

R. v. McDonald, 2017 NWTSC 65

S-1-CR2016000020

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- vs. -

RONALD VINCENT McDONALD

Transcript of the Rulings (Bail application and s. 598 of the Criminal Code) by The Honourable Justice L. A. Charbonneau, at Yellowknife in the Northwest Territories, on August 8th A.D., 2017.

APPEARANCES:

Ms. A. Piché: Counsel for the Crown

Mr. C. Davison: Counsel for the Accused

Charge under s. 271 Criminal Code

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 of Canada

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1 THE COURT: Mr. McDonald faces a charge
2 of sexual assault for events that are alleged
3 to have occurred back in May 2015. He elected
4 to have a jury trial on this charge. That
5 trial was scheduled to proceed in Norman Wells
6 commencing at 2 p.m. on July 31st, 2017.

7 Mr. McDonald did not appear before the
8 Court at that time. A warrant was issued for
9 his arrest. He turned himself into the
10 custody of the RCMP detachment in Yellowknife
11 on the 2nd of August, at 2:20 p.m.

12 Two issues must now be dealt with. The
13 first is bail and the second is whether Mr.
14 McDonald has lost his right to be tried by a
15 jury by operation of section 598 of the
16 Criminal Code. Different legal frameworks
17 govern these two issues but the evidence that
18 relates to the reasons why Mr. McDonald did
19 not attend Court in Norman Wells is relevant
20 to both issues. The two hearings essentially
21 proceeded together.

22 First, with respect to the allegations and
23 the procedural history of this matter, as I
24 said, the events that gave rise to the charge
25 date back to May 2015. Mr. McDonald and the
26 complainant did not know one another before
27 these events. On the evening in question, it

1 is alleged that they were both at a bar in
2 Norman Wells and consumed alcohol there, and
3 that they later found themselves at a house
4 party at a residence in Norman Wells, with
5 five other people in attendance.

6 The complainant was seen at one point
7 going from the kitchen area to the living
8 room. Some time later two people, who were
9 described by the Crown as "independent
10 witnesses", walked into the living room and
11 allegedly found Mr. McDonald on top of her,
12 making thrusting motions. It appeared to them
13 that he was having sexual intercourse with
14 her. It appeared to them that she was
15 unconscious. According to the witnesses, her
16 arms were limp. One witness said that she
17 appeared "dead to the world."

18 Mr. McDonald's clothes were off. The
19 complainant still had clothes on the upper
20 part of her body, but her pants and underwear
21 were off.

22 The two individuals pulled Mr. McDonald
23 off and told him to leave the house. It is
24 alleged that it took several minutes to wake
25 the complainant up. She is expected to
26 testify that she experienced a blackout that
27 night and has no memory of what happened to

1 her; that after she woke up she felt like
2 someone had sex with her; and that she would
3 not have consented to having sex with Mr.
4 McDonald that night.

5 The incident took place in the early
6 morning hours. It was reported to the RCMP in
7 Norman Wells at around 8 o'clock that same
8 morning. Mr. McDonald was arrested at 9:30 at
9 his place of work and was released on a
10 recognizance. A copy of that document was
11 marked as Exhibit A on the hearing.

12 Mr. McDonald had never appeared in court
13 in person on this charge prior to his arrest.
14 His counsel, Tracy Bock, appeared on his
15 behalf at all stages. That was done pursuant
16 to a Designation of Counsel filed in December
17 2015 in the Territorial Court. The
18 preliminary hearing was waived. A pre-trial
19 conference was later held in the usual course.

20 There were some delays in scheduling the
21 trial because for a time there was some
22 uncertainty about Mr. McDonald's
23 representation. Once it was confirmed that
24 Mr. Bock would be acting and once counsel
25 submitted their available dates, a trial date
26 was set. Last April, a docket scheduling the
27 jury trial to commence July 31st was issued.

1 At the end of June, a further pre-trial
2 conference was held with the assigned trial
3 judge. At that pre-trial conference and in
4 the context of discussions about possible
5 admissions, Mr. Bock said that he was having
6 some difficulties getting into contact with
7 Mr. McDonald.

8 During the brief court sittings in Norman
9 Wells on July 31st, Mr. Bock made certain
10 representations to the Court. He told the
11 Court that, first, he had informed Mr.
12 McDonald of the date and location of the
13 trial. Second, that although he had
14 difficulties contacting him at one point, he
15 had been able to get into contact with him on
16 July 24th; that he had a conversation about an
17 hour and a half with him on July 26th; and
18 that during that conversation Mr. McDonald
19 promised he would be in Norman Wells in the
20 afternoon of Sunday, July 30th.

