

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- v -

WAYNE MCDONALD

Transcript of the Ruling on Change of Venue Application,
delivered by The Honourable Justice L.A. Charbonneau,
sitting in Yellowknife, in the Northwest Territories, on
the 2nd day of November, 2018.

APPEARANCES:

Mr. A. Godfrey: Counsel for the Crown
Mr. C.B. Davison: Counsel for the Accused

(Charges under s. 236(b) of the *Criminal Code*)

A publication ban of this decision is in effect
prohibiting the publication, broadcast or transmission of
this Ruling, pursuant to section 648 of the *Criminal
Code*, until the jury retires to consider its verdict

1 THE COURT: Wayne McDonald faces a
2 manslaughter charge arising from the death of his
3 son on April 4th, 2016, in Tsiigehtchic. He has
4 elected to be tried by a court composed of a
5 judge and jury.

6 Mr. McDonald's jury trial was scheduled to
7 proceed in Inuvik commencing November 27th, 2017.
8 Unfortunately, a jury could not be empanelled at
9 that time and a mistrial was declared. Crown and
10 defence agreed, at that point, that the trial
11 should be scheduled to proceed in Yellowknife.
12 Accordingly, the matter was scheduled to proceed
13 commencing on October 1st, 2018.

14 In May 2018, Mr. McDonald discharged his
15 counsel. His new counsel determined that he
16 would not be able to proceed with the trial on
17 the scheduled date and applied for an
18 adjournment. That application was granted. A
19 new trial date has not yet been scheduled, in
20 part, because of the issues that have arisen
21 about venue.

22 Mr. McDonald has instructed his new counsel
23 that he wishes the trial to proceed in Inuvik.
24 The Crown is not agreeing to this because it is
25 concerned about the risk that it will not be
26 possible to obtain a jury in Inuvik, which in
27 turn would result in additional delay. The

1 submissions about venue were heard by me on
2 October 29th.

3 A preliminary issue has arisen about which
4 party bears the onus on this application.
5 Mr. McDonald takes the position that the onus is
6 on the Crown to show that this trial should
7 proceed in Yellowknife. He argues that this is
8 so because proceeding in Yellowknife would be a
9 departure from the usual approach of the Court as
10 far as the location it selects for the holding of
11 jury trials.

12 Counsel argues that although this matter
13 was, at one point, scheduled to proceed in
14 Yellowknife, this was done on consent of the
15 parties and not as a result of an adjudication by
16 the Court. He argues that now that this consent
17 has been withdrawn, it is the Crown who bears the
18 onus of showing that the trial should not be held
19 in Inuvik.

20 As we discussed during submissions, the
21 outcome of this application does not turn on who
22 bears the onus. However, because the issue was
23 raised, and in the event that it arises again in
24 the future, I will address it briefly.

25 There is a longstanding approach in the
26 Northwest Territories to schedule jury trials in
27 the community where the events giving rise to the

1 charge arose whenever possible. If it is not
2 possible, trials are held in the community that
3 is closest to the one where the events arose and
4 where a jury trial can be accommodated. This
5 approach goes back several decades as reflected
6 in the jurisprudence of this Court and is also
7 entrenched in the Criminal Procedure Rules of the
8 Supreme Court at Rule 37.

9 The reasons that underlie this approach are
10 outlined in many decisions of this Court such as:
11 *R v Bonnetrouge*, 2010 NWTSC 60, at paragraphs 7
12 to 10, *R v Beaverho*, 2009 NWTSC 21, at paragraphs
13 22 to 27, *R v McDonald*, 2008 NWTSC 96, at
14 paragraphs 5 and 6. I adopt what this Court said
15 in those cases, and I will not repeat it here
16 because no issue was raised on this application
17 about these principles in the context of this
18 case.

19 In accordance with this approach,
20 Mr. McDonald's trial was originally scheduled in
21 Inuvik. The events giving rise to the charge
22 arose in Tsiigehtchic, but that is one of the
23 communities of the Northwest Territories where
24 this Court is not able to hold jury trials
25 because of its small size.

