COURT MARTIAL

Citation: *R v Brideau*, 2014 CM 1005

Date: 20140315
Docket: 201365

Standing Court Martial

2nd Canadian Division Support Base, Valcartier
Courcelette, Quebec, Canada

Between:

Her Majesty the Queen

- and -

Warrant Officer J.R.R.S. Brideau, Accused

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

OFFICIAL ENGLISH TRANSLATION

REASONS FOR FINDING

(Orally)

INTRODUCTION

[1] Warrant Officer Brideau faces two charges. First, he 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*. The particulars of the first count allege that, on 21 December 2012, at Camp Blackhorse, Kabul, Afghanistan, he handled a Browning 9mm pistol in a manner that did not comply with established procedures contrary to B-GL-385-003/PT-001, Volume 3 – 9mm Pistol, thus causing the firearm to be discharged. Alternatively, the second count alleges that, on 21 December 2012, at Camp Blackhorse, Kabul, Afghanistan, while he was performing a weapon handling exercise using a 9mm pistol, on the order to "clear", he failed to follow the established procedures, as he had the duty to do, thus causing this weapon to be discharged. This charge was laid under section 124 of the *National Defence Act*.

EVIDENCE

[2] The evidence before this Court Martial consists of the testimony of the following people, namely:

a. Sergeant Brault and Warrant Officer Chagnon, who were involved in the planning and the training of the members who where to be part of the Joint Task Force (JTF 4-12) in autumn 2012 in Kabul, Afghanistan.

b. Master Corporal Côté, who participated in the weapons handling training in preparation for the deployment of JTF 4-12;

c. Captain Desaulniers-Guitard, Sergeant Rutkowski, Sergeant Marceau, Lieutenant Anhorn, Warrant Officer Verreault and Sergeant Hogan, who inspected the pistol shortly after the incident. These members were present at the time of the incident leading to the charges, except for Sergeant Hogan;

d. Lieutenant-Colonel Pelletier, commander of JTF 4-12 at the time of its training and also its deputy commander when it was deployed to Afghanistan; and

e. Ms. Sonia Rioux, language test administrator at Valcartier Garrison.

[3] In addition to this evidence, there are the following documents:

a. a series of admissions (Exhibits 5, 18 and 20) by the defence;

b. several documents regarding the training of members of the JTF 4-12, including the attendance sheets for the weapons handling training (Exhibits 9 to 13 and 19); and

c. Warrant Officer Brideau's statement regarding his deployment as part of the JTF 4-12 (Exhibit 5), and the temporary issue card for material he completed upon arrival in Afghanistan (Exhibit 6).

[4] Lastly, the Court took judicial notice, under sections 15 and 16 of the *Military Rules of Evidence*, of B-GL-385-003/PT-001, Volume 3 – 9mm Pistol (Exhibit 4); of DAOD 5039-8 (*Canadian Forces Second Official Language Certification Testing*) (Exhibit 14); and of the Qualification Standards, Section 3 (*Qualification Standards in Relation to Official Languages*), issued by Treasury Board (Exhibit 15).

FACTS

[5] The facts surrounding this case are straightforward. On 21 December 2012, at Camp Blackhorse, in Kabul, Afghanistan, several members working in Building S3 went outside to hold a dry weapons handling drill using their personal firearms, that is, a C-7 rifle and Browning 9mm pistol. This training was the result of an order issued by Canadian authorities for all members of the JTF 4-12, requiring that they continue to hold monthly dry training or formal firing range sessions in order to prevent unauthorized or accidental discharges following a series of such incidents. The purpose of both the training received during the training phase at Valcartier and the ongoing training in Kabul were to eliminate the frequent accidental discharges caused by, according to Lieutenant-Colonel Pelletier, members' lack of preparation in handling the 9mm pistol. These training sessions were designed to ensure that each member was able to repeatedly and correctly carry out each of the stages required in handling their personal weapons. During the training given to the JTF 4-12 during its training phase at Valcartier, Warrant Officer Chagnon wanted members to be able to follow the safety precautions and take the immediate actions using firearms equipped with loaded magazines because this reflected the reality of missions. Even if the members did not have to reach any formal levels according to the established standards, training participants had to reach the highest standard possible by doing all the exercises. Warrant Officer Chagnon taught the pistol inspection procedures—clearing the weapon, clearing, loading and unloading—and the immediate actions as they appear in order B-GL-385-003/PT-001, Volume 3 – 9mm Pistol (Exhibit 4), and as he had been taught. He later taught specialized marksmanship, Level 4.

