Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20190501

Docket: CMAC-592

Citation: 2019 CMAC 2

CORAM: **CHIEF JUSTICE BELL**
BENNETT, J.A.
SCANLAN, J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

CAPTAIN BANNISTER

Respondent

Heard at Halifax, Nova Scotia, on November 21, 2018.

Judgment delivered at Ottawa, Ontario, on May 1, 2019.

REASONS FOR JUDGMENT BY: SCANLAN, J.A.

CONCURRED IN BY: BELL, C.J.
BENNETT, J.A.

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REASONS FOR JUDGMENT

SCANLAN, J.A.

I. Background

[1] Captain Bannister [the Respondent], a former Commanding Officer [CO] of 148 Royal Canadian Army Cadet Corps in Prince Edward Island, on two separate occasions made sexually charged comments to a female subordinate. She was an 18-year-old cadet when the first

comment was made, and a 19-year-old officer cadet with the Cadet Instructor Cadre [CIC] when the second comment was made.

[2] On the first occasion, the Respondent said to the young cadet, “Hey, why don’t you fuck me on my desk”. In relation to another person who was present at the time, the Respondent said “Oh, don’t worry about him, he can watch”. On the second occasion, the then 19-year-old Cadet Instructor was at a railway station in Montreal. She was panicking given the pressure she was under to ensure all cadets were accounted for during a return trip to Prince Edward Island, from Ottawa. The Respondent pulled her aside, onto the rail platform and said, “Let’s have sex”.

[3] Based on these comments, the Respondent was charged with two counts under section 93 of the *National Defence Act*, R.S.C., 1985, c. N-5 [*NDA*] (disgraceful conduct), and two counts under section 129 of the *NDA* (conduct to the prejudice of good order and discipline). A military judge found the Respondent not guilty on all charges. It is from those acquittals that the Crown now appeals. For the reasons set out below, I would grant the Crown appeals and order a new trial on all counts.

II. Preliminary remarks

[4] It is important to note that the Military Judge found the complainant credible. He concluded the words noted above were uttered to the complainant by the Respondent, at the times, and in the places and circumstances, she testified to. The Military Judge accepted the complainant’s evidence as to why, from her perspective, the comments were made. The first incident, according to the complainant, occurred around the time she had filed paperwork to

become a CIC officer. She said the comment caught her off guard. Before then she thought of the Respondent as somebody who was supportive of her. She understood that he intended to convey a message to her. At paragraph 9 of his reasons, the Military Judge said:

> [9] […] She told the Court that she understood she had to get used to that kind of talk.

Of the second incident at the train station in Montreal, the Military Judge said:

> [10] In May 2015, Captain Bannister was in charge of the Prince Edward Island Army Cadets Ottawa tour. [the complainant] was part of the staff for cadets as a CIC officer. She was supervising cadets on this trip. They travelled mostly by train. On the way back from Ottawa, they had to switch trains in Montreal. She was fearing not to meet the timings or to forget any cadet. She got nervous, started to panic and cried. Captain Bannister was there and he tried to calm her down. He told her to calm down and breathe. All of a sudden, he told her, "Let's have sex". Stupefied by such words used by Captain Bannister, she said, "Excuse me?" <u>According to her, Captain Bannister replied, " I'm just trying to lighten the mood."</u> She replied that "It was just not funny." She clearly stated to the Court that she was not expecting such a comment. For this incident, nobody else was present. She told the Court that she was irritated and [angered] by this incident.
>
> [Emphasis added]

She said the two incidents led her to feel hurt and betrayed.

[5] As repugnant as the language of the Respondent was—even more so when one considers the age of the complainant, coupled with the command position of the Respondent—the words he uttered on the dates in question would not constitute a criminal offence under the *Criminal Code*, R.S.C. 1985, c. C-46 [*Criminal Code*]. The issue before the Military Judge was whether those words, viewed in the circumstances of this case, were criminalized as constituting

disgraceful conduct or conduct to the prejudice of good order and discipline, as contemplated by s. 93 or s. 129 of the *NDA*, respectively.

III. Issues

[6] The Appellant sets out six grounds of appeal. Two relate to s. 93 of the *NDA*:

> a. The Military Judge erred in law in his interpretation of the elements of the offence for Disgraceful Conduct contrary to s. 93 of the NDA; and
>
> b. The Military Judge erred in law in failing to consider the risk of harm in his analysis of Disgraceful Conduct contrary to s. 93 of the NDA.

[7] One relates solely to the s. 129 charges:

> d. The Military Judge erred in law by applying a test of certainty to the element of knowledge when considering s.129(2) of the NDA.

[8] Others apply to both the s. 129 and s. 93 charges:

> c. The Military Judge erred in law in refusing to apply his experience and general service knowledge;
>
> […]
>
> e. The Military Judge erred in concluding that there was no evidence that the accused's conduct tended to adversely affect good order and discipline; and
>
> f. The Military Judge erred in law in requiring evidence that the accused's conduct had an impact on other members of the unit in order to prove that the conduct was prejudicial to good order and discipline.

IV. Analysis

A. *Standard of review*

[9] As noted in *R. v. Golzari,* 2017 CMAC 3, 140 W.C.B. (2d) 659 [*Golzari*] at paragraph 23: "[A]n error of law establishes this Court's jurisdiction under Section 230.1 of the NDA". The Notice of Appeal raises questions of law. The applicable standard of review is that of correctness.

B. *Military experience and general service knowledge*

[10] One of the issues that looms large in this case is the extent to which the Military Judge was entitled or obliged to use his military experience and general service knowledge, including whether the use of that experience and knowledge would amount to taking judicial notice. I am satisfied the Military Judge erroneously conflated the concept of judicial notice with the concept of applying his military experience and general service knowledge to make inferences. This conflation prevented him from conducting the proper analysis of the legal issues given his view that the Crown had failed to comply with the *Military Rules of Evidence,* C.R.C., c. 1049 [*MRE*], for taking judicial notice.

