SUPREME COURT OF YUKON

Citation: *H.M.Q.* v. *Murphy*, 2014 YKSC 37

Date: 20140703
S.C. No. 08-01518A
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

Respondent

And

ALICIA ANN MURPHY

Applicant

A publication ban pursuant to s. 517(1) of the *Criminal Code* has lapsed.

Before: Mr. Justice L.F. Gower

Appearances:

Noel Sinclair — Counsel for the Respondent
Jennifer Cunningham — Counsel for the Applicant

REASONS FOR JUDGMENT

INTRODUCTION

[1] Gower J. (Oral) This is an application by the accused for her release from custody pending her trial on a charge that she committed the second-degree murder of Evangeline Billy in Whitehorse on June 22, 2008. The application is made pursuant to s. 522 of the *Criminal Code*, R.S.C. 1985, c. C-46, (the "*Code*"), and the accused bears the onus to convince this Court on a balance of probabilities that her continued detention is not justified under s. 515(10) of the *Code*. Pursuant to paragraphs (a), (b) and (c) of s. 515(10), the accused must show that her detention is not necessary: (a) to ensure her

attendance in court; (b) for the protection or safety of the public; and (c); in order to maintain confidence in the administration of justice. These are commonly referred to as the primary, secondary and tertiary grounds.

[2] The Crown concedes that there is no issue on the primary ground. However, the Crown opposes the accused's release on both the secondary and tertiary grounds.

[3] The accused was arrested on the second-degree murder charge on June 23, 2008. She was tried on that charge before this Court sitting with a jury between October 13 and 27, 2009. The jury returned a verdict of guilty. The accused appealed her conviction. On June 11, 2014, the appeal was allowed and a new trial was ordered.

ALLEGATIONS

[4] The Crown alleges that on June 22, 2008, the accused killed the deceased by striking her in the head with a rock and then drowning her in the Yukon River. The Crown also alleges that the accused partially undressed the deceased to make it appear as if she had been sexually assaulted. The accused and the deceased were acquaintances. The Crown's case rests primarily on the evidence of the accused's sister, Tanya Murphy, and another acquaintance, Rae Lynne Gartner, both of whom are expected to testify that the accused admitted to killing the deceased and trying to stage a sexual assault.

[5] As noted by the Court of Appeal, cited at *R. v. Murphy*, 2014 YKCA 7, the accused testified at the first trial that she had nothing to do with the killing and she denied making the admissions attributed to her. She offered an account of her whereabouts on the night of the killing that was corroborated by independent witnesses, with the exception of a period of two hours that she said she spent in the apartment of a drug dealer and then in

her own apartment. The drug dealer died before the trial. The Crown got notice of the alibi after it was too late to investigate and argued to the jury that the alibi was false.

[6] Defence counsel stresses that there is no forensic evidence to connect the accused with the scene of the crime. She also submitted that the credibility of Tanya Murphy and Rae Lynne Gartner will be a central issue at the new trial. Defence counsel says that both women had been drinking and consuming drugs over June 21 to 22, 2008. Counsel also expects to present new evidence in relation to the alibi to explain when and how the accused disclosed the alibi to her former counsel, so as to avoid the adverse inference that was drawn at the first trial.

[7] All this will have to await the trial, however it is potentially relevant to my assessment of the strength of the Crown's case.

SECONDARY GROUND

[8] On the secondary ground, the Crown submits that there is a substantial likelihood that the accused will, if released from custody, commit a criminal offence or interfere with the administration of justice, and that her detention is necessary for the protection or safety of the public. At the time of the alleged offence, the accused was on a recognizance awaiting charges of assault with a weapon and mischief. These charges arose in 2007, when the accused stabbed her then-common-law partner with a knife. The accused was convicted and sentenced on those charges at the same time that she was sentenced to life imprisonment for the murder. She received sentences of one year concurrent and one day concurrent respectively.

[9] Although the accused also has a conviction for assaulting a peace officer from 1998 and a common assault in 1996, the Crown made no particular mention of these at

this bail hearing. I assume that is because the charges are fairly dated and appear to have been relatively minor.

