Indictment No. S-1-CR-2012-000063

***R. v. Latour*, 2013 NWTSC 57**

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- v -

HUGUES LATOUR

Transcript of the Reasons for Decision by the Honourable Justice L.A. Charbonneau, sitting in Yellowknife, in the Northwest Territories, on Tuesday, August 13th, A.D. 2009.

APPEARANCES:

Mr. Marc Lecorre	**Counsel for the Crown**
Mr. Serge Petitpas **Ms. Jeannette Savoie**	**Counsel for the Accused**

TUESDAY, AUGUST 13, 2013

REASONS FOR DECISION

CHARBONNEAU J. (Orally):

Yesterday we began the jury selection process for Mr. Latour's trial. After the first stage of that process, I heard two motions that I must deal with today. They are two separate motions.

The first is a motion for mistrial presented by the defence. The defence is asking me to order a mistrial on the basis of serious procedural defects in the process of the selection of the jury panel for the trial. More specifically, the defence claims that a large number of potential jurors who had received summonses were illegally excused by the Sheriff's Office and that a mistrial is necessary for this reason.

The second motion I must deal with this morning, if I do not allow the first, is a motion by the Crown asking me to exercise my authority under section 642 of the *Criminal Code* and order the Sheriff to go out on the streets of Yellowknife and summon other persons to appear

before the court as potential jurors for this trial to attempt to fill the empty seats on the jury.

The defence objects to this motion. The defence states that the conditions necessary for the exercise of that authority have not been met. Among other things, the defence is relying on an Ontario case, *R. v. Stephenson*, [1989] O.J. No. 800.

Obviously, if I allow the motion for mistrial presented by the defence, the Crown's motion will become moot.

As a preliminary point, I note that no formal evidence was presented, in the context of these two motions, relating to the details of the process that led to the selection of the jury panel for this trial. Both counsel made their submissions on the basis of the facts that were brought to their attention by the Sheriff's Office, the same facts that were brought to the attention of the Court.

In certain circumstances, it would be impossible or inappropriate for the Court to address issues raised regarding

the selection of a jury panel in the absence of more formal and detailed evidence about the selection process followed. However, in the circumstances of this case, in light of the nature of the arguments submitted and the type of objection raised by the defence, I believe that I can easily deal with the motion on the basis of the information available. I have no reason to doubt the accuracy of the things referred to by counsel for the defence, and furthermore, the Crown did not object to any of the facts relied on by the defence.

I myself referred to these facts last Friday in court. When I dismissed Mr. Latour's motion for a stay of proceedings, I summarized the information that I had available to me at the time, from the Sheriff's Office, regarding the state of the jury panel. Therefore, while no formal evidence has been filed in support of these motions, in the circumstances, I am of the view that I can decide these motions based on the information presented to me.

I think it is important first of all to review the context and facts that have given rise to the two motions. Mr. Latour is being tried on

an indictment comprising three counts. He is charged with having committed these offences in the town of Inuvik. He has elected to be tried by a court composed of a judge and jury, and, during one of his appearances in Territorial Court earlier in the process, he indicated that he wished to exercise his right to a trial in French. The trial was scheduled to take place here in Yellowknife rather than in Inuvik in recognition of the limited number of individuals who could have sat as jurors in a French-language trial in the community of Inuvik, which is much smaller than the community of Yellowknife.

According to the information provided to the Court by the Sheriff's Office, a large number of summonses was issued in preparation for this trial, approximately 1,200. More than 600 of these were served. Each summons was accompanied by a letter informing the prospective juror that the trial would take place in French and that the prospective juror had to speak that language fluently. A very large number of individuals contacted the Sheriff's Office and were excused because they lacked the necessary competence in French.

Yesterday when we began the selection process, we had, I believe, a panel of 47 persons. A fairly large number of them did not appear, about half. At the beginning of the proceeding, I explained to those present the language requirements for the trial.

During the appearance last Friday, counsel for the defence specified that he wished to proceed with a bilingual trial because he wanted to be able to cross-examine Anglophone witnesses without having to be interrupted by the consecutive interpretation that would be necessary if some of the jurors were unilingual Francophones.

