SUPREME COURT OF YUKON

Citation: *R v Murphy*, 2016 YKSC 23

Date: 20160318
S.C. No. 08-01518A
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

Respondent

And

ALICIA ANN MURPHY

Applicant

A publication ban pursuant to ss. 645(5) and 648(1) of the *Criminal Code* has lapsed.

Before Mr. Justice L. F. Gower

Appearances:
Noel Sinclair and Paul Battin — Counsel for the Crown
Jennifer Cunningham — Counsel for Alicia Murphy

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by the accused for an order that prospective jurors be challenged for cause pursuant to s. 638(1)(b) of the *Criminal Code,* R.S.C., 1985, c. C-46, (the "*Code*") to determine whether they are not indifferent (impartial) between the Crown and the accused. The grounds for the challenge are:

a) the fact that the accused is a First Nations woman; and

b) the pre-trial publicity about this case.

[2] The accused also seeks the following procedural orders:

1) that the body of the jury array be kept separate from the juror being challenged for cause, pursuant to s. 640 of the *Code*;

2) that the triers of the challenges for cause rotate, and not remain static, pursuant to s. 640(2.2); and

3) that the trial judge pose the challenge questions to the potential jurors.

[3] The Crown expressly stated at the hearing that they do not oppose the challenge for cause on the basis of pre-trial publicity. The Crown made no submissions in opposition to the application for procedural orders, so I have assumed that those too are unopposed.

[4] The Crown opposes the challenge for cause on the ground of the accused's race, essentially on the basis that the accused and her counsel have failed to establish a sufficient evidentiary basis for the challenge. In particular, the Crown submits that the accused has failed to establish that there is currently widespread racial prejudice against First Nations or Aboriginal persons in the community of Whitehorse.

[5] The accused is charged with the second-degree murder of Evangeline Billy on or about June 22, 2008. This is her second trial following a successful appeal from her earlier conviction as charged.

LAW

[6] Section 638(1)(b) of the *Code* states:

> A prosecutor or an accused is entitled to any number of challenges on the ground that
>
> …

> (b) a juror is not indifferent between the Queen and the accused;

[7] Any discussion of the accused's right to challenge for cause begins with *R v. Sherratt*, [1991] 1 S.C.R. 509, where the accused was charged with murder and the application to challenge for cause was based on pre-trial publicity. L'Heureux-Dubé J., speaking for the 5 to 1 majority[1], started her analysis by noting that s. 638 places "little, if any, burden on the challenger" and that "while there must be an "air of reality" to the application, it need not be an "extreme" case…" (para. 63). She then went on to set out the test:

> 64 …The threshold question is not whether the ground of alleged partiality will create such partiality in a juror, but rather whether it could create that partiality which would prevent a juror from being indifferent as to the result. In the end, there must exist a realistic potential for the existence of partiality, on a ground sufficiently articulated in the application, before the challenger should be allowed to proceed.… (my emphasis)

[8] The first significant case dealing with a challenge for cause on the basis of race is *R. v. Parks* (1993), 15 O.R. (3d) 324 (Ont. C.A.). In that case, Doherty J.A., speaking for the Ontario Court of Appeal, was dealing with the issue of racial prejudice towards black people in Toronto. In *Parks*, Doherty J.A. made a number of instructive comments and observations which have been widely quoted by subsequent courts in applications to challenge for cause. I find the following to be helpful in the case at bar:

> The existence and the extent of racial bias are not issues which can be established in the manner normally associated with the proof of adjudicative facts. Unlike claims of partiality based on pre-trial publicity, the source of the alleged racial prejudice cannot be identified. There are no specific media reports to examine, and no circulation figures to consider. There is, however, an ever-growing body of studies and

[1] Stevenson J. wrote a separate concurring judgment.

reports documenting the extent and intensity of racist beliefs in contemporary Canadian society. (p. 11)

...

