



COURT MARTIAL

Citation: *R v Cyr*, 2012 CM 3013

Date: 20120919

Docket: 201213

Standing Court Martial

Canadian Forces Base Kingston
Kingston, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Sergeant J.S.F. Cyr, Applicant

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

OFFICIAL ENGLISH TRANSLATION

**REASONS FOR DECISION RELATING TO AN APPLICATION FOR
EXCLUSION OF EVIDENCE UNDER SUBSECTION 24(2) OF THE
CANADIAN CHARTER OF RIGHTS AND FREEDOMS ON THE BASIS OF AN
ALLEGED INFRINGEMENT OF SECTIONS 8 AND 9 AND
PARAGRAPH 10(b) OF THE CHARTER**

(Orally)

BACKGROUND

[1] Sergeant Cyr is charged with stealing contrary to section 114 of the *National Defence Act*, wilfully making a false statement in a document made by him and required for official purposes contrary to paragraph 125(a) of the *National Defence Act*, improperly selling public property contrary to paragraph 116(a) of the *National Defence Act*, and, lastly, an offence under section 130 of the *National Defence Act* for possessing a prohibited device contrary to subsection 92(2) of the *Criminal Code*.

[2] At the beginning of the trial before the Standing Court Martial on 10 September 2012, before denying or admitting Sergeant Cyr's guilt on each of the counts, defence counsel representing Sergeant Cyr filed a motion for which written notice had been received by the Office of the Court Martial Administrator on 25 July 2012 and an additional motion for which written notice had been received on 24 August 2012, seeking an order from the Court Martial under subsection 24(2) of the *Canadian Charter of Rights and Freedoms* (hereafter the Charter) to exclude certain evidence on the basis of an alleged infringement of the accused's rights under sections 8 and 9 and paragraph 10(b) of the Charter.

[3] This preliminary motion was presented under subparagraph 112.05(5)(e) of the *Queen's Regulations and Orders for the Canadian Forces* (hereafter QR&O) as a question of law or a question of mixed fact and law to be determined by the military judge presiding at the Court Martial as specified under article 112.07 of the QR&O.

[4] It is important to point out here that because of the range of the alleged violations and because of the prosecution's stated intention to introduce five statements of the accused (two oral and three written statements) considered to be unofficial confessions within the meaning of section 42 of the *Military Rules of Evidence*, I decided to hear these arguments in three separate voir dices. The present decision concerns the third voir dire that I heard and concerns

- a. the exclusion under subsection 24(2) of the Charter of all the evidence seized as a result of the Military Police's execution of a general search warrant on 29 October 2010 and a telewarrant on 30 October 2010 at Sergeant Cyr's home, on the basis that these warrants were illegal and, consequently, in his opinion, an infringement of his right against unreasonable search or seizure under section 8 of the Charter.
- b. the exclusion under subsection 24(2) of the Charter of the oral and written statements made by Sergeant Cyr on 1 and 3 November 2010 to a Military Police investigator on the basis that his right to retain and instruct counsel without delay and to be informed of this right under paragraph 10(b) of the Charter was infringed.
- c. the exclusion under subsection 24(2) of the Charter of all the evidence seized as a result of the Military Police's execution of a general search warrant on 29 October 2010 and a telewarrant on 30 October 2010 at Sergeant Cyr's home, of all the oral and written statements made by Sergeant Cyr on 1 and 3 November 2010 to a Military Police investigator and of all the evidence seized by the Military Police at Sergeant Cyr's home on 3 November 2010 as a result of his arrest on 1 November 2010

and his detention from 1 to 3 November 2010, which was a violation of his right not to be arbitrarily detained under section 9 of the Charter.

EVIDENCE

- [5] The evidence produced in support of this motion consists of the following:
- a. The complete testimonies of Mr. Durepos and Master Corporal Duquette, which were provided for the purpose of the first voir dire and which were filed for the purpose of the present voir dire with the consent of the parties;
 - b. The testimonies, in order of presentation, of Master Corporal Duquette, Captain Perry, Sergeant Bernier, Sergeant Meunier, Master Corporal Goulet and Major Jones;
 - c. Exhibit VD3-1, the notice of motion received on 25 July 2012, filed for the purposes of the first voir dire and filed for the purposes of the present voir dire with the consent of the parties;
 - d. Exhibit VD3-2, the additional notice of motion received on 24 August 2012;
 - e. Exhibit VD3-3, a set of photographs of the items seized at Sergeant Cyr's home during the 1 and 3 November 2010 searches, filed for the purposes of the first voir dire and filed for the purposes of the present voir dire with the consent of the parties;
 - f. Exhibit VD3-4, a memorandum from Sergeant Cyr dated 12 October 2010 and addressed to the commander of the signals platoon, the subject of which is the return of the DeWalt tool kit, filed for the purposes of the first voir dire and filed for the purposes of the present voir dire with the consent of the parties;
 - g. Exhibit VD3-5, a DVD containing a copy of the Military Police's interview with Sergeant Cyr on 1 November 2010, filed for the purposes of the second voir dire and filed for the purposes of the present voir dire with the consent of the parties;

