SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Lemmon*, 2021 NSSC 107

Date: 20210330
Docket: CRP-504306
Registry: Pictou

Between:

Her Majesty the Queen

v.

David Allen Lemmon

DECISION ON BAIL REVIEW

Judge:	The Honourable Justice Scott C. Norton
Heard:	March 24, 2021, in Pictou, Nova Scotia
Decision:	March 30, 2021
Counsel:	William Gorman, for the Crown Douglas Lloy Q.C. and Sheena L. O'Reilly for the Accused

By the Court:

Introduction

[1] David Lemmon (the Accused) seeks release from remand on a review of the bail decision of the Honourable Judge Del Atwood of the Provincial Court of Nova Scotia made on November 30, 2020. The Accused says that there has been a material and relevant change in circumstances and a more secure bail plan can now be presented.

[2] For the reasons that follow, I find that there is no material and relevant change in circumstances, that the new proposed bail plan is no more secure, and accordingly, the application for review of the bail order of Judge Atwood is dismissed.

Facts

[3] Mr. Lemmon is 33 years old. He was raised by a single parent, his mother, who now lives in Dean Settlement, Musquodoboit, Halifax Regional Municipality, Nova Scotia. He has a university degree and owns his own concrete contracting business, presently not operating due to the Covid-19 pandemic.

[4] The Accused has a prior criminal record from 2019 of 21 convictions of fraud. The victim was his employer. He used the firm's debit card to defraud the firm of slightly over $15,000.

[5] Since that time he was charged in March 2020 with theft over $5,000, breach of probation, possession of drugs and a breach associated with that possession. Between March and November 2020 the Accused continued to accrue charges to a maximum of 22 charges, including flight from police, dangerous driving or resisting charges, as well as breach of probation by failing to report and failing to pay restitution on the multiple fraud charges as part of the probation order.

[6] Mr. Lemmon was originally released on a promise to appear in March 2020. By mid November, on the later charges, he was released on a Release Order with two sureties, one of which was the expectant mother of his child, due to be born April 2, 2021. He was to observe strict conditions while continuing to live in his home outside Pictou, Nova Scotia, with his pregnant girlfriend.

[7] He was charged again in November 2020 and was again taken into custody.

[8] Judge Atwood heard bail submissions from counsel on November 30, 2020. The transcript of the hearing and Judge Atwood's decision was filed with this court for the review application.

[9] Before Judge Atwood, the onus was on Mr. Lemmon pursuant to s. 515(7) to prove, on a balance of probabilities that he should be released. Judge Atwood found that Mr. Lemmon was not a safe release. The fact that Mr. Lemmon continued to accrue charges caused Judge Atwood to remand Mr. Lemmon on all grounds set out in s. 515(10), namely that his commitment to attend court was questionable; detention was required as he will continue to reoffend; and, that the public's confidence in the administration of justice would be shaken if he was not remanded.

[10] Since the denial of bail some charges have been withdrawn and guilty pleas have been entered on others for which Judge Atwood imposed a sentence of time served plus probation and ancillary orders on March 8, 2021. There are five charges outstanding on not guilty pleas: a flight charge; theft over; two assaults and the associated breach. Mr. Lemmon was scheduled to return to Provincial Court on March 25, 2021 to obtain a trial date.

[11] At the hearing of the bail review the Court heard testimony from Virginia Michelle Lemmon, the mother of the Accused, and the Accused himself.

[12] The release plan presented to the Court by the Accused on this review application is as follows:

- Mr. Lemmon signs a signature bond for $1,000;
- Mrs. Lemmon, acting as surety for her son, pays the sum of $1,000 in cash to the court as an expression of her faith in the good behaviour of Mr. Lemmon if released;

As conditions of release the Defence proposes the following:

- Keep the peace and be of good behaviour;
- Report via telephone to the New Glasgow Regional Police Service Monday through Friday, between the hours of 8:00 a.m. to 4:00 p.m.;
- Not occupy the driver's seat of any motorized vehicle;
- Have no contact with Joseph Nolan Reddick and Troy Rector;
- Completely abstain from the possession and use of all narcotic substances, with the exceptions of narcotics prescribed under the Medical Marijuana Act;

- Have no alcohol inside your body while outside your residence (amended at the hearing to be at any time);
- Observe house arrest to your residential property (lands and dwelling) located at 1455 Hwy 6 Dean Settlement, HRM, N.S. with exceptions for:
    - Medical, dental and legal appointments;
    - Attendances at court or responding to a subpoena; and
    - Attendances at a hospital or care facility involving the birth of your child

  At all times when any of these exceptions are in force, you must carry on your person a copy of this Release Order.
- Present yourself to the front door of your residence should a peace officer arrive to check compliance with this order.

