

COURT MARTIAL

Citation: *R. v. Radewych*, 2022 CM 2005

Date: 20220216

Docket: 202133

Standing Court Martial

Moss Park Armoury
Toronto, Ontario, Canada

Between:

Master Corporal L.E. Radewych, Applicant

-and-

Her Majesty the Queen, Respondent

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

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 alleged incidents that occurred on 21 August 2020, during a Basic Military Qualification-Land (BMQ-L) course in Trenton, Ontario. The consistency of the evidence suggests that there were approximately forty candidates on the course distributed over four different sections. There were originally three females on the course, but by the time of the alleged incidents, there were only two remaining. Master Corporal Radewych was the Second in Command of Section 4 and the only female instructor.

[2] The male candidates were housed in an H-hut accommodation building, originally designed for cadets. It had four different wings joined by a common area.

[3] The H-hut accommodation building was used for course briefings, such as instruction on the map lamination technique, and the duty Marching Non-commissioned Officer (NCO) entered twice a day to either collect or distribute the bolts required for the C-7 weapons. On those occasions, the instructors and the female candidates would

regularly be present. Further, the H-hut accommodation building was the same area where all the candidates cleaned their weapons and interacted as a group in their free time. The two lone female candidates slept at a different location, but regularly attended the H-hut accommodations as that was the core location of all their course activities. The female candidates entered the male accommodations through 3 Section, which had the closest door to where they were staying. By the end of the course, due to an issue arising with COVID-19 protocols, the two lone female candidates ended up living in the same male barracks.

[4] The evening before the alleged incidents before the Court, while the candidates were on free time, a very heated argument broke out between Private Sylvestre-Ravary, a female soldier, and Private Mariadas, a male soldier. Private Mariadas explained in court that the argument escalated based on his concern that when the female soldiers entered their building they were not being respectful of the male soldiers' privacy. Somehow by the next morning, the instructors received a complaint regarding that heated exchange. After a discussion between the instructors, it was decided that Master Corporal Radewych, who was the duty Marching NCO for the day would address the concerns raised from that heated exchange.

[5] It is what occurred the next morning when Master Corporal Radewych attempted to address the concerns raised that forms the subject of the two charges before the Court. The first charge alleges a violation of section 129 of the *National Defence Act (NDA)* for conduct to the prejudice of good order and discipline with respect to an address that Master Corporal Radewych made in speaking to the platoon about that heated argument.

[6] The second charge alleges an offence contrary to section 95 of the *NDA* for the ill-treatment of a person who by reason of rank was subordinate. The substance of that allegation is that later that same day, Master Corporal Radewych intentionally entered the living quarters of the male students, without regard to their states of undress.

[7] The charges read as follows:

“FIRST CHARGE
NDA Section 129

CONDUCT TO THE PREJUDICE OF
GOOD ORDER AND DISCIPLINE

Particulars: In that she, on or about 21 August 2020, at Trenton, Ontario, did say the following words to the students of the BMQ-L Course 0778, to wit: “There is no reason why you should all be bitching about females being in your shack while changing your clothes. I have been on course where both males and females were naked in the same room and we did our work naked. Just because women enter the shacks while you are changing is

not the issue. The issue is when you make it a problem. Stop being bitches about it and deal with them seeking you naked”, or words to that effect.

SECOND CHARGE
NDA Section 95

ILL-TREATED A PERSON WHO BY
REASON OF RANK WAS
SUBORDINATE TO HER

Particulars: In that she, on or about 21 August 2020, at Trenton, Ontario, did enter and remain present in the living quarters of the male students of the BMQ-L Course 0778, without regard to their states of undress”.

[8] At the end of the Crown’s case, on application, accused persons are entitled to file an application for 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 the essential elements of the offences set out in both charges 1 and 2.

The applicable law

[9] 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.

[10] The note 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 recently 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.

[11] 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. As McLachlin C.J. explained in *R. v. Arcuri*, at paragraph 22 of *R. v. Arcuri*, 2001 SCC 54 (CanLII), [2001] 2 SCR 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.

