SUPREME COURT OF YUKON

Citation: *R v Jules*, 2016 YKSC 45

Date: 201600902
S.C. No. 15-00828
15-0856
Registry: Whitehorse

Between:

REGINA

And

LOREN JULES

Before Mr. Justice R.S. Veale

Appearances:
Paul Battin — Counsel for the Crown
Lynn McDiarmid — Counsel for the Defence

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by the Crown to review and revoke a judicial interim release order for Loren Jules made April 29, 2016, which released Mr. Jules for a treatment program and required him to surrender into custody on completion. It is also an application for judicial interim release pursuant to s. 521(8)(e) of the *Criminal Code*, as Mr. Jules is now in custody.

[2] I released Mr. Jules on strict bail conditions on July 20, 2016 and gave oral reasons for that decision at that time. I indicated that I would provide written reasons, however, that also addressed the issue of the lawfulness of the release condition that required Mr. Jules surrender into custody at a later date. The portion of these reasons that address the s. 521(8)(e) issue and whether or not I should detain or release

Mr. Jules pursuant to s. 515(10) of the *Criminal Code* is substantially the same as what I read in court, with only minor editorial adjustments.

BACKGROUND

[3] Loren Jules is charged with the following:

1. that on March 11, 2016, he assaulted Paul Bosely in Teslin, Yukon;
2. that on March 29, 2016, he committed an aggravated assault on Clinton Beattie in Whitehorse;
3. that he stole a necklace with violence from Clinton Beattie;
4. that during the above times he breached a probation order dated December 1, 2015, to keep the peace and be of good behaviour; and
5. that during the same time he breached the same probation order by possessing or consuming alcohol or a drug.

[4] At the outset of the judicial interim release hearing on April 28 and 29, 2016, Mr. Jules admitted a breach of the curfew in a Conditional Sentence Order of December 1, 2015. As the sentence portion of that order ended on or about March 26, 2016, the Court proceeded with the show cause on the new charges.

[5] On December 1, 2015, Loren Jules pled guilty to assault causing bodily harm and a common assault. He received a sentence of one year in jail for the assault causing bodily harm and a 3-month conditional sentence consecutive to the jail term for the assault. After receiving credit for his remand time, he served the remaining 39 days and was released on December 26, 2015.

[6] As to the new charges of assaulting Paul Bosely on March 11, 2016, the Crown alleges, and I take this essentially from the Transcript of the April 28 and 29 hearing:

> Loren got Paul by the scruff of the neck dragging him into one of the bedrooms, punched him in the head, kept holding him so he couldn't go, choked him out. Paul Bosely got out on the hallway where Loren Jules head butted him. They rolled down the stairs. Loren Jules got a hold of him again but Paul Bosely squirmed his way outdoors. Paul Bosely says he got a bloody nose and a fat lip from being head butted. He has a lump on the side of his head above his left ear. He thinks he got hit about 10 times with closed fists. He said the other individuals told Loren to leave him alone. He thinks Loren was drinking. He said that he didn't fight back but tried to get away. The RCMP reported that they saw some physical injuries which included dry blood on Paul Bosely's nose, a swollen lip and a bump on the right side of his head between his eye and his ear.

[7] As to the charges of March 29, 2016, the Crown alleges:

> That the RCMP in Whitehorse responded to several 911 calls reporting a group of First Nation males fighting in front of the Westmark Hotel. Reports indicated that one male possibly had a knife and another male was knocked out. Two officers arrived moments after and identified Clint Beattie laying on the ground near the entry to the Westmark. He was on his back, had a strong pulse, normal breath, no obvious signs of trauma.
>
> The RCMP were able to immediately review the video footage from inside of the lobby of the Westmark, where the camera points out towards the street. There is a video on the file which shows Loren Jules walking up to the doors of the Westmark Whitehorse, he starts to open the outside door and then two other individuals come up behind him and he turns around. The two individuals then face off, it appears they are squaring off for a physical confrontation. Mr. Jules then squares off towards them.
>
> Nico Helm is seen on the video pulling a knife out of his jeans' pocket, transferring the knife to his left hand and stepping in to punch Loren Jules with his non-knife hand but he appears to miss. Loren Jules then punches Mr. Helm and turns and punches Mr. Beattie in the face, knocking him to the ground. It appears that Mr. Beattie was knocked out from that single punch. He falls backwards on his back and is on the ground.

> Nico Helm then starts running away. And Mr. Jules can be seen on the video stepping towards Mr. Beattie who is apparently unconscious on the ground and stomping once on his head.
>
> One of the officers who was investigating was able to look at the number of different camera angles and security video and states that following Mr. Jules stomping on Mr. Beattie's head, with what the officer considers considerable force, Mr. Jules is seen grabbing a silver necklace from Mr. Beattie's neck, yanking on it and breaking it off his neck and taking it.