[6] Before returning to the events surrounding the facts of this case, we must look at the context. Regarding the handling of the 9mm pistol, the training of members is based on Order B-GL-385-003/PT-001, Volume 3 – 9mm Pistol (Exhibit 4), which outlines Canadian Forces (CF) Policy governing the use or misuse of weapons, ammunition and explosives. Chapter 1 of this publication is a reference manual covering instruction in the handling of small arms and is intended for both classroom and field use. It does not deal with specialized marksmanship techniques. Chapter 1 is an introduction for the use of instructors who give training on the 9mm pistol. Chapter 2 covers what has to be taught to students with respect to the handling of this weapon and is divided into various numbered lesson plans. The safety measures for using the 9mm pistol appear in Lesson 1. They are clearly written for the instructors who have to teach how to handle this weapon according to the steps set out in the order. All students are taught according to the same method. As I have already mentioned, the goal is for members to develop deeply ingrained habits to avoid incidents involving the handling of small arms, an activity that entails an inherent level of risk. This operation is carried out with an empty magazine during training, in compliance with the order.

[7] Regarding the context surrounding the events at issue in this case, the evidence suggests that members at Camp Blackhorse had to leave the perimeter several times a week, be it once or twice a week, or, in the case of some members, every day. Usually, members would leave with their personal arms, either a C-7 or C-8 and a 9mm pistol. Once no longer at the camp, the pistol normally became their main weapon. The

procedures instituted for when a member would return to camp were always the same. Every member had to carry out safety precautions on his or her weapons in a clearing bay under observation from a colleague. For the 9mm pistol, this precaution includes the "For Inspection Clear Weapons" operation, taught according to the requirements set out in paragraphs 14 to 16 of Lesson 1, Chapter 2, of the abovementioned order, and pointing in a safe manner into a barrel located in the clearing bay. In short, this manoeuvre requires the person to first release the magazine, pull the slide to the rear and place the safety lever in the notch on the slide for a visual inspection by an instructor to check whether the pistol is empty and whether the magazines are empty. Once the inspection is completed, the instructor gives the "Clear" command. This should result in the following actions: members hold the magazine in their left hand, depress the slide locking lever allowing it to move to the front of the pistol, re-insert the magazine and squeeze the trigger while aiming at the target. Once these actions have been completed, members return the weapon to its holster; these are the safety precautions.

[8] Be it at Camp Blackhorse or outside, members were equipped with full or loaded magazines for safety reasons and because of the existing threat. Even as this precaution may seem obvious for members going outside the camp, the evidence indicates that members had to be ready to face any threat that might have arisen inside the camp, given the presence there of a large number of people who were not part of the Coalition. In short, members carried their personal weapons, including a 9mm pistol, while moving around Camp Blackhorse, with a magazine loaded with live fire and inserted in the pistol grip, but without any bullets in the chamber. This practice made it possible to respond immediately and effectively should it be required to do so. It appears from the evidence that weapon safety precautions therefore had to be strictly observed not only to prevent tragic incidents while members were at the camp, but also to maintain the reputation of Canadian troops in terms of how they handled their own weapons during the mission, the goal of which was to mentor Afghan troops. Observance of these precautions was just as important when troops left Camp Blackhorse, as accidental discharges could be perceived as exponentially increasing the threat and endangering Coalition soldiers.

[9] It is in this context that Warrant Officer Verreault planned the dry training held on 21 December 2012, at Camp Blackhorse. Sergeant Rutkowski was in charge of overseeing the C-7 rifle exercise, while another member had to manage the 9mm pistol exercise. The individuals in charge of the exercise had chosen to carry out the drill in a parking lot in front of Bunker 9, which was considered to be the safest place in the circumstances. Participants had to line up facing the bunker protected by sand bags and a wall covered in a protective membrane. Even though not all participants reported to the same chain of command, it was agreed that they carry out the exercise together since they all worked at the same place. The evidence reveals that six to eight people came outside with their C-7 rifles and 9mm pistols and lined up facing the bunker, as reported by Sergeant Rutkowski. Witnesses Rutkowski, Verreault, Marceau, Desaulniers-Guitard and Anhorn were part of the group. The participants discussed whether to use loaded or empty magazines. Even though a number of participants felt uncomfortable about using loaded magazines for the exercise that was taking place inside the camp, they agreed to do so. The evidence indicates that Warrant Officer Brideau stood at the extreme left of the line or close to that

