PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Chen*, 2023 NSPC 64

Date: 20231116
Docket: 8554875, 8554876
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Registry: Halifax

Between:

His Majesty the King

v.

Dan Chen

Judge:	The Honourable Judge Elizabeth Buckle,
Heard:	July 26, 27, August 21, 2023 in Halifax, Nova Scotia
Decision:	November 16, 2023
Charge:	380(1)(a), 355(a), 367(a) and 368(1)(a) of the *Criminal Code*
Counsel:	Alex Keaveny, for the Crown Ian Hutchison, for the Defence

By the Court:

Introduction

[1] Dan Chen has been charged with fraud and related *Criminal Code* offences.

[2] During the investigation, she gave a recorded statement to police and subsequently provided further information by email.

[3] This decision concerns the admissibility of that information. Specifically, whether the Crown has proven beyond a reasonable doubt that Ms. Chen provided the information voluntarily.

[4] The Defence argues that Ms. Chen was induced to cooperate because the investigating officer offered to close his file if she provided her side of the story. The Defence submits that the offer was a particularly powerful inducement because Ms. Chen is a foreign national who did not fully understand the Canadian legal system. At the time, she was engaged in divorce proceedings and feared deportation and/or losing custody of her children. The Defence further argues that these motivators were still present when she subsequently provided further information by email, resulting in the emails also being inadmissible due to the 'derived confessions rule'.

[5] The Crown disputes that the purported offer was made, disputes that Ms. Chen had a real fear of deportation or of losing custody of her children and submits that Ms. Chen provided information to police because she believed it was exculpatory and to her benefit.

[6] The broad issue is whether the Crown has proven beyond a reasonable doubt that Ms. Chen provided the information voluntarily. However, resolving that issue will require me to decide whether:

1. The investigating officer said the words that are the alleged inducement;
2. If the words were spoken, in all the circumstances were they an inducement that was strong enough to raise a reasonable doubt about voluntariness; and,

3. If Ms. Chen's video-statement is not proven to be voluntary, the 'derived confessions rule' bars admission of the emails. Specifically, were the subsequent emails contaminated by the same factors that impacted the statement?

Legal and Factual Overview

[7] At issue is the voluntariness of Ms. Chen's recorded statement to D/Cst. Donny Buell of the Halifax Regional Police on February 24, 2021 and her subsequent email correspondence sent to him on February 25, 26, 27, and March 4, 2021.

[8] Ms. Chen's recorded statement to police is inadmissible unless the Crown proves beyond a reasonable doubt that it was made voluntarily (*R. v. Beaver*, 2022 SCC 54, para. 45; *R. v. Oickle*, 2000 SCC 38; *R. v. Paterson*, 2017 SCC 15; and, *R. v. Spencer*, 2007 SCC 11, para. 11).

[9] If the recorded statement is not proven to be voluntary, the subsequent emails may also be inadmissible under the 'derived confessions rule' (*R. v. I. (L.R.) and T. (E.)*, [1993] 4 SCR 504; *R. v. G. (B.)*, [1999] 2 S.C.R. 475; *R. v. S.G.T.*, 2010 SCC 20; and, *R. v. Buckley*, 2018 NSSC 2, paras. 53-64).

[10] Voluntariness is concerned with the reliability of confessions, trial fairness, respect for individual free will, and protecting the accused's right to remain silent (*R. v. Hebert*, [1990] 2 S.C.R. 151, p. 173; *Oickle*, paras. 26 & 69; *Paterson*, paras. 14-16; and, *Beaver*, para. 47). Broadly defined, a voluntary statement involves an exercise of free will by a person who makes an informed and meaningful choice to speak (*Hebert*; *R. v. Singh*, 2007 SCC 48, para. 53).

[11] Here, the Defence submits that D/Cst. Buell made an offer - to forgo a criminal charge in return for a statement - that induced Ms. Chen to give up her right to silence.

[12] It is improper for a person in authority to offer a suspect leniency if they confess (*Oickle*, para. 49). Where there is a *quid pro quo* (the person in authority offers to do something in exchange for the statement) it can raise "the possibility that the suspect is confessing, not because of any internal desire to confess, but merely in order to gain the benefit offered by the

interrogator" (*Oickle*, para. 56; *R. v. Heatley*, 2015 BCCA 350, para. 6; and, *R. v. Fernandes*, 2016 ONCA 772, para. 27).

[13] If made, the offer alleged here would constitute the classic "hope of advantage … held out by a person in authority" that would traditionally render a statement involuntary (*Ibrahim v. The King*, [1914] A.C. 599). An offer to close Ms. Chen's file without charge was a benefit the officer had control over, would be the ultimate offer of leniency and, if made, was offered in exchange for a statement. As such, the offer would also clearly include a *quid pro quo* that is capable of being an improper inducement (*Oickle,* paras. 48 - 57).

[14] However, the existence of a *quid pro quo* offer is not determinative of inadmissibility. The central issue is voluntariness. There can be no inducement where the thing said or done by the person in authority does not result in the confession (*Oickle*, at para. 84). The ultimate question is whether the offer, in all the circumstances, was "strong enough to raise a reasonable doubt about whether the will of the subject has been overborne" (*Oickle,* paras. 57 - 58).

