



## COURT MARTIAL

**Citation:** *R. v. Malikov*, 2021 CM 3010

**Date:** 20210831

**Docket:** 202114

Standing Court Martial

4th Canadian Support Base Petawawa  
Petawawa, Ontario, Canada

**Between:**

**Her Majesty the Queen**

- and -

**Bombardier T. Malikov, Offender**

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

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### **REASONS FOR THE SENTENCE**

(Orally)

#### **Introduction**

[1] Bombardier Malikov pleaded guilty to the first and only charge of the charge sheet. The first charge of conduct to the prejudice of good order and discipline, which reads as follows:

“FIRST CHARGE  
NDA section 129

CONDUCT TO THE PREJUDICE OF  
GOOD ORDER AND DISCIPLINE

*Particulars:* In that he, on or about 30 November 2017, at Petawawa Golf Club, Petawawa, Ontario, did say to Bdr R.M. “Fucking nigger! You fucking niggers come here and take our women...” or words to that effect.”

[2] The Court, having accepted and recorded a plea of guilty in respect of this charge, now finds you guilty of this offence.

[3] In the particular context of an armed force, the military justice system constitutes the ultimate means of enforcing discipline, which is a fundamental element of the military activity in the Canadian Armed Forces (CAF). The purpose of this system is to prevent misconduct or, in a more positive way, promote good conduct. It is through discipline that an armed force ensures that its members will accomplish, in a trusting and reliable manner, successful missions. The military justice system also ensures that public order is maintained and that those subject to the Code of Service Discipline are punished in the same way as any other person living in Canada.

[4] Concerning the sentence to be imposed by the Court, the prosecutor and the offender's defence counsel presented a joint submission. They recommended that the Court impose a fine in the amount of \$1,000, payable in four monthly instalments of \$250.

### **Summary of circumstances**

[5] The circumstances of the offence were presented to the Court through a Statement of Circumstances read by the prosecutor, and for which the offender acknowledged these facts as conclusive evidence. This Statement of Circumstances reads as follows:

#### **“STATEMENT OF CIRCUMSTANCES**

1. On 30 November 2017, the members of 2 Royal Canadian Horse Artillery (2 RCHA) were present at the Petawawa Golf Club for the St. Barabara's Christmas Day Ball.
2. That evening, Bdr McBurnie was tasked as one of the duty drivers in order to drive individuals back to their lodgings after the Ball. Approximately around midnight, Bdr McBurnie noticed Bdr Malikov in the Petawawa Golf Club parking lot.
3. Bdr McBurnie approached Bdr Malikov to offer him a ride. Bdr Malikov turned to Bdr McBurnie and stated to him words to the effect of “You niggers come here and fuck women.” Bdr McBurnie responded by stating that he would not give Bdr Malikov a ride.
4. The comments were overheard by Bdr Reed, the other duty driver that night. He intervened and told Bdr Malikov to get into his duty vehicle so that he could drive him to P-102.

5. Following the incident, Bdr McBurnie has not felt that he has received a sincere or meaningful apology from Bdr Malikov. The impact of the incident on Bdr McBurnie is addressed in the Victim Impact Statement provided to the Court.”

**Agreed statement of facts**

[6] Defence counsel introduced an Agreed Statement of Facts that reads as follows:

**“AGREED STATEMENT OF FACTS**

1. Bdr Malikov joined the Canadian Armed Forces (CAF) in 2009. He has served in the artillery throughout his career.
2. Bdr Malikov has sought a voluntary release from the CAF and will be starting his life as a civilian in the coming months.
3. Bdr Malikov struggles with alcoholism. Bdr Malikov seeks treatment and is on a temporary medical category for his condition.
4. Bdr Malikov is remorseful of his actions, as evidenced in the apology letter that he has provided to the victim and the court.”

**The joint submission**

[7] Although this Court is not bound by the joint recommendation made by counsel, it is generally accepted that the sentencing judge should depart from the joint submission only when it is contrary to the public interest or will bring the administration of justice into disrepute, as stated by the Supreme Court of Canada in *R. v. Anthony-Cook*, 2016 SCC 43, at paragraph 32. The only situation where the Court would depart from the recommendation is where the proposed sentence would be viewed by reasonable and informed persons as a breakdown in the proper functioning of the justice system and this includes courts martial. It is the responsibility of lawyers, in these circumstances, to provide to the Court a full account of the offender’s situation and of the circumstances of the offence in a joint submission. Here, the Court is satisfied with the information provided by counsel. They provided sufficient and detailed information for the Court to appreciate the joint submission arising from their discussions in the specific context they were dealing with.

