



## COURT MARTIAL

**Citation:** *R. v. Cogswell*, 2021 CM 2016

**Date:** 20210813

**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 DEFENCE'S LOST EVIDENCE APPLICATION**

(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 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, flowing from an alleged distribution of cupcakes containing cannabis to Canadian Armed Forces (CAF) personnel during a live-fire exercise.

[3] Exercise COMMON GUNNER was the first exercise of its type that unfolded at RRCAS 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 Exercise COMMON GUNNER. Despite the incident and a check-fire command being ordered for the gun line, the rest of the exercise did not grind to a stop as there were training requirements that needed to be fulfilled, with different activities unfolding concurrently. The time period was particularly busy as not only did RRCAS have a major live-fire exercise ongoing, they were also in the middle of the posting season.

[4] W Battery provides support to the RRCAS, its instructors and students. Bombardier Cogswell was assigned to W Battery and was responsible for manning and operating the canteen for the units training in the field on Exercise COMMON GUNNER. Then-Major Cutting, Battery Commander (BC), commanded W battery and the Battery Sergeant Major (BSM) was then-Master Warrant Officer Ladouceur as the most senior non-commissioned member (NCM). The Battery is then broken down into troops that are 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 then-Warrant Officer Mangrove was the TSM. Under the troop, there were two different detachments. The first detachment was led by then-Master Bombardier Vallerand and the second detachment was led by then-Master Bombardier Diggs.

[5] On the date in question, Mr Diggs, then-Master Bombardier Diggs explained that he was the number 1 (detachment commander), responsible for laying the howitzer and maintaining command of the gun position at Airstrip 1. He estimated that there were approximately six or seven members in his detachment. Late in the morning in question, his detachment was already on the gun line and had finished recording the firing accuracy of their gun on the range. He explained that since there is normally a gap from when they record the gun and when they shoot, he told his detachment to go to the mobile canteen, which had just arrived at their location.

[6] He explained that the canteen arrived at their location around mid-morning between 1030 or 1100 hours, which he described as a fair bit before lunch. He bought a Gatorade and a Monster Energy drink and was given a homemade cupcake from Bombardier Cogswell. He ate the cupcake shortly after he received it. At some point shortly thereafter, he noticed some of the detachment members were acting strangely. He explained that one person was chain-smoking, eating chips, another was more clumsy than usual and another acting paranoid.

[7] Then-Master Bombardier Diggs indicated that he has known his soldiers since they graduated from their Developmental Period 1, which is their entry-level training and they were people he had trained so he was familiar with their behavioural patterns and the things they were doing on the morning in question were out of character for

them. From his detachment, there were only 4 soldiers who ate the cupcakes, being Gunners Chubry and Eoll, Bombardier Lechman as well as himself. Then-Master Bombardier Diggs testified that other than having the pasties (dry mouth) he did not consider himself to be affected. He did indicate that at the time, he weighed about 250 pounds.

[8] Bombardier, then-Gunner Chubry testified that after the canteen arrived at their position on the morning in question, he was given a cupcake by Bombardier Lechman which he ate almost immediately. After he ate the cupcake, then-Gunner Chubry testified to performing sentry duty which required him to control the access in and out of the gun line. About forty-five minutes after he ate the cupcake, he started feeling symptoms. He thought he was feeling high, as he knew what the sensation felt like, but struggled to understand how he could be feeling that way and was worried for his career. He explained that the sentry shifts are normally an hour long and on that particular morning after his shift was finished, he was just wandering around the gun line whereas normally he would return to his detachment.

[9] Master Bombardier Vallerand was the Detachment Commander of the other detachment which was located at a position at least thirty minutes away from Airstrip 1 where Master Bombardier Digg's detachment were set up. Sergeant, then-Master Bombardier Vallerand testified that the canteen came out to their position around 1200 hours. He stated that he went to the canteen around 1230 hours and received a cupcake which he ate right away and then went back to the truck. Sergeant Vallerand told the Court that most of his detachment started to experience symptoms while they were in the truck driving to their next position which was at Airstrip 1 where they joined Master Bombardier Diggs's detachment merging their two call signs together.

[10] Mr Slade, then-Bombardier Slade who was the second in command of the gun for Master Bombardier Vallerand's detachment testified that he went with Gunner Penner to the canteen around lunch time. He received a cupcake from the canteen which he ate right away. He testified that he slept while their detachment drove to Airstrip 1 which he estimated to be at least thirty minutes. He purposefully did not drink his Monster Energy drink beforehand as he wanted to sleep.

[11] Warrant, then-Sergeant, Sampson testified that he was on site where Master Bombardier Vallerand's detachment was located when the mobile canteen arrived. He explained that he told Bombardier Cogswell where to park and he estimated that the canteen showed up at 1240 hours. He testified that he told the troops to go to the canteen before they left to go to the next position which was at Airstrip 1. He indicated that he did not notice any problems until they arrived at Airstrip 1 and Master Bombardier Vallerand approached him.

