



COURT MARTIAL

Citation: *R. v. Mitchell*, 2003 CM 190

Date: 20030618

Docket: F200319

Standing Court Martial

Canadian Forces Base Borden
Borden, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Petty Officer 2nd Class M.J. Mitchell, Accused

Before: Colonel K.S. Carter, M.J.

**DECISION RESPECTING A NO PRIMA FACIE CASE MOTION PURSUANT
TO QUEEN'S REGULATIONS AND ORDERS FOR THE CANADIAN FORCES
112.05(13)**

(Orally)

[1] Defence counsel, at the conclusion of the evidence presented to the court by the prosecution, made a no prima facie case motion pursuant to *Queen's Regulations and Orders for the Canadian Forces* (QR&O) 112.05(13).

[2] I will briefly review what a no prima facie case motion is; what the essential elements of the offence that is before the court are; the arguments of the defence in this matter; the arguments of the prosecution; the evidence before this court, whether it is believed or not, on the essential element of, "contrary to Commanding Officer's Temporary Memorandum 008/01 paragraph 4(b)"; and, finally, I will deliver the decision of the court in this matter.

[3] A no prima facie case motion is a motion which argues that, at the conclusion of the case for the prosecution, as set out in Note B to QR&O 112.05, there is no evidence

before the court which, whether it is believed or not, would be sufficient to prove each and every essential element of the offence such that the accused could reasonably be found guilty at this point in the trial.

[4] The test at courts martial is the same as that that is applied in criminal trials in Canada. That test was set out most recently in the Supreme Court of Canada by Bastarache J., for the majority decision, in the 1998 case of *R. v. Charemski*, 123 C.C.C. (3d) 225, where, at page 229, he explained:

[2] The leading case on the issue of directed verdicts is *United States of America v. Shephard* [1977] 2 S.C.R. 1067 ... which sets out the test to determine whether a case should go to a jury in these terms, at p. 1080: "whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty".... In other words, a motion for a directed verdict should not be granted "in any case in which there is admissible evidence which could, if it were believed, result in a conviction."

[5] Justice Bastarache goes on to explain that:

[3] For there to be "evidence upon which a reasonable jury properly instructed could return a verdict of guilty" in accordance with the *Shephard* test ..., the Crown must adduce *some* evidence of culpability for every essential definitional element of the crime for which the Crown has the evidential burden.

[6] This test is relatively straightforward where the prosecution's case consists of direct evidence. Where the prosecution's case also or entirely rests on circumstantial evidence, the Supreme Court of Canada, again at page 230 of the *Charemski* decision, explains:

[4] There was, at one time, some confusion about the applicability of this test where the Crown's case with respect to any or all of the elements of the crime rested entirely on circumstantial evidence.... Any confusion on this point was cleared up by the Court's unanimous judgment ... in *Monteleone* ... at p. 161:

Where there is before the court any admissible evidence, *whether direct or circumstantial*, which, if believed by a properly charged jury acting reasonably, would justify a conviction, the trial judge is not justified in directing a verdict of acquittal.

[7] This was summarized perhaps even more simply in the 1991 Ontario Court of Appeal case of *R. v. Greenwood*, found at 67 C.C.C. (3d) 435, by Doherty J., at page 442 as:

If the totality of the evidence adduced in the Crown's case admits of a reasonable inference supporting a finding of guilt, a trial judge cannot direct a verdict of not guilty at the end of the Crown's case.

[8] The essential elements of the section 129 charge against Petty Officer 2nd Class Mitchell on which there must be evidence, whether direct evidence or circumstantial evidence, from which reasonable inferences may be drawn are: identity; date, time and

place; the conduct, and in this particular case, the hugging; and that the conduct was contrary to the order set out in the charge; and, finally, that the requisite mental element, that is, the requisite mental state of the accused at the time of the commission of the offence, has been established.