[8] The RCMP also allege that there was an odour of alcohol on Mr. Jules' breath.

[9] Mr. Jules' criminal record can be summarized as follows. Eleven prior convictions for violent offences including: a 1998 assault causing bodily harm; a 2002 aggravated assault; a number of common assaults; a 2006 assault causing bodily harm, with a 14-month conditional sentence order that he breached and served some time on and was then released again before the CSO was eventually terminated. Of course there is also the assault causing bodily harm from December 2015, as well as a number of breaches of bail and breaches of probation over the last few years.

[10] The Crown vigorously opposed Mr. Jules release at the hearing on April 28 and 29, 2016. The initial proposal at that hearing by Mr. Jules' counsel was that he attend a 45-day treatment program at the North Wind Healing Centre in Dawson Creek, BC ("North Wind"), followed by release back into the community of Teslin, his home community. The Crown opposed the release to his community based on Mr. Jules' previous violent offences and the new charges while on the Conditional Sentence Order conditions.

[11] Defence counsel produced a report from Lyall Herrington, dated April 12, 2016. Mr. Herrington is the Wellness Coordinator for the Teslin Tlingit Council, a Yukon First

Nation. Mr. Herrington has worked with Mr. Jules since approximately May 2012. He described Mr. Jules, in that report, as making progress until a fight occurred in February 2013, which brought him back to jail. He also describes Mr. Jules as an untreated alcoholic who was motivated but denied admission to the Community Wellness Court and much needed addictions treatment. I have no further information with respect of that denial of admission but I understand that an application to the Community Wellness Court can again be made in the future, of course subject to the difficulties with Teslin being a community at least two hours outside of Whitehorse by highway.

[12] Mr. Herrington also indicated in the report that Mr. Jules, while at the Whitehorse Correctional Centre ("WCC") continued to do his counselling with Mr. Herrington, took programming on substance abuse and took education upgrading, including passing his 2nd year carpentry apprenticeship exams.

[13] Mr. Jules was approved to begin his treatment at North Wind on March 14, 2016, but he did not attend because of the two new charges arising in March of this year. However, North Wind accepted him to the program beginning on May 2, 2016, with knowledge of those recent assault charges.

[14] As stated above, defence counsel proposed that Mr. Jules would return to Teslin on his release from the North Wind program. He would reside with his mother, Clara Jules, as surety. The Court was advised that, in Teslin, he has a spouse with whom he has a continuing relationship, and he also has two young children, including a daughter, aged 4, and a son, aged 3, that spend time with Clara Jules each day and I believe the daughter actually resides with Clara Jules. The justice of the peace indicated that the

return to Teslin was problematic for her because of his Conditional Sentence Order breaches and the seriousness of the new assault charges.

[15] The hearing on April 28 and 29, 2016, then focussed on whether it was lawful to make the alternative order that released Mr. Jules to North Wind but required him to surrender to WCC upon his completion of the treatment program, to remain there until further order of the Court.

[16] In her order, the justice of the peace acknowledged the seriousness of Mr. Jules' alleged offences, his criminal record for violent offences, and his failures to abide by court orders. She decided, in any event, that she wanted to give him an opportunity to attend treatment.

[17] Her Recognizance dated April 29, 2016, contained the usual clauses of no possession or consumption of alcohol, no attendance at places selling alcohol and a no contact order with five witnesses. The following are the detailed conditions regarding Mr. Jules' release for treatment, and they are found at paras. 7 through 16:

> (7) In the event of a premature discharge from the North Wind Healing Centre, you will surrender yourself into the custody of the RCMP in Whitehorse, YT within forty eight (48) hours of that discharge.
>
> (8) You are to remain inside your residence at all times or in the actual presence of either Lyall Herrington or Clara Jules from the time you are released from custody until you depart by bus to Dawson Creek, BC from Teslin, YT on Monday, May 2, 2016.
>
> (9) Upon arrival in Dawson Creek, BC on May 3, 2016, you are to check into the Comfort Inn Hotel and you are to report to Lyall Herrington by telephone within one (1) hour of your arrival. You are remain on the property of the Comfort Inn Hotel or within five hundred (500) meters of the hotel for the sole purpose of eating your meals until you are to depart for the North Wind Healing Centre on May 4, 2016.