[12] Bombardier then-Gunner Chubry told the court that when Master Bombardier Vallerand's detachment arrived at Airstrip 1, Gunner Penner approached Master Bombardier Digg's detachment members inquiring whether any of them were feeling weird, explaining that their detachment members were feeling that way. It was at that

point, that Gunner Chubry confirmed how he was feeling and told Master Bombardier Diggs that he would not go on the gun line as he felt it was unsafe. Bombardier then-Gunner Chubry testified that the guns were put in the check-fire at approximately 1400 hours, which meant that neither detachment could fire their weapons until the chain of command figured out what was causing this derangement to the personnel during the exercise. Bombardier then-Gunner Eoll estimated that he consumed the cupcake around 1230 hours and that they shut the gun line down around 1400 or 1430 hours. The consistency in the evidence was that the gun line was shut down around 1400 hours.

[13] Then-Master Bombardier Diggs testified that at one point he noticed Master Bombardier Vallerand lying on the grass, not recording the gun the way he is supposed to and not in the location where the Detachment Commander should be. Instead, he witnesses Master Bombardier Vallerand wandering in front of his gun not fully aware of what he was doing.

[14] Master Bombardier, then-Bombardier Lechman from Master Bombardier Digg's Detachment estimated that she ate a cupcake from the mobile canteen around 1100 hours. She explained that after Master Vallerand's detachment arrived at their location at Airstrip 1 and inquired whether their detachment members had eaten cupcakes, Sergeant Sampson called the check-fire and called a medical assistant.

[15] Based on a review of the relevant testimony, it is clear that since the event took place over three years ago, some witnesses do not remember everything and they have different estimates of the time. However, the consistency in the evidence suggests that the mobile canteen first visited the gun line at Airstrip 1 in the morning of 21 July, 2018, around 1100 hours, where Master Bombardier Digg's detachment was located and then it drove to the second position where Master Bombardier Vallerand's detachment was located at least thirty minutes away. Sergeant Sampson estimated that the mobile canteen arrived at that location around 1240 hours and that he told the troops to go to the canteen before they left for Airstrip 1 to amalgamate with then-Master Corporal Digg's detachment.

[16] The onset of effects experienced by the members of Master Bombardier Vallerand's detachment presented during the thirty minute drive in the truck from their last position to Airstrip 1. The evidence suggests that it was the meeting up of Master Bombardier Vallerand's detachment with Master Bombardier Diggs's detachment that assisted the affected members in identifying what might have happened. It was at this point that Warrant Officer Mangrove met with a junior officer, believed to be then-Lieutenant McCarthy, Master Bombardier Diggs and Sergeant Flemming to determine the cause of the mind altering effects that the troops were describing and to determine the next steps to be taken.

Collection of the Cupcake Wrappers

[17] Mr. Diggs, then-Master Bombardier Diggs estimated that he would have collected the cupcake wrappers approximately an hour or forty-five minutes after his detachment went to the canteen. When asked about why he collected the wrappers, he explained “it just made sense”. He told the Court that prior to joining the CAF, he received security training and understood what to do when you suspect something. He explained that he collected the cupcake wrappers in an attempt to figure out the source of the problems the troops were experiencing as there was some speculation that the source of the problem might be the cupcakes. He explained that his chain of command were trying to determine who had gone to the canteen and assess whether or not they needed to shut down the exercise. All the evidence suggests that Master Bombardier Digg’s decision to collect the wrappers was made independently by him very early in the process.

[18] Then-Master Bombardier Diggs testified that he does not recall being asked to collect the cupcake wrappers by Warrant Officer Mangrove, but he did confirm that he gave the wrappers to Warrant Officer Mangrove. Then-Master Bombardier Diggs testified that he collected one or two wrappers from people and retrieved the other wrappers from the top of the garbage bag sitting at the back of his truck. He stated he put the cupcake wrappers in a Ziploc baggie and gave them to Warrant Officer Mangrove. Under cross-examination, then-Master Bombardier Diggs indicated that he would have handed the cupcake wrappers off to Warrant Officer Mangrove when they first met to discuss the incident with the junior officer, which would have been very early on, later clarifying that it would have been well before the BSM and the BC showed up at Airstrip1 that afternoon.

[19] With respect to the other detachment, it was only when Master Bombardier Vallerand approached Sergeant Sampson to tell them he was high and then repeated it multiple times, that Sergeant Sampson hoisted in what was happening and he also attempted to narrow the cause.

