COURT MARTIAL

Citation: *R v Pavlyuk*, 2011 CM 1014

Date: 20111205
Docket: 201156

Standing Court Martial

Les Fusiliers Mont-Royal
Montréal, Quebec, Canada

Between:

Her Majesty the Queen

- and -

Caporal D. Y. Pavlyuk, accused

Before: Colonel M. Dutil, C.M.J.

OFFICIAL ENGLISH TRANSLATION

REASONS FOR FINDING

(Orally)

INTRODUCTION

[1] Corporal Pavlyuk is charged with having engaged in conduct to the prejudice of good order and discipline within the meaning of section 129 of the *National Defence Act*. It is alleged in the particulars of the charge that he harassed a co-worker between 7 June 2011 and 27 June 2011, at Valcartier Garrison, province of Quebec, contrary to Defence Administrative Order and Directive 5012-0.

EVIDENCE

[2] The evidence before this Court Martial is essentially the following:

(a) The testimonies that were heard in Court. In addition to the testimony of Corporal Marc-André Crompt, the complainant in this case, the Court heard the testimonies of the following persons: Daniel Bourdages, Warrant Officer Jean Gagné, Corporal Pierre-Marie Montes, Corporal Réjean-Paul Rodas-Figueroa, Corporal Dany Andraos, Major Benoît Lefebvre and Private Alexandre Joanisse.

(b) Exhibit 3, that is, a pre-enrolment declaration signed by Corporal Pavlyuk, which evidences, among other things, that he

i. has read the Canadian Forces Policy on Discrimination and Harassment;

ii. understands it and that there is nothing which prevents him from complying with it;

iii. understands that if he fails to comply with it, he may be subject to disciplinary and/or administrative action, including release; and

iv. will comply with the policy if he enrols.

(c) Exhibit 4, a unit attendance record for members on Class A Reserve Service, dated 14 December 2010, for the evening of 7 December 2010.

(d) Exhibit 5, the Powerpoint© presentation entitled [TRANSLATION] "Harassment Prevention, Conflict Management and Employment Equity", which was presented by Daniel Bourdages to an audience of the Fusiliers Mont-Royal on 7 December 2010, as part of a program mandated for that unit.

(e) Exhibit 6, an electronic attendance list compiled by Warrant Officer Gagné, containing the names of all of the persons in the Fusiliers Mont-Royal unit apparently in attendance on the evening of 7 December 2010.

(f) Exhibit 7, a Government of Canada publication containing the policy on the prevention of harassment in the workplace. The Court took judicial notice of this publication in accordance with section 16 of the *Military Rules of Evidence*.

(g) Last, the Court took judicial notice of the facts and matters covered by section 15 of the *Military Rules of Evidence*.

FACTS

[3] The facts surrounding this case are therefore mainly centred on the events that unfolded between mid-May and late June 2011 when certain members of the Fusiliers Mont-Royal were working at the Valcartier Garrison over the summer. Although some of the testimonies contained a certain number of contradictions or inconsistencies in light of all of the evidence, it is clear that all of the persons who allegedly witnessed the events, in whole or in part, were all in attendance at Valcartier Garrison in the summer of 2011, namely Corporal Crompt (the complainant), Corporal Andraos, Corporal Montes, Corporal Rodas-Figueroa and Private Joanisse. They were all part of Team A, which was responsible for the mess hall at MSC1 and then at Camp Vimy.

