S. 525 DETENTION REVIEWS

LSS INFORMATION FOR DEFENCE COUNSEL, June 5 2019

This document provides background information to defence counsel who have received a notice of scheduling hearing from the B.C. Supreme Court advising that an accused, believed to be their client, may be eligible for a 30 or 90-day detention review pursuant to s. 525 of the *Criminal Code*. It addresses:

- An overview of the 525 process
- What to do before the scheduling hearing
- What happens at the scheduling hearing
- How to communicate your client's position to the court
- LSS compensation for the s.525 detention review process involving legal aid clients.

THE s.525 DETENTION REVIEW PROCESS

You should begin by reviewing the Supreme Court's comprehensive interim *Practice Direction* on s.525 Review Hearings, which outlines in detail the different steps of the s.525 detention review process:

https://www.courts.gov.bc.ca/supreme_court/practice_and_procedure/practice_directions_and_notices/Criminal/CPD%20-%204%20-%20Interim%20Procedure%20for%20Detention%20Reviews%20Under%20s.%20525%20of%20the%20Criminal%20Code.pdf

The interim procedure for detention reviews was initiated after the SCC rendered its decision in ***R. v. Myers*** [2019 SCC 18] on March 28, 2019. This case is essential reading if your client might be eligible for a s.525 detention review.

The procedures for s. 525 detention reviews continue to evolve. The procedures set out in this summary may change before this information can be updated.

All Scheduling Hearings are conducted in Vancouver Supreme Court. The accused appears by video from the correctional institution. Crown and defence counsel routinely appear by telephone. So far, these scheduling hearings are set on short notice, but the court has been working steadily to increase the notice period. Depending on the timing, on receiving the notice you may need to act promptly to arrange an appearance and obtain instructions from your client prior to the scheduling hearing.

As indicated in the *Practice Direction*, while the scheduling hearings are centralized in Vancouver, the substantive s.525 detention reviews will be heard in the Supreme Court location the court specifies (see para. 13(b) of the *Practice Direction* for the factors the court may consider in determining the hearing location). For this purpose, if a client wishes to proceed with a substantive detention review hearing, if possible, defence counsel are encouraged to attend the scheduling hearing prepared to set a date for the substantive review hearing. Advanced preparation may include discussions with Crown counsel as to a possible date and location for the hearing and consultation with the schedulers at the appropriate BC Supreme Court registry to obtain a date. The proposed date and location can be provided to the presiding judge at the s.525 scheduling hearing, and the judge may set the hearing on the record. If it is

not possible to schedule a substantive detention review hearing at the scheduling hearing, the presiding judge may refer the matter to a type of fix date appearance at a regional hub court location in order to set the hearing date.

There is a strong preference that counsel of record appear at the scheduling hearing if at all possible. The s. 525 inquiry contemplated in ***Myers*** is wide-ranging. Experience to date suggests that the scheduling judge will ask questions about the history and circumstances of the accused's detention, and the anticipated future proceedings, which often go beyond the usual briefing counsel would give an agent. It is common for the s. 525 scheduling judge to address the accused directly to investigate the necessity of a detention review. **It is best that counsel of record speak to the matters themselves, whenever possible.**

BEFORE THE SCHEDULING HEARING

Firstly, please respond to the email from the Detention Review Coordinator at the Supreme Court (who sent you the Scheduling Notice) right away to advise whether or not you are counsel for the named accused. You should also indicate whether you will attend the scheduling hearing.

At this time, the court is automatically giving counsel leave to appear by phone. If you want to arrange to appear at the scheduling hearing by telephone *please make arrangements in advance* by providing the number where you can be reached at the time of the scheduling hearing to the **BCSC 525 Scheduling Coordinator**: detention.review@courts.gov.bc.ca. The best way to do this is likely to respond to the email you received from the Detention Review Coordinator with the scheduling notice.

It is essential to consult with your client about the s.525 detention review prior to the hearing to:

(1) Provide advice regarding their eligibility for a s.525 detention review and their options; and

(2) Obtain their instructions to schedule or waive a s.525 detention review, or adjourn the scheduling hearing to a proximate date for a specific reason.

It is highly recommended you speak to the Crown handling the s.525 matter prior to the hearing to advise whether a detention review will be scheduled or waived. Contact email addresses for federal and provincial Crown handling s.525 detention reviews are listed below.

