IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- and -

DARYLE JACKSON BLACKDUCK

Transcript of the Ruling on an Application to Change the Venue of the Trial and the Ruling on an Application for a Stay of Proceedings (Unreasonable Delay) delivered by The Honourable Justice S. H. Smallwood, in Yellowknife, in the Northwest Territories, on January 15, 2015.

APPEARANCES:

Mr. A. Godfrey: Counsel on behalf of the Crown

Mr. M. Martin: Counsel on behalf of the Accused

Charge under s. 271 C.C.

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pursuant to Section 486.4 of the Criminal Code

R. v. Daryle Jackson Blackduck
January 15, 2015 - Yellowknife
Rulings by Justice S. H. Smallwood
re Application to Change the Venue of the Trial
and Application for a Stay of Proceedings
(Unreasonable Delay)

THE COURT: The accused brought five applications in this matter. The first was to compel production of third party documents from the Sheriff's Office and was abandoned as the Sheriff had filed an affidavit on this application which provided most of the information that the accused sought.

The second application was to compel production of third party documents from the Supreme Court Registry in relation to jury trial statistics for use on a change of venue application. I dismissed that application on January 9th, 2015.

The third application was for an adjournment of the trial currently scheduled for January 19th, 2015, which I dismissed as well on January 9th, 2015.

The fourth application was to change the venue of the accused's trial to Behchoko, or alternately, Fort Providence or Fort Simpson.

The fifth application was for a judicial stay of proceedings as a result of unreasonable

delay.

Following a hearing on January 9th, 2015, I adjourned the last two applications to today's date to give my decision. I will first deal with the application to change the venue of the trial and then with the application for a stay of proceedings as a result of unreasonable delay.

Ruling on Application to Change Venue of Trial

Mr. Blackduck is charged with one count of sexual assault, contrary to section 271 of the Criminal Code. He is alleged to have committed a sexual assault on the complainant in the community of Behchoko in October 2011. His trial is scheduled to commence on Monday, January 19th, 2015, in Yellowknife.

This is the third scheduled trial date for Mr. Blackduck. There is no dispute about what happened with respect to the two previously scheduled trials. A transcript of all of the proceedings has been filed.

The first trial was scheduled for November 4th, 2013, in Behchoko, and was adjourned at the request of the Crown because the complainant's infant son had a medical appointment in Edmonton which might require surgery. The trial was subsequently rescheduled for April 28th, 2014,

again to be held in Behchoko.

On April 28th, 2014, there was a jury panel list returned of 120 persons who had been served jury summonses. Of those, less than half — 57 people — attended jury selection that morning. Jury selection proceeded and a number of people were excused by agreement of the Crown and defence. Other people came forward and were excused for various reasons, which included being related or close to the accused or other witnesses involved in this case, their inability to understand English and for personal hardship.

Six jurors were selected before the initial jury panel was exhausted. One juror was subsequently excused for reasons of personal hardship. The Crown applied, pursuant to Section 642 of the Criminal Code, for the summoning of talesmen, which is to have additional community members summoned when a jury panel has been exhausted and a full jury has not yet been selected. I granted the application; the Deputy Sheriff was directed to summons approximately 30 talesmen for jury selection.

The Deputy Sheriff summoned 23 talesmen and also directed seven people who had missed jury selection that morning to return for the continuation of jury selection that afternoon.

When court resumed, defence counsel brought an application, pursuant to section 629 of the Criminal Code, to challenge the jury panel that had been assembled by the Deputy Sheriff pursuant to the talesmen process. After hearing submissions, I dismissed the application and jury selection continued the following day.

On that date 25 people attended for jury selection. Two people were excused by the agreement of counsel and a number of other persons were excused for various reasons. Four more jurors were selected before the jury 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.

Following the declaration of a mistrial, the scheduling of a third trial and the venue of the trial were discussed. The court invited counsel to make submissions with respect to the scheduling of the trial and the venue. Counsel for Mr. Blackduck indicated that he wished the venue to be either Fort Providence or Fort Simpson. His preference was for either of those

communities over Yellowknife. His view was that those communities were more culturally similar to Behchoko and were more representative of the Aboriginal population by ratio in those communities.

When asked if he agreed that the court should not attempt to have another trial in Behchoko, defence counsel's response was that his preference would be to have the trial in Behchoko but acknowledged that there were difficulties with getting a jury in Behchoko and that his next preference would be to have the trial held in Fort Providence or Fort Simpson. The Crown's position was that given the inability to select a full jury in Behchoko that week, the trial should be held in another community. The Crown reiterated the concerns the court had expressed earlier with respect to the matter becoming dated and there being some urgency to schedule the trial and indicated that the preference of the Crown was to hold the trial in Yellowknife.

The Crown noted that the complainant lived in Yellowknife and that the other witnesses for the Crown did not reside in the jurisdiction and would have to travel to Yellowknife and then on to another community in order to attend the next trial. So for convenience, Yellowknife was also

the preferred venue.

As well, the Crown noted that his understanding was that more court time was available in Yellowknife than would be in some of the other communities and that to expedite matters the Crown was suggesting that Yellowknife was the most appropriate venue.

Defence counsel advised that with respect to the convenience of witnesses, the accused lived in Edmonton and had driven to Behchoko for his trial, so that Fort Providence would be the most convenient place for him to attend as the accused would be driving. And I note that when someone drives from Edmonton, of the suggested communities, the first to be reached would be Fort Providence; continuing down the highway approximately two hours later one would reach Behchoko; and a further hour or so down the road is Yellowknife. Fort Simpson is also accessible by road but requires taking a different highway prior to reaching Fort Providence.