[4] According to Corporal Crompt, he arrived at Valcartier two weeks before Corporal Pavlyuk, and everything was going well for him at that point. He stated that he had been deployed to Afghanistan in 2009 as part of a team that was involved in mentoring the Afghan army. He joined the Canadian Forces in 2006 in the Reserve Force. In all likelihood, he had only a small amount of experience at the time of his deployment to Afghanistan, and it was reasonable to believe that his responsibilities were compatible with his skill level and experience. When he returned, he had problems with his left ear and performed Class C service as regimental quartermaster, which he continues to do to this day. When he was on Class B Reserve Service in the summer of 2011, that is, from mid-May to late June, he was one of the members of Team A in charge of the kitchen and camp supplies, together with Corporal Pavlyuk and the others. Corporal Crompt arrived on site in May, and Corporal Pavlyuk apparently joined the group a few weeks later. They knew each other but were not friends. At first, everything seemed to be going well. It was a feel-good work environment, and the team members entertained themselves by teasing each other and making jokes. During the week of 8 June 2011, certain members of the team began singing a bawdy song that some of them had on their music players. This song, by a French rapper, included the following lyrics: [TRANSLATION] "Suck my penis for Valentine's Day". It seems that this song was always being sung by their team.

[5] According to Corporal Crompt's testimony, things quickly began deteriorating when Corporal Pavlyuk decided to pick on him by changing the song and addressing him as follows, both when they were alone and when other members of the group were present. Thus, the lyrics became [TRANSLATION] "Suck my penis for Valentine's Day . . . Crompt". He added that the group had then picked on him, which he denied later on cross-examination. According to his version of the facts, he decided to bring them back in line on the morning of 8 June 2011, by speaking to them in fairly strong terms: [TRANSLATION] "Guys, the next time you say that to me, I'm filing a complaint". No one continued singing that song to him that day, and it seemed that the message had been understood. According to Corporal Crompt, the altering of the song by adding his name at the end had been done for him alone. None of the other members of his team had been subjected to sarcasm.

[6] According to Corporal Crompt, Corporal Pavlyuk started it up again, in a way, about a week later, by stating this time that Corporal Crompt had been sucking penises while in Afghanistan. Although he found the song stupid and insignificant, such allusions troubled him because he felt that Corporal Pavlyuk was undermining the credit he deserved from the group.

[7] He testified that Corporal Pavlyuk made this comment to him on a daily basis. He added that Corporal Pavlyuk went so far as to pretend to remove his trouser belt while looking at him, to add insult to injury.

[8] Exasperated, Corporal Crompt allegedly went to see a certain Corporal Langlois—who was not called as a witness—and they allegedly went to see Corporal Pavlyuk on 22 June 2011 to bring him back in line by threatening him. Corporal Crompt allegedly said, [TRANSLATION] "I can't tolerate this; if you keep it up you'll be in shit, you'll look like a screw-up. Think about your girlfriend, think about something besides Pavlyuk." According to Corporal Crompt's version of the facts, Corporal Pavlyuk allegedly turned away from him and said vaguely, [TRANSLATION] "If you haven't sucked a penis, it shouldn't bother you".

[9] Corporal Crompt adds that, around 1700 hours on 26 June 2011, he was at Camp Vimy in the tents. The accused occupied the tent next to his. Just then, he heard Corporal Pavlyuk say loudly, [TRANSLATION] "Crompt, suck my penis!" Corporal Crompt was angry because he saw that there were between 20 to 30 young cadets nearby who could have heard. Finding these comments unwarranted, Corporal Crompt decided, as he put it, to set an example. On examination-in-chief, he stated having said, [TRANSLATION] "Tomorrow, I'm making a complaint". That prompted Pavlyuk to reply, [TRANSLATION] "Yes, but we're in the same regiment!" He filed his complaint the next day.