[12] 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.” (*Charemski*, at paragraph 23. Emphasis in original.)

Analysis

[13] The prima facie case standard is used as a screening process to determine whether it is justifiable and sensible to have a case proceed to the trier of fact, who is designated by law to render an ultimate factual decision on the matter.

Relevant evidence

[14] In assessing the elements of the offences, there was no dispute that there was some evidence before the Court with respect to the identity of the accused, the date and the location of the alleged offence.

Testimony

[15] In assessing the evidence, the judge is not to discount testimony because of concerns about the opportunity or ability of the witness to observe or recall the events accurately. The judge is to assume that the witness is not only trying to be truthful, but is also being accurate. Below is a short summary of some of the evidence relevant to this application. It is important to note that it includes only the inculpatory evidence in favour of the prosecution.

Private Monk

[16] Private Monk was a student on the BMQ-L course where Master Corporal Radewych was an instructor. He testified that he was in Section 3. He was unable to identify Master Corporal Radewych in court. He testified that on the day of the alleged incidents, a complaint had been passed up the chain of command regarding an argument that had taken place in their dormitory the evening before. The argument had been quite serious and part of it related to respecting the privacy of the males living in the barracks.

[17] With respect to the first charge, he explained that he could not recall exactly what was said but that that it was to the effect that “they should get used to having females looking at their genitalia.” He said that Master Corporal Radewych referred to them as girls and said that they lacked balls. He could not remember much more detail, but confirmed that Master Corporal Radewych did not verbally single out Private Mariadas, but she stared at him. He felt that her speech made matters worse.

[18] With respect to the second charge, Private Monk explained that Master Corporal Radewych knocked on the door to enter their barracks and one of the privates yelled “not decent”, but despite that, Master Corporal Radewych walked into the barracks saying that she had “seen guys shirtless before”. Under cross-examination he admitted that he did not actually witness the interaction at the door, nor did he actually hear Master Corporal Radewych’s response. In his testimony, he admitted that he was relying upon what others had told him. He explained that Master Corporal Radewych then stopped in a small common area between 3 and 4 Section to have a discussion with a male who he said was only wearing his boxers.

[19] Private Monk stated that he was personally wearing combat pants and an elemental shirt, as he had not yet started to change. He personally did not see anyone naked, but told the Court that there were soldiers in the shower. He explained that Master Corporal Radewych ordered them to return their weapon bolts, giving them five minutes to do so.

[20] When asked under cross-examination if the presence of Master Corporal Radewych in their barracks caused him any personal pain or suffering, he stated no. On re-examination he clarified that although he did not experience any pain or suffering, he felt as though it should not happen and if someone had less mental fortitude, it could severely affect their mental health and how they go about their daily lives.

[21] He stated that Master Corporal Radewych spent about ten to fifteen minutes in the male living quarters.

[22] He testified that he felt that the way Master Corporal Radewych behaved was wrong and he wanted to report what he witnessed. As such, he facilitated the drafting of a joint letter of complaint that was signed by a group of students making allegations against Master Corporal Radewych. He testified that three quarters of the course candidates signed the letter.

[23] He explained that the purpose of the letter of complaint was to let Master Corporal Radewych know that her behaviour was inappropriate.

Private Fahselt

[24] In his testimony, Private Fahselt confirmed that he was in 2 Section on the course and he was able to identify Master Corporal Radewych.

[25] With respect to the first incident and what Master Corporal Radewych said while they were “ranked up”, he described that the conversation was about working with your peers and how it should not matter whether you are dressed or not. He explained that they were told not to be bitching about it and that was the extent of the language he recalled. He stated that the words were directed at the whole platoon and he did not witness Master Corporal Radewych making gestures towards anyone.

[26] With respect to the second charge, he testified that on the evening in question, he was the course senior and was dressed in his combats when Master Corporal Radewych entered their building to give him some instruction for the platoon the next day. He explained that some of the male soldiers did not feel comfortable with her presence as she remained in their barracks for a few hours. He did not see her enter the building and only saw her when she came through to speak with him. He described her as having walked through the bathroom area three or four times. He was not aware of anyone showering that day. He stated that at one point she was having a private conversation with a candidate in the washroom area, but he did not use the washroom while she was present, despite stating that he needed to.

