R v Beaulieu, 2017 NWTSC 23

Date: 2017 03 23
Docket: S 1 CR 2015 000 131

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

-and-

WILLIAM BEAULIEU

MEMORANDUM OF JUDGMENT
(APPLICATION TO STRIKE GUILTY PLEA)

[1] On November 18, 2016, I heard William Beaulieu's Application to strike the guilty plea that he entered on April 11, 2016, to a charge of aggravated assault. On December 20, 2016, I dismissed the Application and said that written Reasons would follow. These are those Reasons.

I) BACKGROUND AND PROCEDURAL HISTORY

[2] Mr. Beaulieu was charged as a result of two incidents that happened within a few hours of one another. The first was an assault on Marlin Shae, in the late evening on September 16, 2015. The second was an incident involving Daniel Jackson which occurred in the early morning hours of September 17, 2015.

[3] Complaints were made to the R.C.M.P. in Fort Smith about these incidents. As a result of the investigation, Mr. Beaulieu was arrested on October 1, 2015. He was charged with aggravated assault of Mr. Shae, assault causing bodily harm of Mr. Jackson, and some breach of Probation charges.

[4] Mr. Beaulieu had a show cause hearing on October 6, 2015. He was represented by defence counsel Michael Martin at that hearing. On October 7, 2015, the Justice of the Peace denied Mr. Beaulieu's application for release.

[5] Mr. Beaulieu had appearances in the Territorial Court on October 20, 27 and November 3, 2015. By the November 3, 2015 appearance, the charge of assault causing bodily harm relating to the incident involving Mr. Jackson had been replaced with a charge of aggravated assault. On that date, represented by defence counsel Jay Bran, Mr. Beaulieu elected to be tried by a judge of this Court sitting alone, without having a preliminary hearing. On December 10, 2015, the Crown filed an Indictment which included the two counts of aggravated assault.

[6] By early 2016, Mr. Beaulieu became entitled to a review of his detention by operation of section 525 of the *Criminal Code*. On January 28, 2016, Mr. Bran wrote to the Court, indicating that Mr. Beaulieu had given him instructions to waive that bail review.

[7] On February 17, 2016, a Pre-Trial Conference was held. Counsel advised that the matter was ready to be set for trial.

[8] On April 1, 2016, the Court received correspondence from the Crown indicating that the matter was expected to resolve without a trial, and requesting to have the matter brought forward to be spoken to in Yellowknife on April 11, 2016.

[9] On April 11, 2016, Mr. Beaulieu appeared before the Court. The Crown indicated it would file a new Indictment alleging a single count of aggravated assault naming both Marlin Shae and Daniel Jackson as victims. Mr. Beaulieu entered a plea of guilty to that count. A Pre-Sentence Report was ordered and the sentencing hearing was adjourned to June 13, 2016.

[10] At the June 13, 2016 appearance, Mr. Bran advised that he had a conflict on the matter, applied to be removed as counsel of record, and told the Court that he understood that Mr. Beaulieu's matter had been transferred to defence counsel Marissa Tordoff. Mr. Bran’s application to be removed as counsel of record was granted.

[11] Ms. Tordoff was present on June 13, 2016. She advised that she had received conflicting instructions from Mr. Beaulieu and could not act on the matter. She also said that she anticipated that Mr. Beaulieu would apply to strike the guilty plea. The matter was adjourned to June 27, 2016 so that new arrangements could be made for Mr. Beaulieu’s legal representation.

[12] On June 27, 2016, defence counsel Charles Davison appeared with Mr. Beaulieu. He confirmed that there would be an application to withdraw the guilty plea. He asked that the matter be adjourned so that he could prepare materials in support of that application.

[13] Mr. Davison filed the Application and supporting materials on August 25, 2016. The hearing was eventually set to proceed November 18, 2016. This was the earliest date the hearing could be set for, in light of the availabilities provided to the Court.

II) LEGAL FRAMEWORK

[14] Some aspects of the legal framework that governs this Application are well settled. Others are more controversial and were the subject of conflicting submissions at the hearing.

A) Features and effect of a valid guilty plea

[15] A guilty plea is a fundamentally significant step in the criminal trial process. It carries a number of serious consequences: it relieves the Crown from the burden of proving guilt beyond a reasonable doubt; it puts an end to the presumption of innocence, the right to silence, and the right to make full answer and defence. *Adgey v. The Queen* [1975] 2 S.C.R. 426; *R. v. Moser*, [2002] O.J. No.552 (Ont. S.C.), para 29.

[16] Because of those serious consequences, a guilty plea, to be valid, must have minimally sufficient characteristics to ensure that the accused's forfeiture of his or her right to trial is fair: the plea must be voluntary, informed, and unequivocal. *Moser*, *supra*, para 31. *R v Duong*, 2006 BCCA 325, Para 12; *R. v. T.(R.)*, [1992] O.J. No.1914 (Ont. C.A.), para 14.

[17] A "voluntary plea" is a "conscious volitional decision of the accused to plead guilty for reasons that the accused considers appropriate". *T.(R.)*, para 15; *R v Alec*, 2016 BCCA 282, para 72. In other words, it is a choice, a decision that an accused makes, of his or her own free will.

[18] Often, there are internal or external pressures on an accused who decides to plead guilty. These may include, for example, the advantages obtained through plea negotiations with the Crown; the desire to spare witnesses from having to testify; remorse.