26 Inuvik is the closest community where jury
27 trials can be held. Indeed, Inuvik is the

1 largest community in the Delta Region. It has a
2 relatively large population by Northwest
3 Territories standards. It is one of the few
4 communities in the jurisdiction that actually has
5 a court registry and a dedicated courthouse
6 space. It also has a number of hotels that can
7 accommodate court personnel and witnesses. Jury
8 trials are held there on a regular basis, both
9 for matters arising from Inuvik itself and for
10 matters arising from smaller communities in the
11 Delta Region.

12 In this particular case, the attempt to
13 empanel a jury in Inuvik failed. That happens
14 from time to time in Inuvik and elsewhere, and
15 when it does, the question inevitably arises as
16 to whether another attempt should be made to
17 empanel a jury in the same community. The answer
18 to that question depends on the specific
19 circumstances of the case as illustrated in the
20 cases referred to by counsel. Sometimes there is
21 no controversy as to what should happen, and
22 here, there was none initially. Crown and
23 defence agreed that the trial should be moved to
24 Yellowknife. But for the change in defence
25 counsel, this trial would have been held in
26 Yellowknife earlier this month.

27 Given all of this, I disagree with the

1 defence's position that the Crown bears the onus
2 to now show that the trial should be held in
3 Yellowknife simply because there was never an
4 adjudication by the Court on that issue. There
5 was a discernible and legitimate reason why the
6 parties agreed to a venue other than Inuvik.

7 Although Mr. McDonald deposes in his
8 affidavit that he quickly regretted having agreed
9 to this, the fact is that the trial was scheduled
10 to proceed in Yellowknife. The October 2018 date
11 was set back in January 2018, and even after the
12 adjournment of the trial last May, it was some
13 time before any attempt was made to have the
14 venue of this trial changed.

15 Under those circumstances, in my view, the
16 onus lies on Mr. McDonald as he is the party who
17 seeks to have a change made in the scheduling
18 plan that had been agreed to and acted upon up to
19 this point. That being said, as I mentioned
20 already, I do not think that the outcome of this
21 matter depends on the question of who bears the
22 onus.

23 The principles that govern an application
24 like this were succinctly summarized by Justice
25 Schuler in *R v Bonnetrouge*, at paragraph 13:

26
27 (a) the change of venue may be granted if
 it is expedient to the ends of justice;

- 1 (b) the judge has a wide discretion which
is to be exercised with caution;
- 2 (c) the circumstances of a particular case
must be examined carefully to determine
- 3 what is expedient to the ends of justice;
- 4 (d) the desirability that a jury trial be
held in the community where the offence is
alleged to have taken place is to be
- 5 balanced against the practicalities of
holding jury trials in small communities,
- 6 including the fact that many people are
related to each other;
- 7 (e) the reasons for and against holding
jury trials in small communities may change
- 8 over time;
- 9 (f) the ultimate aim is always a fair trial
with an impartial jury.

10

11 The reasons put forward by Mr. McDonald for
12 wanting the trial to proceed in Inuvik are
13 legitimate. He is charged with having unlawfully
14 caused the death of his son. Mr. McDonald's
15 support network and family members, who were most
16 affected by these events and have the highest
17 level of interest in the proceedings, are in the
18 Delta Region. I have no difficulty accepting
19 that it would be very difficult, if not
20 impossible, for many of them to attend the trial
21 if it is held in Yellowknife.

22 In addition, and very importantly, the main
23 Crown witness is Mr. McDonald's wife and the
24 deceased's mother. Her support network and
25 family members are also in the Delta Region. The
26 evidence adduced by the Crown on this application
27 is that her preference would also be for the

1 trial to proceed in Inuvik.

2 Weighing against this are the concerns that
3 the Court might not be able to empanel a jury in
4 Inuvik on a second attempt and the additional
5 delay that will necessarily ensue if that
6 happens. The fear that a second attempt to
7 empanel a jury in a community where the first
8 attempt failed is often the reason why trials are
9 moved.

10 As I noted in *R v McDonald*, which is
11 unrelated to this case, absent evidence of
12 unusual or exceptional circumstances that may
13 have led to the failure to empanel a jury the
14 first time, a failed attempt to select a jury
15 raises very real concerns about whether it is
16 realistic to hope for or expect a different
17 result on a second attempt. A failed attempt to
18 empanel a jury is not determinative, but it
19 cannot be ignored. The weight it should carry on
20 the determination of venue depends on many
21 factors, including the size of the community.

