COURT MARTIAL

Citation: *R. v. Banting*, 2019 CM 2009

Date: 20190404
Docket: 201824

General Court Martial

4th Canadian Division Support Base Petawawa
Petawawa, Ontario, Canada

Between:

Lieutenant J.C. Banting, Applicant

- and -

Her Majesty the Queen, Respondent

Before: Commander S.M. Sukstorf, M.J.

DECISION ON A MOTION BY DEFENCE THAT NO PRIMA FACIE CASE HAS BEEN MADE OUT

(Orally)

Introduction

[1] Lieutenant Banting is facing one charge, contrary to section 129 of the *National Defence Act* (*NDA*) for conduct to the prejudice of good order and discipline. The charge emanates from the alleged use of inappropriate sexualized language while he was instructing candidates on the Special Operations Common Environmental Training (SOCET) course held in Petawawa, Ontario during August 2017. In their testimony, four candidates suggested that Lieutenant Banting used sexualized innuendo or double entendres when he described how to perform various combat medical procedures. Aside from one comment, the alleged comments were not directed at individuals and they were made exclusively in the context of describing specific medical procedures.

[2] On application, at the end of the Crown's case, if the prosecution has not presented a prima facie case, accused persons are entitled to a directed verdict of

acquittal. At the close of the prosecution's case, pursuant to the *Queen's Regulations and Orders for the Canadian Forces* (QR&O) paragraph 112.05(13), defence presented a motion seeking a directed verdict. He submitted that the prosecution did not introduce evidence of essential elements of the offence; namely, the date, the blameworthy state of mind of the accused and the prejudice to good order and discipline arising out of the alleged conduct. Defence also argued that the particulars as alleged in the amended charge sheet were not met.

The applicable law

[3] In response to the motion, the prosecution relied primarily on case law relevant to directed verdicts set out by the Supreme Court of Canada (SCC). He relies primarily on the test set out by Fish J., who delivered the decision in *R. v. Fontaine*, 2004 SCC 27 at paragraph 53 which was recently enunciated in *R. v. Barros*, 2011 SCC 51, at paragraph 48 by Binnie J.:

> A directed verdict is not available if there is any admissible evidence, whether direct or circumstantial which, if believed by a properly charged jury acting reasonably, would justify a conviction: *R. v. Charemski*, [1998] 1 S.C.R. 679, at paras. 1-4; *R. v. Bigras*, 2004 CanLII 21267 (Ont. C.A.), at paras. 10-17. Whether or not the test is met on the facts is a question of law which does not command appellate deference to the trial judge.

[4] The test to be applied in courts martial is captured in Note (B) to QR&O article 112.05:

> (B) A *prima facie* case is established if the evidence, whether believed or not, would be sufficient to prove each and every essential ingredient such that the accused person could reasonably be found guilty at this point in the trial if no further evidence were adduced. Neither the credibility of witnesses nor weight to be attached to evidence are considered in determining whether a *prima facie* case has been established. The doctrine of reasonable doubt does not apply in respect of a *prima facie* case determination.

Issue

[5] In rendering a decision on a motion alleging that no prima facie case has been made out, the court martial must not weigh or assess the quality of the evidence on the essential elements of the charges. The test is whether there is some evidence upon which a properly instructed panel might convict. Some evidence may in fact still be insufficient to establish guilt beyond a reasonable doubt. The burden of proof rests on the applicant to demonstrate, on a balance of probabilities, that a prima facie case on the charge has not been met.

Analysis

[6] The prima facie case standard is used as a screening process to determine whether it is justifiable and sensible to have a case proceed to the trier of fact, who is designated by law to render an ultimate factual decision on the matter.

Conduct to the prejudice of good order and discipline

[7] At this stage, a prima facie case is established if the evidence, whether believed or not, would be sufficient to prove each and every essential ingredient such that the accused person could reasonably be found guilty at this point in the trial, if no further evidence was adduced. With respect to the one charge under section 129 of the *NDA* before this court martial, in responding to the motion by the defence, the Court must assess whether the prosecution has provided some evidence that the particularized alleged offences occurred before addressing the blameworthy state of mind. Next, in the context in which the alleged conduct occurred, the Court must determine whether prosecution has provided some evidence that the consequence of the alleged conduct is prejudicial to good order and discipline.

