



COURT MARTIAL

Citation: *R. v. Remington*, 2021 CM 5025

Date: 20210908

Docket: 202047

Standing Court Martial

Halifax Courtroom, Suite 505
Halifax, Nova Scotia, Canada

Between:

Her Majesty the Queen

- and -

Naval Cadet L.R. Remington, Accused

Before: Commander C.J. Deschênes, M.J.

Pursuant to section 179 of the *National Defence Act* and section 486.4 of the *Criminal Code*, the Court directs that any information that could disclose the identity of the person described in these proceedings as the complainant, including the person referred to in the charge sheet as “T.T.”, shall not be published in any document or broadcast or transmitted in any way.

FINDING

(Orally)

Introduction

[1] Naval Cadet Remington is charged with having committed one offence punishable under section 130 of the *National Defence Act* (*NDA*), that is to say sexual assault contrary to section 271 of the *Criminal Code*. The charge alleges that on or about 3 November 2018, at or near Saint-Jean-sur-Richelieu, Quebec, he sexually assaulted the complainant T.T. After preliminary application hearings were completed, both parties presented their evidence and submissions during a five-day trial. The trial took place in Halifax as a result of an order the Court had previously issued, changing the venue from

Saint-Jean-sur-Richelieu, Quebec to Halifax, Nova Scotia, following a joint request by counsel to this effect, primarily based on the fact that both the complainant and the accused had been released from the Canadian Armed Forces (CAF) and were now residing in proximity to the Halifax region. My reasons for the finding follow.

The facts

[2] In late June 2018, Naval Cadet Remington and the complainant first met during their joint swearing in ceremony, as they were in the same enrolment group at the Canadian Forces Recruiting Centre in Moncton, New Brunswick. They later met again in early July 2018 during their attendance for Module 1 (Mod 1), a five-week basic qualification course at the Canadian Forces Leadership and Recruit School, Saint-Jean-sur-Richelieu, Quebec. About two weeks into Mod 1, in the course of his duties, the accused suffered a major panic attack. He was taken to the medical infirmary room on base to be assessed. The issue related to a panic attack caused the accused to miss portions of his course deemed essential to his training that was required for the completion of Mod 1. As a result, Naval Cadet Remington ceased training and joined the personnel awaiting deployment (PAD) on base. Around this time, the complainant also joined the PAD because she also had to cease training.

[3] In late July or early August 2018, both the accused and complainant arrived at the Royal Military College (RMC) campus in Saint-Jean-sur-Richelieu, Quebec (campus), as school was scheduled to start shortly thereafter. It is during summer 2018 that they developed a friendship where, eventually, they mutually considered one another best friends. As such, the accused and the complainant spent time together, taking walks, watching anime, eating out at local restaurants and attending the mess on campus for students at RMC, St-Maurice Mess. At the time, they both had their respective quarters at the Cartier Building.

Imminent release from the CAF

[4] Early in October 2018, Naval Cadet Remington was served a notice of intent for his release since it was discovered that during the selection process for enrolment he had not disclosed he had a history of panic attacks, which led to his release under *Queen's Regulations and Orders for the Canadian Forces* (QR&O) article 15.01, item 5(e), irregular enrolment, after serving less than six months in the CAF.

Move to different quarter

[5] Concomitantly, the accused was required to move to other quarters. Room number 121 in the Maisonneuve Building was allocated to him, a room that he occupied alone. In addition to a bed, this room had a television hung on the wall, a fridge, a desk and at least two chairs. Even after the move to his new quarters, his friendship with the complainant continued with their usual activities, including watching anime either in his room in the Maisonneuve Building or at the mess.

Complainant's experience with alcohol

[6] Sometime during this period in October 2018, approximately two weeks before the alleged sexual assault, the complainant celebrated her eighteenth birthday at the mess. During the celebration of this important milestone, which coincided with attaining the legal drinking age in the province of Quebec, the complainant consumed alcohol for the first time. It was estimated that she consumed a total of eleven shots containing forty per cent alcohol that evening. Eventually, those present at the celebration became worried for the complainant's health due to her heavy alcohol consumption, to the point that they had serious concerns for her life. She was taken to the hospital for treatment for alcohol poisoning. The accused was aware of the situation as he was, in part, present when this happened, being on duty at the mess that evening. This incident became notorious on campus.

Evening of 3 November 2018

[7] Around the material time of the alleged sexual assault, the accused's release process from the CAF was coming to a close. He had turned over his military equipment and was scheduled to return his uniform the following week. Both the complainant and the accused assumed he was leaving campus shortly thereafter and understood that the weekend of 3 November 2018 was, most likely, their last weekend together, at least for some time. Therefore, they made plans to go to the restaurant for dinner on 3 November 2018 followed by drinks at the mess, concluding the evening in his room at the Maisonneuve Building, watching an anime series called, "Death Note". They agreed they would be watching as many episodes as possible in order to complete the second season of the show.

[8] According to plan, they went to a restaurant in Iberville for dinner. With her meal, the complainant had one single-serving bottle of Smirnoff Ice which contained five per cent alcohol. Forty-five to sixty minutes after their arrival, they had finished their dinner and drinks and walked together to the St-Maurice Mess. The walk took ten to fifteen minutes. The video surveillance recordings of the entrance of the mess, which was admitted by the defence to accurately depict the events captured thereon and which showed the accurate date and time stamp, indicates that the accused and the complainant arrived together at the mess at 1951 hours that evening. Upon arrival, the accused went directly to the bar to order drinks while the complainant went to the bathroom. She joined the accused at the bar soon after. The accused had already ordered from the bar several shots of vodka as well as shots of a drink called, "Sour Puss". They consumed their respective shots within minutes. While at the bar, Second Lieutenant Chartier, a more senior member of the complainant's squadron, approached the accused to warn him about the complainant's recent health-related incident caused by alcohol consumption, asking him to ensure that the complainant would drink alcohol in moderation. Following this brief encounter, the accused sat with the complainant at a table located in the corner of the mess. The video surveillance recordings of the entrance of the mess indicated that they departed the mess at 2029 hours. They left in order to go to the accused's room to watch "Death Note".

[9] The walk from the mess to the Maisonneuve Building took five to ten minutes. The road they took was muddy, as there was construction on the streets. Once in the accused's room, they each took a seat on the chairs to watch the show. The accused offered a 473-millilitre can of Smirnoff Ice to the complainant and opened the can for her. She drank at least a quarter of its content. As it was hot in the room, the complainant removed her hoodie and laid on the bed while the accused had left for a short moment.

[10] It is not disputed that, between approximately 2230 hours, 3 November 2018 and 0200 hours, 4 November 2018, while in his room, the accused engaged in sexual activities with the complainant, which included digital penetration, oral sex, attempts at vaginal penetration with his penis, and the placing of his hands around the complainant's neck. It is also not disputed that at some point during the night, the accused had to accompany the complainant to the bathroom of the Maisonneuve Building.

The morning of 4 November 2018

[11] Around 0200 hours on 4 November 2018, the complainant awoke and quickly got dressed to go back to her room in the Cartier Building. In the process, she omitted to put her underwear and socks on, which were inadvertently left in the accused's room. The accused woke up and said he was sorry. He asked her for a hug. She complied. As she left the accused's room, he poked his head outside of the room to ensure that she would use the right door while leaving the building.

[12] Once in the Cartier Building, the complainant went to her friend's room, Officer Cadet Bryan, where she relayed her allegations against the accused at the time, which prompted Officer Cadet Bryan to seek for a superior. The military police (MP) were contacted as a result.

Sexual assault evidence kit

[13] The same day, the complainant, accompanied by Naval Cadet Dalpra and escorted by the MP, attended the Haut-Richelieu Hospital where she underwent a sexual assault evidence kit, #319638. A vaginal swab was obtained following standard medical procedure, secured at all times and sent to the *Laboratoire de sciences judiciaires et de médecine légale* (LSJML) in Montreal for analysis.

[14] On 17 April 2019, Ms Laure Delpech, forensic biology specialist, produced a report of her analysis of the sexual assault evidence kit #319638, which confirmed that the vaginal swab contained a small quantity of semen. Two DNA profiles were identified: that of the complainant, and that of a male, suitable for comparison. A small quantity of semen was also found to have been present in the vaginal wash, also obtained from the complainant from the sexual assault evidence kit on 4 November 2018. However, the DNA sample was not suitable for comparison.

[15] On 17 September 2019, the accused provided Sergeant Nelson of the Military Police Unit Halifax with a sample of blood from his left index finger. This sample was properly secured at all times and sent to the LSJML for analysis.

[16] On 20 December 2020, Ms Caroline Paquet, forensic biology specialist, produced a report of her analysis with regard to the comparison of the blood sample obtained from the accused on 17 September 2019 with the results that were previously obtained. It was concluded that the male DNA profile generated from the vaginal swab from the sexual assault evidence kit was hundreds of billions of times more likely to have come from Naval Cadet Remington than from someone else. It was conceded that the semen from the vaginal swab obtained from the complainant on 4 November 2018 was his.

Voluntary statement made to the military police

[17] Around 2215 hours, on 4 November 2018, the accused made a statement to the investigators, Master Corporal Gagné and Master Corporal Bureau, during an interview that was audio and video recorded. After being given, and understanding, his legal rights, Naval Cadet Remington declined to contact a lawyer before giving his statement. Defence conceded that the statement was made voluntarily.

Items retrieved from garbage can

[18] At about 0110 hours on 5 November 2018, MP Corporal Bérubé went to the Maisonneuve Building and saw the garbage can at the location the accused had described to Master Corporal Gagné during his interview, in the corridor to the right of room 121, between rooms 121 and 123. Corporal Bérubé found and seized, from inside the garbage can, a black garbage bag. The bag contained items that met the description of the complainant's clothing inadvertently left behind in the accused's room the day before: grey-coloured panties and a black sock. Defence admitted that the black garbage bag containing the pair of grey-coloured panties and the black sock was properly seized, secured at all times, deposited and sealed into exhibits bag #1833091D-1.