[11] In a prosecution under the *NDA*, there are specific rules of evidence, as set out in the *MRE,* governing circumstances which allow a military judge to take judicial notice. Those prerequisites were not followed in this case. The prosecutor did not ask the Military Judge to take judicial notice of anything. There appears to have been some confusion, by the Military Judge, as to what the prosecution was asking as it related to judicial notice compared to drawing inferences based upon his military experience and general service knowledge.

[12] The Military Judge made two distinct errors relating to his military experience and general service knowledge. The first, which relates primarily to his consideration of the charges under s. 93 of the *NDA*, was to require that expert evidence be tendered to prove harm or the risk of harm. The second, which relates primarily to his consideration of the s. 129 charges, was to fail to rely on his own experience and knowledge to determine whether the Respondent's conduct caused prejudice to good order and discipline, but to instead require either direct evidence or formal judicial notice. I will consider each error separately, together with the offence to which it is relevant.

C. *Section 93* of the *NDA*

[13] Although the Military Judge made similar errors in relation to both sections of the *NDA*, the distinctions warrant separate comment even though there is, of necessity, some overlap and repetition.

[14] Each of the incidents, which the Military Judge had accepted as having occurred, gave rise to a charge pursuant to s. 93 of the *NDA* and, in the alternative, separate charges pursuant to s. 129 of the *NDA*. I will deal with s. 93 of the *NDA* first. It states:

> 93. Every person who behaves in a cruel or disgraceful manner is guilty of an offence and on conviction is liable to imprisonment for a term not exceeding five years or to less punishment.

[15] It is for the prosecution to prove beyond a reasonable doubt that the accused behaved in a cruel or disgraceful manner. For the purpose of this appeal, the issue is whether the actions of the Respondent were "disgraceful" within the context of s. 93 of the *NDA*. I will first explain that

"disgraceful conduct" requires assessment of the accused's conduct in its context. I will then explain that expert evidence is not required to prove disgraceful conduct, and that the military judge's expertise will usually be all that is needed to draw the necessary inferences.

(1) The standard of "disgraceful conduct"

[16] In *R. v. Boyle*, 2010 CMAC 8, 417 N.R. 237 [*Boyle*], at paragraph 15, the court suggested that the "[…] law of disgraceful conduct is not well-settled". But the court did not go on to provide guidance as to what the appropriate test was to establish disgraceful conduct under s. 93 of the *NDA*. Since *Boyle*, military judges have been divided on whether accusations under s. 93 of the *NDA* should be assessed by applying a "harm-based test" or whether a reasonable person would find the conduct "shockingly unacceptable". In my view, it serves no useful purpose to parse words and create separate silos. Harm and unacceptability inform one another as to whether an incident is disgraceful. Context counts.

[17] Prior to 2012, one definition of the term "disgraceful" used by military judges was "shockingly unacceptable". In *R. v. Buenacruz,* 2017 CM 4014, Military Judge, Commander Pelletier, reviewed decisions rendered before 2012, noting that there were various references to "shockingly unacceptable", with added descriptors such as shameful, dishonorable and degrading, and references to actions being sudden, upsetting, surprising, inducing strong revulsion or profound indignation, and not satisfactory or allowable. Case law is consistent in holding that the issue of whether the actions of an accused were disgraceful was to be judged according to an objective assessment as to what a reasonable member of the military would consider disgraceful.

[18] A court martial must consider the context of the events in any incident, using its experience and general service knowledge to assess that incident. For example, there may be cases where courts martial are satisfied that comments are more in the nature of operational banter amongst seasoned veterans. Those same comments may be viewed under a different lens when, for example, the events involve a unit CO and young cadets. With that said, I do not, in any way, suggest the incidents in question here would be acceptable no matter how seasoned the military members were.

[19] There have been a number of cases that discuss what must be proven before a conviction will be entered on a s. 93 charge. The Military Judge who heard this matter at court martial level has dealt with a number of earlier trials involving s. 93 charges. I refer for example to *R. v. Larouche*, 2012 CM 3009, where he applied a harm-based test (see also: *R. v. Morel*, 2014 CM 3011; *R .v. Lloyd-Trinque*, 2015 CM 3001; and *R. v. Jackson*, 2017 CM 3001).

[20] The Appellant suggests that the harm-based test is too restrictive, arguing that the proper test is whether a reasonable person would find the conduct shockingly unacceptable. It invites this court to clarify the test to be applied in relation to a charge under s. 93. The Supreme Court of Canada [SCC], in *R. v. Labaye*, 2005 SCC 80, [2005] 3 S.C.R. 728 [*Labaye*], discussed the issue of harm in relation to a charge of indecency in the context of a charge under s. 210.1 of the *Criminal Code* (keeping a "common bawdy-house"). The Military Judge appears to have applied that approach, holding that unless proof of harm is established, the Crown cannot prove its case under s. 93 of the *NDA*. At paragraphs 25 and 26 of his reasons, he said:

> [25] … as well, described by Pelletier MJ in his decision on the verdict delivered in the fall of 2017 in the court martial *R v.*

> *Buenacruz*, 2017 CM 4014 at paragraphs 80 to 83, in order to prove that the conduct of the accused was disgraceful, an objective test based on harm must be applied, which would include the following two steps:
>
> > (a) First, by its nature, the conduct at issue causes harm or presents a significant risk of harm to individuals or society, which includes the Canadian Armed Forces, in a way that undermines or threatens to undermine a value reflected in and, thus, formally endorsed through the Constitution or similar fundamental laws of Canada; and
> >
> > (b) Second, the harm or risk of harm is of a degree that is incompatible with the proper functioning of society which includes the Canadian Armed Forces.
>
> [26] I would add that the purpose of such tests is to avoid the situation where the trier of facts, here, the military judge, uses his personal convictions to determine what is disgraceful or not, or to determine what are the moral values to make such determination.

