R. v. Bouvier, 2017 NWTSC 45

S-1-CR2016000065

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- vs. -

MARTY BOUVIER

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Transcript of the Decision (Defence Application to Recuse

Her Honour) by The Honourable Justice S. H. Smallwood, at

Yellowknife in the Northwest Territories, on April 5th

A.D., 2017.

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APPEARANCES:

Mr. B. Green: Counsel for the Crown

Mr. J. Bran, agent

Ms. A. Seaman: Counsel for the Accused

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No information shall be published in any document or

broadcast or transmitted in any way which could identify

the victim or a witness in these proceedings pursuant to

s. 486.4 of the Criminal Code

An Order of the Court has been made prohibiting

publication, broadcast, or transmission of information

contained herein pursuant to s. 648 of the Criminal Code

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1 THE COURT: Good morning.

2 MR. GREEN: Good morning, Your Honour.

3 MR. BRAN: Good morning, Your Honour, I

4 am appearing as agent for Mr. Bouvier's

5 counsel. Mr. Bouvier is appearing by video

6 and I have spoken to him, and we are ready to

7 receive the Court's decision.

8 THE COURT: Okay, thank you.

9 So first, we will deal with the decision

10 which I had given on the previous date, on the

11 27th, following the application for the change

12 of venue regarding the recusal application

13 made by defence.

14 So the accused Marty Bouvier is charged on

15 an Indictment with two counts, that he

16 committed a sexual assault on J.C. contrary to

17 section 271 of the Criminal Code, and that he

18 uttered a threat to J.C. to cause death to her

19 and her family contrary to section 264.1(1)(a)

20 of the Criminal Code, both of which are

21 alleged to have occurred on January 1st, 2016,

22 in Behchokò.

23 Mr. Bouvier has elected trial by Judge and

24 jury, and the trial has yet to be scheduled.

25 The Crown brought an application to have

26 the venue of the trial moved from Behchokò and

27 the grounds for seeking the change of venue

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1 were stated to be that it would be

2 impracticable to impanel a jury in Behchokò

3 given the notoriety of the accused, and that

4 it would impose an unnecessary and

5 inappropriate burden on the victim to hold the

6 trial in Behchokò.

7 The application was heard before me on

8 February 27th, 2017, and I reserved decision

9 at that time.

10 Following the application, counsel for Mr.

11 Bouvier requested that I recuse myself from

12 the eventual trial of this matter. I heard

13 submissions from the Crown and the defence and

14 dismissed the application to recuse myself,

15 indicating that reasons would be provided at

16 the next date. So the reasons that I am

17 providing now are on the application for the

18 recusal.

19 The accused's request that I recuse myself

20 was based upon the bad character information

21 that I had heard about the accused during the

22 change of venue application and that the

23 information that had been provided was

24 prejudicial and would impact how I would view

25 the accused and how I would treat him during

26 the trial.

27 The test for a Judge to recuse themselves

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1 is whether the applicant has established that

2 there is a reasonable apprehension of bias on

3 the part of the Judge. The applicable

4 principles were stated by Justice Vertes in

5 Werner v. The Queen, 2005 NWTCA 05 when he was

6 sitting as a member of the Northwest

7 Territories Court of Appeal. I am going to

8 quote several paragraphs of Justice Vertes'

9 decision because it succinctly sets out the

10 applicable principles, starting at paragraph

11 11:

12 That test, for recusal of judges

on the basis of a reasonable

13 apprehension of bias, is

well-established. It is based on

14 the formulation set out by

deGrandpré J. in Committee for

15 Justice and Liberty v. National

Energy Board, 1976 CanLII 2 (SCC),

16 [1978] 1 S.C.R. 369 (at p. 394):

Would the reasonable, right-minded

17 and properly informed person,

viewing the matter realistically

18 and practically, think that there

is a real likelihood or

19 probability of bias so as to

render the trial unfair?