[9] The submission of the defence counsel is that the court has no evidence before it that the hug, which is set out in the charge, is contrary to Commanding Officer's Temporary Memorandum (COTM) 008/01 paragraph 4(b) of 26 April 01, which is an exhibit before the court, because any hugging prohibited by that specific order must be hugging which occurs in the context of a personal relationship, not hugging in general by members of the Basic Recruit Training (BRT) organization. This is, the defence says, because the COTM 008/01 paragraph 4(b) prohibition against hand holding, caressing, massaging, hugging, which is the conduct alleged in this charge, kissing, and what is described in the order as "the like" while in uniform and on Department of National Defence (DND) property, relates only to those activities in the context of a personal relationship as it is referred to in the title of the temporary memorandum, the reference to the temporary memorandum, and paragraphs 1, 2 and 4(a) of the temporary memorandum, or a romantic relationship as is mentioned in paragraphs 3 and 5 of the COTM 008/01.

[10] The argument of the defence was that the context of a personal relationship is an essential element of this offence because it is implicit in the words "contrary to". The defence indicated that it was not saying that the hand holding, caressing, massaging, hugging, kissing, and the like, in uniform and on DND property, by BRT personnel was not prohibited in the context of non-personal or professional relationships, the defence simply argued that it was not prohibited in June and July of 2001, between those in the BRT organization at Canadian Forces Base (CFB) Borden by the particular order that is mentioned in the charge sheet, the COTM 008/01 paragraph 4(b).

[11] The defence, in arguing the critical importance of the personal nature of the relationship, relied heavily on the provisions of *Canadian Forces Administration Orders* (CFAO) 19-38, which is the reference that is found in the COTM. In fact, it is the only real reference as the other reference that is referred to there is actually cancelled at paragraph 8 of the COTM 008/01. There is also an indication on the face of the COTM 008/01 that the CFAO 19-38 is an enclosure to that COTM.

[12] In particular, the defence stressed that personal relationships are defined in CFAO 19-38, the contents of which the court took judicial notice of pursuant to Military Rule of Evidence 15. That definition of personal relationships in the CFAO is relationships which are romantic, emotional, sexual or family relationships, including legal marriage and common-law relationships between military members.

[13] The defence also stressed that one of the principal purposes of CFAO 19-38 is to regulate what might be considered conduct consistent with such relationships such as holding hands, romantic kisses, embraces or caresses when that conduct occurs in uniform and/or in public. And this is found at paragraph 12 of CFAO 19-38.

[14] The defence argued that a personal relationship must be a reciprocal relationship; that is, recognized as such by both parties, and that the evidence before the court in the testimony of Ordinary Seaman Lefaive was that no personal relationship existed between herself and Petty Officer 2nd Class Mitchell. In essence, the defence argued that the involvement between Petty Officer 2nd Class Mitchell and Ordinary Seaman Lefaive in June and July 2001, during the Naval Reserve Basic Recruit Training course, was a strictly professional one, known and facilitated by BRT authorities, and that any contact of a physical nature in uniform took place in a non-public setting.

[15] The defence urged the court not to redefine or read into the term "personal relationships" anything which might, in essence, be a professional relationship, arguing that there were other prohibitions which existed to appropriately limit unwanted physical contact in professional relationships within the Canadian Forces, such as prohibitions against sexual assault or harassment.

[16] The defence concluded by stating there was no prima facie case because there was no evidence before the court to indicate that there was a personal relationship between Petty Officer 2nd Class Mitchell and Ordinary Seaman Lefaive and, consequently, any hug, even if prohibited by other laws, regulations or orders, was not prohibited by COTM 008/01 paragraph 4(b).

[17] The prosecution's position was, understandably, quite different. Captain Carswell argued that the prosecution had introduced some evidence before the court on each and every essential element of the offence. He stressed that the order alleged to have been breached was COTM 008/01, not CFAO 19-38, and that COTM 008/01, and its wording, effectively, superseded the more generally applicable provisions of the CFAO.

[18] The prosecution's primary position was that COTM 008/01's prohibition against hugging essentially stands alone, outside of any requirement that it be read in the context of a personal or romantic relationship. A personal relationship is simply not the issue before the court, is the position of the prosecution.

[19] As the court understands it, the prosecution's position is that the bold, capitalized, underlined sentence in paragraph 4(b) of the COTM 008/01 is a comprehensive prohibition which applied to all BRT organization members in June and July '01; that is, no touching on any DND property between any personnel from BRT.

[20] Alternatively, the prosecution argued that if the court found that a personal relationship had to exist to activate the COTM 008/01 prohibition, then looking at the definition of personal relationship in CFAO 19-38, which includes emotional relationship, then there was evidence before the court that the relationship between Petty Officer 2nd Class Mitchell and Ordinary Seaman Lefaive was an emotional one: he was offering emotional support to her and she was seeking and receiving emotional

comfort from him; their conversations, at the end of which the hugs occurred, were emotional in content and nature.