[21] I agree that the issue of whether the actions of the Respondent were disgraceful must be determined on an objective standard. In seeking a conviction under s. 93 of the *NDA*, the issue is whether the military judge, considering the perspective of a reasonable person with military experience and general service knowledge, is convinced beyond a reasonable doubt that the actions of the Respondent were disgraceful in the context of military community.

[22] Ultimately, what is required is a contextual assessment of the incidents from the perspective of the Canadian Armed Forces [CAF] and the military community. In some incidents, the contextual assessment must also involve consideration as to the manner by which the incidents might be viewed in the non-military community. As stated earlier, s. 93 criminalizes actions that would not constitute crimes in non-military settings. The severity of the offence is reflected in the maximum penalty, which is imprisonment for a term not exceeding

five years. That punishment alone suggests that the offences targeted are ones that do more than raise a level of discomfort, insult, or somewhat offend those in the military community. The term "shockingly unacceptable", the use of which I have noted above, captures some incidents that could attract a charge under s. 93, but is only part of a contextual assessment.

[23] Harm or risk of harm is also but one part of the context – it simply informs the analysis. In the case at bar, the first incident, as already noted, involved a highly charged explicit sexual comment made to an 18-year-old cadet in the presence of a civilian instructor who had been invited to watch. The personal attributes of those involved are relevant to the contextual assessment. Here, the incident occurred when the Respondent was the unit CO at a time the complainant was applying to be a CIC officer. There are a number of potential types of harm that may flow from that type of exchange. Namely, the harm to the young person and the harm to the institution (CAF). There is also a risk of harm to other persons hearing that this is what a CIC officer should come to expect as they progress through the ranks of the CAF. The list could go on.

[24] A court martial should also consider the alleged purpose for which the statements were made in the circumstances. In some cases, the end result may justify the means. For example, how hard a training officer may push his or her troops is to be considered in light of the objective he or she is attempting to achieve. Non-military observers may judge the training as cruel, whereas a training officer may appropriately respond by saying, "I am doing it this way to try and save their lives in the theatre of war, and to that end, it is not cruel".

[25] In addition to “shockingly unacceptable”, there are many other descriptions that capture the essence of what is meant by the term disgraceful. In some cases, any reasonable person might consider an incident as being disgraceful, saying, “I know disgraceful when I see it”. However, the application of an objective standard can never be that simple.

[26] Whether incidents are disgraceful are not to be determined by considering harm as a separate issue. That is to say, there are not two separate silos, one for “shockingly unacceptable” conduct and one for consequences related to “harm or risk of harm”. Whether something is shockingly unacceptable can be informed by the nature of the harm. The more severe the harm or risk of harm, the more likely something is to bring disgrace to the CAF. Conversely, the more shockingly unacceptable an incident is in light of CAF operational and military community norms, the less is required on the scale of harm assessment.

[27] I offer an example as to how context can inform the inquiry. It is unacceptable, though not necessarily shockingly so, for a person to point an unloaded revolver at another and pull the trigger, even after it has been checked to ensure that it is not loaded. It would, however, be shockingly unacceptable to take that same revolver, insert one live round, point it and pull its trigger in a Russian roulette fashion. That incident is not to be judged based on whether the gun fired. Rather, it is to be judged based on the risk of harm combined with the other surrounding circumstances. It can be either the “harm” or “the risk of harm” that informs the assessment as to whether the action was shockingly unacceptable/disgraceful in the context of a s. 93 of the *NDA* charge.

[28] To extend the analogy further, I note that a military judge is expected to judge cases by applying his or her experience and general service knowledge. It may be that a military judge would find both incidents, taken in the military context, shockingly unacceptable/disgraceful, even though the risk of harm in the first instance was minimal. In a non-military context, perhaps not so. This is why it is important to have military judges involved in this process; the experience and general service knowledge they bring to the military justice system is pivotal. In my view, as I will explain, a military judge is best placed to make that determination in the context of the CAF and the *NDA*.

(2) Was expert evidence required to prove harm or risk of harm in this case?

[29] In *Labaye*, the SCC discussed the issue of harm in respect of whether the actions of the accused were indecent. Namely, the SCC asserted the need for expert evidence on the issue of harm, suggesting that in most cases expert evidence would be necessary to prove harm or risk of harm. The Respondent argues that in the absence of expert evidence as to harm or risk of harm, the Military Judge was right to enter an acquittal. I disagree.

[30] There are some things which reasonable persons in a military or civilian community could find harmful without the need for expert evidence. I say this while recognizing that harm comes in many forms. In *Labaye*, the issue of harm was considered relative to the issue of physical or psychological harm caused to participants or observers by the sexual activity in question. In the case at bar, the issue is disgraceful conduct. Persons in the military community are well equipped to evaluate the issue of disgraceful conduct in the context of the CAF without the necessity of expert witnesses. The issue in this case goes to whether the conduct under

review tarnished the CAF as an institution to the point that a military judge would find it disgraceful.

[31] There are some cases where no expert evidence is required. In those cases, the admission of expert evidence would be proscribed by the rules governing the admissibility of expert evidence. If a reasonable military member was as well-equipped as an expert to make an objective determination on the issue of disgraceful conduct, an expert could do nothing more than opine on the ultimate issue. That goes beyond offering assistance in an area that is beyond the knowledge of a reasonable person (*R. v. Mohan*, [1994] 2 S.C.R. 9, 166 N.R. 245, at pp. 21 and 24).

