



## COURT MARTIAL

**Citation:** *R v Boudreau*, 2012 CM 4007

**Date:** 20120412

**Docket:** 201155

Standing Court Martial

Saint-Jean Garrison  
Saint-Jean-sur-Richelieu, Quebec, Canada

**Between:**

**Her Majesty the Queen**

- and -

**Sergeant J.J.C. Boudreau, Accused**

**Before:** Lieutenant-Colonel J-G Perron, M.J.

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OFFICIAL ENGLISH TRANSLATION

### REASONS FOR FINDING

(Orally)

[1] Sergeant Boudreau, stand up. You are accused of five charges brought under section 130 of the *National Defence Act*, namely, breach of trust by a public officer, contrary to section 122 of the *Criminal Code of Canada*, and two charges brought under section 129 of the *National Defence Act*, namely, conduct to the prejudice of good order and discipline. Since the prosecution failed to produce any evidence on the fourth charge, the Court finds you not guilty of this charge.

[2] The evidence filed at this trial consists of the judicial notice taken by the Court of the facts and issues under Rule 15 of the *Military Rules of Evidence*, 21 exhibits and the testimonies of Master Corporal Proulx, Ms. Guilbert, Leading Seaman Brodeur, Ms. Champagne, Ms. Leger-Gallegos, Master Corporal Paquet, Sergeant Potvin, Sergeant Méthot, Master Warrant Officer Soucy, Warrant Officer Delage, Second Lieutenant Lavoie and Sergeant Boudreau.

[3] Before this Court provides its legal analysis of the charges, it is appropriate to deal with the presumption of innocence and the standard of proof beyond a reasonable doubt, a standard that is intertwined with principles fundamental to all criminal trials. While these principles are well known to counsel, other people in this courtroom may not be so familiar with them.

[4] It is fair to say that the presumption of innocence is 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 an offence is presumed to be innocent until the prosecution proves his or her guilt beyond a reasonable doubt. An accused person does not have to prove that he or she is innocent. It is up to the prosecution to prove its case on each element of the offence beyond a reasonable doubt. An accused person is presumed innocent throughout his or her trial until a verdict is given by the trier of fact.

[5] 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 beyond a reasonable doubt rests upon the prosecution, and it never shifts to the accused person. A court must find an accused person not guilty if it has a reasonable doubt about his or her guilt after having considered all of the evidence. Essentially, a reasonable doubt is not an imaginary or frivolous doubt; it may not be based upon sympathy 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 in no way indicative of his or her guilt.

[6] In *R v Starr*, [2000] 2 SCR 144, 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 . . .

[7] However, 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 beyond a reasonable doubt. To put it in perspective, if the Court is satisfied that the accused is probably or likely guilty, then the accused would have to be acquitted, since proof of probable or likely guilt is not proof of guilt beyond a reasonable doubt.

[8] What is evidence? Evidence may include testimony under oath or a solemn affirmation before the court by witnesses about what they observed or what they did. It is not unusual for some evidence presented before the court to be contradictory. Often,

witnesses may have different recollections of events. The court has to determine what evidence it finds credible. 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, the Court will assess a witness's opportunity to observe or a witness's reasons to remember. The Court will consider, for instance, whether there was something specific that helped the witness remember the details of an event that he or she described: were the events noteworthy, unusual and striking, or relatively unimportant and therefore, understandably, more difficult to recollect? Does the witness have any interest in the outcome of the trial, that is, a reason to favour the prosecution or the defence, or is the witness impartial? 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 the accused chooses to testify.

[9] Another factor in determining credibility is the apparent capacity of the witness to remember. The demeanour of the witness while testifying is a factor that can be used in assessing credibility, that is, was the witness responsive to questions, straightforward in his or her answers, or evasive, hesitant or argumentative? Finally, was the witness's testimony consistent with itself and with the uncontradicted facts? 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 may well taint the witness's entire testimony. 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 testimony as reliable unless there is a reason to disbelieve it.

