

R. v. Beaulieu, 2023 NWTTC 12

Date: 2023 12 01
File: T-1-CR-2023-000619

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HIS MAJESTY THE KING

- and -

RYAN BEAULIEU

REASONS FOR JUDGMENT
of the
HONOURABLE CHIEF JUDGE ROBERT GORIN

Heard at: Yellowknife, Northwest Territories

Date of Decision: December 1, 2023

Counsel for the Crown: Nakita McFadden & Brendan Green

Counsel for the Accused: Charles Davison

[S. 5(2) of the *Controlled Drugs and Substances Act* and other related charges]

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HIS MAJESTY THE KING

- and -

RYAN BEAULIEU

INTRODUCTION

[1] Ryan Beaulieu is charged with possessing fentanyl for the purpose of trafficking contrary to s. 5(2) of the *Controlled Drugs and Substances Act*, on April 3rd of this year. He is further charged with two other offences arising from the same circumstances, possession of cannabis for the purpose of unauthorized distribution contrary to s. 9(2) of the *Cannabis Distribution Act*, and possessing cannabis and fentanyl at a correctional center contrary to s. 60(3) of the *Corrections Act*.

[2] While the accused was being admitted to the North Slave Correctional Centre (“NSCC”) it was discovered that he had secreted 29 grams of fentanyl and 13 grams of cannabis within his body in separate balloons. At issue is whether the Crown has proven beyond a reasonable doubt that certain statements Mr. Beaulieu made to prison officers during that time were voluntary and therefore admissible as evidence against him. The statements the Crown seeks to adduce are: the accused’s denial that he had drugs or contraband on or in his person; his identification of the substance he possessed as fentanyl (or carfentanyl); and that he did not want to be charged.

[3] It is uncontested by the Crown that the corrections officers were persons in authority and that voluntariness must be established before the statements made to them are admissible. I agree with this assessment.

[4] After making the statements that are in issue, Mr. Beaulieu was transported to the local hospital by ambulance for his own safety. In responding to a question about what the substance he had possessed was, Mr. Beaulieu answered that it had been heroin. Defence counsel concedes that the medical personnel were not persons in authority and that therefore voluntariness need not be proven in order for that particular statement to be admissible. Once again, I agree; see *R. v. Butcher*, 2018 NSCC 76, paras. 93 - 97.

[5] After examining the evidence concerning what occurred before and during the time that Mr. Beaulieu was at NSCC and also considering the submissions of counsel, I have concluded that the Crown has not proven to the requisite standard that the statements Mr. Beaulieu made while at NSCC were voluntary. In particular, the Crown has failed to prove that the statements were the product of an operating mind. The reasons for my conclusions follow.

FACTS

[6] I will very briefly review the facts established by the evidence that the Crown presented during this voir dire. Six days before the police transported him to NSCC in Yellowknife, the police had arrested Mr. Beaulieu on charges unrelated to those presently before the court. From that time until being taken to NSCC he remained in police cells outside of Yellowknife. On the date of his initial arrest, he received the standard police cautions and s. 10(b) Charter warning as well. On that date the police cautioned him on two different occasions several hours apart. He is unable to remember being cautioned. Two days following his arrest he consulted a lawyer.

[7] I heard evidence that when Mr. Beaulieu was being admitted to NSCC a questionnaire was conducted by NSCC personnel that included questions as to whether he possessed or had consumed drugs. There was testimony that prior to being scanned for contraband he was asked if he had drugs on him and he responded by denying that this was the case. For reasons that will later follow, I find that the evidence of these purported denials is problematic.

[8] As part of the intake process, NSCC personnel scanned Mr. Beaulieu's body with a machine in order to determine whether he had contraband on him or in him. At the time of the first scan, NSCC personnel observed what appeared to be an object inside of him with gas behind it and formed the suspicion that he had "stuff" on him. They later asked him if he possessed contraband. He denied that he had anything. I heard evidence that Mr. Beaulieu went to a washroom or cell, after which NSCC personnel scanned him a second time.

[9] After the second scan, Mr. Beaulieu did not want to be searched. The corrections officers asked him to handover an object that they discovered was no longer in his body and was now in his underwear. He did not initially comply with their requests to search him or surrender the object. He stated that he did not want “external” (criminal) charges. He asked whether external charges would ensue. After some delay, he ultimately complied with the requests that he surrender what he had had inside of him. One of the corrections officers asked Mr. Beaulieu what the substance in the object(s) was. He replied that it was fentanyl. I heard limited evidence that he may have identified the substance as carfentanyl. The items he surrendered were two balloons which contained 20 grams of a mixture of bromofentanyl, fentanyl and bromazolam, and 13 grams of cannabis respectively.