end. The exercise was carried out in English. Once everyone was in place, Sergeant Rutkowski got ready to do the C-7 operations, but noticed that the member responsible for giving the 9mm pistol drill was late. He therefore decided to run the safety precautions for both weapons at the same time. Sergeant Rutkowski was at the far right of the line, standing behind. He gave the "For Inspection Clear Weapon" or "Pour inspection-Dégagez l'arme" command. The participants carried out the command individually, starting with the C-7. Sergeant Rutkowski started inspecting the C-7, and at the same time, the participants started doing the same with their pistols. At this point, a shot was discharged by Warrant Officer Brideau's weapon. The witnesses noted Warrant Officer Brideau's surprised reaction. The witnesses noted Warrant Officer Brideau's surprise, and he even expressed his surprise verbally. Even though no one saw Warrant Officer Brideau fire the shot, the evidence indicates that he was aiming his weapon in a safe direction, that is directly ahead of him in the direction of the sand bags located in front of the bunker, according to the instructions. Sergeant Rutkowski headed towards Warrant Officer Brideau. He asked him to remove the magazine from his weapon and to give it to him. As soon as this was done, Sergeant Rutkowski pulled the slide of Warrant Officer Brideau's pistol backwards, slid the parts forwards, reinserted the magazine and squeezed the trigger. It was then decided to give the weapon to the armourer, Sergeant Hogan, so that he could examine the pistol. It appears that the incident made some of the people who participated in the exercise nervous and also caused confusion among some, including Lieutenant Anhorn. Indeed, Sergeant Marceau testified that he continued his operations somewhat nervously while clearing his own weapon. It also appears that steps were immediately taken to alert the authorities of Camp Blackhorse of the incident to prevent the shot being interpreted as a hostile incident. Once all the participants had completed their "Clear" operations, they completed the planned dry handling exercise and returned to their respective positions. In short, the monthly exercise did not take place. All the evidence regarding Warrant Officer Brideau's ability to understand and follow the safety precautions for his 9mm pistol in English suggests that this posed no difficulty for him.

[10] Sergeant Hogan, a qualified armourer and expert witness in this case, carried out functional tests on Warrant Officer Brideau's pistol after the incident. He concluded that the weapon was in good working order. According to him, there can only be a bullet in the chamber of a 9mm pistol in the following cases: either a person inserts a projectile manually, or a magazine with ammunition is inserted in the pistol grip before the slide is brought forward and the slide is then brought forward. In that case, squeezing the trigger would cause the pistol to be discharged as these steps would result in a bullet being inserted in the chamber. If the correct procedures are followed, that is, sliding the slide forward first and then inserting the magazine in the pistol, it is impossible to insert a round into the chamber by mistake. The evidence before the Court does not suggest that a round was inserted manually into the chamber of Warrant Officer Brideau's pistol. The only rational conclusion based on all of the evidence is that Warrant Officer Brideau mixed up the order of the procedures to clear his pistol.

ANALYSIS AND DECISION

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

[11] 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.

[12] The presumption of innocence is the first and most important principle of law applicable to all criminal cases or cases dealt with and tried under the Code of Service Discipline. At the opening of his trial, Warrant Officer Brideau was presumed innocent, and this presumption only ceases to apply if the prosecution presents evidence that satisfies the Court of his guilt beyond a reasonable doubt.

[13] Two rules flow from the presumption of innocence. One is that the prosecution bears the burden of proving guilt. The other is that guilt must be proven beyond a reasonable doubt. These rules are linked with the presumption of innocence with a view to ensuring that no innocent person is convicted.

[14] The burden of proof rests with the prosecution and never shifts. Warrant Officer Brideau does not have to prove that he is innocent. He does not have to prove anything.

[15] A reasonable doubt is not a far-fetched or frivolous doubt. It is not based on sympathy or prejudice against anyone involved in the proceedings. Rather, it is based on reason and common sense. It is a doubt that arises logically from the evidence or from a lack of evidence.

[16] It is virtually impossible to prove anything with absolute certainty, and the prosecution is not required to do so. Such a standard would be impossibly high. However, the standard of proof beyond a reasonable doubt falls closer to absolute certainty than to probable guilt. Warrant Officer Brideau can only be convicted if the Court is sure that he is guilty. Even if the Court believes that the accused is probably or likely guilty, this is not enough. In these circumstances, the Court must give him the benefit of the doubt and find him not guilty as the prosecution failed to satisfy the Court of his guilt beyond a reasonable doubt.

[17] The requirement for proof beyond a reasonable doubt applies to each of the essential elements of each charge. It does not apply to individual pieces of evidence. 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. The testimonies heard by this Court are generally considered to be reliable and credible. The minor contradictions in the evidence, regarding the exact position of the people on the firing line on 21 December 2012, for example, are not significant.

