

**Court Martial Appeal Court
of Canada**



**Cour d'appel de la cour martiale
du Canada**

Date: 20211223

Docket: CMAC-605

Citation: 2021 CMAC 10

[ENGLISH TRANSLATION]

**CORAM: BELL C.J.
ROY J.A.
MCVEIGH J.A.**

BETWEEN:

CAPTAIN ÉRIC DUQUETTE

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Québec, Quebec, on June 29, 2021.

Judgment delivered at Ottawa, Ontario, on December 23, 2021.

REASONS FOR JUDGMENT OF THE COURT BY:

THE COURT

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REASONS FOR JUDGMENT OF THE COURT

I. Introduction and summary

[1] The appellant, Captain (Capt) Éric Duquette, is appealing the verdict and sentence imposed by a military judge following a trial at which he was convicted of three offences. One of the punishments imposed on Capt Duquette was a reduction in rank from major to captain.

[2] The events that led to the three convictions and the imposition of the sentence date back to December 1, 2018, when the unit to which Capt Duquette belonged was holding its Christmas celebrations on the Bagotville military base in Quebec. It was during this event, which some 200 people attended, that the acts with which Capt Duquette is accused of, allegedly occurred. Three charges were laid:

[TRANSLATION]

First charge

Section 130 NDA (271(b) Cr.C.)

OFFENCE PUNISHABLE UNDER SECTION 130 OF THE
NATIONAL DEFENCE ACT, NAMELY SEXUAL ASSAULT,
CONTRARY TO SECTION 271(B) OF THE CRIMINAL CODE

Particulars: In that, between 1 and 2 December 2018, at or near
2 Wing Bagotville, Province of Quebec, he sexually assaulted P.B.

Second charge

Section 129 NDA

CONDUCT TO THE PREJUDICE OF GOOD ORDER AND
DISCIPLINE

Particulars: In that, between 1 and 2 December 2018, at or near
2 Wing Bagotville, Province of Quebec, he sexually harassed P.B.
contrary to DAOD 5012-0.

Third charge

Section 95 NDA

ILL TREATMENT OF SUBORDINATES

Particulars: In that, between 1 and 2 December 2018, at or near
2 Wing Bagotville, Province of Quebec, he ill-treated P.B., who by
reason of her rank and office was subordinate to him, by touching
her buttocks.

The relevant portions of Defence Administrative Order and Directive (DAOD) 5012-0, entitled “Harassment Prevention and Resolution”, are reproduced in the Appendix.

[3] For the reasons that follow, we order that the appeals from the convictions on the first and third charges be allowed and that a new trial take place with respect to those charges, that the appeal from the conviction on the second charge be dismissed, and that the appeal from the sentence for the second charge be dismissed.

II. Issue and its framing in light of the case law

[4] In essence, the issue is whether the verdict rendered may be considered a safe verdict, that is to say, whether the verdict is reasonable. A reasonable verdict is a verdict that a properly instructed jury could have rendered. (See, *R. v. R.P.*, 2012 SCC 22, [2012] 1 S.C.R. 746, at para. 9; *R. v. Yebes*, [1987] 2 S.C.R. 168 at p. 185, 1987 CanLII 17 (SCC); *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, at para. 36 [*Biniaris*].) A court of appeal may find that a verdict is unreasonable in circumstances where a judge drew an inference or made a finding of fact that is contradicted by the evidence or that appears to be incompatible with the evidence received without having been contradicted by other evidence or rejected by the trial judge. In *Biniaris*, *supra*, the Court, per Arbour J., stated the following (at para. 37):

. . . [I]n trials by judge alone, the court of appeal often can and should identify the defects in the analysis that led the trier of fact to an unreasonable conclusion. The court of appeal will therefore be justified to intervene and set aside a verdict as unreasonable when the reasons of the trial judge reveal that he or she was not alive to an applicable legal principle, or entered a verdict inconsistent with the factual conclusions reached. These discernable defects are themselves sometimes akin to a separate error of law, and therefore easily sustain the conclusion that the

unreasonable verdict which rests upon them also raises a question of law.

[5] A verdict may be “unreasonable even if supported by the evidence” (*R. v. Sinclair*, 2011 SCC 40, [2011] 3 S.C.R. 3, at para. 17, Fish J. (dissenting in the result), citing *R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190, at para. 57 (Charron J., reasons for judgment), paras. 77–80 (Binnie J., concurring in substance), and para. 97 (Fish J., dissenting in the result)). Moreover, as noted by Fish J. in *Beaudry*, the verdict of a judge may be unreasonable if it is “[a] verdict that was reached illogically or irrationally” (*Beaudry*, at para 97). (See also, *Sinclair*, *supra*, at paras. 4 and 15–17, Fish J. (dissenting in the result), and para. 44, LeBel J.) As Abella J. explained in *R. v. C.P.*, 2021 SCC 19, at para. 29:

[29] Arbour J.’s comments in *Biniaris* led to the adoption, in *R. v. Beaudry*, [2007] 1 S.C.R. 190, and *R. v. Sinclair*, [2011] 3 S.C.R. 3, of a narrowly expanded, second avenue of review for unreasonableness. A verdict reached by a judge may be unreasonable, even if supported by the evidence, if it is reached “illogically or irrationally” (*Beaudry*, at paras. 96-97, per Fish J. (dissenting in the result); *Sinclair*, at paras. 4 and 15-17, per Fish J. (dissenting in the result), and at para. 44, per LeBel J.). This may occur if the trial judge draws an inference or makes a finding of fact essential to the verdict that is plainly contradicted by the evidence relied on by the judge in support of that inference or finding, or shown to be incompatible with evidence that has neither been contradicted by other evidence nor rejected by the trial judge (*Sinclair*, at paras. 4, 16 and 19-21; *R. v. R.P.*, [2012] 1 S.C.R. 746, at para. 9).

The issue is whether the reasons of the military judge reveal an intelligible foundation that will permit meaningful appellate review.

III. Analysis

[6] Three witnesses testified for the prosecution. Seven witnesses were heard for the defence, including the accused.

A. *Sergeant P.B.*

[7] The first witness heard by the Court Martial was the complainant. At the time of the alleged offences, Sergeant (Sgt) P.B. held the rank of master corporal, and Capt Duquette held the rank of major—a difference of seven ranks. The promotion to sergeant occurred prior to the trial. In her testimony, Sgt P.B. recounted two incidents that occurred on the evening of December 1, 2018. These incidents took place nearly an hour apart.

[8] Sgt P.B. testified that while she was on the dance floor between 9:00 p.m. and 10:00 p.m., she felt someone touch her left buttock. At that time, she described the scene as a circle of people dancing. As she turned about 90 degrees to change places, she felt contact with someone. Sgt P.B. stated that she felt a hand touching her left buttock and that she turned around and noticed Capt Duquette lowering his right arm. She further stated that Capt Duquette was to her left, slightly behind her, about one metre away. Sgt P.B. testified that there were about ten people on the dance floor at the time.

[9] Sgt P.B. could not specify exactly how much pressure she felt when she was touched because she was too much in shock. She testified as follows [TRANSLATION]: “I felt someone

touch my buttock, I froze, I turned around and I saw that he was pulling his hand away” (p. 38 of the Appeal Book). She testified that Capt Duquette went on his way and that they did not speak.