The Law

[13] The application is brought under s. 520 of the *Criminal Code*:

> 520(1) Review of order
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> If a justice, or a judge of the Nunavut Court of Justice, makes an order under subsection 515(2), (5), (6), (7), or (12) or makes or vacates any order under paragraph 523(2)(b), the accused may, at any time before the trial of the charge, apply to a judge for a review of the order.
>
> 520(2) Notice to prosecutor
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> An application under this section shall not, unless the prosecutor otherwise consents, be heard by a judge unless the accused has given to the prosecutor at least two clear days notice in writing of the application.
>
> 520(3) Accused to be present
>
> If the judge so orders or the prosecutor or the accused or his counsel so requests, the accused shall be present at the hearing of an application under this section and, where the accused is in custody, the judge may order, in writing, the person having the custody of the accused to bring him before the court.
>
> 520(4) Adjournment of proceedings
>
> A judge may, before or at any time during the hearing of an application under this section, on application by the prosecutor or the accused, adjourn the proceedings, but if the accused is in custody no adjournment shall be for more than three clear days except with the consent of the accused.
>
> 520(5) Failure of accused to attend

> Where an accused, other than an accused who is in custody, has been ordered by a judge to be present at the hearing of an application under this section and does not attend the hearing, the judge may issue a warrant for the arrest of the accused.
>
> 520(6) Execution
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> A warrant issued under subsection (5) may be executed anywhere in Canada.
>
> 520(7) Evidence and powers of judge on review
>
> On the hearing of an application under this section, the judge may consider
>
> (a) the transcript, if any, of the proceedings heard by the justice and by any judge who previously reviewed the order made by the justice,
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> (b) the exhibits, if any, filed in the proceedings before the justice, and
>
> (c) such additional evidence or exhibits as may be tendered by the accused or the prosecutor,
>
> and shall either
>
> (d) dismiss the application, or
>
> (e) if the accused shows cause, allow the application, vacate the order previously made by the justice and make any other order provided for in section 515 that he considers is warranted.
>
> 520(8) Limitation of further applications
>
> Where an application under this section or section 521 has been heard, a further or other application under this section or section 521 shall not be made with respect to that same accused, except with leave of a judge, prior to the expiration of thirty days from the date of the decision of the judge who heard the previous application.
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> 520(9) Application of sections 517, 518 and 519
>
> The provisions of sections 517, 518 and 519 apply with such modifications as the circumstances require in respect of an application under this section.

[14] The nature of a bail review hearing has been comprehensively canvassed by Justice Scaravelli in *R. v. Reddick*, 2016 NSSC 228 (albeit in the context of a Crown application for bail review pursuant to s. 521). The principles apply equally regardless of whether the bail review is at the request of the accused or the Crown.

[15] The leading cases on bail review are the Supreme Court of Canada judgments in *R. v St.-Cloud*, 2015 SCC 27; *R. v. Antic*, 2017 SCC 27; and, *R. v. Zora*, 2020 SCC 14.

[16] Justice Scaravelli in *Reddick* summarized the *St.-Cloud* principles as follows:

> [6] The Supreme Court of Canada recently commented on the reviewing court's powers in *R v St-Cloud* 2015 SCC 27, [2015] SCJ No 27, where Wagner J said, for the court:
>
> > 120 On the basis of the wording of sections. 520 and 521 CC, a comparison with other review provisions and with sentence appeals, and the nature of the decision being reviewed, I conclude that these sections do not confer on the reviewing judge an open-ended power to review the initial order respecting the detention or release of the accused. The reviewing judge must therefore determine whether it is appropriate to exercise this power of review.
> >
> > 121 It will be appropriate to intervene if the justice has erred in law. It will also be appropriate for the reviewing judge to exercise this power if the impugned decision was clearly inappropriate, that is, if the justice who rendered it gave excessive weight to one relevant factor or insufficient weight to another. The reviewing judge therefore does not have the power to interfere with the initial decision simply because he or she would have weighed the relevant factors differently. I reiterate that the relevant factors are not limited to the ones expressly specified in s. 515(10)(c) CC. **Finally, where new evidence is submitted by the accused or the prosecutor as permitted by ss. 520 and 521 CC., the reviewing judge may vary the initial decision if that evidence shows a material and relevant change in the circumstances of the case**. [Emphasis added.]
> >
> > [Bold added]
>
> [7] While this may indicate a correctness standard for matters of law, it by no means supports a general standard of correctness on all bail reviews. A line of Nova Scotia cases have addressed this point. In *R v Marsman* (1994) 140 NSR (2d) 383, [1994] NSJ No 627 (SC), Saunders J (as he then was) said:
>
> > the crown may meet the burden by showing either that the judge of the first instance made a manifest, in other words, clearly demonstrable error in his or her appreciation of the evidence, or made an error in principle in applying the provisions of the Criminal Code which significantly affected the outcome of the initial application.
>
> [8] Cacchione J discussed the nature of bail review in *R v Gobeil*, [1997] N.S.J. No. 592 (SC):
>
> > 5 … bail review hearings are what can be considered hybrid hearings. They are neither an appeal by way of a de novo hearing, nor are they

> strictly appeals from the detention order or the release order, but a combination of both. The court can consider the evidence led at the initial hearing, consider any of the new submissions or any new evidence led at the review hearing, and in essence exercise its discretion anew and I think that the case of the Queen v. Carrier (1979), 51 C.C.C. (2d) 307 essentially says that. Parliament intended the review to be conducted with due consideration for the initial order but, depending upon the circumstances, with an independent discretion to be exercised by a review court. [Emphasis added.]

[9] This passage was cited with approval by Beveridge J (as he then was) in *R v Charter*, 2008 NSSC 299, [2008] NSJ No 442, with the comment that "a bail review hearing is not limited to being an appeal, nor as wide open as a hearing de novo, but a combination thereof." In *R v Lawrence*, 2014 NSSC 451, [2014] N.S.J. No. 681, this court said:

> 5 In summary, absent new evidence the purpose of bail review is to review the transcript of evidence, submissions and the decision of the judge to assess whether there is any error made which justifies setting aside the order. Serious misunderstanding of the evidence or error in law are reversible errors. Where there is new evidence that was not before the bail judge or material change in circumstances not before the judge, the reviewing court must decide whether it justifies a determination that the bail judge's decision is no longer appropriate. The role of the review court is not to substitute its own opinion for the opinion of the bail judge.

[10] The crown says the standard of review in this case is correctness. The accused says error of law is reviewable on a standard of correctness, while errors of fact, or mixed fact and law, would be reviewed on a reasonableness standard. The accused argues that a decision falling within a range of reasonable outcomes, or which contains a minor error, should not be interfered with. This appears to accurately capture the approach in the cases, including *St-Cloud*. The court will have the ability to set an order aside on the basis that it rests on an order of law. Beyond that, the court has a broader power than would be available on an appeal, but the review is not de novo.

[17] The Supreme Court of Canada revisited the issue of bail in *Antic*. Wagner J. (as he then was) wrote for the Court at para 4 (footnotes omitted):

> 4 The "ladder principle", which is codified in s. 515(3) of the *Code*, requires a justice or a judge to impose the least onerous form of release on an accused unless the Crown shows why that should not be the case. The bail review judge failed to adhere to this central principle. He erred by requiring a cash deposit with a surety,

one of the most onerous forms of release, even though Mr. Antic had offered a surety with a monetary pledge (known in the *Code* as a recognizance). A cash deposit and a monetary pledge both give an accused the same financial incentive to abide by his or her release order. Neither is more coercive than the other. But requiring cash can be unfair, as it makes an accused person's release contingent on his or her access to funds. Thus, cash bail is merely a limited alternative to a pledge that should not be imposed where accused persons or their sureties have reasonably recoverable assets to pledge.