[10] The Crown also relies on a history of the accused's conduct while in custody for the current offence. This was provided by her Parole Officer, Tanya Connolly, in two memoranda dated June 25 and 27, 2014. Ms. Connolly reported the following:

- On December 19, 2009, while still in custody at the Whitehorse Correctional Center, the accused assaulted a Correctional Officer by stabbing him in the arm and threatening to do so in the neck. The Crown explained that the injury to the Officer was fortunately limited to a scratch. Defence counsel further explained that the incident was preceded by three Correctional Officers coming into her cell to confront her about something. The Crown felt it was not in the public interest to charge the accused for this incident.
- On May 7, 2010, the accused was placed into segregation due to a physical altercation with another inmate.
- On November 2, 2010, the accused was placed into segregation due to a verbal altercation with staff.
- On August 26, 2011, the accused was placed into segregation as a result of delivering a letter to an inmate on behalf of another inmate, which contained threats and implied intimidation. Defence counsel explained that the accused had not read the letter and was unaware of its contents.
- On February 9, 2012, the accused was placed into segregation for assaulting another inmate by holding the victim's throat and continuing to hit her in the head. She took full responsibility for her actions and expressed remorse. Defence counsel added that she also pursued mediation with the victim and restored the relationship with her.
- On February 23, 2012, the accused was reclassified to medium security.
- On January 9, March 17, and April 4, 2014, the accused received what Ms. Connolly referred to as "serious charges" for refusing to provide samples for urinalysis.

[11] The Crown also notes that the Correctional Service performed a security level assessment of the accused on April 17, 2014, which indicated that the accused continues to be assessed as a medium security inmate with the following ratings: Institutional Adjustment - moderate; Escape Risk - moderate; and Public Safety - high.

[12] Ms. Connolly's report of June 25, 2014 goes on to state that the accused has not been willing to discuss the index offence due to the appeal process, but has voluntarily participated in a number of programs at the penitentiary. In particular she quoted from a report, dated June 15, 2014, on the accused's progress in a Dialectical Behaviour Therapy (DBT) program, as follows:

> "… Ms. Murphy responds well to the structure and philosophy of DBT. It is noted that she made gains in her understanding of herself and others each time she participated in therapy…. Ms. Murphy is an intelligent woman who easily comprehends the academic and cognitive components of the therapy.
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> …
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> …Ms. Murphy said that she is easily bored and has a low tolerance for repetition, so found practicing mindfulness exercises very difficult. Over time, she has improved her control over her attention and is now often able to experience anger and embarrassment without needing to act on them….
>
> Throughout her various attempts at DBT, Ms. Murphy has made a lot of progress and worked hard to incorporate positive changes into her life."

[13] Ms. Connolly also noted that the accused has been employed with Food Services, in the penitentiary, who reports that "she is hard-working with no behavioural concerns." Further, the most up-to-date Psychological Risk Assessment was dated November 29, 2011, and identified the accused as a "moderate risk to re-offend". Finally, Ms. Connolly notes that the accused's behaviour has improved over the course of her incarceration.

[14] In her memo of June 27, 2014, Ms. Connolly stated that, due to the appeal process, the accused has been unwilling to complete the correctional programs identified on her Correctional Plan. However, Ms. Connolly notes that the accused has completed

the pre-requisite program entitled “Aboriginal Women’s Engagement Program”, which is necessary to pursue two subsequent programs. Ms. Connolly says these programs are meant to reduce an inmate’s “overall risk to re-offend generally and/or violently.” With respect to the urinalysis issue, Ms. Connolly said this:

> “In relation to her willingness to participate in demand urinalysis testing it is noted she has recently struggled with compliance while in the institution as outlined in my previous submission. This is not to suggest she consistently refuses as evidenced by recorded negative random urinalysis results in 2011 and 2014.” (my emphasis)

[15] The Crown submitted that the three refusals by the accused to provide urine samples earlier this year is evidence contradicting the claim in her affidavit that she has been clean and sober for the last five years. Defence counsel submitted that, despite these three refusals, there is no evidence the accused has ever failed a urine test. Further, that the above statement by Ms. Connolly indicates that the three refusals are not evidence of a consistent pattern of refusal. Indeed, counsel agree that the accused has provided eight urinalysis samples while in the penitentiary, and none have tested positive for drugs or alcohol.

