*R v* *Dryneck*, 2018 NWTSC 85 **S-1-CR-2016-000105**

# AMENDED ORIGINAL

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

**IN THE MATTER OF:**

**HER MAJESTY THE QUEEN**

**- v -**

**CHRIS DRYNECK**

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_** Amended transcript of the Reasons for Decision re Mistrial Application delivered by The Honourable Justice S.H. Smallwood, sitting in Behchoko, in the Northwest Territories, on the 27th day of November, 2018.

# \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**APPEARANCES:**

**Mr. J. Potter: Counsel for the Crown**

**Ms. A. M. Vogt: Counsel for the Accused (Charge under s. 271 of the *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***

1. THE COURT: Good morning.
2. MS. VOGT: Good morning, Your Honour.
3. MR. POTTER: Good morning, Your Honour.
4. THE COURT: Chris Dryneck is charged with
5. sexual assault contrary to Section 271 of the
6. *Criminal Code*. His trial proceeded before me in

7 December of 2017. Subsequent to the trial and

1. before decision Mr. Dryneck brought a mistrial
2. application on the basis that an interpreter was
3. not available to assist him during the trial
4. which impacted on his ability to make full answer
5. and defence.
6. Mr. Dryneck originally elected trial by
7. judge and jury. A trial was scheduled for

15 September 2017 in Behchoko. At that time a jury

1. could not be empanelled and a mistrial was
2. declared. The court subsequently ruled that the
3. new trial would be held in Yellowknife due to
4. ongoing issues with selecting juries in Behchoko.
5. Mr. Dryneck subsequently re-elected to trial by
6. judge alone, and a second trial was scheduled for

22 December 5, 2017 in Behchoko. Mr. Dryneck's

1. trial proceeded before me last December. The
2. Crown called four witnesses to testify. The
3. defence called one witness, Suzanne Dryneck.
4. Following the trial the matter was adjourned
5. for decision. A date was not set as counsel were
6. requested to submit their availabilities for a
7. date for decision. February 12, 2018 was
8. subsequently set as the date for decision. On

4 January 19, 2018 Steven Fix, then counsel for

1. Mr. Dryneck, filed an application to reopen the
2. case to permit Mr. Dryneck to testify and to file
3. medical evidence regarding Mr. Dryneck's vision.
4. On February 9, 2018 Mr. Dryneck's counsel filed
5. another application. This one to be removed as
6. counsel. On February 12, 2018 Mr. Fix applied to
7. be removed from the record. I allowed the
8. application and the matter was adjourned to March
9. 7, 2018. There were a number of delays in
10. Mr. Dryneck retaining new counsel, and once new
11. counsel was retained there were further delays in
12. determining how to proceed.
13. Eventually Ms. Vogt, Mr. Dryneck's new
14. counsel, filed an application for a mistrial on
15. the basis that Mr. Dryneck's language rights were
16. violated and no Tlicho interpreter was available
17. to assist the accused during his trial. The
18. application began on August 30, 2018. At the
19. application Mr. Dryneck testified with an
20. interpreter. One of the issues raised at the
21. application was that, at that time, Mr. Dryneck
22. was not prepared to waive solicitor-client
23. privilege. The court was prepared to allow Mr.
24. Dryneck to reconsider this issue, and the
25. application was adjourned for Mr. Dryneck to do
26. so. There were other court appearances and
27. further delays. Mr. Dryneck ultimately agreed to
28. a limited waiver of solicitor-client privilege,
29. and the application continued on October 22, 2018
30. where the Affidavit of Steven Fix was presented
31. and counsel made further submissions. The matter
32. was adjourned to today's date for decision on the
33. mistrial application.
34. Turning to the evidence on the application.
35. On the application the Affidavit of Chris Dryneck
36. was filed. The Affidavit was completed with the
37. assistance of an interpreter. Mr. Dryneck
38. deposed that he is 46 years old. He was born in
39. Behchoko and currently lives in that community.
40. He has a limited education and only attended
41. kindergarten. He is legally blind. He has been
42. so for most of his life. He has never worked and
43. has been on income assistance. He has no
44. criminal record and is not familiar with court
45. proceedings. His first language is Tlicho, and
46. this language was spoken at home. Mr. Dryneck
47. stated that his English language skills are
48. limited, and he cannot read or write English or
49. Tlicho. He understands spoken English but not
50. fully, and he states that he can only have a
51. simple conversation in English. Mr. Dryneck
52. deposed that he does not remember having any
53. discussions with his lawyer about his language
54. abilities, and he does not remember being asked
55. whether he needed an interpreter.
56. When the matter was in Supreme Court
57. Mr. Dryneck had an appearance where he advised
58. the presiding judge that his English was not that
59. good. He was advised by the court to tell his
60. lawyer that he needed an interpreter and that the
61. lawyer would advise the court if he did so.
62. Mr. Dryneck deposed that he told his lawyer
63. multiple times that he needed an interpreter and
64. that his lawyer told him he was fine without an
65. interpreter. He also deposed that he was not
66. able to fully understand everything that happened
67. in his trial.
68. Mr. Dryneck was cross-examined on his
69. Affidavit. During his testimony Mr. Dryneck
70. testified that he only understood the most basic
71. English and that everyone at his home spoke
72. Tlicho. Mr. Dryneck testified that his wife
73. speaks English, and he agreed that they
74. occasionally converse in English. Mr. Dryneck
75. testified that he asked his lawyer for an
76. interpreter but that his lawyer did not request
77. one, and that his lawyer told him not to speak
78. during the trial, which is why he did not request
79. an interpreter during the trial.
80. Counsel filed a certified copy of the
81. Information in this matter from Territorial
82. Court. The Information reveals that the issue of
83. language rights was addressed on March 29, 2016
84. at Mr. Dryneck's first appearance. However, the
85. endorsements on the Information indicate that
86. Mr. Dryneck did not appear personally on

