IN THE SUPREME COURT OF NOVA SCOTIA

Citation: R. v. Charter, 2008 NSSC 299

Date: 20080826
Docket: CR 298754
Registry: Halifax

Between:

Her Majesty the Queen

v.

Tamara Lynn Charter

Judge:	The Honourable Justice Duncan R. Beveridge
Heard:	August 21, 2008
Written Decision:	October 9, 2008
Counsel:	Tim McLaughlin, for the Crown Pat Atherton, for the Defence

By the Court:

[1] On July 9, 2008 the RCMP emergency response team and members of the Halifax Regional Municipality Drug Unit entered 556 Bellefontaine Road and executed a CDSA warrant. The warrant was issued based on source information, apparently confirmed in part by police surveillance. Inside the residence they found four individuals, Tamara Lynn Charter, James Francis Charter, Christopher James Charter and his significant partner, Kelsey McGrath. Also found were large quantities of controlled substances, cash, a sophisticated grow operation, firearms, some of which were prohibited weapons and loaded, along with two bullet proof vests.

[2] On July 14, 2008 a show cause hearing was held before MacDonald, Prov. Ct. J. Mrs. Charter was remanded on the basis that the Provincial Court Judge was not satisfied that it was not necessary to detain her on the tertiary ground set out in 515(10) of the *Criminal Code*.

[3] This is an application under s.520 of the *Criminal Code* for a review of the order for detention.

[4] At the hearing before MacDonald, Prov. Ct. J. there was no dispute as to the serious nature of the allegations against the applicant. She was jointly charged with the above named individuals with eight counts under the *CDSA* for the production of cannabis marihuana, possession of cocaine, ecstasy, hydromorphone, morphine, methadone, and cannabis resin, all for the purpose of trafficking. She also faced a rash of charges under the *Criminal Code* with respect to allegations of

possession of a variety of prohibited weapons such as tasers, brass knuckles and firearms.

[5] At the hearing the Crown outlined at length the location and nature of the exhibits seized from 556 Bellefontaine Road. The police found what they described as score sheets, crack cocaine, baggies suitable for packaging controlled substances, two bullet proof vests, one in the son's bedroom, and at least three sets of scales. A power bill in Mrs. Charter's name was found. There was a safe containing $25,000.00 in cash, plus cash in other amounts at different locations. There was also a 200 plant sophisticated grow operation, and bags of shake or by-product in the freezer and 11 bottles of methadone or some 1.1 litres. This latter product likely came from addicts trading the methadone for other controlled substances.

[6] The firearms included a loaded 9mm Luger pistol, a .22 calibre Derringer, loaded, two .32 calibre revolvers, not loaded and an unloaded 12 gauge shotgun in an alcove by the basement door. Ammunition in a belt for this shotgun was found in a different location of the house. However, there was in fact ammunition in the house for all of these firearms.

[7] In one of the vehicles seized was a blue kit bag containing quantities of both crack and powder cocaine, a variety of pills, oxycodone, hydromorphone and morphine tablets in various prescription bottles. Also found in the residence were 250 cartons of contraband tobacco.

[8] The defence put forward Mrs. Charter's brother as a suitable surety. He runs his own business and employs Mrs. Charter apparently as needed.

[9] With respect to the *CDSA* charges, the defence acknowledged that the burden was on them to satisfy Judge MacDonald that her detention was not justified. They admitted the Crown had a strong case and the charges were serious, but Mrs. Charter had no prior record. There was no suggestion that she would not attend court or commit further offences or otherwise interfere with the administration of justice. The defence contended the third ground was not really relevant and with the proposed surety willing to post a substantial amount, a recognizance with conditions would be sufficient.

[10] The Crown argued that despite the absence of a criminal record, Mrs. Charter should be detained on all three grounds. It focussed on the amount of planning and deliberation involved in what they contend was a sophisticated and elaborate drug operation. Mrs. Charter was one of the co-owners of the house and was the lessee and owner, respectively of the two vehicles on the property. They suggested that anyone living there had to have knowledge of what was going on and although knowledge is not sufficient without control to constitute possession, an ownership interest suggests quite strongly some element of control.

[11] The Crown contended that given the nature and extent of drugs and the statutory aggravating factor set out in the *CDSA* with respect to the possession or use of a firearm or other weapon in the commission of the offences, the accused would easily face five or more years incarceration if convicted.

[12] Lastly, the Crown stressed the tertiary ground. They argued that the four factors brought into play by the recent amendments to the *Criminal Code* worked against the accused. These include the strength of the Crown's case, the gravity of the offences, the circumstances surrounding the commission of the alleged offences, in particular that a weapon was used in the commission of the offence. At least this is what the Crown submitted. The Crown also submitted that the public would breathe a sigh of relief in seeing the seizure of drugs and guns but would be concerned that these things were prevalent in their community up until the time the police took action.