Issue

[19] The contentious issue of this case turns on the capacity of the complainant to consent to engaging in the sexual activity that formed the basis of the charge. If the Court finds that the complainant had the capacity to consent, it must decide whether the prosecution proved beyond a reasonable doubt that the complainant did not consent to the sexual activity. Finally, if the Court finds that the complainant did not consent to the sexual activity, the Court must determine if the defence of honest but mistaken belief in communicated consent is available to Naval Cadet Remington. The determination of this case therefore, boils down to the credibility and reliability of the witnesses, particularly the accused and the complainant.

Position of the parties

Prosecution

[20] The prosecution contends that the allegations are based on a spectrum of acts of a sexual nature that included choking, committed over an extended period of time on the complainant without her consent. This case turns in fact on consent. In particular, the complainant was not capable of providing her consent because she was highly intoxicated as a result of her alcohol consumption that evening. Further, the accused and the complainant's versions of event are diametrically opposed; there is no air of reality that would support the defence of honest but mistaken belief in communicated consent.

[21] The prosecution submits that it is undisputed that the complainant had memory gaps, and contends that the defence may try to fill the gaps by asserting the complainant was indeed consenting during these memory lapses. The prosecution submits that this approach is not available as a defence.

[22] Additionally, the evidence demonstrated that the complainant's alcohol consumption that evening supports her testimony that she was suddenly impacted by its effects once in the accused's room. The defence expert witness's opinion on toxicology was helpful in explaining that alcohol consumption would have the effect of causing memory gaps, blackouts and loss of consciousness which is more common in youth. The expert also testified that intoxication varies from one person to another, and the intoxication is not always apparent by looking at the person.

[23] The prosecution also submits that the complainant was largely unaware of what was happening during the sexual acts performed on her and possibly lost consciousness during this time, evidence that is consistent with a high level of intoxication. The evidence demonstrates that the level of alcohol in her blood was most likely at 140 milligrams, as confirmed by the expert's calculation. Although corroboration is not required, the complainant's actions and reactions after the fact, and what other witnesses observed at that time about her physical and emotional condition, in particular the irritation around her neck, is evidence consistent with her claim that she had been sexually assaulted. Further, a witness's memory loss does necessarily impact their credibility.

[24] The prosecution also contends that the defence of honest but mistaken belief in communicated consent is a minefield. The Court has to believe the accused's evidence in order to consider this defence. Evidence of reasonable steps taken by the accused must exist. In the case at bar, such a defence has no air of reality, because Naval Cadet Remington received three warnings that evening: first, he knew about the complainant's incident of alcohol poisoning; secondly, a more senior student, Second-Lieutenant Chartier, warned him about the previous incident and asked him to ensure that the complainant would drink in moderation; and, lastly, Officer Cadet Secant told him that the complainant could not die that night. Additionally, the accused believed the complainant was taking Ativan during the material time and knew the effects of this medication increased with alcohol consumption. Nevertheless, the accused decided to provide more alcohol to the complainant in the course of the evening. Naval Cadet

Remington also consumed a large quantity of alcohol that evening, drinking eleven shots within a few minutes while at the mess. He cannot rely on his own intoxication to advance a defence of honest but mistaken belief in communicated consent. Lastly, the prosecution contends that Naval Cadet Remington took advantage of the complainant instead of ensuring her well-being. He breached her trust.

Defence

[25] The defence submits that this Court may have to answer up to three questions: first, whether the complainant had the capacity to consent. If she did, the Court must ask itself if she did consent. If she did, the Court must acquit Naval Cadet Remington. Otherwise, the Court must consider the defence of honest but mistaken belief in communicated consent. The defence submits that the determination of the capacity to consent is set on a low standard. The level of intoxication of the complainant in this case was minimal; it was definitely not close to the level of incapacity.

[26] The defence contends that, despite Naval Cadet Remington's statement to the Canadian Forces National Investigations Unit (CFNIS) that T.T. was highly intoxicated the evening of 3 November 2018, the complainant was not intoxicated during the material time. The defence submits that the amount of alcohol consumed by the complainant is disputed. He contends that the first drink at the restaurant cannot be accounted for because, based on its expert evidence, the alcohol would already have been eliminated based on the quantity and time it was ingested. He alleges that the complainant had four to six shots while at the mess and asked the Court to draw the inference that the shot glasses used at the mess were one ounce in size. In the short time the shots were consumed along with a "chaser" of Smirnoff Ice, based on the expert's report, the complainant's level of intoxication did not meet the threshold to prove an incapacity to consent. Further, the surveillance video recording from the mess entrance shows that the complainant did not display any signs of impairment; consequently, she was not highly intoxicated that night. In fact, the accused only provided her with the quantity of alcohol that was safe for her because, otherwise, he would have bought a lot more alcohol.

[27] As for whether the complainant consented to the sexual activity, the defence acknowledges that the accused and the complainant's versions of the event are diametrically opposed. He contends that this is a credibility issue that needs to be resolved in the accused's favour. The complainant's memory was patchy, and it is only with her past memory revived that she could finally provide some answers. Further, at the end of her testimony, she made reference to being provided with, and having read her statements three days before her testimony in court yet, she needed to revive her memory in court. Additionally, the defence contends that the complainant's actions while in the accused's room are consistent with her giving her consent to engage in sexual acts with the accused. Naval Cadet Remington's apology to the complainant at that time, pertained to what he believed to be his disappointing sexual performance.

[28] The defence also referred to the forensic evidence to impeach the credibility of the complainant. In particular, the physician's report does not indicate that they had observed

marks on the complainant's neck. The defence contends that this absence of mention is in contradiction with the complainant's evidence that the accused had choked her. The defence also took issue with the indication in the report of the sexual assault kit that the complainant did not consent to provide a blood sample during the exam.

[29] The defence concluded that absence of consent was not proven. On the contrary, the evidence showed that the complainant consented to the sexual activities and it was rather the accused's consent that was a cause for concern.

[30] Finally, defence counsel contends, out of an abundance of caution, that the defence of honest but mistaken belief in communicated consent is available because the evidence shows that there is an air of reality to this defence. He contends that it was the complainant who initiated the sexual activities with the accused. Therefore, Naval Cadet Remington should be found not guilty of the charge.

The evidence adduced at trial

[31] The prosecution called four witnesses in support of its case: the complainant, identified as T.T.; Second Lieutenant Chartier; Officer Cadet Bryan and Naval Cadet Dalpra. The following exhibits were also introduced by the prosecution:

- (a) Exhibit 3 - an agreed statement of facts;
- (b) Exhibit 4 – a USB drive containing two video surveillance videos from 3 November 2018, seized from the St-Maurice Mess; and
- (c) Exhibit 5 – a DVD containing a video recording of a statement made by the accused to the investigators Master Corporal Gagné and Master Corporal Bureau during an interview held on 4 November 2018. Upon reviewing the recording, the Court is satisfied that the statement was made voluntarily.

[32] The defence called James G. Wigmore, an expert witness on forensic alcohol toxicology, Andreanne Choquet, an auxiliary nurse at the Saint-Jean-sur-Richelieu hospital and Mr Mario Pronovost, mess manager for the seven messes located in Saint-Jean-sur Richelieu. Since the prosecutor agreed, I allowed these witnesses to appear and give their testimony by video link in accordance with QR&O article 112.65, Appearance of Witnesses – Video Link. The following exhibits were also introduced by the defence:

- (a) Exhibit 6 – a copy of Mr Wigmore's resume on eleven pages;
- (b) Exhibit 7 – a toxicology report dated 26 August 2021 on four pages;
- (c) Exhibit 8 - a twelve-page document entitled, "Sexual Assault – Forensic Examination", with file # 506725 dated 4 November 2018, containing the

personal information of the complainant as the subject of the examination, with an attached English translation, as a bundle; and

(d) Exhibit 9- a photo of the label of a bottle of Sour Puss.

[33] Naval Cadet Remington also testified in his own defence.

[34] The Court took judicial notice of the facts and matters covered by section 15 of the *Military Rules of Evidence*.

Prosecution witnesses

Testimony of T.T.

[35] In her testimony, the complainant told the Court that she is twenty-one years old and is no longer serving in the CAF. She explained that during the evening of 3 November 2018, she believed Naval Cadet Remington and she arrived at the restaurant between 1700 and 1900 hours. She observed Naval Cadet Remington did not drink any alcohol while at the restaurant. She drank one Smirnoff Ice while at the restaurant. She also recalled a conversation at the restaurant where the accused asked her if she was interested in erotic asphyxiation. She answered knowing what it consisted of, and not being interested.

[36] She testified that when she and the accused were at the mess after dinner, she saw and spoke to colleagues while remaining by the accused's side. She later sat in the big plush chair in the corner at the mess. The accused bought from the bar four to six shots of vodka at forty per cent alcohol content. He also bought shots of Sour Puss which she described as a very sweet, fruity flavoured alcohol, containing the same amount of alcohol as vodka. She believed she consumed six shots, mostly of vodka, but also drank some of the Sour Puss. During the forty minutes that they were at the mess, T.T. observed the accused drinking about the same number of shots as she did. In addition to the four to six shots she consumed, she had one or two single-sized bottles of Smirnoff Ice while at the mess.

