



## COURT MARTIAL

**Citation:** *R. v. Cogswell*, 2021 CM 2015

**Date:** 20210811

**Docket:** 201935

Standing Court Martial

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

**Between:**

**Bombardier C.H. Cogswell, Applicant**

-and-

**Her Majesty the Queen, Respondent**

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

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

(Orally)

**The case**

[1] The allegations before the Court relate to an alleged incident that occurred on 21 July 2018, involving members of Whiskey (W) Battery, Royal Regiment Canadian Artillery School (RRCAS), who were scheduled to conduct a live fire portion of Exercise COMMON GUNNER at 5th Canadian Support Division Base (5 CDSB) Gagetown, New Brunswick.

[2] There are a total of ten charges before the Court against Bombardier Cogswell, known as Bombardier Fraser at the time of the alleged incident, flowing from an alleged distribution of cupcakes containing cannabis to Canadian Armed Forces (CAF) personnel during a domestic live fire exercise. There are eight counts of administering a noxious substance, one count of behaving in a disgraceful manner, and one count of

conduct to the prejudice of good order and discipline. The last two counts are alternatives to each other.

[3] The 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[Fourth charge withdrawn 4 August 2021]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.”

[4] At the end of the prosecution’s case, on application, accused persons are entitled to seek a directed verdict of acquittal if they believe that the prosecution has not presented a *prima facie* case on one or more of the charges. At the close of the prosecution’s case, pursuant to the *Queen’s Regulations and Orders for the Canadian Forces* (QR&O) paragraph 112.05(13), defence presented a motion seeking a directed verdict. Defence argued that the prosecution did not introduce evidence of one of the essential elements of the offences; namely, the identity of the accused; and secondly, defence argued that the prosecution did not provide evidence that the members cited at charges 9, 11 and 17 had consumed cannabis.

### **The applicable law**

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

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

[6] The test is consistent with the test set out for directed verdicts by Fish J. of the Supreme Court of Canada (SCC) in *R. v. Fontaine*, 2004 SCC 27. At paragraph 53, Fish J. set out the test which was later enunciated in *R. v. Barros*, 2011 SCC 51, at paragraph 48 by Binnie J.:

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

[7] The test is the same whether the evidence is direct or circumstantial: see *Mezzo v. The Queen*, [1986] 1 S.C.R. 802, at pages 842-43; *R. v. Monteleone*, [1987] 2 S.C.R. 154, at page 161. The nature of the judge's task, however, varies according to the type of evidence that the Crown has advanced. Where the Crown's case is based entirely on direct evidence, the judge's task is straightforward. In simple terms, direct evidence relates to “the precise fact which is the subject of the issue on trial” (see Sopinka, John, Sidney N. Lederman and Alan W. Bryant. *The Law of Evidence in Canada*, 2nd ed. Toronto: Butterworths, 1999, at section 2.74).

[8] Thus, if the judge determines that the prosecution has presented direct evidence as to every element of the offence charged, the judge's task is complete. As McLachlin C.J.C. explained in *R. v. Arcuri*, [2001] 2 S.C.R. 828:

By definition, the only conclusion that needs to be reached in such a case is whether the evidence is true. It is for the jury to say whether and how far the evidence is to be believed. Thus if the judge determines that the Crown has presented direct evidence as to every element of the offence charged, the judge's task is complete. If there is direct evidence as to every element of the offence, the accused must be committed to trial.  
[Citations omitted.]

[9] However, when it comes to applying the same test to circumstantial evidence, the test is more complicated. With circumstantial evidence, there is, “by definition, an inferential gap between the evidence and the matter to be established — that is, an inferential gap beyond the question of whether the evidence should be believed: see Watt, David. *Watt’s Manual of Criminal Evidence*. Scarborough, Ont.: Carswell, 1998, at § 9.01 (circumstantial evidence is “any item of evidence, testimonial or real, other than the testimony of an eyewitness to a material fact. It is any fact from the existence of which the trier of fact may infer the existence of a fact in issue”).” As the SCC set out in *Arcuri* at page 840:

23 The judge's task is somewhat more complicated where the Crown has not presented direct evidence as to every element of the offence. The question then becomes whether the remaining elements of the offence — that is, those elements as to which the Crown has not advanced direct evidence — may reasonably be inferred from the circumstantial evidence. Answering this question inevitably requires the judge to engage in a limited weighing of the evidence . . . The judge must therefore weigh the evidence, in the sense of assessing whether it is reasonably capable of supporting the inferences that the Crown asks the jury to draw. This weighing, however, is limited. The judge does not ask whether she herself would conclude that the accused is guilty. Nor does the judge draw factual inferences or assess credibility. The judge asks only whether the evidence, if believed, could reasonably support an inference of guilt.  
[Emphasis removed.]

[10] The weighing of the evidence for a directed verdict is a very limited exercise. “The judge does not ask him- or herself whether he or she is personally satisfied by the evidence. Rather, the judge asks whether a jury, acting reasonably, could be satisfied by the evidence.” (*R. v. Charemski*, [1998] 1 S.C.R. 679 at paragraph 23; emphasis removed.)

[11] The inferences to be drawn from circumstantial evidence need not be “compelling” or even “easily drawn” (see *R. v. G.W.*, [1996] O.J. No. 3075 (QL), 93 OAC 1), per Osborne J.A., at paragraph 62 and *R. v. Katwaru* (2001), 52 O.R. (3d) 321, [2001] O.J. No. 209, 153 C.C.C. (3d) 433 (C.A.), per Moldaver J.A., at page 329 O.R., p. 444 C.C.C.).

[12] If there are two competing inferences that can reasonably be drawn, it is a legal error to favour the inference of the accused over that of the prosecution as to do so usurps the function of the trier of fact (see *Arcuri*, at pages 839 to 842 and *Charemski* at paragraphs 27 to 31 and *R. v. Masterson*, 2008 ONCA 481 at paragraphs 6 to 16). As Major J. put it in *R. v. Sazant*, 2004 SCC 77, [2004] 3 S.C.R. 635, [2004] S.C.J. No. 74 (QL), at paragraph 18, “where more than one inference can be drawn from the evidence, only the inferences that favour the Crown are to be considered.” Thus, if a reasonable

inference in favour of the prosecution is available to be drawn, then, regardless of its strength, a judge conducting a preliminary inquiry is required to draw it.

[13] In conducting an analysis of the facts gleaned at trial, I agree with the words of Ducharme J. in *R. v. Munoz*, 86 O.R. (3d) 134 that, “[w]hile the jurisprudence is replete with references to the drawing of ‘reasonable inferences, there is comparatively little discussion about the process involved in drawing inferences from accepted facts.”

[23] It must be emphasized that this does not involve deductive reasoning which, assuming the premises are accepted, necessarily results in a valid conclusion. This is because the conclusion is inherent in the relationship between the premises. Rather, the process of inference drawing involves inductive reasoning which derives conclusions based on the uniformity of prior human experience. The conclusion is not inherent in the offered evidence, or premises, but flows from an interpretation of that evidence derived from experience. Consequently, an inductive conclusion necessarily lacks the same degree of inescapable validity as a deductive conclusion. Therefore, if the premises, or the primary facts, are accepted, the inductive conclusion follows with some degree of probability, but not of necessity. Also, unlike deductive reasoning, inductive reasoning is ampliative as it gives more information than what was contained in the premises themselves.