21 Mr. Bock also said that he spoke with Mr.
22 McDonald again on Sunday, July 30th at about 6
23 p.m. At that point, Mr. McDonald told Mr. Bock
24 that he was in Grande Prairie. Mr. Bock told
25 him to drive to Yellowknife and get on the
26 morning flight to Norman Wells. Mr. McDonald
27 told Mr. Bock he did not have any money for

1 the flight and had planned to drive.

2 Some additional facts were put before the
3 Court by the Crown at the hearing of these
4 applications. The first has to do with
5 information obtained from the Fort Liard
6 detachment.

7 On July 31st at 8:40 a.m., Mr. McDonald
8 went to the RCMP detachment in Fort Liard and
9 spoke to Corporal Nicolas Brodeur. Mr.
10 McDonald told him that he was due in court in
11 Norman Wells on Tuesday, August 1st, to appear
12 on an assault charge. He told the officer
13 that he was not aware that it is not possible
14 to drive to Norman Wells in the summer. He
15 said he was broke and could not afford a plane
16 ticket.

17 Corporal Brodeur made some inquiries,
18 determined that Mr. McDonald was due in court
19 that same day in the afternoon. He told Mr.
20 McDonald that if he was not in court a warrant
21 would likely be issued for his arrest. Mr.
22 McDonald said he would keep driving and check
23 in with the RCMP once he arrived in
24 Yellowknife.

25 The Crown has made an admission of the
26 fact that the website Mapquest, which can be
27 used to map driving routes to various places,

1 including in Canada, erroneously shows it is
2 possible to drive from Fort Liard to Norman
3 Wells. The system generates a route and
4 states that the driving time between those two
5 communities is 12 hours and seven minutes.
6 The website is wrong. There is, in fact, no
7 way to drive to Norman Wells in the summer.
8 There is a way to drive in the wintertime, and
9 I suppose I can probably infer that the route
10 that appears on Mapquest is maybe a route that
11 is available when the winter road is open.

12 The Crown also referred to a number of
13 pending charges that Mr. McDonald faces in
14 Ontario. There is a charge for committing an
15 indecent act in public dating back to
16 September 14th, 2014. On that charge he was
17 released on an undertaking with several
18 conditions, including one that he notify the
19 police of any change of address and
20 employment.

21 There is a simple possession charge dated
22 October 2nd, 2014, and a failure to appear
23 charge from October 16, 2014. There is a
24 warrant for arrest on that charge which was
25 never extended outside Ontario.

26 There is also a theft-under charge for
27 London, Ontario, dating back to October 23rd,

1 a failure to appear charge dating back to
2 November 11th. This is also, in 2014, a
3 failure to appear to provide fingerprints on
4 November 18th, 2014, and a failure to appear
5 in court on November 27th, 2014. Again, there
6 is a warrant for his arrest on those, and
7 there was never any attempt to extend the
8 warrant outside of Ontario.

9 During his testimony, Mr. McDonald
10 acknowledged that he did not comply with the
11 condition to advise the police in Ontario of
12 his change of address when he left that
13 province. He also admitted that he knows
14 about the arrest warrants, and testified that
15 his intention was to deal with the Ontario
16 matters once he had enough money to get a
17 lawyer to assist him with the charges.

18 Mr. McDonald has a criminal record, which
19 was marked as an exhibit on the hearing as
20 well. The convictions span from 1985 to 1998.
21 They are all from Ontario. The longest jail
22 term that he ever received for offences was 40
23 days.

24 The convictions include a variety of
25 offences - theft, possession of property
26 obtained by crime, assault, drinking and
27 driving. They also include failures to comply

1 with court orders, more specifically two
2 breaches of recognizance, one breach of
3 probation, and one failure to appear.

4 That is the information that the Crown
5 presented at this hearing.

6 The defence presented evidence as well. I
7 heard information about Mr. McDonald's
8 background and personal circumstances directly
9 from his counsel, and also to some extent
10 during Mr. McDonald's testimony. But the
11 focus of the testimony was why he was not in
12 Norman Wells for the start of this trial on
13 July 31st.

14 Defence also called Mr. McKinley, who is
15 Mr. McDonald's friend and who had agreed to
16 drive him to the NWT to attend his trial. Mr.
17 McKinley testified about his recollection of
18 their trip, which also goes to the reason of
19 Mr. McDonald's nonattendance. Mr. McKinley
20 confirmed, as well, his willingness to act as
21 a surety for Mr. McDonald if he is released.

