

*Case Name:*  
**R. v. Soares**

**Between**  
**Her Majesty the Queen, and**  
**Abel Soares**

[2013] O.J. No. 72

2013 ONSC 126

275 C.R.R. (2d) 33

Ontario Superior Court of Justice

**G. Trotter J.**

Heard: December 3-5, 2012.

Judgment: January 8, 2013.

(33 paras.)

*Criminal law -- Evidence -- Admissibility -- Voir dire -- Voir dire to determine whether video statement should be admitted into evidence -- Evidence inadmissible -- Soares was charged with sexual offences -- Crown sought to adduce video of interview by police officer -- Soares claimed violation of s. 10(b) of Charter due to poor English -- There was violation of s. 10(b) -- Disconnect between officer and Soares throughout interview ought to have triggered concern that he might not have understood rights when consulting duty counsel -- Admission of video would bring administration of justice into disrepute.*

*Criminal law -- Constitutional issues -- Canadian Charter of Rights and Freedoms -- Legal rights -- Right to retain and instruct counsel without delay -- Remedies for denial of rights -- Specific remedies -- Exclusion of evidence -- Where administration of justice brought into disrepute -- Voir dire to determine whether video statement should be admitted into evidence -- Evidence inadmissible -- Soares was charged with sexual offences -- Crown sought to adduce video of interview by police officer -- Soares claimed violation of s. 10(b) of Charter due to poor English -- There was violation of s. 10(b) -- Disconnect between officer and Soares throughout interview ought to have triggered concern that he might not have understood rights when consulting duty counsel -- Admission of video would bring administration of justice into disrepute.*

Voir dire to determine whether a video statement should be admitted into evidence. Soares was charged with sexual offences against a child. He spoke with duty counsel at the police station before being interviewed by a police officer. The Crown sought to adduce the video of the interview. Soares claimed a violation of his rights under s. 10(b) of the Charter. He said that his poor facility with the English language prevented him from properly exercising his right to counsel, arguing that he would not have spoken with the police had he understood his rights and the advice received from duty counsel.

HELD: Evidence inadmissible. There was a violation of s. 10(b) of the Charter. There appeared to be a disconnect between the officer and Soares throughout the interview. Although the video demonstrated that Soares seemed to understand a good deal of what the officer said to him, he was not able to express himself effectively. He responded in brief sentences, used odd expressions and was confused by colloquialisms. This ought to have triggered a concern that he might not have understood his rights when consulting with duty counsel. When he finally said that his English was not good enough, the officer brought the interview to a speedy conclusion instead of asking if he would like an interpreter. Admission of the video would bring the administration of justice into disrepute. The seriousness of the police conduct, the impact on Soares and the fact that the video did not carry a significant burden of the Crown's case all pointed toward exclusion.

#### **Statutes, Regulations and Rules Cited:**

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 10(a), s. 10(b), s. 24(2)

#### **Counsel:**

Patricia Garcia, for the Crown.

Ernest J. Guiste and Clinton Ellis, for the Defendant.

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### **G. TROTTER J.:--**

#### **I. Introduction**

**1** Abel Soares is charged with sexual assault, sexual touching and invitation to sexual touching. The complainant is A.L., the daughter of L.L., a woman whom Mr. Soares dated from 2000 to 2003, when A.L. was child.

**2** As part of its case, the Crown sought to adduce a video recorded statement of Mr. Soares, taken on April 15, 2010. Counsel for Mr. Soares opposed the admission of the statement on the basis that the Crown was unable to prove that it was voluntary, and also because Mr. Soares's rights under s. 10(b) of the *Charter* had been infringed. The essence of the objection to admissibility is that, because Mr. Soares's facility with the English language is poor, he was unable to properly exercise his right to counsel and unable to express himself properly when dealing with the police.

**3** After a blended *voir dire* into these related issues, I ruled that the statement was voluntary. At the time, I provided reasons, explaining that, based on the principles articulated in *R. v. Oickle*,

[2000] 2 S.C.R. 3 and *R. v. Spencer*, [2007] 1 S.C.R. 500, the Crown had proved beyond a reasonable doubt that the statement was voluntary. Shortly afterwards, I ruled that Mr. Soares's rights under s. 10(b) of the *Charter* had been infringed and that the statement should be excluded, with reasons to follow. These are my reasons.

## **II. Factual Background**

4 Evidence on this issue arose from a number of sources, including the police officers that dealt with Mr. Soares, the complainant and her mother, as well as from Mr. Soares. Perhaps most telling is the transcript of the interview with Mr. Soares.

### ***The Evidence of A.L. and L.L.***

5 The evidence of A.L. and her mother was pretty much the same on this issue. They both testified that they had little trouble communicating with Mr. Soares around the time that these events occurred. A.L. said that she communicated with him in English and they had no trouble understanding each other. However, A.L. said that her mother conversed with Mr. Soares in Portuguese.

