

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN

HER MAJESTY THE QUEEN

-and-

DARYLE JACKSON BLACKDUCK

Application by accused challenging the jury panel pursuant to s. 629 of the *Criminal Code*. Dismissed.

Heard at Behchoko, NT, on April 28 and 29, 2014.

Reasons filed: July 15, 2014

REASONS FOR JUDGMENT OF THE
HONOURABLE JUSTICE S.H. SMALLWOOD

Counsel for the Crown: Alex Godfrey

Counsel for the Accused: Michael Martin

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REASONS FOR JUDGMENT

[1] This is an application by Daryle Jackson Blackduck challenging, pursuant to s. 629 of the *Criminal Code*, R.S.C. 1985, Chap. C-46, the jury panel that was assembled following an Order granting the summoning of talesmen for his jury trial on April 28, 2014 in Behchoko. Following the hearing of evidence and submissions from counsel, I dismissed the application indicating that written reasons would be provided. These are those reasons.

BACKGROUND

[2] The trial of the accused was scheduled to begin on April 28, 2014 in Behchoko on a charge of sexual assault. The accused had elected trial by judge and jury. A total of 250 jury summons were issued and the Sheriff's Office returned a nominal list of 120 persons when jury selection began on the morning of April 28, 2014. Fifty seven people, less than half of those summoned, attended jury selection that morning. On the request of counsel, I ordered that an alternate juror be selected. Jury selection proceeded and a number of people were excused on consent of Crown and defence counsel. A number of others were excused for various reasons including relationships with the accused or witnesses involved in the case, the inability to understand English and personal hardship.

[3] Six jurors were selected, with the Crown and defence each exercising three and six peremptory challenges respectively, before the initial jury panel was exhausted. The Crown applied, pursuant to s. 642 of the *Criminal Code*, for the summoning of talesmen. I granted the application and directed the Deputy Sheriff to summons approximately 30 talesmen for jury selection which was scheduled to continue later that afternoon.

[4] After court adjourned in the morning, the Deputy Sheriff advised me that he had been approached by the spouse of a juror who advised that the juror was supposed to attend a funeral in another community.

[5] The Deputy Sheriff summoned 23 talesmen. He also directed seven individuals who had been summoned but had missed jury selection to return for the continuation of jury selection.

[6] When Court resumed in the afternoon, counsel were advised of the Deputy Sheriff's conversation with the juror's spouse. The juror was brought into Court and questioned regarding the funeral plans. The juror was returned to the jury room and following submissions from counsel, I excused the juror on the basis of personal hardship. This left five jurors remaining on the jury and eight jurors (including an alternate) yet to be selected.

[7] The jury panel had assembled for the continuation of jury selection when defence counsel advised the Court that he would be making an application challenging the jury panel pursuant to s. 629 of the *Criminal Code*. Defence counsel advised the Court that he had spoken with Corine Nitsiza, the court interpreter, and he was concerned that the Deputy Sheriff had engaged in pre-screening by attending certain locations and by pre-screening talesmen for relationships with the accused, complainant and witnesses in the trial. Defence submitted an application in writing, as required by the *Criminal Code*, which alleged that the Deputy Sheriff was guilty of partiality in returning the panel of talesmen.

[8] The jury panel was directed to return the following morning and the s. 629 application proceeded. The defence called two witnesses on the application: Corine Nitsiza and Deputy Sheriff James Donovan. After hearing the evidence on the application and brief submissions from defence counsel, the application was adjourned to the following morning for further submissions. On April 29, 2014,

after hearing submissions, I dismissed the application with reasons to follow, and jury selection continued.

[9] On April 29, 2014, twenty five persons attended for jury selection; five were absent. Two people were excused by consent of counsel and a number of other persons were excused for various reasons. Four more jurors were selected before this additional panel was exhausted. At the end of jury selection, nine jurors had been selected with the Crown using six peremptory challenges while the defence had used all of its peremptory challenges. The Crown did not seek to have further talesmen summoned. As a full jury had not been selected, a mistrial was declared.