[21] The prosecutor also argued that a personal relationship does not have to be recognized reciprocally by both parties as such; it is for the court to decide, on the evidence before it, what is the nature of a relationship.

[22] Finally, the prosecutor pointed out that COTM 008/01 paragraph 4(b) does not limit itself to prohibiting certain conduct only in public.

[23] I will now move to the evidence before the court, and it is important to consider all the evidence in coming to a conclusion on this application, and I will review it in chronological order as it was presented.

[24] Pursuant to Military Rule of Evidence 15, the court took judicial notice of the contents of CFAO 19-38 on personal relationships. In paragraph 3 of that CFAO, personal relationships are defined and they are defined as romantic, emotional, sexual or family relationships, including legal marriage or a recognized common-law relationship between military members.

[25] Further, the court has considered, pursuant to QR&O 1.04, other definitions of operative terms that are found in the *Concise Oxford English Dictionary, Tenth Edition*. In the *Concise Oxford English Dictionary, Tenth Edition*, "personal" has, as one of its relevant definitions, of or concerning a person's private rather than professional life; "relationship" is defined as the way in which two people are connected or regard and behave towards each other or an emotional or sexual relationship; "emotional" is defined as, of or relating to emotions, arousing or showing intense feeling; "interpersonal" is defined as, of or relating to relationships between people; and "fraternize" is defined as, to be on friendly terms with. And I list those now since all of those terms appear either in the CFAO or in the COTM.

[26] Let me return to CFAO 19-38. It is clear that the underlying assumption of that CFAO is that relationships, which are closer than those of simply colleagues; that is, romantic relationships, family relationships, even relationships between two very old and close friends, may normally exist or develop between Canadian Forces (CF) members who train together, who work together, and who live in close proximity.

[27] The CFAO also makes it clear that despite those relationships, certain military requirements must be respected and these requirements may result in restrictions on those personal relationships in order to ensure unit effectiveness through the maintenance of discipline, morale and cohesion. And that is found at paragraph 4 of the CFAO.

[28] In large part, the restrictions that are listed in the CFAO are restrictions on postings, on people who are involved in personal relationships working in direct chain of command with each other, and are designed to ensure that authority within the

Canadian Forces will be used fairly and impartially; that is, all members in a unit or other organization will be treated equally and without favouritism and that this will be seen to be the case. And that is set out in paragraph 5 of the CFAO.

[29] The CFAO emphasizes that, no matter what the nature of the personal relationship between members, unit and military cohesion generally require the maintenance of formality and respect such as saluting and the correct forms of address. It also goes on to say that any personal relationships must be consistent with a high level of discipline, cohesion and morale, contribute to a positive public perception and conform to the general standards required of all military members. As I have already mentioned, postings and working relationships are dealt with to try and avoid conflicts of interest and favouritism, either perceived or real, between people who are involved in personal relationships.

[30] The CFAO explains that conduct in public places, in uniform and in some cases out of uniform, must be consistent with military formality and that open displays of intimate familiarity should be avoided. This, for example, covers off a situation where married service couples are not to walk hand in hand in uniform; people in romantic relationships are not to caress each other in uniform in public; and even if the other service member is, perhaps, your sister, if she is of higher rank than you, you salute when you are in uniform and address her by rank, not by a wave and a casual, Hi, Sis.

[31] CFAO 19-38 is clearly dealing with consensual relationships where the professional relationship between two or more CF members has an overlay of a personal relationship and the concern is about inappropriate conduct, not because one person is taking advantage of their position or power over another person in the relationship, but rather because other CF members may feel that one person in the relationship is being given an unfair advantage by the other person in the relationship. In essence, it is a conflict of interest issue.

[32] At the beginning of the evidence, a number of admissions were made by the defence, pursuant to Military Rule of Evidence 37(b). These admissions include an admission that COTM 008/01 was a lawful order, one which Petty Officer 2nd Class Mitchell received actual notice of, that he was, in essence, directly aware of it, and one that applied to him in June and July of 2001.

