). S then applied under s. 520 *Cr. C.* for a review by a Superior Court judge, who determined that the detention of S was not necessary under s. 515(10)(c) and ordered his release.

*Held:* The appeal should be allowed and the detention order restored.

The ground set out in s. 515(10)(c) of the *Criminal Code*, that is, that the detention of the accused "is necessary to maintain confidence in the administration of justice", is a distinct ground that itself provides a basis for ordering the pre-trial detention of an accused. It is not a residual ground for detention that applies only where the first two grounds for detention provided for in s. 515(10)(a) and (b) are not satisfied. The scope of s. 515(10)(c) has been unduly restricted by the courts in some cases; this provision must not be interpreted narrowly or applied sparingly. The application of this ground for detention is not limited to exceptional circumstances, to unexplainable crimes, to the most heinous of crimes or to certain classes of crimes. The fact that detention may be justified only in rare cases is but a consequence of the application of s. 515(10)(c), and not a precondition to its application, a criterion a court must consider in its analysis or the purpose of the provision. Section 515(10)(c) is worded clearly, and it does not require exceptional or rare circumstances. Nor is the question whether a crime is unexplainable or unexplained a criterion that should guide justices in their analysis under s. 515(10)(c). This concept is ambiguous and confusing. Because many crimes may be explainable in one way or another, the unexplainable crime criterion is of little assistance. The application of a criterion based on the notion of an unexplainable crime could also lead to undesirable conclusions, since crimes that are heinous and horrific might not satisfy it. Such a criterion could give the public the impression that justices are justifying certain crimes, that is, crimes that are explainable.

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In determining whether the detention of an accused is necessary to maintain confidence in the administration of justice, the justice must first consider the four circumstances that are expressly referred to in s. 515(10)(c). First of all, the justice must determine the apparent strength of the prosecution's case. The prosecutor is not required to prove beyond a reasonable doubt that the accused committed the offence, and the justice must be careful not to play the role of trial judge or jury: matters such as the credibility of witnesses and the reliability of scientific evidence must be analyzed at trial, not at the release hearing. The justice must nevertheless consider the quality of the evidence tendered by the prosecutor in order to determine the weight to be given to this circumstance in his or her balancing exercise. The justice must also consider any defence raised by the accused. If there appears to be some basis for the defence, the justice must take this into account in analyzing the apparent strength of the prosecution's case.

Next, the justice must determine the objective gravity of the offence in comparison with the other offences in the *Criminal Code*. This is assessed on the basis of the maximum sentence -- and the minimum sentence, if any -- provided for in the *Criminal Code* for the offence.

The justice must then consider the circumstances surrounding the commission of the offence, including whether a firearm was used. Those that might be relevant under s. 515(10)(c) include the following: the fact that the offence is a violent, heinous or hateful one, that it was committed in a context involving domestic violence, a criminal gang or a terrorist organization, or that the victim was a vulnerable person. If the offence was committed by several people, the extent to which the accused participated in it may be relevant. The aggravating or mitigating factors that are considered by courts for sentencing purposes can also be taken into account.

Finally, the fourth circumstance to consider is the fact that the accused is liable for a potentially lengthy term of imprisonment. Although it is not desirable to establish a strict rule regarding the number of years that constitutes a lengthy term of imprisonment, some guidance is required. Because no crime is exempt from the possible application of s. 515(10)(c), the words "lengthy term of imprisonment" do not refer only to a life sentence. Moreover, to determine whether the accused is actually liable for a potentially lengthy term of imprisonment, the justice must consider all the circumstances of the case known at [page331] the time of the hearing, as well as the principles for tailoring the applicable sentence. This fourth circumstance is assessed subjectively.

The circumstances listed in s. 515(10)(c) are not exhaustive. The court must consider all the circumstances of each case, paying particular attention to the four listed circumstances. No single circumstance is determinative: the justice must consider the combined effect of all the circumstances of each case to determine whether detention is justified. This involves balancing all the relevant circumstances. At the end of this balancing exercise, the ultimate question to be asked by the court is whether detention is necessary to maintain confidence

in the administration of justice. Thus, the court must not order detention automatically even where the four listed circumstances support such a result. Some other circumstances that might be relevant are the personal circumstances of the accused (age, criminal record, physical or mental condition, and membership in a criminal organization), the status of the victim and the impact on society of a crime committed against that person, and the fact that the trial of the accused will be held at a much later date.

The justice's balancing of all the circumstances under s. 515(10)(c) must always be guided by the perspective of the "public", that is, of a reasonable person who is properly informed about the philosophy of the legislative provisions, the values of the *Canadian Charter of Rights and Freedoms*, and the actual circumstances of the case. The person in question is a thoughtful person, not one who is prone to emotional reactions, whose knowledge of the circumstances of the case is inaccurate or who disagrees with our society's fundamental values. However, this person is not a legal expert, and, although he or she is aware of the importance of the presumption of innocence and the right to liberty in our society, expects that someone charged with a crime will be tried within a reasonable period of time, and knows that a criminal offence requires proof of culpable intent and that the purpose of certain defences is to show the absence of such intent, the person is not able to appreciate the subtleties of the various defences that are available to the accused. This reasonable person's confidence in the administration of justice may be undermined not only if a court declines to order detention where detention is justified having regard to the circumstances of the case, but also if it orders detention where detention is not justified.

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Sections 520 and 521 of the *Criminal Code* do not confer an open-ended discretion on the reviewing judge to vary the initial decision concerning the detention or release of the accused. They establish not a *de novo* proceeding, but a hybrid remedy. The judge must determine whether it is appropriate to exercise his or her power of review. Exercising this power will be appropriate in only three situations: (1) where there is admissible new evidence if that evidence shows a material and relevant change in the circumstances of the case; (2) where the impugned decision contains an error of law; or (3) where the decision is clearly inappropriate.

The four criteria from *Palmer v. The Queen*, [1980] 1 S.C.R. 759, are relevant to the determination of what constitutes new evidence for the purposes of the review provided for in ss. 520 and 521. Given the generally expeditious nature of the interim release process and the risks of violating the rights of the accused, and since the release hearing takes place at the very start of criminal proceedings and not at the end like the sentence appeal, a reviewing judge must be flexible in applying these four criteria. Regarding the first criterion, due diligence, the reviewing judge may consider evidence that is truly new or evidence that existed at the time of the initial release hearing but was not tendered for some reason that is legitimate and reasonable. Such new evidence is not limited to evidence that was unavailable to the accused before the initial hearing. In each case, the reviewing judge will have to determine whether the reason why the accused did not tender such pre-existing evidence earlier was legitimate and reasonable. As to the second criterion, it will suffice that the evidence be relevant for the purposes of s. 515(10). This criterion will therefore rarely be decisive in the context of an application for review under ss. 520 and 521, since the range of relevant evidence will generally be quite broad. The third criterion -- that the evidence must be credible in the sense that it is reasonably capable of belief -- must be interpreted in light of the relaxation of the rules of evidence at the bail stage and in particular of s. 518(1)(e) of the *Criminal Code*, which provides that "the justice may receive and base his decision on evidence considered credible or trustworthy by him in the circumstances of each case". Finally, the fourth *Palmer* criterion should be modified as follows: the new evidence must be such that it is reasonable to think, having regard to all the relevant circumstances, that it could have affected the balancing exercise engaged in by the justice under s. 515(10)(c). The new evidence must therefore be significant. If the new [page333] evidence meets the four criteria for admissibility, the reviewing judge is authorized to repeat the analysis under s. 515(10)(c) as if he or she were the initial decision-maker.

It will also be appropriate to intervene if the justice has erred in law or if the impugned decision was clearly inappropriate, that is, if the justice who rendered it gave excessive weight to one relevant factor or insufficient weight to another. The reviewing judge therefore does not have the power to interfere with the initial decision simply because he or she would have weighed the relevant factors differently.

In this case, the Superior Court judge intervened even though there was no basis for a review, given that there was no change in circumstances and no error of law, and that the initial decision was not clearly inappropriate. When all the relevant circumstances are weighed as required by s. 515(10)(c), the detention of S was necessary to maintain confidence in the administration of justice.

## Cases Cited

**Considered:** *R. v. Hall*, [2002 SCC 64](#), [\[2002\] 3 S.C.R. 309](#); **referred to:** *R. v. Pearson*, [\[1992\] 3 S.C.R. 665](#); *R. v. Morales*, [\[1992\] 3 S.C.R. 711](#); *Valente v. The Queen*, [\[1985\] 2 S.C.R. 673](#); *R. v. Thomson* (2004), [21 C.R. \(6th\) 209](#); *R. v. B. (A.)* (2006), [204 C.C.C. \(3d\) 490](#); *R. v. Pichler*, [2009 ABPC 24](#); *R. v. Teemotee*, [2011 NUCJ 17](#); *R. v. Bhullar*, [2005 BCCA 409](#); *R. v. Brotherston*, [2009 BCCA 431](#), [71 C.R. \(6th\) 81](#); *R. v. LaFramboise* (2005), [203 C.C.C. \(3d\) 492](#); *R. v. D. (R.)*, [2010 ONCA 899](#), [273 C.C.C. \(3d\) 7](#); *R. v. Blind* (1999), [139 C.C.C. \(3d\) 87](#); *R. v. Rondeau* (1996), [108 C.C.C. \(3d\) 474](#); *R. v. Summers*, [2014 SCC 26](#), [\[2014\] 1 S.C.R. 575](#); *R. v. Coates*, [2010 QCCA 919](#); *R. v. Mordue* (2006), [223 C.C.C. \(3d\) 407](#); *R. v. Nguyen* (1997), [119 C.C.C. \(3d\) 269](#); *R. v. Lamothe* (1990), [58 C.C.C. \(3d\) 530](#); *R. v. Collins*, [\[1987\] 1 S.C.R. 265](#); *R. v. Burlingham*, [\[1995\] 2 S.C.R. 206](#); *R. v. Trout*, [2006 MBCA 96](#), [205 Man. R. \(2d\) 277](#); *R. v. Turcotte*, [2014 QCCA 2190](#); *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [\[1991\] 3 S.C.R. 459](#); *R. v. M. (S.H.)*, [\[1989\] 2 S.C.R. 446](#); *R. v. Oliver*, [2008 NLCA 27](#), [287 Nfld. & P.E.I.R. 123](#); *R. v. Massan*, [2012 MBCA 26](#), [289 C.C.C. \(3d\) 285](#); *R. v. White*, [2005 ABCA 403](#), [202 C.C.C. \(3d\) 295](#); *United States of America v. Chan* (2000), [144 C.C.C. \(3d\) 93](#); *United States of America v. Pannell* (2005), [193 C.C.C. \(3d\) 414](#); *United States of America v. Yuen*, [2004 ABCA 368](#), [363 A.R. 28](#); [page334] *Tenenbaum v. United States of America*, [2008 ABCA 396](#), [446 A.R. 155](#); *Delagarde v. United States of America* (2005), [293 N.B.R. \(2d\) 80](#); *United States of America v. Palmucci*, [2001 CanLII 38680](#); *Boily v. États-Unis Mexicains*, [2005 QCCA 599](#); *Ivanov v. United States of America*, [2003 NLCA 11](#), [223 Nfld. & P.E.I.R. 44](#); *Seifert v. Canada (Attorney General)*, [2002 BCCA 385](#), [171 B.C.A.C. 203](#); *United States of America v. Graham*, [2004 BCCA 162](#), [195 B.C.A.C. 245](#); *R. v. Shropshire*, [\[1995\] 4 S.C.R. 227](#); *R. v. M. (C.A.)*, [\[1996\] 1 S.C.R. 500](#); *R. v. McDonnell*, [\[1997\] 1 S.C.R. 948](#); *R. v. L.M.*, [2008 SCC 31](#), [\[2008\] 2 S.C.R. 163](#); *R. v. Nasogaluak*, [2010 SCC 6](#), [\[2010\] 1 S.C.R. 206](#); *Toronto Star Newspapers Ltd. v. Canada*, [2010 SCC 21](#), [\[2010\] 1 S.C.R. 721](#); *R. v. Muise* (1994), [94 C.C.C. \(3d\) 119](#); *R. v. McKnight* (1999), [135 C.C.C. \(3d\) 41](#); *Ell v. Alberta*, [2003 SCC 35](#), [\[2003\] 1 S.C.R. 857](#); *Palmer v. The Queen*, [\[1980\] 1 S.C.R. 759](#); *R. v. Warsing*, [\[1998\] 3 S.C.R. 579](#); *R. v. G.D.B.*, [2000 SCC 22](#), [\[2000\] 1 S.C.R. 520](#); *R. v. M. (P.S.)* (1992), [77 C.C.C. \(3d\) 402](#); *McMartin v. The Queen*, [\[1964\] S.C.R. 484](#); *R. v. Price*, [\[1993\] 3 S.C.R. 633](#); *R. v. Burns*, [\[1994\] 1 S.C.R. 656](#); *Harper v. The Queen*, [\[1982\] 1 S.C.R. 2](#); *R. v. Dagenais*, [2012 QCCA 244](#); *R. v. Riendeau*, [2012 QCCA 1155](#).

## Statutes and Regulations Cited

*Canadian Charter of Rights and Freedoms*, ss. 11(d), (e), 24(2).

*Criminal Code*, [R.S.C. 1985, c. C-46, ss. 34](#), 232, 267(b), 268, 469, 515(1), (2), (4) to (4.3), (5), (6), (8), (10), 517(1)(b), 518, 520, 521, 523(2)(b), 680, 687, 718.2(d), 719(3), (3.1), 723, 730, 731, 732.1(3), 734.

*Criminal Law Improvement Act*, 1996, S.C. 1997, c. 18, s. 59(2).

*Extradition Act*, [S.C. 1999, c. 18, s. 18\(2\)](#).

*Tackling Violent Crime Act*, S.C. 2008, c. 6, s. 37(5).