ISSUES

[10] The defence argues that the Deputy Sheriff engaged in pre-screening when summoning talesmen and that by doing so, he was guilty of partiality in returning the jury panel. The defence further argues that the Deputy Sheriff had no discretion in summoning talesmen and that by pre-screening potential talesmen, he infringed upon the authority of the Court to excuse jurors. There are several areas where the defence alleges the Deputy Sheriff acted inappropriately. They are:

- a) Asking questions of potential jurors to determine their suitability as a juror;
- b) Screening potential jurors on the basis of medical appointments, travel, language or prior jury service;
- c) Attending certain locations in Behchoko over others which in this case, was attending office buildings rather than residential buildings;
- d) Summoning only certain people at those locations in order to limit the inconvenience to people and/or offices.

ANALYSIS

A. General Principles

[11] The accused in this case elected trial by judge and jury. The right to be tried by a jury includes the right to be tried by an impartial and representative jury. A jury trial is a trial before one's peers and the process of selecting a jury is designed to ensure that an independent and impartial tribunal, as contemplated by s. 11(d) of the *Canadian Charter of Rights and Freedoms*, is selected. Randomness and

representativeness are essential parts of the jury selection process. *R. v. Davey*, 2012 SCC 75 at para. 30-31.

[12] The process of selecting a jury is a two-stage process as described by the Supreme Court of Canada in *R. v. Find*, 2001 SCC 32 at para. 19:

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 jurisdiction 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.

[13] In addition to the randomness and representativeness that is essential to jury selection, jurors themselves must also be eligible, impartial, representative and competent. *R. v. Yumnu*, 2012 SCC 73 at paras. 40 & 71. The jury selection process, through the compilation of the jury panel and the in-court process, is designed to ensure that the jury that is selected meets these principles to the extent possible in the circumstances.

[14] It is likewise important to remember, as stated in *Yumnu, supra* at para. 72 that jury selection is a process that is also based on custom and local practices that have developed in each jurisdiction:

[W]hile there are various rules and regulations that govern the selection of juries, much of what occurs is rooted in custom. The process must take into account the needs of the people and the special problems that may exist in the locale or region in which the trial is being held. Flexibility is essential, as is common sense, good judgment and good faith on the part of those who play a central role in the process, including judges, Crown and defence counsel, the police, and court administration personnel. In the end, it is essential to keep in mind that from start to finish, the jury selection process is designed to make good on the constitutional promise, enshrined in s. 11(d) of the *Canadian Charter of Rights and Freedoms*, that everyone charged with an offence has the right to be tried by an independent and impartial tribunal.

[15] During the jury selection process, if the original jury panel is exhausted without selecting a full jury, the *Criminal Code* provides the exclusive procedure for the summoning of talesmen: *R. v. Rowbotham*, [1988] O.J. No. 271 (C.A.). Section 642 of the *Criminal Code* allows the Court to order the sheriff to summons

as many persons, whether qualified jurors or not, as the Courts directs in order to provide a full jury and alternate jurors.

[16] The *Criminal Code*, aside from permitting the summoning to occur by word of mouth, if necessary, does not provide any direction to the sheriff as to the process of summoning talesmen. This Court has recently held that when summoning talesmen under section 642, the process must, as far as possible, be in accordance with the general principles and purpose of the legislation applicable to the selection of juries. *R. v. Latour*, 2013 NWTSC 57.

[17] Section 632 of the *Criminal Code* confers upon the judge the authority to screen potential jurors and excuse them on the basis of a personal interest in the matter, a relationship with the accused, witnesses or other persons involved in the case, personal hardship or other reasonable cause.

[18] I agree with the proposition, stated in *R. v. Mid Valley Tractor Sales Ltd.*, 1995 CarswellNB 313 (C.A.) at para. 9, that this discretion is one that the judge cannot delegate to another person or official. In my view, the facts in this case differ from those in *Mid Valley Tractor Sales* and therefore, I do not come to the same conclusion regarding the actions of the Sheriff in summoning talesmen. In that case, the trial judge quite clearly delegated his discretion by advising the Sheriff to summon talesmen who were eligible for jury duty and to pre-screen jurors on the basis of a relationship with the accused or personal hardship. No such directions were given in this case.

[19] Ultimately, the challenge in selecting a jury is to ensure that the general principles and applicable legislation are adhered to, recognizing the specific circumstances and problems that exist in communities in the Northwest Territories and while also ensuring that the process accommodates flexibility, common sense, good judgment and good faith, as contemplated in *Yumnu*, *supra*.

B. Holding Jury Trials in Communities in the Northwest Territories

[20] This Court has traditionally travelled to the community where the alleged offence took place to hold jury trials. This means that jury trials are often held in small communities; whereas, in many other jurisdictions in Canada, holding a jury trial in a community of a few hundred people does not occur. There are obvious benefits to this practice as discussed in *HMTQ v. Beaverho*, 2009 NWTSC 21.