[27] He testified that he was not aware of anyone being naked, but that there were others in the process of changing who did not have a shirt on at the time.

[28] When specifically asked on cross-examination if Master Corporal Radewych’s presence in the male barracks caused him any pain and suffering, he replied “no.”

[29] In his assessment, half of the platoon, being approximately sixteen to eighteen candidates, signed the joint letter of complaint. He explained that his goal was to get it across that there is a privacy issue and a double standard. If a male entered the female shacks he felt that the concern would not be overlooked.

Private Yang

[30] Private Yang testified that he was a candidate on the BMQ-L in Trenton. He described the two incidents differently than the other prosecution witnesses.

[31] He described the incident in the barracks as unfolding in the morning, after physical training (PT) when they were getting changed into their uniforms. He stated that he was the closest to the door when Master Corporal Radewych knocked. He explained that she asked if they were decent and he responded “No, not decent” and then using himself as an example, he said “No, I am shirtless.” He testified that after she opened the door, which he estimated to be about ten seconds later, she said words to the effect “I don’t care, I have seen many shirtless men before.”

[32] He testified that after she entered, she went to speak with a candidate by the name of Samuel Tremblay, who he described as having a towel around his waist. He told the Court that after she spoke with Tremblay, she exited the building. When asked on cross-examination if she had the weapon bolt box with her he stated no, clarifying

that she just walked directly over to talk to a candidate, being Samuel Tremblay. He was clear that the Master Corporal entered and departed briefly thereafter. The candidate in question, Samuel Tremblay did not testify.

[33] Under cross-examination, when it was suggested to him that Master Corporal Radewych's presence in their barracks did not personally cause him any pain or suffering, he disagreed with that suggestion. He explained that during his military career, he was always told that it was part of their job and as both military members and human beings to respect the human dignity of other humans. Just because she was a woman does not mean that I as a man would not be offended by her entering.

[34] When presented with his earlier statement in the transcript of his interview with military police, he admitted that he had earlier told them he was fine with Master Corporal Radewych's presence. In clarifying the inconsistency, he confirmed that he was physically fine with her presence because he was not physically exposed when she entered, but he made clear that he was not fine with the situation. He assumed that was the message he had conveyed in his interview.

[35] With respect to the "speech" that Master Corporal Radewych made to the students, he stated that they were confused and found it weird, but that they did not really talk about it. He could not recall what was said exactly. But, he did confirm under cross-examination that she said something to the gist that "they are all in the army and soldiers, and males and females should be able to work together". He recalls her referring to her own military experience and having to do ablutions in the field beside male members. He confirmed that she explained sometimes you have to work with the space you have and that she did make reference to bitches, but all he remembered is the gist of what she said.

Private Mariadas

[36] Private Mariadas testified that he had a heated argument with Private Sylvestre-Ravary regarding respecting the privacy of the male soldiers in the male barracks. Under cross-examination, he admitted calling her rude names and threatening her with violence and that he had been aggressive and heated. He told the Court that at the time of the alleged events, he was suffering from a concussion. With respect to the first charge, he testified that they were formed up that morning by Master Corporal Radewych. He stated that Master Corporal Ciafaloni was also present. He said Master Corporal Radewych gave them a talking to. In short, he testified that she called them "bitches and pussies" and said they were "weak" for not being able to deal with women in their shacks. He testified that she said it should not matter if they are decent or not.

[37] He stated that when Master Corporal Radewych gave her address, she motioned towards him and looked him straight in the face and said if you want to make it a problem, it is a problem. He said he believed that from what the staff were seeing of him, he had picked an argument with a girl and it did not look good.

[38] He said Master Corporal Radewych looked like she enjoyed it, smiled and looked him right in the face. He said that others around him told him not to move.

[39] He testified that he did not really care about what she had said and they were going to ignore her, it is just another crazy day in the army and let it go. They hoped that she would change and it was just a bad day.