The 1989 report *Eliminating Racial Discrimination in Canada* addressed these three facets of racism in Canada:

> Racism and racial discrimination are facts of life in Canada.
>
> They exist openly and blatantly in attitudes and actions of individuals. They exist privately in the fears, in the prejudices and stereotypes held by many people, and in plain ignorance. And they exist in our institutions.
>
> . . . . .
>
> There's clear evidence that a significant number of Canadians have racist attitudes or, as one poll concluded, "are racist in their hearts". Such attitudes have resulted in actions ranging from name-calling and threatening gestures to writing hate propaganda directed at a specific racial group, damaging property or physical violence. More widespread and more difficult to deal with is the existence of what's being called "silent" discrimination or "polite" prejudice in our institutions and in daily Canadian life. (my emphasis) (p. 12)

… Racism, … is a part of our community's psyche. A significant segment of our community holds overtly racist views. A much larger segment subconsciously operates on the basis of negative racial stereotypes. Furthermore, our institutions, including the criminal justice system, reflect and perpetuate those negative stereotypes. These elements combine to infect our society as a whole with the evil of racism. (p. 12)

…

Despite the lack of empirical data, Canadian commentators have no doubt that racist attitudes do impact on jury verdicts where the accused is a member of a racial minority. In 1984, *Vidmar* and *Melnitzer* referred to the "growing awareness that Canadian society is marked by racism and other prejudices

> that might jeopardize the right of an accused to a fair trial". [Note 31] More recently, Professor C. Petersen observed ("Institutionalized Racism: The Need for Reform of the Criminal Jury Selection Process" (1993), 38 McGill L.J. 147, at pp. 177-78):
>
> > The threshold test, as established by the Supreme Court of Canada, is whether or not there exists a realistic potential for partiality on the part of a prospective juror. It remains to be seen whether the judiciary will be willing, in future cases, to admit the realistic potential for racist partiality on the part of virtually any juror.
> > To refuse to do so would demonstrate a regrettable lack of even rudimentary race awareness. People of colour experience racism in all aspects of their lives (e.g. employment, housing, public transit and education). It is unrealistic to assume that racism will not also be present in the jury room. (my emphasis) (p. 19)

[9] In *R. v. Williams*, [1998] 1 S.C.R. 1128, McLachlin J., as she then was, spoke for the Supreme Court of Canada in an appeal involving a challenge for cause based on the accused's Aboriginal background. McLachlin J. began her reasons by acknowledging that the evidence in the case "established widespread racial prejudice against aboriginals" and that prejudice established "a realistic potential of partiality" which should have prompted the trial judge to exercise his discretion to allow the challenge for cause (para. 2). She further acknowledged, later in the judgment, that the challenge for cause is an essential safeguard of the accused's s.11(d) *Charter* right to a fair trial and an impartial jury (para. 47).

[10] McLachlin J. also referred a number of times with approval to comments made by Doherty J.A. in *Parks*, cited above. One of these references was at para. 30, where she stated that it is within the discretion of the trial judge to determine whether there is a sufficient "air of reality" to the challenge in the particular circumstances of each case. She then went on to quote directly from Doherty's judgment:

> 30 …. The following excerpt from *Parks*, *supra*, at pp. 378-79, per Doherty J.A., states the law correctly:
>
> > I am satisfied that in at least some cases involving a black accused there is a realistic possibility that one or more jurors will discriminate against that accused because of his or her colour. In my view, a trial judge, in the proper exercise of his or her discretion, could permit counsel to put the question posed in this case, in any trial held in Metropolitan Toronto involving a black accused. I would go further and hold that it would be the better course to permit that question in all such cases where the accused requests the inquiry. (my emphasis)

[11] McLachlin J. went on to note the distinction between the two phases of the challenge for cause process under s. 638. The first stage is to determine whether a challenge should be permitted. The second stage is to manage the actual challenge for cause questioning of the potential jurors. McLachlin J. then echoed L'Heureux-Dubé J. in *Sherratt* that there is "little, if any, burden" on the accused at the first stage:

> 32 … The test at this stage is whether there is a realistic potential or possibility for partiality. The question is whether there is reason to suppose that the jury pool may contain people who are prejudiced and whose prejudice might not be capable of being set aside on directions from the judge. The operative verbs at the first stage are "may" and "might". Since this is a preliminary inquiry which may affect the accused's *Charter* rights (see below), a reasonably generous approach is appropriate. (my emphasis)

[12] At para. 54, McLachlin J. acknowledged that the accused, Mr. Williams, called witnesses and tendered studies to establish widespread prejudice in the community of Victoria, British Columbia, against Aboriginal people. However, she also acknowledged that it may not be necessary to duplicate this investment in time and resources in subsequent cases seeking to establish racial prejudice in a community. This is because

courts can take advantage of the evidentiary tool of judicial notice and, in particular, that courts may be able to take judicial notice of racial prejudice as a notorious fact.