[8] In deciding the motion, it is helpful to review the elements of an offence under section 129 of the *NDA*. Firstly, section 129 does not create two distinct offences. It is one offence (see *R. v. Winters*, 2011 CMAC 1). In fact, subsection (1) creates the offence itself and subsection (2) deems the conduct prejudicial when the conditions of subsection (2) are met. Subsections 129(1) and (2) read as follows:

> **Conduct to the Prejudice of Good Order and Discipline**
>
> **Prejudicing good order or discipline**
>
> **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.
>
> **Offence and contraventions prejudicial to good order and discipline**
>
> **(2)** An act or omission constituting an offence under section 72 or a contravention by any person of
>
> **(a)** any of the provisions of this Act,
>
> **(b)** any regulations, orders or instructions published for the general information and guidance of the Canadian Forces or any part thereof, or
>
> **(c)** any general, garrison, unit, station, standing, local or other orders,
>
> is an act, conduct, disorder or neglect to the prejudice of good order and discipline.

Relevant evidence

[9] In assessing the elements of the offence before the Court, there was no dispute on the identity of the accused, nor the location of the alleged offence.

Testimony

[10] In assessing the evidence, the judge is to assume that all of the evidence she hears is true. It is not her function to decide whether witnesses should be believed. The judge is not to weigh the evidence, in the sense of evaluating whether it is reliable. The judge is not, for example, to discount testimony because of concerns about the opportunity of the witness to observe or recall the events accurately. Similarly, the judge is not to assess the witnesses' credibility. The judge is therefore to assume that the witness is not only trying to be truthful, but is also being accurate.

Lieutenant-Colonel Power

[11] Lieutenant-Colonel Power, the current Commanding Officer of the Canadian Special Operations Training Centre provided helpful and thoughtful testimony regarding the background of the SOCET course, which he described as a cultural inculcation of how they do things within Special Operation Forces Command. He also provided evidence on the open letter from Canadian Special Operation Forces Command (CANSOFCOM) to Force senior staff officers. He explained that the letter identified that there was a problem and reflected the Commander's desire to find out how bad it was. He explained that Operation (Op) HONOUR started the process and the fragmentary order (FRAGO) captured the Chief of the Defence Staff's (CDS) feedback and adjustment. Supplemental orders were to be implemented by the respective commanders. Consequently, the Commander of CANSOFCOM issued his own orders. Under cross-examination, Lieutenant-Colonel Power explained the actions he took when he was advised that there was a complaint from a candidate on the course. He explained that he immediately separated the instructor from the course and advised his chain of command. He explained that the military police (MP) were called, but after they investigated, they advised him that they had not identified any criminal behaviour so it was up to the chain of command to take action.

[12] He explained that Lieutenant Banting taught the same course again the next spring. He told the Court that based on what he saw and Lieutenant Banting's reputation, he was of the opinion that the alleged incidents were out of character and that Lieutenant Banting had not demonstrated a troubling pattern of behaviour either before or after that course. He described Lieutenant Banting as meticulous, mature and a tremendous medical professional.

Captain Smith

[13] In his testimony, Captain Smith, who was a SOCET candidate, expressed surprise and shock that these incidents happened in the SOCET setting within CANSOFCOM by an instructor. He described Lieutenant Banting as having an engaging style, but that on numerous occasions, he threw in sexualized comments. Although most of the comments were not made to individuals, Captain Smith described one example that occurred when Lieutenant Banting was demonstrating how to wrap a wound and he requested a volunteer. At one point, when tightening the bandage on the volunteer, Captain Smith alleges that Lieutenant Banting stopped and said, "We should have a safe word, 'harder', no that won't work." Captain Smith stated that it was clear

to him that the choice of words was intended to be a sexual reference. He explained that "when couples come together, they have a safe word" when they do not like what is going on. The Court noted that this was the only case where a comment was made to a member and there is no evidence before the Court that the volunteer complained, interpreted the comment the same way or was offended.

