*R v McDonald*, 2018 NWTSC 71 **S-1-CR-2016-000096**

# 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.

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**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.

1. A preliminary issue has arisen about which
2. party bears the onus on this application.
3. Mr. McDonald takes the position that the onus is
4. on the Crown to show that this trial should
5. proceed in Yellowknife. He argues that this is
6. so because proceeding in Yellowknife would be a
7. departure from the usual approach of the Court as
8. far as the location it selects for the holding of
9. jury trials.
10. Counsel argues that although this matter
11. was, at one point, scheduled to proceed in
12. Yellowknife, this was done on consent of the
13. parties and not as a result of an adjudication by
14. the Court. He argues that now that this consent
15. has been withdrawn, it is the Crown who bears the
16. onus of showing that the trial should not be held
17. in Inuvik.
18. As we discussed during submissions, the
19. outcome of this application does not turn on who
20. bears the onus. However, because the issue was
21. raised, and in the event that it arises again in
22. the future, I will address it briefly.
23. There is a longstanding approach in the
24. Northwest Territories to schedule jury trials in
25. the community where the events giving rise to the
26. charge arose whenever possible. If it is not
27. possible, trials are held in the community that
28. is closest to the one where the events arose and
29. where a jury trial can be accommodated. This
30. approach goes back several decades as reflected
31. in the jurisprudence of this Court and is also
32. entrenched in the Criminal Procedure Rules of the
33. Supreme Court at Rule 37.
34. The reasons that underlie this approach are
35. outlined in many decisions of this Court such as:
36. *R v Bonnetrouge*, 2010 NWTSC 60, at paragraphs 7
37. to 10, *R v Beaverho*, 2009 NWTSC 21, at paragraphs
38. 22 to 27, *R v McDonald*, 2008 NWTSC 96, at
39. paragraphs 5 and 6. I adopt what this Court said
40. in those cases, and I will not repeat it here
41. because no issue was raised on this application
42. about these principles in the context of this
43. case.
44. In accordance with this approach,
45. Mr. McDonald's trial was originally scheduled in
46. Inuvik. The events giving rise to the charge
47. arose in Tsiigehtchic, but that is one of the
48. communities of the Northwest Territories where
49. this Court is not able to hold jury trials
50. because of its small size.
51. Inuvik is the closest community where jury
52. trials can be held. Indeed, Inuvik is the
53. largest community in the Delta Region. It has a
54. relatively large population by Northwest
55. Territories standards. It is one of the few
56. communities in the jurisdiction that actually has
57. a court registry and a dedicated courthouse
58. space. It also has a number of hotels that can
59. accommodate court personnel and witnesses. Jury
60. trials are held there on a regular basis, both
61. for matters arising from Inuvik itself and for
62. matters arising from smaller communities in the
63. Delta Region.
64. In this particular case, the attempt to
65. empanel a jury in Inuvik failed. That happens
66. from time to time in Inuvik and elsewhere, and
67. when it does, the question inevitably arises as
68. to whether another attempt should be made to
69. empanel a jury in the same community. The answer
70. to that question depends on the specific
71. circumstances of the case as illustrated in the
72. cases referred to by counsel. Sometimes there is
73. no controversy as to what should happen, and
74. here, there was none initially. Crown and
75. defence agreed that the trial should be moved to
76. Yellowknife. But for the change in defence
77. counsel, this trial would have been held in
78. Yellowknife earlier this month.
79. 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;

(d) the desirability that a jury trial be

1. held in the community where the offence is alleged to have taken place is to be
2. balanced against the practicalities of holding jury trials in small communities,
3. including the fact that many people are related to each other;
4. (e) the reasons for and against holding jury trials in small communities may change
5. over time;

(f) the ultimate aim is always a fair trial

1. with an impartial jury.