*Young Offenders Act*, R.S.C. 1985, c. Y-1, s. 16(9), (10).

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[page335]

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### History and Disposition:

APPEAL from a decision of the Quebec Superior Court (Martin J.), [2013 QCCS 5021](#), [2013] AZ-51009868, [\[2013\] J.Q. no 14227](#) (QL), [2013 CarswellQue 10825](#) (WL Can.), allowing an application under s. 520 of the *Criminal Code* for review of a detention order. Appeal allowed.

## Counsel

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*Christian Jarry* and *Geneviève Langlois*, for the appellant.

*André Lapointe* and *Guylaine Tardif*, for the respondent.

*Robert E. Gattrell* and *Avene Derwa*, for the intervener the Attorney General of Ontario.

*John Norris* and *Christine Mainville*, for the intervener the Criminal Lawyers' Association (Ontario).

*Anil K. Kapoor* and *Lindsay Daviau*, for the intervener the Canadian Civil Liberties Association.

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English version of the judgment of the Court delivered by

**WAGNER J.**

### I. Introduction

1 The repute of our criminal justice system rests on the deeply held belief of Canadians that the right to liberty and the presumption of innocence are fundamental values of our society that require protection. However, that repute also depends on the confidence citizens have that persons charged with serious crimes will not be able to evade justice, harm others or interfere with the administration of justice while awaiting trial. The risk that one of these events might tarnish the repute of the justice system was recognized by Parliament in enacting s. 515(10)(a) and (b) of the *Criminal Code*, [R.S.C. 1985, c. C-46](#) ("*Cr. C.*"), under which the interim detention of an accused may [page336] be ordered where that is necessary to ensure the attendance of the accused in court or to guarantee the protection or safety of the public.

2 Moreover, Parliament judged that there are circumstances in which releasing an accused person could undermine the repute of the justice system, and this led it to provide, in s. 515(10)(c) *Cr. C.*, for a third ground for interim detention, maintaining confidence in the administration of justice. Thus, Parliament recognized that there are circumstances in which allowing a person charged with a serious crime to be released into the community pending trial in the face of overwhelming evidence might suggest to the public that justice has not been done: see *R. v. Hall*, [2002 SCC 64](#), [\[2002\] 3 S.C.R. 309](#), at para. 26.

3 This appeal affords the Court an opportunity to consider the circumstances in which pre-trial detention of an accused is necessary in order to maintain the confidence of the Canadian public in the administration of justice in accordance with s. 515(10)(c) *Cr. C.* This provision has already been considered by the Court in *Hall*, but the central issue in that case was the constitutionality of this ground for detention as it was worded at that time. In cases decided by lower courts since *Hall*, the provision has been given widely varying interpretations, making it necessary for the Court to provide further guidance on its application.

4 The ground for detention in s. 515(10)(c) *Cr. C.* requires that an effort be made to strike an "appropriate balance between the rights of the accused and the need to maintain justice in the community": *Hall*, at para. 41. In addition, judges must adopt the perspective of the public in determining whether detention is necessary. What the word "public" means is not always easy to understand. These difficulties no doubt explain why s. 515(10)(c) *Cr. C.* has generated so much discussion among legal experts and led to inconsistent results across the country.

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5 In my opinion, the scope of s. 515(10)(c) *Cr. C.* has been unduly restricted by the courts in some cases. This ground for detention is not necessarily limited to exceptional circumstances, to the most heinous of crimes involving circumstances similar to those in *Hall*, or to certain classes of crimes. The interpretation of s. 515(10)(c) *Cr. C.* has also been truncated by a misunderstanding of the meaning of the word "*public*" used in the provision's French version (and implied in the word "confidence" used in the English version), which I will discuss below. For now, I will simply note that the "public" are reasonable, well-informed members of the community, but not legal experts with in-depth knowledge of our criminal justice system.

6 This appeal is the first time this Court has been called upon to determine the extent of the power provided for in ss. 520 and 521 *Cr. C.* to review decisions with respect to detention or to interim release. Since a decision whether to order the pre-trial release of an accused involves a delicate balancing of all the relevant circumstances, the power of a judge hearing an application under s. 520 or 521 *Cr. C.* to review such a decision is not open-ended. I conclude that exercising this power will be appropriate in only three situations: (1) where there is admissible new evidence; (2) where the impugned decision contains an error of law; or (3) where the decision is clearly inappropriate. In the last of these situations, a reviewing judge cannot simply substitute his or her assessment of the evidence for that of the justice who rendered the impugned decision. It is only if the justice gave excessive weight to one relevant factor or insufficient weight to another that the reviewing judge can intervene.

7 In the case at bar, the respondent, Jeffrey St-Cloud, was charged with aggravated assault under s. 268 *Cr. C.* The justice of the peace who heard the initial application for release found that detention [page338] was necessary on the basis of s. 515(10)(b) and (c) *Cr. C.* The justice who heard the respondent's second application for release

on completion of the preliminary inquiry found that his detention was still justified under s. 515(10)(c). The respondent then applied under s. 520 *Cr. C.* for a review by a Superior Court judge, who determined that detention was not necessary under s. 515(10)(c) and ordered the respondent's release. The Crown is appealing that decision to this Court.

**8** For the reasons that follow, I would allow the appeal. The detention of the respondent is necessary to maintain confidence in the administration of justice. I will explain why.

## II. Background and Judicial History

**9** On the night of April 24, 2013, the respondent and two other individuals committed an extremely violent assault against a bus driver working for the Société de transport de Montréal. The incident was recorded by the video system on the bus, and the recording showed that the respondent had been an active participant in the assault. The three individuals struck the driver in the head many times, leaving him with serious long-term injuries. Even the intervention of passengers was not enough to stop the attack right away. The respondent was charged with aggravated assault under s. 268 *Cr. C.*

### A. *Court of Québec (Judge Lavergne), No. 500-01-088824-138, April 29, 2013<sup>1</sup>*

**10** The first release hearing took place on April 26, 2013 before Judge Lavergne. The appellant opposed the respondent's release. At the time of the hearing, the victim was still in the hospital [page339] and the medical prognosis was uncertain. However, it was known that he had, at the very least, a hairline fracture to a facial bone and a concussion.

**11** Judge Lavergne stated at the outset that the onus was on the prosecutor to show that the respondent's detention was necessary. After balancing the relevant factors, he found on the basis of s. 515(10)(b) *Cr. C.* that the interim detention of the respondent was necessary for the protection or safety of the public.

**12** Judge Lavergne nevertheless continued his analysis and considered the circumstances set out in s. 515(10)(c) *Cr. C.* The first three - (1) the apparent strength of the prosecution's case, (2) the gravity of the offence and (3) the circumstances surrounding the commission of the offence - had already been discussed in the context of the ground set out in s. 515(10)(b). He also considered the fourth circumstance, namely the fact that the respondent was liable, on conviction, for a potentially lengthy term of imprisonment (maximum sentence of 14 years). As well, he was of the opinion that aggravating factors were evident from the circumstances of the case.

**13** Judge Lavergne then explained that s. 515(10)(c) [TRANSLATION] "calls for an analysis of whether, at the end of the day, after all the circumstances are considered ... there is a reasonable collective expectation that interim release must be denied to maintain public confidence in the administration of justice": pp. 18-19. He made the following comments in this regard:

[TRANSLATION] But who then is the public? The public means persons who are reasonable, dispassionate and properly informed about the values expressed in legislation, including the presumption of innocence, which applies throughout the criminal process, as I have said, but who are also informed about all the circumstances associated with the commission of a crime.

In light of the videotape and all the circumstances, the defendant's participation, the likelihood of a conviction and the chances of a significant term of imprisonment, [page340] the Court is satisfied that such a reasonable person would conclude that interim release must be denied. [p. 19]

**14** Finding that the Crown had discharged its burden under s. 515(10)(c) *Cr. C.*, Judge Lavergne accordingly ordered the detention of the respondent until further order.

B. *Court of Québec (Judge Legault), No. 500-01-088824-138, June 21, 2013*

**15** On completion of his preliminary inquiry, the respondent applied again to be released, this time on the basis of s. 523(2)(b) *Cr. C.* Judge Legault began by explaining that the onus was on the respondent to show some new cause for ordering his release and that the court had a [TRANSLATION] "limited power that requires [it] to show restraint": para. 2.

**16** Noting that the evidence concerning the circumstances of the offence seemed to be the same that had been presented at the time of the initial application, however, Judge Legault expressed the opinion that there were also some new facts, including a substantial increase in the financial security provided by the respondent's family and the possibility of his obtaining regular employment at a garage.

**17** Judge Legault found on the basis of the new facts that the risk of reoffending was [TRANSLATION] "reduced". He also considered it "credible" that the respondent was seriously committed to working or studying: paras. 20-21. However, he noted that the victim's medical condition had worsened.

**18** Judge Legault therefore accepted Judge Lavergne's conclusion that the detention of the respondent was necessary to maintain confidence in the administration of justice, the ground provided for in s. 515(10)(c) *Cr. C.* He agreed with Judge Lavergne that there was [TRANSLATION] "a reasonable collective expectation that interim release must be denied [page341] to maintain public confidence in the administration of justice": para. 25.

C. *Quebec Superior Court (Martin J.), [2013 QCCS 5021](#)*

**19** On July 2, 2013, the respondent applied to the Superior Court under s. 520 *Cr. C.* for a review of the detention order.

**20** Martin J. began by stating that he understood from Judge Legault's decision that the latter had concluded that the detention of the respondent was not necessary for the protection or safety of the public within the meaning of s. 515(10)(b) *Cr. C.* In Martin J.'s opinion, Judge Legault would therefore have granted the respondent bail had it not been for the ground set out in s. 515(10)(c) *Cr. C.*, namely the need for detention in order to maintain confidence in the administration of justice.

**21** Martin J. then noted that it was up to the respondent to show a reviewable error by the justices who had ordered his detention. Referring to *Hall*, he concluded that s. 515(10)(c) *Cr. C.* must be [TRANSLATION] "used sparingly": para. 22 (CanLII).

**22** Martin J. stated the test he had to apply as follows:

[TRANSLATION] ... Could a reasonable person who has no interest in the situation, but who is well versed in the content of the Charter of Rights, the provisions of the Criminal Code and the principles laid down by the Supreme Court, conclude that confidence in the administration of justice would be undermined if the person in question were released? It is in fact the justice who must assess this on the basis of the facts in evidence. [para. 23]

**23** Martin J. concluded that, in the instant case, the incident was [TRANSLATION] "repugnant ... heinous and unjustifiable", but not unexplainable: para. 27. In his opinion, the two justices had therefore erred in denying release on the basis of the [page342] ground set out in s. 515(10)(c) *Cr. C.* He accordingly granted the respondent's application and ordered his release.

III. Issues

**24** This appeal raises the following questions:

1. What is the proper interpretation of s. 515(10)(c) *Cr. C.*?
2. What are the cases in which the review provided for in ss. 520 and 521 *Cr. C.* is available in the interim release context?
3. In this case, did the Superior Court judge err in his interpretation of s. 515(10)(c) *Cr. C.*?
4. In this case, did the Superior Court judge err in exercising his role as a reviewing judge under s. 520 *Cr. C.* by simply substituting his assessment of the evidence for that of the justices?

IV. Analysis

A. *Proper Interpretation of Section 515(10)(c) Cr. C.*

(1) Legislative and Judicial Context

**25** Although the legislative history of s. 515(10) *Cr. C.* was explained clearly by this Court in *Hall*, I believe that it will be helpful to summarize it here.

**26** I should begin by mentioning that the pre-trial release provisions are of relatively ancient origin:

In 1869, the Federal Government enacted legislation making bail discretionary for all offences: see *An Act respecting the duties of Justices of the Peace, out of Sessions, in relation to persons charged with Indictable Offences*, S.C. 1869, c. 30. Bail was therefore left to the discretion of the judge. Although the primary determinant for denying [page343] bail was the need to compel the accused's attendance, courts also considered other factors such as the nature of the offence, the severity of the penalty, the evidence against the accused, and the character of the accused: see, for example, *R. v. Gottfriedson* (1906), 10 C.C.C. 239 (B.C. Co. Ct.); *Re N.* (1945), 87 C.C.C. 377 (P.E.I.S.C.).

In 1972 the law of bail was recodified: *Bail Reform Act*, S.C. 1970-71-72, c. 37. The Act identified two branches for refusing bail: (1) where the accused's detention was necessary to ensure his attendance in Court; or (2) where detention was "necessary in the public interest or for the protection or safety of the public" against the accused re-offending or interfering with the administration of justice. The use of "or" in the second branch led to the view that there were in effect three grounds for denying bail: (1) ensuring appearance at trial; (2) protection against criminal offences pending trial; and (3) the "public interest". These grounds were originally enacted as s. 457(7)(a) and (b) of the *Criminal Code*, and later became s. 515(10)(a) and (b).

(*Hall*, at paras. 14-15)

**27** Since the enactment of the *Canadian Charter of Rights and Freedoms* ("*Charter*") in 1982, any person charged with an offence has the right "not to be denied reasonable bail without just cause": s. 11(e). This Court has stated that s. 11(e) creates "a basic entitlement to be granted reasonable bail unless there is just cause to do otherwise": *R. v. Pearson*, [1992] 3 S.C.R. 665, at p. 691. Section 11(e) has two distinct components: (1) the right to "reasonable bail" in terms of quantum of any monetary component and any other conditions that might be imposed; and (2) the right not to be denied bail without "just cause".

**28** In *R. v. Morales*, [1992] 3 S.C.R. 711, this Court struck down the component of s. 515(10)(b) *Cr. C.* that authorized pre-trial detention on the ground that detaining the accused was necessary in [page344] the "public interest". The Court held that this wording was vague and imprecise and that it authorized a "standardless sweep" allowing a "court [to] order imprisonment whenever it [saw] fit": p. 732.