[15] Therefore, even if I conclude the offer was made, I will have to go on to determine whether there is a nexus between the offer and the giving of the statement and, in all the circumstances, whether the inducement was strong enough to induce Ms. Chen to give up her right to remain silent (*Spencer,* paras. 15 & 19).

[16] The evidence at the hearing included testimony from D/Cst. Buell and Ms. Chen, the audio-video recording of the interview and copies of the subsequent email correspondence between the two (Ex. 1).

[17] D/Cst. Buell was the investigating officer and the only police officer to deal with Ms. Chen. He was investigating a claim that Ms. Chen had defrauded her husband's parents of approximately $600,000. He contacted her to schedule an interview. They communicated by telephone and email. The defence does not take issue with what he said during these exchanges. He was persistent but the tone of the communication was respectful and accommodating.

[18] D/Cst. Buell scheduled the meeting for February 24, 2021 at the Halifax Regional Police Criminal Investigations Division (CID) building in

Dartmouth. Prior to the meeting, D/Cst. Buell had reviewed material relating to a civil claim between the parties, spoken with the officer who had previously been assigned to the file and interviewed witnesses. He knew the allegations. Of specific relevance to this hearing, he also knew that the complainants were amenable to resolving the case through restorative justice, knew that Ms. Chen did not have a criminal record and believed she met the parameters of the restorative justice program.

[19] Ms. Chen is a citizen of China and not a citizen of Canada. At the time of the interview, she was working in Canada. Her only family in Canada were her estranged husband and his parents. She was the primary care-giver of her two young children and was in the midst of family law proceedings included issues surrounding custody.

[20] Ms. Chen is educated. She received a university degree in China and completed a culinary arts program at the Nova Scotia Community College (NSCC). Her first language is Mandarin but she speaks and understands some English. She took English as a subject in school and at university in China, she lived for a short time in the United States, and has studied or worked in Canada since 2017. After taking additional English classes, she acquired the English proficiency level required for admission at the NSCC.

[21] Other than in the recorded interview, D/Cst. Buell spoke with her in English. He testified that he understood from her family that she was fluent in English, she did not tell him there was a language barrier and none was apparent to him. However, Ms. Chen requested an interpreter for their formal meeting so he arranged for an interpreter to assist her in the recorded interview.

[22] The recorded interview lasted about three hours. At the beginning, D/Cst. Buell advised Ms. Chen of her right to counsel, cautioned her and provided her with the secondary police caution. He was polite and respectful, explained things, including the importance of speaking to a lawyer, and responded to all of her questions. The interview was not confrontational, the circumstances were not oppressive, no threats were made and Ms. Chen had an operating mind. Ms. Chen did not assert her right to remain silent during the interview, either in general or in relation to specific questions.

[23] During the interview, Ms. Chen offered or agreed to follow up by providing D/Cst. Buell with specific details such as the names and contact

information of potential witnesses. She also suggested that there might be helpful information on her cell phone which had been damaged. D/Cst. Buell offered to have it examined to see if the information could be recovered. In the days following the interview, Ms. Chen emailed D/Cst. Buell with the additional information, they made arrangements for her to deliver the phone and it was delivered on March 4, 2021. Efforts to recover further information from the phone were unsuccessful. They then had further email correspondence to arrange for her to pick up the phone and she did so on March 10, 2021.

[24] On March 4th and March 10th, D/Cst. Buell met with Ms. Chen alone. These meetings were not recorded. What Ms. Chen said during these meetings is relevant to my analysis but is not the subject of the voluntariness inquiry.

Issue 1 – Was there an Offer?

[25] The first question is whether D/Cst. Buell made the offer. That required me to think about who bears the burden of proving that he did or did not make the offer and to what standard. Surprisingly, that is not something that has been clearly addressed in the post-*Oickle* voluntariness cases.

[26] The criminal standard of proof beyond a reasonable doubt applies "in those certainly rare occasions when admission of the evidence may itself have a conclusive effect with respect to guilt", such as evidence of the essential elements of an offence (*R. v. Arp*, [1998] 3 S.C.R. 339, para. 71). It does not apply to other preliminary findings of fact or to the weighing of individual pieces of evidence (See: *R. v. Bulldog*, 2015 ABCA 251, para. 39; *R. v. Morin* [1988] 2 S.C.R. 345, paras. 33-43; *R. v. Morin,* [1992] 3 S.C.R. 286, para. 19; *R. v. Ritch*, 2022 NSCA 52, para. 134 & footnote 56; *R. v. T.J.F.* , 2023 NSCA 28, para. 48; *R. v. Ahmadzai*, 2012 BCCA 215, para. 34; and, *R. v. Jeffrey*, 1993 ABCA 245, paras. 18-22). For these other 'non-determinative' facts, a court is entitled to accept evidence on a balance of probabilities.

[27] The proof beyond a reasonable doubt standard clearly applies to the ultimate question of whether the Crown has proven the voluntariness of the statement. This is because admission of the statement may have a conclusive effect on a trial (*Arp*, para. 71).

[28] Prior to *Oickle*, the existence of a promise or threat would generally have been determinative of voluntariness and voluntariness could be determinative of guilt, so the Crown would have to prove beyond a reasonable doubt that the promise or threat was not made.