Defence counsel also advised that Heidi Adzin, who is the accused's common-law spouse and had been subpoenaed for the trial, also lived in Edmonton.

Ultimately, the court noted that the prospect of having a further jury trial in

Behchoko was unlikely given the problems that had been experienced in trying to empanel a jury. And because of the concerns regarding delay, the court did not direct where the specific venue would be. The court stated at page 152:

> In the circumstances, I am not going to direct where the specific venue will be. I think it is important that this trial go ahead as soon as possible. So that will be in large part determined by the availability of counsel (the Crown and defence) and the availability you provide and whether there is a judge and a courtroom available. So I am going to leave it to the scheduling judge with respect to the venue with the note -- sort of a notation that we are trying to get this matter scheduled quickly. So your preferences with respect to the venue will be noted, but one of the priorities will be to try -- where we can have this trial in terms of convenience and where it's -- where the earliest availability is to have the trial.

Counsel were directed to provide their availability for another trial within one week, by May 6th, 2014. Counsel provided their availability, and on May 21st, 2014, the third trial was scheduled for January 19th, 2015, in Yellowknife.

The accused filed his application for change of venue on December 9, 2014, to be heard on a date and time to be set by the court. Counsel provided their availability for a hearing and the

hearing was scheduled for January 9th, 2015.

The grounds in the amended notice of motion encompass two areas:

1. The accused's application for leave to appeal to the Supreme Court of Canada from my decision of April 29, 2014, dismissing the application challenging the panel of talesmen summoned by the Deputy Sheriff; and

2. That the accused, who is an Aboriginal person, is entitled to an impartial and representative jury, neither of which can be obtained in Yellowknife.

In submissions, defence counsel argued that had I granted the application challenging the panel of talesmen and a proper jury selection process followed at that time, a jury could have been empanelled in Behchoko in April 2014 and for that reason another trial should be attempted in Behchoko. Defence counsel also argued that a jury could be empanelled in Fort Providence or Fort Simpson as the accused had no relatives in those communities and only a few friends in Fort Providence. Any delays associated with rescheduling would be borne by the accused, as per the comments of Justice Vertes in R. v. Beaverho, 2000 NWTSC 19, at paragraph 61.

Defence counsel also argued against holding

the trial in Yellowknife, arguing that considering the demographic makeup of the communities in question, Fort Providence is similar to Behchoko in its proportion of Aboriginal people living in the community. The accused argued that he has a right to a representative and impartial jury, which he says cannot be achieved in Yellowknife. He says that the evidence of Mr. Blackduck on the application supports this as he has experienced discrimination in Yellowknife and this should raise concerns with the way Aboriginal accused are treated by this community. Counsel referred to jury statistics from 2010 as demonstrating that accused were convicted twice as often in Yellowknife as in other communities. As well, counsel argued that the proportion of Aboriginal people in Yellowknife is so low that a representative jury cannot be achieved.

The Crown argued that this trial was set in May 2014 and the venue was determined to be Yellowknife. The accused has had months to bring this application but has waited until shortly before the trial to do so. The Crown cites the delay that has occurred in this case and that this should be a concern for the court, as well as notes the problems in attempting to select a

jury in Behchoko go beyond just the talesmen issue. The Crown argues that Yellowknife does have a significant Aboriginal population and that it is possible to select a representative jury.

The Crown argues that the test to change the venue is that it has to be expedient to the ends of justice, and at this point, this late in the process, the applicant has not met the onus that it is expedient to the ends of justice.

In considering an application to change the venue of the trial, section 599(1) of the Criminal Code and rule 37 of the Criminal Procedure Rules are relevant. Section 599(1) of the Criminal Code states, in part:

> A court before which an accused is or may be indicted, at any term or sittings thereof, or a judge who may hold or sit in that court, may at any time before or after an indictment is found, upon the application of the prosecutor or the accused, order the trial to be held in a territorial division in the same province other than that in which the offence would otherwise be tried if
> (a) it appears expedient to the ends of justice...

Rule 37 of the Criminal Procedure Rules state:

> (1) Unless the convenience of the parties and witnesses otherwise requires, a trial shall be held in the community

> (a) at or nearest the place where the offence is alleged to have been committed; and
> (b) in which there are adequate facilities available to house the court and jury and to conduct the trial.

Rule 37(6) says:

> Nothing in this rule limits the discretion of the Court to determine the place of trial.

The general rule, which is well-known and has been commented on in many of the cases, is that the Supreme Court of the Northwest Territories has the tradition of holding jury trials in the communities where the offences are alleged to have occurred. This has occurred even in small communities, although more recently, because of the size of some of the smaller communities and historic problems that have arisen in attempting to select juries in those communities, trials have been scheduled in larger communities in the same region often without first attempting to select a jury in the smaller community.

The tradition of the court is a long-standing one, but it has also been acknowledged in the cases that the tradition must be realistically applied and changes in society over time may cause the tradition to be adjusted.

There have been several cases from this jurisdiction which deal with applications for a change of venue. Changes of venue have been ordered in the past for reasons such as community divisiveness or hostility, psychological harm to or oppression of witnesses, community prejudgment, or where attempts to obtain a jury in a community have failed. Changes of venue have also been denied, even where a trial is scheduled to be held in a small community where there are close family ties and intense community interest in the case. (See R. v. Beaverho, at paragraph 29, for a list of cases and reasons for granting or denying a change of venue).