[33] COTM 008/01 is an exhibit before the court. It is a three-page bilingual memorandum. As I have already indicated, the title of it is, Personal Relationships. The only real reference that is included with it is a reference to CFAO 19-38.

[34] Paragraph 1 talks about interpersonal relationships in the workplace; the policies applicable in the BRT; and indicates that more detailed information on these personal relationships can be found in CFAO 19-38, which, as I have already indicated, is identified as being enclosed. Paragraph 2, which is headed, "General", says that:

"2.GENERAL: As prescribed at ref A [that is, CFAO 19-38]:

[A]nd in order to foster the conditions necessary to good discipline, cohesion and morale, provision must be made to reflect the special circumstances of operating in a training establishment as well as the need to regulate personal relationships.”

[35] This, perhaps, can be seen as introducing a little broader concept than strictly the personal relationships as they are set out in 19-38. It is an indication that they are being dealt with here as they are applicable in training institutions.

[36] Paragraph 3, however, returns immediately to romantic relationships and indicates that the BRT policy detailed below provides necessary guidance to ensure that those engaged in romantic relationships both comply with regulations and also with the focus on the training mandate of the school.

[37] Paragraph 3 also indicates it is designed to respect members' freedom of choice and non-interference if guidelines are followed. In other words, this is consistent with a personal consensual relationship where there is no abuse of position or authority within the relationship.

[38] Paragraph 4 talks about what conduct is or is not permitted and it indicates that at any time on BRT premises, the obligation of BRT members is to conduct themselves in a professional manner at all times when embarked, I take "when embarked" to be a naval expression that means when on the property of BRT, but it also goes on to talk about conduct generally while on DND property. That would be something that is wider than both BRT and CFB Borden. In that, paragraph 4(a) requires that BRT personnel on DND property refrain from inappropriate dialogue reflective of a personal relationship, including use of terms of endearment. There is no indication that this is restricted to public situations, but, practically speaking, it is unlikely to be noted if it happens in private.

[39] Paragraph 4(b) prohibits any physical demonstration or act of affection or intimacy, including hugging, and goes on to say, as I have already mentioned, no touching on DND property between any personnel from BRT. This, perhaps, raises, if one takes it to its logical conclusion, what a married service couple, both from BRT, who are at CFB Esquimalt on a visit, may or may not do.

[40] It goes on to say that, when members of BRT are no longer in uniform and are outside DND property, they are to be "guided by your conscience alone" and I raise this because this is clearly a situation which is not in the same vein as what is found at paragraph 6 of the COTM.

[41] Paragraph 5 goes on to talk about the obligation to report a romantic relationship and to pay strict attention to the restrictions on conduct, which have already been laid out in paragraph 4.

[42] Paragraph 6 indicates it deals with the unique training establishment situation and it is a prohibition, not on all people at BRT, but only on staff members and the prohibition in paragraph 6 is that staff members not fraternize with recruits. As I have

indicated, there is no obligation on recruits not to fraternize with staff members and nor is there any obligation on inter-staff fraternization. The prohibition is a very general one: on or off CF property.

[43] Essentially, it appears to be an absolute prohibition against staff members trying to develop or having personal relationships with recruits on or off DND property. In very summary fashion, essentially, it says, recruits are off-limits for personal relationships. There is to be no personal, friendly, non-professional relationship and it is not stated, but it is implicit in that paragraph that the reason for this is the power imbalance that exists between staff members and recruits and this is to prevent anyone taking advantage of the vulnerability of recruits.

[44] Paragraph 7 deals with relationships and it seems again clear that they mean personal relationships within the same divisional chain of command and indicates it cannot be sanctioned and the reason for this is, essentially, the same reason that is set out in CFAO 19-38, which is to prevent any appearance of favoured status.

[45] So the COTM 008/01 is, to a large extent, similar to CFAO 19-38. It is only in paragraph 6 that it actually introduces the special circumstances that exist in a training establishment.

[46] Petty Officer 2nd Class Mitchell made a free and voluntary statement on the 26th of July, 2001, which was videotaped and transcribed. Both the tape and the transcript were introduced as exhibits and the court has both viewed the tape and read the transcript. The court will not go through all the aspects, but will highlight a number of matters.