[19] Not every type of pressure renders the plea involuntary. What is unacceptable is if the plea is the result of circumstances that unfairly deprived the accused of making a free choice about whether or not to go to trial. This could include pressure from the court; pressure from defence counsel; incompetence of defence counsel; cognitive impairment of the accused; emotional disintegration of the accused; the accused's faculties being impaired by drugs or medication at the time the plea is entered. *Moser*, para 33.

[20] A guilty plea must also be unequivocal. To be unequivocal, the plea must not be made in circumstances that suggest that the plea was confusing, unintended, or that the accused did not intend to admit the essential elements of the offence. *Moser*, para 32. A plea that is qualified, modified, uncertain or conditional may be an equivocal one. *Alec*, para 73.

[21] Finally, the plea must be informed. For the plea to be informed, the accused must understand the nature of the charges, the legal effects of the plea, and its consequences. Where an accused was represented by counsel at the time the plea was entered, the advice given by counsel will obviously be an important consideration in determining whether the plea was informed. The fact that an accused has prior experience with the criminal justice system is also a factor to consider. *Moser*, paras 34-35.

[22] Since the enactment of Subsection 606(1.1) and (1.2) of the *Criminal Code*, judges are required to satisfy themselves that a guilty plea is voluntary and informed before accepting it:

> 606.
>
> (...)
>
> (1.1) A court may accept a plea of guilty only if it is satisfied that the accused
> (a) is making the plea voluntarily; and
> (b) understands
> (i) that the plea is an admission of the essential elements of the offence,
> (ii) the nature and consequences of the plea, and
> iii) that the court is not bound by any agreement made between the accused and the prosecutor.
>
> (1.2) The failure of the court to fully inquire whether the conditions set out in subsection
> (1.1) are met does not affect the validity of the plea.
>
> (...)

Criminal Code, R.S.C. 1985, c. C-34, s. 606.

[23] It was well established, before the enactment of Subsection 606(1.1), that a guilty plea entered in open court by an accused who is represented by counsel was presumed to be valid. *Moser*, Para 37.

[24] The enactment of Subsections 606(1.1) and (1.2) has not altered this presumption. Arguably, it has strengthened it. If the requirements of the provision have been complied with, the presumption of validity of the plea may be more difficult to rebut because important features of what makes a guilty plea valid have been specifically canvassed, upfront, with the accused.

[25] Non-compliance with Subsection 606(1.1) does not automatically render the plea invalid: Subsection 606(1.2) makes that very clear. At the same time, the things that the court is required to satisfy itself of are essential characteristics of a valid guilty plea (that the plea is voluntary and informed). Practically speaking, it may be easier for an accused to rebut the presumption of validity of the plea if, for whatever reason, Subsection 606(1.1) was not complied with at the time the plea was offered.

[26] As such, I conclude that compliance with Subsection 606(1.1) is part of the overall circumstances that the court must consider on any application to strike a guilty plea. If the requirements of that provision are met, this gives rise to a strong presumption that the plea is valid. If they are not, depending on the circumstances, it may assist the accused in his or her attempt to rebut the presumption. But compliance with Section 606(1.1) is not determinative of the matter, and I see no reason to treat it as a distinct step in the analysis. It is simply part of what the court must examine in deciding whether a guilty plea ought to be struck.

B) Significance of Acceptance of Plea and Admission of Facts

[27] On this Application, Defence argued that no inquiry into the validity of the plea was needed because it was never formally accepted by the Court, and Mr. Beaulieu did not admit any facts.

[28] Factually, Defence is correct: there is nothing on the Court record that suggests that the Court formally accepted Mr. Beaulieu's plea or inquired about the underlying facts of the offence after the plea was offered on April 11, 2016. After Mr. Beaulieu entered his guilty plea, the sentencing hearing was adjourned by consent so that a Pre-Sentence Report could be prepared. No reference was made

to the Crown's allegations in support of the charge, and Mr. Beaulieu was not asked to admit any facts.
[29] This manner of proceeding is not at all unusual in this jurisdiction. On the contrary it is quite common for this to happen. Sometimes, facts are alleged and admitted at the time a guilty plea is entered, even when the balance of the sentencing hearing is to be adjourned to a later date. But often, if sentencing is to be adjourned, facts are not placed before the Court until the date of the sentencing hearing. Once the facts are admitted and the Court is satisfied that those facts make out the offence charged, a Conviction is formally entered. There is no such thing, in this Court, as a separate step whereby a guilty plea is "accepted" at an earlier point in the proceedings.

[30] The interpretation advocated by Defence, if correct, would mean that entering a guilty plea, in and of itself, would not have any legal consequence unless it was accompanied by some inquiry into the facts and a formal acceptance of the plea by the Court. I disagree with that interpretation, because I find it inconsistent with the overarching principles, referred to above at Paragraph 15, about the significance of a guilty plea in the context of the criminal trial process.

[31] I also find that this interpretation is inconsistent with Subsection 606(1.1). It makes no sense that Parliament would place an obligation on the court to ensure that a guilty plea meets certain basic characteristics unless the intention was for the plea itself to carry meaningful consequences.

[32] Moreover, Subsection 606(1.1) requires the court to be satisfied that the accused understands that the guilty plea represents an admission of the essential elements of the offence. It does not require the court to satisfy itself that the accused admits specific facts.

