Citation: *R. v. Captain McKoena,*2005CM06

Docket: F200506

STANDING COURT MARTIAL
CANADA
QUEBEC
ASTICOU CENTRE

Date: 1 March 2005

PRESIDING: COLONEL K.S. CARTER, M.J.

HER MAJESTY THE QUEEN
v.
CAPTAIN MCKOENA
(Accused)

FINDING
(Rendered orally)

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[1] Captain McKoena, the court finds you not guilty of the first charge of conduct to the prejudice of good order and discipline. The court finds you not guilty of the second charge of conduct to the prejudice of good order and discipline. The court finds you not guilty on the third charge of conduct to the prejudice of good order and discipline. You may break off and sit with your defence counsel while the court explains its findings.

[2] I would begin by thanking counsel for their submissions, which the court found more useful. Although these may not be the most serious of charges that occur at a court martial, this is a case which raises significant issues such as when inappropriate conduct becomes a disciplinary matter; the difference between section 129 (1) and 129(2) and (3) of the *National Defence Act* offences; the proof required when conduct is not statutorily deemed to be to the prejudice of good order and discipline and the degree to which personal thoughts and emotions can establish prejudice to good order and discipline.

[3] The three charges in this court martial arose from events that took place more than 17 months ago at the commencement of a basic officer training course at the Canadian Forces Leadership and Recruit School, Canadian Forces Base Saint-Jean, Quebec on the 5th, 6th, and 7th of September, 2003. The events were first reported to

the Canadian Forces Leadership and Recruit School authorities in late October/early November 2003, and an internal investigation was conducted by the Canadian Forces Leadership and Recruit School in November 2003. The matter was then referred to the military police authorities at Canadian Forces Base Saint-Jean who interviewed Captain McKoena on the 29th of January, 2004. No further investigatory steps were taken by military police authorities at Canadian Forces Base Saint-Jean in relation to this matter.

[4] On the 25th of October, 2004, the charges before this court were preferred. On the 30th of November, 2004, this court martial was convened to commence in the court facility in Asticou Centre on the 31st of January, 2005. The court martial proceedings lasted for a total of 10 days, not including today and 12 witnesses testified in the main trial and one in a *voir dire* during an application to reopen the defence case.

[5] The three charges that Captain McKoena faced were for offences contrary to section 129 of the *National Defence Act*, specifically conduct to the prejudice of good order and discipline. The conduct, which the prosecution argued in the context in which it occurred was to the prejudice of good order and discipline, was that Captain McKoena misrepresented himself as having training authority over other members of his platoon; that, without authority, he imposed weekend training on his platoon; and that, without authority, he required then Officer Cadet Coulter to buy a new watch and running shoes for which there was no military requirement.

[6] The burden on the prosecution is to prove beyond a reasonable doubt that Captain McKoena did these acts and did them with the requisite state of mind; that is, knowingly and voluntarily, and that the conduct was to the prejudice of both good order and discipline.

[7] The matter before the court is not whether Captain McKoena behaved appropriately or wisely, nor whether his conduct was that expected of an officer in the Canadian Forces, nor whether he is an honest and trustworthy person into whose care members of the Canadian Forces can be safely entrusted. These are all issues which may have been, or may well be, examined by other authorities. The matter before the court is quite simply whether the prosecution has proven beyond a reasonable doubt all the essential elements of the offences charged.

[8] The identity of Captain McKoena and the date, time and place where the events took place were admitted by the defence and are not in dispute. The principal issues before the court are whether the evidence presented is sufficiently reliable to constitute proof beyond a reasonable doubt of what happened and, if it is, whether the prosecution has proven beyond a reasonable doubt those actions were to the prejudice of good order and discipline.

[9] The prosecution submitted that the testimony before the court was credible and, that when relied upon, established all the essential physical and mental elements of the conduct alleged. The prosecutor suggested that the witnesses were fair and frank in their testimony, not only critical of some of Captain McKoena's actions, but also giving him credit for the usefulness of others. The prosecution argued that any discrepancies in the testimony of witnesses, such as in regard to timings or the number of runs, was not significant and could be explained by the passage of time since the events and the different vantage points of the witnesses. Indeed, the prosecution submitted that the discrepancies should be seen as evidence that there had been no contrivance or collusion on the part of witnesses.

[10] In relation to the *mens rea* for these offences, the prosecution submitted that this was set out in the 2 August 2000 Court Martial Appeal Court decision in *Her Majesty the Queen v. Major Michel Latouche* CMAC-431 where, in dealing with an offence charged under section 129(2) of the *National Defence Act,* at paragraphs 18 to 32 of the decision, the Court Martial Appeal Court makes it clear that the *mens rea* required to be established beyond a reasonable doubt by the prosecution is that related to the commission of the alleged conduct, not to any consequential prejudice to good order and discipline.

[11] The prosecutor organized his submissions by relating the testimony presented to the charges. In relation to the first charge, he argued that the evidence of Captain McKoena's words, actions, course of conduct, and omissions, together with the evidence, in particular, of Warrant Officer Kis that Captain McKoena was at the relevant time simply a student on the course who had been assigned no special responsibilities or authority by the course instructors, established that Captain McKoena had misrepresented himself as having training authority over other members of his platoon.

[12] The particular conduct identified as supporting the misrepresentation included wearing a uniform, directing people to do or not do things, calling meetings, correcting people, accepting salutes, allowing or instructing other platoon members to call him Sir or Captain, and failing to identify himself as simply another student on the course. The prejudice to good order and discipline that resulted from this conduct was Captain McKoena losing the trust of other platoon members and an adverse impact on the morale of some other platoon members.

[13] In relation to the second charge, the prosecutor argued that the testimony of Warrant Officer Kis established that Captain McKoena had not been given any authority by the Leadership School to impose weekend training and that the testimony of the other witnesses proved beyond a reasonable doubt that Captain McKoena, by virtue of the authority he misrepresented he had, imposed timings, a reporting system,

regular meetings, a cleaning session, physical training, drill, and group activities, all of which were represented as and constituted training, on his platoon.