A number of principles have emerged from these cases which were referred to in R. v. Bonnetrouge, 2010 NWTSC 60, at paragraph 13:

> From the cases referred to and others submitted by counsel, as well as the governing legislation, I extract the following principles: a) a change of venue may be granted if it is expedient to the ends of justice; b) the Judge has a wide discretion which is to be exercised with caution; c) the circumstances of the particular case must be examined carefully to determine what is expedient to the ends of justice; d) the desirability that a jury trial be held in the community where the offence is alleged to have taken place should be balanced with the practicalities of holding jury trials in small communities, including the fact that many people

> are related to each other; e) the reasons for and against holding jury trials in small communities may change over time; and f) the ultimate aim is always a fair trial with an impartial jury.

The onus is on the applicant to establish the grounds upon which it relies for a change of venue and, ultimately, the applicant must establish that the change of venue is expedient to the ends of justice: (Bonnetrouge, paragraph 14). In this case the onus is on the accused.

Counsel have provided several cases which I have reviewed. I note that the issue in Beaverho and R. v. Lafferty, 2010 NWTSC 36, was somewhat different. In those cases an unsuccessful attempt had been made to hold a jury trial in the community where the offence was alleged to have occurred and the court heard submissions from counsel as to where the next trial should be held. The issue before the court in Beaverho and Lafferty was where to hold the next trial. In this case the trial date has been set and the venue determined. The issue is whether to change the place of trial. Beaverho and Lafferty are helpful because the principles to consider are the same and both cases provide useful analysis of the relevant factors.

As noted in Lafferty, at paragraph 9:

> But different considerations become engaged where, as here, an attempt to empanel a jury in a community has failed, and the trial has to be rescheduled. These considerations include the responsible use by the Court of its resources, and broader concerns about the administration of justice.

This case is similar because there has been an attempt to empanel a jury in Behchoko, which was unsuccessful, and the court must now consider whether the trial should be rescheduled, keeping in mind the responsible use of court resources and concerns about the administration of justice.

One of the concerns, as noted in Lafferty, is delay. Delay is a relevant consideration in situations where a previous attempt to empanel a jury has failed. Delay in these situations is always something the court has to keep in mind. In this case it is particularly relevant as this is the third scheduled trial date. It has been 38 and a half months since the accused was first charged with this offence, and the accused has brought an application for a judicial stay based on unreasonable delay. To change the venue of the trial a few days before the scheduled third trial date would inevitably result in further delay. To schedule a new trial in Behchoko, Fort Providence or Fort Simpson would result in a

delay of several more months.

The process of scheduling a trial is not as simple as just picking a date and saying that is when the trial will occur. Jury trials in this jurisdiction are scheduled based on a number of factors. The availability of Crown and defence counsel, as well as the witnesses, is one factor. The availability of a judge in a jurisdiction where there are only four resident judges, and there is court scheduled every week in Yellowknife, is another factor. As well, in many communities outside of Yellowknife, jury trials are held in community facilities because there are no court houses. Those facilities are also used by the communities for regular community events, as well as special occasions like assemblies or gatherings. Those facilities are also used by the Territorial Court which sits in the communities more often than the Supreme Court does. As well, during certain times of the year there may be events in communities that limit the availability of persons to sit on the jury and may result in insufficient accommodation for those involved in the trial. All of this has to be considered prior to scheduling a trial in the community outside of Yellowknife.

Once a jury trial is scheduled, the process

of creating a jury panel also takes time. The affidavit of Cory Pond, who is the Sheriff in the Northwest Territories, was filed in response to the application for production of third party documents and explains the process. The process involves using a computer system, called the jury management system, to randomly create a jury panel. For Yellowknife and Hay River a jury panel is composed of 300 people; in other communities the jury panel is 250 people. Once the panel list has been prepared, the jury panel list is certified pursuant to section 7 of the Jury Act. Once this occurs, a summons is issued for each person on the panel and then served on each person. Service occurs by personal service or by leaving the summons with a responsible member of the household. Then there are further steps the Sheriff takes with respect to exempting people before preparing the nominal list one week prior to trial. The process of creating a jury panel list starts approximately eight weeks prior to the trial date, and in this case the steps to prepare a jury panel began on November 26th, 2014. While I expect that the process could occur in a shorter time frame, if required, the steps involved to create the panel and to serve each person take time and would still take

several weeks to complete. What this means is that the January 19th, 2015, trial date in Yellowknife could not simply be rescheduled to occur that same week in Behchoko, Fort Providence or Fort Simpson, and at this point that is clearly impossible.

Another consideration, particularly with respect to the accused's request that the trial occur in Behchoko, is what has already occurred. If a further attempt to hold the trial in Behchoko was again unsuccessful, it would result in even more delay. The attempt to empanel a jury in Behchoko in April 2014 was unsuccessful for several reasons. The number of prospective jurors was reduced because of the high number of people who failed to attend the jury selection process and the number of people who were excused, either by consent of counsel or by the court, as a result of being related to or close to the accused or another witness, their inability to understand the English language and personal hardship. It is unclear why so many people failed to attend in response to the jury summons. There was no indication that there was a funeral or other community event which might explain why so many people did not attend. As well, this had been the second time the court had

been in Behchoko in a short period, where the attendance in response to jury summonses was very low and without explanation. This may turn out to be a trend in Behchoko, or it could be an aberration because juries have been selected on many occasions previously in Behchoko without difficulty. Overall, it raises concerns about making another attempt to select a jury in Behchoko in this matter.

Defence has argued that had I granted the application challenging the panel assembled as a result of the talesmen process, the Deputy Sheriff could have been ordered to assemble a new panel and a jury may have successfully been empanelled. As well, had the Crown made a second request for talesmen, a jury could have been successfully empanelled.

