



COURT MARTIAL

Citation: *R. v. Cogswell*, 2021 CM 2017

Date: 20210818

Docket: 201935

Standing Court Martial

5th Canadian Division Support Base Gagetown
Oromocto, New Brunswick, Canada

Between:

Her Majesty the Queen

-and-

Bombardier C.H. Cogswell, Accused

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

REASONS FOR FINDING

(Orally)

The case

[1] The allegations before the court relate to an alleged incident that occurred on 21 July 2018, involving members of W (Whiskey) Battery, Royal Canadian Artillery School (RCAS), who were scheduled to conduct a live fire portion of Exercise COMMON GUNNER at 5 Canadian Division Support Brigade's (CDSB) training area at Canadian Forces Base (CFB) Gagetown, New Brunswick. The exercise ran for two and a half weeks.

[2] Bombardier Cogswell, known as Bombardier Fraser at the time of the alleged incident, baked a dozen cupcakes that she distributed while working at the on-site

mobile canteen. The prosecution withdrew eight charges before the start of the court martial. The remaining charges read as follows:

“FIRST CHARGE

Section 93 of the
National Defence Act
(Alternate to the Second Charge)

BEHAVED IN A DISGRACEFUL MANNER

Particulars: In that she, on or about 21 July 2018, in the training area at 5 CDSB Gagetown, New Brunswick, did distribute cupcakes containing cannabis to Canadian Forces personnel during a domestic live fire exercise.

SECOND CHARGE

Section 129 of the
National Defence Act
(Alternate to the First Charge)

AN ACT TO THE PREJUDICE OF GOOD ORDER AND DISCIPLINE DURING MILITARY TRAINING

Particulars: In that she, on or about 21 July 2018, in the training area at 5 CDSB Gagetown, New Brunswick, did distribute cupcakes containing cannabis to Canadian Forces Personnel during a domestic live fire exercise.

THIRD CHARGE

Section 130 of the
National Defence Act
(Alternate to the Fourth charge)
[Fourth charge withdrawn 4 August 2021]

AN OFFENCE PUNISHABLE UNDER SECTION 130 OF THE NATIONAL DEFENCE ACT, THAT IS TO SAY ADMINISTERING A NOXIOUS THING, CONTRARY TO SECTION 245(1)(B) OF THE CRIMINAL CODE

Particulars: In that she, on or about 21 July 2018, in the training area at 5 CDSB Gagetown, New Brunswick, did cause Dylan Eoll to use cannabis with intent to aggrieve or annoy.

FIFTH CHARGE

Section 130 of the
National Defence Act
(Alternate to the Sixth charge)
[Sixth charge withdrawn 4 August 2021]

AN OFFENCE PUNISHABLE UNDER SECTION 130 OF THE NATIONAL DEFENCE ACT, THAT IS TO SAY ADMINISTERING A NOXIOUS THING, CONTRARY TO SECTION 245(1)(B) OF THE CRIMINAL CODE

Particulars: In that she, on or about 21 July 2018, in the training area at 5 CDSB Gagetown, New Brunswick, did cause Connor Chubry to use cannabis with intent thereby to aggrieve or annoy.

SEVENTH CHARGE

Section 130 of the
National Defence Act
(Alternate to the Eighth charge)
[Eighth charge withdrawn 4 August 2021]

**AN OFFENCE PUNISHABLE
UNDER SECTION 130 OF THE
NATIONAL DEFENCE ACT, THAT
IS TO SAY ADMINISTERING A
NOXIOUS THING, CONTRARY TO
SECTION 245(1)(B) OF THE
CRIMINAL CODE**

Particulars: In that she, on or about 21 July 2018, in the training area at 5 CDSB Gagetown, New Brunswick, did cause Lyann Lechman to use cannabis with intent thereby to aggrieve or annoy.

NINTH CHARGE

Section 130 of the
National Defence Act
(Alternate to the Tenth charge)
[Tenth charge withdrawn 4 August 2021]

**AN OFFENCE PUNISHABLE
UNDER SECTION 130 OF THE
NATIONAL DEFENCE ACT, THAT
IS TO SAY ADMINISTERING A
NOXIOUS THING, CONTRARY TO
SECTION 245(1)(B) OF THE
CRIMINAL CODE**

Particulars: In that she, on or about 21 July 2018, in the training area at 5 CDSB Gagetown, New Brunswick, did cause Jordan Slade to use cannabis with intent thereby to aggrieve or annoy.

ELEVENTH CHARGE

Section 130 of the
National Defence Act
(Alternate to the Twelfth charge)
[Twelfth charge withdrawn 4 August 2021]

**AN OFFENCE PUNISHABLE
UNDER SECTION 130 OF THE
NATIONAL DEFENCE ACT, THAT
IS TO SAY ADMINISTERING A
NOXIOUS THING, CONTRARY TO
SECTION 245(1)(B) OF THE
CRIMINAL CODE**

Particulars: In that she, on or about 21 July 2018, in the training area at 5 CDSB Gagetown, New Brunswick, did cause

Liam Jarbeau to use cannabis with intent thereby to aggrieve or annoy.

THIRTEENTH CHARGE

Section 130 of the
National Defence Act
(Alternate to the Fourteenth charge)
[Fourteenth charge withdrawn 4 August 2021]

**AN OFFENCE PUNISHABLE
UNDER SECTION 130 OF THE
NATIONAL DEFENCE ACT, THAT
IS TO SAY ADMINISTERING A
NOXIOUS THING, CONTRARY TO
SECTION 245(1)(B) OF THE
CRIMINAL CODE**

Particulars: In that she, on or about 21 July 2018, in the training area at 5 CDSB Gagetown, New Brunswick, did cause William Vallerand to use cannabis with intent thereby to aggrieve or annoy.

FIFTEENTH CHARGE

Section 130 of the
National Defence Act
(Alternate to the Sixteenth charge)
[Sixteenth charge withdrawn 4 August 2021]

**AN OFFENCE PUNISHABLE
UNDER SECTION 130 OF THE
NATIONAL DEFENCE ACT, THAT
IS TO SAY ADMINISTERING A
NOXIOUS THING, CONTRARY TO
SECTION 245(1)(B) OF THE
CRIMINAL CODE**

Particulars: In that she, on or about 21 July 2018, in the training area at 5 CDSB Gagetown, New Brunswick, did cause William Long to use cannabis with intent thereby to aggrieve or annoy.

SEVENTEENTH CHARGE

Section 130 of the
National Defence Act
(Alternate to the Eighteenth charge)
[Eighteenth charge withdrawn 4 August 2021]

**AN OFFENCE PUNISHABLE
UNDER SECTION 130 OF THE
NATIONAL DEFENCE ACT, THAT
IS TO SAY ADMINISTERING A
NOXIOUS THING, CONTRARY TO
SECTION 245(1)(B) OF THE
CRIMINAL CODE**

Particulars: In that she, on or about 21 July 2018, in the training area at 5 CDSB Gagetown, New Brunswick, did cause Nathan Penner to use cannabis with intent thereby to aggrieve or annoy.”

[3] In reaching the Court's decision, I reviewed and summarized the facts emerging from the evidence and made findings on the credibility of the witnesses. I instructed myself on the applicable law and applied the law to the facts, conducting my analysis before I came to a determination on each of the charges.

Background and basic facts

[4] Exercise (EX) COMMON GUNNER was the first exercise of its type that unfolded at RCAS where all the artillery functions or subunits came together to conduct combined individual training within a larger construct. It was described as having many moving parts with multiple courses, with approximately 100 students who needed to confirm their training. It was estimated that there were as many as 150 personnel who participated in the exercise. The summer time period was particularly busy at the RCAS as not only did they have multiple courses in-house where the training of the students culminated in the major live-fire exercise ongoing, but they were also in the middle of the posting season. Despite the incident being reported and a "Check fire" command (stoppage in firing the guns) was ordered for the gun line, the rest of EX COMMON GUNNER continued as there were training requirements that needed to be fulfilled, with different activities unfolding concurrently.

[5] W Battery provides support to the RCAS, its instructors and students. RCAS tasked W Battery to run supplies out to the members during the exercise.

[6] Then-Major Cutting, Battery Commander (BC) commanded W Battery and the Battery Sergeant Major (BSM) was then-Master Warrant Officer Ladouceur who served as the most senior non-commissioned member within the battery. The battery is then broken down into troops that are each led by a Gun Position Officer (GPO). The GPO is responsible for the overall conduct of the gun position and the GPO is supported by a sergeant major, which is referred to as a Troop Sergeant Major (TSM). Lieutenant McCarthy was the GPO on that day and both Warrant Officers Mangrove and Sampson were referred to by the witnesses as the TSMs. Under the troop, there were three different detachments of which two are implicated in the facts before the Court. One of the detachments was led by then-Master Bombardier Vallerand and the second detachment was led by then-Master Bombardier Diggs. They are referred to as Number 1s or Detachment Commanders.

[7] Bombardier Cogswell was assigned to W Battery and was responsible for manning and supporting a mobile canteen that provided snacks and supplies to the soldiers while in the field. The canteen moved around the training area to different locations to support the various activities. On 21 July 2018, Gunner McLandress was also working in the canteen with Bombardier Cogswell.

[8] On the morning in question, then-Master Bombardier Diggs' detachment was already on the gun line at Airstrip 1 and had just finished recording their gun when the mobile canteen truck arrived at approximately 1030 to 1100 hours. Mr. (then-Master Bombardier) Diggs explained that they had a break in their schedule so he told his

detachment to go to the canteen. From his detachment, two members, then-Bombardier Lechman and then-Gunner Eoll attended the canteen and each consumed a cupcake. Then-Bombardier Lechman brought a cupcake back from the canteen for then-Bombardier Chubry. All three of them displayed mind-altering symptoms consistent with the ingestion of cannabis. Then-Master Bombardier Diggs also consumed a cupcake, but aside from having a dry pasty mouth, he did not exhibit any mind-altering symptoms.

[9] Most witnesses described the cupcakes as chocolate, approximately two inches by two inches in size, with chocolate icing and a jelly bean on top. There was a wrapper at the bottom of each cupcake, holding it together.

[10] The evidence suggests that the canteen then moved to a different location where Master Bombardier Vallerand's detachment was in position. The testimony before the Court suggested that his detachment was located approximately thirty minutes away from Airstrip 1.

[11] At that location, then-Master Bombardier Vallerand, then-Gunners Jarbeau and Long, as well as then-Bombardier Slade attended the canteen and consumed cupcakes. Then-Gunner Penner also attended at the canteen, but did not take a cupcake. After their visit to the canteen, the members of then-Master Bombardier Vallerand's detachment returned to the truck to do random work. Approximately, fifteen minutes later, then-Gunner Penner ate the remaining piece of the cupcake that then-Gunner Jarbeau did not finish that was left in the cab of the truck.

[12] Master Bombardier Vallerand's detachment then packed up from their position, got into their truck and started to move to Airstrip 1, where the gun line was located. Then-Gunner Long was driving the truck and while enroute, he started to feel mind-altering symptoms and almost had an accident with the vehicle in front of them. Similarly, then-Master Bombardier Vallerand, then-Gunners Jarbeau and Penner experienced similar symptoms that only manifested themselves during the drive to Airstrip 1. Then-Bombardier Slade slept in the back of the vehicle during the drive between the two locations and upon waking up, he felt very foggy, lethargic, incoherent and slow.

[13] After the two detachments were amalgamated together at the gun line, they began comparing their symptoms and eventually came to the conclusion that they were all feeling "weird" and that their symptoms were similar. Some of the members who were familiar with the symptoms of cannabis began to suspect that they were high. After further discussions, they identified the source of their symptoms to be the cupcakes.

[14] The Commandant of RCAS contacted the military police (MP), through then-Captain Kaempffer, to investigate the incident. Corporal Benjamin Whitehall, a MP, attended the bivouac and began a MP investigation.

[15] Corporal Whitehall received a single cupcake wrapper in a Ziploc bag from then-Captain Kaempffer, which he sent for testing by Health Canada. The MP shipped the sealed wrapper on 12 September 2018, by way of Express Post and it arrived on 14 September 2018 at the Health Canada Laboratory in Longueuil, Quebec. Testing by Health Canada revealed the presence of tetrahydrocannabinol (THC) on the wrapper. In an Agreed Statement of Fact, the Certificate of the Analyst, dated 4 October, 2018, signed by Vincent Levasseur was admitted into evidence.

[16] Captain Kaempffer collected five samples of urine pursuant to the Canadian Forces Drug Control Program from five different members involved in the incident who voluntarily submitted to the drug testing. He sent the samples to a Dynacare Laboratory in London, Ontario by way of Purolator. Three members did not provide a urine sample, being then-Gunners Jarbeau and Penner and then-Bombardier Slade.

[17] On 31 July 2018, all five urine samples collected from the affected individuals tested positive for marijuana metabolite as certified by an analyst named Amber Rose. The test measures the nanograms (ng) of a toxic substance in millilitres (ml) of blood. The toxicology results of the urine analysis for marijuana metabolite are as follows: DE1037539 (Gunner Lechman) = 68 ng/ml; DE1081064 (Gunner Eoll) = 25 ng/ml; DE1081065 (Gunner Chubry) = 65 ng/ml; DE1081066 (Master Bombardier Long) = 16 ng/ml; DE1081067 (Master Bombardier Vallerand) = 16 ng/ml.