[29] Post-*Oickle,* that is not so clear. Because of cases such as *Oickle* and *Spencer*, the contemporary voluntariness rule says that the mere presence of a promise is no longer determinative of voluntariness. So, it may be that whether the words that constitute the promise or threat were spoken, is now an 'ordinary' piece of evidence to be assessed on the balance of probabilities standard with either the Crown having to establish that the words were not spoken or the Defence having to establish that they were.

[30] I have reviewed one post-*Oickle* case touching on this issue (*R. v. Bunn*, 2001 MBCA 12). In that case, there was a dispute about whether an offer had been made during an unrecorded statement. The Court overturned the trial judge's conclusion that the statement was voluntary, finding that the trial judge had applied the wrong standard. However, ultimately, the Appeal Court's decision turned on a finding that the judge had a reasonable doubt about the ultimate issue (whether the accused was induced), not about the factual underpinning of that issue (whether the offer was made) (para. 18). As such, this decision does not clearly stand for the proposition that the criminal standard of proof applies to the issue of whether the offer was made.

Evidence

[31] Ms. Chen testified, through an interpreter, that before the recorded interview on February 4th, she met with D/Cst. Buell alone in a room and he told her that if he had her side of the story, he could close his file. D/Cst. Buell denied this. The credibility and reliability of their evidence was crucial to my determination.

[32] Not surprisingly, given the passage of time, neither of them had a perfect recollection of details. D/Cst. Buell made notes at the time and was given permission to use those notes to refresh his memory. He acknowledged the importance of taking accurate notes of important information.

[33] During his initial call to Ms. Chen, D/Cst. Buell told her that he wanted to meet to hear her side of the matter and she understood that this was the purpose of the meeting on February 4th.

[34] She testified that she arrived early for the meeting. She did not clearly recall the time, but thought she arrived about 10 or 15 minutes early. She reported to the front desk, asked to speak with "Detective Donny" and then waited near the front desk. He came out, introduced himself and took her to a room where they were alone. She did not recall the location of the room but testified it was not the room where the recorded interview took place. D/Cst. Buell confirmed that the formal interview room was located within the secure part of the building but there was a room or rooms off the foyer of the building.

[35] Ms. Chen testified that, once in the room, D/Cst. Buell again told her the purpose of the meeting - that he would like to hear her side of the story - and told her that "not long after, it would be that the case/the file would be closed". She said their conversation was "light mooded" and "easy". To her, having the file/case closed meant that there would be no follow-up of the case. She believed this would mean there would definitely be no immigration consequences to her and she would continue to have custody of her children. She testified that when she came out of the room, the interpreter was present and they introduced themselves. They then went to the interview room.

[36] She was not cross-examined on her testimony about the unrecorded conversation. She was cross-examined on her experience and facility with English, her understanding of the Canadian justice system and her reasons for providing information to police during the interview and subsequent emails. If the disputed conversation occurred, her ability to understand English is potentially relevant to my assessment of what was said. At this stage, the latter information is relevant only to my assessment of her credibility. However, if I conclude the offer was made, it will also be relevant to whether it induced her to cooperate.

[37] She did not mention D/Cst. Buell's offer to close his file during the recorded interview or in any of the subsequent emails she sent him (Ex. 1). The Crown argues that this suggests her testimony about the unrecorded offer is not credible. She was not questioned about this, either in direct-examination or cross-examination.

[38] D/Cst. Buell testified that on the day of the recorded interview, he did not have a private unrecorded conversation with Ms. Chen before the

recorded interview and at no time did he tell her he would close her file if she gave a statement.

[39] In direct examination, he testified that he met Ms. Chen in the foyer of the building and the interpreter was present.

[40] In cross-examination, when asked to confirm his evidence in chief that the interpreter was present when he met Ms. Chen, he said 'to the best of my recollection'. When asked if there was some doubt in his memory about who arrived first, he again said that to the best of his recollection the interpreter arrived first. He acknowledged he did not have a note about that and was testifying based on memory of events from approximately 28 months earlier.

[41] The interpreter who assisted Ms. Chen on February 4th did not testify so I don't have the benefit of her evidence on the question of whether she was present when D/Cst. Buell came to the foyer to meet Ms. Chen.

[42] How much time elapsed between when D/Cst. Buell first interacted with Ms. Chen that day and when they entered the room where he conducted the interview is potentially relevant to whether, on his evidence, there was time that is not accounted for during which he could have met with Ms. Chen in the other room. In his direct-examination, he testified that Ms. Chen arrived at 1:30 p.m., he thanked her for attending, introduced the interpreter and they walked to the interview room together. He said the walk from the foyer to the interview room, which was located beyond a secure door, took about 15 seconds and there was no other discussion.