[32] As I have said, the Military Judge referenced *Labaye* and the discussion therein about criminal indecency and the need for expert evidence. In *Labaye*, the SCC said:

> [60] … The judge and jurors are generally unlikely to be able to gauge the risk and impact of the harm, without assistance from expert witnesses. To be sure, there may be obvious cases where no one could argue that the conduct proved in evidence is compatible with the proper functioning of society, obviating the need for an expert witness. To kill in the course of sexual conduct, to take an obvious example, would on its face be repugnant to our law and the proper functioning of society. But in most cases, expert evidence will be required to establish that the nature and degree of the harm makes it incompatible with the proper functioning of society.

[33] I am satisfied that *Labaye* is to be distinguished from the present case. Much of *Labaye* involved the consideration of a case where consenting adults were engaging in sexual activity. It occurred in a club setting. The issue was whether it was indecent as defined by the *Criminal Code*. The Supreme Court assessed the issue of indecency in the context of considering how that

type of activity might cause harm. It proceeded in this manner because the issue of harm had the potential to inform the question of indecency. The Supreme Court was not satisfied that, in the absence of expert evidence, the Crown was able to prove how the acts in question harmed those who participated in the activities. Harm was but one factor informing the issue of whether the activities that occurred in the club were indecent.

[34] The purpose of expert evidence is not to delegate the court's decision-making function on the ultimate issue. Rather, its purpose is to assist the trier of fact by giving him or her the tools necessary to understand the issues beyond their knowledge and experience, upon which they are required to pass judgment. It was not necessary that the Military Judge receive expert evidence on the issue of whether the conduct of the Respondent was disgraceful within the military context. Within the military context, the Military Judge is the expert on the issue of disgraceful conduct. That is one of the reasons why military judges play an essential role in judging cases such as this one, where there is no equivalent charge outside the *NDA*.

(3) Application to this case

[35] I now turn to the inquiry conducted by the Military Judge in the case under appeal. As it relates to the s. 93 charge, the Military Judge erred in law by only considering how the incidents affected the complainant. He determined that the consequences or impact on the complainant were minimal and focused on that as he rendered a verdict of not guilty. The Military Judge failed to consider, from a broader perspective, whether it was appropriate that a CO should be conditioning a cadet, or others in the CAF, to expect or accept such explicit sexually charged comments from a senior officer or that such comments have any place in the CAF. The issue is

whether, considering the relevant contextual factors, the incidents bring disgrace to the CAF. The Military Judge did not consider that issue.

[36] It may be worth comparing the events in question to similar events in a non-military context. How would a similar factual situation be viewed in a high school or college setting with a student and teacher? Would it bring disgrace to those institutions if they were to condone or ignore that type of exchange between a student and instructor?

[37] A next step might be to then ask; if it is disgraceful in a school context, is it more or less disgraceful in the military context? That last question is to be addressed, keeping in mind, as I said above, what the Military Judge brings with him or her in terms of experience and general service knowledge. That experience and service knowledge will uniquely equip him or her to make the determination in the context of the CAF community as viewed by themselves and as viewed by others.

[38] I note that the Military Judge used phrases like “awkward” and “embarrassing” in referring to the fact that the complainant understood there was context or purpose for using such words to communicate a message. The Military Judge states:

> [36] […] Clearly the victim of those remarks got the intended message by the use of those words in the context described, but clearly also felt embarrassed…
>
> [37] […] She [the complainant] is the one who told the court the meaning of the message intended behind these very awkward comments.
>
> [38] Concerning the first incident, the message was to get used to that type of language if you become a CIC officer and, she told the

> court that during the second incident, the purpose of the message was to calm down, to stop panicking.

[39] Feelings of embarrassment or awkwardness cannot be the bellwether upon which to found a conviction or an acquittal under s. 93. This case is about a much larger issue than how the complainant responded to the words used. It is about what these incidents say about the CAF. That is, the harm or potential harm to the CAF. Do the incidents bring disgrace to the Respondent; do they bring disgrace upon the CAF? How does or could it impact the military community? How the complainant acted or reacted is not determinative of that issue. Similarly, how other cadets or civilian bystanders reacted, or may have reacted, is not determinative.

[40] The Appellant urged on appeal that laws, regulations and directives, instructions, core doctrine and military customs applicable to the CAF are instructive when assessing whether the incidents bring disgrace upon the CAF. While materials such as the *Queen's Regulations & Orders* [*QR&Os*] and published Codes of Values and Ethics are helpful, they do not dictate the limits of what may be found to be cruel or disgraceful under s. 93 of the *NDA*. The latter is broad in its application and meaning and may well encompass conduct that falls outside the various *QR&Os* as they exist from time to time. That is the case here.

[41] There was no *Cadet Administrative and Training Order* [CATO] that proscribed what was done at the relevant time. Perhaps to state this more accurately, the prosecution could not prove that the Respondent had knowledge of any such order, nor did it need to do so.

[42] This case involved a young cadet, or CIC, hearing these comments from a CO. The Military Judge simply failed to address the broader question as to whether the incidents were disgraceful in the military context. That constitutes an error in law.

[43] In my view the appeals from the acquittals on both s. 93 charges should be allowed and the matters remitted to a different military judge for retrial.

D. *Section 129 of the NDA*

[44] The appeal also involves two acquittals of accusations pursuant to s. 129 of the *NDA.* Although many of the observations made by me in the s. 93 analysis overlap, I am satisfied the issues differ slightly in relation to the s. 129 charges**.** Separate consideration is warranted, even at the risk of repetition.