6 L.L. testified that she spoke to Mr. Soares in English and Portuguese. She said her children did not speak Portuguese. It was her opinion that Mr. Soares appeared to communicate effectively with her children in the English language. She also testified that he was good at communicating in English when they were out at restaurants, and when he was conversing with his co-workers at a construction company. L.L. witnessed the latter when Mr. Soares took her to his company's Christmas party one year. Still, L.L. said that Mr. Soares was more comfortable conversing in Portuguese.

### ***The Police Evidence***

7 There were a number of Toronto Police Service (TPS) officers who dealt with Mr. Soares after he was arrested. D.C. Chad Nickles assisted with the arrest. He did not take proper notes of the arrest and his memory of what transpired was poor. He essentially gave impressionistic evidence of his encounter with Mr. Soares. He did not think that Mr. Soares had any problem understanding the officers. He could not recall whether Mr. Soares spoke with an accent or whether Mr. Soares's first language appeared to be one other than English. With respect, I observe that these are two very obvious characteristics of Mr. Soares. Consequently, the evidence of D.C. Nickles is unhelpful.

8 Another officer, P.C. Garvin Khan, assisted with a search of Mr. Soares at 13 Division. He testified that Mr. Soares did not appear to have any problems following instructions.

9 Victoria Peters was the most important officer in this case. She is no longer a police officer, having voluntarily left the TPS to pursue a different career path. However, she led the investigation and was in charge of the arrest. Unfortunately, her notes were not very good either. She could not remember whether she took her notebook with her when she went to arrest Mr. Soares. She did remember telling him that he was under arrest for sexual assault, but could not recall if she advised him of the details. Ms. Peters also said she must have read the right to counsel and secondary caution from a memo book that was in the scout car she and D.C. Nickles used that day, but she had no specific recollection. She testified that Mr. Soares did not appear to have trouble with English. He apparently told her that he understood his rights and that he did not have a lawyer, following which he was told he could consult duty counsel at the station.

**10** Once Mr. Soares was back at the station, he was permitted to speak with duty counsel. Ms. Peters could not recall how long he was on the phone with duty counsel. However, Mr. Soares did not express any concerns, he did not say that he needed an interpreter, nor did he ask for a Portuguese-speaking lawyer.

**11** In her evidence, Ms. Peters acknowledged the obvious fact that Mr. Soares speaks with an accent and that it is quite clear that English is not his first language. However, she was adamant that there was no reason to believe that they were not communicating well.

**12** In cross-examination, Ms. Peters agreed that, during her interview with Mr. Soares, he appeared to have difficulty understanding some colloquial expressions. These will be addressed below when I review certain aspects of the statement. Apart from these wrinkles, Ms. Peters had no concern about her communications with Mr. Soares and did not think to ask him if he required an interpreter.

**13** On a more general level, Ms. Peters agreed that the geographic area covered by 13 Division is populated by many Portuguese-speaking people. Ironically perhaps, the TPS has professional translators available for complainants when they are interviewed. But for suspects or accused persons requiring language assistance, efforts are made to see if there is a TPS officer around who speaks the same language. The decision as to whether an accused person receives language assistance is left largely to the booking officer. In this case, the booking officer showed no concern about Mr. Soares's language abilities. Indeed, viewing the recording of the booking process, rather than showing the expected professional concern when Mr. Soares was unresponsive to his questions, the booking officer was aggressive and rude.

### ***The Evidence of Mr. Soares***

**14** Mr. Soares was 53 at the time he testified. He was born in Portugal. He came to Canada when he was seven years old. He went to school in Canada for about four years, and returned to Portugal when he was 11. He came back to Canada roughly five years later. He has worked as a carpenter in Canada since 1986.

**15** Mr. Soares testified that he did not recall being given his right to counsel. He testified that he did not know what the words "to retain and instruct counsel" meant when conveyed to him in English. He did understand the concepts once repeated in Portuguese. At the station, he acknowledged having a discussion with duty counsel. However, he said that he did not really speak to counsel. He essentially listened. Part of the problem was that he did not know to what the charges pertained. The lawyer apparently asked him to look around to determine whether anyone was listening to their conversation. The lawyer then spoke about legal aid. Interestingly, Mr. Soares testified that, at the end of the telephone conversation, the lawyer told Mr. Soares to "be careful with what I said to the police." Mr. Soares said that he did not ask for clarification largely because he was nervous and did not know how to do so.

**16** In cross-examination, Mr. Soares said that he did not really understand the lawyer and it was as if the lawyer was speaking in Chinese. However, he admitted that he did not tell Ms. Peters that he did not understand the lawyer, nor did the lawyer ask to speak with the officer.

