Case Name:

R. v. Smith

Between
Her Majesty the Queen, Applicant, and
Lerondo Cortel Smith, Respondent

[2013] O.J. No. 1057

2013 ONSC 1341

Court File No. CR-13-90000041-00BR

Ontario Superior Court of Justice

M.R. Dambrot J.

Heard: February 21, 2013.
Judgment: March 6, 2013.

(55 paras.)

Criminal law -- Compelling appearance, detention and release -- Judicial interim release or bail -- Review of -- Application by the Crown for review of a release order allowed -- Release order set aside -- Accused was arrested for drug offence and released on a recognizance and required to reside with surety -- Surety was released and accused committed to prison -- Justice of the Peace then granted release based on new surety without conducting new bail hearing -- Once an order in writing was made committing an accused to prison, the underlying release order was spent and a new judicial interim release hearing must be held -- In this case, where accused was required to reside at surety's home, substitution of new sureties without a new bail hearing was entirely inappropriate.

Application by the Crown for review of an order granting the accused bail. The accused was arrested and charged with possession of cocaine, possession of marihuana, possession of cocaine for the purpose of trafficking and breach of a probation order. He was released on a recognizance. The accused was arrested again and charged with possession of cocaine for the purpose of trafficking and breach of a recognizance. The Justice of the Peace ordered the accused released on a recognizance in the amount of $500, with one surety and a number of conditions, including that the

accused reside with the surety at the surety's address. The surety subsequently asked to be released of his obligations under the recognizance and the accused was committed to prison. The accused then made a new interim release application with a proposed new surety, he argued that it was not necessary for the accused to show cause again. After satisfying himself that the surety was suitable, the justice of the peace released the accused.

HELD: Application allowed. The release order was set aside. Where there was a committal order, a new bail hearing was necessary. Once an order in writing was made committing an accused to prison under s. 766(1) of the Criminal Code or the accused was committed to prison pursuant to s. 767, the underlying release order was spent and a new judicial interim release hearing must be held. Pursuant to s. 769 of the Criminal Code, where an accused had been rendered into custody and committed to prison, the judicial interim release provisions applied. In such circumstances, the justice was required to conduct a bail hearing. Once a committal order was made, a simple substitution of sureties was not possible. Even if no new bail hearing was required, where a surety was named, especially where the accused was required to reside at that surety's residence, substitution of new sureties without a new bail hearing would be entirely inappropriate.

Statutes, Regulations and Rules Cited:

Criminal Code, R.S.C. 1985, c. C-46, s. 503, s. 515(1), s. 515(2)(c), s. 521, s. 766(1), s. 766(3), s. 766(4), s. 767, s. 767.1, s. 769

Counsel:

Jennifer Briscoe, for the Crown.

S. Chung, for the Respondent.

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1 M.R. DAMBROT J.:-- The Crown brings this application pursuant to s. 521 of the *Criminal Code* ("the *Code*") for a review of an order made by Justice of the Peace Keilty for the judicial interim release of the respondent, Lerondo Cortel Smith ("the accused"), on January 30, 2013.

Background

2 On June 24, 2012, the accused was arrested and charged with possession of cocaine, possession of marihuana, possession of cocaine for the purpose of trafficking and two counts of breaching a probation order. He was released on a recognizance. On July 9, 2012, the accused was arrested again and charged with possession of cocaine for the purpose of trafficking and breach of the June 24 recognizance.

3 A judicial release hearing was held on July 24, 2012 before Justice of the Peace Humeniuk. The justice of the peace cancelled the June 24 recognizance and held a bail hearing on all of the charges. In the end, she ordered the accused released on a recognizance in the amount of $500, with one surety, and with a number of conditions. In the release order, the justice of the peace specifically named Jerusha Brathwaite as the surety. One of the conditions of the recognizance was that the accused was required to live with Braithwaite at 18 Grenville Street, unit 915, which was Brathwaite's residence, and be amenable to the routine and discipline of that household.

4 On January 15, 2013, Brathwaite brought an application in writing to a justice of the peace to be relieved of his obligations under the recognizance pursuant to s. 766(1) of the *Code* on the basis that the accused refused to be amenable to the routine and discipline of the household. Justice of the Peace Conacher granted the application and made an order in writing for committal of the accused to prison pursuant to s. 766(1) of the *Code*.