[47] The tape and the transcript indicate that the interview ran from 12:57 to 13:49 on the 26th of July, 2001; approximately 52 minutes. And I will refer to some extracts from that transcript, which, as I have indicated, I have compared with the tape itself, and these are extracts which relate to, in essence, the reason for the interview and Petty Officer 2nd Class Mitchell's statements in response to questions about what he did and what his relationship was with Ordinary Seaman Lefaive.

[48] On page 4, of the transcript, the interviewer, Master Corporal Pelletier, indicates that the reason why Petty Officer 2nd Class Mitchell is there is because he is investigating something called professional misconduct and Petty Officer 2nd Class Mitchell, when asked if he understands what that means, says:

“PO2 MITCHELL: Basically not acting professionally in the job that I'm assigned to do.”

[49] Page 7 of the transcript, Petty Officer 2nd Class Mitchell indicates, in response to a question about the counselling sessions that he provided to Ordinary Seaman Lefaive, that:

“PO2 MITCHELL: The first time I had seen her was at the gymnasium, and she said she wasn't feeling well. Now I was doing rounds in the gymnasium, just checking on the platoons, to make sure that everything -- and I started talking to her about how she was eating, how much she was drinking -- like her eating habits.”

[50] It goes on to say:

“I kind of sensed there was something else wrong, so that afternoon I approached her again, with permission from her platoon commander, and asked if I could speak to her, and he said yes.”

[51] And so this is the second time on the same day that Petty Officer 2nd Class Mitchell approaches Ordinary Seaman Lefaive. He goes on to say:

“We chatted for a good 15, 20 minutes, and she went back out, and I immediately talked to the platoon commander as to what we discussed.”

[52] He goes on, further on that page, to say:

“PO2 MITCHELL: I told her that if she wanted to see me at any time she could, and to make sure that she goes through her section commander.”

[53] And apparently, that is how the subsequent interviews were, according to Petty Officer 2nd Class Mitchell, arranged.

[54] He indicated on page 9 of the transcript that there were a total of four counselling sessions, four meetings, that the first was in the common room and that all of them were in Building 115, the other three being in a room on the top floor.

[55] He also goes on to say at page 10:

“PO2 MITCHELL: ...

I always told the block warden that I was up there doing counselling.”

[56] When asked what it was that was discussed, he said:

“PO2 MITCHELL: Mostly her well-being; how she was doing. I asked her, ‘Have you talked to your folks? Have you talked to your dad?’”

[57] On page 12, Petty Officer 2nd Class Mitchell indicates in response to a question:

“MCPL PELLETIER: Are you a trained counsellor?”

PO2 MITCHELL: Yes. I have taken the ...”

and the transcript does not make it clear, but the tape does, that his answer is: I have taken the suicide intervention workshop through CFB Halifax. And also he indicates that he has done some training through the fire department in stress counselling.

[58] On page 15 of the interview, in answer to a question, Petty Officer 2nd Class Mitchell indicates:

“PO2 MITCHELL: ...

I have no idea what her [referring to Ordinary Seaman Lefaive] first name is.”

[59] On pages 18 and 19, he talked about, in response to a question, do you think she benefited from these sessions:

“PO2 MITCHELL: Oh, definitely, yes. Especially the first session. The first session, I think, she benefited the most from.”

[60] And pages 36 to 38 deal with an incident that apparently occurred in the gas hut during the training of the BRT course that Ordinary Seaman Lefaive was on, where Petty Officer 2nd Class Mitchell assisted Ordinary Seaman Lefaive with her problems with the gas mask and the indication is that some questions were raised, not to Petty Officer 2nd Class Mitchell, but to the investigator, that the relationship between the two of them was closer than other students.

[61] Now, in regard to the issue of the hug that is alleged, on page 19 of the transcript Petty Officer 2nd Class Mitchell is asked:

“MCPL PELLETIER: During these sessions that you were giving, was there any touching?”

[62] And he says:

“PO2 MITCHELL: No. Not during the session, no.”

[63] Then he asked:

“MCPL PELLETIER: After the session?”

[64] And he says:

“PO2 MITCHELL: After the session there was a little hug. That was it.”

[65] He goes on to say on the same page:

“PO2 MITCHELL: ...

I probably shouldn't have done that, but it's that fatherly thing again. You know, a hug always makes somebody feel better.”

[66] And again on page 20 he says:

“PO2 MITCHELL: The hug? Oh, I know it was wrong. I really shouldn't have done that, but here is a child who is really having a lot of problems.”