22 Mr. McDonald is originally from Ontario,
23 and he has two children, 17 and 21, who still
24 live there. He said that he is making child
25 support payments in relation to the
26 17-year-old and is also trying to catch up on
27 some arrears.

1 He works as an insulator. He left Ontario
2 to go west and get work. He has lived in
3 Edmonton, Cold Lake, and for the last year or
4 so, in British Columbia, in Coquitlam.

5 Mr. McDonald described his efforts to get
6 to Norman Wells for the trial. In short, he
7 said that he had no money to buy a plane
8 ticket so his plan was to drive with his
9 friend Mr. McKinley. Based on a route that
10 they looked up on Mapquest, they believed it
11 was possible to drive to Norman Wells
12 year-round.

13 He said his lawyer did not tell him the
14 exact date of the start of the trial but only
15 told him that it was going to be the first
16 week of August. Mr. McDonald testified that
17 he interpreted this to mean that he needed to
18 be in Norman Wells for Tuesday, August 1st, as
19 opposed to Monday, July 31st. He said he
20 wanted to work on Saturday, which was July
21 29th, to make as much money as he could before
22 leaving.

23 Initially, he testified that they left
24 after he finished work. Later in his
25 evidence, he clarified that he did not work a
26 full day and that they left at around 2 p.m.

27 He acknowledged that he had a conversation

1 with his lawyer on Sunday, July 30th. He
2 thought they were further on than Grande
3 Prairie when this conversation took place,
4 closer to Fort Liard. At least, that is what
5 I understood him to say. He said at that
6 point he still thought he could get to Norman
7 Wells by road, even in the summer, and that
8 his lawyer thought the same thing.

9 I was not entirely clear on Mr. McDonald's
10 version about when he realized it was not
11 possible to drive all the way up to Norman
12 Wells. He said something about speaking to an
13 old couple that they met on the road who told
14 him that there was no road to get to Norman
15 Wells. But he also mentioned speaking to the
16 police officer about this in Fort Liard, if I
17 recall correctly.

18 Corporal Brodeur says that when Mr.
19 McDonald arrived, he told him they were trying
20 to get to Norman Wells by road and the
21 corporal told him that was not possible. Mr.
22 McKinley also said that it was in Fort Liard
23 that he learned that they could not actually
24 drive to Norman Wells in the summer.

25 Mr. McDonald denied having been trying to
26 avoid the consequences of this trial. He said
27 he wanted to get it done and put it behind

1 him. He denied being concerned about the
2 possibility of having to go to jail. He said
3 he was quite confident he would be acquitted
4 and his lawyer was also quite confident that
5 he would be acquitted. He denied being
6 concerned about the possibility of receiving a
7 lengthy jail term. He said he thought he
8 would get a couple of months of jail, at most,
9 if convicted.

10 With respect to the evidence of Mr.
11 McKinley, he explained that he lived in
12 Ontario until recently. He met Mr. McDonald a
13 year ago by text messaging and somewhat by
14 coincidence. If I understood the evidence
15 correctly, their phone numbers are very
16 similar. There is only one digit difference,
17 and Mr. McDonald, trying to text something to
18 himself, accidentally sent a text to Mr.
19 McKinley and exchanges started from that.
20 Eventually Mr. McKinley decided to relocate to
21 BC. The plan was that he and Mr. McDonald
22 would get an apartment and live together. Mr.
23 McKinley decided to tour national parks as
24 part of his trip west.

25 As I understood his evidence, towards the
26 end of June he was in the Yukon, still, and
27 agreed to give Mr. McDonald a ride to the

1 Northwest Territories for his trial. Mr.
2 McKinley understood that Mr. McDonald had to
3 come to Yellowknife for court and had to be
4 here for August 1st.

5 He said that they left British Columbia at
6 5 p.m. He described the route that they took
7 in very good detail. And he said that 24
8 hours after they left, they were in Grande
9 Prairie.

10 He said that while they were in Grande
11 Prairie, Mr. McDonald had a conversation with
12 his counsel and that was when Mr. McKinley,
13 after that conversation, learned that they
14 needed to get themselves to Norman Wells and
15 not Yellowknife. So he mapped a new route
16 using his GPS, and it showed a way to get to
17 Norman Wells by road. So they headed in the
18 direction of Fort Liard and stopped on the
19 edge of town.