Because of the importance of this issue to the Crown in the case at bar, I will quote rather extensively from McLachlin J.'s comments in this regard:

> 54 ... The law of evidence recognizes two ways in which facts can be established in the trial process. The first is by evidence. The second is by judicial notice….. Judicial notice is the acceptance of a fact without proof. It applies to two kinds of facts: (1) facts which are so notorious as not be the subject of dispute among reasonable persons; and (2) facts that are capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy: see Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (1992), at p. 976. The existence of racial prejudice in the community may be a notorious fact within the first branch of the rule. As Sopinka, Lederman and Bryant note, at p. 977, "[t]he character of a certain place or of the community of persons living in a certain locality has been judicially noticed". Widespread racial prejudice, as a characteristic of the community, may therefore sometimes be the subject of judicial notice. Moreover, once a finding of fact of widespread racial prejudice in the community is made on evidence, as here, judges in subsequent cases may be able to take judicial notice of the fact. "<u>The fact that a certain fact or matter has been noted by a judge of the same court in a previous matter has precedential value</u> and it is, therefore, useful for counsel and the court to examine the case law when attempting to determine whether any particular fact can be noted": see Sopinka, Lederman and Bryant, *supra*, at p. 977. It is also possible that events and <u>documents of indisputable accuracy may permit judicial notice to be taken of widespread racism in the community under the second branch of the rule</u>. For these reasons, it is unlikely that long inquiries into the existence of widespread racial prejudice in the community will become a regular feature of the criminal trial process….(my emphasis)

[13] In her concluding remarks, McLachlin J. summarized the burden on the accused when seeking to challenge for cause:

> 57 There is a presumption that a jury pool is composed of persons who can serve impartially. However, where the accused establishes that there is a realistic potential for partiality, the accused should be permitted to challenge prospective jurors for cause under s. 638(1)(*b*) of the *Code*: see *Sherratt*, *supra*….(my emphasis)

[14] The Ontario Court of Appeal in *R. v. Koh* (1998), 42 O.R. (3d) 688, again dealt with a challenge for cause, this time based on alleged prejudice towards Chinese people in Ontario. At para. 29, the Court referred to *Williams*, and summarized the state of the law on challenges to prospective jurors in that province:

> 29 This court, supported by the judgment of the Supreme Court in *Williams*, has decided that racism is a fact of judicial life and that it must be addressed directly through court approved challenges to members of the jury pool. In doing so we have been prepared to make an exception to the traditional approach that jury panels can be trusted to be true to their individual oaths and try the case on the evidence in accordance with the law as given to them by the trial judge. This conclusion was arrived at incrementally and on the accepted wisdom that racism is omnipresent and where once established through an evidentiary showing with respect to a specific race, need not be the subject of formal proof in subsequent proceedings involving the same race. (my emphasis)

[15] The Court continued to comment on the use of judicial notice in establishing the evidentiary threshold for challenges for cause:

> 41 My suggestion that courts in this jurisdiction may now take judicial notice that reasonable persons must be taken to be aware of the history of discrimination against visible minorities finds practical support in the reality that an accused will often face insurmountable difficulties in marshalling evidence to meet the threshold test with respect to individual minorities of colour…. (my emphasis)

[16] The Supreme Court referred to *Williams* in its ground-breaking decision of *R. v. Gladue*, [1999] 1 S.C.R. 688, which was concerned with the overrepresentation of

Aboriginal people in the Canadian criminal justice system generally, and the prisons in particular:

> 61 Not surprisingly, the excessive imprisonment of aboriginal people is only the tip of the iceberg insofar as the estrangement of the aboriginal peoples from the Canadian criminal justice system is concerned. Aboriginal people are overrepresented in virtually all aspects of the system. As this Court recently noted in *R. v. Williams*, [1998] 1 S.C.R. 1128, at para. 58, there is widespread bias against aboriginal people within Canada, and "[t]here is evidence that this widespread racism has translated into systemic discrimination in the criminal justice system". (my emphasis)
>
> …
>
> 65 … The unbalanced ratio of imprisonment for aboriginal offenders flows from a number of sources, including poverty, substance abuse, lack of education, and the lack of employment opportunities for aboriginal people. It arises also from bias against aboriginal people and from an unfortunate institutional approach that is more inclined to refuse bail and to impose more and longer prison terms for aboriginal offenders. (my emphasis)

