

**IN THE MATTER OF the NWT Human Rights Act,  
S.N.W.T., 2002, c. 18, as amended; AND IN  
THE MATTER OF a complaint filed by Peter Huskey  
Against Diavik Diamond Mines Inc.**

**DECISION**

February 15, 2008

This decision concerns the venue for the hearing of the above mentioned complaint. For the reasons discussed below, I have decided that the hearing will take place at Behchoko, in the Northwest Territories.

**Background**

Peter Huskey (the “Complainant”) filed a complaint against his employer, Diavik Diamond Mines Inc. (“Diavik”) on or about October 7<sup>th</sup>, 2005 alleging discrimination on the grounds of “disability” and “family status”.

The allegations in relation to “disability” appear to involve a condition or conditions he developed as a consequence of certain events affecting the members of his family. Diavik denies that Mr. Huskey suffered from a disability at the material times. The allegations in relation to “family status” involve decisions made by Diavik to deny him leave, to reassign him, discipline him and, eventually, terminate him. Diavik does not deny that it took the actions complained of rather it says that for demonstrable reasons those actions were not based upon the alleged grounds of discrimination.

**Pre-hearings**

I have held three (3) pre-hearing teleconferences to date. Mr. Huskey is unrepresented. Diavik is represented by Paul N.K. Smith. Generally the pre-hearings have served to discuss and fix the pre-hearing processes necessary to ensure that both parties are given a full and fair opportunity to present their respective cases at the hearing of Mr. Huskey’s complaint. Because I have considered some of the representations made by the parties during the pre-hearings, I have encapsulated them below.

**Pre-hearing #1.**

At the first pre-hearing teleconference on December 3<sup>rd</sup>, 2007 it was agreed by the parties that I may review the entire file of the Director of Human Rights. I have now done so.

Mr. Smith indicated that his client will call three (3) witnesses including 2 people from Diavik’s “human resources department” and Mr. Huskey’s former supervisor. Mr. Huskey indicated that he anticipates calling four (4) witnesses at the hearing including his

wife, a psychologist (from Victim Services in Yellowknife) and his father and mother who, he says, are 83 and 67 years of age, respectively. They will require Tli Cho interpretation (and presumably English translation) at the hearing.

Both parties indicated that they will be introducing documentary evidence at the hearing. Among the documents that Mr. Huskey wishes to introduce is a document he referred to as the "Participation Agreement" between the Tli Cho and Diavik. Mr. Smith indicated that he would seek instructions from his client as to the "relevance" of that document before agreeing to production of the Agreement.

I asked the parties where they would like the hearing to take place. Mr. Huskey responded "Behchoko"; Mr. Smith, "Yellowknife", subject to getting further instructions from his client before the next pre-hearing teleconference. I also asked if either party had any privacy concerns and both indicated that the hearing should be open to the public.

### Pre-hearing #2

At the second pre-hearing held on December 18<sup>th</sup>, 2007, there was further discussion about documentary disclosure and production. Mr. Smith confirmed that his client wishes to have the hearing in Yellowknife. Consequently I fixed February 4<sup>th</sup> as the date upon which both parties would be able to argue their respective positions in relation to venue. Further, each party was to file any written argument on that issue by 5 p.m., Monday, January 28<sup>th</sup>, 2008.

Again Mr. Smith confirmed that his client would be calling three (3) witnesses at the hearing, namely: Gerard Rowe, Dave Blake and Wendy Sheridan. Again Mr. Huskey indicated that his parents will give evidence at the hearing. Mr. Smith expressed concerns about the relevancy of their evidence but stated that he would deal with that at the hearing.

### Pre-hearing #3

At pre-hearing #3 which took place on February 4<sup>th</sup>, 2008, further discussion ensued about document lists, disclosure and production. In particular Mr. Huskey requested certain additional documents from Diavik. He also indicated that he will produce copies of a transcript of elders comments made when the Participation Agreement was signed and, possibly, other "meeting minutes".