[24] A good starting point for any discussion of inference drawing is the definition offered by Justice Watt:

An *inference* is a deduction of fact which may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the proceedings. It is a conclusion that *may*, not *must*, be drawn in the circumstances.<sup>8</sup>

Equally important is Justice Watt's admonition that, "The boundary which separates permissible inference from impermissible speculation in relation to circumstantial evidence is often a very difficult one to locate."<sup>9</sup>

[25] The process of inference drawing was described by Doherty J.A. in *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 (Ont. C.A.), at p. 209 C.C.C. as follows:

A trier of fact may draw factual inferences from the evidence. The inferences must, however, be ones which can be reasonably and logically drawn from a fact or group of facts established by the evidence. An inference which does not flow logically and reasonably from established facts cannot be made and is condemned as conjecture and speculation. As Chipman J.A. put it in *R. v. White* (1994), 89 C.C.C. (3d) 336 at p. 351, 28 C.R. (4th) 160, 3 M.V.R. (3d) 283 (N.S.C.A.):

These cases establish that there is a distinction between conjecture and speculation on the one hand and rational conclusions from the whole of the evidence on the other.

[Footnotes omitted; emphasis omitted.]

### **Position of the accused**

[14] Defence counsel broke down his application into two different arguments.

[15] His first argument is based on the question of identity. In his submission, he argues that the prosecution has not led sufficient evidence to establish that a properly instructed jury acting reasonably could be satisfied beyond a reasonable doubt that it was Bombardier Cogswell who caused the troops to use cannabis. He argues that the prosecution has only proven that Bombardier Cogswell had the opportunity and he submits that when the evidence is based primarily on opportunity, the prosecution must find there is “exclusive opportunity” in order to ground a finding of guilt.

[16] Secondly, with respect to three of the complainants, Bombardier Slade (Charge 9), Gunner Jarbeau (Charge 11) and Gunner Penner (Charge 17), defence argues that the prosecution has led no evidence to prove that the symptoms they experienced related to cannabis and as such, no properly instructed jury acting reasonably could conclude that Bombardier Cogswell caused them to use cannabis.

### **Analysis**

[17] At this stage, a prima facie case is established if the evidence, whether believed or not, would be sufficient to prove each and every essential ingredient such that the accused person could reasonably be found guilty at this point in the trial, if no further evidence was adduced.

### ***Issue of identity***

[18] The first issue raised by the defence centres on whether there is any evidence before this court martial to prove that it was Bombardier Cogswell, who put the cannabis into the cupcakes. The Court must assess whether the identity of the accused may reasonably be inferred from the circumstantial evidence before the Court. There is no direct evidence linking Bombardier Cogswell to the cupcakes so the Court must engage in a limited weighing of the evidence due to the inferential gap between the evidence and the element of identity. At this stage, I must not draw factual inferences or assess credibility. I must simply ask myself whether the evidence, if believed, could reasonably support an inference of guilt.

[19] Defence argues that assuming the cupcakes consumed by the complainants were the source of the cannabis, or tetrahydrocannabinol (THC) as tested in the Health Canada analysis, the question is: who put the cannabis in or on the cupcakes? In other words, how did the cannabis get into the complainants’ body via the cupcakes? He argues that there is no direct evidence on this question and the offering of proof is entirely circumstantial and rests on four areas being:

- (a) Opportunity – there is no evidence that Bombardier Cogswell had exclusive opportunity;



- (b) Motive – that she felt hurt based on how she was being treated which is a generalized and non-specific motive and this hurt made her want to indiscriminately poison people;
- (c) Wrapper testing positive for THC – without any ability of the prosecution to establish that THC did not get on the wrapper through contamination; and
- (d) Statements – to suggest that there is evidence of consciousness of guilt.

### **Opportunity**

[20] The defence argues that the prosecution's case with respect to proving the element of identity largely rests on the fact that since Bombardier Cogswell baked the cupcakes, it must be her who put the cannabis in the cupcakes. However, it is the defence position that evidence of opportunity alone is insufficient to establish guilt and there is no other evidence that can overcome the evidentiary gap.

[21] Further, defence argues that in light of the circumstantial evidence, an inference of identity could only be relied upon if Bombardier Cogswell had exclusive opportunity and the prosecution's case provides no evidence to support that she had an exclusive opportunity to put cannabis in the cupcakes.

[22] Defence argues there is no evidence about what happened to the cupcakes after they were baked, prior to being taken to the canteen and before they were eaten by the soldiers and there is no evidence of Bombardier Cogswell's living circumstances as to whether she lived alone or if there was another family member or roommate.

[23] In analysing the application before the Court, I reviewed the relevant evidence admitted at trial. With respect to her living circumstances, the evidence before the Court includes the 20 September 2018, police statement given by Bombardier Cogswell to Sergeant LeBlanc where she confirmed that at that time, she was living with two cats. She does not mention living with family or roommates. She described her daily routine at that time as follows:

"I'm pretty boring. I go to work then I come home. I'm still recovering from what happened so I still lock my doors soon as I get home. I put on my PJs and I make dinner and then I sit in front of the TV and I'm not in school, I just watch TV or read a book. But I don't go out, I don't party, I don't -- I went to (indiscernible) for the first time a few weeks ago and it reminded me why I hate everybody.

[. . .]

I -- when I'm in school, I just do the opposite. I come home, lock the doors, cook dinner, feed the cats their wet food, they get wet food once a day, it's

their treat, and then I'll shower, I'll do an hour of TV and then I'll do my homework, my assignments, discussion questions Monday, papers and tests and (indiscernible) are due on weekends. I read the textbooks in my own time. I'm pretty boring. I got a hot tub for my house to help kind of mellow me out."

[24] Later, Bombardier Cogswell described how she basically keeps to herself and rarely has anyone over, suggesting that at that specific time in her life, she embraced a lifestyle of isolation. She described her social life at that time as follows: "I don't date. I don't go out. I don't -- I go to the movies once in a while by myself but I keep to myself."

[25] Bombardier Cogswell also described how at that time, crowds intimidated her. "I still can't handle crowds. I can't handle lots of people. If the theatre is too full, I return my ticket and leave."

### **Who baked the cupcakes?**

[26] When questioned on whether she made the cupcakes, she confirmed that she baked them from a Betty Crocker mix that she purchased from the Burton Ultramar. When asked what she put in them, she stated:

"There was nothing in my cupcakes. There was freaking the stuff and the eggs and the milk and the oil that you add in and you mix it all up with your mixer and put it in the oven and wait 20 minutes. Then you have to let them cool, which is the worst part. And then you ice them and I sat on the couch and I ate five of them the night before."

[27] In her first interview, she also described how she discovered that you could make cupcakes with the Betty Crocker recipe:

"And I read that you can make them cupcakes because I was going to bake a cake so I was, like, all right, cupcakes, ate five, I felt great. I didn't have diarrhea, I didn't have a tummy ache, I wasn't anything. I was just sitting there on a couch reading a freaking book and eating cupcakes with my two cats. I don't -- I'm not, like, a partier. I don't associate with people. I rarely even talk to people."

[28] When asked about why she brought the cupcakes to the gun line she stated, "And the only reason I even brought them in was because, one, they had been complaining all week that they only had Monsters and junk food". She later added that, "And the only reason I brought them in is because I ate five and I have already gained 20 pounds since Shilo so I didn't want to gain any more."

[29] The prosecution argued that according to Bombardier Cogswell's statement, she was present every time someone received a cupcake, so this idea that she abandoned the cupcakes for some interloper to come in to tamper with them appears unlikely.