[14] The prejudice to good order and discipline that resulted from this conduct was Captain McKoena losing the trust of other platoon members, an adverse impact on the morale of some other platoon members, unauthorized restrictions being placed on the personal liberty of some platoon members, and the loss of opportunity for some platoon members to spend the time that weekend until 1800 on Sunday, essentially, as they wished.

[15] The prosecution argued that the testimony of Warrant Officer Kis and the contents of Exhibits 3, 4, and 5 established that there was no military requirement a trainee be in physical possession of a watch and running shoes before the course began, and that the testimony of Second Lieutenant, then Officer Cadet, Coulter, Baez, Lee, Flavel, Baisley, and Acting Sub-Lieutenant Dion proved beyond a reasonable doubt that then Officer Cadet Coulter had to purchase these personal items.

[16] In relation to this third charge, the prosecution submitted the prejudice to good order and discipline which resulted was, first, a breach of the instruction set out in Exhibit 4, paragraph 15, not to buy anything at CANEX except for immediate personal needs before the first Tuesday of the course because any expenditure might be wasteful as the individual might not know the exact nature of the item required, for example, a particular type of padlock.

[17] In this regard, the prosecution submitted that by his actions, Captain McKoena had breached that instruction, and consequently, the court can presume prejudice to good order and discipline on the basis of the Court Martial Appeal Court decision in *Jones v. Her Majesty The Queen*, 2002 CMAC 11, where Chief Justice Strayer states at paragraphs 7 and 8 that:

> Proof of prejudice can ... be inferred from the circumstances if the evidence clearly points to prejudice as a natural consequence of the proven act....

[18] In addition, the prosecution argued that the adverse financial impact of the unnecessary purchase on then Officer Cadet Coulter as well as the more general adverse impact of the required purchase on Officer Cadet Coulter's attitude and morale and the attitude and morale of other members of the platoon who were aware of the reasons for the purchase constituted prejudice to good order and discipline.

[19] Defence counsel, in his submissions, stressed the presumption of innocence and the burden on the prosecution to prove all the essential elements of the offence beyond a reasonable doubt. He stressed that at its heart, the question before the court was not what was the understanding of platoon members as to Captain McKoena's

status and role on the 5th, 6th, and 7th of September, 2003, but rather whether Captain McKoena had misrepresented himself and then taken advantage of the situation to impose and require things from his platoon mates, without authority and for no reason—no military reason—resulting in prejudice to good order and discipline. The defence submitted that the evidence demonstrated, at best, a series of self-generated misunderstandings and consequential assumptions which resulted in a number of people doing things which some of them now regret.

[20] In fact, the defence argued that there were few reliable, uncontradicted facts before the court and even less testimony that established what Captain McKoena said that weekend and that those words were key to a determination of what, if anything, Captain McKoena misrepresented, ordered, imposed, and required.

[21] The defence reviewed the evidence of each witness. In general, the defence's position was that their recollections and testimony were vague, sketchy, contradictory both internally with their own previous statements and with each other, and in the cases of then Officer Cadet Coulter and his "pod-mates", Dion, Flavel, Hircock, and Baisley, biased against Captain McKoena.

[22] In particular, the defence argued that the court should be alert to the possibility, either conscious or unconscious, of collusion and collaboration and apply the test set out in the case of *R. v. Gostick* (1999), 137 C.C.C. (3d) 53, which adopted the words of Sopinka J. in the Supreme Court of Canada decision of *R. v. Burke* (1996), 105 C.C.C. (3d) 205 at page 222:

> ... the trier of fact is obliged to consider the reliability of the evidence having regard to *all* the circumstances, including the opportunities for collusion or collaboration to concoct the evidence and the possibility that these opportunities were used for such a purpose.

[23] The defence suggested the evidence of Second Lieutenant Coulter was gratuitously unfavourable to Captain McKoena, vague and contradictory; that of Acting Sub-Lieutenant Dion lacked specific words said by Captain McKoena; that of Second Lieutenant Lee contradicted the evidence of Second Lieutenant Coulter while trying to support him and was also vague, contradictory, and unreliable; that of Second Lieutenant Flavel was sketchy and lacking in detail; that of Second Lieutenant Hircock was at best paraphrasing statements made by Captain McKoena ; and that of Second Lieutenant Baisley was sketchy, often guesswork rather than recollection. In summary, with the exception of the testimony of Warrant Officer Kis and, to a lesser degree, the testimony of Lieutenant(N) Bjornson and Second Lieutenant Baez, the testimony before the court was unreliable and not useful.

[24] In relation to the first charge, the defence submitted that if it was not made out, then it was unlikely that the accused would be convicted of the other two

charges, though the contrary was not true. The thrust of the defence's submission was that this offence required proof that Captain McKoena had the specific intent to misrepresent himself as having training authority over his platoon mates, and that critical to such misrepresentation is the actual words he used to make such a misrepresentation. The defence went on to say there was no reliable evidence before the court as to those words.

[25] He described the situation rather as one where other candidates made assumptions based upon, and drew conclusions from, the rank, manner, and actions of Captain McKoena. In addition, the defence's position was that the negative personal feelings of the other platoon members about any misrepresentation by Captain McKoena, particularly in light of the testimony of Warrant Officer Kis that the platoon functioned normally, are not sufficient to prove that the conduct was to the prejudice of good order and discipline.

[26] The defence's submissions in regard to the second charge were that the prosecution failed to prove beyond a reasonable doubt that the activities engaged in that weekend met the definition of training. If they did however, the evidence showed the platoon members engaged in such activities not because they were imposed by Captain McKoena; that is, compelled by him, but rather as the result of a self-interested concensus on the part of the other platoon members, possibly to take advantage of the knowledge, experience, and leadership Captain McKoena had demonstrated.

[27] The defence again submitted that the negative personal feelings of the other platoon members about any training activities imposed by Captain McKoena, particularly in light of the testimony of Warrant Officer Kis that the platoon functioned normally, were not sufficient to prove that the conduct was to the prejudice of good order and discipline.