[18] At para 67, Wagner J. summarized the then current bail principles and guidelines as follows (footnotes omitted):

67 Therefore, the following principles and guidelines should be adhered to when applying the bail provisions in a contested hearing:

(a) Accused persons are constitutionally presumed innocent, and the corollary to the presumption of innocence is the constitutional right to bail.

(b) Section 11(e) guarantees both the right not to be denied bail without just cause and the right to bail on reasonable terms.

(c) Save for exceptions, an unconditional release on an undertaking is the default position when granting release: s. 515(1).

(d) The ladder principle articulates the manner in which alternative forms of release are to be imposed. According to it, "release is favoured at the earliest reasonable opportunity and, having regard to the [statutory criteria for detention], on the least onerous grounds": *Anoussis*, at para. 23. This principle must be adhered to strictly.

(e) If the Crown proposes an alternative form of release, it must show why this form is necessary. The more restrictive the form of release, the greater the burden on the accused. Thus, a justice of the peace or a judge cannot impose a more restrictive form of release unless the Crown has shown it to be necessary having regard to the statutory criteria for detention.

(f) Each rung of the ladder must be considered individually and must be rejected before moving to a more restrictive form of release. Where the parties disagree on the form of release, it is an error of law for a justice or a judge to order a more restrictive form of release without justifying the decision to reject the less onerous forms.

(g) A recognizance with sureties is one of the most onerous forms of release. A surety should not be imposed unless all the less onerous forms of release have been considered and rejected as inappropriate.

(h) It is not necessary to impose cash bail on accused persons if they or their sureties have reasonably recoverable assets and are able to pledge those assets to the satisfaction of the court to justify their release. A recognizance is functionally

> equivalent to cash bail and has the same coercive effect. Thus, under s. 515(2)(d) or 515(2)(e), cash bail should be relied on only in exceptional circumstances in which release on a recognizance with sureties is unavailable.
>
> (i) When such exceptional circumstances exist and cash bail is ordered, the amount must not be set so high that it effectively amounts to a detention order, which means that the amount should not be beyond the readily available means of the accused and his or her sureties. As a corollary to this, the justice or judge is under a positive obligation, when setting the amount, to inquire into the ability of the accused to pay. The amount of cash bail must be no higher than necessary to satisfy the concern that would otherwise warrant detention and proportionate to the means of the accused and the circumstances of the case.
>
> (j) Terms of release imposed under s. 515(4) may "only be imposed to the extent that they are necessary" to address concerns related to the statutory criteria for detention and to ensure that the accused can be released. They must not be imposed to change an accused person's behaviour or to punish an accused person.
>
> (k) **Where a bail review is applied for, the court must follow the bail review process set out in St-Cloud.**
>
> [Emphasis added]

[19] The Supreme Court of Canada again considered the framework for judicial interim release in *Zora*. Justice Martin, writing for the Court, stated at para. 64:

> [64] A bail review under ss. 520 and 521 is the primary way to challenge or change bail conditions which are not, or which are no longer, minimal, reasonable, necessary, least onerous, and sufficiently linked to risks posed by the accused (except for accused charged with very serious offences under s. 469).9 Conditions set in the bustle of a busy bail court with limited information can, and when necessary should, be fine-tuned through bail review. A bail review involves a hybrid process, rather than a de novo proceeding (*St-Cloud*, at paras. 92 and 118). A reviewing judge may intervene if the judicial official has erred in law, if the impugned decision was clearly inappropriate, or if new evidence shows a material and relevant change in the circumstances (para. 121). In addition, s. 523(2) allows for the judicial official, in certain circumstances, to vacate a previous release order and make a different order, including when the accused and the Crown consent to vacating the order (s. 523(2)(c)).

[20] Martin J. instructed the following approach to setting bail conditions:

> [89] In summary, to ensure the principles of restraint and review are firmly grounded in how people think about appropriate bail conditions, these questions may help structure the analysis:

· If released without conditions, would the accused pose any specific statutory risks that justify imposing any bail conditions? If the accused is released without conditions, are they at risk of failing to attend their court date, harming public safety and protection, or reducing confidence in the administration of justice?

· Is this condition necessary? If this condition was not imposed, would that create a risk of the accused absconding, harm to public protection and safety, or loss of confidence in the administration of justice which would prevent the court from releasing the accused on an undertaking without conditions?