> (10) You are to attend and complete the North Wind Healing Centre treatment program from May 4, 2016 until June 10, 2016. During that time you are to remain at the North Wind Healing Centre until your discharge from the program.
>
> (11) During your stay at the North Wind Healing Centre you are to provide your consents to release information about your attendance and progress to Lyall Herrington and your Bail Supervisor.
>
> (12) Upon your discharge from the North Wind Healing Centre on June 10, 2016 and your arrival in Dawson Creek, BC you are to check in to the Comfort Inn Hotel and report to Lyall Herrington by telephone within one (1) hour of your arrival.
>
> (13) You are to remain on the property of the Comfort Inn Hotel or within five hundred (500) meters of the hotel at all times, until you are to depart by bus on June 11, 2016 to return to Teslin, YT.
>
> (14) Upon your arrival in Teslin, YT, on June 12, 2016, you are to remain inside the residence of Clara Jules at all times, unless you are in the actual presence of Lyall Herrington or Clara Jules.
>
> (15) You are to travel to Whitehorse, YT, in the direct immediate company of Lyall Herrington on June 13, 2016 to attend court at 2 p.m.
>
> (16) In court on June 13, 2016, you are to turn yourself into custody where you will remain until further order of the court.

[18] I note that Mr. Jules consented to his return to custody after his treatment program. It is significant that Mr. Jules complied with the above detailed conditions and he has remained in custody at WCC since he turned himself in as directed on June 13, 2016.

MR. JULES' CURRENT CIRCUMSTANCES

[19] Mr. Jules acknowledges that he suffers from a significant alcohol addiction. He also states that he is motivated to remain sober and continue on his healing path. He is

seeking release again to reside with his mother on strict conditions so that he can continue to work with Lyall Herrington on his sobriety.

[20] North Wind prepared an extensive Treatment Summary Report, dated June 10, 2016. It stated that Mr. Jules wishes to set an example for his children and avoid them going down the same path of alcohol and drug abuse.

[21] I'm going to quote from the North Wind's Treatment Summary Report at page 6:

> Loren identified having problems with alcohol and drugs. By doing that he accepted the fact that his attendance at [North Wind] was going to be the starting point of his healing process. A history of alcohol and drug abuse is part of his family's last two generations and the tendency to blame that and feel guilt about it doesn't help handling his own responsibility for it. Loren has attempted to stay clean and sober in the past (2012) but has relapsed. Loren stated that he has abstained himself from drinking for the last 6 months and from using weed from a month currently. He has previously attended addictions treatment at Poundmakers in 2006. At [North Wind], Loren was encouraged to reflect and process the concept that the changes he already made needed to be maintained and the Centre would provide some tools that if used genuinely would assist him in maintaining those changes. Loren stated that participating in an addictions treatment program was suggested to him but in the end was his own need that prompted him to attend.
>
> …

And from p. 9, after a list of recommendations:

> The risk of relapse is low to medium. After careful appraisal of all the work done and responses observed in Loren, our counseling team believes that Loren has good chances of success at staying clean and sober. The most remarkable is Loren's social network with family and an addictions' counsellor, should this be paired with his understanding of the tools learned during treatment, it would reinforce a stronger connection with a higher power. Loren seemed willing to work through the pain of finding the underlying causes of his issues and the realization that he gets after is the strongest motivator to work one day at a time in his

> sobriety. We hope that such attitude and ability will help Loren to make the right choices in life and benefit from the outcome.

[22] Lyall Herrington testified in this hearing to update his treatment plan for Mr. Jules. Mr. Jules is a member of the Teslin Tlingit First Nation and Mr. Herrington has been treating him on and off since 2012. Mr. Herrington referred to Mr. Jules as suffering the consequences of "untreated alcoholism". While I understand why he used this terminology, I point out that it is not technically correct to the extent that Mr. Jules did attend Poundmakers in 2006 and has had the counselling from Mr. Herrington for some time. In the past though, Mr. Herrington's comment more accurately reflects the rejection of Mr. Jules had from the Community Wellness Court.

[23] In any event, Mr. Herrington lives in Whitehorse but works in Teslin from Monday to Friday. His treatment plan for Mr. Jules covers the AA 12-step program, which he would address with Mr. Jules every Monday from 9:30 to 11 a.m. He advised that alcoholics do not have miraculous cures but will have relapses from time to time when they fall back into the old way of thinking. However, he indicated that he would advise the RCMP in Teslin of any breaches of a release order flowing from such a relapse. Mr. Herrington also participates in an AA meeting every Wednesday, when he is available and he advised that he would participate in those meetings and assist Mr. Jules where possible.

[24] Clara Jules is Loren Jules' mother. She is the mayor of Teslin and as well looks after Mr. Jules' two young children each day. She is prepared to be a surety and understands the obligation to advise the RCMP if her son is breaching his release

conditions. The Crown and defence both interviewed Ms. Jules and are satisfied that she understands the role of a surety.