Mr. Smith again confirmed Diavik's intention to call the three witnesses mentioned at the last pre-hearing. Mr. Huskey indicated that he may also call two other witnesses, namely Jason Ouellette and Jerry McDonald. A date was fixed for the exchange of witness summaries and the same date (February 21<sup>st</sup>) was fixed for discussing any outstanding pre-hearing matters.

### **Mr. Huskey's Argument on Venue**

Mr. Huskey filed a two page written argument with my offices on January 30<sup>th</sup>, 2007. Mr. Huskey offers the following for my consideration on the venue issue:

- Behchoko is the largest Tli Cho community
- It has a motel, a restaurant, a Northern Store and two gas stations
- It has a resort nearby which offers accommodations
- Behchoko is one place where Participation Agreement negotiations were held
- Many elders were involved in those negotiations
- There is a school which could provide the facilities for a hearing and he will determine its availability
- He was born and raised in and around Behchoko
- He will welcome the all of the participants to the community for the hearing

During oral argument, Mr. Huskey said words to the effect that he wants the hearing in Behchoko so that the Tli Cho people, including the elders, will hear what is happening at the mine and how they are dealing with people in crises. He said that in his view the terms of the Participation Agreement “*have to be respected*”. Mr. Huskey added that he does not necessarily want everyone in Behchoko to know the details of his family crises. He also stated that he wants to have the hearing and “*if we go to Yellowknife or Behchoko its fine either way*”.

### **Diavik's Argument on Venue**

Mr. Smith, on behalf of Diavik, referred me to the written submissions filed in my office on January 24<sup>th</sup>, 2008. He said that while he respects and understands Mr. Huskey's position, his client says that the “balance of convenience” in this case favors a Yellowknife venue.

Diavik's written argument relies primarily on jurisprudence from Tribunals in B.C., Ontario and the Canadian Human Rights Tribunal (“CHRT”) to demonstrate that the “balance of convenience” test is applicable in this case.

In *Baumbach*<sup>1</sup> the Complainant – who suffered a severe disability affecting her ability to travel - alleged that she was discriminated against in her employment while working in a Northern Ontario Community, Deer Lake, accessible only by air. Deer Lake did not have amenities like “*hearing, food or accommodation facilities*”. She requested that the hearing take place in Ottawa. The corporate Respondent was prepared to compromise on the issue of venue by having the hearing in Winnipeg or Thunder Bay. In that way, members of the Respondent's board – some of whom were not fluent in both English and an aboriginal language – would feel “*familiar and comfortable*”.

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<sup>1</sup> *Baumbach v. Deer Lake Education Authority* [2004] C.H.R.D. No 8

The CHRT pointed out that its “*usual practice...[was] to hold hearings in the place where the discrimination has occurred*”. In this case, however, the CHRT decided to structure a hearing process involving oral evidence in Thunder Bay or Winnipeg supplemented by teleconference evidence in order to accommodate the Complainant.

In another case referred to me by the Respondents, *Castonguay*<sup>2</sup>, the British Columbia Human Rights Tribunal (“BCHRT”) dealt with an application by the Complainants for a change of venue from Bella Coola (where the complaint arose) to Vancouver. The BCHRT indicated that its policy is to hold hearings “*where the incident giving rise to the complaint occurred or at a location within a reasonable distance having regard to the requirements of the Tribunal securing appropriate hearing facilities*”. It also indicated that the burden of having the venue changed lies on the party asking for the change “*to convince the Tribunal that the balance of convenience favours the hearing being moved to another location*”.

In deciding to deny the application for change of venue, the BCHRT considered the following factors: the economic costs borne by both parties, that the Respondents had witnesses located in Bella Coola, who would incur travel costs and that the Tribunal member who heard the case might benefit from viewing certain evidence which was material to the case.

