



COURT MARTIAL

Citation: *R. v. Lawless*, 2024 CM 3005

Date: 20240314
Docket: 202313

Standing Court Martial

Canadian Forces Base Petawawa
Petawawa, Ontario, Canada

Between:

Corporal T. Lawless, Applicant

- and -

His Majesty the King, Respondent

Before: Lieutenant-Colonel L.-V. d'Auteuil, A.C.M.J.

**REASONS ON AN APPLICATION MADE BY THE ACCUSED FOR THE
EXCLUSION OF AN UNOFFICIAL CONFESSION BECAUSE OF AN
ALLEGED BREACH OF HIS RIGHT UNDER SECTION 10(a) AND 10(b) OF
THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS**

(Orally)

Introduction

[1] Corporal (Cpl) Lawless is charged with one offence for having fought, on or about 24 November 2022, with a person subject to the Code of Service Discipline, namely Private (Pte) Lurette, while in military quarters at Garrison Petawawa, contrary to section 86 of the *National Defence Act* (NDA).

[2] This preliminary motion was heard on 12 March 2024 by Cpl Lawless' counsel, further to my decision to declare that the oral statement made by Cpl Lawless to Cpl Poste on 24 November 2022 is voluntary and admissible in this trial. It was put to the Court as a question of mixed law and fact to be determined by the military judge presiding at this Standing Court Martial.

[3] More specifically, Cpl Lawless is requesting from the military judge:

- (a) first, a declaration that the unofficial statement he made, while being interrogated by a military police (MP), Cpl Poste, in the course of an investigation the latter was conducting on the night of 24 November 2022, was obtained in a manner that infringed his constitutional rights under paragraphs 10(a) and 10(b) of the *Canadian Charter of Rights and Freedoms*; and
- (b) an order from the military judge that this statement shall be excluded because, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

The evidence

[4] The hearing on this application took place on 12 March 2024. Both parties decided and agreed to rely on the testimonial evidence heard in the previous application regarding the admissibility of an unofficial confession in the context of the application of the common law confessions rule, which consisted of the testimony of Cpl Poste and the testimony of Cpl Lawless.

[5] The notice in writing filed with the Court by Cpl Lawless' counsel was adduced as an exhibit in this hearing.

[6] The Court also took judicial notice of the facts and matters listed and contained in article 15 of the *Military Rules of Evidence*.

The circumstances

[7] At this stage, it would be appropriate for me to provide a summary of the circumstances relevant to this matter.

[8] On 24 November 2022, Cpl Poste, who is a MP on patrol on the night shift on Garrison Petawawa, arrived at building P-102 at 11:25 p.m. His MP colleague, Cpl Giacomelli, was already there. His other MP colleague, Cpl MacInnes, showed up later. They were sent to that location further to a call made by the Renfrew County Ambulance who was dispatched to that location earlier by 911 services following a call it received reporting that somebody was injured during a fight.

[9] It is common practice for the Renfrew County Ambulance when an ambulance goes to the base, as a matter of courtesy, to call the MP detachment dispatcher to inform them that an ambulance is going on the base. Sometimes, the Renfrew County Ambulance makes such call to request assistance because there is uncertainty concerning the circumstances of the incident being at the origin of the call. For this specific situation, the Renfrew County Ambulance requested the presence of MP patrollers, probably because the nature of the incident involved a fight.

[10] When Cpl Poste arrived at the building, he was met outside the building by Gunner (Gnr) Kuly and Bombardier (Bdr) Radford. He learned that the latter called 911 services, considering that they both found someone with a serious head injury further to, what seemed to be, a fight with another military member.

[11] They told him that while Gnr Kuly was going outside the building for a smoke, he witnessed two members of 2 Combat Engineer Regiment (CER), later identified as Cpl Lurette and Cpl Lawless, fighting in the wing of building P-102 where members of 2 CER are located. Gnr Kuly informed him that he saw Cpl Lawless pile driving Cpl Lurette's head into the ground.

[12] At that point, Cpl Poste considered that Cpl Lawless was a participant and an aggressor in the fight. Cpl Lurette was considered as a participant to the fight. Gnr Kuly was considered as a witness and Bdr Radford as the complainant.

[13] The emergency medical services arrived at the building at about the same time as Cpl Poste. The emergency personnel went inside the building, while Cpl Poste was talking with Gnr Kuly and Bdr Radford.

[14] After talking to Gnr Kuly and Bdr Radford, Cpl Poste went inside building P-102 with Cpl MacInnes to meet with Cpl Lawless.