[43] In cross-examination, the possible distinction between when Ms. Chen arrived versus when he first interacted with her took on some significance. He initially confirmed that she arrived at 1:30 p.m.. He then also agreed with the suggestion that he had testified that he, Ms. Chen and the interpreter had "convened" in the foyer at 1:30 p.m. The recording shows the three of them entering the interview room at 1:35:15 p.m. (Ex. 1). He was questioned about what they were doing in the intervening period, given that the brief conversation in the foyer and the walk to the interview room would not have taken five minutes. He responded that when he noted and testified to the time as '1:30 p.m.' he was not being specific about the time and it referenced the time she arrived, not the time he interacted with her. He explained that he would have been advised around that time that she was present but that didn't mean he met her at that time. He was asked why he would record her time of

arrival in his notebook rather than the time that he first interacted with her and said he viewed it as essentially the same thing. He also explained that some time would have been used for the interpreter to explain what she would do when they went into the room. When asked why he didn't include this when the Crown asked him what had happened, he said he might not have understood exactly what the Crown wanted to know. He agreed he had no notes about any of this.

[44] In re-direct, he provided further clarification. He couldn't say what the source was for the time he recorded in his notes or whether that device was synced with the time on the recording device. He also added that after Ms. Chen arrived and prior to entering the interview room he would also have gone to the monitoring room to ensure the equipment was working properly.

[45] In cross-examination, it was suggested to him that, before the interpreter arrived, he took Ms. Chen to a room off the foyer, told her he was aware she didn't have a criminal record, told her that he was looking for her side of the story and that if she provided her side of the story, the police file would be closed. He responded "I do not recall that".

[46] In re-direct examination, he was asked whether it was his usual practice to have unrecorded conversations with suspects prior to a recorded interview and said "I don't do that". He explained that it would not be proper protocol or practice and he wouldn't have a substantive discussion off camera. He also said that he would not tell someone their file would be closed if they provided their side of the story and that he would not consider it to be appropriate police practice.

[47] There is no dispute that during the recorded interview, D/Cst. Buell provided Ms. Chen with information about the restorative justice process. In this case, I don't have to decide whether that could be interpreted as an implicit offer with a *quid pro quo* or whether it could be a sufficient inducement to overcome the will of some suspects. That is because Ms. Chen's evidence makes it clear that it did not induce her to speak. She testified that she did not understand what D/Cst. Buell said about restorative justice and did not rely on it when she decided to speak.

[48] However, what D/Cst. Buell said during the recorded interview and his explanation for why he said it is relevant to my determination of whether D/Cst. Buell made the unrecorded statement.

[49] After D/Cst. Buell provided Ms. Chen with some preliminary information, including the standard police caution, and before he started asking her questions, the following exchange took place:

Chen	Has this case reached the point where it has to go to Court or are they just trying to get ready to go to that step?
Buell	I'm in the investigation and I've heard from them as the complainants – their side of the story – I've interviewed them, reviewed their affidavits from that civil matter. As well, I've interviewed your ex-husband and reviewed his (inaudible). … do you understand what I mean by criminal offences and criminal law?
Chen	no
Buell	So, these are the laws of the country that people have to obey …. Laws that people have to abide by … example of requiring a drivers licence to drive a car. And if there's allegations of someone breaking the law and its reported to the police then its our job as investigators to go over that , find the evidence, interview people to determine if that violation or offence was committed. You can have laws that are federally based which are criminal offences. .. things like theft, fraud, murder, break and enter or you can have offences that are provincial like speeding. Just like municipal bylaws could be something like a noise bylaw. And every country has its own laws. Just like in china they have their laws that people have to abide by. **One of the things in Canada they've instituted a thing called the restorative justice process.**
Interpreter	I'm trying to find the right term for it
Buell	for restorative …
Interpreter	pauses
Buell	**its like where a person has done wrong and they've come to admit it and it gets resolved before the trial phase of things. Its resolved in advance. Like informally to give a person a second chance.**
Interpreter	yes (translates)
Buell	**and its where the person that's involved, the accused, the police, the crown, the complainant, everyone is kind of in agreement to have it go away .. especially if the person has no criminal record**

[50] What the interpreter actually said to Ms. Chen was not translated for this hearing, but I have Ms. Chen's testimony about what she understood. She testified that at the time of the interview, she didn't really understand what restorative justice meant. She said the interpreter told her that it was concerned with restoring relationships so she thought it was about restoring relationships with her in-laws. As a result, she did not rely on it in deciding to speak with the officer.

[51] D/Cst. Buell testified that he did not intend this to be a promise or inducement. He said he had been explaining the Canadian criminal process to Ms. Chen and included the reference to restorative justice as part of that explanation. He testified, essentially, that this would have been no more than a passing reference except that the interpreter asked for more information so he explained further.

[52] In cross-examination, he acknowledged that prior to the interview, he knew that the complainants were supportive of restorative justice for Ms. Chen, he knew she did not have a criminal record, he felt she met the parameters of the program and thought it was a potential outcome for her. However, he denied that this had anything to do with his decision to tell her about restorative justice. He agreed that he would have input into the decision about restorative justice, but explained that he did not have the ultimate decision making authority. He also acknowledged that he does not provide information about the restorative justice program to everyone he interviews.

[53] D/Cst. Buell met alone with Ms. Chen on March 4th and 10th, 2021. Those meetings took place in a room off the foyer at the CID building and neither were recorded.