[16] The additional information provided by counsel this morning indicates that Ms. Connolly referred to these as “serious charges” apparently because that is how they are categorized under the *Corrections and Conditional Release Act*. Further, an inmate can be charged for “refusing” if they fail to provide a suitable sample (i.e. adequate volume and temperature during a two-hour period of supervision). The consequences of a failure to provide or a refusal can range from fines between five dollars and $45, or to segregation. On the January 9, 2014 incident, the accused failed provide a suitable sample within the two-hour time period, pled guilty, and was fined $15. On March 17,

2014, the accused refused to comply with a demand by a Corrections Officer who had reasonable grounds to believe that she had intoxicants in her body. These grounds were based upon observations by various staff of the accused's "odd, unusual behaviour" over a period of several days prior to the demand. Obviously, that does not equate to proof of consumption of intoxicants. In any event, she pled guilty and received a $15 fine. On April 4, 2014, the accused again refused to comply with a demand from an officer who had reasonable grounds. However, the details of what those grounds were are not available. Again, the accused pled guilty and received a fine of $15. The accused has never provided a sample which tested positive for substance use during her five years at the Fraser Valley Institution.

[17] I prefer the position of defence counsel on this point and infer from Ms. Connolly's statement in her memo on June 27, 2014, that the accused normally is cooperative in providing urine samples. In addition, as there is no evidence of failing any such tests, there is no evidence to contradict the accused's claim of sobriety.

[18] Section 515 (10)(b) of the *Criminal Code* states:

> "… the detention of an accused in custody is justified… where the detention is necessary for the protection or safety of the public, including any … witness to the offence, …having regard to all the circumstances including any substantial likelihood that the accused will, if released from custody, commit a criminal offence or interfere with the administration of justice…"

[19] Crown counsel submitted that there are few authorities interpreting the words "substantial likelihood" appearing in this paragraph. He relies upon one such authority from the Ontario Superior Court of Justice, *R. v. Young*, 2010 ONSC 4194, where Clark J., at para. 20, used the Concise Oxford Dictionary to interpret these words:

> "20 The word "substantial" is defined in the Concise Oxford Dictionary, [Oxford, Oxford University Press, 1964], in part, as follows: "having substance, actually existing, not illusory". The word "likelihood" is defined in the same source, in part, as "being likely". The word "likely" is defined, in part, as "such as might well happen". Therefore, so long as the prosecutor demonstrates that the applicant might well commit another offence if admitted to bail, such that the risk is real or tangible, and not simply fanciful or imaginary, she has met her burden." (my emphasis)

With respect to Clark J., "might well commit another offence" sounds like it is closer to the *possible* rather than the *probable* end of the spectrum. In the *Concise Oxford Dictionary of Current English*, 8th ed., the first definition of "likelihood" is "probability" and the first definition of "likely" is "probable". I am also of the view that the words "substantial likelihood", in this context, focus on the potential consequences if the accused is released from custody. Therefore, the definition of "probable consequence" in *Black's Law Dictionary*, 9th ed., is helpful here: "An effect or result that is more likely than not to follow its supposed cause." Thus, I prefer the view that, in a Crown onus situation, the prosecutor must demonstrate on a balance of probabilities that the accused will, if released from custody, more likely than not commit a criminal offence or interfere with the administration of justice. In a reverse onus situation, the accused must demonstrate the opposite, i.e. that it is not a probable consequence, in the sense described above, that they will do so if released.

[20] This suggested interpretation would seem to be more in keeping with what the Supreme Court said about these words in *R. v. Morales*, [1992] 3 S.C.R. 711, at para. 39:

> "39 I am satisfied that the scope of the public safety component of s. 515(10)(b) is sufficiently narrow to satisfy

> the first requirement under s. 11(e). Bail is not denied for all individuals who pose a risk of committing an offence or interfering with the administration of justice while on bail. Bail is denied only for those who pose a "substantial likelihood" of committing an offence or interfering with the administration of justice, and only where this "substantial likelihood" endangers "the protection or safety of the public". Moreover, detention is justified only when it is "necessary" for public safety. It is not justified where detention would merely be convenient or advantageous. Such grounds are sufficiently narrow to fulfil the first requirement of just cause under s. 11(e).”

[21] The Crown submitted that there is a substantial likelihood that the accused will commit a criminal offence or interfere with the administration of justice if she is released. One of the reasons initially put forward in support of this submission is that the three urinalysis refusals are evidence that the accused has not remained clean and sober for the last five years, as she claims. I have already rejected that argument above.

