COURT MARTIAL

Citation: *R v Nauss*, 2013 CM 3008

Date: 20130228
Docket: 201306

Standing Court Martial

Canadian Forces Base Halifax
Halifax, Nova Scotia, Canada

Between:

Her Majesty the Queen

- and -

Lieutenant-Colonel D.C. Nauss, Accused

Before: Lieutenant-Colonel L.-V. d'Auteuil, M.J.

REASONS FOR FINDING

(Orally)

[1] Lieutenant-Colonel Nauss is charged with two alternative service offences under section 129 of the *National Defence Act* for failing to handle a C7 rifle in a safe manner, as it was his duty to do so: first, contrary to Canadian Contribution Training Mission – Afghanistan, Theatre Standing Order 301, Negligent Discharges; and second, contrary to the Canadian Forces weapons manual for the rifle C7 and carbine C8.

[2] The evidence is composed of the following elements:

a. the testimony of Colonel Smith;

b. Exhibit 3, admissions made by the accused pursuant to paragraph 37(b) of the Military Rules of Evidence (MRE);

c. Exhibit 4, a copy of the Military Personal Record Resume (MPRR) of Lieutenant-Colonel Nauss, printed on 25 February 2013;

d. Exhibit 5, a copy of the Canadian Contribution Training Mission - Afghanistan (CCTM-A), Theatre Standing Order (TSO) 338, In-Theatre Continuation Marksmanship Training;

e. Exhibit 6, a copy of the Canadian Contribution Training Mission - Afghanistan (CCTM-A), Theatre Standing Order 301 (TSO), Negligent Discharges;

f. Exhibit 7, an electronic copy in PDF format of the publication B-GL-317-018/PT-001, the Rifle 5.56 mm C7 and the Carbine 5.56 mm C8, issued on authority of the Chief of the Defence Staff; and

g. the judicial notice taken by the court of the facts in issues under Rule 15 of the Military Rules of Evidence, and more specifically the content of the publication B-GL-317-018/PT-001, the Rifle 5.56 mm C7 and the Carbine 5.56 mm C8, issued on authority of the Chief of the Defence Staff.

[3] From 3 March 2012 to 10 November 2012, Lieutenant-Colonel Nauss deployed to Afghanistan on OPERATION ATTENTION. He did not carry or handle his C7A2 rifle on a regular basis throughout his deployment as he was only required to carry a 9mm pistol in his capacity as a military advisor to the Afghan Army General Staff within the Kabul Green Zone.

[4] Lieutenant-Colonel Nauss was not required to participate in the weekly Canadian-led refresher training because he handled his 9mm pistol on a regular enough basis, on average four or more times a week. However, he recognised that he needed additional refresher training to remain current on the C7A2 rifle because he handled his C7A2 rifle only when travelling outside the Green Zone, on average about once a month throughout his eight-month tour.

[5] On 25 October 2012, Lieutenant-Colonel Nauss was at Camp Eggers, Kabul, Afghanistan. He voluntarily attended on that morning, at 0900 hours, the DCOM Army HQ, G3 Branch monthly weapons refresher training at the clearing barrel located near Jack's House, Camp Eggers. He was not a member of that unit and was not required to participate in this training event. He participated on his own initiative.

[6] The training on 25 October was led by Master Warrant Officer Merriam. There were three individuals who attended the training conducted that day by the G3 Branch: Lieutenant-Colonel Nauss from the Military Advisor Group, Major Hatfield from United States Army, and First Lieutenant Kosenko from United States Marine Corps; those last two individuals belonged to the G3 Branch.

[7] While performing the unload drill on his C7A2 rifle, Lieutenant-Colonel Nauss placed the barrel of the weapon into the steel tube of the clearing barrel. He then placed

the weapon's fire control selector on safe with his left hand and then released the magazine and placed it on the clearing barrel sandbag to his front.

[8] He then flipped the fire control selector back to the firing position with his right hand, momentarily thinking that he could not eject the round while on safe as per the 9mm pistol drill. He then changed his handgrip in order to pull the cocking handle with his right hand to eject the round from the rifle chamber.

[9] During the change in handgrip, Lieutenant-Colonel Nauss caused one live 5.56 mm round from the C7A2 rifle to discharge into the clearing barrel for which he accepted full responsibility. The shot was fired safely into the clearing barrel. At all times the weapon was properly inserted into the steel tube of the clearing barrel. No persons present were injured by the projectile.