- h. Exhibit VD3-6, the written transcript of the Military Police's interview with Sergeant Cyr on 1 November 2010, filed for the purposes of the second voir dire and filed for the purposes of the present voir dire with the consent of the parties;
- i. Exhibit VD3-7, a DVD containing a copy of the Military Police's interview with Sergeant Cyr on 3 November 2010, filed for the purposes of the second voir dire and filed for the purposes of the present voir dire with the consent of the parties;
- j. Exhibit VD3-8, the written transcript of the Military Police's interview with Sergeant Cyr on 3 November 2010, filed for the purposes of the second voir dire and filed for the purposes of the present voir dire with the consent of the parties;
- k. Exhibit VD3-9, a written statement by Sergeant Cyr to the Military Police dated 3 November 2010, filed for the purposes of the second voir dire and filed for the purposes of the present voir dire with the consent of the parties;
- l. Exhibit VD3-10, the control register of the detention barracks of the Valcartier Garrison regarding Sergeant Cyr's stay there from 1 to 3 November 2010, filed for the purposes of the second voir dire and filed for the purposes of the present voir dire with the consent of the parties;
- m. Exhibit VD3-11, the legal rights form signed by Sergeant Cyr on 1 November 2010, filed for the purposes of the second voir dire and filed for the purposes of the present voir dire with the consent of the parties;
- n. Exhibit VD3-12, a written statement by Sergeant Cyr to the Military Police dated 1 November 2010, filed for the purposes of the second voir dire and filed for the purposes of the present voir dire with the consent of the parties;
- o. Exhibit VD3-13, the legal rights form signed by Sergeant Cyr on 3 November 2010, filed for the purposes of the second voir dire and filed for the purposes of the present voir dire with the consent of the parties;
- p. Exhibit VD3-14, a copy of the information to obtain a general warrant and the supporting affidavit, both dated October 2010;

- q. Exhibit VD3-15, two copies of a general warrant dated 29 October 2010;
- r. Exhibit VD3-16, a copy of the information and the telewarrant to search dated 30 October 2010;
- s. Exhibit VD3-17, a copy of the direction to release Sergeant Cyr from custody, signed by Major Jones and dated 3 November 2010;
- t. Exhibit VD3-18, a copy of an account in writing regarding the caution of Sergeant Cyr, signed by Corporal Goulet and dated 1 November 2010;
- u. Exhibit VD3-19, a copy of three admissions made by the parties; and
- v. The judicial notice taken by the Court of the facts and matters contained in Rule 15 of the *Military Rules of Evidence*.

FACTS

[6] In October 2012, Captain Durepos was employed both in the 5 Area Support Group and as signals platoon commander of the 5 Canadian Service Battalion. He was therefore responsible for the Quartermaster, where all the equipment used by the signals platoon was kept.

[7] Captain Durepos explained that three DeWalt tool kits, used for signals platoon exercises and operations, were kept at the Quartermaster. Occasionally, unit members were allowed to borrow certain tools for personal use for short periods of time.

[8] At the time, until his transfer in late September 2010, Sergeant Cyr was the commander of the Quartermaster Section. Captain Durepos was aware that Sergeant Cyr was renovating his home. In fact, during the discussions regarding Sergeant Cyr's transfer to another base, there had been talk of delaying the transfer as he was renovating his home and was going to get married.

[9] In early October 2010, when Sergeant Cyr was no longer a member of the Quartermaster Section because of his transfer, Captain Durepos learnt from Ms. Ulloch,

a member of the Quartermaster Section, that the DeWalt tool kit Sergeant Cyr had borrowed could not be found.

[10] In fact, it was reported to Captain Durepos that, upon Ms. Ullock's insistence, Sergeant Cyr had signed a DND 638 temporary issue form for equipment on 21 July 2010. Captain Durepos also learnt from his Quartermaster staff that Sergeant Cyr claimed that he had returned the tool kit when he was preparing to leave and that he had given it to Corporal Lachance. Corporal Lachance denied receiving the tools from Sergeant Cyr. Moreover, it appears that the DND 638 form signed by Sergeant Cyr could not be found.

[11] At the time, Captain Durepos thought that even a trustworthy person such as Sergeant Cyr could make a mistake once in a while and that nothing fishy was going on. However, he did find it unusual that the tools had not been found yet.

[12] Captain Durepos therefore decided to initiate the loss report procedure, which entails obtaining a written explanation from the holder of the lost items and submitting this explanation to the unit chain of command to have the lost equipment removed from the unit's inventory. The unit can then obtain new equipment. The procedure also involves determining whether the person who borrowed the equipment should pay for the loss. At the time, Captain Durepos believed that it was a simple misunderstanding.

[13] Captain Durepos therefore telephoned Sergeant Cyr on a work day to ask him to explain the loss and to obtain a written account. He told the Court that the telephone conversation lasted 5 to 10 minutes and that it had been cordial: Sergeant Cyr had been at his workplace at the Kingston Base and had been cooperative.

[14] In the days following the conversation, Sergeant Cyr emailed Captain Durepos a memorandum dated 12 October 2010, in which he explained the circumstances of the loan and the return of the equipment to the Quartermaster; he also stated that he would accept responsibility for the loss if the equipment was not found.

[15] Captain Durepos told the Court that this memorandum reflected the telephone conversation he had had with Sergeant Cyr.

[16] Captain Durepos then verified whether the DND 638 form had been found, which it was. The form indicated that the equipment had been returned, but no one had marked their initials next to this note. Moreover, a comparison with documents completed by Sergeant Cyr revealed that the note seemed to have been made by Sergeant Cyr himself, contrary to the customary, authorized practice.