ISSUE 1: SHOULD MR. JULES BE RELEASED OR DETAINED PENDING TRIAL?

[25] The Crown opposes the release of Mr. Jules on the secondary ground, taking the position that he is likely to commit an offence as he did under his Conditional Sentence Order. The Crown also opposes his release on the tertiary ground and says that his detention is necessary to maintain confidence in the administration of justice. The Crown relies *R. v. St-Cloud*, 2015 SC 27, as rejecting the formerly narrow interpretation of s. 515(10)(c) which suggested that maintaining public confidence in the administration of justice was only justified in rare or exceptional circumstances.

[26] Wagner J. in the Supreme Court of Canada in the *St-Cloud* case listed the essential principles to apply when considering the tertiary ground in paras. 87 and 88 of *St-Cloud*:

> 87 I would summarize the essential principles that must guide justices in applying s. 515(10)(*c*) *Cr. C.* as follows:
>
> * Section 515(10)(*c*) *Cr. C.* does not create a residual ground for detention that applies only where the first two grounds for detention ((*a*) and (*b*)) are not satisfied. It is a distinct ground that itself provides a basis for ordering the pre-trial detention of an accused.
>
> * Section 515(10)(*c*) *Cr. C.* must not be interpreted narrowly (or applied sparingly) and should not be applied only in rare cases or exceptional circumstances or only to certain types of crimes.
>
> * The four circumstances listed in s. 515(10)(*c*) *Cr. C.* are not exhaustive.
> * A court must not order detention automatically even where the four listed circumstances support such a result.

> * The court must instead consider all the circumstances of each case, paying particular attention to the four listed circumstances.
>
> * The question whether a crime is "unexplainable" or "unexplained" is not a criterion that should guide the analysis.
>
> * No single circumstance is determinative. The justice must consider the combined effect of all the circumstances of each case to determine whether detention is justified.
>
> * This involves balancing all the relevant circumstances. At the end of this balancing exercise, the ultimate question to be asked by the court is whether detention is necessary to maintain confidence in the administration of justice. This is the test to be met under s. 515(10)(*c*).
>
> * To answer this question, the court must adopt the perspective of the "public", that is, the perspective of a reasonable person who is properly informed about the philosophy of the legislative provisions, *Charter* values and the actual circumstances of the case. However, this person is not a legal expert and is not able to appreciate the subtleties of the various defences that are available to the accused.
>
> * This reasonable person's confidence in the administration of justice may be undermined not only if a court declines to order detention where detention is justified having regard to the circumstances of the case, but also if it orders detention where detention is not justified.
>
> 88 In conclusion, if the crime is serious or very violent, if there is overwhelming evidence against the accused and if the victim or victims were vulnerable, pre-trial detention will usually be ordered.

[27] Section 515(10)(c) reads as follows:

> The detention of an accused in custody is justified:

> (c) if the detention is necessary to maintain confidence in the administration of justice, having regard to all the circumstances, including
>
> (i) the apparent strength of the prosecution's case,
>
> (ii) the gravity of the offence,
>
> (iii) the circumstances surrounding the commission of the offence, including whether a firearm was used, and
>
> (iv) the fact that the accused is liable, on conviction, for a potentially lengthy term of imprisonment or, in the case of an offence that involves, or whose subject-matter is, a firearm, a minimum punishment of imprisonment for a term of three years or more.

[28] I am a reviewing judge on this application. The power of review is described as a hybrid one by Wagner J. in *St-Cloud* and is only exercised appropriately in three situations:

1. where there is admissible new evidence showing a material and relevant change in circumstances,
2. where the impugned decision contains an error of law; or
3. where the decision is clearly inappropriate.

[29] In my view, the admissible new evidence from the North Wind Treatment Centre and Mr. Jules' compliance with the treatment order of April 29, 2016 shows a material and relevant change in circumstances.

[30] There is no doubt that the allegations involve serious and violent offences. However, they involve an attack on March 11, which appears to be one of a personal vendetta rather than a public endangerment and an attack on him on March 29 in which Mr. Jules was initially defending himself. I want to be clear that I am not suggesting either alleged incident is not a serious violent assault but rather that there are

circumstances which may be extenuating but certainly not justifying. None of the victims have been described as vulnerable. No gun was used and there was evidence that alcohol may have been involved in each incident. I find that the prosecutor may have a strong case with respect to the March 11 incident in Teslin but not so much with respect to the March 29 incident in Whitehorse. I do not see either as leading to a potentially lengthy term of imprisonment. I do not find that when all the relevant circumstances are taken into consideration that a reasonable person's confidence in the administration of justice would be undermined by the judicial interim release of Mr. Jules on strict conditions. I also find that his treatment and compliance with conditions in going to North Wind and returning to custody has mitigated somewhat his previous breaches of his Conditional Sentence Order.