[37] When they departed the mess, she recounted walking toward the Maisonneuve Building on a muddy road or street because of road construction. She described feeling warm and fuzzy, clarifying that this is how it feels "when alcohol goes through your system". She felt intoxicated. Although she was wearing flat shoes during the walk, she recalled tripping. Once in the accused's room, Naval Cadet Remington sat on a desk chair and offered her to sit in an armchair. She testified that Naval Cadet Remington offered and gave her a red, white and blue can of Smirnoff from his fridge. She testified she could not open the can because her hands felt fuzzy, shaky, "like drunk hands". The accused then took the can from her and opened it for her. She drank the beverage. T.T. told the Court that at this point, she felt very drunk and warm. She believed she may have casually mentioned to the accused that she was feeling drunk. They started watching anime together.

[38] She testified that while watching the anime series, Naval Cadet Remington mentioned it was hot in the room and suggested she could rest on his bed. Naval Cadet Remington momentarily left his room, and while he was away, she removed her hoodie, wearing only her bra on the top half of her body. She believed she had already changed, wearing Naval Cadet Remington's physical training long pants because she had spilled her beverage on her pants. She laid down on the accused's bed.

[39] The complainant's memory of the events that followed contained several gaps and did not seem to follow a chronology of events. She testified that she felt the accused touching her inappropriately in her "underwear area", that she did not want this to happen and that the accused did not ask for her consent to touch her. She also testified that Naval Cadet Remington placed his hands around her neck and that she pushed back. When asked by the prosecution to provide more details, she testified he attempted to penetrate her vagina with his penis, but that he was frustrated because he was unsuccessful. She believed this happened when they were both on the bed. She did not remember if anything was said, or what she did, but affirmed that she did not want this. She further indicated not recalling more touching happening but then after refreshing her memory, she recalled that she was on her knees, then her buttocks on the cold floor, naked after the accused pulled her off the bed. As Naval Cadet Remington was trying to have fellatio performed by the complainant, he had his genitals in her face, then in her mouth. She remembered Naval Cadet Remington did not ask her if she wanted to engage in any of these sexual activities, and that she did not want this to happen. She believed that at some point during the sexual activities, she accidentally urinated on the floor of Naval Cadet Remington's room.

[40] After having her memory refreshed, she said that Naval Cadet Remington tried to penetrate her with his fingers, and as it was uncomfortable for her, she cried in pain. Naval Cadet Remington then stopped but resumed his attempts to digitally penetrate her vagina. She explained that Naval Cadet Remington never asked permission to do so and she did not want him to touch her there.

[41] She testified not remembering throwing up, but assumed she did while in the accused's room because Naval Cadet Remington applied chap sticks to her lips; she also felt that "drunk-vomit feeling". She testified remembering "being ferried to the bathroom" by the accused.

[42] She could not remember how she got back on Naval Cadet Remington's bed and how the remainder of her clothing's came off. She testified not remembering more of the touching of her throat, but after refreshing her memory, she explained that the accused changed from one hand to two hands on her neck while kissing her with enough force that it interfered with her breathing. She had a difficulty remembering the details of the sexual acts and the sequence, including the choking, because her recollection was not linear.

[43] She recounted waking up beside the accused in his bed under the covers with no clothes on. The accused was sleeping when she awoke. She explained believing he had no

clothes on. She panicked and got dressed, wanting to leave as quickly as possible. The accused woke up, and said “I am sorry”. She understood the apology was provided because she awoke finding both of them naked in his bed, concluding that a sexual activity had happened. Naval Cadet Remington got out of bed and put his pants on. She then told the Court that the accused asked her for a hug to which the complainant acceded, and left his room.

[44] She left to go to her room in the Cartier Building. She said that this happened very fast. It was still dark, but it was after midnight. She could not recall if she went to her room first to remove her shoes, but may have gone directly to the room of her friends Officer Cadets Bryan and DeGrandpre. The complainant was crying a lot while in their room. Both Officer Cadet Bryan and Naval Cadet Dalpra were present in the room. T.T. also testified remembering an exchange student being there momentarily. The complainant told Officer Cadet Bryan and Naval Cadet Dalpra she was sorry, as she felt stupid for drinking too much and putting herself in that situation. Officer Cadet Bryan and Naval Cadet Dalpra helped the complainant take a shower. T.T. brushed her teeth, and was provided with her onesie. She then laid on Officer Cadet Bryan’s bed and fell asleep. Both officer cadets stayed with her that night.

[45] When she awoke later that morning, the complainant described her brain feeling “foggy” as a result of the waning effects of alcohol. She described being “hungover plus”. She also testified feeling pain in her genitals that she did not experience prior to the night of 3 to 4 November. She explained that MP members were present in the room when she awoke.

[46] Later that day she went to the hospital with Naval Cadet Dalpra. During her visit to the hospital, she did not recall any head-to-toe physical examination be conducted.

Testimony of Second Lieutenant Chartier

[47] Second Lieutenant Chartier testified for the prosecution. He met both the accused and the complainant when he was a student at CMR and was senior to them. As cadet flight leader, his role included ensuring the well-being of cadets, that the flight had all it needed and initiating administrative measures for approval by the chain of command. In his capacity, he had some authority over the complainant, who was in his squadron at the time, but he was not her direct supervisor.

[48] Second Lieutenant Chartier testified being at the St-Maurice Mess the evening of 3 November 2018 and seeing the complainant arriving with the accused around 1930 hours. He himself was at the mess for forty-five to sixty minutes, and may have had one beer. He testified that during his time at the mess, he went to the bar and spoke to the accused while the latter was ordering six to eight shots of alcohol. He then told the accused to be careful not to give too many shots to the complainant as a warning, referring to the incident where the complainant was hospitalized a few weeks prior. The accused responded the shots were mostly for him. He observed that the accused and the complainant did not seem drunk and were acting normally.

Testimony of Officer Cadet Bryan

[49] Officer Cadet Bryan also testified and told the Court that in the evening of 3 November 2018, she was watching a movie in her room in the Cartier Building with Naval Cadet Dalpra, a friend of hers who does not reside in the same building. At around 0100 or 0200 hours, the morning of 4 November 2018, she was still awake when the complainant came in her room looking really distressed. She saw T.T. collapsed in the doorway of her room. She testified that the complainant had troubled speaking, was crying a lot, and said she felt very guilty. Her hair was in disarray, she was missing her socks and seemed to be missing other articles of clothing. Officer Cadet Bryan testified noticing a bruise on the complainant's neck that looked like a thumb print, but did not see anything else unusual as the complainant was fully clothed. Officer Cadet Bryan explained that she saw an exchange student pass by in the hallway and asked the person to reach a superior to report the situation. The MP were later contacted. She also testified that she brought her onesie to the complainant after she showered. She testified that the complainant stayed in her room that night and was making a lot of noise, sometime screaming. She had difficulties sleeping. T.T. stayed in her room for approximately a month following that night.

Testimony of Naval Cadet Dalpra

[50] Naval Cadet Dalpra testified that, as she was leaving Officer Cadet Bryan's room at around 0200 hours on 4 November 2018, she saw the complainant turning into the hallway toward her. Naval Cadet Dalpra knew what time it was because she had just verified as it was getting late. She saw the complainant crying on the way toward Officer Cadet Bryan's room and collapsed in the doorway. They could not close the door of the room as a result. The complainant was crying for about two minutes before they could glean any information from her. The witness observed that the complainant was displaying signs of a panic attack; she was hyperventilating. It was apparent that it was hard for her to speak and breathe because of her gasping and crying. Naval Cadet Dalpra said that she could smell the alcohol on the complainant's breath. T.T. was clearly unaware of what Naval Cadet Dalpra and Officer Cadet Bryan were asking or telling her. The witness also observed that the complainant was rubbing her neck, which was red and irritated. She confirmed that an exchange student passed by during that time. Both she and Officer Cadet Bryan eventually took the complainant to the bathroom so she could take a shower. She further testified that after they went to bed, Officer Cadet Bryan was kept awake by the complainant, who was clutching at her. Naval Cadet Dalpra accompanied the complainant to the hospital around 1400 hours the same day and stayed with her at the hospital, but was not present during the medical examination.

Voluntary statement made by the accused to the CFNIS - video recording

[51] The video recording of Naval Cadet Remington's voluntary statement made to the investigators on 4 November 2018 was introduced as an exhibit. During his interview, the accused gave his version of events and responded to the investigator's questions.

Amongst some of the numerous statements he made to the military police, the accused stated that the complainant drank five shots at the mess while he had eleven. The accused also told the investigators that on several occasions, the complainant had gotten fairly sick from over-indulging with alcohol consumption while drinking with him. Naval Cadet Remington also stated that when he came back into his room from filling his canteen, he found the complainant naked in his bed, but later said she was wearing her underwear. The accused stated that he thought at the time he “probably shouldn’t go too far from this”, and that he was “okay with just one, that it was no trouble”, so he and the complainant kissed and laid on his bed. The accused also stated that the complainant said, “Remington, I want you to fuck me”. He told the investigators that he responded that they should wait a couple of hours. He further told the investigators that after sleeping a couple of hours, the complainant was again attempting to initiate sex and was persistent, which is when he accepted to digitally penetrate her, then offered to, and subsequently did, perform oral sex on her. He stated to the MP that it is around this time that he attempted sexual intercourse, and that T.T. left afterward.

[52] He also mentioned to the investigators that the complainant’s underwear must have just been kicked under his bed. As they were dirty, he had no use for them and figured she did not want them back. As he did not want to go speak to her anyway to inquire, he just threw them out in the garbage can outside of his room. He also mentioned to the investigator putting his hands on the complainant’s neck during the sexual acts. He stated that he had joked about choking and about their mutual and unusual inclination towards it, although the accused confirmed during his statement that he did not remember her response regarding his questions on sexual asphyxiation. He further stated not using violence or force when he placed or rested his hands around T.T.’s neck and that it consisted of a gentle touch, but later stated that he squeezed a little bit and let go so she could breathe.

