



## COURT MARTIAL

**Citation:** *R v VanDeWauwer*, 2013 CM 1016

**Date:** 20131219

**Docket:** 201370

Standing Court Martial

Canadian Forces Base Halifax  
Halifax, Nova Scotia, Canada

**Between:**

**Captain C.L. VanDeWauwer, Applicant**

- and -

**Her Majesty the Queen**

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

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### **DECISION RESPECTING A MOTION BY THE COURT THAT A NO *PRIMA FACIE* CASE HAS BEEN MADE OUT AGAINST THE ACCUSED ON ALL CHARGES**

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(Orally)

[1] After the closing of the prosecution's case, the court has raised on its own motion, pursuant to QR&O article 112.05(13), asking counsel to hear arguments as to whether a *prima facie* case has been made out against the accused with regard to the four charges before the court, namely: two counts of fraud, contrary to section 380 of the *Criminal Code*. Those offences are punishable under section 130 of the *National Defence Act*; and also two counts, under section 129 of the *National Defence Act*, for an act to the prejudice of good order and discipline.

[2] In a nutshell, this is a case where the evidence generally indicates that Captain

VanDeWauwer was provided with an AMEX credit card, which was assigned to him with his own number, but from a corporate account of the Canadian Forces and the Department of National Defence, to be used for official purposes; not personal purposes. I will come back later more specifically with the evidence with regard to that. The evidence indicates, especially Exhibits 8 and 9, that Captain VanDeWauwer made purchases that are not *prima facie* compatible with official duty.

[3] The evidence before the court consists of the following:

- (a) We have Exhibit 3, which is a letter that Captain VanDeWauwer made to his adjutant, Captain Flemming, who testified before the court, explaining and giving his version of events with regard to some purchases that he had made while he was in Kabul that were for personal reasons and not related to his duties. Looking at Exhibits 8 and 9, it's easily and identifiable that those purchases were not for official duty. Similarly in that letter, Captain VanDeWauwer told Captain Flemming that he had used the card as well on or about 19 January 2013 for a personal purpose at Home Depot, and in the letter at Exhibit 3, Captain VanDeWauwer stated at the end that "I realize, despite the fact that it was an emergency, no personal use is authorized by the AMEX Corporate card and I will only utilize this card for business expenses";
- (b) The document, at Exhibit 4, dated 25 April 2013, where Captain VanDeWauwer says he was not aware of the CANFORGENs and the MARLANTGEN, identified as CANFORGEN 045/04, CANFORGEN 211/08 and MARLANTGEN 014/13, as well that he did not read them. This evidence is combined with the evidence of Chief Warrant Officer Geoffroy, who was the regimental sergeant major, who was conducting the investigation related to the misuse of the card that had been issued to the accused and during which Captain VanDeWauwer told him that he knew the policy and that he had made some improper or personal purchases with the card;
- (c) Exhibit 5 is the agreement between Captain VanDeWauwer and the Government of Canada, and in this document it clearly indicates that the use of the American Express Government of Canada Travel Charge Card will be governed by this agreement and the agreement between you and AMEX Bank of Canada. The court has not been provided with that agreement, but it is not necessary for our purposes today. This document clearly states that the card is to be used in accordance with this agreement, the agreement between the person signing the agreement and AMEX Bank of Canada and Canada's policies. The person in that document agrees to use the card only for the purchase of authorized business travel and hospitality related expenses. The person agrees in this document that the misuse of the card may result in disciplinary action up to and including dismissal of the cardholder. The agreement

also states that the person is liable to AMEX for payment of all legitimate charges made with the card that is issued to him or her, including any criminal costs as a result of an unpaid account and the document also refers to that in case of impropriety or breach of the agreement the card could be cancelled or suspended. It is also clear on that document that the department travel card is not to be used for personal use of any sort, that includes, but is not limited to PayPal or any other means of online payments to unauthorized websites. So this document signed by Captain VanDeWauwer was entered by consent and is the proof of its content;

