



COURT MARTIAL

Citation: *R. v. Fortin*, 2017 CM 3004

Date: 20170227

Docket: 201618

Standing Court Martial

2nd Canadian Division Support Base Valcartier
Courcelette, Quebec, Canada

Between:

Her Majesty the Queen

- and -

Warrant Officer J.A.T. Fortin, Accused

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

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR FINDING

(Orally)

[1] On 28 July 2016, charges were preferred against Warrant Officer Fortin by the military prosecution, resulting in three charges on the charge sheet dated 22 July 2016, namely, wastefully expending public property, in this case, diesel fuel, contrary to section 116 of the *National Defence Act (NDA)*; improperly selling public property, in this case, diesel fuel, contrary to section 116 of the *NDA*; and committing an act to the prejudice of good order and discipline by concluding and making an arrangement with a civilian to compensate him with public property, in this case, diesel fuel, contrary to section 129 of the *NDA*.

[2] The alleged offences were all committed between 17 July and 25 August 2014 as part of a military exercise conducted by the 5 Combat Engineer Regiment (5 CER) in or near Saint-Léonard-de-Portneuf.

[3] In support of the charges, the prosecution presented nine witnesses: Major Marcotte, Sergeant Lepage, Sergeant Desroches, Corporal Lessard, Corporal Mallet, Corporal Wagner, Master Corporal Fortin, Captain F.Pelland and Warrant Officer Ross.

[4] In his defence, Warrant Officer Fortin relied on the evidence of the following witnesses before the Court: Lieutenant-Colonel Michaud and Sergeant Létourneau. He also decided to testify in his own defence.

[5] As part of all of this testimony, a set of documents were introduced before the Court, by mutual agreement of the parties:

- (a) Exhibit 3, a photograph of the white diesel tank belonging to the farmer, Mr Joosten, in which the diesel from the Canadian Armed Forces (CAF) was poured;
- (b) Exhibit 4, a copy of the invoice for the estimated repair costs for Mr Joosten's tractor, dated 22 July 2014, for the amount of \$1,249.17;
- (c) Exhibit 5, a copy of the agreement between Mr Joosten, the owner of Léonardie farm, and the Department of National Defence, regarding the use of Mr Joosten's land for Exercise AGILE SPECIALIST 2014 for the 11 to 22 August 2014 period, signed by the owner on 28 May 2014 and by Colonel Gosselin on 25 June 2014;
- (d) Exhibit 6, a copy of an invoice for \$1,000 plus tax payable to Mr Joosten for a user permit for a military exercise dated 26 May 2014;
- (e) Exhibit 7, three pages from a copy of a six-page fuel consumption report from 5 CER unit for the month of August 2014, printed on 17 October 2014;
- (f) Exhibit 8, a copy of an email exchange between Corporal Fortin and Warrant Officer Fortin dated 25 August 2014;
- (g) Exhibit 9, a copy of the off-base training authorization request signed by the commanding officer of 5 CER, Lieutenant-Colonel Michaud, on 11 June 2014, and addressed to 5 Canadian Mechanized Brigade Group (5 CMBG);
- (h) Exhibit 10, a copy of the training directive for Exercise AGILE OPERATOR for 6 Troop, 53 Squadron, 5 CER, constituting Annex A to the off-base training authorization request, as drafted by Warrant Officer Fortin in May 2014;

- (i) Exhibit 11, a copy of Annex E to the off-base training authorization request, namely, the threat assessment request, signed by Lieutenant-Colonel Michaud on 11 June 2014;
- (j) Exhibit 13, a copy of an audio-video recording of the interview of Warrant Officer Fortin by an investigator, Sergeant Léveillé, on 19 January 2015;
- (k) Exhibit 14, a copy of the written transcript of the audio-video interview of Warrant Officer Fortin on 19 January 2015;
- (l) Exhibit 15, a copy of an email from Captain F.Pelland to Major Boucher, with its subject reading [TRANSLATION] “Léonardie farm file”, and dated 26 September 2014; and
- (m) Exhibit 16, a plan of the location of the exercise produced by Warrant Officer Fortin during his testimony before the Court and based on a Google image of the Léonardie farm.

[6] The parties also made admissions regarding the testimony Gerry Joosten, the owner of the farm in Saint-Léonard-de-Portneuf, would have given had he been in court, which are part of Exhibit 12.

[7] Finally, the court has taken judicial notice of the facts and issues under section 15 of the *Military Rules of Evidence (MRE)*.