[31] As I do not find his detention justified under the secondary or tertiary ground, I order that he be released on conditions.

[32] I should indicate at the outset that the surety will be Clara Jules, of 21 Boyd Street, Teslin, and she will provide security of $1,000 without deposit and Mr. Jules himself will provide security of $1,000 as well.

[33] The conditions of release are:

1. That you remain within the Yukon unless you obtain the written permission of your bail supervisor or the Court;
2. you will report to a bail supervisor immediately upon his release from custody and thereafter when and in the manner directed by the bail supervisor;

3. you will reside at 21 Boyd Street, Teslin, Yukon, and will abide by the rules of residence, and not change your residence without the prior written permission of your bail supervisor;
4. you will reside under conditions of house arrest at 21 Boyd Street, and will remain on the property at all times, except between 7 a.m. and 9 a.m. daily to attend the gymnasium at the Teslin Rec Plex; except with the prior written permission of your bail supervisor; except in the actual presence of Clara Jules, Leon Jules, or Lyall Herrington;
5. You must also answer the door to the residence at 21 Boyd Street, or answer the telephone, if there is a telephone, for curfew checks, for checks to determine whether you are residing on the premise. Failure to do so during reasonable hours will be a presumptive breach of this condition;
6. You will not possess or consume alcohol and/or controlled drugs or substances that have not been prescribed by a medical doctor;
7. You will not attend any premises whose primary purpose is the sale of alcohol including any liquor store, off sales, bar, pub, tavern, lounge or nightclub;
8. And noting the consent of Mr. Jules, you will provide a sample of your breath or urine for the purpose of analysis upon demand by a peace officer who has reason to believe that you may have failed to comply with this condition;

9. You will attend and actively participate in all assessment and counselling programs as directed by your bail supervisor and complete them to the satisfaction of your bail supervisor for the following issues: substance abuse; Alcohol abuse; Anger management; Psychological issues and any other issues identified by your bail supervisor; and you will provide consents to release information to your bail supervisor regarding your participation in any program you have been directed to do pursuant to this condition, and I am including your attendance with regular addiction counselling with Lyall Herrington every Monday from 9:30 to 11 a.m., and also your attendance at AA meetings in Teslin every Wednesday evening at the Wellness Centre from 7 to 8 p.m.;

10. You will have no contact directly or indirectly or communication in any way with Paul Bosely, Clint Beattie, Nico Helm, Roxanne Peters or Mike Jules;

11. You will remain 50 metres away from the above-mentioned persons and you will not attend any known place of their residence, employment or education except with the written permission of your bail supervisor. It should also be a condition that if any of these persons are in attendance at the gymnasium at the Teslin Rec Plex, you will have to vacate the gymnasium;

12. You are to participate in such education or life skills programs as directed by your bail supervisor and provide your bail supervisor with consents to release information in relation to your participation in any programs you have been directed to do pursuant to this condition;

13. You will not possess any firearms, ammunition, explosive or any other weapons defined in the *Criminal Code*;

14. You are to attend the RCMP Detachment in Teslin, Yukon, twice weekly at a time arranged in advance with the Teslin RCMP Detachment. If you attend at the Teslin RCMP Detachment and it is unmanned you must call 867-390-5555 to report your attendance. The frequency of your attendance can be varied with the prior written permission of the bail supervisor in consultation with the RCMP in Teslin;

15. The surety, Clara Jules, acknowledges that she will report any breaches of this order to the RCMP;

16. The probation order dated December 1, 2015, and its conditions remain in force until further order;

17. The order of April 29, 2016, is vacated.

[34] The return date is July 28, 2016, at 10 a.m. in Teslin.

[35] The exception from house arrest should apply to counselling session with Mr. Herrington only, as other counselling sessions should be arranged with the bail supervisor.

[36] I would also like to include a term that he carry the order around with him.

[37] This is a very detailed order and Mr. Jules is going to have to comply with it.

ISSUE 2: WAS THE BAIL CONDITION REQUIRING MR. JULES TO SURRENDER HIMSELF INTO CUSTODY FOLLOWING TREATMENT LAWFUL?

[38] As noted, following his first-instance bail hearing, Mr. Jules was released into the North Wind Healing Centre on a series of detailed conditions that required him to

surrender himself into custody within 48 hours if he was discharged prematurely or, upon completion of the program, on his June 13, 2016 court date.