[10] The full test as set out in the Supreme Court of Canada's decision in *R v W.(D.)*, [1991] 1 SCR 742, can be applied because the accused, Sergeant Boudreau, testified. As established in that decision, the test goes as follows:

First, if you believe the evidence of the accused, obviously you must acquit.

Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[11] The evidence clearly indicates that Sergeant Boudreau was a medical technician employed at the Canadian Forces Recruitment Centre in Montréal from 2003 to 2009 and that he had to perform recruitment medical examinations on applicants.

[12] Sergeant Boudreau estimated that he examined 7,000–8,000 people at the Recruitment Centre between 2003 and 2009 and that about 10 to 15 percent of these

people were women, meaning that he examined 700 to 1,200 women during this period. He admitted that he had a habit of selecting patients but did not elaborate on this matter. He would tell applicants to undress, to keep their underwear on and to put on a gown. He admitted that he would tell female applicants to remove their brassiere if they asked him whether it was necessary. He admitted that he did not tell applicants to use the curtain and that he left it up to the applicants, whether they be male or female, to draw the curtain while changing. He estimated that less than 10 percent of people used the curtain. He stated that he did not know why people did not use the curtain. Consequently, between 600 and 1,000 women undressed without using the curtain while he was in the examining room.

[13] Sergeant Boudreau stated that he would always perform the medical examination in the same manner, regardless of whether the woman was wearing a brassiere or not. He did not offer men a gown and only asked women whether they desired a chaperone. He stated that no one had asked for a chaperone.

[14] He testified that he would ask female applicants to raise their gown halfway when he examined the abdomen. He would lift the gown four times to see where to place the stethoscope in order to listen to the heart. He could therefore see the female applicants' breasts if they were not wearing a brassiere. He would always lift the bottom of the gown since he found this easier given that the collar of the gown was tied and therefore tighter.

[15] He admits that he performed the medical examinations of each complainant even though he does not remember these examinations. He does not recognize any of the complainants. He stated that these errors of judgment were limited to the number of complainants. This behaviour did not start until June 26, 2007, the date of Ms. Guilbert's medical examination. He is unable to identify anything that may have triggered this behaviour. He admits that he felt remorse after each incident and wondered why he was behaving as he did. He did not think that he would make these errors in judgment again in light of what has happened.

[16] Even though he testified that he could not remember receiving Exhibit 15, the email from Master Warrant Officer Corriveau dated April 12, 2007, he admitted that he probably received it. He fully understands the email of Captain Zeindler that was attached to the email of Master Warrant Officer Corriveau. He confirmed that he remembered receiving information in regard to Captain Zeindler's email.

[17] On cross-examination, Sergeant Boudreau confirmed that no one was ever forced to remove a brassiere and that the curtain had been drawn during his training period at the Recruitment Centre in 2003. Sergeant Geoffroy, who trained him in 2003, would stand before female applicants performing push-ups.

[18] He admitted that a female applicant had to keep her underwear on during the medical examination and that respect of a person's privacy, use of the curtain and leaving of the room while female and male applicants were getting changed were topics

that were dealt with during his training. He confirmed that a patient's privacy was a basic right and that this was taught in his basic medical technician training. Even though he indicated that the decision to use the curtain was left up to applicants, he acknowledged that Sergeant Geoffroy used the curtain and that neither Sergeant Geoffroy nor the policy left this decision up to applicants.

[19] Given all of the evidence, the Court is of the opinion that Sergeant Boudreau is not a credible witness. Even though the Court believes him when he states that he feels remorse, it is of the opinion that he is attempting to downplay his actions. He admitted that he had preselected female applicants, to the point that Master Corporal Paquet and Sergeant Méthot realized this, but he could not explain this behaviour and, on cross-examination, even attempted to suggest that this had only happened towards the end and that it did not mean that he examined more female applicants than the other sergeants.

