SUPREME COURT OF YUKON

Citation: *R. v. Murphy*, 2017 YKSC 34

Date: 20170608
S.C. No. 08-01518D
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

AND

ALICIA ANN MURPHY

Before Mr. Justice L.F. Gower

Appearances:

Paul Battin	Counsel for the Applicant
Kim Hawkins and Joni Ellerton	Counsel for the Respondents

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application for bail estreatment. The accused, Alicia Murphy, was charged with second-degree murder. She was released on a recognizance, with four family members as sureties, in July 2014. Each surety pledged a sum of money that might be forfeited in the event of a breach. That recognizance was amended slightly in August 2014. On September 28, 2014, Ms. Murphy breached a term of her amended recognizance, and was taken back into custody. On December 10, 2014, she was sentenced for that breach and released from custody on the same recognizance. On April 13, 2015, with the consent of the Crown, this Court ordered that the amended

recognizance of August 2014 would continue to apply to the accused (there were other intervening events which gave rise to this delay, which I will refer to below). On June 11, 2015, the accused breached the amended recognizance a second time was taken back into custody. On April 15, 2016, she pled guilty to the lesser included offence of manslaughter. At her sentencing hearing, she also admitted the facts on the second breach of recognizance. The Crown eventually obtained Certificates of Default for each of the two breaches and now seeks full forfeiture of the sums pledged by the sureties. The issue on this estreatment hearing is whether there should be full forfeiture of the sum pledged by each surety for each of the two breaches.

BACKGROUND

[2] The background facts are not in dispute.

[3] The accused, who may now be referred to as the offender, was originally convicted of second-degree murder on November 17, 2009. However, her conviction was overturned by the Court of Appeal of Yukon on June 11, 2014, and a new trial was ordered.

[4] On July 3, 2014, I released the offender on a recognizance, following a contested bail hearing. The recognizance named four family members as sureties, and each pledged a specific sum of money, without deposit:

1) Patrick James (non-biological father) - $5,000;
2) Joanne Murphy (mother) - $3,000;
3) Cindy Chiasson (Mr. James' common-law partner) - $,3000; and
4) Shawna Murphy (sister) - $1,300.

The recognizance had several conditions, including abstention from alcohol and that she reside at the home of Ms. Chiasson and not change that address without first obtaining the permission of her bail supervisor. The offender was also required to remain in Ms. Chiasson's residence, unless she had the prior written permission of her bail supervisor to be outside that residence for certain specific purposes.

[5] On August 11, 2014, Heeney J. allowed an amendment to the recognizance to permit the offender to be outside her residence between the hours of 6 AM and 10 PM in the company of one of her sureties upon prior notification to her bail supervisor ("the amended recognizance").

[6] On September 28, 2014, the offender breached the terms of the amended recognizance. She left Ms. Chiasson's residence shortly after 11 PM and went to another apartment building in Whitehorse known as the "Barracks". Shortly before midnight, the RCMP attended at the Barracks after receiving a complaint that the offender was intoxicated and causing a disturbance. Upon arrival, the RCMP found the offender in an intoxicated state after having consumed alcohol. She initially provided a false name to one of the police officers. She admitted to being outside of Ms. Chiasson's residence and consuming alcohol, contrary to the terms of her amended recognizance, but denied causing any disturbance. The Crown did not seek to prove that she was doing so. She was arrested and taken into custody for failing to abstain and for failing to remain in her residence.

[7] On November 21, 2014, while the offender was still in custody, I granted a conditional stay of proceedings of the second degree murder charge, following a *Rowbotham* application, pending the provision of necessary funding for Ms. Jennie

Cunningham, who was then representing the offender. The Crown appealed the conditional stay to the Court of Appeal of Yukon. The parties proceeded on the basis that the murder charge was in abeyance pending the decision of the Court of Appeal.

[8] On December 10, 2014, the offender pled guilty in Territorial Court to two counts of breach of recognizance for the incident on September 28, 2014. She was essentially sentenced to time served and was released from custody that day.

[9] The Crown took the position that the conditional stay of proceedings had terminated the amended recognizance, and it felt it was necessary for the offender to be subject to certain terms of judicial interim release. Accordingly, on December 19, 2014 the Crown filed an information against the offender under s. 810.2 of the *Criminal Code,* alleging that she may commit a serious personal injury offence. On January 9, 2015, the offender entered into a recognizance under s. 810.2 of the *Code.* The conditions were similar to the two earlier recognizances. The condition regarding residency was as follows:

> Reside at an address that will be communicated to your Bail Supervisor and not change that residence without the prior written permission of your Bail Supervisor.