5 On January 26, 2013, the accused turned himself in to 22 Division and was committed to prison pursuant to the order of Justice of the Peace Conacher. A sheriff's certificate was prepared pursuant to s. 766(3) certifying that the accused had been committed to prison. The original recognizance was not produced in court, but I presume, on the basis of the presumption of regularity, that the justice of the peace ordered an entry of the committal to be endorsed on it.

6 As a result, pursuant to s. 766(4) of the *Code*, the recognizance was vacated and the surety discharged.

7 On January 26, 2013, Justice of the Peace Danbrook issued a warrant remanding the accused to Practice Court in the Superior Court of Justice on January 28, 2013, presumably to permit the accused to apply for judicial interim release. The justice of the peace remanded the matter to this court because by this time, the accused had been ordered to stand trial in this court on two of the charges, and the remaining charges had been withdrawn. As a result, no information remained in existence for any of the charges in the Ontario Court of Justice. On January 28, Then R.S.J. remanded the matter to January 30, 2013.

8 On January 30, 2013, the matter came before Forestell J. At that time, Crown counsel submitted that the matter should proceed as a bail hearing. However, counsel for the accused argued that the accused was entitled to a simple surety substitution and was not required to show cause once again, subject to the court finding that the new proposed surety was suitable. Counsel relied on the authority of *R. v. Alexander*, 2012 ONSC 3792, [2012] O.J. No. 2932.

9 Unfortunately, counsel for the accused had placed no material before Forestell J. in support of her position. Forestell J. did not have the benefit of copies of all of the court documents and transcripts that are now before me, and as a result did not have a full appreciation of what had transpired up to that date. Nor did she have the benefit of full argument. After taking the time to briefly review the decision in *Alexander*, Forestell J. formed the preliminary view that the original release order remained in place, but she noted that she wasn't sure that she had jurisdiction to make

a ruling because the issue was not properly before her. She noted that there was no application in this court raising the issue, and that there was nothing before her to act on. As a result, she adjourned the matter to February 4, 2013. She did say to counsel for the accused that "[i]n the interim you can attempt to have the surety present to try and obtain the release of Mr. Smith on the existing release order." If that proved unsuccessful, she directed that counsel could return to the Superior Court upon a proper application.

10 On January 30, 2013, without notice to Crown counsel and in her absence, and in the absence of the accused, counsel for the accused, together with Robert Smith, the proposed new surety, appeared before Justice of the Peace Keilty. Counsel told the justice of the peace that it was her opinion, based on *Alexander*, that it was not necessary for the accused to show cause again when a committal order is made pursuant to s. 766(1), and that "Justice Forestell agreed with me today." She went on to say that the release order remained intact and that "Justice Forestell ruled on that." With great respect, that overstates what Forestell J. said, and, more importantly, omits what is patently clear from the proceeding before Forestell J.: there was no proper application before her, and she had made no decision, order or ruling.

11 After satisfying himself that the surety was suitable, the justice of the peace released the accused on a document entitled "Bail Variation - Recognizance of Bail." By this document, it is plain that the justice of the peace did not simply substitute a new surety under the existing recognizance. Instead, he amended the underlying judicial interim release order and released the accused on an amended version of the recognizance. Specifically, he removed the name of the surety in the original order and recognizance and substituted the name "Robert Leonard Smith", and he amended the residence clause in the original order and recognizance to now require the accused to reside at "57 Verobeach Blvd. North York, Ontario."

12 The accused subsequently entered into this recognizance and was released from custody.

13 When the Crown learned of this, it brought this application to review the release order pursuant to s. 521 of the *Code.*

Analysis

14 When a peace officer who arrests a person and charges them with a criminal offence causes that person to be detained in custody, that person must be brought before a justice without unreasonable delay (s. 503 of the *Code*). When an accused person charged with an offence is brought before a justice, ordinarily the justice will either detain that person in custody or release him or her on some form of judicial interim release (s. 515(1) of the *Code*). One of the available forms of release is a recognizance with sureties in such amount and with such conditions as the justice directs (s. 515(2)(c) of the *Code*).

15 A recognizance is the formal record of an acknowledgment by an accused of indebtedness to the Crown which is defeasible upon fulfilment of the conditions recorded in the recognizance,

particularly the requirement to attend court as required. A recognizance with sureties also records the acknowledgment by the sureties of their debt to the Crown for some or all of the amount pledged on the same terms. The sureties, in effect, guarantee that the accused will be faithful to the recognizance (see Form 32 of the *Code* and Gary Trotter, *The Law of Bail in Canada*, loose-leaf, 3rd ed. (Toronto: Thomson Reuters Canada Limited, 2010) ("Trotter"), at pp. 6-10 and 6-11).