[54] D/Cst. Buell's evidence about the meeting on March 10th is potentially relevant to the reliability of his evidence. He testified that the meeting on that day lasted approximately 15 to 20 minutes. He could not recall the specifics of their discussion but, after refreshing his memory from his notes, testified that he returned the phone to her, told her that police had not been able to recover anything from the phone, and responded to her question about whether he had spoken with a potential witness she had named. In cross-examination, he also confirmed that she was concerned about custody of her children and he'd told her the charges would have no bearing on it. He

adopted the contents of his report for that day which said that he met with her to return her phone and tell her the results of the examination, that she was worried that if charged she would automatically lose her children, and he explained that she would not lose her children based solely on a charge of fraud or forgery. It was suggested to him that it would not take 15 – 20 minutes to explain to her that nothing could be recovered from the phone and to address her concerns about custody. He again said that the time noted was when she arrived not when he actually met with her and it would have taken time for him to be notified and then go to the foyer.

Analysis of Whether the Offer was Made

[55] In this case, I do not have to decide who has the burden of proof or what the standard is on the issue of whether the offer was made. That is because I have concluded that even if the burden is on the Defence to establish it on a balance of probabilities, I accept Ms. Chen's evidence that the offer was made. My reasons follow.

[56] I will start with Ms. Chen's testimony. In general, I did not detect any of the traditional indicators of deceit in her evidence. She answered questions thoughtfully and carefully, her manner did not change between direct and cross-examination, she was not evasive, she made reasonable concessions, her evidence was not internally inconsistent, and she acknowledged when she could not recall things.

[57] The Crown argued that her evidence about the unrecorded conversation should not be believed. As I said, Ms. Chen was not cross-examined about that aspect of her testimony. In some cases, to ask the Court to conclude that a witness (including an accused) has lied without challenging the witness would be unfair and a violation of the rule in *Browne v. Dunn* (See: *R. v. Shephard*, 2019 NBCA 76, paras. 69-79, and the authorities cited therein). Here, Ms. Chen was put on notice, by hearing D/Cst. Buell's testimony, that her credibility on this point would be challenged, so the rule was not engaged (*Shephard*, paras.78-79; and, *R. v. Lyttle*, 2004 SCC 5). However, the lack of cross-examination impacts my ability to assess her credibility on this crucial evidence because I don't have the benefit of assessing her ability to withstand challenge. In general, on the areas where she was cross-examined, she responded appropriately, conceding what was reasonable to concede and her evidence was not shaken.

[58] The Crown argued that Ms. Chen should not be believed, in part, because one would expect that if there had been an offer to close her file, she would have raised it during the recorded interview or in one of the subsequent emails, especially when she was told she was going to be arrested. I agree that would be expected. However, she was not questioned on this, either in direct or cross-examination. The result is that I have no evidence of any explanation but also no ability to assess her credibility by hearing and observing her reactions when challenged. I agree with the Crown that common sense would suggest that a person in her position would ask why she was being charged given the earlier offer. However, I have to be cautious about relying on apparent common sense to draw negative inferences about her credibility when she was not given an opportunity to explain. I have to be especially careful about applying 'common' sense given that Ms. Chen and I are from very different cultural backgrounds.

[59] I agree with the Defence, that Ms. Chen's credibility is enhanced because of her truthful testimony that she did not understand what D/Cst. Buell told her about the restorative justice program so she did not rely on it when deciding to speak. I say that because if she was prepared to lie under oath, the easier lie would have been to simply say that she cooperated because of what he said about restorative justice during the recorded interview.

[60] I also find that her evidence about the unrecorded conversation is rendered more plausible by the fact that D/Cst. Buell was actually considering restorative justice and then raised it during the recorded interview. This lends credence to Ms. Chen's testimony about the earlier conversation. On its face, it might seem implausible than an officer would tell the subject of a $600,000 fraud investigation that the file might be closed if the subject provided their side of the story. However, in this case, the officer knew the complainants were open to restorative justice, knew Ms. Chen had no criminal record, actually viewed restorative justice as an option, and mentioned it to her during the interview. In those circumstances, it is not implausible that he might have wanted to explain that to her before their formal meeting.

[61] The Crown argued that the alleged unrecorded offer and the comments about restorative justice are unrelated because closing a file is different than restorative justice. Specifically, restorative justice does not result in the file being closed, it just sends it through a different process. I agree there are differences, however, it is a relatively subtle distinction and the ultimate

result would be very similar. It is relevant that, on Ms. Chen's evidence, D/Cst. Buell was speaking to her without an interpreter. As such, it would make sense that he would use simple and straightforward language that she could understand.

[62] Ms. Chen's evidence was contradicted by that of D/Cst. Buell. I recognize that Ms. Chen's evidence has to be assessed in the context of all the evidence and most significantly that of D/Cst. Buell.

[63] The Crown submits that D/Cst. Buell's testimony was reliable, credible and supported by practice and policy. He testified he would not have had a private conversation with a suspect before a recorded interview, would not offer to close a file if a suspect cooperated and would essentially consider it to be improper.

[64] After assessing Ms. Chen's evidence in the context of all the evidence and including D/Cst. Buell's evidence, I find that the offer was probably made.