[40] He said her words did not help resolve the privacy concerns they had raised, but it created more concern as to what was expected of them in terms of respecting each other's privacy.

[41] In his opinion, he felt that her views crossed lines. He explained that her views were wild and were akin to suggesting to people it is okay to go "peep" on others.

[42] With respect to the second charge, he testified that later that day he woke up to Master Corporal Radewych busting through their barracks with a bolt box. He explained that he woke up when he heard a commotion on the other side with a few "Francos" yelling "not decent". He explained Yang yelled it pretty loud, as did "Sherwood". He stated that Master Corporal Radewych stayed in their barracks for as long as three or four hours. He thought it was questionable as to why she was in and out of the washrooms each time and although he could not say how often she did it, he stated it resulted in a massive complaint from the guys. He testified that the "Francos" complained the most as they had been in the showers when she entered their barracks.

[43] He explained that when he walked up to the doorway, you could see her talking to someone or jacking someone up.

[44] Under cross-examination, he admitted that Master Corporal Radewych had been helping a candidate with C-6 weapon drills.

[45] He explained that at the time she entered, they were all changing after returning from remedial PT and some guys were showering. He explained that he was passed out (sleeping) with his combats on. He was not sure why he had his combats on.

[46] He explained that they had little interaction with her until she was the duty Marching NCO.

[47] When directly asked in cross-examination as to whether the presence of Master Corporal Radewych had caused him personal pain and suffering, he responded, "No".

Corporal Pinsent

[48] Corporal Pinsent testified that he was one of only two corporals attending the BMQ-L. He was in 3 Section during the course and was able to identify Master Corporal Radewych.

[49] With respect to the first charge, Corporal Pinsent testified that Master Corporal Radewych said told them that they were all part of the same army and there would be situations where they “will have to work naked in front of one another; that is how it works”. He explained that he thought it was weird, given that they were in a training environment and there was no life or death situation happening, and therefore he did not think people needed to see each other naked.

[50] He testified that the above words were directed towards the group and he did not recall anyone being singled out.

[51] Under cross-examination, Corporal Pinsent asserted that Master Corporal Radewych did in fact use the word “naked”.

[52] With respect to the second charge, he recalled Master Corporal Radewych coming in to collect bolts to the weapons. He did not see her physically enter the building. He confirmed that she came in at the normal time that the Marching NCO would enter to perform that task. During the time she was there, at one point, he stated that he witnessed her in the washroom area. He stated that other than collecting the bolts of the weapons, he did not see her do anything further.

[53] Corporal Pinsent’s evidence was that he was fully clothed and he did not personally experience any pain or suffering.

Charge 1 – conduct to the prejudice to good order and discipline

[54] Defence counsel argued that with respect to the first charge, the prosecution has not produced evidence that the words set out in the particulars were said. She argued that none of the students wrote the words down as the words spoken were not directions nor orders and that there must be some evidence of the words to ground the charge.

[55] Defence further argued that even if the words are accepted at face value as having been spoken, the words themselves do not give rise to the level of prejudice required to make it an offence, contrary to section 129. Further, she argued that the deeming provision for prejudice is not triggered in this case.

[56] With respect to charge 1, 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. With respect to the first charge under section 129 of the *NDA*, in responding to the motion by the defence, the Court must assess whether the prosecution has provided some evidence:

- (a) that the particularized alleged offences occurred;

- (b) in the context in which the alleged conduct occurred, that the consequence of the alleged conduct is prejudicial to good order and discipline; and
- (c) that Master Corporal Radewych had a blameworthy state of mind.

[57] The defence raised a number of very legitimate concerns. Firstly, the alleged comments set out in the particulars are quite lengthy. The words alleged to have been spoken are: “There is no reason why you should all be bitching about females being in your shack while changing your clothes. I have been on course where both males and females were naked in the same room and we did our work naked. Just because women enter the shacks while you are changing is not the issue. The issue is when you make it a problem. Stop being bitches about it and deal with them seeing you naked.”