However, there are also drawbacks in attempting to hold jury trials in the community where the alleged offence occurred.

[21] One of those drawbacks is that, in communities outside of Yellowknife, the number of people who are eligible to sit on a jury may be limited because of the size of the community, family or personal ties to a participant in the case or some knowledge about the incident in question. The result is that resorting to the talesmen procedure under s. 642 of *Criminal Code* is more likely to occur in a community outside of Yellowknife. It is less likely to occur in Yellowknife simply because Yellowknife has a population of 20,300 people which comprises approximately 47% of the total population of the Northwest Territories.¹

[22] Another issue is that there are often time constraints associated with jury selection and the jury trial. The Court will frequently have up to one week set aside for a jury trial in the community. Carrying over onto the following week is usually not possible because of the schedules of the Court, Crown and defence counsel; and the facilities in the community, often recreation centres or community halls, may not be available beyond the week that has been booked by the Court.

[23] Within that week, jury selection also has to occur. If a jury cannot be selected from the initial jury panel, jury selection often cannot be adjourned for any more than a day. The summoning of talesmen and jury selection has to be completed in sufficient time to allow the trial to be completed within the time set aside.

[24] Practically, another issue arises as attendance at jury selection can be problematic and once potential jurors attend for jury selection, they may not return on a later occasion even if directed to do so. As well, it is not uncommon for a person selected as a juror to later claim that they cannot attend court for some reason or to remember a reason why they cannot be a juror that that they had not mentioned previously. All of this to say that there are challenges in selecting a jury in communities in the Northwest Territories and having jury selection conducted in a timely, efficient manner maximizes the possibility that a jury can be selected and the jury trial completed in the time allotted.

[25] The possibility that a jury cannot be selected is always of concern because of the delay that will result from the declaration of a mistrial. This Court sits in

¹ NWT Bureau of Statistics, as of July 1, 2013.

Yellowknife every week but also travels on circuit to communities throughout the Northwest Territories during the year. The circuits are scheduled for specific cases depending on the availability of the Court, Crown and defence counsel and facilities to hold the trial. In this jurisdiction, accused persons who are facing serious charges often elect to be tried by judge and jury. It is a sign of their faith in the judge and jury system. It also means that many jury trials are scheduled throughout the Northwest Territories each year. When a jury cannot be selected and a mistrial is declared, it is more than likely that the trial will be scheduled many months after the initial trial date because it is simply not possible to hold it earlier. In this case, the trial was rescheduled for January 2015 in Yellowknife, some nine months after the initial trial date.

[26] These challenges and concerns are the backdrop to holding jury trials in communities in the Northwest Territories and they must be considered in light of the obligation of the Court to prevent unreasonable delays in holding jury trials and to ensure that the rights enshrined in the *Charter* are fulfilled.

[27] In this case, the trial was scheduled to occur in Behchoko, the community where the alleged offence took place. Behchoko has a population of approximately 2,025 people of which half are estimated to be over the age of 25,² and thus meet the age requirements of the *Jury Act*. With over 1,000 people potentially eligible to serve on a jury, selecting a jury in Behchoko should not be an issue and in the past, it frequently has not been an issue.

[28] On the past two occasions that the Court has come to Behchoko, for this trial and *R. v. Eyakfwo* (S-1-CR-2012-000091) in March 2014, a full jury could not be selected and mistrials were declared. In *Eyakfwo*, of the 126 people on the nominal list, 75 did not attend which equated to 60% absenteeism. In this case, of the 120 people on the nominal list, 63 did not attend which equated to 53% absenteeism. There are times at jury selection when other members of the community who are present will offer an explanation for why a person has not attended or inform the Court about a community event like a funeral or meeting which might impact upon attendance for jury selection. In this case, there were very few explanations offered and it is not clear why so many people did not respond to their jury summons. It is a worrisome trend that appears to be developing in Behchoko and, if it continues, may jeopardize the Court's ability to hold jury trials in that community.

² *Ibid.*

[29] On both occasions, a significant number of people who did attend were excused on the basis of a relationship with the accused, complainant or witnesses in the case, their inability to understand English or personal hardship. As a result of poor attendance, the number of people excused and Crown and defence counsel exercising some of their peremptory challenges, a full jury and an alternate juror could not be selected from the initial jury panel and the talesmen procedure had to be resorted to.