[15] While in the hallway, Cpl Poste met with Cpl Lawless at the door of his room, with Cpl MacInnes. Cpl Poste did not identify himself or Cpl MacInnes, as they were dressed in their MP operational patrol full-dress uniform. They were wearing the black MP vest with a gold wording "POLICE" on the front and the back, and their black duty belt. Cpl Lawless confirmed that he recognized both persons as being MP.

[16] Cpl Poste read him a caution in these terms: before you say anything relating to any charge, which has been or may be preferred against you, you are advised that you are not obliged to say anything, but anything you say may be taken down in writing or recorded by other means, or both, and may be used as evidence. Do you fully understand this warning? Cpl Lawless responded with a yes at 11:45 p.m.

[17] According to Cpl Poste, in simpler words, the caution means that you do not have to talk to us, but if you do, it will be used as evidence. He read a caution to Cpl Lawless to let him know that he was a subject for the investigation and that anything he said could be used as evidence.

[18] According to Cpl Poste, Cpl Lawless seemed intoxicated, he had slurred speech and seemed unsteady on his feet. Cpl Lawless admitted that he had consumed alcohol, and he testified to the same during his testimony before the Court. However, he did not seem confused, he was coherent and understandable the entire time he was questioned, according to Cpl Poste.

[19] Cpl Poste did not make any threat or promises, and neither did Cpl MacInnes. In fact, Cpl Lawless confirmed that he interacted only with Cpl Poste, as Cpl MacInnes did not ask any question during the interview in the hallway.

[20] Cpl Poste asked Cpl Lawless what happened on that evening. Cpl Lawless explained that he was playing a game of Dungeons and Dragons with Cpl Lurette, and that they were drinking while doing so. The game became heated, and as they are practising a Viking or pagan religion, they settled their differences through fighting.

[21] Cpl Poste asked Cpl Lawless why Cpl Lurette had significantly more injuries than he did, to which Cpl Lawless answered that somebody had to win the fight. Then, Cpl Poste ended the interview with Cpl Lawless and put him in an adjacent room that was not occupied by either Cpl Lawless or Cpl Lurette.

[22] Cpl Poste waited for emergency medical services to transport Cpl Lurette to the hospital because of the nature of his injuries. Cpl Lurette had an open wound on the head and a black eye.

[23] It is only once Cpl Lurette left the premises by ambulance that Cpl Poste proceeded with the arrest of Cpl Lawless because he had reasonable grounds to believe that he had committed the offence of fighting with a person subject to the Code of Service Discipline (section 86 of the *NDA*). Cpl Poste proceeded with the arrest as he wanted Cpl Lawless to have some conditions imposed for his release considering that he had no legal authority himself to do such thing. Cpl Poste specifically wanted Cpl Lawless to be ordered to abstain from communicating with Cpl Lurette, as it is a condition normally imposed in such circumstances.

[24] Cpl Lawless was then formally informed that he was suspected of having committed this specific offence, he was cautioned on his right to remain silent, and he was provided with his right to counsel at 11:59 p.m. He was brought to the MP Detachment by Cpl Giacomelli and placed in an interview room at 00:10 a.m. on 25 November 2022. Cpl Lawless was given the opportunity to exercise his right to counsel at that time, which he did.

[25] The custody review officer (CRO) of 2 CER was informed of the arrest of Cpl Lawless. At 03:35 a.m. on that same day, Cpl Lawless was released by the CRO from custody with conditions.

[26] Cpl Lawless confirmed that he remembers the interview he had with Cpl Poste on the night of 24 November 2022. He said that he was very intoxicated on that night. He understood that Cpl Poste was a member of the military police. His memory of that night is not very clear, but he does remember that Cpl Poste made it very clear that he had to speak with him. Because Cpl Lawless was removed from the situation and was told to speak by Cpl Poste who was in uniform, he felt that he had the obligation to speak to Cpl Poste about what happened.

[27] Cpl Lawless told the Court that things were very fuzzy that night because he was drunk, but he remembered that he was told to make a statement and that it could be used as evidence. However, he told the Court that it was not clear to him that his statement could be used to his detriment. It is once he talked to a lawyer further to his arrest and being brought to the MP detachment that he fully understood that any statement he would make to the MP could be used to his own detriment.

[28] However, he told the Court during his cross-examination that he was not told explicitly by Cpl Poste that he had to speak to him about what happened because he is an MP. Considering that he was drunk, he mentioned that while questions were being asked by Cpl Poste, he felt that things were going very fast.

