HEARING BY THE MILITARY JUDGE
ASSIGNED TO PRESIDE AT THE COURT MARTIAL

Citation: *R. v. Tuckett*, 2019 CM 3005

Date : 20190715
Docket : 201845

Preliminary Proceedings

Canadian Forces Base Borden
Borden, Ontario, Canada

Between :

Master Corporal W.A. Tuckett, Applicant

- and -

Her Majesty the Queen, Respondent

Before : Lieutenant-Colonel L.-V. d'Auteuil, D.C.M.J.

DECISION ON AN APPLICATION BY THE ACCUSED CHALLENGING THE CONSTITUTIONALITY OF SECTION 129 OF THE *NATIONAL DEFENCE ACT* (*NDA*) AND SEEKING A DECLARATION OF INVALIDITY AND A STAY OF PROCEEDINGS ON THE BASIS OF A VIOLATION OF PARAGRAPH 2(*b*) OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*.

(Orally)

Introduction

[1] On 6 December 2017, three charges were laid against Master Corporal Tuckett in a record of disciplinary proceedings (RDP).

[2] Master Corporal Tuckett is now charged before a court martial with one offence of conduct to the prejudice of good order and discipline, contrary to section 129 of *NDA* for having harassed Master Corporal Chedore between 1 January and 28 February 2017 at Canadian Forces Base (CFB) Borden, and with a second offence of the exact same nature for having said some comments to Master Corporal Laramee about Master Corporal Chedore on or about 20 February 2017, again at CFB Borden.

[3] The applicant is challenging the constitutionality of the provision governing persons subject to the Code of Service Discipline regarding any act, conduct, disorder or negligence to good order and discipline. More specifically, he is seeking a declaration of invalidity of section 129 of the *NDA* and a stay of the actual proceedings on the basis of a violation of his right to freedom of expression under paragraph 2(*b*) of the *Canadian Charter of Rights and Freedoms*.

Procedural context

[4] The two charges were preferred by the prosecution on 16 July 2018 on a charge sheet signed on the same day. On 22 November 2018, further to an agreement between parties in the context of a coordination call conference, a court martial was convened by the Court Martial Administrator (CMA) to deal with these two charges at CFB Borden on 18 February 2019 for a period of two weeks.

[5] On 31 January 2019, I held a pre-trial conference call with counsel during which the procedure for the trial was discussed. The need for interpreters was discussed. Also, I was told that one witness called by prosecution would testify via the Video Teleconference (VTC) system, and that, two witnesses called by the accused would testify in the same manner. At that time, defence counsel said that he was not considering any preliminary application. It was agreed that another pre-trial conference call should be held on 7 February 2019 in order to give time to counsel to provide more specific information regarding the procedure at the court martial, including what was related to the need for interpreters. The court reporter would also inquire about the technical procedure for recording the testimony of witnesses testifying via VTC and using the services of an interpreter at the same time.

[6] On 7 February 2019, I held a second pre-trial conference call with counsel during which defence counsel announced, for the first time, his intent to file an application challenging the constitutionality of section 129 of the *NDA* in the context of a violation of the freedom of expression as the right of his client pursuant to paragraph 2(*b*) of the *Charter*. Then, I confirmed with counsel as to the way they intended to proceed for the trial. I also told them that we would wait for the notice of application, if any, in order to discuss the way ahead as a matter of procedure.

[7] On 7 February 2019, the applicant, Master Corporal Tuckett, through his counsel, filed a notice of application as a preliminary matter to be heard pursuant to section 187 of the *NDA* and article 112.03 of the *Queen's Regulations and Orders for the Canadian Forces* (QR&O). In his written notice, he is challenging the constitutionality of section 129 of the *NDA* and he is seeking a declaration of invalidity and a stay of proceedings on the basis of a violation of his right to freedom of expression pursuant to paragraph 2(*b*) of the *Charter*.

[8] On 12 February 2019, I held a third pre-trial conference call in order to discuss Master Corporal Tuckett's *Charter* application. I was then told by the prosecution of its

intent to present an application requesting a change of date for the court martial. I then agreed with the parties that such application would be heard as a preliminary matter on 15 February 2019.