C. The Challenge to the Jury Panel under Section 629

[30] Section 629 of the *Criminal Code* permits the accused or prosecutor to challenge the jury panel on the basis that the sheriff has engaged in partiality, fraud or wilful misconduct in returning the panel. The challenge can be to the initial jury panel or a jury panel assembled under s. 642. In this case, the accused has based his application on the ground that the Deputy Sheriff engaged in partiality in summoning talesmen.

[31] The starting point in the inquiry under s. 629 is that the actions of the Deputy Sheriff are subject to the presumption of *omnia praesumuntur* meaning that the Deputy Sheriff, in the absence of evidence to the contrary, is presumed to have acted correctly in summoning talesmen. The applicant bears the onus of establishing on a balance of probabilities that the Deputy Sheriff has acted inappropriately and that the jury panel has been compiled in a manner that demonstrates partiality. *HMTQ v. Monture*, 2011 ONSC 4254 at paras. 43 & 47; *R. v. Wareham*, 2012 ONSC 908 at para. 47.

[32] The defence argues that the Deputy Sheriff asked questions of potential jurors in order to determine their suitability as a juror and that this amounted to pre-screening potential jurors. The defence argues that pre-screening is not permitted by the Deputy Sheriff and that this infringes on the Court's limited ability to excuse jurors under s. 632.

[33] The process that the Deputy Sheriff generally follows in summoning talesmen, from his evidence, is:

- A Sorry. If I may correct myself. Generally how I phrase it to them is: Is there a reason that you can tell me now why you feel you wouldn't be able to serve? And if they come with something valid that I have the discretion to excuse them for, I may. If it's not something, I would direct them to tell the judge.

Q Thank you. That was kind of my follow-up. But perhaps if I can clarify, and maybe just take me through what your process would normally be when you approach a juror. Potential juror.

A Okay. I would, I guess, identify the person. Like I would see them, approach them and identify myself as a sheriff's officer, give them my name, indicate what is happening: that I'm in the community with the Supreme Court for a jury trial, that we were unable to obtain our full jury and that the judge has directed me to summons people from the community to try and complete our jury.

Transcript of an excerpt of the Trial, p. 50, lines 7-26.

[34] The task of a Deputy Sheriff, in summoning talesmen, for jury selection is often not an easy one. The Deputy Sheriff is asked to go around a community and summons individuals at random. It is difficult to imagine that the Deputy Sheriff could accomplish the process of summoning talesmen without engaging individuals in conversation and asking some questions of potential jurors. Clearly, the Deputy Sheriff is required to identify himself and explain what he is doing. Similarly, he needs to identify the person who he may be summoning and attempt to obtain the other basic information that is included on the nominal list (address, employer and occupation). The extent to which the Deputy Sheriff can go further in making inquiries with individuals and deciding whether to summon a person is more problematic and the real issue on this application.

[35] Another challenge is the response to the Deputy Sheriff in the community. The general response, as related in the evidence of the Deputy Sheriff (*Transcript of an excerpt of the Trial*, page 51, lines 1-13), is one of reluctance: people say no, they try and walk away or come up with a reason that they cannot serve as a juror. This reaction is perhaps not surprising as people are given little choice in the matter; their day or week or longer is disrupted with no notice; they are obliged by a court order to attend for jury selection; and, if selected, sit in judgment of a fellow member of their community. The Supreme Court of Canada in *Yumnu*, *supra* at para. 42 observed:

Jury duty is precisely that – a duty. People are not asked to volunteer; they are selected at random and required to serve unless they are otherwise exempted or excused.

While some people may be eager or alternatively resigned, many seek to be excused from jury duty.

[36] The approach of the Deputy Sheriff in summoning talesmen has to be one that attempts to preserve the randomness and representativeness of the jury panel while also demonstrating flexibility, common sense, good judgment and good faith. The Deputy Sheriff will necessarily have to engage in conversation in order to summon talesmen and this will involve posing questions to individuals. It is to be expected that some people will respond with reluctance and attempt to avoid being summoned by providing a reason why they cannot serve on the jury. Where the Deputy Sheriff has decided to summons a person for jury duty and that individual is seeking to be excused from jury duty on the basis of a personal interest in the matter, a relationship with the accused, witnesses or other persons involved in the case, personal hardship or other reasonable cause, the Deputy Sheriff does not have the discretion to excuse that person and must summons that person for jury duty. The authority to excuse those persons lies with the judge under s. 632 and any person who wishes to be excused from jury duty will be given an opportunity to seek to be excused at jury selection.