Negligent performance of a military duty under section 124 of the National Defence Act

[18] Since a violation of a provision of the *National Defence Act* is in itself a prejudice to good order and discipline, I think it would be good to first analyze the second count, that is, negligently performing a military duty under section 124 of the *National Defence Act*. This provision reads as follows:

> Every person who negligently performs a military duty imposed on that person is guilty of an offence and on conviction is liable to dismissal with disgrace from Her Majesty's service or to less punishment.

Other than the identity of Warrant Officer Brideau as the offender, and the date and place of the alleged offence, the prosecution must establish beyond a reasonable doubt the following elements:

(a) that a military duty was imposed on Warrant Officer Brideau; and

(b) that Warrant Officer Brideau negligently performed this duty.

In *R v Brocklebank*, 1996 CMAC-383, the Court Martial Appeal Court of Canada put the offence into context and made the following observations, at pages 18 to 19:

> Several offences in Part V . . . prescribe the standard of conduct expected of Canadian Forces members in the execution of very specific duties or undertakings. The full *mens rea* offences of misconduct in the presence of the enemy, insubordination or striking an officer are familiar examples of conduct which is simply intolerable in the military sphere. The *Act* also imposes penal liability on individuals for wilful or negligent conduct which threatens to disrupt the balance of discipline, obedience and the efficient discharge of tasks having a military purpose, or in relation to the use of armed forces materiel (Note 14: See, for example, sections 104, 107, 125 and 127.).
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> The offence of negligently performing a military duty, contrary to the aforementioned charges, concerns the discharge of <u>any</u> military duty. The charge relates explicitly to the manner of discharging a military duty imposed upon a member of the Canadian Forces. It does not constitute the importation of a tort duty of care into the military milieu and I disagree with the Judge Advocate that the section makes the civil law tort of negligence a service offence. The impugned act or omission of the accused must constitute a marked departure from the expected standard of conduct in the performance of a military duty, as distinguished from a general duty of care. The offence establishes a standard of conduct consistent with the goals of ensuring that service members apply themselves to their military duties in a disciplined and efficient manner.
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> bb) "<u>a military duty</u>"
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> The scope of application of the offence of negligently performing a military duty is limited to those activities which can be defined as military duties within the meaning of section 124 of the Act. A plain reading of the section suggests a restrictive approach in the application of the provision. The fact that the section establishes an offence in relation to the performance of <u>a</u> military duty, as opposed to military duty in general, is of particular relevance in understanding the breadth of application of the charge. Had the provision established an offence for "negligently performing military duty," this would conceivably have the effect of creating a service offence of general negligence in the restricted context of military service.

> Moreover, a person's negligent conduct may only be censured in respect of a military duty "imposed on that person". In *The Concise Oxford Dictionary*], "impose" means to "demand the attention or commitment of (a person)". By specifying that an individual's conduct could only be impugned in relation to "a" military duty "imposed on that person", Parliament has explicitly narrowed the application of [this] section.
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> This interpretation is reinforced by the French text of section 124, which reads:
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> > **124.** L'exécution négligente d'une tâche ou mission militaire constitue une infraction passible au maximum, sur déclaration de culpabilité, de destitution ignominieuse du service de Sa Majesté.
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> "Tâche" is defined in the *Petit Robert I* as "travail déterminé qu'on doit exécuter" and similarly, "mission" means "charge donnée à quelqu'un d'aller accomplir quelque chose, de faire quelque chose". Both words refer to a specific task or duty which an individual is under an obligation to fulfil.
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> [Emphasis in the original.]

After reviewing the case law of the Court Martial Appeal Court regarding section 124 of the Act and comparing it with its British equivalent , Justice Décary, holds as follows at page 25:

> The conclusion, in my view, is inescapable: a military duty, for the purposes of section 124, will not arise absent an obligation which is created either by statute, regulation, order from a superior, or rule emanating from the . . . Chief of Defence Staff. . . .

A military duty

[19] The Court must therefore first determine whether the performance of the safety precautions on the 9mm pistol during the dry handling exercise carried out by Warrant Officer Brideau and his colleagues in front of Bunker 9, on 21 December 2012, at Camp Blackhorse, Kabul, Afghanistan, was a duty that was imposed on him. The evidence suggests that the chain of command took accidental discharges of personal weapons very seriously. Both the pre-deployment training and the requirement for ongoing monthly training imposed in the standing orders applicable to the JTF 4-12 in the theatre of operations show how important this situation was to the chain of command, with reason.

[20] The prosecution submits that the duty imposed on the accused was to follow the monthly training and to perform certain specific operations using his weapon during the "Clear" procedures. The defence submits that the duty imposed on the accused arises from a general military duty rather than a duty imposed specifically on the accused.

