



COURT MARTIAL

Citation: *R. v. Guarnaccia*, 2015 CM 3006

Date: 20150320

Docket: 201447

Standing Court Martial

2nd Canadian Division Support Base Valcartier, Detachment St-Jean
Saint-Jean-sur-Richelieu, Québec, Canada

Between:

Her Majesty the Queen

- and -

Corporal J.F. Guarnaccia, Accused

Before: Lieutenant-Colonel L.-V. d'Auteuil, M.J.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR FINDING

(Orally)

INTRODUCTION

[1] On 28 October 2014, the Director of Military Prosecutions preferred five formal charges for service offences against Corporal Guarnaccia: two charges of abuse of subordinates under section 95 of the *National Defence Act (NDA)*, two charges under section 130 of the *NDA* for committing assault, contrary to section 266 of the *Criminal Code*, and one charge of conduct to the prejudice of good order and discipline for harassing the trainees in a platoon of recruits, contrary to section 129 of the *NDA*.

[2] All the above charges are related to incidents which allegedly took place at the Canadian Forces Leadership and Recruit School (CFLRS), located at the Saint-Jean Garrison, Saint-Jean-sur-Richelieu, in the Province of Québec, between 25 October 2009 and 1 February 2010, and involved trainees in R34 Platoon, participating in the Basic

Military Qualification Course for non-commissioned members, bearing the serial number R0297F. At the time, Corporal Guarnaccia was one of the instructors assigned to this course.

EVIDENCE

[3] The evidence presented in Court during the hearing, which was conducted over a period of six days, from 9 to 13 March and on 16 March 2015, primarily consisted of testimony from nine members of the platoon in question, eight of whom were subpoenaed to appear by the prosecution, namely, Corporal Gagné, Mr Robichaud, Corporal Lessard, Private Roussy, Corporal Dandurand, Corporal Nantel, Corporal McGraw and Corporal Roy. One witness was subpoenaed to appear by the accused, namely, Private Poudrier.

[4] Certain documents were also produced by the parties:

- (a) a copy of the statement, signed by Corporal Guarnaccia on 28 August 2002, indicating that he had read, understood and would adhere to the Canadian Forces policy on discrimination and harassment;
- (b) a copy of the report on the Basic Military Qualification Course for non-commissioned members concerning Mr Robichaud, which had been signed by him on 20 January 2010; and
- (c) a copy of a report obtained from the Météo Média website, printed on 16 March 2015, concerning the minimum, maximum and average temperatures at Saint-Jean-sur-Richelieu from 10 to 13 January 2010.

[5] Through his counsel, Corporal Guarnaccia admitted certain facts which the prosecution is required to prove vis-à-vis certain essential elements of the offences listed on the charge sheet, thereby relieving the prosecution of the burden of proving the identity of the accused as the perpetrator of the offence, as well as the date and location of the alleged incident related to the five charges.

[6] Through his counsel, Corporal Guarnaccia also admitted the following facts:

- (a) that he was part of the team of instructors for a platoon of recruits participating in a course bearing the serial number R0297F, scheduled from 26 October 2009 to 26 February 2010;
- (b) that candidates participating in the course bearing the serial number R0297F for R34 Platoon were subordinates of the accused due to their rank and appointment;

- (c) that he signed the Canadian Armed Forces statement on harassment and discrimination, Exhibit 3, on 28 August 2002, before his re-enrollment in the Canadian Forces on 13 November 2003; and
- (d) that Defence Administrative Order and Directive (DAOD) 5012-0 was published and sufficiently notified to Corporal Guarnaccia and was made available to him in accordance with the requirements of section 1.21 of the *Queen's Regulations and Orders for the Canadian Forces* (QR&O).

[7] In turn, the prosecutor admitted the existence of certain facts for the purpose of dispensing with proof thereof, the effect of which is to narrow the scope of the facts to be proved by the defence. These facts are as follows:

- (a) that Mr Robichaud was not diagnosed as suffering from post-traumatic stress disorder (PTSD) by Doctor Tremblay and Doctor Amado;
- (b) that in a report dated 9 November 2010, Doctor Tremblay provided Mr Robichaud with the following diagnosis, "Adjustment disorder with mixed mood and several post-traumatic symptoms, without meeting all the criteria for PTSD"; and
- (c) that in a report dated 27 March 2012, Doctor Amado provided Mr Robichaud with the following diagnosis, "Adjustment disorder with anxiety (patient does not meet criteria required for diagnosis of post-traumatic stress).

[8] Lastly, the Court took judicial notice of the elements listed in section 15 of the *Military Rules of Evidence*, including the contents of, but not the publication or sufficiency of notification of, DAOD 5012-0, *Harassment Prevention and Resolution*, published on 20 December 2000.

FACTS

[9] Corporal Guarnaccia was an instructor at CFLRS, located at Saint-Jean Garrison, in Saint-Jean-sur-Richelieu. He was assigned to the Basic Military Qualification course for private recruits, scheduled from 26 October 2009 to 26 February 2010. He was part of the team of instructors assigned to R34 Platoon for the course bearing the serial number R0297F. At the beginning of this 14-week course, there were roughly 60 candidates in total enrolled and approximately 40 candidates successfully completed this course.

[10] According to the witnesses, Corporal Guarnaccia primarily exercised the role of a "marcher", the lone instructor accompanying the platoon on various treks during the day. He was also regularly involved with inspections of members of the platoon and was sometimes responsible for conducting drills or offering certain in-class courses. He was

assigned to Section 4 in order to help another instructor, Master Corporal Laframboise, who was subsequently replaced by Sergeant Robert.

[11] All the witnesses gave accounts of various incidents involving Corporal Guarnaccia that they had allegedly observed or heard personally during the course in question. Some of the candidates who testified before the Court joined the course sometime after it had already started but had to drop out. Others started the course at the very beginning but had to drop out before completion. Lastly, some of the witnesses started the course and completed it successfully.

[12] In order to ensure a better understanding of the facts recounted by the various witnesses summoned to appear by the two parties, the Court decided to approach this part of its decision by first addressing the physical punishment which was allegedly imposed on all members of the platoon, followed by the incidents which reportedly took place during inspections and lastly, the other incidents presented as constituting harassment by the accused of certain specific members of the platoon.

PHYSICAL PUNISHMENT

Push-ups inside the “Mega”

[13] As described by numerous witnesses in the context of a basic military qualification course such as the one for private recruits, the use of purely physical punishments involving one or all members of a group appeared to be a normal measure and was expected by those subjected to such punishments.