[22] Secondly, the Crown places significant weight on the fact that the accused was assessed as a “high” public safety risk in the assessment dated April 17, 2014. Defence counsel pointed to a copy of an earlier risk assessment done on the accused in 2012, which also addressed the issue of public safety. Although the accused was ultimately rated as a “high” risk with respect public safety, that report indicates that there was a dissenting opinion on the Correctional Intervention Board, and that her primary worker’s recommendation was for a “moderate” rating. It is also apparent from this document that one of the reasons leading to a “high” rating is if the offender has failed to take responsibility for her own offence. Obviously, as the accused has appealed her conviction, and now intends to plead not guilty at her further trial, her professed innocence works against that aspect of the methodology of the risk assessment. In any

event, the high risk assessment for public safety remains as one piece of objective evidence forming part of the overall circumstances to be considered. That said, it has to be placed in the context of the other evidence, including:

- my finding that the assertion by the accused that she has been clean and sober for the last five years is essentially uncontradicted;
- the fact that she was reported to be a hard worker with no behavioural concerns by Food Services;
- the fact that her 2011 psychological risk assessment rated her risk to re-offend as "moderate";
- the fact that her Parole Officer has described her behaviour as having improved since her initial incarceration, and that she has committed no internal assaults for almost 2 ½ years;
- the fact that her Parole Officer made particular mention of the positive progress the accused has made in her DBT program, as well as her completion of the prerequisite "Aboriginal Women's Engagement Program", which is one of a suite of programs meant to reduce the accused's overall risk to re-offend generally and/or violently; and
- the particulars of the accused's release plan, which I will return to shortly.

[23] The accused is Aboriginal. Counsel are agreed that one of my obligations on this bail hearing is to keep in mind the principles from *R. v. Gladue*, [1999] 1 S.C.R 688, and *R. v. Ipeelee*, 2012 SCC 13. Although these were sentencing cases, the requirement to examine the individual and systemic circumstances of an Aboriginal accused is equally

applicable when deciding whether or not to release on bail: see *R. v. Robinson*, 2009 ONCA 205, at para. 13; and *R. v. Magill*, 2013 YKTC 8, at paras. 23 to 31.

[24] As for the systemic factors, I can do no better than repeat what was said in *Ipeelee*, at paras. 60 and 67:

> "60 …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.…
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> …
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> 67 … judges can ensure that systemic factors do not lead inadvertently to discrimination in sentencing. Professor Quigley aptly describes how this occurs:
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> > Socioeconomic factors such as employment status, level of education, family situation, etc., appear on the surface as neutral criteria. They are considered as such by the legal system. Yet they can conceal an extremely strong bias in the sentencing process. Convicted persons with steady employment and stability in their lives, or at least prospects of the same, are much less likely to be sent to jail for offences that are borderline imprisonment offences. The unemployed, transients, the poorly educated are all better candidates for imprisonment. When the social, political and economic aspects of our society place Aboriginal people disproportionately within the ranks of the latter, our society literally sentences more of them to jail. This is systemic discrimination.
>
> (T. Quigley, "Some Issues in Sentencing of Aboriginal Offenders", in R. Gosse, J. Y. Henderson and R. Carter, eds., *Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice* (1994), 269, at pp. 275-76)"

[25] The concern about these socioeconomic factors leading to discriminatory treatment of an Aboriginal accused in a bail hearing was well described by Ruddy J. in *Magill*, at para. 26:

> "26 These socioeconomic factors play an equally, if not more important, role at the bail stage of a criminal charge. An accused with a poor employment record, substance abuse issues and an unstable family and community support network is more likely to be detained, even though these are the very results that flow from the Canadian history of colonialism, dislocation and residential schools. A judge has the obligation to evaluate the application of bail criteria to ensure that the result does not serve to perpetuate systemic racial discrimination."

[26] The individual circumstances of the accused are that she is 34-years-old and a member of the Champagne and Aishihik First Nations ("CAFN") and the Carcross Tagish First Nation ("CTFN"). Her mother, Joanne Murphy, is Métis by birth, but was adopted into a First Nations family in Haines Junction and is now a member of CAFN. The accused is very close to her adoptive grandparents. Her father, Patrick James, is a CTFN member and a residential school survivor. Although the accused's mother did not attend residential school, she grew up in Haines Junction, a community that suffers from the effects of residential school. The accused was periodically apprehended for child protection concerns and resided in foster homes in Whitehorse and Edmonton. She only attended school up to grade 11. Between the ages of 13 and 17, she was in a relationship with an older man, who abused her emotionally and physically. In retrospect the accused realizes she was taken advantage of by this man, who also introduced her to drugs and alcohol. She eventually became addicted to both. The accused has also experienced sexual abuse. She has only been employed very sporadically. At the time

of her arrest, the accused was relying on Social Assistance. Also at that time, her youngest child was nine months old and her oldest child was five years old. Today they are 6 ½ and 11 years old, and are being cared for by the accused's youngest sister, Shawna Murphy, in Whitehorse.