[30] With respect to the procedure Bombardier Cogswell followed on the day in question in the field as she was distributing the cupcakes to her fellow troops, her statement suggests 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."

[Emphasis added]

[31] Based on the facts of this case, although Bombardier Cogswell might not have had exclusive access given the presence of Gunner McLandress in the canteen, based on the totality of the facts before the Court, mostly taken from Bombardier Cogswell's own statements, the process of baking, transporting and distributing the cupcakes was on the high end of the exclusivity scale.

[32] I accept that there is some evidence before the Court that suggests that the cupcakes were not always in Bombardier Cogswell's exclusive possession. Gunner Jarbeau's evidence also suggests that Bombardier Cogswell was not around when he was seeking a cupcake and it places Gunner McLandress alone with the cupcakes in the second location. However, at this stage of the test, it is not for the Court to assess the credibility or reliability of this evidence against the statements provided by Bombardier Cogswell herself, as that role is for the Court in its position as a trier of fact. I must only assess whether there is some evidence where a jury acting reasonably and properly instructed, could convict on the evidence.

[33] Although there was some suggestion by Bombardier Cogswell that there were troops that had cannabis droppers in the field who could have added the cannabis oil to the top of the cupcake, there is also evidence to suggest that this could not have been the case.

[34] The facts suggest that both Gunners Penner and Jarbeau experienced mind-altering symptoms. Gunner Penner only ate the left overs of the discarded cupcake from Gunner Jarbeau, yet he still experienced symptoms consistent with the consumption of cannabis as described by Constable Watson. If there were only drops added to the top of the cupcake, it is arguable that Gunner Penner would not have been affected.

[35] Defence conceded that there is some evidence of opportunity and some weak evidence of a generalized motive. However, defence also argues that something more than having opportunity and motive is required to base a conviction and it is not enough upon which a jury could convict. In support of this argument, the defence relies upon *R. v. MacFarlane*, 1981 ONCA, [1981] O.J. No. 117, 61 C.C.C. (2d) 458 and *R. v. Ferianz*, 1962 CarswellOnt 4, [1962] O.W.N. 40, 37 C.R. 37 two cases related to arson where the prosecution's case rested on the accused being in the general vicinity of the fires and both accused having a financial motive.

[36] In the arguments suggesting that there is a requirement for the prosecution to prove exclusive opportunity in order to prove identity, the defence did not rely upon any jurisprudence from the court martial or the Court Martial Appeal Court level, however, he did rely upon a case from SCC, primarily *R. v. Yebe*, [1987] 2 S.C.R. 168 which is binding on this Court. As there is currently no court martial jurisprudence on this issue nor has *Yebe* been judicially interpreted at the court martial level, the Court took the time to analyze it. The case law provided was of assistance in assessing how *Yebe* has been judicially interpreted at the trial level in other courts in Canada and consequently, in my analysis, I reviewed the applicable cases from this perspective.

[37] In *Ferianz* and in *MacFarlane* where there was opportunity and a weak motive, the courts found that the convictions were unreasonable. In *MacFarlane*, the Court relied upon only one fact and that was that the accused was observed leaving an apartment building for several minutes during an interval when a fire occurred in his variety store. Other than that fact, there were no other evidence connecting the accused with setting the fire. In *MacFarlane*, given that there was no other evidence or circumstances connecting the appellant with the setting of the fire, the Ontario Court of Appeal found that, "it was incumbent upon the Crown to establish that he had exclusive opportunity to set the fire in order to support a conviction". In *MacFarlane*, the Court also noted that although there was perhaps some evidence of motive, it was of negligible weight since on the facts disclosed in the record, there was no clear evidence that the appellant stood to benefit financially from the fire.

[38] In *Ferianz*, the accused were joint owners of a building which burned. It was common ground that the fire was deliberately started by someone. The only evidence against the accused on the first count was that they conspired with persons unknown to commit arson relying upon motive and opportunity. In that case, the Court held that, "Although motive may be an important element along with other probative and significant facts in establishing guilt, motive by itself and standing alone amounts to nothing or next to nothing in the way of proof."

[39] Further, the Court in *Ferianz* stated that, “Evidence of opportunity, unless it is exclusive opportunity, is on a somewhat similar footing as evidence of motive. Mere opportunity is not accepted as corroboration where corroboration is required or desirable.”

[40] However, after reviewing the full trend of jurisprudence provided on this issue, it is evident that cases of arson are distinguishable from the circumstance of other offences, including this case. For example, exclusive opportunity is often the turning consideration in arson cases. Since fires can originate from a range of causes from natural, accidental to deliberate, the pure nature of the offence, “renders exclusive opportunity a telling reality, effectively leaving guilt of the person having the sole opportunity as the only rational conclusion” (see paragraph 55 of *R. v. Pinsent*, 2000 NFCA 26).

[41] The Court took the time to review other cases in other courts where the case was based primarily upon circumstantial evidence to see how *Yeves* has been interpreted and applied.

[42] In *R. v. Mendez-Romero*, 2007 CarswellOnt 11682, 79 W.C.B. (2d) 757, the accused was alleged to have murdered his partner of twelve years after an increasingly troubled relationship. It was conceded that the accused had opportunity and motive to kill. The sole issue in the case was identity. The accused argued that there was no evidence of exclusive opportunity, but only evidence of mere motive and mere opportunity which were not enough.

[43] As in the case at bar, in *Mendez-Romero*, a great deal of argument was devoted to the abstract proposition that exclusive opportunity to commit an offence is required if the only other evidence is motive. Relying upon the SCC in *Yeves*, the Court in *Mendez-Romero* found that evidence of exclusive opportunity is not required when there is other inculpatory evidence.

[44] In the case of *Yeves*, at paragraph 32, the SCC concluded:

It may then be concluded that where it is shown that a crime has been committed and the incriminating evidence against the accused is primarily evidence of opportunity, the guilt of the accused is not the only rational inference which can be drawn unless the accused had exclusive opportunity. In a case, however, where evidence of opportunity is accompanied by other inculpatory evidence, something less than exclusive opportunity may suffice. This was the view expressed by Lacourcière J.A. in *R. v. Monteleone* (1982), 38 O.R. (2d) 651, 67 C.C.C. (2d) 489 at 493, 137 D.L.R. (3d) 243 (C.A.), where he said:

It is not mandatory for the prosecution to prove that the respondent had the exclusive opportunity in a case where other inculpatory circumstances are proved.

[Emphasis added]

[45] In *Pinsent*, the accused became involved in a heated altercation with two other men in a taxicab in the very early morning hours. The evidence given at trial suggests that the bickering in the cab reached the stage where the prospect of it descending to physical violence was apparent between Mr. Pinsent and each of the other two men. After the second last person, Mr Bennett, exited the cab, “Mr. Pinsent's parting words to the cab driver were: ‘you know yourselves them fellows is going to get what's coming to them.’” The cab driver estimated he dropped off Mr. Pinsent at “roughly five to four, to four o'clock.” Shortly thereafter, a bullet was fired into the house of Mr. Bennett. Upon an investigation, there was evidence of the bullet entering the house but no evidence of the spent missile being found. At approximately 4:35 a.m. Mr. Pinsent was identified as pulling into a gas station on the Trans-Canada Highway in the vicinity of the alleged shooting. No weapon was found but there was evidence that Mr. Pinsent had a valid hunting licence. Mr. Pinsent's post-offence conduct provided probative value placing him in proximate vicinity to the scene of the crime. In short, relying upon the utterance by the accused to the cab driver and the fact that Mr. Pinsent was found in the vicinity shortly thereafter, the appeal court found that there was sufficient evidence transcending motive and opportunity in order to sustain a conviction.