[33] When a guilty plea is entered and the Court finds that the requirements of Subsection 606(1.1) are met, this, in my view, amounts to an acceptance of the plea by the Court. At that point, the plea carries the legal consequences recognized by the jurisprudence, whether facts are admitted or not.

[34] That is not to say that the admission of facts is irrelevant to an application to strike a guilty plea. An accused who has admitted the facts and later seeks to have the plea struck may well face more of an uphill battle than one who has not admitted any facts. It depends on the circumstances of each case, and in particular, on the basis for seeking to have the plea struck.

[35] For example, if the facts have been admitted, and the accused's basis for asking to strike the plea is that he or she did not understand that the guilty plea meant admitting the essential elements of the offence, having admitted specific facts may present an additional hurdle in getting the plea struck. But if the basis for applying to strike the plea is that the accused was cognitively impaired at the time of the plea and did not actually appreciate what was happening, the admission of facts may not make any difference.

C) Burden of proof

[36] The next contentious issue that I must address is the burden of proof that applies to an application to strike a guilty plea.

[37] Aspects of this issue are well settled: allowing an accused to withdraw a guilty plea is a discretionary decision; that decision must be exercised judicially; and the onus is on the accused to establish that the plea should be struck.

[38] The nature of the onus that the accused must meet, however, is not clear at all. The approach in the case law is not uniform. In a number of cases, the issue is not addressed specifically. In the cases where the burden is addressed, it is not described in a consistent manner.

[39] In this case, the Crown argued that the accused must establish that the plea was not valid on a balance of probabilities. Defence argued that it is sufficient for the accused to raise a doubt about the validity of the plea.

[40] The Crown relies on *R v Trautman*, 2015 ABPC 189. In that case, the judge, in considering the application to strike guilty pleas, adopted the standard of balance of probabilities:

> Each guilty plea entered by Mr. Trautman is presumed to be valid. The burden is upon Mr. Trautman to prove otherwise on a balance of probabilities: Adgey v. The Queen, [1975] 2 SCR 426, 39 D.L.R. (3d) 553; R. v. Eizenga 2011 ONCA 113.

Trautman, *supra*, para 23.

[41] The two appellate cases referred to in this excerpt, *Adgey* and *Eizenga* support the proposition that the accused bears the burden on an application to strike a guilty plea. But neither specifically addresses what that burden is.

[42] The standard of balance of probabilities was endorsed by the British Columbia Court of Appeal in *R v Alec*, 2016 BCCA 282. However, the Court applied this standard in the appellate context, when the validity of a guilty plea is raised for the first time on appeal. *Alec*, para 80. It does not necessarily follow that the same standard applies when an application to strike a plea is presented to the trial court. The appellate review of a conviction appeal following a guilty plea does not engage the same principles as those that govern the exercise of discretionary powers at the trial level.

[43] As for the Defence's position, there is some support for it in *Moser*:

> While the accused carries the burden of persuading the court the plea is invalid and ought to be withdrawn, the jurisprudence is not clear as to the standard of persuasion. Some authorities advocate a balance of probabilities standard (Regina v. C.(S.), supra at para. 13; *Regina v. Thawer*, [1996] O.J. No. 989 (Prov. Div.) at para. 36 per Omatsu, J.; *Regina v. Mikalishen*, [1996] B.C.J. No. 2541 (Prov. Ct.) at para. 51 per Stansfield J.) while other cases apply a "heavy onus" or "heavy burden" hurdle for the accused (*Regina v. Dallaire*, *supra* at para. 7; *Regina v. Lamoureux* (1984), 13 C.C.C. (3d) 101 (Que. C.A.) at 106 per Rothman J.A.; *Regina v. Samms*, [1992] N.J. No. 344 (S.C.) at para. 8 per Gushue J.A. (as he then was)). While the quality of the evidence prompting the striking or withdrawal of a guilty plea cannot be speculative, suspect, or lacking in credibility and reliability, I would hesitate to place the burden of persuasion at a point threatening adjudicative fairness. Whatever the standard for appellate intervention, I am content that where a trial judge has a real doubt as to the plea's validity, the court should strike the plea and send the case to trial.

Moser, para 43.

[44] In several other cases, the onus that the accused has to meet is not described in reference to a specific burden of proof. In *R v Moore*, 2004 BCPC 560, at Paragraph 23, the Court described the onus on the accused as being "particularly difficult" when the plea was entered with the assistance of counsel. In *R v Gill*, 2014 BCSC 1150, the presiding judge did not specifically identify a standard of proof during his analysis of the matter but granted the application to strike the plea, saying that he was, on the evidence, "left with a meaningful concern" about the validity of the pleas. In *R v Rabesca*, 2015 NWTTC 05, at Paragraph 40, the Court said that the withdrawal of a guilty plea "should only be allowed in exceptional cases". This requirement “exceptional circumstances” was also adopted, in the appellate context, in *R v Staples*, 2007 BCCA 616 and *R v Hoang*, 2003 ABCA 251.

[45] Perhaps the reason for this apparent difficulty in finding a consistent articulation of the applicable burden of proof in this context stems from the nature of the inquiry. The decision to strike a guilty plea requires considering and balancing a number of factors and can present itself in a myriad of different circumstances. It does not easily lend itself to the application of "traditional" burdens of proof.