[9] On 13 February 2019, the prosecution filed a notice of application, as a preliminary matter, for changing the court martial date. Considering the short notice it received for making its mind on the constitutional issues raised by defence counsel, the nature of the application itself, and its intent to identify and call more than one expert witness in order to make its case, it then suggested to set a new trial date for mid-April 2019.

[10] I heard the application on 15 February 2019 and granted it. It is only on 18 February 2019, just prior to the commencement of the court martial, that I specified the exact date the trial would commence, considering that I would hear the application made by defence counsel as a preliminary matter. Then, a new convening order dated 25 February 2019 was signed by the CMA with a trial date for 21 May 2019. In addition, it was determined with counsel that I would hear the preliminary application on 15 April 2019 and that we would schedule the full week for that hearing. I also imposed on counsel a schedule for presenting written submissions, which was 1 April 2019 for the prosecution and 10 April 2019 for a reply by the applicant. Both parties respected it.

[11] On 15 April 2019, I started to hear the preliminary application. The prosecution made an admission to the effect that section 129 of the *NDA*, in the context of the particulars of the charges for this court martial, violates the right of Master Corporal Tuckett's freedom of expression protected under paragraph 2(*b*) of the *Charter*.

[12] This admission resulted in the burden being shifted to the prosecution to demonstrate that section 129 of the *NDA* is a reasonable limit prescribed by law as it can be demonstrably justified in a free and democratic society under section 1 of the *Charter*. The prosecution then started with the presentation of its case by introducing a number of documents. The testimonial evidence presented by the prosecution relied on expert evidence only. I held a first *voir dire* to determine if Chief Warrant Officer Halpin could provide expert opinion evidence on the proposed areas of expertise. I qualified her as an expert witness and she gave expert opinion.

[13] Further to that *voir dire*, additional disclosure issues were brought to my attention by defence counsel. In short, he considered that he was not provided with proper notice about the experts to be called by the prosecution for this preliminary application and that the information he was provided with by the prosecution was too recent for his own experts to advise him for the cross-examination of the expert witnesses to be called by the prosecution. He then requested that I adjourn the case in order for him to provide the recent disclosure to his own experts, which would allow them to consider it and provide him with proper advice and any additional report if need be. Only then, he would be in a position to cross-examine the expert witnesses called by the prosecution.

[14] Despite the fact that this matter was never raised by defence counsel prior to the time scheduled for the hearing of this application, and the fact that I expressed my disappointment to him for not doing so, I agreed to adjourn the hearing, considering the time for hearing the application on the constitutional issue, the need for experts called by the applicant to reassess their opinion in light of the information disclosed and the availability of the experts called by both counsel.

[15] However, before adjourning the hearing, it was agreed that we would proceed with the *voir dire* for the two other witnesses called by the prosecution for determining if they could provide expert opinion evidence to the Court. I proceeded with these two *voir dires* on 16 and 18 April 2019 and I adjourned the hearing to 21 May 2019. It was then understood that we would proceed with the hearing on this preliminary matter on 21 May 2019 for a period of two weeks, considering the availability of all expert witnesses. It was agreed that two experts called by the prosecution would testify in the first week and that we would also deal with another application regarding interpretation services. In the second week, we would proceed with the last expert witness called by the prosecution and the two expert witnesses called by the applicant.

[16] It was also considered that final addresses on this issue would be made on 3 or 4 June 2019.

[17] On the morning of 21 May 2019, before continuing with the hearing on this preliminary matter, and with the agreement of counsel, I set again a new trial date for 15 July 2019 in Borden. A third convening order was then issued on 22 May 2019 by the CMA for convening the court on 15 July 2019 in Borden.

[18] We then proceeded as planned. I heard evidence concerning this preliminary matter on 21, 27, 28 and 29 May 2019. I listened to counsel addresses on 4 June 2019.

The evidence

[19] I heard four witnesses. Chief Warrant Officer Halpin, Dr. Sanela Dursun and Commodore Patterson were called by the prosecution and accepted by me to provide expert witness opinion. Lieutenant-Colonel Suurd Ralph was called by the applicant to the same effect.

[20] Nineteen documents were identified as exhibits; among them are Canadian Armed Forces (CAF) policies and publications, proposed areas of expertise and curriculum vitae for each expert witness, email correspondence and a bundle of RDP.

Chief Warrant Officer Halpin

[21] Chief Warrant Officer Halpin testified in a very clear and straightforward manner. She testified on the ethos for military members and explained each of the principles and values expected from them.