22 Delay is clearly a concern in this case.
23 There has been considerable delay already, and a
24 second failed attempt to empanel a jury in Inuvik
25 would add to this delay, and delay is the Crown's
26 primary concern here.

27 There are various components to the concern

1 about delay. The first is that our Charter of
2 Rights guarantees an accused the right to be
3 tried within a reasonable time, failing which
4 proceedings can be stayed by the Court. The
5 *Jordan* decision of the Supreme Court of Canada
6 has drastically altered the legal framework that
7 governs delay applications; and anything that can
8 result in any additional delay is always of
9 concern because it is in the interests of justice
10 to have cases decided on their merits.

11 The second concern relates to the potential
12 effect of the passage of time on people's
13 memories and the deleterious effect it can have
14 on the evidence to be adduced. Simply put, the
15 more time goes by, the more memories fade.

16 There is also the prolonged anxiety for
17 people who know they will have to testify about a
18 certain matter. Lengthy delays in having trials
19 proceeding are not only a concern for the accused
20 person, it is also a concern for the witnesses.

21 Finally, there is an overall concern about
22 the effect that lengthy delays have on the
23 public's perception and confidence in the
24 administration of justice.

25 Here, with respect to the first component,
26 Mr. McDonald deposes that he understands the risk
27 of there being additional delay if the second

1 attempt to proceed in Inuvik fails. He also
2 deposes at paragraph 18 of his affidavit that
3 having his trial in Inuvik is important enough to
4 him that he is prepared to waive his
5 constitutional right to be tried within a
6 reasonable time. His counsel reiterated this in
7 court at the October 29th hearing as Mr. McDonald
8 was on the phone listening in on the submissions.

9 There is, in my view, in this case, a clear
10 and unequivocal understanding and waiver by
11 Mr. McDonald respecting additional delay that may
12 accrue should a second attempt to empanel a jury
13 in Inuvik fail. That does not mean that if other
14 circumstances cause an even longer delay, he
15 could not attempt to use that delay in an
16 eventual delay application. But considering that
17 he now seeks a second attempt in Inuvik, and
18 considering he sought the adjournment of the
19 October 1st date, I think it is fairly clear that
20 his chances of success on an eventual delay
21 application would be, virtually, nonexistent.

22 As for the other concerns around delay, here
23 the main Crown witness has expressed a wish to
24 have this matter proceed as quickly as possible,
25 which is understandable, but she also would
26 prefer that the matter proceed in Inuvik, which
27 is also very understandable.

1 Both the accused and the main witness have
2 expressed that it would be beneficial to them to
3 have supports available during this trial. There
4 is also no reason to doubt the assertion that
5 many family members and others who have interest
6 in this case will not be able to attend the trial
7 if it is held in Yellowknife.

8 Another thing that is worthy of mention on
9 the issue of delay is that while there may have
10 been a time where it could be expected that
11 earlier trial dates could be secured in
12 Yellowknife as opposed to other communities, that
13 is no longer necessarily the case. There is a
14 lot of demand for Yellowknife court time and for
15 jury trials, in particular. There is only one
16 courtroom available to this Court for holding
17 jury trials at this courthouse. So, actually, it
18 may well be that this jury trial can be scheduled
19 on an earlier date if it proceeds in Inuvik
20 assuming, of course, that the Court succeeds in
21 empaneling a jury. So from a public-interest,
22 public-perception point of view, there are
23 legitimate reasons to have this trial in Inuvik
24 and make a second attempt worthwhile.

25 With respect to the failed attempt to select
26 a jury in Inuvik in November 2017, there is no
27 evidence of anything, in particular, having been

1 at play. For example, there is no evidence that
2 a large part of the panel was attending a
3 community funeral or a community event that
4 prevented them from attending jury selection. Of
5 the 200 summonses issued, 113 were served. That
6 is the number of names that was on the list at
7 the start of the selection process. Fourteen
8 panel members did not attend, which is not an
9 inordinate number of no-shows compared to what we
10 sometimes see.