[18] The fact that marijuana metabolite was detected in their urine means the members who provided the samples consumed marijuana within twenty-eight days prior to the date the sample was provided.

Evidence

[19] In addition to all the substantial documentary evidence filed in Court, the prosecution called sixteen witnesses. The accused did not testify. However, on consent the prosecution and defence agreed that the two interviews Bombardier Cogswell participated in with a military police investigator, Sergeant LeBlanc, were voluntary, properly cautioned, and admissible at trial without the need for a *voir dire*.

Presumption of innocence

[20] That presumption of innocence remains throughout the court martial until such time as the prosecution has, on the evidence put before the Court, satisfied the Court beyond a reasonable doubt that the accused is guilty of the charges before it.

[21] So, what does the expression “beyond a reasonable doubt” mean? The term “beyond a reasonable doubt” is anchored in our history and traditions of justice. It is so entrenched in our criminal law that some think it needs no explanation, but its meaning bears repeating (see *R. v. Lifchus*, [1997] 3 S.C.R. 320, paragraph 39):

A reasonable doubt is not an imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.

[22] In essence, this means that even if I believe that Bombardier Cogswell is probably guilty or likely guilty, that is not sufficient. If the prosecution fails to satisfy me of her guilt beyond a reasonable doubt, I must give her the benefit of the doubt and acquit her.

[23] On the other hand, it is virtually impossible to prove anything to an absolute certainty and the prosecution is not required to do so. Such a standard of proof is impossibly high. Therefore, in order to find Bombardier Cogswell guilty of the charges before the Court, the onus is on the prosecution to prove something less than an absolute certainty, but more than probable guilt for the charges set out in the charge sheet (see *R. v. Starr*, 2000 SCC 40, [2000] 2 S.C.R. 144, paragraph 242).

[24] The evidence in this case is circumstantial. In other words, nobody saw Bombardier Cogswell put cannabis in the cupcakes. Circumstantial evidence, “is any fact from the existence of which the trier of fact may infer the existence of a fact in issue” (see *R. v. Arcuri*, 2001 SCC 54, paragraph 23).

[25] The application of this standard of proof can be challenging in cases that are reliant on circumstantial evidence. Unlike direct evidence, which, if believed resolves the matter in issue, circumstantial evidence requires inferences to be drawn from the evidence as a whole (see *R. v. Cinous*, 2002 SCC 29 at paragraph 88). The accused should not be convicted unless those inferences leave no reasonable doubt about the guilt of the accused.

[26] What this means is that circumstantial evidence cannot prove something beyond a reasonable doubt if that evidence supports another reasonable inference other than that of guilt.

[27] In *R. v. Villaroman*, 2016 SCC 33, the Supreme Court of Canada (SCC) clarified the law of circumstantial evidence. The SCC concluded that “inferences consistent with innocence do not have to arise from proven facts”, but can arise from an absence of evidence which is what the defence asserts is the case here (see *Villaroman* at paragraph 35). Requiring otherwise would place a burden on Bombardier Cogswell to prove facts supporting her innocence, and ignore the rule that a reasonable doubt must be based on a consideration of all of the evidence.

[28] While I must consider all plausible theories or reasonable possibilities that are inconsistent with guilt, the prosecution does not need to negate irrational or fanciful conjectures that may be consistent with innocence (see *Villaroman* at paragraph 37). These theories or possibilities must be based on logic and experience applied to the evidence, not on speculation.

The law

Section 93 of the NDA – disgraceful conduct

[29] Section 93 of the *National Defence Act (NDA)* states:

Every person who behaves in a cruel or disgraceful manner is guilty of an offence and on conviction is liable to imprisonment for a term not exceeding five years or to less punishment.

[30] In order to prove a charge of disgraceful conduct, the prosecution is required to prove a number of elements of the offence. Based on the unrefuted evidence before the Court, the Court has no problem concluding that the elements of time and place have been met. The elements left to be proven beyond a reasonable doubt for the charge are as follows:

- (a) the conduct alleged in the particulars of the charge;
- (b) that it was the accused who engaged in the conduct set out in the particulars;
- (c) the alleged conduct constituted disgraceful conduct; and
- (d) that the accused had the wrongful intent.

Section 129 of the NDA – conduct to the prejudice of good order and discipline

[31] The second charge before the Court alleges that in the alternative to the first charge that there is a violation of section 129 of the *NDA* for conduct to the prejudice of good order and discipline. Based on the unrefuted evidence before the Court, the Court has no problem concluding that the elements of time and place have been met.

[32] Similar to the required proof in the first charge, the prosecution must prove beyond a reasonable doubt the conduct as alleged and that the accused was the person who put the cannabis into the cupcakes.

[33] In order to prove that the alleged conduct is prejudicial to good order and discipline, there are a number of paths to do so:

- (a) firstly, the prosecution could prove the accused violated an established policy or order that the accused had actual or deemed knowledge of;
- (b) secondly, the prosecution can prove the offence was committed if there is actual or direct evidence of prejudice to good order and discipline based on objective criteria of prejudice or likelihood of prejudice; or
- (c) thirdly, absent evidence of actual prejudice, the prosecution can prove prejudice by inference. As part of an inferential reasoning process, a

military judge must, based on his or her experience and general service knowledge, ask whether the proven conduct in this case can be considered conduct to the prejudice of good order and discipline. The military judge using his or her knowledge and experience must ask whether, on the totality of the evidence, in the circumstances of the case, prejudice to good order and discipline could be inferred from the facts as proven. This reasoning process would take into account all the contextual circumstances of the case.

[34] In an Agreed Statement of Fact, both the prosecution and defence agreed that in July of 2018, the following general penal prohibitions existed for members of the Canadian Armed Forces (CAF) in reference to cannabis:

- (a) it was illegal to possess cannabis without a medical prescription;
- (b) it was prohibited for members to use cannabis without a medical prescription; and
- (c) it was illegal to distribute, give or administer cannabis to CAF members.

Section 130 of the NDA – administering a noxious thing, contrary to paragraph 245(1)(b) of the Criminal Code

[35] Charges 3, 5, 7, 9, 11, 13, 15 and 17 are for offences punishable under section 130 of the *NDA*, that is to say, administering a noxious thing, contrary to paragraph 245(1)(b) of the *Criminal Code* which reads as follows;

Administering noxious thing

245 (1) Every person who administers or causes to be administered to any other person or causes any other person to take poison or any other destructive or noxious thing is guilty

[. . .]

(b) of an indictable offence and liable to imprisonment for a term of not more than two years or an offence punishable on summary conviction, if they did so with intent to aggrieve or annoy that person.

[36] Aside from identity, time and place, the proof required for the *Criminal Code* offence of administering a noxious thing first requires an analysis of whether or not cannabis is a noxious thing. Secondly, whether one administers a noxious thing when adding it into cupcakes to be distributed and finally that the accused put cannabis into the cupcakes with the intention to aggrieve or annoy the persons consuming them.

Analysis

[37] Having instructed myself on the presumption of innocence, reasonable doubt, the onus on the prosecution to prove their case, the required standard of proof and the essential elements of the offences, I now turn to address the legal principles.

Credibility of the witnesses

[38] Given that the event in question took place well over three years ago, it is not unusual that the evidence presented before the Court is contradictory. Witnesses may have different recollections of the events and the Court has to determine what evidence it finds credible and reliable.

[39] With respect to the charges, the main prosecution witnesses who were complainants were then-Gunners Chubry, Eoll, Penner, Jarbeau and Long, then-Bombardiers Lechman and Slade as well as then-Master Bombardier Vallerand. It was noted that at the time of the events, they were all intoxicated by cannabis to varying levels. Intoxication in the context of this case was a consideration in the Court's assessment of the reliability of some of the evidence and the Court needed to assess the evidence from all the witnesses in order to make a determination of what evidence as a whole should be believed. Fortunately, there was testimony from a number of members such as then-Master Bombardier Diggs and Warrant Officer, (then Sergeant) Sampson who witnessed the unfolding of the events and whose testimony provided helpful guidance in deciding what evidence to believe.

[40] A court may accept or reject, some, none or all of the evidence of any witness who testifies in the proceedings.

[41] Many factors influence the Court's assessment of the credibility of the testimony of a witness. For example, a court will assess a witness's opportunity to observe events, as well as a witness's reasons to remember. Was there something specific that helped the witness remember the details of the event that he or she described? Were the events noteworthy, unusual and striking or relatively unimportant and, therefore, understandably more difficult to recollect? There are other factors that come into play as well. For example, does a witness have an interest in the outcome of the trial; that is, a reason to favour the prosecution or the defence or is the witness impartial?

[42] The *viva voce* evidence, which is the live testimony before the Court, consisted of sixteen witnesses led by the prosecution.

[43] The accused did not testify. It is important to emphasize that because the burden is on the prosecution, Bombardier Cogswell has an absolute right to remain silent at her trial. The fact that Bombardier Cogswell did not testify at this trial cannot be taken into account when I decide whether or not the prosecution has proven its case. If, after considering the whole of the evidence, I am not satisfied that the charges against Bombardier Cogswell have been proven beyond a reasonable doubt, I cannot look to her silence to remove that doubt and find she is guilty.

[44] As mentioned earlier, on 20 September 2018 and 10 October 2018, Bombardier Cogswell participated in interviews with Sergeant LeBlanc that were both audio and video recorded. As a general rule, the statements of an accused person made outside court such as the two interviews with Sergeant LeBlanc, a person in authority, if deemed to be voluntary, are receivable in evidence against her (see *R. v. Simpson*, [1988] 1 SCR 3, paragraph 24). Consequently, these two interviews are admissible at trial and provide her perspective on the charges before the Court.

[45] As the Court needs to address the allegations with respect to multiple complainants, the Court will provide its comments on the credibility and reliability of witnesses when addressing the individual charges.

W.(D.) analysis on the critical questions

[46] With respect to the three different offences before the Court, proof of the charges rely upon the same underlying facts. In short, the Crown must prove beyond a reasonable doubt that:

- (a) the complainants consumed cannabis on that day;
- (b) the cupcakes were the source of cannabis consumed by the complainants;
- (c) Bombardier Cogswell put the cannabis in the cupcakes;
- (d) she distributed or administered the cupcakes to the complainants knowing that the cannabis was in them; and
- (e) with respect to those offences contrary to paragraph 245(1)(b) of the *Criminal Code*:
 - i. cannabis is a noxious thing;
 - ii. the distribution of the cupcakes meets the definition of administering; and
 - iii. in distributing the cupcakes, Bombardier Cogswell intended to aggrieve or annoy the complainants, who were soldiers conducting a live-fire exercise.

[47] The defence challenged the credibility and reliability of the complainants and raised alternate theories in cross-examination. Firstly, he suggested that there is no evidence that there was cannabis in the cupcakes as the symptoms displayed by the individuals who consumed them are not consistent with the consumption of cannabis.

[48] Secondly, he argued that if the Court finds that there was cannabis in the cupcakes, he asserts that someone else could have added the cannabis. His arguments

are proffered to raise doubts as to the link between Bombardier Cogswell and the symptoms the soldiers experienced, the presence of THC on the cupcake wrapper, and the five urine samples that tested positive for marijuana metabolite as certified by Amber Rose.

[49] The credibility of the accused, the complainants, and the reliability of the expert opinion provided by Constable Watson, are all central to the fact-finding task in this case.

Assessing conflicting versions

[50] In this case, Bombardier Cogswell did not testify in court, but the evidence included Bombardier Cogswell's two interviews conducted by Sergeant LeBlanc. In both interviews, Bombardier Cogswell emphatically denied putting cannabis in the cupcakes she distributed.

[51] Conversely, the testimony of the prosecution's witnesses suggest that the cupcakes baked by and distributed personally by Bombardier Cogswell were the source of the cannabis they ingested.

[52] In assessing a case with competing versions of what happened, where credibility is a central issue and the accused has testified, the SCC has provided guidance to trial judges in *R. v. W.(D.)*, [1991] 1 SCR 742 commonly referred to as the *W.(D.)* test.

[53] Since the *W.(D.)* test was first enunciated by the SCC, the test has also been found to apply not just to the testimony of an accused, but it also applies to defence witnesses other than an accused (see *R. v. Haroun*, [1997] 1 S.C.R. 593, Sopinka J., writing in dissent) as well as in circumstances where a conflicting exculpatory account emerges through the Crown witnesses or in any other evidence (see *R. v. B.D.*, 2011 ONCA 51 Blair J.A. at paragraph 114).

[54] To assist judges in identifying reasonable doubt in the context of conflicting testimonies, in *W.(D.)*, the SCC recommends that a trial judge consider the exculpatory evidence of the accused in three steps,. The three steps are:

- (a) first, if I believe the exculpatory account advanced by the defence, obviously, I must acquit;
- (b) second, if I do not believe the exculpatory account advanced by the defence but I am left in reasonable doubt by it, I must acquit; and
- (c) third, even if I am not left in doubt by the exculpatory account advanced by the defence, I must ask myself whether, on the basis of the evidence which I do accept, I am convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[55] Further, in *Regina v. C.W.H.*, 7 WAC 205, [1991] BCWLD 2371, 68 CCC (3d) 146, 3 BCAC 205, 14 WCB (2d) 89, [1991] BCJ No 2753 (QL)". Wood J.A. suggested an addition to the second part of the three-part test set out in *R. v. W.(D.)*, [1991] 1 SCR 742. At paragraph 50 of *C.W.H.*, his Lordship said:

If, after a careful consideration of all of the evidence, you are unable to decide whom to believe, you must acquit.