[67] And at page 23, and this is in regard to what is described as the last interview by Petty Officer 2nd Class Mitchell, he says, when asked:

“MCPL PELLETIER: At any time did she ever sit on your lap?

PO2 MITCHELL: No. I mean, she hit my lap on the way up, like just with her legs, but, no, she didn't sit on my lap.”

[68] At page 30, where there is continued questioning about this matter, and there has been between those pages, he says:

“PO2 MITCHELL: ... as she was getting up I gave her another hug, and that's when she did land on my knee. Okay? She did land on my knee. And then it was like, whoa; okay?”

[69] And on page 44 of the transcript, when he is asked whether or not he tells Ordinary Seaman Lefaive not to mention anything about the hugs, he says:

“PO2 MITCHELL: I'm just saying, "I could get in a lot of trouble for this.”

PO2 MITCHELL: So I did explain that to her.”

[70] And page 48, Petty Officer 2nd Class Mitchell says:

“PO2 MITCHELL: Yeah, I understand I was wrong but I think in the circumstances, it's what she needed.”

[71] So that, as I have said, is not the entire testimony evidence before the court, but the evidence that the court is considering specifically in relation to the issue before it.

[72] The evidence of Ordinary Seaman Lefaive, who appeared before the court to testify, was that Petty Officer 2nd Class Mitchell was known to her strictly as a counsellor. She did not know whether this was an informal or formal relationship. He approached her first in the gym when she was unwell and distressed; he initiated the next contact at a session that afternoon; he talked to her instructor; and then took her aside to Building T-115.

[73] She indicated she took the opportunity at this time to get everything out; that was, all her emotional distress, and that Petty Officer 2nd Class Mitchell provided some counselling, empathy, because he had said he had gone through a similar situation, and comfort.

[74] Ordinary Seaman Lefaive indicated she felt better after the first session. She saw him as her counsellor and, when she needed to see him, she went through the chain of command and an appointment was arranged for her to see him. Her testimony was, at the end of the first session there was a hug initiated by him and he told her that he was not normally supposed to do this and not to tell anyone because he; that is, Petty Officer 2nd Class Mitchell, could get into trouble.

[75] There was a second less emotional meeting initiated by Ordinary Seaman Lefaive, according to her, and a third, again, very emotional meeting, again, initiated by her.

[76] At that third meeting, she was again very upset and, in her own words, got it all out. She was sitting on a bed in the room where the session was taking place and Petty Officer 2nd Class Mitchell was on a chair. Once again, he initiated a hug at the end of the interview and this hug was quite difficult because of her sitting position. She then tried to stand up and she indicated Petty Officer 2nd Class Mitchell said, Come here, and initiated another hug. This one was more forceful, from her perspective, and one which ended up with her sitting on his lap. She was scared, she felt what was happening was inappropriate, the door was locked. When asked how she felt, she said, Okay, and, at the earliest opportunity, left, ran down and told friends about what had happened.

[77] These friends strongly encouraged her to report the incident which had made her feel so uncomfortable and scared. Although she indicated she preferred, for personal reasons, given the emotional challenges she faced, to simply put this behind her, she did report the incident and then allowed the system to take its course.

[78] So that is the evidence that is before the court that is relevant to the issue before the court at the moment.

[79] There is no argument from counsel, and it is clear on the evidence that the court has gone through, that there is evidence before the court on the essential elements of: identity; date, time and place; conduct; and the mental element, that is, the conscious and voluntary nature, on the part of Petty Officer 2nd Class Mitchell, of the hug.

[80] The court is not making a finding of credibility or applying reasonable doubt at this stage, it is not appropriate. The court is simply assessing whether or not the Crown has adduced some evidence of culpability for those essential definitional elements of the crime for which it has the evidentiary burden.

[81] The only issue outstanding is whether the evidence shows that the hug, in this situation, was contrary to COTM 008/01 paragraph 4(b). To determine that, the court must assess, first, does paragraph 4(b) prohibit all hugging by BRT members on DND property or only that between persons who are engaged in or have a personal relationship? And, secondly, if it only prohibits hugs, kisses, hand holding, massages, and caressing between persons in a personal relationship, then is there evidence that Petty Officer 2nd Class Mitchell and Ordinary Seaman Lefaive, at the time and place of the hug, were in a personal relationship?

