

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN

HER MAJESTY THE QUEEN

- and -

STEVEN SAYINE

RULING ON VOIR DIRE

A) INTRODUCTION

[1] Steven Sayine faces a charge of manslaughter in connection with the death of his common law spouse, Mary Laboucan, in June 2012. His trial is scheduled to commence on September 2nd, 2014.

[2] Mr. Sayine was arrested on this charge on June 20, 2012. Later that day, he was interviewed by police officers while in custody at the Fort Resolution R.C.M.P. detachment.

[3] The Crown wants to use that interview to cross-examine Mr. Sayine, should he choose to testify at his trial. Mr. Sayine's position is that the Crown should not be permitted to use this statement in any way at his trial because it was not given voluntarily, and because it was taken in breach of his right to remain silent.

[4] On consent of the parties, a blended *voir dire* was held into the issue of admissibility from both the perspective of voluntariness and the alleged *Charter*

breach. The *voir dire* was completed in April 2014. Mr. Sayine did not present any evidence at the hearing.

[5] On July 23, 2014, I filed a Memorandum to Counsel advising of my conclusion that the statement is not admissible, and that written Reasons would be filed at a later date. I proceeded in this way because I wanted counsel to be aware of my ruling sufficiently in advance of the trial date to adjust their trial preparation accordingly. The purpose of this Ruling is to explain why I concluded the statement is not admissible.

B) OVERVIEW OF CIRCUMSTANCES OF THE TAKING OF THE STATEMENT

[6] It should be noted at the outset that the police officers involved in this investigation took care to record all their interactions with Mr. Sayine during the relevant time frame. These recordings were filed as exhibits on the *voir dire*.

[7] As a result of this, there is no issue as to what actually transpired between Mr. Sayine and the various police officers he came into contact with that day. There is no room for ambiguity, inconsistencies in accounts of events based on failing memories, differences in perception, or any other reason. Instead, there is a clear, complete and objective record of all the interactions that could have a bearing on the admissibility of Mr. Sayine's statement. The approach of the officers involved represents the best practice as far as preserving a reliable record of their interactions with a detainee. It is an approach for which they should be commended.

[8] Because this excellent record was created as events were unfolding, the circumstances leading up to the interview are not controversial. Mr. Sayine was placed under arrest by Cst. Kevin Sales shortly before 2:00PM. Mr. Sayine was escorted back to the R.C.M.P. detachment. He was given an opportunity to contact counsel and did so. After having spoken with counsel in private, he was lodged in a cell.

[9] Cst. Ben Kershaw was designated to be the officer to have all contacts with Mr. Sayine prior to the interview taking place. Cst. Kershaw had a number of interactions with Mr. Sayine during the hours that followed his arrest.

Cst. Kershaw gave Mr. Sayine food, brought him papers that Mr. Sayine had requested, and checked on Mr. Sayine from time to time.

[10] At 8:11PM. Cst. Kershaw escorted Mr. Sayine to an interview room. Mr. Sayine's interview began shortly thereafter, and ended at 00:35AM on June 21st. It was video-recorded in its entirety.

[11] On the recording, there is no display that shows the time of day, how much time has elapsed during the interview, or anything else that can be used as a reference point to identify specific portions of the interview. For this reason, in this Ruling, I identify the portions of the interview by reference to the corresponding pages of the transcription of the interview filed as Exhibit "V" on the *voir dire* (the transcript). But what I have relied on in arriving at my decision is the recording itself.

[12] The officer in charge of this investigation was Cpl. Dan Donison. Cpl. Donison assigned Cst. Gregg Garrett to develop the interview plan and to be the lead interviewer.

[13] As part of the interview plan it was decided that Cpl. Mark Caswell would be the first officer to speak with Mr. Sayine. Cpl. Caswell knew Mr. Sayine because, unlike the other members of the interview team, he had been stationed in Fort Resolution in the past and was familiar with Mr. Sayine. Cpl. Caswell's intended role was to attempt to build a rapport with Mr. Sayine and try to engage him in a discussion about the events that led to Ms. Laboucan's death.

[14] The portion of the interview where Cpl. Caswell is asking the questions takes up the first 32 pages of the transcript. At various points during the conversation, Mr. Sayine expressed, in various ways, that he did not want to make a statement. At times, he said he did not want to talk, and at others, he asked to be taken back to his cell.

[15] Cst. Garrett was in another room, watching and listening to the interaction between Cpl. Caswell and Mr. Sayine. When it appeared to Cst. Garrett that Cpl. Caswell would not make any more progress with Mr. Sayine, he walked into the interview room and took over the questioning.

[16] Cst. Garrett then questioned Mr. Sayine at length. That portion of the interview is reflected at pages 32 to 126 of the transcript. Cst. Garrett left the interview room a few times during this period to consult with other members of the team who were observing the interview from another room.

[17] Mr. Sayine said a number of times that Ms. Laboucan's injury was accidental. He said that she was very drunk, that she tried to grab a bottle of liquor that he was holding in his hands, and that as they were struggling for the bottle her hands slipped, which caused her to fall back and hit her head. He said that she then stood up again, lost her balance and fell forward and hit her head on the couch.

[18] Cst. Garrett suggested repeatedly to Mr. Sayine that this narrative was not the whole truth. He suggested to Mr. Sayine that Ms. Laboucan fell because he kicked her. Mr. Sayine denied this.

[19] Cst. Garrett used various techniques to challenge Mr. Sayine's version of events and to get him to admit that he in fact did kick Ms. Laboucan.