[39] Crown counsel takes the position that this condition is unlawful because the condition is not contemplated by s. 515 and because it violates Mr. Jules s. 11(e) *Charter* right to bail. Crown made additional submissions about how this clause is problematic from a practical standpoint in that it makes Mr. Jules' detention status unclear as a matter of law.

[40] Defence counsel says that this condition is practical, points out that it has been used before in the Territorial Court, and, to the extent that Mr. Jules' s. 11(e) *Charter* right may have been infringed, it was with his consent.

[41] I agree with counsel that s. 11(e) of the *Charter* is relevant to this issue, however the Crown's argument that Mr. Jules' right was infringed by the order of the justice of the peace makes little sense to me. It is clear from the reasons she gave that the only real alternative to Mr. Jules' release into the healing centre would have been his detention. It is hard to see how this release, even if for a limited duration, represents a greater curtailment to his right to reasonable bail than a detention order in the face of a release plan that satisfied the justice of the peace on the primary, secondary and tertiary grounds.

[42] Having said that, I do take the Crown's point that there is no explicit provision for such a release in the *Criminal Code.*

[43] Section 11(e) of the *Charter* states:

> 11. Any person charged with an offence has the right …
> (e) not to be denied reasonable bail without just cause;

[44] Although I have referred to this as a “right to reasonable bail”, there are two distinct components of the s. 11(e) right: (1) a right to reasonable bail, i.e. bail that is reasonable in terms of the quantum of any monetary component and other conditions, and; (2) a right not to be denied bail without just cause (see *St-Cloud*, para. 27).

[45] As observed in *St-Cloud*:

> [70] Finally, it is important not to overlook the fact that, in Canadian law, the release of accused persons is the cardinal rule and detention, the exception: *Morales*, at p. 728. To automatically order detention would be contrary to the "basic entitlement to be granted reasonable bail unless there is just cause to do otherwise" that is guaranteed in s. 11(e) of the Charter: Pearson, at p. 691. This entitlement rests in turn on the cornerstone of Canadian criminal law, namely the presumption of innocence that is guaranteed by s. 11(d) of the Charter: Hall, [2002] 3 S.C.R. 309 at para. 13. These fundamental rights require the justice to ensure that interim detention is truly justified having regard to all the relevant circumstances of the case.

[46] As noted earlier, there is no question that the prospect of Mr. Jules’ release raises significant secondary and tertiary ground concerns. However, over the course of the two-day hearing, the justice of the peace heard extensive evidence about Mr. Jules’ circumstances and risk factors and about the treatment available to Mr. Jules. Taking into account all the relevant circumstances, she was satisfied that the concerns would be addressed by his release into the proposed treatment program. This was a reasonable view to take. The dilemma the justice of the peace faced was that, while satisfied that Mr. Jules could be released into treatment, she was equally satisfied that he could not be released into the community without treatment.

[47] The justice of the peace made her order aware that the risk Mr. Jules posed to the public could be significantly mitigated by his successful completion of an alcohol and

drug treatment program, but in the absence of information about whether he would complete the program and how completion might affect the secondary and tertiary ground concerns, she opted for a cautious approach that released him only into treatment subject to further consideration by the court.

[48] The Crown's concern is that Mr. Jules was made subject to a situational and time-limited release order, or as the justice of the peace characterized it, a "partial release order". Crown says that a release condition that requires a subsequent surrender into custody is not found in s. 515 of the *Code.* By this, I understand him to be saying not that the release condition imposed by the justice of the peace is outside the scope of the conditions enumerated in s. 515(4) – which include a very broad basket clause allowing a justice of the peace to impose "other reasonable conditions" that he or she "considers desirable" – but rather that a term that contemplates re-incarceration is neither a release nor a detention under section 515 when it is considered as a whole.

[49] A strictly conventional order would have released Mr. Jules into treatment, with the consequence that as soon as treatment was ended and he was no longer resident at North Wind, he would be in breach of the recognizance and required to either immediately surrender himself or become subject to a further criminal charge and arrest. Alternatively, his surety, Lyle Herrington, could have rendered him on completion of the treatment program, thereby vacating the recognizance. In both circumstances, Mr. Jules would have been returned to custody. From a practical point of view, the recognizance accomplished essentially the same result, without putting Mr. Jules in further criminal jeopardy.

[50] The Crown also says that the condition imposed by the justice of the peace potentially creates confusion about Mr. Jules' detention status, but I am not sure that is borne out. Mr. Jules attended court on June 13, 2016 where he turned himself into custody as required by the order. There would have been a warrant of remand issued by the court until a determination about re-release or detention was made, with the appropriate warrant for committal or recognizance placed on the file at that point. There was not, in my view, any true confusion at any point in time about whether Mr. Jules was detained or released.