[28] In relation to the third charge, the defence argued that there was a reasonable doubt that Captain McKoena required then Officer Cadet Coulter to buy a new watch and running shoes, rather this resulted from a misunderstanding, a feeling on the part of then Officer Cadet Coulter. The defence also advanced the argument that the evidence established that there was a military requirement for both items. Finally, the defence submitted that the negative personal feelings of then Officer Cadet Coulter and other platoon members about this purchase and any personal financial loss suffered by then Officer Cadet Coulter were not sufficient to prove that the conduct was to the prejudice of good order and discipline.

[29] The defence reiterated that collaboration and collusion should be considered a live issue in this case. In that regard, he argued that the failure to report these incidents for nearly two months, the fashion in which some of the original statements in November 2003 were collected, and the cooperative relationship of pod-

mates that existed between a number of the witnesses are all factors that the court should consider.

[30] Both counsel addressed four issues that had been raised by the court. Those were specifically, which orders the court had taken judicial notice of that counsel in particular wished to rely upon; what was the significance, if any, of the status of Captain McKoena as a captain; what was the significance, if any, of the use of the term "members of his platoon" in the first charge and "platoon" in the second charge; and finally, what was the impact of personal thoughts and feelings on the issue of prejudice to good order and discipline.

[31] The court will deal with all of these issues except that of the significance of the use of "members of the platoon" in the first charge and "platoon" in the second charge in the course of its reasons. With regard to the issue of the use of "members of the platoon" in the first charge and "platoon" in the second charge, the submissions of both counsel were that this was not significant. The court raised this issue and has considered whether or not, in the circumstances, "platoon" must be construed as all members of an organization as opposed to simply a certain number of the individual members of an organization.

[32] The court has concluded, in this context, as people were clearly arriving at different times over the weekend in September 2003, that the term "platoon" referred only to members of the platoon who were present a particular time. In essence, the court has accepted the submissions and has also come to the conclusion there is no significance in the use of the different terms.

[33] These are section 129 offences, and as such, the burden is on the prosecution not only to establish what was done and that whatever that was was done with the required *mens rea*, but, in addition, the prosecution must prove that what was done was to the prejudice of good order and discipline.

[34] The Court Martial Appeal Court in the case of *R. v. Latouche*, which has already been mentioned, has established that the intention of the accused relates only to the actions that he did. It is not required that he intend prejudice to good order and discipline. However, these offences are not section 129(2) of the *National Defence Act* offences as the offences in *Latouche* were. That is something which the court will review in some detail because it is key to the decision in this matter.

[35] In a section 129(2) *National Defence Act* offence, the particulars will allege a breach of a regulation, order, instruction published for the general information and guidance of the Canadian Forces or any part thereof, or any general, garrison, unit, station, standing, local, or other order. Then as set out in Note E to QR&O 103.60, once the prosecution has proven that the instruction was issued and promulgated as

prescribed, the accused is deemed to have knowledge of that order, and the particular process of promulgation is set out also in regulations in Queen's Regulations and Orders Volume 1, article 1.21 and article 4.26. Section 129(2) of the *National Defence Act* also deems such a breach to be to the prejudice of good order and discipline.

[36] In essence, as set out in the decision of *Latouche,* at paragraph 32, while section 129 would normally be considered a results crime, in the case of section 129(2) charges, effectively, the *actus reus* and *mens rea* of the result are statutorily deemed once the breach is established. Indeed, a review of section 129 indicates that section 129(3) applies a similar deeming position in cases of attempts to commit an offence contrary to section 73 to 128 of the *National Defence Act*.

[37] Section 129(1), however, is a broad provision which covers other situations. Indeed, its generality is confirmed by the provisions of section 129(4) of the *National Defence Act*. Under section 129(1) where a breach of a regulation or an order occurs, the prosecution can still proceed under 129(1); it is not required to proceed under section 129(2). However, section 129(1) does not permit the prosecution to establish a breach, then rely on that breach as conclusive evidence of prejudice to the good order and discipline without having proven the deemed knowledge as set out in Note E.

[38] In essence, the court would indicate that it must conclude that section 129(1) requires more than simply establishing that an order has been breached to result in an inevitable conclusion that there is prejudice to good order and discipline; otherwise, section 129(2) and, indeed, 129(3), to some degree, are rendered superfluous.

[39] The court is bound, of course, by the Court Martial Appeal Court decision in *Jones and Her Majesty The Queen*, 2002 Court Martial Appeal Court 11, which indicates that proof of prejudice can be inferred from circumstances if the evidence clearly points to prejudice as a natural consequence of the proven act, and the breach of an order, even when there is no proof of knowledge of the order by the accused, is an appropriate factor in establishing beyond a reasonable doubt conduct to the prejudice of good order and discipline. However, section 129(1) is not a short-cut around the promulgation provisions of section 129(2) of the *National Defence Act*; that is, a section 129(1) context is not one where the court can accept that there is statutorily deemed prejudice.

[40] In this case, all the sections are section 129(1) offences; that is, they do not allege in the particulars that there's a breach of any particular order. Consequently, the prosecution must prove beyond a reasonable doubt that the conduct is to the prejudice of good order and discipline. Prejudice is not defined in Queen's Regulations and Orders and so the court looks, as is required by regulation, to the Concise Oxford Dictionary, and the court would indicate it has used the 10th Edition. There, prejudice

is defined and there are a number of definitions, but one begins "chiefly Law" which is the one that the court has deemed to be appropriate, and the definition reads as follows:

> harm or injury that results or may result from some action or judgement.

It is the use of that "may" which appears to be the basis of some of the confusion that occurred in the *Jones* decision.

[41] In essence, given that definition, the prosecution must prove prejudice beyond a reasonable doubt, but that proof does not require proof of actual harm but proof that harm of injury may result, and the court would indicate it takes "may" here in the context of harm or injury as a logical consequence or possibility of the action.