[20] He talked about the need for Mr. Sayine to be truthful so that Ms. Laboucan's family, and the community in general, could know what happened. Mr. Sayine continued to maintain that what happened was an accident.

[21] Cst. Garrett's techniques included the use of a number of "props" that had been downloaded on a laptop that Cst. Garrett he had brought with him in the interview room.

[22] For example, Cst. Garrett played for Mr. Sayine a recorded message from one of Mr. Sayine's aunts. In that recording she encourages Mr. Sayine to tell the truth to police.

[23] Cst. Garrett also showed Mr. Sayine a photograph of Ms. Laboucan, taken some time before these events. He appealed to Mr. Sayine's conscience and emotions, suggesting that Ms. Laboucan deserved that Mr. Sayine tell the truth about what happened to her.

[24] Cst. Garrett also used portions of statements taken from two witnesses during the investigation. In their statements these witnesses said that they were at the house on the day Ms. Laboucan suffered her injury, and that Mr. Sayine

admitted to them that he had kicked her and injured her. Cst. Garrett played portions of the statements and confronted Mr. Sayine with these witnesses' versions of events. Mr. Sayine denied telling them that he had kicked Ms. Laboucan, and insisted that they were either too drunk to remember what happened, or were lying.

[25] Cst. Garrett also talked about DNA testing and other forensic techniques. He suggested that through forensic examination of Ms. Laboucan's body, the police would be able to determine if Mr. Sayine's boot had been used to kick Ms. Laboucan in the head.

[26] At various points during this portion of the interview, usually in response to Cst. Garrett's expression of disbelief of Mr. Sayine's version of events, Mr. Sayine said that he did not want to talk anymore, using language such as "that's good enough", "I am done", and other words to that effect. He also asked on a number of occasions to be taken back to his cell.

[27] Approximately two and a half hours into the interview (page 126 of the transcript) Cpl. Donison entered the interview room and started taking part in the questioning. Cst. Garrett stayed in the room and continued to participate in the questioning for a period of time, but eventually left the interview room while Cpl. Donison continued to ask Mr. Sayine questions. In total, Cpl. Donison was in the interview room for approximately one hour.

[28] He too confronted Mr. Sayine with the evidence of the two witnesses whose evidence Cst. Garrett had referred to. He pressed Mr. Sayine to tell the full truth about what happened. During this portion of the interview Mr. Sayine again asked to be taken back to his cell. He said he was tired on more than one occasion. He said he was cold. Cpl. Donison believed that Mr. Sayine was just trying to avoid answering questions, and told him so. He continued talking to him and asking him questions.

[29] Cpl. Donison then left the interview room. Cst. Garrett came in a few minutes later with an empty bottle (page 174 of the transcript). He asked Mr. Sayine to use it to demonstrate the struggle that he had, by then, described several times during the interview. Cst. Garrett continued to ask questions, suggesting to Mr. Sayine that he had pushed Ms. Laboucan. In this last portion of the interview, which went on for another approximately 40 minutes, Mr. Sayine at times

maintained he did not push Ms. Laboucan during that struggle over the bottle, but at other times said he might have pushed her because everything happened so fast.

C) ANALYSIS

[30] This case engages the common law principles that govern the admissibility of statements made by accused persons to persons in authority. This is commonly referred to as the “confessions rule”, which is somewhat of a misnomer, as it applies both to inculpatory and to exculpatory statements. This case also engages the principles related to the right of detained persons to remain silent, a right that is protected by section 7 of the *Charter*.

[31] There are distinctions between the legal frameworks that govern these two issues, such as the scope of the protection, which party bears the burden of proof, and the underlying goals that these protections are each intended to achieve. But there is also considerable overlap between the inquiry into the voluntariness of a statement and the assessment of an alleged breach of the right to remain silent. Where the issue is the admissibility of a statement given by a detainee to police officers, the outcome of one inquiry is necessarily determinative of the outcome of the other. *R. v. Singh*, [2007] 3 S.C.R. 405, at para. 37.

[32] This is the case here. At issue on this *voir dire* is the admissibility of a statement made by Mr. Sayine to police officers while he was in their custody. The result, whether the analysis is undertaken from the point of view of the confessions rule, or from the point of view of the alleged infringement of Mr. Sayine's right to remain silent, is the same.

1. Voluntariness

a. Governing principles

[33] The principles that govern the voluntariness analysis are rooted, in part, in the recognition that statements made by accused persons are a powerful tool for the prosecution, and that unreliable statements can often lead to wrongful convictions. This is especially obvious with inculpatory statements: it is counter-intuitive to think that a person would falsely admit wrongdoings to police. Because of this, triers of fact tend to attach a lot of weight to confessions. This, in turn, increases

significantly the risk of a wrongful conviction if an unreliable inculpatory statement is admitted in evidence.

[34] But even an exculpatory or partially exculpatory statement can also be quite helpful to the prosecution. It can be used to cross-examine the accused and undermine his or her credibility. Hence, the use of an unreliable exculpatory statement can also increase the risk of a wrongful conviction. This is why, as I already stated, the rules that govern the admissibility of an accused's statement are the same whether the statement is exculpatory or inculpatory.

[35] The confessions rule has been recast in *R. v. Oickle*, [2000] 2 S.C.R. 3. Further clarifications were provided a few years later in *R. v. Singh*, *supra* and *R. v. Spencer*, [2007] 1 S.C.R. 500. In many respects the principles developed in those cases were informed by the notions articulated many years before in *R. v. Hebert*, [1990] 2 S.C.R. 151.

