August 16, 2017

R v Acera: Responding to the Call to Action in *Jordan* Via Detention Review Hearings

By: Amy Matychuk

Case Commented On: *R v Acera*, 2017 ABQB 470 (CanLII)

In *R v Acera*, the Alberta Court of Queen's Bench reviewed the detention of 34 accused persons in remand awaiting trial. Under s 525 of the *Criminal Code*, RSC 1985, c C-46, an accused detainee has the right to have their detention reviewed to determine whether they should be released pending trial when either 30 days (for a summary offence) or 90 days (for an indictable offence) have elapsed from the date they were taken into custody. The institution with custody of the accused must make a request on the accused's behalf for a detention review hearing. At the hearing, the court shall assess the accused's detention using the criteria in s 515(10) of the *Code*: whether detention is necessary to ensure the accused's attendance in court, to protect the public, or to maintain confidence in the administration of justice. However, s 525 also provides an opportunity for a superior court to become involved in case planning to ensure matters reach trial without unreasonable delay, and that additional purpose was the focus of Justice J. B. Veit's decision in *Acera*.

Under s 525(9), a "judge may give directions for expediting the trial of the accused" at a detention review hearing. The permissive rather than mandatory language used here ("may" instead of "shall") seems to indicate to the casual reader that expediting trial is a secondary consideration on a s 525 application, but in fact, the Alberta Court of Appeal held in *Neill v Calgary Remand Centre*, 1990 ABCA 257 (CanLII) that "the thrust of the [s 525] inquiry is into delay of trial not detention" (at para 6). The BC Court of Appeal affirmed this approach in *Vukelich v British Columbia (Director of The Vancouver Pre-Trial Centre)*, 27 CR (4th) 15, 1993 CanLII 800 (BC CA): "Section 525 was intended to ensure that a person in custody did not remain so indefinitely if his or her trial was delayed" (at para 26, emphasis added). The court in *Burton v British Columbia (Director of Surrey Pre-Trial Centre)*, 25 CR (4th) 167, 1993 CanLII 1438 (BC CA) was even more explicit: "The review under s. 525 is required to ensure that an accused person is not unnecessarily detained and that directions are given for expediting his or her trial" (at para 30, emphasis added).

More recent Alberta Court of Queen's Bench decisions reaffirm this approach. In *R v Bowden*, 2013 ABQB 178 (CanLII), Justice Rooke held that the "primary focus" of s 525 was pretrial delay, and that s 525's purpose was to review detentions for unreasonable delay in getting to trial (paras 1, 12, 16). Justice Veit herself previously held in *R v A*, 2016 ABQB 531 (CanLII) that Parliament's intention in s 525 was "to ensure that accused persons who are in custody are given some type of priority in relation to setting down of trials" (at para 31, emphasis added). Accordingly, in *Acera*, Justice Veit urged that s 525 be used (and used it, herself) to proactively address pre-trial delays before they become a concern. Further, she contextualized the detention

review process as a mechanism to ensure the Crown fulfills its broader responsibility, recently highlighted in *R v Jordan*, 2016 SCC 27 (CanLII), to respect the *Charter* s 11(b) right to trial within a reasonable time (for earlier posts on *Jordan* and subsequent cases see here, here and here).

Indeed, Justice Veit described s 525 as "Parliament's *Askov* and *Jordan*", emphasizing that its importance "in the overall assessment of the constitutional right to be tried within a reasonable time cannot be overstated" (at paras 3-4). (*R v Askov*, [1990] 2 SCR 1199, 1990 CanLII 45 (SCC) was an earlier attempt by the Supreme Court to use the *Charter* right to trial within a reasonable time to reduce the institutional delays in the justice system; see also *R v Morin*, [1992] 1 SCR 771, 1992 CanLII 89 (SCC).) Justice Veit characterized the s 525 detention review mechanism as an opportunity for courts to follow *Jordan*'s "call to action" with respect to the pace of trial proceedings, avoiding constitutional arguments on delay at trial by preventing delays in the pre-trial process (at paras 1, 3). She asserted that s 525 "is designed to allow, and indeed to force, courts to take whatever pro-active measures are appropriate in light of the total anticipated delay" to trial (at para 8). By assessing cases, via detention review, which have not yet been resolved, the court can consider and make changes that will move these and other cases more quickly toward trial, thereby optimizing its resources (at para 22) and reducing the likelihood that charges will be stayed due to delay under *Jordan*.