[10] After the incident, Lieutenant-Colonel Nauss cleared his C7A2 rifle and handed it to Master Warrant Officer Merriam. Lieutenant-Colonel Nauss then successfully completed the 9mm clearing drill on his pistol.

[11] Lieutenant-Colonel Nauss immediately reported the incident to Chief Petty Officer 1st Class (CPO1) Gregory, the Camp Eggers' Regimental Sergeant Major (RSM), followed by his immediate Canadian superior, Colonel John Goodman. He surrendered his rifle to CPO1 Gregory on or about 4 November for inspection by a Weapons Technician. The rifle was tested by a weapons technician on 14 November 2012, and was found to be serviceable.

[12] Before this incident, the last time Lieutenant-Colonel Nauss handled a C7A2 rifle was on 9 October 2012, the day he returned from a visit to Northern Afghanistan.

[13] Lieutenant-Colonel Nauss possessed all the qualifications to handle the C7A2 rifle between 3 March 2012 and 10 November 2012. He had received refresher training on the weapon on a number of occasions before and during his tour in Afghanistan.

[14] Colonel Smith testified before this court martial. Currently being the G3 for the Canadian Army, at the time of the incident in October 2012, he was the Deputy Commander of Canadian Contingent Training Mission Afghanistan, and Lieutenant-Colonel Nauss was one of his subordinates. Colonel Smith was on Rotation 1 and he was responsible for managing troops under his command on a day-to-day basis. Being at the head of the Headquarters of the National Command and Support Element, he was responsible for the management and well-being of the Canadian Forces members operating under North Atlantic Treaty Organization (NATO) for training Afghan forces.

[15] Colonel Smith told the court that great emphasis was put on the individual weapons pre-deployment training in Gagetown in November and December 2011 because the prior rotation realized that what they got as weapons training prior to the mission was not enough, and some weapon incidents could have been avoided with more

training. Essentially, negligent discharges, what Colonel Smith considers to be as weapons drill to be done improperly, should be diminished by proper training.

[16] From his perspective, he told the court that somebody could not be deployed if he did not succeed with weapons training. However, he could not tell if Lieutenant-Colonel Nauss received the proper training on weapons, and if he had it, whether he succeeded. He could not tell the court what type of training Lieutenant-Colonel Nauss received, but he expected that he had it and that he was successful.

[17] Colonel Smith said that from his own knowledge and experience, especially with Special Forces, the Infantry School in Gagetown from 1997 to 2001, and with CANSOFCOM, that the handling of the rifle C7, C7A1, and C7A2, especially concerning unloading the weapon, has not changed since the introduction of this rifle in 1990. He explained that the steps for unloading the weapon are the same as the one indicated in the manual for this rifle, and it goes as follows:

a. set the selector lever to 'S' and undo the pouch;

b. remove the magazine and place it in the pouch;

c. point the muzzle upward, tilt the rifle to the right, and pull the cocking handle to the rear twice;

d. hold the cocking handle to the rear, tilt the rifle to the left, and look or feel to ensure that the chamber is empty;

e. let the cocking handle go forward;

f. set the selector lever to 'R' and squeeze the trigger, close the ejection port cover; and

g. recover the ejected round, clean and replace it in the magazine, put the magazine in the pouch, and do up the pouch.

[18] Colonel Smith explained to the court that a clearing barrel or a clearing bay is a location, usually at the entrance of a camp, to conduct the clearance drills and point your weapon into it. It is built locally with sandbags or 45 gallon drums, filled of sand inside of it. The purpose is to make sure that once you're inside the protected and guarded camp, you ensure that your weapon is not loaded and ready; meaning that there is no bullet in the chamber of the weapon with the selector lever on safe, making the soldier ready to fire with it. It would be the best place to unload the weapon because if for some reason a soldier does the drill wrong, then he would fire a bullet in a safe area. This design allows the bullet to be absorbed. Some of the drums have a tube in order to guide the weapon into the barrel. He agreed with defence counsel that the safest place to conduct the unload drill at Camp Eggers was in the clearing bay. He also agreed that

the clearing bay was designed to safely absorb a bullet in the bay if a mistake occurred, and it would be a natural consequence of that action.