[53] In addition, the accused told the investigator on several occasions during his statement that the complainant was drunk that evening, and was unable to consent as a result. In particular, he affirmed understanding that the complainant had memory gaps and only remembered sexual acts with no particular specifics because of her level of intoxication that night. He also mentioned in his statement that he understood why T.T. would be worried that something violent had happened at that time.

Defence witnesses

Testimony of James G. Wigmore

[54] The defence called its expert in forensic alcohol toxicology. The expert’s calculation of the complainant’s level of intoxication induced by alcohol consumption the evening of 3 November 2018 was based on the information provided by the defence regarding the complainant’s characteristics including her age, approximate weight and height and that she had experience drinking alcohol as a social drinker. The expert also made the following factual assumptions regarding her alcohol consumption that night: that she consumed one bottle of Smirnoff Ice at 1800 hours, three single shots of forty per

cent alcohol consumed evenly between 1945 and 2100 hours with another Smirnoff Ice at 2100 hours, and finally one half vodka cooler at approximately 2130 to 2200 hours. Based on this information, the expert estimated that the complainant's blood alcohol concentration (BAC) at 2230 hours would have been between 50 and 95 milligrams of alcohol in 100 millilitres of blood. The table included in the expert's report which shows the BAC range to impairment ratio, indicates that at the complainant's BAC, she would have been in the range of mild (0 to 50 milligrams per 100 millilitres) to increased impairment (60 to 150 milligrams per 100 millilitres). The expert explained that a person in this range of impairment would feel relaxed but there would be significant concerns for their driving ability. The person would also have moderate memory impairment at the higher end of the spectrum. The expert also testified that individuals have different rates of elimination of alcohol.

[55] In cross-examination, the prosecution provided a different scenario to the witness, aligning with the evidence provided by the complainant and combined with the time stamps of the video surveillance that recorded her arrival and departure from the mess. The expert explained that with the speed in which the alcohol was consumed as suggested by the prosecution, his calculation would indicate a much higher BAC. Based on this scenario, his calculation indicates a BAC of between 140 to 160 milligrams per 100 millilitres. He explained that because the alcohol is entering the body so quickly, it is possible not to see the intoxication for a short period of time after consumption. At this BAC, the person would be experiencing patchy memory and blackouts. At 160 milligrams per 100 millilitres, vomiting and loss of consciousness may occur, although this can also occur at a lower level. The expert testified that in fact, patchy memory may occur at a lower BAC, between 60 and 150 milligrams per 100 millilitres. When adding a can of Smirnoff Ice at 2100 hours to the scenario presented by the prosecution, the BAC of the subject would climb to 200 to 210 milligrams per 100 millilitres. The expert estimated that at 2230 hours, the BAC would be between 170 to 195 milligrams per 100 millilitres, while at 0200 hours, it would have lowered to between 100 to 160 milligrams per 100 millilitres, which means that the subject would be in a recovery phase and could therefore walk from one location to another.

[56] He further stated that a person with a BAC of between 70 to 125 milligrams per 100 millilitres would normally show signs of impairment such as staggering and having blood-shot eyes. However, the effects of alcohol, and the signs and symptoms of impairment, vary from one individual to another because body composition is different for each person. In fact, physical characteristics such as size and metabolism are driving factors that influence alcohol concentration, which in turn affects the level of intoxication. Therefore it is possible that the usual signs of impairment would not be apparent for an intoxicated person.

[57] The witness also explained that at a BAC of 300 milligrams per 100 millilitres, alcohol poisoning may occur. He also confirmed that certain medications such as Ativan would compound the effects of alcohol. He clarified that a social drinker—that is someone who consumes alcohol relatively frequently—would have a higher tolerance to alcohol and that blackouts are a more common occurrence amongst youth.

[58] He also testified that a person consuming four-plus drinks in one drinking session of three to four hours would be considered binge drinking. In particular, a female-subject drinking six servings in less than one hour would be considered binge drinking to a level that could lead to an occurrence of blackout.

[59] When prompted to provide additional information regarding blackouts, the witness explained that during an episode of blackout, the person does not record new memory, however they may seem to act normally. There is also no lack of consciousness; the person is still aware of what is going on, but their judgment is impaired. If food is consumed during or around the time the alcohol is consumed, the absorption of alcohol in the blood is slowed down, and after several hours, the effects of alcohol dissipates.

Testimony of Andreanne Choquet

[60] Mrs Choquet, an auxiliary nurse at emergency room in Saint-Jean-sur-Richelieu, also testified for the defence. She was shown Exhibit 8 and she explained its content as well as the standard procedure for these forensic examinations. She confirmed that the examination described in Exhibit 8 was conducted by Dr Philibert, however she was not able to recall T.T.'s examination. She explained that the standard procedure for the medical examination of complainants of sexual assault involves the assistance of a social worker who is called to meet the complainant. The social worker fills out the part of the form that relates to their expertise. When reviewing Exhibit 8, Mrs Choquet confirmed that the box checked in Exhibit 8 identifying the part of the body the suspect used for the sexual contact was "vagina". She stated that checking this box was clearly an error. She also testified that she assumed that Dr Philibert did a full body exam of the complainant when Exhibit 8 was filled out.

Testimony of Mario Pronovost

[61] Mr. Pronovost testified currently being the mess manager for the seven messes located in the Saint-Jean-sur-Richelieu region. He explained being surprised to learn that shots were served at the St-Maurice Mess, because shots are typically not served at recruit schools. He explained that one-ounce shot glasses are used at the various messes in the region however he testified not knowing the size of shot glasses at St-Maurice Mess. At the material time, he was not involved in the management of messes in the region, as he has occupied this function only since 2019.

Testimony of accused

[62] The accused testified to arriving at the restaurant at around 1730 hours, but he was unsure. He confirmed spending around forty-five to sixty minutes there and testified the complainant drank one Smirnoff Ice. Afterward, he and the complainant left for the mess, but he was unsure the time they arrived at the mess. He testified that while at the mess, he bought the complainant four shots of vodka and also purchased one shot of Sour Puss which contains fifteen per cent alcohol, and clarified that T.T. may have had more than

four shots of vodka. He testified that T.T. drank the five shots in less than five minutes and also drank one regular-sized bottle of Smirnoff Ice he bought her. He explained that, because he knew of the complainant's alcohol-poisoning incident from two weeks before that led to her hospitalization, which was the first time she drank alcohol, he had decided to set a limit for her and not provide her more than six shots. He clarified that he understood the complainant was free to drink more if she so wished. The accused drank more alcohol while at the mess, purchasing more shots for himself. He explained drinking between eight and eleven shots while at the mess. He also testified that he saw and briefly spoke to both Second Lieutenant Chartier and Officer Cadet Secant while at the mess. He affirmed that he observed the complainant displaying no sign of intoxication that evening while he was fairly intoxicated throughout the evening to the point of vomiting in a garbage can.

[63] Once in his room, he offered a can of Smirnoff Ice Raspberry to the complainant, opened the can and placed it in front of her. She drank about a quarter of the can. They then watched anime. He testified that she removed her pants; there was no awkwardness. Around this time, he left the room for less than five minutes to fill up his water canteen. He testified that when he returned to his room, the complainant was on the bed in her underwear. He was surprised she had removed her shirt. He claimed that the complainant then said, "I am on the bed, let's screw around". His reaction was to sit down on the bed and continue watching the show. She later said, "Remington, I want you to screw me" or words to that effect. He indicated he blew off her suggestion, and to the best of his recollection, the complainant was not impaired, and he did not observe any signs of intoxication.

[64] They continued watching one or two more episodes. He testified that the complainant was becoming more persistent in her sexual advances, telling her he did not want to engage in sexual activities. He also testified that he considered himself asexual, explaining that he has no interest in engaging in sexual activities. He explained he eventually compromised, accepting to digitally penetrate the complainant's vagina for a few minutes. She did not protest, on the contrary, she was responding positively. He then naturally performed oral sex on her, using his tongue with his fingers; she was responding positively to this act as well.

[65] He further testified that T.T. was not satisfied with the sexual activities he was offering; she constantly pestered the accused to have sexual intercourse with her. He was still hesitant, but he ended up removing his underwear and attempted to vaginally penetrate the complainant with his penis. He testified being unsuccessful so she guided him with her hand with a cupping motion on his penis. Unable to achieve penetration after two or three attempts, the accused resumed digital penetration. He told the Court the complainant never asked him to stop, but that they mutually stopped the sexual activity.

[66] He further testified that during the sexual activity, he rested his hand on the complainant's neck. He later said he used his right hand to give a gentle squeeze to the complainant's neck, using the fingers of his left hand to touch, then penetrate, her vagina.

He placed his hand on the complainant's neck three to four times. He said he recalled previously having a conversation with the complainant about erotic asphyxiation.

[67] The accused also told the Court that during the sexual activity, his hands were tired and since the complainant wanted to continue the sexual activity, he suggested she give him a fellatio. At this time, they both got off the bed. The accused testified the complainant got on her knees on the floor and performed fellatio on him, which he stopped after a few seconds because he was not receiving any pleasure from it. She pulled back and sat on the bed, and after getting some clothes on, they both laid on the bed and dosed off for one hour or two.

[68] The accused explained that he remembered taking T.T. to the bathroom because she needed his assistance to find her way through the confusing layout of the Maisonneuve Building and because a key is required to get back into his room. He denied his assistance was required to guide or carry the complainant to the bathroom as a result of her high level of intoxication. He insisted that throughout the evening the complainant was not staggering and did not display any other signs of intoxication. He did not recall her verbalizing she was intoxicated.

[69] He testified that he woke up because the complainant had gotten up and had decided to go back to her room as she did not want her snoring to disrupt his sleep. He offered to walk her back but she declined, saying she was fine; she was not showing outward emotional signs. He hugged her and peeked outside his room to ensure that she was taking the right direction to leave as there were two exits and he was concerned she would take the wrong one. He also said to the complainant he was sorry when he awoke because he felt he did not perform to her expectations. He went back to bed.

