



COURT MARTIAL

Citation: *R v Massicotte*, 2012 CM 4010

Date: 20120528

Docket: 201162

Standing Court Martial

Her Majesty's Canadian Ship RADISSON
Trois-Rivières, Quebec, Canada

Between:

Her Majesty the Queen

- and -

Ex-Acting Sub-Lieutenant C. Massicotte, Applicant

Before: Lieutenant-Colonel J-G Perron, M.J.

OFFICIAL ENGLISH TRANSLATION

REASONS FOR DECISION

Orally

INTRODUCTION

[1] The accused, Ex-Acting Sub-Lieutenant Massicotte, also filed a motion under subparagraph 112.05(5)(e) of the Queen's Regulations and Orders for the Canadian Forces (QR&O) for a stay of proceedings under subsection 24(1) of the *Canadian Charter of Rights and Freedoms* (Charter) for an alleged violation of the rights of the accused under paragraph 10(b) of the Charter.

EVIDENCE

[2] The evidence before the Court in respect of this motion consists of the facts and matters of which the Court has taken judicial notice under section 15 of the Military

Rules of Evidence, an exhibit adduced by the respondent and the testimony of Ex-Acting Sub-Lieutenant Massicotte and Master Seaman Thériault.

POSITIONS OF THE PARTIES

Applicant

[3] The applicant alleges that his right to speak with counsel of his own choosing was violated.

Respondent

[4] The respondent submits that the applicant's testimony is not credible, that the applicant suffered no prejudice and that the military police officers complied with the law.

[5] Paragraph 10(b) of the Charter reads as follows:

Everyone has the right on arrest or detention

...

(b) to retain and instruct counsel without delay and to be informed of that right;

[6] The applicant must persuade this Court on a balance of probabilities that one of his Charter rights was violated.

[7] The Supreme Court of Canada states at paragraphs 24 and 26 of *R v Sinclair*, 2010 SCC 35, that, in the context of a custodial interrogation, the purpose of paragraph 10(b) is to give the detainee an opportunity to consult counsel and to understand his or her right to choose whether or not to cooperate with the police, by speaking or remaining silent. This right to the assistance of counsel does not guarantee that the detainee will make the right decision; it merely ensures that he or she will have access to legal advice in reaching a decision. A detainee must be informed of his or her right to counsel. The police must allow the detainee to exercise this right. The police must therefore suspend their questioning until the detainee has had a reasonable opportunity to consult counsel. A detainee may waive his or her right to counsel after being informed of it.

[8] The Supreme Court of Canada notes at paragraphs 53 to 55 of *Sinclair* that in the case of a detainee who has already retained legal advice, the police have a duty to provide him or her with a reasonable opportunity to consult counsel again "where a change of circumstances makes this necessary to fulfill the purpose of s. 10(b) of the *Charter* of providing the detainee with legal advice on his choice of whether to cooperate with the police investigation or decline to do so". The change of circumstances must be objectively observable. It is not enough for the accused to assert at trial that he was confused or needed help, absent objective indicators that renewed

legal consultation was required to permit him to make a meaningful choice as to whether to cooperate with the police investigation or refuse to do so.

[9] The Supreme Court of Canada confirms the following at paragraph 57 of *Sinclair*:

The failure to provide an additional opportunity to consult counsel will constitute a breach of s. 10(b) only when it becomes clear, as a result of changed circumstances or new developments, that the initial advice, viewed contextually, is no longer sufficient or correct.

[10] *R v Willier*, 2010 SCC 37, deals mainly with the right to retain and instruct counsel of one's own choosing guaranteed by paragraph 10(b) of the Charter and the duty of the police to facilitate this choice. The Supreme Court of Canada specifies the following at paragraph 24 of *Willier*:

While the right to choose counsel is certainly one facet of the guarantee under s. 10(b), the *Charter* does not guarantee detainees an absolute right to retain and instruct a particular counsel at the initial investigative stage regardless of the circumstances. What the right to counsel of choice entails must be understood having regard to the purpose of the guarantee

[11] The Supreme Court writes as follows at paragraphs 34 and 35 of *Willier*:

[34] Such a limit on the rights of a detainee are necessary, as Lamer J., as he then was, noted in *Smith*, "because without it, it would be possible to delay needlessly and with impunity an investigation and even, in certain cases, to allow for an essential piece of evidence to be lost, destroyed or rendered impossible to obtain. The rights set out in the *Charter*, and in particular the right to retain and instruct counsel, are not absolute and unlimited rights. They must be exercised in a way that is reconcilable with the needs of society."