[46] Based upon my review of the trend in jurisprudence, interpreting the SCC decision in *Yebe*s with respect to circumstantial evidence, although every case will turn on its own facts, I find that the most persuasive case law suggests that absent a case of arson, it is not mandatory for the prosecution to prove exclusive opportunity where other evidence of inculpatory evidence exists.

[47] Consequently, based on the other inculpatory evidence that points to Bombardier Cogswell, the prosecution does not need to prove that she had the exclusive opportunity to put cannabis in the cupcakes.

### **Knowledge of and access to cannabis products**

[48] Further, it is peppered throughout the evidence that Bombardier Cogswell not only had the opportunity to put cannabis into the cupcakes, but she also had the knowledge and access to various forms of cannabis products in order to facilitate this. Her police statements also suggest that she had easy legal access to cannabis when its acquisition, possession and usage were otherwise illegal for members of the CAF.

[49] In her first police statement, 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.”

[50] Bombardier Cogswell informed the investigating military police (MP) that for her one of her academic courses, she focussed on the legalization of marihuana so she researched the use of variants of cannabis products and she very knowledgeably proceeded to explain to Sergeant LeBlanc the differences:

“THC is, like, for people that want to party, I believe it is, and CBD is more for the people that want to relax. So, when I did my research, cancer patients preferred the higher concentration of CBD and the party people, overall, THC.

So, I mean, there's two different kind of variants and, if they're following the strain for CBD and they're medically using it, that makes sense.

Like, you need it to calm yourself or calm your nausea, by all means, partake. But when you show up to the unit, you shouldn't be -- I'm so hungry and, like, acting a fool.”

[51] During her second interview, when she learned that the investigation had shifted to a much higher and more serious level, Bombardier Cogswell’s comments reflect an even higher knowledge of cannabis products, their production, including where she purchases the products, who else shops at that location and then she provided a broad description of the various types of cannabis products available.

### **Conflicting evidence, exaggeration and falsehoods**

[52] Further, in evaluating opportunity, it is clear in the jurisprudence that additional evidence of inculpatory evidence may come from statements of an accused which catch her out in a deliberate falsehood. For example, the courts in *R. v. Monteleone*, (1982), 67 C.C.C. (2d) 489 (Ont. C.A.) and *R. v. Stevens*, (1984), 11 C.C.C. (3d) 518 (Ont. C.A.), along with *Yebe*s, found that instances where implausible explanations are given or fabrications are recognized have the potential to provide the requisite evidence to fill any evidentiary gap.

[53] In defence submissions, it was acknowledged that there was exaggeration by Bombardier Cogswell in her statements. For example, she suggests some people bought multiple Monsters, the energy drinks, and were chugging them. In her first interview, she stated:

“No one in my life has ever gotten sick from my cooking. So that's why, like, ever since then, and I've been hearing all this stuff and I'm, like, scratching my head because I honestly don't understand, like, the guys were buying five Red Bulls or Monsters at a time and chugging them and then, like, there was no limits on what they could buy so basically my canteen was open and whatever they grabbed.”

[54] The prosecution also submitted that Bombardier Cogswell refers to warning them about her cupcakes while noting that some troops were consuming five Monsters at a time while eating her cupcakes. However, none of the witnesses testified to doing

this and of all the people who testified, it was only Bombardier Slade who testified to purchasing more than one Monster as he said he purchased two to three Monsters.

[55] During his testimony, Bombardier Slade told the Court that he bought a few of them because the canteen is not in the field every day. He stated that he did not chug them as he purposefully did not consume any of the Monster energy drinks as he specifically intended to sleep on the drive to Airstrip1. So, there is no evidence that anyone chugged the Monster Energy drinks as described by Bombardier Cogswell.

[56] The prosecution suggested that Bombardier Cogswell was trying to suggest why the complainants became sick to suggest that it was not from the cupcakes. One of the implausible explanations included the following:

“They were buying -- guys were buying cartons at a time of smokes, like, not leaving anything for the other gun line that I had to hit. Like, they were buying all this junk food and all this hard stuff. They weren't eating. It was 40 degrees. I mean, that's the only logical thing I can think of is maybe the heat and the chocolate combination just upset stomachs, like, but, like, that's the thing.”

[57] The Court also heard in her second statement that she spent hundreds of thousands of dollars, which is evidently an exaggeration. She explained that “for the last, like, three or four months that I've been in the canteen, I had spent my own money bringing them in coffee and donuts.”

“BDR FRASER: And every unit will even mention to you, I've always brought in goodies. No one's ever been sick from my food. I have spent hundreds of thousands of dollars on --

SGT LeBLANC: Hundreds of thousands of dollars?

BDR FRASER: I've spent a lot of money just on W Battery alone, I'm looking at over \$700 spent in the last year on Tim Horton's runs for them when they come out of the field.”

[58] Under cross-examination, Bombardier Slade confirmed that he smoked cannabis at least once with Bombardier Cogswell. However, in her statement when asked about her prescription for cannabis she clearly stated:

“And that's my first time that I've ever -- I just take the capsule.”

[59] On 10 October 2018, Bombardier Cogswell had a second interview with the MP. Sergeant LeBlanc explains to her that he had proof that the cupcakes contained cannabis and therefore the seriousness of the incident has a wider implication 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 face of God, then I have to call the RCMP and potentially the



FBI.” When faced with the obvious predicament of the RMCP 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?”

[60] Sergeant LeBlanc asks Bombardier Cogswell directly whether she did administer cannabis in the cupcakes because he has proof that they contained cannabis to which she provides yet another implausible explanation:

“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.”

[61] 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.”

[62] When asked whether the eight people who were affected had done this, Bombardier Cogswell said she could not be sure who from the entire group would have added the THC oil, but she knew “those ingredients were floating around and they could have done whatever.”

[63] On 10 October 2018, Sergeant LeBlanc asked Bombardier Cogswell to send her something from her iPad and he receives the following response:

“Now, I know you're supposed to send me something else from your iPad. I did get the messages –

BDR FRASER: Yeah, I'm still –

SGT LeBLANC: -- from –

BDR FRASER: I'm still downloading right now. I got, like, 300 a day so I'm still going through them.

SGT LeBLANC: Popular.

BDR FRASER: They're all junk mail. Nobody likes me."

[64] The fact that she could not forward evidence to the investigator as requested because she receives 300 messages a day, despite also saying that she only has two friends and is always alone and hates everyone seems implausible.

[65] In reviewing both the statements of the accused given to Sergeant LeBlanc, there are a string of not just exaggerations, but there also reveal significant inconsistencies. Although the Court did not evaluate the inconsistencies for credibility and reliability, their mere existence likely suggests there are evidentiary concerns and possibly deliberate falsehoods contained therein.

[66] For example, in a change to the earlier narrative given to Sergeant LeBlanc in her first interview regarding her distribution of the cupcakes, in her second interview, after learning that the laboratory test confirmed cannabis in the cupcakes, Bombardier Cogswell describes the distribution process very differently. She stated, "I didn't sit there and hold their hand and watch them eat them" (referring to the cupcakes). Similarly, in a deviation from her earlier interview on how she distributed them, she stated, "So all I did was do my normal ration thing, they were on the tailgate and I told them, if they want them, they're there."