[13] MacDonald, Prov. Ct. J. delivered an oral decision. He outlined the nature and extent of the charges and the evidence the Crown said they had available against the accused. He noted that usually in bail hearings one looks at whether detention is necessary to ensure attendance in court or to protect the public. In particular whether there is a substantial likelihood of the commission of further offences. He noted that Mrs. Charter does not have a criminal record and has lived all her life in the area. He concluded she is not a flight risk. Furthermore, on her own or under the supervision of her brother as surety, he would not say there was a substantial likelihood she would commit further offences. He held she had met the burden to show that her detention was not justified if those were the only two issues.

[14] However, it was the third or tertiary ground that caused him to conclude she had not met the ultimate burden of demonstrating that detention was not justified.

MacDonald, Prov. Ct. J. was well aware of the language set out in s.515(10) of the *Code*. He quoted it during the hearing. It is as follows:

> 515(10)
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> For the purposes of this section, the detention of an accused in custody is justified only on one or more of the following grounds:
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> ...
>
> (c) if the detention is necessary to maintain confidence in the administration of justice, having regard to all the circumstances, including
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> (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
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> (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.

[15] Although Judge MacDonald did not go through a step-by-step or subparagraph analysis of this ground, there is no doubt that he referred to the factors that are outlined. He commented that the Crown's case was a strong one. The offence is serious and if convicted a penitentiary term very likely. With respect to the role that firearms played he stated:

> This is a very substantial quantity of a large variety of drugs and the presence of the firearms and the bullet-proof vests would be such that I would conclude that those were, according to the allegations put forward, used for the purpose of committing the offence at least in terms of protection.
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> One of the shotguns was at a basement door, downstairs n the basement where the grow operation was concerned. Bullet-proof vests are used at large drug transactions where people are likely to be armed and maybe intended as protection without intending particular aggression, but the weapons in this residence were certainly being, the firearms, in particular, were being used even if it was in the nature of protection of the people or protecting the drugs and the money, itself, against potential robberies.
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> p.64

[16] And at page 66 he stated:

> It is a significant issue in Parliament, as well, and so recently the bail provisions have been amended to make reference to detention to maintain the confidence in the administration of justice having regard, among other things, to the circumstances surrounding the commission of the offence including whether a firearm was used.
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> I agree with the characterization that the use does not mean discharged or does not mean pointed at somebody. A firearm can be used in circumstances of a variety of kinds and that is a reflection that this is just a really serious issue in the community.

[17] MacDonald, Prov. Ct. J. noted that he had not used the tertiary ground before and would not do so lightly. Nonetheless he went on to conclude that bail could not be given and still maintain confidence in the administration of justice. He came to this conclusion on the *CDSA* charges where the burden was on the accused and on the weapons charges where the burden was on the Crown.

NATURE OF THE REVIEW

[18] The case law that has considered the nature of a review under s.520 and the companion s.521 still contain comment or debate as to what is the exact nature of the review. Sections 520 and 521 do not expressly define the process. Some authorities have viewed the review as an appeal on the record, others as virtually a *de novo* process, and the third or middle ground as a hybrid process requiring either an error in law or principle be demonstrated or there be a change in circumstances or additional evidence adduced.

[19] One of the leading cases in Canada is *R. v. Carrier* (1979), 51 C.C.C. (2d) 307. No evidence was called at the original show cause hearing in that case. The accused was remanded. An application was brought for bail review in the Court of Queen's Bench. The application was eventually heard by Justice Matas in chambers. He wrote:

> [19] In my respectful opinion, the review should not be categorized as an ordinary appeal nor is it helpful to relate a review to summary conviction appeals. On the former point, I agree with the comment made by my colleague O'Sullivan J.A., in *R. v. Crellin*, [1976] 6 W.W.R. 661 at p.662 (in Chambers), where he rejected the suggestion that "the review of bail provided for by Parliament is in the nature of an appeal from the order being reviewed". I am satisfied that Parliament intended the review to be conducted with due consideration for the initial order but, depending on the circumstances, with an independent discretion to be exercised by the review Court.
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> [20] In my opinion, a useful summary of the scope of a review, in accord with the intent of s. 457.5(7), was set out by Berger, J., in *R. v. Hill*, [1973] 5 W.W.R. 382, at p. 383, where he said:
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> > Upon an application for review the onus lies on the accused. He must show cause to vacate the order made below: s. 457.5(7)(e). In

> my view that onus is discharged if it is shown that the circumstances have altered since the hearing below: see Hinkson J. in *Regina v. Orlovich* (1972), 8 C.C.C. (2d) 567 (B.C.). Or, if the judge below misconceived the facts or was guilty of an error in law, the onus would be discharged: Verchere J. in *Regina v. Horvat* (1972), 9 C.C.C. (2d) 1 (B.C.). Those are not the only grounds. A judge of this Court may, if cause is shown, substitute his own discretion for that of the judge below: Anderson J. in *Regina v. Thompson*, [1972] 3 W.W.R. 729, 18 C.R.N.S. 102, 7 C.C.C. (2d) 70.