In April 2014 when I ordered talesmen, I directed the Deputy Sheriff to summon approximately 30 talesmen for jury selection. That number was somewhat higher than what is usually ordered and was higher than what the Deputy Sheriff was accustomed to summoning for talesmen. That number was required to fill initially seven positions on the jury — six jurors and an alternate. One juror was subsequently excused, so ultimately eight jurors

had to be selected. Following the talesmen process, four jurors were selected and three jurors and an alternate had yet to be selected.

In summoning members of the community, the Deputy Sheriff testified that he went to all public places that he was aware of in the community, with the exception of the grocery store which he did not go to because he ran out of time.

In my view, had I granted the application challenging the jury panel assembled for talesmen, it is unlikely that a jury could have been successfully empanelled. The Deputy Sheriff would have had to summons a significant number of people so that a jury panel large enough to empanel eight jurors could be assembled. Again, those people would have also had the opportunity to come forward and seek to be excused if they were related to or close to the accused or other witnesses or if they had another reason for not being able to serve on the jury. In my experience, people in Behchoko frequently come forward to ask to be excused for various reasons, and I do not expect that the situation would have been any different had a new panel of talesmen been ordered. As well, in my experience, expecting to empanel more than half the jury

through the talesmen process is unrealistic.

Similarly, it is unlikely that a jury could have been successfully empanelled had the Crown made a second request for talesmen. In my experience, multiple requests from the Crown for talesmen are not the norm, although they have occurred more frequently recently. It is the discretionary decision of the Crown to decide whether or not to make the application in the first place. There may be repercussions if the Crown fails to request talesmen, but that is a factor the Crown must consider in deciding whether to make the request; and whether the Crown does make the application or not, it does not generally require an explanation or justification.

Considering the response rate to the jury summons, that there was a panel of talesmen assembled and a number of people who were excused for the reasons I referred to, I think it unlikely that a second request for talesmen would have resulted in the remaining four positions on the jury being filled. Overall, there is no basis to conclude that had things occurred differently in April 2014, that a jury could have been successfully empanelled in Behchoko. Similarly, there is nothing to suggest that

another attempt in Behchoko would be any more successful than the last attempt.

The accused has also argued that he cannot get a jury that is impartial and representative in Yellowknife. The accused testified on the application that he lived in Yellowknife for approximately 11 years when he was from the ages of four to 15 years old. He described discrimination that he experienced that he believes was based on his ethnicity. Incidents of teasing, being spit on at school, that he thought occurred because he was native. He also testified about being called names by other children and the bus driver, and described discrimination he experienced as a teenager playing sports. The accused testified that he wanted to have his jury trial in a community with primarily Aboriginal people, like Behchoko, Fort Providence or Fort Simpson, because he feels discriminated against sometimes in Yellowknife.

With respect to the law in this area, an accused person has the right to an impartial and broadly representative jury. The process of assembling the jury panel guarantees representativeness in the jury panel and the random selection process ensures the representativeness of the jury: R. v. Sherratt,

[1991] 1 S.C.R. 509, at paragraph 35; Beaverho, at paragraph 34.

Neither the Crown or defence have the right to select a jury, or the power to shape a jury. Jurors are selected at random, and randomness ensures representativeness: R. v. Davey, 2012 S.C.C. 75, at paragraph 31.

As stated in Beaverho, at paragraph 35:

> Neither can the venue be manipulated on some expectation that a jury from one community would be more favourable than from another one. The aim, as stated earlier, is a fair trial with an impartial jury.

I agree with the comments of Justice Vertes in Beaverho where he goes on to say, at paragraphs 38-39:

> [38] If, however, a trial is held in a particular community with a predominant racial composition, it is inevitable that the jury panel will reflect that race. But that is a feature of demographics. There is nothing in Canadian law that says that an accused has the right to a jury composed so as to deliberately reflect the particular characteristics of race, age, class, sex and so on, of the accused.
>
> [39] So it comes down to a question of what is expedient to the ends of justice. The accused is not entitled as of right to a jury made up of people of his own race. Even if the jury trial is held in

> Behchoko there is no guarantee that all the jurors will be of the same race. There is no indication in this case that there is any cultural component other than the race of the trial participants. There is no suggestion that anything in the subject-matter of the trial makes similarity of cultural background as between the trial participants and the jurors significant. And, there is no suggestion of racial bias or prejudice on the part of potential jurors should the trial be held in Yellowknife.

As to the latter comment, in this case, there is a suggestion that there is racial bias or prejudice on the part of potential jurors in Yellowknife.

There is some evidence that was also on the application with respect to the proportion of Aboriginal persons in various communities in the Northwest Territories. In response to a subpoena, Viktoria Bassarguina, a statistician with the Northwest Territories Bureau of Statistics, filed an affidavit and included demographic information for several communities in the Northwest Territories. The population estimates for persons aged 18 years and older by ethnicity as of July 1st, 2014, indicate that Yellowknife has approximately 3,397 Aboriginal persons which comprise 22.2 percent of the population. These numbers do not include the

community of Dettah, which is included in the jury management system for Yellowknife. To include the residents of Dettah would increase the Aboriginal population of the Yellowknife area by 165 persons and would result in a proportion of Aboriginal persons being 23 percent. The community of Behchoko has approximately 1,195 Aboriginal persons which comprise 92.7 percent of the population. In Fort Providence there are 560 Aboriginal persons which comprise 88.6 percent of the population. In Fort Simpson there are 676 Aboriginal persons which comprise 70.7 percent of the population. All of these numbers are for individuals over the age of 18.