[20] He agreed with the prosecutor that he could not contradict the complainants because he could not remember their examinations. He also agreed with the prosecutor that his practice of lifting the gown and checking where to place his stethoscope, thus making him able to see his patient's breasts, albeit easier, did not ensure female patients' privacy. He never asked female applicants to remove their brassieres while he was under the supervision of Sergeant Geoffroy.

[21] He claimed that he was colour-blind, which is why he could not remember the colour of the curtain in his office, yet he could remember the colour of the walls, explaining that there was a difference between a wall and a curtain. He also indicated that the curtain was not a clear memory for him.

[22] He stated that there had not been any other situations where he had had a woman remove her brassiere, but how can he say that when he does not remember the complainants and when, even though he admitted in his interview with the investigator from the Canadian Forces National Investigation Service that this behaviour had occurred only in his last year at the Recruitment Centre—namely, from September 2008 to September 2009—the first charge dates back to June 26, 2007? Sergeant Boudreau's testimony does not raise reasonable doubt.

[23] The question the Court must now ask itself is whether the evidence accepted by it leaves it with a reasonable doubt as to the guilt of the accused. To do so, the Court must review the essential elements of the offence.

[24] The Court must determine whether the prosecution has proven all the essential elements of each offence beyond a reasonable doubt. The essential elements of charges 1, 2, 3 and 6 are as follows (see paragraph 58 of *R v Boulanger*, 2006 SCC 32):

- (a) the offender's identity;
- (b) the date and place of the offence;

- (c) the fact that Sergeant Boudreau was a public officer;
- (d) the fact that Sergeant Boudreau was acting in connection with the duties of his office;
- (e) the fact that Sergeant Boudreau breached the standard of responsibility and conduct demanded of him by the nature of his office;
- (f) the fact that the conduct of Sergeant Boudreau represented a serious and marked departure from the standards expected of an individual in his position of public trust; and
- (g) the fact that Sergeant Boudreau acted with the intention to use his public office for a purpose other than the public good, for example, for a dishonest, partial, corrupt, or oppressive purpose.

[25] The evidence accepted by the Court, and which has not been challenged by the accused, proves beyond a reasonable doubt the following essential elements: the offender's identity and the dates and places of the incidents.

[26] According to section 118 of the *Criminal Code*, official "means a person who (a) holds an office, or (b) is appointed or elected to discharge a public duty". This provision also defines the word "office" as "an office or appointment under the government", "a civil or military commission" and "a position or an employment in a public department". (See also paragraph 5 of *Boulanger*.) It is therefore clear and undisputed that Sergeant Boudreau was an official at the time of the alleged offences.

[27] Was Sergeant Boudreau acting in connection with the duties of his office? The evidence accepted by the Court, which has not been challenged by the accused, proves beyond a reasonable doubt that Sergeant Boudreau was acting in connection with his duties as a medical technician at the time of the alleged offences.

[28] Did Sergeant Boudreau breach the standard of responsibility and conduct demanded of him by the nature of his office? What is this standard? Exhibit 15, the email from Master Warrant Officer Corriveau dated April 12, 2007, and an email from Captain Zeindler dated April 11, 2007, indicates that male and female applicants are entitled to be able to dress and undress privately, either behind a curtain or in the absence of the examiner. Applicants must be reminded at the beginning of the exam that they may request the presence of a chaperone. Applicants must remain in their undergarments at all times. All applicants must wear shorts during the exam. Female applicants must also wear a T-shirt or a gown. The document also indicates that a full exam is important and that it is possible to perform one while respecting the procedure described in the email.