[21] In *Brocklebank*, the Court Martial Appeal Court clearly stated that the *National Defence Act* imposes penal liability on individuals for wilful or negligent conduct which threatens to disrupt the balance of discipline, obedience and the efficient discharge of tasks having a military purpose, or in relation to the use of armed forces materiel. The Court distinguished these military duties from those covered by section 124 of the Act. To illustrate this, it quoted the example of section 127 of the Act, which reads as follows:

> Every person who wilfully or negligently or by neglect of or contrary to regulations, orders or instructions does any act or omits to do anything, in relation to any thing or substance that may be dangerous to life or property, which act or omission causes or is likely to cause loss of life or bodily injury to any person or damage to or destruction of any property, is guilty of an offence and on conviction, if he acted wilfully, is liable to imprisonment for life or to less punishment and, in any other case, is liable to imprisonment for less than two years or to less punishment.

[22] The safe handling of personal weapons is intrinsically linked to the execution of military duties by the Armed Forces. The training that members must take throughout their careers in handling the firearms they are likely to use in carrying out their duties is deeply entrenched in the curriculum imposed on all members. The evidence highlights that the purpose of continuous training in handling personal weapons is not only to instill, but also to maintain skills in handling personal weapons at the highest possible level in order to prevent potentially disastrous consequences resulting from very nature of this activity. The goal of the general order of the chain of command to impose monthly dry or firing-range training on all deployed members at the time of the alleged offences was to maintain and improve already acquired skills. This is not a specific duty within the meaning of section 124 of the Act. But can the 21 December 2012 dry exercise prepared by Warrant Officer Verrault, who was supervised by Sergeant Rutkowski, be considered to be a specific military duty or, as the prosecution submits, was Warrant Officer Brideau's failure to follow the established procedures when Sergeant Rutkowski gave the "Clear" command a specific military duty? For the reasons expressed by the Court Martial Appeal Court in *Brocklebank* and given the specific offence provided for in section 127 of the Act, I arrive at the conclusion that the circumstances of this case do not trigger the application of section 124 of the Act, but that of section 127. It is therefore irrelevant to deal with the essential element of negligence applicable to this provision in the circumstances.

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

[23] Warrant Officer Brideau is also accused on the first count of committing an act to the prejudice of good order and discipline under section 129 of the *National Defence Act*, which partially provides as follows:

> (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.

[24] It is alleged in the particulars of the charge that, on 21 December 2012, at Camp Blackhorse, Kabul, Afghanistan, Warrant Officer Brideau handled a Browning 9mm pistol in a manner that did not comply with the established procedures under B-GL-385-003/PT-001, Volume 3 - 9mm Pistol, thus causing this weapon to discharge. There is no dispute that this order is an order published for the general information and guidance of the Canadian Forces or any part thereof. It falls under paragraph 129(2)(*b*).

[25] The prosecution stated in its arguments that it consciously chose to characterize the facts alleged against the accused as an act to the prejudice of good order and discipline rather than as neglect to the prejudice of good order and discipline to avoid having to establish the essential sub-elements of penal negligence offences. The Court noted this. The prosecution also chose to rely on the presumption set out at subsection 129(2) of the *National Defence Act* to prove that the alleged act was to the prejudice of good order and discipline. To do so, it alleged that the accused's handling did not comply with order G-GL-385-003/PT-001, Volume 3 - 9mm Pistol.

[26] The wording of the first charge raises important questions in light of counsel for the prosecution's arguments during his address. In his opinion, not following the prescribed steps during the "For Inspection Clear Weapon" and "Clear" procedures described at paragraphs 14 to 16 of Lesson 1 of the publication is in itself an act to the prejudice of discipline. In other words, he claims, this is an absolute liability offence, including if a person's action causes an accidental discharge during a training exercise or an unloading operation carried out in a barrel provided for this purpose in a clearing bay. Consequently, any accidental discharge is an offence under section 129 of the *National Defence Act*. Moreover, the logic of the prosecution's argument would mean that the outcome would be the same even if the presumption set out at subsection 129(2) of the Act does not come into play, when the charge relies on the abovementioned order.

[27] This approach has far-reaching consequences and merits consideration as it is general knowledge that the vast majority of such incidents are dealt with at summary trials presided over by superior commanders, commanders and delegated officers. These summary trials are undoubtedly an essential disciplinary tool for the Armed Forces, but it must be kept in mind that presumption of innocence and "beyond a reasonable doubt" standard-of-proof requirements apply in the same manner there as they do before a court martial, even if the presiding officers do not have the same characteristics as military judges.