[14] Push-ups (also known as *pompes* in French, according to the dictionary *Le Petit Robert*) are a muscle-strengthening exercise which consist of raising and lowering the body using the arms while keeping the body straight in a prone position, supported only by both feet placed closely together and both arms positioned slightly wider apart than the width of the shoulders. In the context of this course, all the instructors used this exercise not only to punish the group of candidates for various minor shortcomings and transgressions but also as a way to improve and maintain the physical condition of candidates.

[15] Eight witnesses who appeared before the Court described an incident which allegedly took place in the green area, located at one end of the building known as the “Mega”, more specifically, where the lockers used by the candidates were located along both sides of a long hallway. All the witnesses referred to this site as the green lockers.

[16] All members of R34 Platoon were reportedly present and Corporal Guarnaccia was the only instructor present, because he had to accompany the group, which was required to move to another location.

[17] The incident involved three separate episodes which were recounted by a number of witnesses.

First episode

[18] The first episode involved a situation in which Corporal Guarnaccia, while all the members of the platoon were doing knuckle push-ups as ordered by him, allegedly grabbed the shirt of Mr Robichaud, then Private Robichaud, and either lifted him up or helped the candidate to lift himself up.

[19] Private Robichaud, who was 44 years old when he enrolled in the Canadian Forces, explained to the Court that he had enrolled in order to get into the intelligence field and that this had been the first opportunity for someone without any military experience to get into this field.

[20] Essentially, he told the Court that following his enrollment the expectation was that he would complete the basic military qualification course and his trade course and would then be employed in intelligence immediately, due to his previous work experience. Based on the Court's understanding of his testimony, only members who had already acquired some experience within the Canadian Forces were usually recruited to work in intelligence, and he was therefore benefitting from an exception to the typical approach used.

[21] Private Robichaud was the oldest of the candidates and well above the average age of all the members of the platoon, who were between 18 and 20 years old. Several witnesses, including Private Robichaud himself, testified that he was not in excellent physical condition and struggled to keep up with the group. However, he did meet the minimum physical standards required to take this course.

[22] He told the Court that after dinner on one particular day during the first week of the course, while he was dressed in civilian clothing, since members of the platoon had not yet received their military clothing and they were all in the area around the green lockers, Corporal Guarnaccia ordered all the candidates in the platoon to get into the knuckle push-up position, because the group had failed to comply with the timing.

[23] Private Robichaud placed himself in the requisite position as ordered by the instructor, just like all the other members of the platoon. It was a cement floor, but he had a small stone under one of his knuckles and started to groan because it was painful. Corporal Guarnaccia allegedly approached him and hit him very hard on the shoulders with closed fists. He then felt some pain around his shoulders. He allegedly fell right on his face. According to the witness, the accused then grabbed him by the shoulders and pulled him up into a standing position. Corporal Guarnaccia reportedly told him to stop crying like a little girl, to stop being a wimp and swore at him. He then returned to the push-up position and completed the requisite number of knuckle push-ups.

[24] Corporal Gagné also testified about a similar incident involving Private Robichaud. He informed the Court that he had joined the platoon during the fourth week of the course and had dropped out of the course between the eighth and twelfth

weeks, because he had failed a physical test. He was unable to pinpoint exactly when the incident occurred.

[25] He explained that while the platoon was in the area around the green lockers doing a change parade, Corporal Guarnaccia had them do squats and told all the members of the platoon to assume the knuckle push-up position. He indicated that they were all wearing combat uniform. He recalled that the instructor was screaming very loudly and attacked Private Robichaud. He confirmed that Corporal Guarnaccia grabbed Private Robichaud's shirt, twisting it to make a handle while the latter was doing push-ups and even helped him doing them by lifting him up with excessive force, thereby punching Private Robichaud in the back a number of times. He also claimed that the accused kicked him a number of times but clarified that he did not actually see the instructor's feet touched the candidate. Throughout the entire time that the above incident was unfolding, Corporal Guarnaccia allegedly called Private Robichaud a wimp. He said that the members of the platoon were all in a line and that he was roughly 10 feet from Private Robichaud, whom he could see clearly while the entire incident unfolded.

[26] Corporal Gagné mentioned that over time Private Robichaud seemed to suffer from paranoia and was not in the best mental state because he believed that he was under constant surveillance both day and night. He believed that there were cameras everywhere and that people were playing tricks on him by scattering coins around the area of his cubicle every night in order to keep him on guard. He seemed to think that he was being oppressed and appeared overwhelmed by the fact that the instructors were always on his back.

[27] Private Robichaud confirmed that he had told a member of his platoon that he thought there were cameras everywhere to keep the younger members quiet.

[28] Private Roussy also recounted a similar incident around the green lockers. He had been part of the platoon since the very beginning of the course. He described Corporal Guarnaccia as being more direct and as someone who paid far more attention to each individual than the other course instructors. In his view, Corporal Guarnaccia wanted the candidates to improve and he did not want them to give up.

[29] He described one push-up session to which Corporal Guarnaccia had subjected members of the platoon in the area where the green lockers were located. He recalled that they were required to assume the knuckle push-up position and do push-ups for a period of between 30 seconds and one minute. He indicated that Corporal Guarnaccia verbally berated those who had difficulty and yelled at Private Sauvé and Private Robichaud. He noticed that Corporal Guarnaccia was leaning in very closely to Private Robichaud and screaming at him. He heard the sound of a slap against Private Robichaud's back, which gave him the impression that Corporal Guarnaccia was going to grab him to help him get up. He did not see whether Private Robichaud actually got up.

[30] Private Dandurand also described a similar incident to the Court, which allegedly occurred in the area around the green lockers. He indicated that when Corporal Guarnaccia arrived, he did not seem to be in a good mood. He ordered members of the platoon to assume the push-up position. He could not remember whether they were supposed to place their hands flat on the ground or position themselves on their knuckles. He indicated that he was right next to Private Robichaud, albeit some distance from the latter.

[31] Private Robichaud groaned and Corporal Guarnaccia immediately ran towards him, grabbed him by his combat shirt around the shoulders, lifted him up and forcefully pushed him into the lockers.

[32] For his part, Corporal Nantel made reference to a rather similar incident. He indicated that while members of the platoon were in the push-up position in the area around the green lockers, lined up in two rows, Corporal Guarnaccia heard someone groaned and first headed towards Private Sauvé, then towards Private Robichaud. He indicated that Corporal Guarnaccia approached Private Robichaud, “grabbed” him by his combat shirt to help him stand up and then pushed him. When he was pushed, Private Robichaud reportedly tripped over someone and fell against the lockers, which made a lot of noise. Private Robichaud then apparently picked himself up and once again assumed the push-up position. Corporal Nantel was able to observe all of this, because there were only about three to five candidates between him and Private Robichaud. At the time, he was shocked to have witnessed such an incident. However, there were things to think about during the day and he simply moved on.