- (d) The evidence consists also of a letter that was sent to the commanding officer of Captain VanDeWauwer from the formation comptroller advising him that the account with regard to that card of Captain VanDeWauwer was delinquent and that he suspected that the card had been misused. It also gave examples of some purchases that were questionable in his opinion, so asking for an investigation by the unit;
- (e) The evidence consists of the Agreed Statement of Fact that is very simple. It states, "The billing details or new transactions appearing on a Government of Canada American Express Statement of Account may reflect the date at which the purchase was made or a date posterior to the date of purchase was actually made by the cardholder," and paragraph 2 says, "The billing details or new transactions appearing on a Government of Canada American Express Statement of Account may reflect the date at which a payment was received which may be the date the payment was made to the account or a date posterior to which the payment was actually made by the cardholder";
- (f) Exhibit 8 consists of the Cardmember Activity as it relates to the card that was issued to Captain VanDeWauwer with the card number which, of course, is the card number that is referred to in the charges, so this is not in issue; and
- (g) Finally, Exhibit 9, which consists of different statements of account from which the court can consider that there is evidence that the card was used for matters that were not properly official matters or matters done during a temporary duty.

[4] We heard the evidence of Ms Christie, the account manager, who described how the accounts functioned and how she had access to the information as it relates to all the cardholders here in Halifax and that they could monitor, through her area of responsibilities, those cardholders who were delinquent or who had made unauthorized purchases. She explained that she is the one who normally would issue the card to the member; the person would sign the agreement, etc., so that was her testimony.

[5] I already stated what Commander Lowe came to testify with regard to Exhibit 4,

but I would also add that initially the sum of the items that he listed in his letter, in his opinion and experience as a comptroller, were not compatible with matters related to official duty and why he asked the commanding officer to conduct an investigation that was made by Chief Warrant Officer Geoffroy. He stated also that when purchases were made with the AMEX card, the money was advanced by AMEX, and if the cardholder was delinquent, the interest was charged to the cardholder and that the cardholder was also responsible to pay it. It is only after 120 days that the Government of Canada would pay American Express if there was an outgoing account that was late or a delinquent account, and that he would make sure that the money paid by the Government of Canada would be recovered immediately through the member's pay. It stated that the misuse of the credit card had no impact whatsoever on the programme between AMEX and the Government of Canada, that the abuse of the card was clearly transparent to AMEX, and that the only consequence for the member was that his privileges as the cardholder would be cancelled or suspended. He stated that there would be no impact on the Canadian Forces, but on the member in the sense that member, because he is not a cardholder anymore, would have to obtain an advance, and if no advance could be obtained, the Canadian Forces member would have to spend his own money upfront and seek reimbursement for the amount expended. Finally, he said that there was no impact on the credit score of the cardholder.

[6] We heard the testimony also of Lieutenant-Colonel Ouellet, the commanding officer of the accused, who stated that she had lost confidence in him, but that he is slowly regaining it back. She stated that the consequence of his actions was that his card was cancelled. Lieutenant-Colonel Ouellet also stated that it was not necessarily an asset for her to have an officer with a corporate card. More generally she testified also to the effect that if an officer did something wrong, it looked bad on the "officership" within her unit, and that is a very general statement. At the end she said that she did not have the trust in Captain VanDeWauwer to be ready at this stage to take any steps that would allow Captain VanDeWauwer to be reissued with a travelling card. This is the evidence before the court. Also the court has taken judicial notice of those matters under section 15 of the Military Rules of Evidence, of course, including those matters under subsection 15(2).

[7] When a judge raises the issue of no *prima facie*, it simply serves to determine whether there is evidence, direct or circumstantial, upon which a properly instructed judge sitting alone or a military panel can rationally conclude that the accused is guilty beyond a reasonable doubt. This is the test that is found in *R v Fontaine*, [2004] 1 SCR 702, at paragraph 53, and this test is a refinement of the classic *Sheppard* test from the *United States of America v Sheppard*, [1977] 2 S.C.R. 1067. As we know, at this stage the judge is not concerned with whether there is evidence beyond a reasonable doubt and it is not the judge's role to weigh the quality of the evidence, assess the credibility of the witnesses or the reliability of the evidence. That would come at a later stage. Although the judge must not weigh the evidence as to the guilt of the accused at this stage, the judge is allowed to do some weighing in a limited matter in order to determine whether there is sufficient evidence to permit a properly instructed jury to reasonably convict.