10 March 29, 2016, and a lawyer Mr. Wool appeared as

1. his agent on that day. There is no indication on
2. the Information that Mr. Dryneck's language
3. rights were addressed again when he was present
4. before the court, the Territorial Court.
5. Similarly, there is no indication on the
6. Information that at any time an interpreter was
7. requested by Mr. Dryneck or counsel who appeared
8. with him.
9. A transcript of the September 18, 2017
10. appearance in Supreme Court was filed. It was
11. also attached to Mr. Dryneck's Affidavit as an
12. exhibit. On that occasion Mr. Dryneck appeared
13. by telephone. Tu Pham, a lawyer, appeared as
14. agent for his counsel Steven Fix. The purpose of
15. the appearance was for Mr. Dryneck to re-elect
16. his mode of trial from judge and jury to judge
17. alone. During the appearance Mr. Dryneck spoke
18. English and did not have the assistance of an
19. interpreter. There had been no request for
20. interpretation made in the Supreme Court.
21. During the appearance it appeared that
22. Mr. Dryneck was confused by what was happening.
23. When questioned about his discussions with
24. Mr. Fix about re-electing his mode of trial,
25. Mr. Dryneck said that he hadn't spoken to Mr. Fix
26. since July. The court asked Mr. Dryneck if he
27. wanted to speak with Mr. Fix prior to
28. re-electing, and Mr. Dryneck stated he wanted to
29. talk to his lawyer. The matter was put over for
30. one week. At the end of the appearance the
31. following exchange occurred:
32. THE COURT: And we'll come back, we'll again come back to court and
33. talk about this and whether you want to re-elect.
34. THE ACCUSED: Okay. THE COURT: Okay.
35. THE ACCUSED: My English is not that good too. My English is not
36. that good. I can talk a little bit but not that good too.
37. THE COURT: Okay. Well, if you need an interpreter let Mr. Fix know,
38. and he can advise the court. THE ACCUSED: Okay.

22

1. Counsel presented an Agreed Statement of
2. Facts on the mistrial application which deals
3. with what occurred following the September 18,
4. 2017 appearance by Mr. Dryneck in this court.
5. Counsel agreed that following the court
6. appearance the Crown counsel who appeared in
7. court that day sent an e-mail to Mr. Fix advising
8. that the accused had told the court he had
9. trouble with English, and that the judge had
10. directed Mr. Dryneck to speak with his counsel
11. about whether he would need an interpreter.
12. Mr. Fix replied to this e-mail shortly after
13. stating:
14. "I have no difficulty in communicating with him. My
15. recollection is there was no interpreter at the preliminary. Is
16. it possible for you to check that?"
17. Once Mr. Dryneck waived solicitor-client
18. privilege an Affidavit was obtained from Mr. Fix.
19. In his Affidavit Mr. Fix confirmed the e-mail
20. exchange with Crown counsel. He also deposed
21. that he did not recall and he does not have any
22. notes pertaining to having a conversation with
23. Mr. Dryneck regarding his English language
24. abilities or his need for an interpreter on that
25. day. He stated that following the close of the
26. Crown's case Mr. Dryneck raised a number of
27. concerns, one of which being that he felt he
28. should have had an interpreter. Mr. Fix stated
29. that Mr. Dryneck had not indicated previously,
30. aside from his comment to the court on

26 September 18, 2017, that he had difficulty with

27 English or that he wanted an interpreter.

1. Looking at the applicable law, Section 14 of
2. the Canadian Charter of Rights and Freedoms
3. states:
4. A party or witness in any proceedings who does not understand or speak the
5. language in which the proceedings are conducted or who is deaf has the
6. right to the assistance of an interpreter.