[20] It appears well settled that in Nova Scotia a bail review hearing is not limited to being an appeal, nor as wide open as a hearing *de novo*, but a combination thereof. In *R. v. Gobeil*, [1997] N.S.J. No. 592 Justice Cacchione summed up the nature of the bail review hearing as follows:

> [5] As Mr. Martin has correctly pointed out, bail review hearings are what can be considered hybrid hearings. They are neither an appeal by way of a *de novo* hearing, nor are they strictly appeals from the detention order or the release order, but a combination of both. The court can consider the evidence led at the initial hearing, consider any of the new submissions or any new evidence led at the review hearing, and in essence exercise its discretion anew and I think that the case of the *Queen v. Carrier* (1979), 51 C.C.C. (2d) 307 essentially says that. Parliament intended the review to be conducted with due consideration for the initial order but, depending upon the circumstances, with an independent discretion to be exercised by a review court.

[21] See also *R. v. PMA*, [2003] .S.J. No. 440 (N.S.S.C.) Per MacDonald, A.C.J.S.C., as he then was; *R. v. Durning*, [1992] N.S.J. No. 206; 114 N.S.R. (2d) 75; *R. v. Tolliver*, [1999] N.S.J. No. 480; *R. v. M.W.S.*, [1995] N.S.J. No. 89 (N.S.S.C.).

POSITION OF THE PARTIES

[22] The applicant's position is that the Provincial Court Judge erred in relying on the tertiary ground, particularly in his reliance on the allegation that the firearms and weapons found in or on the property were used in the commission of the offence and not paying heed to the presumption of innocence and the applicant's right to reasonable bail guaranteed by s. 11(e) of the *Charter*. In addition the applicant brought forward a new surety, Ms. Phyllis Richardson.

[23] Ms. Richardson testified on the bail review hearing. She is the applicant's sister. She, like the applicant, has lived and worked in the metro area all her life. She is employed as a compliance engineer. She testified to having reviewed all the allegations against her sister by reading the Crown sheet materials and of being aware of her obligations as a surety to report any violations of her sister's terms of release. She has no criminal record, has never acted as a surety before and is confident her sister will comply with any reasonable terms of release imposed on her, including that she live at her home. I will say more about Ms. Richardson later in these reasons.

[24] The applicant says the tertiary ground is reserved for serious, horrible and inexplicable crimes and this is not one of them. She does acknowledge that the tertiary ground can be applied in drug cases, but only in relatively rare ones.

[25] The Public Prosecution Service of Canada will be assuming carriage of all the proceedings against Mrs. Charter and had authorization from the Provincial Public Prosecution Service to deal with all matters on the application for bail review.

[26] The Crown acknowledges Mrs. Charter's significant ties to the community but seeks to uphold the order for detention on both a consideration of the secondary and tertiary ground. It argues that the evidence clearly establishes Mrs. Charter does not have a trifling involvement in a very serious criminal business located at 556 Bellefontaine Road. They say it was both a mid level and street level operation.

[27] In addition there was further evidence of the scope and sophistication of that criminal business. Mrs. Charter as part of her application materials included a copy of the Crown brief report that led to additional charges. These charges arise out of a further investigation by the police from its initial seizure on July 9, 2008.

[28] The Crown brief report indicates that from the seizure of the July 9, 2008 a document was found in relation to a storage locker rented at a local self storage facility. The name of the lessee was apparently Kelsey MacGrath. A search warrant was duly obtained and executed on July 22, 2008. The seizure netted 349 grams of cocaine, almost three kilos of marihuana and 1460 tablets of ecstasy along with a semi-automatic pistol with loaded magazines, a 410 shot gon and a .22 calibre loaded revolver. There is no direct evidence of the applicant's involvement in the contraband found in the storage locker, but there is certainly circumstantial evidence that could be argued tie her to it.

[29] No show cause has been held on the new charges arising out of the seizure on July 22, 2008. The parties have agreed to be bound by whatever decision I may make on the initial charges and will apply that decision to the new allegations.

[30] On the hearing before me the Crown stressed the strength of the Crown's case, the seriousness of the offences and the fact that many that are involved in this kind of activity get caught up in it. Once involved they are unable to get out due to obligations to suppliers. They also stress the importance of the presence and nature of the weapons, their accessibility and being in essence ready for use. The Crown fairly acknowledged that there was no evidence that the weapons were even attempted to be accessed or used when the search occurred. The Crown urged that MacDonald, Prov. Ct. J. committed no error in ordering the detention of the applicant.