[10] Sgt P.B. also testified that Ms. M.E.T. and Ms. K.J., two of her friends who were on the dance floor at the time, saw what happened. She made this observation because, according to her, the three of them had talked about it that evening (p. 40 of the Appeal Book).

[11] Sgt P.B. also testified about a second incident that occurred just before 11:00 p.m. She testified as follows:

[TRANSLATION]

Q. What happened?

A. Just before 11 p.m., 2300 hours, I had my back to the DJ and Major Duquette pressed up against me, in front of me, and whispered [TRANSLATION] “You’re fucking hot” into my ear.

(p. 41 of the Appeal Book)

...

Q. Can you describe to me—I understand that you say he was pressed up against you, but can you describe to me what part of the body was touching?

A. The entire chest area, the thighs; there was really no space between our two bodies.

Q. You say he whispered something in your ear. How far was he from your ear?

A. A couple of inches.

Q. How long did the contact last?

A. The time it took for him to get in front of me and talk to me. Maybe five to ten seconds in total.

Q. What did you do?

A. I grabbed him by the shoulders. I pushed him an arm's length away and I left.

Q. Can you describe to me the amount of force you used to push him away?

A. I pushed him an arm's length away, but not—I didn't shove him, I just backed him off a distance the length of my arms, and after that I left.

Q. What was his reaction?

A. He stayed there—he backed away, obviously, then he looked at me, or at least he was—his face was turned towards me. Then I left. (p. 42 of the Appeal Book)

[12] On re-examination, counsel for the prosecution took Sgt P.B. back to the second incident Capt Duquette is alleged to have committed. Counsel for the prosecution had her confirm that the respondent was pressed up against her. Counsel for the prosecution also specifically called the complainant's attention to the respondent's use of his hands during the incident. The complainant did not elaborate despite the invitation to do so. Sgt P.B. did not refer to anyone touching her posterior, or even a buttock, during the second incident.

B. *Ms. K.J.*

[13] The second witness for the prosecution was Ms. K.J., a friend of the complainant. Ms. K.J.'s testimony referred to only one incident that she allegedly witnessed. Sgt P.B. testified that her two friends witnessed both incidents. Ms. K.J. testified to only one incident, corresponding to the first of the two incidents, which Ms. K.J. places between 9:00 p.m. and 10:00 p.m. (p. 146, Appeal Book) on December 1, 2018. This is consistent with the time period in which the first incident allegedly occurred, according to Sgt P.B. In addition, Ms. K.J. stated

that this was the only incident that she witnessed (p. 163, Appeal Book). The second incident allegedly occurred just before 11:00 p.m.

[14] As for the actions to which Ms. K.J. referred, they involved the touching of a buttock. However, the witness said that Capt Duquette touched Sgt P.B.'s right buttock with his left hand. This is the opposite of what Sgt P.B. stated in her testimony. She said that Capt Duquette touched her left buttock with his right hand.

[15] Ms. K.J. was rather specific about her recollection as she told the trial court that she was positioned diagonally to the right of Sgt P.B. She therefore would have seen, from that position, the right buttock being touched. Furthermore, Ms. K.J. stated that the contact was clear, with some force, as she said he [TRANSLATION] "grabbed hold of a buttock" in her testimony.

C. *Ms. M.E.T.*

[16] The third witness for the prosecution was Ms. M.E.T. She spoke only of one incident, which she placed just before 11:00 p.m. She initially described the incident as follows, at pages 184–185 of the Appeal Book:

[TRANSLATION]

Q. What did you notice? What happened next, when you were on the dance floor?

A. We were having a lot of fun, and at one point, well, a man approached us. And then he started dancing more suggestively looking for more than just dancing. And then at one point, well, he grabbed [P.]. He created a very uncomfortable situation for everyone.

Q. You said that he grabbed [P.]. Can you explain to me what you mean by that?

A. Well, he was hanging around her a lot—around all of us to some extent, but mainly around her. And at one point, well, that's it, he got too close to her. She turned around. And then, well, that's when he grabbed hold of her. He grabbed hold of her behind firmly.

Q. You said that he approached her, how close?

A. He was pressed up against her.

Q. And how was he positioned in relation to her?

A. At the beginning we were all facing each other while dancing, and at one point, in circling around, she ended up turning around to face him. And that's when he grabbed her. When he grabbed her, her back was to me.

Q. You said he grabbed her. Where did he grab her?

A. On her buttocks.

Q. With what?

A. Both hands.

Q. And with what force did—how much force did he use?

A. Enough force to not leave any confusion.

Q. When you say [TRANSLATION] “to not leave any confusion”, what do you mean by that?

A. Well, I mean it wasn't just: oh, my hand accidentally slipped. No, no. He—well. He really grabbed her.

Q. And what was Sergeant [P.B.]'s reaction in that moment?

A. She pulled away. She was visibly upset. And that's when we saw a leaving of the dance floor.

Q. Who's that? You said [TRANSLATION] “we saw a leaving of the dance floor”.

A. Well, the girls who were dancing in a circle.

Q. No, no, I meant, who left the dance floor?

A. Oh, [P.]

Q. Now, you said she pulled away. How did she do that?

A. She pushed the hands away, she backed up and she left.

Q. She pushed the hands away, whose hands?

A. The man who grabbed her buttocks.

[17] It seems clear that Ms. M.E.T.'s description is not consistent with either that of Sgt P.B. or that of Ms. K.J. Sgt P.B. did not testify in any way that she was grabbed in the second incident, despite the attempt by counsel for the Crown to encourage her to do so. This was nonetheless what Ms. M.E.T. attested to with regard to the second incident. Nor did Ms. K.J. speak of witnessing the complainant being grabbed with two hands.

[18] Ms. K.J. referred to the left hand on the right buttock. But this is also inconsistent with the complainant's testimony that it was the left buttock that was touched in the first incident. It is certainly not a question of an action such as the one described by Ms. M.E.T., where it was the entire posterior that was grabbed by the accused with both hands. Furthermore, when Sgt P.B. moved Capt Duquette away, she did not say that she seized him by the hands but rather by the shoulders. Sgt P.B. testified that she knew nothing about where Capt Duquette's hands were during the second incident.

[19] Ms. M.E.T. stated that she discussed this matter with Ms. K.J. over the next few days and insisted on the fact that everyone saw the same thing at the same time. Summarizing what she saw, Ms. M.E.T. testified that she [TRANSLATION] "saw an individual pressing up against another

person and grabbing that person's buttocks on the dance floor, which was certainly not something that anyone expected to happen that night" (p. 188, Appeal Book).