[56] A court martial is not an inquiry to determine what happened. We may never know. It serves only to determine whether the prosecution has proven the elements of the offence beyond a reasonable doubt. The *W.(D.)* framework aims to prevent a conviction where reasonable doubt exists.

[57] Of course, the above tests taken alone are oversimplifications of the analysis that a trial judge must undertake. Most often the judge has to apply the *W.(D.)* test in various stages of the evidence, with respect to the critical elements or vital points of the decision-making process such as the elements of the offence or the "elements of a defence".

[58] In other words, the rule applies to any exculpatory evidence regardless of the source, which means it applies to anything that indicates that an accused could be innocent or gives an accused favour in terms of the facts.

[59] What this means is that if there is evidence on vital issues where the accused is believed, then it could raise a reasonable doubt on what the prosecution is required to prove beyond a reasonable doubt to secure a conviction (see Paciocco, David M. "Doubt about Doubt: Coping with *R. v. W.(D.)* and Credibility Assessment" (2017) 22 *Can. Crim. L.R.* 31.

Potential collusion of the witnesses

[60] Given the tight-knit nature of soldiers serving in military units, a court martial must be particularly mindful and alert to unique evidentiary concerns that might arise. From the onset of the trial, I was alert to the risk of collusion in the testimony of the witnesses, whether intentional or unintentional, as well as any potential that the chain of command or the MP were blinded by tunnel vision in their investigation by focussing only on the cupcakes as the source of the symptoms experienced by the complainants. Tunnel vision exists when authorities focus on only one suspect or cause and ignore or suppress evidence that is inconsistent with the suspect's guilt.

[61] The defence conceded that there was no evidence of intentional collusion, but he argued that the perceptions of the affected individuals were irretrievably tainted. He asserted that when considering the evidence as a whole, with respect to the inferences to be drawn, the unintentional collusion will taint the probative force of the assertions.

[62] Upon listening to the evidence, the Court found that there was definitely collaboration and consultation ongoing between the witnesses as they tried to narrow

down what they ate or did that day that might have been the source of their individual symptoms. In light of the impact that the incident had on the live-fire exercise that led to the order to cease firing of the guns from the gun line, their combined efforts to work together to quickly identify a common denominator as a source of their symptoms was completely understandable.

[63] In reviewing the evidence, I found that the collaboration and consultation that occurred was not to the effect that anyone concocted evidence. After coming to this conclusion, the Court remained extremely vigilant and still exercised heightened caution, being alert to the potential that the complainants may have unconsciously coloured or tailored their individual description of their own symptoms based on what their peers were saying. It was for this reason that during the court proceedings, the Court provided some witnesses a bit more latitude with respect to explaining how things unfolded.

[64] In their individual testimonies, I found the witnesses to be particularly sensitive to and straightforward in clarifying when they were relying upon something they heard via hearsay or they heard directly from the accused. When asked why they came to the conclusion that the source of their symptoms was the cupcakes, they all described somewhat different reasoning that was applicable to the facts of their own situation. In another example, when asked who baked the cupcakes, some witnesses stated that based on what others said, they “believed” that Bombardier Cogswell did, but they had no direct knowledge whereas other witnesses testified that Bombardier Cogswell told them directly that she had baked the cupcakes.

[65] After assessing whether there was any evidence of unconscious collusion or tunnel vision on behalf of the chain of command or the military police in their investigation, I am satisfied that there was no evidence to suggest an elevated risk associated with these concerns. Further, the fact that all the complainants eventually came to the same conclusion in narrowing down the cupcakes as the source of their symptoms does not suggest on its own that they came to their finding in an improper way.

[66] In assessing the common elements to all the charges, I broke down the first part of the analysis into three questions to be considered:

- (a) Did the soldiers consume cannabis that day?
- (b) Were the cupcakes the source of the cannabis? and
- (c) Having baked the cupcakes, did Bombardier Cogswell put cannabis into the cupcakes?

Did the soldiers consume cannabis that day?

[67] The defence argued that the prosecution has not proven beyond a reasonable doubt that the symptoms that manifested in the complainants came from cannabis. In fact, he argued that the prosecution did not exclude the possibility that the symptoms arose from something other than cannabis or that the marihuana exposure came from another source.

[68] He also argued that based on the testimony of the various witnesses, the symptoms they describe are not consistent with ingesting marihuana and he raised specific concerns with the testimonies of Master Bombardier (then-Gunner) Long and Sergeant (then-Master Bombardier) Vallerand with respect to the onset of their symptoms.

[69] Applying the first step of the *W.D.* analysis to this question, I considered the exculpatory account advanced by the defence. Upon a review of the evidence, I found there is evidence emerging from the facts that is favourable to Bombardier Cogswell, which includes the various inconsistencies in the complainant's evidence regarding the symptoms they experienced and when they felt them and it needed to be closely analysed.

[70] My analysis began with the expert witness, Constable Watson, who was qualified as an expert before the Court due to his expertise as a Drug Recognition Expert (DRE). He is currently a constable with the Fredericton Police Force. He has been specifically trained to identify people whose driving is impaired by drugs other than, or in addition to, alcohol. His testimony was particularly precise and detailed in answering the questions put to him, providing confidence to the Court. He had no involvement with the current case and based on his training and experience, he described those symptoms commonly associated with impairment from cannabis. Based on the limited nature of his testimony, I found his testimony to be both credible and reliable.

[71] He described that the following symptoms are associated with the use of cannabis:

- (a) with respect to the eyes, included but not limited to red blood shot eyes, dilated pupils, lack of convergence and rebound dilation;
- (b) eyelid tremors, fluttering of the eye, body tremors (legs and fingers), which are symptoms specific to cannabis;
- (c) performing poorly on psychophysical test, short-term memory problems, problems focussing, problems following directions and problems doing more than one thing at once;
- (d) elevated pulse and blood pressure, green or brown coating on the tongue;
- (e) paranoia;

- (f) muscle relaxant and loss of inhibitions; and
- (g) increased appetite.

[72] Constable Watson also confirmed that there is a distinction in onset and duration of symptoms depending on whether cannabis is ingested or smoked. When you ingest cannabis, in an edible form, the peak effects occur within one to three hours and the duration of effects can last up to six to eight hours with some effects lasting up to twenty-four hours.

[73] He confirmed that gender, ethnicity and tolerance level can also affect the level of impairment. Similarly, with respect to environmental factors, mental health, food consumed and sleep patterns will also have an impact on the effects from cannabis consumption.

[74] He confirmed that men would be more tolerant to taking in the same amount of cannabis as women, simply because they are larger in general. However, he also added that independent of the factor of size, gender also plays a role because of the different ways that the body metabolizes the substance.

[75] He confirmed that not all people will experience impairment in the same fashion. As far as symptoms, it is more about your mood and mental health going into the experience and it is impossible to say that there is a predictable range of effects as some people will have a higher tolerance than others. He confirmed that all drugs will affect people differently.

Symptoms described

[76] The defence argued that the symptoms described by the complainants, particularly by Sergeant (then-Master Bombardier) Vallerand and Master Bombardier (then-Gunner) Long are inconsistent with cannabis consumption.

[77] At the request of the chain of command, Corporal Hepditch, the medical technician assigned to EX COMMON GUNNER, attended to the complainants at the gun line. He testified that after assessing the eight members, he determined that there was a very low likelihood that the cause of their symptoms was from exhaustion, heat stroke or dehydration.

[78] Under cross-examination, Constable Watson confirmed that if a person consumed edibles, due to the way that the body metabolizes them through the liver, a person can feel some effects within thirty minutes. However, Master Bombardier (then-Gunner) Long told the Court that he started to feel symptoms about ten to fifteen minutes after he consumed his cupcake. He described his symptoms as a “pasty mouth” and a “body buzz”. However, he also stated that the drive to Airstrip 1 was only ten minutes which the evidence suggests it was not. Then-Bombardier Slade testified that

he slept for the duration of the drive between the last location and Airstrip 1 which he estimated to be between thirty and forty-five minutes. Although there was no evidence before the Court as to the exact distance travelled between the two positions, the evidence given by those in the vehicle suggest that it was not a ten-minute drive, but rather a significant enough drive that then-Bombardier Slade intentionally did not consume his Monster Energy drink so as to ensure that he could sleep in the vehicle on the way.

[79] Other evidence suggests that Master Bombardier Vallerand's detachment did not leave immediately after returning from the canteen. They returned to their vehicles to do work before they received the notice to pack up and move.

[80] The Court noted that based on their individual testimonies, then-Gunner Long and then-Master Bombardier Vallerand both visited the canteen at roughly the same time and travelled together in the same vehicle from their position to the gun line. Then-Gunner Long was driving and then-Master Bombardier Vallerand was seated in the passenger seat beside him.

[81] Sergeant (then-Master Bombardier) Vallerand testified that he started to feel tired and sick to his stomach after disassembling and packing up the gun as they were preparing to move. While they were driving in the truck, at approximately 1315 hours, he experienced an upset stomach and his symptoms worsened, which made him think his symptoms were caused by something he ate. He estimated that he felt this way approximately forty minutes after he consumed the cupcake from the canteen.

[82] Master Bombardier, (then-Gunner) Long testified that it was while he was driving and listening to the music around him, that he started to become aware of the effects of the cannabis. He described how he was watching the command-post vehicle in front of him and he started veering off. He testified that the dust plume ahead appeared animated. However, he explained that he did not feel the full effects until they got to their destination at Airstrip 1. Since both then-Master Bombardier Vallerand and then-Gunner Long started to experience symptoms around the same time, while in the vehicle, the consistency of the evidence suggests that then-Gunner Long could not have experienced the symptoms he described within ten to fifteen minutes of eating his cupcake.

[83] Another example provided by defence is based on Mr. (then-Bombardier) Slade's testimony that after then-Gunner Long received medical treatment at the Airstrip 1 location that he said to the soldiers present, "Boys, take some Gravol, I feel a lot better about 30 seconds after taking it." The defence argument is based on the premise that if then-Gunner Long had consumed cannabis, it would not be possible for him to feel better within thirty seconds of taking Gravol. In reviewing the whole of the evidence, other more reliable evidence confirms that then-Gunner Long's condition had not improved.

[84] Warrant Officer, (then-Sergeant) Sampson testified that after the members had been assessed by Corporal Hepditch, he accompanied the troops to the assembly area (AA). Warrant Officer Sampson told the court that he drove one vehicle to the AA because then-Gunner Long was in no condition to drive. When they arrived at the AA, he testified that then-Gunner Long, who had been the detachment driver for the duration of the exercise, who he described as a solid soldier, keen, with strong leadership and observant, looked at him saying that he was lost and had no idea where he was and what was going on. It was a location where then-Gunner Long had been countless times. Consequently, independent reliable evidence does not support the fact that thirty seconds after taking a Graval, then-Gunner Long was cured of his symptoms.

[85] After reviewing the inconsistencies in Master Bombardier (then-Gunner) Long's testimony, I found that there is consistency in his underestimation of time when compared to the facts unfolding around him which suggests that he had lost all sense of time which is consistent with the ingestion of cannabis. Further, it is important to keep in mind that when he took the Graval, it was after they had arrived at Airstrip 1, where he also testified he started to feel the full extent of the intoxication or impairment.

[86] Sergeant (then-Master Bombardier) Vallerand testified that by the time they arrived at Airstrip 1, he had no motivation and that simple tasks such as unhooking the gun had become complicated, and he decided to go talk to then-Sergeant Sampson. Sergeant (then-Master Bombardier) Vallerand testified that it was after they arrived at Airstrip 1 that his symptoms changed and he started to feel "spaced out" and "high", and could not concentrate. He found it hard to focus, was confused and he felt he could not do his job. He explained that the onset of his symptoms were sudden and "hit him like a brick". He described that when he felt that way he was not exercising his best judgement, which included going up to the BSM to tell him that he felt high.

[87] However, he also told the Court that at approximately 1430 hours that afternoon, he felt completely fine and went from extreme fatigue and lethargy to the point where he could possibly run a half-marathon. He told the Court that he was convinced that he had been high as he was familiar with the feeling from past usage prior to joining the CAF. He also stated that he specifically volunteered for the urine test to determine what he had ingested.

[88] Warrant Officer (then-Sergeant) Sampson's evidence is particularly helpful. He testified to being the gun line Sergeant Major on that day and explained that he had three guns under him with three different detachment commanders, being then-Master Bombardiers Vallerand, Jenkins and Diggs.

[89] Warrant Officer (then-Sergeant) Sampson stated that the mobile canteen truck showed up at the location where Master Bombardier Vallerand's detachment was located at 1240 hours as he specifically recalls telling Bombardier Cogswell where to park. He stated that, since his detachments at that location would be leaving soon, he told them to go to the canteen as soon as it arrived.

[90] What is particularly helpful with Warrant Officer Sampson's testimony is that it confirms the fact that he witnessed no problems with the behaviour of the members in Master Bombardier Vallerand's detachment at the first position, but witnessed a noticeable change in their behaviour when they arrived at the second position on the gun line at Airstrip 1.