16 While the primary obligation of a surety is to ensure the accused's presence in court for trial, the surety is also required to ensure that the accused abides by the conditions of the recognizance, and to ensure the good behaviour of the accused while on bail (see *R. v. Patko*, 2005 BCCA 183, 197 C.C.C. (3d) 192, at paras. 22-23, and Form 32). The extent to which the surety is required to be responsible for the accused's behaviour will depend, in part, on the terms of the recognizance. Where, as here, the accused is required to reside with the surety, be in the surety's residence most of the time under so-called house arrest, and be amenable to the routine and discipline of the household, the expectation will be greater.

17 Where an accused person is not living up to the terms of the recognizance, or where the surety wants to be relieved of his or her obligations under the recognizance for any other reason, the surety may render the accused into court, that is, physically bring the accused to court and give the accused into the court's custody pursuant to s. 767 of the *Code*. Where this is done, the accused will be committed to prison and the surety will be discharged of his or her obligations under the recognizance.

18 More commonly today, rather than personally rendering an accused, sureties who wish to be relieved of their obligations will avail themselves of s. 766(1) of the *Code* and have the accused rendered into custody on the basis of court-ordered process. That section permits a surety to apply in writing to a court, judge or justice to be relieved of his or her obligations under a recognizance. When such an application is received, the court, judge or justice issues an order in writing for committal of that person to the prison nearest to the place where he was, under the recognizance, bound to appear.

19 Where an order is made under s. 766(1) and given to the surety, the surety or any peace officer may, pursuant to s. 766(2), arrest the accused and deliver him or her to prison, where he or she will remain until discharged according to law. Once an accused is imprisoned, pursuant to s. 766(3), the sheriff is obliged to provide a certificate to that effect to the court, judge or justice who issued the order for committal, and the court, judge or justice is then required to order an entry endorsing the committal on the recognizance. By virtue of s. 766(4), the endorsement vacates the recognizance and discharges the sureties.

20 For ease of reference, I set out the entirety of s. 766:

> 766.(1) A surety for a person who is bound by recognizance to appear may, by an application in writing to a court, justice or provincial court judge, apply to be relieved of his obligation under the recognizance, and the court, justice or

> provincial court judge shall thereupon issue an order in writing for committal of that person to the prison nearest to the place where he was, under the recognizance, bound to appear.
>
> (2) An order under subsection (1) shall be given to the surety and on receipt thereof he or any peace officer may arrest the person named in the order and deliver that person with the order to the keeper of the prison named therein, and the keeper shall receive and imprison that person until he is discharged according to law.
>
> (3) Where a court, justice or provincial court judge issues an order under subsection (1) and receives from the sheriff a certificate that the person named in the order has been committed to prison pursuant to subsection (2), the court, justice or provincial court judge shall order an entry of the committal to be endorsed on the recognizance.
>
> (4) An endorsement under subsection (3) vacates the recognizance and discharges the sureties.

21 Once an accused has been rendered into custody and committed to prison, whether pursuant to s. 766 or s. 767, he or she must be taken before a judge or justice pursuant to s. 769 of the *Code*, and a judicial interim release hearing will ordinarily take place. Section 769 provides:

> 769. Where a surety for a person has rendered him into custody and that person has been committed to prison, the provisions of Parts XVI, XXI and XXVII relating to judicial interim release apply, with such modifications as the circumstances require, in respect of him and he shall forthwith be taken before a justice or judge as an accused charged with an offence or as an appellant, as the case may be, for the purposes of those provisions.

22 Based on a plain reading of s. 766, there would not appear to be room for any doubt that once the accused was imprisoned pursuant to an order for committal, a sheriff's certificate delivered and an entry of the committal endorsed on the recognizance, the recognizance was vacated and the surety was discharged. In this case, since there is no longer any proceeding before the Ontario Court of Justice, the accused, it would appear, was properly brought to this court for a judicial interim release hearing.

23 The only provision of the *Code* that contemplates any interruption of the otherwise inexorable progression from rendering to committal to new bail hearing is s. 767.1 of the *Code*. That section was engrafted to the provisions of the *Code* respecting the effect and enforcement of recognizances in 1985. It provides:

> 767.1(1) Notwithstanding subsection 766(1) and section 767, where a surety for a person who is bound by a recognizance has rendered the person into the custody of a court pursuant to section 767 or applies to be relieved of his obligation under

> the recognizance pursuant to subsection 766(1), the court, justice or provincial court judge, as the case may be, may, instead of committing or issuing an order for the committal of the person to prison, substitute any other suitable person for the surety under the recognizance.