[42] The prosecution also has to prove that the actions that are alleged in each charge are contrary to good order, and what constitutes good order is set out again in a Note under QR&O 103.60, and essentially constitutes disruption of normal appropriate public activities. However, it's very clear that if discipline is breached, then good order is breached, and therefore, it is discipline which is the most important concept here. Once again, discipline is one of those words which everyone believes they know, but may have a different definition of. The court has adopted a definition that is found in a document that is issued under the authority of the Chief of the Defence Staff, in 2003, as a cornerstone document and that is "Duty With Honour: The Profession of Arms in Canada" and in that document, discipline is defined as the "quality which facilitates immediate and willing obedience to lawful orders and directives."

[43] So in a section 129 offence which does not establish a breach of a properly promulgated regulation, order, or direction as set out in paragraph 2 of section 129 of the *National Defence Act* or an attempt as set out in section 129 paragraph 3 of the *National Defence Act*, the prosecution must establish the particulars of the act, conduct, or neglect and directly through evidence which may also include judicial notice, or through inference of the natural consequences of the proven act that harm or injury to the quality which facilitates immediate and willing obedience to lawful orders and directives is a logical consequence or did result from the actions.

[44] I have gone through that in some detail because as I've indicated, it is critical to the court's analysis of the findings in this matter. In this case, as in any court martial or any criminal trial in Canada, an accused person is presumed to be innocent and the burden is on the prosecution to prove every element of the offence beyond a reasonable doubt. The defence brought to the attention of the court the case of *R. v. Lifchus*, and in *R. v. Lifchus*, which can be found at (1997), 118 C.C.C. (3d) 1, at page 10, Mr Justice Cory for the majority states:

> ... If the presumption of innocence is the golden thread of criminal justice then proof beyond a reasonable doubt is the silver and these two threads are forever intertwined in the fabric of criminal law....

This presumption remains with the accused person from the beginning of the trial until after all the evidence has been heard and considered, and the finder of fact has been satisfied beyond a reasonable doubt of the guilt of the accused.

[45] The fact that a person has been charged is in no way indicative of his or her guilt. If the court has a reasonable doubt that the accused committed an offence with which he or she is charged, the benefit of that doubt must be given to the accused.

[46] A reasonable doubt as set out at page 13 of the *Lifchus* decision is described as a doubt based upon reason and common sense, not upon sympathy or prejudice. It is one logically connected to the evidence or the absence of evidence. While it does not involve proof to absolute certainty, it requires more than proof that an accused is probably guilty.

[47] It must be a doubt that is held after a fair, thorough, and impartial consideration of all the evidence before the court. If there is a reasonable doubt concerning only one essential element of the charge, the accused must be given the benefit of that doubt.

[48] Evidence can come in many forms but often it is in the form of oral testimony of witnesses. It is not unusual that some evidence before the court is contradictory. Often witnesses have different recollections of events. The court must determine what testimony it finds credible and reliable.

[49] Because it is clear that the credibility of witnesses is critical in this case, it is useful to set out what it consists of and how the court should determine which witnesses and what evidence is credible. A credible witness is one who the court assesses provides honest and reliable testimony. A sincere witness, honestly endeavouring to tell the truth, may still give unreliable evidence.

[50] Many factors influence the court's assessment of the credibility of a witness, and these include a witness's opportunity to observe, a witness's reasons to remember; for example, were the events noteworthy, unusual, striking, or relatively unimportant and routine, and therefore, more difficult to recollect? Does the witness have any interest in the outcome of the trial; that is, a reason to favour the prosecution or the defence, or is the witness impartial? The passage of time, quite naturally, is something that may impact on the recollection of details.

[51] The witness's demeanour is also one factor and only one that can be used to assess credibility; that is, was he or she responsive to questions, straightforward in his

or her answers, or evasive, hesitant, and argumentative? Finally and quite importantly, in this case, was the witness's testimony consistent with any uncontradicted facts? Minor discrepancies can and do innocently occur, and these do not necessarily mean that the testimony should be disregarded. A deliberate falsehood, however, is always serious and may taint a witness's entire testimony.

[52] While a court is not required to accept the testimony of any witness except to the extent that it has impressed the court as credible, a court will accept evidence as trustworthy unless there is a reason to disbelieve it.

[53] A particularly useful explanation of how a trial judge can properly approach credibility is found in the relatively old case of *Faryna v. Chorny* [1952] 2 D.L.R. 354, a decision of the British Columbia Court of Appeal. At pages 356 and 357 of that decision, the British Columbia Court of Appeal states:

> ... A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial judge and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth....
>
> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions....

[54] The defence has raised and it indicates very significantly the issue of collusion, and, in particular, the collusion that it suggests the court should consider is collusion between pod-mates; that is, Coulter, Flavel, Inglis, Baisley, Dion, and Hircock. In the case of *R. v. Gostick*, which the defence presented, there are a number of injunctions and considerations when considering collusion, and at page 58 and 59 of that decision, the court states:

> ... While some allowance must be made for minor discrepancies in their testimony, in my opinion the testimony of all three complainants must be judged in the overall context of the plausibility of the conduct they allege.

It goes on to say that:

> The proper approach to the burden of proof is to consider all of the evidence together and not to assess individual items of evidence in isolation: ...

[55] The court has considered very carefully the issue of collusion, and first of all, the question of opportunity, and there is certainly opportunity for collusion in this matter. Clearly, the majority of the witnesses heard by the court remained on the same course, in close proximity, and many of them on friendly terms. The matter that is the subject of the charges is something which could well be the subject of conversation between them. However, the court has gone on to the second aspect of the analysis, which is required to make, which is the likelihood of collusion. And the court has considered that there is, before it, no evidence that collusion occurred.

[56] This was clearly a basic training course, a very busy course. This is not something where the matter was immediately brought to the attention of authorities, indeed, it's not entirely clear who brought this matter eventually to the attention of authorities. There is some evidence that it occurred after an ethics lecture was presented, but it was certainly not done till some eight weeks after the event occurred.

[57] The original statements, which were made in November 2003 by some of the witnesses, were given individually, not in a collective manner. After the end of the course, it is clear that the witnesses and the other members of the course spread out and kept only in very limited contact. The nature of the testimony of the witnesses is also an indication of a lack of collusion. First, as indicated, there is contradiction on relatively minor matters but ones which could easily be straightened out if collusion existed. Equally, the witnesses were willing to give credit to Captain McKoena for the usefulness of the information that he provided to them on that weekend. So the court would indicate there is nothing before it that indicates there was any collusion between the witnesses in this matter.