[8] One of the roles of 5 CER, 53 Squadron, 6 Troop is to dispose of ammunition, explosives and improvised explosive devices. In January 2014, during a discussion regarding the annual training for members of 5 CER, it was decided that it would be useful for 53 Squadron, 6 Troop to do training to test its skills off-base.

[9] At the time, Warrant Officer Fortin was 6 Troop’s troop warrant officer. He has a great deal of experience in disposing of explosive devices and ammunition and some knowledge about holding off-base exercises in this field. He was therefore the perfect person for organizing the exercise. During the discussions with his troop’s section commanders in preparation for the exercise, Master Corporal Lepage said that he knew a place in the Saint-Raymond-de-Portneuf area that, in his opinion, would be perfect for such an exercise. Originally from that area, he knew the owner of a farm with paths and buildings that would provide a suitable and realistic location for the troop for an explosives search and disposal exercise on unknown terrain.

[10] Once the farmer had given his authorization, on site reconnaissance surveys were conducted and the location was confirmed as being suitable for the goals of the exercise. Warrant Officer Fortin and his troop contacted the brigade to find out what was required to conduct such an exercise on land that is not Crown property.

[11] Meetings took place with the owner of the Léonardie farm in Saint-Léonard-de-Portneuf in order to reach an agreement on the use of his property, including paths and buildings, for an exercise that would be held in August 2014. During one of these visits, Warrant Officer Fortin noticed a rust-brown fuel tank directly behind the farm's garage, which he thought to have a capacity of about 1,500 litres.

[12] In the course of May 2014, Warrant Officer Fortin prepared a training directive that was submitted to the commanding officer of 5 CER. At the end of May 2014, a written agreement was drawn up between the Department of National Defence and Mr Joosten, the owner of the Léonardie farm, for the use of Mr Joosten's land for an exercise to be held between 11 and 22 August 2014. The transaction was entered into for the sum of \$1,000 plus any applicable taxes.

[13] In June 2014, the commanding officer of 5 CER submitted a request for off-base training to 5 CMBG for Exercise AGILE OPERATOR 2014 that was to take place in four stages from 16 June to 26 August 2014. More specifically, 5 CER, 53 Squadron was to validate its Levels 2 and 3 as part of Exercise AGILE SPECIALIST, a regimental exercise, and to achieve this objective, it was proposed that Exercise AGILE OPERATOR, specific training for the counter-explosives troop, 6 Troop, in a domestic context, be inserted.

[14] The troop was to train in searching an area, buildings and vehicles, disposing of explosive devices and sweeping a route in the Portneuf Regional County Municipality, specifically, the towns of Saint-Raymond, Saint-Alban and Saint-Léonard-de-Portneuf, between 11 and 22 August 2014. Several organizations from the military and civilian community involved in the disposal of explosive devices were informed of the exercise while it was being developed. This is how the Canadian Forces School of Military Engineering in Gagetown, technical teams from the Sûreté du Québec and operators from 2 Wing Bagotville became involved in the exercise, making it possible to create an opportunity to practice and develop procedures as if there was a domestic request for assistance. The scope of the exercise, therefore, became much broader than initially planned.

[15] It is in this context that Warrant Officer Fortin sent Sergeant Létourneau to conduct an on site reconnaissance survey of the location where the troop's command post (CP) was to be set up, close to the farm. It appears that as the terrain conditions were variable, reportedly soft and unstable. Warrant Officer Fortin wanted to confirm that the terrain was in a suitable condition given the potential impact of the weight of the vehicles that would be driving across it during the exercise.

[16] Therefore, Sergeant Létourneau went to the location in question in a Cougar vehicle and got stuck in the mud towards the end of the day. The Cougar is a vehicle used to carry troops and tools; it weighs approximately twenty tons and is used specifically for the needs of 6 Troop. Sergeant Létourneau called Master Corporal Lepage and the mechanics. He needed a recovery vehicle, which was sent. He also informed Warrant Officer Fortin of the situation. Master Corporal Lepage decided to go

on site to assist. The recovery vehicle attempted to pull out the Cougar vehicle, but also got stuck in the mud. A second recovery vehicle arrived and succeeded in pulling out the Cougar vehicle. The first recovery vehicle remained stuck however, despite attempts to pull it out.