[17] The Court continued on this theme at para. 68:

> 68 [I]t must be recognized that the circumstances of aboriginal offenders differ from those of the majority because many aboriginal people are victims of systemic and direct discrimination, many suffer the legacy of dislocation, and many are substantially affected by poor social and economic conditions…..(my emphasis)

[18] In *R. v. Ipeelee*, 2012 SCC 13, the Supreme Court revisited the issue of overrepresentation of Aboriginal peoples in the criminal justice system, noting that, since *Gladue,* the situation had not only not improved, but had seemingly worsened. The Court also touched on the issue of judicial notice in the following comments:

> 59 … Judges may take judicial notice of the broad systemic and background factors affecting Aboriginal people generally...

> 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.

Notably, at para. 65, the Court observed that the "available evidence indicates" that the overrepresentation of Aboriginal people is due in part to the fact that "they are the victims of a discriminatory justice system".

[19] Challenges for cause based on an accused's First Nations or Aboriginal background are not unknown in this jurisdiction, at least since *R. v. Hummel*, 2001 YKSC 3, in which Veale J. of this Court addressed a challenge for cause application involving a First Nations accused charged with first-degree murder. The deceased was a Caucasian woman who had been sexually assaulted, bound and beaten to death. As in the case at bar, the accused applied to challenge jurors for cause on two grounds: racial prejudice and pre-trial publicity. The Crown conceded there was a reasonable possibility of prejudice on both grounds. Accordingly, Veale J. authorized two questions to be put to prospective jurors:

> 1. Would your ability to judge the evidence in this case without bias, prejudice or partiality be affected by the fact that the person charged with first degree murder is a First Nation man and the deceased is a white woman?
>
> 2. Would your ability to judge the evidence in this case without bias, prejudice or partiality be affected by anything you have read, seen or heard about the case?

[20] In his ruling on the challenge for cause issue, Veale J. confirmed the "very low evidentiary threshold" to be met in allowing a challenge based on racial prejudice (para. 9). He then went on to refer to *Williams*, and in particular to para. 22, where

McLachlin J. talked about the possibility of racial prejudice being “deeply ingrained in the subconscious psyches of jurors” and that where doubts are raised, “the better policy is to err on the side of caution and permit prejudices is to be examined”. Veale J. then concluded:

> 12 The *Williams* case has established that there is widespread prejudice against aboriginals, both nation-wide and in British Columbia.
>
> 13 I am prepared to take judicial notice of the fact that racial prejudice may exist in the Yukon Territory and this community. I would not go as far to say it is widespread, but simply that there is a realistic potential for racial prejudice, given the fact that First Nation persons are a racial minority in the city of Whitehorse. (my emphasis)

[21] Mr. Hummel was convicted and unsuccessfully appealed to the Yukon Court of Appeal, cited as 2002 YKCA 6. One of his grounds was that Veale J. denied him the opportunity to ask a challenge for cause question about a potential juror’s belief that a white woman is less likely to consent to sex with an Aboriginal man than a Caucasian man. The Court of Appeal found that the race-based question was sufficient. Therefore, the challenge for cause question ultimately allowed by Veale J., although not in dispute before the Court of Appeal, can nevertheless be said to have been brought to the Court’s attention and approved of.

EVIDENCE AND JUDICIAL NOTICE

[22] Part of the Crown counsel’s argument, which I will address below, is that circumstances have changed in Whitehorse and Yukon since *Williams* and *Hummel* were decided. He says that the onus is on defence to provide evidence about the current local attitudes towards First Nations or Aboriginal people and submits that this was not done.