[33] Corporal Roy’s testimony also referenced a similar incident. While members of the platoon were in the vicinity of the green lockers in the knuckle push-up position, Corporal Guarnaccia reportedly approached Private Robichaud, who was whining about something, probably because of the pain, and grabbed him by the shirt to lift him up. Corporal Roy could not remember whether Private Robichaud was completely lifted up to standing position. Corporal Guarnaccia allegedly told him to stop whining and to pay up like the others and then pushed him back into the push-up position. During this incident, Corporal Roy was close to Private Robichaud, with her body positioned in the opposite direction to Private Robichaud, who was to her left.

[34] Private Poudrier described an incident in which members of the platoon were in the push-up position, with palms placed flat on the ground, in the area around the green lockers. He informed the Court that the platoon had been divided into two rows on either side of the hallway, right along the lockers. The candidates’ feet were positioned close to the lockers and their heads were facing in the direction of the centre of the hallway. Corporal Guarnaccia allegedly approached Private Robichaud, who was unable to do any more push-ups; he reportedly touched Private Robichaud’s back with his hand to get his attention and asked him what was going on. Private Poudrier’s understanding was that Private Robichaud no longer had any strength left and could not do any more push-ups. At this point, Corporal Guarnaccia apparently told him to get up and he did.

[35] Private Poudrier testified that Corporal Guarnaccia never forced anyone to do knuckle push-ups, that the latter chose to do knuckle push-ups while doing push-ups with the candidates but did not demand them; all those who did knuckle push-ups, himself included, did so on a voluntary basis in order to try them. Nevertheless, he did concede that they were difficult to do.

[36] He testified that he was surprised by the discussions among the candidates that very evening and was even more surprised by rumours that had circulated, which exaggerated what he had observed during this push-up incident. He indicated that members of the platoon talked about this incident for about one or two weeks.

[37] Lastly, Corporal Lessard informed the Court that he did not recall any physical contact between Private Robichaud and Corporal Guarnaccia.

Second episode

[38] The second push-up incident at the green lockers involved accounts by certain witnesses that Corporal Guarnaccia pretended to kick Corporal Robichaud in the stomach or head, without actually touching him, while he was in the push-up position. In his testimony, Corporal Gagné concluded that he believed that a number of kicks had actually made contact, but he had not been able to observe whether this was in fact the case. In their respective testimony, Corporal Nantel and Corporal McGraw described such a simulation and Corporal Lessard mentioned the same thing but in the context of push-ups that were done outside the building.

Third episode

[39] With respect to the third episode during the same push-up session inside, Private Roussy, Corporal Dandurand and Corporal Roy also testified that Corporal Guarnaccia pretended to kick a candidate, this time targeting Private Sauvé, who also was subjected to this while he was in the push-up position. Private Robichaud also mentioned a similar simulation but could not remember who Corporal Guarnaccia had targeted.

Push-ups outside the “Mega”

[40] Some witnesses also reported that Corporal Guarnaccia required members of the platoon to do closed-fist knuckle push-ups outside the building.

[41] Corporal Gagné told the Court that on the same day that they did push-ups at the green lockers, they did knuckle push-ups outside on the asphalt beforehand and that his knuckles were damaged after this exercise.

[42] Mr Robichaud told the Court that after the push-up incident at the green lockers, all the members of the platoon went outside on a run to another location. In order to wait for those who were lagging behind the rest of the group, Corporal Guarnaccia made those who were waiting to assume the push-up position on the asphalt. When the

laggards joined the group, they were also required to assume the same position and do push-ups, and then they all went off again on another run. Mr Robichaud indicated that his knuckles were bloodied and that he contracted an infection in one of his knuckles that lasted two weeks.

[43] Corporal Lessard told the Court that he recalled one incident when the candidates ran on the asphalt road on the base between the kitchen and the military police detachment. Corporal Guarnaccia ordered members of the platoon to do knuckle push-ups on the asphalt. He recalled injuring his knuckles like several other candidates.

[44] Private Roussy informed the Court that before he had to drop out of the course due to an injury around the fifth week, Corporal Guarnaccia had required candidates in the platoon to do knuckle push-ups while they were outside the building on the lawn.

[45] Corporal Roy gave the Court an account of a knuckle push-up session ordered by Corporal Guarnaccia during the course of one particular weekend. This session was allegedly imposed shortly before the platoon went to the medical clinic for a vaccination. He allegedly told all members of the platoon to go outside and assume the knuckle push-up position. They were spread out here and there outside. Corporal Roy indicated that she had been able to manage this difficult exercise by placing her knuckles between the joint of two concrete slabs.

[46] Corporal Nantel informed the Court that he could remember two push-up sessions, each of which had been done on an asphalt surface. He indicated that his knuckles were damaged and bloodied and that he ended up with some gravel stuck in his knuckles.

Forehead against the locker

[47] Corporal Lessard, Corporal Dandurand, Corporal Roy and Mr Robichaud, all described a physical exercise which was allegedly imposed on members of the platoon by Corporal Guarnaccia. This involved having each candidate to press their forehead against a locker in the green area and then requiring candidates to move their feet roughly 30 centimetres away from the locker so that the body was in an inclined position, without using their hands for support. This could last from 5 to 10 minutes.

[48] Corporal Lessard stated that this only happened to him once during an inspection. He had seen this done to other candidates but not necessarily imposed by Corporal Guarnaccia.

Inspections

[49] Corporal Gagné testified about Corporal Guarnaccia's attitude and the treatment he was subjected to by Corporal Guarnaccia. He told the Court that during one inspection the accused threatened to throw him down from the tenth floor of the building and told him that he would no longer be able to find a job within the public

service or elsewhere and that he would do everything within his power to make sure that he left the Canadian Forces.

[50] He recounted that during inspections Corporal Guarnaccia punched him in the chest on two or three separate occasions, in order to provoke a reaction from him, but he indicated that he had not reacted, in order to avoid any problems. He believes that he would have been able to defend himself, but he did not. He felt hurt, powerless, dominated and unable to react to the situation.

[51] Mr Robichaud informed the Court that during one inspection by the commandant Corporal Guarnaccia prohibited him from sitting down, when Sergeant Bouchard had in fact told him to do the exact opposite, because he had injured his Achilles tendon. He stated that Corporal Guarnaccia used his shoulder to hit his own shoulder while he was standing at attention, in order to try to knock him off balance.

[52] Corporal Lessard told the Court that during inspections Corporal Guarnaccia took pleasure in bumping the candidates in his section while they were standing at attention, thereby trying to knock them off balance. Corporal Lessard confirmed that in his case he did not even move when this was done and that the force applied by Corporal Guarnaccia was not excessive.