· Is this condition reasonable? Is the condition clear and proportional to the risk posed by the accused? Can the accused be expected to meet this condition safely and reasonably? Based on what is known of the accused, is it likely that their living situation, addiction, disability, or illness will make them unable to fulfill this condition?

· Is this condition sufficiently linked to the grounds of detention under s. 15(10)(c)? Is it narrowly focussed on addressing that specific risk posed by the accused's release?

· What is the cumulative effect of all the conditions? Taken together, are they the fewest and least onerous conditions required in the circumstances?

These questions are inter-related and they do not have to be addressed in any particular order, nor do they have to be asked and answered about every condition in every case. The practicalities of a busy bail court do not make it realistic or desirable to require that the judicial official inquire into conditions which do not raise red flags. What is important is that all those involved in the setting of bail use these types of organizing questions to guide policy and to assess which bail conditions should be sought and imposed.

[21] And at para 100:

100 All persons involved in the bail system are required to act with restraint and to carefully review what bail conditions they either propose or impose. Restraint is required by law, is at the core of the ladder principle, and is reinforced by the requirement that any bail condition must be necessary, reasonable, least onerous in the circumstances, and sufficiently linked to the specific statutory risk factors under s. 515(10) of risk of failing to attend a court date, risk to public protection and safety, or risk of loss of confidence in the administration of justice (*Trotter*, at p. 1-59; *Antic*, at para. 67(j); see also s. 493.1 of the *Code* as of December 18, 2019). The setting of bail is an individualized process and there is no place for standard, routine, or boilerplate conditions, whether the bail is contested or is the product of consent. The principle of review means everyone involved in the crafting of conditions of bail should stop to consider whether the relevant condition meets all constitutional, legislative, and jurisprudential requirements.

[22] To summarize from *Reddick, St.-Cloud, Antic* and *Zora*:

(a) Section 520 or 521 hearings allow a Supreme Court Justice to intervene when the Provincial Court Judge:

(i) made an error of law; or

(ii) made a clearly inappropriate decision, that is, giving excessive weight or insufficient weight to a relevant factor (relevant factors are not confined to those found in s. 515(10)(c)), but the reviewing court is not entitled to interfere with the bail judge's decision because the reviewing court may have decided the issue differently; or,

(iii) the reviewing court may vary the bail decision if the evidence shows a material and relevant change in the circumstances of the case.

(b) Bail review hearings are hybrid. They are neither strictly an appeal nor a *de novo* hearing, but a combination of both.

(c) Where there is new evidence or a material change in circumstances that was not before the bail judge, the reviewing court must decide whether it justifies a determination that the bail judge's decision is no longer appropriate; and

(d) An error of law is reviewable on a standard of correctness, while an error of fact or mixed law and fact is reviewable on a reasonableness standard;

(e) The setting of bail is an individualized process and there is no place for standard, routine, or boilerplate conditions, whether the bail is contested or is the product of consent,

(f) The setting of bail conditions must be consistent with the presumption of innocence and the right not to be denied bail without just cause under s. 11(e) of the *Charter;*

(g) s. 515 of the *Criminal Code* codifies the ladder principle, which requires that the form of release and the conditions of release imposed on an accused be no more onerous than necessary to address the risks listed in s. 515(10);

(h) Bail conditions are intended to be particularized standards of behavior designed to curtail statutorily identified risks posed by a particular

person and are to be imposed with restraint. Restraint is required because bail conditions limit the liberty of someone who is presumed innocent of the underlying offence;

(i) Parliament legislated a bail system based upon an individualized process with conditions in place to specifically address personalized, statutory risk factors;

(j) Bail reviews are necessary to fine tune bail conditions that may be imposed based on limited information available in a busy bail court.

(k) The principle of review means everyone involved in the crafting of conditions of bail should stop to consider whether the relevant condition meets all constitutional, legislative, and jurisprudential requirements.