[17] Master Corporal Lepage arrived. Seeing that the recovery vehicle that had come to help was stuck, he asked Mr Joosten, the owner of the farm whom he knew well, whether he could borrow his tractor. Mr Joosten agreed without hesitation and Master Corporal Lepage borrowed the tractor. He attempted a manoeuvre to pull the recovery vehicle out with the tractor. He failed, however, and broke the tractor's steering.

[18] Master Corporal Lepage contacted Warrant Officer Fortin and informed him of the situation. Warrant Officer Fortin understood the situation and, since no one was hurt, told Master Corporal Lepage that they would discuss the matter when he was back at the office.

[19] The incident took place on a Friday. On Monday morning, Warrant Officer Fortin gathered his section commanders to discuss the incident. They felt guilty towards the farmer and attempted to find a solution to compensate him quickly as they did not want him to withdraw his permission for them to use his land for the exercise, given the stage the troop had reached in preparing it. A great deal of effort had gone into developing the exercise, which was promising in terms of what it would offer the troop in training and experience.

[20] Inspired by what he had experienced in an operational setting, Sergeant Létourneau suggested exploring the possibility of providing the owner with diesel to compensate him for the cost of repairing the tractor. In the past, as part of an operation outside the country, he had seen the CAF compensate local civilians for damage caused by CAF members during operations outside Canada, and, in his opinion, this could be applied to the situation at hand.

[21] Master Corporal Lepage confirmed to the Court that such an approach was discussed by the group. As far as he knew, the farmer has a large white diesel tank that could hold 4,000 to 5,000 litres on his farm, close to the shed on the property, behind a wooded area. He also owns two smaller diesel tanks, which are in a garage, and a small gas tank right behind that. However, he did not share this information during the group's discussion. This was personal knowledge from the time he had worked at the farm in question when he was younger.

[22] After the discussion, Warrant Officer Fortin felt that this approach could work. He agreed to the solution, but wanted to run some checks. He therefore involved the 53 Squadron Deputy Commander, Captain F.Pelland. The deputy commander was responsible for the exercise budget and had the necessary finance authorizations.

[23] Warrant Officer Fortin explained the background to the incident and the suggestion that had been made. He asked him whether the suggestion could be put into

practice. Captain F.Pelland understood the situation, but wished to think about it and run some checks before giving him his answer. Captain F.Pelland saw it as a solution to solve the problem quickly, at the lowest level and at the lowest possible cost. He verified the exercise budget, which was about \$30,000. In his opinion, and based on his personal assumption that the cost of the repair would be about \$500, it was possible to enter this expense in the exercise budget as compensation in the form of diesel provided to the farmer, considering how low it was.

[24] A little later that day, he confirmed to Warrant Officer Fortin that the principle of filling the tank with diesel worth the cost of the repair of the tractor was possible, with the farmer responsible for the tractor repair and its cost. He tasked Warrant Officer Fortin with reaching an agreement on these terms with the farmer. He did not deem it necessary to inform the squadron commander, Major Turcotte, or any other superior about this, given that he was responsible for managing the budget.

[25] At that time, the exact cost of the repair was unknown, but Warrant Officer Fortin learned from Master Corporal Lepage that it would be between \$1,000 and \$1,500. Warrant Officer Fortin tasked Master Corporal Lepage with reaching an agreement with Mr Joosten considering his special relationship with the farmer, who accepted the proposal.

[26] The troop members went on holiday and came back for the start of the exercise. In August 2014, at the start of the exercise, Warrant Officer Fortin met with Mr Joosten to apologize for the damage to his tractor and to confirm that he was agreeable to his diesel tank being filled with the equivalent of the cost of the tractor repair. At the same time, Warrant Officer Fortin confirmed that the repair would cost about \$1,300, according to an estimate received by the farmer. On the basis that a litre of diesel costs about one dollar, he concluded that a supply of 1,300 litres would amount to the cost of the repair.

[27] It was agreed that the diesel would be supplied by the section responsible for the regiment on the base. During the exercise, a tank truck had to report to the troop's CP, near the farm, every two days for instructions from the troop warrant officer, Warrant Officer Fortin.

[28] Master Corporal Fortin was responsible for the diesel supply. He drove to the troop's CP. The tank truck driver was Corporal Wagner. Warrant Officer Fortin told them that one of the farmer's diesel tanks had to be filled. Surprised at this unusual request, Master Corporal Fortin made sure that he had understood correctly. Warrant Officer Fortin told him that the request had been approved by operations and that there was no problem.