[29] Master Warrant Officer Soucy testified that Master Warrant Officer Corriveau was the master warrant officer who approved medical exams and who happened to be next in authority to the recruiting surgeon general, Captain Zeindler. This email was sent to all persons responsible for performing enrolment medical exams. Master Warrant Officer Soucy testified that the email contained nothing new and that he had learned these procedures in 2002. Moreover, these procedures were discussed at annual workshops. Sergeant Boudreau's name was on the distribution list, and he does not deny receiving the email. Sergeant Potvin testified that the contents of Exhibit 15 were known to all examiners and that he ensured that Sergeant Boudreau and Sergeant Méthot had reviewed the directives. Sergeant Potvin stated that these policies had been in place for a long time and that they contained nothing new. Warrant Officer Delage testified that the Surgeon General's directives were transmitted by telephone or email. There were regular refresher emails and emails to address particular situations. The procedures were the same as those he had learnt when he was assigned to the Rimouski Recruitment Centre in 2001–2003. The email that can be found in Exhibit 19 was sent following his conversation with Ms. Guilbert and his subsequent conversation with his supervisor in Ottawa, Master Warrant Officer Thibeault.

[30] The evidence establishes without a doubt that male and female applicants had to keep their underwear, that is, their underpants or their panties and brassieres, on and that they were entitled to get changed privately. Exhibit 15 and the testimonies of Master Warrant Officer Soucy, Warrant Officer Delage, Sergeant Potvin, Sergeant Méthot and Master Corporal Paquet show without a shadow of a doubt that applicants' privacy was of the utmost importance and that this was taught at the basic medical technician course and throughout the medical technician's career. Medical technicians could ensure applicants' privacy by asking them to get changed behind a curtain or by leaving the room and by requesting that female applicants keep on their brassiere and panties.

[31] Ms. Guilbert testified that she reported for her medical exam wearing jeans, a T-shirt, a brassiere and panties. She asked Sergeant Boudreau whether she had to remove her brassiere, and he replied yes. The curtain was pulled back. While listening to her heart, Sergeant Boudreau lifted her gown on four or five occasions to look under it. He could see her breasts. While she was doing push-ups, he was facing her, looking down the front of her gown, where he could see her breasts. The Court concludes that Ms. Guilbert is a credible witness. The Court concludes that Sergeant Boudreau breached the standard of responsibility and conduct demanded of him by the nature of his office, since he did not comply with the directives regarding this applicant's level of undress and the respect of her privacy.

[32] Master Corporal Proulx testified that she reported to her medical exam dressed in jeans, a T-shirt, a brassiere and panties. She asked Sergeant Boudreau why she had to remove her brassiere, and he replied that she had to remove it because she had answered that she had had breast surgery. She closed the curtain. While listening to her heart, Sergeant Boudreau raised her gown and looked under it. He could see her breasts. While she was doing push-ups, he was facing her and could see her breasts. The Court

concludes that Master Corporal Proulx is a credible witness. The Court also concludes that Sergeant Boudreau breached the standard of responsibility and conduct demanded of him by the nature of his office, since he did not comply with the directives regarding this applicant's level of undress and the respect of her privacy.

[33] Second Lieutenant Lavoie testified that she had asked Sergeant Boudreau whether she had to remove her brassiere and that he had replied yes. She had no recollection of a curtain. While listening to her heart, Sergeant Boudreau lifted her gown on at least two occasions to look under it. He could see her breasts. While she was doing push-ups, he was facing her and was also able to see her breasts. The Court concludes that Second Lieutenant Lavoie is a credible witness. The Court also concludes that Sergeant Boudreau breached the standard of responsibility and conduct demanded of him by the nature of his office since he did not comply with the directives regarding this applicant's level of undress and the respect of her privacy.

[34] Leading Seaman Brodeur testified that she reported to her medical exam dressed in jeans, a short-sleeved blouse, a brassiere and panties. She asked Sergeant Boudreau whether she had to remove her brassiere, and he replied yes. She asked again whether this was necessary since the document said that she could keep her underwear on, and he again said yes. She turned her back to Sergeant Boudreau to change. She did not remember seeing a curtain. While listening to her heart, Sergeant Boudreau raised her gown and looked under it. He could see her breasts. While she was doing push-ups, he was facing her, looking down the front of her gown, where he could see her breasts. The Court concludes that Leading Seaman Brodeur is a credible witness. The Court also concludes that Sergeant Boudreau breached the standard of responsibility and conduct demanded of him by the nature of his office, since he did not comply with the directives regarding this applicant's level of undress and the respect of her privacy.