[23] *St.-Cloud* also addressed the issue of what is admissible as new evidence and specifically referenced the *Palmer Test* (so called) at para 128:

> 128 In *R. v. Palmer* (1979), [1980] 1 S.C.R. 759 (S.C.C.), at p. 775, this Court established the following criteria that must be met for evidence to be considered "new evidence" on appeal:
>
> 1. The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial. ...
>
> 2. The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
>
> 3. The evidence must be credible in the sense that it is reasonably capable of belief, and
>
> 4. It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.
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> (Reproduced in *R. v. Warsing*, [1998] 3 S.C.R. 579 (S.C.C.), at para. 50.)
>
> 129 In my opinion, the four criteria from *Palmer* are relevant, with any necessary modifications, to the determination of what constitutes new evidence for the purposes of the review provided for in ss. 520 and 521 Cr.C. Given the generally expeditious nature of the interim release process and the risks of violating the rights of the accused, and since the release hearing takes place at the very start of criminal proceedings and not at the end like the sentence appeal, a reviewing judge must be flexible in applying these four criteria. I reiterate at the outset that the rules of evidence are relaxed in the context of the release hearing: s. 518 Cr.C.
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> [Emphasis Added]

The Bail Judge's Decision

[24] At the hearing before Judge Atwood, counsel for the Accused acknowledged that, aside from the assault charge, the Crown's evidence was very strong.

[25] The bail judge agreed, stating that: " at this point in time, I am confident in saying that there is a cogent and substantial body of evidence implicating Mr. Lemmon in each of the charges before the court."

[26] Judge Atwood considered each of the grounds in s. 515(10)(a), (b), and (c) and found, at pages 34-35:

> In my view, all three of the grounds are in play here because the allegation of Mr. Lemmon's serial and consistent pattern of flight from police, his previous failure to attend court and substantial evidence of Mr. Lemmon engaging in criminal conduct while on bail.
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> …
>
> The Court should be focussed on the bail plan, on the release plan that is being submitted by Mr. Lemmon. In my view, that is not materially different from the release plan that was imposed by the court…It will essentially rely upon Mr. Lemmon's goodwill to remain…to remain house arrest compliant, keep the peace compliant and the court simply does not have that confidence. It is clear from Mr. Lemmon's conduct that Mr. Lemmon is, indeed, struggling with a substantial substance use issue and Mr. Lemmon's unregulated conduct is emblematic of that. I have little confidence that if Mr. Lemmon were to be admitted to bail under the terms as proposed that Mr. Lemmon would be able to keep himself out of conflict with the criminal law or that he would remain bail compliant.
>
> Mr. Lemmon's demonstrable non-compliance up to this point in time satisfies me beyond a reasonable doubt that Mr. Lemmon, if released from custody, either would fail to attend court, would commit further criminal offences, would engage in bail violations and applying the principles set out in ***R v St. Cloud,*** am well satisfied that right thinking members of the… and properly informed members of the public informed of Mr. Lemmon's course of conduct since last April of 2020 would have their confidence in the administration of justice profoundly shaken if Mr. Lemmon were to be admitted to bail.

The Parties' Positions

<u>The Accused</u>

[27] The Accused does not suggest that the bail judge made an error of law or made a clearly inappropriate decision by weighing any single factor incorrectly. The argument made by the Accused is that there has been a material and relevant change in circumstances in that a better, more secure, bail plan is now available that was not available at the time of the bail decision under review.

[28] The four changes of circumstances submitted by the Accused are:

1. Mr. Lemmon's abstinence from drugs;
2. The recognition that rehabilitation is a viable option for him as evidenced by Judge Atwood's time served sentence;
3. The quality and faith of his surety who has volunteered to supervise him; and
4. The remote location where he will be residing.

[29] Specifically, Mr. Lemmon has had time on remand to "dry himself out" from alcohol and drug dependency such that his mother now has the confidence in him to come forward and volunteer as a cash surety for her son. In addition, Mr. Lemmon is motivated by the hope to be present at the birth of his child to obey the court's release conditions. Although this was voiced by him at the time of the bail hearing, he submits that with his mind uninduced by drugs and alcohol, his motivation is more reliable. Finally, the present proposed release plan would have him live with his mother in Dean Settlement, far away from his former associates and temptations (including his drug provider) in the Pictou area.

[30] His mother advises that there is no alcohol or drugs present in her home and that she has locked cabinets in which keys to any vehicle present can be locked. She does not have a vehicle herself. She relies on the uncle of the Accused to transport her to shift work with the mentally ill in Pictou County.

The Crown

[31] The Crown questions whether the proposed bail plan is, in fact, a "better, more secure bail plan" which was "unknown to all concerned" at the time of the bail decision under review.