[10] For his own safety, an ambulance ultimately took him to the hospital located near NSCC. While he was being transported medical personnel asked him what the substance he had possessed was. He replied that it was heroin. Some of the corrections officers who testified recalled that Mr. Beaulieu appeared to be exhibiting indicia of intoxication throughout the period they interacted with him.

ANALYSIS

[11] The Crown submits that it has discharged its onus in relation to all of the utterances made by Mr. Beaulieu to the corrections officers while at NSCC. Defence counsel submits that under all of the circumstances, in particular the lack of a police caution reasonably close in time to the making of the statements, the Crown has failed to fulfill its onus. As noted, Mr. Beaulieu is conceding that the voluntariness of the utterances to medical personnel in the ambulance is not in issue since they were not persons in authority.

[12] I will begin by observing that the jurisprudence unequivocally establishes that prison guards are presumptively persons in authority: see *R. v. Hodgson*, [1998] 2 SCR 449, paras. 3, 36, 45, 48. In this case the Crown concedes that the presumption applies and has not been rebutted. The Crown also agrees with defence counsel that the approach to be applied to determining voluntariness is the same whether or not the person in authority is a police officer or prison guard. I agree that the same considerations should apply.

[13] The concept of voluntariness is shorthand for a complex of values. The term describes the various rationales underlying the confession rule. *R. v. Oikle*, [2000] 2 SCR 3, at para 70.

70 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, § 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.

See *Hebert, supra*. While the “complex of values” relevant to voluntariness in Canada is obviously not identical to that in the United States, I agree with Warren C.J. that “voluntariness” is a useful term to describe the various rationales underlying the confessions rule that I have addressed above.

[14] More recently, the majority of the Supreme Court in the case of *R. v. Tessier*, 2022 SCC 35, provided a summary of the reasons behind the confessions rule:

[70] The rule is animated by both reliability and fairness concerns, and it operates differently depending on context. As Iacobucci J. explained in *Oickle*, while the doctrines of oppression and inducement are primarily concerned with reliability, other aspects of the confessions rule, such as the presence of threats or promises, the operating mind requirement, or police trickery, may all unfairly deny the accused’s right to silence (paras. 69-71; *Rothman v. The Queen*, 1981 CanLII 23 (SCC), [1981] 1 S.C.R. 640, at pp. 682-83 and 688, per Lamer J.; *Hebert*, at pp. 171-73; *Whittle*, at p. 932; *R. v. Hodgson*, 1998 CanLII 798 (SCC), [1998] 2 S.C.R. 449, at paras. 21-22; *Singh*, at para. 34). A statement may be excluded as involuntary because it is unreliable and raises the possibility of a false confession, or because it was unfairly obtained and ran afoul of the principle against self-incrimination and the right to silence, whatever the context indicates. It may be excluded if it was extracted by police conduct [translation] “[that] is not in keeping with the socio-moral values at the very foundation of the criminal justice system” (J. Fortin, *Preuve pénale* (1984), at No. 900).

[15] In order for a statement to be voluntary, it must be the product of an operating mind. The doctrine of the operating mind is concerned more with fairness and protection of the suspect’s rights than it is the reliability of their statements. At paragraph 69 of *Oickle*, Iacobucci J. stated:

[69] The doctrines of oppression and inducements are primarily concerned with reliability. However, as the operating mind doctrine and Lamer J.'s concurrence in *Rothman, supra*, both demonstrate, the confessions rule also extends to protect a broader conception of voluntariness “that focuses on the protection of the accused’s rights and fairness in the criminal process”: J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at p. 339. [. . .]

[16] At paragraphs 8 and 9 of *Tessier*, the majority set out what an operating mind entails. It also noted that while the absence of a caution may impact on the discrete issue of police trickery, the police caution is aimed at ensuring that the suspect in fact had an operating mind:

[8] As part of its persuasive burden to prove voluntariness beyond a reasonable doubt at trial, the Crown must, in my view, show that the absence of a caution did not undermine the suspect’s free choice to speak to the police as part of the contextual examination of voluntariness. It is an important factor that must be addressed by the Crown by pointing in particular to circumstances that prove beyond a reasonable doubt that the suspect possessed an operating mind and voluntariness was not otherwise impugned. *Generally the operating mind doctrine requires the Crown to show that the accused possessed the limited cognitive ability to understand what they were saying and to comprehend that the statement might be used as evidence in criminal proceedings (R. v. Whittle, 1994 CanLII 55 (SCC), [1994] 2 S.C.R. 914, at p. 939). Where the police do not provide a caution in the circumstances in which, as Charron J. says, they would be well advised to do so, the Crown must show further that the police conduct did not unfairly frustrate the suspect’s ability to understand that what they were saying could be used in evidence, that they were not subject to police trickery and that there were no circumstances that would otherwise cast doubt on voluntariness.*

[Emphasis added.]

