



COURT MARTIAL

Citation: *R. v. O'Brien*, 2015 CM 1013

Date: 20151001

Docket: 201522

Standing Court Martial

Canadian Forces Base Trenton
Trenton, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Master Corporal O'Brien, I.M.G., Accused

Before: Colonel M. Dutil, C.M.J.

[OFFICIAL ENGLISH TRANSLATION]

FINDING

(Orally)

INTRODUCTION

[1] The accused is facing two charges for offences punishable under section 130 of the *National Defence Act*, contrary to section 342.1 of the *Criminal Code*. Halfway through its evidence, the prosecution decided to provide additional details about the charges and modified the theory of its case. The details of the charges, as amended by additional details (Exhibit 2-A), are as follows:

[TRANSLATION]

In that she, between 1 January 2011 and 25 February 2013, at or near CFB Trenton, Ontario, fraudulently obtained, directly or indirectly, computer services, namely the Security and Military Police Information

System,¹ by querying the following individuals: MCpl Real Laflamme, WO Marc Grenier, WO Frank Hildebrandt, WO Mark Kluge.

In that she, between 1 January 2011 and 25 February 2013, at or near CFB Trenton, Ontario, fraudulently obtained, directly or indirectly, computer services, namely the Canadian Police Information Centre,² by querying the following individuals: Cpl Darryll Marshall, Cpl Kaven Norani, MCpl Matt Horner, Cpl Carolyn Lecouvie, Cmre Tammy Miller.

THE EVIDENCE

[2] Aside from the judicial notice under section 15 of the Military Rules of Evidence, the evidence is composed of the following:

- a. transcript of the video interview of Master Corporal O'Brien with Petty Officer 2nd Class Dingwall dated 7 October 2013 (Exhibit 4) and a DVD of the recording (Exhibit 5);
- b. a letter dated 28 January 2008, called [TRANSLATION] "DPM Police Advisory 05/08 Unacceptable Browse/Querying on SAMPIS" signed by Deputy Provost Marshal - Police, Major R.W.E. Bell (Exhibit 6);
- c. a document listing the queries conducted by Master Corporal O'Brien at the Canadian Police Information Centre as of 17 May 2011 (Exhibit 7);
- d. a document called "TIS Access Control and Authorization Form" signed by Master Corporal O'Brien on 19 August 2009 (Exhibit 8);
- e. a document listing the queries conducted by Master Corporal O'Brien using a mobile data terminal (MDT) as of 29 December 2010 (Exhibit 9);
- f. a document listing the queries conducted by Master Corporal O'Brien in SAMPIS from 1 January 2011 to 22 February 2013 (Exhibit 10);
- g. a document called "CPIC Acknowledgment of Restrictions Respecting the Handling of CPIC Material, Records and Information" signed by Master Corporal O'Brien dated 19 August 2009 (Exhibit 11);
- h. a document called "Acknowledgment of Restrictions Respecting the use of SAMPIS Equipment, Records and Information" signed by Master Corporal O'Brien dated 19 August 2009 (Exhibit 12);

¹ In this decision, the acronyms SAMPIS (Security and Military Police Information System) and its French version SISEPM (Système d'information – Sécurité et police militaire) are used interchangeably.

² In this decision, the acronyms CPIC (Canadian Police Information Centre) and its French version CIPC (Centre d'information de la police canadienne) are used interchangeably.

- i. a letter dated 17 March 2014, signed by Deputy Provost Marshal – Policy and Plans, Major J.M. Inman, called [TRANSLATION] "CF MP Gp HQ – DPM Policy and Plans Notice regarding Police Policy 03/2014 (Misuse of CPIC and SAMPIS to conduct background checks of MPO/MP)" (Exhibit 13);
- j. a copy of the following Canadian Forces Military Police Group Orders: 2-640 (Canadian Police Information Centre) in both English and French (Exhibits 14 and 14A);
- k. a copy of the following Canadian Forces Military Police Group Orders: 2-630 (Security and Military Police Information System (SAMPIS) in both English and French (Exhibits 15 and 15A);
- l. an excerpt from the Canadian Forces publication A-SJ-100-004/AG, Chapter 7 (Investigation Aid: General) dated July 2004 (Exhibit 16);
- m. a document called [TRANSLATION] "Summary of Facts" (Exhibit 17);
- n. a series of emails between Carl Beaulieu and Jean Aubé dated 1 September 2015 (Exhibit 18);
- o. a document called "Member's Personnel Record Resume (MPRR)" dated 6 January 2015, regarding Master Corporal O'Brien (Exhibit 19);
- p. a document called [TRANSLATION] "Joint Statement of Facts" (Exhibit 20);
- q. testimony of Carl Beaulieu, Sergeant Johanne Roy, Captain Ian Kelly, Petty Officer 1st Class Brian Grass, Petty Officer 2nd Class John Dingwall and Warrant Officer Douglas Bumstead.

[3] For proper understanding of the case, I shall reproduce the relevant elements from the Summary of Facts (Exhibit 17) and the Joint Statement of Facts (Exhibit 20):

[The excerpt of the Summary of Facts is reproduced as presented in Exhibit 17.]