[22] She told me about the importance of the Code of Service Discipline and the leadership within the CAF and how they interact.

[23] She spent some time on how discipline is handled. She talked about the existing administrative measures, the disciplinary measures and how these processes impact on the management of discipline. She also provided the Court with her own experience in managing discipline throughout her career.

[24] She explained how freedom of expression is permitted and may contribute to the efficiency of the CAF. She also discussed the limits that must be imposed in the context of the way military members must perform their various tasks and responsibilities which may affect the public's perception of the CAF.

[25] She admitted that any standard of conduct expected must be clear and there exist some similarities and dissimilarities between the disciplinary system for the CAF members and police officers.

Dr. Sanela Dursun

[26] Dr. Sanela Dursun provided expert opinion evidence from a scientific perspective. She explained the concept of sexual harassment and sexual assault. She affirmed that sexual misconduct includes sexual harassment.

[27] She explained that when you compare the survey conducted in 2016 and the recent one from 2018, there is a slow decrease in the number of women who experienced sexual harassment during the last twelve-month period.

[28] She said that sexual harassment is more prevalent in the military than in civilian society because of the demography issue, since the majority of CAF members are young men and the minority is composed of young women, of the selection process because people recruited come with more personal problems, of the military lifestyle because of the operating environment, and of the military culture, structure and policies.

[29] She also explained that men and women perceived sexual harassment differently; mainly that the difference comes from the fact that sexual attention is a different concept for each gender.

[30] She told the Court about the impacts sexual harassment has on military members and the effect of policies and processes known to decrease this situation.

[31] She discussed the concept of language and culture, their interrelationship, and their impact on the question of sexual harassment.

[32] She talked about penal measures taken to punish the perpetrator of sexual harassment. She said that the severity of the punishment must be proportionate to the

fault. However, she agreed that there is a gap for dealing with perpetrators, while victims are actually at the heart of all the measures that have been taken so far.

[33] She said that the Royal Canadian Mounted Police and the Canadian Coast Guard are valid comparators regarding the way sexual harassment issues are dealt with, but other military organizations in the world are still a better comparator with the CAF.

Commodore Patterson

[34] Commodore Patterson testified about the military ethos. She said that it contains the values that underpin the profession of arms and give a sense of cohesion. She was of the opinion that, in the context, the CAF has a mandate to manage violence, and provides about what to think and what to believe.

[35] She explained the interconnection between ethos and values for CAF members. She said that the fact that there is a concept of unlimited liability residing with those who are tasked to make decisions distinguishes and makes the CAF working environment a unique one. She illustrated that question by saying that, at some point, somebody may order someone else to do something that may result in losing lives with the purpose of saving many more, and that such thing involves the fact that it is expected that no question or second-guessing issue should arise from such situation.

[36] She discussed the concepts of external and internal discipline as they respectively related to the maintenance of cohesion and self-discipline. She explained how discipline is essential to the operational effectiveness of the CAF and how to instill it.

[37] She talked about the role of officers, the importance of the Code of Service Discipline, and the role of a commanding officer at various levels. She discussed how important respect within the organization is and how it is linked to the recent diversity strategy within the CAF. She testified on the importance of developing trust among people and to avoid any situation that may harm this concept.

[38] She stressed the importance of remediating in a quick and proportional manner the harmful conduct in order to minimize the impact on morale and cohesion of a group and the reputation of the CAF.

[39] She exposed the various ways the perpetrator may contest an administrative measure taken.

[40] She talked about Operation HONOUR as an education campaign in order to clarify what is forbidden.

[41] She agreed that when a standard is vague, it could be ineffective.

Lieutenant-Colonel Suurd Ralph

[42] Lieutenant-Colonel Suurd Ralph talked about the importance for CAF members to have a voice. She said that it contributes to the autonomy of individuals, allowing them to express their opinion on important issues, and to frank discussion because it may favour the acceptance of diversity.

[43] She expressed the opinion that penalization of free expression within the CAF could have a negative effect to the extent that somebody may decide to be silent in the workplace, even if this topic has never been studied.

[44] She said that there are many non-penal methods to address freedom of expression, such as verbal warning, written warning, suspension or termination.