[35] Does the conduct of Sergeant Boudreau represent a serious and marked departure from the standards expected of an individual in his position of public trust? As indicated at paragraphs 52 to 54 of *Boulangier*, Canadians are entitled to expect that public officials exercise their powers and responsibilities for the public benefit. Public officials are therefore made answerable to the public for their actions in a way that private actors may not always be. This does mean, however, that they are held to a standard of perfection and will be found criminally culpable for "mistakes" and "errors in judgment". The conduct at issue must be sufficiently serious to move it from the realm of administrative fault to that of criminal behaviour. The seriousness of the misconduct is to be determined by taking into account the responsibilities of the office and the officeholder, the importance of the public objects which they serve, and the nature and extent of the departure from those responsibilities. The public official's conduct must therefore represent a "marked" departure from the standards expected of an individual in his or her position of public trust.

[36] The standard in the present matter is quite simple: ensuring that female applicants' privacy is respected. How? By respecting the directives indicating that female applicants must keep on their brassieres and panties, that they wear their top or a



gown and that they change behind a curtain or in the absence of the examiner. All the witnesses who had worked at the Montréal Recruitment Centre were fully aware of this standard, as was Sergeant Boudreau.

[37] While listening to the hearts of Ms. Guilbert, Master Corporal Proulx, Second Lieutenant Lavoie and Leading Seaman Brodeur, Sergeant Boudreau raised their gowns on several occasions to look underneath. He could see their breasts. While they were doing push-ups, he was facing them, looking down their front and could see their breasts. He admitted that he deliberately told them to remove their brassieres because he wanted to see their breasts. This was not an accident or omission but a wilful, premeditated act. This was not a mistake but conduct designed to satisfy Sergeant Boudreau's desire to see the breasts of female applicants, revealing complete disregard for the victims' privacy.

[38] Sergeant Boudreau held an important position in the enrolment process since he had to ensure that applicants were healthy and able to meet the physical and psychological requirements of the Canadian Forces. The applicants, and the general Canadian public, were entitled to expect that Sergeant Boudreau exercise his powers and responsibilities for the benefits of the Canadian Forces and of Canada and not for personal ends. He held a position of trust, and the Court concludes that the evidence proves beyond a reasonable doubt that his behaviour towards each complainant was a marked departure from the standards expected of an individual in his position of trust.

[39] Did Sergeant Boudreau act with the intention to use his public office for a purpose other than the public good, for example, for a dishonest, partial, corrupt or oppressive purpose? The evidence clearly demonstrates that Sergeant Boudreau used his public office for personal ends. There was no public good to be gained from forcing the victims to remove their brassieres and then looking at their breasts during the medical exam. He abused his position of authority over the victims to satisfy his personal needs.

[40] The essential elements of charges 5 and 7 are as follows:

- (a) the offender's identity;
- (b) the date and place of the offence;
- (c) the alleged act or omission, namely, in the course of enrolment medical examinations, failing to respect Ms. Heide Leger-Gallegos's right to privacy in the case of charge No. 5, and Ms. Josée Champagne's right to privacy in the case of charge No. 7.
- (d) the required standard of conduct, namely, the general orders applicable in the circumstances;
- (e) the fact that you were aware of or should have been aware of the standard of conduct;

- (f) the fact that the act was a violation of the required standard of conduct; and
- (g) the fact that this violation of the standard of conduct constituted conduct to the prejudice of good order and discipline.

[41] The evidence accepted by the Court, and which has not been challenged by the accused, proves beyond a reasonable doubt the following essential elements: the offender's identity and the dates and places of the incidents.

[42] Ms. Leger-Gallegos testified that she was wearing a brassiere, panties and a gown during her medical exam. She had changed without using the curtain while Sergeant Boudreau was sitting at his desk, taking notes. She had felt uncomfortable getting changed in front of him. The Court concludes that Ms. Leger-Gallegos is a credible witness.