20 At that point, Mr. McKinley still thought
21 the court date was August 1st. He stopped in
22 at the RCMP station in Fort Liard on Monday
23 morning. That is when Mr. McKinley says he
24 learned it was not possible to drive to Norman
25 Wells in the summer. From that point on, they
26 decided to go to Yellowknife and got here
27 Monday afternoon.

1 I found Mr. McKinley to be a careful and
2 thoughtful witness. He appeared to try his
3 best to be precise and complete in his
4 answers. He corrected himself or added to
5 some of his answers on a few occasions to add
6 clarity. I believed him. I believed his
7 evidence. I believe he was doing his best to
8 try to assist his friend to get to court. It
9 is apparent he is very loyal to him, but I do
10 not think he was trying to mislead me in any
11 way.

12 By contrast, I found Mr. McDonald's
13 evidence very confusing. Some of his answers
14 were vague, others were long and somewhat
15 rambling and confused. Other times he was
16 evasive. Some of his answers were not at all
17 responsive to what he was being asked. He
18 contradicted himself. And I find some of the
19 things he said quite implausible.

20 Mr. McKinley's evidence supports Mr.
21 McDonald's general story about the plan to
22 drive up to the north for his court
23 appearance. But there are some
24 contradictions, some subtle, some less subtle,
25 and the sum total of these differences, in my
26 view, calls into question Mr. McDonald's
27 credibility and sincerity when he says he was

1 trying to get himself to court.

2 There is the question of time of departure
3 and how his evidence evolved on that point,
4 and its difference with Mr. McKinley's
5 account. I recognize, as Mr. McDonald's
6 counsel said, that often people are wrong
7 about time. It is not so much the difference
8 between their evidence that I found
9 interesting, but the evolution in Mr.
10 McDonald's testimony during cross-examination,
11 as though he wanted to say they left earlier,
12 giving more time for the drive. It is a small
13 detail and I would not draw any inference from
14 it if that is all there was. It is simply a
15 small piece in a larger picture that
16 demonstrates, in my view, some shifts and some
17 self-serving elements in Mr. McDonald's
18 evidence.

19 Another interesting detail has to do with
20 Mr. McDonald's phones. In the context of
21 talking about whether he stayed in touched
22 with his counsel in the time leading up to the
23 trial, he said that he changed phones at some
24 point because he had two phones stolen, and he
25 also said something about his e-mail account
26 getting hacked. By contrast, Mr. McKinley
27 said that throughout the period of time he has

1 been acquainted with Mr. McDonald, he has
2 always used the same phone number to
3 communicate with him by phone or text. The
4 number never changed, he said. Mr. McKinley
5 did not seem to have any trouble staying in
6 contact with Mr. McDonald using that phone
7 number. And that, to me, calls into question
8 Mr. McDonald's explanations, or attempted
9 explanations for difficulties in communication
10 between him and his counsel.

11 Again, it is a detail and on its own it
12 would establish nothing, but I find it
13 curious.

14 One contradiction I find important between
15 their testimonies is that Mr. McDonald said
16 they mapped a GPS course to Norman Wells from
17 the start. Mr. McDonald, of course, knew his
18 trial was to be held in Norman Wells. Mr.
19 McKinley, however, said they were heading for
20 Yellowknife. That's where he thought his
21 friend had to go. It was only after the phone
22 call with the lawyer when they were in Grande
23 Prairie that he realized that their
24 destination was actually Norman Wells, and
25 that was when he looked for a new route on the
26 GPS.

27 Mr. McKinley was getting his information

1 from Mr. McDonald. It is difficult for me to
2 imagine how there could have been
3 miscommunication and misunderstanding about
4 their destination, considering the whole point
5 was for Mr. McDonald to get somewhere for his
6 court proceedings. If Mr. McDonald arranged
7 for a ride, but somehow gave his friend the
8 wrong destination, the obvious question is why
9 would he do that if he really wanted to get
10 where he was supposed to go?

11 Then there is the whole confusion about
12 the trial date. I find it difficult to accept
13 that Mr. Bock would have been as vague as Mr.
14 McDonald claims he was, when he told him about
15 the trial date initially. I would find it
16 surprising that any lawyer would simply tell a
17 client that the trial is on "the first week of
18 August" without reference to a specific date
19 and time. That would be a very odd way to
20 communicate a trial date to a client,
21 especially an out-of-town client who will have
22 to travel a fair ways to get to court.

23 But even if I give Mr. McDonald the
24 benefit of the doubt about that, even if there
25 was an honest mistake initially about the
26 trial date, I do not accept that there could
27 still have been confusion about it after the

1 Sunday phone call. Everyone seems to agree
2 that Mr. McDonald and Mr. Bock spoke on the
3 Sunday night, July 30th. Mr. McKinley said
4 that after that he knew what their destination
5 was but he still thought the court was August
6 1st.