DECISION

[31] The Supreme Court of Canada has had three occasions to address the interpretation and constitutional validity of the provisions of the *Criminal Code* dealing with judicial interim release. In *Pearson*, [1992] 3 S.C.R. 665, the court dealt with the constitutional validity of the reverse onus provisions of the *Code* with respect to persons charged with drug offences and the application of s. 11(e) of the *Charter*.

[32] Chief Justice Lamer in *R. v. Pearson*, [1992] 3 S.C.R. 665 wrote at paras 30 and 31:

> [30] Section 11(d) of the *Charter* sets out the presumption of innocence in the context of its operation at the trial of an accused person. As I stated in *Dubois v. The Queen*, [1985] 2 S.C.R. 350, at p. 357:
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> > Section 11(d) imposes upon the Crown the burden of proving the accused's guilt beyond a reasonable doubt as well as that of making out the case against the accused before he or she need respond, either by testifying or by calling other evidence.
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> [31] This operation of the presumption of innocence at trial, where the accused's guilt of an offence is in issue, does not, in my opinion, exhaust the operation in the criminal process of the presumption of innocence as a principle of fundamental justice. The presumption of innocence, as a substantive principle of fundamental justice "protects the fundamental liberty and human dignity of any and every person accused by the State of criminal conduct": *Oakes*, *supra*, at p. 119. In my view, the presumption of innocence is an animating principle throughout the criminal justice process. The fact that it comes to be applied in its strict evidentiary sense at trial pursuant to s. 11(d) of the *Charter*, in no way diminishes the broader principle of fundamental justice that the starting point for any proposed deprivation of life, liberty or security of the person of anyone charged with or suspected of an offence must be that the person is innocent.

[33] In the companion case of *R. v. Morales*, [1992] 3 S.C.R. 711 the majority struck down the “public interest” component of what was then s. 515(10)(b) as unconstitutional on the ground that it was vague, imprecise, and authorized a “standardless sweep” that would permit a court to “order imprisonment whenever it sees fit”.

[34] Parliament responded to *Morales* some five years later by amending s.515(10) of the *Code* under the *Criminal Law Improvement Act*, 1996, S.C. 1997, c.18. As a result of the amendments, there were three criteria rather than two. The third criteria became:

> (c) 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, having regard to all the circumstances, including the apparent strength of the prosecutions's case, the gravity of the nature of the offence, the circumstances surrounding its commission and the potential for a lengthy term of imprisonment.

[35] This new subparagraph became the subject of a further constitutional challenge in *R. v. Hall*, [2002] 3 S.C.R. 309. In *Hall*, the court was unanimous in holding that the phrase in s.515(10)(c), "On any other just cause being shown and without restricting the generality of the foregoing", violated s.11(e) of the *Charter* and are therefore inoperative. The court was divided on the question of whether that portion of s.515(10)(c) which authorized the denial of bail in order "to maintain confidence in the administration of justice" was constitutionally valid.

[36] The accused in *Hall* was charged with first degree murder. Compelling evidence linked him to the brutal murder of a woman, who had sustained 37 wounds to her hands, forearms, shoulder neck and face. The victim's injuries revealed that the perpetrator had attempted to cut off her head. The murder was highly publicized, and there was evidence in the record that the public was fearful that the killer was at large. The bail hearing judge determined that pre-trial detention was not necessary under ss. 515(10)(a) or (b). He considered detention was warranted under subsection 515(10)(c) "to maintain confidence in the administration of justice". This decision was affirmed by the Ontario Court of Appeal. On further appeal, Chief Justice McLachlin, giving the judgment for the majority, held that the portion of s.515(10)(c) which authorizes the denial of bail in

order “to maintain confidence in the administration of justice” is constitutionally valid.

[37] In the context of a constitutional challenge to the provision, Chief Justice McLachlin noted:

> [16] In 1992, this Court first considered the application of s.11(e) of the *Charter* to the law of bail in the cases of *Pearson* and *Morales*, *supra*. In *Pearson*, Lamer C.J., for the majority, held that s.11(e) contained two distinct elements: (1) the right to “reasonable bail” in terms of quantum of any monetary component and other applicable restrictions; and (2) the right not to be denied bail without “just cause”. He interpreted the term “just cause” as meaning that bail could only be denied (1) in a narrow set of circumstances, where (2) denial was necessary to promote the proper functioning of the bail system.

[38] There is no doubt that the court recognized that there is a small category of circumstances where bail can be denied even if the first two grounds for detention do not justify denial. Chief Justice McLachlin discussed the tertiary ground and the relevant considerations to the denial of bail as follows:

> [40] 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. 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.