[91] Warrant Officer (then-Sergeant) Sampson testified that after the detachment arrived at the gun line, then-Master Bombardier Vallerand could not comprehend a direction and was confused and disoriented. Both Sergeant (then-Master Bombardier) Vallerand and Warrant Officer (then-Sergeant) Sampson testified that while at Airstrip 1, then-Master Bombardier Vallerand approached then-Sergeant Sampson declaring, "I am fucking high." Warrant Officer (then Sergeant) Sampson testified that he originally believed that then-Master Bombardier Vallerand was joking and told him to get back to work. Warrant Officer Sampson also testified that then-Master Bombardier Vallerand repeated this about three times before he also noticed that then-Bombardier Lechman, a healthy fit soldier, out of nowhere eating countless chips and smoking like crazy. He stated he had never seen her do that before. He also noted that then-Gunner Long stood there almost like a statue motionless, staring at him with no awareness of what was going on. He noted that then-Gunner Long's mood changed and started to transition to confusion and anger as to why they were feeling that way and Warrant Officer Sampson estimated that they were all scared.

[92] However, Warrant Officer Sampson said that when he realized that the members of the detachment were having problems, he ordered them to go and stay in the truck which was air conditioned. However, mere minutes after he ordered them into the truck, they exited it and began attempting to record their gun again. He explained that he grabbed the trailer to help and when the detachment members all fell down and started to laugh, he ordered them back into the truck again.

[93] Although Master Bombardier (then-Gunner) Long might have estimated a timeline of his experiences that appears on the surface to be inconsistent with the science on the topic, the Court did not give it too much weight in light of the reliability of the third-party observations and the other confirmatory evidence of his symptoms. Then-gunner Long was intoxicated and clearly had lost all sense and perception of time.

[94] Although Sergeant Vallerand also described symptoms such as an upset stomach which Defence intimated might be inconsistent with consumption of cannabis, it is not necessarily inconsistent with the ingestion of food products and it must be put into context. As Constable Watson described, there is no predictable range of effects as some people will have a higher tolerance than others and drugs will affect people differently.

[95] What is the most persuasive with respect to then-Gunner Long's and then-Master Bombardier Vallerand's conduct is that Warrant Officer (then-Sergeant) Sampson, who was completely sober, testified that based on his observations and interactions with them, which includes some of the examples provided above, they were

intoxicated. The Court also found that their symptoms were consistent with the expected symptoms described by Constable Watson flowing from the consumption of cannabis. Further, in order to confirm what they had been exposed to, both then-Gunner Long and then-Master Bombardier Vallerand voluntarily submitted to a drug test, which confirmed that they had consumed cannabis within twenty-eight days of taking the test.

[96] Although the Court dealt primarily with those allegations related to then-Gunner Long and then-Master Bombardier Vallerand as they were specifically challenged by the defence as exculpatory to Bombardier Cogswell's defence, the evidence as a whole suggests that eight CAF members, being then-Gunners Chubry, Eoll, Jarbeau, Long and Penner, then-Bombardiers Lechman and Slade and then-Master Bombardier Vallerand, experienced symptoms that day.

[97] The symptoms identified from Master Bombardier Vallerand's detachment were as follows:

- (a) Bombardier, (then-Gunner) Penner described himself as being "very lethargic" explaining to the court that lethargy was not uncommon while on exercise in the field. Consequently, at first, he did not associate the lethargy with anything specific. However, he noted that the extreme lethargy persisted and that was abnormal. Master Bombardier Diggs testified that when Bombardier Penner came to his detachment's location, he noticed that Bombardier Penner was not acting normally.
- (b) Bombardier, (then-Gunner) Jarbeau described being particularly anxious, paranoid and sick to his stomach, "with butterflies". He described having the urge to vomit. Those members of his detachment who observed Gunner Jarbeau noted how sick he was.
- (c) Mr., (then-Bombardier) Slade testified that while transiting in the vehicle to Airstrip 1, he slept for what he estimated to be half an hour, maybe forty-five minutes. When he woke up, he described himself as "particularly lethargic". He stated everything was foggy, he was not coherent and was slow. He explained that he was nauseous but not experiencing the same nauseous feeling that he would normally get from eating food.

[98] The symptoms identified from the soldiers in Master Bombardier Diggs' detachment were as follows:

- (a) Master Bombardier, (then-Bombardier) Lechman testified that she felt dehydrated, lost a sense of time, was unable to perform tasks, was nauseous, could not fuse a round, was not able to listen to orders, had a hard time setting a fuse to delay and loaded the ammunition round awkwardly into the breech. She also fell off an ammunition box when attempting to sit down. She testified that although she might have a

cigarette once in a while, she is not a smoker. Mr. (then-Master Bombardier) Diggs described then-Bombardier Lechman at that time as being paranoid and observed her chain smoking and eating a bag of Doritos. Warrant Officer Samson told the court he also observed Bombardier Lechman, who he considered to be healthy and fit, who out of nowhere was eating countless chips and “smoking like crazy”. He had never observed her doing anything like that before.

- (b) Bombardier, (then-Gunner) Chubry testified that he was given a cupcake by then-Bombardier Lechman which he ate almost immediately. His symptoms manifested themselves when he was on sentry duty. He described feeling high, as he knew what the effects were, but he thought there was no way he could be in that situation and was worried for his career. He explained that the sentry shifts are normally an hour. He stated that after his shift, he returned to the gun line and normally he would return to his detachment, but instead he was just wandering around. Mr. (then-Master Bombardier) Diggs testified that he observed then-Gunner Chubry being anxious and not able to sit still which was very out of character for him as he is usually very calm.
- (c) Bombardier, (then-Gunner) Eoll described that he felt “a little weird and spacey”, like when you “just wake up” and “you do not feel all there”. At first, he thought he was dehydrated so he drank one and a half litres of water, but then he realized he was not sweating so he could not be dehydrated. He explained that small tasks became harder and harder to do, he felt sluggish and groggy, and found the task of setting fuses more difficult, he would quickly forget what he was told to do, tasks took longer than they normally would, he felt paranoid and had no sense of motivation. His symptoms lasted three or four hours. Mr. (then Master Bombardier) Diggs testified that then-Gunner Eoll was the first of the three that he noticed acting more out of character than normal. He described him as the kind of guy who might trip over his shoelace and, at that time, he just did not seem able to coordinate his movements, so that raised flags.

[99] Mr. (then Master Bombardier) Diggs told the Court that he had known his detachment members (then-Bombardier Lechman and then-Gunners Chubry and Eoll) since they graduated from their Developmental Period 1 training which is their introductory phase training. He explained that they were soldiers he had trained and was familiar with their behavioural patterns and the things he witnessed them doing were out of character for them.

[100] I reviewed the testimony of all the complainants for its credibility and reliability. I found that all the complainants were credible and made every effort to be honest and forthright. None of the complainants displayed any particular animosity towards the

accused nor did they seem to have any incentive to lie or embellish their personal accounts of what occurred to them.

[101] However, as I stated previously, due to their intoxication at the time of the incident, the reliability of their evidence required the Court to be particularly cautious and weigh it against both the evidence as a whole and the observations of independent witnesses such as then-Sergeant Sampson and then-Master Bombardier Diggs who were both sober and familiar with the work habits of the affected members who were their subordinates.

[102] In summary, the above-listed symptoms included anxiety, paranoia, nausea, feeling spaced out, foggy, increased appetite, dry mouth and dehydration that could not be quenched with liquids, loss of sense of time, fatigue, an inability to perform tasks they were trained to complete, impaired motor skills, confusion, and difficulty focussing which are all consistent with the symptoms expected as described by Constable Watson. I found that the symptoms for each of the eight complainants were consistent with those symptoms described by Constable Watson.

Urine tests

[103] The defence argued that the urine samples do not confirm that the complainants were exposed to marihuana on that specific day, being 21 July 2018. He argued the tests are not meaningful other than to confirm that the individuals providing the sample had consumed or ingested marihuana within twenty-eight days of the test. He argued that we do not know whether the concentrations found are significant or whether they could relate to an inadvertent exposure.

[104] Upon a review of the toxicology reports entered into evidence, the form clearly indicates that there are established confirmation cut off levels, which ensure inadvertent exposure is not reported as positive. All of the toxicology results were above the cut-off level of 15 ng/ml.

[105] In assessing this defence argument, the Court noted that there was unrefuted evidence before the court that then-Bombardier Lechman had never consumed cannabis or any drug prior to that day and then-Gunner Long had been sober and free of drugs and alcohol for eight years at that point in time. They both tested positive for having marihuana metabolite in their systems. The others who voluntarily submitted to a urine test also tested positive for the exact same marihuana metabolite, making it one hundred per cent of those submitting to the urine tests who tested positive for having the exact same substance in their bodies. Although it is possible that some might have consumed marihuana within twenty-eight days of the test, the unrefuted evidence that then-Bombardier Lechman and then-Gunner Long had not, strengthens the inference that can be drawn from the toxicology results. It is also notable that the test results reveal that the laboratory did not test only cannabis consumption, but rather, it tested for all the controlled narcotics possible as the soldiers testified that they had no idea at that time what they had been exposed to.

[106] The testimonial evidence suggests that the soldiers felt high based on the belief that there was “something” in the cupcakes. It could have been any type of substance and the affected soldiers and staff wanted to know what it was that caused their symptoms. Given the voluntary nature of the testing, and the fact that the consumption of cannabis was illegal at the time, there is a low likelihood that someone who might have consumed prohibited drugs within that twenty-eight-day window would voluntarily get tested as there would be the distinct possibility that their results could reflect the presence of a drug other than that identified in the tests of the majority of the other members who agreed to be tested. As the Agreed Statement of Fact indicates, it was prohibited for CAF members to use cannabis or any other prohibited substance without a prescription and, if identified, they could be subject to disciplinary measures.

[107] Upon a review of all the toxicology reports, it was clear that there was a full range of tests completed which included testing for opiates, cocaine, morphine, codeine, oxycodone, amphetamines, methamphetamine, MDA, and MDMA. Consistent with their testimony, all the complainants tested negative for everything other than marijuana metabolite.

[108] The evidence suggests that some of the gunners displayed symptoms of paranoia and were afraid for their own reasons and had the courage to say no to being tested. I emphasize this fact that they did not get tested simply to say that there was no evidence that anyone was pressured to submit to the urine test and if the most junior, no-hook gunners felt free to refuse to be tested, then so too would any of the others who might have been concerned.

[109] After considering all the evidence on the question of whether or not the complainants ingested cannabis, in applying the *W.(D.)* test set out above, I do not believe the exculpatory accounts advanced by the defence.

[110] I have verified the following primary facts established by the evidence:

- (a) the symptoms described and observed of the eight persons affected were consistent with expected symptoms described by Constable Watson from the consumption of cannabis;
- (b) the testimonial evidence suggests that the soldiers felt “high”;
- (c) Corporal Hepditch determined that there was a very low likelihood that the cause of the symptoms was from exhaustion, heat stroke or dehydration;
- (d) there is unrefuted evidence that then-Bombardier Lechman had never consumed cannabis or any drug prior to that day;

- (e) there is also unrefuted evidence that then-Gunner Long had been sober and free of drugs and alcohol for eight years at that point in time;
- (f) The supervisors, Warrant Officer (then-Sergeant) Sampson and then-Master Bombardier Diggs who were present and observing the soldiers, testified that at the time in question the conduct of both then-Gunner Long and then-Bombardier Lechman was uncharacteristic of their normal behaviour and that they were displaying symptoms consistent with the consumption of cannabis ;
- (g) having voluntarily submitted a urine sample for drug testing, both then-Bombardier Lechman and then-Gunner Long tested positive for having marihuana metabolite in their systems;
- (h) all those members who displayed symptoms and voluntarily took a urine test tested positive for the exact same substance as then-Gunner Long and then-Bombardier Lechman, being marihuana metabolite.

[111] On the basis of the totality of the evidence that I do accept, with the primary facts set out above, I am convinced beyond a reasonable doubt that the soldiers in question, being then-Gunners Chubry, Eoll, Jarbeau, Long and Penner, then-Bombardiers Lechman and Slade and then-Master Bombardier Vallerand did consume or ingest cannabis on that day in question.

[112] I find, from the material proven facts, the only reasonable and rational conclusion to be drawn is that the common substance ingested by the soldiers was cannabis. This inference is logically and reasonably drawn from the group of facts clearly established at subparagraphs 110 (a) to (h) and proved in this court martial.

[113] Further, based on the totality of the evidence that I do accept, I find that it does not matter that then-Bombardier Slade and then-Gunners Penner and Jarbeau did not take urine tests. Their symptoms were completely consistent with those of their peers who engaged in the same activities alongside them at the exact same time and are consistent with the evidence as a whole.

[114] Next, I proceeded to assess the source of the cannabis.

Did the cannabis come from the cupcakes?

[115] The defence also asserted that if the Court finds that the complainants did consume cannabis then there is no proof that it came from the cupcakes. Defence argues that the prosecution has not proven beyond a reasonable doubt that the cannabis ingested came from the cupcakes. He suggested that it could have come from the drinking water.

[116] In both her interviews, Bombardier Cogswell was adamant that she did not put cannabis in the cupcakes. In her second interview, when challenged on the results of a positive test on a cupcake wrapper, she immediately suggested that she knew who had done it and suggested that some of the exercise participants who ate her cupcakes also had cannabis droppers and other edibles in the field during the exercise.