[9] Drawing on scholarly commentary on the burden of proof relating to the operating mind dimension of voluntariness, I would recognize that the absence of a caution for a suspect constitutes *prima facie* evidence that they were unfairly denied their choice to speak to the police (see S. N. Lederman, M. K. Fuerst and H. C. Stewart, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada* (6th ed. 2022), at 8.119). In circumstances in which the accused has raised credible evidence that their status at the time of questioning was that of a suspect, the presence or absence of a caution takes on meaningful significance. Where the accused further puts the lack of a caution and their increased legal jeopardy into evidence — by cross-examining Crown witnesses or otherwise — they have met their evidentiary burden that raises the issue as to whether their statements were freely given. It then falls to the Crown to discharge its persuasive burden by

proving either that the accused was not in legal jeopardy, in that they were a mere witness and not a suspect, or that the absence of a caution was without consequence and that the statements were, beyond a reasonable doubt and in view of the context as a whole, voluntary. This would give substance to the recommendation formulated by Charron J. in *Singh* for trial judges seeking to weigh the importance of a lack of caution.

[10] Beyond merely showing that the person questioned had an operating mind, there may also be circumstances in which the absence of a caution is in point of fact a willful failure by the police to give a caution. This might reflect a deliberate tactic by the police to manipulate the individual into thinking that they are a mere witness and not a suspect so that, in making a statement, their jeopardy is not at risk. Where the failure to caution a suspect amounts to trickery, the effect of the police conduct may have an impact on voluntariness and should be analyzed in that light (see *Oickle*, at paras. 67 and 91).

[17] At paragraph 71, the court further explained the importance of the police caution.

[71] Even if reliability and fairness concerns are often tightly intertwined, the police caution is typically understood as speaking to fairness, as the case of *Morrison*, cited here by the trial judge, has emphasized. *I agree with the Attorney General of New Brunswick that the lack of a police caution generally does very little to undermine the reliability of a statement. The mere fact that an individual was not cautioned does not in itself raise concerns that an unreliable confession or statement was provided.* That said, in some situations a lack of a caution may exacerbate the pernicious influence of threats, inducements or oppression, which could contribute to undermining the reliability of a statement. *In most cases, however, it speaks to fairness, in the sense that the absence of a caution may unfairly deprive someone of being able to make a free and meaningful choice to speak to police when, as a suspect, they are at a risk of legal jeopardy.*

[Emphasis added.]

[18] However, the court emphasized that the lack of a police caution was not necessarily dispositive on the question of voluntariness at paragraph 74.

[74] To make the absence of a police caution determinative of voluntariness would risk inhibiting legitimate investigative techniques while ignoring the other protections provided by the rule. As one author put it, “[t]o strive for equality of knowledge . . . is to strive to eliminate confessions” (Grano, at p. 914). The confessions rule accepts in its design that statements resulting from police questioning are valuable, provided they are reliable and fairly obtained (*Hodgson*, at para. 21; *Singh*, at para. 29; see also Penney

(1998), at p. 378; Trotter, at p. 293). Even where a caution is not given, the circumstances may nevertheless indicate that a person has freely chosen to speak and no fairness concerns arise. Requiring a police caution as a condition of voluntariness would defeat the purposes of the rule and the balance it strives to achieve by imposing an inflexible standard of subjectively held knowledge for all individuals, whatever their status or role in an investigation. While the cases rightly speak of a balance, it bears recalling that the scales already tip in favour of protecting the rights of the accused by the broad scope of the rule and the heavy burden resting with the Crown. Moreover, the common law has hesitated to substitute a caution or waiver requirement of the right to silence for suspects who are questioned for the fact-sensitive, contextual analysis in which the absence of a caution is an important, yet non-determinative, factor. If such a requirement was thought to be necessary, Parliament could introduce legislation to that effect [. . .]

[19] In Mr. Beaulieu's case there was no standard police caution, or s. 10 Charter advisement anywhere close in time to the moments when Mr. Beaulieu made the utterances. The fact that the police had previously cautioned and chartered him on two occasions is of little consequence. On both prior occasions the police were advising him in relation to other charges. The first caution was 6 days before the interaction at the NSCC at the time of his arrest. He appeared to be falling in and out of consciousness at the time. The second occasion was on the same date about 5 hours later. Mr. Beaulieu was still mumbling and sleepy at that time. He fell out of consciousness immediately after the police cautioned him the second time. They then asked him to stand up so that he could be put in contact with a lawyer. It is an agreed fact that Mr. Beaulieu now has no memory of the earlier cautions – although he concedes that they occurred. Mr. Beaulieu ultimately spoke with a lawyer two days after the cautions while he was still in custody.