[46] Courts often have to make decisions without reference to a specific burden of proof. For example, the residual discretion to exclude evidence because its prejudicial effect outweighs its probative value is not exercised in reference to a specific burden of proof. It is an evaluative decision based on all the factors in the case. The decision on an adjournment application is another example of a discretionary, evaluative decision that is based on weighing factors, and not on whether a party has proven something. The same is true for decisions to allow the use of testimonial aids (sections 486.1 and 486.2 of the *Criminal Code*); decisions to exclude the public from the courtroom (section 486 of the *Criminal Code*); or the decision on an application pursuant to section 64 of the *Youth Criminal Justice Act*, S.C. 2002, c.1 to have a young person sentenced as an adult.

[47] A wide variety of inquiries may have a bearing in deciding whether there are valid grounds to allow an accused to withdraw a guilty plea. *Alec*, para 77. While the onus of satisfying the court that the guilty plea should be struck is on the accused, it does not come down to the accused proving anything to a specific degree. In my view, this is another example of an evaluative decision that the Court must make, based on an assessment and balancing of all the facts.

[48] I now turn to the evidence adduced on this Application, and my findings of fact.

III) ASSESSMENT OF EVIDENCE AND FINDINGS OF FACT

[49] Mr. Beaulieu and Mr. Bran testified at the hearing. They have very different accounts of key aspects of their interactions leading up to the April 11, 2016 appearance, including what happened at the meeting that took place at the courthouse that morning.

A) Mr. Beaulieu's evidence

[50] Mr. Beaulieu testified that he did not assault Mr. Shae and that while he did use force against Mr. Jackson, he did so in self-defence. Mr. Beaulieu testified he

never intended to admit any of the allegations involving Mr. Shae. He instructed Mr. Bran to offer a guilty plea to the Jackson charge in exchange for the Shae charge being dropped. He did so to get matters dealt with so he would not have to spend months on remand waiting for his trial.

[51] Mr. Beaulieu remembers Mr. Bran advising him of the Crown's counter-offer, which was to combine the two counts into one, and that the Crown would be seeking a sentence of three to four years in custody. Mr. Beaulieu agreed that Mr. Bran "probably said something along the lines" that he thought the Crown's position was reasonable and that he was going to make it a joint submission.

[52] Mr. Beaulieu testified that he did not want to agree with the counter-offer because he was not guilty of having assaulted Mr. Shae. Despite this, he told Mr. Bran, initially, that he would agree to this resolution.

[53] The Friday before the April court appearance, Mr. Beaulieu advised Mr. Bran that he no longer wanted to plead guilty to the combined count. Mr. Beaulieu testified that Mr. Bran's reaction was to tell him he was not going to help him or say anything for him in court.

[54] Mr. Beaulieu said that he met with Mr. Bran on April 11, 2016 at the courthouse, before the matter was spoken to in court. He said Mr. Bran did not explain anything about the consequences of the guilty plea. All Mr. Bran, said, according to Mr. Beaulieu, was that Mr. Beaulieu had to do what he wanted to do and that he, Mr. Bran, would not speak for him. Mr. Beaulieu also testified that he told Mr. Bran during that meeting that he did not want to plead guilty.

B) Mr. Bran's evidence

[55] Mr. Bran testified about his interactions with Mr. Beaulieu during the period of time when he was his counsel.

[56] Mr. Bran recalled entering the election at the November 3, 2015 appearance. Before that appearance, he said he reviewed the matter with Mr. Beaulieu and sought his instructions as to the election.

[57] Mr. Bran had an email exchange with Crown prosecutor Alexander Godfrey about resolving this matter. A print-out of this email exchange was made an Exhibit at the hearing.

[58] Mr. Bran confirmed that he sent an email to the Crown on March 14, 2016, offering a resolution of the matter whereby Mr. Beaulieu would plead guilty to the charge involving Mr. Shae in exchange for the Crown withdrawing the count involving Mr. Jackson. Mr. Bran testified that in his practice, he would not have put a resolution offer in writing or in an email unless he had instructions from Mr. Beaulieu to do so. He also said that before making such an offer he would have canvassed the requirements of section 606(1.1) of the *Criminal Code* with his client.

[59] The Crown responded on March 29, 2016 with the counter-offer to combine the two charges into one. Mr. Bran testified that he spoke with Mr. Beaulieu about this. He noted some hesitation in Mr. Beaulieu's acceptance of that offer. In the email Mr. Bran sent to the Crown on March 30, 2016 in response to the counter-offer, while he indicated Mr. Beaulieu had accepted the offer, he also wrote that he wanted to reconfirm his instructions with Mr. Beaulieu to make sure that Mr. Beaulieu was in agreement with this disposition of the case.

[60] Mr. Bran testified that he spoke to Mr. Beaulieu again about the proposed resolution and sent a further email to the Crown on April 1, 2016 confirming that the Crown's offer was accepted.

[61] Mr. Bran explained that the Thursday or Friday before the court appearance, Mr. Beaulieu contacted him and told him that he did not want to proceed as planned. Mr. Beaulieu was "very clear and adamant" that he did not want to plead guilty. Mr. Bran said Mr. Beaulieu may have also asked not to come to court the following Monday. Mr. Bran told Mr. Beaulieu that the appearance was scheduled and would have to take place.

[62] Mr. Bran met with Mr. Beaulieu in person at the courthouse on April 11, 2016, before the matter was called to be dealt with. Mr. Bran testified that he explained to Mr. Beaulieu that the appearance had been arranged for the purpose of entering the guilty plea but that Mr. Beaulieu did not have to plead guilty, and whatever his final instructions were, that was what they would do.