[TRANSLATION]

SUMMARY OF FACTS (EXCERPT)

- 1. On 6 May 2013, the NIS opened an investigation into the applicant, a military police officer, for unauthorized use of computer services. The applicant was suspected of having conducted queries into four individuals on SAMPIS and CPIC for purposes other than law

enforcement and having disclosed this information to her husband, contrary to the SAMPIS and CPIC usage policies.

2. On 7 May 2013, MCpl Beacom of the NIS was designated to investigate.

3. On 8 May 2013, MCpl Beacom initiated a request to obtain the reports of the applicant's queries on CPIC and SAMPIS for the two previous years. Investigator Beacom received and analyzed the CPIC report on 9 May 2013, and the SAMPIS report on 16 May 2013. MCpl Beacom observed that the applicant had queried some of the four names. MCpl Beacom identified around 18 other individuals who were the subject of suspicious queries conducted by the applicant on SAMPIS and/or CPIC. MCpl Beacom noted this information in the investigation report.

4. On 7 October 2013, the applicant was interviewed by PO2 Dingwall. During her interview, the applicant admitted she queried the individuals she was suspected of having fraudulently queried on SAMPIS and CPIC, she explained the reasons behind some of her queries, she acknowledged her signature on the documents dealing with the SAMPIS and CPIC usage policy and she explained her understanding of this usage policy.

5. The applicant was unable to recall the reasons for the queries she conducted on certain individuals in CPIC and SAMPIS but explained that she acted in good faith and her notes would indicate the reasons for the queries.

[The Joint Statement of Facts is reproduced as presented in Exhibit 20.]

[TRANSLATION]

JOINT STATEMENT OF FACTS

- a. August 2009 to end of November 2009 – Patrol officer ("shift");
- b. End of November 2009 to 1 September 2010 – Security;
- c. 1 September 2010 to 1 February 2011 – Patrol officer ("shift");
- d. 1 February 2011 to March 2011 – Investigator ("invest") and community relations;

- e. March 2011 to April 2011 – Patrol officer ("shift");
 - f. April 2011 to 28 February 2012 - Investigator ("invest") and community relations;
 - g. 28 February 2012 to 3 April 2012 – Sick leave;
 - h. 4 April 2012 to 16 July 2012 – Maternity leave;
 - i. 16 July 2012, to 12 August 2012 – Community relations;
 - 1) During this period, from 27 July to 31 July – Patrol officer;
 - 2) 6 to 9 August 2012 – Patrol officer ("shift");
 - j. 13 August 2012 to 17 June 2013 – Second in Command of the investigation section;
- 2. On 4 January 2011, MCpl Matt Horner was a military police officer assigned to 21 MP Flight.
 - 3. On 4 January 2011, MCpl Darryll Marshall was a military police officer assigned to 21 MP Flight.
 - 4. On 4 January 2011, Cpl Keyvan Norani was a military police officer assigned to 21 MP Flight.
 - 5. On 30 July 2012, Cpl Carolyn Lecouvie was a military police officer assigned to 21 MP Flight.
 - 6. On 30 July 2012, Commissionaire Miller was working at 21 MP Flight.
 - 7. On 22 January 2013, WO Marc Grenier was a military police officer.
 - 8. On 10 February 2013, WO Frank Hildebrandt was a military police officer.
 - 9. On 10 February 2013, MWO Mark Kluge was a military police officer.
 - 10. MCpl O'Brien knew MCpl Darryll Marshall, MCpl Matt Horner and Cpl Keyvan Norani, Cmre Tammy Miller, Cpl Carolyn Lecouvie.

11. Cmr Miller never gave permission to MCpl O'Brien to query her in CPIC or SAMPIS. Cmr Miller was never arrested by MCpl O'Brien, and to her knowledge, she was never under investigation by the Military Police.

12. If Major Bossé, responsible for policies at the Military Police Gp HQ, were to testify, he would say that:

a. Military Police Policy 03/2014 was issued because a Sgt at the Valcartier Military Police, 5th Regiment, Ops reported to Maj Bossé that he was told by a member of Ops that every year, the Sgt of Operations must query all the members of the detachment on CPIC to ensure that they do not have a criminal record. This was done in order to complete the military police *McNeil* reports. To conduct this query in CPIC, the signed authorization of the person being queried is required, as well as a policy to allow it. If these do not exist, this type of query is not permitted.

b. When querying the GO of another MP, it is permitted to query the name of this police officer in SAMPIS. It is always permitted for a military police officer to query his or her name in SAMPIS in accordance with DPM Police Advisory 05/08 Unacceptable Browse/Querying on SAMPIS (Exhibit 6), despite the prohibition in CF MP Gp Order 2-630 (Exhibits 15, 15A), to find one of his or her investigation records.

[4] During his testimony as an expert witness, Mr Carl Beaulieu explained the terminology of various acronyms and words that appear in the reports produced before the Court regarding the queries the accused conducted, the documents categorizing the queries Master Corporal O'Brien conducted as of 17 May 2011 (Exhibit 7) using a mobile data terminal (MDT) as of 29 December 2010 (Exhibit 9) and those conducted by Master Corporal O'Brien in SAMPIS from 1 January 2011 to 22 February 2013 (Exhibit 10). He also explained how the CPIC and SAMPIS systems work, who has access and how they can access them. He described the various types of queries that can be conducted, either by name, fingerprints, vehicle registration number or driver's licence and described the information that can be obtained depending on the types of queries conducted by the user.