[29] After filling up all vehicles and other equipment to be filled, Master Corporal Fortin drove to the farmer's tank. The tank was a white tank with a capacity of up to 5,000 litres of diesel. He emptied the tank truck and filled the tank with 2,750 litres. Later, Master Corporal Lepage went to the white tank in question and noticed that it

was not full. He told Warrant Officer Fortin, indicating how much he thought was missing.

[30] During the exercise, Warrant Officer Fortin intercepted the tank truck and told the driver, Corporal Mallet, that he had to finish filling up the farmer's tank in Master Corporal Fortin's presence. However, he failed to do it.

[31] At the end of the exercise, on Friday, Warrant Officer Fortin was told that the tank in question was still not completely full. While he was at the regiment, he informed Master Corporal Fortin of this, and the latter told him that it would be done on his return Monday morning. On Monday morning, Master Corporal Fortin and Corporal Lessard went to finish filling up the farmer's tank with 1,000 litres of diesel. Upon his return to the unit, Master Corporal Fortin informed Warrant Officer Fortin by email that he had added 1,000 litres to the farmer's tank, making a total of 3,750 litres. Warrant Officer Fortin thanked him in response to this email.

[32] According to the evidence heard in the examination of Warrant Officer Fortin, more particularly according to the investigator, it was a routine verification of the monthly fuel report that revealed that a large quantity of diesel had been used during the exercise that could not be matched to any other specific activity carried out by unit members.

[33] In response to this discrepancy, Captain F.Pelland provided a written explanation by email in which he explained the problem that had arisen and how it was solved. He indicates clearly, as he also did in his testimony, that he alone made the decision to authorize Warrant Officer Fortin verbally to fill the farmer's diesel tank during the exercise to compensate him for the damage to his tractor. He stated that he was the only person responsible in this matter and that the goal had been to come up with a solution that was easy and motivated by good intention, even though it may not have complied with usual procedure.

[34] In the fall of 2014, Warrant Officer Fortin was deployed on a two-month mission outside Canada together with other members of 5 CER. At the beginning of his deployment, he found out that the arrangement made with the farmer with regards to the diesel was under investigation, but no one present wanted to say more. When he returned to the unit after the mission, it was confirmed to him that a military police investigator would meet with him about the matter. He contacted the military police and met with the investigator on 19 January 2015. He made a statement to the officer.

[35] In March 2015 he was served an administrative action by his unit for this issue. Eleven months later, on 1 February 2016, a charge for wastefully expending public property, in this case, diesel fuel, was brought against him. On 28 July 2016, charges, specifically the three charges before this Court, were preferred against Warrant Officer Fortin.

[36] In September 2016, the date for the trial by standing court martial was set by the parties for 20 February 2017. A convening order was issued on 13 September 2016.

[37] On 20 February 2017, Warrant Officer Fortin filed a motion for abuse of process under the *Canadian Charter of Rights and Freedoms* with the Court, asking the Court to order a stay of proceedings. On 21 February 2017 I dismissed this motion and the Court heard the evidence and counsel's oral arguments between 21 and 23 February 2017.

[38] Before the Court provides its legal analysis, it is appropriate to deal with the issue of the presumption of innocence, the burden and the standard of proof beyond a reasonable doubt, a standard that is inextricably intertwined with the principles fundamental to all criminal trials; the issue of credibility and the reliability of testimony; the concept of proof; and the essential elements concerning each of the charges that Warrant Officer Fortin is facing. These principles, of course, are well known to counsel, but other people in this courtroom may well be less familiar with them.

[39] The presumption of innocence is the first and most important principle of law applicable to all criminal cases or cases dealt with under the Code of Service Discipline. At the opening of his trial, Warrant Officer Fortin was presumed innocent, and this presumption only ceases to apply if the prosecution presents evidence that satisfies the Court of his guilt beyond a reasonable doubt.

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

[41] The burden of proof rests with the prosecution and never shifts. Warrant Officer Fortin does not have to prove that he is innocent. He does not have to prove anything. 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 a lack of evidence.

[42] 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 impossible to achieve. However, the standard of proof beyond a reasonable doubt falls much closer to absolute certainty than to probable guilt. The Court must not find Warrant Officer Fortin guilty unless it is sure he is guilty. Even if the Court believes that Warrant Officer Fortin is probably or likely guilty, this is not enough. In those circumstances, the Court must give the benefit of the doubt to Warrant Officer Fortin and find him not guilty because the prosecution has failed to satisfy the Court of his guilt beyond a reasonable doubt.

[43] 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 Warrant Officer Fortin's guilt beyond a reasonable doubt.