[65] I accept that in a normal circumstance, D/Cst. Buell would not make this kind of offer to the subject of an interview, that it would be contrary to his practice and he would view it as improper and a violation of policy. However, this was not a normal file because of the possibility of restorative justice and because Ms. Chen's English was less than perfect. It is not implausible that an officer who was considering restorative justice might explain that to a suspect. It is also not implausible that an officer would use simple language to explain that concept to a suspect whose first language is not English.

[66] I had concerns about the reliability of D/Cst. Buell's recollections. He understandably did not recall details of his meetings with Ms. Chen and was quite reliant on his notes. However, his notes were not adequate to refresh his memory and this negatively impacted his evidence in a number of areas. This was most significant in relation to his evidence of what happened before the recorded interview on February 24th. In direct-examination, he testified that Ms. Chen and the interpreter arrived together, however in cross-examination he acknowledged that he did not have a clear recollection of who arrived first and had no notes about that. Further, in direct-examination he provided a narrative of what happened after he met Ms. Chen. However, in cross-

examination and re-direct examination, he recalled significant additional details that were not in his notes.

[67] His lack of recollection coupled with the lack of clarity in his notes also means that I cannot rely on his evidence as to what time Ms. Chen arrived at the CID building and/or what time he met her in the foyer. Ultimately, I have concluded that the question of whether the time recorded in his notes for February 24th reflected the time Ms. Chen arrived or the time he first interacted with her does not matter. I say that because D/Cst. Buell did not have an independent recollection of what time Ms. Chen arrived and, given his testimony that he was not being specific about the time in his notes and did not know where he got that time, the time recorded in his notes may or may not accurately reflect her arrival time. The conversation reported by Ms. Chen would have taken only minutes, so even if I accept D/Cst. Buell's evidence that his notes reflect Ms. Chen's arrival time, I cannot say there would not have been time to have the conversation before they entered the interview room.

[68] D/Cst. Buell also had an imperfect recollection and inadequate notes of his meeting with Ms. Chen on March 10th. Not much turns on that since he did agree that Ms. Chen raised a concern about custody of her children which is what is relevant about the meeting. However, this part of the examination does impact my assessment of the reliability of his evidence. When questioned by the Crown about the duration of this meeting, he provided a clear and direct response to a straightforward question but then equivocated when Defence sought to confirm that answer. In direct-examination, he was asked about the March 10th meeting with Ms. Chen and what they discussed. The Crown then asked, "how long was the interaction?" and he responded, "approximately 20 minutes". In cross-examination, counsel sought to confirm that evidence, saying, "you said that interaction lasted for about 20 minutes?". In response, D/Cst. Buell seemed to suggest that his earlier answer reflected the time that Ms. Chen was at the station, rather than the time he interacted with her. I do not believe the officer could have misunderstood the Crown's very clear question, especially given that it followed immediately after questions concerning what he and Ms. Chen had discussed during their interaction. Then, when Defence counsel suggested to him that it would not take that long to discuss the matters that he recalled being discussed, D/Cst. Buell again claimed that his time estimate referred to the period from when Ms. Chen arrived, saying, "once again, from being

notified that she's present there and then that's the time that she got there but doesn't mean I was right out there in the foyer…". If D/Cst. Buell had simply responded to the Defence by saying that his response to the Crown was an approximation only so the meeting may have been shorter or if he had simply reiterated that he did not recall everything that was discussed, I would have no difficulty with his evidence. However, given that his initial response to the Crown was an approximation of how long his interaction with Ms. Chen was, whether or not she arrived earlier than the meeting began would not be particularly relevant. On its own, this would have little impact, but it does contribute to my overall sense that his testimony was not reliable.

[69] I was also troubled by D/Cst. Buell's explanation for why he told Ms. Chen about restorative justice during the recorded interview. He acknowledged that when he interviewed her he was considering restorative justice but testified that this had nothing to do with his decision to tell her about it in the interview. I don't accept that the fact that he was actually considering restorative justice played no part in his decision to mention it during the interview. He did mention it while explaining the criminal justice process and he did provide more details after the interpreter expressed confusion. However, his explanation of the criminal justice system was prompted by a question from Ms. Chen about whether the matter had reached the point where it would go to court. There was no need to mention restorative justice to answer that question and he acknowledged that he does not raise restorative justice with everyone he interviews. In my view, the most plausible explanation for why he mentioned it is that it was something he was actually considering as an option.

[70] Given my overall assessment of the reliability and credibility of Ms. Chen's evidence and my concerns about the reliability of D/Cst. Buell's recollections, I accept Ms. Chen's evidence that D/Cst. Buell suggested to her that the file could be closed 'soon after' if she provided her side of the story.

Issue 2 – Was Ms. Chen Induced by the Offer?

[71] Having concluded that the offer was probably made, I have to go on to determine whether there is a nexus between the offer and the giving of the statement and, in all the circumstances, whether the inducement was strong enough to induce Ms. Chen to give up her right to remain silent (*Spencer,* paras.15 and 19).

[72] The ultimate question is whether the offer, in all the circumstances, was “strong enough to raise a reasonable doubt about whether the will of the subject has been overborne” (*Oickle,* at paras. 57 - 58).

[73] This requirement that an inducement be strong enough that the subject’s will is overborne suggests a high level of psychological compulsion.