[45] She is of the opinion that it is more efficient to use an administrative process than a penal process. From her perspective, dialogue and counselling are more effective means to deal with issues involving freedom of expression.

[46] She told the Court that when punishment is too severe, it may create a fear for reporting wrongdoings.

[47] She also said that unclear standards impact on the effectiveness of an individual and the organization.

[48] In short, she expressed the opinion that overly punitive reactions may have a negative impact. She illustrated her view by saying that because millennials have different expectations, such ways to address freedom of expression may impact on CAF recruitment.

[49] For her, dialogue, counselling and administrative measures would be sufficient to deal with issues related to freedom of expression within the CAF and she does not see how punishing somebody publicly is better than privately. However, she recognized that maintaining discipline is a very important objective for the CAF.

The issues

[50] Such application raised three questions:

(a) Is section 129 of the *NDA* inconsistent with the right of the accused to freedom of expression under paragraph 2(*b*) of the *Charter*?

(b) In the affirmative, is section 129 of the *NDA* to be regarded as a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under section 1 of the *Charter*?

(c) In the negative, what is the appropriate remedy in the circumstances?

The law

[51] The relevant portions of section 129 of the *NDA* read as follows:

> (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
>
> > (a) any of the provisions of this Act,
> >
> > (b) any regulations, orders or instructions published for 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.
>
> …
>
> (5) No person may be charged under this section with any offence for which special provision is made in sections 73 to 128 but the conviction of a person so charged is not invalid by reason only of the charge being in contravention of this subsection unless it appears that an injustice has been done to the person charged by reason of the contravention.

[52] Section 129 of the *NDA* does not create two offences, namely one under subsection 129(1) and another under subsection 129(2) of the *Act.* As said by the Court Martial Appeal Court (CMAC) in the decision of *R. v. Tomczyk*, 2012 CMAC 4, at paragraph 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.

[53] Subsection 129(1) of the *NDA* simply tells us that any act, conduct, disorder or neglect to the prejudice of good order and discipline is an offence. Generally speaking, proof of prejudice to good order and discipline beyond a reasonable doubt is required (see *R. v. Winters*, 2011 CMAC 1, at paragraph 24), although this proof of prejudice can sometimes "be inferred from the circumstances [*sic*] if the evidence clearly points to prejudice as a natural consequence of [a] proven act." (see *R. v. Jones*, 2002 CMAC 11 at paragraph 7)

[54] Subsection 129(2) of the same Act tells us that, in specific conditions, prejudice to good order and discipline is deemed to have occurred.

[55] In some instances, subsection 129(2) of the *NDA* is void insofar if 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 *NDA* requires the trier of fact to convict in spite of a reasonable doubt. (see *R. v. Korolyk*, 2016 CM 1002, at paragraph 28)

[56] The applicant alleged the infringement of his right to freedom of expression under paragraph 2(*b*) of the *Charter*, which reads as follows:

> 2. Everyone has the following fundamental freedoms:
>
> > (*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

[57] Freedom of expression has a truth-seeking function by promoting free exchange of ideas, encouraging democratic discourse through participation in social and political decision-making and cultivating diversity in individual self-fulfillment and human flourishing for speakers and listeners (see *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at 976; *Ford v. Quebec (A.G.)*, [1988] 2 S.C.R. 712 at 765-766).

[58] As principles and values underlying the protection of freedom of expression, it must be said that the second one previously enumerated has been recognized as being connected to the political process (see *R. v. Keegstra*, [1990] 3 S.C.R. 697; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877; *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827), while the two others are more directly engaging individual human dignity.

[59] Then, if I come to the conclusion that there is a breach of the right of the applicant to freedom of expression, I shall then proceed with an analysis under section 1 of the *Charter*. This provision reads as follows:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[60] The test for justification of a *Charter* infringement under section 1 was enunciated by the Supreme Court of Canada (SCC) in *R. v. Oakes*, [1986] 1 S.C.R.103. The onus is on the party seeking to uphold the limitation to satisfy, on a balance of probabilities, that:

> (a) the infringing legislation has a pressing and substantial objective based on societal concerns in a free and democratic society; and
>
> (b) the means employed in the legislation to achieve that objective must be reasonable and demonstrably justified in proportion to the objective, in that:
>
> > i. the means is rationally connected to the legislative objective;

ii. the means produces the minimal possible impairment of the right or freedom; and

iii. there is proportionality between the limiting effects and the legislative objective.