[5] Sergeant Johanne Roy testified that she had known Master Corporal O'Brien for many years and they had done their Military Police basic training (QL3) together in Borden in 2003. She explained what she was taught during this training, particularly using the CPIC investigative tool. She noted that her understanding of the standards of use for CPIC limited her use to querying elements that were related to one of her investigations. With regard to using SAMPIS, she indicated that she was not specifically taught what constituted appropriate use of this system, but that she learned

how to create a GO and how to enter information in the system. Sergeant Roy testified that she normally records her CPIC and SAMPIS queries in her police notes, but the policy on note-taking has changed a lot since 2004. She adds that she told Master Corporal O'Brien, after the latter had requested assistance on obtaining a production order she had issued for her in 2010, to check in her records via SAMPIS to find an example. Sergeant Roy also testified that Master Corporal O'Brien had consulted her a number of times in the past regarding investigation files. Sergeant Roy also testified that she herself has consulted the GO of another person in SAMPIS after obtaining authorization to do so.

[6] Captain Ian Kelly testified that he was the commanding officer of the 21 Military Police Flight in Trenton during the summer of 2012 and that Master Corporal O'Brien was a member of his unit. He stated that he had an informal meeting with Master Corporal O'Brien at the end of the summer, during which they addressed many subjects, in particular, Master Corporal O'Brien's new position at the investigation section. There were specific issues regarding concerns Master Corporal O'Brien had about certain individuals working at the Canadian Joint Incident Response Unit (CJIRU) (*Unité interarmées d'intervention du Canada (UIIC)* in French) and the steps she wanted to take to investigate. Captain Kelly was impressed by Master Corporal O'Brien's initiative, but asked her to wait until Petty Officer 2nd Class Grass (his rank at the time), her new supervisor, was in position before proceeding. He added that he did not have any concerns regarding the investigation initiative of his subordinate at the time and did not know that Master Corporal O'Brien's spouse was part of the unit in question at the time. When questioned on the content of paragraph 11 of the English version of the Canadian Forces Military Police Group Orders: 2-640 (Canadian Police Information Centre) (Exhibit 14-A), that states: "All CPIC usage shall be in support of a legitimate law enforcement purpose, an authorized MP investigation, or the security clearance program", Captain Kelly testified that the message was communicated to the members of his unit through the unit's Standing Operating Procedures (SOP) and that this directive was a common sense directive for people in his line of work. Captain Kelly also testified that Chapter 7 of Document A-SJ-100-004/AG (Investigative Tools: General) from July 2004 (Exhibit 16) was available in his unit and online. He added that some excerpts from Chapter 7 were reproduced in his unit's standing operating procedures and they were available in a binder in the Military Police offices.

[7] Petty Officer 1st Class Grass testified that he was the immediate supervisor of Master Corporal O'Brien starting in mid-June 2012 for a period of around one year, except from mid-February to mid-March 2013, while he was training the investigation section team at the 21 Military Police Flight in Trenton. He added that he also had other duties during his secondment at the Canadian Forces base in Trenton from 2011 to 2015, in particular as watch commander and person responsible for everything involving the duties of the military police on patrol, including schedules, distributing policies and Chain of Command directives that apply to military police, by email or verbally. According to his version of the facts, the nature of the investigations of military police on patrol cover a wide range of situations depending on the events, from routine verifications to more serious situations such as sexual assaults, child

pornography or fraud, even if these investigations could be taken over by the National Investigation Service or even civil police authorities. He stated that when he was in charge of the investigation section, he was asked to investigate with regard to charges against a military police officer from the 21 Flight, Master Corporal Horner. When he realized at the start of his investigation that the charges involved events that had taken place in the city and not on a Defence establishment, he advised his superior and ended his investigation. He also testified that he was familiar with the Military Police Policies and Technical Procedures (MPPTP) and that they were available and accessible on the Military Police Group website when he was assigned to the 21 MP Flight. He stated that the military police at the flight had access or should have had access to them. He added that the flight also had Standing Operating Procedures (SOP) and that they were accessible electronically or on paper at the police station. He added that military police officers were to read them and sign a record once a year to attest that they read them. He was unable to confirm whether military police officers Horner, Marshall and Norani had been subject to an investigation in January 2011 because he was not a member of the 21 MP Flight at that time. He also added that he could not recall whether Commissionaire Tammy Miller had been the subject of an investigation by Master Corporal O'Brien in July 2012, when they worked together at the investigation section and states that he does not know whether Carolyn Lecouvie, a military police officer from the 21 MP flight, was under investigation at the time although he recalls that she was investigated as a victim. He added that Master Corporal O'Brien was a very good investigator, devoted and determined. His testimony indicates that it is not uncommon for a police officer to begin an investigation that does not provide any results. Therefore, the supervisor might never be informed about it. He also stated that he authorized Master Corporal O'Brien to consult some of his previous investigation files as teaching tools. Regarding the military police officers' consulting GOs, he explained that it was a common practice, including consulting GOs from other Canadian Forces Bases. As for querying information on CPIC, he added that military police officers conduct certain verifications after they receive information from police officers or other people, including anonymous sources. He also confirmed that he told the investigator responsible for the case that is now before the Court, when asked about the rules surrounding the use of data from SAMPIS and CPIC, that he would have to review the Military Police Group Orders in order to answer the question.