[36] Not surprisingly, given the concerns about the dangers associated with unreliable confessions, one of the themes that underlies the governing principles in this area is ensuring that only reliable statements are admitted into evidence. But the concept of voluntariness now also encompasses considerations that relate to overall fairness of the criminal justice system:

Wigmore perhaps summed up the point best when he said that voluntariness is "shorthand for a complex of values": Wigmore on Evidence (Chadbourn rev. 1970), vol. 3, para. 826, at p. 351. I also agree with Warren C.J. of the United States Supreme Court, who made a similar point in *Blackburn v. Alabama*,

[361 U.S. 199](#) (1960), at p. 207:

[N]either the likelihood that the confession is untrue nor the preservation of the individual's freedom of will is the sole interest at stake. As we said just last Term, "The abhorrence of society to the use of involuntary confessions ... also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." ... Thus a complex of values underlies the stricture against use by the state of confessions which, by way of convenient shorthand, this Court terms involuntary, and the role played by each in any situation varies according

to the particular circumstances of the case.

R. v. Oickle, supra, para. 70.

[37] The same point was underscored again in *R. v. Singh*. Referring with approval to comments made in *R. v. Hebert*, the Court confirmed that the scope of the confessions rule includes the protection of detainees' exercise of free will in choosing whether to speak to police or remain silent, as well as safeguards to ensure that reception of a statement by an accused would not result in unfairness. *R. v. Singh, supra*, para. 34.

[38] That said, the law also recognizes that in order to investigate crimes, police officers must be able to put questions to suspects. The principles that govern the admissibility of statements by accused persons recognize the importance of protecting the rights of an accused and the integrity of the process, while at the same time not unduly limiting society's need to investigate and solve crimes. *R. v. Oickle, supra*, at para. 33.

[39] As a result, while detainees have the right to remain silent, they do not have the right not to be spoken to by the state authorities. And a detainee's assertion that he or she does not want to give a statement does not trigger an obligation for police to put an immediate end to their questioning. *R. v. Singh, supra*, paras 28 and 42.

[40] The assessment of voluntariness requires a contextual analysis that takes into account a number of factors. Those factors include whether the statement is the result of threats or promises; whether it was made as a result of oppressive circumstances; and whether the detainee had an operating mind when the statement was made. Consideration must also be given to whatever trickery may have been used by the interrogators to obtain the statement: statements that are obtained through police trickery of a nature that is so appalling as to shock the community are not considered voluntary. *R. v. Oickle, supra*, paras 65 to 67.

[41] The inquiry into voluntariness must take into account these factors in a global way, not in isolation. In *Oickle*, the Supreme Court of Canada summed things up as follows:

While the foregoing might suggest that the confessions rule involves a panoply of different considerations and tests, in reality the basic idea is quite simple. First of

all, because of the criminal justice system's overriding concern not to convict the innocent, a confession will not be admissible if it is made under circumstances that raise a reasonable doubt as to voluntariness. Both the traditional, narrow Ibrahim rule and the oppression doctrine recognize this danger. If the police interrogators subject the suspect to utterly intolerable conditions, or if they offer inducements strong enough to produce an unreliable confession, the trial judge should exclude it. Between these two extremes, oppressive conditions and inducements can operate together to exclude confessions. Trial judges must be alert to the entire circumstances surrounding a confession in making the decision.

R. v. Oickle, supra, at para 68.

[42] The prosecution bears the onus of establishing voluntariness beyond a reasonable doubt. If, upon consideration of the whole of the circumstances in light of all the factors, there remains a reasonable doubt about whether the statement was voluntary, the statement is not admissible.

[43] In this case, some of these considerations are not engaged at all, and Mr. Sayine concedes it. The police officers who conducted the interview used various tricks, but there is no suggestion that any of those tricks were of a nature that would shock the community. Similarly, based on the testimony of the officers and the video-recording itself, it is clear that Mr. Sayine had an operating mind at the time the statement was taken. Finally, there is no evidence that any threats were made to Mr. Sayine.

[44] Mr. Sayine argues, however, that the police officers made improper inducements to him; he argues that those inducements, combined with the cumulative effect of oppressive circumstances he found himself in, effectively prevented him from exercising his free will.

b. Inducements

[45] Inducements, like threats, can be overt or subtle. Whatever form the inducement takes, what matters is whether the interrogators offered a *quid pro quo* to the detainee, something in exchange for giving a statement. *R. v. Oickle, supra*, at para. 57. What is key is the strength of the inducement offered, having regard to the particular individual's circumstances. *R. v. Spencer, supra*, para. 15.

[46] This means that not every inducement renders a statement inadmissible. Police officers usually need to resort to some level of inducement to persuade a detainee to talk to them. People rarely spontaneously confess their wrongdoings to the authorities. As a result, it is to be expected that interviewers will use various techniques to persuade a detainee to talk to them, as was done in this case.

[47] Lying to suspects in an effort to build a rapport, pretending to be sympathetic to their plight, appealing to their conscience and emotions, confronting them with other evidence, exaggerating somewhat the extent to which technology may assist police in establishing certain things, are all techniques commonly used in police interviews. The use of these techniques in order to convince a suspect to admit his or her involvement with an offence is not in itself reprehensible. It becomes problematic only where, standing alone or in combination with other factors, the inducements are strong enough to raise a reasonable doubt about whether the will of the suspect was overborne.