[61] Regarding the appropriate remedy, I told counsel that I would prefer to proceed with a separate hearing if need be. Accordingly, I do not intend to expand on the law for that specific issue at this stage.

Position of the parties

The prosecution

[62] Right at the start, the prosecution admitted that, in the context of this case, section 129 of the *NDA* infringed the right of the accused to freedom of expression under paragraph 2(*b*) of the *Charter*.

[63] However, it also clearly stated that section 129 of the *NDA* shall be regarded as a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under section 1 of the *Charter*.

[64] The prosecution suggested applying the *Oakes* test developed by the SCC, in which it is well established that in such circumstances it belongs to the prosecution to show, on a balance of probabilities, that the law has a pressing and substantial objective and that the means chosen are proportional to that objective.

[65] Referring to the SCC decision in *R. v. Moriarity*, 2015 SCC 55, the prosecution alleged that the pressing and substantial objective for section 129 of the *NDA* is to maintain discipline, efficiency and morale of the military.

[66] As a matter for the Court to determine proportionality, the prosecution submitted first that there does not exist a clear, obvious and manifest rational connection between the prosecution of expressive activities that are prejudicial to good order and discipline under section 129 of the *NDA* and the objective of maintaining discipline.

[67] By referring to the establishment of conduct to the prejudice to good order and discipline, the prosecution proposed that section 129 of the *NDA* has been tailored as a reasonable solution for limiting the prosecution of persons subject to the Code of Service Discipline regarding expressive activities that would impact only in relation to the objective, which is maintaining discipline, efficiency and morale of military, and nothing else.

[68] Considering the very unique situation of the military environment, which is the use of violence in a controlled and cohesive manner, as the evidence has demonstrated,

the prosecution took the position that section 129 of the *NDA* produces the minimal possible impairment to the right to freedom of expression of the applicant.

[69] On the question of overbreadth, the prosecution argued that section 129 of the *NDA* is an intelligible standard and does not go too far. It is true that it covers a wide range of behaviours, but the notion of prejudice to good order and discipline limits and prevents such situation.

[70] On the issue of vagueness, the prosecution referred to the decision of the CMAC in *R. v. Lunn*, CMAC-352, when the court said, in reference to section 129 of the *NDA*:

> It is not at all vague when the required particulars are properly provided with it.

[71] Concerning the issue that section 129 of the *NDA* was going well too far from the Parliament's objective of maintaining discipline, efficiency and morale of the military when expressive activities are sanctioned pursuant to that provision, the prosecution advanced that because of the CAF's unique disciplinary needs, as recognized by the SCC in the decision of *R. v. Généreux*, [1992] 1 S.C.R. 259, the existence of more severe sanctions is still proportionate to the objective in such a context.

[72] The prosecution concludes that in making the final balancing, I shall come to the conclusion that I am not facing a situation where deleterious effects of section 129 of the *NDA* are too great to permit the infringement of the applicant's right to freedom of expression, and consequently, that section 129 of the *NDA* is a reasonable limit prescribed by law in a free and democratic society.

Master Corporal Tuckett

[73] Considering the section 1 *Charter* analysis that I have to do, Master Corporal Tuckett's defence counsel expressed his opinion to the effect that the prosecution has not met the required burden.

[74] According to him, section 129 of the *NDA* is not a limit prescribed by law. It does not prescribe an intelligible standard capable of being interpreted because the standard expressed is so obscure that it is beyond definition. Consequently, no analysis under section 1 of the *Charter* would be required and he told me that I shall then proceed to the remedy phase.

[75] If I disagree with his perspective, he suggested that I should proceed with an analysis referring to the *Oakes* test, as suggested by the prosecution.

[76] On behalf of Master Corporal Tuckett, defence counsel suggested that he does not disagree with the prosecution's proposition on the pressing and substantial objective for section 129 of the *NDA*.

[77] However, for him, section 129 of the *NDA* does not produce the minimal possible impairment to the right to freedom of expression of the applicant. For him, this provision is too general and imprecise. According to him, the concept of prejudice to good order and discipline is unspecific and imprecise because it covers all and some prohibitions at the same time.