[8] As for the testimony of Petty Officer 2nd Class Dingwall, it provides little additional information. He was the investigator in this case and led the 7 October 2013 interview with Master Corporal O'Brien. He also obtained all the queries Master Corporal O'Brien conducted during the period in question in the investigation, which are listed in Exhibit 7 (CPIC), Exhibit 9 (MDT) and Exhibit 10 (SAMPIS).

[9] Lastly, the testimony of Warrant Officer Bumstead indicates he was never officially Master Corporal O'Brien's supervisor, although he did work with her occasionally. He never had a conversation with the accused regarding the SOP of the 21 MP Flight. Warrant Officer Bumstead described the various duties of the military police including those related to building security, patrols and community affairs. He acknowledged that regardless of their duties, military police officers may be required to

investigate and use search tools such as SAMPIS and CPIC. He added that he did not know whether the military police officers Marshall, Horner and Norani had been the subject of investigations in the past. When he was asked to describe the process when there are criminal or disciplinary charges against a military police officer, he stated that he would collect preliminary information and inform the National Investigation Service, when necessary.

[10] As for the charge alleging fraudulent use of the Security and Military Police Information System (SAMPIS), the policies and procedures regarding authorized access to SAMPIS as well as the authorized management and use of SAMPIS are stated in Canadian Forces Military Police Group Order 2-630 (Security and Military Police Information System (SAMPIS)) (Exhibits 15 and 15A). This order has been in force since 1 April 2012. Non-commissioned members and Regular Force Military Police officers carrying out duties related to law enforcement, and those who must access SAMPIS data while carrying out their usual duties are authorized to access it (see paragraph 16 of the Order). Paragraphs 26 and 27 deal with what is considered unacceptable use of the system:

26. All SAMPIS use shall be in support of authorized law enforcement activities and MP investigations. No person shall use SAMPIS for any other reason.

27. The following are examples of unacceptable uses of SAMPIS:

- a. browsing/querying oneself;
- b. browsing/querying another MP, a family member, former family member, or any other person for any reason other than in support of an authorized MP function or investigation;
- c. modifying or deleting any record or data in SAMPIS, other than in support of authorized investigative management or supervisory quality control measures; and
- d. providing access to SAMPIS or SAMPIS records and data to any person other than an authorized user. This does not include normal distribution of police records pursuant to CF MP Gp Orders 2-140, 2-150 or 2-155.

This order was clarified on 17 March 2014, by the Military Police authorities through Notice 03/2014 regarding the abusive use of CPIC and SAMPIS to verify the records of officers and non-commissioned members of the military police (Exhibit 6). The previously-cited Statement of Facts (Exhibit 20) clarifies this issue by stating that the Military Police Policy 03/2014 was issued further to a specific case, namely after a sergeant with Operations at the 5 Military Police Regiment in Valcartier reported to

Major Bossé that he was told by a member that every year, the sergeant of operations must query all the members of the detachment in CPIC to ensure they do not have a criminal record. This procedure was done for the purpose of completing the military police *McNeil* reports. In order to conduct these CPIC queries, a signed authorization by the person being queried was required, as well as a policy permitting it. Without these, this type of query is not permitted. The Statement of Facts also informs us that when the GO of another military police officer is queried, it is permitted to query the name of the police officer in SAMPIS. It is, therefore, always permitted for a military police officer to query his or her name in SAMPIS, in accordance with DPM Police Advisory 05/08 Unacceptable Browse/Querying on SAMPIS (Exhibit 6), despite the prohibition in CF MP Gp Order 2-630 (Exhibits 15, 15-A), to find one of his or her investigation records.

[11] As for the charge alleging fraudulent use of the Canadian Police Information Centre (CPIC), the applicable policies and procedures regarding access by military police officers to the CPIC database are stated in the Canadian Forces Military Police Group Order 2-640 (Canadian Police Information Centre (CPIC)) (Exhibits 14 and 14-A). This order has been in force since 1 December 2011. It replaced Chapter 7 (Investigation Aid: General) in the Canadian Forces publication A-SJ-100-004/AG (Military Police Policies and Technical Procedures (MPPTP)), in force since July 2004. These two publications apply in this case since the prosecution is alleging that the queries Master Corporal O'Brien conducted regarding Carolyn Lecouvie and Tammy Miller occurred on 30 July 2012, whereas those conducted into Darryl Marshall, Keyven Norani and Matt Horner occurred on 4 January 2011.

[12] For the purposes of applying Order 2-640, paragraphs 11 to 13 set out the CPIC usage parameters for members of the military police who are authorized to access it under paragraph 8:

11. All CPIC usage shall be in support of a legitimate law enforcement purpose, an authorized MP investigation, or the security clearance program.