[117] After finding that the ingestion of cannabis was the source of the symptoms experienced by the soldiers, I must consider all plausible theories or reasonable possibilities that are inconsistent with Bombardier Cogswell's guilt, which includes the exculpatory accounts advanced by the defence or any exculpatory evidence from any of the prosecution's witnesses.

[118] I began my analysis by outlining the accepted evidence before the Court that is favourable to Bombardier Cogswell, which included the fact that then-Master Bombardier Diggs consumed a cupcake and, aside from a dry pasty mouth, he did not suffer any effects.

[119] I began first by assessing whether there is any evidence that supports another reasonable inference other than the cupcakes as the source of the cannabis. I did not rely upon the assertions of the witnesses that the source of the cannabis was the cupcakes, but rather I conducted my own assessment on the likely source of the cannabis by relying upon as much independent and reliable evidence as possible.

Other theories

[120] Firstly, it was recognized that there were two different detachments originally situated in two separate geographical locations that were affected. Given that the Court found beyond a reasonable doubt that the individuals in question did consume cannabis, I referred back to Constable Watson's testimony and the fact that the peak effects flowing from the consumption of cannabis edibles would take from one to three hours.

[121] Constable Watson testified that based on the manner upon which cannabis edibles are metabolized, they take longer than inhaled marijuana to present symptoms. He also confirmed that the effects from edibles could kick in as early as thirty minutes after ingestion. Given the timing of the onset of the symptoms within both detachments, and based on the fact that the manifestation of symptoms in Master Bombardier Vallerand's detachment occurred while they were driving between the two locations and peaked after they arrived at the gun line, I determined that the common source had to have originated in each of the two separate locations.

[122] Warrant Officer (then-Sergeant) Sampson confirmed that he ate the same meals that were served to the troops that day in the location where Master Vallerand's detachment was first located. He told the Court that they consumed hot rations for breakfast, which he believed were hash browns and eggs. For lunch, he confirmed that they individually consumed their hard rations, also known as Individual Meal Packs

(IMP) that the soldiers carried with them. The Court also heard evidence that the IMPs were sealed meals and are often different for each individual and meal.

[123] Bombardier (then-Gunner) Jarbeau described that they all carried their own water. Based on the time period when the symptoms manifested themselves, it is highly unlikely that the water was the source of the symptoms. Mr., (then-Bombardier) Slade testified on this point. He stated: "I've been in high heat throughout my career and I was drinking a lot of water as I was supervisor and I was ensuring that members of my detachment were hydrated." Given the heat on that day, which the evidence suggested was approximately thirty degrees and based on the testimony of Master Bombardier Slade, water was being regularly ingested by the soldiers starting very early in the day. Consequently, if water was the source of the cannabis, their symptoms of intoxication would have presented much earlier than they did.

[124] More decisively, if the water had been the source of the problem, there would have been much wider effects and implications on persons affected given that the evidence was that there were as many as forty persons in attendance between these two locations. Consequently, there is no evidence to suggest that the water they carried was compromised or contaminated that day.

Canteen

[125] Based on the consistency of the evidence, the mobile canteen truck arrived at the gun line at Airstrip 1 between 1030 and 1100 hours where Master Bombardier Diggs' detachment was in position. The canteen then moved to Master Bombardier Vallerand's position, arriving at approximately 1240 hours in the afternoon. The evidence also suggests that the soldiers in Master Bombardier Diggs' detachment started to feel their symptoms earlier than the soldiers in Master Bombardier Vallerand's detachment.

[126] The Court scrutinized the evidence based on what the soldiers could have been exposed to at the canteen, other than the cupcakes. The affected members of Master Bombardier Diggs' detachment testified that they obtained the following from the canteen that day:

- (a) Then-Master Bombardier Diggs: purchased a Gatorade and a Monster Energy drink; received a cupcake and ate no lunch;
- (b) Then-Bombardier Lechman: purchased a Gatorade; received two cupcakes, one for her and one which she gave to then-Gunner Chubry;
- (c) Then-Gunner Chubry: did not go to the canteen because it was morning, but received a cupcake from then-Bombardier Lechman which he ate around 1100 hours; and
- (d) Then-Gunner Eoll: purchased a pink Monster Energy drink, chocolate and cigarettes and received a cupcake. He ate the chocolate immediately, drank the pink Monster Energy drink with his IMP and ate the cupcake

for dessert afterwards. He testified that Bombardier Cogswell told him that she made the cupcakes so he asked if they cost money and she told him they were free. He recalled Bombardier Cogswell warning him that the cupcakes contained avocado oil.

[127] Master Bombardier, (then-Bombardier) Lechman testified that she started to feel the symptoms approximately thirty minutes to an hour after eating the cupcake.

[128] Bombardier, (then-Gunner) Chubry testified that he started to experience symptoms approximately forty-five minutes after he ate the cupcake that Bombardier Lechman gave him.

[129] Bombardier, (then-Gunner) Eoll testified that approximately forty-five minutes after he ate the cupcake he started to feel symptoms.

[130] Mr., (then-Master Bombardier) Diggs, who also attended the canteen, testified that despite receiving a cupcake, aside from having a dry pasty mouth, he did not experience any notable symptoms. However, he also told the Court that he was very focussed on resolving what was going on with his troops. He explained that he was so focussed that he did not eat his lunch that day. It was then-Master Bombardier Diggs who took the initiative to collect the cupcake wrappers and took steps to ensure the safety of his gun detachment. Mr. (then-Master Bombardier) Diggs also testified that, at the time, he was very fit and weighed approximately 250 pounds. In the Court's observation, Mr. Diggs is perhaps twice the size of some of the other witnesses, primarily Master Bombardier Lechman.

[131] Based on the testimony of Constable Watson, gender, ethnicity and tolerance level will affect the manifestation of symptoms. Constable Watson also explained that men are more tolerant than women when ingesting equivalent amounts. He explained that this is partly due to their size and partly due to the different ways their bodies metabolize a drug. He explained that some people have a greater tolerance than others and environmental factors including one's mental health, the food consumed and sleep are all factors that play a role.

[132] Mr. (then-Master Bombardier) Diggs also confirmed for the court that based on where they were within the training scenario on the day in question, his detachment was well rested and none of his soldiers were sleep deprived.

[133] After ensuring members at the Airstrip 1 location were served, the mobile canteen truck drove to a second location where Master Bombardier Vallerand's detachment was positioned. As explained earlier, based on the testimony of Warrant Sampson, the mobile canteen arrived at the second location at 1240 hours.

[134] Sergeant, (then-Master Bombardier) Vallerand estimated that he started to feel his symptoms around 1315 hours while they were driving in their vehicle to the next

position. Based on the evidence, his whole detachment started to feel the symptoms while they were driving between the two locations.

[135] If Sergeant (then-Master Bombardier) Vallerand's time assessment of 1315 hours is relatively accurate, and given that an edible can take from thirty to sixty minutes before its effects are felt, this would put the consumption of the cannabis by Master Bombardier Vallerand's detachment somewhere after 1215 hours up to 1245 hours or later, which coincides with the arrival of the canteen truck at their position.

[136] Given the fact that the canteen arrived at their position around lunch and given the timing when their symptoms presented themselves, the Court ruled out the potential that what they consumed for breakfast was a cause or contributing factor to their symptoms. For lunch, the majority of the complainants in both detachments confirmed that they consumed only IMPs.

[137] The affected soldiers from then-Master Bombardier Vallerand's detachment testified that they obtained the following items from the canteen:

- (a) Then-Master Bombardier Vallerand: purchased one vitamin water; received a cupcake. He thought he had hard rations for lunch, but could not really remember;
- (b) Then-Bombardier Slade: purchased a t-shirt and two or three Monster Energy drinks for the exercise; received a cupcake. He ate an IMP for lunch;
- (c) Then-Gunner Long: did not purchase anything; received a cupcake. He ate IMP for lunch;
- (d) Then-Gunner Jarbeau: did not purchase anything; received a cupcake. He ate IMP for lunch; and
- (e) Then-Gunner Penner: purchased cigarettes and a drink; did not receive a cupcake from the canteen, but later he ate the remainder of then-Gunner Jarbeau's cupcake which he found in the back of the truck. It was approximately a quarter of the cupcake.

[138] Warrant Officer (then-Sergeant) Sampson explained that when he briefed the canteen vehicle on where to park, he was offered a cupcake, but he refused one as he wanted to ensure that the troops received one first and said that if there were any left over, he would have one. Then-Sergeant Sampson did not consume a cupcake and displayed no symptoms at all.

[139] Sergeant, (then-Master Bombardier) Vallerand testified that he ate his cupcake right away and then went back to the truck where they did random work until they got

the notice to move to Airstrip 1. He testified that he has never become sick from drinking vitamin water.

[140] The Court noted that although some of the troop consumed Monster Energy drinks, Gatorade and chocolate bars, the evidence was also that these items were sealed and other than the cupcakes, there was no uniformity in the other items that were consumed.

[141] Upon closer review, from the two detachments, three individuals consumed only the cupcakes from the canteen and nothing else. In Master Bombardier Vallerand's detachment, in addition to IMPs, then-Gunners Long and Jarbeau consumed only the cupcakes from the canteen. Similarly, from Master Bombardier Diggs' detachment, then-Gunner Chubry did not attend the canteen at all and only ate the cupcake given to him by then-Bombardier Lechman. In all three of these cases, the members displayed symptoms consistent with the consumption of cannabis which minimizes the possibility that the source of the cannabis could have come from something at the canteen other than the cupcakes.

[142] Initially, all the affected members testified to having personally suspected the cause of their symptoms to have come from something other than cannabis, such as possible heat injury, exhaustion or perhaps another food item. Sergeant, (then-Master Bombardier) Vallerand explained that because his stomach was "upset" and "gassy", he originally speculated that the cause was something bad in the ingredients of the cupcake, such as the milk and eggs. However, once he arrived at Airstrip 1, his gassy sick stomach changed and he started to feel "high", a feeling he said he recognized from personal experience prior to joining the CAF. Some of those who recognized the feeling of being "high" became understandably paranoid and worried that they were experiencing their symptoms in isolation.

[143] Once Master Bombardier Vallerand's detachment arrived at Airstrip 1, they became aware that they were all feeling the same way. Bombardier, (then-Gunner) Penner explained that it was while they were in the truck that they came to the conclusion that none of them were doing well and they were feeling sick. Once they stopped and intermingled with Master Bombardier Diggs's detachment, they learned that they were not the only ones feeling the same way. After discussing the only commonality they shared, they formed the suspicion that the cupcake was the source of the problem.

[144] After medical issues arising from such ailments as heat exhaustion were deemed to have a low likelihood of causing the symptoms experienced by the soldiers, the only common denominator remaining that was shared by the soldiers from the two detachments, who were separated in physical location, was the consumption of the cupcakes that came from the mobile canteen that visited both locations.

[145] As I explained earlier, the prosecution does not need to negate irrational or fanciful conjectures that may be consistent with innocence. These theories or

possibilities must be based on logic and experience applied to the evidence, not on speculation (see *Villaroman*, at paragraph 37).

Cupcake wrapper

[146] Although I am of the view that prosecution did not have to produce forensic evidence, and additional evidence is not required to convince the Court beyond a reasonable doubt that there was cannabis in the cupcakes, there was in fact a wrapper from the cupcakes that was collected and tested.

[147] The defence raised concerns regarding the one cupcake wrapper collected from the cupcakes consumed, which was given to the MP and tested by Health Canada. The testing revealed the presence of THC.

[148] The defence argued that the fact that a single wrapper tested positive for THC is of no probative value. He raised concerns with the chain of custody with respect to the wrapper and the continuity of it as evidence. He argued that the way it was handled cannot exclude potential contamination.

[149] I agree that there is a lack of clarity as to how the cupcake wrapper was handled prior to it being handed over to the MP. The individuals handling the wrapper were not police nor were they trained to record every individual to whom it was passed. This led to some confusion as to how the Ziploc bag made its way to the MP. In fact, the evidence suggests that the only person collecting wrappers was Master Bombardier Diggs who put one wrapper (or possibly more) into a Ziploc bag before he handed it off to Warrant Officer Mangrove who gave it to the BSM or someone higher in rank to him and the Ziploc bag eventually made its way to then-Captain Kaempffer who then gave the Ziploc baggie containing the wrapper directly to the MP, Corporal Whitehall.

[150] At the early stages of the management of the incident, the people who handled the Ziploc bag were not police and did not properly record who they handed it to, but the evidence also suggests that they were trusted members of the chain of command and their testimony reflected that they understood the need to safeguard the wrapper in the Ziploc bag as evidence, which they ultimately did, given that it did make its way to the MP and was then properly entered as evidence and safeguarded from that point on. Importantly, the cupcake wrapper made it directly to the MP within a number of hours and there is no evidence to suggest it was left sitting unattended for days.

[151] None of the witnesses testified to opening the Ziploc bag nor tampering with its contents. Further, there is no evidence that anyone witnessed any tampering. It is important to highlight that based on then-Gunner Chubry's testimony, the gun line where the wrapper was retrieved was a controlled location with a sentry limiting the access of people coming in and out. It was not an accessible location where unfamiliar people were coming and going. Aside from assertions made later by Bombardier Cogswell, there is no evidence that there was cannabis anywhere in the field that day.

