COURT MARTIAL

Citation: *R. v. Korolyk,* 2016 CM 1002

Date: 20160222
Docket: 201549

General Court Martial

Canadian Forces Base Esquimalt
Victoria, British Columbia, Canada

Between:

Her Majesty the Queen

- and -

Leading Seaman K. N. Korolyk, Applicant

Before: Colonel M. Dutil, Chief Military Judge

DECISION RESPECTING AN APPLICATION ASKING FOR THE DECLARATION THAT SUBSECTION 129(2) OF THE *NATIONAL DEFENCE ACT* IS CONTRARY TO SECTION 7 AND 11(*d*) OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

(Orally)

[1] This is the court's decision in respect of an application asking for a declaration that subsection 129(2) of the *National Defence Act* (*Act*) is contrary to sections 7 and 11(*d*) of the *Canadian Charter of Rights and Freedoms*.

[2] The accused, Leading Seaman Korolyk, is charged with one count under section 129 of the *National Defence Act* for neglect to the prejudice of good order and discipline. Alternatively, she is also charged for an act of a fraudulent nature not particularly specified in sections 73 to 128 of the *National Defence Act* contrary to section 117(f) of the *National Defence Act*. The first charge alleges the contravention of article 26.02 of the *Queen's Regulations and Orders for the Canadian Forces*.

[3] The accused challenges the constitutionality of subsection 129(2) of the *National Defence Act* because it creates a non-rebuttable presumption that contravenes

section 7 and 11(*d*) of the *Canadian Charter of Rights and Freedoms*, hereinafter, the *Charter*. Sections 7 and 11(*d*) of the *Charter* provides that :

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
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> . . .
>
> 11. Any person charged with an offence has the right
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> . . .
>
> (*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

[4] The applicant asks the court to declare that subsection 129(2) is of no force or effect pursuant to section 52 of the *Constitution Act*, 1982. Subsections 129(1) and (2) of the *National Defence Act* provide that:

> 129. (1) Any act, conduct, disorder or neglect to the prejudice of good order and discipline is an offence and every person convicted thereof is liable to dismissal with disgrace from Her Majesty's service or to less punishment.
>
> (2) An act or omission constituting an offence under section 72 or a contravention by any person of
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> (*a*) any of the provisions of this Act,
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> (*b*) any regulations, orders or instructions published for the general information and guidance of the Canadian Forces or any part thereof, or
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> (*c*) any general, garrison, unit, station, standing, local or other orders,
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> is an act, conduct, disorder or neglect to the prejudice of good order and discipline.

[5] The evidence filed in this application is limited to an agreed statement of facts and the matters for which the court has taken judicial notice under section 15 of the *Military Rules of Evidence.* For clarity, I reproduce the document entered as Exhibit M1-2:

AGREED STATEMENT OF FACTS

> 1. The charges in this matter relate to the accused's alleged failure to report a domestic event relevant to her Post Living Differential allowance, though she had a duty to report that event in accordance with QR&O 26.02. Leading Seaman Korolyk is charged under *National Defence Act* section 129 for neglect to the prejudice of good order and discipline.

> 2. PLD is an allowance designed to reduce the adverse financial impact on military members and their families when posted to an area with a cost of living above.
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> 3. Leading Seaman Korolyk and Leading Seaman Colson moved in together at 429 Thetis Crescent on or about 4 January 2014. They jointly occupied 429 Thetis Crescent as their principle residence beginning on that date.
>
> 4. When service members jointly occupy a principle residence they are entitled to 75 per cent of the normal rate of PLD allowance, in accordance with the Compensation Benefits Instructions section 205.45(10).
>
> 5. There is dispute as to the facts regarding when the joint occupancy ended. It is agreed for the purposes of this application that it ended no later than 1 October 2014.
>
> 6. Leading Seaman Korolyk received the full PLD allowance in 2014 during the period 1 June 2014 to 1 October 2014.

[6] There is no other evidence before the court. Although counsel for the prosecution asked the court to rule that a specific witness be declared an expert under section 81 of the *Military Rules of Evidence*, the court denied the request because the prosecution failed to meet its burden to establish the necessary requirements that the proposed evidence met the criteria of relevance and necessity in order to assist the court in dealing with this issue. However, it must be clearly stated that nothing precluded the prosecution to call the same witness as an ordinary witness to provide relevant and admissible evidence or any other witness (including expert witnesses), file documentary evidence or ask the court to take judicial notice of facts or matters under section 16 of the *Military Rules of Evidence.* Despite being reminded of this opportunity, counsel for the prosecution expressly declined to do so.