And at paragraph 35:

[35] Should detainees opt to exercise the right to counsel by speaking with a specific lawyer, s. 10(b) entitles them to a reasonable opportunity to contact their chosen counsel prior to police questioning. If the chosen lawyer is not immediately available, detainees have the right to refuse to speak with other counsel and wait a reasonable amount of time for their lawyer of choice to respond. What amounts to a reasonable period of time depends on the circumstances as a whole, and may include factors such as the seriousness of the charge and the urgency of the investigation: *Black*. If the chosen lawyer cannot be available within a reasonable period of time, detainees are expected to exercise their right to counsel by calling another lawyer or the police duty to hold off will be suspended.

DECISION

[12] Both parties agree that Mr. Massicotte was detained by the military police during his interrogation on the night of 20 to 21 October 2009. Mr. Massicotte had just admitted to Sergeant Gagné that he had taken the computer and iPod. The latter had informed the military police. It was to be expected that the military police would wish

to interrogate Mr. Massicotte. The military police officer informed him of his rights: see Exhibit R2-2.

[13] Mr. Massicotte testified that he remembered what he had done but did not remember specific times. He remembered how he felt when talking to Sergeant Gagné. He knew that the computer and iPod did not belong to him, and he wanted them to be recovered. He testified that he saw the situation as a game and that he believed it would be better to tell Sergeant Gagné everything. He remembered that Sergeant Gagné had told him that he had shown courage in admitting that he had taken the items. He remembered waiting 20 to 30 minutes before meeting the military police officer. He also stated that he did not believe that the matter would be resolved this way, with a military police interrogation.

[14] He testified that he had told the military police officer that he wished to speak with an old friend of his who was a lawyer, Mr. Bégin, after he had been read his rights. He tried unsuccessfully to reach Mr. Bégin and ended up speaking instead with military defence duty counsel Lieutenant-Commander Létourneau.

[15] He also testified that he had told military defence duty counsel Lieutenant-Commander Létourneau that he was under arrest. He explained his situation to Lieutenant-Commander Létourneau, who told him to keep his mouth shut. He asked Lieutenant-Commander Létourneau to repeat his explanations, which the latter did. He testified that he had informed the military police officers that he was dissatisfied with the advice of Lieutenant-Commander Létourneau and that he wished to speak with Mr. Bégin. The military police officer again attempted to reach him at two different telephone numbers, without success.

[16] He testified that he would have used a computer to find Mr. Johnson-Bégin's telephone number had he not been under pressure and stressed out during the interrogation. On cross-examination at the hearing, he stated that asking him whether he wanted water, food or paper was a way of pressuring him.

[17] On cross-examination, he stated that he could not remember how often he had asked to speak with Mr. Bégin. He said that he had not asked to speak to Mr. Bégin before his rights were read to him. He said that he could not remember the sequence of events and that he would have asked more questions to Mr. Bégin, who would have done a better job of explaining his rights to him. He stated that he would not have provided a written statement because he had not understood that he was not supposed to talk. He said that he had told the officer that he had not understood Lieutenant-Commander Létourneau's advice. Then he testified that it was possible that he had not asked to speak to Mr. Bégin after talking. Finally, he testified that it was possible that he had only asked to speak with Mr. Bégin after having spoken with Lieutenant-Commander Létourneau. He testified that he had intended to cooperate with the military police before speaking with Lieutenant-Commander Létourneau, but that when the latter told him not to talk, he had become confused and had asked to speak with Mr. Bégin.

[18] He testified that had looked in a Quebec telephone directory provided by the military police to find Mr. Bégin's number. He testified that he had turned the pages of the directory and had found names associated with Mr. Bégin. Then he said that he could not remember who had looked in the telephone directory. Later in his testimony, he also stated that he had written Mr. Johnson-Bégin's name on a piece of paper and had given it to one of the officers, who called Canada 411 to find the number. He could not remember whether he had been offered the opportunity to call a friend to find Mr. Bégin's telephone number, but he indicated that this was possible.