24 In interpreting the effect of this provision, it is helpful to consider its purpose. It is apparent that there is an array of reasons that a surety might decide to render an accused. Sometimes, the surety does so because the accused is not complying with his or her obligations under the recognizance, and the surety does not wish to remain at risk of losing the money he or she has pledged. Sometimes the surety simply does not want to continue to be responsible for an accused who will not conduct himself or herself in accordance with the recognizance. But sometimes, a surety may render an accused for reasons that have nothing to do with misconduct.

25 A surety may simply wish to be freed of his or her obligations because he or she is relocating, or has taken on other responsibilities making it impossible to continue in the role of a surety. In these cases, the cumbersome process of rendering, committal and a new judicial release hearing may be unnecessary. A simple process permitting the substitution of one sufficient and satisfactory surety for another was considered desirable, and s. 767.1 was enacted. But that provision was wisely enacted as a discretionary power. Presumably a justice would decline to exercise it when the rendering was said to flow from misconduct on the part of the accused. In this regard, I agree with Trotter, at p. 7-16, where the author states, "In situations where the attempt to render the accused reveals misconduct on the part of the accused person, it is better to issue a warrant and to have the issue aired at a new bail hearing."

26 In any event, on the face of things, s. 767.1 has nothing to do with this case. In this case, when the surety applied for relief, the accused was ordered to be committed to prison, and he was committed to prison pursuant to that order. But when the accused was brought before this court for a judicial interim release hearing, counsel for the accused expressed a different view. As I have already noted, when the matter came before Forestell J. on January 30, 2013, counsel for the accused argued that the accused was entitled to a simple surety substitution on the authority of *Alexander*.

27 I turn next to examine the decision in *Alexander*. In *Alexander*, on April 13, 2011, the accused was ordered released on a recognizance with one or more sureties in the amount of $25,000. Unlike this case, the sureties were not named in the order. The accused was not immediately released, and was returned to custody. Approximately one month later, on May 16, 2011, the accused was in a position to comply with the release order, and he was in fact released on a recognizance with three sureties.

28 On November 30, 2011, the sureties applied to be released of their obligations under the recognizance, and a justice of the peace signed an order for committal pursuant to s. 766(1) of the *Code*. On December 2, 2011, the accused surrendered to the police and was taken before a justice of

the peace in the Ontario Court of Justice. The justice of the peace remanded the accused for a bail hearing. Ultimately, the accused consented to his detention. The matter came before Hill J. as an application to review the detention order pursuant to s. 520 of the *Code*.

29 It is noteworthy that in *Alexander*, unlike in this case, no sheriff's certificate was prepared pursuant to s. 766(3) certifying that the accused had been committed to prison. In addition, it was agreed that no justice of the peace had ordered an entry of the committal to be endorsed on the recognizance. Hill J. was of the view that the failure to endorse an entry of the committal meant that the recognizance was not vacated and the sureties were not discharged pursuant to s. 766(4).

30 As a result, Hill J. characterized the position of the accused as a kind of "detention limbo". He said, at para. 31, that the accused was "in custody on a s. 766(1) committal order but unable to be free of the existing recognizance to allow him to secure a new recognizance with new sureties to satisfy the subsisting April 13, 2011 order for release."

31 This led Hill J. to consider the significance of a committal order made pursuant to s. 766(1). He reasoned, at para. 35, that a s. 766(1) committal order "returns an accused to the status he had of having a release order in hand ... awaiting fulfilment, if possible, by the production of new sureties approved by a releasing justice pursuant to s. 519(1)(b) of the *Code*." Importantly, he went on to say, at para. 39, that he considered this to be the effect of a s. 766(1) committal order whether or not the ss. 766(3) and (4) endorsement process was properly executed. In coming to this conclusion, he relied on the fact that s. 769 imports the provisions of Part XVI of the *Code*, with such modifications as the circumstances require, into the process of an accused obtaining release after a "committal" (as opposed to a "detention"). Understandably, he did not rely on s. 767.1. He explicitly recognized that that provision is unavailable after a committal order has been made.

32 Hill J. did note that a different conclusion concerning the effect of a surety rendering was reached in Trotter, at p. 7-14. In Trotter, the author expressed the view that a surety-rendering places an accused "in the same position as if he/she had not yet applied for bail". Hill J. did not agree. He concluded, at para. 36, that running a new bail hearing "because of a s. 766(1) surety rendering *simpliciter* does not recommend itself as necessary or appropriate." He concluded that Alexander was unlawfully detained.