In Mr. Blackduck's affidavit in support of the application for production of third party documents, some unofficial statistics were included which had been compiled for a jury trial education seminar in 2011. They were statistics regarding the number of jury trials that had been scheduled in 2010. They included the number of jury trials scheduled, the number of stays of proceedings, the number of re-elections, the number of mistrials and information regarding trials in specific communities. It stated:

> Of the 18 trials that were completed, 9 resulted in conviction and 9 resulted in acquittals;

- of 5 trials held in Yellowknife, there were 4 convictions and 1 acquittal;
- of the 13 trials held in other communities, there were 5 convictions and 8 acquittals.

There was also information regarding the number of trials held in various communities, including Behchoko and Fort Simpson.

As I stated earlier, I dismissed the application for production of third party documents because I was not satisfied that the information would assist the accused in establishing systemic or racial bias against Aboriginal accused persons, and, partly, that is because none of these statistics refer to Aboriginal persons. Neither the jury management system or the court registry tracks the ethnicity of the jury panel or of an accused. So while this information may provide statistics with respect to the conviction rates in Yellowknife compared to other communities, it does not assist in determining whether there is racial or systemic bias against Aboriginal accused persons. There is also no evidence about how many of those accused would have been Aboriginal persons. And, as I stated, there are a whole host of factors, aside from ethnicity, which might factor into why a person is convicted or acquitted, not the least

of which is the strength or weakness of the Crown's case or the strength or weakness of evidence presented by the defence.

In saying this, I do not doubt that there is discrimination against Aboriginal persons which occurs regularly and in various ways. I have witnessed this myself growing up in Fort Good Hope and Inuvik and living in Yellowknife. It is not specific to one community. And I do not doubt that Mr. Blackduck has experienced discrimination as an Aboriginal person while growing up in Yellowknife. Some people bully, some people discriminate, but not every member of the community does so. While I sympathize with Mr. Blackduck's experiences, I do not see how they establish a basis for concluding that a jury in Yellowknife cannot be fair and impartial and would not treat an Aboriginal person, or any other person of an ethnicity not their own, fairly.

The accused is not entitled as of right to a jury made up of people of his own race. Even if the jury trial is held in one of the suggested communities, there is no guarantee that all jurors will be of the same race as the accused. From my review of the pre-trial conference report, there is no indication that there is any

cultural component other than the race of the accused and witnesses in the trial. There is no suggestion that the subject matter of the trial makes similarity of the cultural background between the accused and witnesses and jurors significant. In saying this, I am cognizant that in Beaverho, the court ultimately decided to hold the trial in Behchoko and noted that "If holding the trial in Behchoko results in further delay, then that is the accused's choice."

As in Beaverho, ultimately there are good reasons to hold the trial in Yellowknife, and there are good reasons to hold the trial in Behchoko or another community. But having previously tried to empanel a jury in Behchoko, I am not satisfied that it is clear that a second attempt would be any more successful. And, if this application had been brought in a more timely fashion and in not the last few weeks before the trial was scheduled to start, then perhaps relocating the trial would have been a more viable option. But given the delay that has occurred in this matter so far, that this is the third trial date, that the accused is already claiming unreasonable delay, I am not satisfied that it would be expedient to the ends of justice to change the venue of this trial from

Yellowknife to Behchoko, Fort Providence or Fort Simpson. For these reasons, the application to change the venue of the trial is dismissed.

Ruling on Application for Stay of Proceedings (Unreasonable Delay)

Mr. Blackduck is also claiming that his right to be tried within a reasonable time has been infringed. The accused was charged with sexual assault arising from an incident alleged to have occurred on October 30th, 2011. The accused was arrested by the police and released on an undertaking on November 2nd, 2011. The Information was also sworn on that date.

The accused had a first appearance in Territorial Court on February 14th, 2012. On that date the Crown elected to proceed by indictment. Defence counsel asked that the matter be adjourned without defence election as he was awaiting some disclosure and the results of DNA testing. The matter was adjourned to March 27, 2012, for defence election. On March 27, 2012, the accused elected trial by judge and jury and requested a preliminary inquiry. The preliminary inquiry was scheduled for June 13, 2012. On that date the preliminary inquiry was held and the accused was committed to stand

trial. Following this, an Indictment was filed on July 23rd, 2012. A pre-trial conference was held on September 21st, 2012. Counsel agreed to send in their availability for trial shortly thereafter. Crown counsel provided their availability for trial on November 6th, 2012, and defence provided their availability on November 23rd, 2012.

On November 29, 2012, the matter was scheduled for trial in Behchoko during the week of November 4th, 2013. Prior to the trial, the Crown brought an application for an adjournment of the trial due to the complainant's infant son having to go to Edmonton for a medical reason. The application was heard on October 21st, 2013, and the adjournment was granted. The Crown provided availability for a second trial in court on October 21st. A conflict subsequently arose between counsel for Mr. Blackduck and a witness in this case, which forced the accused to change counsel. Mr. Martin, the accused's new counsel, submitted his availability for trial on October 29th, 2013. On December 13, 2013, a second trial was scheduled for the week of April 28th, 2014.

On April 28th, 2014, jury selection was held in Behchoko. Despite resorting to the talesmen procedure under section 642 of the Criminal Code,

only nine jurors could be selected. As a full jury could not be selected, a mistrial was declared.

At the conclusion of the proceedings in Behchoko on April 29th, 2014, defence counsel advised that he expected to be bringing a section 11(b) application as a result of unreasonable delay. Counsel were given until May 6th, 2014, to provide availability for a third trial.