11 The real difficulty may have come from the
12 fact that 50 persons were excused by consent.
13 This combined with the inevitable number of
14 persons who were excused by the judge for various
15 reasons left very little chance of a jury being
16 selected.

17 The Court does not know the reasons why
18 various people were excused by consent, but
19 counsel based those decisions on information
20 available to them about panel members and their
21 relationship with the people involved in the
22 case, as well as other factors. It can, and
23 should, be expected that there will again be
24 consent excuses and probably more if this
25 proceeds in Inuvik because chances are that there
26 will be a larger number of people who are
27 connected to this family. Similarly, it can be

1 expected that if the matter proceeds in Inuvik as
2 opposed to Yellowknife, a larger number of people
3 will be asked to be excused because they are
4 connected to the family or the events and will
5 say that they do not think they can be impartial.

6 An additional factor that was mentioned in
7 submissions is that the time estimate for this
8 trial has been revised, and counsel now think it
9 will require two weeks, or, at the very least,
10 more than just one week of court time. This does
11 increase the chances of people having commitments
12 that will prevent them from sitting.

13 However, as defence counsel noted during the
14 hearing, to the extent that some of the potential
15 jurors may have one appointment or a commitment
16 for only part of a day during the duration of the
17 trial, this Court's practice has always been to
18 attempt to keep them on the panel and adjust the
19 trial schedule accordingly if that person is
20 selected.

21 All this to say, there is no reason to think
22 that there will not be a large number of people
23 excused from the panel if we attempt to
24 reschedule this trial in Inuvik. One way to
25 alleviate those concerns is to have a larger
26 panel to begin with.

27 I agree with defence that it is open to the

1 Court to give directions to the Sheriff's Office
2 to have a larger panel assembled. This has been
3 done in recent years for longer trials or when a
4 challenge for cause was anticipated or when, for
5 whatever other reason, it was felt that a larger
6 jury pool than usual should be constituted.

7 An additional safeguard which has also been
8 used from time to time is to have the Sheriff's
9 Office monitor how the service of summonses is
10 going, and if it appears that the numbers are
11 low, to have additional summonses issued to
12 expand the pool even more.

13 I just want to reiterate what I said during
14 submissions that the comments that I made in *R v*
15 *McDonald*, at paragraphs 14 to 16 about not second
16 guessing the work of the Sheriff's Office were
17 not intended to suggest that the Court cannot
18 give directions of this kind. In that case,
19 there had been a failed attempt to select a jury
20 in Norman Wells, even after a talesman had been
21 ordered. There were two accused, so a large
22 number of challenges.

23 In arguing that a second attempt should be
24 made in the community, defence counsel in that
25 case had, among other things, called into
26 question the method used to create the original
27 panel list, as well as how the talesman procedure

1 had been carried out by the Sheriff's Office. My
2 comments were intended to address those
3 submissions and not to suggest that the Court
4 cannot issue directions to the Sheriff's Office
5 on a prospective basis so long, of course, as
6 those directions are not inconsistent with the
7 *Jury Act* and regulations.

8 All that being said, ordering an expanded
9 panel may increase the chances of success at jury
10 selection, but it does not, of course, guarantee
11 it. We know not everyone will be served. We
12 know not everyone served will appear. We know a
13 number of people will be excused. Although the
14 fact that the events that led to this charge
15 occurred within one family unit means that,
16 unlike what is often the case, that family unit
17 is really the one that may give rise to some
18 conflicts and people being excused as opposed to
19 there being a number of families involved in the
20 case.

21 In the end, this decision is a discretionary
22 one. I am concerned, as the Crown is, about the
23 possibility of this matter being delayed further
24 due to another failed attempt to empanel a jury
25 in Inuvik. But, on the whole, I am satisfied
26 that the reasons put forward by Mr. McDonald
27 combined with his waiver of his Charter rights

1 regarding any further delay that could occur
2 combined with the wishes of the main Crown
3 witness that the trial be held in Inuvik tip the
4 scale in favour of making a second attempt to
5 hold the trial in Inuvik, and for that reason I
6 am granting the application and directing that
7 this trial be scheduled to proceed in Inuvik.