[37] Turning to the specific inquiries in this case, the defence argues that the Deputy Sheriff pre-screened potential jurors on the basis of medical appointments, travel, language or prior jury service.

i. *Prior commitments including medical appointments and travel*

[38] The Deputy Sheriff testified that he encountered two individuals who claimed to have a medical appointment. One was at a local gas station where the Sheriff encountered a lady whose child had a dental appointment in Yellowknife. The Sheriff did not summons that person. Another individual claimed to have a medical appointment but when asked to produce proof of the appointment, the person indicated that they would attend jury selection and that person was served.

[39] The Deputy Sheriff also encountered several people at a local gas station who were unable to attend jury selection because they were leaving the community of Behchoko. The Deputy Sheriff testified:

There was a number of people. I would say overall, I maybe spoke to a half dozen in that location. Some [were] on the road, leaving the community. They had – one had a dental appointment in Yellowknife. There's a fellow driving to Fort Providence. There were different reasons given why they wouldn't be able to attend, so I used my discretion at that point and did not serve those people.

Transcript of an excerpt of the Trial, p. 21, line 27 – p. 22, line 8.

[40] The Deputy Sheriff also encountered two people at an office building who were going to be travelling for work for a week to go to Yellowknife. The Sheriff was unable to confirm this with their supervisor but both individuals had their bags with them in the office. He did not serve them with summons.

[41] While the Deputy Sheriff does not have the discretion to excuse a juror summoned as a talesmen on the basis of personal hardship, I am of the view that the Deputy Sheriff retains a limited discretion to refrain from serving individuals whom he is satisfied cannot attend jury selection. This is a matter of flexibility, common sense and good judgment. Otherwise, individuals who have travel plans, or medical appointments which conflict with jury selection would be in the untenable position of having no way to ask to be excused without jeopardizing their plans. They would be forced to decide between responding to the summons and missing their appointment or following through with their plans and ignoring the summons, which is a court order, thereby risking the penalties under the *Jury Act*. If these individuals decided to follow through with their plans and not attend jury selection, another possibility, particularly in a community like Behchoko where there has been a high absentee rate for jury selection, is that other talesmen, for some reason, may also choose not to attend jury selection. This increases the risk that a full jury cannot be selected even with the talesmen who do respond to the jury summons, thus resulting in a mistrial and delays in holding the trial.

[42] In this case, there is no evidence that the Deputy Sheriff, in choosing not to summons some people because of a prior commitment, did not exercise this limited discretion in a reasonable manner. The evidence of the Deputy Sheriff was that he attempted to determine whether the person was making a valid claim and if he was not satisfied that it was a valid claim, he summoned that person for jury selection.

ii. *Language issues*

[43] The defence argues that the Deputy Sheriff pre-screened potential jurors on the basis of language and that the interpreter, Ms. Nitsiza, attended with the Deputy Sheriff to assist with language issues which confirms that the Deputy Sheriff was pre-screening potential jurors on the basis of language.

[44] The interpreter, Ms. Nitsiza, went with the Deputy Sheriff as he drove through the community to summons talesmen. Ms. Nitsiza testified that she went along to show the Deputy Sheriff places where he could go in the community to summons people. She also testified that she assists people who don't understand

English but that no individuals approached her for assistance while the Deputy Sheriff was summoning talesmen.

[45] The Deputy Sheriff testified that Ms. Nitsiza accompanied him to assist with language issues if they arose. He testified that he was the one who made the ultimate decisions about where to go and who to summons. The Deputy Sheriff was the person who approached and spoke with potential jurors. Ms. Nitsiza was present but did not meaningfully interact with potential jurors. The Deputy Sheriff testified that a person who he spoke to claimed not to speak English but “he was telling me he didn’t speak English in English.” The assistance of Ms. Nitsiza was not required. This person turned out to be someone who had not attended jury selection in the morning and he was directed to return when jury selection resumed in the afternoon. The Sheriff advised this person that he could tell the Judge if he felt there was a concern about his ability to speak English.

[46] I find that the interpreter accompanied the Deputy Sheriff to assist with interpretation if necessary and also made suggestions about where to go in the community. The Deputy Sheriff was the one who decided where to go in the community and made the decision regarding who to summons.