[63] Mr. Bran testified that Mr. Beaulieu instructed him during that meeting that he wanted to accept the Crown's offer and plead guilty. Mr. Bran satisfied himself that Mr. Beaulieu's plea was voluntary and informed. He was especially careful, he said, given that Mr. Beaulieu had made it clear, a few days before, that he did not want to plead guilty.

[64] Mr. Bran said that in his experience as a defence counsel, it is not uncommon for people to hesitate or vacillate about whether they will plead guilty. He testified that he does not assist someone entering a guilty plea unless he is satisfied that the person is prepared to admit that they are guilty and prepared to acknowledge that they committed the offence they are pleading guilty to.

[65] In cross-examination, Mr. Bran was asked about a memo that he had prepared outlining his involvement with Mr. Beaulieu. This memo was not made an exhibit at the hearing but was referred to on a few occasions. Mr. Bran confirmed that he wrote this memo on August 20, 2016, from memory and from any notes or emails he had on his file. He did not remember if he actually had any notes. He was shown a piece of paper which he acknowledged was in his handwriting. The document was marked as Exhibit D. It has the words "Crown position", "Bail review/hearing", and the words "Jan 2016" written on it. It does not constitute detailed notes of anything.

[66] Mr. Bran confirmed that all his dealings with Mr. Beaulieu, before April 11, 2016, had been by telephone because Mr. Beaulieu had been incarcerated in Fort Smith and was transferred to Yellowknife very shortly before his court appearance.

[67] Mr. Bran acknowledged that Mr. Beaulieu had expressed from the start that he wanted to have his trial as quickly as possible. He was asked about some of the processes that took place on this matter after the November 3, 2015 appearance. He acknowledged that he received a letter dated November 18, 2015 from the Court, asking that he provide his availabilities for a Pre-Trial Conference within 30 days.
The Court's records show that when the pending Supreme Court list was spoken to at List Scheduling on December 11, 2015 the Court noted that dates were needed so that a Pre-Trial Conference could be scheduled. Mr. Bran acknowledged that he provided those availabilities to the Court on January 18, 2016, approximately one month later than the deadline set out in the letter from the registry.

[68] Mr. Bran acknowledged that at the conclusion of the Pre-Trial Conference held on February 17, 2016, counsel were asked to send in their available dates for trial. The Crown sent its dates in on February 19, 2016.

[69] The Court's records show that at List Scheduling on February 26, 2016, the presiding judge noted that Mr. Beaulieu was in custody, that Crown dates had been sent in and that dates were needed from Defence. The presiding judge directed that Defence's dates be submitted by March 11, 2016. Mr. Bran acknowledged that he only sent his dates to the registry on March 29, 2016. He also agreed that delays

in providing availabilities to the Court necessarily result in delays in trial dates getting set.

[70] Mr. Bran was asked several questions about the origin of the resolution proposal that he sent to the Crown in his March 14, 2016 email, and specifically, why the proposal was to have Mr. Beaulieu plead guilty to the charge involving Mr. Shae and withdraw the other charge, and not the other way around. Mr. Bran maintained that any resolution offer he put in writing to the Crown would have been based on instructions received from his client.

[71] When he was asked whether it was possible he received instructions from Mr. Beaulieu of a more general nature, as opposed to specific instructions to offer a guilty plea to the Shae count, Mr. Bran answered:

> My practice is that, if I'm going to put something in writing, those are going to be my instructions. So given that I put that in writing to the Crown prosecutor, those would have been the instructions I had. Is it possible that the instructions more general? It's poss... - - it's - - obviously it's a possibility but my practice is I'm not putting something in writing unless those are my instructions.

Transcript of Evidence at Application to Withdraw Guilty Plea, p.102, lines 8-16.

[72] Mr. Bran was asked if it was possible he formulated his resolution proposal working from memory of a conversation he had with Mr. Beaulieu during the week of March 7, 2016. He answered:

> I either worked straight from memory or if I had any notes that I would have had on my desk, I would have referred to any of those notes, but most likely, because of the quick turnaround, it was probably from memory.

Transcript of Evidence at Application to Withdraw Guilty Plea, p.103, lines 7-11.

[73] It was then suggested to Mr. Bran that given that he was working from memory, it was possible that Mr. Beaulieu had instructed him to offer a plea to the charge involving Mr. Jackson, not the charge involving Mr. Shae. Mr. Bran answered "Certainly, it's possible". This is somewhat inconsistent with an answer he gave to a similar question during his Examination in Chief: he had been asked if there was any possibility that he confused the two assaults and had answered “I

don’t believe so”. *Transcript of Evidence at Application to Withdraw Guilty Plea*, p.69, lines 6-8; p.103, lines 13-21.

[74] Mr. Bran conceded that it was "a little frustrating" that Mr. Beaulieu was changing his position back and forth between wanting to accept the Crown offer and not wanting to accept the Crown offer. He also said that it was not uncommon in his practice and did not present any particular difficulty from him. He was prepared to deal with the matter and assist Mr. Beaulieu whether Mr. Beaulieu decided to accept the Crown’s offer or not.