[44] Reasonable doubt applies to the issue of credibility. Regarding any issue, the Court may believe a witness, not believe that witness or be unable to decide. The Court does not have to fully believe or not believe a witness or group of witnesses. If it has a reasonable doubt as to the guilt of Warrant Officer Fortin because of the credibility of the witnesses, the Court must find him not guilty.

[45] If the evidence, the absence of evidence, or the reliability and credibility of one or more witnesses leaves the Court with a reasonable doubt as to Warrant Officer Fortin's guilt in respect of a charge, the Court must find him not guilty of that count.

[46] The Court has heard Warrant Officer Fortin testify. When a person charged with an offence testifies, the Court must assess that evidence as it would assess the testimony of any other witness, keeping in mind the instructions mentioned earlier about the credibility of witnesses. The Court may accept Warrant Officer Fortin's testimony in whole or in part, or not accept it at all.

[47] Clearly, if the Court believes Warrant Officer Fortin's testimony that he did not commit the alleged offences, it must find him not guilty.

[48] However, even if the Court does not believe Warrant Officer Fortin's testimony, but his testimony raises reasonable doubt about an essential element of the offence, it must find him not guilty of that offence.

[49] Even if Warrant Officer Fortin's testimony does not raise a reasonable doubt about an essential element of the alleged offence, if, after considering all the evidence, the Court is not satisfied of his guilt beyond a reasonable doubt, it must acquit him.

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

[51] 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.

[52] Now, regarding the charges Warrant Officer Fortin is facing, I must set out the essential elements that have to be proven by the prosecution beyond a reasonable doubt in this trial.

[53] First, some of the essential elements are common to all three charges. It is understood that for each of the three charges, the prosecution has to prove beyond a

reasonable doubt the identity of the accused as the offender, and the date and location of the offence as described in the particulars.

[54] Regarding more specifically the first and the second charge, namely, wastefully expending and improperly selling public property, Warrant Officer Fortin is charged with committing these offences contrary to paragraph 116(a) of the *NDA*, which reads as follows:

116 Every person who

(a) wilfully destroys or damages, loses by neglect, improperly sells or wastefully expends any public property, non-public property or property of any of Her Majesty's Forces or of any forces cooperating therewith,

...

is guilty of an offence and on conviction is liable to imprisonment for less than two years or to less punishment.

[55] In addition to proving the common essential elements, the prosecution must also prove the following specific elements beyond a reasonable doubt for each of the two offences:

- (a) the property was public property belonging to Her Majesty;
- (b) Warrant Officer Fortin wastefully expended the property under the first charge, and sold it under the second charge;
- (c) the property was sold improperly under the second charge; and
- (d) Warrant Officer Fortin intended to do what he did, that is, he knew what he was doing when he committed both offences. This includes determining whether he acted recklessly or whether he intentionally did not do something he was supposed to do.

[56] Regarding the third charge, that is, committing an act to the prejudice of good order and discipline, subsection 129(1) of the *National Defence Act* reads 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.

[57] In addition to proving the common elements, the prosecution has to prove the following essential elements:

- (a) that the act described in the particulars of the charge actually happened;
- (b) prejudice to good order and discipline; and
- (c) Warrant Officer Fortin's culpable state of mind.

[58] Regarding the prejudice to good order and discipline, to prove such an essential element, the prosecution must establish:

- (a) the applicable standard of review;
- (b) whether Warrant Officer Fortin was aware or should have been aware of the required standard of conduct;
- (c) the fact that the act is a violation of the required standard of conduct; and
- (d) the nature and degree of the prejudice.

[59] As noted by the Court Martial Appeal Court in *R. v. Jones*, 2002 CMAC 11, at paragraph 7:

[7] Proof of prejudice can, of course, be inferred from the circumstances if the evidence clearly points to prejudice as a natural consequence of the proven act.

[60] The accusations that led to the prosecution preferring charges rely on two separate events that occurred during Exercise AGILE OPERATOR 2014:

- (a) the agreement entered into with the farmer to compensate him for his tractor; and
- (b) the execution of this agreement by filling his tank with diesel fuel.

[61] The prosecution's position relies on the fact that the agreement with the farmer constitutes an act to the prejudice of good order and discipline on the part of Warrant Officer Fortin and improper selling of public property. In turn, the fact that more fuel was put into the farmer's tank than stipulated in the agreement is related to the charge of wastefully expending public property.