[28] It is common ground that there are three categories of criminal or penal offence: the true criminal offence, the strict liability offence and the absolute liability offence. A criminal offence requires either proof of the prohibited act or proof of a reckless disregard for the consequences of committing that act. A strict liability offence is still a *mens rea* offence, but the accused can avoid any penal liability by demonstrating that he or she exercised reasonable care in taking all reasonable steps to avoid performing the prohibited act. Lastly, absolute liability offences do not make it open to the accused to explain themselves. A review of the statutory provision creating the offence makes it possible to

determine whether a statutory or regulatory penal offence is a strict or absolute liability offence. In *Gauthier v Her Majesty the Queen*, 1998 CMAC-414, the Court Martial Appeal Court considered whether the offence of absence without leave under section 90 of the *National Defence Act* was one of strict or absolute liability. After analyzing the terms of the offence, the importance of discipline in the Armed Forces and the purpose of creating this kind of offence, it concluded that it is a strict liability offence. The offence under section 129 of the *National Defence Act*, whether or not it arises from one of the activities set out in subsection 129(2) making it an offence deemed to be prejudicial, is punishable by dismissal with disgrace from Her Majesty's service or less punishment. The scale punishments under section 139 of the *National Defence Act* situates this punishment between imprisonment for less than two years and imprisonment for two years or more. This maximum sentence clearly indicates that the offence under section 129 of the Act can in no way be categorized as an absolute liability offence, regardless of whether the prosecution benefits from the offence deemed to be prejudicial presumption. Consequently, the prosecution's submission that the offence in this case is an absolute liability offence is without merit.

[29] In *Her Majesty the Queen v Winters*, 2011 CMAC 1, Justice Létourneau dealt with the essential elements of an offence under section 129 of the *National Defence Act* and proof of prejudice to good order and discipline, 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.
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> [27] Thus, the fact that the conditions in subsection 129(2) with regard to proof have not been met does not mean that there was no offence under subsection (1), that the prosecution cannot prove the offence or that the accused cannot plead guilty to the offence. In other words, the prosecution's loss of the benefit of any presumption with regard to proof of prejudice does not put an end to the prosecution and to the possibility of the accused pleading guilty.

[30] The prosecution seems to be relying on the application of subsection 129(2) of the Act to prove the prejudice to good order and discipline. Regarding the question of the relationship between the alleged act and a possible contravention of the alleged order, namely, B-GL-385-003/PT-001, Vol 3 – 9mm Pistol, this order does not contain any

instructions or prohibitions for individuals being trained in handling the 9mm pistol. The duties and obligations imposed in Chapter 2 of Volume 3 directly address the instructors. Handling contrary to the teaching standards can certainly lead to a charge under section 129 of the Act, but an offence deemed to be prejudicial for contravening a teaching standard under Chapter 2 can only apply if the accused is an instructor who failed to teach the operations expressly set out in the order. In such circumstances, the prosecution could benefit from the presumption and would be exempted from having to establish a prejudice to good order and discipline. But this cannot be the case here as the accused is not the person who provided the training on the 9mm pistol on 21 December 2012.

[31] An analysis of the particulars of the first charge makes it possible, however, to consider the alleged act in light of the contents of this publication regarding the steps to follow in the safety precautions to be taken when handling a 9mm pistol.

[32] Among the circumstances the prosecution must prove, other than the factors relating to the essential elements concerning identity, date and place, which are all admitted by the defence, the prosecution must establish the following elements beyond a reasonable doubt.

a. the act of the accused;

b. the prejudice to good order and discipline resulting from the act; and

c. the blameworthy state of mind of the accused in which the offence is alleged to have been committed.

The act of the accused

[33] The prosecution indicated that it consciously chose to characterize the acts allegedly committed by the accused as an act rather than negligence to avoid the application of the concept of penal negligence. The Court is satisfied that the evidence shows beyond a reasonable doubt that Warrant Officer Brideau did not follow the proper procedures following the "Clear Weapon" command. The testimony of the expert, Sergeant Hogan, and the facts surrounding the accidental discharge reveal that the only rational conclusion implies that Warrant Officer Brideau erred in the sequence of the procedures of clearing his pistol. What the accused is essentially accused of is inversing the steps when executing the "Clear" operation. According to *Le Petit Robert*, the word "acte" in French means a [TRANSLATION] "a human action seen objectively rather than subjectively". In other words, it is a deed. The conduct the accused is accused of is inverting the order of procedures and not of committing a deed. What deed could he have been accused of? That of inserting the magazine, that of bringing the slide forward or that of squeezing the trigger thus causing an accidental discharge, or all of these deeds? The alleged handling involves a series of successive actions in a specific order. We are therefore not dealing with an act, and the accused's alleged conduct falls under the kind of negligence dealt with in section 129 of the Act. Consequently, the prosecution's decision to use the word [TRANSLATION] "act" to describe a procedural breach is of no help to it.