[10] I am informed by Ms. Cunningham, who testified at this bail estreatment hearing, that the offender did well following her release from custody on December 10, 2014. Accordingly, she was permitted by her bail supervisor to reside on her own in a separate residence from that of Ms. Chiasson.

[11] On April 8, 2015, financial arrangements were put in place to retain Ms. Cunningham and I lifted the conditional stay of proceedings on the second-degree murder charge. At that hearing, Crown counsel expressed their position that the

amended recognizance had been terminated when I ordered the conditional stay of proceedings. Accordingly, said the Crown, the offender was no longer under any form of judicial interim release (apparently ignoring the s. 810.2 recognizance) and ought to be taken into custody pending a show cause hearing the following week. Defence counsel, Ms. Cunningham, took the position that the amended recognizance had only been suspended during the period of the conditional stay and that, with the lifting of the stay, the amended recognizance came back into force. Accordingly, said defence counsel, there was no need for the offender to be taken back into custody. Rather, she urged me to adjourn the matter to the following week, at which time there could be an application by the Crown under s. 524 of the *Criminal Code* to terminate the amended recognizance. At that time, counsel said that the offender could apply again to show cause for her release. I agreed with defence counsel and adjourned the matter to the following Monday, as requested.

[12] On Monday, April 13, 2015, the offender appeared before me briefly, by which time the Crown had changed their position and agreed that the offender's continuing release could be governed by the terms of the amended recognizance from August 2014. I am informed by Ms. Cunningham that one of the reasons the Crown likely changed its position in this regard was because the offender had been doing very well up to that point, including residing on her own with the permission of her bail supervisor.

[13] On May 6, 2015, the Court of Appeal of Yukon dismissed the Crown's appeal of my *Rowbotham* order.

[14] On June 11, 2015, the offender committed the second breach of the amended recognizance. The circumstances, which the offender admitted to in her later sentencing

for the manslaughter offence, were that the RCMP received a complaint from the landlord of the apartment building where the offender was living in Whitehorse. The landlord had called to complain about a party going on at that residence. The police attended and met the landlord and the offender outside the apartment. The RCMP officer determined that the offender appeared to be intoxicated by alcohol and was smelling strongly of marijuana. She had bloodshot eyes and slurred speech. The officer directed the offender into the police vehicle and arrested her for breaching her recognizance. Initially the offender refused to get into the police vehicle. Once inside she was transported to the Whitehorse Correctional Centre ("WCC"). Enroute the offender was screaming that she was going to sue the RCMP. She also hit her head on the silent patrolman barrier between the front and back seat of the police vehicle two or three times. On arrival at WCC, the offender was uncooperative with WCC staff. She was yelling obscenities and would not follow directions. She was taken into the phone room to contact legal counsel and pushed the telephone off the desk. When it was replaced on the desk, she flipped the desk over and threw a chair. There were no additional charges arising out of this behaviour. She was taken into custody that day.

[15] On June 16, 2015, I granted a s. 524 application to terminate the amended recognizance. The offender remained on consent remand until her sentencing for the manslaughter offence.

[16] On April 15, 2016, with the consent of the Crown, the offender pled guilty to the lesser included offence of manslaughter. At that time, she also admitted the facts on the second breach of recognizance from June 11, 2015 for the court to consider as an aggravating factor. Following a joint submission, I sentenced the offender to nine years

for the manslaughter offence, subject to credit for time served. I also directed that the Certificate of Default (Form 33) be endorsed on the amended recognizance. The Crown then directed a stay of proceedings on the information alleging the breaches of recognizance from June 11, 2015.

[17] On November 3, 2016, a Certificate of Default was issued in relation to the breaches from September 28, 2014.

[18] On January 11, 2017, a Certificate of Default was issued in relation to the breaches from June 11, 2015.

LAW

General Considerations

[19] One of the leading cases here is *Canada (Minister of Justice)* v. *Mirza*, 2009 ONCA 732[1] ("*Mirza*"). That case confirmed a number of general principles relating to estreatment hearings.

[20] The onus is on the surety to show why the recognizance should not be forfeited (para. 27). In doing so, they have an obligation to adduce credible evidence to support their position (para. 52).

[21] The effectiveness of the bail system depends on the "pull of bail", which is essentially the moral suasion upon an accused person to attend court as required and to abide by the conditions of their release, because failing to do so could cause their sureties to suffer a significant financial penalty, and possibly even jail (paras. 40 and 41).

[1] Sometimes alternatively cited as *Canada (Attorney General) v. Horvat*h.