[10] According to the complainant's testimony, Corporal Pavlyuk's conduct showed a lack of respect towards him, and he could not tolerate it. He added that these statements affected him personally and that he even went to see the "Padre" twice. On cross-examination, Corporal Crompt made some surprising comments. He stated, among other things, that he knew that Corporal Pavlyuk's career was in his hands because of the weight of his words and his experience. Corporal Crompt's own testimony shows that, in his opinion, his mere presence in Afghanistan as a soldier assigned to a team mentoring the Afghan army had made him a mentor and an experienced military member, at least in comparison to the other members of Team A with whom he worked last summer. Corporal Crompt testified in a way that leaves no doubt as to his perception that his peers, especially Corporal Pavlyuk, lacked respect for him considering his length of service and experience in Afghanistan—respect that he deserved. Moreover, Corporal Crompt's testimony shows that the only team member who deserved as much respect as he did was Corporal Montes, who, just like him, had served his country in the operational theatre. On cross-examination, the complainant acknowledged that he was not the only one who was teased and that each person had a turn being the butt of jokes. He also acknowledged on cross-examination that he was

not picked on by the group. According to the complainant, the leader of Team A, Corporal Andraos, knew what was happening, but turned a blind eye.

[11] Corporal Crompt testified that he had discussed the matter before this Court with Corporal Montes, who was aware of his complaint, and that he trusted Corporal Montes because he had experience. Regarding Corporal Pavlyuk, he made no secret of the fact that he had no respect for him and had more respect for his Taliban enemies. He even added the Corporal Pavlyuk was against Canadian values in terms of respect. This assertion is troubling for what it reveals of Corporal Crompt's state of mind and the gut-level feeling he seems to have toward the accused.

[12] On cross-examination, Corporal Crompt admitted to having laughed at the song lyrics at first, but not for long. He asserted having deliberately chosen to warn Corporal Pavlyuk and the other members of the group around 0415 hours on 9 June 2011 because people would be tired and his words would have a greater impact. It was then that he allegedly said [TRANSLATION] "I'll make sure the next person who says it gets in hot water!" He was careful to add that his statement was dynamic and strongly worded to have an impact. Also on cross-examination, he asserted having given warnings on 8 and 22 June 2011 and that, on 26 June 2011, he warned Corporal Pavlyuk and the others who were present, including Corporals Andraos and Rodas-Figueroa and Private Joanisse, that he would be making a complaint the next day.

[13] In Corporal Crompt's opinion, the remarks he says he was subjected to had no place within a professional army, and he was disappointed by his co-workers' lack of maturity. Whereas the atmosphere within the group was given over to teasing and fun, Corporal Crompt perceived it as harbouring an inappropriate lack of maturity. According to him, his goals were different from those of his co-workers. When questioned about the effect of surprise that his complaint had on his co-workers, he was quick to add that it was precisely because they were soldiers that they had no experience with discipline, while he was part of the group of individuals who had that experience.

[14] Corporal Crompt stated that the song lyrics had affected him, clarifying that he was not a [TRANSLATION] "penis sucker". According to him, it was the constant repetition of the lyrics at him that affected him. He added that he wanted to destroy Corporal Pavlyuk after the corporal had said the lyrics to him twice. His last answer given on cross-examination is revealing: [TRANSLATION] "It's true that I wanted to teach him a lesson". Although the Court will address the testimony of Private Joanisse later on, it is opportune to specify that Private Joanisse strongly contradicted Corporal Crompt's assertion that he was affected by the lyrics directed at him. At the moment, it need only be borne in mind that, on two occasions, Private Joanisse specifically asked Corporal Crompt, when he was informed about Corporal Crompt's complaint, whether he had truly been affected by the statements made to him in the summer of 2011. According to Private Joanisse, Corporal Crompt told him that that had not been the case.

[15] The Court accepts the following evidence from the other witnesses heard in this case. Corporal Montes enrolled in 1997. Since then, he has served in Bosnia in 2004 and in Afghanistan in 2009 and 2010. Of all of the witnesses heard who were members of Team A at Valcartier in the summer of 2011, he is by far the oldest and the most experienced. He testified that he had often witnessed Corporal Pavlyuk making remarks to Corporal Crompt, such as [TRANSLATION] "Suck my dick, Crompt, for Valentine's Day", once or twice a day. He added that sex was often a topic in the exchanges between the two individuals. According to him, Corporal Pavlyuk treated it as a joke. Corporal Montes testified that he had often heard Corporal Crompt speaking to the accused, telling him that if he kept on saying it, he—referring to Crompt—would file a harassment complaint. Despite this warning, Corporal Pavlyuk had kept on. On cross-examination, Corporal Montes maintained having heard the remark, but stated that it was in a context where everyone was teasing each other, even though he would not have accepted it if that remark had been made to him.