> [41] This, then, is Parliament's purpose: to maintain public confidence in the bail system and the justice system as a whole. The question is whether the means it has chosen go further than necessary to achieve that purpose. In my view, they do not. Parliament has hedged this provision for bail with important safeguards. The judge must be satisfied that detention is not only advisable but necessary. The judge must, moreover, be satisfied that detention is necessary not just to any goal, but to maintain confidence in the administration of justice. 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 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. In addition, as McEachern C.J.B.C. (in Chambers) noted in *R. v. Nguyen* (1997), 119 C.C.C. (3d) 269, the reasonable person making this assessment must be one properly informed about "the philosophy of the legislative provisions, *Charter* values and the actual circumstances of the case" (p. 274). For these reasons, the 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.

[39] The parties referred to no cases in Nova Scotia that have considered *Hall*. I could find none.

[40] In the meantime Parliament has again amended s.515 by what was then Bill C-2 *Tackling Violent Crime Act*. It has now been passed, received Royal assent and at least partially proclaimed. It has become S.C. 208 c.6. I will repeat the actual language, as it is important to keep it in mind. It is as follows:

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

[41] Obviously Parliament specifically mandated that the court take into consideration all of the circumstances including whether a firearm was used in the commission of the offence. Subparagraph (iii) specifically directs that the court consider "including whether a firearm was used". Subparagraph (iv) also references the potential consequences that can flow from a conviction for an offence that involves or whose subject matter is a firearm.

[42] The applicant argues that MacDonald, Prov. Ct. J. erred in concluding that the allegations against her included use of a firearm within the meaning of s.515(10)(c). The leading case on what constitutes use of a firearm is *R. v. Steele*, [2007] 3 S.C.R. 3. *Steele* was a case that was concerned with a charge under s.85 of the *Criminal Code*. Section 85 makes it a separate offence for a person who commits a number of specific offences or attempts to do so, or during committing or attempting to commit an indictable offence, uses a firearm. Section 85 further mandates that when someone is convicted that the court shall, on a first conviction, impose a minimum punishment of imprisonment for one year to be served consecutively to any other punishment imposed by the court. Section 85 also

provides that the minimum period of imprisonment for a second or subsequent offences increases to three years.

[43] In *Steele*, there was no specific evidence that the accused and his three accomplices actually used a firearm. The evidence was that they forcibly entered a home at night looking for a marihuana grow operation. The residents testified that they heard the intruders say “we have a gun, get the gun, get the gun, get the gun out”. They testified that one intruder was holding something in his hand about the size of a gun. Another of the residents testified that they saw one of the intruders pull a dark metal object from the inside of his jacket. The four intruders were apprehended a short time later. The car was searched, several weapons were found including a loaded handgun.

[44] The accused was convicted at trial of using a firearm under s.85(1) of the *Criminal Code*. His conviction was upheld on appeal at the British Columbia Court of Appeal. On further appeal at the Supreme Court of Canada the conviction was upheld.

[45] Fish, J. for a unanimous court wrote:

> [24] With respect to both imitation and operational weapons, the meaning of "uses a firearm" in s. 85 is informed by case law under its predecessors.
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> [25] In *McGuigan*, for example, the central issue was whether *R. v. Quon*, [1948] S.C.R. 508, continued to apply despite the material differences between what was then s. 122(1) of the Criminal Code and its successor, s. 83(1) (now, in substance, s. 85). Section 122(1) provided that "[e]very one who has upon his person a rifle, shotgun, pistol, revolver or any firearm capable of being concealed

upon the person while committing any criminal offence is guilty of an offence" and subject to a minimum of two years' imprisonment in addition to any penalty imposed for the underlying offence. Writing for the majority, Dickson J. (as he then was) explained that s. 83(1) was more narrowly phrased than s. 122(1) to underscore its concern with the actual use of a firearm, as opposed to its mere physical possession, which sufficed to support a conviction under s. 122(1) (pp. 317-18).

[26] Three years later, in *Krug*, at p. 263, the Court held that possession alone could not support a conviction under s. 85. And it has at least since then been settled law that carrying a concealed weapon while committing an offence is not "using" a firearm within the meaning of s. 85(1): *R. v. Chang* (1989), 50 C.C.C. (3d) 413 (B.C.C.A.); *R. v. Gagnon* (1995), 86 O.A.C. 381.