**17** In cross-examination, Mr. Soares admitted that he speaks to his boss in English about 50% of the time, largely out of necessity. He also admitted that he has an Ontario driver's licence. He

disagreed that he did his banking in English. He said that the employees at the bank he uses speak to him in Portuguese. I accept this evidence.

**18** For the purposes of this motion, the most important aspect of Mr. Soares's evidence concerns his interaction with the officer during the interview. He testified that, had he understood his rights and the advice he received, he would not have spoken with the police. He agreed that he nodded a lot during the interview and seemed to be following along. He also admitted that he tends to use his hands a great deal when talking. He acknowledged telling the officer he did not want to talk and did not want to remember. However, he said, "in order for me to explain to the police, it would be difficult without someone helping me to interpret."

### ***The Recorded Statement***

**19** As noted above, Mr. Soares was arrested on April 15, 2010, concerning allegations that dated back to 2000. The interview started in a rather disorienting way, at least from Mr. Soares's perspective. Ms. Peters started by asking Mr. Soares, "why do you think you're here?" Mr. Soares indicated that it was for sexual assault. When he was asked who was making the complaint, he said "maybe [L.L.]", the complainant's mother. There is nothing inherently objectionable, as far as s. 10(a) or s. 10(b) of the *Charter* is concerned, in employing this interviewing technique: see S. Penney, V. Rondinelli and J. Stribopoulos, *Criminal Procedure in Canada* (Toronto: LexisNexis, 2011), p. 300. However, it did not help in establishing authentic lines of communication between Ms. Peters and Mr. Soares in this case.

**20** Throughout the interview, there appears to have been a disconnect between Mr. Soares and the officer. Mr. Soares responded in fairly brief sentences. He sometimes used odd expressions (*i.e.*, "I don't know who ... put me here"). Whenever the officer used colloquial language or metaphors (*i.e.*, "Does that ring any bells?"; "So you were her knight in shining armour, right?"), Mr. Soares became confused and asked for clarification. I do not wish to overstate this aspect of the statement. At times, Mr. Soares appeared to understand what was going on quite well. He repeatedly said he did not want to remember the events from many years ago.

**21** The most significant aspect of the statement, at least for present purposes, occurred at the end, when the following exchange took place:

**Officer:** Okay. But is it fair to say you're - you don't wanna - you don't wanna go into the details about it?

**Soares:** Please.

**Officer:** Why? Because it's too hard to talk about?

**Soares:** Is hard is like talking you know, is hard for me. Plus my English not right - is no -no- no good - good - good enough.

**Officer:** Well, I think we're - we're talking okay, here. You - you've understood everything this morning that's happened. But I understand if you don't wanna uh, discuss it any further too. So are we done, are we --?

**Soares:** Yeah.

The interview ended immediately after this exchange.

### III. Positions of the Parties

22 On behalf of Mr. Soares, Mr. Guiste submitted that s. 10(b) was infringed because it was clear (or it should have been) that Mr. Soares's language abilities were insufficient for the purposes of an interrogation. The officer should have taken steps to ensure that Mr. Soares was able to properly exercise his right to counsel and to meaningfully participate in the interview. On behalf of the Crown, Ms. Garcia argued that, while Mr. Soares's English is far from perfect, his comprehension and expression abilities were adequate for constitutional purposes.

### IV. Analysis

#### *Right to Counsel: s. 10 (b)*

23 In all of the circumstances, I found that Mr. Soares's rights under s. 10(b) of the *Charter* were infringed by the manner in which Ms. Peters conducted the interview. It should have been clear from the outset, when the police first encountered Mr. Soares, that there was a language issue. This should have prompted the arresting officers to inquire into Mr. Soares's facility with the English language: *R. v. Vanstceghem* (1987), 36 C.C.C. (3d) 142 (Ont. C.A.), at pp. 147-149. If it was not apparent at the outset, it became crystal clear during the interview. There were a number of times that language presented itself as an issue. When Mr. Soares finally raised the issue himself, saying that his English was not good enough, instead of asking him if he would like an interpreter, Ms. Peters simply asserted that there was no problem, and then brought the interview to a speedy conclusion.

24 This state of affairs leads me to conclude that Mr. Soares's rights under s. 10(b) were infringed. Further inquiries were required to ensure that his rights under s. 10(b) were protected: see *R. v. Doan*, [2012] O.J. No. 3066 (S.C.J.), at para. 72, *R. v. Chen*, [2012] O.J. No. 2456 (S.C.J.), at para. 79 and *R. v. Liew*, [2012] O.J. No. 1365 (S.C.J.), at para. 83.