7 Mr. McKinley was getting his information
8 from Mr. McDonald, and it simply does not make
9 sense to me that after speaking with Mr. Bock
10 on Sunday, the eve of trial, Mr. McDonald
11 could still have been confused about when his
12 trial was starting. The whole point of the
13 conversation was that he needed to get himself
14 to court. I find it very hard to believe that
15 Mr. McDonald could have been honestly confused
16 about his court date at that point, yet the
17 next day he tells Corporal Brodeur he has to
18 be in court on Tuesday. And clearly he does
19 not make the timeline clear to his friend at
20 that point either. And, again, the obvious
21 question is why?

22 There are other things about Mr.
23 McDonald's evidence that trouble me.

24 Witnesses are sometimes nervous.
25 Sometimes they are honestly mistaken about
26 certain details. I have taken this into
27 account as well as the fact that Mr. McDonald

1 and Mr. McKinley drove long hours after they
2 left British Columbia and this could have had
3 some impact on their ability to remember small
4 details, although Mr. McKinley certainly
5 seemed to remember things quite well. Mr.
6 McDonald was testifying about events that
7 occurred not weeks, not months, not years
8 before, but days before. It is hard to
9 understand that he could be that confused and
10 vague about such recent events - events
11 associated with trying to get to court;
12 conversations was his lawyer; events that
13 would have been important at the time they
14 unfolded. Yet, he remembers having bacon and
15 eggs before turning himself into custody.
16 That is odd.

17 Mr. McDonald claims that Mr. Bock thought,
18 like him, that it is possible to drive to
19 Norman Wells in the summer. We did not at
20 this hearing hear from Mr. Bock. Considering
21 that Mr. Bock has lived in Yellowknife for
22 some time, I would find it surprising if he
23 thought there was an all-season road to the
24 Sahtu region. This is a topic that is raised
25 from time to time in the news. It is
26 discussed by politicians, and it is actually a
27 topic of choice for one columnist in one of

1 the local newspapers. But leaving that aside,
2 even if I accept that Mr. Bock thought it was
3 possible to drive to Norman Wells in the
4 summer, it makes complete sense that despite
5 this, his advice to his client would have
6 been, on the eve of trial, to go to
7 Yellowknife to catch a flight. That is what
8 Mr. Bock told the Court he told his client,
9 and I have not heard a satisfactory
10 explanation from Mr. McDonald for why he did
11 not do just that, or at least attempt to.

12 As of Sunday and the time of that phone
13 call, it was entirely unrealistic, and it
14 defies logic, for Mr. McDonald to have stuck
15 with the plan to drive, even if there was a
16 road. His only chance to get to court on time
17 would have been to head to Yellowknife and try
18 to get on that flight, just like his lawyer
19 said he should. Heading in the direction of
20 Fort Liard was a plan that was doomed to fail
21 even if there had been a road.

22 Mr. McDonald denied on cross-examination
23 that he was concerned about having to face the
24 consequences of his trial. He denied having
25 wanted to delay things. He said he was quite
26 confident he would get acquitted, and so was
27 his lawyer. Maybe Mr. McDonald is very

1 confident. Still, one would expect anyone to
2 be at least a little concerned or a little
3 worried heading into a trial on such a serious
4 charge.

5 He also denied knowing he would face a
6 lengthy jail term if convicted. He said he
7 thought he would get a few months. I also
8 find that hard to believe. It is possible
9 that Mr. McDonald does not realize the exact
10 extent of his jeopardy, although I would
11 expect that to be part of the discussions
12 counsel would have with their clients as a
13 matter of course. But one way or another, I
14 find it highly implausible that he sincerely
15 thinks that the sentence for the rape of an
16 unconscious woman would be a sentence of a few
17 months considering he has been in court before
18 and he has received 40-day sentences before
19 for things like breaching his probation,
20 theft, and drinking and driving. Mr. McDonald
21 has some experience with the criminal justice
22 system. I find it difficult to believe that
23 he could be this naive about the extent of his
24 jeopardy on this charge.

25 The other problem, of course, is that Mr.
26 McDonald's version of his dealings with Mr.
27 Bock are, in several respects, not just not

1 confirmed by Mr. Bock but they are contrary to
2 what Mr. Bock said on the record on July 3st.