Therefore, yesterday I explained to the prospective jurors that they had to be comfortable in both languages. Three or four people asked for exemptions because they spoke no or insufficient French. Nobody asked to be exempted on the basis of a lack of understanding of English. Therefore, for all practical purposes, I think it is clear that the fact that we were trying to empanel a bilingual jury rather than a Francophone jury had no impact on the selection process.

Yesterday others asked to be excused for personal reasons, and I granted some

of those requests.

By the time we had finished dealing with the requests for excuses, I believe there were eight names remaining. We selected two jurors. The defence used six peremptory challenges, and the Crown did not use any. Therefore ten jurors remain to be selected for this trial.

It was at this point that the Crown made its application pursuant to section 642 of the *Criminal Code*. The defence objected to this motion, but stated that it wanted to examine more carefully some of the case law on the issue. We stood down the proceedings until the afternoon.

That is the background to the motions that were presented and that I must rule on this morning.

First, with respect to the motion presented by the defence, the defence submits that a mistrial must be ordered because there were serious defects in the process leading up to the selection of the panel that we used yesterday. The defence states that the excuses granted by the Sheriff's Office before the beginning of the trial sittings were granted illegally.

The defence claims that the section of the *Jury Act* that authorizes the Sheriff to grant excuses does not apply to a criminal trial. The defence argues that the only part of the *Jury Act* that applies to criminal trials is that which sets the conditions for eligibility for serving as a juror, because section 626 of the *Criminal Code* refers to the provincial and territorial legislation on this issue.

The defence argues that section 632, which deals with excusing jurors, makes no reference to the provincial legislation, and for this reason, in a criminal trial, the only legal means for a prospective juror to be excused is to appear and seek to be excused by the court, by the judge, in the presence of the accused.

For the reasons that follow, I do not accept this argument.

It is clear that from a constitutional perspective, the federal government has jurisdiction over criminal matters, while the territorial government has jurisdiction over the administration of justice and of the courts. It is very clear to me from the case law that, with respect to the empanelling of a jury, both levels of government have jurisdiction, but at different stages

of the proceedings.

I will begin by citing *Find*, [2001] 1 S.C.R. 863, a decision of the Supreme Court of Canada dealing with this issue. I do not intend to focus on the specific facts of that case. I wish to cite the Supreme Court's overview of the jury selection process at pages 876 and 877:

> The jury selection process falls into two stages. The first is the "pre-trial" process, whereby a panel (or "array") of prospective jurors is organized and made available at court sittings as a pool from which trial juries are selected. The second stage is the "in-court" process, involving the selection of a trial jury from this previously prepared panel. Provincial and federal jurisdictions divide neatly between these two stages: the first stage is governed by provincial legislation, while the second stage falls within the exclusive domain of federal law.

The Court goes on to specify that the in-court stage is governed by sections 626 to 644 of the *Criminal Code*, while the pre-trial stage is governed by provincial legislation or, in this case, territorial legislation.

This shared jurisdiction with respect to the process for selecting jurors was also recognized by the Supreme Court of

Canada in *Barrow*, [1987] 2 S.C.R. 694.

The Superior Court of Ontario's judgment in *Re s. 39 Juries Act Contempt Inquiry*, 2011 ONSC 1105, provides, in my view, a good summary of what this represents. It is a decision by Hill J.

The issue underlying that case was what the consequences should be for those who do not appear for a jury selection process. However, Hill J. took the opportunity to present a relatively complete overview of the system for selecting jurors and the broader role of the jury trial in our system. At paragraph 27 of the decision, he writes:

> Criminal jury selection has both federal and provincial aspects — pursuant to ss. 91(27) and 92(14) of the *Constitution Act, 1867* respectively, the federal and provincial governments both play a role. The Ontario *Juries Act* governs much of the process relating to identifying and directing prospective jurors to the courthouse on the date of trial settings. Generally speaking, Part XX of the *Criminal Code of Canada* addresses the treatment of prospective jurors and the empanelling of juries here at the courthouse.

