COURT MARTIAL

Citation: *R. v. Buenacruz*, 2017 CM 4014

Date: 20171101
Docket: 201735

Standing Court Martial

Canadian Forces Base Shilo
Shilo, Manitoba, Canada

Between:

Her Majesty the Queen

- and -

Warrant Officer J.N. Buenacruz, Accused

Before: Commander J.B.M. Pelletier, M.J.

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REASONS FOR FINDINGS

(Orally)

Introduction

[1] Warrant Officer Buenacruz is facing five charges under the Code of Service Discipline, in relation to two related incidents. Chronologically, the first incident constitutes the background for charges 3, 4 and 5, where it is alleged that in April 2016, at Canadian Forces Base (CFB) Shilo, Warrant Officer Buenacruz offered Corporal XX money in exchange for sex. Charge 3 is laid under section 130 of the *National Defence Act* (*NDA*) alleging communication with a person for the purpose of obtaining sexual services for consideration, contrary to sections 286.1 and 463 of the *Criminal Code*. Charge 4 alleges that Warrant Officer Buenacruz behaved in a disgraceful manner

contrary to section 93 of the *NDA* by offering Corporal XX money in exchange for sex and charge 5 alleges that the same offer of money for sex constitutes conduct to the prejudice of good order and discipline contrary to section 129 of the *NDA*. Charges 1 and 2 are related to the second incident, an encounter of a sexual nature between Warrant Officer Buenacruz and Corporal XX on 11 May 2016 in Brandon. The first charge under section 130 of the *NDA* alleges that a sexual assault was committed contrary to section 271 of the *Criminal Code* and the second charge alleges that by pursuing a sexual relationship with Corporal XX on that occasion, Warrant Officer Buenacruz behaved in a disgraceful manner.

[2] It is understood that Warrant Officer Buenacruz has retired from the Canadian Armed Forces (CAF) in October 2016. Yet, for the purpose of the Code of Service Discipline, he is deemed to have the same status and rank that he held immediately before his retirement by virtue of section 60(3) of the *NDA*. Consequently, I have addressed the accused as Warrant Officer Buenacruz throughout this trial and will continue to do so in these reasons.

The Evidence

[3] The prosecution called three witnesses. The first was the lead military police investigator from the Canadian Forces National Investigation Service (CFNIS) who described his investigation and introduced as exhibits audio video recordings and transcripts of the interview he had with the accused and, at the request of defence counsel, the three interviews conducted with Corporal XX. He also introduced a phone log of calls to/from Corporal XX's phone on 10 and 11 May 2016 including details of three of these calls; the clothing worn by Corporal XX during the sexual encounter; and, most importantly, a CD containing surveillance video footage of the parking lot where the sexual encounter of 11 May took place, showing the vehicles of both Corporal XX and the accused as well as some of their movement, especially of Corporal XX as she moves in and out of the vehicles.

[4] The second witness called was Corporal XX who described her version of both incidents and provided significant background as to her interaction with Warrant Officer Buenacruz and others from her unit before and since the incidents, including details about the context of her decision to complain in June 2016, when on exercise in Wainwright, Alberta. I will comment on her testimony in more detail further. Sergeant Martin also testified for the prosecution about statements made by the accused to her confirming that he had been involved in a sexual encounter with Corporal XX.

[5] The defence called eleven witnesses, which can be separated in four categories. First, the accused testified and provided his version of the events which differed in many ways with Corporal XX's version, to an extent that will be analyzed in detail further. Second, Warrant Officer Buenacruz's wife testified to corroborate her husband's testimony on a number of collateral issues. Third, Corporal Dreyer was called by the defence, mainly to comment on his interactions with Corporal XX at the time of the two incidents. Finally, the defence called several current and former

members of the 1st Regiment Royal Canadian Horse Artillery (1 RCHA), the unit to which Warrant Officer Buenacruz and Corporal XX belonged at the time of the incidents, including the former commanding officer, to comment on various degrees on their past interaction with Corporal XX, her bad reputation as it pertains to credibility and the circumstances surrounding her decision to complain in June 2016, when on exercise in Wainwright, Alberta.