[58] During her submissions, I asked the prosecution to confirm the “messaging” or “intent” of the words set out in the particulars. Although the prosecution agreed that none of the witnesses gave evidence of the exact words stated above, the intent of the message that was sent was that the male course members had an invalid complaint regarding their privacy, they were bitches for complaining and as a result, they were making it a problem and they need to get used to working naked with women. If I accept that as the “intent” of the words, then I must examine the evidence of the witnesses to ensure that is the intent conveyed.

[59] The prosecution referred to the following evidence on the record to support this position. She argued that Private Faselt remembers her saying that when working with peers, it does not matter whether you are dressed or not, it should not make a difference and not to bitch about it. Private Mariadas testified that the messaging was to the effect that they should stop being little bitches and it is only a problem if they make it one. He recalls being called pussy, weak, and bitches and that it does not matter if they are decent or not. Similarly, Corporal Pinsent recalled that the theme of what she stated was that they should be able to work naked next to each other as part of the job.

[60] Consequently, upon a review of the prosecution witnesses’ testimony, although there is no one witness that testified to the exact words spoken, there is some evidence, if believed that could support the particulars as set out above.

[61] This Court is also mindful that any concerns with respect to the wording of the particulars can similarly be resolved by the panel under section 138 of the *NDA*. It reads:

Special finding of guilty

138 A court martial may, instead of making a finding of not guilty, make a special finding of guilty if it concludes that

- (a) the facts proved in respect of an offence being tried by it differ materially from the facts alleged in the statement of particulars but are sufficient to establish the commission of the offence charged, and

(b) the difference between the facts proved and the facts alleged in the statement of particulars has not prejudiced the accused person in his defence.

If the court martial makes a special finding of guilty, it shall state the differences between the facts proved and the facts alleged in the statement of particulars.

Proof of prejudice to good order and discipline

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

- (a) firstly, the prosecution could prove the accused violated an established policy or order that the accused had actual or deemed knowledge of;
- (b) secondly, the prosecution can prove the offence was committed if there is actual or direct evidence of prejudice to good order and discipline based on objective criteria of prejudice or likelihood of prejudice; or
- (c) thirdly, absent evidence of actual prejudice, the prosecution can prove prejudice by inference. As part of an inferential reasoning process, a military judge must, based on his or her experience and general service knowledge, ask whether, on the totality of the evidence, in the circumstances of the case, prejudice to good order and discipline could be inferred from the facts as proven. This reasoning process would take into account all the contextual circumstances of the case.

[63] The prosecution argued that as an instructor addressing her students, the messaging she sent was the candidates had to be okay with working naked with other members. She argued that it is very plausible that these students could believe her and then go ahead without respecting the privacy interests of their peers because they believed that this was both expected and the norm. The candidates were told that there was no reason why they should be concerned or complaining about their privacy concerns.

[64] In other words, it is the prosecution's position that Master Corporal Radewych put pressure on the students to accept a certain type of conduct while suggesting that the concerns they raised makes them weak. She argues that this is extremely prejudicial to good order and discipline.

[65] It is clear that the deeming provision for prejudice was not relied upon by the prosecution. Consequently, the Court had to determine if there was any actual evidence of prejudice and if not, I had to determine whether I could infer prejudice based on the evidence before the Court.

[66] In terms of direct prejudice flowing from the words spoken, none of the witnesses testified to any exact prejudice flowing from Master Corporal Radewych's address to the platoon. Some described it as weird, however, others were left with an impression that

their decency and privacy was not and would not be respected. Some testified that they were left with a different opinion of their instructor and thought there was a double standard. It is questionable whether these witness comments of prejudice by themselves raise the spoken words to the required level of prejudice to give effect to the criminal standard that must be met.

[67] However, even if the prosecution fails to provide evidence of direct prejudice, the judge must proceed to the next step to determine whether the prosecution has proven prejudice by inference. In assessing whether the prosecution has submitted some evidence, the military judge must perform the task of limited weighing to determine whether it would be reasonable for a properly instructed panel to infer prejudice if the prosecution's evidence was believed. This task of limited weighing never requires consideration of the inherent reliability of the evidence itself. It should be regarded, instead, as an assessment of the reasonableness of the inferences to be drawn from the circumstantial evidence.