[67] Similarly, although she stated a few weeks earlier that she had no negative effects from eating the cupcakes, in the second interview, she confirms that she in fact did have a stomach ache, "I ate five of them myself the night before. I didn't feel any of these fucking effects or whatever that these people experienced. The only thing I had was a tummy ache and I ate five straight so, I mean, that's a given."

[68] In her earlier statement she indicated that bringing the cupcakes in for the guys was more of an afterthought:

"And the only reason I brought them in is because I ate five and I have already gained 20 pounds since Shilo so I didn't want to gain any more.

[. . .]

Like, I don't understand. I just don't get it. I mean, I made the cupcakes, they cooled off, I ate five, I tested them. I was, like, I could bring them in. I probably shouldn't eat any more. I should bring them in for the guys. They wanted stuff anyways and it's not hot."

[69] In her second statement, she provides more information on how she prepared the cupcakes and confirmed that she actually went out and got avocado oil to add into the mix and then later explains that she added coconut syrup to give it a better flavour.

“BDR FRASER: Yeah. I've never cooked with avocado and all the guys were, like, oh, like, vegan? Oh, (indiscernible), oh, I'm trying to bulk up. And I'm, like, there's 500 different diets. Avocado oil is the least trans-fat, it's the healthiest version of oil. It's better than canola, it's better than vegetable. I'll try the avocado oil.

So I went and got my avocado oil, did all the usual ingredients. I've been making the same box for years, I mean—”

[70] There are so many inconsistencies in the accused's statements which, in isolation, may not amount to much, but the inconsistencies in the context of all the other evidence rises to the level of inculpatory and could be considered in the assessment of circumstantial evidence.

[71] Based on the totality of the evidence and the circumstances of this case, although I do find that the opportunity for Bombardier Cogswell to put cannabis in the cupcakes was on the high end of the exclusivity scale, given that there is other inculpatory evidence available, the application of the test for a directed verdict at this stage does not depend on an express finding that Bombardier Cogswell had exclusive opportunity to put cannabis in the cupcakes.

### **Motive**

[72] It is the defence's position that the evidence of motive is especially weak and as a result does not establish inculpatory motive. In the defence view, it is really evidence of an animus. There is evidence Bombardier Cogswell told the military police that she had been poorly treated in the past, but in the defence's assessment, that hardly equates to the motivation to indiscriminately poison a number of people. 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.

[73] The prosecution disagrees that the inference of motive is weak. In her first interview, Bombardier Cogswell told the MP that after patronizing a place, “it reminded me why I hate everybody.” She makes it clear that she had been treated unfairly. 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.”

[74] The prosecution argued that contrary to what the defence suggested, nobody testified that she was friendly and kind, but only that she brought treats from time to time. It was clear that she did want to fit in and that she also felt that she was not treated fairly.

[75] The accused mentioned multiple times that she was very disappointed in the events that had transpired in Shilo and based on her statements, she was so deeply affected, she expected to be posted to the JPSU.

[76] Further, it is notable that despite the fact that this was the largest exercise of its kind, and included approximately 150 military members in attendance, from courses and other functions within the RRCAS, it was only the members in W Battery which were affected by the substance consumed. There is no evidence before the court that the problem was larger than W Battery who were there to support the training of many other participants engaged in the exercise.

### **Cupcake wrapper**

[77] With respect to the wrapper that was seized and tested by Health Canada, the defence argues that a single wrapper is of no probative value as there is no continuity of custody on the wrapper. Defence argues that there is no evidence as to which cupcake the wrapper came from or what happened to it after Master Bombardier Diggs collected it. Defence further submitted that you cannot exclude contamination as the source of the THC. Someone who handled the wrapper may have been exposed to marijuana but did not ingest it or they did ingest it and the contamination on their hands is how it got on the wrapper.

[78] Secondly, the defence argues that there is no evidence as to where the THC was located on the wrapper. If it was on the outside of the wrapper only and not on the inside, then one might infer that it is more likely from contamination. And lastly, there is no evidence as to the quantity of the THC. If it was a trace amount, it is more probable that the contamination was from another source. In his submission, the wrapper is nothing and provides no evidentiary value.

[79] Conversely, the prosecution argues that the wrapper is both relevant and probative. He argues that this is a circumstantial case, and as such, the evidence must be considered cumulatively and not piecemeal. The symptoms of the complainants, the environment where they consumed the cupcakes, the role of the accused in personally baking the cupcakes and being present when the troops received them, the evidence of Master Bombardier Diggs regarding the collection of the wrapper and that fact that since he ate one he would recognize the appearance of the wrappers.

[80] The prosecution argues that while contamination is possible, beyond the mere assertions of the accused, there is absolutely no evidence to suggest that there is an air of reality to the assertion that there was cannabis in the field that day or even the

possibility that cannabis could have been inadvertently or intentionally transferred onto some cupcake wrapper.

[81] Finally, in his submissions, the prosecution argues that the fact that defence seeks exclusion of the wrapper in another application suggests that he does not believe that the wrapper is of no evidentiary value. In the prosecution's view, in the context of all the other evidence, the wrapper is both relevant and probative.

[82] In short, the arguments made by defence fail to acknowledge that the Health Canada test conducted on the cupcake wrapper is simply one piece of evidence before the Court and the concerns he raises relate more to the reliability of the test and are more appropriately considered in deciding how much weight should be provided to it as evidence. At this stage, it is not the role of the Court to engage in an assessment of the reliability of the test conducted nor should I engage in the weighing of the test as evidence.

### **Actions that suggest consciousness of guilt**

[83] Defence suggests that there is no evidence of consciousness of guilt. It was submitted that in evidence, the Court has Bombardier Cogswell's firm uncontradicted denials to these offences. In considering the whole of the evidence, defence argued that her uncontradicted denials add credence and the prosecution has led no evidence to prove otherwise.

[84] Defence submits that actions at the time or in relation to her statements that might suggest some evidence of consciousness of guilt are equally consistent with an innocent mind. It is the defence position that this offering of proof falls far short of establishing that it was Bombardier Cogswell who drugged the troops and that no jury acting reasonably and properly instructed could convict on this evidence.

[85] It is the defence position that the statements made on scene by Bombardier Cogswell referring to the fact that she added avocado oil and coconut syrup are simply not things that would be expected in a cupcake. Defence argues that if Bombardier Cogswell was trying to drug people she would not be drawing attention to these ingredients. It was submitted that the fact that Bombardier Cogswell warned people about potential allergens associated from these ingredients unexpectedly included in the cupcakes is also consistent with innocence.

[86] Further, defence counsel argued that the exchange Bombardier Cogswell had with Gunner Long who asked what was in the cupcakes was considered a joke by Gunner Long for which she responded raising her hands that she did not know. It is the defence position that the only available inference that the Court can draw is that whatever Bombardier Cogswell said did not cause Gunner Long any concern. He argued it was a response in kind that was completely consistent with innocence and with someone who did not add THC/cannabis to the cupcakes.

[87] With respect to the statements to police, Bombardier Cogswell mentions not knowing what the interview was about while Sergeant LeBlanc says that he told her what it was about. However, defence counsel argues that we do not have evidence on what he actually said and that Bombardier Cogswell's reaction to not knowing what the interview was about is not meaningful on its own.