7

1. The Supreme Court of Canada in the
2. R. v. Tran, [1994] 2 S.C.R. 951, established
3. the framework for determining if a person's
4. Section 14 Charter Rights had been violated.
5. The right of an accused...to obtain the assistance of an interpreter when
6. needed serves several important purposes.

14

1. Tran, supra, at paragraph 39:
2. First and foremost, the right ensures that a person charged with a criminal
3. offence hears the case against him or her and is given a full opportunity
4. to answer it. Second, the right is one which is intimately related to
5. our basic notions of justice, including the appearance of fairness.
6. As such, the right to interpreter assistance touches on the very
7. integrity of the administration of criminal justice in this country.
8. Third, the right is one which is intimately related to our society's
9. claim to be multicultural, expressed in part through s. 27 of the *Charter*.
10. The magnitude of these interests which are protected by the right to
11. interpreter assistance favors a purposive and liberal interpretation
12. of the right under s. 14 of the

*Charter*, and a principled application

1. of the right.
2. The onus is on the person alleging a breach
3. and the standard of proof is on a balance of
4. probabilities. The first consideration is
5. whether the accused was actually in need of
6. interpreter assistance. Second, the accused must
7. show in cases where it is alleged that
8. interpretation was deficient that there has been
9. a departure from the basic, constitutionally
10. guaranteed standard of interpretation. Third,
11. the accused must establish that the alleged lapse
12. in interpretation occurred in the course of the
13. proceedings when a vital interest of the accused
14. was involved.
15. If a court is satisfied that the first three
16. requirements have been met, then a violation of
17. s. 14 will have been made out unless the Crown is
18. able to prove on a balance of probabilities that
19. there was a valid and effective waiver of the
20. right. Tran, supra at paragraphs 42 to 46.
21. With respect to the need for interpreter
22. assistance, the court is to take a generous and
23. open-minded approach when assessing an accused's
24. need for an interpreter. Establishing the need
25. for interpreter assistance will not often be an
26. onerous step unless the issue is only being
27. raised for the first time on appeal or there is
28. some question as to whether the right is being
29. asserted in bad faith. Tran, supra at
30. paragraph 43.
31. The Supreme Court went on to state in Tran
32. at paragraph 49:
33. As a general rule, courts should appoint an interpreter when either of
34. the following occurs:
    1. it becomes apparent to the judge
35. that an accused is, for language reasons, having difficulty expressing
36. him or herself or understanding the proceedings and that the assistance
37. of an interpreter would be helpful; or
38. (2) an accused (or counsel for the accused) requests the services of
39. an interpreter and the judge is of the opinion that the request is
40. justified.
41. There is a recognition that while a person

14 may be able to communicate in the language of the

1. proceedings generally, their comprehension may
2. not be sufficient to fully participate in a trial
3. without the assistance of an interpreter. As
4. acknowledged in R. v. Blackduck, (2014) NWTSC 58,
5. paragraph 83:
6. Having an understanding of language to function in certain types of
7. interactions is not the same thing as understanding rights, legal concepts
8. and the potential ramifications of certain decisions.

23

1. The circumstances in which the issue of
2. interpretation is raised will vary. In some
3. situations the need for interpreter assistance

27 may not be requested initially, and the need for

by defence counsel that the safer

|  |  |  |
| --- | --- | --- |
| 1 | interpretation may not be apparent until the |  |
| 2 | proceedings have already commenced. The court | in |
| 3 | Tran considered this issue stating at |  |
| 4 | paragraph 51: |  |
| 5 | However, it should be borne in mind |  |

* 1. course will always be to request an interpreter when one is required,
  2. rather than to rely on a court to appoint one entirely on its own
  3. motion. Indeed, as officers of the court, there is an obligation on both
  4. Crown and defence counsel to draw a court's attention to the need for an
  5. interpreter where counsel become aware that such a need exists. While
  6. courts must be alert to signs which suggest that an accused may have
  7. language difficulties, they are not nor can they be expected to be mind
  8. readers. Where there are no outward indications which point to a lack of
  9. understanding on the accused's part and where the right has not been
  10. invoked by the accused or by counsel (in the case of represented accused),
  11. these may be factors which are weighed against the accused if, after
  12. sitting quietly throughout the trial, the issue of interpretation is
  13. suddenly raised for the first time on appeal.