[20] While at the first location late that morning, Warrant, then-Sergeant Sampson did not notice any problem until Master Bombardier Vallerand’s detachment arrived at Airstrip 1. It was upon their arrival at the Airstrip 1 where then-Sergeant Sampson observed that Master Bombardier Vallerand could not comprehend direction, was confused and disoriented, while others were giggling and laughing. He explained that Gunner Long stood there motionless just laughing. Warrant Sampson explained that Master Bombardier Vallerand approached him saying, “I am fucking high.” Warrant Sampson testified that he assumed Master Bombardier Vallerand was joking but when Master Bombardier Vallerand repeated that he “was high” a few more times, he knew something was up. He then noticed that Bombardier Lechman, a healthy fit girl, “eating countless chips and smoking like crazy”. He stated he had never seen anything like that before. Warrant Sampson testified that Master Bombardier Vallerand’s detachment were insistent that they needed to record (verify the accuracy) of their gun so he grabbed the trailer to help them. He explained that when Master Vallerand’s detachment members all fell down and started to laugh, he ordered them into the truck.

[21] Mr, then-Warrant Officer Mangrove vaguely recalls someone giving him wrappers that day, but he cannot recall specifically who. He indicated that it would have been one of his detachment commanders, which would have been either Master Bombardiers Vallerand or Diggs. However, only the latter testified to giving then-Warrant Officer Mangrove wrappers.

[22] Warrant Officer Mangrove does not recall to whom he gave the wrapper, but did indicate that it was someone higher than his rank and he did not rule out the possibility that he gave it to the medic.

[23] Captain, then-Master Warrant Officer Ladouceur testified that both he and the BC received a phone call from Warrant Officer Balicki advising them that there was something going on at the gun position and he thought the troops were high. The BC was beside him and he immediately ordered “check firing” and then they made their way to the gun line. He does not remember what time that was, but estimated it was midday.

[24] When they got to the gun line, Captain, then-Master Warrant Officer Ladouceur stated they dispersed and spoke to their respective counterparts. The BC went to speak with the GPO and as the BSM, he went to speak with the TSM and the NCMs. He explained that after he and the BC joined back up, the BC ordered those affected soldiers to be transported to the Assembly Area (AA). Captain, then-Master Warrant Officer Ladouceur, then-BSM stated that both he and the BC then went to the AA where they met and briefed the commanding officer (CO) and the acting regimental sergeant-major (RSM).

[25] Captain, then-Master Warrant Officer Ladouceur told the Court that he received a single wrapper in a Ziploc bag from one of the TSMs or Warrant Officer Balicki. Then-Warrant Officer Mangrove testified that he was the TSM on that day in question and that he was responsible for overall safety and making sure that everything was being “done the way it should be”. Unfortunately, Warrant Officer Mangrove released from the CAF as a result of post-traumatic stress disorder which resulted in him experiencing some memory loss which affected his memory of what might have happened with the cupcake wrappers.

[26] Captain Ladouceur, then-Master Warrant Officer and BSM explained that he put the Ziploc bag with the wrapper inside his flak vest, keeping the wrapper secure before eventually giving the wrapper to the military police.

[27] Major Kaempffer, then-Captain, was the acting Adjutant at RRCAS. He confirmed that he received a wrapper in a Ziploc bag, but he does not recall who gave it to him. He speculated it was possibly the BC or Warrant Officer Mangrove. In any event, he recalled being told that it came from a soldier who was on the gun line, which based on the evidence is most likely a soldier from Master Bombardier Diggs’ detachment since that was the only location where there was any attempt made to collect wrappers.

[28] Corporal Hepditch, the medical technician on scene, denied that anyone gave him wrappers. Corporal Hepditch testified that although he is not sure of the exact time he was on the gun line, he estimated that it was from lunch time until they were pulled back to the AA. He testified that after assessing the affected members, although he determined that there was a low likelihood that what the troops were experiencing was due to heat exhaustion, he had no idea what they had consumed that was causing their symptoms. Corporal Hepditch did say that he personally observed someone looking for wrappers but does not know or recall who. After Corporal Hepditch completed his medical assessment of the affected members, at approximately 1400 hours, their status was reported up the chain of command and the affected individuals were moved to the AA.

[29] In light of the ongoing live-fire exercise and the fact that the members were safely recovering under the supervision of a medic, there were no emergency responders called to the scene. The BC had already given the “check fire” command and the gun line was closed. It was at that point that the senior leadership gathered to assess their next steps.

[30] Major Kaempffer testified that the incident was relayed to him directly by his CO, then-Lieutenant Colonel Robie at approximately 1400 hours on the day in question. He stated that the scenario described appeared so unbelievable at the time, that he originally thought it was a joke. Major Kaempffer testified that after the senior staff learned that the medic could not attribute the soldiers’ symptoms to heat exhaustion or other known causes, concerns that the soldiers may have been drugged seemed more possible. He explained that they soon realized the incident was outside their expertise as combat officers and that they needed to call the subject matter expert, being the military police.