[22] The pull of bail can sometimes be vindicated by something less than total forfeiture, although in the vast majority of cases in which involve relatively small sums, probably nothing less than total forfeiture will suffice (paras. 45 and 46).

[23] I pause here to observe, as did Charbonneau J. in *R* v. *Smallgeese*, 2017 NWTSC 10, at para. 27, that what is a "small sum" is a very relative thing, especially in northern communities.

[24] The case of *Romania* v. *Iusein*, 2014 ONSC 623, ("*Romania*") is often referred to by the Crown as authority for the proposition that pledges of $5,000 or less are considered relatively small sums. *Romania* was a case involving three sureties, apparently in the Scarborough area of Toronto, one of whom, Solmaz, had pledged all his assets, the equity in his home, and $30,000 in GICs. The Court there ordered Solmaz to forfeit the sum of $150,000. The second surety was ordered to forfeit $15,000. The third surety, Gihan, was ordered to forfeit $5,000. In doing so, Speyer J. commented:

> ... This is one of those cases that involve "a relatively small sum" and "nothing less than total forfeiture will suffice to vindicate the pull of bail" (See *Horvath and Mirza*, para. 46). I order that Gihan forfeit the entire amount of $5,000.

It is obvious that the sum pledged by Gihan was small relative to the other two sureties, but that is hardly compelling authority for the proposition that all sureties pledging $5,000 or less should invariably face full forfeiture because their pledges are considered to be relatively small sums.

[25] I return now to the general principles arising from *Mizra*.

[26] Sureties are expected to supervise the accused (para. 48).

[27] Courts must not be so inflexible in the exercise of their discretion that reasonable sureties are discouraged from coming forward (para. 48).

[28] Courts in Canada have adopted a broad discretionary approach, referring to a number of factors, in considering whether to relieve against forfeiture (para. 42). The Ontario Court of Appeal in *Mizra* set out a non-exhaustive list of factors that the judge should take into account in exercising this discretion. Not all of these factors will be of equal relevancy or weight in all cases (para. 51):

1. the relationship between the accused and the surety;
2. the amount of the recognizance;
3. the surety's means;
4. the circumstances under which the surety entered into the recognizance (especially whether there was any duress or coercion);
5. the diligence of the surety;
6. any significant change in the surety's financial position after the recognizance was entered into, and especially after the breach; and
7. the surety's post-breach conduct, especially attempts to assist the authorities in locating the accused.

[29] In *R.* v. *Norman,* 2014 ONSC 2005, ("*Norman*"), Trotter J. (now Trotter J.A. and the author of *The Law of Bail in Canada*,3rd ed., looseleaf (Toronto: Carswell, 2010)) observed that *Mirza* was an absconding case and that the Ontario Court of Appeal did not discuss the principles applicable to other types of bail breaches. He also talked briefly about the history of law in this area.:

> 21 As noted above, *Mirza* was an absconding case. The Court of Appeal did not discuss the principles applicable to

> other types of bail breaches. In fact, little has been written about forfeiture in these circumstances. This is not surprising because, at common law, a surety was not liable to forfeiture for breaches of conditions designed to secure the accused person's good conduct while on bail. Indeed, in England and Wales, sureties are only responsible for ensuring that the accused person attends in court as required: see *Bail Act*, *1976* (U.K.), 1976, c. 63. In other words, in England and Wales, there is no such thing as a surety for good behaviour: see C. Chatterton, *Bail: Law and Practice* (London: Butterworths, 1986), p. 108.
>
> 22 Canadian law took a different path and sureties are now required to supervise compliance with all of the conditions of release. This is made clear by the wording of Form 32 (Recognizance) of the *Criminal Code.* Among other conditions, sureties are often tasked with ensuring that accused persons attend treatment, observe curfews and be subject to house arrest. Conditions of this type are imposed in order to address primary, secondary and tertiary concerns while the accused person is on release.
>
> 23 Categorically, one type of condition is no more important than any other. It will depend on the circumstances. Historically, attendance in court was the dominant focus of Anglo-Canadian bail law. When an accused person fails to attend his or her trial, public confidence in the administration of justice is undermined. However, other conditions may be just as important, especially those that are put in place to protect specific individuals (*i.e.*, non-communication conditions) or the public at large (*i.e.*, firearms and weapons prohibitions and house arrest conditions). (my emphasis)

[30] In *Romania*, cited above, Speyer J. picked up on this theme of ensuring the accused's attendance in court as being one of a surety's primary responsibilities:

> 26 Without in any way diminishing the importance of a surety supervising and attempting to enforce an accused's conditions of bail other than attendance in court, the primary responsibility is ensuring an accused's attendance in court. Absconding is more serious than most, if not all, other breaches of recognizance. The extent of a surety's liability when the breach concerns curfew violations and residency requirements may well be mitigated by the diligence exhibited by the surety **in the context of what can be**

> **reasonably expected**. That said, an important counterbalancing consideration is to ensure there is not an over emphasis on a surety's lack of fault. Such overemphasis could adversely impact the effectiveness of the bail system. (See paragraph 41 of *Horvath and Mirza*). (my emphasis)

Additional Considerations Unique to the Yukon Bail System

[31] There are currently more legally innocent people in Canada's jails than there are in custody serving a sentence. This alarming fact was set out in a report from the Canadian Civil Liberties Association ("CCLA") and Education Trust, dated July 2014, entitled *Set Up to Fail: Bail and the Revolving Door of Pre-trial Detention*. At p. 11 of the report, the authors state:

> The *Canadian Charter of Rights and Freedoms…* constitutionally guarantees individuals' right to be presumed innocent, right to reasonable bail, right to equality, right to be free from arbitrary detention and right not to be deprived of our liberty except in accordance with the principles of fundamental justice. The *Criminal Code* sets out a presumption that accused should be released without conditions while awaiting trial. Yet, for the past 30 years, the remand population has grown at an alarming rate. Today there are more legally innocent people in Canada's provincial and territorial jails than there are people in custody serving a sentence post-conviction…

[32] Deputy Territorial Court Judge Lilles referred to this report in *R* v. *Schab*, 2016 YKTC 69, while noting that the bail system can also disproportionately adversely affect those suffering from poverty, addiction and mental illness, particularly in the Yukon, which has the third highest remand rate in the country:

> 24 The Canadian Civil Liberties Association ("CCLA") published a report in July 2014 entitled *Set Up to Fail: Bail and the Revolving Door of Pre-trial Detention*. In addition to concluding that the bail system is risk-averse, the CCLA found that it also disproportionately penalizes poverty, addiction, and mental illness, including those suffering from

> Fetal Alcohol Spectrum Disorder, by imposing release conditions that are difficult if not impossible for individuals with these issues to meet. Invariably and predictably, criminal charges for breach of bail follow and, as a result of the breach, diminished prospects for release not only for the current charge but also for any future charge. Too often the activity that resulted in the breach would not have been illegal or a crime but for the fact that it was a condition of the offender's bail.
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> 25 The CCLA report included statistics showing that the Yukon has the third-highest remand rate in the country, after the Northwest Territories and Nunavut, with 166 remand inmates per 100,000 population. This is notably higher than the national average of 39. (my emphasis)

[33] In *R* v. *Ipeelee*, 2012 SCC 13, the Supreme Court of Canada recognized that poverty and other incidents of social marginalization, which arguably would include addictions, are often present in the lives of Aboriginal people due to the legacy of colonialism (para. 77):

> …The overwhelming message emanating from the various reports and commissions on Aboriginal peoples' involvement in the criminal justice system is that current levels of criminality are intimately tied to the legacy of colonialism (see, e.g., RCAP, at p. 309). As Professor Carter puts it, "poverty and other incidents of social marginalization may not be unique, but how people get there is. No one's history in this country compares to Aboriginal people's" (M. Carter, "Of Fairness and Faulkner" (2002), 65 Sask. L. Rev. 63, at p. 71). Furthermore, there is nothing in the *Gladue* decision which would indicate that background and systemic factors should not also be taken into account for other, non-Aboriginal offenders. Quite the opposite. Cory and Iacobucci JJ. specifically state, at para. 69, in *Gladue*, that "background and systemic factors will also be of importance for a judge in sentencing a non-aboriginal offender". (my emphasis)

Furthermore, courts have now been directed by *Ipeellee* to take judicial notice of such matters as the history of colonialism and residential schools and how that has resulted in higher rates of substance abuse and incarceration for Aboriginal Peoples:

> 60 Courts have, at times, been hesitant to take judicial notice of the systemic and background factors affecting Aboriginal people in Canadian society (see, e.g., *R. v. Laliberte*, 2000 SKCA 27, 189 Sask. R. 190). To be clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples… (my emphasis)

[34] In *R. v. Omeasoo*, 2013 ABPC 328, Rosborough J. also touched on the prevalence of alcoholism amongst Aboriginal populations and how this can result in a disproportionate effect on those populations for justice system participants (i.e. including the accused and sureties) in the bail and sentencing processes:

> 25 Alcoholism is a health concern in Canada. Amongst aboriginal populations that concern is elevated and, in some instances, acute. Its existence places added obligations upon justice system participants in order to ameliorate the disproportionately high rates of incarceration of aboriginal offenders both at the bail and sentencing stages… And sentencing for the offence of breaching an 'abstention clause' is another area in which that obligation should be recognized. (my emphasis)

[35] In the Yukon, a disproportionate number of admissions to WCC are Indigenous people. According to a report from the Yukon Department of Justice in 2017, 64% of the total admissions to WCC between April 1, 2016 and December 31, 2016 were identified as First Nations.[2]

[36] Further, according to the July 2014 CCLA report I just referred to, contrary to the rest of Canada, where the most common form of release is on an accused's own

[2] *Corrections Statistics, Whitehorse Correctional Centre, 3rd Quarter Report, April 16, 2016 to December 31, 2016.*

recognizance, in the Yukon, the majority of individuals released (57%) have had a surety requirement (p. 101).

ANALYSIS

[37] When courts impose the requirement of a surety in conjunction with strict conditions, that can give rise to particularly harsh consequences for vulnerable and marginalized Aboriginal people. As a result, consideration of the historical causes for overrepresentation of First Nations people in the judicial system, and the prevalence of addiction, must be integrated into every step of the judicial process. Furthermore, in a jurisdiction where sureties are such an integral part of the bail system that the majority of the accused are not released unless they can find a surety, defaulting to full forfeiture in every case, on the basis that relatively small sums are involved, could have an adverse effect on the bail system as a whole by discouraging sureties from coming forward, as well as having a disproportionate impact on First Nations people.

[38] The offender, Alicia Murphy, is a member of the Champagne and Aishihik First Nations and the Carcross/Tagish First Nation. Her mother, Joanne Murphy, is Métis by birth and was adopted into an Aboriginal family in Haines Junction. The offender's biological father committed suicide when she was a baby. She understands that he was suffering from severe addictions at the time. He was a member of the Champagne and Ashihik First Nations. Her mother was in a relationship with Patrick James from when Alicia was about one until she was about five years old, however Patrick has continued to be a father figure for Alicia for her entire life.[3]

[39] I understand it to be an accepted fact that the offender is an alcoholic and has also abused drugs.

[3] Affidavit of Alicia Murphy, sworn June 25, 2014.

[40] The breach of recognizance offences which she committed on September 28, 2014 were for failing to abstain from alcohol and failing to remain in her residence. The breaches she committed on June 11, 2015 were similarly for not abstaining from alcohol and for not keeping the peace and being of good behaviour. As noted by Lilles J. in *R* v. *Schab,* quoted above, arguably none of those activities would have been illegal but for the fact that they were subject to conditions of the offender's bail: certainly the two offences of failing to abstain would not have been illegal.

[41] Further, there was no additional substantive offence committed by the offender on either occasion.

[42] The offender's father, Patrick James, is a member of the Carcross/Tagish First Nation. He deposed that he was forced away from his parents into residential school when he was almost 10 years old. Mr. James attended the residential school in Carcross for six years. He has deposed that everyone in his family has suffered a great deal from the effects of residential school and that Alicia has suffered from gaps in his parenting. Mr. James also spoke about the abuse he suffered and the abuse that was suffered by his family and his community.[4]

[43] In explaining his understanding of his role as a surety, Mr. James deposed:

> … I understand that if I do not fulfill my role as a surety, and report Alicia if she breaches any terms of her recognizance, that I could lose my pledge. I understand the importance of my role as a surety before the Court, and I would report Alicia if she were to breach any term. I trust that she will not breach, but I am ready to report her in the event that was to occur. (my emphasis)

[44] Mr. James pledged $5,000 as a surety. At the time he did so, he had savings of about $11,000 and an approximate annual income of $65,000, based on full-time

[4] Affidavit of Patrick James, sworn June 24, 2014.

employment. At the time of the estreatment hearing, Mr. James savings had been reduced to about $1,400 or $1,500. He explained that he had spent a lot of his savings supporting the offender during the time when she was released from custody from late 2014 to mid-2015. He is now suffering from health problems and has only been able to work part-time, accordingly his annual income has been reduced to between $14,400 and $15,600 ($1,200-$1,300 per month). He has deposed that if he had to pay the full $5,000 pledge, it would bankrupt him.[5]

[45] At the time the offender was released from custody pursuant to the amended recognizance, Mr. James was in a common-law relationship with Cindy Chiasson. During the week, he lived and worked in Carcross, however he would come to Whitehorse for the weekends and spent time with Ms. Chiasson and Alicia. He would also stay in touch with the offender during the week by phoning and texting her.