[48] Mr. Sayine points to the portions of the interview where Cst. Garrett spoke about the small size of the community of Fort Resolution and about rumors that were going around the community about the circumstances of Ms. Laboucan's death. Cst. Garrett suggested that people in the community were thinking that Mr. Sayine had killed Ms. Laboucan on purpose, and may be labelling him a murderer. He invited Mr. Sayine to tell him what happened, more particularly to confirm this was not a planned killing. Cst. Garrett held out to Mr. Sayine that if he told him what happened, Cst. Garrett could "deliver that message to the community":

(.) Okay. Now, I need to know, I need you to take me back, the struggle with the bottle, where it happened and exactly what happened, okay. So I can deliver that message to this community. I gotta tell this community what happened. You tell me. Okay. Because you know what they're going around sayin'. He is a murderer. But if it's, it's it's a different story if something happened as an accident, okay

(...)

(page 57 of the transcript).

[49] As the exchange continued, Cst. Garrett made other references to the fact that community members were talking about the events, some saying Mr. Sayine

was a murderer. Cst. Garrett continued to invite Mr. Sayine to give him “his side” of the story. Cst. Garrett made similar comments, at other points during the interview, about “going back to Ms. Laboucan’s family” with Mr. Sayine’s explanations as to what happened to her.

[50] Cst. Garrett acknowledged on cross-examination that he had no intention of reporting back to the members of the community of Fort Resolution, or to Ms. Laboucan's family, the things that Mr. Sayine would be telling him during the interview. He acknowledged that this was simply one of the techniques that he used to try to persuade Mr. Sayine to talk about what happened.

[51] I do not find that these aspects of the interview give rise to any concerns. As noted above, interrogators have to resort to certain techniques to get suspects to open up. Appealing to their conscience, or to their emotions, or encouraging them to let their side of the story known in the face of gossip or rumors, is not in itself a reprehensible interview technique and it does not amount to an improper inducement.

[52] In addition, there is no evidence that these inducements had any effect on Mr. Sayine's ability to exercise his free will. His reaction during this portion of the interview does not suggest that Cst. Garrett’s comments influenced him in his decision to speak or not to police. On the contrary, Mr. Sayine appeared to be somewhat resigned to the fact that there would be rumors and gossip in the community about these events, and that nothing could be done about that.

[53] As for Ms. Laboucan's family, Mr. Sayine also did not appear overly concerned about what they might think. More than anything else, he appeared to be angry at them, in particular for not having contacted him before the decision was made to terminate life support systems for her. On the whole, the evidence does not support the notion that inducements related to what Cst. Garrett may say or not say to her family had any impact on Mr. Sayine’s decision to talk about what happened.

[54] I conclude that to the extent these aspects of Cst. Garrett's questioning could be characterized as inducements, they were not improper on their face, nor is there any indication that they were of a nature to overbear Mr. Sayine's will.

c. Oppression

[55] The main concern that Mr. Sayine raises about the interview is that he argues that the circumstances he found himself in, particularly as time went by, were such that it made it impossible for him to exercise his free will not to speak to the police.

[56] Oppressive circumstances have the potential of leading to unreliable statements in various ways. They can cause a detainee to give a statement and “give the police what they want” simply to escape distasteful conditions that they find themselves in. Oppressive circumstances can make a person doubt their own memory, particularly if faced with relentless accusations made by the interrogators, and eventually admit to things they do not actually remember doing but come to believe they have done.

[57] Oppressive circumstances may arise from prolonged and aggressive questioning. Here, Mr. Sayine was questioned firmly and persistently, but he was not subject to aggressive questioning on the part of the interviewers. The lack of aggressive questioning, however, is not determinative in deciding whether a statement is the result of oppressive conditions, as noted by this Court in *R. v. Buggins*, 2013 NWTSC 87, para. 48.

[58] Oppressive circumstances may also arise from a detainee being subjected to inhumane or very distasteful conditions, such as being deprived of clothing, food, or sleep. *R. v. Hoilett* (1999), 136 C.C.C. (3d) 449 (Ont.C.A.).

[59] The *Hoilett* case provides an example of rather extreme circumstances leading to the conclusion that the statement ultimately given by the detainee was the result of oppression. There is no suggestion that Mr. Sayine was subjected to conditions analogous to those that prevailed in *Hoilett*. He was given food. He was wearing clothes. The only evidence before the Court about the temperature at the R.C.M.P. detachment that day, and in Mr. Sayine's cell, is that it was normal, comfortable temperature.

[60] But extreme circumstances do not necessarily have to be present for a reasonable doubt to be raised about whether a statement was the product of an overall oppressive situation. Oppressive circumstances can be the result of the cumulative effect of several factors which, alone, might not have been problematic.

Here, I find that there are several aspects of the overall circumstances that give rise to concerns about the voluntariness of Mr. Sayine's statement.

[61] First, as a starting point in the analysis, and by way of overarching context, it must be remembered that the deceased was Mr. Sayine's long time spouse. It appears undisputed that Ms. Laboucan was transported from her residence, unconscious and unresponsive, by the local nurse, with police assistance, during the evening on June 16. At the time it was believed she might be suffering from alcohol poisoning. By the time Mr. Sayine was taken into custody and interviewed on June 20, it is clear from what transpired during the interview that he knew that Ms. Laboucan had died. It is also apparent from aspects of his demeanour during the statement that Mr. Sayine was feeling some distress about this.

[62] Another factor is Mr. Sayine's general physical condition during the interview. On the whole of the evidence, I conclude that Mr. Sayine was suffering from a certain level of sleep deprivation when the interview began, and that condition became progressively more acute as the hours went by. The interview took place in the evening, lasted over four hours, and ended after midnight. The timing of the interview is in itself is a factor to consider. But the evidence about what Mr. Sayine had been doing in the days leading up to the interview must also be considered.