[23] The Crown began its argument by suggesting that the Supreme Court of Canada 'tightened the screws' on the test for courts taking judicial notice in *R. v. Find*, 2001 SCC 32. In that case, the accused was charged with the sexual assault of children. He sought to challenge for cause on the basis that the nature of the charges against him could give rise to a realistic possibility that some prospective jurors might harbour prejudice towards him. The Supreme Court concluded that there was no basis for such a challenge and dismissed the appeal. In doing so, McLachlin C.J.C., made the following comments about judicial notice:

> 48 In this case, the appellant relies heavily on proof by judicial notice. Judicial notice dispenses with the need for proof of facts that are clearly uncontroversial or beyond reasonable dispute. Facts judicially noticed are not proved by evidence under oath. Nor are they tested by cross-examination. Therefore, the threshold for judicial notice is strict: a court may properly take judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy… (my emphasis)

While I agree that McLachlin C.J.C. did refer to the threshold as "strict" in this passage, when she described the two kinds of facts which can be accepted by judicial notice without proof, she did so in virtually identical language to that which she used earlier in *Williams*.

[24] The Crown also relies upon *R. v. Spence*, 2005 SCC 71. In that case, Binnie J. wrote for the Supreme Court. At para. 53, he referred to the Court's earlier decision in *Find*, and "the more stringent test of judicial notice adopted in [that case]". He then quoted McLachlin C.J.C. at para. 48 of *Find*, which I set out above at para. 23.

[25] Nevertheless, Binnie J. then went on to state, at para. 56, that it is arguable that the requirements of judicial notice accepted in *Find* should be "relaxed" in the context of proving a realistic potential for bias:

> 56 It could be argued that the requirements of judicial notice accepted in *Find* should be relaxed in relation to such matters as laying a factual basis for the exercise of a discretion to permit challenges for cause. These are matters difficult to prove, and they do not strictly relate to the adjudication of guilt or innocence, but rather to the framework within which that adjudication is to take place…. (my emphasis)

[26] In the result, I rely upon *Williams*, at para. 54, where McLachlin J., as she then was, stated:

> …Widespread racial prejudice, as a characteristic of the community, may therefore sometimes be the subject of judicial notice. Moreover, once a finding of fact of widespread racial prejudice in the community is made on evidence, as here, judges in subsequent cases may be able to take judicial notice of the fact. "The fact that a certain fact or matter has been noted by a judge of the same court in a previous matter has precedential value and it is, therefore, useful for counsel and the court to examine the case law when attempting to determine whether any particular fact can be noted": see Sopinka, Lederman and Bryant, *supra*, at p. 977. It is also possible that events and documents of indisputable accuracy may permit judicial notice to be taken of widespread racism in the community under the second branch of the rule….(my emphasis)

[27] While, based on *Williams,* it may well be that law and precedent alone support the challenge for cause, I also rely on the following documents which I find do state facts which are so notorious as not to be the subject of dispute among reasonable persons, or are facts which are capable of immediate and accurate demonstration.

[28] According to Yukon Bureau of Statistics' *Population Report, September 2015,* (Whitehorse: Executive Council Office, 60 January 2016), as of June 2015, the First

Nations population of the Yukon (7,796) represented 20.9% of the territory's population as a whole (37,343). However, according to Yukon's Department of Justice Corrections Statistics (2015-16 Midyear Report, available online at: www.justice.gov.yk.ca/prog/cor/CorrectionsStatistics.html), between April 1, 2014, and March 31,2015, First Nations persons comprised 71% of total admissions to the Whitehorse Correctional Centre ("WCC"). Further, over the period from April 1 to September 30, 2015, First Nations persons admitted to WCC were 73% of the population. These statistics show an overrepresentation of First Nations people in the Yukon justice system that corresponds with what has been documented in the federal system by the Supreme Court of Canada in *Gladue* and *Ipeelee*.

[29] Parallels between the Yukon and the rest of Canada in terms of First Nations interactions with the justice system were also observed in a report prepared by Simone Arnold, Peter Clark and Dennis Cooley[2] for the Government of Yukon in 2011, entitled "Sharing Common Ground - Review of Yukon's Police Force", at p. 32:

> There is no reason to believe that the circumstances that First Nations people in Yukon find themselves in are dissimilar to those in other parts of the country. We Co-Chairs believe that First Nations citizens in Yukon, like those in Manitoba and Saskatchewan, have experienced discriminatory treatment. Yukon First Nations citizens report experiencing discriminatory treatment in the justice system, and in other areas of life as well - in the educational system, the health care system and the communities….
>
> The Co-Chairs believe that the perception of racism expressed during the Review by Yukon aboriginal and non-aboriginal persons in communities across Yukon is an underlying issue that contributes to the atmosphere of mistrust that First Nations citizens have towards the RCMP and the entire justice system. This pervasive social issue needs to be confronted head on…. (my emphasis)

[2] The former Deputy Minister of Justice for the Government of Yukon.