[58] In addition and important points, the testimony of Coulter, Flavel, Inglis, Baisley, Dion, and Hircock is confirmed by the testimony of witnesses such as Baez, Bjornson, and Turner where no collusion is alleged. So the court has considered whether or not there is any indication of collusion or collaboration; it has considered the opportunity and the likelihood, and its conclusion is there was no collusion.

[59] The court would indicate that it believes all the witnesses who appeared before it testified honestly. In many cases, they may have tried a little too hard to answer questions, and they would preface their responses by indicating it was a guess or something similar. Indeed, in at least one occasion, one of the witnesses apologized to defence counsel for being unable to answer the question; that is, unable to provide the information.

[60] It is also clear that, from the demeanour of the witnesses, they were very eager to give answers to questions posed by two people who, from their perspective, were senior officers in the Canadian Forces. So the court accepts that all of the witnesses testified honestly. There is, however, a varying degree of reliability in their testimony, and it is not always the case that those who were most involved in these matters had the best, most reliable recollection.

[61] In reviewing their testimony, the court has indicated that, in some cases, some of the witnesses are perhaps less involved and also more reliable in their recollection. So the court would indicate, first of all, it considers the evidence of Warrant Officer Kis, who was uninvolved in any of the activities of the weekend until a meeting at 1800 on the Sunday, as very reliable.

[62] The court also considers the testimony of Second Lieutenant Baez very reliable. He was calm and mature. He was clearly not awed by this process as some of the other witnesses were, and he also had a minimal involvement after this weekend with anyone else in this platoon because he was moved to another platoon. The court was impressed by the testimony of Lieutenant(N) Bjornson who played scrupulous attention to questions, imposed very strict division between what she knew and what she didn't know and identified both of them very clearly.

[63] The court was also impressed by the testimony of Second Lieutenant Turner who was clear in her responses and also qualified in what she recalled and what she didn't recall. She was very straightforward in being willing to adopt statements that she made earlier as a better account or a more reliable recollection. The court would indicate that, in relation to the testimony of Second Lieutenant Lavigne, although it was generally reliable, it was not particularly useful.

[64] With regard to the other witnesses, again, the court would indicate it has found them all honest and generally reliable, but the other witnesses were more inclined to guess; that is, they were less inclined to indicate when they clearly didn't know, and so the court certainly scrutinized very carefully their testimony, particularly where they, themselves, have indicated that their recollection is limited.

[65] At the same time, the court has taken into account that these events occurred 17 months ago and that, although some of the witnesses made written statements in November 2003, some 15 months ago, there was no indication they had reviewed the exhibits that were produced or the statements before they testified. In addition certain other witnesses apparently had not discussed this matter for up to a year after it occurred.

[66] One of the tests that the court has looked at is the reliability of recollection with regard to a particular event and that is the meeting on the Sunday

evening, and in that regard, Warrant Officer Kis, Second Lieutenant Baez, Second Lieutenant Flavel, Second Lieutenant Turner, Inglis, and Baisley all recall the meeting being at 1800 on the Sunday. Dion, Lee, and Bjornson do not recall when that meeting occurred, and Coulter, Hircock, and Lavigne recall it happening on Monday morning. This is not to indicate that this is the only basis on which the court has evaluated the testimony, but it certainly is one factor which has reliably been established as occurring and which people's recollections differ about.

[67] In general, however, the court would indicate there's a remarkable consistency in the testimony and the differences the court would accept come from the perspective and experience, and, in some cases, the respective locations on that weekend of the witnesses. And in that regard, the court has approached the evaluation a little differently from simply looking at the charges or the witnesses. It has analysed, in some detail, who arrived when and what their previous background was.

[68] So on the Friday, we have Second Lieutenant Baez, who has previously been on one of these courses and been recoursed, arriving at approximately 10 a.m. in the morning. The afternoon of Friday, we have a series of individuals arriving. They include Acting Sub-Lieutenant Hircock with no previous military experience and Second Lieutenant Flavel also with no previous military experience; Second-Lieutenant Dion with no previous military experience; Second Lieutenant Coulter with no previous military experience—sorry, with Regular Force experience; and Inglis with Reserve Force experience. Finally, there is Second Lieutenant Baisley who has some military experience in terms of contact training.

[69] These people all arrived on the Friday and all of them except Baez are co-located in one pod, and the court has taken that into account in assessing their testimony because it puts them in a similar position. At the same time, it has taken into account that those with previous military experience may have a different perspective on the matters than those who have no previous military experience.

[70] The other witnesses who the court has heard from arrived on the Saturday and at different times on the Saturday. It appears that Lieutenant(N) Bjornson and Second Lieutenant Lee arrived on Saturday morning and that Turner and Lavigne arrived a little later on the Saturday around lunchtime. In that case, Lavigne is geographically separate; that is, he's in a pod, it seems more or less by himself, not with other platoon members, and Bjornson and Turner are in a pod that is for female platoon members. So the court has taken that into account in assessing the testimony of the witnesses.

[71] In terms of discrepancies, the major discrepancies are the timing of the first course meeting, whether it occurs on Sunday evening or Monday morning; the timing a number of PT periods that occurred over the weekend; and how long the

cleaning activity on Saturday evening took. There is, however, consistency and significant consistency in areas such as the length and nature of meetings on Friday night; when then Officer Cadet Coulter arrived at that meeting on Friday night; the process for going to and what happened at meals; the incident of Lieutenant(N) Bjornson being called to attend a meeting; the, as I would describe them, two incidences involving Second Lieutenant Turner; the general number and nature of meetings that occurred over that weekend; and most significantly, the role of Captain McKoena.

[72] So the court has made the following findings of fact: First of all, that this related to an incident that included members of 1 Platoon as it was described—and from the testimony of Warrant Officer Kis, it is clear that platoons consisted of 30 or more members—who arrived in Saint-Jean over the course of the weekend before a course was scheduled to begin. As he indicated, as the exhibits indicate, and as all the witnesses indicate, they were briefed by staff and directed to accommodation. In this case, the accommodation was in an upper floor of the blue section of the Megaplex at Canadian Forces Base Saint-Jean to a series of rooms which were called "pods" and all the witnesses, other than Warrant Officer Kis, fell into the category of people who were coming to attend this course.