12. CPIC queries shall not be conducted for personal reasons or unauthorized purposes.

13. Any misuse of the CPIC system shall be deemed to be a breach of the CPIC database and a violation of national CPIC policy. Annex A to this Order sets out the procedures that shall be followed for all suspected or actual breaches of the CPIC database.

[13] A breach of the CPIC is defined at paragraph 3(a) of Order 2-640:
3.(a) Any transaction or query that is not in direct support of law enforcement duties or investigations. Any query conducted where the information is utilized for personal or financial gain. This includes release of information to unauthorized persons and the use of unsecured terminals or Internet connections without security clearances or approved firewall;

[14] MPPTP, Chapter 7, Paragraphs 42 and 43 in force before 1 December 2011 and replaced by Order 2-640 stated the following:

42. **Access.** CPIC is a law enforcement system and as such may only be accessed by authorized law enforcement personnel. All CPIC information is to be protected in accordance with PROTECTED B standards, with the caveat “Law Enforcement Eyes-Only”. Enforcement Support Personnel, employed by law enforcement agencies in direct support of law enforcement activities, may also be granted access. As such, Commissionaires, communicators or dispatchers working for the MP may be granted access to the system. The CPIC System Manager must authorize all users who are not MP members. All users must receive training. Further guidance on all aspects of CPIC is found at Annex H.

43. **Proper Use.** CPIC is an official law enforcement system and must, as stated above, only be used for official law enforcement matters. Due to the nature of the system, a significant amount of trust is vested in all persons who are accountable for their use of the system or access to CPIC information. All such persons must sign, and forward to DPM Police, the Acknowledgement of Restrictions Respecting the Handling of CPIC Material, Records and Information, which is located at Annex H, Appendix 2 of this Manual. Proven acts of misuse of the CPIC system may result in disciplinary or administrative action being taken against the alleged offender. Suspected acts of misuse shall be simultaneously reported to both Deputy Provost Marshal Professional Standards (DPM PS) and Deputy Provost Marshal Police (DPM Police).

[15] MPPTP, Chapter 7, Annex H, Paragraph 5 in force before 1 December 2011, replaced by Order 2-640 stated the following

5. **CPIC System Security Breaches or Violations.** The CPIC system is to be utilized for official law enforcement purposes only. The CPIC Unit Coordinator shall report all CPIC breaches/violations and suspected breaches/violations to the MP CPIC System Manager. Misuse of the CPIC system by the MP could result in loss of privileges either individually or collectively.

[16] During the 7 October 2013 interview with Petty Officer 2nd Class Dingwall, the accused admitted that she had queried the individuals she was suspected of having fraudulently queried using SAMPIS and CPIC. She explained the reasons that motivated some of her queries, she acknowledged her signature on the documents on the usage policy for these investigation tools and her understanding of the usage policy. When she was unable to recall the reasons for certain queries, she submitted that she acted in good faith. The free and voluntary nature of the statement is not in question.

She noted that she understands that the use of CPIC by individuals who have access is for authorized purposes and investigative purposes in the broad sense of the term, including when a police officer is assigned to community relations duties and obtains information that requires an investigation to be launched. As for the offence alleging fraudulent use of SAMPIS, the evidence indicates that Master Corporal O'Brien queried each of the individuals mentioned in the supplementary information provided by the prosecution (Exhibit 2-A). She queried Réal Laflamme three times on 4 February 2013, twice on 5 February 2013, five times on 7 February 2013, and five times on 19 February 2013. These queries are often only separated by a few seconds. The query of Marc Grenier was conducted on 24 January 2013, at 3:36 p.m., while those on Frank Hildebrandt and Mark Kluge were conducted on 10 February 2013, at 3:19 p.m. and 3:23 p.m. These three individuals have a higher rank than the accused.

[17] During her 7 October 2013 interview, she explained that she had queried Réal Laflamme because she wanted to verify some information about him after fellow military police officers had asked her some questions; they had been involved in an incident with this individual with whom she played badminton. She admitted she consulted Laflamme's SAMPIS record because she wanted to know who she was dealing with when Laflamme himself asked her questions regarding his problems with the law, knowing that she was a military police officer. As for the query of Kluge, she stated that she did know him but explained that she would have conducted this query in the context of an investigation or because someone had asked her to conduct the query for an investigation. She also acknowledges that she queried Warrant Officer Hildebrandt, but does not know why because she did not know him at the time, even though he is now her boss. Finally, Master Corporal O'Brien indicated that she does not recall why she had queried Marc Grenier, a military police officer, but explained that sometimes during an investigation and to contact an individual, that person's contact information had to be accessed. She added that she would only have queried the name "Marc Grenier" in SAMPIS in relation to an investigation, an allegation or something of that sort.