[82] It is, frankly, unusual that this much analysis goes into a no prima facie case motion; generally, they are very factual. The court has considered carefully whether this is an appropriate point at the trial to conduct such an analysis. It has decided it is appropriate because it is necessary. If there is no evidence before the court that the hug is contrary to COTM 008/01, then there is no evidence on an essential definitional element of the offence.

[83] Perhaps it is useful to give an example, in a slightly different situation, to explain this. If you change the situation to one where there is an allegation of someone doing something with, we will say, a personal vehicle, contrary to a unit standing order, then it is necessary to establish that whatever is prohibited is done in the right sets of circumstances. There would be no prima facie case if the evidence did not show the requisite circumstances in which the prohibited conduct is prohibited. And, for example, if there is an order that says, No talking on a cell phone in, we will say, a personal vehicle because it leads to accidents and a bad impression in public, then is it important, in terms of any charge, that it be established this occurred in a personal vehicle; that is, the court would need some evidence that, even if the individual was talking on the cell phone, that they were doing it in the circumstances that were prohibited; that is, in the personal vehicle.

[84] Let me begin my analysis of a personal relationship by saying I agree with the prosecution's position that it does not have to be reciprocally identified as such by the participants. It is a question for the court to decide.

[85] Looking at paragraph 4(b) of COTM 008/01, which prohibits:

“b. any physical demonstration or acts of affection or intimacy, including, but not limited, to hand holding, caressing, massaging, hugging, kissing, and the like.”

the court has to determine, does this prohibition only relate to those which occur in the context of a personal relationship? The court concludes, given the context, that the prohibition must be read in the context of the title, the intent of the temporary memorandum, and the underlying reference of the CFAO 19-38, and therefore, the answer is, yes.

[86] The court looks at the COTM 008/01 as a whole, in English and in French. As I have indicated, the title, the reference, paragraph 1, paragraph 2, paragraph 3, paragraph 4(a), paragraph 5 and paragraph 7, all clearly mention personal relationships. The overall context is one of personal relationships and the intent is to prescribe the appropriate professional conduct in the context of those relationships, so as to ensure, both the prevention of the perception or the prevention of the reality of favoured treatment, as a result of the personal relationship, and also to ensure that general standards of military decorum are observed.

[87] Personal relationships are not specifically defined in COTM 008/01, but paragraph 1 does indicate:

“1.... More detailed information may be found in the reference A.”

And reference A, CFAO 19-38, does define those. Even if the court used the definition under the *Concise Oxford English Dictionary*, of "personal" concerning a private rather than a professional life, this would not change.

[88] The court, however, believes the CFAO definition of personal relationship is most appropriate here because it really reflects the overlay of personal relationships on top of professional military relationships and the overall intent of CFAO 19-38 and COTM 008/01 is to maintain the necessary military professionalism in the context of those appropriate and authorized and, as it is described, normal personal relationships.

[89] As I have indicated, paragraph 6 of COTM 008/01 is more general and perhaps covers a somewhat different issue than anything found in CFAO 19-38 because it does not seem merely to regulate a personal relationship, but prohibit certain personal relationships; that is, fraternization by staff with recruits at BRT. However, this is not a paragraph which is an essential definitional element of the offence.

[90] As I have indicated, paragraph 4(b) does not cover the same area. The last sentence of paragraph 4(b), which says:

“4.... Once you are no longer in uniform and have proceeded beyond the confines of DND property, you are guided by your conscience alone.”

clearly does not apply in the situation set out in paragraph 6. In the situation covered by paragraph 6, then you are still subject to COTM 008/01 with regards to recruits, whether you are on or off DND property, in or out of uniform.

[91] Although, as I have indicated, paragraph 6 of COTM 008/01 introduces a somewhat broader intent, the paragraph 4(b) restrictions must be read in the context of a personal relationship, based on the evidence that is before the court. It is consistent with the rest of this memorandum and with the reference and also the provisions that are set out in the other subparagraph, 4(a). The purpose is clearly to restrict married people, family members, those in romantic sexual relationships, and those who are in an emotional relationship where such gestures; that is, kissing, hugging, et cetera, might be normal and might reasonably be anticipated as part of the relationship, it is designed to set limits on what they can appropriately do. In essence, in some ways what it says is, when two members of the military are engaged in personal relationships, there are some restrictions and, although certain activities may be consensual between the two parties, the Canadian Forces may have to consent to certain things as well.