[17] At this point, Captain Durepos's suspicion about the truth of Sergeant Cyr's account of the circumstances of the loss of the tool kit was aroused. He concluded that the DeWalt tool kit could have been stolen by Sergeant Cyr. He therefore decided to refer the matter to the Military Police for a disciplinary investigation and to suspend his own administrative investigation for the loss report.

[18] On 19 October 2010, in the company of Sergeant Chevrette, he therefore met with two members of the Military Police to report the facts of the case.

[19] On 29 October 2012, Master Corporal Duquette laid an information together with an affidavit to obtain a general warrant under section 487.01 of the *Criminal Code*, to allow him to enter Sergeant Cyr's home, in the knowledge that Sergeant Cyr was away for a certain period of time, to search for and photograph the DeWalt tool kit, with the ultimate purpose of obtaining the information required to lay an information to obtain a search warrant to seize the tools.

[20] On 29 October, the general warrant was authorized and issued by a provincial court judge. The warrant was executed by Master Corporal Duquette on the same day. He was unable to find the tools in question, but, upon entering and searching the residence, he noted the presence of a large amount of Canadian Forces property, cannabis paraphernalia and a prohibited device, namely, an empty magazine for 30 5.56 mm rounds. He also noted that the house was being renovated.

[21] On 30 October 2010, on the basis of this new information, Master Corporal Duquette laid an information accompanied by an affidavit to obtain a telewarrant to seize the items he had identified as being Canadian Forces property. On the same day, a justice of the peace authorized and issued the telewarrant, authorizing Master Corporal Duquette to seize the items identified in his affidavit.

[22] Following the two searches carried out by the Military Police on 29 and 30 October 2010, Sergeant Cyr was arrested by the Military Police close to his home on 1 November 2010. It appears that Sergeant Meunier, a Military Police officer, had called the accused beforehand in order to agree on an appropriate location close to his home to arrest him. The purpose of this was to avoid having to arrest Sergeant Cyr in front of his family.

[23] Master Corporal Goulet, a Military Police officer, was the arresting officer. He was accompanied by Corporal Bergeron, a trainee at the time, who did not actively participate in the arrest.

[24] Master Corporal Goulet informed Sergeant Cyr of the reasons for his arrest and of his legal rights. He then handcuffed him and seated him in the back of his vehicle. They drove to the Military Police Detachment at the Valcartier Garrison. The trip took about 30 minutes. He described Sergeant Cyr as being calm and cooperative. He and Sergeant Cyr did not speak.

[25] Upon their arrival at the Valcartier Garrison's Military Police Detachment, Master Corporal Goulet brought Sergeant Cyr to an interview room, where he was under constant supervision. He undid and removed the handcuffs, and informed him that Sergeant Meunier, a Military Police officer, would come to see him.

[26] Sergeant Meunier came to meet with Sergeant Cyr for a few minutes to explain to him what would happen next. He told him that he would interview him.

[27] Then, Sergeant Cyr was transferred to an interrogation room. Sergeant Meunier, who was alone with him in the room, informed him of the offences of which he was suspected, of his right to remain silent and of his right to retain and instruct counsel without delay.

[28] Regarding the free legal services, he told him that there were military lawyers on duty, which he referred to as the military legal aid service. Then, he provided him with the provincial legal aid number, but told him that he was not eligible. Lastly, he gave him the telephone number of the Quebec Bar, informing him that this association would provide him with the name of a civilian lawyer, whom he would have to pay for.

[29] Sergeant Cyr stated that he understood the suspicions against him, that he understood that he had the right to remain silent and that he did not wish to talk to a lawyer. He was informed by Sergeant Meunier that should he change his mind, he could do so at any time during the interview, in which case, he would stop questioning him immediately to allow him to do so.

[30] During the interview, Master Corporal Goulet was on the other side of a mirror through which he had an excellent view of the interview. His main task was to observe and take notes on the interview.

[31] Sergeant Meunier interrogated Sergeant Cyr. In response to his questions, Sergeant Cyr admitted that he had stolen most of the items mentioned by the investigator in the interview. He also stated that he had pawned the DeWalt tool kit and that he believed that the kit had been sold, given that he had not returned to the pawn shop to pick it up. He also stated that he and his spouse had used marihuana.

[32] Towards the end of the interview, Sergeant Cyr provided a written statement in which he summarized all of the admissions he had made orally to the investigator. The interview took place in the afternoon and lasted about three hours. Sergeant Cyr was described as being depressed and sad, albeit calm and relieved after he confessed. Following the interview, Sergeant Cyr had the opportunity to meet with a priest in a different interview room from the one in which he was interrogated.

[33] Master Corporal Goulet then decided to keep Sergeant Cyr in custody out of concern that he was suicidal and because some evidence had to be verified and he did not want Sergeant Cyr to have a chance to make this evidence disappear upon his release.

[34] An account in writing to that effect was prepared. Sergeant Cyr was handed to the head guard of the Valcartier Garrison's detention barracks, Sergeant Bernier. Sergeant Bernier acknowledged the account in writing, and Sergeant Cyr was put in a cell. He was given a meal that evening. As an accused, he did not have any specific tasks to carry out.