[14] In his testimony, Captain Smith provided other examples, but none of these examples involved comments made to individuals. When asked how others responded to the alleged incidents, Captain Smith explained that there was a chatter and that a few people spoke to him directly and others were as surprised as he was. It was Captain Smith that brought the incidents to the attention of the staff.

Corporal Ferland

[15] Corporal Ferland was a candidate on the SOCET course. She testified that she was shocked when Lieutenant Banting made a reference to kids being "hot" when speaking about body temperature. She provided a few other examples, but specifically told the Court that she thought they were funny. She said that she was not offended by these additional comments, but she testified that she thought others had been.

Master Corporal Garland

[16] Master Corporal Garland was also a candidate on the SOCET course. He described a few incidents where he felt the instructor could have described the medical procedures differently. He testified he did not notice anyone being visibly offended, but clarified that in his opinion, the use of sexualized language diminished the focus on the skill or knowledge being presented. He further stated that he saw no need to file a harassment complaint as the comments were not directed at him or any specific person.

Corporal St Jean

[17] Corporal St Jean testified that, in her opinion, Lieutenant Banting made a number of inappropriate comments. She said she tried to understand why they were being made and found them weird and unnecessary. She said she just started to tune Lieutenant Banting out. She felt that the comments were not necessary and did not aid their learning. She specifically stated that the alleged conduct did not impact the SOCET because they were all adults and experienced Canadian Armed Forces (CAF) members and could put it aside. Under cross-examination, in explaining why others did not come forward, she stated that they did not view the comments the same way she did.

Captain Nevins

[18] Captain Nevins was the SOCET course director at the time. He explained that on the Monday after the Saturday, 26 August 2017 lecture, Captain Smith asked to speak with him. He explained that after Captain Smith reported the incidents, he passed the complaint up to the chief instructor and a unit disciplinary investigation was

commenced. Although he did describe the course as gruelling and intense, he also stated that few things would lead to a candidate failing.

Elements of the offence

[19] Although the defence argued that most witnesses could not confirm the date, based on the testimony of Captain Nevins, there is some evidence upon which a properly instructed panel can determine the date set out. Further, if required, the panel can make a special finding under section 138 of the *NDA* to amend the date.

[20] The defence raised a number of very legitimate concerns regarding the phrasing in the particulars. It is possible that with the appropriate instruction any concerns with respect to the wording of the particulars can similarly be resolved by the panel under section 138 of the *NDA*. It reads:

> **Where tribunal may make special finding of guilty**
>
> **138** Where a service tribunal concludes that
>
> > **(a)** the facts proved in respect of an offence being tried by it differ materially from the facts alleged in the statement of particulars but are sufficient to establish the commission of the offence charged, and
> >
> > **(b)** the difference between the facts proved and the facts alleged in the statement of particulars has not prejudiced the accused person in his defence,
>
> the tribunal may, instead of making a finding of not guilty, make a special finding of guilty and, in doing so, shall state the differences between the facts proved and the facts alleged in the statement of particulars.

[21] The prosecution further argued that the Court could consider that the incidents were a breach of Op HONOUR. Although, the Court notes that the particulars of the charges do not rely specifically upon the breach of an order, nor do the particulars reference subsection 129(2), since the Court Martial Appeal Court (CMAC) in *Winters* recognized section 129 as one offence, there is nothing that precludes such an analysis.

Subsection 129(2) of the *NDA*

[22] The Court heard evidence on the CDS Canadian Forces General message (CANFORGEN) 130/15, CDS Op Order - Op HONOUR and its accompanying FRAGOs, Commander CANSOFCOM Open Letter to the Force Senior Staff Officers, as well as the Bystander Intervention training package.

[23] In practice, in order for the prosecution to rely upon subsection 129(2) of the *NDA* that deems conduct prejudicial upon the breaching of an order, the prosecution must prove the accused's knowledge or deemed knowledge of the provision, regulation, order or instruction allegedly contravened. In the case of *R. v. Korolyk*, 2016 CM 1002, Dutil C.M.J. found subsection 129(2) to be constitutionally valid, but found the presumption of deemed prejudice to be refutable.