**29** In 1997, Parliament therefore changed the wording of s. 515(10) and also added para. (c) to it: *Criminal Law*

*Improvement Act, 1996*, S.C. 1997, c. 18, s. 59(2). The detention of an accused could then be justified "on any other just cause being shown and, without limiting the generality of the foregoing, where the detention is necessary in order to maintain confidence in the administration of justice". At the time, Parliament had not drawn up a list of circumstances the justice was required to consider in this analysis.

**30** The validity of that provision was the issue before the Court in *Hall*. The Court held that the first part of s. 515(10)(c) *Cr. C.*, which authorized the denial of bail for "any other just cause", was unconstitutional because it was inconsistent with the presumption of innocence and with s. 11(e) of the *Charter*. The Court found that this wording conferred a broad discretion on justices to grant or deny bail in that it did not specify any particular basis upon which bail could be denied: *Hall*, at para. 22. However, the balance of s. 515(10)(c) *Cr. C.* was found to be constitutional.

**31** In 2008, Parliament amended s. 515(10)(c) *Cr. C.* so as to make it consistent with the Court's decision in *Hall: Tackling Violent Crime Act*, S.C. 2008, c. 6, s. 37(5). That version of s. 515(10)(c) *Cr. C.*, which is still in force today, is the one at issue in this appeal:

(c) if the detention is necessary to maintain confidence in the administration of justice, having regard to all the circumstances, including

(i) the apparent strength of the prosecution's case,

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(ii) the gravity of the offence,

(iii) the circumstances surrounding the commission of the offence, including whether a firearm was used, and

(iv) the fact that the accused is liable, on conviction, for a potentially lengthy term of imprisonment or, in the case of an offence that involves, or whose subject-matter is, a firearm, a minimum punishment of imprisonment for a term of three years or more.

The remainder of s. 515(10) *Cr. C.* is reproduced, together with other relevant statutory provisions, in the Appendix at the end of these reasons.

(2) Principles From *Hall*

**32** The central issue in *Hall* was the constitutionality of s. 515(10)(c) *Cr. C.* However, the Court provided some guidance on how to interpret this provision.

(a) *Basis for Section 515(10)(c) Cr. C.*

**33** McLachlin C.J., writing for the majority of the Court, explained that in some circumstances it may be necessary to deny an accused bail, even where there is no risk he or she will not attend trial or may reoffend or interfere with the administration of justice: *Hall*, at para. 25. According to the Chief Justice, "[w]here justice is not seen to be done by the public, confidence in the bail system and, more generally, the entire justice system may falter": para. 26. Yet, she wrote, "[p]ublic confidence is essential to the proper functioning of the bail system and the justice system as a whole": para. 27, citing *Valente v. The Queen*, [1985] 2 S.C.R. 673, at p. 689.

(b) *Distinctiveness of the Ground Set Out in Section 515(10)(c) Cr. C.*

**34** McLachlin C.J. also explained that s. 515(10)(c) *Cr. C.* creates not a ground for detention that [page346] might

be characterized as "residual" in the sense that it applies only as a last resort, but one that is separate and distinct:

Bail denial to maintain confidence in the administration of justice is not a mere "catch-all" for cases where the first two grounds have failed. It represents a separate and distinct basis for bail denial not covered by the other two categories. The same facts may be relevant to all three heads... . But that does not negate the distinctiveness of the three grounds. [Emphasis added.]

(*Hall*, at para. 30)

(c) *Test Under Section 515(10)(c) Cr. C.*

**35** McLachlin C.J. did not elaborate at length on the analysis to be conducted by a justice who must determine whether s. 515(10)(c) *Cr. C.* applies. However, I will reproduce the following remarks:

Section 515(10)(c) sets out specific factors which delineate a narrow set of circumstances under which bail can be denied on the basis of maintaining confidence in the administration of justice. As discussed earlier, situations may arise where, despite the fact the accused is not likely to abscond or commit further crimes while awaiting trial, his presence in the community will call into question the public's confidence in the administration of justice. Whether such a situation has arisen is judged by all the circumstances, but in particular the four factors that Parliament has set out in s. 515(10)(c) - the apparent strength of the prosecution's case, the gravity of the nature of the offence, the circumstances surrounding its commission and the potential for lengthy imprisonment... .

This, then, is Parliament's purpose: to maintain public confidence in the bail system and the justice system as a whole... . Most importantly, the judge makes this appraisal objectively through the lens of the four factors Parliament has specified. The judge cannot conjure up his own reasons for denying bail; while the judge must look at all the circumstances, he must focus particularly on the factors Parliament has specified. At the end of [page347] the day, the judge can only deny bail if satisfied that in view of these factors and related circumstances, a reasonable member of the community would be satisfied that denial is necessary to maintain confidence in the administration of justice... . [T]he provision does not authorize a "standardless sweep" nor confer open-ended judicial discretion. Rather, it strikes an appropriate balance between the rights of the accused and the need to maintain justice in the community. In sum, it is not overbroad. [Emphasis added.]

(*Hall*, at paras. 40-41)

**36** I will come back to *Hall* below and consider certain passages I have not discussed here.

(3) Principles That Must Guide the Analysis

(a) *Rejecting a Narrow Application of Section 515(10)(c) Cr. C.*

**37** The appellant submits that, despite the very clear principles enunciated in *Hall*, the courts have artificially added factors to s. 515(10)(c) *Cr. C.* for the avowed purpose of restricting its scope and limiting the cases in which its application is justified. The appellant asserts that such an approach must be rejected.

**38** The respondent counters that it follows from the principles established in *Hall* that the cases in which s. 515(10)(c) applies will be few and far between. The respondent submits that the four factors must be assigned a relative weight and that the justice must not lose sight of the key question, namely whether confidence in the administration of justice would be maintained if the accused were released.

**39** It is true that some decisions reflect a strict application of s. 515(10)(c): see, e.g., *R. v. Thomson* (2004), 21 C.R. (6th) 209 (Ont. S.C.J.); *R. v. B. (A.)* (2006), 204 C.C.C. (3d) 490 (Ont. S.C.J.); *R. v. Pichler*, 2009 ABPC 24; *R. v. Teemotee*, 2011 NUCJ 17. [page348] This approach has also been adopted by some appellate courts. For

example, the British Columbia Court of Appeal and the Ontario Court of Appeal have stated that the use of s. 515(10)(c) is justified only in rare or exceptional circumstances: *R. v. Bhullar*, [2005 BCCA 409](#), at paras. 62 and 65; *R. v. Brotherston*, [2009 BCCA 431](#), [71 C.R. \(6th\) 81](#), at paras. 30 and 35; *R. v. LaFramboise* ([2005](#)), [203 C.C.C. \(3d\) 492](#) (Ont. C.A.), at para. 30. A variant of this prerequisite is that s. 515(10)(c) must be used "sparingly": *LaFramboise*, at para. 30; *R. v. D. (R.)*, [2010 ONCA 899](#), [273 C.C.C. \(3d\) 7](#), at paras. 51-53. The Saskatchewan Court of Appeal has also held that s. 515(10)(c) requires that there be "something more", something in addition to the four factors set out in it: *R. v. Blind* ([1999](#)), [139 C.C.C. \(3d\) 87](#), at para. 16. Although the latter case predated this Court's decision in *Hall*, this statement has been reiterated since *Hall*, including by the Ontario Court of Appeal: *LaFramboise*, at para. 38. In a judgment subsequent to *LaFramboise*, the Ontario Court of Appeal found instead that the words "something more" were simply a way to convey the need to use s. 515(10)(c) sparingly: *D. (R.)*, at para. 53. However, it expressed the view that the third ground for detention is not limited to the most heinous of offences and can be invoked even if the community has not experienced the same horror and fear as was the case in *Hall*.

**40** I see two reasons - one based on legislation and the other on the case law - why Canadian appellate courts may have adopted such interpretations.

**41** First, the former wording of s. 515(10) *Cr. C.* - the one in effect, *inter alia*, at the time of *Morales* - specified two grounds for pre-trial detention, a *primary* ground and a *secondary* ground. The primary ground, set out in s. 515(10)(a), was that detention of the accused was necessary "to ensure his or her attendance in court in order to be dealt with according to law". The secondary ground, under s. 515(10)(b), was that detention of the accused was necessary "in [page349] 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". An accused could be detained on the secondary ground only if detention was not justified on the primary ground set out in s. 515(10)(a). It was the secondary ground for detention that was at issue in *Morales* and, as I mentioned above, its "public interest" component was struck down by this Court. However, since the change made to the wording in 1997, s. 515(10) has no longer provided for a hierarchy of grounds for detention.

**42** Second, it seems to me that the position taken by certain courts originates in a misinterpretation of *Hall*. As Justice Trotter points out, there are cases in which courts, although acknowledging the authority of the Chief Justice's reasons in *Hall*, have actually seemed to prefer the minority's reasons: *The Law of Bail in Canada* (3rd ed. (loose-leaf)), at p. 3-45. The dissenting judges would have struck down s. 515(10)(c) *Cr. C.* in its entirety, since they did not think it lent itself to a piecemeal analysis: *Hall*, at para. 88. In their view, the factors listed in that provision served as a "facade of precision", and it was difficult to see how they could promote the proper administration of justice in cases in which the grounds set out in s. 515(10)(a) and (b) were not already applicable: paras. 98-99. They were also of the opinion that the phrase "maintain confidence in the administration of justice" essentially revived the old "public interest" ground that the Court had struck down in *Morales* and invoked "similarly vague notions of the public image of the criminal justice system": para. 104. Since *Hall*, some courts have therefore found, using the minority's reasons to bolster this view, that the majority's reasons advocated a restrictive interpretation of s. 515(10)(c): Trotter, at p. 3-45.

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**43** The crime at issue in *Hall* was a particularly heinous one: the murder of a woman who had 37 slash wounds on her body. Her assailant had intended to cut her head off. The murder had caused significant public concern. The accused had applied for bail, which the justice had denied on the basis of s. 515(10)(c) *Cr. C.*

**44** This Court described the crime as "heinous and unexplained": *Hall*, at para. 25. It also quoted a comment from *R. v. Rondeau* ([1996](#)), [108 C.C.C. \(3d\) 474](#) (C.A.), at p. 480, that [TRANSLATION] "[t]he more a crime like the present one is unexplained and unexplainable, the more worrisome bail becomes for society": *Hall*, at para. 25. I note that the decision in *Rondeau* concerned what was at that time the secondary ground for detention, that is, the

need to detain the accused for the protection or safety of the public. Section 515(10)(c) *Cr. C.* was not yet in force when that case was decided.

**45** The following passage from *Hall* is also worth reproducing:

Where, as here, the crime is horrific, inexplicable, and strongly linked to the accused, a justice system that cannot detain the accused risks losing the public confidence upon which the bail system and the justice system as a whole repose. [para. 40]

**46** I am of the opinion that some courts have misinterpreted this Court's decision in *Hall*. First of all, the Court's comments must be viewed in the context of that case and analyzed in light of the case's very specific circumstances: the crime was an extremely horrific one. It was therefore natural for the Court to take this into account when applying s. 515(10)(c) *Cr. C.* The Court's description of the crime as horrific, heinous and unexplained was simply an observation, a description of the facts considered by the Court in its analysis of s. 515(10)(c) *Cr. C.* It cannot be read as imposing conditions or prerequisites.

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**47** In my view, the question whether a crime is "unexplainable" or "unexplained" is not a criterion that should guide justices in their analysis under s. 515(10)(c). Apart from the fact that the provision itself does not even refer to such a criterion, I consider the concept ambiguous and confusing. What is meant by an "unexplainable" crime? Is it a crime against a random victim? A crime that could be committed only by a person who is not rational? An especially horrific crime?

**48** Moreover, many crimes may be "explainable" in one way or another; for example, it may be that the assailant was provoked by the victim or that he or she had a mental illness or was intoxicated. From this perspective, the "unexplainable" crime criterion is of little assistance.

**49** The application of a criterion based on the notion of an "unexplainable" crime could also lead to undesirable conclusions. Crimes that are truly heinous and horrific might not satisfy it. Such a criterion could therefore give the public the impression that justices are "justifying" certain crimes, that is, crimes that are "explainable". Although this Court used the words "unexplained and unexplainable" in *Hall* in referring to the murder at issue in that case, its decision was based, first and foremost, on the brutal and heinous nature of the crime, the strong evidence tying the accused to the crime and the fact that people in the community were afraid: para. 25. In any event, the drift in the case law since *Hall* and the reasons I have stated demonstrate the need to limit recourse to such a criterion. As much as possible, it would also be wise for justices hearing applications for release to avoid attaching such a label to the circumstances of the alleged crimes that come before them so as not to give the public the impression that they are "justifying" them.

**50** Furthermore, I agree with the appellant that detention may be justified only in rare cases, but that this is simply a consequence of the application [page352] of s. 515(10)(c) and not a precondition to its application, a criterion a court must consider in its analysis or the purpose of the provision.

**51** This interpretation is consistent with the following comment made by this Court in *Hall*:

While the circumstances in which recourse to this ground for bail denial may not arise frequently, when they do it is essential that a means of denying bail be available. [Emphasis added; para. 31.]

**52** I am of the view that a "rareness" of circumstances criterion would be vague and unmanageable in practice. How would such a criterion be assessed? Should justices consider how many cases have been heard (in their jurisdictions, in Canada, in the last year, etc.) and, at the same time, ensure that cases of detention based on s. 515(10)(c) will remain "rare" if they order detention in the cases before them? Should a justice review the cases in which detention has been ordered and determine whether the facts of the case before him or her are the same (or

nearly the same) as the facts of those cases? In any event, it seems to me that a "rareness" of circumstances criterion would prompt justices to engage in a comparative exercise and thus to move away from the careful examination of the circumstances of individual cases that the situation requires. In my opinion, a comparative approach such as this could potentially undermine the public's confidence in the administration of justice.