[63] The evidence suggests that Mr. Sayine and Ms. Laboucan had been consuming a considerable amount of alcohol around the time of the events that led to her being injured. Police officers attended their residence in response to a complaint on the morning of June 16 and although no one was hurt at that point, they found that both Ms. Laboucan and Mr. Sayine were intoxicated. It was the evening of that same day that Ms. Laboucan was taken to the health center.

[64] There is little evidence as to what Mr. Sayine was doing or how much sleep he got between that time and the time of his arrest. After he was placed in cells on June 20 he told Cst. Kershaw that the last time he had eaten was "a few days ago". Cst. Kershaw asked him if he had had anything to drink that day and Mr. Sayine answered "hardly anything", which I take to mean he had consumed some alcohol that day. Mr. Sayine also said that he had been smoking marijuana, that he always smokes marijuana, and that he had smoked a joint or two a couple hours before his arrest.

[65] At the very start of the interview, when Cpl. Caswell asked Mr. Sayine how he was doing, Mr. Sayine's answer was "not too good". And when Cpl. Caswell asked him if he got some sleep, Mr. Sayine said "no". Mr. Sayine also made comments about not having had a lot of sleep later on in the interview.

[66] While it appears from the entries in the guards' logbook that Mr. Sayine got some sleep after his arrest, that sleep was interrupted several times by Cst. Kershaw. As outlined above at Paragraph 9, shortly after Mr. Sayine was lodged in cells, he was given food; he was also provided papers that he had requested. These interactions occurred between 3:11PM and 3:57PM.

[67] Following that, in a time span of just over four hours, Cst. Kershaw went into Mr. Sayine's cell four times. According to the entries in the guards' logbook, Mr. Sayine was asleep each of those times. Cst. Kershaw went in at 5:35PM, woke Mr. Sayine, and asked him if he needed anything. He went in at 6:43PM, woke Mr. Sayine, and asked him if he wanted to speak to a lawyer again. Cst. Kershaw went to see Mr. Sayine again at 7:47PM. He woke him and asked him if he could get him anything, if he was hungry, and if he wanted to contact counsel. Mr. Sayine declined. Finally, Cst. Kershaw returned to the cell at 8:11PM, woke Mr. Sayine and escorted him to the interview room.

[68] Cst. Kershaw testified that his reason for checking on Mr. Sayine every hour or so was to ensure Mr. Sayine's well-being. In submissions, the Crown made the point that the police had a duty to monitor Mr. Sayine closely while he was in their custody and make sure he was all right.

[69] There is no evidence that Cst. Kershaw's actions were deliberately designed to interfere with Mr. Sayine's sleep so as to make him more tired or vulnerable in preparation for the interview, and I make no such finding. But irrespective of what the reasons were, the net result was that Mr. Sayine's sleep was interrupted several times in the hours that preceded the interview. That is a relevant factor in assessing the evolution of his condition later on during the evening as the interview progressed, and in particular his claim that he was tired and his repeated requests to be taken back to his cell so he could sleep.

[70] There were several times during the interview where Mr. Sayine said that he was tired and wanted to sleep. At one point he said he could not function. His behaviour on some of the occasions when he was left alone in the interview room

confirms that he was getting increasingly tired. In the video he is seen laying his head on the table at one point. At another point he got up and disappeared from the view of the camera but based on what happens when the officer came back in, it appears Mr. Sayine had been lying down on the floor of the interview room.

[71] The fact Mr. Sayine was getting increasingly tired is also relevant, in my view, to his claim that he was cold. I have no reason to doubt the officers' testimonies about their perception of the temperature in the detachment and the interview room that evening. Still, their experience of the conditions in that room may well have been different from that of someone who lacked sleep, had consumed excessive amounts of alcohol and drugs over the previous days, and was in a situation of high stress.

[72] Cpl. Donison readily acknowledged in his evidence that he believed that Mr. Sayine's claims of being tired and cold were simply a stalling tactic, a way to avoid having to answer questions. This is why he pressed on with his questions.

[73] Cpl. Donison may well have believed this at the time but having watched the video-recording carefully, I am not certain that he was correct. What the video recording shows, in my view, is a progressive deterioration in Mr. Sayine's condition. As time went by, he said a number of times that he was tired and that he wanted to sleep. He asked repeatedly to be taken back to his cell. He yawned. He became less focused. He laid his head on the table. He put his arms inside his shirt and remained that way for quite a long period of time, including a period of time where he was alone in the interview room. If this was all an act, Mr. Sayine kept it up when there was no one there to see him, and no questions to evade.

[74] There were also noticeable changes in Mr. Sayine's demeanor as time went by during the interview. During the first part of the interview, he was assertive but relatively calm. As the interview progressed, and the officers continued to press him and challenge his version of events, he had a number of outbursts, raised his voice, even yelled, becoming very upset at the officers on more than one occasion. Towards the end of the interview he called Cst. Garrett a "big fuckin'dummy". Some of these outbursts, especially during the second half of the interview, came out of nowhere, and appeared out of proportion with what was being discussed and the questions he was being asked.

[75] The Crown argues that this behaviour demonstrates that Mr. Sayine was not afraid of the officers, that his will was never overborne, and that he remained, throughout the interview, in control and able to assert himself. That is one way of interpreting the evidence. But Mr. Sayine's outbursts can also be interpreted as the reaction of someone who is feeling less and less in control and more and more desperate.

[76] Apart from those concerns, the evidence raises issues about whether Mr. Sayine's statement was the product of his free will to speak to the authorities. There is no question that Mr. Sayine was aware of his right to remain silent. He attempted to assert that right a number of times during the interview. There is also no question that in some respects, Mr. Sayine's actions contradicted his assertion that he did not want to speak: despite saying he did not want to talk, he did talk. He answered the officers' questions and shared a lot of information about his version of what happened.