[19] Colonel Smith told the court that CCMT-A TSO 301 was not posted, but available on a computer system. However, he did not know what kind of accessibility Canadian Forces members had to computer systems on Camp Eggers. He also mentioned that in order to get acquainted with the CCTM-A TSOs, it would have been possible for Lieutenant-Colonel Nauss to ask to the Camp Senior for a copy of them. He assumed that Lieutenant-Colonel Nauss was briefed on CCTM-A TSO as it was supposed to be done by his subordinates for every person in theatre, but he does not know if Lieutenant-Colonel Nauss was briefed. He admitted that it is possible that Lieutenant-Colonel Nauss did not read the CCTM-A TSOs.

[20] He recognized that he did not ask anybody under his command to get acquainted or read the Canadian Forces weapons manual for the rifle C7 and carbine C8. He told the court that he expected that training and refreshers on the C7 rifle were done in accordance with the manual, but he could not tell if it was so.

[21] Before this court provides its legal analysis, it's appropriate to deal with the presumption of innocence and the standard of proof beyond a reasonable doubt, a standard that is inextricably intertwined with the principle fundamental to all criminal trials. And these principles, of course, are well known to counsel, but other people in this courtroom may well be less familiar with them.

[22] It is fair to say that the presumption of innocence is perhaps the most fundamental principle in our criminal law and the principle of proof beyond a reasonable doubt is an essential part of the presumption of innocence. In matters dealt with under the Code of Service Discipline, as in cases dealt with under criminal law, every person charged with a criminal offence is presumed to be innocent until the prosecution proves his guilt beyond a reasonable doubt. An accused person does not have to prove that he is innocent. It is up to the prosecution to prove its case on each element of the offence beyond a reasonable doubt.

[23] The standard of proof beyond a reasonable doubt does not apply to the individual items of evidence or to separate pieces of evidence that make up the prosecution's case, but to the total body of evidence upon which the prosecution relies to prove guilt. The burden or onus of proving the guilt of an accused person beyond a reasonable doubt rests upon the prosecution and it never shifts to the accused person.

[24] A court must find an accused person not guilty if it has a reasonable doubt about his guilt or after having considered all of the evidence. The term "beyond a reasonable doubt" has been used for a very long time. It is part of our history and traditions of justice. In *R v Lifchus* [1997] 3 SCR 320, the Supreme Court of Canada proposed a model charge on reasonable doubt. The principles laid out in *Lifchus* have been applied in a number of Supreme Court and appellate courts subsequent decisions. In substance, a reasonable doubt is not a far-fetched or frivolous doubt. It is not a doubt based on sym-

pathy or prejudice. It is a doubt based on reason and common sense. It is a doubt that arises at the end of the case based not only on what the evidence tells the court, but also on what that evidence does not tell the court. The fact that a person has been charged is no way indicative of his or her guilt, and I will add that the only charges that are faced by an accused person are those that appear on the charge sheet before the court.

[25] In *R v Starr* [2000] 2 SCR, 144, at paragraph 242, the Supreme Court held that:

> ... 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.

[26] On the other hand, it should be remembered that it is nearly impossible to prove anything with absolute certainty. The prosecution is not required to do so. Absolute certainty is a standard of proof that does not exist in law. The prosecution only has the burden of proving the guilt of an accused person, in this case, Lieutenant-Colonel Nauss, beyond a reasonable doubt. To put it in perspective, if the court is convinced or would have been convinced that the accused is probably or likely guilty, then the accused would have been acquitted since proof of probable or likely guilt is not proof of guilt beyond a reasonable doubt.

[27] What is evidence? Evidence may include testimony under oath or solemn affirmation before the court by witnesses about what they observed or what they did; it could be documents, photographs, maps or other items introduced by witnesses; the testimony of expert witnesses; formal admissions of facts by either the prosecution or the defence; and matters of which the court takes judicial notice.

[28] It is not unusual that some evidence presented before the court may be contradictory. Often witnesses may have different recollections of events. The court has to determine what evidence it finds credible.

[29] Credibility is not synonymous with telling the truth and a lack of credibility is not synonymous with lying. Many factors influence the court's assessment of the credibility of the testimony of a witness. For example, a court will assess a witness' opportunity to observe; a witness' reasons to remember, like, were the events noteworthy, unusual and striking, or relatively unimportant and, therefore, understandably more difficult to recollect? Does a 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? This last factor applies in a somewhat different way to the accused. Even though it is reasonable to assume that the accused is interested in securing his or her acquittal, the presumption of innocence does not permit a conclusion that an accused will lie where that accused chooses to testify.