**53** Moreover, the appellant correctly points out that s. 515(10)(c) *Cr. C.* is worded clearly and that it does not require exceptional or rare circumstances. This interpretation is consistent with this Court's recent decision in *R. v. Summers*, [2014 SCC 26](#), [\[2014\] 1 S.C.R. 575](#), which concerned the sentencing provisions of s. 719(3) and (3.1) *Cr. C.* Section 719(3) provides that in determining the sentence to be imposed on a person convicted of an offence, a court may take into account any time spent in custody by the person as a result of the offence and may credit a maximum of one day for each day spent in [page353] custody. However, s. 719(3.1) specifies that, "if the circumstances justify it", the maximum can be increased to one and one-half days for each day spent in custody. The Court interpreted this provision as follows:

... this provision is free of any language limiting the scope of what may constitute "circumstances". The legislature could easily have provided that only "exceptional circumstances" or "circumstances other than the loss of eligibility for early release and parole" justify enhanced credit.

As Cronk J.A. observed, language limiting the scope of the word "circumstances" is used elsewhere in the *Criminal Code*. For example, reference is made to "exceptional circumstances" or "compelling circumstances" in s. 672.14(3) (fitness assessments last no longer than 30 days, except they may last for 60 if "compelling circumstances" so warrant), s. 672.47(2) (when an accused is found unfit to stand trial, a disposition must be made within 45 days but, in "exceptional circumstances", may be made within 90 days) and s. 742.6(16) (when an offender breaches a conditional sentence order, in "exceptional cases" some of the suspended sentence may be deemed to be time served).

The absence of qualifications on "circumstances" in s. 719(3.1) is telling since Parliament *did* restrict enhanced credit, withholding it from offenders who have been denied bail primarily as a result of a previous conviction (s. 515(9.1)), those who contravened their bail conditions (ss. 524(4)(a) and 524(8)(a)), and those who committed an indictable offence while on bail (ss. 524(4)(b) and 524(8)(b)). Parliament clearly turned its attention to the circumstances under which s. 719(3.1) should *not* apply, but did not include any limitations on the scope of "circumstances" justifying its application. [Underlining added.]

(*Summers*, at paras. 37-39)

**54** In conclusion, the application of s. 515(10)(c) is not limited to exceptional circumstances, to "unexplainable" crimes or to certain types of crimes such as murder. The Crown can rely on s. 515(10)(c) [page354] for any type of crime, but it must prove - except in the cases provided for in s. 515(6) - that the detention of the accused is justified to maintain confidence in the administration of justice.

(b) *Circumstances Set Out in Section 515(10)(c) Cr. C.*

**55** Section 515(10)(c) expressly refers to four circumstances that must be considered by a justice in determining whether the detention of an accused is necessary to maintain confidence in the administration of justice. The justice must assess each of these circumstances - or factors - and consider their combined effect. This is a balancing exercise that will enable the justice to decide whether detention is justified.

**56** It must be kept in mind that, at this stage of criminal proceedings, the accused is still presumed innocent regardless of the gravity of the offence, the strength of the prosecution's case or the possibility of a lengthy term of imprisonment.

(i) Apparent Strength of the Prosecution's Case

**57** An interim release hearing is a summary proceeding in which more flexible rules of evidence apply. As a result, some of the evidence admitted at this hearing may later be excluded at trial. As Justice Trotter notes, it may be difficult to assess the strength of the prosecution's case at such a hearing: "The expeditious and sometimes informal nature of a bail hearing may reflect an unrealistically strong case for the Crown" (p. 3-7).

**58** Despite these difficulties inherent in the release process, the justice must determine the apparent strength of the prosecution's case. On the one hand, the prosecutor is not required to prove beyond a reasonable doubt that the accused committed the offence, and the justice must be careful [page355] not to play the role of trial judge or jury: matters such as the credibility of witnesses and the reliability of scientific evidence must be analyzed at trial, not at the release hearing. However, the justice who presides at that hearing must consider the quality of the evidence tendered by the prosecutor in order to determine the weight to be given to this factor in his or her balancing exercise. For example, physical evidence may be more reliable than a mere statement made by a witness, and circumstantial evidence may be less reliable than direct evidence. The existence of ample evidence may also reinforce the apparent strength of the case.

**59** On the other hand, the justice must also consider any defence raised by the accused. Rather than raising a defence at the initial hearing, the latter will most likely not do so before the release hearing held upon completion of the preliminary inquiry, and may not even raise one before trial. If the accused does raise a defence, however, this becomes one of the factors the justice must assess, and if there appears to be some basis for the defence, the justice must take this into account in analyzing the apparent strength of the prosecution's case. As the Quebec Court of Appeal noted in a relatively recent decision, [TRANSLATION] "it would be unfair to allow the prosecution to state its case if the justice is not in a position to consider not only the weaknesses of that case, but also the defences it suggests": *R. v. Coates*, [2010 QCCA 919](#), at para. 19 (CanLII).

(ii) Gravity of the Offence

**60** For the purposes of s. 515(10)(c), what the justice must determine is the "objective" gravity of the offence in comparison with the other offences in the *Criminal Code*. This is assessed on the basis of the maximum sentence - and the minimum sentence, if any - provided for in the *Criminal Code* for the offence.

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(iii) Circumstances Surrounding the Commission of the Offence, Including Whether a Firearm Was Used

**61** Without drawing up an exhaustive list of possible circumstances surrounding the commission of the offence that might be relevant under s. 515(10)(c), I will mention the following: the fact that the offence is a violent, heinous or hateful one, that it was committed in a context involving domestic violence, a criminal gang or a terrorist organization, or that the victim was a vulnerable person (for example, a child, an elderly person or a person with a disability). If the offence was committed by several people, the extent to which the accused participated in it may be relevant. The aggravating or mitigating factors that are considered by courts for sentencing purposes can also be taken into account.

(iv) Fact That the Accused Is Liable for a Potentially Lengthy Term of Imprisonment

**62** The fourth circumstance set out in s. 515(10)(c) is "the fact that the accused is liable, on conviction, for a potentially lengthy term of imprisonment or, in the case of an offence that involves, or whose subject-matter is, a firearm, a minimum punishment of imprisonment for a term of three years or more".

**63** Although it is not desirable, for the purposes of s. 515(10)(c) *Cr. C.*, to establish a strict rule regarding the

number of years that constitutes a "lengthy term of imprisonment", some guidance is nonetheless required for the exercise to be undertaken by justices in this regard.

**64** First of all, since I have found that no crime is exempt from the possible application of s. 515(10)(c) *Cr. C.*, it is self-evident that the words "lengthy term of imprisonment" do not refer only to a life sentence.

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**65** Moreover, to determine, on a case-by-case basis, whether the accused is actually liable for a potentially "lengthy term of imprisonment", the justice must consider all the circumstances of the case known at the time of the hearing, as well as the principles for tailoring the applicable sentence. But this does not mean that the justice would be justified in embarking on a complex exercise to calculate the sentence the accused might receive: it must be borne in mind that interim release occurs at the beginning of the criminal process and that the justice must avoid acting as a substitute for the trial judge. That being said, there will be cases in which a claim of mitigating or aggravating circumstances appears to have sufficient merit for it to be open to the justice to consider it in determining whether the accused is liable for a potentially "lengthy term of imprisonment". As far as possible, therefore, this fourth circumstance is assessed *subjectively*, unlike the second circumstance - the gravity of the offence - which is assessed *objectively*.

(c) *The Listed Circumstances Are Not Exhaustive*

**66** The appellant, relying on *R. v. Mordue* (2006), 223 C.C.C. (3d) 407 (Ont. C.A.), submits that a detention order must be made when the four circumstances set out in s. 515(10)(c) weigh in favour of that result, unless there are other "circumstances" that might justify a release order.

**67** In my opinion, the appellant is mistaken.

**68** Section 515(10)(c) could not be worded more clearly: it refers to "all the circumstances, including ...". In my opinion, Parliament would have worded this provision differently (although I will not comment on the validity of such a wording) if it had intended a detention order to be automatic where the four listed circumstances weigh in favour of such an order. In fact, Parliament intended the opposite. As the Chief Justice stated in *Hall*, a justice dealing with an application for detention based on s. 515(10)(c) must consider all the relevant circumstances, but must *focus particularly on the factors Parliament has specified*: para. 41. The automatic [page358] detention argument also seems to be inconsistent with the following statement by the Chief Justice, at para. 41:

At the end of the day, the judge can only deny bail if satisfied that in view of these factors and related circumstances, a reasonable member of the community would be satisfied that denial is necessary to maintain confidence in the administration of justice. [Emphasis added.]

**69** Moreover, the automatic detention argument disregards the fact that the test to be met under s. 515(10)(c) is whether the detention of the accused is necessary to maintain confidence in the administration of justice. The four listed circumstances are simply the main factors to be balanced by the justice, together with any other relevant factors, in determining whether, in the case before him or her, detention is necessary in order to achieve the purpose of maintaining confidence in the administration of justice in the country. This is the provision's purpose. Although the justice must consider all the circumstances of the case and engage in a balancing exercise, this is the ultimate question the justice must answer, and it must therefore guide him or her in making a determination. The argument that detention must automatically be ordered if the review of the four circumstances favours that result is incompatible with the balancing exercise required by s. 515(10)(c) and with the purpose of that exercise.

**70** Finally, it is important not to overlook the fact that, in Canadian law, the release of accused persons is the cardinal rule and detention, the exception: *Morales*, at p. 728. To automatically order detention would be contrary to the "basic entitlement to be granted reasonable bail unless there is just cause to do otherwise" that is guaranteed in

s. 11(e) of the *Charter: Pearson*, at p. 691. This entitlement rests in turn on the cornerstone of Canadian criminal law, namely the presumption of innocence that is guaranteed by s. 11(d) of the *Charter: Hall*, at para. 13. These fundamental rights require the justice to ensure that interim detention is truly [page359] justified having regard to all the relevant circumstances of the case.

71 Although I will not set out an exhaustive list of the circumstances relevant to the analysis required by s. 515(10)(c) *Cr. C.*, I think it will be helpful to give a few examples. Section 515(10)(c)(iii) refers to the "circumstances surrounding the commission of the offence". I would add that the personal circumstances of the accused (age, criminal record, physical or mental condition, membership in a criminal organization, etc.) may also be relevant. The justice might also consider the status of the victim and the impact on society of a crime committed against that person. In some cases, he or she might also take account of the fact that the trial of the accused will be held at a much later date.

(d) *Meaning of "Public"*

72 I should point out that although the French version of s. 515(10)(c) refers to "*la confiance du public*" (public confidence) - "*sa détention est nécessaire pour ne pas miner la confiance du public envers l'administration de la justice, compte tenu de toutes les circonstances, notamment les suivantes...*" - the word "public" does not actually appear in the provision's English version. However, this Court has confirmed that detention under this provision is based on the need to maintain *public* confidence in the administration of justice: *Hall*, at para. 41. This means that the justice's balancing of all the circumstances under s. 515(10)(c) must always be guided by the perspective of the "public".

73 In *Mordue*, the Ontario Court of Appeal provided an interesting analysis of the relationship between "public confidence" for the purposes of s. 515(10)(c) and the "safety of the public" factor set out in s. 515(10)(b):

Public fear and concern about safety, while relevant, are not the exclusive considerations in assessing the public's confidence in the administration of justice. The [page360] effect of the accused's release on confidence in the administration of justice must be considered more broadly.

Limiting the analysis of confidence in the administration of justice to the public's safety concerns results in the tertiary ground amounting to little more than a recapitulation of the secondary ground...

Here, the bail judge placed decisive weight on the quality of the respondent's bail arrangements. By doing so, he erred by not considering whether the tertiary ground established a separate and distinct basis for denying bail. Having quite appropriately considered the level of public concern about safety in this case, the bail judge erred by not going on to consider the effect the release of the respondent would have more broadly on the public confidence in the administration of justice. [Emphasis added; paras. 23-25.]

74 In *Hall*, this Court explained that the "public" in question consists of reasonable members of the community who are properly informed about "the philosophy of the legislative provisions, *Charter* values and the actual circumstances of the case": para. 41, quoting *R. v. Nguyen (1997), 119 C.C.C. (3d) 269* (B.C.C.A.), at para. 18.

75 In a pre-*Hall* decision concerning the "public interest" ground formerly provided for in s. 515(10)(b) *Cr. C.*, the Quebec Court of Appeal stated the following:

[TRANSLATION] With respect to the perception of the public, as we know, a large part of the Canadian public often adopts a negative and even emotional attitude towards criminals or [potential] criminals. The public wants to see itself protected, see criminals in prison and see them punished severely. To get rid of a criminal is to get rid of crime. It [unjustifiably] perceives the judicial system ... and the administration of justice in general as too indulgent, too soft, too good to the criminal. This perception, almost visceral in respect of crime, is surely not the perception which a judge must have in deciding the issue of interim release. If this were the case, persons charged with certain types of [page361] offences would never be released because the perception of the public is negative with respect to the type of crime committed, while

others, on the contrary, would almost automatically be released where the public's perception is neutral or more indulgent... . Therefore, the perception of the public must be situated at another level, that of a public reasonably informed about our system of criminal law and capable of judging and perceiving without emotion that the application of the presumption of innocence, even with respect to interim release, has the effect that people, who may later be found guilty of even serious crimes, will be released for the period between the time of their arrest and the time of their trial. In other words, the criterion of the public perception must not be that of the lowest common denominator. [Emphasis added.]