[73] The briefing and, indeed, the material that is set out in the exhibits indicate that, in essence, although there were limitations on what the officer cadets could do, they were essentially free until the first scheduled meeting of the course at 1800 on the Sunday evening.

[74] On Friday, the 5th of September, in the morning, then Officer Cadet Baez arrives and goes through a slightly different procedure than everybody else, apparently because he's a returning course member; he talks with Warrant Officer Kis and then goes off to his pod. In the course of the afternoon, as indicated, Officer Cadets Baisley, Hircock, Dion, Flavel, Inglis, and Coulter arrive; they all go through a briefing and go to the same pod. Late in that afternoon, sometime after 1600, Captain McKoena arrives at the floor where the pods are located in the Megaplex. He arrives in uniform and he arrives wearing something described as a CADPAT camouflage uniform.

[75] There, he meets Officer Cadet Flavel. Officer Cadet Flavel is 37 years old and an engineer, but someone with no previous military experience who is talking on the phone with his wife. There's a brief conversation between Officer Cadet Flavel and Captain McKoena, and although Officer Cadet Flavel does not remember exactly what Captain McKoena's words were, it is his understanding at the end of that meeting that Captain McKoena is the platoon commander who is in early to give one platoon a head start, and that he would be holding a platoon meeting in the common room later that day. Officer Cadet Flavel then goes and tells his roommates all about his experience.

[76] There then begins a series of what I would describe as serial meetings on the evening of Friday which people participate in depending on their availability. Officer Cadet Baez is in the common room, he indicates, with a book waiting for people to drift in when Captain McKoena comes into the common room dressed in his uniform. There are other people in the room at that time, and Officer Cadet Baez calls the room to attention. People come to attention, sitting, and Captain McKoena then tells them that they can sit at ease.

[77] Officer Cadet Baez's impression from the rank that Captain McKoena wears and his uniform is that he's a platoon commander visiting his platoon. This is the impression that's created on somebody who has already gone through part of the course at Canadian Forces Base Saint-Jean and been recoursed. This impression is reinforced for Officer Cadet Baez by Captain McKoena's actions. He introduces himself and then directs others to introduce themselves. Captain McKoena talks about his pride in being in the Canadian Forces; about his job and that he has people working for him; about the course and what is necessary to succeed on the course; about the importance of helping each other; and from the court's point of view, quite significantly, Officer Cadet Baez remembers Captain McKoena talking about the importance of obedience to staff orders.

[78] Captain McKoena goes on to talk about fellowship, cleanliness, the importance of the uniform, and the importance of honesty and officer-like qualities. Although Officer Cadet Baez notices Captain McKoena's boots do not seem to be tied in accordance with regulations, this is not something he brings up. He waits and at a later point in time, he addresses Captain McKoena privately because he does not want to embarrass him. So this is Officer Cadet Baez's impression on Friday evening. The impression is garnered from the appearance and the actions and the words of Captain McKoena.

[79] I've indicated that there was essentially, what I call, a serial meeting; that is, on Friday evening, a number of people came to meetings and they all seem to be organized by Captain McKoena. For example, Captain McKoena turns up to get Officer Cadet Baisley, who is in his pod, and quite significantly, he asks Baisley, when Baisley tells him the other people are at a movie, who gave these people permission to go to a movie. Captain McKoena tells Baisley when the meeting is going to start, then comes back, changes it, and subsequently sends Baisley to go and get his roommates after the meeting has begun.

[80] There is a remarkable consistency between the accounts of Baez, Coulter, Dion, Flavel, Inglis, Hircock, and Baisley as to what occurred on Friday evening, and they also indicate that this was, in essence, a standard format that continued to occur throughout the weekend. Captain McKoena came in and was in uniform, he was wearing his rank. He had his beret with him which had his cap badge on. He went to the front of the room and he directed the meeting. He introduced himself, and it's

something where there have been different descriptions of exactly what he said, but that is consistent with the fact that these introductions occurred again and again; that is, Captain McKoena didn't introduce himself once, but introduced himself at the beginning of each of the meetings.

[81] And, in essence, Officer Cadet Coulter recalls no particular words of introduction but only the rank and the authoritative role that Captain McKoena took on Friday evening. Dion recalls that Captain McKoena was on course with them to act as a course facilitator. Flavel, of course, had the experience of the previous conversation with Captain McKoena and so his recollection is that Captain McKoena indicated he was staff, in early, to get a head start on the weekend. Inglis recalls Captain McKoena's introduction as being that he was an advisor, that he was there to smooth the transition, and that the members of the course should just think of him as one of themselves. Acting Sub-Lieutenant Hircock understood that Captain McKoena was there to assist and to take, in part, the course with the members of 1 Platoon. Officer Cadet Baisley, as he then was, understood that Captain McKoena was a staff member or platoon commander but only recalled that he said he was a lawyer from Toronto who was with them on the course.

[82] What is quite significant is that none of these people indicate that Captain McKoena, in any way, indicated he was a fellow student. Everyone of the explanations, although they are different, clearly distinguish him and make him not what they are, and this is consistent with the fact he chooses to wear his uniform and accepts compliments, it is also confirmed by the fact that people are instructed to call him Sir or Captain, not by his first name. It is the case that one of the witnesses, Hircock indicates that Captain McKoena did indicate he had been on course in Saint-Jean previously, but it is clear that from none of the witnesses, did Captain McKoena convey the impression that he was back and being recoursed as had been suggested.

[83] Captain McKoena, on Friday evening, directs the introductions. He explains the rank, the structure, the rules of the school, what to expect on the course, what people need to know, the importance of timing, how to call a room to order, how to ask questions when addressing instructors, the importance of sticking together and working as a team, how to address an officer; that is, himself. He sets timings for what's happening the next day and for some of the witnesses, they adopt the term, "Captain McKoena directs and Captain McKoena sets."

