

**AMENDED ORIGINAL**

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

**IN THE MATTER OF:**

**HER MAJESTY THE QUEEN**

**-v-**

**LEVI CAYEN**

**Transcript of the Decisions delivered by the Honourable Justice S. H. Smallwood, sitting in Yellowknife, in the Northwest Territories, on the 10th day of July, 2020.**

**APPEARANCES:**

<b>A. Piche</b>	<b>Counsel for the Crown</b>
<b>D. Praught:</b>	<b>Counsel for the Crown</b>
<b>S. Straub</b>	<b>Counsel for the Crown</b>
<b>S. Delli-Fraine</b>	<b>Counsel for the Crown</b>
<b>A. Regel:</b>	<b>Counsel for the Accused</b>
<b>T. Pham:</b>	<b>Independent Counsel</b>

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Charges under s. 235(1) and 344 of the *Criminal Code*

**There is a ban on the publication, broadcast or transmission of the evidence taken, the information given, or the representations made and the reasons for decision until such time as the trial has concluded pursuant to s. 517 of the *Criminal Code*.**

**ORIGINAL amended as of September 14<sup>th</sup>, 2020:  
Page 10, line 4 changed from "possession" to "position"**

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1           **(TELECONFERENCING COMMENCES)**

2           **(VIDEOCONFERENCING COMMENCES)**

3           **(DECISION RE ROLE OF INDEPENDENT COUNSEL)**

4           THE COURT           Okay. So I will start with the decision  
5                                   with respect to the role of independent counsel.

6                                   So on March 13, 2020, I ruled on the  
7                                   issue of the conflict of interest of Mr. Regel in  
8                                   representing the accused given that he had previously  
9                                   represented a Crown witness, Mr. Norwegian, who is  
10                                  also the deceased's father. I do not intend to repeat my  
11                                  ruling. It can be found at 2020 NWTSC 10.

12                                 Following my ruling that there was a  
13                                 conflict of interest, I appointed independent counsel to  
14                                 conduct the cross-examination of Mr. Norwegian, and I  
15                                 imposed several conditions to the continued  
16                                 representation of Mr. Cayen by Mr. Regel. Those  
17                                 conditions were intended to have the effect of isolating  
18                                 Mr. Regel from the portion of the case involving Mr.  
19                                 Norwegian.

20                                 So the conditions were that:

- 21                                 • If Mr. Regel has any information in his control or  
22                                    possession related to his representation of Mr.  
23                                    Norwegian, that information will be sealed;
- 24                                 • Mr. Regel will not provide any person with confidential  
25                                    information related to Mr. Norwegian;
- 26                                 • If Mr. Norwegian testifies at trial, Mr. Regel will not be  
27                                    present in the courtroom during his testimony;

- 1 • Mr. Regel will not be involved in any way with the cross-
- 2 examination of Mr. Norwegian;
- 3 • Independent counsel will be appointed to conduct the
- 4 cross-examination of Mr. Norwegian and will be
- 5 retained specifically for that purpose;
- 6 • Mr. Regel can discuss the defence strategy generally
- 7 with independent counsel but will not instruct the
- 8 independent counsel regarding the cross-examination
- 9 of Mr. Norwegian;
- 10 • Mr. Regel will not be involved in the preparation or
- 11 delivery of any submissions concerning Mr. Norwegian;
- 12 • To the extent that Mr. Regel wishes to challenge Mr.
- 13 Norwegian's evidence in any way including in the
- 14 defence opening, the calling of witnesses to contradict
- 15 Mr. Norwegian's evidence or commenting on Mr.
- 16 Norwegian's evidence in closing submissions, such
- 17 challenge will be conducted by independent counsel;
- 18 • Mr. Cayen will be required to consult with independent
- 19 legal counsel to determine if he is prepared to continue
- 20 to have Mr. Regel represent him on these terms.

21 Following my ruling, Mr. Cayen received

22 independent legal advice and confirmed that he

23 continued to want Mr. Regel to represent him. Mr.

24 Pham was appointed independent counsel for the

25 purpose of dealing with Mr. Norwegian's evidence.

26 Later, when dealing with other issues, the issue of Mr.

27 Pham's involvement became an issue.

1                               Following his appointment as  
2                               independent counsel, Legal Aid offered Mr. Pham the  
3                               role of second chair representing the accused. Mr.  
4                               Pham takes no position on this application and is  
5                               prepared to fill any role the Court feels is appropriate.

6                               The Crown has raised concerns that  
7                               allowing Mr. Pham to become a full member of the  
8                               defence team is incompatible with the Court's ruling and  
9                               would undermine the protective measures put in place.