The Court will address this count from the perspective of neglect to the prejudice of good order and discipline and the *actus reus* of the offence, which refers to the intentional acts or the conduct of the accused considered to be negligence.

[34] I agree with the approach described by d'Auteuil M.J. in *R v Nauss*, 2013 CM 3008, at paragraphs 34 to 36:

> [34] The essential elements of the offence of neglect to the prejudice to good order and discipline under section 129 of the *National Defence Act* are:
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> a. the identity of the accused as the offender;
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> b. the date and place of the offence;
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> c. the omission as alleged in the charge really occurred;
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> d. that the omission amounted to a blameworthy negligence, which includes proving that:
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> i. there was a standard of care to be exercised by the accused;
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> ii. the omission of the accused was in relation with the standard of care;
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> iii. the omission of the accused breached the required standard of care; and
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> iv. the omission of the accused amounted to a negligence, which means that the acts or omissions of the accused constituted a marked departure from the expected standard of care.
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> e. the prejudice to good order and discipline, which includes proving:
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> i. the standard of conduct required;
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> ii. the fact that the accused knew or ought to have known the standard of conduct required; [and]
>
> iii. the fact that the omission of the accused amounted to a contravention of the standard of conduct.
>
> [35] Concerning the essential element of neglect, this court has to find out if some evidence has been adduced by the prosecution concerning the conduct of the accused itself, which is the *actus reus*, and the requisite mental element of it, which is the *mens rea*.
>
> [36] First, the negligence concept under section 129 of the *National Defence Act* must be addressed as a penal concept as I already stated in my decision in *R* v *Gardiner*, 2008 CM 3021. Generally speaking, conduct which constitutes a departure from the norm expected of a reasonably prudent person forms the basis of both civil and penal negligence. However, unlike civil negligence, which is concerned with the apportionment of loss, penal negligence is aimed at punishing blameworthy conduct. Fundamental principles of military law justice require that the law on penal negligence concern itself not only with conduct that deviates from the norm, but also with the offender's mental state. As established in *R. v. Beatty*, 2008 SCC 5, at paragraph 7, the modify objective test

> established in *R. v. Hundal*, [1993] 1 S.C.R. 867 remains the appropriate test to determine the requisite *mens rea* for negligence-based military service offences under the Code of Service Discipline. Concerning the *actus reus*, it must be defined by the applicable standard and the fact that the conduct of the accused did not respect it.

[35] The analysis of d'Auteuil M.J. in *Nauss*, at paragraphs 56, 58 and 59 is persuasive. There, he makes the following observations:

> [56] Properly handling a weapon when unloading it appears to the court as a standard of conduct, not a standard of care, for which the court cannot rely on to assess negligence in this case. As pointed out earlier, the notion of negligence refers to the concept of standard of care, which is different from a standard of conduct. As established by the prosecution through the particulars of both charges, the standard of care in this case is about handling a C7 rifle in a safe manner, not in a proper or correct manner. However, it is true that in some situations, by handling a weapon in an incorrect or improper manner, it may result in an unsafe way to handle a weapon, which is not the case here.
>
> [58] It is the conclusion of the court, having regard to the evidence as a whole concerning this essential element of the offence that the prosecution has not proved beyond a reasonable doubt that the omission amounted to a blameworthy negligence for both charges.
>
> [59] I would like to add that from the court's perspective, when a weapon's drill is done improperly causing a weapon to fire when it is not supposed to or when it is not authorized to, it does not constitute automatically a penal negligence offence in the meaning of section 129 of the *National Defence Act*.

This Court is not quite as categorical. Respect for safety measures when handling weapons can straddle both the standard of care and the standard of conduct depending on the circumstances of the case.

[36] The purpose of the training imposed on members throughout their career regarding the handling of the personal weapons assigned to them and the intensification of this training, where applicable, when operational situations require it, is to deeply engrain the actions associated with the basic safety precautions followed when handling these weapons; this is to prevent unfortunate accidents arising from the inherently dangerous nature of the activities related to the handling of such weapons. This is not a theoretical statement, but an observation that clearly emerges from the evidence heard before this Court, namely, the instilling of a habit and great ease in handling personal weapons. The discharge of a firearm cannot be removed from its context.