[43] Ms. Champagne testified that she was wearing a brassiere, panties, disposable blue shorts and a gown during her medical exam. She had changed behind the curtain, and Sergeant Boudreau had left the room while she changed. She also testified that Sergeant Boudreau had placed her foot on his genitals while examining her leg and that he had looked down her shorts. He had slid his hands up her calves and thighs and had put his face close to hers during this procedure, which had made her feel very uncomfortable. The Court concludes that Ms. Champagne is also a credible witness.

[44] What is the standard of conduct required, namely, the general orders applicable in the circumstances? Exhibit 15, the email from Master Warrant Officer Corriveau dated April 12, 2007, concerning the email from Captain Zeindler dated April 11, 2007, indicates that applicants were entitled to be able to dress and undress privately, either behind a curtain or in the absence of the examiner. Applicants had to be reminded at the beginning of the exam that they could request the presence of a chaperone. Male and female applicants had to remain in their underwear at all times. All applicants had to wear shorts during the exam. Female applicants had to wear a T-shirt or a gown. Moreover, the document indicates that a full exam is important and that it is possible to perform one while respecting the procedure described in the email.

[45] Master Warrant Officer Soucy testified that Master Warrant Officer Corriveau was the master warrant officer who approved medical exams and who happened to be next in authority to the recruiting surgeon general, Captain Zeindler. Warrant Officer Delage testified that the Surgeon General's directives were transmitted by telephone or by email. The Court concludes that the evidence demonstrates beyond a reasonable doubt that the required standard of conduct can be found in the emails from Captain Zeindler and Master Warrant Officer Corriveau.

[46] Was Sergeant Boudreau aware of or should he have been aware of this standard of conduct? Master Warrant Officer Soucy testified that this email was sent to all

persons responsible for performing enrolment medical exams. Moreover, these procedures were discussed at annual workshops. Sergeant Boudreau's name was on the distribution list, and he does not deny receiving the email. Sergeant Potvin testified that the contents of Exhibit 15 were known to all examiners and that he had ensured that Sergeant Boudreau had reviewed the directives. The Court concludes that the evidence proves beyond a reasonable doubt that Sergeant Boudreau was aware of this standard of conduct.

[47] Was the act a violation of the required standard of conduct? Respecting male and female applicants' privacy is a fundamental aspect of any medical exam, and Sergeant Boudreau was fully aware of this. Sergeant Boudreau made no attempt to respect female applicants' privacy. He did not draw the curtain, nor did he tell them to draw the curtain, contrary to the training that he had received and to the directive found in Exhibit 15. His not using the curtain and not leaving the room while Ms. Leger-Gallegos was undressing is a violation of the required standard of conduct.

[48] Even though, as she described it, Ms. Champagne felt uncomfortable during her medical exam, the evidence demonstrates that Sergeant Boudreau respected the required standard of conduct.

[49] Did this violation of the standard of conduct constitute conduct to the prejudice of good order and discipline? Subsection 2 of section 129 of the *National Defence Act* clearly states that a contravention of any general orders is an act, conduct, disorder or neglect to the prejudice of good order and discipline. Counsel for the prosecution simply has to prove the contravention to prove that an act, conduct, disorder or neglect to the prejudice of good order and discipline has been committed. The Court concludes from this that the evidence proves beyond a reasonable doubt that Sergeant Boudreau's behaviour during his exam of Ms. Leger-Gallegos was an act, conduct, disorder or neglect to the prejudice of good order and discipline.

**FOR THESE REASONS, THE COURT:**

[50] **FINDS** you not guilty of the fourth and seventh charges;

AND

[51] **FINDS** you guilty of the first, second, third, fifth and sixth counts.

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**Counsel:**

Major P. Doucet and Major P. Rawal, Canadian Military Prosecution Service  
Counsel for the Her Majesty the Queen

Captain H. Bernatchez, Directorate of Defence Counsel Services  
Counsel for Sergeant J.J.C. Boudreau