Other conduct

[53] Corporal Gagné mentioned that he had a tattoo on his neck that said, "Hell on earth". He had this tattoo done when he was 18 years old and attributed it to youthful indiscretion. Corporal Guarnaccia was aware of this and called him a member of the Hells Angels, because he came from the city of Sorel. On one occasion, after he had left the course, Corporal Guarnaccia allegedly stopped him in the Mega, had him stand at attention and asked to check his tattoo, telling him that he would prove that he was a member of the Hells Angels. Corporal Gagné was interviewed by the military police because of his tattoo.

[54] Corporal Lessard testified that Corporal Guarnaccia told Corporal Gagné in front of all the members of the course, when he was no longer a member of the platoon, that he would not finish the Forces as long as he was there.

[55] He also indicated that he heard from Corporal Guarnaccia certain specific comments about a candidate of the black race. Corporal Guarnaccia allegedly asked members of the platoon why the Canadian Forces was accepting more candidates of the black race. He apparently answered his own question, saying that it was because of what happened in Somalia.

[56] Mr Robichaud described the incident in which he injured himself again on 11 January 2010 and which resulted in him leaving R34 Platoon for medical reasons. He informed the Court that when he returned from his holiday break, he no longer had any medical restrictions due to his injury, because the restriction period indicated in his

medical report had expired. He informed Corporal Guarnaccia of this, telling him that he needed to return to the medical clinic for follow-up related to his injury.

[57] Corporal Guarnaccia allegedly told him to get his things and join the platoon. A march started in the late afternoon. Later, members of the platoon went to the indoor parade square, where they were required to complete a run. Private Robichaud had barely started running when he felt a sharp pain in his Achilles heel. Corporal Guarnaccia screamed at him, seemingly beside himself with anger, demanding that he get up and finish the run. Subsequently, despite the fact that another instructor had noted that he was injured, he had to catch up with the platoon and return to his quarters with the help of another candidate. It was not until the next morning that Private Robichaud was able to go to the clinic, where his medical restrictions were updated due to his injury. He left the platoon on 20 January 2010 due to this injury.

[58] Mr Robichaud indicated that he was constantly disparaged by Corporal Guarnaccia, who allegedly told him that there was no place for him in the Canadian Forces, particularly in intelligence and that he would not finish the course. Corporal Dandurand, Corporal McGraw and Corporal Roy confirmed that Corporal Guarnaccia picked on Private Robichaud. Corporal Roy indicated that this attitude could potentially be attributed to a memorandum written by Private Robichaud, which had allowed members of the platoon to comply with a requirement from the instructors.

[59] Corporal Dandurand told the Court that Corporal Guarnaccia said, “that we get rid of those who are no good, that natural selection runs its course”, when referring to Private Robichaud who was no longer on the course.

[60] Corporal Dandurand and Corporal Roy testified that Corporal Guarnaccia also picked on Private Duchesne due to his physical appearance, specifically due to his teeth and smile, and that he never missed an opportunity to mention Private Duchesne’s appearance in front of all the members of the platoon by making unflattering comments. Moreover, he never failed to make Private Duchesne feel like he did not have the abilities to become an infantryman with the Royal 22^e Régiment. Corporal Roy told the Court that Corporal Guarnaccia took great pleasure in informing Private Duchesne that he had failed his weapons test. She described Private Duchesne as someone who showed very little emotion, but indicated that she had seen him crying and realized at the time that he wanted the instructors to leave him alone.

LAW

[61] The presumption of innocence is the first and most important principle of law applicable to every case dealt with under the Code of Service Discipline and the *Criminal Code*. At the opening of his trial, Corporal Guarnaccia was presumed innocent and this presumption of innocence only ceases to apply if the prosecution presents evidence that satisfies the Court of his guilt beyond a reasonable doubt.

[62] Two rules flow from the presumption of innocence. The first one is that the prosecution bears the burden of proving guilt; the second one is that guilt must be proven beyond a reasonable doubt. These rules are inextricably linked with the presumption of innocence and ensure that no innocent person is convicted.

[63] The burden of proof rests with the prosecution and never shifts. There is no burden on Corporal Guarnaccia to prove that he is innocent. He does not have to prove anything.

[64] What does the expression “beyond a reasonable doubt” mean? A reasonable doubt is not an imaginary or frivolous doubt. It is not based on sympathy for or prejudice against anyone involved in the proceedings. Rather, it is based on reason and common sense. It is a doubt that arises logically from the evidence or from an absence of evidence.

[65] It is virtually impossible to prove anything to an absolute certainty, and the prosecution is not required to do so. Such a standard would be impossibly high. However, the standard of proof beyond a reasonable doubt falls much closer to absolute certainty than to probable guilt. The Court must not find Corporal Guarnaccia guilty unless it is sure he is guilty. Even if the Court believes that Corporal Guarnaccia is probably guilty or likely guilty, that is not sufficient. In those circumstances, the Court must give the benefit of the doubt to Corporal Guarnaccia and find him not guilty, because the prosecution has failed to satisfy the Court of his guilt beyond a reasonable doubt.

[66] The important point for the Court is that the requirement of proof beyond a reasonable doubt applies to each of the essential elements of an offence. It does not apply to individual pieces of evidence. The Court must decide, looking at the evidence as a whole, whether the prosecution has proved Corporal Guarnaccia’s guilt beyond a reasonable doubt.

[67] Reasonable doubt also applies to the issue of credibility. On any given point, the Court may believe a witness, not believe that witness or not be able to decide. The Court does not have to fully believe or not believe a witness or a group of witnesses. If it has a reasonable doubt as to the guilt of Corporal Guarnaccia because of the credibility of witnesses, the Court must find him not guilty.

[68] If the evidence, the absence of evidence or the credibility or the reliability of one or more of the witnesses leaves the Court with a reasonable doubt as to Corporal Guarnaccia’s guilt in respect of a charge, the Court must find him not guilty of that charge.

[69] The Court must consider only the evidence presented in the courtroom. That consists of testimony and exhibits adduced. It may also include stipulations or admissions as in this case, because counsel for both parties agreed on certain facts.

[70] The evidence includes what each witness says in response to questions asked. The questions, however, are not evidence, unless the witness agrees that what is asked is correct. Only the answers are evidence.

[71] Now, what can be said about the different essential elements for each of the charges to be proven by the prosecution?

[72] First, Corporal Guarnaccia is charged with abuse of subordinates, contrary to section 95 of the *NDA*. This section of the Act reads as follows:

Every person who strikes or otherwise ill-treats any person who by reason of rank or appointment is subordinate to him is guilty of an offence and on conviction is liable to imprisonment for less than two years or to less punishment.