[7] In *R. v. Tomczyk*, 2012 CMAC 4, 3 December 2012, the Court Martial Appeal Court explained the nature of the offence under 129 of the *National Defence Act*, at paragraphs 24 and 25:

> [24] Section 129 is a broad provision that criminalizes any conduct judged prejudicial to good order and discipline in the CF. Subsection 129(1) creates the offence while subsection 129(2) deems a number of activities to be prejudicial. In *R. v. Winters (S.)*, 2011 CMAC 1, 427 N.R. 311 at para. 24 Létourneau J.A. summarized the constituent elements of a section 129 offence as follows:
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> > When a charge is laid under section 129, other than the blameworthy state of mind of the accused, the prosecution must establish beyond a reasonable doubt the existence of an act or omission whose consequence is prejudicial to good order and discipline.

> [25] Proof of prejudice is an essential element of the offence. The conduct must have been actually prejudicial (*Winters*, *supra*, paras. 24-25). According to *R. v. Jones*, 2002 CMAC 11 at para. 7, the standard of proof is that of proof beyond a reasonable doubt. However, prejudice may be inferred if, according to the evidence, prejudice is clearly the natural consequence of proven acts; see *R. v. Bradt (B.P.),* 2010 CMAC 2, 414 N.R. 219 at paras. 40-41.

[8] In *R. v. Winters*, the Court Martial Appeal Court captured the nature and effect of the presumption found in subsection 129(2) of the *National Defence Act*, at paragraphs 24 to 26:

> [24] When a charge is laid under section 129, other than the blameworthy state of mind of the accused, the prosecution must establish beyond a reasonable doubt the existence of an act or omission whose consequence is prejudicial to good order and discipline. Proof of prejudice may be clear, direct, but the existence of prejudice and its causal relationship can also be inferred from matters proven in evidence: see *Bradt v. R.*, 2010 CMAC 2, at paragraphs 39 to 42.
>
> [25] In certain cases, proof of prejudice or of the causal relationship may be difficult to establish. Parliament may wish to create a presumption to mitigate this difficulty or even obviate it. Or, as in the case of paragraph 129(2)(*b*) of the Act, to ensure compliance with the regulations, orders or instructions published for the governance of the Canadian Forces and, by the very fact, simplify the proof of prejudice resulting from a breach of those provisions.
>
> [26] Thus, subsection 129(2), and consequently paragraph (2)(*b*), presume, from the act, the existence of a prejudice to good order and discipline as well as the existence of a causal relationship between the act and the prejudice. When the conditions of subsection (2) and, more particularly, paragraph (2)(*b*) in this case, are met, the prosecution is relieved of having to prove this essential element of the offence. But the offence referred to here is the one under subsection 129(1). There is no other.

[9] Defence counsel submits that subsection 129(2) creates a non-rebuttable presumption that a contravention of regulations and any instruments expressly mentioned in that subsection is prejudicial to good order and discipline and it dispenses the prosecution from proving one of the essential elements of that offence. This presumption would, therefore, violate the rights of an accused person to be presumed innocent under section 11(*d*).

[10] The prosecution has a very concise approach to this issue. In a nutshell, the prosecution argues that this is a matter of common sense. The breach of regulations, directives and orders leads inextricably to prejudice of good order and discipline. The prosecution invokes that courts martial have previously taken judicial notice that "failure to comply with direction, instructions, command, order of a superior is prejudicial to good order and discipline" as being a matter of "general service knowledge which is not subject to any reasonable dispute" as it was stated by Lamont J. in *R. v. Ross,* 2003 CM 52 when he referred to a 1997 decision of a military judge in *R. v. Maier*. The prosecution relies on the reasoning adopted by the presiding judge in *Ross* that concluded, at 14:

> [14] [I]t would be unreasonable for the trier of fact not to be satisfied beyond a reasonable doubt of the existence of prejudice to good order and discipline if a contravention of a regulation, order, or instruction is established. Proof of a contravention of one of the subsidiary instruments described in subsection 129(2)(*b*) leads inexorably to the conclusion of prejudice to good order and discipline.