In discussing the venue of the trial, the court emphasized that the trial should go ahead as soon as possible. The court did not make any direction with respect to the venue of the trial, noting that the priority was to have the trial where it was convenient and at a location where there was the earliest availability to hold a trial.

On May 5th, 2014, both Crown and defence provided their availability. In defence counsel's letter, he again stated his intention to bring a section 11(b) application.

On May 21st, 2014, a third trial was scheduled for the week of January 19th, 2015, in Yellowknife.

Section 11(b) of the Charter guarantees an accused person the right to be tried within a reasonable time. The principles that apply in

determining whether this right has been infringed have been determined by the Supreme Court of Canada in several cases. The Supreme Court of Canada stated in R. v. Morin, [1992] 1 S.C.R. 771, at paragraphs 21-22, that the primary purpose of section 11(b) is the protection of individual rights of the accused, the right to security of the person, the right to liberty, and the right to a fair trial.

Security of the person is protected by seeking to minimize the anxiety, concern and stigma of those facing criminal charges. The right to liberty is protected by seeking to minimize restrictions on liberty which arise from pre-trial detention and restrictive bail conditions. The right to a fair trial is protected by attempting to ensure that trials occur while evidence is available and fresh.

A secondary interest is the interest of society as a whole. Society has an interest in trials being held within a reasonable time and promotes the confidence of the public in the justice system and ensures that those who are charged with an offence are brought to trial and dealt with according to law: Morin, paragraphs 24-25.

In Morin, the factors that must be

considered in analyzing whether there has been unreasonable delay were set out:

1. the length of the delay;
2. waiver of time periods;
3. the reasons for the delay, including
(a) inherent time requirements of the case,
(b) actions of the accused,
(c) actions of the Crown,
(d) limits on institutional resources, and
(e) other reasons for delay; and
4. prejudice to the accused.

The court emphasized in Morin that there is no mathematical formula or specified time period for when delay becomes unreasonable, but instead the process is a judicial determination balancing the interests protected by the Charter and other factors which result in delay.

The approach under Morin is to ask whether the length of the delay is sufficient to raise the issue of reasonableness. If delay does raise the issue of reasonableness, then it warrants an inquiry into the reasons for the delay. The total delay from the date that the charge was laid stems from November 2nd, 2011, to the date the third trial date is scheduled to begin — January 19th, 2015. In total, that amounts to 38 months and 17 days.

With respect to the issue of waiver of time periods, the Crown has argued that Mr. Blackduck has contributed to the delay from May 22nd, 2014 to January 9th, 2015, and that some 232 days should either be considered waived or attributable to the actions of the accused because of his failure to bring the section 11(b) application in a timely fashion. The Crown argued, citing R. v. Sapara, 2001 ABCA 59, that the failure to bring the application earlier effectively precluded the court from considering alternatives to a judicial stay, and that defence counsel should not be able to sit by and watch the clock tick while preparing to file a delay application. In response, defence counsel argues that the intent of the accused to bring a delay application was indicated in court on April 29th, 2014, and by letter on May 5th, 2014, so the delay application could not have been considered a surprise. As well, defence counsel argues that in setting the trial, the court was aware that counsel sought the earliest possible trial date and presumes that the court set the earliest possible trial date.

When the trial date was set on May 21st, 2014, the amount of delay was determinable. It would be 38 and a half months from the date the

accused was charged until the third trial date. So in that sense it makes little difference whether the application was brought in May, June or January. However, a judicial stay of proceedings upon a finding of unreasonable delay is not the only remedy open to the court. As stated in Sapara, there is the possibility that an earlier trial date could be ordered in response to a finding of unreasonable delay.

This case is factually different from Sapara because here, counsel quite clearly indicated on two occasions to the court and the Crown that a section 11(b) application was being considered; whereas in Sapara, the court found that, despite attending pre-trial conferences, defence counsel made no mention of concerns regarding delay. In that case the court found that there may have been viable alternatives to a judicial stay had the accused raised the issue of delay rather than "sitting in the weeds" watching the clock tick.

I discussed earlier how trials are scheduled in this jurisdiction and I do not intend to repeat what I said, but we do not have set assizes or courtrooms where counsel can consult a trial coordinator and consider various trial dates. While the court sits in Yellowknife on a weekly basis, holding trials in other communities

only occurs on an as-needed basis. The court's resources are limited. Our trials are scheduled by the scheduling judge based on the availability of counsel (Crown and defence), the availability of a judge, the availability of court staff, and the availability of suitable facilities in the community. In cases like this where concern with delay has been noted, the court attempts to provide the earliest trial date. I am not the scheduling judge, but I think that it is a fair assumption for defence counsel to make that they received the earliest possible trial date, taking into account the factors that I have just referred to.

Whether an earlier trial date could have been accommodated had defence counsel brought the application earlier is speculative, and I am not prepared to draw that conclusion, and that is not to say that earlier trial dates are never available in this jurisdiction in appropriate circumstances. But in this case I am not satisfied that there is any evidence that had the accused brought the application earlier that an earlier trial date could have been considered. Therefore, I decline to find that the accused explicitly or implicitly waived his right to be tried within a reasonable time during this or any

other time periods.

The Crown concedes that the overall delay in this case is sufficient to raise the issue of reasonableness and warrant an inquiry. I agree. As stated in Morin, "some delay is inevitable" and the criminal trial process itself has inherent time requirements.