[73] In addition to proving the identity of the accused, as well as the date and location alleged in the two charges, the prosecution is also required to prove the following essential elements beyond a reasonable doubt:

- (a) that Corporal Guarnaccia ill-treated a person;
- (b) that the person ill-treated by Corporal Guarnaccia was subordinate to him by reason of rank or appointment;
- (c) the blameworthy state of mind of Corporal Guarnaccia.

[74] The plain and ordinary meaning given to the word “*maltraité*” by the dictionary *Le Petit Robert* is to treat someone brutally, to beat, to handle roughly, to molest or to treat harshly. In English, I characterize the word “ill-treat” as meaning to act with cruelty by causing suffering to others, to treat severely, to mistreat or to abuse.

[75] Essentially, as stated at paragraph 45 of my decision in *R. v. Murphy*, 2014 CM 3021, containing an analysis of the essential elements of this offence, it appears that Parliament enacted such a provision in the Code of Service Discipline to prevent any abusive behaviour by Canadian Forces members in a position of authority, which would result in striking or using any other kind of violence toward any subordinate by reason of the existence of a hierarchy system based on the rank or the employment in a military context.

[76] With respect to the blameworthy state of mind of an accused in respect of this offence, I also came to the conclusion, at paragraph 48 of *Murphy*, that the prosecution must prove beyond a reasonable doubt the intent of Corporal Guarnaccia to abuse his authority or to use violence toward a subordinate, because of the existence of such a hierarchical relationship.

[77] Corporal Guarnaccia is also charged with assault, contrary to section 266 of the *Criminal Code*. Section 265 of the *Criminal Code* defines the concept of assault and reads in part as follows:

265 (1) A person commits an assault when

- (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
- (b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or
- (c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.

[78] In addition to proving the identity, date and location, the prosecution must also prove the following essential elements beyond a reasonable doubt:

- (a) the fact that Corporal Guarnaccia applied force, directly or indirectly, against the complainant;
- (b) the fact that Corporal Guarnaccia applied force intentionally against the complainant;
- (c) the fact that the complainant did not consent to the use of force by Corporal Guarnaccia;
- (d) the fact that Corporal Guarnaccia was aware that the complainant had not provided consent or was reckless or wilfully blind in this regard.

[79] Force simply means physical contact. Force can be applied without physical violence. In other words, this essential element will need to be proven beyond a reasonable doubt by establishing that the complainant was in fact touched.

[80] It is important to understand that individuals do not necessarily provide consent just because they submit or fail to resist. Section 265(3) of the *Criminal Code* reads as follows:

265 (3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of:

- (a) the application of force to the complainant or to a person other than the complainant;
- (b) threats or fear of the application of force to the complainant or to a person other than the complainant;
- (c) fraud; or
- (d) the exercise of authority.

[81] The prosecutor must establish that the accused intended to apply force to the complainant. When individuals intend to do something, they do so in a deliberate

manner. This differs from individuals who do things with care and something then happens accidentally. When someone does something accidentally, it was not done intentionally.

[82] The evidence that the accused was aware that the complainant had not provided consent (or provided valid consent) for the application of force may be established in one of the three following three manners: the fact that the accused had actual knowledge of the lack of consent; the fact that the accused acted carelessly or recklessly, despite knowing such was the case; or by wilful blindness, that is, that he knew but decided to disregard it.

[83] A person acts carelessly or recklessly where he or she knows that his or her conduct may entail consequences of a criminal nature but still chooses to act regardless. Wilful blindness is when a person decides not to inquire into or verify something, because he or she does not really want to know the answer. In other words, the person deliberately closes his or her eyes to something, because he or she prefers to remain oblivious rather than know what the actual answer will be.

[84] Lastly, Corporal Guarnaccia is charged with conduct to the prejudice of good order and discipline, contrary to section 129 of the *NDA*. This section reads in part as follows:

129 (1) Any act, conduct, disorder or neglect to the prejudice of good order and discipline is an offence and every person convicted thereof is liable to dismissal with disgrace from Her Majesty's service or to less punishment,

(2) An act or omission constituting an offence under section 72 or a contravention by any person of:

- (a) any of the provisions of this Act,
- (b) any regulations, orders or instructions published for the general information and guidance of the Canadian Forces or any part thereof, or
- (c) any general, garrison, unit, station, standing, local or other orders,
- (d) is an act, conduct, disorder or neglect to the prejudice of good order and discipline.

[85] With respect to this charge, the prosecution must therefore prove the following essential elements:

- (a) the identity of the accused as the offender, the date and location of the offence as alleged in the particulars of the offence;
- (b) the conduct alleged in the charge;
- (c) the prejudice to good order and discipline, which includes:

- i. the standard of conduct (the nature and existence of the order, regulation or instruction);
 - ii. that the accused knew or should have known the requisite standard of conduct (the order was issued, published and notified (see article 1.21 or 1.22 of the *QR&O*);
 - iii. that the order constitutes a violation of the requisite standard of conduct (the conduct is equivalent to a violation of the order, regulation or instruction).
- (d) the blameworthy state of mind of the accused.

[86] It is important to remember that when it is alleged in the particulars of such a charge that there has been a contravention of instructions, as indicated in paragraph 129(2)(b) of the *National Defence Act*, the contravention of such an order is deemed to constitute conduct to the prejudice of good order and discipline.

[87] Having provided this explanation on the presumption of innocence, the standard of proof beyond a reasonable doubt and the essential elements of the charges, I will now examine the issues in dispute.

ANALYSIS

[88] Given the admissions made by Corporal Guarnaccia through his counsel, the prosecution has discharged its burden of proving certain essential elements for each of the offences beyond a reasonable doubt.

[89] Consequently, with respect to the first and third charges, namely, having ill-treated Mr Robichaud and Corporal Gagné, who by reason of rank or employment were subordinates to him, the Court finds that the identity, the date, the location and the fact that each of these persons were subordinates to the accused by reason of rank or employment have been proven beyond a reasonable doubt by the prosecution.

[90] With respect to the second and fourth charges, namely, committing assault, the Court finds that the prosecution has discharged its burden of proof with respect to the following essential elements: the identity, the date and the location of the offence.

[91] Lastly, with respect to the fifth charge, namely, had a conduct to the prejudice of good order and discipline for harassing trainees in R34 Platoon, the Court finds that the prosecution has demonstrated the following elements beyond a reasonable doubt: the identity, the date and the location of the offence. With respect to the prejudice to good order and discipline, the Court holds that the standard of conduct and the fact that the accused knew or should have known the requisite standard of conduct has been proven beyond a reasonable doubt.

[92] Since the Court has provided a comprehensive list of everything it finds to have been established beyond a reasonable doubt by the prosecution on each of the charges in view of the admissions made by the accused, the Court will now turn to an analysis of the other essential elements of each of the offences that it has yet to determine.