The Facts

Areas of agreement on the facts

[6] At the end of trial, as confirmed during submissions of counsel, it became clear that the parties were *ad idem* on a number of facts as it relates to the sequence of events pertaining to both incidents which form a continuum. Chronologically, it is agreed that there has been at least one conversation between Warrant Officer Buenacruz and Corporal XX within 1 RCHA unit lines in April 2016, the subject of which was the possibility of entering into sexual interaction. Both parties also agree that the possibility of Corporal XX being paid for her participation in the sexual interaction was mentioned. Where parties differ to an important degree is on the issue of who initiated the conversation, whether further conversations occurred at a later date before 10 May 2016 and what exactly was said by whom, especially as it pertains to the issue of payment in relation to sexual interaction.

[7] It is also agreed by the parties that in connection with this initial conversation or conversations, Warrant Officer Buenacruz initiated four phone calls to Corporal XX on 10 May 2016. The first call made from his phone was not answered. The second and third calls were made from payphones and did not result in conversations. It is as a result of a short, one-minute, conversation during the fourth call made from a phone on CFB Shilo that an understanding was reached to the effect that the next day, 11 May, both were to drive to the parking lot behind the Shoppers Mall in Brandon at 1000 hours to engage in sexual activity.

[8] The video surveillance footage, providing an intermittent view of the vehicles in the parking lot, reveals that the meeting took place as agreed on 11 May. After parking her small car next to Warrant Officer Buenacruz's SUV, Corporal XX entered the SUV by the front passenger door. She exited the vehicle 38 seconds later to re-enter the SUV through the back passenger-side door, laid down on the folded rear seats, her head towards the rear of the vehicle in contact with Warrant Officer Buenacruz whose head was towards the front of the vehicle. She performed oral sex until Warrant Officer Buenacruz ejaculated in her mouth. Corporal XX then left the vehicle through the back passenger side, approximately 4 minutes 9 seconds after having entered, to spit semen from her mouth in bushes behind the SUV. She then re-entered through the back passenger door spending approximately a minute and a half on the back seat prior to exiting the vehicle again, closing the door and re-entering her own vehicle to leave, followed by Warrant Officer Buenacruz leaving a few seconds later, heading in the opposite direction.

[9] The white SUV of Warrant Officer Buenacruz gets back in the frame just under two minutes later, moving to another area of the parking lot where it stops right next to Corporal XX's vehicle, heading in the opposite direction. Warrant Officer Buenacruz immediately exits the vehicle and proceeds to the back passenger side door. From the testimony, it is established that he recovered a pair of sunglasses left behind by Corporal XX in the back passenger side of his SUV, returned them to her through her driver side window and drove away. Although both came within sight of each other at work subsequently, they never met nor spoke to each other again.

[10] As for events surrounding the complaint, it is agreed that Corporal XX complained about both incidents to Major Hudson, a designated Operation HONOUR office of primary interest (OPI) for her unit, at the end of Exercise MAPLE RESOLVE held in the field at CFB Wainwright. She was subsequently called to a tent where she met with her commanding officer and acting regimental sergeant major to discuss her complaint. She then exercised the option given to her to move away from the field to base accommodation, where she was able to communicate with her family. At the suggestion of her sister, she called the Sexual Misconduct Response Centre through which military police investigators from the Canadian Forces National Investigation Service (CFNIS) were dispatched to Wainwright. They met with Corporal XX on 7 June 2016 when she provided a statement initiating the investigation that led to the charges.

Areas of contention on the facts

[11] The most important disagreement on the facts as it pertains to the charges relates to the conversation or conversations that happened in April 2016. There is essentially no disagreement as to the events of 11 May 2016 with the exception of the conversations between the participants, which may impact consent on the first charge. That being said, it is important to state that the events occurred in a continuum. The conversation or conversations in April constitute an essential element of context for the phone conversation of 10 May and the events of 11 May and is relevant to the analysis on all charges. I will now turn to the evidence of key witnesses.

Testimony of the complainant

[12] Corporal XX's testimony was initially directed on her career since joining the CAF in 2011 until the present with the Royal Regiment of Canadian Artillery School in Gagetown, New Brunswick. She discussed the difficult circumstances she experienced upon moving to Shilo and joining the 1 RCHA in April 2013 until her departure in April 2017. These included a miscarriage in 2014 which left her in a state of turmoil during which she was charged for drunkenness following a fight at the Junior Ranks on Remembrance Day, an incident she said was started by another soldier who, to her knowledge, was never charged. She described the changes in employment she requested and obtained in the following two years, allowing her to get exposure in a number of different areas, including communications, which she seems to like and said she is good

at. More specifically as it pertains to the time of the incident in 2016, she mentioned that during Exercise MAPLE RESOLVE, a sergeant had made remarks in the presence of the entire troop to the effect that girls do not become women until they have a baby and that women cannot lead. That was particularly hurtful to her given her earlier miscarriage. A few days later, as the exercise ended, she met the Troop Sergeant Major (TSM) to highlight her complaints against the sergeant who had said these words and against another sergeant, both having been her supervisors. She also formulated complaints about some of her subordinates who did not satisfactorily comply with her direction in her view. The response of the TSM was not satisfactory as he suggested members of the troop could also make complaints about her. She was redirected to Major Hudson.