[46] Joanne Murphy is the offender's biological mother. She is Métis by birth and her adoptive parents are from the Champagne and Aishihik First Nations. She deposed that Alicia had a difficult childhood. Ms. Murphy said that Alicia's biological father died of a gunshot wound and that left her as a single parent before and after her relationship with Patrick James. Ms. Murphy deposed that her daughters were often in the care of child protection due to many issues she had with her history of trauma and addictions.[6]

[47] Joanne Murphy pledged $3,000 as a surety. At that time, she had approximately $2,000 in savings and equity in her home, which she then shared with a common-law partner. At the time of the estreatment hearing, Ms. Murphy had spent more than $40,000 in legal fees, going through separation proceedings with her common-law

[5] Affidavit of Patrick James, sworn March 17, 2017.
[6] Affidavit of Joanne Murphy, sworn June 24, 2014.

partner. She no longer has any savings, although she continues to have full-time seasonal employment with the Yukon Government.

[48] In explaining her role as a surety, Ms. Murphy deposed:

> …I am very frugal with money and I would have absolutely no hesitation reporting Alicia to the police if she were to breach a term of her bail… (my emphasis)

[49] While the offender was on release pursuant to the amended recognizance, Joanne Murphy was residing at her home in the Mendenhall subdivision, about a 45-minute drive west of Whitehorse. Furthermore, from May to approximately October, she would have been working during the day with the Yukon Government. Accordingly, she would see the offender when she came down to visit other family or when the offender came up to her home in Mendenhall.

[50] During the period from 2014 to 2015, Joanne Murphy also experienced a number of difficulties in her life which she described as “overwhelming”, including the death of her father, her mother being diagnosed with cancer, and her separation proceedings.

[51] Shawna Murphy is the offender’s younger sister. She pledged the sum of $1,300. At that time she had an RRSP in that amount. She was then living with her fiancé and an 18-month-old son. In addition, Shawna Murphy had custody of Alicia’s Murphy’s two sons, then aged seven and two. She was 20 years old at the time.

[52] In explaining her understanding of her role as a surety, Shawna Murphy deposed:

> …I understand the importance of my role as a surety before the Court, and I would report Alicia if she were to breach any term. I love my sister and I am very close to her, but I care about my reputation and my finances, and I would definitely report Alicia even if I suspected there was a problem with her following her conditions.… (my emphasis)

[53] During the offender's release on the original and amended recognizance, she would often spend time with Shawna Murphy at her home during the day, while Cindy Chiasson was working. Shawna Murphy also testified that she would stay in touch with her Alicia on a daily basis by calling her on the phone or texting.

[54] Shawna Murphy is currently unemployed. She is a stay-at-home mom raising three children. Her husband is employed seasonally and relies upon employment insurance for the winter. She deposed that the couple incurred extra expenses in the summer of 2016, mainly due to vehicles breaking down. Shawna Murphy says that she can no longer afford to pay $1,300 and, if she has to, that it would "financially devastate" her family. [7]

[55] Cindy Chiasson is the former common-law partner of the offender's father, Mr. James. She pledged $3,000 as a surety. At that time she had an RRSP in that amount. However, she had to cash in her RRSP last year so that she could fly home to New Brunswick for her mother's death. She no longer has any savings from which she can pay her pledge.

[56] In explaining her understanding of her role as a surety, Ms. Chiasson deposed:

> …I understand that if I do not fulfill my role as a surety, and report Alicia if she breaches any terms of her recognizance, that I could lose my pledge. I understand the importance of my role as a surety before the Court, and I would report Alicia if she were to breach any term. I trust that she will not breach, but I am ready to report her in the event that was to occur… (my emphasis)

[57] During the offender's release on the amended recognizance, Ms. Chiasson would usually spend time with the offender at her home in the evenings and on weekends, because she was required to leave the home during the day to go to work.

[7] Affidavit of Shawna Murphy, sworn March 16, 2017.

[58] On the occasion of the first breach in September 2014, Ms. Chiasson had been ill in bed with pneumonia and had fallen asleep just before the offender left her residence to go to the Barracks apartment building.

[59] Following the breach, Ms. Chiasson was no longer willing to have Alicia Murphy reside at her home, because she had explained to the accused earlier on that this was a "one-time thing", and that there would be no second chances.

[60] Although Ms. Chiasson continues to have the same full-time employment she did at the time of the original bail hearing, her annual income is modest, about $56,000, and she continues to be the sole caregiver for her three teenage grandchildren.