[70] He woke up around 0900 hours in the morning, feeling hangover, nauseous and later had a headache. At breakfast, he briefly spoke to Officer Cadet Secant, who informed him that the complainant's room had been cordoned off by the MP. He testified being genuinely concerned about T.T.'s well-being. He explained that he decided not to visit the complainant to inquire about her well-being and what had happened because he felt his presence in her building would be "counterproductive". He also did not attempt to contact her because it did not occur to him to do so at the time. He did not inquire about the well-being of the complainant when he spoke to Officer Cadet Secant. The accused told the Court he suspected the MP would be looking to speak to him that day.

[71] The accused provided explanations for the discrepancies found in his testimony in Court, and in his voluntary statement made to the investigators the day following the event, particularly when he, amongst other things, told the investigators on several occasions during the interview that the complainant was drunk that night. He explained making this statement about T.T.'s intoxication because he told the investigators what he believed they wanted to hear. His behaviour was caused by the anxiety he experienced during the interview. The accused conceded during his testimony that he displayed no apparent sign of anxiety on the recordings of his interview with the MP.

The law

Sexual assaults – general principles

[72] This evidence was considered and assessed in the context of the offence laid against Naval Cadet Remington. It is alleged that he committed one offence under section 130 of the *NDA*; that is to say, sexual assault, contrary to section 271 of the *Criminal Code*. In order to secure a conviction for a sexual assault offence, the prosecution must prove beyond a reasonable doubt the identity of the accused and the place and date of the commission of the offence as alleged in the charge sheet. It must also prove the following essential elements:

- (a) the application of force. In *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, the Supreme Court of Canada (SCC) recognized the application of force as any degree of force, including touching.
- (b) the application of force was intentional.
- (c) the complainant did not consent to the application of force, or her consent was vitiated.
- (d) the application of force by the accused on the complainant occurred in circumstances of a sexual nature, such that the sexual integrity of the complainant was violated.
- (e) finally, the prosecution has to prove that the accused knew, was wilfully blind to, or was reckless as to the fact that the complainant had not communicated consent. Also referred to “as honest but mistaken belief in communicated consent”, this element can be established by evidence that the accused failed to take reasonable steps to ascertain that the complainant had communicated consent.

Intoxication

[73] The *Criminal Code* defines the term “consent” in the context of a sexual assault. Pursuant to section 273.1 of the *Criminal Code*, consent means “the voluntary agreement of the complainant to engage in the sexual activity in question”. This section also specifies that consent must be present at the time the sexual activity takes place. The element of consent is subjective; it is determined by reference to the complainant's internal state of mind towards the touching.

[74] Section 273.1 also provides that no consent is obtained if the complainant is unconscious or incapable of consenting to the activity for any other reason, such as by reason of intoxication by alcohol. In other words, the complainant's capacity to consent is a precondition to subjective consent. In the very recent case of *R. v. G.F.*, 2021 SCC 20, the court stated at paragraph 47 that:

If the Crown proves beyond a reasonable doubt that the complainant did not have an operating mind capable of consenting, or did not agree to the sexual activity in question, then the Crown has proven a lack of subjective consent and the *actus reus* is established.

[75] In examining the application and interpretation of section 273.1 of the *Criminal Code*, the SCC further established at paragraph 56 of *G.F* that:

[I]n order to voluntarily agree to the sexual activity in question, the complainant must understand that saying “No” is an option. In *J.A.*, this Court held that consent requires that the complainant have “an operating mind” at the time of the touching, capable of evaluating each sexual act and choosing whether or not to consent to it Thus, an unconscious complainant could not provide contemporaneous consent. It follows that where the complainant is *incapable* of understanding that they have this choice to engage or refuse to engage, they are incapable of consenting. Accordingly, a complainant who is unable to say no, or who believes they have no choice in the matter, is not capable of formulating subjective consent: [citation omitted].

[76] The SCC further established the four cumulative things that a complainant must be capable of understanding in order to provide subjective consent to sexual activity:

[57] In sum, for a complainant to be capable of providing subjective consent to sexual activity, they must be capable of understanding four things:

1. the physical act;
2. that the act is sexual in nature;
3. the specific identity of the complainant’s partner or partners; and
4. that they have the choice to refuse to participate in the sexual activity.

Consent: question of credibility

[77] In *Ewanchuk*, a seminal SCC decision that clarified the law in relation to sexual assault offences, such as the confirmation that there was no such thing as “implied consent”, stated the following with regard to the assessment of the evidence relevant to the element of absence of consent:

[29] While the complainant’s testimony is the only source of direct evidence as to her state of mind, credibility must still be assessed by the trial judge, or jury, in light of all the evidence. It is open to the accused to claim that the complainant’s words and actions, before and during the incident, raise a reasonable doubt against her assertion that she, in her mind, did not want the sexual touching to take place. If, however, as occurred in this case, the trial judge believes the complainant that she subjectively did not consent, the Crown has discharged its obligation to prove the absence of consent.

[30] The complainant’s statement that she did not consent is a matter of credibility to be weighed in light of all the evidence including any ambiguous conduct. The question at this stage is purely one of credibility, and whether the totality of the complainant’s conduct is consistent with her claim of non-consent. The accused’s perception of the complainant’s

state of mind is not relevant. That perception only arises when a defence of honest but mistaken belief in consent is raised in the *mens rea* stage of the inquiry.

Honest but mistaken belief in communicated consent

[78] Before turning to the issue of assessment of credibility in the case at bar, counsel have raised the possibility that this Court consider that the accused had an honest but mistaken belief in T.T.'s communicated consent. In this regard, in *R. v. Barton*, 2019 SCC 33, the SCC confirmed that, in accordance with subparagraph 273.2 (b) of the *Criminal Code*, the following precondition must exist before the defence can be put to the jury:

[104] Section 273.2(b) imposes a precondition to the defence of honest but mistaken belief in communicated consent — no reasonable steps, no defence. It has both objective and subjective dimensions: the accused must take steps that are objectively reasonable, and the reasonableness of those steps must be assessed in light of the circumstances known to the accused at the time.

Credibility and reliability of witnesses

[79] As quoted from *Ewanchuk*, in sexual assault cases such as this one, it is not unusual that the crux of the issue is one of contradictory testimonies, since most time the only ones who were present during the alleged sexual assault were the complainant and the accused. The Court must therefore decide which evidence it accepts, and the weight to be given to it. When making that determination in the context of contradictory testimonies, the Court must assess the reliability and credibility of the witnesses who testified in court. Credibility and reliability are two different concepts. Reliability speaks to the ability of a witness to accurately observe, recall and recount the events, whereas credibility refers to the sincerity of the witness and whether they are being truthful.

Reliability

[80] Many factors influence the Court's assessment of the reliability of the testimony of a witness. The opportunity of the witness to observe events, their capacity to remember, as well as a witness's reasons to remember a specific event, because, for example, it was out of the ordinary, are factors that will assist the trier of fact in his or her assessment. Due to a number of reasons including, but not limited to, the passage of time or alcohol consumption, the actual accuracy of the witness's account may not be reliable. So in effect, the testimony of a credible or an honest witness may nonetheless be unreliable (see *R. v. Morrissey*, 97 CCC (3d) 193 and *R. v. Clark* 2012 CMA 3 at paragraph 48.)

Credibility

[81] Many factors also influence the Court's assessment of the credibility of a witness. For example, does a witness have an interest in the outcome of the trial; that is, a reason to favour the prosecution or the defence, or is the witness impartial? The demeanour of the witness while testifying is a factor which can be used in assessing credibility; that is, was the witness responsive to questions, straightforward in his or her answers or evasive,

hesitant or argumentative? Finally, was the witness's testimony consistent with itself and with the undisputed facts? A witness whose evidence on an issue is not credible cannot give reliable evidence on the same point (see *R. v. H.C.*, 2009 ONCA 56).

[82] The assessment of credibility is no easy task. As stated in *R. v. R.E.M.*, 2008 SCC 51 at paragraph 49, "assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization".

Possible outcomes

[83] A court may accept or reject some, none or all of the evidence of any witness who testifies in the proceedings. A finding that a witness is credible does not require a trier of fact to accept all the witness's testimony. A portion of it may be accepted as true while the remainder could be deemed not credible.

[84] The burden of proof rests on the prosecution. The prosecution's case is not made out simply because the testimony of the complainant might be preferred to the accused's testimony. In fact, it is possible to not believe some of what the accused has testified to, but still be left in doubt as to whether the prosecution has established each of the essential elements of the offence beyond a reasonable doubt. The appropriate approach in assessing the standard of proof is to weigh all the evidence and not assess individual items of evidence separately. It is therefore essential to assess the credibility and reliability of individual testimony in light of the evidence as a whole.

[85] As stated by the Court Martial Appeal Court in *Clark* at paragraphs 40 to 42:

[40] First, witnesses are not "presumed to tell the truth". A trier of fact must assess the evidence of each witness, in light of the totality of the evidence adduced in the proceedings, unaided by any presumption, except perhaps the presumption of innocence: *R. v. Thain*, 2009 ONCA 223, 243 CCC (3d) 230, at para 32.

[41] Second, a trier of fact is under no obligation to accept the evidence of any witness simply because it is not contradicted by the testimony of another witness or other evidence. The trier of fact may rely on reason, common sense and rationality to reject uncontradicted evidence: *Aguilera v Canada (Minister of Citizenship and Immigration)*, 2008 FC 507, at para 39; *R.K.L. v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116, at paras 9-11.