[74] However, in *Oickle*, Iacobucci, J. discussed how voluntariness should be assessed when dealing with an offer of leniency. His comments bear repeating:

> 49 As noted above, in *Ibrahim* the Privy Council ruled that statements would be inadmissible if they were the result of "fear of prejudice or hope of advantage". The classic" hope of advantage" is the prospect of leniency from the courts. It is improper for a person in authority to suggest to a suspect that he or she will take steps to procure a reduced charge or sentence if the suspect confesses. Therefore in *Nugent, supra*, [1988] N.S.J. No. 186 the court excluded the statement of a suspect who was told that if he confessed, the charge could be reduced from murder to manslaughter. See also *R. v. Kalashnikoff* (1981), 57 C.C.C. (2d) 481 (B.C.C.A.); *R. v. Lazure* (1959), 126 C.C.C. 331 (Ont. C.A.); R. Marin, Admissibility of Statements (9th ed. (loose-leaf)), at p. 1-15 ... In these circumstances, holding out the possibility of a reduced charge or sentence in exchange for a confession would raise a reasonable doubt as to the voluntariness of any ensuing confession. An explicit offer by the police to procure lenient treatment in return for a confession is clearly a very strong inducement, and will warrant exclusion in all but exceptional circumstances.
>
> (emphasis added)

[75] The Supreme Court has repeatedly emphasized the need for a flexible and contextual approach to voluntariness in general (*Oickle,* paras. 27 & 47; and, *Spencer,* para. 11). A judge must consider all relevant factors and “strive to understand the circumstances surrounding the confession and ask if it gives rise to a reasonable doubt as to the confession’s voluntariness ….” (*Oickle,* para. 71).

[76] Resolving whether an inducement was strong enough to overcome the subject’s will also requires consideration of the context and circumstances, including the strength of the inducement, the particularities of the individual and their circumstances (*Spencer,* paras.13 -19; and, *Oickle,* para. 42).

[77] In my view, there was nothing about the specific circumstances of the interview that would have made Ms. Chen more susceptible to an

inducement. Nothing leading up to the interview or during the interview was suggestive of oppression, threats or that Ms. Chen did not have an operating mind.

[78] During the interview, she was not under arrest or detention and was told that she was free to leave at any time. D/Cst. Buell provided her with the standard police caution, including advising her that that she need not say anything and "had nothing to hope from any promise or favour". He then explained in plain language that she did not need to speak with him if she didn't want to and provided her with the secondary police caution, including that anything said to her previously should not make her feel compelled to say anything at this time. She confirmed she understood.

[79] He also advised her of her right to consult counsel and explained it in plain language. She said she had not spoken to a lawyer about the criminal aspect of the case. He told her that she could stop the interview at any time, that he would provide her with a phone and a number for counsel, reminded her of her right to silence and that she was free to go.

[80] I find no fault in how D/Cst. Buell cautioned Ms. Chen or dealt with her right to counsel. That can be important to the voluntariness analysis (*Beaver,* para. 50; *R. v. Tessier,* 2022 SCC 35, para. 5; and, *Singh*, paras. 31-33).

[81] The broader context of Ms. Chen's circumstances and the reasons why she provided the information are also important. I have already summarized the relevant information about Ms. Chen's background and circumstances at the time of the interview.

[82] In direct-examination, she was asked why she answered D/Cst. Buell's questions during the recorded interview. She said that she hoped that the police could help her find the truth, that he had said it was possible that the file would be closed sooner if she cooperated and it would be helpful to her case. She was asked what she meant by 'helpful to her case' and said that in China, if you were taken to the police station and if you "cooperate well", the case would go better and she thought it would be the same in Canada so she had to cooperate.

[83] In cross-examination, she acknowledged that during the interview, she wanted to help the investigation, was being truthful, and didn't change any of her answers.

[84] She was asked why she provided further information, including the names of potential witnesses, to D/Cst. Buell after the interview. She said that she felt the case had not been properly investigated in the civil court and hoped that the police officer would have more power and would communicate with those people to prove her innocence. More specifically, she said that she had mentioned names during her interview and wanted to provide contact information so the officer could speak with them and provide the truth. She said she provided her phone because she believed it might be able to be fixed and the police could obtain helpful information from it. She said she was trying her best to find information and be cooperative to help the detective find the truth.

[85] She testified that she was concerned about the impact of a charge on her immigration status in Canada and custody of her children. She testified that she raised her concerns about losing custody of her children during the meeting with D/Cst. Buell on March 10th. She said she was very concerned about the case because it was criminal and she did not yet have a result in the family court case. She was concerned about what would happen to the children if she was arrested and there was no one to take care of them and thought that if she was charged or arrested and put in jail it would be very easy to lose her children. D/Cst. Buell agreed that she raised concerns about custody of her children during that meeting.

[86] This concern was raised again in an email she sent to D/Cst. Buell on February 15, 2022 (Ex. 1, email 15). That was in response to an email from him telling her that the family wished to proceed with the case, that the Crown supported charges being laid and he wanted her to come in to be arrested and then released (Ex. 1, email 11). She asked, "may I know wether (sic) this will impact my custody". D/Cst. Buell responded that it would not affect custody and the only time that would happen would be where the mother caused harm to the child (Ex. 1, email 15).