20

This test for recusal has been

21 restated time and again as the

sole test: R. v. R.D.S., 1997

22 CanLII 324 (SCC), [1997] 3 S.C.R.

484; Wewaykum Indian Band v.

23 Canada, 2003 SCC 45 (CanLII),

[2003] 2 S.C.R. 259.

24

There are a number of points that

25 need to be noted so as to provide

context to the issue of judicial

26 recusal.

27 There is a strong presumption of

judicial impartiality and the

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1 threshold for a finding of bias,

real or apprehended, is

2 necessarily high. Thus there must

be cogent grounds. Mere suspicion

3 is not enough. And it is

important to note that the test is

4 not whether a party to the

proceeding (such as the applicant)

5 would reasonably apprehend bias

but whether the reasonable and

6 informed member of the public

would apprehend it.

7

Numerous cases and articles also

8 emphasize the fact that it is not

in the public interest to have

9 judges easily disqualified. A low

standard would lead to delays

10 because it would encourage

tactical motions by litigants

11 seeking another Judge when they

may anticipate an unfavorable

12 outcome. It would also make it

extremely difficult run cases on

13 an efficient basis in small

centres (such as Hay River) where

14 there may be few judges and a

likelihood that litigants who

15 appear frequently in the courts

would often appear before the same

16 judge.

17 These principles were restated recently in

18 Heffel v. Registered Nurses Association 2015

19 NWTSC 16 where, at paragraphs 95 and 97,

20 Justice Schuler stated:

21 The accepted test for reasonable

apprehension of bias was stated by

22 de Grandpré J. in Committee for

Justice and Liberty v. National

23 Energy Board, 1976 CanLII 2 (SCC),

[1978] 1 S.C.R. 369 (at p. 394):

24 “what would an informed person,

viewing the matter realistically

25 and practically - and having

thought the matter through -

26 conclude. Would he think that it

is more likely than not that [the

27 decision-maker], whether

consciously or unconsciously,

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1 would not decide fairly.”

2 The cases note that there is a

strong presumption of judicial

3 impartiality and the threshold for

a finding of real or apprehended

4 bias is high, requiring that there

be cogent grounds. Mere suspicion

5 is not enough. As Vertes J.A.

noted in Werner, the test is not

6 whether a party to the proceeding

would reasonably apprehend bias,

7 but whether the reasonable and

informed member of the public

8 would apprehend it (at paragraph

[14]). The member of the public

9 is one who is reasonable, not a

person of “very sensitive or

10 scrupulous conscience”.

11 In this application, there was evidence

12 that was filed by the Crown, and it was filed

13 in support of the application for the change

14 of venue. It consisted of the offence record

15 report for the accused which indicated that he

16 had a number of convictions, mainly

17 convictions for breaches of court-ordered

18 conditions, that he also had a conviction for

19 an assault in 2015, and a conviction for

20 sexual assault in 2015.

21 Affidavits were also filed by S.C., who is

22 the adoptive mother of the alleged victim in

23 this matter; from John Gouthro, the principal

24 of school in Behchokò, and Constable Bennett,

25 who had been stationed in Behchokò from 2014

26 to 2016.

27 The Crown also filed other material

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1 relating to statistical information regarding

2 the community of Behchokò as well as to the

3 difficulties in selecting juries in Behchokò

4 since 2013.

5 The affidavits that were filed primarily

6 speak to the accused's reputation in the

7 community and his alleged reputation as

8 someone who has committed sexual assaults

9 against young persons. The affidavits refer

10 to the deponents' concerns as well as the

11 concerns that they say that other members of

12 the community have about Mr. Bouvier.

13 They allege that Mr. Bouvier has a

14 reputation in Behchokò and is known amongst at

15 least some members of the community for having

16 committed a sexual assault and perhaps other

17 sexual assaults for which he was either not

18 charged or convicted.