[18] The records of the queries Master Corporal O'Brien conducted in CPIC show that she also queried the names of the individuals listed in the supplementary information, Marshall, Norani, Horner, Lecouvie and Miller. They were all military police officers stationed at 21 MP Flight except Miller, who was a commissionaire at 21 MP Flight. The queries of Marshall, Norani and Horner were all conducted on 4 January 2011, using a mobile terminal in a patrol vehicle around 1:55 a.m. There is nothing in the evidence that could provide an explanation for these queries. In the case of Lecouvie, the evidence shows that Master Corporal O'Brien queried her many times in SAMPIS on 8 November 2012 and 3 December 2012, but only once in CPIC on 30 July 2012, at 7:25 p.m., eight minutes after having conducted a similar query of Tammy Miller, while she was in a vehicle equipped with a mobile terminal. The evidence shows that Lecouvie was involved in a domestic case as a victim in September or October, but there is no explanation from Master Corporal O'Brien for why she conducted her queries on 30 July 2012. As for Tammy Miller, Master Corporal O'Brien told the investigator during her 7 October 2013 interview that she thought she remembered that

she had queried CPIC after noticing something weird in Tammy Miller's parking spot when she was absent. According to the accused's statements during the interview, she did not understand why she would have queried Tammy Miller.

PARTIES' POSITIONS

[19] The accused's use of a computer and queries of the individuals in question in SAMPIS and CPIC is not in dispute. The defence submits that the accused acted in the context of her police duties or duties related to law enforcement. She adds that the evidence does not support the conclusion beyond a reasonable doubt that she acted fraudulently or without colour of right. She added that the evidence does not show that she acted for unauthorized purposes, namely for personal reasons that were unrelated to her duties. The defence submits that the explanations provided during the 7 October 2013 interview are plausible and that the accused's lack of memory to justify one or more queries is not sufficient to support as sole rational inference that a query was not authorized in the circumstances because that would constitute a reversal of the burden of proof.

[20] The prosecution submits that all of the evidence shows that Master Corporal O'Brien appointed herself as a defender of justice who used her privileged access to SAMPIS and CPIC to reassure herself of certain facts and justified her actions using scenarios she created. The prosecution adds that the accused cannot justify the queries that are the subject of the charges using a moral, not legal, foundation, in particular when the accused alleges that she always acted in good faith. As for the second charge, the queries in SAMPIS, the prosecution submits that the accused's queries of Réal Laflamme were not authorized because the evidence shows that they were done for personal reasons. As for the queries of military police officers Grenier, Kluge and Hildebrandt, military police officers having a higher rank, the prosecution submits that these queries of individuals, including those of Kluge and Hildebrandt within a few minutes of each other and conducted six months before her 7 October 2013 interview are highly suspicious. According to the prosecution, these queries could not have any investigative motivation, and it seems that they were conducted by the accused without colour of right because SAMPIS cannot be used to locate military police officers as if conducting a Google-type search.

[21] As for the queries that are the subject of the third charge, namely those conducted on CPIC, the prosecution submits that the fact the military police officers in her unit, Horner, Norani and Marshall, were involved in an incident that was the subject of a police investigation by another police force cannot be used as justification by Master Corporal O'Brien to query these individuals, for whom she did not have a mandate to investigate. According to the prosecution, the accused cannot raise the colour of right in these circumstances. She adds that a reasonable person would conclude that the queries of these three individuals around 2:00 a.m. on 4 January 2011, using a mobile terminal in a patrol vehicle at two minutes' interval constitutes a dishonest activity because there was no reason for investigating. The prosecution submits that the queries of Lecouvie and Miller on 30 July 2012, were conducted for no

valid reason. On one hand, the prosecution rejects the accused's explanations, during her interview, that she had investigated Lecouvie because she had been involved in a domestic case as a victim. According to the prosecution, this explanation does not hold water because the complaint was only filed a few months later. The prosecution also rejects the accused's explanations regarding the CPIC query of Miller on the ground that she had observed something weird in Miller's parking spot while she was absent.

ANALYSIS

The law

[22] Paragraph 342.1(1)(a) of the *Criminal Code* states the following:

342.1 (1) Everyone is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years, or is guilty of an offence punishable on summary conviction who, fraudulently and without colour of right,

(a) obtains, directly or indirectly, any computer service;

[23] The Court of Appeal of Quebec ruled on the essential elements of this offence, which must be proven beyond a reasonable doubt, in *R. c. Parent*, EYB 2012-211297, 2012 QCCA 1653. In that decision, Justice Gagnon described the essential elements of this offence. He defined the *actus reus* at paragraph 37:

[TRANSLATION]

In this case, in order to prove the *actus reus* of the offence referred to in paragraph 342.1(1)(a) Cr.C., the appellant had to establish that the respondent had obtained a computer service, that this use was prohibited and that a reasonable person in the same circumstances would have agreed that it was a dishonest activity. The appellant also had to establish that the misappropriation was done “without colour of right.” These elements make up the *actus reus* of the alleged offences.

He also addresses the expression “without colour of right” at paragraph 26:

[TRANSLATION]

I need only reiterate that the colour of right is based on an honest belief in a situation that, if it actually existed, would at law justify or excuse the act in question. I would add that the colour of right may result from the accused’s honest misinterpretation of the law applicable to the litigious situation or from his or her erroneous assessment of the actual situation he or she is facing. (Footnote omitted)

[24] In *R. v. Simpson*, 2015 SCC 40, the Supreme Court of Canada did not modify the “colour of right” defence. Justice Moldaver considered whether there was an air of reality to this defence in the circumstances of the case and the Court analyzed whether the trial judge’s errors in assessing the issue had a material bearing that would justify ordering a new trial (paragraph 27).