[42] Third, as juries in civil and criminal cases are routinely and necessarily instructed, a trier of fact may accept or reject, some, none or all of the evidence of any witness who testifies in the proceedings. Said in somewhat different terms, credibility is not an all or nothing proposition. Nor does it follow from a finding that a witness is credible that his or her testimony is reliable, much less capable of sustaining the burden of proof on a specific issue or as a whole.

Presumption of innocence and the standard of proof beyond a reasonable doubt

[86] It is the prosecution that bears the burden of proving guilt; guilt must be proved beyond a reasonable doubt. These two rules are linked to the presumption of innocence to

ensure that no innocent person is convicted. The presumption of innocence remains throughout the case until such time as the prosecution has, on the evidence accepted at the trial, satisfied the Court beyond a reasonable doubt that the accused is guilty of the charge. This is not a standard of absolute certainty, but it is a standard that certainly approaches that. Anything less entitles an accused to the full benefit of the presumption of innocence and a dismissal of the charge.

[87] The term “beyond a reasonable doubt” is anchored in our history and traditions of justice. A reasonable doubt is not an imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence (see *R. v. Lifchus*, [1997] 3 S.C.R. 320).

[88] In essence, this means that even if I believe that Naval Cadet Remington is probably guilty or likely guilty, that is not sufficient. In those circumstances, I must give him the benefit of the doubt and acquit him because the prosecution has failed to satisfy me of his guilt beyond a reasonable doubt. On the other hand, it is virtually impossible to prove anything to an absolute certainty and the prosecution is not required to do so. Such a standard of proof is impossibly high. Therefore, in order to find Naval Cadet Remington guilty of the charge before the court, the onus is on the prosecution to prove something less than an absolute certainty, but something more than probable guilt for the charge set out in the charge sheet (see *R. v. Starr*, 2000 SCC 40, at paragraph 242).

Analysis

Assessment of credibility

[89] The Court must ask itself if the prosecution proved, beyond a reasonable doubt, all the essential elements of the sexual assault charge. It is important to note that, in order to meet this evidentiary threshold, corroboration of the complainant’s evidence is not required. That said, the burden never shifts; the presumption of innocence remains unless and until a judge finds the accused guilty of the charge.

[90] Although the burden of proof never shifts, I must decide whether I believe Naval Cadet Remington’s version of event. This is not a matter for the Court to choose between Naval Cadet Remington’s version and the complainant’s. I must rather examine his testimony and assess its credibility in light of the whole of the evidence that was accepted at the trial in the context of the issue alive to this case, in particular whether the complainant had the capacity to consent to the sexual activity.

Credibility of the accused

[91] Naval Cadet Remington testified, keeping his composure, giving relatively detailed answers as he was speaking fairly fast. On some occasions, he provided more information than asked, and even initiated providing additional information after his answer was accepted as complete by counsel. When he testified to material facts

however, the Court noted at times that he showed some signs of nervousness, he stuttered on occasion; and it seems that the accused was collecting his thoughts before giving any answer directly related to the allegations. A witness's demeanour in Court is in no way determinative of their credibility, however it does provide the Court with a certain perspective.

[92] In any event, the Court finds a plethora of inconsistencies and contradictions in the accused's testimony that cannot possibly all be addressed. Some of these inconsistencies pertain to the accused's evidence downplaying T.T.'s intoxication that night. He insisted he did not observe any sign of intoxication from the complainant throughout the evening of 3 November 2018. He also claimed that they both arrived at the restaurant earlier, around 1700 hours. Both he and the complainant testified that they spent between forty-five to sixty minutes at the restaurant before leaving for the mess.

[93] He later corrected this portion of his testimony, to state that they most likely arrived at the restaurant at 1800 hours based on the time and date stamps of the video surveillance recordings of the mess showing their arrival at the mess at 1951 hours. Based on the undisputed evidence of the time they spent at the restaurant and the time stamps of the recording of their arrival at the mess, they could not have arrived at the restaurant at 1700 or 1800 hours. They could only have arrived at Les Glaces around 1900 hours. The Court finds that this discrepancy in the accused's testimony seems to be an attempt to expand the time the complainant consumed her first alcoholic beverage at the restaurant in order to downplay her level of intoxication that evening.

[94] The accused also assured the Court that he knew the shot glasses at the mess were one ounce in size. He confirmed he never measured the shot glass, but explained that he assumed, based on the size of different shot glasses he saw at the mess while on duty, which did not involve bartending at the mess, that the smaller shot glasses were one ounce.

[95] He also said he was careful to not go over the six-shot limit he imposed when providing alcohol to the complainant on 3 November 2018, but understood that she was free to drink more if she wished. He admitted he may have gone over this limit when he provided the complainant with alcohol that evening. The Court finds that the six-shot limit the accused had decided to impose, is quite high for an eighteen-year-old-young female who had nearly no experience with alcohol consumption, and in fact had just had a near-death experience the first and only time she consumed alcohol two weeks prior to the allegations when she suffered alcohol poisoning. The accused was present and very well aware of the situation, yet he set an arbitrary limit of the number of shots he was willing to provide the complainant that was just a few shots less than the quantity that nearly killed her.

[96] Logically, if the accused was truly concerned for the complainant's well-being, that limit he self-imposed would have been closer to zero. He would certainly not have bought her shots for her to drink in a matter of minutes. Other witnesses provided evidence that they were concerned for the complainant's well-being in relation to

drinking alcohol the evening of 3 November, with two senior CMR students taking the time to warn the accused in this regard. The accused also knew that Officer Cadet Bryan had voiced similar concerns with the complainant, in particular if she was drinking alcohol in the company of the accused. The accused clearly chose to ignore these warnings. Instead, he continued to fund the complainant's alcohol consumption.

[97] Additionally, the accused admitted drinking eight to eleven shots during the fifty-minute period they were at the mess, with a 473-millilitre can of Smirnoff Ice while in his room. He was highly intoxicated that night to the point that he vomited in the garbage can. It is difficult to believe that he is now able to testify to details of the evening with such precision, including his observations of the complainant's alcohol intake, his insistence that he did not observe her displaying signs of intoxication, as well as the nature, sequence and duration of the sexual acts, and that he used his right hand to squeeze the complainant's neck.

[98] The accused stated in his testimony that although the complainant was not displaying signs of intoxication, he nevertheless guided her to the bathroom, and when she departed the Maisonneuve Building early in the morning, he peeked outside of his room to ensure that T.T. left through the right door. The evidence shows that the bathrooms were nearby, located only five doors down from the accused's room. The evidence also showed that the complainant had spent time in the Maisonneuve Building since early October 2018, visiting the accused's room on several occasions, possibly less than ten times, to watch their favourite anime together. Obviously, after several recent visits to the accused's room in the Maisonneuve Building to watch episodes of a television show, it is a fair assumption to make that the complainant would have known the location of nearby bathrooms, as well as the location of the exit to use when departing the building, unless she was too intoxicated to walk by herself to the bathroom. It is not credible, as a result, that the accused's concerns were related to a confusing building layout. The same goes with the requirement to have a key for the complainant to re-enter his room. If this was true, he would have left his door unlocked or ajar or lent her the key. His testimony in relation to the complainant not being intoxicated on the evening of 3 November 2018 is simply not credible.

[99] He also testified that the complainant had at least five shots at the mess, composed of four shots of vodka and one shot of Sour Puss, but admitted she may have drank more alcohol. He confirmed that she drank the shots in less than five minutes, along with one bottle of Smirnoff Ice during the fifty minutes they were at the mess. The accused's testimony established that the complainant would have drank more alcohol in a shorter period of time than the quantity and time provided to, and used by, the expert for the calculation of the complainant's BAC that night.

[100] As for the alleged sexual assault itself, the accused testified that once he came back in his room from filling up his canteen, the complainant was naked. He later testified that at that time, she was wearing her underwear.

[101] The accused claimed being asexual which he explained as having no intention or interest in engaging in sexual acts with either male or female partners, presumably to support the contention that he is unlikely to have engaged in a sexual activity with T.T. because he had no interest in doing so, therefore he could not have willingly had sexual activities with her. His claim of being asexual allowed him to shift the blame on to the complainant, affirming that not only she asked to engage in sexual activities, she was rather very persistent in her sexual advances. He alleged that it was his consent that was at play. However, he admitted that he willingly engaged in a sexual activity with the complainant, which further put into question the truthfulness of his claim of being asexual.

[102] He testified he reluctantly engaged in sexual acts with the complainant because he felt he could not refuse; however, he also testified taking the initiative to perform sexual acts the complainant did not request, such as performing oral sex on her or suggesting that she perform fellatio on him, or putting his hand around her neck. He even told the Court that he asked the complainant to stop the fellatio because he felt no sexual pleasure from it. His evidence shows that he did not hesitate to stop a sexual act that he felt was dissatisfying. The evidence he provided demonstrated that he was seeking or at least expecting sexual gratification, contradicting his claim that he was not interested in engaging in sexual activity with the complainant. In his statement to the investigators, he went as far as to say that his penis was sore because of the long period it was erect that night, further discrediting his claim of lack of interest in sexual activities with the complainant. When cross-examined on the reason for prolonging the sexual activity with the complainant, he answered that he did not want to speculate. It was apparent to the Court that the accused was then caught in a clear lie.

[103] His conduct following the alleged sexual assault also greatly impeached his credibility. He explained that he disposed of the complainant's underwear because he believed they were soiled, he had no use for them and figured the complainant did not want them back. He later changed his story and said he did not want to wash the complainant's underwear because he did not want to wreck them, choosing instead to throw them in the garbage. Logically, as her best friend, the accused would have contacted the complainant to ask if she wanted her underwear she inadvertently left behind returned to her.