[24] Major Mayne testified that the accused, while he was still a warrant officer, did attend the Bystander Intervention training and having attended it, it was evident in the training package that he would be aware of the expectations of Op HONOUR and the guidelines set out in the Bystander Intervention training. Hence, there is some evidence upon which the panel could rely, in proving that the accused had some knowledge of what was expected of him under Op HONOUR.

Op HONOUR evidence

[25] The Court then extensively reviewed the contents of all evidence related to Op HONOUR. It included the CDS CANFORGEN 130/15, CDS Op Order - Op HONOUR and its accompanying FRAGOs, Commander CANSOFCOM Open Letter to the Force Senior Staff Officers, as well as the Bystander Intervention training package. The Court assessed whether any of the documents amounted to orders within the meaning of subsection 129(2). This subsection reads as follows:

> **(2)** An act or omission constituting an offence under section 72 or a contravention by any person of
>
> . . .
>
> **(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,
>
> is an act, conduct, disorder or neglect to the prejudice of good order and discipline.

[26] Commander CANSOFCOM Open Letter to the Force Senior Staff Officers, dated 6 May 2015). This well-written letter sets out very clearly the expectations of the Commander of CANSOFCOM and his Sergeant Major in addressing matters of sexual harassment and assault identified in Mme Deschamps' report. In his letter, he acknowledges acceptance of the fact that this "insidious behaviour exists within our Force." He committed himself to gaining a real understanding of the scope and scale over the coming months as well as "making clear where the red lines are and holding people accountable if they cross them." He further states, "We will never turn a blind eye. As leaders, next to mission success, making our troops feel safe under our command is a sacred duty. And trust by our troops of our chain of command goes to the core of mission success."

[27] CANFORGEN 130/15 CDS 041/15 222041Z JUL 15– CDS Message to Canadian Armed Forces on Harmful Sexual Behavior. The message does not mince words. The CDS states, "It is therefore abhorrent to me that anyone would mistreat another by bringing harm or the fear of harm through assault or harassment. I lament the fact that there exist within our ranks those that would bully, degrade or assault others, especially another member of the CAF or a member of the defence team. Moreover, to attack the dignity of any member by sexual assault and harassment serves only to

weaken our force when we need to be strong, and serves to make some feel less worthwhile when we know that everybody is important." Although this CANFORGEN makes the CDS's expectations very clear, his comments are focused on deterring the mistreatment of others. It reinforces the CDS's commitment to prevent bullying, harassment or assault, but it does not constitute an order of prohibited behaviour in the context of subsection 129(2).

[28] CDS Op Order - Op HONOUR dated 14 August 2015. Op HONOUR is a cornerstone document that will become a legacy of its time. It has made more of an impression on leadership instituting overall change in behaviour than other documents of its kind. Although it is clear that Op HONOUR is written as an Operation Order, it is in substance a policy directive issued to the chain of command describing how it must handle reported incidents of misconduct and sets out tasks, including the chain of command's responsibility to institute proactive and preventative policies. The CDS Op Order defines the problem, sets out the CDS's intent, describes the lines of effort, the conduct of operations, and provides extensive direction on tasks and support requirements. In many ways, it is brilliant and an effective tool to accomplish the CDS's intent.

[29] Notwithstanding this, the CDS Op Order - Op HONOUR is not the type of order envisaged under subsection 129(2). As designed, it is not intended to be relied upon as the basis of a charge. Most noticeably, Op Honour does not provide parameters nor does it create offences. In short, Op HONOUR and its FRAGOs set out clear direction to the chain of command on how to deal with issues of inappropriate conduct in accordance with extant policy and the law. It does not establish new law or policies.

Proof of prejudice to good order and discipline

[30] The Court noted that both the commanding officer of the unit, Lieutenant-Colonel Power, as well as the SOCET course director, Captain Nevins, testified, but neither of them provided any direct evidence of prejudice to good order and discipline that flowed from the alleged conduct within the unit. Further, the Court acknowledged that the witnesses were asked about the effects of the incidents and how they made them feel, but the Court found no actual evidence on the record of a breakdown or prejudice to discipline and good order either on the course or within the unit that flowed from the consequence of the conduct alleged.