33 With great respect, I cannot agree with the conclusion reached by Hill J. about the effect of a s. 766(1) committal order. Whether or not a new bail hearing is "appropriate" in all circumstances is debatable. I agree with Hill J. that there are some circumstances when it is not. But in my view, whatever might be "appropriate," where there is a committal order, a new bail hearing is necessary. In reaching my conclusion, I note, first of all, that while Hill J. made reference to s. 769 of the *Code*, he appears to have overlooked the ultimate words in that provision. As noted above, s. 769 provides:

> 769. Where a surety for a person has rendered him into custody and that person has been committed to prison, the provisions of Parts XVI, XXI and XXVII relating

> to judicial interim release apply, with such modifications as the circumstances require, in respect of him *and he shall forthwith be taken before a justice or judge as an accused charged with an offence or as an appellant, as the case may be, for the purposes of those provisions*. [Emphasis added.]

34 This section provides that where an accused has been rendered into custody and committed to prison, the judicial interim release provisions apply, modified to fit the circumstances, and the accused must forthwith be brought before a judge or justice *as an accused charged with an offenc* e for the purpose of the judicial interim release provisions. This section does not say, as Hill J. would have it, that the accused is to be brought before the court as an accused person with a release order in hand. Indeed, if that were the case, there would be no need to bring the accused before a judge or justice at all. All he would need to do is have his new sureties attend. Instead, the language used in s. 769 closely tracks the language in s. 515 of the *Code*, which provides that when "an accused who is charged with an offence ... is taken before a justice" the justice shall release the accused on an undertaking unless the prosecutor shows cause why another order should be made. In other words, in such circumstances, the justice is required to conduct a bail hearing.

35 I note that it is not only Trotter who takes the view that once a committal order is made, the accused must have a new bail hearing. The editors of *Martin's Annual Criminal Code*, in their annotation to s. 769, state, "A new bail hearing is required when an accused has been rendered by a surety and committed to prison." In addition, several other judges and authors have taken the same view. With respect to cases in Ontario, it is sufficient to quote from the judgment of Vannini D.C.J. in *R. v. Whalen* (1980), 57 C.C.C. (2d) 10 (Ont. Dist. Ct.), who referred to several texts and other cases in his judgment. He stated, at pp. 14-16:

> Is the order of Judge Stortini in full force and effect having regard to the surrender of the accused into custody by his surety?
>
> While the requirements of s. 700 [now s. 766] may not have been strictly complied with, as it does not appear from the record that the Sheriff delivered to the Justice that committed the accused to jail on the application of the surety a certificate that the accused had been committed to prison and that the Justice did not order an entry of the committal to be endorsed on the recognizance, the endorsement of which vacates the recognizance and discharges the sureties; s. 700(3) and (4), the proceedings had and taken effectively vacates the recognizance and discharges the surety.
>
> ...
>
> These irregularities notwithstanding, the vacating of the recognizance as by s.

700(4) provided effectively vacated the order of release made by Judge Stortini thereby requiring a new hearing: see *R. v. Faulkner*, [1980] 2 W.W.R. 286, 4 W.C.B. 164 (Garson Prov. Ct. J., Man).

It is by s. 703 provided:

> 703. Where a surety for a person has rendered him into custody and that person has been committed to prison, the provisions of Parts XIV, XVIII and XXIV relating to judicial interim release apply, *mutatis mutandis*, in respect of him and he shall forthwith be taken before a justice or judge as an accused, charged with an offence or as an appellant, as the case may be, for the purposes of those provisions.

Of these provisions, Scollin, *supra*, [Scollin: *Pre-trial Release* (1977)] observes at pp. 89-90:

> Where the surety turns the accused back into custody, the accused must be taken forthwith before a justice or judge having jurisdiction to grant him interim release. Thus, in the ordinary case, he will be brought before a justice under s. 457. Where he is charged with murder or one of the serious offences mentioned in s. 457.7 (see Appendix E), he must be taken before a judge of or a judge presiding in a superior court of criminal jurisdiction. If he was granted release pending the determination of his appeal, he must be taken before a judge of the Court of Appeal under s. 608.
>
> When the accused is brought before him, the justice or the judge will then determine anew the question of interim release.