[37] In the present matter, it is the Court's view that the required standard demands that members must be able to follow the safety precautions for the weapons assigned to them as long as they have received proper, regular training. Both care and conduct apply here. This standard was satisfied in the circumstances, as can bee seen in the documentary evidence regarding Warrant Officer Brideau's career, and the testimony and documentary evidence related to the training received by Warrant Officer Brideau in the pre-deployment phase of the JTF 4-12.

[38] Even though the *Beatty* decision dealt with penal negligence with respect to the offence of dangerous operation of a motor vehicle under section 249 of the *Criminal Code*, it is relevant in several regards. The comments made by Charron J. at paragraphs 34 to 35 are not without significance:

> [34] Therefore, as noted by Cory J., the difficulty of requiring positive proof of a particular subjective state of mind lends further support to the notion that *mens rea* should be assessed by objectively measuring the driver's conduct against the standard of a reasonably prudent driver. In addition, I would note that the automatic and reflexive nature of driving gives rise to the following consideration. Because driving, in large part, is automatic and reflexive, some departures from the standard expected of a reasonably prudent person will inevitably be the product, as Cory J. states, of "little conscious thought". Even the most able and prudent driver will from time to time suffer from momentary lapses of attention. These lapses may well result in conduct that, when viewed objectively, falls below the standard expected of a reasonably prudent driver. Such automatic and reflexive conduct may even pose a danger to other users of the highway. Indeed, the facts in this case provide a graphic example. The fact that the danger may be the product of little conscious thought becomes of concern because, as McLachlin J. (as she then was) aptly put it in *R. v. Creighton*, [1993] 3 S.C.R. 3, at p. 59: "The law does not lightly brand a person as a criminal." In addition to the largely automatic and reflexive nature of driving, we must also consider the fact that driving, although inherently risky, is a legal activity that has social value. If every departure from the civil norm is to be criminalized, regardless of the degree, we risk casting the net too widely and branding as criminals persons who are in reality not morally blameworthy. Such an approach risks violating the principle of fundamental justice that the morally innocent not be deprived of liberty.
>
> [35] In a civil setting, it does not matter how far the driver fell short of the standard of . . . care required by law. The extent of the driver's liability depends not on the degree of negligence, but on the amount of damage done. Also, the mental state (or lack thereof) of the tortfeasor is immaterial, except in respect of punitive damages. In a criminal setting, the driver's mental state does matter because the punishment of an innocent person is contrary to fundamental principles of criminal justice. The degree of negligence is the determinative question because criminal fault must be based on conduct that merits punishment.

[39] In the circumstances of this case, the Court is not satisfied beyond a reasonable doubt that the facts proven with respect to Warrant Officer Brideau's breaches fall into the penal negligence category.

[40] In the event that I am wrong on the issue of negligence, I will briefly examine the elements concerning prejudice to good order and discipline. In this case, the evidence suggests that the exercise was not carried out correctly or as planned. From the start, some participants were unwilling to use loaded rather than empty magazines given that the exercise took place in the parking lot of Camp Blackhorse, in front of Bunker 9. In addition, there were two stages to the exercise: first, the operations involving the C-7 rifle supervised by Sergeant Rutkowski, and second, the operations involving the 9mm pistol supervised by another member. Because of the late arrival of this other member, Sergeant Rutkowski deliberately decided to ask the participants to perform the safety precautions for both weapons at the same time, without notice, even though the participants had already expressed their discomfort at the beginning. During his incorrect

execution of the exercise, Warrant Officer Brideau was pointing his weapon in the designated safe direction in the area chosen and identified as being the most safe. There is no evidence that Warrant Officer Brideau's incorrect execution endangered the life or safety of another person or put any equipment at risk. The discharge of the weapon alone is not enough. The normal reaction of the other participants must have increased the level of stress, but the evidence is not conclusive in confirming that their level of nervousness was such as to undermine their own performance of the operations, on the contrary.

[41] The prosecution submitted that the prejudice to good order and discipline may also be inferred from the fact that the monthly training exercise was cancelled and that the members had to wait until the next session to train using their weapons as required by the Camp authorities. This statement has no merit. The exercise was planned by Warrant Officer Verreault for the benefit of the participants themselves, who all shared the same workplace. The training session could have been repeated at short notice. Lastly, the fact that this accidental discharge could, in the circumstances, have been embarrassing for Canadian authorities is also not sufficient to infer that there was a prejudice to good order and discipline. Do all of the elements together suffice to establish a prejudice to good order and discipline? The Court believes that prosecution may indeed have established that this is likely.

[42] Unfortunately, this is not enough as it is bound by the standard of proof beyond a reasonable doubt.

For these reasons, the Court

[43] **FINDS** the accused not guilty on all of the counts.

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