[30] Another factor in determining credibility is the apparent capacity of the witness to remember. The demeanour of the witness while testifying is a factor which can be used in assessing credibility; that is, was the witness responsive to questions, straight-

forward in his or her answers or evasive, hesitant or argumentative? Finally, was the witness' testimony consistent with itself and with the uncontradicted facts?

[31] Minor discrepancies, which can and do innocently occur, do not necessarily mean that the testimony should be disregarded. However, a deliberate falsehood is an entirely different matter. It is always serious and it may well taint a witness' entire testimony.

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

[33] Section 129 of the *National Defence Act* reads in part 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,
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> is an act, conduct, disorder or neglect to the prejudice of good order and discipline.

[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:

a. the identity of the accused as the offender;

b. the date and place of the offence;

c. the omission as alleged in the charge really occurred;

d. that the omission amounted to a blameworthy negligence, which includes to prove that:

   i. there was a standard of care to be exercised by the accused;

   ii. the omission of the accused was in relation with the standard of care;

   iii. the omission of the accused breached the required standard of care; and

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.

e. the prejudice to good order and discipline, which includes to prove:

i. the standard of conduct required;

ii. the fact that the accused knew or ought to have known the standard of conduct required;

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.

[37] Concerning the *mens rea* for negligence under section 129 of the *National Defence Act*, the remarks of the Supreme Court of Canada decision in *R* v *Beatty* at paragraphs 48 and 49 are very relevant to the present case. Further to a reading of those paragraphs, I still conclude, as I did in *Gardiner*, that for an offence of negligence under section 129 of the *National Defence Act*, it is only necessary to establish an objective *mens rea* and a subjective one is not necessary in order to prove this offence.

[38] Concerning the two offences as charged, the identity, the date and place are not disputed.

[39] The prosecution is taking the position that concerning the prejudice to good order and discipline, the court may infer from the evidence that considering the way the

accused did act in reporting the incident, the fact that he would have followed pre-deployment training and admitted having the required qualification and received re-fresher training to handle a C7A2 rifle, he knew or ought to have known the standard of conduct required, and, therefore, considering the other evidence adduced by the prosecution, prejudice to good order and discipline has been proved beyond a reasonable doubt.

[40] Concerning the negligence, the prosecution took the position that because the accused did not properly unload his weapon as required by applicable standard, he did not handle in a safe manner his C7 rifle and was then negligent.

[41] The accused is of the opinion that the prosecution failed to prove beyond a reasonable doubt the prejudice to good order and discipline because it did not demonstrate that he had actual knowledge or ought to have known the specific instructions and orders to which both charges referred to.

[42] In addition, the accused claimed that despite the fact that he did not follow the proper procedure when he unloaded his weapon, he did so in a safe manner by pointing his weapon into the clearing barrel, raising then a reasonable doubt on both charges.

[43] Concerning the prejudice to good order and discipline, it is clear that the prosecution did not discharge on both charges its burden to prove this essential element beyond a reasonable doubt.

[44] An accused is deemed to have knowledge of the content of an order or instruction to which a charge under subsection 129(2)(b) and (c) of the *National Defence Act* is referring to if it is published and sufficiently notified as required by articles 1.21 and 4.26 of the *Queen's Regulations and Orders for the Canadian Forces*. Then it means that orders and instructions shall be received at the base, unit or element the accused is serving and that the commanding officer of such base, unit or element took measures for those orders and instruction to be drawn to the attention and made available to the accused.

[45] On both charges, the prosecution did not discharge its burden of proof regarding this essential element of the offence. Concerning the CCMT-A TSO, it is true that Colonel Smith testified that in general, those who were deployed in Afghanistan under his command were made aware of the existence of these orders through a briefing received at their arrival in operational theatre. However, there is no indication that when the accused arrived in theatre on 3 March 2012 or thereafter, such briefing was really given, and if so, what was the content of that briefing.

[46] Moreover, there is no evidence concerning the fact that those orders were received at Camp Eggers and if so, if they were made available to those who were there. The only evidence adduced is that it was possible for Canadian Forces members who were at Camp Eggers to ask for a copy of those orders to the Camp Senior, which does

not constitute proof beyond a reasonable doubt that they were received and available at the camp.

[47] The prosecutor would like the court to acknowledge the fact that because the accused did report and notify his chain of command about the incident on which charges are based, it constitutes evidence that the accused had knowledge of the corresponding applicable order. Such conclusion cannot be made, especially considering that the evidence adduced by the prosecution does not reflect exactly that. It is true that the incident was reported, but there is nothing in the evidence that it was done pursuant to any order, directive or policy. The weapon was passed by the accused to somebody else, but not confiscated, and in fact, the evidence disclosed that it was the accused on all time who at different moments brought his weapon to different persons. However, there is nothing that would allow the court to infer that such behaviour was directly related to the enforcement of the specific TSO on that issue.