IV. Reasons and verdict on charges 1 and 3

[20] The military judge gave a brief summary of the evidence:

[TRANSLATION]

. . . The complainant recounted two separate incidents to the Court. The first incident is said to have occurred at approximately 10:00 p.m. while she was dancing in a dance circle on the dance floor. She turned to her right to change positions and was touched on her left buttock. When she turned around, she saw that Major Duquette was lowering his right arm, that he was backing up as he was positioned a little to her left. It is clear that there was contact, but she was unable to explain the exact nature of it to the Court as she was surprised and froze, which is why she does not remember the nature of the touch. As for Major Duquette, he apparently simply continued to dance as if nothing had happened. The complainant mentioned that Major Duquette's wife was in the dance circle and that in her opinion, his wife had seen the incident as she had an angry expression on her face. (p. 460 of the Appeal Book)

[21] The judge does not recount what Ms. K.J.'s testimony consisted of, even though the times are consistent and the general description of the incident suggests that Ms. K.J. was speaking of the first incident. The reasons continue:

[TRANSLATION]

She left the dance floor and went to her boyfriend, whom she told what had just happened. He reacted in a way that suggested that he thought that she should not worry about it too much and get back on the dance floor.

She then returned to the dance floor. A little later in the evening, just before 11:00 p.m., a second incident involving Major Duquette reportedly occurred. Major Duquette is said to have danced close

to her and positioned himself directly in front of her. Afterwards, he apparently pressed up against her and grabbed both her buttocks with both hands while saying in her ear [TRANSLATION] “You’re fucking hot.” At that point she purportedly pushed him away, and he resumed dancing. It apparently lasted a total of five to ten seconds. According to witnesses for the prosecution, there was a feeling of unease among those who witnessed the incident.

The complainant then left the dance floor and returned to her boyfriend. The boyfriend allegedly said something to her to the effect that she should not go back on the dance floor. She said that she was not feeling well at the time, that she was shocked and confused by what had just happened.

Afterwards, she met up with her friend. This friend had been a little further away and positioned diagonally at the time of the incident, and she apparently witnessed the incident. A friend of this friend allegedly saw the same thing. (pp. 460–61 of the Appeal Book)

[22] In fact, the Court Martial found, as will be seen later, that Ms. K.J.’s testimony and Ms. M.E.T.’s testimony recounted the facts of the second incident, but without an explanation. Such an explanation was necessary given the content of the two testimonies. Sgt P.B. did not testify in respect of either the first or the second incident that both of her buttocks were [TRANSLATION] “grabbed”.

[23] Without ever referring to the content of Ms. K.J.’s testimony, which appears to describe the first incident, the military judge stated that the first incident was accidental. He stated:

[TRANSLATION]

Essentially, the complainant testified that she was touched by someone the first time. She therefore established that there was contact. The accused’s admission of identity, combined with the fact that she identified that the accused was present, makes it clear that the Court could have found that Major Duquette was the perpetrator of the contact.

However, from this perspective, evidence of intent to make such contact did not convince the Court of this beyond a reasonable doubt. As established by some witnesses, a dance floor can result in accidental contact with other people. This possibility exists, and it would have been very difficult for the Court to conclude that such a thing could not have happened. Accordingly, even if the Court had found that the accused's testimony was not reliable and credible and did not raise any reasonable doubt even when discounted by the Court, the prosecution still would not have been able to convince the Court beyond a reasonable doubt that the accused intended to touch or commit the offences alleged, as it is possible that this first incident simply resulted from an accidental act while the accused was dancing near the complainant. (pp. 473–474 of the Appeal Book)

[24] Furthermore, it appears that the military judge conflated Ms. K.J.'s testimony and Ms. M.E.T.'s testimony to conclude that they had testified about the same incident, the second. The problem with this approach is obvious. The trial court failed to analyze the evidence adduced before concluding that the two witnesses were describing the same incident. However, viewed objectively, the testimonies were inconsistent in terms of both the times and the facts recounted. Ms. K.J. placed the time of the incident she witnessed between 9:00 p.m. and 10:00 p.m. This was also the time when the first incident occurred according to the complainant. The description of the incident is also similar to that of the complainant. She spoke of a hand making contact with a buttock. Before conflating the versions of Ms. K.J. and Ms. M.E.T., the military judge should have examined their testimony closely in order to make his findings of fact, based on the evidence, to avoid conflating the two. In this case, he should have accepted or rejected evidence before reaching his conclusion. As noted above, the details of the incident are different in the testimony of Ms. K.J. and the testimony of the complainant, but there is some similarity that suggests that Ms. K.J.'s testimony appears to relate to the first incident, that of the touching that was considered accidental. The issue is not the honesty of the witnesses. Rather, it

is that the trial court's failure to analyze the testimonies suggests that the testimonies were conflated. The discrepancies between the testimonies are such that the trial judge was required to explain how he arrived at the conclusions he did despite three differing versions.

[25] The military judge saw a similarity between Ms. K.J.'s testimony and Ms. M.E.T.'s testimony, which he said relates to the second incident, without any explanation. He did not discuss the differences in their testimonies. He did not talk about the different times. He did not speak about the different acts—one buttock versus two buttocks grabbed. The military judge should have clearly indicated which parts of Ms. K.J.'s testimony he did or did not accept in order to reach his conclusion with respect to the second incident.

[26] With respect to this second incident, the trial judge posed the question to be resolved as follows:

[TRANSLATION]

The Court must now determine whether the alleged actions regarding the second incident described by the complainant and corroborated by two witnesses were committed by Major Duquette. (p. 474 of the Appeal Book)

[27] One wonders what the corroboration is: Ms. K.J. described something that might have been similar to the first incident related by the complainant, apart from the inconsistencies, but certainly not the second incident, and Ms. M.E.T. described an incident that the complainant never mentioned: that the accused had grabbed her with both hands. This can hardly constitute corroboration of testimony the complainant never gave. The military judge also did not attempt to explain the fact that Sgt P.B. felt something brush against one buttock between 9:00 p.m. and

10:00 p.m., but did not testify to any vigorous grabbing of her buttocks, just before 11:00 p.m., as described by Ms. M.E.T.

V. Application of the case law to the military judge's reasons

[28] In our view, the military judge's presentation of the evidence was not consistent with what was recounted by the three witnesses. One cannot skip from the testimony to the verdict without stating which evidence has been accepted and which evidence has been rejected, and why. As Arbour J. stated in *Biniaris, supra*, a trial judge must determine what evidence is reliable, credible and admissible in order to make findings of fact. This has not been done here. Instead, what we have seen is an unfortunate amalgam of three testimonies, the honesty of which is not in doubt, but which remains unexplained.

[29] The difficult task of the trial judge is to conduct a rigorous analysis of the evidence in order to arrive at a verdict that is beyond a reasonable doubt. The quality of a verdict lies in, among other things, such rigorous analysis. Here there is no doubt, in our view, that it was the result of an amalgam of disparate testimony for which no explanation was provided.

[30] As we have attempted to demonstrate, the verdict in this case was reached without an analysis of the evidence. As the Supreme Court of Canada noted in *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3 [*R.E.M.*], at para. 57, “[t]o conduct meaningful appellate review, the court must be able to discern the foundation of the conviction.”

[31] Since *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869 [*Sheppard*], there has been a shift in the law regarding the need for trial courts to provide reasons for their decisions. There continues to be a concern about adding to the workload of these already overburdened courts, so much so that there is a need to circumscribe the cases in which more elaborate reasons are required. Thus, as the Court noted in *Sheppard*, at paragraph 4, “there is no general duty . . . to provide reasons ‘when the finding is otherwise supportable on the evidence or where the basis of the finding is apparent from the circumstances’ (*R. v. Barrett*, [1995] 1 S.C.R. 752, at p. 753)” (italics in original). That was not the case here.