[47] Behchoko is a community where an interpreter regularly attends for both Territorial and Supreme Court circuits. The interpreter is available to assist potential jurors at jury selection as there are often individuals who will seek to be excused from jury selection on the basis that they do not speak English or they are not sufficiently fluent in English to serve on a jury in an English language trial.

[48] The Deputy Sheriff does not have the discretion to excuse a potential juror summoned as a talesmen on the basis that they do not have the ability to speak or understand the language in which the trial is going to be held. The authority to excuse on this basis again rests with the judge and if a potential juror feels that their ability to speak or understand English (or the language in which the trial is going to be held if it is not English) is not sufficient, they can seek to be excused by the judge at jury selection.

[49] I see nothing wrong with the interpreter assisting the Deputy Sheriff in summoning people, particularly in a community like Behchoko where there are unilingual TliCho speakers. As stated above, the Deputy Sheriff has to be able to communicate with potential jurors as part of the process of summoning talesmen and it may be that an interpreter is required to assist the Deputy Sheriff in

gathering information or explaining the summons to a juror who does not speak English.

[50] In this case, there is no evidence that the Deputy Sheriff did pre-screen any potential jurors on the basis of language as the only person he encountered who raised the issue of language was directed to attend jury selection.

iii. *Prior jury service*

[51] Section 7 of the *Jury Act* states that a person is not required to serve as a juror more than once in a two year period unless there are an insufficient number of persons qualified to serve within 30 km of the place of the trial. An individual who has previously served on a jury might be expected to raise this if the Deputy Sheriff approaches them while summoning talesmen. There are two issues associated with this claim: firstly, whether a potential juror has served as a juror within the previous two years; and secondly, whether that person might be required to serve as a juror again because there are an insufficient number of persons qualified to serve who have attended jury selection.

[52] The Deputy Sheriff does not have the discretion to excuse a potential juror summoned as a talesmen on the basis that they have previously served as a juror. If the talesmen process has been resorted to, then it is likely that the question of whether there are a sufficient number of persons qualified to be jurors in that community will be in issue. The determination of these issues and the authority to excuse on this basis rests with the judge and if a potential juror wishes to be excused on the basis of prior jury service, they can seek to be excused by the judge at jury selection.

[53] In this case, the Deputy Sheriff did encounter a person who had previously served on a jury. He spoke with this person regarding their prior jury service and they indicated that it had been some time since they had served on a jury. The Deputy Sheriff was unable to conclude that this had been within the previous two years and ultimately served that person with a summons. In my view, the Deputy Sheriff dealt with the issue of prior jury service in an appropriate manner.

iv. *Attending certain locations in Behchoko over others: in this case, attending office buildings rather than residential buildings*

[54] In ordering talesmen under s. 642, the Court specified that at least 30 persons should be summoned for jury selection. Beyond that, there were no instructions provided to the Deputy Sheriff regarding how to accomplish this or where to attend to do so. The complaint of the defence is that the Deputy Sheriff attended office buildings rather than residential buildings, and by doing so, utilized a pre-screening mechanism.

[55] The Deputy Sheriff testified in detail about the places he attended in Behchoko to summons talesmen. He visited several public buildings or places including: FC services, a local gas bar; the senior's home; Chief Jimmy Bruneau School; another gas station in Behchoko; the TliCho Community Services Building; the Nishi-Kon building; and the Friendship Centre. In driving around the community, the Deputy Sheriff drove around Rae on the main road including Bay Island and to Edzo. In the Deputy Sheriff's view, he had gone to all of the public areas in Behchoko to summons talesmen with the exception of the grocery store. The Deputy Sheriff ceased summoning people because of the timeframe and he needed time to prepare the jury list and distribute it before jury selection resumed.

[56] The Deputy Sheriff did not attend to residential areas or go to houses in summoning talesmen. The Deputy Sheriff testified that he had gone to residences in the past and had not been successful in summoning talesmen:

Q Okay. With respect to your usual practice as for finding jurors in Behchoko and other communities, is it your common practice that you do go to office buildings or public areas rather than residential?

A Yes.

Q And why is that?

A It's just generally there will be more people. It's been my practice – In the past, I had attended to [residences] and it was not successful. It's very – My recollection from having done talesmen in other communities where I did attend to [residences], there was little to no success. People simply won't answer the door.

Transcript of an excerpt of the Trial, p. 54, lines 12-25.