[104] The accused also affirmed that he did not remember seeing the complainant's sock after she departed his room. However, one of her socks was found with her underwear in the same plastic bag retrieved by the investigators from the garbage can that was identified by the accused outside of his room. The fact that he included the complainant's sock with her underwear in a plastic bag, which he disposed of in a garbage can outside of his room, is rather consistent with the accused disposing of uncomfortable items that he did not want to see linger around in his room.

[105] During his testimony, the accused explained that he found out from Officer Cadet Secant the morning of 4 November 2018 at breakfast that the complainant's room had been cordoned off by the MP. He consequently decided he would speak to the MP to

clarify the situation if they did not contact him first. He explained that he believed this was another case where the complainant suffered from alcohol poisoning and he was concerned for T.T.'s well-being. However, when he was informed by Officer Cadet Secant that the complainant's room had been cordoned off, the accused did not ask Officer Cadet Secant how the complainant, his best friend, was doing. When asked in Court why he did not contact nor visit T.T. to inquire about her health situation, Naval Cadet Remington testified that he had decided his presence in the complainant's building would be "counterproductive". He later testified that contacting her was not something that occurred to him at the time. Furthermore, in addition to his assumption that the MP would be looking to speak to him that day, he went as far as to tell the investigators during his interview that the complainant would want to have a rape kit performed on her. I find therefore that the accused's testimony is inconsistent with his affirmation that when he found out the next morning the complainant's room was cordoned off, he was concerned for the complainant's well-being as he believed this was another case of alcohol poisoning, and he assumed the MP would seek to speak with him in this regard.

[106] Further, there are multiple internal inconsistencies and contradictions between his testimony and the statement he made to the investigator the day after the alleged assault. One of the most remarkable statements he made is when he told the investigator that during the sexual activity, he would release his squeeze of the complainant's neck in order to allow her to breathe, because he was watching the expression on her face. Shortly thereafter, he referred to the squeeze as being a gentle touch and later saying that he was merely resting his hand on her neck.

[107] The accused changed his story several times on the stand to explain why during his interview with the investigators he told them the complainant was drunk that night, contradicting his evidence in Court. Naval Cadet Remington first asserted that he was mistaken when he told the investigators on many occasions that the complainant was drunk, even though his memory of the events would have been better the day after the alleged sexual assault when he spoke to the MP than years later testifying in Court. He later explained that he had lied to the investigators because he suffered anxiety; he was telling them what they wanted to hear, even though he understood that he was free to leave at any time and seemed rather composed and calm on the video recording. He changed his answer a third time, explaining that he was merely agreeing with a hypothetical scenario presented by the investigator; he was not agreeing with him that he knew T.T. was so intoxicated that she was unable to consent. In viewing the context in which the exchange took place during the interview, and the terminology used, it is very clear that the accused was in fact, agreeing with the premise that he believed the complainant was too intoxicated to consent. The Court finds that Naval Cadet Remington's evidence explaining why he told the investigator that the complainant was highly intoxicated is simply not credible.

[108] During his testimony, the accused made other statements that defied common sense. He asserted for example that his memory is generally not good, but it improves when he drinks alcohol. He also contended that if he does not remember a fact, it did not happen.

[109] Although this is in no way determinative of the Court's finding of credibility of the accused, the latter has admitted that during the enrolment process in the CAF in 2018, he had deliberately concealed his condition in relation to his anxiety issues. This was the reason he was released the same year under item 5(e) of the Table to QR&O 15.01. Although he was specifically queried about the existence of pre-existent conditions during the enrolment process, he explained he omitted to disclose his condition on the basis that his anxiety issues were sporadic, therefore he felt these issues had resolved themselves.

[110] When confronted during the cross-examination with the numerous inconsistencies of his evidence, he had an explanation for everything and none of them made much sense. It was apparent to the Court that Naval Cadet Remington had difficulties keeping track of all of his deceptive statements made in the course of his testimony. He had excuses for every single inconsistency, occasionally blaming his anxiety when he could not provide a more realistic answer. The Court finds that his testimony downplaying the complainant's alcohol consumption the evening of 3 November 2018, where he denied observing signs of intoxication on the part of the complainant, is not credible, nor is his version that the complainant was not only a willing participant, but persisted in making sexual advances to engage in sexual activity with him. In light of these inconsistencies and implausible statements, his testimony is not credible. In light of those inconsistencies, contradictions and illogical assertions, the Court does not believe Naval Cadet Remington's version of events.

Credibility of the complainant - generally

[111] Following an order granting the use of testimonial aids during the complainant's testimony, in particular regarding the use of a screen to allow the complainant not to see the accused in the courtroom and allowing her to provide her testimony with the presence of a support person by her side, the complainant testified. During her testimony, the Court noted that as the prosecution's questions started gravitating toward the allegations, the complainant became visibly upset and agitated. After an adjournment, and at the request of the prosecution, the Court allowed the complainant to have colouring paper and crayons to occupy her hands, to assist her in alleviating her anxiety as long as it did not interfere with her testimony or disrupt court proceedings. The Court was mindful of not drawing any inference of guilt from the use of these testimonial aids or from the complainant's anxiety on the stand.

[112] The complainant testified first about her alcohol consumption that night. She stated she drank one Smirnoff Ice at the restaurant, which would have been consumed between 1900 and 1940 hours, and soon after quickly drinking six shots of vodka in a matter of minutes. She also drank one or two bottles of Smirnoff Ice during her fifty-minute visit at the mess. She later testified that she stumbled on the walk to the Maisonneuve Building. She described feeling "warm and fuzzy". She felt intoxicated. Once in the accused's room she felt the alcohol "really hit her". Shortly after their arrival in his room, the accused offered and gave her a red, white and blue can of Smirnoff. She

testified that because her hands felt “fuzzy, shaky, like drunk hands” she was unable to open the can. The accused took the can from her and opened it for her. She testified drinking the beverage. After this moment, she told the Court she felt very drunk and warm and had a patchy memory of what unfolded next.

[113] The complainant said she did not remember the details of the evening after being offered the can of Smirnoff Ice, as she has a spotty memory at that time, however she said she remembered part of the anime television show that was playing. She remembered removing her hoodie and laying down on the bed. She then described the sexual acts later referred to by the accused, including digital penetration of her vagina, then having the accused’s penis in her mouth, and later experiencing vaginal penetration with the accused’s penis. She also testified that Naval Cadet Remington squeezed her neck in a way that interfered with her breathing. She affirms not consenting to any of these sexual acts, and that they were, in fact, imposed on her and that she had no choice in the matter. She further stated leaving the room in a panic when waking up later, inadvertently leaving pieces of clothing behind, and going directly to Officer Cadet Bryan’s room to seek comfort, help and shelter. She also testified feeling pain in her genitals when she awoke the next morning and her brain felt foggy.

Conduct of the complainant after the alleged sex assault

[114] As for what unfolded after the complainant departed the accused’s room, a trial judge may consider evidence adduced to show the complainant’s conduct after the alleged sexual assault. This evidence has limited use, and the trier of fact must be mindful not to use it to support myths and stereotypes related to how a victim of sexual assault is supposed to act after the fact. Such evidence can be used to assess the credibility of the complainant in certain circumstances; however, corroboration of a complainant’s testimony is not required.

[115] In this respect, the Court finds credible the uncontested evidence of both Officer Cadet Bryan and Naval Cadet Dalpra, who saw the complainant arrive at Officer Cadet Bryan’s room in a dishevelled state, missing pieces of clothing and in the midst of a panic attack. Both witnesses noticed something irregular in the complainant’s neck, described by Officer Cadet Bryan as a thumb-print mark, and described by Naval Cadet Dalpra as a rash or irritation. They saw the complainant crying and being oblivious to her surrounding, unable to comprehend what was asked of her. They had to assist her in taking a shower and comfort her. Her agitation eventually diminished, and she fell asleep in Officer Cadet Bryan’s bed, with her friend by her side. The complainant did not leave Officer Cadet Bryan’s room for a while, and stayed there for a month.

[116] Delivering her testimony, even with the screen and in the presence of her support person, was clearly difficult for the complainant, where, at times, it seemed that her distress rendered her temporarily unable to provide an answer as she was trying to repress strong emotions, particularly when the questions neared the allegations. Nevertheless, she testified in a forthright manner, recognizing that her memory of the events in the accused’s room the night of 3 November 2018 was not clear; she could not remember

certain details and occasionally her memory needed to be refreshed. She also said that she tried not to remember these events, and the passage of time was also a challenge in trying to provide certain answers. It was also apparent to the Court that her consumption of alcohol the evening of 3 November 2018 caused her to be highly intoxicated and to have a patchy memory of the events of that evening. During the cross-examination, she was cooperative and not combative and admitted when she could not remember a fact. However, as the cross-examination progressed, the complainant seemed to agree on any proposition the defence put to her in order to shorten her presence in Court as much as possible.

Evidence to impeach the credibility of the complainant

[117] In an attempt to impeach the credibility of the complainant, in particular when it came to her allegations that Naval Cadet Remington grabbed her by the neck, causing her to gasp for air and leaving a mark on her skin, defence counsel introduced exhibit 8: the form filled out as part of the rape kit performed on the complainant in Saint-Jean-sur-Richelieu on 4 November 2018. The defence suggested that the doctor would have seen the mark on the complainant's neck, if it existed, and would have noted the mark on the form, therefore the Court was asked to draw the inference that the absence of such mention in the form meant that there were no marks on the complainant's neck.

[118] The Court gave little weight to this exhibit and did not draw the inference asked by defence. There was at least one error in the form, being the box inadvertently checked indicating that the complainant had been sexually assaulted by contact from the suspect's vagina. There was another box checked indicating that the description of the sexual contacts by the complainant was unclear, possibly as a result of the use of drugs, alcohol or loss of consciousness. In addition, three persons filled out different portions of the form. Mrs Choquet, one of the three signatories to the form pertaining to the complainant, was able to explain in Court the content of the form and the process for the forensic examination related to sex assault, but she had no recollection of the complainant nor of her examination. The doctor who performed the examination and the social worker who also filled it out the document were not called as witnesses to explain their own process, and what they observed on the complainant. Clearly, errors were made when the form was filled out; it seems that the form did not accurately depict the reality of the complainant's situation the day after the sexual assault. Therefore, the Court does not have enough evidence to draw the inference the defence is seeking.