[78] Defence counsel suggested that by failing to demonstrate that section 129 of the *NDA* does not give adequate guidance to those expected to conform to it, and does not limit law enforcement discretion, the prosecution then did not refute the claim of vagueness and overbreadth he made. Consequently, he told the Court that the prosecution has not shown that the provision, on its face, does not catch more expression than necessary to meet the legislator's objective and that the language of the provision is not vague and unclear, that it may be applied in a way that in fact does not go beyond the legislator's stated goals.

[79] For defence counsel, in making the final balance, I shall conclude that I am facing a situation where deleterious effects of section 129 of the *NDA* are too great and permit the infringement of the applicant's right to freedom of expression, and consequently, that section 129 of the *NDA* is not a reasonable limit prescribed by law in a free and democratic society.

Analysis

[80] I would like to highlight the fact that this very question has been decided many years ago in the context of the court martial of Corporal Purnelle. Chief Military Judge Brais had an application before him raising the same questions.

[81] The decision has not been published, but the minutes of proceedings for that court martial do exist and it can be found in it. In addition, the Office of the Chief Military Judge also initiated a project to put on a specific format court martial decisions that were not published. Consequently, the decision of Chief Military Judge Brais has been put in a publishing format but has not been published yet. This is the document that I provided to counsel in February 2019, for them to consider this decision that is actually only available in the French language. The decision may be cited as follows: *R. v. Purnelle*, docket number C199704, 18 February 1997.

[82] That being said, I find it important to raise the fact that Chief Military Judge Brais, after concluding that section 129 of the *NDA* infringed the right of Corporal Purnelle to freedom of expression under paragraph 2(*b*) of the *Charter*, confirming the admission made by the prosecution to that effect, concluded, further to an analysis under section 1 of the *Charter* while using the *Oakes* test, that the prosecution had proven, on a balance of probabilities, that section 129 of the *NDA* is a reasonable limit prescribed by law in a free and democratic society.

[83] Even if I am not bound by such decision, I must say that I found no reason to come to a different conclusion on the basis of the evidence adduced before me in the course of the present hearing.

Is section 129 of the NDA inconsistent with the right of the accused to freedom of expression under paragraph 2(b) of the Charter?

[84] As Chief Military Judge Brais in *Purnelle*, I confirmed that section 129 of the *NDA* is inconsistent with the right of the accused to freedom of expression under paragraph 2(*b*) of the *Charter*. This provision limits the right to freedom of expression of Canadian citizens who decided to be part of the CAF as military members, on a great number of topics related to the performance of their duties and to the perception by the public, individually and as a group.

[85] It does also confirm the admission made by the prosecution to that same effect.

Is section 129 of the NDA to be regarded as a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under section 1 of the Charter?

[86] Now, with the burden shifting to the prosecution, has it proven, on a balance of probabilities, that section 129 of the *NDA* is a reasonable limit prescribed by law in a free and democratic society?

Prescribed by law

[87] Defence counsel submitted that section 129 of the *NDA* does not constitute a limit prescribed by law. I disagree with him. It is expressly provided for by statute, which is the *NDA* as clearly stated in *R. v. Therens*, [1985] 1 S.C.R. 613, at paragraph 60.

[88] Section 129 of the *NDA* is "an intelligible standard according to which the judiciary must do its work" (*Irwin Toy Ltd*. at page 983). There is some discretion but not plenary discretion to do whatever seems best. This provision is framed with the existence of the fact that an act, conduct, disorder or neglect could be prejudicial to good order and discipline.

[89] The CMAC in *Jones* clearly said that when a situation does not arise from a well-known established CAF regulation or policies framing what is acceptable or not as an act or conduct contemplated under section 129 of the *NDA*, then logic and common sense must prevail, in the sense that if logical factual inferences point to a situation which constitutes harm or a real risk of harm to good order and discipline, then it can be regulated by that provision.

[90] In short, section 129 of the *NDA* allows the control of the conduct of persons subject to the Code of Service discipline when it impacts on order and discipline in the

CAF. All military members, through their training and education within the CAF, get a sense of the importance of discipline on the morale and the cohesion of a group. By the way they wear their uniform, they execute drills or handle a weapon, they learned discipline and how it could impact if it is not there. For the average Canadian citizen, an armed force is synonymous with discipline and when somebody joins the CAF, this person expects to learn about it and sometime fears how he or she would react to it.