[57] The Deputy Sheriff testified that he has been a Sheriff for fourteen years and has worked on at least half a dozen jury trials every year. In addition, he estimated that he had summoned talesmen “upwards of 20, 25, 30” times. I find that the Deputy Sheriff is an experienced Sheriff who has significant experience working on jury trials and in summoning talesmen. As part of that experience, he has found that he has a better chance of success by attending public buildings or places rather than individual residences.

[58] The Deputy Sheriff was instructed to summon 30 people in the space of a few hours. Given the limited time and difficulty described above in summoning talesmen, I see nothing wrong with the Deputy Sheriff’s decision to attend public buildings and drive around the main roads of Behchoko to seek talesmen. I do not view this as unacceptable pre-screening but rather as the Deputy Sheriff exercising his judgment to go to public places where he expected to find sufficient persons to summon 30 talesmen in accordance with his instructions. Moreover, by attending public places where community members might be expected to go rather than attending specific residential areas, the randomness of jury selection was enhanced.

v. Summoning only certain people in order to limit inconvenience to people and/or offices

[59] The defence argues that the Deputy Sheriff also pre-screened talesmen by only summoning certain people at some locations so as to limit the inconvenience to people and/or offices.

[60] The Deputy Sheriff testified that he did not summons every person at some locations. For example, at the Nishi-Kon building, the Deputy Sheriff encountered eight to ten people of whom he served four to five. The Deputy Sheriff did not recall why he did not serve the other three to four people. However, he also testified that he didn’t get to speak to everyone and he believed that some people saw him and left the area.

[61] The Deputy Sheriff also testified that, at some locations, he did not summons every person so as to not inconvenience the office or business. For example, he encountered the water or sewage truck which had two employees in the vehicle. He summoned the passenger because the driver needed to drive the truck and the passenger did not have a licence.

[62] Another example was at the senior's home where the Deputy Sheriff encountered three individuals and summoned one. He did not summons the other two persons because:

But it's often my practice, discretionary once again, that if there's a number of people in a – what could be considered a necessary service, being a senior's home or like at the school as well, I would summons maybe one, or like if there was – if there's two individuals, summon one, if there's three, summons two.

Transcript of an excerpt of the Trial, p. 26, lines 16-23.

[63] Each encounter with a person is necessarily going to take some time; time to explain to the potential juror who the Deputy Sheriff is and what he is doing and to gather information from the potential juror. The Deputy Sheriff also has to fill out the summons and explain it to the person. Meanwhile, other individuals in the area may leave, as occurred in this case. In the circumstances, I think that it is unrealistic to expect the Deputy Sheriff to be able to summons every person he sees at a specific location.

[64] While the Court is holding jury selection, there are services that should not be disrupted unless necessary. If the Deputy Sheriff was to serve every employee at a senior's home or at a school, those individuals would not have the ability to seek to be excused in advance of jury selection. The same concerns as mentioned above for those who have commitments that interfere with jury selection apply. In addition, there is the added concern that senior citizens or young children may be left without an appropriate caregiver or teacher while their caregiver or teacher attends jury selection.

[65] There is a fine line that the Deputy Sheriff must observe in deciding who to serve at a specific office or business in order to limit the inconvenience to people or businesses and the Deputy Sheriff must be cautious about infringing on the Court's discretion to excuse individuals on the basis of personal hardship or other reasonable case. However, the process of summoning of talesmen, if it is to going to have any chance of success in small communities in the Northwest Territories must also be flexible, and incorporate common sense and good judgment.

[66] In this case, the Deputy Sheriff attended all of the public buildings and places that he was aware of in Behchoko with the exception of the grocery store. He summoned 23 people from a variety of places: the cultural centre, FC services,

the friendship centre, the senior's home, Chief Jimmy Bruneau school, and government buildings.

[67] In the circumstances, the process of summoning talesmen that the Deputy Sheriff engaged in does not raise any concerns and in my view, the jury panel that was returned was sufficient to meet the randomness sought in jury selection.

[68] For these reasons, the application was dismissed.

S.H. Smallwood
J.S.C.

Dated at Yellowknife, NT, this
15 day of July 2014

**IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES**

BETWEEN:

HER MAJESTY THE QUEEN

- and -

DARYLE JACKSON BLACKDUCK

REASONS FOR JUDGMENT OF THE
HONOURABLE JUSTICE S.H. SMALLWOOD