[31] However, absent specific evidence of prejudice, the CMAC decision in *R. v. Golzari*, 2017 CMAC 3 held that prejudice will be proven, beyond a reasonable doubt, so long as the totality of the circumstances supports the finding that the conduct in question would tend to, or be likely to, result in prejudice to good order and discipline. Similar to the facts before this court martial, *Golzari* was not a case where an order had been breached.

[32] The prosecution referred the Court to *R. v. Williams*, 2017 CM 4016 where Pelletier M.J. addressed the *Golzari* decision and found that a finding of harassment

would result in prejudice. Firstly, the *Williams* case can be distinguished from the case at bar, because the specific allegation before that Court related to harassment, which is a breach of an objectively defined norm expected within the CAF. However, the facts before the Court fall short of harassment and although the conduct was described as inappropriate, not all inappropriate conduct rises to the level where it constitutes conduct prejudicial to good order and discipline.

[33] The prosecution also relied upon paragraph 79 in *Golzari*, where the CMAC stated that in most instances, the trier of fact in a court martial should be able to determine whether the proven conduct is prejudicial to good order and discipline based on their experience and general service knowledge. In *R. v. Rollman*, 2017 CM 2005, I interpreted this comment to mean that if a trier of fact wishes to rely upon its own experience and knowledge, it must be done in accordance with the law of evidence. More specifically at paragraph 79 in *Rollman*, I stated:

> [79] Much of the concern with the wider interpretation advanced by the prosecution is the uncertainty that exists if the trier of fact relies upon his or her own subjective experience and general service knowledge in order to infer an essential element of an offence. An accused cannot be left in the unfair position of having to speculate on what fact, matter, custom or general military knowledge as evidence that the trier of fact might rely upon in order to convict him. An accused must have all the legal evidence adduced before him in court to ensure that he is given the opportunity to meet, explain or contradict this evidence and to determine on what grounds he should argue his defence. No interpretation of the law may limit this principle.

[34] The Court recognizes that based on the CMAC direction in *Golzari*, the prosecution does not need to wrap up the evidence identifying it as prejudicial for the panel to be able to rely upon their own knowledge and experience to infer prejudice. However, when relying on their knowledge and experience, there must be some evidence that the accused breached an objectively defined norm that he is presumed to know.

[35] In the evidence before the Court, the prosecution relied primarily on CDS Op Order - Op HONOUR and its accompanying FRAGOs, as well as the Bystander Intervention training package to infer prejudice. The prosecution argues that the panel can draw an inference of the element of prejudice from these documents. Where the evidence on one or more of the elements that the prosecution must prove is circumstantial, the Court must conduct limited weighing of the evidence. Before, being able to leave the evidence with the panel, the trial judge must assess the reasonableness of the panel being able to draw an inference from the documents.

[36] In performing the task of limited weighing, the judge's task is to determine whether it would be reasonable for a properly instructed panel to infer the guilt of the accused if the prosecution's evidence was believed. Thus, this task of "limited weighing" never requires consideration of the inherent reliability of the evidence itself. It should be regarded, instead, as an assessment of the reasonableness of the inferences to be drawn from the circumstantial evidence.

Bystander Intervention training package

[37] The Bystander Intervention training package has no place in policy or law. Its aim is to provide guidance on how to prevent a broad range of behaviours. In the guide, at Learning Objective 1, it defines harmful and inappropriate sexual behaviour (HISB) as follows:

> **Harmful and Inappropriate Sexual Behaviour**
>
> HISB is not defined in policy or law, but is in common use in matters related to Op HONOUR. HISB is a term coined by the CAF to cover a range of behaviours having a sexual context, all of which are not only unacceptable within our institution and in direct conflict with the DND/CAF Code of Value and Ethics, but are often in contravention of existing policy and law. The HISB continuum spans such comportments as sexualized behaviour, sexual harassment and sexual offences.