[88] The prosecution further argued that in her interview, there is evidence of a guilty mind that bridges any gap between opportunity and motive. During her first interview, the accused is clearly nervous; so much so that she apologizes for vomiting. When Sergeant LeBlanc asks her a question about the cupcakes, she acts surprised and he reminds her that he told her what the interview was about when they spoke on the phone and explained that she was the subject of an investigation.

[89] However, despite reacting she was completely surprised by the subject of the investigation, Bombardier Cogswell comments reflect that she had in fact been thinking about the incident for weeks and had already sought legal advice:

“Yeah. Like, why would I -- like, there's no rationale, like, I've been scratching my head for the last couple weeks, since this whole cupcake thing happened and I just, like, it blows my mind, like, my lawyer on the phone, the legal counsel, laughed at me and told me this is where our Forces is going, down the toilet.

And I'm, like, okay, but what do I do?”

[90] Given that Bombardier Cogswell had already spoken to legal counsel seeking advice and it was no secret what was going on in the unit, the prosecution argues that it is difficult to see how she could have been surprised as to the subject of the interview.

[91] The defence is of the view that the last piece of evidence is a change of attitude or behaviour toward Bombardier Lechman and Gunner Long after the cupcake incident. They both testified that after the incident, Bombardier Cogswell started to speak to them more and was friendly with them. In response, defence counsel argued that this change in behaviour is consistent with a fellow troop being supportive of someone who has gone through a negative experience.

[92] The prosecution disagreed that the change in the way Bombardier Cogswell treated Bombardier Lechman and Gunner Long was simply an expression of concern for a brother and sister in arms. In her police interview, Bombardier Cogswell states, “I'm not, like, a partier. I don't associate with people. I rarely even talk to people.” She also states, “I have done so much for these people and it -- just, like, getting slapped in the face.” The prosecution highlighted that all witnesses said they had no relationship with Bombardier Cogswell beyond work. Given that her usual behaviour was not to talk or associate with people, it is unusual that those persons whom she includes in a group of people to have slapped her in the face that she would reach out to them. In light of the circumstances, the prosecution argued that it is unusual behaviour and one of the numerous oddities that contribute to the element of identity in this case.

[93] Despite the arguments made on both sides regarding the post-offence conduct particularly with how she treated Bombardier Lechman and Gunner Long, I found that neither of counsel's arguments identified precisely the live material issue it informs so I afforded these arguments little weight at this stage. Judges must be particularly cautious not to conflate post-offence conduct as evidence relevant to guilt.

[94] In any event, the direct proven facts are that the accused baked the cupcakes, she said she lived in isolation, she personally transported the cupcakes to the canteen in her car, she purportedly forewarned every person who took a cupcake, suggesting she exercised close control over the distribution of the cupcakes. Further, one of the cupcake wrappers from a cupcake she baked tested positive for THC and all the recipients who ate her cupcakes and provided a urine sample tested positive for the presence of marihuana metabolite. Together, the above items provide very strong probative pieces of evidence that intensifies the evidence of opportunity and adds additional pieces of inculpatory evidence within the meaning of "other inculpatory evidence."

[95] 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. There can be no inference unless there are objective facts from which to infer the facts sought to be established. Consequently, the Court took the time to outline all the relevant facts that relate to the inference of identity.

[96] From the Agreed Statement of Facts, and other non-controversial evidence arising from the testimony, the following basic facts are relevant:

- (a) Bombardier Cogswell was assigned to W Battery and was tasked to run supplies out to members during the domestic live fire exercise referred to as Exercise COMMON GUNNER;
- (b) On or about the 21 July 2018, Bombardier Cogswell was personally responsible for and worked at an on-site canteen during the Exercise;
- (c) Bombardier Cogswell baked a dozen cupcakes that she said she personally distributed while working at the on-site canteen on 21 July 2018;
- (d) The following members participating in Exercise Common Gunner reported symptoms that they believe came from the cupcakes:
  - i. Gunner Dylan Eoll;
  - ii. Gunner Connor Chubry;
  - iii. Bombardier Lyann Lechman;

- iv. Gunner Nathan Penner;
  - v. Master Bombardier Ashley Diggs;
  - vi. Bombardier Jordan Slade;
  - vii. Master Bombardier William Vallerand;
  - viii. Gunner Liam Jarbeau; and
  - ix. Gunner William Long
- (e) The MP were contacted to investigate the incident by the Commandant of the RRCAS as actioned by Captain Nicholas Kaempffer. As a result, Corporal Benjamin Whitehall attended the bivouac to commence an investigation.
- (f) From the cupcakes baked by Bombardier Cogswell, Corporal Whitehall collected a single wrapper which was sent for testing by the Health Canada laboratory in Longueuil, Quebec. The testing of that wrapper by Health Canada confirmed the presence of THC on the wrapper. The Certificate of Analyst dated 4 October 2018, signed by Vincent Levasseur was agreed to be admissible under the *Controlled Drugs and Substances Act*.
- (g) Captain Kaempffer collected five samples of urine under the Canadian Forces Drug Control Program (CFDCP) from five different complainants involved in the incident;
- (h) On 31 July 2018, all five urine samples voluntarily collected from the affected individuals tested positive for marihuana metabolite as certified by Amber Rose;
- (i) The fact that marihuana metabolite was detected in their urine means the members who provided the samples consumed marihuana within 28 days of the date the sample was provided;
- (j) There was unrefuted evidence that prior to and after consuming the cupcake, Bombardier Lechman had not consumed cannabis or any other illicit drugs in any form;
- (k) There was also unrefuted evidence that prior to consuming the cupcake, Gunner Long who was in the midst of a lengthy period of recovery from alcohol and drug abuse had not consumed any alcohol or drugs for over seven years.



- (l) Both Gunner Long and Bombardier Lechman testified to and witnesses confirmed that based on their observations they both displayed symptoms consistent with the ingestion of cannabis after eating the cupcakes. Gunner Long recognized the effects he was experiencing while Bombardier Lechman did not;

[97] On 20 September 2018 and 10 October 2018, Bombardier Cogswell participated in interviews with Sergeant LeBlanc that were both audio and video recorded. It was agreed that the interviews were voluntary, properly cautioned and admissible at trial without the need for a *voir dire*.

[98] A summary of relevant evidence flowing from those interviews is as follows:

- (a) The accused told the investigator that she spends most of her time alone and does not associate with anyone, having only two friends at the time;
- (b) Based on what she told Sergeant LeBlanc that she is almost a recluse and keeping to herself, her statement reveals an implausibly high level of knowledge of specific senior members of the RCCAS who she alleged were consuming cannabis products, including edibles and oils and she could provide specific details as to where they were purchasing them;
- (c) Similarly, despite being a recluse and not talking to anyone, when challenged during her second interview with respect to the laboratory results of the cupcake wrapper, she surprisingly could explain exactly how the cannabis got into the cupcakes but made it very clear that it was not from her. Her evidence suggested that she intimate knowledge of and knew for sure that specific members on the Exercise who also ate her cupcakes were also using what would have been illegal oil droppers and vape products containing cannabis during the exercise. The Court found that based on other evidence on the record that this assertion is just not plausible;
- (d) The accused was disappointed in her perceived treatment from personnel within W Battery particularly by the senior NCOs. She felt they were biased against her based on an incident that occurred a few years earlier in Shilo where she had implicated another senior NCO who was friends with the senior NCOs of W Battery;
- (e) She resented being referred to as “the Canteen Bitch”, which she said junior members with significantly less experience than her had called her when they saw her drive by;
- (f) Bombardier Cogswell admitted that she baked the cupcakes, personally transported them to the canteen which she responsible for running;