(*R. v. Lamothe* (1990), 58 C.C.C. (3d) 530, at p. 541)

**76** In my opinion, these comments are still relevant.

**77** Although the "public interest" ground was subsequently held to be unconstitutional, these passages remain helpful in underscoring the fact that the word "public" used in the context of the new s. 515(10)(c) does not mean Canadians who tend to react impulsively. This being said, although it is true that the public in question consists of reasonable, well-informed persons, and not overly emotional members of the community, it seems to me that some of the decisions have rendered the word "public" meaningless in this context. Parliament made an express choice by using the word "*public*" in the French version of s. 515(10)(c) in requiring that the courts take confidence in the administration of justice into account in deciding whether an accused should be detained pending trial. It referred not to legal experts or judges, but to the "public". Meaning must therefore be given to this legislative choice. Public confidence cannot be equated with the confidence of legal experts in the administration of justice. The Canadian public - even its most knowledgeable members - cannot be expected to have the same level of legal knowledge as judges or lawyers. That would distort the meaning of the word [page362] "public". It would also disregard the purpose of this provision, which is to maintain public confidence in the administration of justice.

**78** I note that this position is similar to the one taken by this Court concerning s. 24(2) of the *Charter*, which provides for the exclusion of evidence obtained in violation of the *Charter* if "the admission of it in the proceedings would bring the administration of justice into disrepute". In *R. v. Collins*, [1987] 1 S.C.R. 265, Lamer J., writing for the majority, put the relevant question in figurative terms: "Would the admission of the evidence bring the administration of justice into disrepute in the eyes of the reasonable man, dispassionate and fully apprised of the circumstances of the case?" (p. 282, quoting Y.-M. Morissette, "The Exclusion of Evidence under the *Canadian Charter of Rights and Freedoms: What To Do and What Not To Do*" (1984), 29 McGill L.J. 521, at p. 538). Lamer J. stated that "[t]he reasonable person is usually the average person in the community, but only when that community's current mood is reasonable": *Collins*, at p. 282. He explained that the reasonable person test "serves as a reminder to each individual judge that his discretion is grounded in community values, and, in particular, long term community values. He should not render a decision that would be unacceptable to the community when that community is not being wrought with passion or otherwise under passing stress due to current events": *ibid.*, at pp. 282-83; see also *R. v. Burlingham*, [1995] 2 S.C.R. 206, at para. 142.

**79** Thus, a reasonable member of the public is familiar with the basics of the rule of law in our country and with the fundamental values of our criminal law, including those that are protected by the *Charter*. Such a person is undoubtedly aware of the importance of the presumption of innocence and the right to liberty in our society and knows that these are fundamental rights guaranteed by our Constitution. He or she also expects that someone charged with a crime will be tried within a reasonable period of time, and is aware of the adage that "justice [page363] delayed is justice denied": *R. v. Trout*, 2006 MBCA 96, 205 Man. R. (2d) 277, at para. 15. Finally, a reasonable member of the public knows that a criminal offence requires proof of culpable intent (*mens rea*) and that the purpose of certain defences is to show the absence of such intent. A well-known example of this type of defence is the mental disorder defence. The person contemplated by s. 515(10)(c) *Cr. C.* therefore understands that such a defence, once established, will enable an accused to avoid criminal responsibility. However, it would be going too far to expect the person in question to master all the subtleties of complex defences, especially where there is overwhelming evidence of the crime, the circumstances of the crime are heinous and the accused admits committing it.

**80** In short, the person in question in s. 515(10)(c) *Cr. C.* is a thoughtful person, not one who is prone to emotional reactions, whose knowledge of the circumstances of a case is inaccurate or who disagrees with our society's fundamental values. But he or she is not a legal expert familiar with all the basic principles of the criminal justice system, the elements of criminal offences or the subtleties of criminal intent and of the defences that are available to accused persons.

**81** It is of course not easy for judges to strike an appropriate balance between the unrealistic expectations they might have for the public on the one hand, and the need to refuse to yield to public reactions driven solely by emotion on the other. This exercise may be particularly difficult in this era characterized by the multiplication and diversification of information sources, access to 24-hour news reports and the advent of social media.

**82** Canadians may in fact think they are very well informed, but that is unfortunately not always the case. Moreover, people can also make their reactions known much more quickly, more effectively and on a wider scale than in the past, in particular through the social media mentioned above, which are conducive to chain reactions. The courts must therefore be careful not to yield to purely emotional public reactions or reactions that may be based on [page364] inadequate knowledge of the real circumstances of a case.

**83** However, the courts must also be sensitive to the perceptions of people who are reasonable and well informed. This enables the courts to act both as watchdogs against mob justice and as guardians of public confidence in our justice system. It would therefore be dangerous, inappropriate and wrong for judges to base their decisions on media reports that are in no way representative of a well-informed public. Indeed, the Quebec Court of Appeal recognized this risk in its recent decision in *R. v. Turcotte*, [2014 QCCA 2190](#):

[TRANSLATION] The press clippings show how risky it is to rely on this mode of proof. They contain several different opinions that vary in the degree to which they are balanced, objective, moderate or superficial. Many of them contain inaccurate facts or do not mention the essential facts. Most of them say nothing about the legal principles that must be applied in making release decisions. Certain opinions stir up anger and distort the debate. Few accurately report the facts and correctly state the applicable principles. On the whole, it must be acknowledged that they do not satisfy the reasonable person test defined in the case law. [para. 68 (CanLII)]

**84** Having said this, I wish to point out that this does not mean the courts must automatically disregard evidence that comes from the news media. It must be recognized that the media are part of life in society and that they reflect the opinions of certain segments of the Canadian public. In *Canadian Broadcasting Corporation v. New Brunswick (Attorney General)*, [1991] 3 S.C.R. 459, at p. 475, this Court noted: "The media have a vitally important role to play in a democratic society. It is the media that, by gathering and disseminating news, enable members of our society to make an informed assessment of the issues which may significantly affect their lives and well-being." Such opinion evidence can therefore be considered by the courts when it is [page365] admissible and relevant. This will be the case where it corresponds to the opinion of the reasonable person I described above.

**85** I should mention, however, that since *Turcotte* has not been brought before this Court, it would be inappropriate for me to speak to the correctness of the Court of Appeal's conclusion with respect to release in that case. I will simply observe that the soundness of that conclusion must be assessed in light of the principles I have already outlined.

**86** In short, there is not just one way to undermine public confidence in the administration of justice. It may be undermined not only if a justice declines to order the interim detention of an accused in circumstances that justify detention, but also if a justice orders detention where such a result is not justified.

(4) Conclusion on the Application of Section 515(10)(c) *Cr. C.*

**87** I would summarize the essential principles that must guide justices in applying s. 515(10)(c) *Cr. C.* as follows:

- \* Section 515(10)(c) *Cr. C.* does not create a residual ground for detention that applies only where the first two grounds for detention ((a) and (b)) are not satisfied. It is a distinct ground that itself provides a basis for ordering the pre-trial detention of an accused.
- \* Section 515(10)(c) *Cr. C.* must not be interpreted narrowly (or applied sparingly) and should not be applied only in rare cases or exceptional circumstances or only to certain types of crimes.
- \* The four circumstances listed in s. 515(10)(c) *Cr. C.* are not exhaustive.
- \* A court must not order detention automatically even where the four listed circumstances support such a result.

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- \* The court must instead consider all the circumstances of each case, paying particular attention to the four listed circumstances.
- \* The question whether a crime is "unexplainable" or "unexplained" is not a criterion that should guide the analysis.
- \* No single circumstance is determinative. The justice must consider the combined effect of all the circumstances of each case to determine whether detention is justified.
- \* This involves balancing all the relevant circumstances. At the end of this balancing exercise, the ultimate question to be asked by the court is whether detention is necessary to maintain confidence in the administration of justice. This is the test to be met under s. 515(10)(c).
- \* To answer this question, the court must adopt the perspective of the "public", that is, the perspective of a reasonable person who is properly informed about the philosophy of the legislative provisions, *Charter* values and the actual circumstances of the case. However, this person is not a legal expert and is not able to appreciate the subtleties of the various defences that are available to the accused.
- \* This reasonable person's confidence in the administration of justice may be undermined not only if a court declines to order detention where detention is justified having regard to the circumstances of the case, but also if it orders detention where detention is not justified.

**88** In conclusion, if the crime is serious or very violent, if there is overwhelming evidence against the accused and if the victim or victims were vulnerable, pre-trial detention will usually be ordered.

**89** Having completed the interpretation of s. 515(10)(c) *Cr. C.*, I will now consider the power [page367] of review of superior court judges, which enables them to vary release or detention orders made under s. 515(10)(a), (b) or (c) *Cr. C.*

#### B. *Availability of a Review Under Sections 520 and 521 Cr. C.*

**90** Section 520 *Cr. C.* gives an *accused* the right to apply to a judge for a review of an interim detention order made against him or her by a justice. Similarly, s. 521 *Cr. C.* enables the *prosecutor* to apply to a judge for a review of a release order made in relation to an accused. Sections 520 and 521 are worded similarly. In both cases, the application may be made "at any time before the trial": ss. 520(1) and 521(1) *Cr. C.* It should be noted that these sections are limited to the review of orders made in connection with offences other than the ones referred to in s. 469 *Cr. C.*

**91** This is the first time this Court has considered the scope of ss. 520 and 521 *Cr. C.* Not all lower courts in Canada are agreed on the nature of this review process. Some consider it an appeal, which means that only an error of law or principle will provide a basis for a "review". Others take the view that they have full discretion to vary the initial order even in the absence of an error. This approach is sometimes described as a "*de novo*" hearing, although, as Justice Trotter points out, a true *de novo* hearing is conducted as if there were no previous proceedings: p. 8-13. Finally, other courts treat the review under ss. 520 and 521 *Cr. C.* as a hybrid remedy. In their view, the section authorizes the accused and the prosecutor to present new evidence to show a change in circumstances, and to raise an error of law or principle by the justice to justify a review of the initial order.

**92** For the reasons that follow, I am of the opinion that ss. 520 and 521 *Cr. C.* do not confer an open-ended discretion on the reviewing judge to [page368] vary the initial decision concerning the detention or release of the accused. Nonetheless, they establish a hybrid remedy and therefore provide greater scope than an appeal for varying the initial order.

(1) Wording of Sections 520 and 521 *Cr. C.*

**93** The provisions - ss. 520(1) and (7) and 521(1) and (8) - that establish the power of review read as follows:

**520.** (1) If a justice, or a judge of the Nunavut Court of Justice, makes an order under subsection 515(2), (5), (6), (7), (8) or (12) or makes or vacates any order under paragraph 523(2)(b), the accused may, at any time before the trial of the charge, apply to a judge for a review of the order.

...

(7) ...

and [the judge] shall either

(d) dismiss the application, or

(e) if the accused shows cause, allow the application, vacate the order previously made by the justice and make any other order provided for in section 515 that he considers is warranted.

...

**521.** (1) If a justice, or a judge of the Nunavut Court of Justice, makes an order under subsection 515(1), (2), (7), (8) or (12) or makes or vacates any order under paragraph 523(2)(b), the prosecutor may, at any time before the trial of the charge, apply to a judge for a review of the order.

...

(8) ...

and [the justice] shall either

(d) dismiss the application, or

[page369]

(e) if the prosecutor shows cause, allow the application, vacate the order previously made by the justice and make any other order provided for in section 515 that he considers to be warranted.

...

**94** It should be mentioned that ss. 520 and 521 do not provide for a *de novo* hearing, whereas Parliament expressly provided for such a hearing in the *Youth Criminal Justice Act*, [S.C. 2002, c. 1, s. 33\(1\)](#), where an application for release is made to a youth justice court and that court has not ruled on the initial application. If Parliament had intended for reviewing judges to conduct a true *de novo* hearing, it would have specified this in the legislation. As well, ss. 520(7) and 521(8) provide that the review is conducted on the basis of the transcript and exhibits from the initial proceedings, although some new evidence is admissible. I will return to this point below. For the moment, it is enough to say that these factors confirm my conclusion that ss. 520 and 521 *Cr. C.* do not establish a *de novo* proceeding.

**95** Moreover, even though the power of review may seem broad at first glance, ss. 520 and 521 *Cr. C.* expressly limit its exercise in favour of the accused or the prosecutor, as the case may be, to cases in which cause is shown. It should be borne in mind that, in the old *Young Offenders Act*, R.S.C. 1985, c. Y-1, Parliament used the word "discretion" in referring to the reviewing court's power over the transfer of young accused persons to ordinary court: s. 16(9) and (10). This Court found that the use of that word conferred a broad power of review on the reviewing court and authorized that court to make an independent evaluation and to arrive at an independent conclusion on the same facts: *R. v. M. (S.H.)*, [\[1989\] 2 S.C.R. 446](#). But Parliament did not choose to use the same wording in ss. 520 and 521 *Cr. C.*

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**96** The wording of ss. 520 and 521 *Cr. C.* therefore seems to preclude an interpretation to the effect that the reviewing judge has an open-ended discretion. It remains to be seen whether this conclusion can be confirmed through a comparison with other similar provisions, having regard to the nature of the initial release decision.

(2) Difference Between the Wording of Sections 520 and 521 *Cr. C.* and That of Other Review Provisions

**97** The appellant argues that the difference between the wording of ss. 520(7)(e) and 521(8)(e) *Cr. C.*, which provide that a reviewing judge may vary the initial decision "if the accused [or the prosecutor, as the case may be,] shows cause", and that of s. 680(1) *Cr. C.* and s. 18(2) of the *Extradition Act*, [S.C. 1999, c. 18](#), which contain no such words, favours a standard of review requiring greater deference to the initial release decision.

**98** Section 680 *Cr. C.* deals, *inter alia*, with the review of release decisions in the context of the offences listed in s. 469 *Cr. C.* Section 680(1) *Cr. C.* reads as follows:

**680.** (1) A decision made by a judge under section 522 or subsection 524(4) or (5) or a decision made by a judge of the court of appeal under section 261 or 679 may, on the direction of the chief justice or acting chief justice of the court of appeal, be reviewed by that court and that court may, if it does not confirm the decision,

(a) vary the decision; or

(b) substitute such other decision as, in its opinion, should have been made.