The third decision referred to me by the Respondent Diavik is the *Colvin* decision from the Ontario Human Rights Tribunal.<sup>3</sup> In *Colvin* the Ontario Human Rights Commission joined with the Complainants to have the hearing venue changed from Thunder Bay to Atitokan, Ontario. All eighteen (18) witnesses, including the Complainants, resided in Atitokan. The Complainants did not oppose the application. The somewhat anticlimactic conclusion of the Tribunal was, indeed, that the balance of convenience favored a change of venue.

Diavik also offers the following for my consideration on the venue issue in this case:

- The Commission and Panel’s offices/resources are in Yellowknife
- Mr. Huskey served his complaint at Diavik’s Yellowknife office
- Diavik’s “head office” is in Yellowknife
- Diavik’s employees access the mine via Yellowknife
- One of Mr. Huskey’s allegations concerns travel from Yellowknife to the mine site
- Diavik correspondence in these matters and leave request decisions originated in Yellowknife
- Diavik stores personnel files in Yellowknife
- Mr. Huskey’s medical treatment occurred in Yellowknife
- Diavik’s “potential” witnesses live in Yellowknife or will be using accommodation in Yellowknife

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<sup>2</sup> Chas. Castonguay and Agnieszka Wisniewska v. Bella Coola Motel, et al. (No.2) 2004 BCHRT 442

<sup>3</sup> *Colvin v. Gillies* (2003) CHRR Doc. 03-231, 2003 HRTO 19.

- Diavik is intending to call more than three (3) witnesses for the hearing including two living in Yellowknife, one living in Ontario and one living in Ohio
- All out-of-NWT witnesses will travel by air to Yellowknife for the hearing
- Yellowknife has “appropriate” hearing and accommodation facilities for his and Mr. Huskey’s witnesses as well
- There is “no connection” between Behchoko and the discriminatory conduct
- Facilities are limited in Behchoko, e.g. only one hotel, no restaurant and possibly “not...sufficient accommodation for staff, witnesses, counsel and the panel”
- Behchoko is one hour’s drive from Yellowknife and “farther from the site of the alleged discrimination”
- Travel to Behchoko will create additional time and expense for the hearing process
- Mr. Huskey’s parents (who reside in Behchoko) do not have relevant evidence to give at the hearing
- The balance of convenience favours a hearing in Yellowknife

### **Analysis and Decision**

Although neither party in this case questioned the jurisdiction of the adjudicator to deal with the question of venue, it is important to note that the NWT *Human Rights Act* does not specifically empower adjudicators to deal with the question of the place at which hearings are to be held. However section 52 of the *Act* states as follows:

*“52. (1) Subject to this Act and the regulations, the adjudication panel may make rules governing the practice and procedure in hearings and pre-hearing matters. (2) Subject to this Act, the regulations and any rules made under subsection (1), the adjudicator may determine the practice and procedure for the conduct of the hearing and pre-hearing matters that the adjudicator considers appropriate to facilitate the just and timely resolution of the complaint or appeal, as the case may be.”*

The current Rules of Procedure made by the Panel do not specifically address the question of venue however in my view, venue is an aspect of both hearing “practice and procedure” and the requirement to “facilitate a just and timely resolution” of complaints and appeals as set out in subsection (2) above.

It is in the latter statutory context that I asked the parties where the hearing ought to take place. Although it is true that the few hearings held by adjudicators to date have invariably taken place in Yellowknife, it is also true that the facilities of the adjudication panel in Yellowknife are not adequate in terms of size and amenities to conduct a full-blown hearing. Hearing facilities costs are simply one of the panel’s “costs of doing business”. Further, two adjudicators live outside of Yellowknife; all are lawyers in private practice. Travel costs also fall under the general rubric of “business costs” for the panel. In short: there is no administrative reason that hearings cannot take place outside of Yellowknife in appropriate circumstances.

I say “in appropriate circumstances” because the cases that the Respondent has given me above (among others) has established certain legal principles which a decision-maker must consider when determining where a hearing is to take place. For example, as the Respondent’s legal counsel has demonstrated in his argument, the decision-maker must consider the “balance of convenience test”.