[62] The prosecution submits that, in reaching an agreement, Warrant Officer Fortin did not comply with the usual procedure for dealing with damages caused to civilian property, which is to report and document the incident to determine liability and for the authorized Department of National Defence representatives to pay compensation, where appropriate. In acting as he did, he incited other members to act in the same manner and, through such conduct, paved the way for possible abuses involving Her Majesty the Queen's property.

[63] In the prosecution's opinion, such abuses did in fact occur as the agreement represented the sale of public property by Warrant Officer Fortin to a farmer, and the oversupply of diesel reflects a total lack of monitoring on the part of Warrant Officer Fortin, which resulted in the wasteful expending of the public property in question, that is, the diesel fuel.

[64] Warrant Officer Fortin's position relies on the fact that he was authorized to act as he did and that the purpose of the agreement in question was merely to restore the balance of the situation by compensating the farmer for the value of the damage caused. They had had to act quickly to maintain a relationship of trust with the farmer so as not to jeopardize the success of the exercise. As for the oversupply of diesel, Warrant Officer Fortin describes this as the result of a simple misunderstanding between him and the people who filled the tank. He sincerely believes that the tank that was to be filled and that he had in mind was the tank behind the garage, whereas those who performed the task had a different one in mind. While he thought that the capacity of the tank that should have been filled was enough to compensate for the damage caused, it turned out that another tank with a greater capacity for fuel was chosen by the members who performed the task without him realizing that this was the case. He did not want this to happen and it was not until he reviewed the evidence through his counsel that he realized the error that had been made.

[65] To begin with, the Court finds that the identity, date and location for each charge are uncontroversial, in light of the testimony given by the accused and the witnesses heard; it also finds that the prosecution has proved these essential elements for each charge beyond a reasonable doubt.

[66] I will therefore start my analysis with the third charge, the one concerning the making of an arrangement with the farmer.

[67] Warrant Officer Fortin admitted in his testimony that he had entered into and made an arrangement with a civilian, Mr Joosten, the owner of the farm, to compensate him with public property, in this case, diesel fuel. He has never pretended otherwise.

[68] The evidence also reveals that he acted under authority when he performed this act. He was authorized by Captain F.Pelland, deputy commander of 53 Squadron and the person responsible for the exercise's budget, to act in this manner. Warrant Officer Fortin suspected that there was an official process for settling claims against the Crown. He did not know how this process worked, but he did not take any initiative without being authorized to do what he did. Like his subordinates, he was inspired by a settlement process used in operational settings outside the country to find the most practical approach possible in the circumstances. It was clearly established that he had reason to believe that he was authorized to act as he did and to enter into and make an arrangement with the farmer.

[69] The procedure for dealing with claims against the Crown is set out in Defence Administrative Order and Directive 7004-1, of which the Court took judicial notice under section 15 of the *MRE*. Under this directive, when a member damages property, an incident report must be made and forwarded to the unit. The report is forwarded to the authorities empowered to settle the claim in question. There may be an investigation to determine the exact context and to what extent the Crown is liable, and a legal opinion may be required for this.

[70] The time this process takes can vary. Warrant Officer Fortin and his section commanders were concerned by this factor and, given the circumstances, explored other solutions. The preferred solution, and the one that was authorized, was an agreement with the farmer to fill one of his diesel tanks with enough diesel to compensate him for the cost of the damage caused to his tractor by the members.

[71] Reaching such an agreement, in the context established before the Court, does not as such constitute an act to the prejudice of good order and discipline. In fact, as far as he knew, there was nothing preventing Warrant Officer Fortin from doing as he did. But he did question whether he could act like this, and an authorized superior confirmed to him that it was possible. It is clear that Warrant Officer Fortin had no intention of committing an act to the prejudice of good order and discipline. On the contrary, in order to maintain the cohesion and morale of his troops, he sought and obtained the permission to act in a manner that preserved the integrality of the exercise as it had been planned and into which many of his subordinates had put a great deal of work. Moreover, as admitted by the prosecution, no standard or benchmark was demonstrated to the Court to suggest that Warrant Officer Fortin's act was contrary to anything that could establish such prejudice. Finally, no prejudice arises naturally from entering into and making an arrangement with a civilian in the circumstances established before the Court.

[72] The objective was noble, but the means chosen to achieve it were questionable. However, Warrant Officer Fortin was clearly authorized by a recognized authority to act as he did and this is what he did: he ensured that an agreement be reached according to the terms established by his superior.