Later, at paragraph 42 of the same decision, Hill J. explains that, because of the excuses granted before the beginning of the

trial sittings, the final panel is invariably shorter than the original list of names. Hill J.'s decision also makes it plain that Ontario's legislation, like ours, authorizes the Sheriff's Office to grant excuses before the proceedings begin.

In my view, this decision simply confirms the holding in *Find*, *supra*: it is perfectly legal and legitimate for the Sheriff's Office to have the power to grant excuses before the beginning of the proceedings, as is the case in our *Jury Act*, which states the following at subsection 17(2):

> At any time before the time indicated for appearance on the summons, the Sheriff may excuse from service as a juror any person who the Sheriff is satisfied has good reason to be excused.

With respect, I believe that the interpretation proposed by the defence, according to which only the trial judge could excuse prospective jurors, would lead to absurd outcomes. According to this interpretation, there would be absolutely no way for a person who has received a summons to ask to be excused in advance. For example, a person who is unable to sit as a juror for medical reasons would be forced to travel to the court to

ask to be excused. Someone who, for example, already has a plane ticket booked for a planned trip that conflicts with the trial date would have to choose between disobeying the summons and missing the trip, as there would be no way to be excused in advance. These are two examples. There are dozens and dozens of others.

It is important to remember that a summons issued under the *Jury Act* is a court order. A person who fails to comply with it faces penalties. In light of this, it would be fundamentally unfair, in my opinion, if a citizen of the Northwest Territories who receives a summons and who has a valid reason not to appear were to have no recourse. This is why section 17, like similar provisions in the provincial and territorial legislation of other jurisdictions, authorizes the Sheriff's Office to excuse someone who, according to the statute, has good reason to be excused.

There is nothing here to suggest that this power was not exercised correctly by the Sheriff's Office. On the contrary, many people were excused because

they did not have the language skills required to participate in this trial. This was a completely valid reason for excusing them.

Our *Jury Act* grants the Sheriff's Office relatively broad powers to excuse prospective jurors. There could be a host of reasons to justify excusing somebody before the commencement of the proceedings. As long as it is done in compliance with section 17, before the date of the start of the sittings, and as long as it is done for the reasons provided for in section 17 (the person has good reason to be excused), then there is nothing illegal or inappropriate about it. It is a process that occurs every time a jury is empanelled for a trial. Every time this Court sits with judge and jury, the panel used for the jury selection differs from the original list of summonses. In my view, all of this complies with the case law of the Supreme Court of Canada and is consistent with the way things are done one in other jurisdictions.

This type of excuse, which is granted before the time indicated for appearance on the summons, is not like the situation where, a judge would delegate his or her power to excuse, after

the proceedings have begun, to the Sheriff. I fully agree with the defence that it would not be appropriate for a judge to delegate his or her power to excuse, or any other power related to selection, to the Sheriff's Office since, once the Court is in session, the *Criminal Code* applies. This is why section 17 of the *Jury Act* specifies that the Sheriff's authority may only be exercised before the time indicated for appearance on the summons.

For these reasons, I find that the defence's motion for mistrial has no merit.

Now, turning to the Crown's motion, the Crown is asking that I order the Sheriff to summon additional persons to try to complete the selection process. As I mentioned earlier, we are currently missing 10 of 12 jurors.

The defence made submissions regarding comments made by the Court in *R. v. Stephenson*, *supra*, an Ontario case that seems to suggest a certain number of conditions that must be present before the authority described in section 642 can be exercised. I will not go into these arguments in detail. I believe that the comments in *Stephenson* need to be understood in the broader context of the

jury selection process as it exists in that jurisdiction and in the context of the particular issue that was raised in that case.

All that section 642 of the *Criminal Code* says is that a judge may, at the Crown's request, issue this type of order if a full jury cannot be formed. The provision itself creates no other requirement, such as the existence of several jury lists at the outset, or that the application be filed before the start of the selection process.