[35] Sergeant Cyr was detained from about 1700 hrs on 1 November and was released early in the afternoon of 3 November. During his detention, he was alone in his cell and under constant supervision. On the morning of 2 November, he saw a psychologist, as he had requested. He was able to contact his spouse in the afternoon of the same day. On the morning of 3 November, Sergeant Meunier, in his capacity as the patrols warrant officer, came to enquire about Sergeant Cyr's state.

[36] Early in the afternoon of 3 November, Sergeant Meunier interrogated Sergeant Cyr a second time. He was therefore transferred to the interrogation room. Sergeant Meunier, this time in the presence of Master Corporal Goulet, who was in the room, conducted the interview.

[37] Sergeant Meunier informed Sergeant Cyr of the offences of which he was suspected, of his right to remain silent, of his right to remain silent even if he had discussed the matter previously with persons in authority, including the police, and of his right to retain and instruct counsel without delay.

[38] Regarding the free legal services, he told him that there were military lawyers on duty, which he referred to as the military legal aid service. Then, he provided him with the provincial legal aid number, but told him that he was not eligible. Lastly, he gave him the telephone number of the Quebec Bar, informing him that this association would provide him with the name of a civilian lawyer, whom he would have to pay for.

[39] Sergeant Cyr stated that he understood the offences of which he was suspected and that he had the right to remain silent, despite the fact that he had already discussed the matter in a previous interview with Sergeant Meunier, and indicated that he did not wish to talk to a lawyer.

[40] He was then questioned about some other items whose legitimate owner he claimed to be, about the DeWalt tool kit and about some other transactions he had carried out at the same pawn shop. He also admitted who had supplied him with marihuana.

[41] At the end of the interview, he completed a written statement, after which he was released. He then went home in the company of Military Police officers whom he willingly showed the items that were Canadian Forces property, which the officers seized immediately. He then returned to the Canadian Forces Base Kingston with some members of his unit.

ISSUES AND ANALYSIS

The search warrants

[42] Through his application, Sergeant Cyr is seeking the exclusion under subsection 24(2) of the Charter of all the evidence seized as a result of the Military Police's execution of a general search warrant on 29 October 2010 and a telewarrant on 30 October 2010 at his home, on the basis that these warrants were illegal and, consequently, in his opinion, an infringement of his right against unreasonable search or seizure under section 8 of the Charter.

[43] Subsection 24(2) of the Charter reads as follows:

Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[44] Accordingly, the Court must determine whether the accused has established on a balance of probabilities that the evidence was obtained in such a way as to infringe the accused's right to protection against unreasonable seizures as specified in section 8 of the Charter.

[45] Subsequently, if the Court concludes that this is the case, it must determine if, considering the circumstances, the use of this evidence is likely to bring the administration of justice into disrepute.

[46] In order to determine the first issue, it is appropriate to first review section 8 of the Charter, which reads as follows:

Everyone has the right to be secure against unreasonable search or seizure.

[47] For the purposes of the present application, it seems clear that the seizure of the items at Sergeant Cyr's home was clearly state action triggering the Charter.

[48] In addition, Sergeant Cyr clearly had a reasonable expectation of privacy with regard to the items that were the subject of the two search warrants executed at his home. In fact, it is clear from the circumstances of this case that Sergeant Cyr could reasonably expect privacy at his home in the context of a search for tools and other items.

[49] The Court must therefore determine whether the items that were seized by Master Corporal Duquette in executing the two search warrants he obtained were seized unreasonably, which then will allow the Court to determine whether the applicant's right under section 8 of the Charter was infringed. In other words, was the seizure of these items unreasonable?

[50] Sergeant Cyr argues that the search warrant issued on 29 October 2010, was unlawful for the following reasons:

- a. The affidavit supporting the information regarding this warrant does not contain reasonable and probable grounds for the judge to believe that the offence of stealing had been committed and that there were items at the home of the accused that could have provided evidence for the commission of this offence; and
- b. The written version of the investigator's affidavit is incomplete and contains significant inaccuracies and omissions, which, once corrected, would not have given the judge reasonable and probable grounds to believe that Sergeant Cyr committed the offence of stealing and that there were items at the home of the accused that could have provided evidence for the commission of this offence.

[51] The applicant also argued that the search warrant issued and executed on 30 October 2010 was invalid, since the grounds justifying the issuance of the warrant had allegedly been obtained unlawfully, meaning that the warrant issued and executed on 29 October is considered to be invalid. In fact, Sergeant Cyr submits that the grounds supporting this second warrant could not have been obtained without executing the first warrant. In his opinion, therefore, the fact that the first warrant is invalid means that the second is invalid too.

[52] It must be noted that when a court reviews the issuance of a search warrant, it is conducting a judicial review of the decision to issue this warrant. Accordingly, there is no question of proceeding *de novo*. Instead, the question to be determined is whether, when the warrant was issued, the judicial authority had the evidence required to satisfy it of the existence of the preconditions to the authorization. If the answer is that there was no such evidence, the court has basis to intervene. As stated by the Supreme Court of Canada at paragraph 40 of *Morelli*:

In reviewing the sufficiency of a warrant application, however, “the test is whether there was reliable evidence that might reasonably be believed on the basis of which the authorization could have issued” (*R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992, at para. 54 (emphasis in original)). The question is not whether the reviewing court would itself have issued the warrant, but whether there was sufficient credible and reliable evidence to permit a justice of the peace to find reasonable and probable grounds to believe that an offence had been committed and that evidence of that offence would be found at the specified time and place.