3 Of course, misunderstandings and
4 miscommunications can happen and they happen
5 all the time, but here we are not talking
6 about one mistake or one miscommunication. We
7 have a whole series of serious
8 miscommunications between Mr. McDonald and his
9 counsel, and we also have serious
10 miscommunication between Mr. McDonald and Mr.
11 McKinley.

12 I find they are not particularly plausible
13 areas for miscommunication in the context of
14 what was taking place - a lawyer talking to
15 his client about a trial date on a serious
16 charge; a friend getting another friend's help
17 to get him to where he needed to be for
18 something important. I find all of these
19 misunderstandings and miscommunications defy
20 common sense and render Mr. McDonald's
21 evidence very, very suspect.

22 Defence counsel has pointed out that it
23 does not make a lot of sense if Mr. McDonald
24 was trying to avoid court that he would have
25 undertaken the trip at all. He could have
26 simply done nothing and remained in BC.

27 It is a good point, and I have given that

1 point serious consideration. But somewhere
2 between long-term planning to defeat the
3 process and a series of mishaps that
4 accidentally defeat a person's sincere
5 attempts to get to court on time, there is a
6 broad range of possibilities. Perhaps
7 initially Mr. McDonald was quite confident
8 that he would be found not guilty. Perhaps he
9 was initially looking forward to this all
10 being behind him and he believed he could
11 drive to Norman Wells and that is why he made
12 these arrangements and asked for Mr.
13 McKinley's help. And perhaps it is only as
14 time moved closer that he started to become
15 more worried about the outcome of this case.

16 But whatever the case was, I do not accept
17 or believe that things unfolded in the manner
18 that they did because of mere mistakes and
19 misunderstandings. There is just too much
20 here that does not hold together, does not
21 make sense, and is implausible about what Mr.
22 McDonald's version of events. I think that
23 there came a point where he did not want this
24 trial to go ahead. He did not sincerely want
25 to get to where he was supposed to be when he
26 was supposed to be there.

27 The first issue I have to decide is bail.

1 The Crown opposes Mr. McDonald's release on
2 the primary ground only and there are a number
3 of concerns on the primary ground.

4 Because of my conclusions about what
5 unfolded last week and Mr. McDonald's attitude
6 towards this case, I obviously have
7 significant concerns about whether he can be
8 trusted to honour his obligation to appear in
9 court the next time this trial is scheduled.
10 I have great concerns that if released, Mr.
11 McDonald may again, when the times comes, try
12 to avoid facing trial for this charge. But
13 those are not the only two concerns I have.

14 The criminal record raises concerns
15 because it includes breaches of court orders,
16 including failure to appear. Because it is
17 dated, on its own it would not render Mr.
18 McDonald's detention necessary. It is simply
19 a factor among others.

20 I am concerned, as well, about the
21 outstanding charges in Ontario. Mr. McDonald
22 was asked about these in his testimony. He
23 does not appear overly concerned about these
24 charges. He did not comply with the condition
25 that required him to advise the police of
26 changes in address and employment, and he gave
27 no explanation for not having complied with

1 that condition. It is obvious he simply
2 ignored it.

3 He is aware of the outstanding warrants
4 and he has done nothing about that either.
5 His explanation for doing nothing at this
6 point is that he was waiting to have money so
7 he could get a lawyer to help him with those
8 matters. I find that explanation feeble and
9 unconvincing. Mr. McDonald's attitude about
10 his Ontario charges seems to me to be quite
11 cavalier. It does not inspire a lot of
12 confidence about his attitude towards the
13 charge that he has pending in this court.

14 Another factor is Mr. McDonald's lack of
15 ties to the NWT and the somewhat transient
16 lifestyle he has had over the past few years.
17 He would have to return from a long distance
18 away to face trial, and that will be expensive
19 no matter where the trial is scheduled. The
20 problems that were encountered on the last
21 occasion will exist the next time the trial
22 date is set as well.

23 Over the past three years Mr. McDonald has
24 lived in different places. He was in Ontario
25 as of the fall of 2014 when some of the
26 charges that he faces there were laid. Since
27 then he's lived in Edmonton, Cold Lake, he has

1 spent some time in Norman Wells and for the
2 last while he has been in Coquitlam or
3 Vancouver. The lack of stability is a concern
4 as far as the primary ground is concerned.

5 The failure to comply with this process on
6 the NWT charge is also a concern. He has
7 reported but he did not comply with the
8 requirement that he notify the police on the
9 change of address. That type of condition is
10 crucial for the authorities to keep track of
11 an accused person. When he was asked about
12 having not complied with that condition, he
13 was evasive. At first he seemed to imply that
14 he was not aware of the condition. He later
15 had to acknowledge that the recognizance has
16 his signature on it and that the conditions
17 are all written on the document. There is no
18 adequate explanation for why he did not comply
19 with that condition which, again, suggests a
20 cavalier attitude towards the court process.