[11] Whether this fact or matter is rightly within the ambit of section 16 of the *Military Rules of Evidence* is subject to legal debate, it remains that judicial notice is an evidentiary matter. I stress the fact that such a request to take judicial notice of such facts or matters was not made before the court and that there is no evidence of such a fact or matter in this case. It is well known that the concept of prejudice of good order and discipline is not defined, but has been judicially interpreted in the context of the specific circumstances of each case and whether it could be inferred or not in particular circumstances.

[12] After careful review, I cannot agree with the conclusion reached by the court martial in *Ross* that subsection 129(2) does not violate the fourth principle set out in *R. v. Downey*, [1992] 2 S.C.R. 10, also reported at 72 C.C.C. (3d) 1, even if I do not have any issue with the court's following remarks found at 10-13 of its decision:

> [10] Subsection 129(2) permits a conviction for the offence of conduct to the prejudice of good order and discipline to rest upon a finding of a contravention of any regulations, orders, or instructions. The issue is, therefore, whether it would be unreasonable for the trier of fact not to be satisfied beyond a reasonable doubt of the existence of prejudice to good order and discipline if a contravention of a regulation, order, or instruction is established.
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> [11] Counsel for the prosecution points out that QR&O article 19.01, headed, and I quote, "OBSERVANCE AND ENFORCEMENT OF REGULATIONS, ORDERS AND INSTRUCTIONS," requires that both officers and non-commissioned members, such as the accused:
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> > 19.01 ...
> >
> > ... shall become acquainted with, obey ...
>
> I emphasize "obey"
>
> > ... and enforce:
> >
> > ...
> >
> > (d) all ... regulations, rules, orders and instructions necessary for the performance of the member's duties.
>
> [12] Thus, disobedience of one of the subsidiary instruments described in subsection 129(2)(*b*), such as the order in issue in this case, may itself be a contravention of QR&O where the order relates to the performance of the member's duties. I say "may" because the evidence in this case is not yet concluded and no findings of fact have yet been made.
>
> [13] A military organization cannot function effectively without diligent obedience to all lawful orders, whether they be orally conveyed from a superior to a subordinate, or

> in writing by means of the instruments referred to in subsection 129(2)(*b*). Discipline is simply the habit of obedience to lawful orders, even in situations of grave peril to the person who is subject to the order.

[13] This reasoning falls short of leading inextricably to the conclusion of prejudice to good order and discipline. Applying this reasoning to the offence of disobedience of a lawful order under section 83 of the *National Defence Act*, an accused could still raise a reasonable doubt with regard to the legitimacy of the order. The mere violation of an illegal or abusive order cannot lead inextricably to a prejudice to good order and discipline that ought to be caused by the accused, where at the same time it could be established that such prejudice did not exist or that it was caused by the existence and implementation of an abusive order by the chain of command. The comfort found by Judge Lamont, in support of his own reasoning, with the fact that the Standing Court Martial in *Maier* accepted to take judicial notice of the proposition that failure to comply with direction, instructions, command, orders of a superior is prejudicial to good order and discipline is a matter of general service knowledge which is not subject to any reasonable dispute, would not withstand scrutiny today.

[14] In *Maier*, the presiding military judge took judicial notice of the matter put to him by the prosecution with no objection or arguments from the defence. It is of interest to reproduce the comments made by the judge on this issue, found at pages 54-55 of the transcript:

> "If the court takes the requested judicial notice, then once the prosecution has established the underlying facts of each proposition, the element of prejudice to good order and discipline will be conclusively established. This does not necessarily offend the doctrine of reasonable doubt as long as the proposition or matter judicially noticed is so obvious that it is apparent beyond any reasonable doubt. Therefore, judicial notice under paragraph (2)(a) of Military Rule of Evidence 16, where it amounts to an element of an offence, must be a matter of general service knowledge which is not subject to any reasonable dispute.
>
> Now, it must be remembered that the term "prejudice to good order and discipline" does not require an actual harm or damage to good order in military discipline. All that is required to establish prejudice is a situation which has the potential to harm good order and discipline.
>
> I am satisfied that the first proposition is a matter of general service knowledge and is not subject to any reasonable dispute. The second proposition also qualifies under paragraph (a) as general service knowledge not subject to any reasonable dispute as well as under subparagraph (b) of MRE 16(2)."