[53] In my opinion, the affidavit supporting the information regarding the search warrant dated 29 October 2010 contains reasonable and probable grounds to permit the judge to believe that the offence of stealing had been committed and that evidence of that offence would be found at Sergeant Cyr’s home.

[54] In fact, the affidavit states the following:

- a. Sergeant Cyr had taken a tool kit;
- b. The signature on the form confirming the loan was somewhat problematic;
- c. When he left his position, there had been some confusion as to whether he had returned the equipment.
- d. When the Temporary Issue form was found again, the note confirming the return of the equipment was highly problematic.
- e. Sergeant Cyr was renovating his home; and
- f. The equipment was never found.

[55] Consequently, I find that the judge could issue the general search warrant dated 29 October 2010 as he had reasonable grounds to believe that the offence of stealing

had been committed by Sergeant Cyr and to assume that the stolen items could be found at his home.

[56] It appears from this file that, in accordance with the Supreme Court's decision in *R v Garofoli*, [1990] 2 SCR 1421, I authorized the respondent to interrogate Master Corporal Duquette on the technique used and on the allegations made in paragraphs 7, 8 and 13 of the affidavit filed in support of the information to obtain the search warrant dated 29 October 2010. I also allowed the prosecution to verify these two aspects by permitting an examination of the witness on these issues.

[57] Master Corporal Duquette testified in a clear and coherent manner. His answers were logical and truthful. He limited his answers to what he knew about the case, and when he did not understand a question, he did not hesitate to ask counsel to repeat it.

[58] He testified that the information in paragraph 13 of his affidavit, namely, the fact that Sergeant Cyr was renovating his home and that he had bragged in front of colleagues that he was using the missing tools, came from his conversation with Master Corporal Ouellet, a police officer who had received the complaint and who had met with the complainant in this matter. He acknowledged that the information regarding the fact that Sergeant Cyr had bragged in front of colleagues did not appear in any summary of the Military Police's evidence or in any other witness statement.

[59] This situation was corroborated by Sergeant Meunier, who also testified for the purpose of this application.

[60] Captain Durepos's testimony also shed some light on the affidavit in question. It is clear from paragraph 8 of the affidavit that Captain Durepos never noted that the tools had been stolen but simply that they were missing. In fact, according to his testimony, he started being suspicious of Sergeant Cyr only after he had verified the Temporary Issue form, that is, after obtaining Sergeant's Cyr's written memorandum dated 12 October 2010.

[61] Having said that, I conclude that Master Corporal Duquette's affidavit is not incomplete because of significant inaccuracies or omissions. In fact, Sergeant Cyr did not establish that paragraph 13 of the affidavit contains errors or falsehoods. It is true that these facts are entirely based on what Master Corporal Ouellet reported to the author of the affidavit, but it has not been established that these facts are false or inaccurate or contain errors or omissions. In addition, the error at the beginning of paragraph 7 of the affidavit regarding Captain Durepos's realization that the tools had been stolen has no impact on the assessment of all the facts, which allowed the judge to determine whether he had reasonable grounds to believe that Sergeant Cyr had

committed the offence of stealing and to assume that the stolen items could be found at his house.

[62] The judicial authorization to secretly enter Sergeant Cyr's home to determine whether the DeWalt tools were there and to do so by using the technique of photographing the items in question reflects the purpose of the general warrant that was issued. There is no other provision that permitted the use of this process, and the issuance of the warrant was in the best interests of the administration of justice.

[63] Consequently, it is my opinion that the general search warrant dated 29 October 2010 is legal and that the telewarrant dated 30 October is also legal since the facts supporting the information were lawfully obtained.

Right to counsel

[64] Through his application, Sergeant Cyr was also seeking the exclusion under subsection 24(2) of the Charter of the oral and written statements made by him on 1 and 3 November 2010 to a Military Police investigator on the basis that his right to retain and instruct counsel without delay and to be informed of this right under paragraph 10(b) of the Charter was infringed.

[65] More specifically, he alleges that he was not properly informed about his right to counsel at no charge and that, consequently, he did not fully waive his right when the police officer asked him whether he wished to retain and instruct counsel for each of the two interviews.

[66] The police officers have to inform every person in custody of their right to retain and instruct counsel without delay and, when such a system is available, to a duty counsel and legal assistance.

[67] Detainees have the right to be informed of any system for free, immediate preliminary legal advice available within the jurisdiction and of how to access it, for example, by calling the 1-800 number for the duty counsel. Failure to provide such information is a violation of paragraph 10(b).

[68] Paragraph 10(b) places three duties on state authorities:

- a. The duty to inform detainees of the right to counsel;
- b. The duty to provide them with a reasonable opportunity to exercise this right; and

- c. The duty to curtail questioning and not to compel the person in custody to make a decision or participate in a process which could ultimately have an adverse effect in the conduct of an eventual trial until that reasonable opportunity has been exercised.

[69] The first duty is an informational one. The second and third are implementation duties that are triggered only if a detainee expresses the wish to exercise the right to counsel.