[20] In my respectful assessment, these earlier cautions are of very little consequence on the issue of the voluntariness of Mr. Beaulieu's statements while he was at NSCC. More specifically, they do not substantially lessen my concerns about whether he had an operating mind when he made those statements. He was never cautioned whatsoever in relation to the illegal conduct that he was suspected of at that time. I am of the view that once the suspicions of the NSCC personnel were raised, this would have been the proper moment to recaution Mr. Beaulieu to prevent the potential exclusion of his subsequent statements at trial: *R. v. Tessier*, supra, at para. 80; *R. v. Smith*, [1991] 1 SCR 714.

[21] The same can be said about his prior consultation with counsel. Certainly, where a detainee has exercised his s. 10 Charter right to counsel, he will presumably have been informed of his right to remain silent, and the overall

significance of the caution, or lack thereof, may be somewhat diminished: *R. v. Singh*, (supra), at para. 33. That said, the legal advice was provided several days before the circumstances that unfolded at NSCC. Moreover, like the earlier cautions, it was provided for charges unrelated to those now before the court.

[22] The absence of any caution around the time Mr. Beaulieu was taken to NSCC is an important factor in determining voluntariness. Recently in the case of *R. v. Tessier*, supra, the Supreme Court of Canada focused on the existence or nonexistence of a caution when assessing voluntariness. It referred to a spectrum of different situations where the lack of a caution might be less or more consequential.

[76] Yet in the specific context where a mere witness or an uninvolved individual is questioned, introducing a caution requirement as a condition of voluntariness could exact a cost on the administration of justice, notwithstanding the fact that no unfairness has arisen in obtaining the statement. Questioning at a police station is, to be sure, qualitatively different if the circumstances suggest that the interviewee brought or summoned for questioning is, on an objective basis, a suspect deserving of a caution. But to call for cautions in all circumstances would unnecessarily inhibit police work. Where a person faces no apparent legal jeopardy and the intentions of police are merely to gather information, an imposed caution could even chill investigations. Effective law enforcement is also highly dependent on the cooperation of members of the public (*Grant*, at para. 39). Where a contextual analysis reveals that no unfairness has arisen and no *Charter* protections were engaged, a bright-line rule to caution everyone could disturb the balance struck by the confessions rule by excluding reliable and fairly-obtained statements. It is preferable to allow courts to take measure of the true circumstances of the police encounter flexibly. In the spirit of Charron J.'s suggestion in *Singh*, courts should pay particular attention to whether the absence of a caution has had a material impact on voluntariness in a manner which would warrant exclusion of the statement.

[77] As a suspect who was not detained, Mr. Tessier's circumstances lie between these extremes. Contrary to the Crown's suggestion, there are fairness reasons why the caution may take on greater importance once a person becomes a suspect. A person in Mr. Tessier's situation may also experience heightened vulnerability, but to a lesser degree than someone who, arrested and detained, is more fully under the control of the state. Speaking generally, a suspect who is not detained is free to leave. In some circumstances, notwithstanding the absence of a caution, a suspect may clearly know they do not have to answer questions or may be subject to no influences that would impugn voluntariness by way of threats or inducements, oppression, or police trickery. A suspect is not unfairly denied a free choice to speak in these circumstances. Conversely, even with an operating mind, conduct of the police may unfairly deny them that choice. All of this to say that the totality of the circumstances will be important in determining whether a statement made by a suspect who is not detained has been unfairly obtained.

[78] I agree with the Attorney General of New Brunswick that the weight to be given to the absence of a caution will fall on a spectrum. At one end, the significance attached to the failure to caution an uninvolved individual — such as the person on the street corner — will typically be negligible. The relative lack of vulnerability of an uninvolved individual or witness who is questioned by police means that a caution will typically be unnecessary to show that the statements were voluntary. To require that police caution every person to whom they address questions in a criminal investigation, even where those questions are asked at a police station, would be — as the Court of Appeal rightly noted here — an unworkable standard. It would unduly limit the broader societal interest in investigating crime by excluding reliable and fairly obtained statements in circumstances that do not warrant it.

[79] At the other end of the spectrum, the vulnerability and legal jeopardy faced by detainees cement the need for a police caution. Fairness commands that they know of their right to counsel and, by extension, of their right to remain silent so that they can make an “informed choice” whether or not to participate in the investigation (I borrow the expression “informed choice” from *Singh*, at para. 33). The balance courts seek to achieve in applying the confessions rule in this context tilts in favour of protecting the rights of the detained person and of limiting society’s interest in the investigation of crime. The weight attached to the absence of a caution in these circumstances, while not determinative of the question of voluntariness owing to the contextual analysis required, will be at the highest end (see *Singh*, at para. 33).