[15] In *R. v. Jones*, 2002 CMAC 11, the court made the following remarks:

[2] We would not give effect to the grounds of appeal raised by the appellant save one. It is whether the military judge erred in concluding that the offence was made out on the basis that prejudice "*may have or could have*" resulted to good order and discipline or that the appellant's conduct was such as to "*bring into danger the concepts of good order and discipline*."

[3] Section 129 provides as follows:

> 129. (1) Any act, conduct, disorder or neglect to the prejudice of good order and discipline is an offence and every person convicted thereof is liable to dismissal with disgrace from Her Majesty's service or to less punishment.
>
> 129(2) An act or omission constituting an offence under section 72 or a contravention by any person of
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> …
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> (b) any regulations, orders or instructions published for the general information and guidance of the Canadian Forces or any part thereof, or
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> …
>
> is an act, conduct, disorder or neglect to the prejudice of good order and discipline.

[4] One of the regulations relating to improper comments respecting a superior officer reads as follows:

> **19.14 - IMPROPER COMMENTS**
>
> (1) No officer or non-commissioned member shall make remarks or pass criticism tending to bring a superior into contempt, except as may be necessary for the proper presentation of a grievance under Chapter 7 (*Grievances*). **(15 June 2000)**
>
> (2) No officer or non-commissioned member shall do or say anything that:
>
> (*a*) if seen or heard by any member of the public, might reflect discredit on the Canadian Forces or on any of its members;
>
> (*b*) if seen by, heard by or reported to those under him, might discourage them or render them dissatisfied with their condition or the duties on which they are employed.
>
> **(29 May 2000 effective 15 June 2000)**

[5] In this case, the appellant was not charged with contravening a regulation under s. 129(2). As a result, the deeming provision does not apply. In *R. v. Latouche*(2000), 147 C.C.C. (3d) 420 (C.M.A.C.), Ewaschuk J. discussed s. 129 and stated at para. 32:

> … the offence of "conduct to the prejudice of good order and discipline" would, normally be characterized as a "result crime" inasmuch as the accused's underlying conduct must be prejudicial to good order and discipline. However, s. 129 of the *National Defence Act* deems the accused's underlying conduct to

> be prejudicial to good order and discipline, so long as the accused's underlying act or omission contravenes a regulation, order or instruction.
>
> [6] We understand Ewaschuk J. to be saying that for a charge under subs. 129(1) to be made out, there must be proof of prejudice to good order and discipline since the subsection prohibits "conduct to" such prejudice. Admittedly, this statement was *obiter dicta* as the charge in *Latouche* was laid under s. 129(2)(*b*) for breach of a regulation and prejudice would be deemed to have occurred.
>
> [7] Proof of prejudice can, of course, be inferred from the circumstances if the evidence clearly points to prejudice as a natural consequence of the proven act. The standard of proof is, however, proof beyond a reasonable doubt.
>
> [8] At the commencement of his reasons, the trial judge stated one of the essential elements the prosecution had to prove beyond a reasonable doubt under s.129 was "prejudice to good order and discipline resulting from the [accused's] conduct."
>
> [9] At the conclusion of his reasons, the trial judge held, however:
>
> > In the way in which it [prejudice] is used in this charge, it [prejudice] means an injury that results or *may result* to good order and discipline. In other words for the prosecution to prove prejudice to good order and discipline it does not have to prove actual injury to good order and discipline has occurred but only that such an injury *may have or could have resulted* from what the accused did. It is my decision that the conduct of the accused, as established by the evidence was such as to cause damage to or adversely affect or *bring into danger* the concepts of both good order and discipline.
>
> [10] The military judge's conclusion is problematic. The military judge did not make a clear and unambiguous finding that the appellant's conduct was prejudicial to good order and discipline. To convict the appellant on the basis that he *may have* or *could have* occasioned injury or prejudice is to convict him on the basis of a standard of proof that is less than a balance of probabilities and to engage in conjecture. As the trial judge himself noted at the beginning of his reasons, the standard of proof beyond a reasonable doubt is required. In using the words he did, the military judge improperly enlarged the area of risk encompassed by the offence.
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> (Emphasis added)

[16] Although *Jones* did not deal with the presumption found in subsection 129(2), it has made it clear that the term “prejudice of good order and discipline” requires an actual harm or injury to good order and discipline contrary to the assertion made by the presiding judge in *Maier*. Therefore, I find that taking judicial notice of such an absolute affirmation would be highly improbable today because the effect of such notice prevents anyone to present contradictory evidence of that fact (see section 19(2) of the *Military Rules of Evidence*).