[32] As the Supreme Court stated in *Sheppard, supra*, the test for determining whether a verdict is unreasonable on appeal applies equally to a trial by jury and a judge-alone trial (para. 34). It is therefore important for the trial judge “to articulate reasons in relation to a key issue in circumstances which require explanation” (para. 39). A failure to do so could be characterized as an error of law, giving rise to a new trial. Thus, it would be an error of law to provide “inadequate trial reasons which cause or contribute to a deprivation of the meaningful exercise of a party’s right to have the correctness of the trial decision reviewed by an appellate court” (*Sheppard*, at para. 40).

[33] The law has evolved since *Sheppard, supra*. In *R.E.M., supra*, the Supreme Court confirmed that “it may now be said with confidence that a trial judge on a criminal trial where the accused’s innocence is at stake has a duty to give reasons” (at para. 14). The same finding had been made a few months earlier in *R. v. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788 [*Dinardo*], at paragraph 24. What remains difficult is determining what constitutes sufficient reasons.

[34] Both *Sheppard, supra*, (at para. 25) and *Dinardo, supra*, (at para. 25) establish that the sufficiency of reasons is a function of the fact that deficiencies in reasons prevent meaningful appellate review. The Court added, in *Dinardo*:

[27] Reasons “acquire particular importance” where the trial judge must “resolve confused and contradictory evidence on a key issue, unless the basis of the trial judge’s conclusion is apparent from the record” (*Sheppard*, at para. 55). Here, the complainant’s evidence was not only confused, but contradicted as well by the accused. As I will now explain, it is my view that the trial judge fell into error by failing to explain how he reconciled the inconsistencies in the complainant’s testimony on the issue of whether she invented the allegations. I also conclude that the trial judge’s failure to provide such an explanation prejudiced the accused’s legal right to an appeal.

This constitutes an error of law (*Sheppard, supra*, at para. 28, and *R.E.M., supra*, at para. 52).

[35] The role of an appellate court is obviously not to determine whether the trial court did a poor job of expressing itself. It is rather to examine whether the reasons underlying the verdict reveal an intelligible basis, which allows for meaningful review on appeal. As the Supreme Court stated in *R.E.M., supra*, at paragraph 55, “[i]f the evidence is contradictory or confusing, the appellate court should ask whether the trial judge appears to have recognized and dealt with the contradictions.”

[36] In this case, the trial judge neither recognized nor dealt with what he concluded from the three testimonies regarding what may be the same incident. The inconsistencies between the testimonies had to be resolved by identifying what evidence was accepted and what evidence was rejected. The evidence was confused and inconsistent on one key issue: the circumstances of the second incident. Moreover, depending on the findings of fact that the trier of fact arrived at,

the issues of whether a sexual assault occurred and what that alleged assault consisted of would have to be considered. There was little doubt that an incident in which a complainant's posterior is allegedly grabbed constitutes sexual assault. However, if, after a rigorous analysis of the evidence, the circumstances of the incident differ, the trial judge will have to determine whether those circumstances are sufficient to find beyond a reasonable doubt that a sexual assault occurred.

[37] The Supreme Court wrote the following in *Sheppard, supra*, at paragraph 15:

15 Reasons for judgment are the primary mechanism by which judges account to the parties and to the public for the decisions they render. The courts frequently say that justice must not only be done but must be seen to be done, but critics respond that it is difficult to see how justice can be *seen* to be done if judges fail to articulate the reasons for their actions. Trial courts, where the essential findings of facts and drawing of inferences are done, can only be held properly to account if the reasons for their adjudication are transparent and accessible to the public and to the appellate courts.

[Italics in original.]

[38] With respect, the reasons in the within case are lacking. Appeals are brought against verdicts, not reasons. However, where the reasons are so deficient that they prevent a meaningful review of the verdict, an appellate court faced with such an error of law must intervene.

[39] Given the testimonies of the complainant, Ms. K.J. and Ms. M.E.T., the judge had to consider them and make findings of fact after accepting or rejecting certain pieces of evidence. It seems unreasonable to us to conclude, without analyzing the testimonies, that the two witnesses were testifying about the same incident. In light of the differences regarding the facts recounted

in their testimonies, the judge would have had to rule on which testimony he was relying on to make his findings. The superimposition of testimonies without explanation makes the verdict unreasonable to the point where it is impossible to determine how the trial court arrived at its verdict. It is not the role of an appellate court to weigh their testimonies.

[40] The verdict on charges 1 and 3 is an amalgam that cannot stand without a review of the testimonies that would lead to an explanation, as the facts are confused and the testimonies are contradictory. The main point in this case is that there are three different versions of two incidents. We agree that a judge does not have to reconcile all of the evidence; in many cases, this is impossible. He or she may believe some, none, or all of the testimony (*R. v. J.H.S.*, 2008 SCC 30, [2008] 2 S.C.R. 152, at para. 10; *R. v. Clark*, 2012 CMAC 3, at para. 42). However, in such a case, the judge must say what is being accepted and what is being rejected, and why. For example, to find that Ms. K.J. was testifying about the second incident, the judge had to unequivocally reject her evidence regarding the time of the incident and the nature of the acts committed. In fact, the trial judge concluded that the first incident was accidental. If Ms. K.J. was right about the time of the incident she witnessed, the act she saw was part of the “accident” on the dance floor and does not constitute evidence regarding the second incident.

[41] Having reviewed the verdict and the reasons supporting it, we must conclude that the reasons regarding the second incident are clearly lacking, even essentially non-existent. As for the first incident, the Court Martial found that the contact was accidental, but that finding is not under appeal.

VI. Reasons and verdict regarding charge 2

[42] Harassment, which includes sexual harassment, is defined in DAOD 5012-0 as follows:

Improper conduct by an individual, that offends another individual in the workplace, including at any event or any location related to work, and that the individual knew or ought reasonably to have known would cause offence or harm.

DAOD 5012-0 also identifies six criteria that must be met for there to be harassment:

- a. improper conduct by an individual;
- b. individual knew or ought reasonably to have known that the conduct would cause offence or harm;
- c. if the harassment does not relate to a prohibited ground of discrimination under the *Canadian Human Rights Act*, the conduct must have been directed at the complainant;
- d. the conduct must have been offensive to the complainant;
- e. the conduct may consist of a series of incidents, or one severe incident which had a lasting impact on that complainant; and
- f. the conduct must have occurred in the workplace.

[43] The difficulties encountered with charges 1 and 3 are not present with respect to charge 2.

There is less confusion, and the amalgam of testimonies concerning the verdict on the second charge is not problematic. The military judge accepted Sgt P.B.'s testimony to the effect that Capt Duquette said [TRANSLATION] "You're fucking hot" when he was in very close proximity to ([TRANSLATION] "pressed up against") the complainant. The military judge also concluded that Capt Duquette [TRANSLATION] "found the complainant sexually attractive" (p. 479 of the Appeal

Book). Finally, the military judge concluded that [TRANSLATION] “the conduct was to the prejudice of good order and discipline, as it was established that this standard [of non-harassment] exists, that the accused admitted being aware of the content of this standard and that his actions were contrary to the content of DAOD 5012-0, and [that the accused had] a blameworthy state of mind” (*ibid*). The military judge spoke about the difference in rank between the two. He accepted the evidence that Capt Duquette approached the complainant until he was pressed up against her, in the midst of colleagues. Such conduct is improper and inappropriate. It is offensive to the person who experiences it, and it inevitably has a lasting impact. In our view, when such conduct occurs on a military base, at a military party, it occurs in the workplace.