[68] The prosecution argued that the evidence was that the soldiers were at the beginning of their military training and were left with the impression by their instructor that decency and privacy were not respected and that there was a double standard. Importantly, the prosecution argued that the message being sent was that notwithstanding how they feel about the lack of respect, they had no right to complain, which is prejudicial by itself as it discourages the reporting of inappropriate behaviour.

[69] Importantly, where there are two competing inferences that can reasonably be drawn by a trier of fact, at this stage it is a legal error for the military judge to favour the inference of the accused over that of the Crown. To do so usurps the function of the trier of fact (*Arcuri*, at paragraphs 21 to 25, *Charemski* at paragraphs 27-31, and *R. v. Masterson*, 2008 ONCA 481 at paragraphs 6-16). As Major J. put it in *R. v. Szasant*, 2004 SCC 77, [2004] 3 S.C.R. 635 at paragraph 18, “[W]here more than one inference can be drawn from the evidence, only the inferences that favour the Crown are to be considered.”

[70] Thus, if a reasonable inference in favour of the Crown is available to be drawn, then, regardless of its strength, at this stage of the court martial, a military judge is required to draw it. Consequently, after reviewing and engaging in the limited weighing of the evidence to determine if an inference of prejudice can be drawn, I must favour the inference advanced by the Crown at this stage. As a result, I am satisfied that there is some evidence upon which a properly instructed panel may infer prejudice.

[71] With respect to whether Master Corporal Radewych had a blameworthy state of mind, the prosecution is not required to prove that Master Corporal Radewych intended the consequences of her actions, but simply that she intended to say the words or message as set out in the particulars.

[72] With respect to intent, there was some evidence in the testimony of the witnesses that Master Corporal Radewych's comments were made directly in response to the

complaint the students had made regarding privacy concerns that had arisen regarding the heated argument between the two privates the evening before. Consequently, there is indeed some evidence that Master Corporal Radewych intended to address the privacy concerns in her messaging that next morning.

Second charge – contrary to section 95 – ill-treatment of a subordinate

[73] With respect to the second charge that Master Corporal Radewych “did enter and remain present in the living quarters of the male students of the BMQ-L Course 778, without regard to their states of undress”, defence argued that the witnesses recall her entering the living quarters at different times and it is not clear what the actual incident is that she is charged for. Further she argued that the identity of the persons who were ill-treated is not clear. Defence argued that context is important and the assessment is determined objectively. Master Corporal Radewych was an instructor on the course and evidence suggests that she was in the barracks to collect bolts for the weapons, and there is nothing to suggest that her activities were not in line with what was expected of an instructor.

[74] Further, the defence argued that to ill-treat is to act cruelly towards subordinates in such a way as to cause pain or suffering. There was no evidence that any of the students were caused any pain or suffering or that any of the witnesses were naked. The only evidence from a witness who stated that he was not completely dressed was Private Yang, who stated that he was shirtless. Even if Private Yang did experience pain and suffering, defence argued that there is insufficient evidence that Master Corporal Radewych acted cruelly.

[75] With respect to the second charge, the prosecution argued that the identity, date, time and place are not in issue. Based on the evidence in the testimony set out above, I find that there is some evidence on each of these elements.

[76] With respect to the particulars, they require evidence that Master Corporal Radewych did enter and remain present in the living quarters of the male students, which is consistent in the evidence from the witness testimony. The evidence suggests that Master Corporal Radewych did enter the barracks for a short period of time on the evening in question to either collect the weapon bolts or to talk to one or some of the cadets. With respect to Master Corporal Radewych not having any regard for their states of undress, there is also some evidence found in Private Yang’s testimony that he told Master Corporal Radewych that he was shirtless. He further told the Court that Master Corporal Radewych entered their living quarters about ten seconds after he told her he was not decent and when she entered she replied to him saying that “she had seen shirtless men before”. Consequently, based on this evidence, I must conclude that if this evidence is believed to be true then the particulars would be met.