- (g) She told Sergeant LeBlanc that she personally oversaw the distribution of the cupcakes to the troops and gave specific details of how and why she did what she did;
- (h) Despite there being approximately 150 members participating in the exercise, from various sub-units of the RRCAS, it was notable that only those soldiers from W Battery were affected.
- (i) At the time of the incident, despite the possession and distribution of cannabis still being illegal in Canadian law and the use of cannabis being prohibited for CAF service members, her two interviews suggest that she personally had a highly developed knowledge of and experience with the use of a very broad range of cannabis products;
- (j) The accused 's evidence suggests that she had both a medical prescription for and very easy access to various forms of cannabis products, including edibles and oils;
- (k) The accused admitted that one of the ingredients she added into the cupcakes was avocado oil, for which she stated multiple times that she “warned every single person before they ate a cupcake”; and
- (l) The accused was fully cognizant of the various effects of THC and cannabidiol (CBD) and that in her case, the ingestion of cannabis led to improved relaxation and sleep;

[99] With respect to the avocado oil, the following additional evidence is relevant:

- (a) Gunner Eol testified that Bombardier Cogswell told him that she had added avocado oil to the cupcakes and she hoped that they did not taste weird and nobody feels bad from them. He testified that he thought it was a weird thing for her to say.
- (b) Master Bombardier Vallerand also testified that Bombardier Cogswell told him the cupcakes had avocado oil in them and she hoped that they did not taste weird.
- (c) Master Bombardier Diggs testified to overhearing something similar;
- (d) After medical issues arising from ailments such as heat exhaustion were deemed to have a low likelihood of causing the symptoms experienced by the soldiers, the only common denominator identified was the cupcakes;

- (e) The evidence suggests that only the troops who ate the displayed mind-altering symptoms consistent with the ingestion of cannabis; and
- (f) Captain Ladouceur testified that when he was the BSM and trying to resolve what had made the troops sick, he contacted Bombardier Cogswell and asked what she put in the cupcakes. He testified that she told him that she put nothing out of the normal other than avocado oil.

[100] Having considered the evidence directly admissible against the accused, in the context of the evidence as a whole, I conclude that the facts are reasonably capable of supporting the inference that Bombardier Cogswell could have placed the cannabis in the cupcakes with respect to the allegations set out in the charge sheet.

[101] Based upon this Court's review of the evidence as a whole, I must conclude that some or all of the admissible evidence, if believed, could reasonably support an inference of guilt.

***Did Bombardier Slade, Gunners Jarbeau and Penner ingest THC?***

[102] The second issue raised by the defence questions was whether three complainants, being Bombardier Slade, Gunners Jarbeau and Penner ingested THC. The defence submits that there is some evidence that the three soldiers: Slade, Jarbeau and Penner had an altered state on the day in question, but there is no evidence as to what caused the altered state and no evidence that it was due to anything administered by Bombardier Cogswell. Defence submits that the three soldiers did not submit to urine tests and the seized wrapper did not necessarily correlate to one of the cupcakes that they ate.

[103] Defence argues that there is no evidence that the symptoms they suffered were caused by ingesting cannabis and, therefore, no evidence upon which a properly instructed jury could convict. He therefore seeks an acquittal on Charges 9, 11 and 17. Finally, the defence argued that because there is no similar fact application before the Court, the evidence on the other accounts are not applicable to the three soldiers who did not submit to the urine test.

[104] Conversely, the prosecution argued that in his testimony, Bombardier Penner described himself as being tired, abnormally lethargic, despite being well rested. He said he felt bad, dazed and unable to focus. He further testified to feeling sick, having butterflies, feeling paranoid and anxious and losing track of time. Mr Slade testified to feeling fatigued and foggy when he woke up and that the feeling did not go away. He indicated that it was not a nauseous feeling that he would relate to food and he had never had the same feeling before from eating food. The Court also noted that under cross-examination, although Bombardier Slade had testified to smoking cannabis, he was insistent that prior to that time he had not ingested cannabis edibles.

[105] The prosecution relied upon the testimony of Constable Watson who described some of the expected symptoms from cannabis consumption to include a lack of focus, paranoia, difficulty concentrating, feeling relaxed, suggesting that the symptoms were synonymous with feeling lethargic. The prosecution argued that all the affected soldiers displayed symptoms of cannabis impairment. He argued that the three complainants, being Penner, Slade and Jarbeau suffered from these symptoms after eating all or part of a cupcake, similar to the other five victims who were tested.

[106] The prosecution further argued that while there was no application for the Court to consider similar fact evidence that does not preclude the evidence of the statements and circumstances and from other similarly situated individuals from being considered.

[107] The charge sheet for this court martial lists multiple charges with respect to different complainants. It is a multi-count court martial where the charges all flow from the exact same incident where Bombardier Cogswell is alleged to have distributed cupcakes containing cannabis. Based on the facts of the case, given that the three complainants being Slade, Jarbeau and Penner, all consumed the same cupcakes baked by Bombardier Cogswell that she also personally distributed to the other complainants listed on the charge sheet, I see no necessity for a similar fact evidence application. Bombardier Cogswell is directed linked to Bombardier Slade and Gunners Jarbeau and Penner through the exact same facts and evidence that relate to the other complainants.

[108] I also find that this argument is a moot point for the purpose of this application since there is some evidence from both the testimony of Constable Watson as well as from the testimony of the three complainants who did not submit to a urine test, being Gunners Penner, Jarbeau and Bombardier Slade to suggest that they all displayed symptoms associated with the ingestion or consumption of cannabis.

[109] All the witnesses ultimately denied that heat stroke was the source of their symptoms. Sergeant Sampson who testified to having experience with heat stroke indicated that based on his observations of their behaviour, there is no chance that what they were experiencing was from heat exhaustion.

[110] In assessing a case that relies upon circumstantial evidence, the court must weigh the reasonableness of the inference the prosecution seeks to have drawn from the other evidence before the court. The relevant evidence before the court is outlined in the following paragraphs.

[111] Constable Watson, who was qualified as an expert before the Court, testified 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), poor performance on psychophysical tests, short-term memory problems,

problems focussing, problems following directions and problems doing more than one thing at once;

- (c) he explained that eyelid and body tremors are specific to cannabis;
- (d) elevated pulse and blood pressure, green or brown coating on the tongue;
- (e) problem focussing and staying on one task;
- (f) paranoia; and
- (g) experiencing relaxed muscles and loss of inhibitions.

[112] Constable Watson also confirmed the following:

- (a) there is a distinction between onset and duration of the effects depending on whether cannabis is ingested or smoked. When you ingest cannabis, such as an edible, the peak effects occur within one to three hours and the duration of effects can last up to six to eight hours and some effects can last up to 24 hours;
- (b) 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 effect;
- (c) 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 it is related to size, but gender does play a role based on hormones; and
- (d) not all people will experience impairment in the same fashion. With respect to the effect of symptoms on certain individuals, 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 and some people will have a higher tolerance than others. He confirmed that all drugs affect people differently.

### **Bombardier (then-Gunner) Jarbeau**

[113] Bombardier Jarbeau testified that on the day in question, the relevant members in his detachment were Master Bombardier Vallerand, as well as Gunners Penner and Long and Bombardier Slade. He explained that his detachment attended the canteen sometime between 1100 and 1200 hours, just before lunch. He explained that he recalls them eating their lunch, individual ration packs in the back of the truck after attending the canteen.