[27] The accused's father, Patrick James, is a proposed surety. He resides in Carcross during the workweek, but travels to Whitehorse on weekends to spend time with his significant other, Cindy Chiasson. His home in Carcross is drug-and alcohol-free. He deposed that he was in a relationship with the accused's mother, Joanne Murphy, from the time Alicia Murphy was six months old to the time she was about five years old. He has continued to act as a father to the accused to this day. He attended residential school in Carcross for six years and deposed that his family has suffered a great deal from the effects of residential school. He also deposed that the accused has suffered from his gaps in parenting and the abuse he suffered. Mr. James has no criminal record and is a former chief of CTFN and a former Grand Chief of the Tlingit Nation. He has experience with alcohol, drug and family counselling and has been a member on the National Parole Board. He some modest savings, an approximate annual income of $65,000, and is prepared to make a surety pledge of at least $5000.

[28] The accused's mother, Joanne Murphy, is also a proposed surety. She deposed that the accused had a difficult childhood. The accused's biological father died of a gunshot wound when she was a baby. Ms. Murphy was a single parent both before and after her relationship with Patrick James. She said that her daughters were often in the care of child protection services due to the many issues she had and her history of trauma and addictions. Ms. Murphy has since upgraded her education and obtained a

job with the Yukon Government. Ms. Murphy lives in a home in Mendenhall, which she and her significant other own. The house was valued for tax purposes at $90,000. Ms. Murphy has seasonal employment income of approximately $42,000 per year. She is willing to make a surety pledge of at least $3000. She deposed that her home and the home of her adoptive First Nations parents in Haines Junction are alcohol-and drug-free. Joanne Murphy is also close to the accused's children. She has been alcohol-free for many years and drug-free for over a decade.

[29] Cindy Chiasson is a third proposed surety. She has been in a relationship with Patrick James and has known the accused for about 20 years. Ms. Chiasson lives in Whitehorse with her three grandchildren, ages 13, 11 and 10. She has a bedroom for the accused at her home. Ms. Chiasson works from 8:30 AM to 4:30 PM Monday to Friday, but other than that spends most of her time at home with her family. She has an approximate annual income of $56,000. Patrick James comes to visit on weekends. Ms. Chiasson says that it is a condition of staying at her home that the accused not use drugs or alcohol. She deposed that she has a rule that nobody is allowed into her house if they are using any drugs or alcohol. Ms. Chiasson has no criminal record. She is prepared to make a surety pledge of at least $3000. Ms. Chiasson says she is close to the accused's children and also knows Joanne Murphy.

[30] Shawna Murphy is the accused's youngest sister and the fourth proposed surety. She is 25 years old and has been caring for the accused's children since 2009, as their legal guardian. She lives with her fiancé in the Riverdale subdivision of Whitehorse. About 18 months ago, Shawna Murphy gave birth to a son. Neither she nor her fiancé have a criminal record. Shawna Murphy has been a surety in the past and reported that

gentleman to the court registry for a suspected breach. She is presently unable to work outside the home due to the needs of her children. Shawna Murphy is therefore able and willing to monitor the accused Monday to Friday during the day, while Ms. Chiasson is at work. She also has an RRSP in the amount of $1300, and she is willing to make a surety pledge in that amount.

[31] Defence counsel submits that I should regard the accused's criminal record, as well as her history within the penitentiary, in the context of her Aboriginal background and the systemic *Gladue* and *Ipeelee* factors which have worked against her over the years.

[32] Defence counsel also made a number of submissions about the strength of the Crown's case, as that relates to both the secondary and tertiary grounds. In my view, nothing more needs to be said on that front. I am satisfied, on the basis of what I have heard thus far, that the Crown's case is not overwhelming.