The “balance of convenience test” is the process of considering the concerns raised by both parties as to venue and deciding which concerns, if any, outweigh or are more important to achieving a just and fair hearing at the desired location. As Diavik’s legal counsel indicated in his written submission, generally the kinds of concerns that I must consider using that test and the evidence that I have before me, include the following:

(i) Location of the witnesses:

On the same date that the venue hearing took place (February 4<sup>th</sup>), legal counsel for Diavik indicated to me that his client would be calling three (3) witnesses consisting of one Yellowknife resident and two witnesses who will fly-in to Yellowknife for the hearing. That number is consistent with what legal counsel told me during the two previous pre-hearings. If I understand the written submission of Diavik correctly, the rest of the witnesses are merely “potential” witnesses, both of whom reside in Yellowknife.

Mr. Huskey has stated consistently that he wishes to call four (4) witnesses including his parents, his wife and a psychologist. Three of his witnesses reside in Behchoko.

(ii) Appropriate hearing facilities:

Both Yellowknife and Behchoko may be considered to have “appropriate” facilities. I take notice that the Territorial and Supreme Courts of the Northwest Territories continue to hold hearings in Behchoko.

(iii) Accommodation for witnesses:

Yellowknife has several hotels which could house Diavik’s two out-of-Yellowknife witnesses and Mr. Huskey’s three out-of-Behchoko witnesses. Behchoko has one motel and a nearby resort hotel. The latter is within five minutes of downtown Behchoko.

(iv) Travel times for hearing members:

There is no doubt that if the hearing occurs in Behchoko and the adjudicator and witnesses have to commute, there will be an hour of driving each way, every day. If the hearing is in Yellowknife, Mr. Huskey and his witnesses would have to commute unless they stay in a Yellowknife hotel for the hearing.

(v) Proximity to the mine site:

This is a non-issue as far as I can tell from reading the materials in the Director's file. If travel to the site became necessary, air travel would be arranged out of Yellowknife.

(vi) Other evidence:

Diavik has submitted a number of other "factors" that it says support Yellowknife as the hearing venue including: correspondence from Diavik originated there, certain Diavik decisions were made there, personnel files were stored there, the human resources department is there and "*One of the allegations...was in response to [Mr. Huskey] missing a flight from Yellowknife to the Mine Site*".

Mr. Huskey asks me to consider that he was "*born and raised in and around Behchoko*".

#### Assessing the "balance of convenience"

I have taken all of the submissions of the parties, both written and oral, into account.

Both parties have three witnesses who would potentially have to travel to a hearing location. I have some concerns about travel for elderly witnesses, i.e. Mr. Huskey's parents, but those may be alleviated by ensuring that they have appropriate accommodations for the duration of the hearing if it is held in Yellowknife. Accommodations are available in both places (as far as we know at this point in time, without having set a hearing date) as are hearing facilities. While the economic costs of a hearing will be inherently greater for Diavik because of where its witnesses work and reside, most of those costs cannot be avoided regardless of which venue is chosen. Mr. Huskey will bear significant accommodations costs if he and his 3 witnesses have to attend a hearing in Yellowknife and chose to stay in hotel accommodations.

If the hearing takes place in Behchoko, there may be auto rental costs involved for Diavik, gasoline costs for Mr. Huskey and, possibly, his witnesses. In any event, travel to Behchoko or Yellowknife (if necessary) in the late spring or summer (when it now looks like the hearing will take place) will be by reasonably well maintained highway during long hours of daylight. Safety is not an issue in this case (as it might be in travel to some northern communities during different times of year).

I do not put much weight on the Respondent's contention, untested, that the evidence of the Complainant's parents (who reside in Behchoko) is "irrelevant". Similarly I am not convinced that there is "no connection" between the community of Behchoko and the allegations of Mr. Huskey.