[44] In light of the foregoing, we are satisfied that the guilty verdict on the second charge is not the result of any error on the part of the military judge. (See: *R. v. Williams*, 2017 CM 4017 at para. 58; *R. v. Renaud*, 2020 CMAAC 5.)

VII. Sentence appeal

[45] The military judge sentenced the accused to a reduction in rank to captain as a result of the convictions. Capt Duquette’s conduct, which constitutes the harassment of which he was found guilty, was highly reprehensible. Even though the sentence stems from a guilty verdict on the three charges, we see no grounds for us to interfere with the decision imposing the punishment of reduction in rank for the second charge. The military judge clearly explained his reasoning, including the impact of such conduct on troop morale in general and on the victim in particular. He took deterrence and reintegration into society into account and properly considered

the aggravating and mitigating factors. See: *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089 at paras. 56–58; *R. v. Hoekstra*, 2017 CMAC 5 at para. 25; *R. c. Cardinal*, 2012 QCCA 1838 at para. 62, [2012] CarswellQue 10406; *R. c. McClelland*, 2017 QCCS 2735 at paras. 82–83; *Williams, supra*; *Renaud, supra*.

[46] The military judge also ordered the appellant to comply with the *Sex Offender Information Registration Act*, S.C. 2004, c. 10, for a period of 20 years pursuant to paragraph 227.02(2)(b) of the *National Defence Act*, R.S.C. 1985, c. N-5 (NDA). According to sections 227 and 227.01 of the NDA, such an order can be made only for certain offences under subsection 490.011(1) of the *Criminal Code*. In this case, the order could only be made with regards to the conviction for sexual assault. In light of our decision on the first charge, the order cannot stand. The issue has become moot.

[47] The military judge also made an order authorizing the taking of the number of samples of bodily substances that is reasonably required for the purpose of forensic DNA analysis from the appellant, pursuant to section 196.14 of the NDA. According to section 196.11 of the NDA, as is the case for sex offender information registration, such an order has to be connected with the first and third charges. In light of our decision on the first and third charges, this order has become null and void. The issue has become moot.

VIII. Conclusion

[48] We allow the appeal in respect of the verdicts on the first and third charges. We dismiss the appeal from the second charge, as well as the appeal from the sentence of a reduction in rank.

[49] The appropriate remedy in respect of charges 1 and 3 depends on the nature of the unreasonable verdict. If the verdict is unreasonable because a properly instructed jury (or a judge alone) could not find the accused guilty, the appropriate remedy is normally an acquittal (*Sinclair*, above, at para. 23, Fish J. dissenting in the result). However, “where there is evidence capable of supporting a conviction” but the verdict is unreasonable because it “was reached illogically or irrationally” (*Beaudry*, *supra*, at para. 97, Fish J. dissenting in the result), the appropriate remedy is a new trial (*Sinclair*, *supra*, at para. 23, Fish J. dissenting; *R. v. Wright*, 2013 MBCA 109 at paras. 53–54, [2013] M.J. No. 435; *R. c. César-Nelson*, 2014 QCCA 1129 at para. 107, [2014] J.Q. No. 532; *R. v. Lee*, 2015 BCCA 512 at para. 48, [2015] B.C.J. No. 2748).

[50] The appeal from the second charge is dismissed. The appeal from the first and third charges is allowed. The amalgam of the testimonies without an explanation and the military judge’s failure to make logical inferences and findings of fact regarding the albeit confusing evidence requires that the appeal be allowed. The lack of sufficient reasons to allow a court of appeal to conduct a meaningful review constitutes an error of law that warrants appellate intervention. Therefore, the Court considers it appropriate to allow the appeal and order a new trial on the first and third charges.

“B. Richard Bell”

Chief Justice

“Yvan Roy”

J.A.

“Glennys McVeigh”

J.A.

APPENDIX

**DAOD 5012-0, Harassment
Prevention and Resolution****DOAD 5012-0, Prévention
et résolution du
harcèlement****1. Introduction****1. Introduction****Date of Issue:** 2000-12-20**Date de publication :** 2000-
12-20**Date of Last Modification:**
2020-03-24**Date de la dernière
modification :** 2020-03-24**Application:** This DAOD is a directive that applies to employees of the Department of National Defence (DND employees) and an order that applies to officers and non-commissioned members of the Canadian Armed Forces (CAF members).**Application :** La présente DOAD est une directive qui s'applique aux employés du ministère de la Défense nationale, ci-après nommés « employés du MDN », et une ordonnance qui s'applique aux officiers et aux militaires du rang des Forces armées canadiennes (FAC), ci-après nommés « militaires ».**Supersession:****Documents annulés :**CFAO 19-39, *Harassment*OAFc 19-39, *Harcèlement*CPAO 7.18, *Harassment*OAPC 7.18, *Harcèlement*

...

...

2. Definitions**2. Définitions****harassment** (*harcèlement*)**agent responsable**
(*responsible officer*)

Improper conduct by an individual, that offends another individual in the workplace, including at any

- un directeur général au Quartier général de la Défense nationale;

event or any location related to work, and that the individual knew or ought reasonably to have known would cause offence or harm. It comprises objectionable act(s), comment(s) or display(s) that demean, belittle, or cause personal humiliation or embarrassment, and any act of intimidation or threat. It also includes harassment within the meaning of the *Canadian Human Rights Act* (i.e. based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability, or conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered). Harassment is normally a series of incidents but can be one severe incident which has a lasting impact on the individual. Harassment that is not related to grounds set out in the *Canadian Human Rights Act* must be directed at an individual or at a group of which the individual is known by the harassing individual to be a member. (Defence Terminology Bank record number 19050)

- un supérieur de directeur général au Quartier général de la Défense nationale dans le cadre d'une plainte de harcèlement concernant un directeur général ou un supérieur d'un directeur général;
- un officier commandant un commandement ou une formation;
- un chef d'état-major ou un officier équivalent à un commandement ou à une formation à la demande du commandant concerné;
- un commandant du quartier général de formation, à la demande du commandant de la formation, dans le cas d'une plainte de harcèlement qui a été déposée par un militaire;
- tout autre commandant;
- un cadre supérieur civil à la tête d'une unité hébergée ou intégrée dans une région ou une formation. (Banque de terminologie de la défense, fiche numéro 43231)

responsible officer (*agent responsable*)

- a director general at National Defence Headquarters;
- a superior of a director general at National Defence Headquarters in the case of a complaint of harassment involving a director general or superior of a director general;
- an officer commanding a command or formation;
- a chief of staff or equivalent officer at a command or formation if directed by the applicable commander;
- a commanding officer of a formation headquarters if directed by the formation commander in the case of any complaint of harassment made by a CAF member;
- any other commanding officer; or

harcèlement (*harassment*)