Accordingly, Justice Veit took this opportunity to identify flaws in criminal procedure and other systemic issues affecting the 34 detainee files before her. Her observations revealed some startling institutional shortcomings with respect to s 525 obligations. She noted that 30 of the 34 detention review requests significantly failed to meet the 30/90-day deadline set out in s 525, all of them from Edmonton Remand Centre (ERC) (at para 16). The responsibility to set a hearing date for a detention review rests with the institution where the accused is in custody. In the most extreme case, ERC's request that the courts review an inmate's detention was delayed by 9 months, though most delays were between 2 and 4 months (see Appendix A of the judgment). As Justice Veit held in her conclusion, "the ERC's inability to meet its obligations under the Criminal Code must be addressed" (at para 23).

The file with the 9-month delay involved an accused who had problems retaining counsel on a number of summary charges. The accused's initial Legal Aid lawyer wanted him to enter a guilty plea, which he was not willing to do; he could not retain other counsel due, in part, to restrictions on phone access in remand and an undiagnosed "emotional problem which [made] it difficult for him to concentrate on a specific issue" (at para 10). At the time of Justice Veit's decision, this particular accused had been in custody for more than a year, with some question as to whether his trial dates (set for 15 months after he was taken into custody) would be usable, given that he did not have a lawyer. Justice Veit did not blame the Crown for the delay; indeed, she acknowledged that this individual had "fallen through the cracks" and that the Crown had "gone beyond what might legitimately be expected" in its efforts to find him a lawyer (at para 11). Further, she expressed confidence that "all participants in the criminal justice system are doing their best to address long delays to trial" (at para 13). However, a 15-month wait is already approaching the 18-month ceiling that was established in *Jordan* for provincial court trials. In addition, this detainee should have had a detention review hearing after just 30 days had elapsed since the date he was taken into custody, because the Crown was proceeding summarily; the 9-month delay is therefore even more egregious.

Justice Veit also held in her conclusion that "delays on summary proceeding matters are, proportionately, more important than delays which are proceeding by way of indictment" and should be dealt with first (at para 23). She provided some more detailed comments on this point in earlier judgments on s 525. In *R v A*, she held:

> Apart entirely from any delay caused by either party or the total delay to trial, it appears to me that a judge is also entitled, and perhaps required, to consider on a s. 525 hearing whether the delay to trial is unreasonable on the basis that delay will have the effect of requiring the accused to serve more time in pre-trial custody than would probably be imposed even if he were convicted at trial. (at para 42)

And in *R v Schneider*, 2015 ABQB 77 (CanLII), she wrote: "a court is entitled to consider how long an accused would serve if convicted of the offence charged and take that into account in determining the justice of the accused's pre-trial detention" (at para 22). Because those convicted on summary matters will serve less jail time than those convicted on indictable matters, pretrial custody on summary matters should be prioritized in the context of s 525 so that those in remand on summary charges do not serve more pre-trial jail time than they would serve if convicted.

Justice Veit did not suggest a specific solution for the 9-month summary detainee's situation, but she went on to make additional comments about procedural or systemic changes that would reduce delay in the pre-trial process. In particular, she noted that in many of the files before her, the detention centre lacked information about whether or not a detainee had a lawyer and, if so, who that lawyer was. She observed that a lawyer representing a detainee can help solve this problem by filing a Designation of Counsel (DOC) with the court. This will improve the lawyer's chances of being advised of and available for their client's detention review hearing (at para 19). As Justice Veit held in her concluding remarks, "detention review hearings are obviously more effective when defence counsel is present", and the court should "consider ways in which defence counsel might be encouraged to file DOCs in the expectation that they will be given notice of s. 525 hearings" (at para 23).