[70] Detainees have to be informed of their rights so that they can understand their extent. Unless there are indications that the person in custody has not understood, it is a matter of reciting the usual formula of his or her rights and informing the person of the availability of the legal assistance plan and the duty counsel. If there are reasons to suspect that the person in custody has not understood, police officers must reasonably ensure that these rights are properly understood and, if they are not, do what is necessary to ensure that they are.

[71] As stated by Chief Justice Lamer in *R v Bartle*, [1994] 3 SCR 173:

A detainee is entitled under the information component of s. 10(b) of the Charter to be advised of whatever system for free, preliminary legal advice exists in the jurisdiction and of how such advice can be accessed (e.g., by calling a 1-800 number, or being provided with a list of telephone numbers for lawyers acting as duty counsel).

[72] The issue here is whether the essence of Sergeant Cyr's right to "immediate and temporary free legal advice was adequately communicated to him" (see *Bartle*).

[73] In my opinion, Sergeant Cyr was adequately informed that he was entitled to immediate, free legal advice from a duty counsel. In fact, Sergeant Meunier read him the following text (Exhibit VD3-6, at pages 10 and 11, and Exhibit VD3-8, at page 8):

[TRANSLATION]

You have the right to retain and instruct counsel of your choice without delay. You have the right to receive immediate free legal advice from the duty counsel. You will be provided with a telephone and the number of a lawyer. I will give you privacy should you wish to avail yourself of this right.

[74] Sergeant Meunier then provided Sergeant Cyr with three telephone numbers, each for a different service. He first provided the telephone number of what he described as military legal aid, then that of Quebec's provincial legal aid service (which, in his opinion, as he told Sergeant Cyr, the sergeant was not entitled to because of his salary) and, lastly, that of the Quebec Bar, explaining to Sergeant Cyr that this service would provide him with the name of a civilian lawyer who would be at his own expense.

[75] It is agreed that, each time Sergeant Cyr was interrogated, there was counsel on duty, meaning that Sergeant Cyr could have retained and instructed counsel at any time and at no charge. In fact, the Military Police officer provided Sergeant Cyr with the number of this service.

[76] It is also accepted that Canadian Forces Defence Counsel Services gives legal advice at any time to persons arrested or detained in relation to a military offence. In fact, the Military Police officer also provided Sergeant Cyr with the number of this service.

[77] Did the police officer's words imply that Sergeant Cyr could not obtain free legal advice? In my view, this is not the case. It is true that, in stating that Sergeant Cyr was not eligible for provincial legal aid and that he would have to pay for any legal services referred by the Quebec Bar, the police officer explicitly contradicted his previous statement that Sergeant Cyr was entitled to free legal advice from the duty counsel. In contrast, however, by not saying anything specific about the costs of what he described as [TRANSLATION] "military legal aid", he clearly implied that this service was free of charge.

[78] The manner in which the police officer expressed himself at the two interviews with Sergeant Cyr therefore did not imply, in my opinion, that he could not obtain free legal advice. At the very least, it appears that Sergeant Cyr was able to understand from the officer that he could retain and instruct a military legal aid counsel without delay and at no cost.

[79] I therefore find that, in the circumstances of this case, Sergeant Cyr was fully informed and had all the information required to exercise his right to counsel, and, consequently, it is my opinion that his waiver to exercise this right at both interrogations, on 1 November 2010 and on 3 November 2010, was valid.

Arrest

[80] Through his motion, Sergeant Cyr is seeking the exclusion of all the evidence obtained following his arrest by the Military Police on 1 November 2010 and during his detention from 1 to 3 November 2010, alleging a violation of his right not to be arbitrarily detained under section 9 of the Charter.

[81] Section 9 of the Charter reads as follows:

Everyone has the right not to be arbitrarily detained or imprisoned.

[82] First, what was legally required for Corporal Goulet to proceed with a lawful arrest? Section 156 of the *National Defence Act* states clearly that officers and non-

commissioned members who are appointed as Military Police may detain or arrest any person subject to the Code of Service Discipline who is believed on reasonable grounds to have committed a service offence.

[83] There is both a subjective and an objective component in establishing reasonable and probable grounds, that is, the officer must have an honest belief that the suspect committed the offence, and there must be reasonable grounds for this belief (see *R v Shepherd*, 2009 SCC 35, at paragraph 17). Whether these conditions have been fulfilled must be determined on the basis of the total circumstances: see *R v Debot*, [1989] 2 SCR 1140, at page 1168.

[84] In the case before us, it is clear that after seizing the items at Sergeant Cyr's home, and noting that because of the nature, quantity and value of these items, Sergeant Cyr could not have been in possession of them unless he had obtained them illegally, Corporal Goulet could, on the basis of reasonable grounds, honestly believe that Sergeant Cyr had committed the offences of stealing and of using marihuana. Consequently, Sergeant Cyr's arrest seems legal, and Sergeant Cyr does not seem to have challenged it.

[85] Regarding the detention, in *R v Grant*, 2009 SCC 32, the Supreme Court wrote as follows at paragraph 54:

A lawful detention is not arbitrary within the meaning of s. 9 (*Mann*, at para. 20), unless the law authorizing the detention is itself arbitrary. Conversely, a detention not authorized by law is arbitrary and violates s. 9.

[86] In other words, unlawful detention is arbitrary detention.