[19] Master Seaman Thériault is not a military police officer, but he was working with the military police to provide physical protection for their unit. He acted as an interpreter during Mr. Massicotte's interrogation. He was in an airport hangar in Vancouver with members of the military police when Sergeant Gagné informed them of Mr. Massicotte's admission. Corporal Agoston, a military police officer, prepared an interview room in the hangar. He described Mr. Massicotte as being cooperative and somewhat nervous. Master Seaman Thériault read Mr. Massicotte his rights in French. Master Seaman Thériault testified that he was under the impression that Mr. Massicotte had understood his rights, because Mr. Massicotte had also read his rights and had been given the opportunity to sign the form and indicate whether he understood or not. Master Seaman Thériault never had the impression that Mr. Massicotte did not understand his rights. Mr. Massicotte had spoken privately with military defence duty counsel. Mr. Massicotte did not make any special requests until after he had spoken with military counsel. Mr. Massicotte told them that counsel had advised him not to talk, but he nevertheless decided to continue with the interview.

[20] Mr. Massicotte said that he was not sure about his decision and wished to speak with a friend who was a lawyer in Québec or Trois-Rivières. Corporal Agoston suspended the interview. Mr. Massicotte did not have his friend's telephone number. Master Seaman Thériault did a search with Canada 411. He found three or four numbers and dialled them with no success.

[21] He believes that Mr. Massicotte called a friend to find the telephone number. Mr. Massicotte decided to continue even though he had not been able to reach his friend. Master Seaman Thériault testified that Mr. Massicotte had maintained a cooperative attitude throughout the interrogation, despite being nervous. He described him as [TRANSLATION] "insecure" when he was trying to reach his friend.

[22] On cross-examination, he stated that Mr. Massicotte had asked once or twice to speak with Mr. Bégin and that he had taken steps at that point. He did not believe that Mr. Massicotte had asked to speak with Mr. Bégin while being informed of his right to counsel. He confirmed that he had called Canada 411 because there was no telephone directory for Quebec. He could not remember the telephone number or numbers that he was given. Mr. Massicotte made his statement after these attempts. He could not remember whether Mr. Massicotte had again been provided with the right to counsel

after the attempts. He believed that Mr. Massicotte had tried to call a friend to find Mr. Bégin's telephone number.

[23] The evidence clearly establishes that Mr. Massicotte was aware of his right to counsel from the outset of the interrogation and that he had spoken with a lawyer before being questioned. Therefore, this is not a situation calling for a *Prosper* warning.

[24] The issues in this case are the following:

Did Mr. Massicotte ask to speak with Mr. Bégin before he spoke with Lieutenant-Commander Létourneau?

Did Mr. Massicotte tell the officers that he was dissatisfied with the counsel he had received from Lieutenant-Commander Létourneau?

If yes, were the officers required to ensure that he had the opportunity to speak with counsel of his choice or any other counsel at that time?

[25] Mr. Massicotte had the opportunity to perform a careful reading of the cautions and descriptions of his rights found in Exhibit R2-2. He testified that he had not felt like analyzing the document or taking the time to read it carefully; he merely scanned the cautions before signing them, and he said that he had not understood his rights very well at that time, despite indicating in the form that he had. He testified that he had not understood his right to remain silent at the moment he had signed that form. That document was filled out before the interrogation. He did understand that he needed to speak with a lawyer. According to him, that was a [TRANSLATION] "real yes" that he put on the form. He testified that he had not understood the first part of the supplementary caution at the time, despite indicating that he had, and then he said that he did understand. He also testified that he had not, at the time, understood the second part of the supplementary caution, but that he understood it now.

[26] He allegedly asked the military police to explain his rights again, which they did, and he described the officer as kind. He did not claim that the officers had explained his rights inadequately. The evidence does not establish that the officers pressured him at that moment. His counsel even stated in his submissions that the military police officers had read him his rights properly.