10                              The defence has expressed concerns  
11                              regarding the defence appearing bifurcated given that  
12                              Mr. Pham would only be involved in the defence in a  
13                              limited way and how that might appear to the jury.

14                              When I ruled that independent counsel  
15                              be appointment to deal with Mr. Norwegian's evidence,  
16                              I was concerned that it was not the most ideal option  
17                              given that there could be still a lingering concern that  
18                              confidential information could still be misused in other  
19                              ways or that confidential information could not be  
20                              adequately isolated without sacrificing an element of the  
21                              accused's defence. However, I felt that it was the best  
22                              solution in the circumstances given that there were also  
23                              compelling reasons to permit Mr. Regel to continue as  
24                              counsel.

25                              To allow independent counsel to become  
26                              a member of the defence team would mean that that  
27                              counsel is no longer independent. It is incompatible

1 with my previous ruling. It immediately raises concerns  
2 about the misuse of confidential information. It would  
3 greatly increase the risk that a reasonable member of  
4 the public would conclude that there was a risk that  
5 confidential information given by Mr. Norwegian to Mr.  
6 Regel could be used at the accused's trial.

7 Mr. Pham's role will continue as  
8 independent counsel and will remain subject to the  
9 conditions that I have previously imposed. With respect  
10 to the defence's concerns about Mr. Pham's role and  
11 how it would appear to the jury, this can be addressed  
12 in my opening remarks to the jury, in a mid-trial  
13 instruction, and in my final remarks to the jury. Mr.  
14 Pham's role will obviously have to be explained so that  
15 the jury is not under any misapprehension with respect  
16 to it and that they do not draw improper inferences from  
17 his involvement in the case.

18 As well, Mr. Regel's absence during  
19 cross-examination of Mr. Norwegian, and the other  
20 conditions to an extent, will also have to be addressed  
21 with the jury, and I think that providing those remarks to  
22 the jury will allay any concerns that the defence should  
23 have with respect to how the defence appears.

**24 (DECISION RE RESILING FROM ADMISSION AS TO**  
**25 VOLUNTARINESS OF STATEMENTS)**

26 Okay. So turning now to the ruling with  
27 respect to resiling from the admission as to the

1 voluntariness of Mr. Cayen's statements. So this  
2 application arises from the waiver of the *voir dire* into  
3 the voluntariness of the accused's statements to the  
4 police. The accused, Levi Cayen, seeks to reopen the  
5 *voir dire* into the admissibility of the statements.

6 Mr. Cayen is charged with first-degree  
7 murder contrary to s. 235(1) of the *Criminal Code* and  
8 robbery contrary to s. 344 of the *Criminal Code*. It is  
9 alleged that he robbed and murdered Alexander  
10 Norwegian on December 27, 2017. During the  
11 investigation, Mr. Cayen provided statements to the  
12 police. He provided a witness statement on January 1,  
13 2018, that was audio recorded. Following his arrest on  
14 January 3, 2018, he provided warned cautioned  
15 statements to the police on January 3 and 4, 2018  
16 which were audio and video recorded.

17 The matter was set for trial in January  
18 2020. A *voir dire* into the voluntariness of Mr. Cayen's  
19 statements to the police was set for the week of  
20 October 7, 2019. On October 10, 2019, Mr. Cayen's  
21 then lawyer, Evan McIntyre, confirmed in court that all  
22 three statements to the police by Mr. Cayen were  
23 "voluntary within the meaning of the common law and  
24 admissible at trial." The Court had been advised of this  
25 development in advance, and the court also adjourned  
26 that morning for the accused to speak to his lawyer  
27 before this admission was confirmed on the record.

1                                    On November 18, 2019, Mr. Cayen fired  
2                                    his lawyer and subsequently retained Mr. Regel. Mr.  
3                                    Regel advised the Court that the accused now wished  
4                                    to have a *voir dire* into the voluntariness of the  
5                                    statements which precipitated this application. The  
6                                    issue is then whether the Court should allow the  
7                                    accused to resile from his admission of voluntariness of  
8                                    the statements he gave to the police and reopen the  
9                                    *voir dire*.

10                                    The accused filed an affidavit on this  
11                                    application and his application for a change of venue.  
12                                    The affidavit mainly addresses the accused's concerns  
13                                    with respect to the venue of the trial. The only  
14                                    reference to the statements and the admission that was  
15                                    made is contained in paragraph 18 of his affidavit which  
16                                    states:

17                                    I believe the circumstances and manner in which  
18                                    the police obtained the statements from me was  
19                                    unfair, and I would like to dispute the  
20                                    admissibility of any statements I made to the  
21                                    police or to the RCMP when the trial is  
22                                    rescheduled.