[51] This is not to say that the order made by the justice of the peace fits squarely within the bail provisions of the *Code.* With respect to the Crown's submission, I think the larger problem raised by the order is that the Territorial Court is arguably reviewing a release order in circumstances not contemplated by s. 523.

[52] Section 523 of the *Criminal Code* speaks to the period for which a recognizance is in effect. Generally, it continues in force until the charge is finally disposed of, either by discharge after a preliminary inquiry or by an acquittal or conviction and passing of sentence. Additionally, conditions of release can be varied by the Territorial Court at any time during the accused's trial (s. 523(2)(a)), on completion of the preliminary inquiry (s. 523(2)(b)), or with the consent of both the prosecutor and the accused (s. 523(2)(c)). The consent required is consent to the disposition and conditions and not simply to the forum: *R. v. Pumphrey,* 2006 YKSC 15.

[53] It seems from the condition that the justice of the peace, in requiring Mr. Jules to surrender himself into custody after completing the North Wind healing program, also contemplated that he would be brought forward for another show cause hearing before

the Territorial Court. Had Mr. Jules been rendered by his surety at the completion of treatment, he similarly would have been entitled to a further show cause hearing "forthwith" (s. 769). It is less clear what the *Code* would have required should Mr. Jules have surrendered himself in anticipation of a breach charge, but it is clear that were he charged with breach of the recognizance, he would have been brought before a justice of the peace within 24 hours of being charged (s. 503).

[54] I point all of this out because, even if the condition imposed by the justice of the peace is unlawful, it not difficult to appreciate the value of it, especially in the context of an Aboriginal offender and given the relevance of *Gladue* principles in these circumstances.

[55] While not expressly framed in terms of *Gladue*, it is clear from the Treatment Summary Report appended to his affidavit, that Mr. Jules has a background that should cause a bail court to consider the application of the *Gladue* principles. As observed by Ruddy J. in *R. v. Magill*, 2013 YKTC 8:

> 16 There is no dispute in my mind that *Gladue* principles apply to bail hearings; the question is how. As noted in a chambers decision of the Ontario Court of Appeal in *R. v. Robinson*, 2009 ONCA 205 (Ont. C.A. [In Chambers]):
>
> > It is common ground that principles enunciated in the decision of the Supreme Court of Canada in *R. v. Gladue*, [1999] 1 S.C.R. 688, have application to the question of bail. However, the application judge cannot apply such principles in a vacuum. Application of the Gladue principles would involve consideration of the unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts. The exercise would involve consideration of the types of release plans, enforcement or control procedures and sanctions that would,

> because of his or her particular aboriginal heritage or connections, be appropriate in the circumstances of the offender and would satisfy the primary, secondary and tertiary grounds for release.

[56] Both *Magill* and *Robinson* were cited in a recent decision by Shaner J. of the Northwest Territories Supreme Court. In *R. v. Chocolate,* 2016 NWTSC 28, she wrote:

> 49 In my view, honouring the constitutional right to reasonable bail requires consideration of the socio-economic factors present in the life of *any* accused, regardless of whether they are Aboriginal. For many Aboriginal people who come before the courts, however, the factors identified in *Gladue* will form a large part of their overall socio-economic context. It would be unreasonable and unfair to conclude detention is justified based solely on an accused's criminal record and/or the circumstances of the alleged offence without considering the role *Gladue* factors may have played in leading to that person committing criminal acts in the past, being charged again and, consequently, seeking bail. There simply must be more than a superficial review of an accused's past criminal conduct and/or the circumstances leading to the current charge.
>
> 50 An examination of the intergenerational impact of the residential school system, cultural isolation, substance abuse, family dysfunction, poverty, inadequate housing, low education levels and un- or underemployment on an Aboriginal offender may inform questions about *why* an accused has an extensive criminal record and, if applicable, *why* that person has demonstrated an inability to comply with pre-trial release conditions in the past. They will also inform the decision about whether, given the accused's circumstances, there are release conditions which can be imposed so that future compliance is realistic and concerns about securing attendance at trial, public safety and overall public confidence in the justice system are meaningfully addressed.

[57] In the circumstances of Mr. Jules, it is clear from his affidavit material that he has long struggled with alcohol and that there is a history of alcohol and drug abuse in his family that spans the past two generations. It was also clear from the submissions made

to the justice of the peace that he had reached a point where he was actively seeking treatment for his addiction and that he had identified the link between his alcohol use and his violent or criminal behaviour.