[61] There is no evidence that any of the sureties had any particular reason to suspect that the offender was going to commit either breach. On the contrary, all thought the offender was doing very well in complying with her release conditions. Further, their views in this regard were apparently corroborated by the actions of the offender's bail supervisor. According to the evidence of Ms. Cunningham, the bail supervisor thought that Alicia Murphy was doing well enough to reside on her own after her release from custody in mid-December 2014. In addition, the fact that the Crown consented to Ms. Murphy' s continued release on the terms of the amended recognizance, on April 13, 2015, is also evidence that she appeared to be doing well at that time.

[62] It also appears from the evidence that both of the breaches were due to alcoholic "slips", which almost by definition are notoriously hard to predict with any given alcoholic. I have also already observed that but for the fact that there was a condition to

abstain from alcohol on the amended recognizance, it is likely that neither event would have resulted in a criminal charge.

[63] As well, it is important to observe here that, in each case, the sureties' understanding of their role focused on "reporting" Alicia in the event of a breach. This is understandable and reasonable. While it is also the law that they had a duty to supervise the accused/offender, the sureties were not expected to be prescient about when the offender was likely to breach.

[64] Further, the offender was taken into custody following each breach, and I understand that each of the sureties was aware of this. Accordingly, there was no need for them to report the offender to the authorities, as the matter was already in hand.

[65] In his cross-examination of Ms. Chiasson, Crown Counsel suggested that she should have had one of the other sureties over to her residence when she became ill with pneumonia. In retrospect, which is always 20/20 vision, that may well have been a good idea. However, the standard to be expected of sureties is not one of perfection, but rather "what can be reasonably expected".[8]

[66] Another issue arose during the estreatment hearing and, because a good deal of time was taken to address it, I will touch on it briefly here. The issue is whether the sureties were aware that they were continuing to act in that role after the Crown consented, on April 13, 2015, that Alicia Murphy could continue to be released on the terms of the amended recognizance. In effect, what happened there was that the amended recognizance had been suspended during the period of the conditional stay of proceedings of the second degree murder charge. However, when I lifted the stay of proceedings, defence counsel persuaded me that the amended recognizance, which

[8] *Romania*, cited above, at para. 26.

had not been cancelled in the meantime, continued to be in force. The Crown presumably agreed with that position when it indicated its consent on April 13, 2015. However, the evidence was less than clear about whether the sureties were informed of this fact, and were aware that they continued to be potentially liable for any breaches under the amended recognizance after that point in time. Accordingly, I directed that Ms. Cunningham attend on the second day of the estreatment hearing. She did so and was cross-examined by the Crown. Just prior to that cross-examination, counsel and I were able to listen to a digital audio recording of the proceedings on April 8, 2015, at which time Ms. Cunningham indicated to the court, twice, that she had spoken to all of the sureties and that they were willing to be sureties until the following Monday, when she was expecting to go into a contested bail hearing. Ms. Cunningham confirmed in her testimony that she had indeed spoken with all of the sureties and asked them if they wanted to be in that role “again”.

[67] One of the reasons this became a live issue is because two of the sureties, Patrick James and Cindy Chiasson, could not recall clearly in their testimony at the estreatment hearing whether they had agreed to act as sureties after April 13, 2015. Shawna Murphy was relatively clear that she had agreed to do so. Joanne Murphy was less so, but did not deny that she had agreed to act in that role a second time.

[68] I am satisfied both from the digital recording of April 8, 2015 and from Ms. Cunningham’s testimony that she did speak with the sureties about them continuing to serve in that capacity before and after April 8th.

[69] I attribute the poor memories of Patrick James, Cindy Chiasson and Joanne Murphy to the passage of over two years since those events.

[70] One final issue which arose during the estreatment hearing was the passage of time between the dates of the respective breaches and bringing the matters forward to seek forfeiture of the amounts pledged.

[71] In the case of the second breach committed on June 11, 2015, there were some bureaucratic errors for the delay which the Crown has satisfactorily explained.[9]

[72] However, there appears to be no explanation for the delay following the first breach on September 28, 2014. I appreciate that there is no limitation period relating to estreatment proceedings under ss. 770 and 771 of the *Criminal Code.*[10] I can also understand why the Crown, after the second breach, wanted to bring both breaches together to be dealt with at the same hearing, as the same sureties were involved. However, that does not explain why the Crown took no steps to seek forfeiture between September 28, 2014 and June 11, 2015. Had the Crown acted in a more timely fashion in that regard, I gather from what I have heard from the sureties in this hearing, there likely would have been less of an argument that they could not afford to pay. However, with the significant passage of time, their financial circumstances have changed for the worse, to the point where they are each claiming that it would be a hardship if full forfeiture is ordered, particularly if they are required to pay the maximum amount of their respective pledges for each breach.