[8] In this case, the principles and objectives of maintaining public trust in the CAF as a disciplined armed force, denunciation and general deterrence of offenders and other persons from committing such offences or anything similar, providing reparations for harm done to victims or to the community and promoting a sense of responsibility in offenders and an acknowledgement of the harm done to victims and to the community were an integral part of counsel’s discussions and the basis for their joint submission.

[9] It must be reminded that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender as it is stated at section 203.2 of the *National Defence Act (NDA)*.

[10] Bombardier Malikov started his career with the CAF with the reserve force. He joined the regular force, according to the Member's Personnel Record Résumé in 2009. He had a decent career, however, as he admitted, he was partying and struggling at the time of the offence with alcohol problems. It does not excuse at all what happened, but it may help the Court to understand the context. Bombardier Malikov stated that he intends to release from the CAF at some point, and address this very specific problem.

[11] The first step for him in the circumstances was to recognize responsibility, what has been done through his plea of guilty. In addition, as requested by the prosecution, he formally apologized and his apology was read in the courtroom in the presence of the victim

[12] Talking now about the victim, Bombardier McBurnie, I just want to let you know that you used fine words. There is no way for me to express better what you said. You clearly expressed the impact these words had on you, and why they are not accepted in our Canadian society, including the CAF.

[13] It has not been mentioned by counsel here, but I am still aware, because judges keep contact with the society and with the Canadian Forces, that there is a class action for those kinds of things. I am not saying anything from a legal perspective, but time has changed. I have been, so far, a military judge for fifteen years. I have thirty-two years in the Canadian Forces. I can tell you that what has happened was not acceptable and still not acceptable, but now, as you decided to do, you said "enough is enough", I have to take action and raise that issue, and this is what people are doing. So, we see class actions involving the Canadian Forces in this. We have seen this here, the Assistant Deputy Minister of National Defence coming with an anti-racism plan, recognizing systemic racism within the Canadian Forces. The purpose of this plan is to make more people aware of the extent of the problem and the need to fix it as soon as we can. One way to fix it is exactly the way Bombardier McBurnie took. It is to express the problem, bring it to an authority, and at some point, it will find a resolution. It does not mean that every single time it will end up before a court martial, but that is a way to do it.

[14] Additionally, DAOD Chapter 5019-0 was recently amended in order to officially recognize hateful conduct as a performance deficiency for members of the Canadian Forces. So, anything related to the colour of the skin, or the race is of concern within the Canadian Forces, and the Canadian society. The idea of all these things is to prevent the conduct related to race and colour in a better way.

[15] I want to express to Bombardier McBurnie that I admire his courage, which is something I think needs be highlighted here. He took the time to process what happened, decided on how best to address it, and then took action. I cannot state it any

better way that what he has already said: “enough is enough”, which was subsequently recognized by Bombardier Malikov. Such a situation is exactly what the Canadian Forces want to prevent, not just for the individual, but also from a collective perspective. This is where morale and cohesion may start to erode and impact on the mission.

[16] Canadian Forces Code of Values & Ethics put first, as the very first principle that their members must “respect the dignity of all persons”. Of all. And the matter before this Court is exactly about this.

[17] You expressed yourself; an apology was made. I hope it may help you to start to deal properly with this situation and make you be what you are. As you said it, you are a happy person, and I hope that you will come back to that state.

[18] Bombardier Malikov you started to realize the consequences of drinking alcohol may have when it goes too far, and how it can make an individual, no matter what, do things that you are not used to do. You accepted and recognized that you have a problem, and I encourage you to follow that path because it will just help you to better appreciate this life and help others in a positive way.

### **Conclusion**

[19] I would like to thank counsel for their work and the approach they have taken for this process. From my perspective, I think it was done appropriately. They took into consideration the individuals involved in this, and there was a forum for a resolution. This is for each of them a way to start to turn the page and move on. I appreciate from both of you the hard work you put forth.

[20] I accept the joint submission counsel made to sentence Bombardier Malikov to a fine in the amount of \$1,000, as it is not contrary to the public interest, and it will not bring the military justice system into disrepute.

### **FOR THESE REASONS, THE COURT:**

[21] **FINDS** Bombardier Malikov guilty of the first charge contrary to section 129 of the *NDA* for conduct to the prejudice of good order and discipline.

[22] **SENTENCES** Bombardier Malikov to a fine in the amount of \$1,000, payable in four equal monthly instalments of \$250, starting 1 September 2021.

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### **Counsel:**

The Director of Military Prosecutions as represented by Major A. Dhillon

Major F.D. Ferguson, Defence Counsel Services, Counsel for Bombardier T. Malikov