[38] The prosecution also referred the Court's attention to a spectrum of conduct set out in a graph that begins with sexualized behaviour. At the next page it reads:

> **Sexualized Behaviour**
>
> Sexualized behaviour is prevalent in a sexualized culture and is not appropriate in the CAF environment. Sexualized behaviours in the workplace erode morale and operational effectiveness. Consequently, there is a need for everyone to be vigilant in watching for these behaviors and diligent in correcting them immediately. See the examples used in the next section for the kind of behaviours that refer to sexualised behavior.

[39] The pragmatic problem with the spectrum is that we do not have a clear test upon which a trier of fact may decide when specific behaviour has moved far enough along the spectrum that prejudice may be inferred. What are the distinguishing factors? I refer back to the handwritten letter by the then Commander of CANSOFCOM, where he highlights the importance of making it clear where the red lines are so they may hold people accountable if they cross them. The establishment of red lines is noticeably absent within the training material.

[40] The training package focuses primarily on sexual harassment and sexual misconduct, which are described as constituting offences under the *Criminal Code*, Code of Service Discipline or both. Later, at Learning Objective 2, the material describes the potential impact of harmful and inappropriate sexual behaviour by immediately referencing the Defence Administrative Orders and Directives (DAOD) 5012-0 policy on Harassment Prevention and Resolution, which is not applicable to the facts of this case.

[41] The prosecution drew the Court's attention to Learning Objective 2 - Key Points, set out at slide 10 of the training package that states:

> It is important to recognize that as smaller inappropriate behaviours are tolerated or ignored, the more serious inappropriate behaviours start to become more accepted or unaddressed.

[42] Does this key point set out in the Bystander Intervention training package provide some evidence upon which the panel can rely to infer conduct to the prejudice of good order and discipline? It is clear from the evidence that the key point, set out above is made in the context of explaining how a facilitator should highlight the importance of Bystander Intervention. The guide specifically suggests that the facilitators explain why this particular lesson is important to the participants and aims to influence a bystander's decision to act, especially in an organization in which rank and positions are dominant factors. The training package is designed to prepare members for the next time they witness a potentially harmful situation. It is not reasonable that this statement be relied upon as evidence upon which a panel can infer prejudice to the good order and discipline.

Does CDS Op Order - Op HONOUR provide evidence upon which prejudice may be inferred?

[43] At paragraphs 4 and 6 of the CDS Op Order - Op HONOUR, the problem and the CDS intent are described as follows:

> 4. Problem Definition. There are behaviours that are inconsistent with the Profession of Arms. Harmful and inappropriate sexual behaviour includes but is not limited to actions that perpetuate stereotypes and modes of thinking that devalue members on the basis of their sex, sexuality, or sexual orientation; unacceptable language or jokes; accessing, distributing, or publishing in the workplace material of a sexual nature; offensive sexual remarks; exploitation of power relationships for the purposes of sexual activity; unwelcome requests of a sexual nature, or verbal abuse of a sexual nature; publication of an intimate image of a person without their consent, voyeurism, indecent acts, sexual interference, sexual exploitation, and sexual assault.
>
> 6. CDS Intent. My intent is to eliminate harmful and inappropriate sexual behaviour within the CAF by leveraging the unequivocal support of my Commanders and all leaders in the CAF. Any form of harmful and inappropriate sexual behaviour is a threat to the morale and operational readiness of the CAF, undermines good order and discipline, is inconsistent with the values of the profession of arms and the ethical principles of DND and CAF, and is wrong. I will not allow harmful and inappropriate sexual behaviour within our organization, and I shall hold

> all leaders in the CAF accountable for failures that permit its continuation.
>
> [Emphasis in original]

[44] The Court notes that the Problem Definition lists unacceptable language or jokes within it. However, consistent with the original CANFORGEN on the subject, the CDS Op Order and its supporting documents are focused on eliminating conduct described by the conjoined term of "harmful and inappropriate sexual behaviour" (HISB). It is not clear what makes specific language or jokes unacceptable. However, most notably HISB is repeatedly used as a parameter and the focus of the CDS's direction. One would therefore assume that unacceptable language would require it to be both inappropriate and harmful.