[29] Cpl Lawless confirmed that he was asked by Cpl Poste what transpired, how Cpl Lurette injured his head, what amount of alcohol was consumed, and how the broken glass ended up all over the floor. He answered the questions asked in the manner reported to the Court by Cpl Poste.

The issue

[30] There are some questions I need to answer in order to decide if the oral statement made by Cpl Lawless to Cpl Poste on 24 November 2023 shall be excluded as evidence in this trial:

- (a) first, was Cpl Lawless detained by Cpl Poste when he made his statement? If the answer is yes, I would need to go to the next question. If the answer is no, it would put an end to my analysis and result in the dismissal of Cpl Lawless' application;
- (b) second, was Cpl Lawless informed of the reasons of his detention prior to making his statement? Regardless of the answer to this question, I would need to go to the next question;
- (c) third, was Cpl Lawless informed without delay of his right to retain and instruct counsel prior to making his statement? If the answer is no to the previous question or to this question, or to both, then the Court can conclude that the statement was obtained in a manner that infringed his constitutional right and consider the next question; and
- (d) fourth, would the admission of the statement in the proceedings bring the administration of justice into disrepute, having regard to all the circumstances? If the answer is yes, then the statement shall be excluded as evidence in this trial. If the answer is no, then it shall be admitted.

Was Cpl Lawless detained by Cpl Poste when he made his statement?

[31] Section 10 of the *Charter* reads in part as follows:

Everyone has the right on arrest or detention:

- (a) to be informed promptly of the reasons therefor;
- (b) to retain and instruct counsel without delay and to be informed of that right; and
- [. . .]

[32] A person is detained where they are either physically or psychologically restrained at the hands of the State: *R. v. Grant*, 2009 SCC 32, at paragraph 44; *R. v. Le*, 2019 SCC 34, at paragraph 27; and *R. v Suberu*, 2009 SCC 33, at paragraph 21. In this case, I agree with both parties that Cpl Lawless was not physically restrained when he made his statement to Cpl Poste, and the sole issue is whether he was psychologically restrained.

[33] Psychological detention may occur in two different ways. First, it is where the person has a legal obligation to comply with an officer's request or demand, or second, where a reasonable person would feel obligated to comply with a police direction or demand and that they are not free to leave (see *Grant* at paragraph 44, and *Suberu* at paragraph 25).

[34] Factors were set out in *Grant* at paragraph 44 for a proper application by the trial judge of the test for deciding on the existence, or not, of psychological detention:

- (a) the circumstances giving rise to the encounter as the individual would reasonably perceive them;
- (b) the nature of the police conduct; and
- (c) the particular characteristics or circumstances of the individual where relevant.

[35] As explained by the Supreme Court of Canada (SCC) in *Grant* and reiterated in *Suberu* at paragraph 24:

[24] As explained in *Grant*, the meaning of "detention" can only be determined by adopting a purposive approach that neither overshoots nor impoverishes the protection intended by the *Charter* right in question. It necessitates striking a balance between society's interest in effective policing and the detainee's interest in robust *Charter* rights. To simply assume that a detention occurs every time a person is delayed from going on his or her way because of the police accosting him or her during the course of an investigation, without considering whether or not the interaction involved a significant deprivation of liberty would overshoot the purpose of the *Charter*.

[36] Consequently, not every police interaction with a person can lead the trial judge to a finding of detention. Where the police believe a crime has recently been committed, they may engage in preliminary questioning of bystanders without giving rise to a detention under section 10 of the *Charter* (see *Suberu*, at paragraph 28, and *Grant*, at

paragraph 37). The line between general questioning and focused interrogation resulting in detention may be difficult to draw, and it is the trial judge's task to assess the circumstances to determine if that line has been crossed (see *Suberu*, at paragraph 29).

[37] Cpl Lawless was approached by Cpl Poste and Cpl MacInnes while exiting his room in building P-102 at Garrison Petawawa. Cpl Poste approached him and confirmed his identity by referring to his name, to which he responded positively. He was told that he had the right to remain silent and anything he could say may be used as evidence.

[38] He was asked immediately what happened and why Cpl Lurette was the person most injured as a result of the fight they both had.

[39] In these circumstances, it was reasonable for Cpl Lawless to have the impression that he was the target of the investigation conducted by Cpl Poste, that the focus of it was on his involvement and the level of responsibility he had for the injuries of Cpl Lurette. Cpl Lawless told the Court that he felt obliged to answer the questions asked by Cpl Poste and that he could not go anywhere else without having first answered these questions. Once he did, he was taken into a room where he had to wait until his formal arrest.