[31] Major Kaempffer testified that, due to the nature of this incident, any decision on how to respond resided exclusively with the CO as the incident fell within the type of incident that the needed to be reported directly to the CO under a formal notification process. In other words, based on the facts of the incident, there was a duty for lower members in the chain of command to report to and engage the CO on the next steps. It was shortly thereafter that the CO went to the AA to meet with the chain of command in the field and the affected soldiers. Based on the other testimony, the CO was engaged well after Master Bombardier Diggs collected the wrappers from his detachment members at Airstrip 1 and passed them along to Warrant Officer Mangrove.

[32] Major Kaempffer testified that it was after the CO spoke with the staff and students at the AA, that the CO directed him to call the military police. The evidence before the Court suggests that then-Captain Kaempffer called the military police at approximately 1730 hours, which was three and a half hours after the issue was first communicated to the higher levels of the chain of command. Corporal Whitehall, the military police who responded, indicated that since they were in the middle of a shift handover when the call was received, he arrived on the scene around 1830 hours.

[33] Major Kaempffer confirmed that based on the information they had received, the higher levels of command did not think a unit disciplinary investigation was appropriate. He testified that the incident was incredibly serious and aside from suicide, during his tenure, he considered this incident to be the most serious.

[34] Major Kaempffer further testified that the chain of command was in uncharted territory and the CO was directly engaged because of the level of seriousness of the incident. When questioned on who could direct an investigation on this issue, he was very clear that it was not the BSM or the RSM, but that it fell in the realm of the CO.

[35] Major Kaempffer testified that he gave the cupcake wrapper he had been given to Corporal Whitehall, who in turn, confirmed receiving a wrapper from him.

### **Applicant's position**

[36] The applicant argues that the loss of the cupcake wrappers violated her section 7 rights as guaranteed by the *Charter*.

[37] She makes the following arguments:

- (a) firstly, she argues that cupcake wrappers were lost because of the Crown's unacceptable negligence;
- (b) secondly, she argues that she has been materially prejudiced by the loss of the cupcake wrappers and prevented from making full answer and defence; and
- (c) thirdly, she is entitled to a remedy and asks the Court to exclude the evidence of a Health Canada analysis that was conducted on the one wrapper that was tested.

### **Respondent's position**

[38] The prosecution, which is the respondent in this application, argued that this application to exclude evidence should be dismissed. The prosecution argued that there is no lost evidence in this case as the wrappers were never in the possession of investigative authorities nor were they fruits of an investigation until the military police became engaged. It is their position that any cupcake wrappers which were not collected had been disposed of prior to the contemplation or commencement of any investigation. The disposal of the cupcake wrappers before the investigation began should not be considered lost evidence nor can it be a violation of any *Charter* rights.

[39] Further, the prosecution argued that if any evidence was lost, it was not due to unacceptable negligence nor was it lost through actions that violate the community's sense of fair play and decency. In any event, the prosecution argued that there is no



prejudice to the accused's right to make full answer and defence. Given that a wrapper tested positive for tetrahydrocannabinol (THC), any exculpatory evidentiary value of a negative result on any of the missing wrappers would be negligible. The prosecution argued that a negative result for THC on another wrapper does not conclusively prove that there was no cannabis in the cupcakes. However, a positive result on the rest of the wrappers would confirm the test of the sample collected.

[40] Although the prosecution argued against a possible finding of a violation of the accused's section 7 *Charter* rights, they submitted that if the court finds a breach, that any breach should be properly remedied through mitigation on sentence. They argued that the exclusion of relevant, lawfully obtained evidence would not be justified.

### Law

[41] Section 7 of the *Charter* provides that:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[42] In *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, the SCC recognized that, subject to limited exceptions, all relevant information must be disclosed to the defence. Relevant information is described as any information that is reasonably capable of affecting an accused's ability to make full answer and defence. (see *R. v. Egger* (1993), 82 C.C.C. (3d) 193 at 203).

[43] The law governing breaches of *Charter* rights arising from the failure to preserve evidence is set out by the decision of the Supreme Court of Canada (SCC) in *R. v. La*, 2 S.C.R. 680. As Sopinka J. noted in his majority judgment in *La*, “[D]espite the best efforts of the Crown to preserve evidence, owing to the frailties of human nature, evidence will occasionally be lost.” Sopinka J. then sets out the legal framework for analyzing when lost or destroyed evidence gives rise to a breach of section 7 of the *Charter* and when it justifies a stay of proceedings.

[44] The assessment begins with the prosecution providing some explanation as to why the evidence was lost. That obligation flows from their duty to preserve relevant evidence. Sopinka J. discusses two classes of cases: cases where the Crown's explanation is unsatisfactory or the Crown gives no explanation at all, and cases where the Crown's explanation is satisfactory.