[27] He then spoke with Lieutenant-Commander Létourneau. He testified that he had felt the need to speak with someone he trusted after speaking with Lieutenant Commander Létourneau. A lawyer explained the right to remain silent twice to Mr. Massicotte after the latter had explained the situation, and despite this, he claims to have provided a written statement without really having understood his right to remain silent.

[28] He stated that having a conversation with Mr. Bégin would have ensured that he really understood his rights, in which case he would not have provided a written

statement. Exhibit R2-2 states on its face that he was suspected of “theft of DND laptop and personal IPOD device”, namely, the two items that he had admitted to taking in his admission to Sergeant Gagné. One does not need to be familiar with the contents of the *Criminal Code* or the *National Defence Act* to know that taking items belonging to others is not tolerated in our society and that there may be consequences.

[29] Mr. Massicotte stated that he remembered the events, but not the precise times or sequences; however, his testimony was quite specific and included detailed descriptions of events such as his conversations with Sergeant Gagné and several contradictions that were not chronological but rather were related to concrete actions such as looking in a telephone directory.

[30] Mr. Massicotte is not a reliable witness because his testimony contains significant contradictions. His explanations also lack credibility. His statement that he had not understood that the advice not to talk also meant that he should not provide a written statement makes no sense. He has a university education. Nothing in his testimony indicates that he lacks the intellectual capacity to understand relatively simple concepts such as the rights and cautions found in Exhibit R2-2. He explained that he was under pressure. Naturally, the Court accepts that he must have felt nervous and pressured. However, he has provided no evidence of excess pressure caused by the military police officers that would have prevented him from being able to understand his rights. Apart from Mr. Massicotte’s own testimony, there is no evidence demonstrating that he did not understand his rights despite having replied affirmatively upon receiving the cautions.

[31] Master Seaman Thériault is a credible witness. Although his memory was not perfect, his testimony was consistent and was not attacked by the applicant’s counsel.

[32] On the basis of all the evidence, the Court finds that the applicant has failed to demonstrate that he had asked to speak with Mr. Bégin before speaking with Lieutenant-Commander Létourneau. He received legal advice about his rights from Lieutenant-Commander Létourneau, and about his right to remain silent in particular. Therefore, this was not a situation in which the police officers were required to wait a reasonable amount of time before proceeding with the interrogation to allow Mr. Massicotte to speak with Mr. Bégin and obtain legal advice about his right to remain silent.

[33] Did Mr. Massicotte tell the police officers that he was dissatisfied with the advice he had received from Lieutenant-Commander Létourneau? Mr. Massicotte told the officers that Lieutenant-Commander had told him not to speak, but he decided to proceed with the interview. He felt somewhat confused at that moment because he had begun the interview with the intention of cooperating with the police and had received contradictory advice from Lieutenant-Commander Létourneau. He then asked to speak with Mr. Bégin.

[34] Mr. Massicotte alleges that he did not understand his rights and that he had informed the police officers that he was dissatisfied with the advice of Lieutenant-Commander Létourneau; this he alleges in order to establish that he should have been allowed to speak with his counsel of choice, and that his right to counsel was therefore violated. On the basis on all the evidence, the Court finds that the applicant did not indicate that he was dissatisfied with the advice he had received from Lieutenant-Commander Létourneau; the Court finds instead that the applicant told the police that he wished to speak with Mr. Bégin because he was unsure about whether he wanted to cooperate with the investigation.

[35] Uncertainty as to whether to cooperate with the police investigation does not necessarily mean that the applicant did not understand his rights. This uncertainty does not necessarily represent a change of circumstances or a new risk giving rise to a right to consult counsel again.

[36] On the basis of all the evidence and applicable law, the Court finds that the police officers did not have a duty to allow the applicant to speak with his counsel of choice, despite the fact that the attempts made to find Mr. Bégin's telephone number were unsuccessful.

Decision

[37] For these reasons, the motion for a stay of proceedings under subsection 24(1) of the *Canadian Charter of Rights and Freedoms* for an alleged violation of the right to counsel set out at paragraph 10(b) of the Charter is dismissed.

Counsel:

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Counsel for Her Majesty the Queen

S. Johnson-Bégin
Counsel for ex-Acting Sub-Lieutenant Massicotte