19

1. The question of whether or to what extent
2. Mr. Dryneck required interpretation assistance
3. was not raised in this court until September 18,
4. 2017. In reviewing the materials on the Supreme
5. Court file, there were no indications that would
6. alert the court to the need for the assistance of
7. an interpreter before then. The issue of
8. interpretation was not addressed in the pre-trial
9. conference report. There was no request for the
10. assistance of an interpreter at the first trial
11. scheduled in Behchoko in September 2017.
12. The first indication that Mr. Dryneck might
13. require assistance came from Mr. Dryneck himself
14. when he appeared by telephone on September 18,
15. 2017. During the appearance Mr. Dryneck spoke in
16. English, was responsive to questions and did not
17. appear to have any difficulty in speaking to the
18. court. However, it was apparent that he was
19. confused about what was occurring and the
20. consequences of his re-election. His focus
21. appeared to be on ensuring that his trial
22. proceeded in Behchoko. At the end of the
23. appearance Mr. Dryneck raised the issue of
24. language stating:
25. My English is not that good too. My English is not that good. I can talk
26. a little bit but not that good too.
27. I was the presiding judge in chambers that
28. day and advised him that if he needed an
29. interpreter to let Mr. Fix know and that Mr. Fix
30. could advise the court. Mr. Dryneck's matter was
31. being adjourned so that he could speak to his
32. lawyer about re-election to confirm that he did
33. wish to re-elect his mode of a trial. It was
34. expected that the issue of interpretation could
35. also be addressed with counsel during this
36. conversation.
37. The request for an interpreter is generally
38. made by counsel either by writing the court to
39. advise that the accused requires an interpreter,
40. by stating the need for an interpreter in the
41. pre-trial conference report or by verbally
42. advising the court in a chambers appearance.
43. There are occasions when an accused person
44. requests the assistance of an interpreter and the
45. request is often made in court generally by
46. accused who do not have the assistance of
47. counsel. Any of these methods is acceptable, and
48. when a request is received the court will arrange
49. for the appropriate interpretation. Tlicho,
50. Mr. Dryneck's first language, is a language in
51. which the court regularly arranges for
52. interpreters. Frequently an interpreter is
53. present for jury trials in Behchoko as unilingual
54. Tlicho-speaking members of the jury panel often
55. require assistance during the jury selection
56. process.
57. The evidence of Mr. Fix was that Mr. Dryneck
58. did not at any time prior to September 18, 2017
59. indicate that he required an interpreter or had
60. difficulty with the English language. It appears
61. from Mr. Fix's Affidavit that there was no
62. discussion of language between Mr. Fix and
63. Mr. Dryneck until the close of the Crown's case
64. some two and a half months later.
65. Mr. Dryneck's evidence was that following
66. the September 18, 2017 court appearance he told
67. his lawyer multiple times that he needed an
68. interpreter and that Mr. Fix's response was that
69. he was fine without an interpreter. This is a
70. significant discrepancy. I have some hesitation
71. in accepting Mr. Dryneck's assertion that he
72. raised the issue of an interpreter with Mr. Fix
73. multiple times. Mr. Dryneck in his testimony
74. appeared to overstate his lack of fluency in
75. English. In cross-examination he denied using
76. English regularly, and when asked if he would go
77. to a store and use English he responded "no". He
78. stated that he only understood basic English,
79. things like if someone says "come here". Later
80. he agreed that he does sometimes speak to his
81. wife in English. Mr. Dryneck also testified that
82. during the September 18, 2017 court appearance
83. that his sister was translating for him.
84. Mr. Dryneck appeared by telephone on that
85. occasion. However, it was not apparent during
86. that appearance that anyone was translating for
87. Mr. Dryneck as he appeared to respond to
88. questions without the need for assistance.
89. Mr. Dryneck also testified on an application
    1. during the trial and testified in English. When
    2. asked about that appearance in cross-examination
    3. Mr. Dryneck said that he didn't understand what
    4. the lawyer was saying but that he just said "yes"
    5. and "no" in English. A review of the transcript
    6. and my recollection of his testimony demonstrates
    7. that Mr. Dryneck appeared to understand the
    8. questions and responded to them appropriately.
    9. His answers were more than just "yes" or "no" to
    10. questions. I accept that Mr. Dryneck has some
    11. familiarity with English more so than he is