[77] The law is clear: the assertion by a detainee of his or her desire not to speak does not trigger an obligation on the part of the police to immediately stop trying to elicit information. Some persistence on the part of the police is permitted, and indeed consistent with the law's recognition of the importance of letting them carry out their investigative duties and attempt to solve crimes. However, the longer police persist in their questioning in the face of repeated attempts by a detainee to assert his or her right to remain silent, the greater the risk that any statement so obtained may be found to not be voluntary:

Under both common law and *Charter* rules, police persistence in continuing the interview, despite repeated assertions by the detainee that he wishes to remain silent, may well raise a strong argument that any subsequently obtained statement was not the product of a free will to speak to the authorities.

R. v. Singh, supra, para.47.

[78] The question of whether the police officer's conduct of an interview resulted in a breach of the detainee's rights, thereby rendering the statement involuntary, is highly fact-specific. Its assessment requires a careful examination of the whole of the statement, the context in which it took place, and what was actually said.

[79] Here, in the initial portion of the interview, which was conducted by Cpl. Caswell and lasted half hour or so, Mr. Sayine said several times that he did not want to say anything to police:

SAYINE: What is this about?

CASWELL: What's that?

SAYINE: You gonna ask me questions?

CASWELL: Well I'm gonna sit down, you know, we want to talk to you, Steve,
so

SAYINE: I don't want, I don't have nothing to say.

CASWELL: Okay

SAYINE: Take me back

(p.2 of transcript)

SAYINE: I put that on paper and I don't have to say nothing to you. Just
bring me back there.

CASWELL: No, just have a seat there, Stevie, it's all right.

SAYINE: I'm not saying anything.

(p. 3 of transcript)

CASWELL: (...) Did you go out to Little Buffalo at all?

SAYINE: No. Can I go back to my cell?

(p. 16 of the transcript)

CASWELL: (...) Who are you worried about spreadin' the gossip? (...)

SAYINE: Don't know

CASWELL: You don't know?

SAYINE: Good enough. Go back to my cell.

(p.19 of transcript)

SAYINE: (...) That'it, enough, I'm done.

CASWELL: And what did Laura –

SAYINE: I want to go back to my cell. Right now, please.

CASWELL: Well I'm still gonna talk for a bit, Steve, so.

SAYINE: Get me a cigarette.

CASWELL: Laura Egericon.[sic] That's Raymond's wife, eh. And she came by just to visit or?

SAYINE: Get me a cigarette maybe I'll answer

CASWELL: And like I explained to you before I can't, you know, I got you a cigarette but, you know, if I'm talkin' to you if I get you a cigarette it's not to get answers out of you or anything like that, Steven. It's not to get you to talk so we can't have that arrangement at all and, and I'll just let you know now that, you know, we can't have that sort of a deal goin' on, all right, so

SAYINE: I'm done.

CASWELL: What's that?

SAYINE: I want to go in my cell.

(page 25 of the transcript)

SAYINE: That's good enough. I don't want to answer no more. I want to go back in my cell.

(...)

I don't want to answer no more. It's my right.

(page 27 of transcript)

SAYINE: Can I go to my cell? I'm done. And the last bottle, I don't know where she got it from.

CASWELL: Okay.

SAYINE: Also five packs of cigarette are missing.

CASWELL: Went missing.

SAYINE: Yeah.

CASWELL: From where?

SAYINE: From the closet. One blue camera.

CASWELL: Where was that?

SAYINE: It was in the closet as well.

CASWELL: In the closet, okay.

SAYINE: And seventy bucks. That's it. I'm done.

(page 28 of transcript)

SAYINE: (...) I'm not supposed to be answering you guys, you know. I'm done here. I'm not giving any more.

(...)

Good enough, 'kay. I want to go back to my cell

(...)

Can I go to my cell now? That's it. I'm not gonna answer any more

(page 32 of the transcript)

[80] Cst. Garrett entered the interview room shortly after Mr. Sayine made the comment last quoted. He introduced himself and started to talk to Mr. Sayine. Relatively soon after the start of that exchange, Mr. Sayine stated that he did not want to talk to him:

GARRETT: Hear me out. Hear me out for a second.

SAYINE: Well I'm not saying nothing.

GARRETT: Okay. Fair enough. Hear me out. Hear me out for a second

SAYINE: I'm not saying nothing.

GARRETT: You know how small towns work. And I know how small towns work. I worked lots in these places. Okay. I worked in northern Saskatchewan. I worked all over the place. Okay. And I get one side of the story and I don't get your side of the story. And you have a story to tell. Okay. And I know you have a story to tell and that's why, okay, and I, and I know you have a, it's weighing down on your shoulders right now. Okay. I can see that. Okay. So you take me through your day and you got a story to tell.

SAYINE: I'll wait 'til, I wait 'til court.

GARRETT: Fair enough.

SAYINE: I'll wait 'till court.

(pages 35-36 of transcript)

[81] Cst. Garrett continued to talk to Mr. Sayine. Mr. Sayine provided information in response to the questions Cst. Garrett was putting to him. Mr. Sayine provided his version of how Ms. Laboucan came to fall.

[82] Cst. Garrett told Mr. Sayine he did not believe that was he was telling him the entire truth. On a few occasions during that part of the interview, Mr. Sayine became upset and angry at Cst. Garrett for not believing him. Eventually he said that if Cst. Garrett was not going to believe him, he was not going to say any more:

SAYINE: That's good enough. If you don't want to believe me I don't have to answer anymore. Because I'm telling you the truth about that part.