(1) Conduct to the prejudice of good order and discipline

[45] The particulars of both s. 129 charges are as follows:

> **CONDUCT TO THE PREJUDICE OF GOOD ORDER AND DISCIPLINE**
>
> In that he, on a Sunday afternoon between November 2012 and March 2013, while on duty as the Commanding Officer of 148 Royal Canadian Army Cadet Corps, at Queen Charlotte Armouries in Charlottetown, Prince Edward Island, stated to [the complainant] “want to fuck me on the desk” or words to that effect, contrary to Cadet Administrative and Training Order 13-24 Harassment Prevention and Resolution…
>
> […]
>
> In that he, in May 2015, in Montreal, Quebec, on a return trip from Ottawa, Ontario to Charlottetown, Prince Edward Island, while on

> duty as the Commanding Officer of 148 Royal Canadian Army Cadet Corps, stated to [the complainant] "want to fuck?" or words to that effect, contrary to Cadet Administrative and Training Order 13-24 Harassment Prevention and Resolution…

[46] The Crown has a number of ways to prove an offence under s. 129 of the *NDA*. Firstly, provided the Crown can prove an accused has notice of what, in this case, was a CATO 13-24, the Crown will have proven prejudice if the Military Judge was satisfied that the actions of the accused contravened the CATO. Proof of notice must be beyond a reasonable doubt. The Military Judge found that, although the accused probably had notice, it was not proven beyond a reasonable doubt. Secondly, the Crown can prove the offence was committed if there is actual evidence of prejudice to "good order and discipline" based on objective criteria of prejudice or likelihood of prejudice. In this case, the Military Judge concluded there was insufficient evidence of prejudice and acquitted the accused. He found that any disruption of good order and discipline was due to the accused's being replaced rather than the incidents themselves.

[47] The operation of s. 129 of the *NDA* is explained in *R. v. Tomczyk*, 2012 CMAC 4, 443 N.R. 82 [*Tomczyk*], as follows:

> [24] Section 129 is a broad provision that criminalizes any conduct judged prejudicial to good order and discipline in the CF. Subsection 129(1) creates the offence while subsection 129(2) deems a number of activities to be prejudicial. In *R. v. Winters (S.)*, 2011 CMAC 1, 427 N.R. 311 at para. 24 Létourneau J.A. summarized the constituent elements of a section 129 offence as follows:
>
> > 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.

> [25] Proof of prejudice is an essential element of the offence. The conduct must have been actually prejudicial (*Winters, supra*, paras. 24-25). According to *R. v. Jones*, 2002 CMAC 11 at para 7, The standard of proof is that of proof beyond a reasonable doubt. However, prejudice may be inferred if, according to the evidence, prejudice is clearly a natural consequence of proven acts; see *R. v. Bradt (B.P.)*, 2010 CMAC 2, 414 N.R. 219 at paras. 40-41.

[48] As I noted in relation to my s. 93 analysis, the words uttered by the Respondent in the circumstances would not constitute a criminal offence under the *Criminal Code*. They are only criminalized if they meet the requirements for a conviction under the provisions of the *NDA*, including s. 129.

(2) Proof of prejudice and judicial notice

[49] In his analysis, the Military Judge considered whether the evidence satisfied him that the words and actions of the Respondent caused harm, or risk of harm under s. 129 resulting in a prejudice to good order and discipline. He referred to the burden on the Crown and concluded:

> [47] […] There is no evidence on the impact to members of the unit or other officers. I do not deny that there is evidence that impacted on [the complainant], but there is no impact described by anybody about what his conduct had on the unit, on other officers or any evidence that he intended to do so. Mainly what the Court understood, what caused the main disturbance at the unit was the fact that Captain Bannister was removed and replaced.

[50] The Appellant says the Military Judge erred in not using his military experience and general service knowledge to determine that the actions of the Respondent constituted conduct to the prejudice of good order and discipline. The Appellant contends that the Military Judge erred by concluding that a military judge can only use his or her experience and general service

knowledge to assess "prejudice to good order and discipline" if judicial notice is requested by the prosecution.

[51] The Military Judge said he agreed with the comments of Military Judge, Commander Sukstorf, as expressed in *R. v. Rollman*, 2017 CM 2005 [*Rollman*]. In this case, it appears the Military Judge conflated the concepts of judicial notice and inferential reasoning. In *Rollman*, Sukstorf, MJ, said the Crown must prove the element of prejudice beyond a reasonable doubt. Without the benefit of the deeming provision found in subsection 129(2) of the *NDA*, there must be proof beyond a reasonable doubt, of actual prejudice (*Tomczyk*; *R. v. Winters*, 2011 CMAC 1, 427 N.R. 311; *R. v. Jones*, 2002 CMAC 11, 6 C.M.A.R. 293 [*Jones*], at para. 7). I agree that prejudice must be proven to the criminal standard.

[52] While the Military Judge referred to, and said he accepted the comments in *Golzari*, his conflation of the concepts of judicial notice and application of experience and general service knowledge to make inferences, led to confused reasoning. As a consequence, he denied himself the opportunity to employ inferential reasoning as it relates to the issue of prejudice.

[53] In *Golzari*, Justice Mosley referenced *Jones* by saying:

> [76] However, a close reading of *Jones* demonstrates that the Court was careful to emphasize that prejudice need not be confined to a physical manifestation of injury to good order and discipline. At paragraph 7, the Court stated:
>
> > Proof of prejudice can, of course, be inferred from the circumstances if the evidence clearly points to prejudice as a natural consequence of the proven act. The standard of proof is, however, proof beyond a reasonable doubt.

> [77] This language suggests that prejudice will be proven, beyond a reasonable doubt, so long as the totality of the circumstances supports the finding that the conduct in question would *likely* result in prejudice to good order and discipline. Since the Court in *Jones* left the window open to infer prejudice from the circumstances, I agree with the Appellant that "prejudice" encapsulates conduct that "tends to" or is "likely to" result in prejudice.