[87] The majority of the Supreme Court of Canada made the following comments at paragraph 30 of *R v Clayton*, [2007] 2 SCR 725:

The justification for a police officer's decision to detain, as developed in *Dedman* and most recently interpreted in *Mann*, will depend on the "totality of the circumstances" underlying the officer's suspicion that the detention of a particular individual is "reasonably necessary". If, for example, the police have particulars about the individuals said to be endangering the public, their right to further detain will flow accordingly. As explained in *Mann*, searches will only be permitted where the officer believes on reasonable grounds that his or her safety, or that of others, is at risk.

[88] This is reflected in subsection 158(1) of the *National Defence Act*, which reads as follows:

158. (1) A person arrested under this Act shall, as soon as is practicable, be released from custody by the person making the arrest, unless the person making the arrest

believes on reasonable grounds that it is necessary that the person under arrest be retained in custody having regard to all the circumstances, including

- (a) the gravity of the offence alleged to have been committed;
- (b) the need to establish the identity of the person under arrest;
- (c) the need to secure or preserve evidence of or relating to the offence alleged to have been committed;
- (d) the need to ensure that the person under arrest will appear before a service tribunal or civil court to be dealt with according to law;
- (e) the need to prevent the continuation or repetition of the offence alleged to have been committed or the commission of any other offence; and
- (f) the necessity to ensure the safety of the person under arrest or any other person.

[89] Master Corporal Goulet reached the conclusion that it was necessary to detain Sergeant Cyr for two main reasons, as described in the account in writing and as expressed in his testimony before the Court:

- a. It was necessary to ensure the safety of Sergeant Cyr; and
- b. It was necessary to secure or preserve certain pieces of evidence that might have disappeared if Sergeant Cyr had been released.

[90] It is true that Master Corporal Goulet testified before this Court that keeping Sergeant Cyr in custody had not been his personal decision. The Court understands from all of the evidence that the Military Police officers were working as a team and that they discussed the different steps together. Through Sergeant Meunier, Master Corporal Duquette and Master Corporal Goulet, the evidence shows that this approach was adopted particularly at the interrogation stage. Master Corporal Goulet was consulted by Sergeant Meunier, who conducted the interrogation, which Master Corporal Goulet observed, and the Court understands from Master Corporal Goulet's testimony that he was personally satisfied that there were grounds warranting Sergeant Cyr's detention, but that his decision to detain the sergeant reflected the consensus reached as a result of the discussion he had with the other police officers, particularly Sergeant Meunier, and not simply his personal belief.

[91] In my opinion, the prosecution has established that Sergeant Cyr's detention was reasonably necessary in the circumstances. The police officers personally noted Sergeant Cyr's state of psychological distress while he was in custody. Indeed, the first interview, which was filmed, clearly shows that Sergeant Cyr was anxious and depressed. His psychological history did not help matters. Moreover, the tension between him and his spouse at the time and his spouse's recognition that a psychological problem explained what Sergeant Cyr had done, in addition to the

suicidal thoughts he claimed to have had at one point, were further factors to support the police officers' reasoning that his detention was necessary. However, this in itself does not seem sufficient to the Court to justify that it was reasonably necessary to keep Sergeant Cyr in custody. He could have been referred to Medical Services for an assessment and then released as if recommended by the medical authorities.

[92] However, it is also clear to the Court that a number of factors in the investigation remained nebulous, particularly with regard to the items found at Sergeant Cyr's home, the ownership of which was unclear. Moreover, since the interrogation revealed that Sergeant Cyr had disposed of certain items through a pawn shop, the police officers had to verify the truth and the extent of this discovery without Sergeant Cyr being able to interfere in any way. Consequently, given this situation, combined with Sergeant Cyr's psychological state, Master Corporal Goulet and the police officers assisting him could reasonably conclude that, in the circumstances, it was necessary to take Sergeant Cyr into custody.

[93] The custody went smoothly, and the Court understands that it lasted only until the police officers had the time to make the necessary verifications and to interrogate Sergeant Cyr a second time on the basis of the outcome of these verifications. While he was in detention, Sergeant Cyr did not endure any hardship and was given the opportunity, as requested by him, to meet with a psychologist and to speak to his spouse by telephone. The Court understands from the various testimonies of the police officers and the written observations in the register of the detention barracks that Sergeant Cyr's psychological state improved and that he was calmer.

[94] Finally, the procedure followed by the custody review officer, Major Jones, to determine whether Sergeant Cyr should be released with or without conditions or whether he should be detained and brought before a military judge for a custody review was marred by major mistakes. Sergeant Bernier did not provide the review officer with the mandatory report of custody or the equally mandatory statement confirming that Sergeant Cyr was given the opportunity to make submissions concerning his release from custody. A simple conversation with the Military Police officers involved in the case could not replace these minimum requirements. The manner in which he proceeded clearly indicates to the Court that the custody review officer made his decision without fulfilling some of the minimal requirements established by the *National Defence Act*.

[95] Despite the fact that the decision of the custody review officer appears to the Court to be arbitrary because it was not made fully in accordance with the applicable *National Defence Act* provisions, as it did in Court Martial decision *R v Harris*, 2009 CM 3012, the Court cannot conclude that the process followed by the custody review officer and its outcome constitute an arbitrary detention within the meaning of section 9 of the Charter, given that the accused did not prove, on a balance of probabilities, that his release from custody with conditions was comparable to detention within the meaning of that same Charter provision.