Moreover, because the provision refers to the impossibility of forming a full jury, it seems logical to me to suppose that this type of motion would generally be presented after the process has begun and it becomes clear that the list has been exhausted. I am having trouble understanding how the power could be limited to situations in which it is possible to determine from the outset that a jury cannot be formed.

It should be noted that there are significant regional differences across the country. The jury selection process in major

centres is a very different operation from how that process is experienced in a smaller community, or in the communities that this Court visits when it sits on circuit.

The decisions filed by the Crown and the defence dealing with the jury selection process in Ontario, for example, clearly demonstrate that the process there is very different from the one followed in this territory.

Going back to section 640, it does not set out specific conditions or criteria to guide the Court in the exercise of its discretionary power, but it is a discretionary power. It must therefore be exercised reasonably and judicially, and not arbitrarily or frivolously.

The real issue, and the sole issue before me, in my view, is whether the Court should use its discretionary power in the circumstances and order that a certain number of persons be summoned immediately for the purpose of completing the jury selection process. There are some arguments in favour of this course of action. First, many resources have already been dedicated to this trial, and it is always tempting, in such circumstances, to say that it could not hurt to do

everything possible to have it proceed as planned.

Obviously, the other argument in favour, even if it means summoning a very large number of persons to appear this week in an attempt to complete the jury, is that the ultimate aim is to allow the accused to have that which he requested and that to which he is entitled, namely a jury trial and a bilingual trial.

However, as I have already mentioned, when the legislation grants a court a discretionary power, that power must be exercised reasonably. This in not an instance in which we need select two, three or even four more jurors. We are missing ten. To my knowledge, no request under section 642 of the *Criminal Code* has ever been made in this jurisdiction with so many seats to fill. Generally, such requests are made when the jury is short two or three jurors, possibly more, but I strongly doubt that there has ever been a request made, let alone granted, in a case where ten additional jurors were needed.

I must be realistic in exercising my discretionary power, and I must take into account all that has happened so far in terms

of efforts to select an adequate panel. As I have said, more than 600 people were originally summoned. Of that number, about forty made up the final panel because of the large number of excuses granted on account of the language requirements for this trial. Of that number, only two jurors could be selected.

It does not take a PhD in mathematics to understand that the number of persons who would have to be summoned to appear in order to fill the other ten seats would have to be absolutely enormous, especially in light of this trial's language requirements. I believe that even without these language requirements, summoning enough people at this stage to fill ten juror positions would be excessively difficult in any case.

There were many submissions yesterday regarding the issue of whether I could legally give instructions to the Sheriff to have a more targeted process for serving summonses, for example, by ordering the Sheriff to go to specific places where he would have a greater chance of finding bilingual individuals. Even assuming that such locations could be identified (it is far from obvious that there are many that could enable us

to serve a large number of summonses), I keep in mind the basic principle that, when the power set out by section 642 is exercised, it must be exercised in accordance with the general principles and purpose of the legislation generally applicable to the formation of juries. One very important aspect of this is the element of randomness inherent in the selection of prospective jurors. Any instruction that could compromise this randomness could give rise to problems.

Having carefully considered the issue since hearing the submissions yesterday afternoon, I find that I need not make a firm decision either way regarding the possibility of giving targeted instructions, since, unfortunately, I am convinced that even a targeted process would not enable us to summon enough people to allow a full jury to be empanelled.

In reaching this conclusion, I have mainly relied on the number of jurors currently lacking and the language requirements for this trial. It is not simply ten additional jurors who need to be identified, but ten additional

bilingual jurors.

In light of all that has happened so far in the process, I am unable to find that there is a reasonable chance or possibility that the process will succeed. In the circumstances, I do not think it would be responsible of me to order that a large number of citizens be summoned to continue the selection process.

For these reasons, the Crown's application is also dismissed.

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(TRANSLATION OF ORIGINAL FRENCH TRANSCRIPT CERTITIFIED BY COURT REPORTER LYNN CARRIÈRE AND FILED AUGUST 16, 2013)