[48] Concerning the Canadian Forces weapons manual for the rifle C7 and carbine C8, it is worse. There is no evidence that this instruction was received and made available at Camp Eggers. In addition, there is no evidence that measures were taken to draw the attention of Canadian Forces members on that camp on this instruction. Evidence adduced by the prosecution is that members were not asked to read this publication and it was not expected that they would do so.

[49] There is no evidence whatsoever concerning the fact that the accused had personal knowledge of these orders and of that instruction. The prosecution would like the court to infer that because the accused admitted that he possessed all the qualifications to handle a C7A2 rifle and the he received refresher training on that weapon, then it would be a clear indication that he had personal knowledge of this instruction. While the testimony of Colonel Smith seems to indicate to the court that it is possible that knowledge of this instruction was taken by the accused through courses or refresher sessions, nothing in the evidence would allow the court to conclude that it is the case beyond a reasonable doubt.

[50] Consequently, having regard to the evidence as a whole concerning this essential element of the offence, it is the conclusion of this court that the prosecution has not proved beyond a reasonable doubt prejudice to good order and discipline on both charges.

[51] However, there is more than that. Concerning the first charge, it is clear that the prosecution did not prove beyond a reasonable doubt prejudice to good order and discipline because it failed to prove that the omission of the accused amounted to a contravention of the standard of conduct. The reality is that CCMT-A TSO 301 is about reporting and investigating any incident related to the discharge of a weapon occurring further to an alleged improper handling of it, no matter if it is accidental, intentional or further to some kind of negligence. As stated by Colonel Smith, what is called a "negligent discharge" reflected in that order is that 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.

[52] So, as indicated in that order, to deter occurrence of such incident, this order was issued. However, there is nothing in CCMT-A TSO 301, as indicated by the prosecution witness and confirmed by both counsels, which would make an alleged improper handling of a weapon something contrary to this order.

[53] It is the conclusion of the court, having regard to the evidence as a whole concerning this essential element of the offence on the first charge that the prosecution has not proved beyond a reasonable doubt prejudice to good order and discipline because that the omission of the accused did not amount to a contravention of the standard of conduct.

[54] Now, the other essential element the court would like to comment is about negligence on both charges. Essentially, the prosecution particularized both offences by referring to the notion of safety by using the expression "in a safe manner" for characterizing the handling of the C7 rifle. By doing so, it refers to a standard of care in order to assess the negligence not on the fact that the rifle was properly handled, but on the issue that it was safely handled.

[55] Looking at the Canadian Forces weapons manual for the rifle C7 and carbine C8, it is interesting to note that the safe handling of a C7 rifle is referring to controlling and manipulating the weapon without exposing anybody to danger or risk, such as pointing the muzzle in a safe direction, having the selector lever at safety position, taking some actions when it is handed over to another person or avoiding to point at anyone at jest (see section 209 of the manual, at paragraph 17, as an example).

[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.

[57] I could not agree more with the defence counsel that by pointing his C7A2 rifle in the clearing barrel on 25 October 2012 at Camp Eggers, Lieutenant-Colonel Nauss did handle his weapon in the safest manner he could, as established by the evidence. As a matter of fact, he did not properly unload his rifle, which resulted in a bullet discharged in the clearing barrel. However, by having his weapon in that position, he did not expose anybody to any danger or risk as it was expected.

[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*.

[60] It is true that a high standard of care is expected from soldiers when they handle their weapons. However, the lack of care claimed must be considered serious enough by those who are authorized to lay charges and by prosecutorial military authorities to constitute a mark departure from the standard of care expected.

[61] Consequently, having regard to the evidence as a whole, the prosecution has not proved beyond a reasonable doubt all the essential elements of failing to handle a C7 rifle in a safe manner, as it was his duty to do so, concerning both charges.

FOR THESE REASONS, THE COURT:

[62] **FINDS** Lieutenant-Colonel Nauss not guilty of the first and second charge on the charge sheet.

Counsel:

Major P. Rawal, Canadian Military Prosecution Services
Counsel for Her Majesty the Queen

Major S.L. Collins, Directorate of Defence Counsel Services
Counsel for Lieutenant-Colonel D.C. Nauss