8 Having reviewed counsel's availabilities, I
9 am now in a position to actually schedule the
10 date.

11 As I alluded to earlier, it turns out that
12 there are some dates in May 2019 when the Court
13 can accommodate this trial but would not have
14 been able to hold it in Yellowknife. This
15 illustrates what I said earlier about Yellowknife
16 court time not necessarily being the easiest to
17 secure.

18 I propose to have this trial commence on
19 Tuesday, May 21st, with jury selection commencing
20 in the afternoon, at whatever time makes sense in
21 light of the flight schedule, and I leave that
22 detail to the clerk of the court to work out.

23 I will set aside nine days, the week of May
24 21st being a four-day week, and I will schedule
25 the trial for nine days, so that week and the
26 following week will be set aside. Given what I
27 have heard from counsel about the time estimate,

1 I think this will build in some flexibility in
2 the trial schedule, and it may be possible to
3 accommodate some jurors who might have punctual
4 needs to be away.

5 I am going to give two directions to the
6 Sheriff's Office about the creation of the jury
7 panel.

8 The first is that the initial jury panel
9 will be an expanded panel with 500 names. The
10 second direction is that the Sheriff will provide
11 me with an update as to the number of summonses
12 served as of March 31st, 2019, and depending on
13 how the service of the summonses is going, I may
14 direct that additional summonses be issued, all
15 this with the view, of course, of maximizing the
16 chances of obtaining a jury.

17 Having given this matter a lot of thought
18 and given the very unusual circumstances of this
19 case, I am also going to do something that I
20 would not otherwise do and that I have only done
21 on occasion.

22 I will set aside a two-week block of time in
23 Yellowknife in the fall so that if the second
24 attempt in Inuvik fails, the trial can still be
25 completed in 2019, because my fear is, if I wait
26 and what we all hope will not happen happens and
27 I am looking at scheduling another two-week trial

1 as of May, between counsel's availabilities,
2 witnesses' availabilities and the Court schedule
3 filling up, the third attempt to hold this trial
4 would be pushed back very far, and I do not think
5 that is in anyone's interest.

6 I will also say that I fully intend to
7 double book those Yellowknife weeks. What I mean
8 by that is, we will know in May if this trial has
9 proceeded or not, and I do not want to wait until
10 then to slot other cases in the Yellowknife
11 weeks. So we will be able to use those weeks
12 either way, and I will make sure that the
13 Registry notifies counsel that there is this
14 caveat for the other cases all scheduled.

15 But I do ask that counsel protect those
16 dates in the fall for this case. Based on what I
17 have read from your availabilities, it appeared
18 to me the weeks of September 30th and the week of
19 October 7th were weeks where everyone was
20 available. Those will be blocked for Courtroom
21 201 tentatively for this matter in the event that
22 it cannot proceed as scheduled in Inuvik.

23 And with that, I hope that -- I think that
24 the Court has done everything in its power to
25 bring this matter to a conclusion.

26 Is there any clarification needed,
27 Mr. Godfrey?

1 MR. GODFREY: No, thank you, Your Honour.

2 THE COURT: Anything from defence?

3 MR. DAVISON: No, thank you.

4 THE COURT: All right. So a docket will
5 issue for the May dates. No docket will issue
6 for the September one, but please protect these
7 dates.

8 I want to thank you for your submissions on
9 this, and I want to thank you, Mr. Godfrey, for
10 having taken a very fair position on this despite
11 the Crown's concern about delay. But as I said,
12 in all things considered, I think it is best to
13 try again in Inuvik for this.

14 So the matter is officially adjourned to May
15 21st. The exact start date will be reflected in
16 the docket and may change if the flight schedule
17 changes.

18 MR. DAVISON: Thank you, Your Honour.

19 MR. GODFREY: Thank you, Your Honour.

20 THE COURT: Thank you.

21

22 **ADJOURNED TO MAY 21, 2019**

23

24

25

26

27

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

CERTIFICATE OF TRANSCRIPT

I, the undersigned, hereby certify that the foregoing transcribed pages are a complete and accurate transcript of the digitally recorded proceedings taken herein to the best of my skill and ability.

Dated at the City of Sault Ste. Marie, Province of Ontario, this 15th day of November, 2018.

Certified Pursuant to Rule 723
of the Rules of Court



Kerri Francella
Court Transcriber