[93] To do this, the Court must first analyze all the testimonies provided in support of the charges.

Credibility and reliability of witnesses

[94] At this point in the analysis, it is worth recalling the comments made by the Court Martial Appeal Court in *R. v. Clark*, 2012 CMAC 3, in which Justice Watt, on behalf of the Court, reiterated certain principles concerning the analysis of testimonial evidence 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.

[95] With respect to the issue of the credibility and reliability which should be attributed to testimony, the Court Martial Appeal Court expressed the following opinion at paragraph 48 of that same decision in *Clark*:

Testimony can raise veracity and accuracy concerns. Veracity concerns relate to a witness’ sincerity, his or her willingness to speak the truth as the witness believes it to be. In a word, credibility. Accuracy concerns have to do with the actual accuracy of the witness’ account. This is reliability. The testimony of a credible, in other words an honest witness, may nonetheless be unreliable: *R. v Morrissey* (1995), 97 CCC (3d) 193 (Ont CA), at p 205.

[96] As highlighted by the Court in the context of submissions made by the prosecution, all the testimonial evidence presented by the prosecution raises numerous concerns about reliability or in other words, accuracy.

[97] The alleged facts occurred a little over five years ago and all the witnesses invariably referred to the passage of time as an obstacle with respect to their testimony

in terms of being able to remember what was said or even the very nature of comments made by Corporal Guarnaccia. When asked to describe an incident and situate it within the timeframe covered by the course, this exercise often became a difficult, if not impossible, task for the witnesses. Far from faulting them for this, the Court notes here that the passage of time has dimmed many of the memories related to the incidents associated with the charges and has affected the ability of witnesses to provide an accurate account of the facts they claim to remember.

[98] The Court must also consider, as Private Poudrier stated in his testimony, the fact that the members of this platoon discussed several incidents that occurred during the course, making it even more difficult for them to distinguish what they actually observed, that is, what they saw and heard, from comments made by their colleagues. In addition to the passage of time, this is another factor which can explain some of the difficulties experienced in recalling certain events.

[99] The most striking example is the information provided by eight of the nine witnesses heard concerning Corporal Guarnaccia's alleged actions towards Private Robichaud during the incident involving push-ups at the green lockers. The incident, as recounted by the victim himself, Private Robichaud, was described somewhat differently by the other seven witnesses. None of them, not even those who had been in a position close to him, corroborated the fact that the instructor had hit him and that he had initially been smashed into the ground. All the other witnesses who reported a similar incident instead indicated that Private Robichaud had been lifted up by or with the assistance of the instructor.

[100] The prosecution explained that the witnesses had perhaps provided explanations for three different incidents: a first, where Private Robichaud was allegedly thrown to the ground; a second, when he was allegedly forced to do push-ups assisted by the instructor; and lastly, a third, when he was allegedly lifted up and thrown onto the lockers by the instructor.

[101] However, Mr Robichaud described just one single incident which apparently took place around the beginning of the course, when he was not yet wearing a uniform, while other witnesses described an incident which occurred at another time and had unfolded in a manner that was very different from the account that the alleged victim provided to the Court.

[102] Without denying that such an incident did in fact occur, it is the Court's opinion that this raises some doubt about the exact manner in which everything unfolded. Moreover, the incident involving the knuckle push-ups done inside the building is the one and only incident which each of the witnesses indicated remembering. In such a context, it is the Court's opinion that this has the effect of casting doubt on the accuracy of what happened.

[103] With respect to the other physical punishments, i.e., the knuckle push-ups done outside and placement of the forehead on the locker with the body on an incline, it

appears that these were physical sanctions which were rarely imposed, but captured the imagination of members of the platoon. It is clear that this kind of punishment was not abusive and was not intended to belittle, humiliate, embarrass, intimidate or threaten the candidates. The consequences on the knuckles or even any feelings of vulnerability may seem extreme, but these activities took place in the context of specific circumstances and there is no indication that Corporal Guarnaccia had any such intention.

[104] References to the push-ups done outside, involving different witness accounts of the circumstances and timing of when they were actually done, again illustrate the reliability issue vis-à-vis the body of testimony on which the prosecution is relying.

[105] But there is more. The testimony provided by both Mr Robichaud and Corporal Gagné has raised issues concerning veracity.

[106] Indeed, Mr Robichaud testified in a calm and direct manner. However, his comments were tinged with bitterness. Essentially, it is the Court's understanding that Mr Robichaud blames Corporal Guarnaccia for causing various health problems that he has suffered since leaving the platoon of recruits in 2010. He also told the Court that he wanted justice to be done and that if he was not happy with the outcome of the charges before the Court, he would ensure that criminal charges are filed against Corporal Guarnaccia in a civilian context. Furthermore, on his own initiative, this witness wanted to discuss and introduce certain evidence at the end of his testimony and the Court had to remind him that it was the responsibility of the parties before the Court to determine which evidence would be presented and not the responsibility of the witness himself.

[107] Mr Robichaud's comments and conduct demonstrated to the Court that he had an interest in ensuring that Corporal Guarnaccia was convicted for what he had allegedly done; this is an indicator that the witness would have a tendency to give testimony to favour the conviction of the accused by the Court. Consequently, he may wish to exaggerate some of the comments and actions directed towards him by the accused for the sole purpose of seeing the accused convicted. Indeed, he criticizes the accused for certain decisions, such as the fact that male members were required to shower and undergo inspection, when he was forced to admit that the accused was only ensuring compliance with an order or the fact that he was forced to complete a march when such treatment was also applied to others, such as Private Beauchemin.

[108] Mr Robichaud's desire to obtain a conviction casts some doubt on the veracity of the account he provided to the Court. Moreover, based on the view that the other prosecution witnesses hardly corroborated his account of the incident involving the push-ups at the green lockers, the Court concludes that this is a witness who is generally not credible and who suffers from the same reliability issues as the other witnesses.

[109] With respect to the other alleged victim of Corporal Guarnaccia, namely, Corporal Gagné, the Court comes to the same conclusion regarding his testimony as was reached for Mr Robichaud but for different reasons.

[110] Corporal Gagné told the Court that he was trying to rebuild his reputation, which had alleged been tarnished due to Corporal Guarnaccia's actions during the course. He primarily criticizes Corporal Guarnaccia for giving him a bad reputation by making a link in front of all the other members of the platoon to the effect that he was associated with the Hells Angels. Corporal Guarnaccia had allegedly made such an assertion due to his tattoo and his place of residence, Sorel. Moreover, the accused had allegedly been very insistent about this matter, even after Corporal Gagné was no longer on the course and he blames him for creating rumours which have followed him throughout his career over the past five years. His testimony presented an opportunity for him to rehabilitate his reputation.