Comportement inopportun d'une personne qui offense une autre personne en milieu de travail, y compris pendant toute activité ou dans tout lieu associé au travail, et dont l'auteur savait ou aurait raisonnablement dû savoir qu'un tel comportement pouvait offenser ou causer préjudice. Il comprend tout acte, propos ou exhibition qui diminue, rabaisse, humilie ou embarrasse une personne, ou tout acte d'intimidation ou de menace. Il comprend également le harcèlement au sens de la *Loi canadienne sur les droits de la personne* (c.-à-d. en raison de la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'identité ou l'expression de genre, l'état matrimonial, la situation de famille, les caractéristiques génétiques, la déficience ou l'état de personne graciée). Le harcèlement est normalement constitué d'une série d'incidents, mais peut être constitué d'un seul incident grave lorsqu'il a un impact durable sur la personne. Le harcèlement qui n'est pas lié à des motifs prévus par la *Loi*

- a senior civilian manager who is a head of a lodger or integral unit in a region or formation. (Defence Terminology Bank record number 43231)

canadienne sur les droits de la personne doit viser une personne ou un groupe dont l'auteur du harcèlement sait que la personne harcelée fait partie. (Banque de terminologie de la défense, fiche numéro 19050)

workplace (*milieu de travail*)

- Any location where work-related functions and other activities take place and work relationships exist, such as:
- on travel status;
- at a conference where the attendance is sanctioned by the DND or the CAF;
- at DND or CAF sanctioned instruction or training activities, or information sessions; or
- at DND or CAF sanctioned events, including social events. (Defence Terminology Bank record number 43176)

3. Policy Direction

milieu de travail (*workplace*)

- Tout lieu ou environnement de travail où s'exercent des fonctions et autres activités professionnelles et où des relations de travail entrent en jeu, notamment :
- pendant un déplacement;
- dans le cadre d'une conférence où la présence est sanctionné par le MDN ou les FAC;
- dans le cadre d'activités d'instruction ou de formation sanctionnées par le MDN ou les FAC, ou dans le cadre de séances d'information;
- dans le cadre d'activités sanctionnées par le MDN ou les FAC, y compris des activités sociales. (Banque de terminologie de la défense, fiche numéro 43176)

3. Orientation de la politique

Interpretation**3.1** In this DAOD:

“harassment” may include the abuse or misuse of authority inherent in the position of an individual;

“harassment” is also any act that involves participation as a result of expressed or implied coercion, and that demeans, belittles or causes personal humiliation or embarrassment at any ceremony or other event, such as an initiation rite;

“abuse of authority” may mean: taking advantage of a position of authority to exploit, compromise or mistreat others; the improper use of power or authority to endanger a person’s job or threaten a person’s economic livelihood, or to interfere with or influence the career of an individual; intimidation, threats, blackmail and coercion. Abuse of Power may include behaviour such as shouting, belittling a person’s work, favouritism/disfavouritism, unjustifiably withholding information that a person needs to perform their work and asking subordinates to take on personal errands. However, if an individual has authority over another individual in a situation by virtue of law, military rank, civilian classification or

Interprétation**3.1** Dans la présente DOAD :

le « harcèlement » peut inclure l’abus ou l’exercice inapproprié de l’autorité qui est inhérente au poste d’une personne;

le « harcèlement » est également tout acte commis à la suite d’une coercition explicite ou implicite et qui diminue, rabaisse ou humilie ou embarrasse une personne lors de toute cérémonie ou de tout autre événement, tel qu’un rite d’initiation;

l’« abus de pouvoir » peut signifier : profiter d’un poste d’autorité pour exploiter, compromettre ou maltraiter autrui; faire l’usage inapproprié du pouvoir ou de l’autorité pour mettre en péril l’emploi d’une personne ou menacer le moyen de subsistance d’une personne ou pour nuire ou influencer la carrière d’une personne; intimidation, menaces, chantage et coercition. L’abus de pouvoir peut inclure des comportements tels que les cris, la dépréciation du travail d’une personne, le favoritisme ou la désapprobation, la retenue injustifiée des renseignements dont une personne a besoin pour exécuter son travail et le recours à des subordonnés pour exécuter des tâches personnelles. Toutefois, si une personne est en position

appointment, the proper exercise of that authority is not harassment. This includes the proper exercise of authority related to the provision of advice, the assignment of work, counselling, performance appraisal, discipline, and other supervisory and leadership functions.

“workplace” in the DND and CAF context can include places such as messes, on-base clubs, quarters, dining halls, gyms, and sanctioned events such as holiday gatherings and course parties as well as office spaces, classrooms, garrisons, ships, hangars, vehicles, aircraft, online forums, etc.

Policy Statement

3.2 Harassment in any form, including in the use of social media, constitutes unacceptable conduct and will not be tolerated in the DND and the CAF. It is prohibited for any DND employee or CAF member to subject any person in the workplace to harassment.

d'autorité par rapport à une autre personne dans une situation en vertu de la loi, du grade militaire, de la classification ou d'une nomination civile, l'exercice opportun de ce pouvoir ne constitue pas du harcèlement. Cela comprend le bon exercice des pouvoirs relatifs à la prestation de conseils, à l'attribution du travail, au counseling, à l'évaluation du rendement, à la discipline et à d'autres fonctions de supervision et de leadership.

le « milieu de travail » dans le contexte du MDN et des FAC englobe des lieux comme les mess, les clubs situés à la base, les quartiers d'habitation, les salles à manger, les gymnases et les activités sanctionnées comme les rassemblements des fêtes et les fêtes de classe de même que les bureaux, les salles de classe, les garnisons, les navires, les hangars, les véhicules, les aéronefs, les forums en ligne, etc.

Énoncé de politique

3.2 Le harcèlement sous toutes ses formes, y compris dans l'utilisation des médias sociaux, constitue une conduite inacceptable et ne sera pas toléré au MDN et dans les FAC. Il est interdit à tout employé du MDN ou militaire de faire subir du harcèlement à toute personne en milieu de travail.

3.3 The DND and the CAF are committed to providing a respectful workplace through:

a. prevention of harassment by:

i. establishing the promotion of a comprehensive harassment prevention and awareness policy;

ii. ensuring that all DND employees and CAF members have the right to be treated respectfully and with dignity in a workplace free of harassment; and

iii. ensuring that managers, supervisors and leaders at all levels take immediate steps, whether or not a complaint has been submitted, to stop any harassment that:

- they witness; or
- is brought to their attention;

b. resolution of harassment by:

i. establishing efficient harassment complaint resolution processes, including workplace restoration activities;

ii. offering informal conflict resolution, in a timely fashion, if appropriate;

3.3 Le MDN et les FAC s'engagent à offrir un milieu de travail respectueux par les moyens suivants :

a. prévenir le harcèlement en :

i. assurant la promotion d'une politique globale en matière de prévention et de sensibilisation au harcèlement;

ii. veillant à ce que tous les employés du MDN et les militaires aient le droit d'être traités avec respect et dignité dans un milieu de travail exempt de harcèlement;

iii. s'assurant que les gestionnaires, les superviseurs et les leaders à tous les niveaux prennent des mesures immédiates, qu'une plainte ait été déposée ou non, pour mettre un terme à tout harcèlement :

- dont ils sont témoins;
- qui leur est signalé;

b. résoudre le harcèlement en :

i. établissant des processus efficaces de résolution des plaintes de harcèlement, y compris des activités de rétablissement du milieu de travail;

ii. offrant une résolution informelle des conflits, en

temps opportun, le cas échéant;

iii. taking steps in the workplace when it has been determined that harassment has not occurred but that a workplace conflict exists; and

iii. prenant des mesures en milieu de travail lorsqu'il a été établi qu'il n'y a pas eu de harcèlement, mais qu'un conflit en milieu de travail existe;

c. monitoring of the effectiveness of this DAOD and other applicable policies and instructions.

c. surveiller l'efficacité de la présente DOAD et des autres politiques et instructions applicables.

