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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