[17] Moreover, the decisions of the Court Martial Appeal Court in *Latouche* and *Jones* shall not be read in isolation. They must be interpreted in light of the evolution of the jurisprudence of the Court Martial Appeal Court in recent years on the subject of the nature and the extent of section 129 of the *National Defence Act*, namely *Bradt*, *Winters*, and *Tomczyk*. Recent jurisprudence leaves no doubt that the offence under

section 129 requires proof beyond a reasonable doubt of actual prejudice, even if such prejudice can be inferred from the inherent consequences of the act or conduct.

[18] In *Winters*, the Court Martial Appeal Court clarified that section 129 of the *National Defence Act* did not create two separate offences and that subsection 129(2) presumed from the act, the existence of a prejudice to good order and discipline as well as the existence of a causal relationship between the act and the prejudice. Therefore, the prosecution is dispensed of proving the essential element of prejudice to good order and discipline. The Court Martial Appeal Court was never seized with the constitutionality of the deeming provision found in subsection 129(2).

[19] In *R. v. Downey*, Cory J., for the majority, laid out the principles derived from the authorities with regards to the presumption of innocence in the context of section 11(*d*) of the *Charter*, at page 29:

> I - The presumption of innocence is infringed whenever the accused is liable to be convicted despite the existence of a reasonable doubt.
>
> II - If by the provisions of a statutory presumption, an accused is required to establish, that is to say to prove or disprove, on a balance of probabilities either an element of an offence or an excuse, then it contravenes s. 11 (*d*). Such a provision would permit a conviction in spite of a reasonable doubt.
>
> III - Even if a rational connection exists between the established fact and the fact to be presumed, this would be insufficient to make valid a presumption requiring the accused to disprove an element of the offence.
>
> IV -Legislation which substitutes proof of one element for proof of an essential element will not infringe the presumption of innocence if as a result of the proof of the substituted element, it would be unreasonable for the trier of fact not to be satisfied beyond a reasonable doubt of the existence of the other element. To put it another way, the statutory presumption will be valid if the proof of the substituted fact leads inexorably to the proof of the other. However, the statutory presumption will infringe s. 11 (*d*) if it requires the trier of fact to convict in spite of a reasonable doubt.
>
> V - A permissive assumption from which a trier of fact may but not must draw an inference of guilt will not infringe s. 11 (*d*).
>
> VI - A provision that might have been intended to play a minor role in providing relief from conviction will nonetheless contravene the *Charter* if the provision (such as the truth of a statement) must be established by the accused (see *Keegstra*, *supra*).
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> VII - It must of course be remembered that statutory presumptions which infringe s. 11 (*d*) may still be justified pursuant to s. 1 of the *Charter* . (As for example in *Keegstra*, *supra*.)

[20] Based on the evidence and lack of evidence produced during this application, I find that it would be reasonable for the trier of fact not to be satisfied beyond a reasonable doubt of the existence of prejudice to good order and discipline in circumstances where such prejudice could not be inferred as a direct consequence of the proven act or conduct. For example, this could occur where the order is questionably not related to a military duty, unlawful or abusive. In these cases, the proof of the

violation of the order would not lead inexorably to the proof of actual prejudice to good order and discipline. It is equally possible than an accused could, by the effect of the presumption, be convicted despite the existence of a reasonable doubt revealed by the particular circumstances of a case. The court concludes that principles I and IV set out in *Downey* are not protected by the existence of the presumption found in subsection 129(2) of the *Act* and that such provision violates section 11(*d*) of the *Charter.*

[21] Whether subsection 129(2) can be saved under section 1 of the *Charter* is not an easy task for this court. Again, I reiterate that the prosecution failed to provide the court with any evidence on this matter that could have assisted the court in its analysis. The prosecution must justify the infringement of the accused's rights protected by section 11 (*d*) under section 1 of the *Charter* by showing that the law has a pressing and substantial objective and that the means chosen are proportional to that objective. It is known that a law is proportionate if (1) the means adopted are rationally connected to that objective; (2) it is minimally impairing of the right in question; and (3) there is proportionality between the deleterious and salutary effects of the law: *R. v. Oakes*, [1986] 1 S.C.R. 103.