[54] I adopt the comments of Mosley J.A. as being the correct statement of the law. Justice Mosley went on to discuss the meaning of "prejudice" as set out in s. 129 of the *NDA*:

> [78] Prejudice in its ordinary grammatical sense means "harm or injury that results or may result" (Concise Oxford English Dictionary). The addition of the words "to the" before "prejudice" incorporates an element of risk or potential and the expression, read as a whole, does not require that harmful effects be established in every instance. **Though evidence of actual harmful effects may exist, it is not required for conduct to be punished in the context of military discipline.** Military discipline requires that conduct be punished it if carries a real risk of adverse effects on good order within the unit; this is more than a mere possibility of harm. If the conduct tends to or is likely to adversely affect discipline, then it is prejudicial to good order and discipline.
>
> [Emphasis added]

[55] In the case under appeal, as to the evidence of harm or prejudice, the Military Judge said:

> [47] […] When I look at the evidence put before the Court, there is not much evidence on the harm or real risk of harm caused by his behaviour on good order and discipline. There is no evidence that would lead the Court to conclude beyond a reasonable doubt that his conduct tends to adversely affect good order and discipline. There is no evidence on the impact to members of the unit or other officers. …

[56] It is of import that in the next paragraph the Military Judge said:

> [48] Now, concerning the period of time the first incident allegedly occurs, concluding that there is no disgraceful behaviour of

> conduct to the prejudice of good order and discipline proved beyond a reasonable doubt by the prosecution, I do not intend to address this issue because it would be unnecessary in the circumstances. However, **I would like to mention that I would have been open to consider a special finding on this issue.**
>
> [Emphasis added]

[57] I take from the highlighted portion above that the Military Judge was suggesting that the prosecution did not ask him to take judicial notice of whether the actions of the member were prejudicial to good order and discipline. I can see no other explanation for that passage. In saying this, I reference below both the *MRE* and a lengthy exchange between the prosecutor and the Military Judge.

[58] The *MRE* establish a process that is different in the military justice system as compared to a non-military hearing:

> **Judicial Notice**
>
> **Limitation on Judicial Notice**
>
> **14** Except as authorized by these Rules, a court shall not take judicial notice of a fact or matter.
>
> **Required Judicial Notice**
>
> **15 (1)** A court shall, whether or not requested to do so by the prosecutor or the accused, take judicial notice of
>
> **(a)** the accession and death of the Sovereign;
>
> **(b)** the title and sign manual of the Sovereign;
>
> **(c)** the constitution of Canada;
>
> **(d)** the Great Seal of Canada;
>
> **(e)** Acts and resolutions of the Parliament of Canada;

(f) Acts and resolutions of the legislatures of the provinces and Territories of Canada;

(g) the territorial limits of Canada and of the provinces of Canada;

(h) the existence of an emergency recognized by the Government of Canada;

(i) the component or unit being on active service; and

(j) the status of foreign governments.

(2) 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.

Discretionary Judicial Notice

16 […]

(2) Subject to section 18, a court may, whether or not requested to do so by the prosecutor or the accused, take judicial notice of

(a) all matters of general service knowledge;

(b) particular facts and propositions of general knowledge that, in view of the state of commerce, industry, history, language, science or human activity, are at the time of the trial so well known in the community where the offence is alleged to have been committed that they are not the subject of reasonable dispute; and

(c) particular facts and propositions of general knowledge, the accuracy of which is not the subject of reasonable dispute, that are capable of immediate and accurate verification by means of readily available sources.

Judicial Notice on Request

17(1) The prosecutor or the accused may request the court to rule that a fact or matter is within section 15 or 16, and he shall if requested by the court, furnish the court with information relevant to the fact or matter.

> **(2)** The court shall give the adverse party an opportunity to oppose the granting of the request.
>
> **Determination of Propriety of Taking Judicial Notice**
>
> **18(1)** When a court proposes to take or appears to be taking judicial notice of a fact or matter under section 15 or 16, or is requested to take judicial notice of it under section 17, both prosecutor and accused have the right to submit informally evidence and argument as to the competence of the court to take, or the propriety of the court taking, judicial notice.
>
> **(2)** When the court or the judge advocate raises a question as to whether judicial notice may be taken of a fact or matter under section 15 or 16, the judge advocate shall decide the question, and his decision shall be final.
>
> **(3)** When determining whether to take judicial notice of a fact or matter, the members of a court and the judge advocate may consult any source of pertinent information, including a person, document or book, whether or not furnished by a party, and use the information obtained therefrom.
>
> **(4)** If the information possessed by the court, regardless of source, fails to convince the judge advocate that a fact or matter is clearly within section 15 or 16, he shall rule against taking judicial notice of the fact or matter.
>
> **Effect of Taking Judicial Notice**
>
> **19(1)** No evidence of a fact which a court has taken judicial notice need be given by the party alleging its existence or truth.
>
> **(2)** When a court has taken judicial notice of a fact, it is conclusively taken to be true, and no allegedly contradictory evidence is thereafter admissible.

[59] The Military Judge's comments suggest that in the absence of direct evidence of prejudice or the use of the judicial notice process, there is no other way to prove prejudice. This is to conflate the concept of judicial notice with the concept of a military judge applying his experience and general service knowledge to make inferences. To stop there is to fail to ask whether the prosecution has proven prejudice by inference.

[60] The Appellant says the Military Judge should have applied his general service knowledge and experience to determine that the words the Respondent uttered were prejudicial. The Appellant relies heavily upon the comments of Justice Mosley in *Golzari*:

> [79] […] in most instances, the trier of fact in a Court Martial should be able to determine whether the proven conduct is prejudicial to good order and discipline based on their experience and general service knowledge: [*Smith v. The Queen,* (1961) 2 C.M.A.R. 159 at 164].