21 Another indication of this cavalier
22 attitude is that knowing he had missed this
23 court date last Monday, Mr. McDonald, after
24 arriving in Yellowknife, did not turn himself
25 into custody right away. He did various other
26 things on both the Monday, the Tuesday and
27 part of Wednesday. He took care of things

1 that he felt were important. He tried to
2 speak to a lawyer beforehand. He got
3 breakfast. He turned himself in almost two
4 days after having arrived in Yellowknife,
5 knowing that a warrant issued on the Monday
6 after he failed to appear for his jury trial.

7 It goes without saying that Mr. McDonald's
8 failure to attend court on July 31st is also a
9 huge concern on the primary ground. A
10 considerable amount of resources were wasted
11 as a result of his failure to attend.
12 Witnesses were subpoenaed, some having
13 travelled from outside the NWT. A number of
14 jury summonses had been issued and served on
15 community members and people were
16 inconvenienced by having to attend court for
17 nothing. The court party travelled to Norman
18 Wells at very high cost and to absolutely no
19 use. The matter is getting quite dated and
20 now it is going to be delayed even longer. So
21 all that to say, there are significant
22 concerns on the primary ground.

23 Against those serious concerns, I find the
24 release plan that is being proposed is quite
25 weak. I want to make it very clear that I do
26 not at all doubt Mr. McKinley's sincerity. He
27 obviously cares about Mr. McDonald. He wants

1 to stand by him and he has already gone out of
2 his way to help him. I also accept that
3 despite his loyalty to Mr. McDonald, he would
4 be diligent and responsible if he were to be
5 named as his surety. He has acted as a surety
6 before and he understands the obligations of a
7 surety. He has been in the position before,
8 he said, where he has had to call the police
9 on someone, when people he was a surety for
10 did not comply with conditions. He said under
11 oath that he would do that if he became aware
12 the Mr. McDonald is in breach, and I believe
13 him when he says he would.

14 But Mr. McKinley has only known Mr.
15 McDonald for about a year and he has known him
16 mostly from a distance. I appreciate over
17 that year he did visit Mr. McDonald once in
18 BC. The current plan is that they would look
19 for an apartment and move in together but at
20 this point it is still a plan; it has not
21 happened.

22 While I do not doubt Mr. McKinley's
23 sincerity, I have grave concerns about whether
24 he would actually be in a position to exercise
25 the influence, control, and supervision and
26 would ensure Mr. McDonald's attendance in
27 court for trial.

1 As I already noted, some of the
2 information Mr. McDonald gave Mr. McKinley
3 about his court date this time was not
4 accurate information. This raises concerns
5 about whether Mr. McDonald would give accurate
6 information to Mr. McKinley in the future.

7 The reality is that Mr. McDonald could
8 decide to pick up and leave without regard for
9 his obligations and his pending charge just
10 like he did when he left Ontario, leaving his
11 problems with the criminal justice system
12 behind. If Mr. McDonald decided to go, and
13 even if Mr. McKinley reported that to the
14 authorities right away, Mr. McDonald could be
15 long gone and it could take time before the
16 authorities could locate him.

17 Given my findings about Mr. McDonald's
18 attitude towards his charge, his lack of ties
19 to the NWT, his transience over the past few
20 years, and the other aspects of the evidence
21 that I have referred to, I conclude that there
22 is a huge risk that Mr. McDonald will, as he
23 has in the past, move without advising the
24 authorities. And that even if Mr. McKinley
25 did his best to supervise him, Mr. McDonald
26 could disappear from the map as it were, and
27 just as is the case with his Ontario charges,

1 the Norman Wells charge might not get dealt
2 with in a timely fashion.

3 For those reasons I am satisfied that his
4 detention is necessary to ensure that he will
5 attend his trial when it is rescheduled.

6 The second issue is whether he has
7 forfeited his right to be tried by a jury.

8 Section 598 of the Criminal Code provides
9 that a person who has elected to be tried by a
10 judge and jury and fails to attend trial is
11 not to have a jury trial unless that person
12 establishes that there was a legitimate excuse
13 for his or her failure to appear.

14 The right to a jury trial is a very
15 important right. It cannot be taken away
16 lightly.

17 The Supreme Court of Canada have
18 confirmed, when it examined the constitutional
19 validity of this provision in *R. v. Lee*,
20 [1989] 2 S.C.R. 384, that placing the onus on
21 an accused to establish the existence of a
22 legitimate excuse is not contrary to the
23 Charter.