3.4 The DND and the CAF affirm that a work environment that fosters teamwork and encourages individuals to contribute their best effort in order to achieve the defence objectives of Canada is essential. Mutual trust, support and respect for the dignity and rights of every person are essential characteristics of this environment and are directly linked to the first ethical principle (Respect the Dignity of all Persons) in the *Department of National Defence and Canadian Forces Code of Values and Ethics*.

3.4 Le MDN et les FAC affirment qu'un environnement qui favorise le travail d'équipe et encourage les personnes à faire de leur mieux pour atteindre les objectifs de défense du Canada est essentiel. La confiance et le soutien mutuels, de même que le respect de la dignité et des droits de chacun, sont des caractéristiques essentielles d'un tel environnement et sont directement liés au premier principe éthique (Respecter la dignité de toute personne) dans le *Code de valeurs et d'éthique du ministère de la Défense nationale et des Forces canadiennes*.

3.5 Harassment in certain forms is not only against the law, but also erodes mutual confidence and respect for individuals and can lead to a poisoned work environment. As a result, operational

3.5 Le harcèlement sous certaines formes est non seulement illégal, mais il mine également la confiance mutuelle et le respect d'autrui et peut empoisonner le milieu de travail. Par conséquent,

effectiveness, productivity, team cohesion and morale are placed at risk.

l'efficacité opérationnelle, la productivité, la cohésion et le moral de l'équipe peuvent en pâtir.

3.6 The following six criteria, as set out in the definition of harassment in section 2 of this DAOD, must be met for harassment to have occurred:

3.6 Les six critères suivants, tels qu'énoncés dans la définition de harcèlement à la section 2 de cette DOAD, doivent être présents pour qu'il y ait eu harcèlement :

a. improper conduct by an individual;

a. comportement [inopportun] d'une personne;

b. individual knew or ought reasonably to have known that the conduct would cause offence or harm;

b. l'auteur savait ou aurait raisonnablement dû savoir qu'un tel comportement pouvait offenser ou causer un préjudice;

c. if the harassment does not relate to a prohibited ground of discrimination under the *Canadian Human Rights Act*, the conduct must have been directed at the complainant

c. si le harcèlement n'est pas lié aux motifs de discrimination prévus par la *Loi canadienne sur les droits de la personne*, le comportement doit viser le plaignant;

d. the conduct must have been offensive to the complainant;

d. le comportement doit avoir été offensant pour le plaignant;

e. the conduct may consist of a series of incidents, or one severe incident which had a lasting impact on that complainant; and

e. le comportement peut être une série d'incidents ou un seul incident grave qui a eu un impact durable sur le plaignant;

f. the conduct must have occurred in the workplace.

f. le comportement doit avoir eu lieu en milieu de travail.

Obligations

3.7 The DND and the CAF must provide DND employees and CAF members with:

Obligations

3.7 Le MDN et les FAC doivent fournir aux employés du MDN et aux militaires :

a. information about:	a. des renseignements sur ce qui suit :
i. conduct that constitutes harassment;	i. le comportement qui constitue du harcèlement;
ii. their rights and responsibilities in respect of harassment prevention and resolution;	ii. leurs droits et leurs responsabilités à l'égard de la prévention et de la résolution du harcèlement;
iii. ways of dealing with harassment; and	iii. les manières de faire face au harcèlement;
iv. the resources available to them;	iv. les ressources qui sont mises à leur disposition;
b. ongoing prevention activities to promote a respectful workplace;	b. des activités de prévention du harcèlement pour favoriser un milieu de travail respectueux;
c. knowledge of the various informal resolution mechanisms in the case of harassment;	c. une connaissance des différents mécanismes de résolution informels en cas de harcèlement;
d. access, without fear of reprisal, to effective, timely and confidential harassment complaint resolution processes;	d. l'accès à des processus efficaces, rapides et confidentiels de résolution de plaintes de harcèlement, sans crainte de représailles;
e. clear roles and responsibilities for responsible officers (RO), harassment advisors and investigators, labour-relations officers and other persons in key positions in support of harassment prevention and resolution; and	e. une définition claire des rôles et des responsabilités des agents responsables (AR), des conseillers et enquêteurs en matière de harcèlement, des conseillers en relations de travail et des autres personnes qui occupent des postes clés à l'appui de la prévention et de la résolution du harcèlement;
f. guidance, support and training for ROs and supervisors to carry out their	f. une orientation, du soutien et de la formation pour les AR et les superviseurs afin de

responsibilities to prevent harassment and resolve harassment and conflict situations that may occur.

Note 1 – All parties directly involved in the resolution of a complaint of harassment or workplace conflict are expected to limit the discussions pertaining to the complaint to those who need to know.

Note 2 – All decision-makers involved in the resolution of a complaint of harassment must adhere to the principles of procedural fairness and natural justice. This includes:

- notice to affected parties that a complaint has been submitted and of the allegations;
- disclosure of information to be used in rendering a decision;
- an opportunity to make representations;
- the right to a fair and unbiased decision; and,
- written reasons for the decision.

In addition to a final investigative report, decisions also include the Situational Assessment. Any RO that is in a real or perceived conflict

s’acquitter de leurs responsabilités visant à prévenir le harcèlement et à résoudre le harcèlement et les situations conflictuelles qui peuvent survenir.

Nota 1 – Toutes les parties qui prennent directement part à la résolution d’une plainte de harcèlement ou d’un conflit en milieu de travail doivent limiter les discussions portant sur la plainte à ceux et celles qui en ont besoin.

Nota 2 – Tous les décideurs impliqués dans la résolution d’une plainte de harcèlement doivent respecter les principes d’équité procédurale et de justice naturelle. Cela comprend :

- la notification aux parties concernées qu’une plainte a été déposée et des allégations formulées;
- la divulgation des renseignements qui seront utilisés pour rendre une décision;
- la possibilité de présenter des observations;
- le droit à une décision juste et impartiale;
- les motifs écrits de la décision.

En plus d’un rapport d’enquête final, les décisions comprennent également l’évaluation de la situation. Tout AR qui est en situation

of interest or is biased in any way must recuse themselves from a file, including at the initial stages and prior to conducting a Situational Assessment.

3.8 The ability of the DND and the CAF to provide confidential harassment complaint resolution processes may be limited by any obligation on a CAF member to report to the proper authority an infringement of the pertinent statutes, regulations, rules, orders and instructions that govern the conduct of any person subject to the Code of Service Discipline. Unit authorities should consult with the local representative of the Judge Advocate General as appropriate.