[84] Others agree that perhaps it was something where there was a suggestion from Captain McKoena and people agreed, but equally, as has been pointed out, this is a suggestion by someone who is a captain, who has come in and indicated to them that he has a role to play in introducing them to the course, and so it is not at all unexpected that there is agreement and the people who agreed may subsequently conclude that they only agreed because of the understanding they had of Captain McKoena's role.

[85] Quite simply, it is not necessary to say to someone, "I order you to do something." If you carry the rank, if you indicate that you have a position of responsibility, then it is highly unlikely that people are going to disagree with your suggestions. In essence, Captain McKoena, on Friday evening, portrayed himself as a senior officer and it was not necessary for him to say, "I order you to do things," he could use the other terms and people would comply with his suggestions.

[86] By the end of Friday evening, there was a clear misrepresentation by Captain McKoena of his training authority over his other platoon members by his words, by his omissions, and by his actions. This continued on Saturday, but, of course, it was less necessary for him to do this because by that time, as with Flavel and Baisley and O'Neill, other people worked to pass the information that Captain McKoena was there and this was what he wanted.

[87] However, in some cases, it was necessary for Captain McKoena to demonstrate his role as being in charge of the course; one of these actions on Saturday was when he had Lieutenant(N) Bjornson brought in to the meeting because he wanted her to report. Her description of what she saw was that Captain McKoena again was in the front of the room. He had on his rank and his uniform. He took charge. He told people what to expect. He showed people what to do and how to do it. He imposed the standard.

[88] The other people, who came in that day, ended up with very similar experiences. Second Lieutenant Lee indicated that Captain McKoena left the impression he was going to teach. He was directing the activities and he was engaging in what Second Lieutenant Lee described as a "feel good" speech, which, in essence, was a repetition of the kind of speech that Captain McKoena gave on Friday night.

[89] Second Lieutenant Turner was told that Captain McKoena wanted to meet her and therefore, she went to the common room to meet him. He talked to her about the rules. He welcomed her. He gave her an introduction to the school. He was an officer in uniform.

[90] All of these were cumulative activities on the part of Captain McKoena. He consistently wore his uniform and rank except when he was engaged in physical activity. He allowed and encouraged people to treat him as someone different by having them call him Sir, offering him compliments, by taking a role at the front of the class, by demanding people come to the meetings that he had organized. He consistently avoided saying, " I am a student."

[91] In essence, it is fair to say his uniform and his rank were the foundation of the exercise of his authority and these were used, together with the actions that he

initiated, to engage in a misrepresentation that that authority was an authority that allowed him to engage in training of other members of the platoon.

[92] The court has considered very carefully and this is why it raised the issue of Captain McKoena.'s rank, whether or not Captain McKoena's rank, as a captain, gave him authority generally over the other members of his platoon. The court has been satisfied by the testimony of Warrant Officer Kis that in relation to training authority, that, in fact, Captain McKoena, as with the two other captains on the course, who do not seem to have exercised any degree of authority; that is, Captain Patterson and Lieutenant(N) Bjornson, was simply another student; that is, the rank of captain did not, in this very limited context, give him any authority other than the authority of another student. And that is important because generally, as a captain, Captain McKoena would have authority over all people who were subordinate in rank to him.

[93] So the court has found, that in terms of the issue of misrepresentation, that Captain McKoena did misrepresent himself as having training authority over other members of his platoon.

[94] In terms of imposing weekend training. The issue was raised as to whether the activities that were engaged in were, in fact, training. These activities included marching, meetings, adhering to timings, physical education, cleaning of common rooms, saluting, drill, and how to report in. The testimony of Warrant Officer Kis is these are exactly the kind of things that are taught on the course at the beginning, and the testimony of the other witnesses were, indeed, that this was what they learned on the course. So the court concludes that these are indisputably training.

[95] On the Friday, it would appear that the imposition was strictly in relation to meetings; that is, what the court has indicated was a long serial meeting on Friday evening. At that point in time, however, various other activities began to be imposed; that included timings; that included PT.

[96] On Saturday, there is a great deal of consistency as to what happened. There are timings established for meetings and in the case of some witnesses, they seem to conclude that any time spent in the common room, even if it's simply prior to going downstairs for a meal is a meeting, other witnesses indicated fewer ;meetings, but there are meetings. Members of the course go downstairs as a group, they are formed up by Captain McKoena who takes the leadership position, who shows them what to do, who marches them down, who establishes the timing of low long they can have for their meals, who, at least once on the Saturday, had someone brought back from another table when they don't conform to the rules that he has set.

[97] There is PT which Captain McKoena leads. There is a series of meetings where, once again, he is in charge and these meetings follow the same pattern as the

meeting on Friday evening. So, in essence, on Saturday, the training that is imposed is marching, it is timings, it is physical education, it is cleaning, and, in addition, during the meetings, saluting, drill, and reporting are all things which Captain McKoena requires people to do to his satisfaction.

[98] In addition, there is a sign-out book that has been—that is initiated by Captain McKoena and people are required to sign in and out. There is also the testimony that although people could go to a movie, they had to finish the cleaning that was assigned my Captain McKoena before they could go to the movie. On Sunday, it appears that there is less training imposed by Captain McKoena, although, breakfast appears to go in the same way as the meals from the previous day and there are some meetings. Generally, people end up with less organized time, they do not have to attend to the common room as often to participate in meetings and introductions.

[99] So the court is satisfied that these were training activities and the court is satisfied that they were imposed by Captain McKoena on other members of his platoon.

[100] With regard to the third charge; that is, whether or not Captain McKoena required Officer Cadet Coulter to buy personal items; that is, a watch and running shoes for which there was no military requirement, the prosecution raised the issue of this being a breach of paragraph 15 of Exhibit 4, and that the court should come to an irresistible inference if it found the facts that, in fact, this was prejudice to good order and discipline which resulted. The court has reviewed Exhibit 4 which is a briefing; as indicated in the testimony of Warrant Officer Kis, this was something he prepared for his platoon, it is not a general document.