[80] In circumstances in between, where police interview a suspect who is not detained and do not provide a caution, I agree with the longstanding view that the lack of caution is not fatal, but that it is an important factor in determining voluntariness (see generally Kaufman, at pp. 142-46). The importance attached to the absence of a caution will also be significant in recognition of the potential for vulnerability and exploitation of an informational deficit, unless it can be demonstrated in the circumstances, as I will explain in more detail below, that there is no doubt as to its voluntariness. This builds incrementally on Charron J.’s helpful reasons on this point in *Singh*. The heightened jeopardy and consequential vulnerability faced by a suspect, as opposed to an uninvolved individual, warrants special consideration in the final analysis to ensure adequate and principled protections under the confessions rule. *Although encounters between police and citizens sometimes mean the status of a person may change over the course of an interview, investigators are well accustomed to signs that raise their suspicions. This would be the proper moment to caution the interviewee to prevent the potential exclusion of the statement at trial.*

[Emphasis added.]

[23] The Court then spoke of the significance of the interviewee being or becoming a suspect when determining the gravity of the absence of a police caution.

[81] The first step in assessing the importance of the absence of a police caution is therefore to identify whether or not the person was a suspect. I would endorse the suggestion of the Attorney General of New Brunswick that fairness considerations may arise where a person is a suspect, and that a suspect test is a useful way of determining whether an accused person may have been unfairly denied their right to silence (see *Oland*, at para. 42; *Smyth*, at p. 34, citing *Boudreau*). This is also consistent with statements from this Court that “the confessions rule applies whenever a person in authority questions a suspect” (*Oickle*, at para. 30). The test is as proposed by the Attorney General of New Brunswick: whether there were objectively discernable facts known to the interviewing officer at the time of the interview which would lead a reasonably competent investigator to conclude that the interviewee is implicated in the criminal offence being investigated (see *Morrison*, at para. 50; *Oland*, at paras. 43-46; *Smyth*, at pp. 34-36; *Wong*, at para. 64; *Merritt*, at para. 39; *Higham*, at paras. 5-7).

[82] The test is objective, and includes both an assessment of the objectively discernable facts known at the time and the interaction between police and the interviewee. Pointed questions, particularly where they suggest the culpable involvement of the individual being questioned, may indicate that the person is a suspect, but pointed questions may have other legitimate ends, depending on the circumstances. A trial judge is best positioned to determine whether the police were simply seeking to gauge a person’s reaction to certain lines of questioning, or whether the questioning is more consistent with the interrogation of a true suspect. While the fact that the police initiated the interview does not, on its own, indicate that a person is a suspect, it may serve as a sign that a person was a suspect where combined with other indications. That said, questions that provoke anxiety or discomfort or even imply guilt do not necessarily mean a person is a suspect. The nature of the interaction between police and the individual and its connection to the objectively verifiable facts is therefore relevant to the suspect test.

[83] Once a court reaches the conclusion that a person was a suspect, the absence of a police caution is not merely one factor among others to be considered. Rather, it is *prima facie* evidence of an unfair denial of the choice to speak to police, and courts must explicitly address whether the failure created an unfairness in the circumstances (see *Oland*, at para. 42). It cannot be washed aside in the sea of other considerations. Instead, it serves to impugn the fairness of the statement and must be addressed, by the Crown, in the constellation of circumstances relevant to whether the accused made a free choice to speak. In discharging its burden to prove beyond a reasonable doubt that a statement was voluntary, the Crown will need to overcome this *prima facie* evidence of unfairness.

[24] The situation faced by Mr. Beaulieu, does not fall neatly within the majority’s examples of situations where the absence of a caution may vary from being only minor to highly consequential. Mr. Beaulieu’s position was different than those contemplated in paragraphs 78 and 79 of *Tessier*, in that he was detained before he became a suspect on the present charges.

[25] However, the fact that he was in custody is an important factor. At that point he could not simply walk away from the authorities. At the point he became suspected of having illegal contraband on his person, *he was both detained and a suspect*. In my view, at that point he fell at the more extreme end of the spectrum noted by the majority in *Tessier*, at paragraph 79. As noted, the weight to be attached to the absence of a caution under these circumstances, while not necessarily determinative of voluntariness given the contextual analysis required, will be at the highest end.

[26] I find that in the absence of a caution, there is a strong presumption that any statement made by Mr. Beaulieu was involuntary, following the moment when corrections personnel observed him to have a suspicious object inside his body.

[27] The circumstances of Mr. Beaulieu can be contrasted with those that existed in the case, *R. v. Pangman*, 2000 CanLII 21108 (MBKB), submitted by the Crown. In *Pangman*, the trial judge found that the evidence elicited by the accused was not part of an investigation *per se*; see para. 26. Pangman was not being asked whether he had committed a crime. Rather, he was being asked about past involvement with gangs. As noted by Krindle J., asking someone whether he is a member of a gang is not synonymous with asking whether he has committed a crime. However, in Mr. Beaulieu's case, the suspicions of the NSCC personnel had been aroused and he was plainly being asked questions which could incriminate him of committing a crime under the *Controlled Drugs and Substances Act* or an offence contrary to the territorial *Corrections Act*. I will also note parenthetically that in *Pangman* at the beginning of paragraph 26, Krindle J. stated:

[26] The only circumstance under which the law requires that a person in custody be recautioned is where the focus of the investigation and hence the potential jeopardy of the accused changes: *R. v. Smith*, [1991] 1 SCR 714. [. . .]