[61] Military judges are expected and entitled to bring that experience and general service knowledge with them to the Bench. Experience and general service knowledge are not to be confused with the judge's values. A judge who decides a case based on his or her values injects a subjective element. The Military Judge was clearly aware of the requirement that he judge this case based upon an objective standard not a subjective one. He specifically noted that in relation to the issue of the s. 93 of the *NDA* charges when he said:

> [26] I would add that the purpose of such tests is to avoid the situation where the trier of facts, here, the military judge, uses his personal convictions to determine what is disgraceful or not, or to determine what are the moral values to make such determination.

[62] I refer to the Crown submissions at trial and again reference the Military Judge having said that he would have been open to a special verdict. I set out the exchange to highlight the fact that the Military Judge conflated judicial notice with the application of experience and general service knowledge to make inferences:

> PROSECUTOR: Now, Your Honour, the main argument of prosecution is that despite that the CATO exists and it's impossible that – to us it's impossible that Captain Bannister did not know about it, despite that, the conduct in question here, in and of itself is to the prejudice of good order and discipline / that as there is a real intangible risk of prejudice associated with that conduct.

Your Honour as stated in the Court Martial Appeal Court [decision] of *Golzari*, the evidence needs to show that the conduct carried a real risk of prejudice to the good order, that discipline that the conduct tends or is likely to affect discipline. The prosecution does not need to prove that the conduct did in fact [result] in an actual prejudice. At paragraphs 71 to 76 of *Golzari* the judge discusses the impact of the decision in *Jones* and states that at paragraph 7 of *Jones*, the Court was careful to emphasize that there is not need for an actual physical manifestation of prejudice.

Paragraph 7 – I gave you the *Jones* decision as well but paragraph 7 of *Jones* is quoted in paragraph 71 to 76 of *Golzari.* Also the judge in *Golzari* went on at paragraph 77 in saying this would suggest that the prejudice would be proven beyond a reasonable doubt when a circumstance shows that the conduct in question will likely [result] in prejudice of good order and discipline and he concludes at paragraph 78 that this requires "more than a mere possibility of harm," it is something that carries a real risk of adverse effects on good order within the unit.

That "conduct tends or is likely to adversely affect discipline". And at paragraph 79, the judge also confirms that a military judge can rely on their military experience and knowledge "to determine whether the proven conduct is prejudicial to good order and discipline based on their experience in general service knowledge." That refers to the *Smith* decision, Your Honour.

MILITARY JUDGE: The what?

PROSECUTOR: *Smith.* I didn't print *Smith,* but the judge in *Golzari* is quoting [the] *Smith* decision, Your Honour, at that paragraph.

MILITARY JUDGE: Just a second. Okay, have you read the decision of Judge Sukstorf in *Rollman.*

PROSECUTOR: No, Your Honour.

MILITARY JUDGE: Where she commented about *Golzari* and how careful a trial judge, specifically a military trial judge should be in assessing a situation in that way. Especially paragraphs 83, 84, about judicial notice. The experience of a judge as a matter of being new and she said [at para. 82]:

> In making his [comment] at paragraph 79, Mosley J.A. references the CMAC decision of *Smith.* In *Smith,* although there were a number of issues on

> appeal, the one relied upon in *Golzari* was the appellant's argument that the Court failed to comply with the judicial notice provisions under the *MRE*. However, in rendering its decision, the CMAC panel in *Smith* stated at paragraph 12 of its decision, that it had "read the record with great care and was unable to find that *during the hearing of the evidence* [any] question arose as to whether the Court could or could not take judicial notice of matters of general service knowledge." However at paragraph 25, the Court also found that it was "abundantly clear that each ingredient of the charge was fully established by the evidence of Crown witnesses and not denied by the appellant or his witnesses." As such, it was clear that in the facts of the *Smith* case, the trier of fact did not have to rely upon an inference drawn form its own general service knowledge, but rather there was specific evidence before the Court upon which the decision could be made.

That's her comment.

> There is nothing new here. One of the ways in which matters of general service knowledge can be specifically relied upon by a [trier of fact] is through the taking of judicial notice under the *MRE*. […]

I understand that you have not requested this Court to take judicial notice of any other specific matter.

PROSECUTOR: **No, Your Honour.**

MILITARY JUDGE: That's correct? Okay.

> Judicial notice in the context of a court martial is codified in the *MRE* and permits the trial judge to take into consideration all matters of general service knowledge as well as a range of other facts and propositions of general knowledge. Judicial notice is the acceptance by the Court, without the requirement of proof, of any fact [or] matter regarding general service knowledge that is so generally known and accepted in the military community that it cannot be reasonably questioned or any fact [or] matter that can readily be determined or verified by resort to sources whose accuracy cannot reasonably be questioned. Even where judicial notice has been taken, the [trier] of fact must

> be careful to limit it to matters of general knowledge or facts known to the "ordinary" military person and is not entitled to apply knowledge that he or she might have by reason of military [specialty] or personal experience.

And I have expressed a couple of times the fact that it would be difficult for general – for lawyers, generally speaking, to rely on judicial notice of – having the judge presiding at the court martial to take judicial notice for the Court on a matter of the general service based on his own experience or knowledge because I would suggest to you, as suggested by Judge Sukstorf, that every judge has a different background and experience and you don't know mine, as you don't know the one of Judge Pelletier, Judge Sukstorf. It would be difficult, it would be clearly impossible for the parties to argue, you should know this or not know this.

The other thing is those strict rules in the *MRE*'s as you may see would require counsel to […] put in their evidence to the judge that they would like to rely on judicial notice on relation to a specific matter about general service and the judge has – **must** – not has, **must** allow parties to make representation about if the Court should take or not take judicial notice of that fact. So [the] *Military Rules of* [*Evidence*] are clear: if the Court must rely on such thing like this it must be at least discussed during the presentation of the evidence, not once the evidence is closed.

PROSECUTOR: Yes, Your Honour.