[16] Corporal Andraos was the leader of Team A. In the summer of 2011, he had two years' experience in the Canadian Forces Reserve Force, but was nonetheless the team leader of a group of 20-25 people. He stated having witnessed only one exchange between Corporal Pavlyuk and Corporal Crompt, that is, on 26 June 2011, outside a tent at Camp Vimy. He corroborates Corporal Crompt's testimony regarding the content of the sentence to which Corporal Pavlyuk added the complainant's name. He added having heard the song before, but that this was the first time it was aimed at Corporal Crompt directly. Corporal Andraos testified regarding Corporal Crompt's reaction at that time, specifically, that he had smiled. According to what he observed, it seemed that Corporal Crompt had found this funny, even though he had heard Corporal Crompt tell the accused that if he did not stop, he would file a complaint. He stated having been surprised by Corporal Crompt's harassment complaint. Corporal Andraos added that the members of his team had been flabbergasted. The other members of the team had also been teased during that period, for various reasons. Such reasons included age, such as for Private Joanisse, or ethnic origin, such as for Corporal Rodas-Figueroa or himself, who was called a terrorist because of his origin. According to him, everyone had their turn. He stated that on the day before the complaint, everyone thought this was funny.

[17] Corporal Rodas-Figueroa was the assistant leader of Team A. He has been a Reserve member since 2006. He confirms having heard Corporal Pavlyuk say those well-known words to Corporal Crompt on a number of occasions. According to him, Corporal Crompt would laugh at it, even though he seemed slightly angry. According to him, Corporal Crompt took the whole thing with a sarcastic air. Corporal Rodas-Figueroa stated that he knew the song and that it had been altered by adding the name of a number of people. According to him, the group members laughed at it, including Corporal Crompt. He added that there was a spirit of humour within the team and corroborated Corporal Andraos' testimony that there was teasing directed at each member, including himself. The use of vulgar words and immature remarks was commonplace on Team A. As regards this particular song, he did not believe that Corporal Crompt was more of a target than anyone else. He has no memory of any words allegedly spoken near a tent at Camp Vimy on 26 June 2011 by Corporal Crompt

to Corporal Pavlyuk and to other persons regarding a complaint. The Court emphasizes that Corporal Crompt testified that Corporal Rodas-Figueroa had been there. Corporal Rodas-Figueroa told the Court that a superior had informed him of Corporal Crompt's complaint. At that time, he reacted by saying that Corporal Crompt was within his rights in doing so, but that he had not been expecting it.

[18] Private Joanisse was the last witness heard by the Court. He joined the Reserve Force in early 2010. He was a member of Team A at the time of the events. He testified that, during the period at issue, the feeling on their team had been that it was time to party and that there had been no bickering between them. According to him, people wanted to enjoy themselves, go out and have fun. He stated that he had even asked his chain of command to be allowed to be heard as a witness before the Court once he had become aware that a Court Martial would he held in this case. He allegedly even gave a written statement.

[19] Private Joanisse testified that the song in question was, so to speak, the song of the summer and that it had been adapted by adding each person's name, including his own. Private Joanisse stated that it was just to fool around and that he saw nothing mean in it. He was a witness on a number of occasions when Corporal Pavlyuk sang it to Corporal Crompt. According to Private Joanisse's account, all of the group members laughed about it and no one was picked on. To quote his own words, "Everyone was laughing, everyone was having fun with it". No one was complaining about it, except for Corporal Crompt. Regarding the exchange on 26 June 2011 between Corporal Crompt, Corporal Pavlyuk and the others near the tent at Camp Vimy, Private Joanisse confirmed that he was there. He recalled that Corporal Crompt had been angry and had asked Corporal Pavlyuk to stop singing that song because he was sick of it. According to him, Corporal Pavlyuk seemed to have gotten the message because he might have realized he had been too far away. Private Joanisse had never seen Corporal Crompt give a warning before that day.