[119] I find the complainant's testimony to be credible. There were no internal inconsistencies in her testimony. Her evidence was supported by some of the evidence provided by both parties, in particular with regard to her alcohol consumption the evening of 3 November 2018 in both the quantity and the speed in which she consumed the shots at the mess.

Capacity to consent - section 273.1 of the Criminal Code

[120] In light of the evidence admitted at trial, I must determine whether the complainant had the capacity to consent. The exact amount that she consumed that night does not have to be established; the Court, however must be satisfied beyond a reasonable doubt, based on the evidence it accepted, that the complainant did not have the capacity to consent to the sexual activity the night of 3 November 2018. In this regard, I found the testimony of Naval Cadet Remington not credible and have rejected it in regard to the level of intoxication of the complainant that evening as well as in regard to his affirmation that T.T. was consenting to the sexual activity.

[121] With regard to other evidence adduced by the defence, Mr Pronovost's testimony provided little assistance to the Court. He began his current mess manager function for the Saint-Jean-sur-Richelieu region after the alleged sexual assault and told the Court that he was unable to provide evidence regarding the size of the shot glasses used at St-Maurice Mess both in 2018 and now.

[122] I have considered the toxicologist's evidence adduced by the defence to demonstrate that the level of intoxication of the complainant did not amount to a level that would have prevented her from having an operating mind on the night of 3 November 2018. The Court gave very little weight to the toxicology report with regard to its conclusion that the complainant had a low BAC during the material time, as this conclusion was based on several erroneous factual assumptions. These assumptions were contradicted by the evidence adduced by both parties and therefore provided an inaccurate lower level of intoxication of the complainant. In particular, the expert confirmed that his report was based on statistics of the average social drinker adult, and not on a youth who had little experience with alcohol consumption. He explained that the category of adult-social drinker would have a higher tolerance to alcohol than a youth, since youths are still developing and have little experience with alcohol. Youths are also more prone to blackouts. The evidence shows that the complainant, who had just turned 18 years of age two weeks prior, was not an adult social drinker with a higher level of alcohol tolerance. On the contrary; she had just started experimenting with alcohol just prior to the alleged sexual assault, with a near-death experience caused by alcohol poisoning when she consumed alcohol for the very first time. The expert also used an approximation of the weight and height of the complainant, information that was provided by the defence. As every individual has a unique body composition, accurate calculations can only be achieved by testing the subject. The complainant was not tested by the expert. The assumptions of the quantity of alcohol she drank that night, and the time span she consumed the alcohol, were also inaccurate, as the expert used three single shots of forty per cent alcohol consumed evenly between 1945 and 2100 hours, with another Smirnoff Ice at 2100 hours, and one-half vodka cooler at approximately 2130 to 2200 hours. The accused's own testimony referred to the complainant consuming at least five shots within a few minutes while at the mess between 1950 and 2030 hours.

[123] Regardless, the table in the report shows that at the level calculated with these erroneous assumptions, the complainant would have still been in the mild (0 to 50 milligrams per 100 millilitres) to increased impairment (60 to 150 milligrams per 100 millilitres) level.

[124] In his cross-examination, the prosecution provided a scenario to the expert of a youth subject who would have consumed alcohol of a quantity and speed of consumption aligning with the evidence the Court accepted as credible. The expert's calculation, while on the stand, resulted in a conclusion of a much higher BAC of at least 140 milligrams per 100 millilitres, consistent with a person with a much higher level of intoxication than shown in the report. He further explained that rapid consumption of alcohol equates to a rapid level of alcohol in the bloodstream. The expert also testified that when alcohol is consumed speedily in a short period of time, it is possible not to see signs of intoxication for a relatively short period of time after consumption, corroborating the complainant's testimony that she suddenly felt highly intoxicated only once in the accused's room.

[125] Mr Wigmore confirmed that at a BAC level of between 150 to 160 milligrams per 100 millilitres, the person would be experiencing patchy memory and blackouts, and at 160 milligrams, they would be vomiting and loss of consciousness may occur. When he added to his calculation a can of Smirnoff Ice at 2100 hours as requested by the prosecution during the cross-examination, his calculation of the complainant's BAC climbed to 200 to 210 milligrams per 100 millilitres. At 2230 hours, the BAC would be between 170 to 195 milligrams per 100 millilitres while at 0200 hours, it would be between 100 to 160 milligrams per 100 millilitres.

[126] The BAC levels calculated by the expert using the information provided by the prosecution, in particular with respect to the quantity of alcohol consumed at various timings, are consistent with the complainant's description of the symptoms she was having after her alcohol consumption, in particular during the sexual activity where she said she suffered from patchy memory, blackouts and possibly lack of consciousness, as well as later when she later woke up and left the accused's room. The Court therefore accepts the expert's conclusion of the complainant's BAC that was based on the information provided by the prosecution. This information was evidence the Court accepted as credible.

[127] Therefore, in applying the criteria found in the SCC case of *G.F.*, and after having conducted an assessment of the credibility of Naval Cadet Remington's testimony, the complainant's testimony, as well as other witnesses and the evidence as a whole, and having rejected the accused's evidence that the complainant was only a little to not at all intoxicated, the Court finds that, in light of the evidence that the court accepted as credible, the complainant did not have "an operating mind" at the time of the sexual activity, as she was incapable of evaluating each sexual act and choosing whether or not to consent to them. Consequently, the Court finds credible that the complainant was highly intoxicated while in the accused's room on 3 November 2018 to the point that she was incapable of understanding that she had a choice to engage or refuse to engage in a sexual activity with the accused. In particular, the Court finds that the complainant was not capable of understanding the physical acts she was the subject of, and that she had the choice to refuse to participate in the sexual activity. With her description of how the alleged sexual assault unfolded as she remembered it, combined with the proven amount of alcohol she consumed that night and her high level of intoxication that led to patchy

memories, blackouts and possible lack of consciousness, the Court is satisfied that the prosecution proved, beyond a reasonable doubt, that the complainant did not have an operating mind on the night of 3 November 2018. She did not have the capacity to consent to the sexual activities Naval Cadet Remington engaged with her.

[128] Furthermore, having rejected the accused's evidence that the complainant consented and persistently made sexual advances to him, and accepting the complainant's evidence as credible, in addition to finding that she was unable to say no, or believed she had no choice in the matter, I believe the complainant when she said she remembered not consenting to the sexual activity the accused engaged in with her.

Defence of honest but mistaken belief in communicated consent

[129] The Court rejected the accused's testimony with regard to the complainant's absence of signs of intoxication and that she was consenting to the sexual activity. In these circumstances, the defence proposed that should the Court find that the evidence proved that the complainant was not consenting, the Court must consider the defence of honest but mistaken belief in communicated consent.

[130] The issue with this proposition is that the accused testified that the complainant was a willing participant in making persistent sexual advances towards him. I have rejected this portion of the accused's testimony as being not credible. The version of events Naval Cadet Remington offered in Court is diametrically opposed to the complainant's. I have found her testimony to be credible; T.T. was highly intoxicated to the point of suffering blackout and possibly losing consciousness. The accused told the investigators multiple times during his recorded interview that he knew the complainant was very intoxicated, and he went as far as to say that he knew she was unable to consent to the sexual activity as a result.

[131] Further, on his own admission, Naval Cadet Remington drank eight to eleven shots of alcohol during the fifty-minute period that he was at the mess, with a complete 473-millilitre can of Smirnoff Ice while in his room. He was highly intoxicated that night, to the point that he vomited in the garbage can. In accordance with section 273.2, it is not a defence that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge where the accused's belief arose from the accused's self-induced intoxication, the accused's recklessness or wilful blindness.

[132] Further, if the accused did not take reasonable steps in the circumstances known to him at the time to ascertain that the complainant was consenting, this defence is not opened to him. I find that there is ample evidence supporting that if the accused did have a belief that the complainant was consenting, this belief either arose from his self-induced intoxication, or his recklessness or wilful blindness. I will add that, having rejected Naval Cadet Remington's testimony, the Court finds that there is evidence that he did not take any reasonable steps in the circumstances known to him at the time to ascertain that the complainant was consenting. Consequently, this defence is not opened to the accused.

Conclusion

[133] In conclusion, I have rejected Naval Cadet Remington's testimony as being not credible. His testimony does not leave me with a reasonable doubt as to his guilt. Looking at the rest of the evidence, finding the testimony of the prosecution's witnesses to be credible, and even when considering the accused's testimony at this stage, I find that the prosecution proved, beyond a reasonable doubt, that the complainant did not have the capacity to consent to the sexual activity the accused engaged in with her. In light of the evidence the Court accepted as credible, the Court finds that the defence of honest but mistaken belief in communicated consent is not open to the accused, as there is no air of reality for this defence in the circumstances of this case. Therefore, the Court finds that the prosecution proved beyond a reasonable doubt that Naval Cadet Remington sexually assaulted T.T. on 3 November 2018.

FOR THESE REASONS, THE COURT

[134] **FINDS** Naval Cadet Remington guilty of one charge of sexual assault.

Counsel:

The Director of Military Prosecutions as represented by Major J.D.H. Bernatchez and Lieutenant-Colonel M. Pecknold

Lieutenant(N) B. Wentzell and Lieutenant-Colonel A. Bolik, Defence Counsel Services, Counsel for Naval Cadet L.R. Remington