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1. The reasons put forward by Mr. McDonald for
2. wanting the trial to proceed in Inuvik are
3. legitimate. He is charged with having unlawfully
4. caused the death of his son. Mr. McDonald's
5. support network and family members, who were most
6. affected by these events and have the highest
7. level of interest in the proceedings, are in the
8. Delta Region. I have no difficulty accepting
9. that it would be very difficult, if not
10. impossible, for many of them to attend the trial
11. if it is held in Yellowknife.
12. In addition, and very importantly, the main
13. Crown witness is Mr. McDonald's wife and the
14. deceased's mother. Her support network and
15. family members are also in the Delta Region. The
16. evidence adduced by the Crown on this application
17. is that her preference would also be for the
18. trial to proceed in Inuvik.
19. Weighing against this are the concerns that
20. the Court might not be able to empanel a jury in
21. Inuvik on a second attempt and the additional
22. delay that will necessarily ensue if that
23. happens. The fear that a second attempt to
24. empanel a jury in a community where the first
25. attempt failed is often the reason why trials are
26. moved.
27. As I noted in *R v McDonald*, which is
28. unrelated to this case, absent evidence of
29. unusual or exceptional circumstances that may
30. have led to the failure to empanel a jury the
31. first time, a failed attempt to select a jury
32. raises very real concerns about whether it is
33. realistic to hope for or expect a different
34. result on a second attempt. A failed attempt to
35. empanel a jury is not determinative, but it
36. cannot be ignored. The weight it should carry on
37. the determination of venue depends on many
38. factors, including the size of the community.
39. Delay is clearly a concern in this case.
40. There has been considerable delay already, and a
41. second failed attempt to empanel a jury in Inuvik
42. would add to this delay, and delay is the Crown's
43. primary concern here.
44. 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
45. attempt to proceed in Inuvik fails. He also
46. deposes at paragraph 18 of his affidavit that
47. having his trial in Inuvik is important enough to
48. him that he is prepared to waive his
49. constitutional right to be tried within a
50. reasonable time. His counsel reiterated this in
51. court at the October 29th hearing as Mr. McDonald
52. was on the phone listening in on the submissions.
53. There is, in my view, in this case, a clear
54. and unequivocal understanding and waiver by
55. Mr. McDonald respecting additional delay that may
56. accrue should a second attempt to empanel a jury
57. in Inuvik fail. That does not mean that if other
58. circumstances cause an even longer delay, he
59. could not attempt to use that delay in an
60. eventual delay application. But considering that
61. he now seeks a second attempt in Inuvik, and
62. considering he sought the adjournment of the

19 October 1st date, I think it is fairly clear that

1. his chances of success on an eventual delay
2. application would be, virtually, nonexistent.
3. As for the other concerns around delay, here
4. the main Crown witness has expressed a wish to
5. have this matter proceed as quickly as possible,
6. which is understandable, but she also would
7. prefer that the matter proceed in Inuvik, which
8. 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