[111] This type of attitude does not only demonstrate a desire to set the record straight, but also demonstrates a desire of revenge for all the prejudice allegedly suffered during and after the recruit course, due to the actions of Corporal Guarnaccia. Corporal Gagné clearly did not like Corporal Guarnaccia and, based on his comments, wanted Corporal Guarnaccia to be convicted by the Court. This type of attitude clearly casts some doubt as to the veracity of the account provided by this witness, in addition to the reliability issues that he demonstrated for the reasons already cited by the Court with regard to all the other witnesses. The Court therefore concludes that his testimony cannot be found to be credible and reliable, particularly with respect to issues that could be deemed crucial to convict Corporal Guarnaccia.

1st charge

[112] The first charge concerns Corporal Guarnaccia's ill-treatment of Private Robichaud. The essential elements that remain to be determined by the Court are the following:

- (a) that Corporal Guarnaccia ill-treated Private Robichaud;
- (b) the blameworthy state of mind of Corporal Guarnaccia.

[113] With respect to the ill-treatment of Private Robichaud, the Court finds that he was subjected to rather general and often repetitive remarks by Corporal Guarnaccia to the effect that he had no place in the Canadian Forces and that he would not finish the course. The witnesses established that physically Private Robichaud had difficulty keeping up with the group due to his physical condition, which seemed to put him on the spot in front of the group more often than not. Was this due to his actions or his attitude, or because Corporal Guarnaccia really seemed to want to hurt his morale? This does not really appear to be clear and, in the Court's opinion, does not really constitute ill-treatment in and of itself.

[114] Since there are still some questions surrounding the manner in which the push-ups incident actually unfolded, this evidence cannot be used to demonstrate ill-treatment of Private Robichaud by the accused.

[115] Lastly, did the fact that Mr Robichaud was dealing with a medical condition related to an adjustment disorder with anxiety or mixed mood influence his perception of things with regard to the alleged persecution that he suffered at the hands of Corporal Guarnaccia? Did he have this condition during the period that he was on the course, which could justify the comments of the other witnesses regarding his attitude and his constant anxiety about being under surveillance and seeing or inferring things that other members of the platoon told him did not exist? Did this stem from what was happening in the context of the course? The evidence is silent in this regard. However, for the Court, this also raises questions concerning the veracity and reliability of Mr Robichaud's comments regarding the ill-treatment that he allegedly suffered.

[116] Consequently, the Court concludes that the prosecution has not demonstrated beyond a reasonable doubt that Corporal Guarnaccia ill-treated Private Robichaud.

[117] With respect to the blameworthy state of mind of Corporal Guarnaccia with regard to this offence, the Court has no alternative but to conclude that the prosecution has failed to discharge its burden on this point as well.

[118] Had the Court concluded that the accused had ill-treated Mr Robichaud, it is far from certain that it would have concluded that Corporal Guarnaccia had a blameworthy state of mind. The lack of evidence on instruction parameters, which guide the actions of instructors in such a context, does not exactly dispel the doubt raised in this regard, but would perhaps have helped to do so.

[119] The Canadian Forces training environment is certainly not left to the goodwill and discretion of instructors. Common sense dictates that challenging the physical and psychological limits of candidates would be part of such a course. However, this raises the following question, to what extent is an instructor allowed to test candidates and what are the parameters of such testing? The evidence in this regard is totally non-existent. The attitude, comments and actions of the instructors, who are the first points of contact that new recruits have with the Canadian Forces, may impact the career of a military member on account of the example and the role model that can be drawn. The evidence on what was required of instructors at the time, whether based on orders, instructions or simply customs and traditions, could have enlightened the Court about the presumed state of mind typically associated with an instructor such as Corporal Guarnaccia. However, the prosecution decided not to present evidence in this regard, thereby depriving the Court of a key element that it would certainly have found useful in establishing this essential element of the charge with certainty.

[120] With respect to the allegation that he was kicked by Corporal Guarnaccia while he was in the push-up position, the evidence shows that it is unlikely that this happened. One such incident was mentioned by Corporal Gagné, who confirmed that he did not see the accused's foot to make contact with the body of Private Robichaud. The latter did not refer to any such incident in his testimony and three other witnesses mentioned that a kick was simulated but never indicated that the accused actually kicked Private Robichaud. Consequently, there is a low probability that such an act occurred and the

Court is left with reasonable doubt that force was even applied to Private Robichaud under the circumstances.

2nd charge

[121] With respect to the second charge, the Court finds that the prosecution has discharged its burden of proof on two points: that Corporal Guarnaccia, by touching or grabbing Private Robichaud, made direct use of force and that the use of this force was intentional.

[122] However, the Court finds that the prosecution has not discharged its burden beyond a reasonable doubt on two other points: consent to the use of force against Private Robichaud by the accused and knowledge of the absence of consent from Private Robichaud.

[123] Due to the various versions provided, it is far from clear whether Corporal Guarnaccia hit Private Robichaud as he claimed or even if he lifted him up off the ground and pushed him onto the lockers, or simply touched or grabbed him to help him get up. This particular point remains unclear due to the credibility and reliability ascribed to Mr Robichaud's testimony by the Court and due to the divergent testimony of the other witnesses in regard to this incident, thereby raising the issue of their reliability.

[124] Once again, the lack of evidence on the question of parameters for testing candidates and the manner in which such testing is to be done by instructors within CFLRS for this type of course does nothing to help the Court decide with certainty the question of knowledge of the absence of consent from the alleged victim.

3rd charge

[125] In the context of the third charge, Corporal Guarnaccia is once again accused of ill-treatment, but this time he is accused of ill-treating Corporal Gagné. The essential elements which remain to be determined by the Court are the following:

- (a) that Corporal Guarnaccia ill-treated Corporal Gagné;
- (b) the blameworthy state of mind of Corporal Guarnaccia.

[126] Corporal Guarnaccia made certain comments to Corporal Gagné concerning his tattoo and the fact that he would not complete the course. Corporal Gagné described the accused's conduct towards him during inspections and how he had allegedly hit him on the chest. However, in light of the Court's conclusions concerning the veracity and reliability of Corporal Gagné's testimony, the Court has a reasonable doubt about all of the evidence concerning the fact that Corporal Gagné was ill-treated by Corporal Guarnaccia. The Court concludes that it is possible and probable that he was ill-treated, but the Court is not in a position to establish this fact with a sufficient degree of

certainty that would enable it to conclude that this was proven beyond a reasonable doubt by the prosecution.

[127] With respect to the issue of the blameworthy state of mind of the accused, the Court has no alternative but to reiterate its comments on this subject, provided in the context of its analysis on the first charge, which leads it to conclude that the prosecution has not discharged its burden of proof on this point.