19 Judges are called upon to make

20 applications regarding the admissibility of

21 evidence on a daily basis; for example,

22 whether the accused can be cross-examined on a

23 criminal record, whether a statement given by

24 the accused to the police is admissible,

25 whether prior acts committed by the accused

26 are admissible as similar-fact evidence. Many

27 of these applications involve hearing evidence

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1 that do not cast an accused in a positive

2 light. Judges are required to make a ruling

3 and are then expected to continue on with the

4 trial. It is not presumed that following this

5 that a Judge will be required to recuse

6 themselves because of the bad character or

7 other negative evidence that they have heard

8 about the accused.

9 There is a strong presumption of judicial

10 impartiality. Judges are expected to put

11 aside inadmissible evidence and decide cases

12 impartially and on the basis of the admissible

13 evidence before them. That is not to say that

14 there cannot be situations where a Judge may

15 be in a position where there is real or

16 apprehended bias, but as the cases state there

17 must be cogent grounds and mere suspicion is

18 not enough.

19 The affidavits filed on this application

20 are somewhat vague and do not provide a lot of

21 information about the incidents that Mr.

22 Bouvier is alleged to have committed. It also

23 appears that they refer to incidents for which

24 Mr. Bouvier was either never charged or

25 convicted of a criminal offence. And I am not

26 certain how helpful these affidavits are in

27 terms of providing specific evidence about Mr.

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1 Bouvier's actions, but they do indicate that

2 some members of the community have concerns

3 about Mr. Bouvier and that he has a certain

4 negative reputation amongst those members.

5 Whether those concerns or that reputation is

6 well founded or not is another issue.

7 Mr. Bouvier has also had a show cause

8 hearing on these charges and he has had a

9 section 525 bail review in front of Justice

10 Mahar of this Court. At that hearing, similar

11 information was put before Justice Mahar

12 regarding Mr. Bouvier's background and more

13 specific information was provided regarding

14 the offence itself and his criminal history.

15 If I were to recuse myself on the basis of the

16 information provided at the change of venue

17 application, then it seems that there would be

18 grounds for Justice Mahar to be asked to

19 recuse himself on a similar basis.

20 It may be, as well, that Mr. Bouvier will

21 appear in front of another Judge for another

22 section 525 bail review or another application

23 which could result in another Judge hearing

24 similar information about Mr. Bouvier.

25 As Justice Vertes observed in the Werner

26 case, a low standard for having Judges

27 disqualified would inevitably result in delays

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1 and it can be difficult to have matters

2 proceed expeditiously in this jurisdiction

3 where there are only four resident Supreme

4 Court Judges.

5 In my view, the evidence which has been

6 filed on this application is not sufficient to

7 raise a concern that the Judge hearing the

8 application would have a bias, real or

9 apprehended. A reasonable and informed member

10 of the public would not view the information

11 that was submitted at the change of venue

12 application as resulting in the Judge having a

13 bias against the accused. Members of the

14 public expect Judges to hear these types of

15 applications and then to continue on with the

16 trial. They expect justice to occur in a fair

17 and expeditious manner and not to be delayed

18 or interrupted by a Judge having to recuse

19 themselves following an application where they

20 have heard evidence that is of the type that

21 is regularly considered by a trial Judge.

22 So for these reasons, I dismiss the

23 application to recuse myself.

24 So there is also the issue, Mr. Green,

25 about the publication ban and the notice,

26 which on the last date, the notice

27 requirements had not been complied with.

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1 MR. GREEN: Yes, Your Honour, before we

2 move to that, in your reasons on recusal you

3 did identify S.C. as being the adoptive mother

4 of J.C. In light of the 486.4 publication

5 ban, I would ask that in the transcript or any

6 published reasons that Ms. S.C.'s [initials

7 inserted] name also be anonymized.

8 THE COURT: That's fine.

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11 Certified to be a true and

accurate transcript pursuant

12 to Rules 723 and 724 of the

Supreme Court Rules,

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18 Lois Hewitt,

Court Reporter

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