[45] Where the prosecution provides no explanation or where the prosecution's explanation shows that the evidence has been lost or destroyed because of the prosecution's “unacceptable negligence”, then the prosecution has failed to meet its disclosure obligation and will be considered to have breached section 7 of the *Charter*. A determination as to whether the breach entitles the accused to a stay of proceedings or some lesser remedy depends on the extent of the actual prejudice caused by the loss or destruction of the evidence.

### **Were the wrappers lost?**

[46] The prosecution argues that there were no wrappers lost. Upon a review of the evidence, it appears that it was only Master Bombardier Diggs who collected cupcake wrappers, putting them in a Ziploc bag. He testified that he handed them off to Warrant Officer Mangrove, who believes he gave them to the BC, who is the fire-team partner of the BSM. The BSM testified to receiving a wrapper in a Ziploc bag, and he believed that he then gave the Ziploc bag to the military police. However, somehow one wrapper in a Ziploc bag was given to then-Captain Kaempffer who in turn, gave it directly to Corporal Whitehall, the military police who responded to the call to investigate.

[47] In his testimony, Master Bombardier Diggs indicated that he collected five or six wrappers, but said it could also have been four or five. It was notable that aside from himself, there were only three other persons in his detachment who reported eating the cupcakes, being Bombardier Lechman and Gunners Eoll and Chubry. Consequently, based on the number of available wrappers from his detachment members, it appears likely that his estimate is not completely reliable. If Master Bombardier Diggs had collected all the wrappers from his detachment members, there would only be a maximum of four wrappers. There was no evidence before the Court that anyone else in the chain of command collected an individual wrapper.

[48] The members of Master Bombardier Vallerand's detachment testified that they ate their cupcakes almost immediately after receiving them and prior to loading their truck to drive to Airstrip 1, an estimated thirty minutes away. There is no evidence to suggest that anyone collected the wrappers from their cupcakes, nor were the complainants asked where they might have discarded their wrappers.

[49] The mobile canteen arrived at the location where Master Bombardier Vallerand's detachment was positioned a couple of hours after the canteen stopped at the Airstrip 1 location where Master Bombardier Diggs' detachment was set up. Consequently, the members from Master Bombardier Vallerand's detachment did not experience symptoms until later and while they were in their truck driving to Airstrip 1.

[50] The evidence also suggests that that the wrapper or wrappers collected were put in a sealed Ziploc bag and passed along up the chain of command. There is no clear chain of custody to explain how the Ziploc bag was handled and there is inconsistency in the evidence as to who received the Ziploc bag, who they passed it to and exactly how many cupcake wrappers were in the Ziploc bag.

[51] Given the fact that the military chain of command has dual responsibilities, the determination of when someone in the chain of command is engaged in an investigation requires a nuanced assessment. This is necessary because the chain of command occupies different hats when performing their functions. Although the role of the chain of command is integral in the administration of discipline, this role does not automatically make members of the chain of command trained police officers nor can one impute the duty of care of a civilian police officer to members in every case.

[52] I reviewed the relevant authorities with respect to when a person becomes a “person in authority”. The term “person in authority” was defined by the SCC to include “those formally engaged in the arrest, detention, examination or prosecution of the accused” such as police officers and prison guards (see *R. v. Hodgson*, [1998] 2 SCR 449).

[53] In the military justice system, under the *Military Rules of Evidence*, sections 41 and 42, a military member becomes a person in authority with respect to a statement made by an accused who is under investigation. He or she is not a “person in authority” simply because that person holds a higher service rank than the accused. Consequently, the duties and expectations that flow from the legal construct of “a person in authority” are reliant on the “formal engagement” of an investigation which was not the case here when Master Bombardier Diggs collected the wrappers.

[54] Master Bombardier Diggs was a junior leader who exercised excellent initiative in collecting the cupcake wrappers from his detachment members who were the first members to report symptoms. He estimated he collected them approximately forty-five minutes to an hour after his detachment members went to the canteen which he estimated was in the late morning between 1030 and 1100 hours. Although his actual estimated timings may not be exact, based on the consistency in the testimony, Master Bombardier Diggs collected the wrappers well before the more senior authorities within the RRCAS chain of command were engaged and at least 6 hours before a formal investigation by the military police had begun.

[55] Master Bombardier Diggs was clear in his testimony that he did not do an investigation in the criminal sense, which is evidenced in the fact that he only collected wrappers from his own detachment, he did not interview anyone nor did he engage with anyone outside of his own detachment. He told the Court that he normally does not concern himself with anything outside of his own detachment. He explained that his primary concern at that time was the safety of the gun position.

[56] He was also clear in saying that nobody told him to do an investigation. Although Master Bombardier Diggs’ intuitive response flowed from his prior security training, it is important not to impute a requirement for military members involved at his level to start their own independent investigation. In fact, it would be dangerous to think that members and officers in the chain of command who have the slightest suspicion of a potential wrongdoing must, on their own, begin an immediate investigation and while doing so, are held to the highest standard of care as that demanded by a trained police officer.