[73] Therefore, the Court concludes that the prosecution has not discharged its burden of proof regarding the prejudice to good order and discipline and the accused's culpable intent.

[74] Regarding the second charge, the improper selling of public property, the Court finds that some of the essential elements of this charge were not proven beyond a reasonable doubt by the prosecution.

[75] The term "vendre" ("to sell" in English) in section 116 of the *NDA* can be understood in the sense of exchanging a public good in a commercial setting, as indicated in the *Le Petit Robert* dictionary. The idea is to make a tangible profit for oneself or others. The evidence clearly establishes that this is not what happened. The idea was to provide compensation for and to repair damage for which the members of the troop felt responsible. Usually, when terrain is damaged, troop members have an opportunity to restore it, which they actually did do on a few occasions during the exercise. It seems that this went without saying, so a claim should also have been considered in the circumstances. In fact, redoing part of a road or some land involves additional expenses on the part of the Crown and triggers legal responsibilities that, in principle, require an analysis of the damage and each party's liability. Simply restoring does not solve the issue.

[76] When they thought of compensating the farmer with diesel fuel, the troop members, including Warrant Officer Fortin, thought that this could rebalance the farmer's situation after the damage caused to his tractor, just like the repair of a portion of land or road would have done. Here they were not selling public property in exchange for money or a service. Instead they were looking to compensate the farmer with the intent of restoring the balance that existed before the damage was caused. Therefore, even though the farmer himself was to pay for the damage caused to his tractor, he would be able to use it for some time using the fuel supplied to compensate him. Moreover, by keeping the farmer happy, the risks of his withdrawing the permission to use his land were greatly reduced.

[77] Regarding the accused's intention, the evidence has established that Warrant Officer Fortin wanted to reach an agreement to compensate the farmer and not to sell something. There is no evidence that he intended to dispose of the diesel by selling it; rather, he wanted to compensate the farmer, and this process was preauthorized by his superior.

[78] Lastly, as in other trials involving charges concerning public property, the Court notes that there is no evidence that the diesel was public property. The mere fact that property is being used by a member of the CAF does not create a presumption that this property is public. In section 2, the *NDA* defines public property as "all money and property of Her Majesty in right of Canada". This alone does not establish the origin and the nature of the property in question. The prosecution did not establish the ownership of the property in question and there is no evidence to that effect.

[79] The Court therefore concludes that the prosecution has not discharged its burden of proof beyond a reasonable doubt regarding the sale of property, namely, that the property was public property belonging to Her Majesty the Queen, or the accused's culpable intent.

[80] As for the charge of wastefully expending public property, in this case, diesel fuel, the Court reaches the same conclusion as for the two other charges, namely, that the prosecution did not prove certain essential elements beyond a reasonable doubt.

[81] According to the *Le Petit Robert* dictionary, "dissiper" ("to wastefully expend" in the English version of the *NDA*) means [TRANSLATION] "to spend extravagantly," in the sense of "to waste." The facts of this case establish that Warrant Officer Fortin did not intend to wastefully expend the diesel fuel. He explained to the Court that he had assessed the compensation to be made by estimating the cost of diesel to be one dollar a litre. Since there were \$1,300 worth of damages, he had concluded that 1,300 litres of diesel would represent the necessary compensation for the estimated damage to the tractor.

[82] Warrant Officer Fortin explained to the police officer during his interview, and also to the Court during his testimony, that the tank he wanted to be filled was right

behind the garage. He described it as being rust brown and estimated that it had a capacity of about 1,500 litres. He knew, also according to his testimony, that the tank was not full and that it already contained about 200 litres. In his opinion, according to a simple mathematical rule, by filling the tank to the top, they would be supplying 1,300 litres to compensate the farmer.

[83] It appears, however, that the tank that was filled was not the tank Warrant Officer Fortin had had in mind. He explains that more fuel was supplied to the farmer than should have been, given that the tank he had had in mind, the rust brown one right behind the garage, was not the one the people who filled and checked the tank had identified, namely, the white tank right behind the wooded area behind the garage.

[84] In his mind, he had ensured that the diesel tank would be filled. However, the tank and its capacity were not what he had imagined. He therefore told the Court that he was informed during the exercise that the tank had initially been filled with 300 litres of diesel and that when Master Corporal Fortin confirmed that 1,000 additional litres had to be added, he thought that, with the 200 litres already in the tank and the 1,300 litres supplied, the farmer's tank was full and the farmer had been compensated.

