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**MEMORANDUM TO:**

All Chiefs of Police and
Commissioner Thomas Carrique
Chairs, Police Services Boards

FROM:

Stephen Waldie
Assistant Deputy Minister
Public Safety Division and Public Safety Training Division

SUBJECT:

**Implications of the Recent Supreme Court of Canada
Decision - *R. v. Myers***

DATE OF ISSUE:	July 16, 2019
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In a unanimous decision of nine Justices of the Supreme Court of Canada (SCC) on March 28, 2019, the Court held in *R. v. Myers* 2019 SCC 18 (*Myers*) that accused persons in custody should have a review of their detention every 90 days in the case of indictable offences and 30 days in the case of summary offences.

The Superior Court of Justice released a Provincial Practice Advisory regarding s. 525 detention reviews effective June 3, 2019, which may be found at:
<http://www.ontariocourts.ca/scj/practice/detention-reviews/>

As a result of the decision, police services may need to provide more frequent transportation for individuals held in custody at correctional facilities. As you know, section 29 of the *Adequacy and Effectiveness of Police Services* regulation under the *Police Services Act* requires a police services board to have a policy on prisoner transportation and prisoner care and control. In addition, clauses 13(1)(l) and (m) of the regulation require the Chief of Police to establish procedures and processes in respect of prisoner transportation and prisoner care and control. These policies, procedures and processes may require updating in light of the decision.

Summary of *R. v. Myers* - 2019 SCC 18

In *Myers*, the SCC was asked to interpret a provision within the *Criminal Code* dealing

with review of pre-trial detention. *Myers* clarifies how to properly interpret s. 525 of the *Criminal Code*, which has been inconsistently applied across the country.

The provision gives accused individuals, who are detained pending trial, an automatic review of their detention after 90 days or 30 days for summary conviction offences. In most provinces, the “90-day bail review” generally took the form of an obligatory check-in with the court or was not even held at all. The SCC was asked to adopt such a “two-step” approach, placing a threshold onus on the accused. However, the Court unanimously rejected it.

On behalf of the unanimous court panel of justices, Chief Justice Wagner quoted the Canadian Civil Liberties Association’s (CCLA) submission that “today, as before, three months is a long time for a person who is presumed innocent to be held in jail awaiting trial”. Therefore, 90-day bail reviews are intended to be mandatory and automatic – and need to be brought promptly by the institution with custody of the accused. The question that the judge must answer at a s. 525 hearing is whether the continued detention of the accused in custody is justified, within the meaning of s. 515(10) (see Appendix A). In determining whether the detention remains justified, the judge should consider the time that has elapsed or is anticipated to elapse prior to trial – and, importantly, the proportionality of the detention.

The Court also took the opportunity to comment on problems affecting the bail system generally, stating that “delays in routine bail and detention matters are a manifestation of the culture of complacency denounced by this Court in *Jordan*¹, and must be addressed.” It made clear that release “at the earliest opportunity and in the least onerous manner” is the rule – pre-trial detention being the exception. For further detail on the case, see Appendix B.

The Decision:

In a unanimous decision of the nine-judge panel on March 28, 2019, **the SCC held that accused persons in custody should have a review of their bail every 90 days in the case of indictable offences and 30 days in the case of summary offences.** The Court’s decision reaffirms the strength of the presumption of innocence when judges are considering whether someone should be out of custody while awaiting trial.

A judicial review of the accused’s detention must occur in a superior court immediately upon the expiration of 90 days following (30 days for summary conviction offences) (i) the day on which the accused was initially taken before a justice under s. 503; (ii) being detained for a breach or revocation of bail; or (iii) a defence or Crown initiated bail review decision.

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¹ *R v. Jordan* was a 2016 decision of the Supreme Court of Canada which rejected the framework traditionally used to determine whether an accused was tried within a reasonable time under section 11(b) of the *Canadian Charter of Rights and Freedoms* and replaced it with a presumptive ceiling of 18 months between the charges and the trial in a provincial court without preliminary inquiry, or 30 months in other cases.

The SCC maintained that the legislation was clear: accused persons should have reviews of their detention every 90 days for indictable matters and 30 days for summary matters, and there should not be a threshold requirement read in since that is not what the legislation says. The Court held this position as being consistent with its previous pronouncements and views in other landmark cases, "a liberal and enlightened system of pre-trial release."