[57] Based on the evidence at trial, there is strong evidence to support the prosecution’s position that there was no real evidence lost. The fact that Master Bombardier Diggs did collect one or more of the cupcake wrappers that ultimately made its way to the military police does not mean that Bombardier Diggs was part of or

that his actions taken collecting the wrappers started an official disciplinary investigation.

[58] Although I am of the belief that based on the facts there was not any real evidence actually lost by military persons in authority, out of an abundance of caution, I proceeded to the next step of the analysis.

**Were the wrappers lost because of the prosecution's unacceptable negligence?**

[59] According to the procedure set out in *La*, if the explanation provided by the prosecution establishes that the evidence has not been destroyed or lost owing to unacceptable negligence, then the duty to disclose has not been breached.

[60] The main consideration that I must assess is whether reasonable steps were taken in the circumstances to preserve the evidence for disclosure. In normal circumstances, this consideration applies to the prosecution and the military police. In this case, neither the prosecution nor the military police lost any evidence. If any evidence was lost, it was prior to the military police even being notified of an incident. Master Bombardier Diggs' testimony would put his collection of wrappers at approximately noon or shortly thereafter and the military police were not even notified that there had been an incident until 1730 hours later that day.

[61] The applicant argues that the loss of the cupcake wrappers violates her section 7 *Charter* rights in that the chain of command's possession of the cupcake wrappers triggered the prosecution's obligation to preserve the cupcake wrappers under section 7 of the *Charter* and the loss of the wrappers resulted from unacceptable negligence. The applicant's argument is predicated on holding the military chain of command to the same level of a duty of care as a civilian police force is held to.

[62] The prosecution argued that there was no unacceptable negligence. They argued that the timing of the commencement of the investigation is relevant in determining the reasonableness of the chain of command's actions. They submitted that the first symptoms were reported between 1100 hours and 1130 hours and since the cupcakes were consumed at different times and in different locations, those affected also felt their symptoms at different times. The range of symptoms included dehydration, overheating, fatigue, confusion, dry mouth and paranoia. The prosecution argued that given the danger of having intoxicated gunners involved in a live-fire exercise, the chain of command understandably focussed on safety, the mission and the health of its personnel.

[63] It was a hot day on 21 July 2018 in Gagetown, NB and heat injury was the first reason suspected for being the cause of the symptoms being reported. The Court noted that most of the witnesses testified that immediately upon feeling effects, they drank water as they were first concerned they were dehydrated. There was no reason for soldiers training in a field exercise to suspect that because they were feeling weird that an offence had been committed. Sergeant Vallerand testified that he felt excessive

fatigue and had a sore stomach and after thinking what might have caused his symptoms, he initially thought it was likely something in the ingredients of the cupcake such as bad milk, etc. However, after a period of time, he started to feel high and described that he was aware of what that felt like as he had experimented with cannabis while in high school.

[64] Sergeant Vallerand testified that he approached then-Sergeant Sampson and stated: "I am fucking high". He told the Court that Sergeant Sampson originally thought that he was joking and told him to get back to work. In his testimony, Warrant Sampson confirmed that he did not originally believe what then-Master Bombardier Vallerand was saying. The Court noted that Sergeant Sampson had been with Master Bombardier Vallerand's detachment at their position just prior to them getting into their vehicle to drive to Airstrip 1 and it is completely understandable that he would be doubtful given the fact that his detachment members were all sober prior to loading their truck.

[65] In coming to a determination of whether there is a satisfactory explanation by the prosecution, I considered the circumstances surrounding the potential loss of missing wrappers, including whether the evidence was perceived to be relevant at the time they were lost and whether the persons in authority acted reasonably in attempting to preserve them. The more relevant the evidence, the more care that should be taken to preserve it.

[66] Despite having collected the wrappers, then-Master Bombardier Diggs described being more concerned with other priorities. He explained that with a live-fire exercise there are many moving parts and when they fire their howitzer guns the damage on the other end is significant. Because they are a training school, they generally fire the guns for courses so there are people observing the fall of that shot and if they make an error in judgement it could lead to errors that could put those observers in harm's way. For instance, as a detachment commander, he has to read the bearing sights and confirm the bearing laid is where they are actually shooting. If the detachment commander is intoxicated, they may make a mistake due to their confusion that could have tragic deadly consequences. Similarly for people moving ammunition- they might slip or trip. There are many safety issues that were the focus of his concern that day based on the fact that people were not acting the way they should. On a live-firing range, safety takes priority over all other considerations and he was clear in his testimony that this was the impetus for his actions.