[33] Defence counsel also stresses that the proposed release plan adequately meets any residual concerns regarding public safety on the secondary ground. The minimum components of the plan are as follows:

- the accused will reside in Cindy Chiasson's home, which is alcohol-and drug-free;
- Ms. Chiasson, Patrick James, Joanne Murphy and Shawna Murphy will each act as sureties, and will respectively pledge $3000, $5000, $3000 and $1300, for a total of $12,300;
- if the accused is permitted by her bail supervisor to attend the homes of Patrick James or Joanne Murphy, those residences will also be alcohol-and drug-free;
- the accused will attend any counselling directed by her bail supervisor;

- the accused will report to her bail supervisor and/or the RCMP, as directed;
- the accused will seek and maintain some form of employment, or volunteer work until she obtains employment (I note here that the accused has completed a professional cooking course in the penitentiary, which lasted a total of eight months, with six hours of programming per day. Thus, I would expect her prospects of employment to be relatively good);
- the accused will abstain from drugs and alcohol;
- the accused will consent to providing breath or urine samples to ensure compliance with the above; and
- the accused will have no contact with Tanya Murphy or Rae Lynne Gartner.

[34] Having regard to all the circumstances, including the proposed release plan, I am satisfied by the accused that her detention is not necessary for the protection or safety of the public and that there is no substantial likelihood that she will, if released from custody, commit a criminal offence or interfere with the administration of justice. Thus, the accused has met her onus on the secondary ground.

TERTIARY GROUND

[35] On the tertiary ground, under s. 515(10)(c) of the *Criminal Code*, the accused must persuade me on a balance of probabilities that her detention is not necessary to maintain confidence in the administration of justice, having regard to all the circumstances, including:

(i) the apparent strength of prosecution's case;

(ii) the gravity of the offence;

(iii) the circumstances surrounding the commission of the offence; and

(iv) the fact that the accused is liable, on conviction, for a potentially lengthy term of imprisonment.

[36] With respect to the strength of the prosecution's case, I have already determined that I do not view it as overwhelming.

[37] With respect to the gravity of the offence, obviously second degree murder is extremely grave.

[38] With respect to the circumstances of the offence, the Crown properly stressed that, according to its theory, this was not an attack on a stranger, or a crime committed on the spur of the moment in the heat of passion. Rather, the accused committed this crime upon an acquaintance, badly beat her, removed some of her clothing, and dragged her to the river bank and put her in the river where she drowned.

[39] As to punishment, the Crown says that second degree murder is punishable by a minimum term of life imprisonment. Defence counsel submitted in response that, if the accused is committed of the lesser included offence of manslaughter, considering that she has already served five years in custody, it is not necessarily a 'given' that she will face a lengthy term of imprisonment.

[40] Crown counsel also urges me to take all the circumstances into account, including those considered under the secondary ground, and I do so.

[41] The leading case on the tertiary ground is *R. v. Hall*, 2002 SCC 64. At para.41, McLachlin C.J., speaking for the majority spoke about the strict circumstances required for the application of the tertiary ground:

> "…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)"….
> (emphasis already added)

Further, at para. 31, McLachlin C.J. noted that the circumstances giving rise to this ground for bail denial "may not arise frequently".

[42] In *R. v. Bhullar*, 2005 BCCA 409, the British Columbia Court of Appeal suggested, at para. 66, that exceptional circumstances are required for the tertiary ground to be engaged:

> "66 Assuming an accused has shown that his detention is unnecessary under s. 515(10)(*a*) and (*b*), *Hall* anticipates that persons charged with very serious offences, including murder, will receive bail, unless there is a constellation of exceptional factors." (my emphasis)

[43] In *R. v. Laframboise*, (2005), 203 C.C.C. (3d) 492, the Ontario Court of Appeal echoed these remarks by stating, at para. 30, that, in light of what the Supreme Court said in *Hall*, "s. 515(10)(c) can only be used sparingly to deny bail."