Warrantless search

[96] In his submissions, counsel for Sergeant Cyr asked the Court to examine the legality of the seizure carried out by the police without a warrant following Sergeant Cyr's release by the custody review officer, Major Jones. Even if this was initially not part of the notices of application, it appears that, at the beginning of the first voir dire hearing, Sergeant Cyr stated through his counsel that he also intended to challenge this issue. I feel that, in the circumstances of this case, I must rule.

[97] A search will be deemed reasonable if it is authorized by law, if the law itself is reasonable and if the manner in which the search was carried out was reasonable.

[98] A warrantless search is presumed to be unreasonable. When it is demonstrated that a search was warrantless, the burden of proof shifts to the prosecution, which must then establish, on a balance of probabilities, that it was not unreasonable. The prosecution must establish that the police officer was reasonably justified to believe that proceeding in this way would result in finding signs that a crime had been committed. When the prosecution cannot establish that this belief is based on reasonable grounds, section 8 has been infringed.

[99] Unlike paragraph 10(b), section 8 does not impose an informational duty. There is no duty to inform individuals of their right to refuse to consent to a search and, consequently, failure to do so would not render an otherwise valid search invalid. However, if the search can only be justified on the basis that the section 8 Charter rights were waived by virtue of Sergeant Cyr's consent, failure to give such notice may stop such apparent consent from being valid. To be valid, any waiver of a Charter right must be informed.

[100] In this regard, as established by the authorities, in order to assess the validity of the waiver of a search warrant requirement, that is, whether the required valid consent was given before the police officers conducted a search or seizure without a warrant, I would use the test in *R c Wills*, 70 CCC (3d) 529, set out at page 546, which reads as follows:

- a. there was a consent, express or implied;
- b. the giver of the consent had the authority to give the consent in question;
- c. the consent was voluntary in the sense that that word is used in *Goldman, supra*, and was not the product of police oppression, coercion or other external conduct which negated the freedom to choose whether or not to allow the police to pursue the course of conduct requested;
- d. the giver of the consent was aware of the nature of the police conduct to which he or she was being asked to consent;

- e. the giver of the consent was aware of his or her right to refuse to permit the police to engage in the conduct requested; and,
- f. the giver of the consent was aware of the potential consequences of giving the consent.

[101] The overwhelming weight of the evidence on this issue lies in the two interrogations of Sergeant Cyr. Specifically in the second interrogation, it appears that Sergeant Cyr explicitly consented to a warrantless search being conducted at his home.

[102] It is clear from the evidence that, as the person residing there, Sergeant Cyr had the necessary authority to consent to the Military Police's search of his home.

[103] Regarding the voluntary consent, the Court must consider the context in which the police officers' request was made. During the first interrogation, Sergeant Meunier explicitly asked Sergeant Cyr whether he would agree to go home with the police officers to show them where the other items of Canadian Forces property he had allegedly stolen were, including those that he had already identified during his interrogation. He told him that he was not obliged to do so, but that, if he refused, the police officer would have to consider obtaining a search warrant for another seizure at his home.

[104] In the second interrogation, the police officer clearly referred Sergeant Cyr to the fact that he had already consented to looking for certain items in the company of the police officers.

[105] Sergeant Meunier obtained Sergeant Cyr's consent in the context of an interrogation during which he told him that he could retain and instruct counsel at any time during the interview. Sergeant Cyr admitted that he had stolen some items that were still at his home and that he regretted this. He clearly indicated that he wished to cooperate. At the end of the second interview, he clearly told the police officer that he believed that he had made a mistake, that he had been caught, and that he had a problem that he intended to cure. His honest repentance was a clear sign that he wished to start over and that he voluntarily consented to the police officers going to his house so that he could show them and give them the stolen items. In that regard, the Court believes that Sergeant Cyr's consent was voluntary.

[106] Sergeant Cyr clearly knew that the police officers had already been to his house and had seized certain items. He understood the police officers' goal, namely, that he hand over the additional items he had identified as well as those for which it was not clear whether they were Canadian Forces property.

[107] Sergeant Cyr was clearly aware of his right to refuse, and, if he was unsure, he could have retained and instructed counsel without delay and at no charge. It is true that he was informed of the potential consequences should he refuse, but he does not seem to have interpreted this as a reason forcing him to consent.

[108] Lastly, Sergeant Cyr was aware of the consequences of his consent, by which he gave access to evidence that could potentially be used against him in eventual legal proceedings. However, his intention to cooperate is clearly described in the file.

[109] Consequently, the Court is satisfied that the prosecution has proved on a balance of probabilities that the warrantless search conducted on 3 November 2010 at Sergeant Cyr's home was not unreasonable.

FOR THESE REASONS, THE COURT

[110] **DISMISSES** the application of Sergeant Cyr seeking the exclusion under subsection 24(2) of the Charter of all of the evidence obtained by the Military Police upon executing a search warrant and performing a warrantless search and of the accused's statements on the basis that sections 8 and 9 and paragraph 10(b) of the Charter were infringed.

Counsel:

Major E. Carrier, Canadian Military Prosecution Service
Counsel for Her Majesty the Queen

Major E. Thomas, Defence Counsel Services
Counsel for Sergeant J.S.F. Cyr