(pages 116-117 of transcript)

[83] Cst. Garrett told Mr. Sayine he wanted to believe him but said the police knew that Mr. Sayine had kicked Ms. Laboucan. Mr. Sayine became quite angry at that point and repeatedly denied kicking Ms. Laboucan.

[84] By then, the interview had been ongoing for over 2 hours. Cst. Garrett stepped out of the interview room. When he came back, the following exchange took place:

GARRETT: Okay. It's not sitting well with me. Give me a minute.

SAYINE: Just bring me back to my cell. I don't have nothing to say to you.

GARRETT: Yeah, we got a whole team down here, okay. And it's not sittin' well with anybody on the team your version of the events.

SAYINE: I want to go to sleep for a while

(page 126 of the transcript)

[85] At that point, Cpl. Donison entered the interview room. He spoke to Mr. Sayine about what he had allegedly told the two witnesses about how Ms. Laboucan got injured and suggested to him that it would make sense for Mr. Sayine to have told them the truth about what had happened. Mr. Sayine responded to some of the things that Cpl. Donison was saying but said expressed several times that he wanted to go back to his cell and that he was tired:

I'm getting tired and want to go to bed for a while.

(...)

That's good enough. I don't have to answer no more. I want to go back to my cells.

(...)

I just want to go back to my cell. I'm done. I'm not answering any more questions. It's my right.

(...)

I want to go back to my cell

(...)

That's good enough. I don't want to answer no more questions. You get to ask me all these I'm gonna mute

(pages 130,134, 137, 138, 140 of transcript)

[86] Cpl. Donison continued to ask Mr. Sayine questions. This was one of the many points during the exchange with Cpl. Donison where Mr. Sayine became upset:

SAYINE: Okay. Fuck, man, you guys are just like fuckin'

DONISON: No, I'm just talking.

SAYINE: I had enough. I want to go in my cell. Please. And record it. I want to go back in my cell.

I don't want to talk about it. I'm not gonna no more answers. [sic]
That's it you guys. No.

DONISON: So –

SAYINE: There's one bad guy, one good guy, one asshole. I'm done with you all. No more.

GARRETT: Do the right thing, Stevie.

SAYINE: I'm done. I want to go back to my cells. I have the right.

GARRETT: Do the right thing here. She deserves that.

SAYINE: I have the right to go to my cells.

GARRETT: Mary deserves you to do the right thing. Tell us what really happened?

SAYINE: I just did. And there's no more you can get me out of, right. 'Cause I told you the truth about the bottle part and that's the truth. Okay. Now can I go to my cells. If you won't let me go to my cells I want to talk to my lawyer.

GARRETT: Fair enough.

SAYINE: I want to go to my cells.

GARRETT: And you're gonna go to your cell. You don't have to, you don't have to answer us. We'll talk to you.

(pages 146-147 of transcript)

[87] The questioning continued. Cst. Garrett continued to ask questions at first, then Cpl. Donison started intervening more and more. At one point Cst. Garrett left the room. At various points during this part of the interview, Mr. Sayine expressed that he did not want to speak any further. He also complained about

being cold and tired:

I'm telling you the truth. If you could believe that part that kick and you can, you cannot believe that fuckin' ashtray part. I want outta here right now. I'm done.

(...)

'Kay I'm done

(...)

I'm getting really tired. I can't really function.

(...)

I want to go to bed. I'm tired, man. I can't even think right. I'm hungry. Fuckin' I want to go to bed.

(...)

SAYINE: Cold. Hungry. Fuckin' need a cigarette. Fuckin'.

DONISON: Okay. If you're cold I mean we can turn the air conditioning off out there and warm it up. It's actually quite warm in here I thought but if you're cold we can turn the air conditioner off. Okay I think you're making excuses so you don't have to talk to me.

SAYINE: No fuckin' excuses. I'm cold.

DONISON: Okay, fair enough. Why, why are you hiding your face on me?

SAYINE: I'm not. I'm fuckin' cold I said.

DONISON: Can I get you a jacket?

SAYINE: Sure.

DONISON: Okay, I'll get the guys to get you a jacket. Will you talk to me if I get you a jacket?

SAYINE: No. I don't have to talk. I told you everything that I –

(...)

DONISON: Okay. I'll get you a jacket, okay.

SAYINE: I just want to go to bed.

DONISON: Well like I want to make sure you're comfortable, okay.

SAYINE: I'm tired.

DONISON: Do you want me to get you a jacket?

SAYINE: I'm tired

(...)

SAYINE: Mary tried to grab the bottle out of my hand. I'm tired, I want to go to sleep for a while

DONISON: Okay. I'll be back in a minute, okay? Can I get you a jacket?

SAYINE: Anything, man.

DONISON: No, well, I want to make sure you're warm there, Stevie. I don't want you cold.

SAYINE: I want to go have a sleep, me. I'm fuckin' tired, man. I haven't hardly slept for about -

DONISON: Can I get you a blanket?

SAYINE: Can I just go have a sleep for a while? Fuck.

(pages 160, 161, 162, 168, 170 and 174 of transcript)

[88] After this last exchange, Cpl. Donison left the room. A few minutes later Cst. Garrett came back in with an empty bottle. He asked Mr. Sayine to demonstrate the struggle that took place over the bottle. Mr. Sayine became very upset with Cst. Garrett during this portion of the interview. As the discussion progressed Mr. Sayine conceded that it was possible he pushed Ms. Laboucan at some point during the struggle over the bottle. Towards the end of the exchange he made additional comments about being thirsty and tired:

I want some water. Fuck, man.