[91] Then, as a matter of common sense, military members can reasonably foresee that some expressive activities may sometime impact on the morale and cohesion because of the very nature of the military environment they are working in. Saying that such provision is too wide to the extent that it becomes unintelligible because it covers a very wide range of situations involving freedom of expression cannot stand in such a context.

[92] Only situations limited to being prejudicial to good order and discipline, as defined by the CMAC in *R. v. Golzari*, 2017 CMAC 3, will be considered for disciplinary purposes. This concept clearly qualified section 129 of the *NDA* as an intelligible standard.

[93] Consequently, an analysis under section 1 of the *Charter* is then needed.

Substantial and pressing objective

[94] In order to answer the question, I must apply the *Oakes* test, the first step of it requiring that I ask myself the following question: is the objective sufficiently important to justify limiting freedom of expression?

[95] In *Moriarity*, the SCC came to the conclusion that for some specific provisions of the Code of Service Discipline in the *NDA*, the objective is to maintain discipline, efficiency and morale of the military. I would agree with counsel that such objective is also a valid one for section 129 of the *NDA*.

[96] As demonstrated by the evidence, in order to perform their tasks and duties, there is a need to control freedom of expression among military members and in a military environment. Without such control and limitation, the morale of military members could be undermined, which would impact on the cohesion of the group. In *Généreux* the SCC said at page 293:

> The safety and well-being of Canadians depends considerably on the willingness and readiness of a force of men and women to defend against threats to the nation's security. To maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently.

[97] This statement illustrates why such objective is pressing and substantial and the evidence adduced by the prosecution, especially the one provided by Commodore Patterson, supports that SCC statement.

Proportionality

[98] For determining if there is proportionality between the objective and the means used to achieve it, I must ask myself some questions. First, is the limit rationally connected to the objective?

Rational connection

[99] Is the means rationally connected to the legislative objective? Section 129 of the *NDA* is aimed at all military members, without distinguishing by rank or status. It provides the conditions to enforce it. However, logically, it would be difficult to request from Parliament a precision that would allow this provision to cover all situations involving expressive activities.

[100] The prosecution demonstrated, on a balance of probabilities, that there is a causal relationship between the limit and the benefit sought. As an example, among other things, it showed that sexualized comments may impact on the morale of individuals, and on the cohesion of a group, and when the CAF authorities decided that such conduct must be disciplined, the use of section 129 of the *NDA* on this matter appears to be justified, achieving the objective of maintaining discipline when such harmful conduct occurred.

[101] I would then agree with the prosecution that a rational connection exists between the prosecution of expressive activities that are prejudicial to good order and discipline under section 129 of the *NDA*, and the substantial and pressing objective of maintaining discipline, efficiency and morale of the military.

[102] I just want to raise the fact that, even if *Moriarity* did not exist at the time, Chief Military Judge Brais came to that same conclusion for essentially the same reasons.

Minimal impairment

[103] On this question, defence counsel raised two issues. First, by its penal nature, section 129 of the *NDA* exposes CAF members to a deprivation of their liberty for things related to expressive activities, while usually in a working environment similar to that of the CAF, administrative sanctions are considered more than adequate to deal with such matters. Second, the vagueness and/or the overbreadth of section 129 of the *NDA* allows it to cover situations which go well beyond what it tries to achieve, basically forcing CAF members to absolute silence if they do not want to be disciplined.

[104] Through the testimonies of Commodore Patterson and Chief Warrant Officer Halpin, the prosecution has established, on a balance of probabilities, that the CAF working environment is unique by what it has to perform and what is expected. The use of lethal force in a controlled and cohesive manner for defending the country and its citizens domestically and abroad distinguishes the CAF from any other working environment that may appear similar. It is the means of last resort, and consequently, it

is expected that the CAF cannot fail. Then it makes other similar working environments useless for comparison.

[105] Being unique does not allow you to do anything you want. As such, even if Parliament allows CAF members to be disciplined on expressive activities under section 129 of the *NDA*, it has to make sure that, if for any reason, a military member is found guilty for such thing, then the very well-recognized and fundamental principle of proportionality on sentence has to be respected by service tribunals, as mentioned at section 203.2 of the *NDA*.