She also observed that most of the 34 matters had been dealt with "in a manner that was acceptable to the detainee" by the time the delayed reviews occurred (at para 21). However, she raised the possibility that detainees might have made different choices "if they had had the opportunity of reviewing the state of disclosure and the anticipated delay . . . 2 to 4 months previously" (at para 21); i.e., if ERC had made requests for detention review hearings within the time limits stipulated in s 525, as is its duty. One file did indicate that an accused wished to plead guilty but his counsel was unable to comply due to lack of disclosure from the Crown (at para 22). Otherwise, there was not much evidence to indicate that detainees would have made different choices if the Crown had provided them with more timely disclosure and if they had received information about the probable wait time until trial at an earlier point (two of the things the detention review process, according to Justice Veit, is supposed to facilitate).

Regardless of the lack of concrete evidence on this point, Justice Veit spent a significant amount of space in a relatively short decision discussing late Crown disclosure to defence as a primary cause of pre-trial delay (see in particular paras 5-7, 13). Section 525 explicitly provides that at a detention review hearing, "the judge may . . . take into consideration whether the prosecutor or the accused has been responsible for any unreasonable delay in the trial of the charge." As recently noted in *R v DMS*, 2016 NBCA 71 (CanLII), on which Justice Veit relied (at paras 7-8),

an accused is entitled not to take a further step in criminal proceedings until they are in possession of full disclosure. Therefore, an accused cannot be held responsible for delay where that delay results from a failure by the Crown to provide disclosure. It follows that where a matter is delayed because an accused has not received disclosure, the Crown will be held responsible for those delays if the accused raises a *Jordan* argument at trial—an eventuality the court can perhaps avoid by addressing issues with disclosure at detention review hearings, early enough in the pre-trial process to avoid excessive delay.

Reviews of individual files indicated that some detainees were experiencing other types of delay for which they were similarly not responsible: in a few matters, a final disposition of the case was delayed because of the need for a *Gladue* report for the sentencing of Indigenous offenders; in several others, the recorded date that a detainee was taken into custody was wrong (at para 22). Conversely, however, some detainees did not even wish to be released from custody: they preferred to stay in remand where they could access addiction treatment and "boot camp" programs. As Justice Veit rightly noted,

> This is a sad commentary on the availability of social services for those with relatively few financial resources; it also suggests that an assessment of whether it is in fact cheaper to keep a person in custody than to provide services in the community might be useful. (at para 22)

Despite some detainees' preference to remain in custody, Justice Veit did not think that s 525 provided detainees with the option to waive their detention review hearings. She noted the importance of s 525 as a means for a judge to exercise a supervisory role over the pre-trial process:

> . . . it may be that a purposive interpretation of the section requires a judge to make an assessment of delays to trial not only in one, isolated, case, but as a result of having the opportunity of assessing a representative sample of the persons in the judge's community who are in jail even though they have not been convicted. (at para 15)

Justice Veit used the s 525 detention review mechanism purposively, as is its intent, to comment on delays in the justice system, and her remarks reflect an expectation that both detention centres and Crown counsel take seriously their responsibility to avoid the kind of delay addressed in *Jordan*. In Alberta, trial delays put more than 1400 cases at risk of being dismissed, and she rightly refused to tolerate delays resulting from errors as simple as wrongly recording dates on which custody began and failing to record lawyers on file. *Jordan* established the ceiling for time to trial at provincial court as 18 months. As discussed above, it is currently possible for an accused on summary charges to spend more than half that timeline in remand without an opportunity for a detention review. This, as Justice Veit recognized, indicates an unacceptable level of systemic inertia that it is the Crown's responsibility to remedy. Although a plain reading of s 525 does not immediately reveal its potentially forward-looking use as a means of commenting on and rectifying systemic delays, Justice Veit's comments reveal that such oversight is badly needed.

This post may be cited as: Amy Matychuk "*R v Acera*: Responding to the Call to Action in *Jordan* Via Detention Review Hearings" (16 August, 2017), online: ABlawg, http://ablawg.ca/wp-content/uploads/2017/08/Blog_AM_Acera.pdf

To subscribe to ABlawg by email or RSS feed, please go to **http://ablawg.ca**

Follow us on Twitter **@ABlawg**