> Some delay is inevitable. Courts are not in session day and night. Time will be taken up in processing the charge, retention of counsel, applications for bail and other pre-trial procedures. Time is required for counsel to prepare. Over and above these inherent time requirements of a case, time may be consumed to accommodate the prosecution or defence. Neither side, however, can rely on their own delay to support their respective positions. When a case is ready for trial a judge, courtroom or essential court staff may not be available and so the case cannot go on. This latter type of delay is referred to as institutional or systemic delay.
> (Morin, at paragraph 40)

Inherent time requirements encompass the time it takes the parties to be ready for trial. Essentially, it is the point when the parties are ready for trial but the system cannot accommodate them, as described in Morin. In cases like Mr. Blackduck's, the inherent time requirements include the time it takes to retain counsel, receive disclosure, make elections, hold bail

hearings and preliminary inquiries, attend pre-trial conferences and submit availability to the court. The complexity of the case is another factor to consider in determining the inherent time requirements of the case.

Mr. Blackduck is charged with a single count of sexual assault and it is anticipated that the trial will take four to five days. The trial is not anticipated to be particularly complex, the few witnesses expected to testify for the Crown. A DNA expert is expected to testify so the matter is not as simple as many sexual assault matters which come before this court. The offence is also indictable so a preliminary inquiry was held, which adds to the inherent time requirements.

The inherent time requirements of this case do not comprise a significant portion of the delay in this case. The preliminary inquiry was completed on June 23rd, 2012, some seven and a half months following the Information being sworn. On November 29th, 2012, the first trial date for Mr. Blackduck was scheduled; therefore, a little over a year elapsed before the parties were ready for trial. In this jurisdiction that amount of time is somewhat longer than normal but not unreasonable.

However, within this time period there are portions which are attributable to both Crown and defence. Following the pre-trial conference on September 21st, 2012, counsel were to provide their availability for trial "shortly". However, neither the Crown nor defence provided their availability for trial for several weeks. The Crown provided availability on November 6th, 2012, and defence on November 23rd, 2012. Neither party has provided an explanation for why it took so long to provide their availability for trial. In the circumstances, the period between September 22nd, 2012 and November 6th, 2012, are equally attributable to Crown and defence. The period from November 7th, 2012 to November 23rd, 2012, is attributable to the defence. Therefore, the inherent time requirements to bring this matter to trial of approximately 13 months must be reduced by approximately two months as a result of the Crown and defence failure to provide their trial availability shortly after the pre-trial conference.

There is a further delay which is attributable to the Crown as a result of the adjournment of the first trial. The period of November 4th, 2013, when the trial was scheduled to commence, and the next trial date of April

28th, 2014, is attributable to the Crown.

Therefore, I find that of the 38 and a half months it has taken this matter to be scheduled for trial for the third time, that delay can be considered as follows: inherent time requirements — 11 months; actions of the accused — a little over a month; actions of the Crown — a little over six months. That leaves approximately 20 months of institutional delay.

Systemic or institutional delay is the period from when the parties are ready to proceed to trial but the system cannot accommodate them. The Supreme Court of Canada has acknowledged that there are limited resources in the justice system and that contributes to delay. However, there are limits to what is acceptable as institutional delay. At some point courts will not tolerate delays based on inadequate resources: (Morin, at paragraph 48)

The Supreme Court of Canada has issued guidelines to assist courts in determining what is acceptable for institutional delay. These guidelines, however, are not to be applied in a rigid manner or treated as a limitation period and cannot be applied mechanically: (Morin, at paragraph 48, and R. v. Latour, 2013 NWTSC 95, at paragraph 72 to 74).

In Morin, at paragraph 55, the Supreme Court of Canada confirmed that a delay of six to eight months between committal to stand trial and trial was the appropriate range of what is reasonable, and that in Territorial Court proceedings the acceptable institutional delay was eight to ten months. So an indictable matter which proceeds through both the Territorial and Supreme Court levels with a preliminary inquiry, would consider a range of 14 to 18 months, based on Morin. These time periods are suggestions and not fixed deadlines. The Supreme Court of Canada acknowledged in Morin that there will be regional differences.

> These periods will no doubt require adjustment by trial courts in the various regions of the country to take into account local conditions and they will need to be adjusted from time to time to reflect changing circumstances.
> (Morin, at paragraph 57)

There are also local conditions to take into account in the north in general, and in the Northwest Territories in particular, which have been discussed in other cases: R. v. Caesar, 2013 NWTSC 65, at paragraphs 21-24; Latour, at paragraphs 76-81; and R. v. Oolamik, 2012 Nun. C.J. 21.

There are challenges in holding jury trials in this jurisdiction that result in the period between committal for trial and trial being somewhat longer than what is contemplated under Morin but that is also not unreasonable. The challenges have been commented on by Justice Charbonneau in a recent bail review decision which also address the amount of time it takes to proceed to trial.

> The large majority of the circuits that this court holds are held for the purpose of holding criminal trials, and a very large proportion of those trials are jury trials. Circuits in general, and circuits where jury trials are held in particular, require a lot of planning and present logistical constraints and challenges. In scheduling these circuits the court has to contend with geography, a finite level of judicial resources, a small criminal bar whose members have a very heavy case load and many circuit and court commitments. In that context, it is simply not realistic for people to expect to have their jury trial within a matter of months from charges being laid. The court strives to give priority in assigning dates to matters where the accused are in custody or to matters that are getting more dated. Still, the reality is that it takes time for the various processes to take their course. People do have the right to choose to be tried by a court composed of a judge and jury when they are charged with an indictable offence, but one of the consequences of that choice is having to wait longer before being able to have their trial.