[152] I am not suggesting that none of the soldiers there that day had never tried cannabis, but the evidence of witnesses suggested that given the nature of the activities and the live firing they were engaged in, it was highly unlikely that anyone had cannabis in the field. Even if they did, given the nationwide and institutional prohibition on recreational use of cannabis that existed at that time, there is little likelihood that it would be just “laying around” to be discovered. Consequently, the possibility that cannabis could coincidentally come into contact with the cupcake wrapper that was inside a sealed plastic bag and being handled by the higher ranked members of the chain of command who were actively engaged and responsible for discipline is remote. The evidence of persons who handled the bag was clear that they kept it safeguarded while in their possession. Given the nature of a field exercise ongoing, it is highly unlikely that, in the larger circumstances of this case, the wrapper was tainted after the fact by inadvertently coming into contact with cannabis.

[153] In any event, the Court found that although the test results on the wrapper might provide collaborative evidence of THC in the cupcakes, it is simply one piece of evidence to be weighed in the context of all the other admissible evidence to be weighed by the Court.

[154] I have verified that the following primary facts are established by the evidence:

- (a) according to the DRE, Constable Watson, after the consumption of edibles, the expected onset of peak symptoms is between one and three hours, with symptoms presenting as early as thirty minutes after ingestion;
- (b) the detachments of then-Master Bombardiers Vallerand and Diggs were originally in two different geographical locations;
- (c) the mobile canteen truck attended at both locations and served the two affected detachments;
- (d) the mobile canteen truck served then-Master Bombardier Diggs’ detachment first, between 1030 to 1100 hours on the gun line at Airstrip 1 before heading to then-Master Bombardier Vallerand’s location;
- (e) The mobile canteen truck arrived at approximately 1240 hours at then-Master Bombardier Vallerand’s detachment. His detachment members attended at the mobile canteen from its arrival until 1300 hours;
- (f) Then-Master Bombardier Diggs’ detachment members who consumed the cupcakes manifested symptoms earlier than then-Master Bombardier Vallerand’s detachment;

- (g) Then-Master Bombardier Vallerand's detachment members started to experience symptoms while driving to their next position;
- (h) given that both detachments were affected and were in two separate locations, the source of the cannabis had to have originated from both locations;
- (i) based on the timings of the effects experienced, the consumption of cannabis from the water source or breakfast was remote;
- (j) all eight persons who displayed symptoms consistent with the consumption of cannabis ate the cupcakes;
- (k) three of the persons affected did not eat anything else from the canteen other than the cupcakes;
- (l) all five of those members from the two different detachments, who manifested symptoms and submitted to a urine test, tested positive for marihuana metabolite; and
- (m) it was unrefuted that two of the five members who tested positive for marihuana metabolite had not consumed cannabis within the 28-day interval; and
- (n) a cupcake wrapper that contained a cupcake consumed by one of the soldiers tested positive for THC.

[155] Having verified that the primary facts are established by the evidence, which I accept, this Court may make the inference that the cupcakes were the source of the cannabis ingested by the complainants.

Did Bombardier Cogswell put the cannabis in the cupcakes?

[156] The defence argued that if the Court accepts that there was cannabis in the cupcakes, the evidence should leave one in doubt as to who put the cannabis in them.

[157] It is the defence's position that Bombardier Cogswell did not put cannabis in the cupcakes. In her two police interviews, Bombardier Cogswell clearly asserted that she did not. Her exculpatory claims in her statements are reliant on others allegedly consuming cannabis in the field by other means the Court must assess. In short, it must assess whether there are any plausible theories or reasonable possibilities that are inconsistent with the guilt of Bombardier Cogswell.

[158] As explained earlier, the first step in inference drawing is verifying that the primary facts, said to provide the basis for the inference, are established by the

evidence. Consequently, the Court took the time to outline all the relevant facts that relate to the inference of identity.

Police interviews, motive and animus

[159] The two interviews given by Bombardier Cogswell are particularly problematic. There are so many inconsistencies within them and between them that their reliability is limited. Consequently, I only relied upon them to permit the Court to draw out any exculpatory theories that lie therein and in order to assess live issues. However, I did not consider the fact that, in substance, they were so inconsistent and possibly represent lies and fabrications to be additional inculpatory evidence by itself.

[160] The concern I had is that the interviews are post-conduct and it was clear upon my close reading of them that Bombardier Cogswell was suffering immensely. This was confirmed with her follow-up interview of 10 October 2018, where Bombardier Cogswell tells Sergeant LeBlanc that she just returned from two weeks of stress leave and confirmed that she is now on a permanent medical category (PCat), which, based on what she stated in her first interview, is likely for post-traumatic stress disorder (PTSD).

[161] In that light, I was particularly careful in how I relied upon the contradictions and inconsistencies within the interviews. Upon a review of the interviews, I find that Bombardier Cogswell was already struggling within her unit prior to the alleged incident, and then she became implicated in what had been described by Major (then-Captain) Kaempffer as one of the most critical incidents to occur at the RCAS excluding suicide. She felt alienated, alone and somewhat desperate. As I explained in an earlier decision, without an understanding of the live material issue at play, I was cautious in how I assessed many aspects of her interviews. As such, I was vigilant to avoid conflating her post-offence conduct, which includes all the inconsistencies in her statements made within the interview, as evidence relevant to her guilt. However, I did have to consider her statements made within her interviews in the determination of the live issues the Court must decide.

[162] One of the live issues is motive. It is the defence's position that there is no meaningful motive. He argues that the evidence of motive is especially weak and as a result does not establish inculpatory motive at all. In the defence view, it is really evidence of animus. Defence argues that there is evidence Bombardier Cogswell told police that she had been poorly treated in the past, but in the defence's assessment that hardly equates to the motivation to commit the offences before the court. There is no evidence that she had anything against the people affected. The fact that she was upset does not turn her into someone who would go and indiscriminately drug troops in a live-fire exercise. He further argues that there is evidence that she was trying to fit in.

[163] The prosecution disagreed that the inference of motive was weak.

[164] There is evidence to suggest that Bombardier Cogswell was suffering from a number of mental health issues well before the incident in question. In her

20 September 2018 interview, Bombardier Cogswell tells the investigator that she is still recovering from an incident that occurred in Shilo, Manitoba and, since that time, she has kept to herself. She tells Sergeant LeBlanc that she is waiting for a transfer to the Joint Personnel Support Unit as she cannot stay in the unit any longer as it is “too much, way too much”. She tells him that she is awaiting a PCat for PTSD after everything that happened to her. She anticipates it will be granted either on 9 or 19 October 2018. With respect to her assimilation within her unit, she explains:

“The unit's been very difficult since I came here. At first, they were very supportive but, as soon as that court martial was done, it just -- it flipped. They turned completely not supportive any more. They expected me to be good to go a month after. And it just -- it's just been constant bugging, like, the rumour mill. They're always telling me what is going on in the accused or the person's life.

AIGs [NCOs] from the school, they all took him out to dinner and drinks when he went up to Shilo.”

[165] Further, the investigation reveals that there was animosity flowing from a perception, whether warranted or not, that the senior non-commissioned members (NCO) were somehow celebrating with the accused from an earlier court martial that involved her as the complainant. She says:

“So a bunch of them went to Shilo to shoot, I think it was a PKG trial or something, I can't remember bu[t] they all wound up taking him out for drinks, celebrate him getting off the hook for the court martial and then I found out about that and then all the rumours, all the other harassment stuff. It just -- it hasn't stopped and I'm just worn out.”

[166] In her first interview, Bombardier Cogswell told the investigator that after patronizing a place, “it reminded me why I hate everybody.” She makes it clear that she feels that she has been treated unfairly and her comments provide insight into how she was struggling to fit in, but falling short. At one point she states:

“And that's what I've been doing this entire time. I've been just laying down, doing what people want, getting pushed around, getting abused, taking the insults, taking the rumours. I got called -- I drove to work one day with coffee for these guys and there's a group that was rucking and I got yelled, “There goes the canteen bitch,” with my windows down.

[. . .]

It's just -- it's venomous and it's the old hook gunners that are saying it, that my boobs have more time in.”

[167] At one stage, in an effort to clear her name, Bombardier Cogswell states:

“I spend more time crying than I do at work.”

[168] What is clear from her interviews is its internal inconsistency with who she says she is. She repeatedly tells the investigator that she does not go out and keeps entirely to herself, and has “maybe two friends”. She is insistent that she does not talk to anyone, yet, in contrast, she later provides significant information regarding members she alleges are using prohibited drugs or consuming edibles. She possesses a great deal of information on drug use of members in the unit that is completely inconsistent with this claim of not speaking with people.

[169] In her interviews, she also appeared intent on implicating or projecting blame on then-Bombardier Slade who was in Master Bombardier Vallerand’s detachment. In then-Bombardier Slade’s testimony, he did admit to smoking marihuana with the accused on one occasion. Bombardier Cogswell also appeared intent on undermining or blaming some of the senior NCOs, who possibly could be the same people who met with the individual implicated in Shilo, MB. It is unclear.

[170] Nonetheless, there is animosity seeded in these statements and they are directed at the unit RCAS and senior NCOs in general. Keeping in mind that EX COMMON GUNNER was the first time the unit engaged in such a large exercise, bringing all the artillery functions or subunits together to conduct combined individual training within a larger construct. It would have been their flagship event for their year dominating the energy and focus of the unit. The alienation that Bombardier Cogswell was personally experiencing and her bitterness she admits to having towards the unit cannot be minimized. It is also notable that despite the various units of the RCAS participating, it was only those members of W Battery who displayed symptoms consistent with the ingestion of cannabis.

[171] However, animosity or hostility is not the same as motive. Bombardier Cogswell could have harboured negative resentful feelings towards her unit, being the RCAS or the senior NCOs, without intending to embark on a particular course of conduct. Nonetheless, it is important to be aware that while motive is always relevant, it is never essential (see *Lewis v. The Queen*, [1979] 2 S.C.R. 821, at page 833).

Opportunity to administer cannabis into the cupcakes

[172] The defence argues that Bombardier Cogswell did not have exclusive opportunity to put cannabis in the cupcakes.

[173] There is unrefuted evidence before the Court that Bombardier Cogswell baked the cupcakes. In the decision this Court rendered on the defence’s application for a directed verdict, I found that based on the totality of the facts before the Court, mostly taken from Bombardier Cogswell’s own statements in her interviews, the process of baking, transporting and distributing the cupcakes was on the high end of the exclusivity scale.

[174] I accept that there is some evidence before the Court that is favourable to Bombardier Cogswell which suggests that while at the canteen, the cupcakes were not always in her exclusive possession. Specifically, then-Gunner Jarbeau's evidence suggests that Bombardier Cogswell was not immediately present when he went to get a cupcake, as he asked Gunner McLandress if he could take one.

[175] Despite the fact that she may not have handed then-Gunner Jarbeau his cupcake, according to Bombardier Cogswell's first police interview, she was present every time someone received a cupcake, confirming that she did not relinquish any control over the cupcakes.

[176] According to the procedure Bombardier Cogswell claimed to have followed in distributing the cupcakes to her fellow troops, it does suggest she personally controlled the distribution of the cupcakes. She stated:

“So I was, like, all right, I'll bring them in. So I put them in the car, took them all down. Got my stuff ready. I got Mick Landress(ph) with me and he was there. I warned every single person before they ate a cupcake, I said, “It's hot, you're drinking Monsters, there's chocolate, it could upset your bellies. If you're scared of that, don't eat them.” I warned every single person before.

I said, that's the combination. It's hot out. You could get sick. Don't do it, all right?

And I -- every single person had that warning and they were all, like, “Oh, we don't care. We don't care,” and they just started smashing them like this and, like, ripping off the wrappers and throwing them. And I'm, like, okay, but if you get sick, like, let me know and I will go and get Gravol.”

[My emphasis.]

[177] On 10 October 2018, Bombardier Cogswell had a second interview with the MP. Sergeant LeBlanc explains to her the seriousness of the issue and its wider implications on an international level. He says, “Hold on, hold on, please. If you didn't do this, true man, honest and true, you know, by the grace of God, then I have to call the RCMP and potentially the FBI.” When faced with the obvious predicament of the RCMP and the FBI becoming engaged, the position of Bombardier Cogswell changes very rapidly.

“And if you didn't, right, like I said, I need to notify the authorities way bigger than the MPs because this could be worldwide.

Do you understand the dilemma that I'm facing right now?”

[178] Sergeant LeBlanc asks Bombardier Cogswell directly whether she did administer a substance because he has proof that her cupcakes did contain cannabis. In response, Bombardier Cogswell immediately responds:

“So I will ask you, from the bottom of my investigative skills, Chelsea Hazel Marie, did you or did you not poison -- not poison but administer a substance because I have proof, from your muffins, that it did contain cannabis.

So either you did it or, if not, I need to go elsewhere.

BDR FRASER: I didn't do it but I know who did. I just found out.

The guys didn't only bring out edibles, from what I am capturing.”

[179] She further explained that: “The guys brought out vapes and they brought out oils. Oils are taken by droppers.” She then stated:

“And some of the guys on that fucking gun line had droppers and they were not only adding droppers but fucking ate cupcakes that I brought, they added it to their rations and they added it to their desserts and they've added it to their drinks.”

[180] Bombardier Cogswell's response asserts that she knows exactly what happened and how the cannabis got into the cupcakes. But when questioned further, she backtracks and says that she knew “those ingredients were floating around and they could have done whatever.”