[106] The evidence adduced by defence counsel through RDPs have very often shown, issues related to freedom of expression are mostly dealt with by summary trial. Usually, a fine and/or a reprimand will be imposed in order to apply the proportionality principle on sentence. However, there is no evidence that such situation will lead to some incarceration. As a matter of last resort, the latter does not appear as being the sentence of choice for service tribunals when sanctioning situations involving expressive activities.

[107] Disciplinary actions are usually taken for punishing the military member and for deterring him or her, and others who would find themselves in the same situation, to commit such offence. It is a way to control the behaviour but, in a military context, to train a military member to obey and respect rules. Even if there is a penal sanction, by its nature, provisions within the Code of Service Discipline are there to achieve the objective of maintaining discipline, efficiency and morale of the military.

[108] In addition, legal actions, complaints such as harassment complaints or human rights complaints, or even grievances are additional means available to CAF members for raising the issue of a limitation to the right to freedom of expression.

[109] Conclusively, the very unique working environment and the existence of some provisions on sentence or other available means does support my conclusion that section 129 of the *NDA* meets the minimal impairment required.

[110] On the issue of vagueness and overbreadth, I would say that the comments I made previously on the question related to section 129 of the *NDA* as being a limit prescribed by law are relevant and sufficient to respond to defence counsel’s concern.

[111] Section 129 of the *NDA* is not too general or imprecise in its language. Situations raising issues on the fact that they are prejudicial to good order and discipline have been well identified through the years by the CMAC and it has provided clear guidance on the meaning of this concept.

[112] In addition, this provision catches, or is limited to, expressive activities that are prejudicial to good order and discipline, not to all activities that are conducted in all situations.

[113] All possible regulations, orders, directives, and local orders regarding expressive activities, as long as they were duly notified pursuant to section 72.2 of the *NDA*, are potentially enforceable under section 129 of the *NDA*. It must be proven beyond a reasonable doubt that a person subject to the Code of Service Discipline knew or ought to have known any of them in order to be charged under that provision. All other situations that could be considered under this provision shall be inferred from the circumstances if the evidence clearly points to prejudice as a natural consequence of a proven act. The limits for section 129 of the *NDA* are then clear enough to apply it with certainty.

Proportionality (final balancing)

[114] Section 129 of the *NDA* impacts on the right to freedom of expression of CAF members. It captures expressive activities that would be prejudicial to good order and discipline. However, this limitation has some measure and is for one specific purpose: maintaining discipline, efficiency and morale of the military to ensure readiness for using the appropriate level of force, including a lethal one, in a coordinated and cohesive manner, to defend and help Canadians domestically and abroad.

[115] The benefit of limiting the right to freedom of expression of military members for disciplinary purposes with section 129 of the *NDA* is high because it achieves the pressing and substantial objective identified. The impact on limiting this right is also there, but as long as it does not result in absolute silence, because the provision is tailored and limited to serve the objective as it was demonstrated on a balance of probabilities by the prosecution, it is clear that the harm caused by this restriction does not go beyond that objective.

[116] This is a case where it was demonstrated, on a balance of probabilities, that the collective good benefits of safety and well-being of Canadians through its armed force outweighed the one of CAF members' individual right to freedom of expression because there is proportionality between the effects of the measure that limits the right and the law's objective.

[117] I conclude that the prosecution, on a balance of probabilities, proved that section 129 of the *NDA* is a reasonable limit prescribed by law in a free and democratic society.

FOR ALL THESE REASONS, AS THE MILITARY JUDGE ASSIGNED TO PRESIDE AT THE COURT MARTIAL OF MASTER CORPORAL TUCKETT, I:

[118] **DECLARE** that section 129 of the *NDA* is inconsistent with the right of Master Corporal Tuckett to freedom of expression guaranteed under paragraph 2(*b*) of the *Charter*.

[119] **DECLARE** that the limits imposed on the right of Master Corporal Tuckett to freedom of expression guaranteed under paragraph 2(*b*) of the *Charter* by section 129 of the *NDA* are reasonable limits prescribed by law in a free and democratic society.

[120] **DISMISS** the application brought by Master Corporal Tuckett.

Counsel :

Major A. Gélinas-Proulx, Defence Counsel Services, Counsel for the applicant, Master Corporal W.A. Tuckett

The Director of Military Prosecutions as represented by Major L. Langlois and Lieutenant(N) J. Besner, Counsel for the respondent