[40] From these circumstances, I can conclude that Cpl Poste approached Cpl Lawless to specifically confirm his involvement in the fight and to what extent he was responsible for Cpl Lurette's injuries.

[41] The nature of the police conduct was of the nature of someone who suspected that Cpl Lawless committed a service offence. Immediately after talking to Cpl Lawless, Cpl Poste placed him in a room to isolate him from others. His actions flowed from his initial interview of Cpl Lawless to determine his degree of responsibility in the offence allegedly committed.

[42] Cpl Lawless confirmed in his testimony that the manner in which he was approached by Cpl Poste and Cpl MacInnes in the hallway while exiting his room was a clear indication that he could not go anywhere, and in fact he did not.

[43] In addition, shortly after being interrogated by Cpl Poste, approximately ten minutes later, Cpl Lawless was formally arrested and brought to the MP detachment.

[44] The encounter Cpl Lawless had with Cpl Poste was not preliminary or exploratory to determine if Cpl Lawless was involved in the commission of an offence. Cpl Poste's investigation was focused more on understanding the degree of responsibility of Cpl Lawless for the injuries inflicted on Cpl Lurette, and not if Cpl Lawless had any involvement in the fight, as he knew he had.

[45] When all these circumstances are put together, including the caution made to Cpl Lawless before he was questioned by Cpl Poste, it is my conclusion that Cpl Lawless proved, on a balance of probabilities, that he was psychologically detained.

Was Cpl Lawless informed of the reasons of his detention prior to making his statement?

[46] The answer is no. The evidence is that prior to making his statement, throughout the provision of his statement and after, Cpl Lawless was not told by Cpl Poste the reasons for his detention. From the time he was stopped in the hallway where he was interrogated to the time he was brought to a room, Cpl Lawless was not told that he was suspected of having committed a service offence.

[47] Consequently, it is my conclusion that, prior to making his oral statement to Cpl Poste on 24 November 2022, the right of Cpl Lawless to be informed of the reason of his detention pursuant to paragraph 10(a) of the *Charter* was infringed.

Was Cpl Lawless informed without delay of his right to retain and instruct counsel prior to making his statement?

[48] The answer is no to this question. There is no evidence that such thing happened, and the prosecution conceded that it was not made by Cpl Poste prior to obtaining an oral statement from Cpl Lawless.

[49] Consequently, it is my conclusion that, prior to making his oral statement to Cpl Poste on 24 November 2022, the right of Cpl Lawless to be informed without delay of his right to retain and instruct counsel pursuant to paragraph 10(b) of the *Charter* was infringed.

Would the admission of the statement in the proceedings bring the administration of justice into disrepute, having regard to all the circumstances?

[50] Now, shall the oral statement made by Cpl Lawless to Cpl Poste on 24 November 2022, which the prosecution intends to use at trial, be excluded pursuant to subsection 24(2) of the *Charter*?

[51] To answer this question, as suggested in *Grant*, the Court must consider three factors:

- (a) How serious is the *Charter*-infringing state conduct?
- (b) What is the impact of the breach on the accused *Charter*-protected rights?
- (c) What is society's interest in the adjudication of the case on the merits?

[52] There is an undeniable link between the evidence obtained and the violation of the accused's right to be informed without delay of his right to retain and instruct counsel pursuant to paragraph 10(b) of the *Charter*. Cpl Lawless expressed to the Court that it is when he was later informed of that right and he exercised it, that he understood the extent of the seriousness of the situation in which he found himself.

[53] How should the conduct of Cpl Poste be characterized in these circumstances? In my view, all of the evidence clearly indicates that this MP had already made up his mind regarding the involvement of Cpl Lawless in the incident. He was conducting a targeted and focused investigation on the applicant, trying to confirm the extent of his involvement in it.

[54] Clearly, it was not a general inquiry that Cpl Poste was making to find out what happened and who was involved. When he approached Cpl Lawless, he knew all that, and he felt that he must give him a caution about his right to silence, which confirms that he feared that he could say something of a self-incriminating nature.

[55] Regular Force members of the Canadian Armed Forces are subject to the Code of Service Discipline at all times, regardless of the time and the place. As such, they are entitled to the respect of their fundamental constitutional rights as any other citizen in Canada. If, for any reason, the military context is raised to justify their infringement, then it shall be considered under an analysis pursuant to section 1 of the *Charter*, and nowhere else.