[20] Private Joanisse was informed of Corporal Crompt's complaint against Corporal Pavlyuk. He is not friends with either of them. He testified that this situation had bothered him enough that it made him want to speak directly with Corporal Crompt about his complaint. He states that, on 13 July 2011, he discussed the matter with Corporal Crompt to have him confirm that he had truly been affected by having had the song sung to him with his name added. According to Private Joanisse, Corporal Crompt had told him that it did not affect him personally. Following this revelation, Private Joanisse had been perplexed. He therefore met with Corporal Crompt on another occasion to confirm what had been said at their first meeting. Private Joanisse stated categorically that Corporal Crompt had told him six or seven times that it did not bother him. Corporal Crompt also asked him if he had learned a lesson, that is, that it did not bother him!

ANALYSIS AND DECISION

Presumption of innocence and the standard of proof beyond a reasonable doubt

[21] Before applying the law to the facts of the case, I will take this moment to discuss the presumption of innocence and the standard of proof beyond a reasonable doubt, which is an essential component of the presumption of innocence.

[22] Whether facing charges under the *Code of Service Discipline* before a military court or proceedings before a civilian criminal court involving criminal charges, an accused person is presumed to be innocent until the prosecution has proved his or her guilt beyond a reasonable doubt. This burden of proof rests with the prosecution throughout the trial. An accused person does not have to prove that he or she is innocent. The prosecution must prove each of the essential elements of a charge beyond a reasonable doubt. A reasonable doubt is not a far-fetched or frivolous doubt. It is not a doubt based on sympathy or prejudice. It is a doubt based on reason and common sense. It can be based not only on the evidence, but also on a lack of evidence.

[23] Proof beyond a reasonable doubt does not apply to individual pieces of evidence or to separate parts of the evidence. It applies to the all of the evidence relied on by the prosecution to establish guilt. The burden of proof rests with the prosecution throughout the trial and is never shifted to the accused.

[24] A court must find the accused not guilty if it has a reasonable doubt as to his or her guilt after having assessed all of the evidence. In *R v Starr*, [2000] 2 SCR 144, at paragraph 242, Justice Iacobucci, for the majority, wrote the following:

> . . . an effective way to define the reasonable doubt standard for a jury is to explain that it falls much closer to absolute certainty than to proof on a balance of probabilities.

It is useful, however, to recall that it is virtually impossible to prove something with absolute certainty, and that the prosecution is not required to do so. That kind of standard of proof does not exist in law. In other words, if the Court is convinced that Corporal Pavlyuk is probably or likely guilty, it must acquit him, since proof of probable or likely guilt is not proof of guilt beyond a reasonable doubt.

[25] The standard of proof beyond a reasonable doubt also applies to questions of credibility, and the Court need not make a definitive determination of the credibility of a witness or group of witnesses. In addition, the Court need not believe the entire testimony given by a person or group of persons. If the Court has a reasonable doubt regarding the guilt of Corporal Pavlyuk that stems from the credibility of the witnesses, it must acquit him.

Credibility and reliability of testimonies

[26] The evidence before this Court is such that the Court must rule on the credibility and reliability of the witnesses in light of all of the evidence. There is no magic formula for deciding on the credibility of a testimony or the value that it should be assigned. However, the Court has, among other things, focused on the witnesses' ability to clearly and precisely recall and communicate their stories, on the consistency of their stories in themselves and with the evidence as a whole and on whether the testimonies seemed coloured by a personal interest. The Court considered their ability to recall events, while bearing in mind that certain events or facts may strike each person differently. In observing the witnesses, the Court also paid attention to factors such as whether the witness was trying honestly to tell the truth and was sincere and frank, or whether he or she was partial, reticent, evasive or argumentative.