**99** The appellant concedes that the case law on the nature and availability of a review under s. 680 *Cr. C.* is not consistent. This has even been recognized by certain provincial courts of appeal: *R. v. Oliver*, [2008 NLCA 27](#), [287 Nfld. & P.E.I.R. 123](#); *R. v. Massan*, [2012 MBCA 26](#), [289 C.C.C. \(3d\) 285](#); *R. v. White*, [2005 ABCA 403](#), [202 C.C.C. \(3d\) 295](#); see also Trotter, at p. 8-23; T. Quigley, *Procedure in [page371] Canadian Criminal Law* (2nd ed. (loose-leaf)), at p. 11-17.

**100** Section 18(2) of the *Extradition Act* concerns the review of an order made with regard to a person arrested under that statute. It reads as follows:

(2) A decision respecting judicial interim release may be reviewed by a judge of the court of appeal and that judge may

- (a) confirm the decision;
- (b) vary the decision; or
- (c) substitute any other decision that, in the judge's opinion, should have been made.

**101** It can be seen immediately that the various decisions open to the reviewing judge are set out in a similar way to those provided for in s. 520 *Cr. C.* However, like s. 680(1) *Cr. C.*, s. 18(2) of the *Extradition Act* does not limit the variation of the initial decision to cases in which "cause" is shown.

**102** The case law of Canadian appellate courts is nearly unanimous. Section 18(2) of the *Extradition Act* provides that a reviewing judge may vary the initial decision only on the basis of an error in principle: *United States of America v. Chan* (2000), 144 C.C.C. (3d) 93 (Ont. C.A.); *United States of America v. Pannell* (2005), 193 C.C.C. (3d) 414 (Ont. C.A.); *United States of America v. Yuen*, 2004 ABCA 368, 363 A.R. 28; *Tenenbaum v. United States of America*, 2008 ABCA 396, 446 A.R. 155; *Delagarde v. United States of America* (2005), 293 N.B.R. (2d) 80 (C.A.); *United States of America v. Palmucci*, 2001 CanLII 38680 (Que. C.A.); *Boily v. États-Unis Mexicains*, 2005 QCCA 599; *Ivanov v. United States of America*, 2003 NLCA 11, 223 Nfld. & P.E.I.R. 44.

**103** Only the British Columbia Court of Appeal has taken the position that, although this is not a *de novo* hearing or a proceeding in which it can [page372] render a decision as if it were the first judge, it must determine whether the initial decision is "correct" while at the same time according the usual deference to the first judge's findings of fact: *Seifert v. Canada (Attorney General)*, 2002 BCCA 385, 171 B.C.A.C. 203, at para. 6; *United States of America v. Graham*, 2004 BCCA 162, 195 B.C.A.C. 245, at paras. 8-10. Paradoxically, the British Columbia Court of Appeal and the Newfoundland and Labrador Court of Appeal arrived at different outcomes even though they both based their decisions on an analogy with the review procedure provided for in s. 680 *Cr. C.* This is hardly surprising given that the courts do not agree on the nature of the latter procedure.

**104** For the purposes of this appeal, I do not have to determine the validity of the positions taken by appellate courts with respect to s. 680(1) *Cr. C.* and s. 18(2) of the *Extradition Act*. The comparison between those provisions and ss. 520 and 521 *Cr. C.* is nonetheless not without relevance. The fact that s. 680(1) *Cr. C.* and s. 18(2) of the *Extradition Act* - unlike ss. 520 and 521 *Cr. C.* - do not require cause to be shown for the court of appeal to exercise its power of review suggests that Parliament intended, in ss. 520 and 521 *Cr. C.*, to limit the reviewing judge's discretion.

(3) Comparison Between the Appeal From a Sentence and the Review Procedure Provided for in Sections 520 and 521 *Cr. C.*

**105** The appellant points to similarities between the interim release decision and the sentencing decision. In the appellant's view, these similarities mean that a release decision should be reviewed on the basis of the same principles that guide a sentence appeal under s. 687 *Cr. C.* Relying on *R. v. Shropshire*, [1995] 4 S.C.R. 227, *R. v. M.* (C.A.), [1996] 1 S.C.R. 500, *R. v. McDonnell*, [1997] 1 S.C.R. 948, *R. v. L.M.*, 2008 SCC 31, [2008] 2 S.C.R. 163, and *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, the appellant asserts that a superior court conducting a review under ss. 520 and 521 should reverse the initial decision and substitute another one for it only if the initial decision contains an error in principle that [page373] affects the result, or if it is clearly inappropriate or clearly unreasonable.

**106** In the respondent's view, the distinctions between the sentencing decision and the interim release decision are so great that no similarity would justify equating the rules for one with the rules for the other. According to the respondent, the right to interim release is a constitutional right, whereas the sentencing principle requiring consideration of whether "less restrictive sanctions may be appropriate in the circumstances" (s. 718.2(d) *Cr. C.*) is not important enough to justify this analogy.

**107** It is true that there are similarities between the interim release decision and the sentencing decision. Although both these decisions are discretionary, specific statutory rules apply to each of them. In both cases, the rules on the admissibility of evidence are relaxed: ss. 518 and 723 *Cr. C.* As well, the release of an accused must be ordered unless the prosecution shows cause why detention is justified: s. 515(2) and (10) *Cr. C.* Similarly, the sentencing judge must opt for the least restrictive sanction having regard to the circumstances: s. 718.2(d) *Cr. C.* Finally, the various possibilities available to the judge are similar. In the case of interim release, the justice may release the accused without conditions, impose statutory conditions for interim release of the accused (with or without sureties), require the payment of a deposit or order the detention of the accused: s. 515(1), (2)(a) to (d), (4) to (4.3), (5) and (8) *Cr. C.* In the case of sentencing, the judge may discharge the accused, impose statutory conditions of probation, fine the accused or sentence the accused to a term of imprisonment: ss. 730, 731, 734 and 732.1(3) *Cr. C.*

**108** However, there are also some significant differences between the interim release decision and the sentencing decision. In *Toronto Star Newspapers Ltd. v. Canada*, [2010 SCC 21](#), [\[2010\] 1 S.C.R. 721](#), this Court discussed the expeditious nature of [page374] our interim release system and the implications of that nature:

... s. 503(1)(a) *Cr. C.* requires that a person who is arrested and detained be taken before a justice "without unreasonable delay" and in any event within 24 hours after the arrest. Section 515 *Cr. C.* provides that the justice *shall* release the person unless the prosecution shows cause why the detention should be continued. The grounds that can be relied on to deny the person's release are limited. In the short time it has before it must show cause why the detention of the accused is justified, the prosecution has to gather the evidence it intends to use at the bail hearing, which means it may have insufficient time to meet with witnesses and further investigate the matters relevant to bail. Section 516(1) *Cr. C.* provides that the adjournment of a bail hearing cannot exceed three days except with the consent of the accused; and orders can be reviewed at the request of the accused provided that the accused has given the prosecution two days' notice (s. 520(1) and (2) *Cr. C.*).

To avoid any delay prejudicial to an accused who ought to be released, while at the same time ensuring that those who do not meet the criteria for release are kept in custody, compromises had to be made regarding the nature of the evidence to be adduced at the bail hearing. There are practically no prohibitions as regards the evidence the prosecution can lead to show cause why the detention of the accused in custody is justified. According to s. 518(1)(e) *Cr. C.*, the prosecutor may lead any evidence that is "credible or trustworthy", which might include evidence of a confession that has not been tested for voluntariness or consistency with the *Charter*, bad character, information obtained by wiretap, hearsay statements, ambiguous post-offence conduct, untested similar facts, prior convictions, untried charges, or personal information on living and social habits. The justice has a broad discretion to "make such inquiries, on oath or otherwise, of and concerning the accused as he considers desirable" (s. 518(1)(a)). The process is informal; the bail hearing can even take place over the phone (s. 515(2.2)). [Underlining added; paras. 27-28.]

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**109** This conscious choice to expedite the release hearing is grounded in the importance our society attaches to the presumption of innocence and the right of individuals to liberty even when charged with a serious criminal offence. However, this expeditious process is not without consequences for the accused, who generally has very little time to choose counsel and may even have no legal representation at the release hearing. The accused, or his or her counsel, also has very little time to, *inter alia*, review and analyze the prosecutor's evidence, devise a defence strategy and make the best possible decisions on how to proceed.

**110** On the other hand, the sentencing judge is often the judge who presided over the trial of the accused. Thus, even though the appellant argues that the rules on the admissibility of evidence are relaxed, a sentencing decision is made at the end of a long process during which the judge has generally analyzed an abundance of evidence and

is more familiar with the situation of the accused. The sentencing judge is therefore not in the same position as the justice who must decide whether to grant the accused interim release.

**111** Finally, it is important to note that, at the time of sentencing, the accused has already been convicted and is therefore no longer presumed innocent. However, the sentence could have a longer-term impact on the life of the accused than would interim detention.

**112** Thus, although a comparison between the interim release decision and the sentencing decision is interesting, it cannot in itself be determinative, given the differences between these two types of decisions.

(4) Nature of the Decision Reviewed Under Sections 520 and 521 Cr. C.

**113** The decision concerning the interim release of an accused is often characterized as "discretionary". This word must be used carefully in the context of this provision of the *Criminal Code*, [page376] since release of the accused remains the rule, the exception being where his or her detention is justified on one of the grounds set out in s. 515(10) *Cr. C.*

**114** Nevertheless, s. 515(10)(c) requires the justice to balance several factors, including the ones listed in that provision. In this balancing exercise, the justice must for the most part make findings of fact and assess the weight of those findings to determine whether detention is justified. Thus, the provision requires the justice to assess the appropriateness of a decision, which, from this perspective, can be characterized as "discretionary".

**115** I have already dealt with the argument concerning the similarity between the release decision and the sentencing decision. It will be helpful to return here to the discretionary nature of the sentencing decision. In *Shropshire*, this Court reproduced comments that had been made by the Nova Scotia Court of Appeal, quoting *R. v. Muise* (1994), 94 C.C.C. (3d) 119, at pp. 123-24:

In considering the fitness of a sentence imposed by a trial judge, this court has consistently held that it will not interfere unless the sentence imposed is clearly excessive or inadequate... .

...

The law on sentence appeals is not complex. If a sentence imposed is not clearly excessive or inadequate it is a fit sentence assuming the trial judge applied the correct principles and considered all relevant facts... . My view is premised on the reality that sentencing is not an exact science; it is anything but. It is the exercise of judgment taking into consideration relevant legal principles, the circumstances of the offence and the offender. The most that can be expected of a sentencing judge is to arrive at a sentence that is within an acceptable range. In my opinion, that is the true basis upon which Courts of Appeal review sentences when the only issue is whether the sentence is inadequate or excessive. [para. 48]

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...

It then added:

Unreasonableness in the sentencing process involves the sentencing order falling outside the "acceptable range" of orders; this clearly does not arise in the present appeal. [Emphasis added; para. 50.]

**116** In *Nasogaluak*, the Court noted that an appellate court cannot interfere with a sentence simply because it would have weighed the relevant factors differently (para. 46, quoting *R. v. McKnight* (1999), 135 C.C.C. (3d) 41

(Ont. C.A.), at para. 35):

... The weighing of relevant factors, the balancing process is what the exercise of discretion is all about... .  
Only if by emphasizing one factor or by not giving enough weight to another, the trial judge exercises his or her discretion unreasonably should an appellate court interfere with the sentence on the ground the trial judge erred in principle. [Emphasis added.]

**117** Allow me to repeat that the accused has a right to be presumed innocent at the time of the release hearing, which is no longer the case at the time of sentencing. However, the passages reproduced above aptly convey the implications of a discretionary decision that involves the balancing of a number of factors. As I explained above, a decision with respect to release made on the basis of s. 515(10)(c) *Cr. C.* calls for the consideration of several factors that may be difficult to balance. This is a delicate exercise whose essence would be distorted if an open-ended discretion to review the initial release decision were to be conferred on the judge.

**118** As I mentioned above, I am of the opinion that ss. 520 and 521 *Cr. C.* do not provide for a *de novo* hearing. Thus, unless there is new evidence - a subject I will address below - the reviewing judge is not in a better position than the justice to evaluate whether the detention of the accused is necessary. In addition, the reviewing judge has, in [page378] relation to the justice, no special expertise with respect to release.

**119** I therefore have difficulty seeing any possible justification for allowing a reviewing judge, at all times, to substitute his or her assessment of the various circumstances for that of the justice.

(5) Conclusion: The Review Provided for in Sections 520 and 521 *Cr. C.* Is a Hybrid Remedy

**120** On the basis of the wording of ss. 520 and 521 *Cr. C.*, a comparison with other review provisions and with sentence appeals, and the nature of the decision being reviewed, I conclude that these sections do not confer on the reviewing judge an open-ended power to review the initial order respecting the detention or release of the accused. The reviewing judge must therefore determine whether it is appropriate to exercise this power of review.

**121** It will be appropriate to intervene if the justice has erred in law. It will also be appropriate for the reviewing judge to exercise this power if the impugned decision was clearly inappropriate, that is, if the justice who rendered it gave excessive weight to one relevant factor or insufficient weight to another. The reviewing judge therefore does not have the power to interfere with the initial decision simply because he or she would have weighed the relevant factors differently. I reiterate that the relevant factors are not limited to the ones expressly specified in s. 515(10)(c) *Cr. C.* Finally, where new evidence is submitted by the accused or the prosecutor as permitted by ss. 520 and 521 *Cr. C.*, the reviewing judge may vary the initial decision if that evidence shows a material and relevant change in the circumstances of the case.

(6) Material Change in Circumstances

**122** Sections 520(7) and 521(8) *Cr. C.* provide for the tendering of new "evidence or exhibits". Section 520(7) reads as follows:

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**520.** (7) On the hearing of an application under this section, the judge may consider

- (a) the transcript, if any, of the proceedings heard by the justice and by any judge who previously reviewed the order made by the justice,
- (b) the exhibits, if any, filed in the proceedings before the justice, and
- (c) such additional evidence or exhibits as may be tendered by the accused or the prosecutor,

Section 521(8) is essentially identical to s. 520(7).