As previously noted, this would apply in the case of Mr. Beaulieu once he became suspected of the offences now before this court. Although the investigation by NSCC personnel was not one that was focused on a potential criminal prosecution, the accused was nonetheless being investigated for possible criminal activity.

[28] The purpose of the voluntariness voir dire is not necessarily to examine the propriety of the conduct of the persons in authority to whom the utterances were made. In this case, I find little fault with the conduct of the NSCC personnel who interacted with Mr. Beaulieu at the time of his statements. They were understandably focused on his safety given their suspicions that he had drugs in or on him. They were likewise focused on the safety of other inmates to whom illegal

drugs could potentially be provided. The safety of the employees of NSCC was also a pressing concern, given what they knew of how one might absorb fentanyl when accidentally coming into contact with it. While they were clearly investigating whether he possibly had drugs on or in him, they were not concentrating on obtaining proof for a potential criminal prosecution. They were attempting to deal with a pressing danger.

[29] Notwithstanding the justification of the conduct of the NSCC personnel, my focus must be on whether Mr. Beaulieu's statements were voluntary within the meaning of the jurisprudence. Was he effectively forced into participating in an investigation into his criminal activity? Were his statements the product of an operating mind?

[30] The Crown submits that his behaviour indicated that he knew he was facing some jeopardy if the corrections officers were to uncover what he had on his person. Ms. McFadden refers to Mr. Beaulieu's reference to "external charges" and his anxious and distressed behaviour at the time, as indicating that he was aware of his jeopardy. It may be the case that he knew his position was precarious at that point. However, surely the fact that someone knows they are in a difficult position that may result in criminal charges will not necessarily render a statement voluntary.

[31] Ms. McFadden also notes that the accused had had experience with the criminal justice system. She points to the testimony of some of the NSCC personnel that they had had prior contact with Mr. Beaulieu when he was apparently an inmate. She refers me to the case of *R. v. Engel*, 2016 ABCA 48, where the Court of Appeal stated at paragraph 16:

[16] Then, in *Spencer*, the court, commenting on the foregoing passage, stated at para 15:

Therefore, while a *quid pro quo* is an important factor in establishing the existence of a threat or promise, it is the strength of the inducement, having regard to the particular individual and his or her circumstances, that is to be considered in the overall contextual analysis into the voluntariness of the accused's statement.

[17] In applying these principles, context, including the character and personality of the appellant and any experience he may have had with the criminal justice system, is relevant. On that point, it will be recalled that the appellant was initially arrested for breaching conditions of his bail. He was taken to an RCMP detachment and interviewed by Sgt. Simcoe. During that tape-recorded interview, the

following exchange occurred which, in our opinion, is particularly significant in measuring the voluntariness of all subsequent conversations between the appellant and the police.

[18] Early in the conversation, when asked if any other police officer had made promises or threats to induce him to talk to the police, the appellant interjected:

Engel: I know. I don't have to talk if I don't want to talk. Whatever. I can turn around and walk out, blah, blah, blah. I call a lawyer, do all that stuff. I've had a lot of years in the system.

Simcoe: Okay.

Engel: Unfortunately.

Simcoe: Well, as long as I know you've been treated fairly here today.

Engel: Oh, yeah.

Simcoe: I'm happy with that.

Engel: No, they've been good to me.

Simcoe: Yeah. Because regardless of what anybody else has said to you, you don't have to speak to me.

Engel: No, no, yeah, I know that. Like I said, I spent a lot of years, unfortunately.

[19] The appellant's statement that he had "a lot of years in the system" was an apparent reference to his lengthy record of criminal convictions, which spanned 20 years and included a prior conviction for first degree murder while a young offender.

[32] In the present case of Mr. Beaulieu, the evidence does not come close to establishing a criminal past as extensive of that of Mr. Engel. Moreover, in Mr. Engel's case, he was clearly aware of the fact that he did not have to talk if he did not want to and could turn around and walk out. That can certainly not be said for Mr. Beaulieu based on the evidence identified by the Crown, the testimony of corrections staff that they knew him from other occasions when he had been incarcerated.