AT THE SCHEDULING HEARING

Scheduling hearing list days at Vancouver Law Courts proceed in one-hour blocks on a prescribed schedule for video connections to each correctional facility. In each block, the court cycles through a series of 5 to 10-minute video appearances by each accused from the facility (there will be at most 6 accused scheduled to appear per hour, usually less). If you have arranged to appear by telephone at the designated time, the court will contact you when your matter is called (which may be later than the time specified in the notice).

Expect the court, even at the scheduling phase, to actively inquire into your client's detention. Though counsel may not have all the answers at the time of the scheduling hearing, here are some of the questions that may arise (please see also s. 13 of the *Practice Direction*):

1. At what stage is the proceeding?
2. Are there any other matters that affect the accused's detention status and eligibility for a review?
3. Did current counsel conduct the bail hearing (if one was held)?
4. Has counsel reviewed the record?
5. If not, does counsel need the court's direction as to production of the record (DARS, ROP, exhibits)?
6. Has counsel consulted with the client and received instructions on whether a detention review will be pursued or waived?
7. If a s.525 detention review is sought, does counsel require the court to make an order regarding transcripts? (Please be prepared to provide details required to complete a transcript order, i.e. dates, locations, file numbers, judge's name).
8. Has counsel spoken to the Crown regarding the detention review?
9. Where will counsel want the matter to be heard?
10. What is counsel's time estimate for the detention review hearing?
11. Is an interpreter or any other accommodation required?

Eligibility

The judge will want to know whether the accused is actually eligible for a s.525 detention review. The Crown will usually provide their position on whether or not the detainee is eligible for a s. 525 detention review. In this transitional period, it is often the case that while the accused was eligible for a s. 525 detention review at the time Corrections issued its notice of application, subsequent events have rendered the accused ineligible (for example, the accused has been detained on other matters, or is now serving a sentence). The key question is whether the accused is eligible for a 525 review on the matters listed on the Corrections notice of application. If the court is satisfied, based on its review of the notice and the record of proceedings, that the accused is no longer eligible, it will order the matter concluded.

The *Practice Direction* includes a consent form (Appendix A) that allows Crown and defence to confirm in advance that the accused is no longer eligible for a s.525 detention review. If you complete and file the form in a timely way, the scheduling hearing may be removed from the list without the need for an appearance.

In some cases, an accused may no longer be eligible on the matters listed on the notice, but is eligible, or will soon be eligible, on other matters not included on the notice. If so, those matters should be the subject of a separate notice that will trigger another s.525 detention review. In this transitional period, given some of the errors in Corrections notices, on some occasions the court has been open to adjourning the scheduling hearing so it retains some degree of oversight of the accused's detention. In

other cases, the court orders the matter concluded in the expectation that a new notice will issue for the other matters.

Adjournments

In *R. v. Myers* (paras. 39-41) the Supreme Court of Canada cautions against routine, open-ended adjournments that are inconsistent with the court's obligation to assess the accused's detention in a timely way. At the same time, it recognized that there may be good reasons to adjourn the s.525 detention review.

If a scheduling hearing is to be adjourned, it should be for a specific reason (e.g. to obtain instructions), and to a date certain, usually within two weeks. In this transitional period, there have been quite a few "precautionary adjournments" – where the defence is waiting for something to occur (bail hearing, perfecting bail, sentencing) that may affect detention status, but it is premature to waive the s.525 detention review. In such circumstances, out of an abundance of caution, the court is generally open to adjourn to a date after the contingent future event. If, by the next appearance, the s.525 detention review is moot or waived, it can be dealt with quickly. Note that the *Practice Direction* (para. 14) provides that if counsel appears at a subsequent scheduling hearing the client need not appear. Again, if circumstances change and the client is no longer eligible for a s.525 detention review by the next appearance date (if sentenced, released, or subject to a new detention order), the consent form at Appendix A of the *Practice Direction* can be filed to have the matter removed from the list without an appearance.

Waivers

In order to waive the s.525 detention review, you should be prepared to advise the court that:

- You have consulted with the accused.
- The accused understands the purpose of the s.525 detention review and the consequences of a waiver.
- The accused is waiving the s.525 detention review.