[67] Based on the testimony given at trial, it was clear that on the afternoon in question, there was a great deal of confusion, disbelief and concern as everyone tried to narrow down the cause or source of the symptoms being experienced by the soldiers, while at the same time continuing with a live-fire exercise. It was a hot day, and W Battery had been in the field for a few weeks, and were under-staffed. It was clear that aside from the soldiers who had experienced being under the influence of cannabis previously, in the first few hours, which coincided with when Master Bombardier Diggs collected the wrappers, the speculation focussed first on the symptoms being caused by heat exhaustion. The cupcakes had been distributed and consumed at two different

locations, so it took some time for the chain of command to make an assessment and identify the source or cause of the symptoms. In fact, they would have erred if they had jumped to a specific conclusion and thereafter engaged in a tunnel vision investigation.

[68] It is imperative to hoist in that the information available in hindsight is always clearer than when an incident is unfolding. The chain of command was in a situation where it was forced to make decisions based on imperfect information while still managing a live-fire training exercise. All they knew in the beginning was that there was something that made the soldiers sick and some of the soldiers reported feeling high. Every member of the chain of command who testified explained what they did to narrow down the source of the problem but they also made it clear that they were neither experts in conducting criminal investigations nor did they consider themselves engaged in one. They were all originally concerned with the safety of the exercise and personnel affected.

[69] What this incident reveals is that requiring everyone in the chain of command to be held to the standard of trained police officers whenever anything unusual presents itself is problematic. In fact, it is detrimental to the operational environment and could hinder the overall safety and success of any mission. In short, imposing such a standard on non-police trained members of the CAF risks paralysing the chain of command when they must take immediate action to mitigate operational safety concerns. This is akin to suggesting that an ordinary person is automatically liable for responding to an emergency and when they do, they are held to the standard of care of a paramedic. It was clear that even at the highest level, after the situation had stabilized, the chain of command recognized they had to engage the subject matter experts being the military police. As Major Kaempffer explained in his testimony, he is an artillery officer with a geography degree and not a police officer.

[70] The Court heard that at approximately 1830 hours, Corporal Whitehall arrived at the AA and began speaking with the affected members. It was at that point that a formal investigation began.

[71] Major Kaempffer testified that he gave Corporal Whitehall a single cupcake wrapper in a Ziploc bag and Corporal Whitehall explained to the court how he safeguarded it by putting it in the temporary locker to ensure that it would not go mouldy or spoil. The wrapper was later sent by the investigating officers to Health Canada for analysis. On the evening in question, Corporal Whitehall was asked to meet the affected soldiers at the AA, which was not at either of the locations where the cupcakes were consumed. By the time he completed his interviews, it was late. He did not do any further investigation that night such as driving around to the multiple locations in search of cupcake wrappers.

[72] It is also important to keep in mind that the unit in question was in the field on an exercise, without readily available food and snacks. Witnesses testified that they were served food from hay boxes for breakfast and supper and for lunch, they consumed their individual meal packs they all carried. The evidence suggests that there

were no cupcakes and wrappers readily lying about throughout the training area that might have been confused with the ones distributed that day by Bombardier Cogswell.

[73] In fact, Bombardier Cogswell's interview suggested that the soldiers were complaining about the lack of variety in what they had to eat:

“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 and they were eating -- Master Bombardier Diggs said that they were eating, like, once a day and they weren't getting enough time and they wanted -- they asked me to bring them pizza. They asked me to bring them cheeseburgers. And I told them no because the CO said we can't bring anything hot to the field. No hot food whatsoever.”

[74] In the context of all the circumstances, although the military police could have done a more thorough investigation that night, I am unable to conclude that their investigation was negligent. It seems nonsensical to suggest that cupcake wrappers that were discarded as garbage at the time the cupcakes were consumed when the importance of that evidence was not known, now constitutes alleged negligence committed by the prosecution and the military police.

[75] In summary, firstly, I cannot conclude that cupcake wrappers that were never in the possession of the military police nor the prosecution were “lost” by them. I find that if the chain of command did mishandle or lose some of the wrappers in the context of all the other events unfolding at that time, this by itself does not prove a systemic disregard on the part of the prosecution's obligation to preserve relevant evidence. Finally, there is simply no evidence to support, let alone suggest, that the prosecution acted with a malevolent motive. In these circumstances, permitting a trial to proceed on the merits would not do irreparable damage to the integrity of the judicial process.

[76] I find that the prosecution has satisfactorily explained any loss of cupcake wrappers and has met its disclosure obligation. Consequently, section 7 of the *Charter* has not been breached.

[77] In extraordinary circumstances Bombardier Cogswell would still be entitled to a stay if she can show that the lost or destroyed evidence is so prejudicial to her right to make full answer and defence that it impairs her right to receive a fair trial.

[78] Bombardier Cogswell argued that the loss of the cupcake wrappers caused actual prejudice to her ability to make full answer and defence as it lost the only available, real direct evidence of the *actus reus* of the offences and there is no other evidence that exists that can act as an adequate substitute for the forensic testing of the wrappers.