[33] I have considered all the factors referred to by the Crown. However, I am of the view that in this instance, notwithstanding that I do not necessarily find significant fault with the conduct of the corrections staff, the absence of a caution to Mr. Beaulieu after he became suspected of possessing contraband on or in him,

is a very important factor weighing against the voluntariness of the statements he made. The additional factors referred to by the Crown do not allay my concerns to the point that I am able to say that I find that it has proven beyond a reasonable doubt that Mr. Beaulieu's statements were voluntary. On the contrary, the evidence establishes that he was in an emotional state during the unfolding situation at NSCC. He was doubtlessly under considerable stress given his jeopardy. It may well be that he was solely responsible for the situation that he was in. However, the question is whether his statements were the product of an operating mind. I am unable to conclude that they were.

[34] The Crown has asked that I allow all of the statements made by Mr. Beaulieu. Specifically, it asks that I admit:

- 1) his denial that he possessed any contraband;
- 2) his identification of the substance he had; and
- 3) his statement that he did not want charges or external charges.

[35] In the case of Mr. Beaulieu's denial that he possessed contraband, the difficulty that I am faced with is that a considerable amount of the evidence concerning what he said or whether he said it prior to becoming a suspect is not clear.

The Denials

[36] Mr. Couture, a corrections officer who was present at the time Mr. Beaulieu was at the intake area of NSCC, testified to the general procedure that applies when a prisoner is being admitted.

[37] He said that prior to going through the scanner, Mr. Beaulieu was advised what the machine did. He was questioned if he had drugs on him and denied that this was the case.

[38] Mr. Couture said that it was *probably* he who explained to Mr. Beaulieu what the scanner was for. He explained that at the time of intake, advising an inmate of the purpose of the scanner is part of the usual procedure.

[39] When he was asked if he recalled who questioned Mr. Beaulieu if he had drugs on him. He replied by saying that usually the inmate is asked if he has drugs on him or in him. I find that this response was somewhat equivocal. Either he recalled Mr. Beaulieu being asked the question or he didn't. From his response, his recollection of that being done seems very unsure.

[40] Mr. Couture said that it was not he who asked the initial questionnaire that would have included a question on whether Mr. Beaulieu had drugs on him.

[41] Mr. Smith, another corrections officer who was present, recalled that it would have been him who would have asked the normal questions to a new intake on the date charged. He believes that he started interacting with Mr. Beaulieu in the morning. He said that when he processed Mr. Beaulieu they would have gone through a number of questionnaires, added his court dates into their system, added people with whom he was to have no contact, and given him a security rating. Mr. Scott also said that there would be a medical questionnaire and that after the questionnaire there would be a strip search and then a body scan.

[42] When he testified, it seemed apparent to me that he was describing the general procedure that would have applied at the time in question.

[43] He recalled Mr. Beaulieu saying words to the effect that he knew they had gotten a new scanner. He said he remembered this because it seemed unusual. He said that it was after Mr. Beaulieu went through the scanner the first time that a suspicion arose that he had some stuff on him.

[44] “They”, that is the corrections personnel who were present, questioned him about it and Mr. Beaulieu denied that he had anything. However, his answers following that point became equivocal.

[45] On Mr. Smith’s evidence, Mr. Beaulieu had become a suspect at the time he completed the first scan. It follows that following that time the questions he was being asked by NSCC personnel were in furtherance of an investigation concerning the security of the institution.

[46] Mr. Smith testified that when processing prisoners, NSCC personnel ask if they have any narcotics on them or if they have used narcotics lately. He said that Mr. Beaulieu said no twice. However, he also said that he did not remember any specific conversations with Mr. Beaulieu.

[47] Two other corrections officers, Mr. Harrison and Mr. Falk, were called as witnesses by the Crown. Neither one of them testified that Mr. Beaulieu denied possessing substances or contraband. According to their testimony became involved in the situation with Mr. Beaulieu later than Mr. Couture and Mr. Smith.

[48] In my assessment, the evidence concerning any denials made by Mr. Beaulieu prior to him becoming a suspect is imprecise. It is unclear to me whether Mr. Couture was simply advising of the general procedure when he said what

occurred when Mr. Beaulieu was being admitted. Certainly, he testified that at the beginning of the intake procedure, Mr. Beaulieu was asked if he possessed drugs and responded that he did not. However, given the equivocal nature of Mr. Couture's evidence following that point, I am unsure whether or not he actually recalled Mr. Beaulieu being asked if he had substances in his possession and his purported subsequent denial.

[49] Similarly, a significant amount of Mr. Smith's evidence described the general procedure that would have applied on the date charged rather than specific memories he had of his interaction with Mr. Beaulieu. I accept that he recalled suspicions being aroused following the scanning of Mr. Beaulieu and Mr. Beaulieu denying that he had stuff on him when he was asked. Certainly, that is something that would stick out in one's mind. As noted however, this was after the moment that Mr. Beaulieu had become a suspect.