[114] Bombardier Jarbeau told the Court that he heard from his detachment commander, Master Bombardier Vallerand that there were cupcakes at the canteen so he went to the canteen. He explained that the cupcakes were in the back or side of the vehicle, readily available, and he asked Gunner McLandress if he could take one, which he ultimately did.

[115] He described the cupcake as chocolate, with icing and a jelly bean on top and measuring approximately two inches by two inches within a cupcake wrapper that is pulled off. When he ate the cupcake, he did not notice anything off with the taste. He understood at the time that Bombardier Cogswell had baked the cupcakes.

[116] Bombardier Jarbeau testified that he ate the cupcake soon after he received it while walking back to the truck. He stated that prior to that day, Bombardier Cogswell had never offered him anything for free. Approximately an hour after eating the cupcake, he began to feel anxious, paranoid, and sick. When their detachment moved to their next location, he rode in the back of the Medium Support Vehicle System (MSVS), the truck used to transport weaponry, with Gunner Penner. Gunner Long was the driver, and Master Bombardier Vallerand was the Detachment Commander and seated in the front of the vehicle beside Gunner Long. At some point during their drive, he told Master Bombardier Vallerand that he was not feeling well. Afterwards, Master Bombardier Vallerand asked Gunner Jarbeau if he had eaten any of the cupcakes. He stated that he originally thought the discomfort he was feeling was related to a head injury sustained prior to the exercise. However, once they arrived on position and it became clear that others were experiencing the same symptoms, he realized something else was wrong and he stayed in the vehicle as he felt very paranoid and anxious. He was unable to estimate time during this period as he had lost track. He explained that he felt they were unable to perform their duties.

[117] When Bombardier Jarbeau was asked why he thought the symptoms experienced were from the cupcake, he said those soldiers who were affected were able to deduce it based on the questions posed to them from Sergeant Sampson. He explained that they all ate their own individual ration packs and the cupcakes were the only item in common that they all ate from the canteen.

[118] He described his symptoms as paranoia, feeling sick to his stomach as if he had butterflies and needing to vomit as well as having a headache.

[119] He explained that the chain of command offered them an option of submitting to a urine test to determine what they might have ingested, but he personally declined.

#### **Bombardier (then-Gunner) Penner**

[120] Bombardier Penner testified that he went to the canteen with other members of his detachment shortly before lunch between 1100 and 1200 hours. He explained that he bought cigarettes and a Monster Energy drink, but he did not take a cupcake from the canteen. However, he explained that he ate the left overs of Gunner Jarbeau's cupcake.

He estimated that there was about one quarter of the cupcake that was still in its wrapper that he found in the back of the truck. He said that he heard from others that Bombardier Cogswell made the cupcakes.

[121] After eating the cupcake, the detachment packed up from that position and departed in their truck. He explained that Gunner Long was in the driver's seat, Master Bombardier Vallerand in the front seat as the Detachment Commander and Bombardier Slade, Gunners Chartrand and Jarbeau were in the back. He explained they were headed to Airstrip 1 to link back up with the other call signs.

[122] He recalls their drive to Airstrip 1 being very dusty and that they almost had an accident. He explained that Gunner Jarbeau became sick enroute and when Master Bombardier Vallerand looked back towards them in the rear of the truck, he noticed that Master Bombardier Vallerand had a similar look on his face suggesting he was also exhibiting signs of being sick. Bombardier Penner explained that Gunner Jarbeau's eyes were glazed and he was very lethargic.

[123] Bombardier Penner stated that he became very lethargic which in the field is a common occurrence, so at first, he did not associate the lethargy with anything specific, but he described what he was experiencing as abnormal. Once they arrived at Airstrip 1, where the other detachment was already in position, they became aware that they were all feeling sick. When they stopped and intermingled with the other gun detachment, they learned that members of the other detachment were also feeling the same way. He explained that after speaking with the members of the other detachment, together they formed the suspicion that the cupcakes were the source of their problems as they were the only common item they had all consumed.

[124] He explained that when they arrived at Airstrip 1, they attempted to record their gun, (checking its accuracy on the range), but they were unable to finish. He said he felt that they could not safely do their job with the entire detachment feeling sick. He explained that he was personally lethargic and dazed and could not focus. In his testimony, Gunner Penner explained that they were all feeling similar and in his opinion, it was not normal for him to feel that way from consuming caffeine or cigarettes.

**Mr Slade (then-Bombardier)**

[125] Mr Slade, then-Bombardier Slade retired from the CAF on 24 August 2019, after serving a total of eight years. He explained that on the day in question, their detachment were about to leave their position to join the other detachment at the Airstrip 1 when they went to the onsite mobile canteen. He told the Court that he bought a shirt, a couple of Monster Energy drinks, possibly two or three, as the canteen was not out every day. He said that Bombardier Cogswell offered him a cupcake. He believed that Bombardier Cogswell made the cupcakes herself and distributed them for free. He said that he ate the cupcake immediately upon receiving it. He believes that they ate

ration packs for lunch. He stated that he did not drink any of the Monster Energy drinks during lunch as he planned to have a nap in the truck on the drive to Airstrip 1.

[126] Mr Slade described the cupcakes as chocolate in flavour and approximately two inches by two inches, with chocolate icing and a jelly bean on top. After he ate the cupcake and they were done at the canteen, they started the road move. He testified that he slept in the back of the MSVS and woke up when they arrived at Airstrip 1. He explained that as soon as he woke up from the road move, about forty-five minutes later, he felt fatigued not a hundred per cent there, “like foggy”. He later described himself feeling incoherent and slow. He said originally he still felt tired, but the tiredness did not go away. He said he slept for about half an hour to forty-five minutes.

[127] He said that at the time, he thought that it might be a heat injury as it was hot that day and they were short of personnel. However, once everyone within their detachment talked about how they were feeling, they determined that the only common denominator was the cupcakes.

[128] Although he had agreed that he had smoked marihuana previously, including once with Bombardier Cogswell, he denied any suggestion that he ever consumed drugs while in the field.

### **Summary**

[129] In addition to the evidence outlined immediately above, the Court has relied upon the evidence in the analysis in the earlier section as it relates to the evidence of the Charges 9, 11 and 17.

[130] The cupcake wrapper, which was identified and picked up as being from one of the cupcakes served on the range that day, tested positive for THC.

[131] Additionally, although Bombardier Slade and Gunners Penner and Jarbeau did not submit to the urine test, the urine samples of their fellow detachment members, Master Bombardier Vallerand and Gunner Long, who attended the canteen at roughly the same time period, ate the same cupcakes and felt similar symptoms both tested positive for marihuana metabolite. Further, based on the evidence before the Court Gunner Long, who was with them at their location did not consume any cannabis within 28 days prior to consuming the cupcake.

[132] I am satisfied that the evidence before the Court, if believed, could reasonably support an inference of guilt with respect to Charges 9, 11 and 17.

### **Conclusion**

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

[133] **DISMISSES** the application.



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**Counsel:**

Mr I. Kasper, assisting the Director of Defence Counsel Services, Counsel for  
Bombardier C.H. Cogswell, Accused and Applicant

The Director of Military Prosecutions as represented by Majors É. Baby-Cormier and  
M. Reede, Prosecutors and Counsel for the Respondent