[25] As for the *mens rea* of paragraph 342.1(1)(a) of the *Criminal Code*, Justice Gagnon addresses the issue in paragraph 50 of *Parent*:

[TRANSLATION]

In order to prove the offence set out in paragraph 342.1(1)(a) *Cr.C.*, the prosecution had to show that the respondent had obtained a computer service knowingly and voluntarily. This required evidence of his intent to commit the prohibited act, knowing that this act was prohibited with regard to the planned purposes of this use. In my view, this is the *mens rea* required for offences, subject of this appeal to be committed.

Application to the present facts in issue

[26] With regard to the second charge, having obtained a computer service, namely SAMPIS, the queries must be reviewed individually in light of the overall evidence, including the explanations the accused provided during the 7 October 2013 interview or the lack thereof. First, Master Corporal O'Brien never claimed to have conducted any queries whatsoever for personal or unauthorized purposes. The prosecution submits that Master Corporal O'Brien acted for personal reasons when she queried Réal Laflamme. The prosecution supports its claims with an excerpt from the accused's interview when she told the investigator, "I want to know where I stand" with regard to this query, because she played badminton with him. This does not take into consideration the context in which the statement was made. She queried Réal Laflamme three times on 4 February 2013, twice on 5 February 2013, five times on 7 February 2013, and five times on 19 February. These queries, as noted above, are often separated by only a few seconds. During her 7 October 2013 interview, she explained that she queried Réal Laflamme because she wanted to verify some information about him after she was asked questions by fellow military police officers who had been involved in an incident with this individual, with whom she played badminton. She admitted that she consulted the SAMPIS record of Laflamme because she wanted to know who she was dealing with ("I want to know where I stand") when Laflamme himself asked her questions about his legal issues, knowing that she was a military police officer. During this period, Master Corporal O'Brien was the second in command at the investigation section (see Joint Statement of Facts, Exhibit 20). In this context, the Court cannot agree with the prosecution's theory. These queries were conducted when she was on duty and they were related to police purposes.

[27] Regarding the queries of Grenier, Kluge and Hildebrandt, the query of Marc Grenier was conducted on 24 January 2013, at 3:36 p.m., whereas those of Frank Hildebrandt and Mark Kluge were conducted on 10 February 2013, at 3:19 p.m. and 3:23 p.m. Master Corporal O'Brien was second in command at the investigation section. These three individuals had a higher rank than the accused. She stated that she did not know Kluge, but explained that she would have conducted this query in the context of an investigation or because someone asked her to conduct this query for an investigation. She also acknowledged that she queried Warrant Officer Hildebrandt, but does not know why since she did not know him at the time, even though he is now her boss. Lastly, Master Corporal O'Brien indicated that she does not recall why she

queried Marc Grenier, a military police officer, but she explained that sometimes in an investigation and to contact a person, she had to obtain that person's contact information. She added that she would only have queried the name Marc Grenier in SAMPIS in relation to an investigation, an allegation or something of that sort.

[28] The prosecution asks the Court to dismiss the explanations provided by the accused during her interview and submits that the queries of these individuals, who were higher ranking, conducted a few minutes apart six months before her 7 October 2013 interview, including those of Kluge and Hildebrandt, are highly suspicious. According to the prosecution, these queries could not be supported by any investigative reason, and are without colour of right because SAMPIS cannot be used to locate military police officers as if conducting a Google-type search.

[29] The prosecution cannot meet its burden of proof by asking the Court to dismiss the explanations provided by the accused. This would constitute a reversal of the burden of proof. The prosecution relies on circumstantial evidence and it is essential for the Court to be able to find that this would be the only rational conclusion that could be drawn from the evidence as a whole. The fact something is highly suspicious does not constitute proof beyond a reasonable doubt. The explanations the accused provided may raise doubts or questions, but they cannot be dismissed on the ground that they might be far-fetched or unreasonable. It was open to the investigator to probe deeper into the reasons provided by the accused at the interview. He did not do so. However, the evidence shows that when querying the GO of another military police officer, it is permitted to query the name of that police officer in SAMPIS. Therefore, it is always permitted for a military police officer to query his or her own name in SAMPIS in accordance with DPM Police Advisory 05/08 Unacceptable Browse/Querying on SAMPIS (Exhibit 6), despite the prohibition in the CF MP Gp Order 2-630 (Exhibits 15, 15-A), to find one of his or her investigation records. The accused's explanations are consistent with this practice and the Court cannot conclude beyond a reasonable doubt that these queries were prohibited and a reasonable person in the same circumstances would have agreed that this was a dishonest activity.