[75] Mr. Bran testified he had always found Mr. Beaulieu easy to deal with. They had good discussions. He never had any negative interactions with him. Mr. Beaulieu's instructions were clear: when he wanted to resolve the matter and accept the resolution proposal, he was clear; when he contacted Mr. Bran to say he did not want to resolve matters in that fashion, he was clear.

[76] As far as their discussion before Court on April 11, 2016, Mr. Bran acknowledged that he has no notes of that conversation. He said that he felt he did not need to take notes because Mr. Beaulieu was very clear about what he wanted to do that day. Mr. Bran testified that he went over everything carefully with Mr. Beaulieu and that he was "probably quite repetitive" in explaining things to Mr. Beaulieu because he wanted to be make sure that Mr. Beaulieu really did want to plead guilty. Mr. Bran was especially careful because Mr. Beaulieu's position had changed over the course of the previous weeks.

C) Assessment of the evidence

[77] As noted above, the evidence of Mr. Beaulieu and Mr. Bran is very contradictory in many key respects. I considered this evidence carefully in making findings of fact on this Application.

[78] I found that there were several problems with Mr. Beaulieu's testimony. There were internal inconsistencies in his evidence at the hearing. There were also aspects of his testimony that were inconsistent with his own Affidavit and with the Agreed Statement of Facts.

[79] For example, Mr. Beaulieu testified that before he had his discussions with Ms. Tordoff, no one had explained to him that pleading guilty meant admitting the essential elements of the offence. That is inconsistent with what Mr. Beaulieu deposed to in his Affidavit when he explained why he told Ms. Tordoff he would admit the allegations:

> From everything I had been told by my lawyers I knew she could not help me unless I told her I was admitting those things, so I told her I was making those admissions. However, I only did this so the matter could be ended more quickly.

Affidavit of William Beaulieu, Paragraph 17.

[80] There were also inconsistencies in Mr. Beaulieu's evidence about how many times he asked Mr. Bran about what would happen if witnesses did not attend court. In the first part of cross-examination, he acknowledged having asked Mr. Bran on a few separate occasions. But later in the cross-examination he retracted this, saying he only asked about this once.

[81] Mr. Beaulieu's evidence was also inconsistent on a matter central to this Application, namely, the reason why he entered the guilty plea on April 11, 2016. In his Affidavit, he deposes that his reason for pleading guilty was a mix of not wanting to wait 8 to 10 months for a trial to be held, and feeling intimidated and pressured. Mr. Beaulieu reiterated these things, at one point, in his testimony at the hearing. But he later added an entirely different explanation for why he entered the plea. He said:

> (...) we came into this room and I made that guilty plea without realizing what I was doing 'cause I felt sort of pressured because I stole Mr. Bran's best friend's truck in 2013 where I was convicted on my criminal record.

Transcript of Evidence at Application to Withdraw Guilty Plea, p.14, lines 18-22.

[82] I found this aspect of Mr. Beaulieu’s evidence interesting for two reasons. First, Mr. Beaulieu has considerable experience with the criminal justice system. He has a lengthy criminal record. He acknowledged that he has had, in the past, cases where he pleaded guilty; cases where he pleaded not guilty, had a trial, and was convicted; cases where he pleaded not guilty, had a trial, and was acquitted; cases where he pleaded not guilty initially and later changed his plea to guilty. I find it difficult to accept that he could plead guilty or "without realizing what he was doing".

[83] Second, the evidence about when Mr. Beaulieu formed the view that Mr. Bran had a conflict is unclear. Mr. Beaulieu was asked when he realized Mr. Bran might have a conflict and should not represent him. First, he answered that he found out in 2013, when Mr. Bran stood up in court and said he could not act for Mr. Beaulieu on a theft charge because the complainant was Mr. Bran's friend.

When he was asked more questions about this Mr. Beaulieu said he had forgotten about it and was reminded of the issue by his girlfriend.

[84] Mr. Bran testified he was contacted by Legal Aid about this a few weeks or maybe a month after the guilty plea was entered. The Agreed Statement of Facts states that Ms. Tordoff was asked to appear with Mr. Beaulieu at the June appearance and spoke to him in preparation for this on May 31st, 2016.

[85] Mr. Beaulieu testified his girlfriend reminded him of the conflict about seven months after his arrest. Mr. Beaulieu was arrested in early October. If that timeline is correct, it means he was reminded of the conflict in May. This appears consistent with Mr. Bran's evidence about when he first heard about this problem and with the timing of Ms. Tordoff becoming involved with the matter.

[86] On the whole, the evidence suggests that Mr. Beaulieu formed his concerns about Mr. Bran's possible conflict after the April 11, 2016 court appearance. If that is the case, the potential conflict could not, contrary to what Mr. Beaulieu testified to, have had a bearing on his state of mind when he entered the plea.

[87] Aside from the timing issue, it is significant that Mr. Beaulieu's Affidavit makes no reference whatsoever to the conflict issue. Rather, Mr. Beaulieu deposed that the reason why he pleaded guilty was that he felt pressured and intimidated because Mr. Bran had said he would not speak for him and because of how long he would have to wait for trial.

[88] For those reasons, I have great difficulty accepting that this potential conflict issue had any bearing on Mr. Beaulieu's guilty plea.

[89] As for what took place between Mr. Bran and Mr. Beaulieu leading up to the April 11, 2016 appearance, I accept that one aspect of the inconsistency between their versions of events could be the product of a misunderstanding: it is conceivable that if Mr. Bran told Mr. Beaulieu that Mr. Beaulieu would have to tell the Court himself what he wanted to do and enter his plea himself, Mr. Beaulieu could have misinterpreted that as meaning that Mr. Bran would not speak for him or assist him at all.