[44] Cooper J., in *R. v. Nakashuk*, 2011 NUCJ 16, also stressed that the "reasonable person" referred to in *Hall* must have in mind the constitutional presumption of innocence and the right to reasonable bail. At paras. 32 and 34, she stated:

> "32 In considering the tertiary ground for detention, the Court must be mindful of the constitutional presumption of innocence and the right to reasonable bail. I must consider not only the four factors set out in section 515(10)(c) of the *Criminal Code*, but all of the circumstances of the alleged offence and the accused.
> …
>
> 34 The reasonable person understands and values the presumption of innocence. The reasonable person understands that the right to reasonable bail is necessary if the presumption of innocence is to have meaning." (my emphasis)

[45] The Crown submits that this is an extraordinary case with a constellation of exceptional factors, and thus meets the threshold for the application of the tertiary ground. I disagree. In my view, a reasonable member of the community would not likely conclude that it is necessary to detain the accused to maintain confidence in the administration of justice, assuming that reasonable person is apprised of all the circumstances here, including the *Gladue* and *Ipeelee* factors and the proposed release plan, and that such person is also cognizant that the right to reasonable bail is necessary if the presumption of innocence is to have any meaning.

CONCLUSION

[46] The accused shall be released on a recognizance with four sureties: Patrick James; Joanne Murphy; Shawna Murphy; and Cindy Chiasson. Each surety will pledge the following amount, but without the deposit of money or other valuable security:

- Patrick James - $5000

- Joanne Murphy - $3000
- Shawna Murphy - $1300
- Cindy Chiasson - $3000

The recognizance will also be subject to the following conditions:

1. The accused shall keep the peace and be of good behaviour and appear before the court when required to do so.
2. The accused shall report within 12 hours of her release from custody, in person, to a bail supervisor or the Royal Canadian Mounted Police (RCMP), and thereafter shall report as and when directed by the bail supervisor, and in any event not less than once per week, in person.
3. The accused shall reside at the residence of Cindy Chiasson in Whitehorse and shall not change her address without first obtaining the permission of her bail supervisor.
4. When first reporting to her bail supervisor, the accused shall provide her phone number and shall not change that phone number without first advising her bail supervisor.
5. The accused shall register the number of any cell phone or portable telecommunication device with her bail supervisor.
6. The accused shall obey all rules and regulations of her residence.
7. The accused shall remain within the Yukon, unless she has the prior written permission of her bail supervisor.

8. The accused shall remain within Cindy Chiasson's residence under house arrest, unless she has the prior written permission of her bail supervisor, for such purposes as:
    - Meetings with defence counsel;
    - Visiting with one of the sureties;
    - Volunteering;
    - Employment;
    - Attending counselling;
    - Shopping;
    - Education;
    - Medical or dental needs; or
    - Such other purpose as the bail supervisor may approve.
9. The accused shall present herself at the door of her residence when any peace officer or bail supervisor attends there for the purpose of determining her compliance with this order.
10. The accused shall respond personally and immediately to the phone when any peace officer or bail supervisor makes a phone call to her residence for the purpose of determining her compliance with this order.
11. The accused shall abstain absolutely from the possession or consumption of alcohol and controlled drugs and substances, except in accordance with a prescription given to her by a qualified medical practitioner.

12. The accused shall not enter any liquor store, bar, lounge or other business premise whose primary purpose is the sale of alcohol.
13. The accused shall not possess any pipe, syringe or other drug paraphernalia.
14. The accused shall provide samples of her breath or urine, for the purposes of analysis, upon demand by a peace officer who has reason to believe that she may have failed to comply with this order.
15. The accused shall make reasonable efforts to find and maintain suitable employment and provide her bail supervisor with all necessary details concerning her efforts.
16. The accused shall have no contact directly or indirectly or communication in any way with:
    - Tanya Murphy;
    - Rae Lynne Gartner;
    - Denise Pegg;
    - Jack Ollie;
    - Warren Edzerza;
    - Mercy Devillers;
    - Roz James;
    - Lynn Johns;
    - Leah Issac;
    - Lenore Minet;
    - Mohammed Abdullahi;

- Sally Nukon; and
- Scott James.

17. The accused shall take such alcohol, drug, psychological or other assessment, counselling and programming, as directed by her bail supervisor.
18. The accused shall take such alcohol, drug, psychological or other assessment, counselling and programming, as directed by her bail supervisor.
19. The accused shall provide her bail supervisor with consents to release information with regard to her participation in any programming, counselling, employment or educational activities that she has been directed to do by her bail supervisor.
20. The accused shall not possess any weapon as defined in section 2 of the *Criminal Code*.
21. The accused shall not possess any knife, except for the purposes of preparing or eating food.
22. At all times when the accused is outside of her residence, she shall carry with her a copy of this recognizance as well as a copy of any written permission provided to her by her bail supervisor.

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Gower J.