(R. v. Ruben, 2013 NWTSC 23, paragraph 30)

In this case the remaining delay from November 29th, 2012 to November 4th, 2013, and from April 28th, 2014 to January 19th, 2015, approximately 20 months, is attributable to institutional or systemic delay. Within that delay, significantly, three trials were scheduled. The first trial scheduled for November 2013 was adjourned at the request of the Crown. The second trial in April 2014 could not be completed because a full jury could not be selected. The third trial was scheduled for January 2015. The attempts to hold multiple trials within that time period distinguishes this case from those like Morin and Godin where the Supreme Court of Canada was considering delays of 14 and a half months and a 30 month delay between the dates the charges were laid and the first scheduled trial of the matter. I dare say that if Mr. Blackduck's situation was that it was 38 and a half months between when the charge was laid and the first trial date, my view of his application would be different. But there has to be some recognition that in this jurisdiction it may take longer to have a trial, particularly in the communities, and in some of the smaller communities, including Behchoko, which is not

necessarily small but where there have been recent problems selecting a jury, that in those communities there is a very real risk that a jury cannot be selected due to the size of the community and the relationships that potential jurors have with the accused and/or witnesses. That is one of the drawbacks to the court's tradition of attempting to hold jury trials in the community where the alleged offence took place, and that is a risk the accused must assume in requesting the trial happen in a smaller community.

Overall, the delay attributable to institutional resources and the Crown together — some 26 months — the delay itself is not unreasonable, taking into account the failure to select a jury at the second trial date and the logistical constraints which impact on institutional delay in this jurisdiction.

In considering the prejudice to the accused, the defence is alleging that there is prejudice, both inherent prejudice and actual prejudice.

The Supreme Court of Canada has held that prejudice can be inferred as a result of the delay itself. The longer the delay the more likely it is that prejudice can be inferred. The accused can also adduce specific evidence of

prejudice. The prejudice must arise from the delay and not from the charge itself.

Mr. Blackduck filed an affidavit and testified at the application. In his affidavit, Mr. Blackduck claims that he has suffered prejudice as a result of the delay and that it is terrible to have a charge hanging over his head. The charges and court dates are always in the back of his mind. He goes on to say that the charges have had an impact on his relationship with his common-law spouse Heidi Adzin. He claims that being unable to resolve the charges in a timely way has placed undue strain on their relationship. He has also incurred financial costs in driving from Edmonton for the last trial date. On that trip his vehicle broke down in High Level and he had to have his father drive down from Behchoko to pick him up. He also claims being unable to drink as a result of his bail conditions limited the social activities that he has been able to attend.

In his testimony, Mr. Blackduck repeated much of what he said in his affidavit and provided further details of the impact that the charges have had on him and the delay over a period of time.

It is not unusual for a person facing a

criminal charge to feel stress and anxiety and for the charge to have an impact upon personal relationships. As time passes and the charge remains outstanding, it is understandable that those effects would continue and would be exacerbated. I agree that these effects are, in part, attributable to the delay associated with this case, but I do not agree that they are solely attributable to the delay. I expect that simply being charged with these offences would have resulted in these effects, regardless of the time it took to conclude the matter.

Mr. Blackduck has been out of custody for virtually the entire time this matter has been outstanding, with the exception of a brief period between his arrest and release on an undertaking. He was released on an undertaking which is by no means strict. He is subject to four conditions: to keep the peace and be of good behaviour; to have no contact with the complainant; not to attend the complainant's residence; and not to consume or possess intoxicating substances unless medically prescribed. There have been no restrictions on Mr. Blackduck's movements. He has not been required to remain in the Northwest Territories. As a result, he has been free to move to Edmonton since these charges arose. He

has been able to work. And while he lost his job at a diamond mine it was not as a result of the charge. He has been able to find work readily in Alberta, he admitted, albeit not always at the wage he would like.

As a result of moving to Edmonton, he has incurred costs in travelling back for the trial and for other court dates. These costs can be considered part of the cost of moving outside the jurisdiction while a criminal charge is outstanding; however, it must also be kept in mind that because of the amount of time this case has required, the costs are more than would be expected and can result in financial hardship. There is no evidence that Mr. Blackduck's ability to make full answer and defence has been prejudiced by the passage of time.

Overall, I am prepared to conclude that Mr. Blackduck has suffered some prejudice. Prejudice can be inferred from the passage of time, and Mr. Blackduck has demonstrated that he has incurred some financial costs and some stress which is, in part, attributable to the delay in this case.

The determination of whether the delay is unreasonable depends on a consideration of all the factors I have referred to, so the reasons for delay and the prejudice suffered by the

accused.

As mentioned, the Crown and defence are responsible for approximately two months of the delay following the preliminary inquiry. The Crown is also responsible for the delays associated with the adjournment for the first trial, a little over five months, and the remainder of the delay is attributable to either the inherent time requirements of the case of approximately 11 months, and institutional delay of approximately 20 months. I have considered recent cases from this jurisdiction and Nunavut which counsel provided: R. v. Latour; the second R. v. Latour case, 2013 NWTSC 04; R. v. Oolamik; R. v. Caesar; and R. v. Unka, 2005 NWTSC 15.

In my view, the delay that has occurred in this case is within what might be reasonably expected, taking into account the particular circumstances that exist in the Northwest Territories and the history of this matter. While Mr. Blackduck has demonstrated some prejudice as a result of the delay, I am not satisfied that the prejudice is severe enough to conclude that his rights under section 11(b) of the Charter have been infringed and that a judicial stay of proceedings is warranted. So for these reasons, the application is dismissed.

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Certified to be a true and accurate transcript pursuant to Rule 723 and 724 of the Supreme Court Rules of Court.

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Annette Wright, RPR
Court Reporter