4th charge

[128] As was the case for the second charge, the Court finds that the prosecution has discharged its burden of proof on two points: that Corporal Guarnaccia, by pushing Corporal Gagné, made direct use of force and that the use of this force was intentional.

[129] However, the Court finds that the prosecution has not discharged its burden of proof beyond a reasonable doubt on two other points: consent to the use of force against Corporal Gagné by the accused and knowledge of the absence of consent from Corporal Gagné.

[130] Corporal Gagné informed the Court that Corporal Guarnaccia hit him on the chest during an inspection, when he was standing at attention, and that he did so one or two times. He did not provide any more information about the circumstances which allegedly prompted the accused to act in such a manner. He also alleged that Private Robichaud was subjected to similar conduct by the accused, but Private Robichaud did not make reference to any such incident during his testimony.

[131] The Court's findings regarding the credibility and reliability of Corporal Gagné's testimony raise a reasonable doubt about this essential element of the charge for the Court. Indeed, Corporal Gagné's manner, comments and capacity to recall information during his testimony affected the veracity and accuracy of the testimony provided. Under the circumstances, the lack of corroboration, even if not required by the evidence, does nothing to help the Court to obtain a more accurate view of the issue. Corporal Gagné did not conceal his interest in this matter, and under the circumstances, this raises doubt about the very veracity of his comments.

[132] However, once again, the lack of evidence on the parameters within which an inspection is supposed to be conducted in the context of a recruit course, on the relationship between the recruits and the instructors in such a context and on the parameters within which candidates can be tested certainly does not help the Court obtain an accurate picture of the circumstances in this case concerning the two essential elements which have raised doubt.

5th charge

[133] With respect to the fifth charge, harassing the trainees in R34 Platoon, it remains for the Court to determine whether this did in fact happen as alleged in the particulars of

the charge and whether this constituted a violation of the directive on that issue, thus justifying a finding of prejudice to good order and discipline, as well as whether the accused had the requisite blameworthy state of mind.

[134] First, let us assume that the physical sanctions, even those involving knuckle push-ups, do not constitute conduct by Corporal Guarnaccia intended to belittle, embarrass and intimidate the trainees in R34 Platoon. As indicated by certain witnesses, all the instructors used physical sanctions in response to the shortcomings of some or all members of the platoon. To some extent, it was normal for such sanctions to cause physical pain and stiffness, and they also seemed to involve psychological challenges that were imposed on the candidates from time to time. The fact that the push-ups caused more physical damage to certain candidates than to others was perhaps the result of an exercise that went too far due to the abilities of some of the candidates, but this was not a repeated occurrence. At most, this tactic was reportedly used twice by Corporal Guarnaccia and it never went beyond that.

[135] Private Poudrier's testimony also casts some doubt on the fact that this was demanded by the accused. Corporal Guarnaccia opted to do knuckle push-ups, but did the other candidates believe that they were obligated to emulate their instructor? Why was one candidate in a position to say that he had never considered doing that, while others did not understand or see things quite the same way? In the eyes of the Court, all of this raises doubt as to what actually happened.

[136] The simulated kicks directed towards Private Robichaud and Private Sauvé, the accused's alleged threatening remarks towards Corporal Gagné during an inspection, the alleged pushing of candidates, namely, Robichaud and Lessard, during inspections while they were standing at attention, the comments about Corporal Gagné's tattoo, the general disparagement of Private Robichaud and Corporal Gagné to the effect that there was no place for them and that they would not finish the course, and the comments about Private Duchesne's physical appearance and his lack of skills required to become an infantryman, all relate to comments and actions which allegedly targeted five candidates: Robichaud, Sauvé, Lessard, Gagné and Duchesne.

[137] With respect to the actions that targeted Private Duchesne and Private Sauvé, the Court notes that these two parties were not heard by the Court. It would have been worthy hearing their point of view and their perspective on the comments which were allegedly made towards them. Once again, the lack of any such evidence can only serve to raise doubt about what really happened and their perception as targets of Corporal Guarnaccia.

[138] When such comments are reported to the Court, it is true that they are at the very least disturbing and may appear to be inappropriate. Did the accused make these comments in order to belittle, embarrass and intimidate those who bore the brunt of them? The accused was clearly trying to provoke the candidates. Were these the exact words and circumstances? Once again, the exact comments and actions reported by the witnesses are of a particular concern to the Court, as illustrated by its various comments

on this point, and under the circumstances, the Court has no alternative but to conclude that the prosecution has not discharged its burden of proof.

[139] Moreover, the Court has no choice but to accept the defence's argument that by using the term "the trainees", the prosecution was referring to conduct by the accused which targeted all the trainees and not just some of them. Further to a reading of the particulars of this charge and after carefully considering the meaning that is to be ascribed to this expression, the Court had no alternative but to reach such a conclusion.

[140] The evidence only refers to the accused's actions towards five specific candidates and there is no evidence before the Court to show that the accused harassed the trainees, i.e., all of them. Considering the complete lack of evidence in this regard, the Court must conclude that the accused is to be acquitted on this charge.

[141] The respect for the integrity and dignity of other people are fundamental values enshrined in the Canadian Constitution and form an integral part of the effective operations of an armed force such as the Canadian Forces. The Statement of Defence Ethics also deems that such values should normally apply to the general population as well as to its own members. This decision does not in any way deny the existence of such values; on the contrary, they are closely examined in this context, but only within the parameters permitted by the charges before the Court.

[142] However, those who believe that the Court must render justice by convicting those against whom justice is sought are sometimes misguided. The Court martial depends on the charges brought before the Court by the prosecution. It is required to ensure a fair and equitable trial for the accused, who is being charged with an offence and who is presumed innocent until the proof of the charges is established by the prosecution beyond a reasonable doubt, in compliance with the Constitution and related legislation. Unfortunately, for those who take a different view, the Court's role is definitely not to assess fairness and ensure compensation for physical or moral prejudice due to the alleged actions of a member of the Canadian Forces.

[143] Once again, I would like to reiterate the fact that the Court does not necessarily deny that the incidents reported to the Court actually happened, but finds, rather, that it is possible and probable that most of them did in fact occur. However, the analytical framework, which has been clearly defined by the Court, requires the prosecution to prove each of the essential elements of the charge beyond a reasonable doubt, and this analysis must be based on all of the evidence presented to the Court.

CONCLUSION

FOR ALL THESE REASONS, THE COURT:

[144] **FINDS** Corporal Guarnaccia not guilty on the five charges listed on the charge sheet.

Counsel:

The Director of Military Prosecutions, as represented by Major G. Roy

Major E. Thomas, Lieutenant Commander P.D. Desbiens and Captain J.F. Guay,
Directorate of Defence Counsel Services, counsel for Corporal J.F. Guarnaccia