In Powell: *Arrest and Bail in Canada*, the author states at p. 44:

> An amendment to s. 703 of the Criminal Code now provides that where a surety for a person has rendered him into custody and that person has been committed to prison the provisions of the Criminal Code relating to judicial interim release apply and require that the accused forthwith be taken before a justice or judge as an accused charged with an offence or as an appellant, as the case may be, to be dealt with according to the

> provisions of Part XIV, Part XVIII or Part XXIV.

Salhany, *supra*, [Salhany, *Canadian Criminal Procedure,* 3rd ed. (1978)] observed at p. 95:

> At common law, a surety who wished to discharge his obligations had the right to seize the accused and deliver him to a justice of the peace. This right has been preserved for the surety in Canada by the Criminal Code and may be exercised by him at any time up until the accused has had his trial.
>
> The surety may also apply in writing to a court, justice or magistrate to be relieved of his obligation. An order is then issued in writing committing the accused to the nearest prison where he is bound to appear. The order is then delivered to the surety who may arrest the accused himself, or request a peace officer to arrest him and deliver him to the keeper of the jail. Upon receipt of a certificate from the sheriff that the accused is in prison, the judge, magistrate or justice who issued the order for the accused's arrest will endorse the committal on the recognizance. The endorsement automatically vacates the recognizance and discharges the surety.
>
> If the sittings of the court at which the accused is required to appear have begun, the surety may deliver the accused to the court at any time and obtain a discharge of his obligation.
>
> The rendering of an accused into custody and the discharge of his sureties does not operate to bar the accused from obtaining his release again. He must be taken immediately before a justice of the peace and the provisions relating to interim release will apply.

Of these provisions, Greco Prov. Ct. J. (Ont.), *R. v. Leclair* (1978), 39 C.C.C. (2d) 461, expressed his view at p. 464, as follows:

> I take the view that the process now required to be undertaken by the Crown, involving the release or detention of the accused, must be begun *anew* as though the accused were freshly before the Court as an arrested person, and that all hearings or applications which preceded the surrender

> of the accused by the surety in no way affect the requirements of s. 703 in that regard.
>
> Having regard to these provisions and these authorities I do hold that upon the accused having been committed to jail pursuant to the application of his surety, he was required to be brought forthwith before a Justice for the purpose of a new interim release hearing pursuant to s. 457. [Emphasis in original.]

36 Unlike Hill J., Vannini D.C.J. did not consider that the effect of the order of committal was undermined by the absence of a sheriff's certificate and an endorsement on the recognizance, since the subsequent proceedings had effectively vacated the recognizance and discharged the surety. I agree with him on this point. While it is true that s. 766(4) provides that an endorsement under subsection (3) vacates the recognizance and discharges the sureties, it does not say that absent an endorsement, the recognizance, and the surety's obligations under it, must remain in effect. With respect, that would be an absurdity. Once a surety has done what he is obliged to do and the accused is committed into prison, the recognizance, and the surety's obligations under it, are of necessity at an end. The failure of the sheriff or the justice to do the administrative acts required of them does not penalize the surety. The surety can have no continuing responsibility when the accused is in custody or if the accused is subsequently out of custody again, whether lawfully or unlawfully. The certificate and endorsement are meant to create a record, and to help to ensure that the accused is dealt with according to law. A failure to complete them cannot penalize the surety or preserve a spent recognizance. Vannini J. was correct to say that once an accused is committed to prison, the reality of "the proceedings had and taken effectively vacates the recognizance and discharges the surety."

37 In any event, whatever the effect of a failure to complete a sheriff's certificate and to endorse the recognizance may be, in the end it is not s. 766(4) that addresses the termination of the original bail order; it is s. 769 that does this. Once again, s. 769 requires a new bail hearing, effectively terminating the original bail order, upon committal of the accused after he or she is rendered. Section 769 makes no reference to the sheriff's certificate or the endorsement on the recognizance. A failure to comply with s. 766(3) has no effect on the termination of the original bail order.

38 To complete the picture in Ontario, I note that the decision of Vannini D.C.J. was followed by Marchand J. in *R. v. Shank*, [1995] O.J. No. 804 (Gen. Div.).

39 At least one other court in Canada outside Ontario has considered the effect of a committal under an order of committal made pursuant to s. 766(1) of the *Code*. In *R. v. Delorey*, 2012 NSCA 5, 311 N.S.R. (2d) 197, an offender had been released on a recognizance with a surety pending an appeal to the Court of Appeal. His surety decided that she did not wish to continue as a surety, and brought an application under s. 766(1) to be relieved of her obligations under the recognizance. As a result, an order of committal was issued by a judge of the Court of Appeal, and the offender was

arrested and committed to prison. The offender then brought a motion to a Court of Appeal judge in chambers for an order substituting a new surety under s. 767.1(1), or, in the alternative, for a new order of release pending appeal.