[92] I mentioned paragraph 4(a) because it perhaps reflects this, where it says you cannot, on DND property, use inappropriate dialogue reflective of a personal relationship, presumably, you cannot refer to the other person in your relationship, while on DND property, as member of BRT, as "honey bun" or "sweetie-pie" or anything similar. You have to refer to them in their appropriate military context.

[93] And again in paragraph 4(b), the limits on kissing, and hand holding, and massaging, et cetera, would all seem to be reasonable limits on people who, one might expect, engage in these kind of activities as an essential part of their personal relationship.

[94] Having found that the breach of COTM 008/01 paragraph 4(b) must be in the context of a personal relationship and does not cover non-consensual acts or acts which occur in a professional situation, the court must then consider whether or not the hug that is alleged to have occurred on the charge sheet, occurred within the context of such a personal relationship.

[95] Again, as an example, if you considered a situation that was not a personal relationship, such as a platoon commander on the parade square starts massaging a recruit without consent, then this may, indeed, be something that constitutes assault or abuse of a subordinate, but would not be, massaging contrary to COTM 008/01 paragraph 4(b).

[96] It might be argued that perhaps COTM 008/01 should have covered all relationships: personal; professional; appropriate conduct in classrooms; appropriate conduct in offices; counselling sessions, whether formal or informal, but it does not on its face. There may well be other documents which do cover these areas, but they are not before the court and nor are they on the charge sheet.

[97] What is the evidence as to whether a personal relationship existed between Petty Officer 2nd Class Mitchell and Ordinary Seaman Lefaive during the period of July 2001? The evidence shows initiative on the part of Petty Officer 2nd Class Mitchell to

commence these counselling sessions; it was of his initiative to hug; it was his initiative to select a private location with a door that locked and to lock it on at least one occasion.

[98] However, the sessions were all facilitated by the chain of command of Ordinary Seaman Lefaive. They were, apparently, reported back to them by Petty Officer 2nd Class Mitchell. Ordinary Seaman Lefaive initiated the second and the third sessions because she indicated she found them useful and helpful. As she saw it, Petty Officer 2nd Class Mitchell was her counsellor, there to help her cope with emotional problems relating to her course. The sessions occurred always in the dress of the day, whether that be uniform or gym clothes. There is no indication that any of the contact was on a first name basis, indeed, there is some evidence to the contrary as to whether or not Petty Officer 2nd Class Mitchell even knew the first name of Ordinary Seaman Lefaive. The sessions all occurred in Building 115.

[99] However scanty the qualifications Petty Officer 2nd Class Mitchell may have had, it would appear he was provided by the chain of command as a counsellor on course related matters to Ordinary Seaman Lefaive. The sessions only occurred in the context of a professional workplace environment. The fact that any actions of Petty Officer 2nd Class Mitchell might be, to use the words that he used himself in his interview, "wrong" and that he knew that what he was doing would get him into trouble if Ordinary Seaman Lefaive told people what was happening, does not make it a personal relationship.

[100] And as the hugging did not occur in the context of a personal relationship, it was not contrary to COTM 008/01 4(b), although it may well be, quite properly, contrary to many other laws, regulations and orders.

[101] The protection of vulnerable recruits from the inappropriate and potentially predatory conduct of more senior members of the Forces who can easily take advantage of a recruit's vulnerability and lack of knowledge to satisfy their own personal desires, is an important and very appropriate area for the regulation of conduct. A 17-year old recruit and her or his master corporal, sergeant, petty officer, or warrant officer are in a similar relationship as a 17-year old high school student and her or his teacher. There is a position of trust which must not be abused; must not be abused by the more senior person, not because to do so would be an inappropriate display of intimacy or affection or favouritism, but for far more serious reasons. Both personal and professional conduct between service members is regulated, but not in the same way or for the same reason.

[101] The court finds there is no evidence before it upon which a reasonable jury properly instructed could return a verdict of guilty on the charge that Petty Officer 2nd Class Mitchell faces. The no prima facie case motion is granted. Petty Officer 2nd Class Mitchell, the court finds you not guilty of the charge on the charge sheet.

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