MILITARY JUDGE: How would I do that? I am just trying to – and I'm not disputing *Golzari* or the comments made. I'm just taking the comments made by Judge Sukstorf to say, fine, but you want me to rely on my own experience to make a determination of that sort?

PROSECUTOR: Your Honour, I was simply quoting their paragraph in *Golzari,* that are of interest today. I'm not suggesting that …

MILITARY JUDGE: But what are you suggesting me to do?

PROSECUTOR: I was quoting the analysis of the …

MILITARY JUDGE: I know you're quoting but what do you expect from the Court?

PROSECUTOR: I – Maybe I may continue my submissions maybe that will be clear.

> MILITARY JUDGE: I'm asking a question, I think I deserve an answer.
>
> PROSECUTOR: Your Honour, I was explaining what is in *Golzari*. To me […] what the Court Martial Appeal Court [explains] in *Golzari*, the way to [prove a] 129 offence and that a 129 offence can be proven where a conduct tends or is likely to affect discipline and I was simply highlighting that the judge also said that this – the judge can rely on their military experience and knowledge to do that. But I haven't applied *Golzari* to what I want to discuss now, Your Honour. So I'm not saying that there is a specific fact that …
>
> MILITARY JUDGE: But do you expect me to take judicial notice of something?
>
> PROSECUTOR: No, Your Honour.
>
> [Emphasis added]

[63] The process of applying experience and general service knowledge to the inferential reasoning process is distinct from the process of taking judicial notice. As part of an inferential reasoning process, a Military Judge must, based on his or her experience and general service knowledge, ask whether the words uttered in this case can be considered "conduct to the prejudice of good order and discipline". As I discuss below, this can be answered without direct evidence on the issue of prejudice.

[64] In *Golzari*, this Court was faced with the appeal of an acquittal of Corporal [Cpl] Golzari on a charge under s. 129 of the *NDA*. This Court allowed the appeal and ordered the matter remitted to a different Military Judge for retrial. The charges stemmed from an incident at the gate of CFB Kingston. At the time, there was an increased level of security given that two members of the CAF were killed several days prior at other locations. Cpl Golzari, then off duty, provided ID but refused to answer questions put to him by the security officer at the gate.

Military Police [MP] were called and arrived in a military police car with flashing lights activated. The MP Officer advised of the increased security and the right to know details of Cpl Golzari's attendance at the base. Cpl Golzari again refused to provide details as to where he was going on the base. He also refused to move his vehicle, which by then was obstructing other traffic attempting to enter the base. He also refused a direct order from the ranking Sergeant (the MP Officer) to move the car. Cpl Golzari was warned and arrested. An issue arose as to the means by which prejudice could be proven.

[65] In *Golzari*, Justice Mosley opined that *Jones* left the window open to infer prejudice. I agree. It is open to a Military Judge to infer prejudice from the circumstances in a proceeding under s. 129. In determining whether prejudice is proven beyond a reasonable doubt, using inferential reasoning, a Military Judge must apply his or her experience and general service knowledge. As I have noted above, this differs from taking judicial notice.

[66] This is consistent with the Court's approach in *Smith v. The Queen* (1961), 2 C.M.A.R. 159. In commenting upon the lack of definition of the nature of the act, conduct, disorder or neglect that must be proven to establish prejudice of good order and discipline for the predecessor to s. 129(1), this Court held (at p. 165):

> […] the service tribunal may apply its general military knowledge as to what good order and discipline require under the circumstances, and so come to a conclusion whether the conduct, disorder, or neglect complained of was to the prejudice of both good order and discipline…

(3) Application to this case

[67] In the case on appeal, there was limited direct evidence of prejudice, other than what the Military Judge described as the "discomfort" or "awkwardness" of the complainant. That evidence, by itself, would fall short of proving "prejudice" beyond a reasonable doubt. The Military Judge erred in not continuing his analysis by applying his military experience and general service knowledge. Using that knowledge and experience, he was required to ask whether, on the totality of the evidence, in the circumstances of this case, prejudice to good order and discipline could be inferred from the facts as proven.

[68] He was not only entitled, but obliged to use the inferential reasoning process. This reasoning process would take into account all the contextual circumstances of the case. The sexual nature of the comments, the presence of a civilian instructor in the first incident, the age of the complainant at the relevant times, and the power imbalance. In the first incident, the Respondent was, as a CO, training a young cadet to accept that the types of sexually charged comments he made were something she had to get used to in the CAF. Did she have to get used to that type of comment or would that type of comment amount to prejudice to good order and discipline in the CAF? Alternatively, was he teaching a potential future leader that this was an appropriate teaching strategy? These are the types of questions the Military Judge was required to consider.

[69] The Military Judge erred by failing to consider whether prejudice to good order and discipline had been proven to the required standard using inferential reasoning. He also erred by failing to apply his own military experience and general service knowledge and by failing to consider the broader prejudicial impact on the CAF at large.

V. Disposition

[70] As a result of the conclusions I have set out above, I would set aside the decision of the Military Judge and direct a trial take place before a different Military Judge on the first four charges on the charge sheet.

"J.E. Scanlan"
J.A.

"I agree.
B. Richard Bell, Chief Justice"

"I agree.
Elizabeth A. Bennett, J.A."

COURT MARTIAL APPEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	CMAC-592
STYLE OF CAUSE:	HER MAJESTY THE QUEEN v. CAPTAIN BANNISTER
PLACE OF HEARING:	HALIFAX, NOVA SCOTIA
DATE OF HEARING:	NOVEMBER 21, 2018
REASONS FOR JUDGMENT BY:	SCANLAN, J.A.
CONCURRED IN BY:	BELL, CHIEF JUSTICE BENNETT, J.A.
DATED:	MAY 1, 2019

APPEARANCES:

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Lieutenant-Commander Mark Létourneau	FOR THE RESPONDENT

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