[90] Still, other crucial aspects of their evidence are entirely irreconcilable. Mr. Bran said he went over everything with Mr. Beaulieu in their meeting at the courthouse, and that he was especially careful to make sure Mr. Beaulieu really did want to plead guilty, given that Mr. Beaulieu had a few days earlier said that he did

not want to plead guilty. Mr. Bran testified that he told Mr. Beaulieu they would do whatever he wanted. By contrast Mr. Beaulieu testified that Mr. Bran did not explain anything to him. And, very significantly, Mr. Beaulieu said that his instructions to Mr. Bran were that he did not want to plead guilty.

[91] The differences between these witnesses' testimonies go far beyond what can be considered a misunderstanding or miscommunication. On Mr. Beaulieu's version of events, not only did Mr. Bran not discharge his professional duties in explaining the nature and consequences of a guilty plea to him, but he acted contrary to instructions.

[92] For the reasons I already outlined, I found there were significant problems with Mr. Beaulieu's credibility. While Mr. Bran's evidence was not perfect, I found his evidence about his dealings with Mr. Beaulieu entirely credible and unshaken in cross-examination.

[93] Some of the evidence adduced at the hearing disclosed aspects of Mr. Bran's practice that could be improved. He readily acknowledged that he did not provide his availabilities for the Pre-Trial Conference, and for trial, within the timelines that had been set by the Court. He acknowledged that it was possible that in the email he sent to the Crown setting out a proposed resolution of the matter, he mixed up the two counts and proposed that Mr. Beaulieu plead guilty to the Shae assault whereas Mr. Beaulieu had instructed him to offer a plea to the Jackson assault. Mr. Bran does not appear to have kept detailed notes of his discussions with Mr. Beaulieu, and in particular, of the instructions he received at different times.

[94] But file management and best practices are one thing, and outright dishonesty quite another. Mr. Bran swore that he at all times acted on Mr. Beaulieu's instructions. He had no reason to act against instructions on this matter. I do not accept that he did. I do not find Mr. Beaulieu's evidence about his interactions with Mr. Bran that day credible at all.

[95] I do not accept that Mr. Bran acted against Mr. Beaulieu's instructions on April 11, 2016, entered a guilty plea contrary to Mr. Beaulieu's wishes, misled the Court about having satisfied himself that the requirements of Section 606(1.1) had been met, and lied about those matters in his testimony at the hearing of this Application. There is no reason why Mr. Bran would do any of this. There is no reason why he would enter a plea of guilty on Mr. Beaulieu's behalf against Mr. Beaulieu's will. As Mr. Bran noted, accused persons sometimes change their

minds about what they want to do on a case. It would have been very simple for Mr. Bran to advise the Court on April 11, 2016, that the agreement that had been reached with the Crown had fallen through and that the matters needed to be scheduled for trial.

[96] Clearly, Mr. Beaulieu changed his mind a number of times about how he wanted to deal with this case, both before and after the guilty plea was entered. It is undisputed that initially he instructed Mr. Bran to accept the Crown's offer, and changed those instructions the week before the April 11, 2016 appearance. It is also undisputed that after Ms. Tordoff took over, Mr. Beaulieu changed his mind back and forth about what he wanted to do.

[97] Of course, what happened between Mr. Beaulieu and Ms. Tordoff does have any bearing on the validity of a plea entered before she became involved in this matter. But I find the admitted facts about their interactions relevant in two ways.

[98] First, it confirms that Mr. Beaulieu was prone to changing his mind about what he wanted to do with this case. This was not something that happened only in his dealings with Mr. Bran.

[99] Second, the interactions with Ms. Tordoff are helpful in assessing the credibility of Mr. Beaulieu's assertions about his state of mind about feeling intimidated and pressured when he entered his plea.

[100] What I mean is that in his dealings with Ms. Tordoff, Mr. Beaulieu had no difficulty telling her what he wanted to do. He gave her clear instructions not to attempt to have the plea struck. He then changed his mind completely the next day, and communicated this to her in the clearest of terms. He had no qualms about telling her what he wanted to do.

[101] This suggests Mr. Beaulieu was engaged in his case, and quite capable of voicing his views. That is very consistent with how Mr. Bran described him: a client who asked questions and provided clear instructions, even though these instructions changed at different points in the process.

[102] For those reasons, I reject Mr. Beaulieu's version about his interactions with Mr. Bran in the days leading up to the April 11, 2016 court appearance and the morning of that court appearance. I accept Mr. Bran's evidence as to how the meeting at the courthouse unfolded. I accept that the instructions Mr. Bran received from Mr. Beaulieu, that morning, were that Mr. Beaulieu wanted to plead

guilty. I find that Mr. Bran explained to Mr. Beaulieu what the consequences of that plea were, and satisfied himself that pleading guilty was what Mr. Beaulieu wanted to do that morning.

[103] I now turn, in light of my findings of fact, to the things that, in Defence's submissions, compromised the voluntariness of Mr. Beaulieu's guilty plea.

[104] The first, Defence argues, was delay. Mr. Beaulieu wanted this matter dealt with quickly and there were delays in the process, caused by Mr. Bran's failure to send his available dates to the Court in a timely fashion.