[30] Finally, I refer to the final report released by the Truth and Reconciliation Commission of Canada in 2015, entitled “Honouring the Truth, Reconciling for the Future”. In this report, which represented the culmination of over seven years of work, the Commission spoke of the continuing need for reconciliation between Aboriginal peoples and the non-Aboriginal population of Canada[3]. In addition, the Commission referred to the tragic legacy from the history of Canadian residential schools being:

> … reflected in the intense racism some people harbour against Aboriginal people and in the systemic and other forms of discrimination Aboriginal people regularly experience in this country…

as well as in the “disproportionate imprisonment” of Aboriginal people. Lastly, the Commission’s “Calls to Action” following the report include the following:

> 30. We call upon federal, provincial and territorial governments to commit to eliminating the overrepresentation of Aboriginal people in custody over the next decade, and to issue detailed annual reports that monitor and evaluate progress in doing so.
> …
> 38. We call upon the federal, provincial, territorial and Aboriginal governments to commit to eliminating the overrepresentation of Aboriginal youth in custody over the next decade.

ANALYSIS

[31] I understand the Crown’s principal argument in this application is that *Williams* requires the accused to establish that there is widespread racial prejudice within the city of Whitehorse, before granting her the opportunity to challenge for cause. While Crown counsel concedes that there may be <u>some</u> people within Whitehorse who harbour racial prejudice towards First Nations persons, he submits that this Court cannot go so far as to take judicial notice that such prejudice is “widespread”. Further, to the extent that the

[3] p. 8

accused seeks to rely on studies and evidence in the case law, the Crown says this evidence is now quite dated. In addition, the Crown argued that Whitehorse is a relatively progressive city *vis-à-vis* relations between First Nations people and non-aboriginals. He notes, for example, that 11 of the 14 First Nations in the Yukon, including the two predominant First Nations in Whitehorse, achieved final land claim and self-government agreements several years ago. Therefore, submits the Crown, Whitehorse may be on a different footing than other communities across Canada, where courts have routinely taken judicially notice that the bias against Aboriginal people, talked about in *Williams, Gladue* and *Ipeelee*, also likely exists in their respective communities. In short, says the Crown, if it exists, the mere existence of bias against First Nations people is not sufficient, rather it must be shown to be "widespread".

[32] The Crown also relies on *Find* as authority for the emphasis it places on the need for "widespread" bias. At paras. 32, 34, and 39, McLachlin C.J.C. touched on this question as follows:

> 32 As a practical matter, establishing a realistic potential for juror partiality generally requires satisfying the court on two matters: (1) that a widespread bias exists in the community; and (2) that some jurors may be incapable of setting aside this bias, despite trial safeguards, to render an impartial decision….
>
> …
>
> 34 The test for partiality involves two key concepts: "bias" and "widespread". It is important to understand how each term is used.
>
> …
>
> 39 The second concept, "widespread", relates to the prevalence or incidence of the bias in question. Generally speaking, the alleged bias must be established as

> sufficiently pervasive in the community to raise the possibility that it may be harboured by one or more members of a representative jury pool (although, in exceptional circumstances, a less prevalent bias may suffice, provided it raises a realistic potential of juror partiality: *Williams*, *supra*, at para. 43). If only a few individuals in the community hold the alleged bias, the chances of this bias tainting the jury process are negligible. For this reason, a court must generally be satisfied that the alleged bias is widespread in the community before a right to challenge for cause may flow. (my emphasis)

[33] In *Hummel*, Veale J. accepted that there was a sufficient level of racial prejudice against First Nations persons in Whitehorse to give rise to a "realistic potential" that this might adversely affect juror impartiality. Even though he did not find that such prejudice was "widespread", his decision to allow the challenge for cause received no criticism from the Court of Appeal of Yukon. Accordingly, I believe that I am able to rely on this decision as having significant precedential value.