40 Upon hearing the motion, Farrar J.A. concluded, at para. 7 of his reasons, that upon the offender being arrested under the order of committal, "Ms. MacDonald was discharged as a surety and the Recognizance was at an end." He refused to substitute a new surety and instead considered it necessary for the matter to proceed as a fresh application for bail pending appeal.

41 This decision is at odds with the analysis in *Alexander*, and supports the view I take of the matter. Once an accused is committed to prison under s. 766(1), the recognizance is terminated, substitution of sureties is not available under s. 767 or otherwise, and a fresh judicial interim release hearing is necessary before an accused can be released.

42 I note as well that if Hill J. is correct that a committal order leaves the underlying release order intact and in effect, there would have been no need for Parliament to have added s. 767.1 concerning the substitution of sureties in 1985. On the contrary, the words of that section suggest that a committal order does have the effect of cancelling the original release order. It only authorizes a justice to permit the substitution of sureties "instead of committing or issuing an order for the committal of the person in prison". Once a committal order is made, that section does not authorize the substitution of sureties. The natural inference is that once a committal order is made, whether or not it is desirable, a simple substitution of sureties is not possible.

43 I have examined the debates from when Bill C-18 was before the House and Senate in hopes that they might shed light on the proper interpretation of the effect of committal under s. 766 and the availability of substitution of sureties. Bill C-18 became the *Criminal Law Amendment Act, 1985*, R.S.C. 1985, c. 27. This Act created what is now s. 767.1 (and what was then s. 701.1). Clause 167 was the amendment creating this provision. Unfortunately, there is nothing in the debates in either the House or the Senate, or in the proceedings before the House Standing Committee on Justice and Legal Affairs or the Senate Standing Committee on Legal and Constitutional Issues, specifically in relation to s. 767.1. However, the Explanatory Note in the version of the Bill before the House of Commons on first reading does provide some insight into the views of the Minister. It reads:

> *Clause 167*: New. This amendment would give the court discretion to accept a suitable alternative surety <u>before committing an accused to jail</u> because the original surety under a recognizance is to be relieved of his responsibilities thereunder. [Underlining added; italics in original.]

44 From this, it is safe to say that the government viewed substitution of sureties as being unavailable except pursuant to s. 767.1, and available pursuant to s. 767.1 only before an accused is committed to prison and before the recognizance is vacated.

45 One final point on this issue. In *Alexander*, Hill J. also relies on the use of the word "committal" in s. 766(1) in contrast to the word "detention" in s. 523 and s. 524, which authorize the setting aside of a release order in quite different circumstances, in support of his conclusion that a committal order under s. 766(1) does not vacate the underlying release order. For my part, I do not think that much flows from this distinction. I note that the word "committal" does not, of itself, imply that there is no valid release order in respect of an accused. After all, when an accused is not immediately released after a bail hearing, a warrant of committal issues in Form 8 whether the accused has been ordered detained or released. Rather, it is the entire scheme in Part XXV of the *Code* concerning the effect and enforcement of recognizances that drives me to that conclusion.

46 For all of these reasons, I conclude that once an order in writing is made committing an accused to prison under s. 766(1) or the accused is committed to prison pursuant to s. 767, the underlying release order is spent and a new judicial interim release hearing must be held.

47 However, even if my analysis of s. 766 is wrong, in this case the decision in *Alexander* is clearly distinguishable, and the justice still had no authority to substitute a new surety without a bail hearing. I say this because the release order in this case named the surety, and included a term that the accused reside at the address of that very surety. In order to substitute a new surety, the justice of the peace amended these two provisions of the original release order. Indeed, as I have already noted, the justice of the peace released the accused on a document entitled "Bail Variation - Recognizance of Bail." A "bail variation" is a colloquial term, but in this case it obviously means an amendment of the underlying release order. Clearly, the justice of the peace had no authority to amend the release order, and nothing in *Alexander* suggests otherwise.

48 The first distinction that I raise, that in this case the surety was named in the original release order, is no mere technicality. Section 515(2)(c) authorizes a justice conducting a judicial interim release hearing to release an accused "on his entering into a recognizance before the justice with sureties in such amount and with such conditions, if any, as the justice directs". Pursuant to s. 519, the accused may be released immediately if the accused can immediately comply with the order, or may be released later by the same or another justice if the accused cannot immediately comply with the order. In a great many cases, particularly less serious cases, the justice who conducts the bail hearing and orders the release of the accused on a recognizance with sureties does not name the sureties, but merely orders that the sureties are to be "sufficient." The sufficiency of the sureties is then left to the justice who later actually has the accused enter into the recognizance and then releases the accused.