(...)

I'm tired. I want to go to bed

(pages 188-189 of transcript)

[89] As already stated, the police are not required to immediately stop an interview when a detainee indicates an intention or desire not to speak to police. At the same time, in the face of repeated such assertions by a detainee over an extended period of time, there comes a point where police cannot simply ignore those assertions and continue to forge ahead, even if it is because they are of the view that the detainee is not been truthful.

[90] Mr. Sayine expressed several times the wish to go back to his cell. Many times during the interview he actually stood up from his chair, often at the same time as he was asking to be taken back to his cell or as he was saying he did not want to answer any more questions. Although he continued to answer some of the questions put to him and volunteer his version of events, he reiterated, several times and throughout the interview, to each officer he was speaking to, that he did not want to speak any more. I find it apparent from the recording that as his requests to be taken back to his cell were systematically ignored, and as time went by, he became progressively frustrated, frazzled, tired and emotionally volatile.

[91] The Crown points to the very limited admissions that Mr. Sayine made - that he may have pushed Ms. Laboucan during the struggle for the bottle – and argues that this demonstrates that his will was not in fact overborne, because he never actually endorsed or accepted the theory of the case that was being presented to him by the officers.

[92] I understand that argument but find it unpersuasive. If accepted, it would mean that a statement where the detainee does not fully adopt the theory of the case put forward by the interrogators would almost always be found to be voluntary. It would, in effect, make the test for admissibility of an exculpatory statement less stringent than it is for an inculpatory statement. That is not the law, and for good reason, because as noted above at Paragraph 34, even an exculpatory or partially exculpatory statement can be of significant assistance to the Crown,

more specifically in attacking the accused's credibility as a witness if that accused chooses to testify.

[93] The overriding concerns about the inherent unreliability of a statement that is the product of oppressive conditions exist even if a detainee does not ultimately give a full confession. A detainee may well, to put an end to oppressive circumstances, make partial admissions (as opposed to a full confession) as a means of ending an interview. A detainee may also start to doubt his or her memory enough to admit part, but not all, of what interrogators are suggesting is what truly happened. The concerns stemming from the unreliability of anything said under those types of conditions remain, independently from the extent of the admissions that are ultimately made.

[94] For those reasons, the fact that Mr. Sayine, for the most part, maintained his innocence during this interview is not, in and of itself, a reason to conclude that his statement was voluntary.

[95] Mr. Sayine's repeated attempts to assert his right to silence and to put an end to the interview must be examined in the context of the overall circumstances I have referred to in this Ruling. Many aspects of those circumstances are only partially apparent when reading the transcript, but come across more clearly when watching and listening to the full interview. On the whole, the evidence does not satisfy me beyond a reasonable doubt that the statement was the product of the exercise by Mr. Sayine of his free will. I am left with a reasonable doubt about the voluntariness of the statement.

2. Right to silence

[96] As I have already mentioned, the analysis to be conducted to determine whether there was a breach of Mr. Sayine's right to remain silent is functionally equivalent to the analysis as to voluntariness.

[97] In examining whether Mr. Sayine's right to remain silent was breached, obviously, the portions of the interview where he said he did not want to speak any more and asked to be taken back to his cell, are particularly significant.

[98] As already noted, while the police were under no obligation to stop questioning Mr. Sayine when he first expressed his desire to remain silent, they were also not permitted to ignore his repeated requests to be taken back to his cell and his repeated assertions that he did not want to speak to them. I recognize that the balance may be a difficult one to achieve, especially when police are investigating as serious a matter as they were in this case. One can understand why they were persistent. But their ability to pursue questioning of a suspect in an effort to get to the truth of the matter is not without limits, as underscored in *Singh*, in the excerpt quoted above at Paragraph 77.

[99] It is often noted that in *Singh*, the statement was ruled admissible notwithstanding the fact that Mr. Singh had said 18 times that he did not want to speak to police, and that finding was ultimately upheld by the majority Supreme Court of Canada. But the majority's decision was in large measure based on the standard of review that applies to factual findings. Especially in light of the statement by the Supreme Court that the number of times a detainee asserts his or her right is not determinative, I do not view *Singh* as setting the bar anywhere in particular as far as how many times the right has to be asserted before a breach can be found to have occurred. In all cases, what is determinative is a consideration of the whole of the circumstances and the contextual analysis discussed in *Oickle*.

D) CONCLUSION

[100] For those reasons, I conclude that Mr. Sayine's statement is not admissible at his trial.

[101] The *voir dire* proceedings were originally subject to a publication ban, because Mr. Sayine had elected to be tried by a court composed of a judge and a jury. The purpose of such a publication ban is to ensure that potential jurors do not become aware of matters that proceeded in the absence of the jury, particularly

when, as was the case here, what is at issue is whether certain evidence is admissible.

[102] Mr. Sayine has since re-elected to be tried by a judge sitting alone. Given this, there is no longer a reason for there to be a publication ban with respect to the evidence adduced at the *voir dire*, or this decision. Therefore, the publication ban previously ordered with respect to this *voir dire* is vacated.

L.A. Charbonneau
J.S.C.

Dated this 27th day of August 2014.

Counsel for the Crown: Marc Lecorre and Cecilia Bastedo
Counsel for the Accused: Charles Davison and Michael Martin

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

BETWEEN

HER MAJESTY THE QUEEN

- and -

STEVEN SAYINE

Accused

RULING ON *VOIR DIRE* OF THE
HONOURABLE JUSTICE L.A CHARBONNEAU