1. on an earlier date if it proceeds in Inuvik
2. assuming, of course, that the Court succeeds in
3. empaneling a jury. So from a public-interest,
4. public-perception point of view, there are
5. legitimate reasons to have this trial in Inuvik
6. and make a second attempt worthwhile.
7. With respect to the failed attempt to select
8. a jury in Inuvik in November 2017, there is no
9. evidence of anything, in particular, having been
10. at play. For example, there is no evidence that
11. a large part of the panel was attending a
12. community funeral or a community event that
13. prevented them from attending jury selection. Of
14. the 200 summonses issued, 113 were served. That
15. is the number of names that was on the list at
16. the start of the selection process. Fourteen
17. panel members did not attend, which is not an
18. inordinate number of no-shows compared to what we
19. sometimes see.
20. The real difficulty may have come from the
21. fact that 50 persons were excused by consent.
22. This combined with the inevitable number of
23. persons who were excused by the judge for various
24. reasons left very little chance of a jury being
25. selected.
26. The Court does not know the reasons why
27. various people were excused by consent, but
28. counsel based those decisions on information
29. available to them about panel members and their
30. relationship with the people involved in the
31. case, as well as other factors. It can, and
32. should, be expected that there will again be
33. consent excuses and probably more if this
34. proceeds in Inuvik because chances are that there
35. will be a larger number of people who are
36. connected to this family. Similarly, it can be
37. expected that if the matter proceeds in Inuvik as
38. opposed to Yellowknife, a larger number of people
39. will be asked to be excused because they are
40. connected to the family or the events and will
41. say that they do not think they can be impartial.
42. An additional factor that was mentioned in
43. submissions is that the time estimate for this
44. trial has been revised, and counsel now think it
45. will require two weeks, or, at the very least,
46. more than just one week of court time. This does
47. increase the chances of people having commitments
48. that will prevent them from sitting.
49. However, as defence counsel noted during the
50. hearing, to the extent that some of the potential
51. jurors may have one appointment or a commitment
52. for only part of a day during the duration of the
53. trial, this Court's practice has always been to
54. attempt to keep them on the panel and adjust the
55. trial schedule accordingly if that person is
56. selected.
57. All this to say, there is no reason to think
58. that there will not be a large number of people
59. excused from the panel if we attempt to
60. reschedule this trial in Inuvik. One way to
61. alleviate those concerns is to have a larger
62. panel to begin with.
63. 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
64. had been carried out by the Sheriff's Office. My
65. comments were intended to address those
66. submissions and not to suggest that the Court
67. cannot issue directions to the Sheriff's Office
68. on a prospective basis so long, of course, as
69. those directions are not inconsistent with the
70. *Jury Act* and regulations.
71. All that being said, ordering an expanded
72. panel may increase the chances of success at jury
73. selection, but it does not, of course, guarantee
74. it. We know not everyone will be served. We
75. know not everyone served will appear. We know a
76. number of people will be excused. Although the
77. fact that the events that led to this charge
78. occurred within one family unit means that,
79. unlike what is often the case, that family unit
80. is really the one that may give rise to some
81. conflicts and people being excused as opposed to
82. there being a number of families involved in the
83. case.
84. In the end, this decision is a discretionary
85. one. I am concerned, as the Crown is, about the
86. possibility of this matter being delayed further
87. due to another failed attempt to empanel a jury
88. in Inuvik. But, on the whole, I am satisfied
89. that the reasons put forward by Mr. McDonald
90. combined with his waiver of his Charter rights
91. regarding any further delay that could occur
92. combined with the wishes of the main Crown
93. witness that the trial be held in Inuvik tip the
94. scale in favour of making a second attempt to
95. hold the trial in Inuvik, and for that reason I
96. am granting the application and directing that
97. this trial be scheduled to proceed in Inuvik.
98. Having reviewed counsel's availabilities, I
99. am now in a position to actually schedule the
100. date.
101. As I alluded to earlier, it turns out that
102. there are some dates in May 2019 when the Court
103. can accommodate this trial but would not have
104. been able to hold it in Yellowknife. This
105. illustrates what I said earlier about Yellowknife
106. court time not necessarily being the easiest to
107. secure.
108. I propose to have this trial commence on
109. Tuesday, May 21st, with jury selection commencing
110. in the afternoon, at whatever time makes sense in
111. light of the flight schedule, and I leave that
112. detail to the clerk of the court to work out.
113. I will set aside nine days, the week of May
114. 21st being a four-day week, and I will schedule
115. the trial for nine days, so that week and the
116. following week will be set aside. Given what I
117. have heard from counsel about the time estimate,
118. I think this will build in some flexibility in
119. the trial schedule, and it may be possible to
120. accommodate some jurors who might have punctual
121. needs to be away.
122. I am going to give two directions to the
123. Sheriff's Office about the creation of the jury
124. panel.
125. The first is that the initial jury panel
126. will be an expanded panel with 500 names. The
127. second direction is that the Sheriff will provide
128. me with an update as to the number of summonses
129. served as of March 31st, 2019, and depending on
130. how the service of the summonses is going, I may
131. direct that additional summonses be issued, all
132. this with the view, of course, of maximizing the
133. chances of obtaining a jury.
134. Having given this matter a lot of thought
135. and given the very unusual circumstances of this
136. case, I am also going to do something that I
137. would not otherwise do and that I have only done
138. on occasion.
139. I will set aside a two-week block of time in
140. Yellowknife in the fall so that if the second
141. attempt in Inuvik fails, the trial can still be
142. completed in 2019, because my fear is, if I wait
143. and what we all hope will not happen happens and
144. I am looking at scheduling another two-week trial
145. as of May, between counsel's availabilities,
146. witnesses' availabilities and the Court schedule
147. filling up, the third attempt to hold this trial
148. would be pushed back very far, and I do not think
149. that is in anyone's interest.
150. I will also say that I fully intend to
151. double book those Yellowknife weeks. What I mean
152. by that is, we will know in May if this trial has
153. proceeded or not, and I do not want to wait until
154. then to slot other cases in the Yellowknife
155. weeks. So we will be able to use those weeks
156. either way, and I will make sure that the
157. Registry notifies counsel that there is this
158. caveat for the other cases all scheduled.
159. But I do ask that counsel protect those
160. dates in the fall for this case. Based on what I
161. have read from your availabilities, it appeared
162. to me the weeks of September 30th and the week of

19 October 7th were weeks where everyone was

1. available. Those will be blocked for Courtroom
2. 201 tentatively for this matter in the event that
3. it cannot proceed as scheduled in Inuvik.
4. And with that, I hope that -- I think that
5. the Court has done everything in its power to
6. bring this matter to a conclusion.
7. Is there any clarification needed,
8. 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.

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22 **ADJOURNED TO MAY 21, 2019**

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# 1 CERTIFICATE OF TRANSCRIPT

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1. I, the undersigned, hereby certify that the
2. foregoing transcribed pages are a complete and
3. accurate transcript of the digitally recorded
4. proceedings taken herein to the best of my skill and
5. ability.
6. Dated at the City of Sault Ste. Marie, Province
7. of Ontario, this 15th day of November, 2018. 10
8. Certified Pursuant to Rule 723
9. of the Rules of Court 13

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1. Kerri Francella
2. Court Transcriber

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