49 However, in some cases, the justice who conducts the bail hearing and orders the release of the accused actually names the sureties in the release order. Although this practice existed long before the enactment of s. 515(2.1) of the *Code*, that provision now authorizes the practice. Section 515(2.1) provides:

> (2.1) Where, pursuant to subsection (2) or any other provision of this Act, a justice,

> judge or court orders that an accused be released on his entering into a recognizance with sureties, the justice, judge or court may, in the order, name particular persons as sureties.

50 This provision makes clear that a justice releasing an accused on a recognizance with sureties may name a particular person as a surety. In addition, importantly for this discussion, where a surety is named, he or she is named "in the order". As a result, a justice who is otherwise authorized to substitute one surety for another cannot do so where the surety is named. In such a case, the justice would be amending the underlying release order, something that the justice is not authorized to do. The fact that the justice may not amend the release order is particularly clear from s. 767.1(2), which provides:

> (2) Where a person substituted for a surety under a recognizance pursuant to subsection (1) signs the recognizance, the original surety is discharged, but the recognizance and *the order for judicial interim release pursuant to which the recognizance was entered into are not otherwise affected.* [Emphasis added.]

51 If there was any doubt, the emphasized words in s. 767.1(2) make plain that a simple substitution of sureties cannot take place where, as here, an accused is obliged by the release order to reside with his or her surety and the surety's address is specified.

52 While some might think that this is a mere technicality, in my view, this is as it should be. I say this because in many cases, the naming of the surety is an integral part of the release order. Admittedly, in some cases, naming the surety in the release order is a mere convenience. But often, it is much more than a convenience. Often, in cases where release on the primary ground (ensuring attendance in court - s. 515(10)(a)) or the secondary ground (for the protection or safety of the public - s. 515(10)(b)) is a close call, the justice will find that the balance tips to the accused because a strong and reliable surety with an effective plan of supervision is presented to the court. In such a case, the act of substituting a new surety would not simply be a question of sufficiency. Instead, a new consideration of the balance between those considerations favouring release and those favouring detention would be necessary - in effect, a new bail hearing. As a result, where a surety is named, and still more where, as here, the accused is required to reside at that surety's residence, substitution of new sureties without a new bail hearing would be entirely inappropriate.

53 Finally, Crown counsel complains that counsel for the accused appeared before the justice without notice in this case seeking a substitution of sureties. Having regard to her understanding of the outcome of the appearance before Forestell J., I will not criticize counsel for the accused for failing to give notice to the Crown. But I will say this. When an application is made pursuant to s. 767.1 of the *Code*, an order for substitution does not go as of right. Where a surety was named in the original order, or where some condition of the original order cannot be complied with, as I have stated, substitution is not available. But even where no surety is named, the justice is still exercising discretion. Section 767.1 provides that the justice "may" substitute another suitable person for the

surety. The reason that the surety is rendering the accused is an obvious consideration. If the rendering is occasioned by an allegation of misconduct by the accused, this may tell against substitution. As a result, in most cases, the justice should ensure that notice has been given to the Crown, and should provide the Crown with an opportunity to appear and make submissions. The only time that I could imagine that notice might perhaps be unnecessary is when there is no allegation of misconduct on the part of the accused, no surety was named in the original order and the substitution of one sufficient surety for another is all that is in issue.

Disposition

54 The application is granted, the release order is set aside, and the accused is committed to prison, to be kept there until he is discharged according to law. An order of committal may issue to this effect if necessary. I further order that the accused be returned to this court on a date agreed upon by counsel for a fresh judicial interim release hearing. I am satisfied, despite some authority to the contrary, that this hearing should properly be in this court.

55 A final note. It may be, since the order made by Justice of the Peace Keilty for the judicial interim release of the accused on January 30, 2013, was not made under s. 515 or s. 523 of the *Code*, and indeed was not made under any provision of the law, that a review under s. 521 is not technically available. If that is so, then I exercise my prerogative jurisdiction to quash the release order, direct that the accused be committed to prison and that an order of committal issue if necessary, and direct that the accused be returned to this court for a fresh judicial interim release hearing.

M.R. DAMBROT J.