[27] Testifying is not an everyday experience. People react and present themselves differently. They each have different capacities, values and life experiences. There are quite simply too many variables for a witness's behaviour to be the only or most important factor on which to make a decision.

[28] The testimonies heard were generally credible and reliable. However, there can be no doubt that the witnesses differ in their perception of the events. Corporal Crompt testified with conviction, at times excessively so. Moreover, he often seemed categorical about certain details that a person with normal memory skills would have had difficulty recalling. He also tended to argue with counsel for the defence or tried to avoid questions as though his integrity was being called into question. He seemed to feel personally attacked. It is clear from his testimony that he has a very favourable opinion of himself and of the standards to which members of a professional army are held. There is no doubt, however, that he was and is still of the opinion that Corporal Pavlyuk's conduct and level of professionalism showed immaturity and were wholly inadequate for a military member.

[29] On the basis of all of the evidence, the Court is of the opinion that Corporal Crompt is exaggerating the impact that the remarks had on him. This does not mean that they did not affect him, but that it was rather Corporal Pavlyuk's general air of immaturity and lack of professionalism that irritated him intensely. He had had enough and wanted to teach him a lesson.

Offence of conduct to the prejudice of good order and discipline under section 129 of the National Defence Act

[30] Corporal Pavlyuk is charged with conduct to the prejudice of good order and discipline under section 129 of the *National Defence Act*, which provides, in part, as follows:

> 129. (1) Any act, conduct, disorder or neglect to the prejudice of good order and discipline is an offence and every person convicted thereof is

> liable to dismissal with disgrace from Her Majesty's service or to less punishment.
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> (2) An act or omission constituting an offence under section 72 or a contravention by any person of
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> (*a*) any of the provisions of this Act,
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> (*b*) any regulations, orders or instructions published for the general information and guidance of the Canadian Forces or any part thereof, or
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> (*c*) any general, garrison, unit, station, standing, local or other orders,
>
> is an act, conduct, disorder or neglect to the prejudice of good order and discipline.

The particulars of the charge state that Corporal Pavlyuk harassed Corporal Crompt, contrary to Defence Administrative Order and Directive 5012-0. There is no dispute that this defence administrative order is an order published for the general information and guidance of the Canadian Forces or any part thereof and that it falls under paragraph 129(2)(*b*). The prosecution has therefore chosen to rely on the presumption set out at subsection 129(2) of the *National Defence Act* to prove that the conduct of which the accused stands charged is to the prejudice of good order and discipline, although the loss of this presumption would in no way prevent the prosecution from establishing the prejudice to good order and discipline by other means. The Court Martial Appeal Court recently addressed this issue in *R v Winters*, CMAC 2011, 3 February 2011, at paragraphs 24 to 27:

> [24] When a charge is laid under section 129, other than the blameworthy state of mind of the accused, the prosecution must establish beyond a reasonable doubt the existence of an act or omission whose consequence is prejudicial to good order and discipline. Proof of prejudice may be clear, direct, but the existence of prejudice and its causal relationship can also be inferred from matters proven in evidence: see *Bradt v. R.*, 2010 CMAC 2, at paragraphs 39 to 42
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> [25] In certain cases, proof of prejudice or of the causal relationship may be difficult to establish. Parliament may wish to create a presumption to mitigate this difficulty or even obviate it. Or, as in the case of paragraph 129(2)(*b*) of the Act, to ensure compliance with the regulations, orders or instructions published for the governance of the Canadian Forces and, by the very fact, simplify the proof of prejudice resulting from a breach of those provisions.
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> [26] Thus, subsection 129(2), and consequently paragraph (2)(*b*), presume, from the act, the existence of a prejudice to good order and discipline as well as the existence of a causal relationship between the act and the prejudice. When the conditions of subsection (2) and, more particularly, paragraph (2)(*b*) in this case, are met, the prosecution is relieved of having to prove this essential element of the offence. But the offence referred to here is the one under subsection 129(1). There is no other.