[22] The Code of Service Discipline has a pressing and substantial objective as expressed by Cromwell J, in the context of the overbreath analysis, in the recent Supreme Court of Canada decision in *R. v. Moriarity*, 2015 SCC 55, at paragraph 46 and 48:

> [46] I conclude that Parliament's objective in creating the military justice system was to provide processes that would assure the maintenance of discipline, efficiency and morale of the military. That objective, for the purposes of the overbreadth analysis, should not be understood as being restricted to providing for the prosecution of offences which have a direct link to those values. The challenged provisions are broad laws which have to be understood as furthering the purpose of the system of military justice. Both s. 130(1)(*a*) and s. 117(*f*)'s purpose is to maintain discipline, efficiency and morale in the military. The real question, as I see it, is whether there is a rational connection between that purpose and the effects of the challenged provisions.
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> …
>
> [48] I conclude that the purpose of the challenged provisions is the same as that of the overall system of military justice: to maintain the discipline, efficiency and morale of the military. This statement of purpose is in my opinion firmly anchored in the legislative text understood in its full context, keeps the objective and means distinct and is expressed in succinct terms at an appropriate level of generality.

The prosecution further submits that subsection 129(2) of the *National Defence Act* has a specific subsidiary purpose that was described by Létourneau J.A. in the previously cited paragraphs 24 to 26 of the Court Martial Appeal Court decision in *Winters*, namely that Parliament has created a presumption to mitigate the difficulty to prove prejudice to good and discipline or even obviate it, in order to ensure compliance with the regulations, orders or instructions published for the governance of the Canadian Forces. The prosecution argues that without prejudice flowing from a breach of an order, there could be no penalty and no enforcement would be possible.

[23] I agree with the remarks made by Létourneau J.A. in *Winters*. However, I disagree with the prosecution that without prejudice flowing from a breach of an order, there could be no penalty and no enforcement would be possible, because there is no evidence to support such a blunt and absolute statement. It is disconcerting and troubling that no evidence was called by the prosecution despite being expressly invited to do so by the court. The court is not in a position to conclude, in the absence of evidence, that the means is rationally connected to the objective and that it is minimally impairing the accused's right to the presumption of innocence.

[24] All regulations, directives and orders are not of equal weight and subject to the same rigour when they are adopted. Some contain prohibitions; others are administrative and informative in nature. Subsection 129(2) does not discriminate. It covers all possible regulations, orders and directives ranking from a Governor in Council regulation that has been examined as to form and legality, including basic compliance with the *Charter*, to the local unit order that is arbitrarily issued without any consultation.

[25] Once the breach of an order and its surrounding circumstances is proven, it is simply not credible, in absence of evidence, to pretend that evidence of actual prejudice resulting from the breach of the order could not be readily available or that, in some cases, prejudice to good order and discipline could not flow from the natural consequences of the proven violation. If no prejudice is proven, it shall result in an acquittal. The real and only prejudice to good order and discipline would then flow from a wrongful conviction and its effect on the discipline, morale and cohesion of the unit. This type of prejudice to good order and discipline has serious consequences, including the discredit of the administration of military justice.

[26] At the stage of the analysis dealing with the minimal impairment, the court would have to determine whether the limit on the right is reasonably tailored to the objective. The inquiry into minimal impairment asks whether there are less harmful means of achieving the legislative goal. The burden is on the government to show the absence of less drastic means of achieving the objective in a real and substantial manner and the analysis is aimed at ensuring that the deprivation of *Charter* rights is confined to what is reasonably necessary to achieve the state's objective. Again, the prosecution has failed to call evidence and establish the impossibility of less drastic means. It could have chosen to do so. I conclude that the prosecution did not establish that subsection 129(2) of the *Act* is saved under section 1 of the *Charter*.

FOR THESE REASONS, THE COURT:

[27] **FINDS** that subsection 129(2) of the *National Defence Act* violates the presumption of innocence protected by section 11(*d*) and is not saved under section 1 of *Charter*.

[28] **DECLARES**, under section 52 of the *Constitution Act*, 1982, that subsection 129(2) of the *National Defence Act* is void insofar as it makes an accused liable to be convicted despite the existence of a reasonable doubt on the essential element of prejudice to good order and discipline and because the presumption created in subsection 129(2) of the *National Defence Act* requires the trier of fact to convict in spite of a reasonable doubt.

Counsel:

The Director of Military Prosecutions, as represented by Major E.J. Cottrill

Lieutenant-Colonel D.R. Berntsen, Defence Counsel Services, Counsel for Leading Seaman Korolyk