[50] Mr. Smith testified that when processing prisoners, NSCC personnel ask the inmate if they have any narcotics on them or if they've used narcotics lately. Once again, however, he appeared to be describing general procedure. He said that Mr. Beaulieu said no twice. However, he also said that he did not remember any specific conversations with Mr. Beaulieu. I am unclear whether Mr. Smith was testifying as to his actual memory of what happened when he says that Mr. Beaulieu said no twice. I am not sure what the denials related to possessing narcotics or using them were or when they were made.

[51] Under all the circumstances the evidence of the denials is too imprecise and equivocal for me to conclude that any of the denials that Mr. Beaulieu may have made occurred before the moment when he became a suspect. I therefore find the Crown has not proven beyond a reasonable doubt that those purported denials were voluntary and accordingly exclude them as evidence.

[52] Additionally, I conclude that the Crown has not established that Mr. Beaulieu's denial following the time that the suspicions of the corrections officers were aroused was voluntary. Under the circumstances, the lack of a caution weighs heavily against a finding that his denial was voluntary. The other factors argued by the Crown, including his involvement in the criminal justice system and purported knowledge of his jeopardy, are insufficient to overcome my lack of confidence that the denial was the product of an operating mind.

Identification of the Substance

[53] On Mr. Harrison's evidence, Mr. Beaulieu's statement that the substance was fentanyl, was made following the time that he was scanned and had become a suspect. Moreover, Mr. Harrison elicited the statement when he asked him what the object they retrieved from him was.

[54] Once again, after considering the lack of a caution and the other surrounding circumstances and background of the accused, I find that the Crown has failed to discharge its onus in establishing voluntariness.

Reference to "Charges"

[55] Mr. Couture testified that Mr. Beaulieu was scanned, rescanned, told to go back to a private dry-cell, advised that a strip search would be conducted and that he had an item in his underwear. He said that it was then that Mr. Beaulieu expressed that he was worried about external charges and how the situation might result in them.

[56] Mr. Smith testified that he thought he remembered Mr. Beaulieu saying something to the effect that he was worried about getting charged. He thought that this was when he was in the dry-cell and down to his underwear and wasn't willing to give up the object or be searched further.

[57] Mr. Harrison testified that some time after Mr. Beaulieu had been on the scanner – he wasn't sure whether it was after the first or second scan or how far things had proceeded – he became involved in the interactions with Mr. Beaulieu. He said that for the sake of Mr. Beaulieu's health and safety, he and another colleague were attempting to get him to hand over something that had been "seen" by the scanner.

[58] Mr. Harrison said that it was at this time that Mr. Beaulieu said that he did not want external charges. Mr. Harrison said that this was in response to something that Mr. Harrison had said. Mr. Beaulieu kept asking them to ensure that he did not get externally charged.

[59] Mr. Falk testified that he heard part of what appears to have been the conversation between Mr. Harrison and Mr. Beaulieu. He said that he recalls that Mr. Harrison explained to Mr. Beaulieu that if he were to give up the contraband, he had not seen anyone get charged when they had done so.

[60] Once again, the evidence is that Mr. Beaulieu made these utterances following the moment that he became a suspect. For the reasons I have already provided, I conclude that the Crown has failed to prove beyond a reasonable doubt that these utterances were the product of an operating mind. I am unable to find that the statements were voluntary. Consequently, they are inadmissible as evidence.

CONCLUSION

[61] To summarize, I find that the Crown has not proven beyond a reasonable doubt that the utterances made by Mr. Beaulieu to NSCC personnel were voluntary. They are therefore excluded. The utterances made to medical personnel in the ambulance are not in issue and are admissible.

[62] Once again, what I have said concerning the conduct of the NSCC personnel should not necessarily be interpreted as criticism. They were faced with an urgent situation. Their focus was properly on security. Under the circumstances it was understandably their foremost concern. As a result of their management of the situation, they retrieved dangerous narcotics that Mr. Beaulieu had secreted in and on his person. In doing so, they protected the inmates of NSCC, NSCC staff, and Mr. Beaulieu as well.

[63] The issue I have had to decide is not the propriety of their actions, but simply whether under all of the circumstances, Mr. Beaulieu's utterances to them were voluntary as that term has been defined in the applicable jurisprudence. As stated, I am unable to reach that conclusion.

Robert D. Gorin
Chief Judge of the Territorial Court

Dated at Yellowknife, Northwest Territories
this 1st day of December, 2023.

R. v. Beaulieu, 2023 NWTTC 12

Date: 2023 12 01

File: T-1-CR-2023-000619

**IN THE TERRITORIAL COURT OF THE
NORTHWEST TERRITORIES**

BETWEEN:

HIS MAJESTY THE KING

-and-

RYAN BEAULIEU

**REASONS FOR JUDGMENT
of the
HONOURABLE CHIEF JUDGE
ROBERT GORIN**

[S. 5(2) of the *Controlled Drugs and Substances Act* and other related charges]