[105] It goes without saying that counsel should, as a matter of course, send in availabilities and other information that the Court requires in a timely fashion. It goes without saying that counsel should respect timelines that are set by the Court. Aside from this being a duty owed by officers of the Court, the reality is that without this information, trial dates simply cannot be scheduled. Delays are always a concern but are a particular concern for accused persons who are in pre-trial custody.

[106] The additional delay arising from Mr. Bran's failure to provide his availabilities to the Court when he should have was unfortunate. But I do not find that it was so inordinate as to vitiate the voluntariness of Mr. Beaulieu's plea.

[107] Defence argues that the voluntariness of the plea was also compromised by the nature of Mr. Beaulieu's relationship with Mr. Bran. There are two components to this: the first is Mr. Beaulieu's perception that Mr. Bran was in a situation of conflict of interest, and the second is Mr. Beaulieu's assertion that he was, or thought he was "abandoned" by Mr. Bran just before the April 11, 2016 court appearance.

[108] On the conflict issue, it is important to note that Defence does not take the position on this Application that Mr. Bran actually had a conflict on this case. But Defence argues Mr. Beaulieu's perception that there was a conflict had an impact on his relationship with Mr. Bran and his ability to make a true choice about his plea.

[109] As I mentioned already, the timing of Mr. Beaulieu becoming aware of the potential conflict issue is far from clear. I have difficulty accepting that this issue came to Mr. Beaulieu's attention before he entered the plea. The balance of the

evidence suggests that it was some time afterwards that Mr. Beaulieu became aware of this.

[110] But in any event, I am not satisfied this was a factor that compromised the voluntariness of the plea. Mr. Beaulieu raised this issue with Legal Aid. Clearly, he was able to assert his concerns. Even if he remembered the 2013 Fort Smith case before he entered his plea, I am not satisfied it deprived him of his ability to make a true choice about how to plead.

[111] As for what transpired between Mr. Beaulieu and Mr. Bran immediately before the April 11, 2016 court appearance, given my findings of fact, there is no basis to conclude that Mr. Beaulieu was abandoned by his counsel, or that Mr. Beaulieu could have believed he was abandoned by his counsel such that it deprived him of an ability to make a true choice about whether to plead guilty.

[112] The third factor the Defence raises is the extent to which Mr. Beaulieu was prepared to admit the essential elements of the assault against Mr. Shae. Defence relies on Mr. Beaulieu's evidence that he never intended to admit the elements of that offence and that the plea resolution offer sent to the Crown by Mr. Bran was actually not in line with Mr. Beaulieu's instructions.

[113] Even assuming that Mr. Bran confused which count Mr. Beaulieu was initially prepared to plead guilty to, this has no bearing on this Application. Ultimately, the plea was entered, in accordance with the Crown's counter-offer, to the combined count. As I have already said, I am satisfied that before that occurred, Mr. Bran did ensure, as he testified to, that Mr. Beaulieu understood that pleading guilty to the combined count meant admitting the essential elements of the assaults against both Mr. Shae and Mr. Jackson. Mr. Bran was very clear that he would not assist someone in pleading guilty unless he was satisfied that the person understands what they are admitting to and are actually prepared to admit those things. As I have already indicated, I accept his evidence in that regard.

IV) CONCLUSION

[114] Section 606(1.1) was complied with in this case. This gives rise to a strong presumption that the guilty plea was valid. Even aside from that presumption, in my view, the evidence adduced at this Application positively establishes that the guilty plea entered on April 11, 2016 was voluntary, unequivocal and informed.

[115] Mr. Beaulieu has some experience with the criminal justice system. He was engaged in this matter. He weighed his options. He asked his lawyer questions

about what would happen if witnesses did not show up at trial. He considered the information his counsel gave him about the amount of time he would have to wait before he could have a trial.

[116] He instructed his counsel to enter into plea negotiations with the Crown. He hoped to plead to one count and have the other withdrawn. The counter-offer he received was to plead to one count, but one that would name both complainants. He was told what the Crown's sentencing position would be if he accepted this offer. By pleading to only one count, and given the sentencing position the Crown was prepared to take, Mr. Beaulieu's jeopardy was significantly reduced by accepting this offer. He knew that.

[117] Clearly, there was some pressure on Mr. Beaulieu at the time he had to decide how to plead. Any accused who has to decide whether to give up the right to have a trial is under some degree of pressure. But in my view, the evidence on this Application does not establish that Mr. Beaulieu, in the words of the Court in *Moser*, was "deprived of making a free choice about whether or not to go to trial".

[118] I conclude that Mr. Beaulieu made a free, voluntary and informed decision on April 11, 2016. He may well have later regretted this decision, and still regret it. But that is not a reason to strike a guilty plea that is otherwise valid. On the whole of the evidence, I am not satisfied that Mr. Beaulieu has demonstrated that his guilty plea should be struck.

[119] The Application to strike the guilty plea is dismissed.

L.A. Charbonneau
J.S.C.

Dated in Yellowknife, NT this
23rd day of March, 2017

Counsel for the Applicant: Brendan Green
Counsel for the Respondent: Charles Davison

S 1 CR 2015 000 131

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

-and-

WILLIAM BEAULIEU

MEMORANDUM OF JUDGMENT
(APPLICATION TO STRIKE GUILTY PLEA)
OF THE HONOURABLE JUSTICE
L.A. CHARBONNEAU