**123** The question is what is admissible as new evidence.

**124** The appellant submits that this evidence is limited to facts that are truly new in the sense that they have come to light since the initial decision. It therefore does not include facts that could have been alleged at the initial hearing or during a previous review. Otherwise, the system could encourage "judge shopping".

**125** It is true that the principle of finality of judgments and that of the need to avoid a multiplicity of unwarranted court proceedings are important, and the courts must not facilitate "judge shopping". However, it is going too far to say, as the appellant does, that it might be in an arrested person's interest to tender a minimum of evidence at the initial release hearing and then, should that prove to be insufficient, to adduce evidence on review that had existed at the time of that hearing but had not been used then. Detained persons generally do everything in their power to be released as quickly as possible. The appellant's argument reflects a misunderstanding of the impact of detention on an individual, particularly when it may be unjustified: see, e.g., *Toronto Star Newspapers Ltd.*, at para. 51, quoting *Hall*, at para. 47; *Ell v. Alberta*, [2003 SCC 35](#), [\[2003\] 1 S.C.R. 857](#), at para. 24.

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**126** That the fear expressed by the appellant goes too far seems even clearer to me given the fact that, following a first application for review under ss. 520 and 521 *Cr. C.*, a further application may not be made, except with leave of a judge, prior to the expiration of 30 days: ss. 520(8) and 521(9) *Cr. C.*

**127** I am instead of the opinion that the reason why detained persons may not always tender all possible evidence at their first hearing lies in the generally expeditious nature of the release process and in the consequences of that nature, namely the short time between arrest and hearing, a lack of representation for accused persons, and incomplete evidence at this stage. The interests of justice would therefore be undermined if courts acting under ss. 520 and 521 *Cr. C.* were to adopt a narrow view regarding the "new evidence" that can be admitted under those sections.

**128** In *Palmer v. The Queen*, [\[1980\] 1 S.C.R. 759](#), at p. 775, this Court established the following criteria that must be met for evidence to be considered "new evidence" on appeal:

- (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial ... .
- (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
- (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
- (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

(Reproduced in *R. v. Warsing*, [\[1998\] 3 S.C.R. 579](#), at para. 50.)

**129** In my opinion, the four criteria from *Palmer* are relevant, with any necessary modifications, to the determination of what constitutes new evidence for the purposes of the review provided for in ss. 520 and 521 *Cr. C.* Given the generally expeditious nature of the interim release process and the risks of violating the rights of the accused, and since [page381] the release hearing takes place at the very start of criminal proceedings and not at the end like the sentence appeal, a reviewing judge must be flexible in applying these four criteria. I reiterate at the outset that the rules of evidence are relaxed in the context of the release hearing: s. 518 *Cr. C.*

**130** The first criterion - due diligence - exists to ensure finality and order, which are values that are essential to the integrity of the criminal process: *R. v. G.D.B.*, [2000 SCC 22](#), [\[2000\] 1 S.C.R. 520](#), at para. 19, quoting *R. v. M. (P.S.) (1992)*, [77 C.C.C. \(3d\) 402](#) (Ont. C.A.), at p. 411. The appellant relies on these same values to limit what constitutes new evidence in this case. However, the pre-trial detention of accused persons - like their release - is, by its nature, very often "interim" and not final.

**131** Moreover, despite the importance of these values, this Court has also stated that the due diligence criterion should not be applied as strictly in criminal matters as in civil cases: *Palmer*, at p. 775, quoting *McMartin v. The Queen*, [\[1964\] S.C.R. 484](#), at p. 493. The weight to be given to this criterion depends on the strength of the other criteria or, in other words, on the totality of the circumstances: *R. v. Price*, [\[1993\] 3 S.C.R. 633](#), at p. 634; see also *Warsing*, at para. 51. In *G.D.B.*, this Court stated that "an appellate court should determine the reason why the evidence was not available at the trial": para. 20. A generous and liberal interpretation of the meaning of "new evidence" in the context of ss. 520 and 521 *Cr. C.* is thus quite consistent with the principles developed by this Court.

**132** I am therefore of the opinion that a reviewing judge may consider evidence that is truly new or evidence that existed at the time of the initial release hearing but was not tendered for some reason that is legitimate and reasonable. This is how the "due diligence" criterion from *Palmer* must be [page382] understood in the context of the review provided for in ss. 520 and 521 *Cr. C.* The nature of the release system and the risks associated with it demand no less.

**133** I wish to be clear that such new evidence is not limited to evidence that was unavailable to the accused before the initial hearing because, for example, the prosecutor did not disclose it to the accused. It is possible that the prosecutor will give the evidence to the accused only at the very last minute before, or very shortly before, the initial hearing. Depending on the circumstances of a given case, it could be unreasonable and unfair to say that if the accused does not use such evidence at the initial hearing, he or she will be precluded from adducing it on a subsequent application for review, that is, after his or her counsel has had the necessary time to analyze it and weigh the advantages and disadvantages of using it. In each case, the reviewing judge will have to determine whether the reason why the accused did not tender such pre-existing evidence earlier was legitimate and reasonable.

**134** This requirement to show a reason that was legitimate and reasonable means that it will be open to the reviewing judge to refuse to admit new evidence where it is alleged to have actually been in the interest of the accused to drag out the application for release or where the accused is alleged to have tried to use the review to engage in judge shopping. In this way, the conception of new evidence in the context of ss. 520 and 521 *Cr. C.* reflects both the need to ensure the integrity of our criminal justice system and the need to protect the rights of accused persons in proceedings that are generally expeditious.

**135** As to the second *Palmer* criterion, the evidence obviously does not have to "bear upon a decisive or potentially decisive issue in the trial": p. 775. It will suffice if the evidence is relevant for the purposes of s. 515(10) *Cr. C.* Where, more specifically, the third ground for detention under s. 515(10)(c) - the one at issue here - is concerned, I note that the justice must consider "all the [page383] circumstances". The second *Palmer* criterion will therefore rarely be decisive in the context of an application for review under ss. 520 and 521 *Cr. C.*, since the range of "relevant" evidence will generally be quite broad.

**136** The third criterion - that the evidence "must be credible in the sense that it is reasonably capable of belief" (*Palmer*, at p. 775) - must be interpreted in light of the relaxation of the rules of evidence at the bail stage and in particular of s. 518(1)(e) *Cr. C.*, which provides that "the justice may receive and base his decision on evidence considered credible or trustworthy by him in the circumstances of each case".

**137** Finally, the fourth *Palmer* criterion should be modified as follows: the new evidence must be such that it is

reasonable to think, having regard to all the relevant circumstances, that it could have affected the balancing exercise engaged in by the justice under s. 515(10)(c) *Cr. C.* The new evidence must therefore be significant.

**138** If the new evidence meets the four criteria for admissibility, the reviewing judge is authorized to repeat the analysis under s. 515(10)(c) *Cr. C.* as if he or she were the initial decision-maker. The reviewing judge must therefore consider all the circumstances of the case, focusing in particular on the circumstances specified in that provision. The judge must then undertake a balancing exercise and determine, from the perspective of the public, whether the detention of the accused is still justified. The *Palmer* criteria, modified as I have just done, must not be applied in a manner that delays or needlessly complicates the release process. As I explained above, that process, by its very nature, generally requires an expeditious and flexible procedure. The criteria therefore serve as guidelines for the reviewing judge, but they must not have the effect of creating a procedural straightjacket that would interfere with the administration of justice.

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**139** In conclusion, a reviewing judge can intervene where relevant new evidence is tendered, where an error of law has been made or, finally, where the decision was clearly inappropriate.

### C. *Application to the Facts of This Case*

#### (1) No New Facts

**140** In making the initial decision on whether the respondent should be released, Judge Lavergne considered the fact that, according to the witnesses, the respondent and his co-accused had shouted abuse and insults at the driver during the entire ride, had tried to provoke him and had threatened to beat him up. Judge Lavergne also noted that the video showed that the young men had spat at the driver while getting off the bus. This appeared to provoke a reaction by the driver, who stood up and went to the door of the bus. Judge Lavergne wrote that the driver had in all likelihood said something to the young men, who had then rushed back onto the bus. That was when the assault began.

**141** On review, Martin J. of the Superior Court found that not all elements of the incident had been in evidence before Judge Lavergne. According to Martin J., the starting point for the events taken into account by Judge Lavergne seemed to be the moment when the three young men had stood up at the back of the bus to go to the front. However, in Martin J.'s view, the events had instead started when the driver had refused to open the bus doors to let the young men on at a previous stop. Martin J. also pointed out that, once the three young men had gotten off the bus, the driver had jumped up from his seat and headed for the door. Following a verbal exchange, the driver went back to sit down, followed by the young men, who got back on the bus. At that moment, the driver turned toward them and took [TRANSLATION] "a certain physical action against one of the individuals": para. 11. It was from that point on, according to Martin J., that the situation degenerated.

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**142** It is true that Judge Lavergne did not state in his decision that the driver had refused to let the three young men board at a previous stop. The transcript from the initial hearing seems to indicate that this was not discussed by counsel of record. Judge Lavergne also did not refer to the physical action the driver had taken against the young men before they assaulted him. These details came from a statement made by a passenger, which was not given to counsel for the respondent until the morning of the hearing before Judge Lavergne. The investigating officer, who testified for the prosecution, referred to the passenger's statement, but this specific point was not mentioned. When cross-examining the investigating officer, counsel for the respondent did not bring up the passenger's statement. In light of my conclusions with respect to "new evidence" and of the fact that counsel did not receive the statement until the morning of the initial hearing, this fact could have constituted a reason that was legitimate and reasonable for not using it at that hearing but then doing so at a subsequent hearing.

**143** However, it can be seen from the transcript of the second release hearing, held on completion of the preliminary inquiry, that counsel for the respondent submitted at that hearing that the bus driver had not stopped at a previous stop. Counsel also observed that, after being spat at, the driver had spoken aggressively to the three young men and had allegedly pushed the first of the young men who had gotten back on the bus. Counsel for the respondent then filed the passenger's statement in evidence.

**144** In the decision he rendered following the preliminary inquiry, Judge Legault noted that the young men had complained to the driver for not waiting for them at a previous stop. He also observed that, when the young men had gotten off the bus throwing what remained of their pizza at him and spitting at him, the driver had gone to the door of the bus to object to their behaviour.

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**145** Judge Legault nevertheless found that the detention of the respondent was still justified under s. 515(10)(c) *Cr. C.*:

[TRANSLATION] The Court sees no reason to interfere with Judge Lavergne's observations on the third ground, which concerns confidence in the administration of justice, having regard to all the factors, namely the likelihood of conviction, the circumstances surrounding the commission of the offence, the gravity of the offence, which is even greater because of the serious consequences for the personal life and work of the accused, the lack of prospects for independence in the future and, finally, the fact that the accused is liable for a potentially lengthy term of imprisonment.

...

The Court is not of the opinion that it has evidence that would allow it to qualify or temper the judge's findings concerning the aggravating factors involved in the significant participation of the accused in the offence that was committed. [paras. 26 and 30]

**146** Thus, no new facts were presented to Martin J. in the context of the application for review. Judge Lavergne may not have had all the elements of the incident before him at the initial hearing, but Judge Legault did have them on completion of the preliminary inquiry. He found that the new details in the sequence of events did not alter Judge Lavergne's initial conclusion.

**147** It is true that, in his decision, Judge Legault did not mention the [TRANSLATION] "physical action" taken by the driver to which the Superior Court judge referred. However, it can be seen from the evidence that Judge Legault was aware of that fact. It must be assumed that he considered it in making his decision. "The judge is not required to demonstrate that he or she knows the law [or] has considered all aspects of the evidence": *R. v. Burns*, [1994] 1 S.C.R. 656, at p. 664. I do not think this is a case in which the judge failed to appreciate, or completely disregarded, relevant evidence: *Harper v. The Queen*, [1982] 1 S.C.R. 2, at p. 14. In light of all the relevant circumstances, the driver's action could not in itself have tipped the balance in the respondent's favour.

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**148** It was therefore not open to Martin J. to review the initial detention order on the basis of new facts.

(2) Question Whether the Alleged Crime Is "Unexplainable"

**149** Judge Lavergne began by properly identifying the test set out in s. 515(10)(c) *Cr. C.*, as can be seen from the following comment:

[TRANSLATION] But above all, this provision, s. 515(10)(c) of the Criminal Code, essentially calls for an analysis of whether, at the end of the day, after all the circumstances are considered, including the four (4) factors I have already mentioned, there is a reasonable collective expectation that interim release must be denied to maintain public confidence in the administration of justice. [Emphasis added; pp. 18-19.]

**150** Judge Lavergne also stated that [TRANSLATION] "[t]he public means persons who are reasonable, dispassionate and properly informed about the values expressed in legislation, including the presumption of innocence ... but who are also informed about all the circumstances associated with the commission of a crime": p. 19. This statement is perfectly consistent with this Court's decision in *Hall*. Judge Lavergne added that the onus was on the prosecutor to show that the detention of the accused was justified.

**151** It is true that Judge Lavergne did not elaborate on his finding that the prosecution had discharged its burden of proof under s. 515(10)(c) in this case. However, when considered as a whole, his decision was detailed enough for a reviewing judge to be able to understand the grounds on which he had based his detention order. He referred to the first three factors, which he had already discussed in the context of s. 515(10)(b). On the fourth factor, he stated that the accused was liable for a potentially [TRANSLATION] "significant" term. In his analysis under s. 515(10)(b), Judge Lavergne considered the following circumstances surrounding the offence: (1) the three young men had allegedly shouted abuse and insults at the driver during the bus ride; (2) they had spat at him when getting off the bus; (3) the driver had then stood up and gone to the door and [page388] had, in all likelihood, said something to the young men; and (4) the young men had gotten back on the bus, rushed at the driver and beat him severely. Judge Lavergne also noted that the respondent had been an active participant and that the existence of the videotape meant that a conviction was highly likely.