[27] "Use" has been held to include *discharging* a firearm *R. v. Switzer* (1987), 32 C.C.C. (3d) 303 (Alta. C.A.)), *pointing* a firearm *R. v. Griffin* (1996), 111 C.C.C. (3d) 567 (B.C.C.A.)), "pulling out a firearm which the offender has upon his person and holding it in his hand to intimidate another" (*Langevin*, at p. 145, citing *Rowe v. The King*, [1951] S.C.R. 713, at p. 717; see also *Krug*, at p. 265), and *displaying* a firearm for the purpose of intimidation *R. v. Neufeld*, [1984] O.J. No. 1747 (QL) (C.A.)). In *Gagnon*, the court indicated in passing that "use of firearm" may include revealing its presence by word or deed.

[28] It is thus settled law that use and mere possession (or "being armed") are not synonymous. But courts have almost invariably determined on a case-by-case basis whether the conduct alleged in each instance amounted to use of the firearm in question. They cannot be said to have articulated a principled test that fully captures the type of conduct that rises to the level of "use" within the meaning of s. 85(1).

[29] The judgment of the British Columbia Court of Appeal in *Chang*, however, does shed some light on the nature of the distinction between use and mere possession in this context. In concurring reasons, Carrothers J.A. held in *Chang* that "uses" within the meaning of s. 85(1) "bears the clear connotation of the actual carrying into action, operation or effect", which is to be distinguished from being armed or possessing a firearm which "connote merely a latent capability of 'use', rather than actual 'use'" (p. 422).

30 The U.S. Supreme Court reached a like conclusion in *Bailey v. United States*, 516 U.S. 137 (1995), which concerned the meaning of "use" in § 924(c)(1)

of 18 U.S.C. – a provision similar to s. 85(1) of the *Criminal Code*. Speaking for the court in *Bailey*, Justice O'Connor found that "use" requires more than mere possession and that evidence of proximity and accessibility of a firearm was insufficient to support a conviction for its use under the statute. To establish use, she stated, "the Government must show active employment of the firearm" (p. 144 (emphasis added)). She later stated:

> The active-employment understanding of "use" certainly includes brandishing, displaying, bartering, striking with, and, most obviously, firing or attempting to fire a firearm. We note that this reading compels the conclusion that even an offender's reference to a firearm in his possession could satisfy § 924(c)(1). Thus, a reference to a firearm calculated to bring about a change in the circumstances of the predicate offense is a "use," just as the silent but obvious and forceful presence of a gun on a table can be a "use."

[31] These observations are entirely consistent with the ordinary and accepted meaning of "use". And the Court has recognized that the ordinary meaning of "use" (or "utilise", in the corresponding French version of a statute) can be discerned from its dictionary definitions in both languages. In determining the meaning of utiliser, albeit in a different context, the Court adopted its definition in the *Petit Robert*, which includes [TRANSLATION] "render useful [or] employ for a specific purpose" (*Veilleux v. Quebec (Commission de protection du territoire agricole*), [1989] 1 S.C.R. 839, at p. 854). This definition, the Court found, "implies both the idea of activity and the idea of an ultimate purpose". Similarly, the *Canadian Oxford Dictionary* (2nd ed. 2004) defines "use" as "employ (something) for a particular purpose ... [or] exploit (a person or thing) for one's own ends". Likewise, according to *Black's Law Dictionary* (6th ed. 1990), "use" means "make use of; to convert to one's service; to employ; to avail oneself of; to utilize; to carry out a purpose or action by means of; to put into action or service, especially to attain an end" (emphasis added).

[32] In the absence of a statutory definition, I would therefore hold that an offender "uses" a firearm, within the meaning of s. 85(1), where, to facilitate the commission of an offence or for purposes of escape, the offender reveals by words or conduct the *actual presence or immediate availability* of a firearm. The weapon must then be in the physical possession of the offender or readily at hand.

[46] Here there is no evidence that the applicant personally, or as a party, used a firearm. Mr. MacLachlin, with his usual candour admitted that the test for use set out in *Steele* was not met.

[47] With all due respect to MacDonald, Prov. Ct. J. I find that he erred in law in concluding that the applicant used a firearm in the commission of the offences.

[48] I recognize that words in the *Criminal Code* may have different interpretations where they appear in different sections. However, the plain grammatical meaning of use in paragraph (c) of 515(10) would be in accord with the decision of the Supreme Court of Canada in *Steele*. Furthermore, Parliament does not legislate in a vacuum. It, like all members of the public, are presumed to know the law, statutory and otherwise. The decision of the Supreme Court of Canada in *Steele* was released on July 20, 2007. The first reading of Bill C-2 was October 18, 2007. It then went through the legislative process, having received third reading on November 22, 2007. It received third reading in the Senate on February 27, 2008, and Royal Assent on February 28, 2008. Some sections, including s.37 (which contains the amendments to s.515(10)(c)), were proclaimed in force on May 1, 2008.