[34] I also note that the test for when a challenge for cause is appropriate may not always require "widespread" prejudice. In *Williams*, McLachlin J. herself allowed for the possibility that in some cases less than widespread prejudice might suffice:

> 43 I add this. To say that widespread racial prejudice in the community can suffice to establish the right to challenge for cause in many cases is not to rule out the possibility that prejudice less than widespread might in some circumstances meet the *Sherratt* test. The ultimate question in each case is whether the *Sherratt* standard of a realistic potential for partiality is established. (my emphasis)

[35] In addition, it is important to remember that McLachlin J. in *Williams*, at para. 30, said that Doherty J.A. stated the law correctly when he referred to "a realistic possibility that one or more jurors will discriminate against [the] accused because of his or her colour." This low threshold was echoed again in *Find*:

> 39 The second concept, "widespread", relates to the prevalence or incidence of the bias in question. Generally speaking, the alleged bias must be established as sufficiently pervasive in the community to raise the possibility that it may be harboured by one or more members of a representative jury pool (although, in exceptional circumstances, a less prevalent bias may suffice, provided it raises a realistic potential of juror partiality: *Williams*, *supra*, at para. 43). (my emphasis)

[36] The presence of racial prejudice against Aboriginal persons across the country is well documented. The official statistics and government observations available for the Yukon that I cited above do not suggest that the situation is radically different in Yukon or Whitehorse. I find that there is a realistic possibility that one or more members of a representative jury pool for Alicia Murphy's trial may harbour such a bias against her.

[37] Further, I disagree with the Crown that the problem of Aboriginal overrepresentation in the jails across Canada is distinct from the problem of bias against Aboriginal people, and that the comments of the Supreme Court of Canada about overrepresentation in *Gladue* and *Ipeelee* are therefore of no assistance on this application. As noted by Cory and Iacobucci JJ. in *Gladue*, at para. 61, quoting in turn from *Williams*, "there is widespread bias against [A]boriginal people within Canada, and "[t]here is evidence that this widespread racism has translated into systemic discrimination in the criminal justice system". In my view, the two problems are inextricably linked. Further, as the statistical evidence above and the final report by the Truth and Reconciliation Commission demonstrate, the problem of Aboriginal overrepresentation in the correctional system, including Yukon's correctional system, continues today.

[38] Lastly, while I agree with the Crown, that the people of the Yukon as a whole have made great strides towards the reconciliation of the claims of the First Nations people here, it would be rather naïve to think that we are somehow immune from the insidious and corrosive effect of prejudice towards Aboriginal peoples across the country. Indeed, the "Review of Yukon's Police Force", quoted above, is relatively recent evidence underlining that concern as one which is significant and ongoing.

CONCLUSION

[39] The accused's counsel, in her notice of application to challenge jurors for cause, stated a total of four proposed questions, two on the topic of the racial issue and two on pretrial publicity:

1. Do you hold any opinions about people of First Nations heritage particularly with respect to criminal behaviour and if so, what are those opinions?
2. Would those opinions interfere with your ability to try this case fairly?
3. Have you heard anything or read anything in [the] media about Alicia Murphy or the death of Evangeline Billy?
4. (If yes) would what you have heard or read affect your ability to judge this case and a fair and impartial manner based solely on the evidence lead in court?

[40] However, during the hearing, I understood defence counsel to concede that she would be content with the kind of generic questions on each topic which were permitted by Veale J. in *Hummel*, and by this Court in *R. v. Asp*, 2012 YKSC 16, for example. In my view, that would tend to simplify matters and avoids the kind of open-ended question

in #1 above, which could be unnecessarily problematic. Accordingly, I reduce the four questions to two, as follows:

1. Would your ability to judge the evidence in this case without bias, prejudice or partiality be affected by the fact that the accused is an Aboriginal person?
2. Would your ability to judge the evidence in this case without bias, prejudice or partiality be affected by anything you have read, seen or heard in the media about Alicia Murphy or this case?

[41] If either counsel has any comments on this proposed wording, I will hear them in case management.

[42] Finally, I further direct that:

1. The body of the jury array be kept separate from the juror being questioned;
2. The triers rotate and not remain static, pursuant to s. 640(2) of the *Code*; and
3. I will pose the questions to the potential jurors.

_____
GOWER J.