[32] The Crown refers to the Release Order of November 12, 2020 which was approved by Judge Atwood. It involved the presentation of two sureties and a

signature bond of $2,000. Noteworthy is that there was no cash deposit. What is proposed now is one surety, with a cash payment of $1,000 into court and a signature bond for the accused in the amount of $1,000.

[33] The Crown cites the decision of the Alberta Court of Appeal in *R v Ledesma*, 2019 ABCA 60, wherein the Court was dealing with a s. 680 bail review. As to what amounts to a change in circumstances, the Court said, at paras 32-34:

> 34 In our view, moreover, a change of strategy does not amount to a change of circumstances. Rather, an applicant for bail is obliged to put his or her best foot forward at the original hearing. Put another way, the original bail hearing is not a consequence-free opportunity to simply "test the waters" and if bail is refused on the basis of the applicant's initial plan, then it is time to "up the ante" in subsequent applications, and offer other options that were known to the applicant at the original applicant, and which may have been less convenient, more expensive, or more restrictive.
>
> 35 A bail applicant is well advised not to treat the original bail application or any subsequent bail application as a form of fluid, malleable, ongoing negotiation or debate with the court, that will somehow permit the applicant to hold in reserve known but less preferred release options, on the theory that if the original bail hearing is unsuccessful, then the less preferred options can be offered up to the court the next time around, or perhaps the time after that. This dicta applies both in the present context of a severely over-taxed Alberta court system, and otherwise in the event that that situation improves.

[34] The Crown points out that the Accused's mother was proposed as a third surety but was unable to attend to sign the document due to awaiting the outcome of a Covid test for work. It is now proposed that Mrs. Lemmon act as surety. The Crown says that the plan proposed to this Court on review is substantially the same as what was proposed to the bail judge.

[35] The Crown cites the Ontario Superior Court of Justice in *R. v. Baidwan*, 2020 ONSC 2349, where Skarica J., at para 23, cited with approval the following comments of Justice Hill:

> 23 Justice Hill stated in *R. v. Ferguson*, [2002] O.J. No. 1969 (Ont. S.C.J.) at para. 17:
>
> > "Simply reshuffling the deck of prospective sureties to draw out new ones, or a greater number, does not in itself amount to a material change of circumstances. Only where it can be said that the commitment and nature of the newly proffered suretyship materially calls into question the continued validity of the reasons for detention can it be reasonably be said

> that the submitted material change in circumstances is relevant to the existing cause of detention."

[36] The Crown submits that the proposed release plan does not qualify as new evidence, as under the first prong of the *Palmer* Test, it was not a plan that could not have been properly presented with due diligence.

Analysis

[37] I am not satisfied that Mr. Lemmon has met the threshold of the *Palmer* Test for new evidence to be considered. With respect to the first criterion, the evidence satisfied me that, by due diligence, it could have been adduced at the bail hearing and accordingly it should not be admitted.

[38] As to the third criterion in *Palmer*, that the evidence must be credible in the sense that it is reasonably capable of belief, the Crown submits that the testimony of the accused before the Court that he did not speak to his mother at the time of the bail hearing to request her to be a third surety is inconsistent with the following exchange before Judge Atwood at the bail hearing:

> Mr. Lloy: …There was some thought about having a third (surety) but as I understand from my client's conversation with one of his potential sureties, he is not prepared to wait for the third surety to sign…
>
> The Court: Mr. Lemmon are you waiting for your third surety?
>
> Mr. Lemmon: I am not willing to wait. It is my mother, however, she's taking a COVID test for work so she's unable to be around anybody, so I thought it best for everyone at the Legal Aid station that she wait it out.

[39] Mrs. Lemmon testified that she was not asked to be a surety at the time of the bail hearing on November 30, 2020.

[40] I accept the mother's evidence that she did not speak with anyone about being her son's surety in November 2020. That said, it was clearly within the contemplation of the Accused and his counsel and as such it was something that, by due diligence, could have been put forward to the bail judge.