[181] In light of Bombardier (then-Gunner) Jarbeau's evidence that he simply picked up a cupcake after asking Gunner McLandress, I reviewed whether he might have been responsible. Aside from then-Gunner Chubry who received his cupcake from then-Bombardier Lechman, then-Gunner Jarbeau was the only one providing evidence that Bombardier Cogswell was not present and involved with the distribution of the cupcakes.

[182] In assessing some of the alternate theories, I first reviewed the evidence given by those members in then-Master Bombardier Diggs' detachment who received their cupcakes at least two hours before then-Gunner Jarbeau took one. Then-Master Bombardier Diggs, then-Bombardier Lechman and then-Gunner Eoll all interacted personally with Bombardier Cogswell at the canteen when they were given a cupcake or cupcakes (as then-Bombardier Lechman took a cupcake for then-Gunner Chubry). In fact, then-Gunner Eoll testified that he asked Bombardier Cogswell specifically whether he had to pay for the cupcake.

[183] The only evidence of Gunner McLandress being alone with the cupcakes, occurred two hours later when then-Gunner Jarbeau approached the canteen looking for

one at the second location. Although Gunner McLandress may have had those few seconds, maybe minutes, to add drops to a cupcake at the second location, it does not explain how the cannabis got into the cupcakes that were distributed at the first location when Bombardier Cogswell was personally and actively involved in their distribution.

[184] In assessing this exculpatory account advanced from the defence regarding the use of droppers, there are a number of problems that surface.

- (a) Firstly, the theory advanced by the defence suggests that the soldiers had cannabis droppers or something similar which they self-administered into their own rations, desserts or drinks and that these same people then ate her cupcakes. But, the fundamental problem with this theory is that it relies upon the remote possibility that everyone who consumed a cupcake also had their own dropper and they just coincidentally added cannabis to their cupcake that day. It also begs the question as to how then-Gunner Long and then-Bombardier Lechman or any of the others who did not recreationally consume any cannabis ended up with cannabis in their cupcakes;
- (b) Secondly, the facts indicate that there were two different detachments from which the Court concluded that members had to have consumed cannabis in their respective locations. The defence theory does not suggest that there was someone with a dropper in both locations that somehow administered the drops to the affected individuals; however, the Court considered whether this theory might be likely;
- (c) Master Bombardier (then-Gunner) Long testified that he ate the cupcake right away and found that there was something off about it. Aside from then-Gunner Eoll who stated that he ate his cupcake for dessert after finishing his IMP and then-Bombardier Lechman and then-Gunner Chubry who ate their cupcakes together, the majority of the witnesses testified that they consumed their cupcakes almost immediately, either at the canteen or walking back from the canteen.
- (d) It appears very remote that an interloper with a dropper intercepted every one of the cupcakes (which were distributed in two different locations), to apply cannabis drops from droppers that they presumably acquired for their own personal use.
- (e) In assessing whether the cupcakes were the source of the cannabis in the cupcakes, the court accepted the testimony of then-Gunner Penner's that when he went to the canteen, he did not take a cupcake. However, he also told the court that he later ate the leftovers of then-Gunner Jarbeau's cupcake that he found in the cab of their truck. He said that he ate approximately a quarter of the leftover cupcake from inside the wrapper. Given that both then-Gunners Penner and Jarbeau displayed symptoms

of intoxication, and only one of them would have eaten the top and/or the jelly bean, this fact dispels the possibility that someone might have dropped a cannabis source onto the top of the cupcakes or, alternatively, that the source of the cannabis might have come from the jelly bean on the top. If there were only drops added to the top of the cupcake, it is highly unlikely that then-Gunner Penner would have been affected, but the fact that he experienced symptoms of cannabis intoxication strengthens the inference that the THC was in the actual cupcake mix itself.

Means, capacity and skills - Knowledge of and access to cannabis products

[185] In her first police interview, Bombardier Cogswell confirmed that she was medically prescribed marihuana that she takes in the evenings as she is preparing for bed:

“So when I go home, lock my doors, and at about 7:00 when I'm ready to start going to bed, I'll take my capsule and I'll go straight to bed.

I don't party with anyone, I don't give anything.”

[186] In the second interview, she describes what she takes for her prescribed cannabis which are small capsules, described as a butter substance.

“They're little capsules. I don't know -- I just take them when I can't sleep or I'm anxious. But they're just small little -- it's not oil but it's, like, a butter substance.

[. . .]

It would be, like, eating, like, a wax candle.

[. . .]

It melts with your stomach acid. You feel the effects after about an hour.

[. . .]

[O]ne capsule of marijuana butter at night to go to sleep and be able to sleep like a normal person without getting up three hours —

SGT LeBLANC: Did you get that through med relief? Where did you get that from? The butter.

BDR FRASER: The butter? The capsules?

SGT LeBLANC: The capsules, whatever.

BDR FRASER: I got my prescription and then my friend's dad is, like, he's an ex-vet and he's got all his licenses and everything and he makes butter and then he sells them.”

[187] Defence counsel argued that even if Bombardier Cogswell had a medical prescription for marihuana and knew where to purchase it this is not evidence that supports that she did in fact add it to the cupcakes.

[188] During her second interview, when Bombardier Cogswell learns that the investigation has shifted to a much higher level, Bombardier Cogswell’s interview reflects a more elevated and very detailed knowledge of a wide variety of cannabis products, their production, including exact specifics on where to purchase the products and who purchases them.

[189] Bombardier Cogswell not only had the opportunity to put cannabis into the cupcakes, but she also had the knowledge and ready access to a wide range of cannabis products in order to facilitate this.

Other relevant evidence

[190] The evidence suggests that Bombardier Cogswell knew that she should provide a warning to the soldiers regarding the cupcakes. However, unlike what she asserted in her interviews about warning them on the risks of mixing the heat and the consumption of chocolate, their testimony suggested that the only warning they received was regarding potential allergies or taste due to the fact she added avocado and coconut oil.

[191] All eight complainants and then-Master Bombardier Diggs were asked about what warnings they received at the canteen that day; however, only three, then-Master Bombardiers Vallerand and Diggs and then-Gunner Eoll said they had been warned by Bombardier Cogswell about a possible reaction they might have to avocado oil that was an ingredient in the cupcakes. Notably, although Bombardier Cogswell told the investigator that she warned them that the consumption of Monster Energy drink, chocolate, and heat that might “upset their bellies” and expressed her concerns to them, none of the complainants testified that they heard this.

[192] Bombardier (then-Gunner) Eoll testified that Bombardier Cogswell warned him that she had used avocado oil in the cupcakes. Sergeant, (then-Master Bombardier) Vallerand testified that Bombardier Cogswell told him, “[H]opefully, they won’t taste weird because I made them with avocado oil and coconut oil. . . . [H]opefully nobody feels bad or [sick].” Sergeant (then-Master Bombardier) Vallerand testified that he did not think much about it at the time other than to think it was “a weird comment”. In most instances, when someone brings in baking to share, they do not provide stern warnings with it. Mr., (then-Master Bombardier) Diggs testified that he was not sure if Bombardier Cogswell was speaking directly to him, but he recalled hearing that she

said, in general, that the cupcakes were made with avocado oil. It was noted that Bombardier Cogswell told both then-Master Bombardiers Vallerand and Diggs, who were the two detachment commanders, about the presence of avocado oil in the cupcakes.

[193] Master Bombardier (then-Gunner) Long testified that he asked Bombardier Cogswell if there was anything in the cupcakes because at that time, he was in recovery for alcoholism for the past eight years and wanted to know if there was anything unusual in the cupcakes he should know about.

[194] In response, Bombardier Cogswell raised her hands in an “I don’t know” gesture, and he testified that he actually questioned himself whether he should eat the cupcake or not, but ultimately decided to eat it based on his trust of his colleague.

Summary

[195] After assessing all the evidence, I do not believe the exculpatory accounts submitted by the defence nor the theory postulated regarding the cannabis droppers being the source of the cannabis in the field that day.

[196] From the whole of the evidence, the primary facts established in evidence with respect to identity are:

- (a) Bombardier Cogswell demonstrated significant animus towards the senior NCOs and members of W Battery and resented the more junior members referring to her as the “canteen bitch”;
- (b) despite the number of units from RCAS participating in the exercise, only those members from W Battery were affected;
- (c) Bombardier Cogswell demonstrated an above average knowledge of cannabis products and the nature of their effects;
- (d) Bombardier Cogswell had a medical prescription for cannabis and a readily accessible supply of various types of cannabis edibles and oils;
- (e) Bombardier Cogswell baked the cupcakes herself and her interviews suggest, she was particularly mindful of the ingredients she put into the cupcakes, one of them being avocado oil;
- (f) when distributing the cupcakes, she drew specific attention to the fact that she added avocado oil into them and said she hoped that the cupcakes didn’t “taste weird” or words to that effect;
- (g) Bombardier Cogswell told the investigator she lived in somewhat isolation interacting with “maybe two friends”;

- (h) she personally transported the cupcakes to the canteen in her car;
- (i) she purportedly warned every person who took a cupcake, suggesting very close control over the distribution of the cupcakes;
- (j) based on the testimony of the DRE, all the troops who consumed the cupcakes, with the exception of one being then-Master Bombardier Diggs, displayed symptoms consistent with the ingestion of cannabis;
- (k) detachment members at two separate locations ate the cupcakes distributed by Bombardier Cogswell from the mobile canteen truck and within 45 minutes to an hour after their consumption of the cupcakes, they began to experience symptoms consistent with the ingestion of cannabis;
- (l) given that then-Gunner Jarbeau ate the top half of the cupcake and then-Gunner Penner ate the bottom half of the same cupcake and yet both displayed symptoms consistent with the ingestion of cannabis suggests that there is a very low likelihood that the cannabis was added to the cupcakes via drops administered to the top of the cupcake;
- (m) all the recipients who ate her cupcakes and provided a urine sample tested positive for the presence of marijuana metabolite; and
- (n) one of the cupcake wrappers from a cupcake she baked tested positive for THC.

[197] Having verified that the primary facts are established by the evidence, which I accept, this Court may make the inference that Bombardier Cogswell added cannabis into the cupcakes. I am therefore convinced beyond a reasonable doubt that it was Bombardier Cogswell who added cannabis in the cupcakes;

[198] Based on the above findings beyond a reasonable doubt, I turn next to review the charges before the Court.

First charge: Section 93 of the NDA for disgraceful conduct

[199] Firstly, based on the above analysis, I find that the particulars, as detailed in the first charge were proven beyond a reasonable doubt. The particulars read as follows:

“Particulars: In that she, on or about 21 July 2018, in the training area at 5 CDSB Gagetown, New Brunswick, did distribute cupcakes containing cannabis to Canadian Forces personnel during a domestic live fire exercise.”

[200] The finding on the charge depended not only on my assessment of the credibility of the witnesses and that the act particularized in the charge sheet has been proven beyond a reasonable doubt, but the prosecution also had to prove that the actions of the accused were disgraceful within the context of section 93 of the *NDA*. With respect to the evidence before the Court, I am satisfied beyond a reasonable doubt that:

- (a) the accused baked the cupcakes;
- (b) the accused added cannabis into the cupcakes or alternatively was aware that the cannabis was in the cupcakes via one of its ingredients;
- (c) the cupcakes containing cannabis were distributed to the soldiers without their knowledge while they were participating in a live firing exercise;
- (d) The complainants became impaired from eating the cupcakes that contained cannabis;
- (e) the accused knew or ought to have known of the effects the cannabis would produce once ingested; and
- (f) the accused distributed the cupcakes to the troops from the mobile canteen while knowing they were participating in a live firing exercise.

[201] A finding that the alleged conduct constituted disgraceful conduct requires an assessment of Bombardier Cogswell's conduct in its context. In assessing the proven conduct, a judge can apply their military experience and general service knowledge and engage in a contextual assessment from the perspective of both the Canadian Armed Forces and the military community. A contextual assessment must also include consideration as to the manner by which the incidents might be viewed in the non-military community.

[202] The term "shockingly unacceptable" is a term that is often used to describe incidents that are disgraceful. In addition, there are many other descriptions that capture the essence of what is meant by the term such as shameful, dishonourable, degrading, inducing strong revulsion or profound indignation.

[203] An assessment of "harm" or "risk of harm" is often part of the context and can inform the analysis. The more severe the harm or risk of harm, the more likely something is to bring disgrace to the CAF or tarnish the CAF as an institution to the point that it is disgraceful.

[204] Conversely, the more shockingly unacceptable the facts are in light of CAF operational and military community norms, the less is required on the scale of harm. In other words, a judge might find that the allegations, taken in the military context, are shockingly unacceptable or disgraceful, even if harm or risk of harm is minimal.

[205] In this case, there was indeed evidence of harm in terms of the physical mind-altering effects suffered by the complainants, the interference in their bodily integrity by the introduction of drugs that they unknowingly consumed, as well as the fact that the exercise was interrupted and training affected. The risk of harm associated with the act was significant.

[206] Then-Gunner Long was driving a heavy vehicle with other members of his detachment while under the influence of cannabis, while others were trying to record a gun (setting coordinates where the round will fall) and trying to fuse a round (setting the explosive function on the munition round). These circumstances presented the potential for even greater harm, including potential death.