Police Services - Policies and Procedures Review

The ministry requests that police services boards and chiefs of police review and update their policies and procedures, respectively, to reflect the decision of the Supreme Court of Canada. If you have any concerns or questions, you may contact Alan Jaffee at Alan.Jaffee@ontario.ca or at (416) 314-3037.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Stephen Waldie', is positioned above the typed name.

Stephen Waldie
Assistant Deputy Minister
Public Safety Division and Public Safety Training Division

Appendix A

Criminal Code of Canada, s.515 (10):

Justification for detention in custody

(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.

Appendix B

Key Facts of the Case:

On January 4, 2016, Mr. Corey Lee James Myers was arrested and charged with several firearms offences. He sought bail for the first time in respect of these charges on November 9, 2016, but his application was dismissed, since the judge was not satisfied that any terms of release would adequately address the risk that Mr. Myers would, if released, commit other offences or interfere with the administration of justice.

Later that month, he sought a review of his detention order under s. 520 of the *Criminal Code*, which was denied on the basis that the judge saw no significant change that would justify releasing Mr. Myers. In March 2017, Crown Counsel asked the defence whether Mr. Myers wished to pursue a 90-day detention review under s. 525 of the *Criminal Code*. Given the existence of competing lines of authority, the British Columbia Supreme Court heard submissions from both parties on the correct approach to the review under s. 525. It concluded that the correct test at a s. 525 hearing involves a two-step process: the accused must first convince the reviewing judge either that there has been an unreasonable delay in the proceedings on the Crown's part, or that the passage of time has had a material impact on the initial basis for detaining the accused, and, if either of these thresholds is met, the judge must then determine whether the detention of the accused remains justified within the meaning of s. 515(10) of the *Criminal Code*.

Analysis:

The Court had to apply the principles of statutory interpretation to determine the correct approach to a detention review under s. 525, and to explain the place of such a review within the larger context of pre-trial custody in Canada. Under Canadian law, the pre-trial release of accused persons is the fundamental rule; detention is the exception. Yet practices vary widely in terms of when s. 525 detention review hearings take place, whether they are mandatory, what factors are considered and which test is applied.

The right not to be denied reasonable bail without just cause, which is enshrined in s. 11(e) of the *Canadian Charter of Rights and Freedoms*, operates as a key organizing principle of Part XVI of the *Criminal Code* of Canada. Release is favoured at the earliest reasonable opportunity and on the least onerous grounds. The experience of pre-trial detention can have serious detrimental impacts on an accused person's ability to raise a defence. It also comes at a significant cost in terms of their loss of liberty, the impact on their mental and physical well-being and on their families, and the loss of their livelihoods.

The section 525 review hearing should be held at the earliest opportunity after the passage of 90 days (or 30 days). At the hearing, the reviewing judge may refer to the transcript, exhibits and reasons from any initial judicial interim release hearing and from

any subsequent review hearings, and should show respect for any findings of fact made by the first-level decision maker if there is no cause to interfere with them. Both parties are also entitled to make submissions based on any additional credible or trustworthy information, which is relevant or material to the judge's analysis, and pre-existing material is subject to the criteria of due diligence and relevance.

At the hearing, unreasonable delay is not a threshold that must be met before the detention of the accused is reviewed. Parliament did not intend to restrict the court's ability to review the detention of an accused at a s. 525 hearing to situations in which there has already been an unreasonable delay. The overarching question is only whether the continued detention of the accused in custody is justified within the meaning of s. 515(10), which sets out three possible grounds on which the detention of an accused in custody may be justified: (i) where it is necessary in order to ensure the attendance of the accused in court; (ii) where it is necessary for the protection or safety of the public; and (iii) where it is necessary in order to maintain public confidence in the administration of justice.

In determining whether the detention of the accused is still justified, the reviewing judge may consider: (i) any new evidence or change in the circumstances of the accused; (ii) the impact of the passage of time and any unreasonable delay on the proportionality of the detention; and (iii) the rationale offered for the original detention order, if one was made. If there was no initial bail hearing, the s. 525 judge is responsible for conducting one, taking into account the time the accused has already spent in pre-trial custody. Ultimately, s. 525 requires a reviewing judge to provide accused persons with reasons why their continued detention is — or is not — justified. Finally, the judge should make use of his or her discretion under ss. 525(9) and 526 to give directions for expediting the trial and related proceedings where it is appropriate to do so. Directions should be given with a view to mitigating the risk of unconstitutional delay and expediting the trials of accused persons who are subject to lengthy pre-trial detention.