**152** Judge Lavergne repeatedly stressed the brutality and gratuitousness of the assault as well as the fact that it was unexplainable and unexplained:

[TRANSLATION] [The video footage] illustrates the brutality of the assault, which is matched only by its gratuitousness.

...

The Court will refrain [from describing such conduct] except to again emphasize the unexplainable and unexplained brutality of such behaviour.

...

The defendant and the driver do not know each other, which makes this even more incomprehensible. There was nothing to predispose the defendant to attack the driver so violently, which makes the assault that much more senseless and heinous.

...

Conduct as unpredictable and disturbing as this does not weigh in favour of release. [pp. 2, 9-10 and 14-15]

**153** Judge Lavergne's reasons may suggest that the fact that the assault was gratuitous or unexplainable played a key part in his conclusion that the detention of the respondent was necessary under s. 515(10)(c) *Cr. C.*, and not only under s. 515(10)(b). As I mentioned above, however, the question whether an offence is unexplainable or unexplained is not a criterion that should guide justices in their analysis under s. 515(10)(c) *Cr. C.*

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**154** In any event, there is no doubt that Martin J. made the crime being "explainable" a criterion in his analysis, in addition to unduly restricting the scope of s. 515(10)(c) *Cr. C.* After finding that Judge Lavergne had not had all the

circumstances before him at the initial hearing, Martin J. wrote that this was not a totally gratuitous and unexplained or unexplainable incident. He then reviewed the history of s. 515(10) *Cr. C.* and the case law on s. 515(10)(c), finding that the latter provision had to be used [TRANSLATION] "sparingly": para. 22.

**155** Martin J. disagreed with the view that the incident was unexplainable. He added:

[TRANSLATION] Do not misunderstand me. Such behaviour is heinous and cannot be justified. However, it is not unexplainable. [para. 27]

**156** I note as well that Martin J. quoted, with approval, *Trout*, in which the Manitoba Court of Appeal had found that the facts of the case before it, though brutal, "pale[d] in comparison to the vicious butchering of the victim in *Hall*": para. 26, quoting *Trout*, at para. 12.

**157** With all due respect for the reviewing judge, I believe he erred in stating that s. 515(10)(c) *Cr. C.* must be interpreted narrowly and applied only in rare cases. In addition, the offence being "explainable" proved to be a determinative factor in his decision, although he did properly recognize the seriousness of the offence and its [TRANSLATION] "heinous" and "repugnant" nature. Moreover, he reversed the decisions of Judge Lavergne and Judge Legault without even considering the four factors set out in s. 515(10)(c) *Cr. C.* Martin J. therefore made several errors that justify reviewing his entire decision.

**158** Finally, Martin J. intervened even though there was no basis for a review, given that there was no material change in circumstances and no error [page390] of law, and that the initial decision was not clearly inappropriate. Indeed, in my opinion, the detention of the respondent was justified under s. 515(10)(c) *Cr. C.*

### (3) Necessity of the Respondent's Detention

**159** All the relevant factors in this case must be analyzed to determine whether, when they are balanced as they should have been had it not been for the errors, the detention of the respondent is necessary to maintain confidence in the administration of justice.

**160** First of all, the prosecution's case appears to be strong, since the incident was videotaped and there is eyewitness testimony. Real evidence such as a videotape is more reliable than circumstantial or testimonial evidence. In addition, the respondent does not seem, *prima facie*, to have a valid defence to put forward, even if the driver's [TRANSLATION] "physical action" against the respondent and his co-accused were to be taken into account. Indeed, the respondent did not argue in this Court that he had a valid defence that could limit the apparent strength of the prosecution's case. Although it is not my role - nor is it the role of a bail judge - to analyze in detail the possible outcomes of a future trial, it is difficult to imagine, at first glance, how self-defence could be available to the respondent. At this stage of the proceedings, the evidence does not logically support an argument by the respondent that he used reasonable force to defend or protect himself or to protect another person, or that the act he committed was reasonable in the circumstances: s. 34 *Cr. C.* It should also be noted that the defence of provocation is not available, given that it applies only to reduce a murder charge: s. 232 *Cr. C.*

**161** The offence is objectively very serious, since it is aggravated assault and since the maximum sentence of 14 years for that offence is among the most severe in the *Criminal Code* after imprisonment for life: para. 268(2).

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**162** As for the circumstances surrounding the commission of the offence, I am considering the fact that the respondent was an active participant in the assault and that the assault was extremely brutal: even the intervention of passengers could not put a quick stop to it. The fact that an offence is violent, brutal or heinous is clearly an important factor that a justice can consider. The fact that the driver had refused to wait for the young men at a previous stop is of no relevance in this analysis. Moreover, I have difficulty seeing why the physical action the driver

allegedly took - pushing a friend of the respondent's - should even be considered to favour the respondent in light of the insults and threats directed at him during the ride.

**163** Finally, the maximum sentence for aggravated assault is 14 years. If the respondent were instead convicted of assault causing bodily harm, the maximum sentence would be 10 years: s. 267(b) *Cr. C.* Neither offence carries a minimum sentence. Courts have held that [TRANSLATION] "this type of crime, aggravated assault, generally demands an unconditional term of imprisonment to properly express society's denunciation of crimes of violence against the person and to send a clear message of deterrence": *R. v. Dagenais*, [2012 QCCA 244](#), at para. 18 (CanLII); *R. v. Riendeau*, [2012 QCCA 1155](#), at para. 32; see also C. C. Ruby, G. J. Chan and N. R. Hasan, *Sentencing* (8th ed. 2012), at s. 23.230. Even though the respondent had no criminal record and was only 20 years old at the time of the events, he will, if convicted, likely be sentenced to a significant term of imprisonment in light of the circumstances of the offence, and in particular of his active participation in and the violent nature of the assault. Therefore, there is no doubt that he is liable for a potentially "lengthy term of imprisonment" within the meaning of s. 515(10)(c) *Cr. C.* if he is convicted of either aggravated assault or assault causing bodily harm.

**164** Accordingly, the four circumstances set out in s. 515(10)(c) *Cr. C.* strongly support the detention of the respondent.

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**165** In my view, the fact that the assault was committed against a bus driver, a civil servant who works in the community to ensure the well-being of the public, makes the offence even more heinous. Also relevant are the nature and severity of the injuries sustained by the driver, and in particular the long-term effects and the impact on his career and his personal life.

**166** In short, I find that, when all the relevant circumstances are weighed as required by s. 515(10)(c) *Cr. C.*, the detention of the respondent was necessary to maintain confidence in the administration of justice.

**167** I believe that a reasonable member of the public who, although not a legal expert, is nonetheless properly informed about the philosophy underlying the legislative provisions, *Charter* values and the actual circumstances of the case would not understand why the respondent should not remain in custody pending his trial. Such members of the public are not people who would allow themselves to be guided by their emotions and to be swayed by the mob or by incomplete or distorted information. In the face of such a brutal attack that was committed by several people in the middle of the night against a bus driver, a person who was serving the community, and that had serious consequences for the victim's health and integrity and was captured on a videotape that left no doubt as to the respondent's active participation in the assault, I believe that the confidence in our justice system of a reasonable member of our society would be undermined if the interim detention of the respondent were not ordered.

#### V. Disposition

**168** I would allow the appeal. It was not open to the Superior Court judge to interfere with the initial release decision, and he unduly restricted the scope of s. 515(10)(c) *Cr. C.* and erred in basing his decision on the question whether that the offence was "unexplainable". The detention of the [page393] respondent is justified on the basis of s. 515(10)(c) *Cr. C.* The detention order is accordingly restored.

\* \* \* \* \*

#### APPENDIX

*Criminal Code*, [R.S.C. 1985, c. C-46](#)

**515...**

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

- (a) where the detention is necessary to ensure his or her attendance in court in order to be dealt with according to law;
- (b) where the detention is necessary for the protection or safety of the public, including any victim of or witness to the offence, or any person under the age of 18 years, having regard to all the circumstances including any substantial likelihood that the accused will, if released from custody, commit a criminal offence or interfere with the administration of justice; and
- (c) if the detention is necessary to maintain confidence in the administration of justice, having regard to all the circumstances, including
  - (i) the apparent strength of the prosecution's case,
  - (ii) the gravity of the offence,
  - (iii) the circumstances surrounding the commission of the offence, including whether a firearm was used, and
  - (iv) the fact that the accused is liable, on conviction, for a potentially lengthy term of imprisonment or, in the case of an offence that involves, or whose subject-matter is, a firearm, a minimum punishment of imprisonment for a term of three years or more.

**517.** (1) If the prosecutor or the accused intends to show cause under section 515, he or she shall so state to the justice and the justice may, and shall on application by the accused, before or at any time during the course of the proceedings under that section, make an order directing that the evidence taken, the information given or the representations made and the reasons, if any, given or [page394] to be given by the justice shall not be published in any document, or broadcast or transmitted in any way before such time as

...

(b) if the accused in respect of whom the proceedings are held is tried or ordered to stand trial, the trial is ended.

**520.** (1) If a justice, or a judge of the Nunavut Court of Justice, makes an order under subsection 515(2), (5), (6), (7), (8) or (12) or makes or vacates any order under paragraph 523(2)(b), the accused may, at any time before the trial of the charge, apply to a judge for a review of the order.

(2) An application under this section shall not, unless the prosecutor otherwise consents, be heard by a judge unless the accused has given to the prosecutor at least two clear days notice in writing of the application.

(3) If the judge so orders or the prosecutor or the accused or his counsel so requests, the accused shall be present at the hearing of an application under this section and, where the accused is in custody, the judge may order, in writing, the person having the custody of the accused to bring him before the court.

(4) A judge may, before or at any time during the hearing of an application under this section, on application by the prosecutor or the accused, adjourn the proceedings, but if the accused is in custody no adjournment shall be for more than three clear days except with the consent of the accused.

(5) Where an accused, other than an accused who is in custody, has been ordered by a judge to be present at the hearing of an application under this section and does not attend the hearing, the judge may issue a warrant for the arrest of the accused.

(6) A warrant issued under subsection (5) may be executed anywhere in Canada.

(7) On the hearing of an application under this section, the judge may consider

(a) the transcript, if any, of the proceedings heard by the justice and by any judge who previously reviewed the order made by the justice,

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(b) the exhibits, if any, filed in the proceedings before the justice, and

(c) such additional evidence or exhibits as may be tendered by the accused or the prosecutor,

and shall either

(d) dismiss the application, or

(e) if the accused shows cause, allow the application, vacate the order previously made by the justice and make any other order provided for in section 515 that he considers is warranted.

(8) Where an application under this section or section 521 has been heard, a further or other application under this section or section 521 shall not be made with respect to that same accused, except with leave of a judge, prior to the expiration of thirty days from the date of the decision of the judge who heard the previous application.

(9) The provisions of sections 517, 518 and 519 apply with such modifications as the circumstances require in respect of an application under this section.

**521.** (1) If a justice, or a judge of the Nunavut Court of Justice, makes an order under subsection 515(1), (2), (7), (8) or (12) or makes or vacates any order under paragraph 523(2)(b), the prosecutor may, at any time before the trial of the charge, apply to a judge for a review of the order.

(2) An application under this section shall not be heard by a judge unless the prosecutor has given to the accused at least two clear days notice in writing of the application.

(3) If the judge so orders or the prosecutor or the accused or his counsel so requests, the accused shall be present at the hearing of an application under this section and, where the accused is in custody, the judge may order, in writing, the person having the custody of the accused to bring him before the court.

(4) A judge may, before or at any time during the hearing of an application under this section, on application of the prosecutor or the accused, adjourn the proceedings, but if the accused is in custody no adjournment shall be for more than three clear days except with the consent of the accused.

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(5) Where an accused, other than an accused who is in custody, has been ordered by a judge to be present at the hearing of an application under this section and does not attend the hearing, the judge may issue a warrant for the arrest of the accused.

(6) Where, pursuant to paragraph (8)(e), the judge makes an order that the accused be detained in custody until he is dealt with according to law, he shall, if the accused is not in custody, issue a warrant for the committal of the accused.

(7) A warrant issued under subsection (5) or (6) may be executed anywhere in Canada.

(8) On the hearing of an application under this section, the judge may consider

(a) the transcript, if any, of the proceedings heard by the justice and by any judge who previously reviewed the order made by the justice,

(b) the exhibits, if any, filed in the proceedings before the justice, and

(c) such additional evidence or exhibits as may be tendered by the prosecutor or the accused,

and shall either

(d) dismiss the application, or

(e) if the prosecutor shows cause, allow the application, vacate the order previously made by the justice and make any other order provided for in section 515 that he considers to be warranted.

(9) Where an application under this section or section 520 has been heard, a further or other application under this section or section 520 shall not be made with respect to the same accused, except with leave of a judge, prior to the expiration of thirty days from the date of the decision of the judge who heard the previous application.

(10) The provisions of sections 517, 518 and 519 apply with such modifications as the circumstances require in respect of an application under this section.

*Appeal allowed.*

**Solicitors:**

*Solicitor for the appellant: Poursuites criminelles et pénales du Québec, Montréal.*

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*Solicitors for the respondent: André Lapointe, Montréal; Guylaine Tardif, Montréal.*

*Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.*

*Solicitors for the intervener the Criminal Lawyers' Association (Ontario): John Norris, Toronto; Henein Hutchison, Toronto.*

*Solicitors for the intervener the Canadian Civil Liberties Association: Kapoor Barristers, Toronto.*

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- 1** Judge Lavergne issued a publication ban under s. 517(1)(b) of the Criminal Code (see Appendix) on April 26, 2013. I note that no one raised the issue of the publication ban in this appeal, and I do not interpret s. 517(1)(b) as preventing the Court from publishing these reasons for judgment in the Supreme Court Reports and from posting them online following the Court's usual practice.