[30] As for the third charge, regarding the accused's CPIC queries on Marshall, Norani, Horner, Lecouvie and Miller, Master Corporal O'Brien knew them all. Master Corporal O'Brien was a patrol officer on 4 January 2011 and from 27 July to 31 July 2012, even though she was assigned to community relations duties from 16 July 2012 to 12 August 2012. Master Corporal Matt Horner, Master Corporal Darryl Marshall and Corporal Keyven Norani were military police officers assigned to the 21 Military Police Flight on 4 January 2011. Corporal Carolyn Lecouvie was part of the same unit on 30 July 2012, as was Tammy Miller, but as Commissionaire. Tammy Miller had never given permission to the accused to query her in SAMPIS or CPIC. Commissioner Miller was never arrested by Master Corporal O'Brien and to Miller's knowledge, she was never under investigation by the military police (see Joint Statement of Facts, Exhibit 20).

[31] The queries of Marshall, Norani and Horner were all conducted on 4 January 2011, using a mobile terminal in a patrol vehicle around 1:55 a.m. There is nothing in the evidence that could provide an explanation for these queries. In the case of Lecouvie, the evidence shows that Master Corporal O'Brien queried her many times in SAMPIS on 8 November 2012 and on 3 December 2012, but only once in CPIC on 30 July 2012 at 7:25 p.m., eight minutes after having conducted a similar query of Tammy Miller, all while on board a vehicle equipped with a mobile terminal. The evidence indicates that Lecouvie was involved in a domestic issue as a victim in September or October 2012, but there is no explanation from Master Corporal O'Brien for why she conducted the query on 30 July 2012. As for Tammy Miller, Master Corporal O'Brien first told the investigator, during her 7 October 2013 interview, that she did not recall why she had conducted a query, but it must have been serious. Shortly thereafter, she added that she recalled that she conducted a CPIC query after noticing there was something weird in Tammy Miller's parking spot, although she was absent. According to the accused's statements during the interview, she did not understand why she would have queried Tammy Miller for any other reason than that.

[32] During the 7 October 2013 interview, investigator Dingwall asked the accused why she had queried her co-worker Lecouvie. Master Corporal O'Brien related her queries to the September or October 2012 incident. The fact is, the investigator failed or neglected to ask her if she could explain the 30 July 2012 query while she was on patrol. The prosecution submits that the accused's explanation does not hold water because it corresponds to an incident in the fall of 2012 and the Court must find that this inconsistency shows that Master Corporal O'Brien's query of Lecouvie on 30 July 2012, a few minutes after that of Miller, was prohibited and a reasonable person in the same circumstances would have agreed that it was a dishonest activity. As for the query of Miller, the Court must accept the explanation the accused provided in context. Even if the accused's suggestion seems difficult to believe, the prosecution cannot rely on this hypothesis to infer there was a prohibited and dishonest query and the gap between the two queries, of Lecouvie and Miller, does not allow them to be connected. The burden of proving beyond a reasonable doubt that one or the other of the queries was prohibited was on the prosecution. It is not the Court's responsibility to speculate on the reasons for the queries the accused conducted on Lecouvie and Miller on 30 July 2012.

[33] There is nothing in the evidence that would explain why Master Corporal O'Brien conducted CPIC queries of Marshall, Norani and Horner. The prosecution alleges that because of the circumstantial evidence, the accused's guilt can be inferred since they were coworkers and there was no reason to investigate these individuals in the circumstances and at the time the queries were conducted. With respect, the lack of an explanation by the accused is not a determining factor and she does not have anything to prove. MPPTP, Chapter 7, Paragraph 43, in force before 1 December 2011, restricts CPIC usage to official duties and law enforcement. MPPTP, Chapter 7, Annex H, Paragraph 5 also specifies that the CPIC system is to be utilized for official law enforcement purposes only. These terms are very broad and cover a multitude of situations that are not limited to an investigation. Again, it is the prosecution's burden to prove beyond a reasonable doubt that the query was prohibited and dishonest.

Circumstantial evidence is insufficient to establish that the query was not for law enforcement purposes. There must be evidence to support a reason for querying to determine whether the use was prohibited and dishonest. This direct evidence does not exist in the circumstances and the circumstantial evidence does not lead to the finding that the only rational conclusion to be drawn from the evidence as a whole is that the use of the CPIC system was prohibited.

[34] This case is not determined on the civil standard of a balance of probabilities, but on the criminal law standard of proof beyond a reasonable doubt. The role of this Court is not to determine whether the accused correctly used SAMPIS and CPIC but whether the accusations made by the Director of Military Prosecutions were proved beyond a reasonable doubt. Even if the Court believes the accused is probably guilty or likely guilty, this is not sufficient. The evidence before the Court throughout the trial raises important questions regarding proper use and the accused's understanding of the parameters that must guide her when she uses these systems. I do not doubt that this issue will be the subject of a thorough examination by the competent authorities. The finding of this Court should not be interpreted in any way as a validation of the acts the accused performed in the SAMPIS and CPIC systems between 2011 and 2013. It relies solely on the evidence as a whole and the application of the standard of proof beyond a reasonable doubt that is the prosecution's burden.

FOR THESE REASONS, THE COURT

[35] **FINDS** the accused not guilty on all charges.

Counsel:

Director of Military Prosecutions as represented by Major A.-C. Samson, Major A. Van Der Linde and Captain J.P.S. Poitras

Lieutenant Commander P.D. Desbiens, Counsel for Master Corporal I.M.G. O'Brien