[8] There is no issue in this case with the credibility or the reliability of the witnesses. The evidence is straightforward and this is a case that deals simply with the inappropriate use of a Corporate AMEX credit card by someone who had signed an agreement to that effect. So in the analysis at this stage, I assume that all the evidence I've heard is true. I did not weigh the evidence in the sense of evaluating whether it is reliable proof, but in order to pass the threshold of no *prima facie* with regard to the charges. The prosecution has the evidential burden of bringing evidence on the record upon which a properly instructed court martial could rationally conclude that Captain VanDeWauwer is guilty beyond a reasonable doubt as it relates to the charges before the court.

[9] Other than the date and the place where the alleged offences would have occurred, the prosecution would have to provide evidence on the following elements with regard to the first and the second charge for the offence of fraud under section 380 of the *Criminal Code*, and those elements are the following:

- (a) that Captain VanDeWauwer deprived Her Majesty in right of Canada of something of value;
- (b) that Captain VanDeWauwer's deceit, falsehood or other fraudulent means caused deprivation; and
- (c) finally, that Captain VanDeWauwer intended to defraud Her Majesty in right of Canada.

[10] As I said, there is no issue for the court that the evidence demonstrates that he misused the AMEX credit card for which he had signed an agreement, but that is not what the offence of fraud is all about. The offence of fraud requires deprivation. We know that it includes, but does not require that Her Majesty in right of Canada suffer actual economic loss; that is not necessary for deprivation. It is enough that Her Majesty in right of Canada is induced to act to his or her detriment by Captain VanDeWauwer's conduct.

[11] To the question, Were Her Majesty's in right of Canada interests at risk in this case? It is understood that for this offence it is not necessary that Her Majesty in right of Canada has lost money or anything of value as a result of Captain VanDeWauwer's conduct, but there must be deprivation. Without deprivation, as I explained it, there could not be any offence of fraud. The fact that he misused the card contrary to the agreement does not amount to deprivation. There is no evidence that the Crown was deprived of anything in this case, not even that there was a risk of deprivation, and I refer to Commander Lowe on that effect.

[12] The court could go on with the next element of offence that deals with deceit, falsehood or other fraudulent means, not only would the court say that there is not evidence of deceit, falsehood or other fraudulent means in this case, but to the contrary. He admitted the misuse and he said why he did it and those amounts were paid. The court does not have to determine whether there is a *prima facie* case with regard to the

evidence of intent to defraud. As I said, the court concludes that there is no evidence of deprivation in this case and the analysis must stop there. For this reason, the court finds that no *prima facie* case has been made out with regard to the first and the second charge.

[13] The court will now move to the third and fourth charges, which are laid under section 129 of the *National Defence Act*, an act to the prejudice of good order and discipline. The prosecution said in his submissions that there is evidence that the accused knew of the policy, signed the agreement with regard to the card, and he referred also to the evidence of Lieutenant-Colonel Ouellet and to the letter and testimony of Commander Lowe with regard to the prejudice of good order and discipline. To that extent, I agree with the prosecution, but this is not the test for the *prima facie* case for the third and fourth charge.

[14] The prosecution is bound by its particulars. Although I heard absolutely no submissions with regard to a violation of what policy this court was seized with, I will simply refer to the third and the fourth charge, and the particulars state, "In that he, between 10 October 2012 and 15 October 2012, at or near Kabul, Afghanistan, used a Government of Canada American Express credit card" states the number "to make personal purchases of the sum of \$469.01 contrary to DAOD 1016-0"; and fourth charge, "In that he, on 20 January 2013, at or near Dartmouth, Nova Scotia, used a Government of Canada American Express credit card" states the number "to make personal purchases of the sum of \$86.25 contrary to DAOD 1016-0." As I said, the prosecution is bound by its particulars. DAOD 1016-0 is an order that applies to members of the Canadian Forces and a directive that applies to employees of the Department of National Defence, as such it is an order published for the general information and guidance of the Canadian Forces or any part thereof and it falls consequently under paragraph 129(2)(b) of the *National Defence Act*.