[85] He stated that he did not really pay any attention to the total of 3,750 litres mentioned in the email from Master Corporal Fortin, interpreting this figure as being the total used throughout the exercise, which, in the Court's opinion, is possible. In fact, it was adduced that the diesel suppliers came every two days over a total of ten days and supplied between 500 and 1,000 litres on each visit. Based on these figures, between 2,500 litres at least and 5,000 litres at most would have been used in total during the exercise, which makes Warrant Officer Fortin's conclusion plausible on the total used.

[86] The Court believes the accused when he states that all of this was the result of a misunderstanding about which tank was to be filled. Nothing in the evidence suggests that this could not have happened. Warrant Officer Fortin testified in a clear, calm and direct manner. He appeared sincere to the Court and never attempted to change the facts in his favour. He never questioned the testimony of the other witnesses, and these witnesses confirmed the main gist of his version of the facts.

[87] The Court believes the accused when he says that the whole situation was the result of a misinterpretation on his part and that he never intended to wastefully expend anything. He was the centre of the organization of the exercise, ensuring that everything ran smoothly and that any necessary adjustments were made along the way. In addition, he provided training to his subordinates and his superior throughout the exercise making sure they fully benefitted from it.

[88] The interactions regarding the need to fill the tank were presented by everyone as minor day-to-day events that they considered to be of little importance as this task was simply one of many. Warrant Officer Fortin relied on the other members of the troop and those that supported it to ensure that all the tasks related to the exercise would be completed. It is clear that his testimony before the Court is in line with this

perspective, and the fact that he only recently realized his mistake is entirely plausible. In fact, his astonishment at the situation was clearly revealed in his interview with the investigator. At the end of the interview, he noted with surprise that the capacity of the tank that had been filled was much greater than he had thought.

[89] Master Corporal Fortin stated in his testimony that Warrant Officer Fortin had explained to him in which tank to put the diesel, namely, the white tank. However, under cross-examination, he stated that this was not the first time he was reporting this, but he was unable to say to whom and when he had done so previously. His testimony on this issue leaves the Court perplexed on this fact, and the Court finds that it raises doubt about the credibility and reliability of his testimony on this issue. This is not sufficient to question his entire testimony or Warrant Officer Fortin's testimony that he never told him anything of the kind.

[90] Even if the Court did not believe Warrant Officer Fortin, his testimony before the Court would, minimally and in the circumstances, raise reasonable doubt about the same essential elements of the charges, and the outcome would be the same.

[91] The term "dissiper" ("wastefully expending" in the English version of the *NDA*) means "to spend extravagantly," "to waste," according to the *Le Petit Robert* dictionary. The evidence does not support the fact that Warrant Officer Fortin was engaging in such an act at any time. In fact, there is no evidence that the diesel fuel was wastefully expended. The fact that the warrant officer only kept an approximate record rather than an exact record of the quantity of diesel fuel to be supplied proves only one thing: Warrant Officer Fortin was concerned about not wasting the fuel in question unnecessarily or not using it extravagantly. He was far from being reckless. He may not have been accurate, but he did have a basis for his calculation, showing that he was concerned about the quantity that would be filled in the farmer's tank. Once again, the question of public property raises reasonable doubt for the same reasons I noted in my analysis of the second charge, and which I will not repeat here.

[92] The Court therefore concludes that the prosecution did not discharge its burden of establishing beyond a reasonable doubt that property was wastefully expended, that this property was public property belonging to Her Majesty the Queen and that the accused's intent was culpable.

[93] In short, the agreement that was reached by Warrant Officer Fortin with the farmer to compensate him for his tractor cannot give rise to a conviction for conduct to the prejudice of good order and discipline and for selling diesel fuel in a situation where he had been authorized to reach such an agreement and where any intention that he wanted to sell it was not established beyond a reasonable doubt. Moreover, the fuel that was supplied cannot give rise to a conviction for wastefully expending diesel fuel as the intention to do so and the facts reflecting such a situation were not established beyond a reasonable doubt.

FOR ALL THESE REASONS, THE COURT

[94] **FINDS** Warrant Officer Fortin not guilty of the first, second and third charges.

Counsel:

The Director of Military Prosecutions, as represented by Captain M.-A. Ferron and Major A.J. Van der Linde

Mr M. Morin, Morin Lessard avocats, 118 Saint-Jean-Baptiste Street, Victoriaville, Quebec, G6P 4G1, counsel for Warrant Officer J.A.T. Fortin