[77] The crux of the analysis on the second charge lies in whether the alleged conduct set out in the particulars rises to the level of ill-treatment. Firstly, there is evidence that the males in the quarters were all on the course for which Master Corporal Radewych

was an instructor. Consequently, there is some evidence that they were all her subordinates for the purpose of meeting that element of the charge.

[78] Further, as I explained in *R. v. Jonasson*, 2019 CM 2003, as well as in *R. v. Reid*, 2022 CM 2003:

(b) *Ill-treatment*

once the particularized acts are proven beyond a reasonable doubt, then an assessment must be made as to whether, in the context in which the incident occurred, the act amounted to ill-treatment. Context is important in making a determination of whether the alleged conduct constitutes ill-treatment. The determination of whether something amounts to ill-treatment is determined objectively by assessing the above definitions with regard to all the circumstances.

The word “ill-treatment” is not defined in the *NDA*; however, on a strict reading of the section, there is no limitation imposed as to the nature or manner of ill-treatment envisaged. The words in the section are “strike or otherwise ill-treat” and includes treating badly or mistreating a subordinate in a different manner than by striking. It is not limited to physical violence or physical harm or injuries. It could be psychological, emotional or any harm or injuries of that nature.

With respect to what constitutes ill-treatment, my colleague Pelletier M.J. set out the following in *R. v. Duhart*, 2015 CM 4022:

[48] The test that has been developed over time by various courts martial appears to be based on dictionary definitions, specifically as it relates to the expression “ill-treat”, which translates as *maltraiter* in French. The relevant terms are defined as follows in the *Concise Oxford English Dictionary*, 11th edition and *Le Nouveau Petit Robert*.

“*ill-treat*” verb: act cruelly towards. DERIVATIVES: ill-treatment, noun.

“*cruel*” adjective: disregarding or taking pleasure in the pain or suffering of others. Causing pain or suffering. DERIVATIVES: cruelly, adverb.

“*maltraiter*” 1. *Traiter avec brutalité.* 2. *Traiter avec rigueur, inhumanité.* 3. *Traiter sévèrement en paroles (une personne à qui l'on parle, ou dont on parle).*

(c) *Blameworthy state of mind*

once the particulars are proven and it has been determined that the conduct rises to the level of ill-treatment, the Court must then assess whether the accused had the requisite mental intent.

[79] Note (B) to the QR&O 103.28 provides that “[v]iolence other than striking [...] is included, for the purposes of section 95[...] under ‘ill-treatment’.” That note provides

non-binding information about offences and courts martial have found that violence is not absolutely required in order to find ill-treatment. In *Duhart* at paragraph 47, Pelletier M.J. concluded that the term “violence” does not exclude psychological violence or a combination of psychological pressure and a physical act. Court martial case law has adopted and expanded this.

[80] While accepting that non-physical conduct can be captured within section 95, at paragraph 81 of *Jonasson*, I cautioned that:

Although a *NDA* section 95 offence is not reserved exclusively for physical contact, being “striking”, particular care must be exercised not to broaden the nature of conduct that fits within it. To do so compromises the nature of the offence.

I further explained how the nature of non-physical conduct could be captured within the offence where there is the existence of both a psychological pressure and a physical act of some sort:

The proof of a section 95 offence requires a component of cruelty in the conduct, which may be actualized where the senior ranked person disregards or takes pleasure in the pain or suffering of the lower ranked individual. This can occur when he or she knew or ought to have known that the intended conduct would not just be unwelcome, but that it amounted to downright meanness. For example, if the senior person had already been warned that certain conduct was unwelcome or it was done specifically to tantalize the junior member, or if as a senior member, he was aware that the Captain was suffering from post-traumatic stress disorder or some other known sensitivity that could be triggered by someone touching her hair, then strong arguments exist. Similarly, if there had been a prior pattern of conduct such as harassment or a prior incident that would have overly sensitized the complainant and the accused knew or ought to have known that his conduct would aggravate, then there may also be a basis.