24 The case talked about the underlying
25 rationale for the provision.

26 When people do not attend for a jury
27 trial, there are concerns about the financial

1 costs to the system but there are also
2 concerns about another kind of cost - the
3 erosion of respect for the criminal justice
4 system when citizens are ordered to appear in
5 court for jury selection only to be sent home
6 because the accused has not appeared.

7 Section 598 says, and the case law is
8 clear, that the onus is on Mr. McDonald to
9 show that he has a legitimate excuse for not
10 having appeared on July 31st. An honest
11 mistake as to trial date does constitute a
12 legitimate excuse for the purposes of section
13 598. That was made very clear in R. v. Harris
14 [1991] O.J. No. 1509.

15 At paragraph 8 of that decision, the Court
16 said that nothing less than an intentional
17 avoidance of appearing at trial for the
18 purpose of impeding or frustrating the trial,
19 or the intention of avoiding the consequences
20 of the trial, should deprive an accused of his
21 or her right to a jury trial.

22 As counsel have properly noted, if I were
23 to conclude that Mr. McDonald was merely
24 careless, that is not a sufficient basis to
25 deprive him of his right to be tried by a
26 jury. That was the conclusion I reached in
27 R. v. Wedawin, 2008 NWTSC 98.

1 The legitimate excuse put forward by Mr.
2 McDonald is that he took steps to attend his
3 trial and was defeated in those efforts by a
4 combination of his financial situation,
5 misunderstandings and his miscommunications
6 with his counsel about the date of trial, and
7 a mistaken belief that it was possible to
8 drive to Norman Wells in the summertime.

9 I accept that the error about the
10 existence of the road is an honest mistake.
11 Mr. McDonald had not spent a lot of time in
12 Norman Wells, or in the Northwest Territories
13 for that matter, on the evidence, and he may
14 well not have known that there was no
15 all-season road to Norman Wells, and certainly
16 the fact that the program Mapquest erroneously
17 shows road access to Norman Wells would have
18 confirmed that mistaken belief.

19 But based on the whole of the evidence,
20 and for reasons I have gone over at length
21 already, I do not accept that Mr. McDonald
22 made an honest mistake about when he needed to
23 be in Norman Wells. His claims are contrary
24 to what his counsel told the court. There are
25 unexplained and, to my mind, unexplainable
26 shortcomings in what he told his friend who
27 was trying to help him get to court. It may

1 not be possible to pinpoint exactly when Mr.
2 McDonald's desire to avoid the consequences of
3 his travel crystalized, but I conclude that at
4 some point during all of this he made choices
5 that ensured he would not make it to his
6 trial. I conclude he was playing games.

7 The claim that he never was told with
8 precision the date of his trial is dubious, at
9 best. The idea that he could still not have
10 known his trial started July 31st, after he
11 spoke to Mr. Bock on July 30th, is entirely
12 implausible.

13 The issue in Wedawin was very different.
14 Mr. Wedawin had not been particularly careful
15 or prudent in his plans to get himself to
16 trial. He had waited until the last minute to
17 book a flight from Gamèti to Behchokò. He
18 went on a Friday, and at that point the two
19 flights available between the two communities
20 were both full.

21 The trial was supposed to proceed in early
22 December. The winter road was not yet open.
23 Mr. Wedawin had not tried to see if anyone
24 would give up his or her seat on either
25 flight. He had not checked if there were
26 cancellations. Certainly he could have done a
27 lot more to try to get himself to trial.

1 But, he had also often travelled between
2 these two communities. He had often made his
3 arrangements at the last minute and he had
4 never had any problems. In fact, it is
5 apparent from paragraph 20 of the decision
6 that in that case, even the Crown was not
7 forcefully arguing that his conduct amounted
8 to wilful blindness.

9 The situation is very, very different
10 here. We are talking about travel from
11 British Columbia to Norman Wells by someone
12 who had never done that trip - about planning
13 to drive an exceedingly long distance having
14 never done that trip. In Wedawin, the
15 accused's sincerity was not at all called into
16 question. There would have been no basis to
17 call it into question. That is another
18 important difference between that case and
19 this case.

20 I am not satisfied that Mr. McDonald has
21 provided a legitimate excuse for not having
22 attended his trial. For that reason, I find
23 he has forfeited his right to be tried by a
24 jury.

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

Lois Hewitt,
Court Reporter