[58] To pay more than lip service to *Gladue* at the bail stage, a court has to be willing to confront the background and historic factors that have contributed to the accused being present before the court, recognizing that there is an obligation on the justice system to contribute to the ongoing process of reconciliation. As noted by Cozens J. in a sentencing context in *R. v. Rodrigue,* 2015 YKTC:

> [102] There is a public interest component within Canadian society and thus within the Canadian justice system to make reparations to Aboriginal Peoples, to their communities, to their children and to their children's children for the harm done to them by destructive governmental policies such as the residential school system. This harm all too often manifests itself in the disproportionate number of Aboriginal offenders that come before the courts having committed criminal offences …

[59] Similarly, in *R. v. Charlie*, 2014 YKTC, Cozens J. wrote:

> [65] As I have stated previously in other cases, R. v. Quash, 2009 YKTC 54, for example, in reference to the Canadian government's June 11, 2008 apology to the Aboriginal peoples of Canada, when you apologize to someone for the harm your actions have caused, it is incumbent on you to then take such steps as are possible to try to repair or compensate for the damage. The Canadian government's underlying agenda and actions that included, but were not limited to, the placement of Aboriginal children in the residential school system, did not just impact individuals, but communities of individuals and struck at and devastated a way of life and a way of believing for those affected. It is not enough by way of compensation to hand out cheques to surviving individuals who were forced to attend residential schools; reparations require rebuilding, to the extent possible, the foundation that was torn away, not just for one generation but for the generations that follow.

[60] In a bail context, as in a sentencing context, Canadian courts have a role to play in the process of reconciliation. This can be accomplished, in part, by the Court's meaningful consideration of *Gladue* principles when faced with an Aboriginal accused. Where a release plan is capable of ensuring an Aboriginal accused's attendance in court, the protection and safety of the public and public confidence in the administration of justice, there is I think an obligation on the court to facilitate its implementation, especially if, as here, it is capable of addressing some of the underlying issues that have brought that accused before the court.

[61] Obviously, our justice system applies to all accused persons and, at least in the absence of a *Charter* challenge, the provisions, procedural and substantive, of the *Criminal Code* have to be complied with. Here, however, as in many other cases before the Territorial Court, there was a positive obligation on the justice of the peace to pay particular attention to the circumstances of this Aboriginal accused and consider options other than imprisonment. Indeed, the *Gladue* case itself notes that a court can expect counsel on both sides to adduce relevant evidence to assist the court with this obligation (para. 83, *R. v. Gladue,* [1999]1 S.C.R. 688; also see *R. v. Kakekagamic* (2006), 81 O.R. (3d) 664 (C.A.). This is what the justice of the peace did in the case at bar. She recognized Mr. Jules' circumstances as an Aboriginal person, his supports in the community, his opportunity to attend a culturally-relevant treatment program for alcoholism and determined that a "partial release" would satisfy the secondary and tertiary ground concerns she otherwise had. The "partial release" created a shortcut to get Mr. Jules back before the court for a show cause in circumstances where he

otherwise would have been subject to arrest, and quite possibly new charges, before coming back for a re-consideration of his release in light of changed circumstances.

[62] Despite the efficacy of the order made by the justice of the peace though, I do not think that the *Code* can be expanded to allow for a Territorial Court review of a Territorial Court bail in these circumstances.

[63] However, to the extent that the condition could have simply required that Mr. Jules surrender himself into detention in custody after completing treatment, I do not see it as problematic or outside the scope of the bail provisions of the *Code*. The release of Mr. Jules into an alcohol and drug treatment program in circumstances where such a release satisfied the primary, secondary and tertiary grounds for detention, in my view gave effect not only to his right to reasonable bail but also to the principles underlying *Gladue.* On his surrender, he would have been made subject to a detention order, and able to either remain in custody or avail himself of the bail review mechanism contained in s. 520 of the *Code.* I also observe that his completion of treatment could, and here was, properly be considered as admissible new evidence showing a material and relevant change in circumstances.

CONCLUSION

[64] In my view, Mr. Jules' completion of the North Wind treatment program is a material and relevant change in his circumstances that allows me to review the order made by the justice of the peace with respect to bail. I am also satisfied that the secondary and tertiary ground concerns can be met by the plan put forward by Mr. Jules' counsel.

[65] Furthermore, with respect to the condition in Mr. Jules' earlier release order, I find that it lay within the jurisdiction of the justice of the peace to release Mr. Jules for the purposes of attending a residential alcohol treatment program and to impose a condition requiring that he surrender himself into custody on his return from that program. To the extent that the specific condition contemplated a further bail hearing in the Territorial Court, I do not think that is permissible under the *Criminal Code*. Rather, such an order should be clear that, upon surrender, the accused is in pre-trial detention, subject to a bail review in Supreme Court.

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VEALE J.