[15] The court has taken judicial notice of the matters contained in section 15 of the Military Rules of Evidence, and subsection 15(2) states:

A court shall, whether or not requested to do so by the prosecutor or the accused, take judicial notice of the contents of, but not of the publication or sufficiency of notification of, proclamations, orders in council, ministerial orders, warrants, letters patent, rules, regulations or by-laws made directly under authority of a public Act of the Parliament of Canada or of the legislature of a province of Canada, including but not limited to QR&O and orders and instructions issued in writing by or on behalf of the Chief of the Defence Staff under QR&O 1.23.

So the court has taken judicial notice of this order, but the court has not taken judicial notice of its publication or the sufficiency of its publication.

[16] As I have previously mentioned, the particulars of this charge allege a contravention to DAOD 1016-0, so the act of the accused must be linked to that DAOD because the alleged act has to be contrary to the policy statement that is contained in that DAOD. The prosecution did not allege a contravention of the agreement between AMEX and the accused or between the Government of Canada and the accused as it

appears in Exhibit 5. The prosecution has deliberately alleged that the acts of the accused, as alleged in the third and fourth charges, were contrary to the policy statement that appears in that DAOD. The prosecution has not provided the court with any submission with regard to how this DAOD applies and where or what was violated by the actions of the accused in that DAOD. So how did Captain VanDeWauwer, in doing the acts that are mentioned, how did that contravened the policy in that DAOD?

[17] The prosecution in this case has chosen to rely on the presumption set out at subsection 129(2) of the *Act* to prove that the acts for which Captain VanDeWauwer has been charged are prejudicial to good order and discipline. By relying on that presumption they would not have to prove beyond a reasonable doubt prejudice to good order and discipline.

[18] In *R v Winters*, CMAC 2011, 3 February 2011, Justice Létourneau for the Court of Appeal stated 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.

[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.

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

[27] Thus, 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.

[19] DAOD 1016-0 is entitled "Expenditure Management"; it was issued on 2001-04-01. It applies to members of the Canadian Forces and employees of the Department of National Defence. The Policy Direction statement in this order provides the following context:

a. first, it explains the Expenditure Management process that consists of

three major phases: the expenditure planning and initiation (*Financial Administration Act* section 32); account verification (*Financial Administration Act* section 34); and payment (*Financial Administration Act* section 33). And it says, "For additional financial instructions for specific issues pertaining to the expenditure management process, see the DAODs and *Financial Administration Manual* chapters listed in References";

- b. Policy Statement, this DAOD would have been contravened by the accused as a result of his actions, the Policy Statement states the following, "Public funds must be managed and spent to meet established program objectives in an efficient and cost-effective manner. DND employees and CF members shall process, record and account for all planned and actual expenditures, accounts payable and any other financial commitments in a diligent, open and accountable manner"; and
- c. Requirements, "Through policies and procedures for planned and actual expenditures, DND and CF managers shall ensure that: public funds are not misused; annual appropriation ceilings, allotment and fund limits are not exceeded; proper financial coding and accounting methods are used; accounts are settled in a timely fashion; and financial management processes and systems have proper internal controls."

[20] A plain reading of this DAOD makes it clear that this order does not deal with the matter for which the accused has been charged; that is, the misuse of an AMEX card issued to his name for temporary duty. That's not the purpose of that DAOD.

[21] To rely on the presumption, the prosecution must provide evidence of the sufficiency of the notification and the publication of that order. That was not done in this case. Nevertheless the actions that were put into evidence before the court of Captain VanDeWauwer and his misuse of the credit card are not contrary to the policy. They might be contrary to several things: the agreement between him and the Government of Canada, the agreement between him and AMEX, but not contrary to this policy.

[22] Can the court now, despite the particulars of the third and fourth charge, turn around and now just look at the actions to determine whether these actions, in the context, were prejudicial to good order and discipline? The answer to that is no because the court cannot go and look for another breach somewhere of another kind.

[23] If the prosecution as it has done or as the prosecution did not do, i.e. by not proving the sufficiency of the publication and the notification of the order to the accused, the prosecution loses the benefit of relying on the presumption. Without the presumption, it doesn't change that the policy violated that appears in the particulars, it must be the same. This is not a matter for which the court can make a special finding.



**FOR THESE REASONS, THE COURT:**

[24] **FINDS** the prosecution has not met its burden of proof and that no *prima facie* case has been made against the accused.

[25] **FINDS** the accused, Captain VanDeWauwer, not guilty of all charges.

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**Counsel:**

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