> [27] Thus, subsection 129(2), and consequently paragraph (2)(*b*), presume, from the act, the existence of a prejudice to good order and discipline as well as the existence of a causal relationship between the act and the prejudice. When the conditions of subsection (2) and, more particularly, paragraph (2)(*b*) in this case, are met, the prosecution is relieved of having to prove this essential element of the offence. But the offence referred to here is the one under subsection 129(1). There is no other.

Issues

[31] The Court has identified two issues. The first relates to the evidence that the accused knew about the order because, by its nature and existence, it was subject to section 15 of the *Military Rules of Evidence*, while the second involves determining whether Corporal Pavlyuk's conduct is harassment under Defence Administrative Order and Directive 5012-0, DOAD 5012-0.

Evidence of knowledge of DOAD 5012-0

[32] Regarding the evidence of the order, the prosecution had to establish, beyond a reasonable doubt, that the accused had knowledge of DOAD 5012-0. The defence submits that the prosecution has failed to prove that the accused had personal knowledge of the order such that it was binding on him because it was never specifically explained to him. The defence adds that the order was not issued, published and sufficiently notified to the accused within the meaning of articles 1.21 and 4.26 of the *Queen's Regulations and Orders for the Canadian Forces*. This argument is not supported by the evidence. There is no doubt that the accused had personal knowledge of the order in question, that is the Canadian Forces harassment policy, as appears from Exhibit 3, which contains his own declaration to that effect. In addition, there is reliable, undisputed evidence that Corporal Pavlyuk was indeed in attendance at both briefings given to his unit, the Fusiliers Mont-Royal, first, the one on 7 December 2010 (see Exhibits 4, 5 and 6 and the testimonies of Daniel Bourdages and Warrant Officer Jean Gagné) and, second, the one given in March 2011 by Major Lefebvre.

[33] The issue is not to determine whether the accused knew the specific title and number of order 5012-0, but whether he knew its contents, that is, the harassment prevention and resolution policy of the Canadian Forces. The Court is satisfied that this has been proven beyond a reasonable doubt. Furthermore, during his mandated briefing on 7 December 2010, Daniel Bourdages covered the entire Canadian Forces and Department of National Defence policy contained in DOAD 5012-0 at pages 9 to 32 of his Powerpoint© presentation. All of the elements of the definition and of the policy applicable to Canadian Forces members were covered in the briefing given by Mr. Bourdages. DOAD 5012-0 defines harassment as follows:

> Harassment is any improper conduct by an individual that is directed at and offensive to another person or persons in the workplace, and that the individual knew or ought reasonably to have known would cause

> offence or harm. It comprises any objectionable act, comment or display that demeans, belittles or causes personal humiliation or embarrassment, and any act of intimidation or threat. It includes harassment within the meaning of the *Canadian Human Rights Act*.

Did Corporal Pavlyuk's conduct constitute harassment within the meaning of DOAD 5012-0?

[34] According to the version of the facts given by the complainant in this case, Corporal Crompt, the statements he holds against the accused are of two types. First, the fact of addressing him, either when he was alone or in the company of others, by taking up the lyrics of a commercial song, popularized by a rapper who was widely known and sung by most of his team during the period at issue, and adding his name, that is, [TRANSLATION] "suck my penis for Valentine's Day . . . Crompt!" According to the complainant, he was the only one to whom this part of the song was sung by adding his surname at the end of the sentence to single him out. Also according to the complainant, he had been Corporal Pavlyuk's only target for a number of weeks and had warned him to stop on three occasions, that is, on 8, 22 and 26 June 2011. Second, in the same vein, the complainant states that one week after his warning to the group, Corporal Pavlyuk had started it up again, in a way, by making degrading remarks to him, in particular by saying to him, [TRANSLATION] "You sucked penises in Afghanistan".