[79] The foundation of this defence argument relies upon a speculative assertion that another wrapper might not have THC on it. There is a reasonable possibility that the

analysis of another cupcake wrapper would have resulted in one or more cupcake wrappers not having THC on it. However, it is also possible that analysis of the wrappers might confirm the presence of cannabis in the cupcakes to even a greater degree of certainty than the more remotely circumstantial deposit of THC on the one cupcake wrapper that is currently introduced as evidence against Bombardier Cogswell. When I view the circumstances in that light, the loss of cupcake wrappers may have impaired the prosecution's case more than Bombardier Cogswell's defence.

[80] In *La*, Sopinka J. wrote that the availability of other evidence is a critical consideration in assessing the degree of prejudice from lost evidence.

[81] For example, in the case of *R. v. Bero* (2000), 151 CCC (3d) 545 (Ont CA), 79 CRR (2d) 83, the defence argued that it required the DNA to be retrieved from the dashboard of the car in order to prove the identity of who was driving the car. The accused in that case insisted that he was not driving and was in the passenger seat. He testified that he hit his face on the dashboard and his head on the windshield partly severing his tongue when his face hit the dashboard on the front passenger's side. In *Bero*, the only available evidence to prove that he was not in the driver's seat would have been the DNA on the dashboard of the vehicle.

[82] Unlike in *Bero*, Bombardier Cogswell was not able to explain how the forensic evidence to be gained from testing another cupcake wrapper will assist her defence. In other words, what is the benefit to be gained to her defence from the additional testing that is not otherwise supported by other evidence? In *Bero*, there simply was no other evidence available to prove that the accused in that case was not driving the car. He sought to introduce his DNA that he argued was on the dashboard of the car, which had been disposed of.

[83] Further, the prosecution argued that there is already other evidence before the Court to suggest that not everyone who ate the cupcakes was affected. Master Bombardier Diggs testified to eating a cupcake but stated that he wasn't really affected.

[84] For her defence, the applicant asserts that she did not put cannabis in the cupcakes. Her defence is further refined to be that if the court finds that there was cannabis in the cupcakes, she did not add it.

[85] There is evidence on the record that all five urine samples voluntarily collected from five of the affected individuals who consumed the cupcakes tested positive for marijuana metabolite. The entirety of the evidence suggests that the members who consumed the cupcakes displayed symptoms consistent with having ingested cannabis.

[86] Given all the other admissible evidence, even if another wrapper tests negative for a marijuana metabolite that, on its own, does not lead to the conclusion that there was no cannabis in the cupcakes or that if there was cannabis, that Bombardier Cogswell did not add it.



[87] Whether or not the source of the cannabis could only have come from the cupcakes is part of a larger analytical assessment to be completed in the context of all the other admissible evidence before the Court. A negative test for THC on another wrapper could simply mean that there was no THC found on the wrapper of that particular cupcake.

[88] Consequently, I find that on its own, the results from testing additional cupcake wrappers are likely to be of no assistance to assist Bombardier Cogswell in her defence that she was not the person who put cannabis into the cupcakes.

**Did the loss of the wrappers constitute an abuse of process that violates those fundamental principles that underlie the community’s sense of decency and fair play?**

[89] The applicant argued that the loss of the cupcake wrappers by the chain of command was so negligent as to constitute an abuse of process and she seeks a remedy based upon this.

[90] I did not find a *Charter* breach and, as such, the loss of the wrappers does not constitute an abuse of process that violates those fundamental principles that underlie the community’s sense of decency and fair play. Consequently, there is no need for this Court to consider a remedy.

[91] Nonetheless, I will remind the defence that it is still entitled to demonstrate the inadequacy of the police investigation or highlight the failures in an investigation and to link those failures to the prosecution’s duty to prove its case beyond a reasonable doubt.

[92] The absence of evidence can, in some cases, be an important consideration in determining whether the prosecution has proved its case beyond a reasonable doubt. As Cory J. said, in *R. v. Lifchus*, [1997] 3 SCR 320 at paragraph 39, a reasonable doubt may be “derived from the evidence or absence of evidence.” The absence of evidence may be particularly important to the defence where no defence evidence is called as in the case at bar. Prior to the *Charter*, many acquittals could be attributed to police failure to preserve evidence or otherwise to conduct a proper investigation.

[93] In considering all the evidence, I will be particularly mindful of any potential harm, should it exist, to Bombardier Cogswell’s right to full answer and defence particularly whether the inferences from the circumstantial evidence are sufficient for the prosecution to meet its burden of proof beyond a reasonable doubt.

**FOR THESE REASONS, THE COURT:**

[94] **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 Majors É. Baby-Cormier and M.  
Reede, Prosecutors and Counsel for the Respondent