25 In reaching this conclusion, I do not mean to suggest that I accept all of Mr. Soares's evidence. To the contrary, I do not accept his evidence on certain points. For example, I do not accept that the officers failed to advise him of his right to counsel at the time (or close to the time) of his arrest. The fact that he was put in touch with duty counsel almost immediately upon arriving at the station points strongly in the other direction. Moreover, I find that Mr. Soares exaggerated his lack of ability with the English language. I reach this conclusion in light of the time he has spent living and working in Canada, how he deals with his affairs in society and how he conversed with A.L., L.L. and the rest of her family. Indeed, when he testified, with the assistance of Portuguese interpreters, he often provided answers to questions before they had been translated for him. Nevertheless, I still find that the manner in which the language issue was handled by the police undermined his rights under s. 10(b) of the *Charter*: see *R. v. Ly*, [1993] O.J. No. 268 (Ont. C.J.).

26 The recorded statement demonstrates that Mr. Soares seemed to understand a good deal of what was said to him by Ms. Peters. However, as noted above, when colloquialisms or metaphors were used by the officer, Mr. Soares faltered. More fundamentally, in the context of a police interrogation, there is more to communication than just comprehension; an accused person must be able

to participate in a meaningful way, expressing him or herself effectively. That was lacking in this case. It ought to have triggered a concern that Mr. Soares might not have understood his rights when consulting with duty counsel. As evidence of this, I refer back to Mr. Soares's description of duty counsel's advice to him - to be very careful when speaking with the police. While duty counsel was not called as a witness, this aspect of Mr. Soares's evidence leads me to conclude that either Mr. Soares did not understand the advice he was given, or that he received terrible advice from the lawyer with whom he spoke. I suspect (and hope) that it was the former.

**27** In all of the circumstances, the interview of Mr. Soares was unfair and required that the language issue be addressed directly in the context of the right to counsel. For this reason, I found s. 10(b) was infringed.

***Exclusion of Evidence: s. 24(2)***

**28** As noted at the outset of these Reasons, I concluded that Mr. Soares's statement ought to be excluded. This is based on an application of the principles in *R. v. Grant* (2009), 245 C.C.C. (3d) 1 (S.C.C.). I must balance: (1) the seriousness of the *Charter*-infringing state conduct; (2) the impact of the breach on the *Charter*-protected interests of the accused; and (3) society's interest in the adjudication of the case on its merits. As McLachlin CJC and Charron J. said in that decision (para. 92): "The three lines of inquiry described above support the presumptive general, though not automatic, exclusion of statements obtained in breach of the *Charter*."

**29** In terms of the seriousness of the conduct, I cannot say that Ms. Peters acted in bad faith or with malfeasance. However, the record reveals that there was a rather obvious language issue that needed to be addressed. As the Supreme Court held in *R. v. Grant, supra*, at para. 75: "[I]gnorance of *Charter* standards must not be rewarded or encouraged and negligence or wilful blindness cannot be equated with good faith." While there was no bad faith in the circumstances, the seriousness of the scenario that unfolded following the arrest of Mr. Soares, especially in the interview room, militates towards exclusion in the s. 24(2) analysis: see *R. v. Letourneau*, [2010] O.J. No. 2635 (S.C.J.), paras. 20 and 21. Instead of attempting to solve the problem when Mr. Soares raised concerns about his ability to communicate properly, the officer merely asserted that everything had been just fine and that the interview was over. This was simply not good enough.

**30** In terms of the *Charter*-protected impact on the accused, *R. v. Grant, supra*, holds that, because a violation of s. 10(b) impacts on the right to silence and the protection against self-incrimination, it tends to militate in favour of excluding statements: paras. 95 and 96. There are no special circumstances in this case, like the ones alluded to in *R. v. Grant, supra*, that would suggest that a different approach should be taken.

**31** As for adjudication on the merits, Mr. Soares's statement does not carry the whole (or even a significant) burden of the Crown's case. While Mr. Soares said some things that were somewhat unusual, curious or suspicious from time to time, when asked directly whether the complainant's allegations were truthful, he flatly denied them. Ms. Garcia for the Crown candidly admitted that she sought to admit the statement primarily for the purposes of cross-examination and to confirm details of the complainant's account. I am not saying that these objectives and uses of the statement are unimportant; however, the exclusion of the statement does not undermine an adjudication of the case on the merits. Again, this factor points to exclusion.

**32** On the facts of this case, each of the *Grant* factors points in the direction of exclusion. Accordingly, I find that the admission of the statement would bring the administration of justice into disrepute, within the meaning of s. 24(2) of the *Charter*.

**V. Conclusion**

**33** For these reasons, I found that Mr. Soares's rights under s. 10(b) of the *Charter* were infringed and that his statement should be excluded pursuant to s. 24(2) of the *Charter*.

G. TROTTER J.

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