[87] In her testimony, she was asked why she asked that and said that she was always concerned about how the case would impact custody because she did not want to lose her children. She testified that she thought that if she was

arrested or convicted it might negatively affect her case in family court and she might lose custody.

[88] In cross-examination, she acknowledged that she knew that her husband had been charged with a criminal offence in Canada and was not deported.

Conclusion on Whether Ms. Chen was Induced

[89] I have concluded that when Ms. Chen was interviewed, she was honestly fearful that being charged might lead to her losing custody of her children. It is not disputed that she raised this concern during her in-person meeting with D/Cst. Buell about two weeks after the interview and again in the email about a year after the interview. That, of course, doesn't establish that she had that fear on February 24th, but it is corroborative of her evidence that she did.

[90] I also conclude that there was a nexus between the offer made by D/Cst. Buell and her decision to provide information. The offer was not the only reason she cooperated. I believe she also felt that what she had to say would help her, perhaps because she thought it was exculpatory and perhaps because of her knowledge of the legal system in China. However, I am satisfied that the offer was a factor in Ms. Chen's decision to cooperate with the police.

[91] Ms. Chen had a hope that by providing information to police she could avoid being charged. In some cases, that hope is "self-generated" and is irrelevant to the voluntariness inquiry (*R. v. Rennie* (1981), 74 Cr. App. R. 207 (C.A.), p. 212, cited in *Oickle*, para. 57). Ms. Chen's hope was not self-generated. It was reasonably connected to the offer made by the officer.

[92] In all the circumstances, including her legal status in Canada and her concern about losing custody of the children, the hope of having the file closed without charge would have been a powerful inducement to provide the officer with information.

[93] The Crown bears the onus of proving the voluntariness of the statement beyond a reasonable doubt and I find that the onus has not been met.

[94] The statement is not admissible in the trial.

Issue 3 – Are the Emails also Inadmissible?

[95] The Crown and Defence agree that admissibility of the emails should be governed by the law relating to the 'derived confessions rule' (*I. (L.R.) and T. (E.)*; *G. (B.)*; and, *S.G.T.*). The applicable law was summarized by Justice Arnold in *Buckley* (paras. 53-64). In *I. (L.R.) and T. (E.)*, the Court was dealing with admissibility of a verbal statement given by a young person, with those special statutory requirements. However, the test set out by Justice Sopinka, writing for the Court, was subsequently applied in the adult context (*G. (B.)*, paras. 21 -24; and, *S.G.T.*, paras. 28-30) and to determine the admissibility of statements made in writing in the form of an apology letter and an apologetic email (*S.G.T.*).

[96] It is clear from these and other cases that the 'derived confession rule' does not require exclusion of all statements that are preceded by an involuntary statement (*I. (L.R.)*, para. 29; *S.G.T.*, para. 29; and, *R. v. D. (M.)*, 2012 ONCA 841, para. 53)). Subsequent statements will be excluded where "the court is satisfied that the degree of connection between the two statements is sufficient for the second to have been contaminated by the first" (*G.B.*, paras. 22-23). That can happen where "… the tainting features which disqualified the first confession continued to be present" in the second statement or "if the fact that the first statement was made was a substantial factor contributing to the making of the second statement." or if both conditions are present at the same time (*I. (L.R.)*, para. 30; and, *G. (B.)*, para. 23).

[97] The degree of connection between the two 'statements' must be assessed with reference to the relevant circumstances which may include: the lapse of time between the statements; whether the second statement was essentially a continuation of the first; whether the first statement was referred to during subsequent questioning; whether additional incriminating evidence was discovered between the two statements; whether the same police officer(s) were involved; where there were other similarities between the two circumstance; and, whether the suspect was cautioned or received advice from counsel between the two statements (*L.(R.) and T. (E.)*, paras. 29 and 31; and, *D. (M.)*, para. 54).

[98] The first statement may be a substantial contributing factor in making the second statement where the suspect feels that once the first statement is

made, there is no longer a reason to remain silent. In *D. (M.)*, Justice Watt described the inquiry as "essentially a causation inquiry that involves a consideration of the temporal, contextual, and causal connections between the proffered and earlier statements…" (para. 56).

[99] In summary, under the 'derived confessions rule' I have to consider the level of connection between the statement and the subsequent emails and decide whether:

a. the same features that tainted Ms. Chen's statement continued to be present when she sent the emails; or,

b. the fact that she had given the statement was a substantial factor in her decision to send the emails.

[100] I have considered the level of connection between the recorded statement and the emails in light of the relevant circumstances. The emails that contain information were sent between February 25, 2021 and March 4, 2021, so are temporally connected. Given their content and the content of the statement, they are also contextually connected. They flow from the oral statement. Ms. Chen was providing D/Cst. Buell with information that she said she would provide him during the oral statement.

[101] I am satisfied that the tainting feature that contaminated the oral statement – Ms. Chen's understanding that if she cooperated, she would not be prosecuted - continued. As such, I am satisfied that "… the degree of connection between the two statements is sufficient for the second to have been contaminated by the first" (*G.B.*, paras. 22-23).

[102] As such the emails are also not admissible.

Elizabeth Buckle, JPC