[35] The Court is satisfied that the statements reported by Corporal Crompt and corroborated by a number of witnesses are inappropriate in a work environment. Corporal Pavlyuk's comments to Corporal Crompt tended to demean, belittle, cause personal humiliation to or embarrass him. However, these statements only constitute harassment if the prosecution establishes, beyond a reasonable doubt, that Corporal Pavlyuk knew or ought reasonably to have known that such conduct would cause offence or harm to Corporal Crompt, at the time when the words were spoken, in light of all of the circumstances, including the relationship between the individuals who made up Team A at the time.

[36] The evidence as a whole substantiates the assertion that the atmosphere was teasing and immature, where jokes in bad taste and conversations of a sexual nature were run-of-the-mill among everyone. Corporal Crompt and Montes were older than their co-workers and had more military experience. They were also more mature. The facts further show us that the persons responsible for the team held the same rank as most of the others and had very little experience in the Canadian Forces. It is also very clear that Corporal Crompt expected greater respect from the members of his team, particularly from Corporal Pavlyuk, because of his previous professional experience. Corporal Crompt considered himself much more professional than his colleagues and therefore expected greater respect from them. Moreover, these are the same reasons for which he gave such respect to Corporal Montes and trusted him. The context of this case also shows us that the prevailing atmosphere on Team A was more suited to joking around and levity than the professional rigour expected by Corporal Crompt. The

teasing, even if out of place, was trivialized and encouraged by the laxity of the team's leaders and by the other team members, who saw no harm in it.

[37] It is not without reason that only Corporals Crompt and Montes found these kinds of jokes dubious. The Court shares the opinion of these two non-commissioned members that such teasing is immature and demeaning and should have no place within a group of professional military members, even if there is an atmosphere of outspoken camaraderie. This is, moreover, one reason that the military hierarchy has the framework to ensure that subordinates develop in a structured environment where the leaders are responsible for seeing to the learning of common values, including mutual respect and the policies applicable to all military members in the management of their interpersonal relationships. All of the evidence shows that Team A had significant shortcomings in terms of leadership. If that was so, those responsible should have put an end to the bantering and to the lack of professionalism of certain members of the team. Instead, Corporal Andraos and Rodas-Figueroa saw nothing improper about this conduct, same as the other members of the group except for Corporals Crompt and Montes for the reasons given above.

[38] In such circumstances, is the Court satisfied beyond all reasonable doubt that Corporal Pavlyuk knew or reasonably ought to have known that such conduct would cause offence or harm to Corporal Crompt? The Court is satisfied that Corporal Pavlyuk probably or likely knew that this was so. However, when a charge is laid under section 129 of the *National Defence Act*, that is not the applicable standard of proof, since evidence of probable or likely guilt is not proof of guilt beyond a reasonable doubt. In other words, if Corporal Pavlyuk was subject to administrative action, which could theoretically go up to and include dismissal, the decision-maker might possibly conclude, on a balance of probabilities, that Corporal Pavlyuk knew or reasonably ought to have known that he was or could be giving offence or causing harm to Corporal Crompt by his repeated, unsolicited statements. That, however, is not the applicable standard of proof in a military Court.

[39] Consequently, the Court finds that the prosecution has not met its burden of proof, and Corporal Pavlyuk must receive the benefit of reasonable doubt, even if the Court is satisfied that it could be established, on a balance of probabilities, that Corporal Crompt was harassed by Corporal Pavlyuk in June 2011.

FOR THESE REASONS, THE COURT:

[40] **FINDS** the accused not guilty on the first charge under section 129 of the *National Defence Act*.

Counsel:

Major J.S.P. Doucet and Lieutenant(N) A. Lippé, Canadian Military Prosecution Service
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