[Emphasis added.]

[81] Most recently, in the case of *Reid*, where the facts were such that the complainant, who was new in Canada, having grown up in Turkey, had a well-known aversion or paranoia to showering naked with others in a communal shower. In attempting to assist the complainant in forming his beret, the instructor ordered the complainant to take a shower naked while the instructor observed him. While the complainant was showering, the instructor stared the complainant up and down. Based on the evidence before the Court, I determined that this was not done for any sexual purpose, but rather was done to intimidate and demean the private. I found that case rose to such a level of ill-treatment of a subordinate given the psychological pressure and conduct that unfolded under the pressure from the instructor. In that context, there was a sense of cruelty to the conduct.

[82] The prosecution argued that this case is similar to the facts set out in *Reid* because there is evidence that Master Corporal Radewych was aware of the complaints and the privacy sensitivities of the male candidates regarding the entry of females into their barracks. She argued that Master Corporal Radewych purposely entered the male barracks that evening in order to prove the points she had made in her address that morning. However, defence argued that the evidence suggests that Master Corporal Radewych entered the barracks in the performance of her duties and as required for the

collection of the weapon bolts. Other evidence before the Court suggested that this was the regular procedure that occurred every evening by the Marching NCO for that day.

[83] During the viva voce testimony provided in court, only one witness, being Private Yang, admitted to experiencing any personal pain and suffering flowing from the presence of Master Corporal Radewych in the barracks on that day. Although this evidence of his subjective feelings is not conclusive by itself, it is an important fact to be considered in interpreting whether or not the conduct of Master Corporal Radewych rises to the level of downright “meanness” such that it results in the ill-treatment of her subordinates. Once again, it is not sufficient to simply be unwelcome conduct.

[84] Private Yang was challenged on his position in light of his earlier statement provided to the police, where he stated that he was “fine” with what had happened. In response, he clarified what he meant in the context of his response. Once again, at this time it is not for the Court to assess whether Private Yang’s assertion is credible. This must be left for the final analysis.

[85] At this point, I must not engage in any assessment of the reliability or the strength of the evidence, but rather, I must simply look to see if there is any evidence, if believed to support the prosecution’s position.

[86] It is true that there is some evidence that Master Corporal Radewych was aware of the sensitivities of the male candidates regarding the entering of females into their barracks, as it was the actual substance of a complaint that she specifically addressed when she spoke to them that morning. There is also some evidence that she stood speaking privately with a candidate in the washroom area, which had urinals and showers in the near vicinity. There was also evidence given by some witnesses that there were people in the barracks that were in various states of undress. Although the majority of the evidence suggested that Master Corporal Radewych was only in the barracks for a very short time period in order to collect the weapons bolts and to speak with someone, there was also testimony by Private Fahselt that she lingered in the male barracks for as long as one and half to two hours, or as long as three or four hours, as suggested by Private Mariadas.

[87] The above evidence that Master Corporal Radewych was aware of the sensitivities of the male candidates at that time, combined with the assertion that Private Yang did experience some pain and suffering of some sort, leads me to conclude that there is “some” evidence before the Court to support the second charge.

[88] With respect to whether Master Corporal Radewych had a blameworthy state of mind, the fault element that must be met is whether she intended to engage in the prohibited conduct. The prosecution suggested that there is evidence before the Court that Master Corporal Radewych did hear Private Yang say or yell that he was not decent as he also testified that when she entered, she stated words to the effect that she had seen shirtless men before.

Summary

[89] I am satisfied that the evidence before the Court, if believed, could reasonably support an inference of guilt with respect to charges 1 and 2.

Conclusion

FOR THESE REASONS, THE COURT:

[90] **DISMISSES** the application.

Counsel:

Defence Counsel Services as represented by Lieutenant-Commander F. Gonsalves, for the Applicant, Master Corporal L.E. Radewych

The Director of Military Prosecutions as represented Major A. M. Orme and Captain S.Z. Zeewari, counsel for the Respondent