[207] Notwithstanding this, the parties have agreed that for a CAF member to distribute cannabis for consumption to CAF members without their knowledge or consent during a domestic live fire exercise is disgraceful conduct that is shockingly unacceptable to military operational and community norms. To distribute cannabis to members in that context causes harmful effects to CAF members if consumed without consent. To distribute cannabis for consumption in that context creates risks of harm to other members and property surrounding general military training; military vehicles; military weapon systems; and military live-fire exercises.

[208] The section 93 offences are general intent offences and the prosecution is not required to prove that the accused intended to act in a disgraceful manner. They simply have to prove that the accused intended to engage in the conduct set out in the particulars.

[209] With respect to the requisite intent, I find that Bombardier Cogswell baked the cupcakes, either added cannabis or ingredients with cannabis into the cupcakes and knowingly distributed them to the soldiers in W Battery while they were conducting a live-firing exercise.

[210] The Court is satisfied beyond a reasonable doubt that the prosecution has proven the particulars of the offence and that the actions were disgraceful.

Second charge: An act to the prejudice of good order and discipline

[211] Since the second charge is an alternate to the first charge, and I find that the prosecution has proved the first charge beyond a reasonable doubt, the second charge will be stayed.

Charges 3, 5, 7, 9, 11, 13, 15 and 17: Administering noxious thing

[212] The remaining charges are for individual allegations pursuant to section 245 of the *Criminal Code* for administering a noxious thing being cannabis. The relevant provision that existed at the time of the alleged offences reads as follows:

Administering noxious thing

245 (1) Every one who administers or causes to be administered to any person or causes any person to take poison or any other destructive or noxious thing is guilty of an indictable offence and liable

[. . .]

(b) to imprisonment for a term not exceeding two years, if he intends thereby to aggrieve or annoy that person.

[My emphasis.]

[213] Upon reviewing the above provision, this court martial must first consider the inherent characteristics of the substance, the quantity administered and the manner of administration.

Meaning of the words “noxious thing”

[214] Section 245 of the *Criminal Code* does not define “poison”, “destructive thing” or “noxious thing”. The *Concise Oxford English Dictionary*, 12th edition, defines the word “noxious” as “harmful, poisonous, or very unpleasant.”

[215] I find that there is support for the view originally set out in *Regina v. Hennah* (1877), 13 Cox C.C. 547, and adopted in Canadian case law in *R. v. Burkholder*, 1977 CarswellAlta 189, 1977 AltaSCAD 8, [1977] 1 W.W.R. 627, [1977] A.J. No. 740, 1 W.C.B. 134, 2 A.R. 119, 34 C.C.C. (2d) 214 that a substance is a noxious thing if, in the light of all of the circumstances attendant upon its administration, it is capable of effecting, or in the normal course of events will effect, a consequence defined in the relevant provision of the *Criminal Code*. In this case, the accused is charged with the lesser offence of section 245, where paragraph 245(1)(b) defines the consequence as to aggrieve or annoy that person.

[216] Based on the above position as set out at the Alberta Court of Appeal whether something is “noxious” will depend on all of the circumstances accompanying its administration, in particular, whether the product is capable of causing or, in the normal course of events, will cause someone to be aggrieved or annoyed.

[217] As such, the determination as to whether a substance is noxious is a question of fact and evidence, to be determined at trial. A noxious thing need not be poisonous to be noxious as per *Burkholder* above.

[218] The onus is on the prosecution to prove that the substance administered was noxious. Cannabis is in its own special drug category.

[219] There was toxicology evidence at trial that showed that at least five of the complainants had cannabis in their system. There was also evidence presented by an expert witness who described the effects of ingesting cannabis. Constable Watson, a DRE, testified as to the effects of cannabis in one’s system. Amongst other symptoms,

he explained that it creates disorientation, alterations in thought process, drowsiness and sedation.

[220] We do not know the exact quantity of cannabis ingested by each of the complainants from the cupcakes, but all five urine samples collected from the complainants who consumed the cupcakes tested positive for marijuana metabolite.

[221] Further, all the complainants displayed the predicted symptoms from the consumption of cannabis which included amongst other things, the impairment of cognitive abilities, lethargy and drowsiness which were incompatible with their tasks that day.

[222] On the basis of the evidence, I am satisfied that on the facts of this case, the cannabis was noxious.

Meaning of “administer”

[223] This term is not defined in the *Criminal Code*, but has been judicially considered in *R. v. Clark*, 2008 ABCA 271. The analysis starts with referring to the *Concise Oxford English Dictionary* (12th Ed), which in the context of the case before us is defined as “dispense (a drug or remedy).” Further with respect to the facts before the Court, the word “dispense” is defined as “distribute to a number of people.”

[224] In *R. v. Franchino*, 2018 ONCA 350, the appellant had been charged with a number of offences. The ones that apply more directly to the facts of this case relate to one night for which he was charged for three offences: one of administering a noxious substance; administering a stupefying substance for the purpose of sexual assault; and sexual assault. The jury convicted the accused at trial on the offence of administering a noxious substance, but found him not guilty on the other two charges. The appellant argued that the jury erred since the offences were all interconnected and, therefore, he should be found not guilty of the offence of administering a noxious substance.

[225] The Ontario Court of Appeal disagreed. It found that “[t]he jury could have had a reasonable doubt about the sexual assault and the sexual assault motive for administering the noxious substance, but no reasonable doubt that the appellant put GHB into the wine that he brought to the complainant’s apartment and served [...] to her while he drank beer.”

[226] Similarly, as cannabis was put into the ingredients of the cupcake, it was administered without the knowledge of the complainants who were offered a free cupcake.

What is the *mens rea* required to support a conviction? Intends thereby to aggrieve and annoy

[227] I must also be satisfied that there is sufficient evidence that the administration of the cannabis was committed with intent to aggrieve or annoy. Paragraph 245(1)(b) of the *Criminal Code* reads: “if he intends thereby to aggrieve or annoy that person.” [My emphasis.]

[228] The section does not make it an offence simply to administer a noxious thing to another person. The offence is established by the mental element that accompanies the act of administering a substance that is in fact noxious with the specific intent to aggrieve and annoy the person. The “intent” referred to in paragraph 245(1)(b) does not refer to the intent to do the act itself (putting cannabis in the cupcakes) as the provision has no immediate reference to the act but rather the intent refers to the intended consequence of the act, which would be to aggrieve and to annoy the victim.

[229] As an example, if Bombardier Cogswell made herself cupcakes with cannabis in them in order to treat her personal anxiety and someone enters her home, sees the cupcakes sitting on the counter and simply helps one’s self to a cupcake, the effect of the act might aggrieve, or annoy, but the actual intent of the accused has no necessary connection with the effect if she did not intend for the guest to consume the cupcake. There must be a subjective purpose on the part of Bombardier Cogswell to aggrieve or annoy the persons invited to eat the cupcakes.

[230] Nonetheless, applying the law on intent as interpreted in *Burkholder*, if the complainants were aggrieved or annoyed that is relevant evidence from which it may be inferred that the accused administered the cannabis with the intent thereby to aggrieve or annoy.

[231] Alternatively, if a complainant was not aggrieved or annoyed, although that is also evidence that must be considered in determining whether the necessary intent may be inferred from the evidence as a whole, that finding by itself does not constitute an answer to the charge. If the cannabis administered was a noxious substance in the sense that it was capable in the normal course of events of aggrieving or annoying, the intent necessary to support a conviction may be inferred despite the fact that a person was not aggrieved or annoyed.

[232] The terms “aggrieve” or “annoy” are also not defined in the *Criminal Code*. The current *Concise Oxford English Dictionary*, 12th edition, defines them as follows: “aggrieve: distress” and “annoy: make slightly angry”. In short, the consequence defined in paragraph 245(1)(b) of the *Criminal Code* suggests that the intent is to distress or make slightly angry the person receiving the noxious substance.

[233] In *Burkholder*, it was held that the *mens rea* required by this paragraph 245(1)(b) of the *Criminal Code*, i.e. “with intent thereby to”, did not encompass recklessness but was limited to proof that the accused intended a specific consequence defined in the section.

[234] Unlike paragraph 245(1)(a) of the *Criminal Code*, paragraph 245(1)(b) of the *Criminal Code* does not require the administration of the cannabis to be for the intent of causing bodily harm. The requisite mental intent required for this lesser offence is comparatively quite low, requiring only that the accused intended to distress or annoy those persons consuming the cupcakes.

[235] More specifically, based on the offence set out at paragraph 245(1)(b) of the *Criminal Code*, the requisite intent does not require that Bombardier Cogswell intended the more harmful second order effects caused to the Exercise with respect to the operation of powerful guns on the live-firing range which was not only dangerous, but could have led to deadly consequences. They are, however, very important considerations in the context of this case.

[236] Cannabis was well known to be a substance prohibited not just within the CAF at the time, but, similar to other medications, it must not be consumed when operating heavy machinery or guns and, if consumed, it can lead to mistakes that could cause bodily harm and at the very least could lead to future health issues and addiction.

[237] On a lesser and more immediate level, it is known that consuming cannabis is capable of aggrieving or annoying the person to whom it is administered and that is the basis of the charges the accused faces here in court.

[238] Based upon her interview with Sergeant LeBlanc, Bombardier Cogswell was taking medicinal marijuana at the time. As such, she was fully aware of the effects of cannabis products, as she told Sergeant LeBlanc during her interview that often it is the only thing that can relax her and put her to sleep. As such, there is evidence whereby the Court can infer that she understood that putting cannabis into the cupcakes, at a minimum, would have undesirable mind-altering physical effects on those ingesting it. Based on this, Bombardier Cogswell was aware of the adverse effects of mixing cannabis into the cupcakes and serving them to military members who were conducting any work-related task and, therefore, I find that she reasonably intended the grievous and annoying consequences to each of the complainants.

[239] Based on the above comprehensive analysis, the Court reviewed each of the charges punishable under section 130 of the *National Defence Act*, that is to say, administering a noxious thing, contrary to paragraph 245(1)(b) of the *Criminal Code*:

- (a) Third charge - Particulars: In that she, on or about 21 July 2018, in the training area at 5 CDSB Gagetown, New Brunswick, did cause Dylan Eoll to use cannabis with intent to aggrieve or annoy.

The Court is satisfied beyond a reasonable doubt that the prosecution has proven all the elements of the offence and Bombardier Cogswell's guilt on the third charge;

- (b) Fifth charge - Particulars: In that she, on or about 21 July 2018, in the training area at 5 CDSB Gagetown, New Brunswick, did cause Connor Chubry to use cannabis with intent thereby to aggrieve or annoy.

The Court is satisfied beyond a reasonable doubt that the prosecution has proven all the elements of the offence and Bombardier Cogswell's guilt on the fifth charge.

- (c) Seventh charge - Particulars: In that she, on or about 21 July 2018, in the training area at 5 CDSB Gagetown, New Brunswick, did cause Lyann Lechman to use cannabis with intent thereby to aggrieve or annoy.

The Court is satisfied beyond a reasonable doubt that the prosecution has proven all the elements of the offence and Bombardier Cogswell's guilt on the seventh charge.

- (d) Ninth charge - Particulars: In that she, on or about 21 July 2018, in the training area at 5 CDSB Gagetown, New Brunswick, did cause Jordan Slade to use cannabis with intent thereby to aggrieve or annoy.

The Court is satisfied beyond a reasonable doubt that the prosecution has proven all the elements of the offence and Bombardier Cogswell's guilt on the ninth charge.

- (e) Eleventh charge - Particulars: In that she, on or about 21 July 2018, in the training area at 5 CDSB Gagetown, New Brunswick, did cause Liam Jarbeau to use cannabis with intent thereby to aggrieve or annoy.

The Court is satisfied beyond a reasonable doubt that the prosecution has proven all the elements of the offence and Bombardier Cogswell's guilt on the eleventh charge.

- (f) Thirteenth charge - Particulars: In that she, on or about 21 July 2018, in the training area at 5 CDSB Gagetown, New Brunswick, did cause William Vallerand to use cannabis with intent thereby to aggrieve or annoy.

The Court is satisfied beyond a reasonable doubt that the prosecution has proven all the elements of the offence and Bombardier Cogswell's guilt on the thirteenth charge.

- (g) Fifteenth charge - Particulars: In that she, on or about 21 July 2018, in the training area at 5 CDSB Gagetown, New Brunswick, did cause William Long to use cannabis with intent thereby to aggrieve or annoy.

The Court is satisfied beyond a reasonable doubt that the prosecution has proven all the elements of the offence and Bombardier Cogswell's guilt on the fifteenth charge.

- (h) Seventeenth Charge - Particulars: In that she, on or about 21 July 2018, in the training area at 5 CDSB Gagetown, New Brunswick, did cause Nathan Penner to use cannabis with intent thereby to aggrieve or annoy.

The Court is satisfied beyond a reasonable doubt that the prosecution has proven all the elements of the offence and Bombardier Cogswell's guilt on the seventeenth charge.

Conclusion

FOR THESE REASONS, THE COURT:

[240] **FINDS** Bombardier Cogswell guilty of the first, third, fifth, seventh, ninth, eleventh, thirteenth, fifteenth and seventeenth charge.

[241] **DIRECTS** a stay of proceedings on the second charge.

Counsel:

The Director of Military Prosecutions as represented by Majors É. Baby-Cormier and M. Reede

Mr I. Kaspar and Captain D. Sommers, assisting the Director of Defence Counsel Services, Counsel for Bombardier C.H. Cogswell, Accused