[73] *Nayally*, cited above, is a case with some similarities to the case at bar. First of all, it is a northern case from the Northwest Territories. Secondly, the amounts pledged by the accused ($3,000 cash deposit) and his two sureties ($1,000 each, no deposit) were similar to those in the case at bar. Thirdly, there was an unexplained delay

[9] Affidavit of Amanda Bornhuse, sworn May 30, 2017.
[10] *Canada (Attorney General) v. Nayally*, 2012 NWTSC 56, at para. 37.

between the date of the breach (September 28, 2010) and the estreatment hearing (July 9, 2012). Fourthly, the breach of recognizance was for failing to abstain from the consumption of alcohol.

[74] Charbonneau J. emphasized the importance of upholding the pull of bail, as follows:

> 31 In my view, the central consideration in this matter is the importance of upholding the bail system. This is sometimes referred to as upholding the "pull of bail". It must be made clear to anyone offering a cash deposit in support of an application for release that there will be consequences in the event that the conditions are not complied with, beyond the possibility of facing a breach charge. The same applies to the sureties: it must be made clear to anyone agreeing to act as a surety that it is a serious commitment, and one that can potentially carry serious consequences in the event of a breach. Without such consequences, having accused persons enter into Recognizances and having people sign on to act as sureties is meaningless, and seriously undermines the bail system as a whole. (my emphasis)

[75] However, Charbonneau J. also focused on the nature of the breach as a factor on whether the sureties should be released from forfeiture, stressing, as did Trotter J. in *Norman*, cited above, stressing that a breach for failing to appear at trial is considered to be more serious than other breaches:

> …[T]he nature of the breach is also a factor. If the breach has serious consequences, it is all the more reason for the Court to be concerned about the bail system being undermined. For example, if a person who is bound by a recognizance fails to appear at their trial, such that resources are wasted and witnesses are inconvenienced, the concern about upholding the bail process through forfeiture is highlighted. The same is true if the breach is associated with further criminal activity. (my emphasis)

[76] In the result in *Nayally*, Charbonneau J. determined that it was necessary that there be a forfeiture order to uphold the integrity of the bail system. However, having regard to the whole of the circumstances, she decided that full forfeiture was not necessary to achieve that objective (para. 42).

[77] I am cognizant of the fact that the original substantive charge in the case at bar was originally one of the most serious in the *Criminal Code*, i.e. second-degree murder. Further, as there were allegations that the accused/offender was under the influence of alcohol and/or drugs at the time of the killing, the abstain from alcohol condition in the amended recognizance was no doubt intended to protect the public. Sureties coming forward to assist an accused charged for such a serious crime must be aware that it is a serious commitment and one that can potentially carry serious consequences in the event of a breach. I believe that was the case here, as several of the sureties indicated in their evidence that they expected the Crown would come after them for their pledges after the first breach. However, when no action was taken for so long, they naturally began to think that they were no longer liable for estreatment.

[78] I take all of the circumstances into account, including:

- the *Ipeelee* factors likely giving rise to the offender's alcoholism in the first place;
- the fact that both breaches were principally for failing to abstain from consuming alcohol, which in and of itself is not an illegal act;
- the fact that neither breach resulted in or was associated with further criminal activity;
- the fact that the accused/offender was, by all accounts, doing very well on her release conditions just prior to each of the breaches;

- conversely, none of the sureties had any particular reason to believe that the accused/offender was about to breach;
- although each of the sureties was very much aware of their duty to report the accused/offender in the event of a breach, there was no need to do so in this case because she was jailed immediately after each occasion;
- there have been significant adverse changes in the financial positions of each surety after the amended recognizance was entered into;
- there has been unexplained and unacceptable delay in the Crown seeking forfeiture from the first breach; and
- the means of each surety are modest, to say the very least.

[79] Accordingly, I order the following:

1. Patrick James, who still has some savings and some ability to earn an income, shall pay $2,500 for both breaches, which is one-half of his one-time pledge;
2. Joanne Murphy, who has a small amount of financing available to her on her line of credit and who also has continuing annual income, shall pay $1,500 for both breaches, which is also one-half of her one-time pledge;
3. With respect to Cindy Chiasson and Shawna Murphy, there will be no forfeiture order, as I am not persuaded that either has the means to pay at the present time. Further, Ms. Chiasson, in particular, originally opened her home to the accused/offender. As well, Shawna Murphy took on the added responsibility of the custody of Alicia Murphy's two children. Thus, it was these sureties who initially were doing the heavy lifting of supervising

the accused/offender on more or less a daily basis. They should be credited for that effort.

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GOWER J.