[45] Aside from one incident, the alleged use of inappropriate language was not directed at anyone, nobody was offended and the context under which the language was used was benign. It was not used to mock, belittle or devalue members or perpetuate stereotypes. The alleged language was identified by some witnesses as being inappropriate, but it clearly falls short of being harmful. Some witnesses testified that the alleged conduct was inappropriate, but there was no evidence from any of the witnesses that the alleged conduct was harmful. Corporal St Jean, who arguably was the most affected by the alleged use of inappropriate language, specifically stated that she found the language used to be inappropriate, but stated that it did not impact anyone on the SOCET course, or the course itself because they were all adults and experienced CAF members and could put it aside.

[46] The CDS OP Order very aptly leverages existing policy and law in enforcing the CDS intent and ensuring that commanders take prompt and decisive action in response to any allegations of harmful and inappropriate sexual behaviour. Section 8 reads:

> . . . Commanders will ensure that prompt and decisive action is taken in response to any harmful and inappropriate sexual behaviour, consistent with all applicable laws and policies.

[47] This is reinforced by looking at FRAGOs 1 and 2 where the strategic enablers recognize that responses to HISB should be addressed in accordance with applicable laws and policies:

> 11. Strategic Enablers.
>
> a. Leadership Engagement and Accountability. Leaders at all levels will continue to ensure that prompt and decisive action is taken in response to any HISB consistent with all applicable laws and policies. More than ever, we must reinforce the values of the Profession of Arms, the DND/CAF Code of Values and Ethics, and be decisive and immediate in our response to HISB. I

> will not tolerate leaders at any level who fail to act appropriately when confronted with HISB within their chain of command.
>
> [Emphasis in original]

[48] It is a common law principle that offences or crimes must be sufficiently defined to ensure that members have a clear understanding of what acts are prohibited and why. As explained earlier, the Court must focus its assessment on the reasonableness of the inference to be drawn from Op HONOUR. If the facts before the court rose to the level of harassment, which is a term understood in both policy and law, I would agree entirely with the prosecution that pursuant to the CMAC's guidance in *Golzari*, a panel could rely upon their own experience and knowledge, including the CDS Op Order - Op HONOUR to infer prejudice.

[49] However, the allegation before the Court falls short of fitting into conduct addressed by applicable laws and policies. It does not fit within the definition of HISB and is situated within a grey zone of conduct which CDS Op Order - Op HONOUR does not address. Further, Op HONOUR does not provide guidance on conduct that falls short of HISB, nor does it assist in identifying when inappropriate language rises to the level where it becomes harmful. As such, the Court cannot expect a properly instructed panel, to rely upon CDS Op Order - Op HONOUR to infer prejudice on the alleged behaviour before the court.

[50] In conclusion, I must ask myself if the documents in question provide some assistance upon which a panel, properly instructed, may rely upon with their own experience and knowledge to infer prejudice from the allegation before the court. After a review of the Op Order and its FRAGOs, I find that, if all the evidence before the court is believed to be true, the conduct alleged falls outside of that captured by the CDS Op Order - Op HONOUR and as such, it is not reasonable for the panel to rely upon these documents to assist it in inferring the essential element of prejudice.

Conclusion

[51] I conclude that Lieutenant Banting has demonstrated on a balance of probabilities that no evidence was adduced to prove that the alleged conduct resulted in prejudice to good order and discipline.

[52] It is my decision that a prima facie case has not been made out against you on the only charge on the charge sheet.

FOR THESE REASONS, THE COURT:

[53] **GRANTS** the application.

[54] **FINDS** Lieutenant Banting not guilty of the charge.

Counsel:

Mr J.M. Juneau and Mr M.W. Drapeau, Michel Drapeau Law Office, 192 Somerset Street West, Ottawa, Ontario, Counsel for the Applicant, Lieutenant J.C. Banting

The Director of Military Prosecutions as represented by Major G.J. Moorehead and Captain R. Fernet for the Respondent