[49] It is important to recognize that Parliament in Bill C-2 introduced a number of amendments to the *Code*, not just with respect to s.515(10)(c), but also with respect to the possession or use of firearms. Included were amendments to s.85 correcting what appeared to be an error by Parliament in having 85(3)(b) and (c) as duplicate sections. Those sections dealt with the minimum period of imprisonment

on a second or subsequent offence. In addition, extensive amendments were made with respect to other firearm related offences, including having firearms in someone's possession or ready for use.

[50] If Parliament intended that the alleged commission of an offence while in simple possession of a firearm to have the same significance as use for the purposes of 515(10)(c), it had every opportunity to do so. It did not.

[51] I note as well Parliament's earlier legislative initiative in s.10 of the *Controlled Drugs and Substances Act* that specifically mandated it to be a relevant aggravating factor on sentence if an accused carried, used or threatened to use a weapon.

[52] The commission of an error of law or principle does not in my opinion entitle an applicant to be released. In other words, an accused is not entitled to his or her release simply by demonstrating some error in law, misapprehension of the evidence or erroneous conclusion by a Provincial Court Judge or Justice of the Peace. He or she must show cause why the application should be allowed and why the order of the Justice should be vacated, or in other words why his or her detention is not justified. (See *R. v. English* (1983), 8 C.C.C. (3d) 487).

[53] This is particularly so where although firearms were not used in the commission of the offences, the evidence concerning the extent and nature of the firearms, loaded and otherwise, not to mention the other weapons, is nonetheless a very relevant consideration within the meaning of s.515(10).

[54] In my opinion the burden remains on the applicant under s.520 for the reverse onus *CDSA* charges and it is now on the Crown with respect to the *Criminal Code* offences.

[55] Like Judge MacDonald I am satisfied that it is not necessary to detain the applicant to ensure her attendance in court in order to be dealt with according to law. Nor is detention necessary for the protection or safety of the public under the secondary ground.

[56] It is the tertiary ground that gives me considerable cause for concern. While Chief Justice McLachlin spoke of the offence in *Hall* as being horrific or inexplicable and the evidence strongly linking the accused to that offence, she also noted the homicide received extensive media coverage that caused significant public concern. Indeed evidence was called by the Crown in that case about the general sense of fear in the community generated by the commission of the offence.

[57] I have no doubt that the tertiary ground is not limited to crimes that are horrific or inexplicable. Nor do I take the view there is any specific burden on the Crown to call evidence tailored to demonstrate broader concerns about the administration of justice.

[58] Both the applicant and the Crown have referred to a number of decisions where the tertiary ground has been addressed in cases involving *CDSA* and other

charges where firearms are alleged to have been found in the possession of the accused. These include: *Her Majesty the Queen v. D.G.B.*, [2004] A.J. No 314; *Her Majesty the Queen v. A.B.*, [2006] O.J. No. 394; *Her Majesty the Queen v. Wilcox*, [2005] B.C.J. No. 2848; *Her Majesty the Queen v. Parsons*, [2007] B.C.J. No. 44; *Her Majesty the Queen v. Bourdeau*, [2008] O.J. No. 2906*; Her Majesty the Queen v. Whervin*, [2006] O.J. No. 443; *Her Majesty the Queen v. M.A.*, [2008] O.J. No. 566; *Her Majesty the Queen v. Preddie*, [2006] O.J. 2425.

[59] There are other cases that have also considered the tertiary ground in these kinds of circumstances.

[60] After reviewing these decisions it is difficult, if not impossible, to reconcile them. I would note that where the tertiary ground was relied upon to detain the accused the alleged possession of the firearm was in a public place.

[61] The most that can be said about these cases is that each case depends on the very individualistic nature of the circumstances surrounding the alleged offences and the circumstances of the accused.

[62] It must also be borne in mind that the criteria set out in s.515(10)(c) must be applied in light of the overall objectives of the bail system and the principles upon which it is based. These include the presumption of innocence and the very considerable impact that denial of bail can have on the functioning of the criminal process. In *Hall* Iacobucci J., for himself and three other members of the court, wrote:

> [47] At the heart of a free and democratic society is the liberty of its subjects. Liberty lost is never regained and can never be fully compensated for; therefore, where the potential exists for the loss of freedom for even a day, we, as a free and democratic society, must place the highest emphasis on ensuring that our system of justice minimizes the chances of an unwarranted denial of liberty.
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> ...
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> [50] The duty to protect individual rights lies at the core of the judiciary's role, a role which takes on increased significance in the criminal law where the vast resources of the state and very often the weight of public opinion are stacked against the individual accused. Courts must not, therefore, take lightly their constitutional responsibility to scrutinize the manner by which the legislature has authorized the detention of the accused in the absence of a conviction.
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> ...
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> [58] Of particular significance for the purposes of this appeal was his discovery of a clear relationship between custody pending trial and the trial itself. Not only was custody likely a factor in inducing guilty pleas, but also, those who were not in custody during trial were more likely to be acquitted than those who were in custody, and, if convicted, were more likely to receive lighter sentences. These alarming findings caused him to conclude that "[t]he prejudicial effects on the accused of custody pending trial demand that the system which determines whether or not he will be released pending trial be a well-considered one" (p. 175).
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> [59] Although it is generally accepted and acknowledged that the denial of bail has a detrimental effect on the presumption of innocence and liberty rights of the accused, it is less often recognized that pre-trial detention can also have serious practical effects on the accused's ability to raise a defence, and can thereby have a second, more indirect, prejudicial effect on the accused's liberty rights and the criminal justice system as a whole.

[63] The views of Iacobucci J. were not, in my opinion, disagreed with by the majority. In fact the majority recognized that the philosophy of the legislative

provisions and *Charter* values play an important role in determining if the tertiary ground justifies detaining individuals who would otherwise meet the criteria for release pending trial. I earlier set out the comments of Chief Justice McLachlin in *Hall* at paragraph 41. The relevant portions at paragraph 41 bear repeating.

> ...Parliament has hedged this provision for bail with important safeguards. The judge must be satisfied that detention is not only advisable but necessary. The judge must, moreover, be satisfied that detention is necessary not just to any goal, but to maintain confidence in the administration of justice. 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 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. In addition, as McEachern C.J.B.C. (in Chambers) noted in *R. v. Nguyen* (1997), 119 C.C.C. (3d) 269, the reasonable person making this assessment must be one properly informed about "the philosophy of the legislative provisions, *Charter* values and the actual circumstances of the case" (p. 274)...

[64] The application of the law and its myriad legal principles is not a popularity contest. It frequently requires a balancing of competing interests. Here Mrs. Charter is presumed to be innocent. The Crown has not suggested any particular evidence about her alleged role in the pending charges. There is no allegation that she nor anyone else used or attempted to use violence. It can be fairly said that someone must have contemplated doing so, at least to protect their patently illegal enterprise. The information sworn to obtain the search warrant has just recently been unsealed. There may well be defences open to her to pursue, both based on the *Charter* and at common law.

[65] Nonetheless there is no doubt the Crown's case against the applicant, on its face, is a strong one. Nor is there any doubt about the gravity of the offences alleged and that the accused, if convicted, faces the potential for a lengthy period of imprisonment, although not nearly as long a period of imprisonment as far as allegations of murder, where release on strict conditions, with one or more sureties, is not uncommon.

[66] I also have little doubt that there are some members of the public that would want her to be detained pending her trial. However, viewed objectively I conclude that a reasonable member of the community, properly informed about the philosophy of the legislative provisions, *Charter* values and actual circumstances of this case would be satisfied that remand pending trial is not necessary to maintain confidence in the administration of justice.

[67] This does not mean that she can be released simply on her own undertaking or recognizance without fairly strict conditions. I was impressed with Ms. Richardson as a proposed surety for the applicant. She has no firearms or weapons in her home nor controlled substances. She struck me as someone who would not abide by any such behaviour. She is aware of the nature and extent of the allegations and of her obligations and rights as a surety. Although she may have to travel from time to time, her willingness to put up $25,000.00 of her own hard earned resources will surely bind the conscience of the applicant.

[68] I therefore order the applicant be released pending trial on her entry into a recognizance in the amount of $25,000.00 with Phyllis Richardson as a surety with the following conditions:

- that she reside with Phyllis Richardson at 17 Digby Crescent, Dartmouth, Nova Scotia;

- that she abstain from the possession or use of any controlled substance as defined by the *CDSA*;

- that she be prohibited from possessing a firearm, crossbow, prohibited weapon, restricted weapon, prohibited devise and ammunition of any type or explosive substance;

- that she report every week in person or by phone to the Cole Harbour Detachment of the RCMP;

- that she seek and maintain employment;

- that she remain within the Province of Nova Scotia;

- that she surrender her passport to the Cole Harbour Detachment of the RCMP within 48 hours of release;

- that she not apply for a passport;

- that she abstain from communicating directly or indirectly with Kelsey McGrath except in the presence of counsel;

- that she abstain from being in the presence of anyone known to her to have a criminal record;

- her attendance, if any, at 556 Bellefontaine Road is to be between the hours of 8:00 a.m and 6:00 p.m.

[69] If counsel wish to consider making submissions with respect to these conditions, I am prepared to hear you further.

[70] I will just remind those present that there will be a notice attached to the decision. I will edit the decision and release it to the parties in due course. There is a publication ban pursuant to s.517 which includes publication of the reasons until such time as the matter is concluded.

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Beveridge, J.