[101] It is also clear, both from the term and the tone and the contents, that some parts were not to apply before training began. An example of this would be the provisions of paragraph 16. So the court does not accept that Exhibit 4 is something which indicates that a breach would be a breach of an order, a regulation, or a direction. It is simply a briefing.

[102] The court, however, does accept that there is a military—there is no military requirement for a watch and running shoes during the time frame that is set out in the charges. Exhibit 5 indicates that students are required to have two pairs of running shoes which are identified as personal items, and Officer Cadet Coulter testified that he had these two pairs of running shoes which he had in his military baggage that had been forwarded. In addition, Exhibit 5 requires an inexpensive watch and he indicated he had a watch in the military baggage that was being forwarded.

[103] Warrant Officer Kis confirmed that forwarding of military baggage was an accepted way to have the personal items or other items delivered to students, that, in essence, they would not be required to have them before their luggage arrived. So from

the point of view of the burden of the prosecution, there was no military requirement for Officer Cadet Coulter to have these items in that time frame.

[104] On Friday evening, in the meeting, Officer Cadet Baez indicates that in respect to a comment from then Officer Cadet Coulter, Captain McKoena says to Coulter that he should buy a watch. This is, in fact, much clearer recollection of what happened at that time then from Officer Cadet Coulter, who simply indicated that Captain McKoena required him to get a watch. It is clear that Captain McKoena also, at some point in time between this meeting and Saturday afternoon when Officer Cadet Coulter went to CANEX, lent Officer Cadet Coulter a watch himself to allow Officer Cadet Coulter to comply with the timings that had been imposed by him.

[105] On Saturday, there is, in one of the meetings that Captain McKoena organized, a comment by Officer Cadet Coulter who says he cannot borrow shoes, and he, therefore, wishes to be excused again from physical training. Captain McKoena says he will not be excused; that is, Coulter will not be excused from the run on Sunday, and Officer Cadet Coulter indicates, he says that Coulter could buy the items at CANEX. This is something which Officer Cadet Coulter feels that he has now no choice about, and he indicates he goes and he buys the shoes and the watch.

[106] This is one of those areas where the issue of discrepancy plays a role because, of course, some witnesses recall being marched over to CANEX and other don't, but the court is satisfied that that discrepancy is not something that is significant. In essence, Officer Cadet Coulter did buy these items, he is seen buying the items, he's seen in possession of the items afterwards. It is also, from the court's perspective, important that, in essence, the requirement comes in two stages. The watch is something that is required on the Friday evening; the running shoes are on the Saturday, late in the morning or early in the afternoon. In essence, there are two separate matters here, and the testimony of Coulter is confirmed by Baez on the Friday evening that it's just the watch that is raised at that point in time, and also, by Flavel on the Saturday.

[107] So the court finds that Captain McKoena did require Officer Cadet Coulter to purchase both of these items.

[108] All the elements of all three offences are made out except the element of prejudice to good order and discipline. The prosecution has submitted and introduced evidence that the thoughts and feelings of the individuals impacted by Captain McKoena's actions are sufficient to constitute prejudice to good order and discipline. Officer Cadet, as he then was, Coulter indicated he was upset. He felt robbed of his free weekend by Captain McKoena and was concerned he had to spend money unnecessarily.

[109] Lieutenant(N) Bjornson said she was surprised and felt Captain McKoena's actions were inappropriate. Second Lieutenant Lee said he was astonished

and, looking back, did not think it was right, felt it was a power trip for Captain McKoena, and felt used by Captain McKoena. Second Lieutenant Flavel indicated afterwards he was wary of Captain McKoena and felt Captain McKoena had misled him. Second Lieutenant Turner said she felt duped and a bit angry as well. Inglis said initially, he did not know what to feel, but then felt a bit annoyed and that Captain McKoena had taken away his weekend. And Acting Sub-Lieutenant Hircock felt surprised.

[110] All of these feelings were directed towards Captain McKoena. It is clear that a number of the individuals who expressed that they felt this was not right or upset, nevertheless, continued to work with Captain McKoena. A prime example is Second Lieutenant Lee who was, indeed, Captain McKoena's fire buddy right after this. The evidence is that Captain McKoena was appointed the CPC; that is, the Cadet who is properly authorized to be in charge of the platoon, immediately after this weekend, and there's no evidence before the court that he had any problems in fulfilling his duties.

[111] The court accepts that it may well be reasonable to conclude that these actions could have harmed discipline of individuals, and in certain circumstances, might have harmed the good order and discipline of a platoon. However, there is no evidence of this before the court. Whether it's because certain of the platoon members sucked it up, as Second Lieutenant Coulter indicated, or they felt that to report someone meant that unfavourable attention would focus not only on who they reported but themselves, as Second Lieutenant Lee indicated, the court does not know.

[112] Clearly, this was a busy course. Everyone was new and keen to make a good impression. What is significant, however, is this is not even reported until nearly the end of the course, and as the court has indicated earlier, it is not clear that it's done by someone who was significantly impacted by the actions of Captain McKoena on that weekend.

[113] So, in essence, the impact that is before the court is simply the feelings of the individuals which do not appear to have been reflected in their actions. Most importantly, however, there is evidence to the contrary before the court, and that is, the evidence of Warrant Officer Kis. Warrant Officer Kis testified that the platoon was not dysfunctional, that it was normal in all respects in comparison to all the other platoons that he had trained. There is nothing before the court that indicates that these incidents led to any distrust of the chain of command or to the questioning of the status of other officers or the orders of other people in authority.

[114] Consequently, the court finds that the prosecution has failed to prove that the actions of Captain McKoena were to the prejudice of good order and discipline. The court has considered with perhaps particular significant consideration the third charge, and that is because it does result in the expenditure of personal funds by an individual,

not for any military requirement. However, the court, after considering the *Jones* decision and the issue of whether or not there is a natural inference here, concludes that there is no such natural inference in this case.

[115] Given that the establishing of prejudice to good order and discipline is an essential element in all these charges, the court has come to the conclusion that regardless of the conduct that occurred that weekend, it did not prejudice good order and discipline and these charges are not made out.

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