Producing the Record

If you need to review the record of a prior bail or detention review hearing in order to advise your client on whether to pursue a s. 525 detention review, then at the scheduling hearing you may request that the court produce a copy of the DARS audio of the relevant proceeding.

If you determine that a s.525 review will proceed, as this is a mandatory review required by the court, rather than a review initiated by the defence, at the scheduling hearing you may request that the court order the production of any required transcripts. To facilitate such orders, be prepared to advise the court of the relevant dates, the presiding judge (if known), and court location of the initial bail hearing and detention order, as well as any subsequent detention orders (made, for example, under s.520 or 524).

Note: While the court is presently prepared to order the necessary material from the record, including transcripts, this is an interim measure to promote expediency and convenience in this transitional period only. The ultimate responsibility for ordering and funding of transcripts has yet to be determined.

COMMUNICATING YOUR POSITION TO THE COURT

As counsel of record it is your responsibility under the Interim Practice Direction to speak to your client and confirm your decision whether a s.525 detention review hearing should be scheduled. You are responsible to communicate your position to the court. If you are not able to confirm instructions this should be communicated to the court and to Crown along with returnable dates in the near future.

To assist with the introduction of this new process, at least until the end of June 2019, LSS will provide duty counsel for s.525 detention review scheduling hearing list days in Vancouver. If you cannot appear in person or by telephone and need duty counsel to speak to a matter on the scheduling hearing list on your behalf, you can relay information or instructions *in writing* via the LSS 525 Detention Review team: 525Reviews@lss.bc.ca. Duty counsel or LSS staff will report back to you regarding the results.

If you have not made a direct request to LSS to provide duty counsel services and provided clear instructions, duty counsel will not speak to your matter. This means providing LSS with:

(1) confirmation that you have spoken with your client about their eligibility for a s.525 detention review, discussed their options, and received clear instructions or a statement when this will be done.

(2) clear instructions you would like duty counsel to convey to the court. Duty counsel is not able to provide case specific information to the court other than what you provide in writing.

If your client intends to waive the s. 525 detention review, it is best that you speak to the matter yourself unless the reason for the waiver is abundantly clear (for instance the client is about to be sentenced). Your instructions on waiver should address the points in the waiver section above.

LSS COMPENSATION FOR THE s.525 DETENTION REVIEW PROCESS

For clients with current legal aid contracts LSS will provide tariff funding for the s. 525 scheduling hearing and s.525 detention reviews: see the *What's New* article posted **May 10, 2019 on LSS Online**:

https://lssonline.lss.bc.ca/Lists/LSSWhatsNew/DispForm.aspx?ID=303&Source=https%3A%2F%2Flssonline%2Elss%2Ebc%2Eca%2FPages%2FHome%2Easpx&ContentTypeId=0x01002844A2F05A6F478D819A1244E6A17E670053EBD5E420B56443A81B1F8B64D9F130

There is no longer a requirement to seek prior authorization for a s. 525 detention review, but you need to advise LSS that you are taking conduct of a s. 525 detention review scheduling matter and/or

conducting a s. 525 detention review so we can update your representation contract. , Please email 525Reviews@lss.bc.ca to so advise and the pertinent tariff items will be added to your contract.

Currently, counsel will be compensated in one of two ways:

- *s.525 Scheduling fee* (new) - Counsel can bill this fee for dealing with an eligible s. 525 case through the scheduling process leading to conclusion of the matter without the need for a s.525 detention review hearing.

- *Bail Matters in Supreme Court* - Alternately, counsel can bill this fee if the s.525 detention review proceeds to hearing.

If you need to visit your client to obtain instructions or prepare materials for the s. 525 scheduling hearing or detention review, request that an additional visit be added to your contract and this will be authorized.

If your client is not eligible for a s. 525 detention review because you received a scheduling notice after they had already been released or sentenced, please do not bill the s.525 scheduling fee. The fee is intended to compensate counsel when substantive steps are taken to give advice, and take instructions, to adjourn or waive the 525 detention review hearing.

Contact information

Contact email addresses for key agencies are as follows:

BC Crown: 525BCPS@gov.bc.ca

PPSC (Federal matters): Federal525Notices@ppsc-sppc.gc.ca

BCSC 525 Scheduling Coordinator: detention.review@courts.gov.bc.ca

LSS 525 Detention Reviews team: 525Reviews@lss.bc.ca