23                                    At the time the accused made the  
24                                    admissions, he was represented by experienced  
25                                    defence counsel who had clearly discussed the matter  
26                                    with the accused. Court was adjourned for a period of  
27                                    time to allow Mr. McIntyre to discuss the issue with the



1 accused before the admission was confirmed on the  
2 record. The accused has provided no explanation  
3 regarding the circumstances in which he previously  
4 admitted the voluntariness of the statements or what  
5 has prompted this change. The evidentiary basis for  
6 this change of mind is thin. The only justification is that  
7 the accused wants to dispute the admissibility of the  
8 statements.

9 The accused's complaint about the  
10 voluntariness of the statements, according to his  
11 affidavit, is that they were unfairly obtained. Defence  
12 counsel says that in the statement the accused says a  
13 number of times that he does not want to say anything  
14 which is ignored, and he is interrogated for  
15 approximately six hours, and that a police officer of a  
16 similar cultural background was used to win the  
17 accused over. Whether any of these claims would raise  
18 a doubt about the voluntariness of the statements has  
19 not been determined. Whether the accused's will was  
20 overborne when he provided the statement to the police  
21 is an issue which can raise a reasonable doubt about  
22 the voluntariness of the statements.

23 Counsel agree that the Court has the  
24 authority to reopen the *voir dire*. It is a discretionary  
25 decision to permit the accused to withdraw his  
26 admissions. The test has been stated as being whether  
27 the interests of justice require that the accused be

1 permitted to withdraw the admission. Factors to  
2 consider are whether the admissions were made as a  
3 tactic or part of a trial strategy and whether the accused  
4 received a benefit in exchange for the admissions,  
5 whether the admissions were made by mistake or as a  
6 result of a misunderstanding and whether counsel had  
7 the authority to make the admissions: *R. v.*  
8 *Montgomery*, 2014 BCSC 222 at paragraph 10.

9 The Crown argues that the Court should  
10 not exercise its discretion to allow the defence to resile  
11 from the admission unless evidence is brought by the  
12 accused showing that the admission was made by  
13 mistake or a misunderstanding. The Crown argues that  
14 there is no evidence of mistake or misunderstanding  
15 and that all the accused has asserted is that the  
16 statements were unfairly obtained.

17 The defence argues that soon after the  
18 *voir dire* was waived previous counsel was dismissed  
19 and new counsel immediately advised that a *voir dire*  
20 would be required, it would unfairly limit the defence to  
21 be bound by the tactics of previous counsel, and the  
22 defence argues that this will not unduly delay the trial,  
23 and the Crown can still proceed and have the  
24 statements ruled admissible in a *voir dire*.

25 While there is no evidence that this  
26 admission was made pursuant to a mistake or a  
27 misunderstanding, that is not the only consideration. In

1 this case, the trial date has not been set. Given the  
2 issues with conducting jury trials during the pandemic, it  
3 is not likely to be set until sometime in 2021. So this  
4 issue will not delay the trial, that is a consideration.  
5 Were this application were brought very close to the  
6 trial date or during the trial, this would be a significant  
7 factor in my decision.

8 The admission of voluntariness is an  
9 admission that is somewhat different than an admission  
10 of fact pursuant to s. 655 of the *Criminal Code* which  
11 occurred in some of the cases that were provided by  
12 the Crown. For example, it is not an admission  
13 regarding date or time or jurisdiction but it is an  
14 admission that involves a legal conclusion. As the  
15 Crown stated, this, in my view, provides the Court with  
16 a broader discretion than if Mr. Cayen was seeking to  
17 resile from a purely factual admission.

18 Both counsel referred to the issue of trial  
19 fairness in their submissions, and that is a valid concern  
20 for each party. It is a matter of fundamental trial  
21 fairness that the Crown and the defence should be held  
22 to their clearly stated positions. It is a concern that the  
23 accused may seek to change his mind about other  
24 agreements which could cause further delay to this  
25 already delayed trial. The accused is also facing  
26 serious charges, and the statements he provided to the  
27 police are potentially significant evidence against him.

1 I have considered all of these factors, and  
2 I am going to allow the accused to withdraw his  
3 admission of the voluntariness of the statements made  
4 to the police. The Crown is still in a **position** to  
5 pursue the admissibility of the statements and holding a  
6 *voir dire* in the next few months will not delay the trial.

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1           **CERTIFICATE OF TRANSCRIPT**

2           Neesons, the undersigned, hereby certify that the foregoing  
3           pages are a complete and accurate transcript of the  
4           proceedings transcribed from the audio recording to the best  
5           of our skill and ability. Judicial amendments have been  
6           applied to this transcript.

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9           Dated at the City of Toronto, in the Province of Ontario, this  
10          7th day of August, 2020.

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Kim Neeson

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Principal

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