[41] Overall, I agree with the phrase repeated in the Crown's authorities, that the bail release plan before this Court is no more than a "shuffling of the deck" of proposed sureties. In *R v Ferguson*, [2002] O.J. No. 1969 (Ont. S.C.J.), Justice Hill stated, at para 17:

> 17 As to the first point, the advancement of fresh prospective sureties in a bail review, I would think that this approach to support an argument of unjustified detention is generally destined to fail. **Simply re-shuffling the deck of prospective sureties to draw out new ones, or a greater number, does not in itself amount to a material change in circumstances. Only where it can be said that the commitment and nature of the newly proffered suretyship materially calls into question the continued validity of the reasons for detention can it reasonably be said that the submitted material change in circumstances is relevant to the existing cause of detention**.
>
> [Emphasis added]

[42] Further, I am not satisfied that even if the new evidence is considered that it amounts to a material change in circumstances and I am not persuaded that it justifies a determination that the bail judge's decision is no longer appropriate.

[43] With respect, the Court does not accept that the new release plan proposed by Mr. Lemmon adequately addresses the concerns expressed by the bail judge. Mr. Lemmon's mother lives in an area that is only a 45-minute drive from the area where the offences occurred when Mr. Lemmon was last on release conditions. His mother works shift work and would not be home during material lengths of time.

[44] I agree with the Crown that there is no doubt that Mrs. Lemmon is a loving and caring parent and I have no doubt of her sincerity when she says that she would not hesitate to call the police if she observed her son taking alcohol or drugs or otherwise violating the terms of his release. However, there is no evidence of a plan for supervising Mr. Lemmon during his mother's absence when at work.

[45] Mr. Lemmon testified that when, as a result of Covid-19 shutting down his work, he found he had too much time on his hands, he slipped back into the abuse of drugs and alcohol and reoffended. His ongoing substance use struggles have only been ameliorated by the fact that he has been in custody. I have no confidence that he will not be able to access alcohol and drugs while resident at his mother's home from those who have enabled him in the past. I am not persuaded that Mr. Lemmon will not have access to his prior associates and temptations and that he will be able to keep himself out of conflict with the law or that he would remain bail compliant. In summary, I am not satisfied that the proposed bail plan is any more secure than the plan proposed to and rejected by Judge Atwood.

[46] I adopt, as an appropriate summary of my concerns about the ability of Mrs. Lemmon to supervise her son, the following passage from *R. v. Haughton*, 2020 ONSC 4159, wherein Justice Garton said:

> 15 At the initial bail review, I found that one of the key issues with respect to the plan of release, given Mr. Haughton's criminal antecedents and proclivity to breach court orders, was the ability of the proposed surety to control him and proactively prevent him from breaching his conditions. As stated in my earlier reasons, Mr. Haughton Sr. appears to be well-meaning and obviously wants to help his son. I accept that he would take his role as surety seriously. However, there is little evidence that Mr. Haughton Sr. has had any success over the years in influencing Mr. Haughton's behaviour and steering him away from a life of crime. Moreover, Mr. Haughton Sr. has not played and is not capable of playing any significant role in terms of assisting Mr. Haughton with his drug addiction. He knew virtually nothing about his son's addiction, which has been the driving force behind the accused's criminal activities since 2009, if not earlier. Mr. Haughton Sr. had no idea what drug his son was addicted to and apparently never asked him. He testified that he encouraged him to get treatment, but that encouragement bore no fruit, as Mr. Haughton has consistently failed through the years to follow through with any treatment program when out of custody.
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> 16 At the initial bail review, I found that there was a substantial likelihood that if Mr. Haughton were released from custody, he would repeat his past pattern of conduct — that is, he would seek to fuel or finance his addiction by committing criminal offences. I found that it was highly unlikely that any fear that Mr. Haughton may have about returning to custody and contracting COVID-19 would deter him from engaging in criminal activity and that it was more than likely that any such fear would take a back seat to, or be overpowered by, his need to satisfy his longstanding addiction to crack cocaine. For these reasons, coupled with a concern about insufficient monitoring by the surety, especially during the night, I found that the proposed plan of release was inadequate and that the risk of Mr. Haughton's re-offending was extremely high.

[47] Accordingly, the application by the Accused for review of the Bail order of Judge Atwood made on December 9, 2020 pursuant to s. 520 of the *Criminal Code* is dismissed. As a result, Mr. Lemmon continues on remand until his hearing in the Provincial Court on March 25, 2021.

Norton, J.