[56] Consequently, it is very important that MPs be able to appreciate the differences in which they find themselves when they are investigating at a place where an incident recently occurred. Depending on the circumstances, they must adapt their behaviour and clearly recognize when the line is crossed and requires that a person be informed of their constitutional rights.

[57] Here, Cpl Poste probably identified the situation, but he stopped halfway. He failed to do what was required in the circumstances. This mistake was unreasonable in the circumstances because he ought to have known that he had to inform Cpl Lawless of the reasons of his detention, and of his right to retain and instruct counsel without delay, knowing that he had no intent to let him go elsewhere.

[58] As mentioned in *Le* at paragraph 147, the absence of bad faith does not constitute a positive finding of good faith regarding the conduct of a police officer. Clearly, it is not a situation where Cpl Poste had a misunderstanding of the law. It is rather the misunderstanding of the facts that resulted in obtaining a statement from Cpl Lawless without first informing him of his constitutional rights.

[59] Accordingly, I conclude that there was a flagrant disregard of the *Charter* by Cpl Poste while he had the responsibility to uphold Cpl Lawless' *Charter* rights. The seriousness of the breach favours excluding the evidence.

[60] What is the impact of the breach of the accused's *Charter* rights? In my opinion, it is very significant. As illustrated by Cpl Lawless himself, if someone is detained and provided with his constitutional rights, including the one to consult a lawyer, it indicates to the person being subjected to the detention how serious the situation is and gives access to a person who can help him understand what is going on, and what to do regarding such situation. Knowing that it can result in being charged and tried before a court martial, the posture to be taken by the person may or may not drastically change. At least, he can make an informed decision. I conclude that the impact of the breach is very high and again, it favours the exclusion of the evidence.

[61] Finally, what is society's interest in the adjudication of the case on the merits? First, let us assume that the evidence at issue in this application is totally reliable. Then, it would essentially mean that Cpl Lawless said that he was fighting with Cpl Lurette, which goes to an essential element that the prosecution must prove beyond a reasonable doubt.

[62] However, this is not the only evidence available to the prosecution to prove this essential element. The prosecution made it clear that Cpl Lurette, the other person involved in the alleged fight, will be called by the prosecution, and Gnr Kuly provided some evidence in his testimony on this same topic. The importance of this evidence for proving the prosecution's case is not indispensable in the circumstances, knowing that there is other evidence it can rely on to prove this specific essential element.

[63] The offence of fighting with a person subject to the Code of Service Discipline is objectively considered as being at the low end of the scale of seriousness because the maximum punishment on conviction is imprisonment for less than two years. In addition, it is one of those offences for which a conviction does not necessarily imply a conviction for a criminal offence, depending on the sentence imposed, and it does not constitute an offence for the purposes of the *Criminal Records Act*.

[64] However, it is true that the alleged offence was committed on a defence establishment, more specifically in military quarters, and it is important to ensure that such place is safe and secure for military members, considering that it is the place where they reside and rest.

[65] Considering that the preceding, the public's perception of the military justice system, and the court martial in particular, could not be severely undermined, or eroded in the long term if the statement of Cpl Lawless was excluded. It would not make the public believe that the Court is unable to properly exercise its truth-seeking function, or deal with disciplinary matters, considering that other evidence can be adduced by the prosecution.

[66] In the present case, I am of the opinion that a reasonable person, fully apprised of the relevant circumstances of this case and of the underlying *Charter* values, would conclude that the exclusion of the oral statement made by Cpl Lawless to Cpl Poste on 24 November 2022 would not bring the administration of justice into disrepute.

FOR ALL THESE REASONS, THE COURT:

[67] **DECLARES** that Cpl Lawless proved, on a balance of probabilities, that he was psychologically detained prior to making his statement to Cpl Poste on 24 November 2022.

[68] **DECLARES** that Cpl Lawless proved, on a balance of probabilities, that his right to be informed of the reasons of his detention pursuant to paragraph 10(a) of the *Charter*, and his right to be informed without delay of his right to retain and instruct counsel pursuant to paragraph 10(b) of the *Charter* were infringed.

[69] **DECLARES** that, having regard to the circumstances, the admission of Cpl Lawless' oral statement made to Cpl Poste on 24 November 2022 would bring the administration of justice into disrepute.

[70] **ORDERS** that this evidence be excluded pursuant to subsection 24(2) of the *Charter*.

Counsel:

Lieutenant-Commander F. Gonsalves, Directorate of Defence counsel services, counsel for Corporal T. Lawless, the Applicant

Lieutenant-Commander J. Benhaim and Major B. Richard, Military Prosecution Services, counsel for the Respondent