    12. currently willing to admit. It is for that
    13. reason that I have some hesitation in accepting
    14. his assertion that he raised the issue of
    15. interpretation with Mr. Fix multiple times.
    16. However, that is not the issue. There is a
    17. difference as noted in Blackduck in being able to
    18. communicate generally in a language and being
    19. able to fully participate in a trial and
    20. understanding your rights, legal concepts and the
    21. potential ramifications of certain decisions. I
    22. accept that Mr. Dryneck requires interpretation
    23. in order to fully participate in his trial to be
    24. able to make full answer and defence.
    25. Despite the discrepancy between the evidence
    26. of Mr. Fix and Mr. Dryneck, the record is clear
    27. that Mr. Dryneck raised the issue with the court
90. on September 18, 2017. It is also agreed that
91. Crown counsel alerted Mr. Fix to this issue as he
92. was not present in court, having an agent appear
93. on that day. Mr. Fix acknowledged receiving the
94. e-mail from the Crown in his Affidavit; however,
95. having received this information there is no
96. evidence that Mr. Fix did anything about it.
97. Looking at Mr. Fix's Affidavit he has no
98. recollection or notes of having spoken to
99. Mr. Dryneck about this issue until after the
100. Crown closed its case. There is no indication
101. that he spoke to Mr. Dryneck about whether he
102. required interpretation prior to this point.
103. While Mr. Fix may not have had concerns about
104. Mr. Dryneck's ability to comprehend English and
105. while he may not have had issues communicating
106. with Mr. Dryneck, once Mr. Dryneck had raised the
107. issue of needing interpretation, in my view, it
108. was incumbent upon Mr. Fix to at least canvass
109. the issue with Mr. Dryneck. As an officer of the
110. court he had a duty to follow up with his client
111. about the information he received from Crown
112. counsel about Mr. Dryneck needing interpretation.
113. Unfortunately, for whatever reason, this did not
114. occur.
115. In the circumstances, I am satisfied that
116. Mr. Dryneck needed the assistance of an
117. interpreter in order to fully participate in his
118. trial to be able to make full answer and defence.
119. I am also satisfied that he raised this issue in
120. advance of the trial, and unfortunately for
121. everyone involved in this process this was not
122. followed up on. I am satisfied that Mr. Dryneck
123. has established on the balance of probabilities
124. that his Section 14 Charter rights were violated
125. during the trial. Therefore I am granting the
126. application for a mistrial.
127. All right, Counsel, in terms of providing
128. availabilities for a new trial date, I would like
129. to have those in as soon as possible so I am
130. going to say by Friday of this week.
131. MR. POTTER: Certainly, Your Honour.
132. MS. VOGT: Yes.
133. THE COURT: And the court will be making
134. this a priority in terms of scheduling, and I
135. hope that counsel in terms of making themselves
136. available will be able to make it a priority too
137. given the passage of time since this offence is
138. alleged to have occurred. So if there are, if
139. you can provide your availability for the next
140. few months, and if there are significant blocks
141. where counsel are not available, if you could
142. provide an explanation to the court as to why
143. counsel is not available. Hopefully we can get
144. something scheduled fairly quickly.
145. The other issue is that I had made some
146. rulings during the first trial which I indicated
147. further reasons would be forthcoming. I think
148. given the issue of the interpretation that I am
149. not going to issue those rulings because of the
150. interpretation issue that I have just ruled on,
151. and that counsel should be prepared to bring
152. those applications again if you wish to pursue
153. them so that they can be done with Mr. Dryneck
154. having the benefit of interpretation.
155. All right, Counsel, is there anything else
156. we need to address at this point?
157. MR. POTTER: No, Your Honour. Thank you.
158. MS. VOGT: No, Your Honour. Thank you.
159. THE COURT: All right. Thank you. We
160. will adjourn.

18

19 -----------------------------------------------------

20

21

22

23

24

25

26

27

# 1 CERTIFICATE OF TRANSCRIPT

2

1. I, the undersigned, hereby certify that the
2. foregoing pages are a complete and accurate
3. transcript of the proceedings taken down by me in
4. shorthand and transcribed from my shorthand notes
5. to the best of my skill and ability.
6. Dated at the City of Edmonton, Province of
7. Alberta, this 10th day of December, 2018.

10

1. Certified pursuant to Rule 723
2. of the Rules of Court

13

14 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

1. Darlene Sirman, CSR(A)
2. Court Reporter

17

18

19

20

21

22

23

24

25

26

27