3.9 When harassment, as defined in section 2 of this DAOD, is considered not to have occurred but a workplace conflict exists, the RO must take steps to address the conflict.

3.10 Detailed implementing instructions are set out in the associated *Harassment Prevention and Resolution Instructions*.

4. Compliance and Consequences

réelle ou perçue de conflit d'intérêts ou qui est partial d'une façon quelconque doit se retirer d'un dossier, notamment aux étapes préliminaires et avant le déroulement d'une évaluation de la situation.

3.8 La capacité du MDN et des FAC de fournir des processus confidentiels de résolution des plaintes de harcèlement peut être limitée par toute obligation qui incombe à un militaire de signaler à une autorité compétente une infraction aux lois, aux règlements, aux règles, aux ordres et aux directives pertinents qui régissent la conduite de toute personne assujettie au Code de discipline militaire. Les autorités de l'unité doivent consulter le représentant local du Juge-avocat général, au besoin.

3.9 Lorsque le harcèlement, tel que défini à la section 2 de cette DOAD, est considéré comme n'ayant pas eu lieu mais qu'un conflit en milieu de travail existe, l'AR doit prendre des mesures pour le résoudre.

3.10 Des instructions détaillées de mise en œuvre sont énoncées dans les *Lignes directrices sur la prévention et la résolution du harcèlement* connexes.

4. Conformité et conséquences

Compliance

4.1 DND employees and CAF members must comply with this DAOD. Should clarification of the policies or instructions set out in this DAOD be required, DND employees and CAF members may seek direction through their channel of communication or chain of command, as appropriate. Managers and military supervisors have the primary responsibility for and means of ensuring the compliance of their DND employees and CAF members with this DAOD.

Consequences of Non-Compliance

4.2 DND employees and CAF members are accountable to their respective managers and military supervisors for any failure to comply with the direction set out in this DAOD. Non-compliance with this DAOD may have consequences for both the DND and the CAF as institutions, and for DND employees and CAF members as individuals. Suspected non-compliance may be investigated. Managers and military supervisors must take or direct appropriate

Conformité

4.1 Les employés du MDN et les militaires doivent se conformer à la présente DOAD. Si des éclaircissements sur les politiques ou les instructions énoncées dans la présente DOAD sont nécessaires, les employés du MDN et les militaires peuvent demander des directives par l'entremise de leur voie de communication ou de la chaîne de commandement, selon le cas. Les gestionnaires et les supérieurs militaires sont les principaux responsables, et détiennent les principaux moyens, d'assurer que les employés du MDN et les militaires qui relèvent d'eux se conforment à la présente DOAD.

Conséquences d'une non-conformité

4.2 Les employés du MDN et les militaires sont tenus de rendre compte respectivement à leur gestionnaire ou à leur supérieur militaire de tout cas de non-conformité aux directives énoncées dans la présente DOAD. La non-conformité à la présente DOAD peut entraîner des conséquences tant pour le MDN et les FAC, en tant qu'institutions, que pour les employés du MDN et les militaires, en tant qu'individus. Tout cas de non-conformité soupçonné

corrective measures if non-compliance with this DAOD has consequences for the DND or the CAF. The decision of an L1 or other senior official to take action or to intervene in a case of non-compliance, other than in respect of a decision under the Code of Service Discipline regarding a CAF member, will depend on the degree of risk based on the impact and likelihood of an adverse outcome resulting from the non-compliance and other circumstances of the case.

4.3 The nature and severity of the consequences resulting from non-compliance should be commensurate with the circumstances of the non-compliance and other relevant circumstances. Consequences of non-compliance may include one or more of the following:

a. the ordering of the completion of appropriate learning, training or professional development;

pourrait faire l'objet d'une enquête. Les gestionnaires et les supérieurs militaires doivent prendre ou imposer les mesures correctives appropriées dans le cas où la non-conformité à la présente DOAD entraîne des conséquences pour le MDN ou les FAC. La décision d'un conseiller de niveau un (N1) ou d'un autre haut fonctionnaire de prendre des mesures ou d'intervenir dans un cas de non-conformité, sauf en ce qui concerne une décision prise en vertu du Code de discipline militaire à l'égard d'un militaire, dépendra du niveau de risque évalué en fonction des incidences et de la probabilité d'un résultat défavorable découlant du cas de non-conformité et des autres circonstances entourant ce cas.

4.3 La nature et la gravité des conséquences découlant d'une non-conformité devraient être proportionnelles aux circonstances entourant le cas de non-conformité et aux autres circonstances pertinentes. Une non-conformité pourrait entraîner une ou plusieurs des conséquences suivantes :

a. l'ordre de suivre l'apprentissage, la formation, l'instruction ou le perfectionnement professionnel approprié;

- | | |
|---|--|
| b. the entering of observations in individual performance appraisals; | b. l'inscription d'observations dans l'évaluation du rendement individuel; |
| c. increased reporting and performance monitoring; | c. le renforcement des mesures de suivi et de contrôle du rendement; |
| d. the withdrawal of any authority provided under this DAOD to a DND employee or CAF member; | d. la révocation, en partie ou en totalité, de l'autorité qu'accorde la présente DOAD à un employé du MDN ou à un militaire; |
| e. the reporting of suspected offences to responsible law enforcement agencies; | e. le signalement des infractions soupçonnées aux autorités chargées de l'application de la loi; |
| f. the application of specific consequences as set out in applicable laws, codes of conduct, and DND and CAF policies and instructions; | f. l'imposition des conséquences particulières énoncées dans les lois et les codes de conduite applicables ainsi que les politiques et directives du MDN ou des FAC; |
| g. other administrative action, including the imposition of disciplinary measures, for a DND employee; | g. l'application de toute autre mesure administrative, incluant l'imposition de mesures disciplinaires, à l'endroit d'un employé du MDN; |
| h. other administrative or disciplinary action, or both, for a CAF member; and | h. l'application de toute autre mesure administrative ou disciplinaire, ou les deux, à l'endroit d'un militaire; |
| i. the imposition of liability on the part of Her Majesty in right of Canada, DND employees and CAF members. | i. l'imposition de la responsabilité de Sa Majesté du chef du Canada, des employés du MDN ou des militaires. |

Note – In respect to the compliance of DND

Nota – En ce qui concerne la conformité des employés du

employees, see the Treasury Board *Framework for the Management of Compliance* for additional information.

...

MDN, voir le *Cadre stratégique sur la gestion de la conformité* du Conseil du Trésor pour de plus amples informations.

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COURT MARTIAL APPEAL COURT OF CANADA

SOLICITORS OF RECORD

DOCKET: CMAC-605

STYLE OF CAUSE: CAPITAIN ÉRIC DUQUETTE v.
HER MAJESTY THE QUEEN

PLACE OF HEARING: QUEBEC, QUEBEC

DATE OF HEARING: JUNE 29, 2021

**REASONS FOR JUDGMENT OF THE COURT
BY:** BELL CHIEF JUSTICE
ROY J.A.
MCVEIGH J.A.

DATED: DECEMBER 23, 2021

APPEARANCES:

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