The "family status" allegations of discrimination in this case relate to obligations that Mr. Huskey says he had to his family living in Behchoko. Mr. Huskey will have the burden of demonstrating that he has been discriminated against on the basis of "family status" at the hearing. He will have to demonstrate that a term or condition of his employment

resulted in a “*serious interference with a substantial parental or other family obligation*” that he had in his role as father and husband: *Health Sciences Association of B.C. v. Campbell River and North Island Transition Society* (2004) BCCA 260.

The actions taken by Diavik, e.g. denial of leave, reassignment, disciplinary action and termination, are matters that might affect anyone in Behchoko working at Diavik. Further, Mr. Huskey has given every indication that he intends to lead (what he says is relevant) evidence about the making of and content of the Participation Agreement made between the Tli Cho and Diavik. The Participation Agreement (parts of which were contained in the Director’s materials) appear to have, among other things, socio-economic implications for all of the Tli Cho including, of course, those people residing in its largest community, Behchoko.

This brings me to consider another legal principle relevant to this proceeding that has developed in the north, albeit in the context of criminal proceedings. That principle is that justice will be brought to all communities of the Northwest Territories: *R. v. Lafferty* (1977) 35 C.C.C. (2d) 183 (N.W.T.S.C.) at p. 186. Although the *Lafferty* decision dealt with the Court’s determination to hold jury trials in northern communities, in my view the principle is just as compelling in relation to human rights hearings. Human rights legislation is, after all, “*fundamental law*”: *Insurance Corp of B.C. v. Heerspink*, [1982] 2 S.C.R. 145 @ a58; it is “...*of a special nature and declares public policy regarding matters of general concern*”: *Winnipeg School Division No. 1 v. Craton* [1985] 2 S.C.R. 150 @156. People throughout the NWT need to know about and have access to the processes set out in the N.W.T *Human Rights Act* regardless of their geographic proximity to the capital city. What better way to learn than to see those processes in action?

Other civil cases (in non human rights contexts) that have considered the “balance of convenience test” have come to similar conclusions. In *Industrial Services Corp. v. Jacques Daoust Coatings Management Inc* [2005] OJ. No. 2285, Stinson J. said:

*“The requirement for a rational connection between the proper venue for a proceeding and the place giving rise to the litigation is consistent with the principle that our judicial system should be open to public observation. The relevance of an open court is undermined if a hearing occurs in a place completely removed from the community giving rise to the dispute”.*

And in *First Real Properties Ltd. Et al v. City of Hamilton* [2002] 59 O.R. (3d) 477:

*“There is a more important principle here than the balance of convenience. Litigation that directly affects a community should be heard in the court that serves the community”.*

In my view based upon the materials that I have read to date and the submissions of the parties, the case before me has less to do with the community of Yellowknife than the community of Behchoko. Based on the size of the population and the cultural makeup of



the two communities, it seems to me likely that the people of Behchoko will find the evidence more relevant to their community and culture than people living in Yellowknife.

Decision:

I have considered Mr. Huskey's comments about family privacy in reaching my decision. Privacy issues can be dealt with during the hearing process by way of application by a party. I have also considered his seeming ambivalence about where the hearing is to take place ("*It's fine either way*"). In context, I find that he was simply telling me that whatever my decision he wants a hearing but that he still would like that to happen in Behchoko for the reasons he stated.

I am satisfied that on the application of the balance of convenience test and taking into account the access to justice issues mentioned above, the hearing of Mr. Huskey's complaint should take place in Behchoko. I make one qualification: the hearing will not take place in Behchoko if we are unable to secure a facility there that will meet our operational needs. Once a hearing is date is fixed, we will commence in earnest to find such a facility.

I am going to defer any argument on costs to the conclusion of the hearing of Mr. Huskey's complaint.

James R. Posynick  
Adjudicator  
(original signed by)  
James R. Posynick  
Chair, Adjudication Panel