[13] Corporal XX testified that she met with Major Hudson and complained about Warrant Officer Buenacruz in addition to having to reformulate her initial complaint about the two sergeants. During her testimony, Corporal XX mentioned that she had not been kept adequately informed of the result of the complaints she made while at 1 RCHA, including a complaint to her unit and military police about online harassment in the form of a *Reddit* post identifying her as promiscuous. She added that the entire situation regarding her complaints and the way she was generally treated at 1 RCHA is currently under review at a higher level of command. Corporal XX also commented on how she was ostracized at 1 RCHA before and following her complaint against Warrant Officer Buenacruz. She was moved to another battery where she felt like a huge administrative burden. Afterwards she was informed that the unit was going to post her to CFB Suffield in Alberta, in a position outside of the artillery, even further from her family located in the Atlantic Provinces. She said she was able to get that plan cancelled after writing a memo opposing the posting and after her father, a former artillery officer, had written to his Member of Parliament. She was ultimately posted to New Brunswick, close to her family, in April 2017.

[14] As it pertains to the conversation in April 2016, subject of charges 2, 3 and 4, Corporal XX testified that at the end of a workday in April 2016, just prior to leaving for Exercise PROMETHEAN RAM in Wainwright, Warrant Officer Buenacruz approached her nervously and stated that he needed a favour and that it was very personal. She finished up her work and they spoke privately, albeit in a public space at the Regiment. She testified that Warrant Officer Buenacruz asked her if he could give her some money in exchange for oral sex with him or for sleeping with him. He stated he worked late, that is until 7 p.m. on Mondays and Wednesdays, and on those occasions they could go somewhere and interact. Corporal XX testified that she replied, "I don't know, maybe, we will have to see." When asked by the prosecutor why that was her reply, she stated that she just wanted to get out of the situation because she was uncomfortable, especially that she respected Warrant Officer Buenacruz so much ever since having professional interaction with him on her first gunner course in Gagetown three years earlier and because he appeared to be a very decent man. She stated she did not want to say no to him because maybe, as he was the training warrant officer for the unit, he could block her participation on future career courses or talk to her TSM who was a friend of his, so that she would have to do extra duties. She said that after the

conversation, she was pretty upset, got to her car where she started crying and drove directly home. She said that in her opinion Warrant Officer Buenacruz was serious when he made the offer and if she had said yes it would have happened; he would have paid her for sex. She said the conversation changed her perspective of her Regiment, the RCHA and of the CAF in general, especially given the atmosphere at the time with the *Deschamps Report*, Operation HONOUR and various reports in the media to the effect that sexual misconduct was rampant in the CAF.

[15] In the days following this conversation, Corporal XX spoke to her friend Corporal Dreyer, about Warrant Officer Buenacruz's proposition. That evidence was received not to prove the truth of what she said but rather the fact that it was said. She subsequently left for Exercise PROMETHEAN RAM where she only saw Warrant Officer Buenacruz sporadically, never talking to him other than in the course of duties over the radio. She came back from that exercise a week or two later, in early May 2016. At that time she was on leave as were all other members of her regiment in anticipation of the next period of Exercise: MAPLE RESOLVE, from mid-May to early June 2016. She said that on 10 May she had gotten up early, was having a hot bath and reading a book when her phone rang at 10:43. Her caller ID identified the caller as Warrant Officer Buenacruz. She said she did not bother answering. This was the first phone call she ever got from him. The second and third calls were made from Manitoba Telecom Services (MTS) payphones. Corporal XX said she usually does not answer calls from an unknown source, but did answer the second call which lasted only 22 seconds and did not result in a conversation as Warrant Officer Buenacruz hung up. The fourth call was made from a CFB Shilo extension at 13:16. It resulted in a conversation lasting one minute. Corporal XX testified in direct examination that Warrant Officer Buenacruz asked if she wanted to meet up the following day at 10 a.m. behind the Shoppers Mall in Brandon. In cross-examination she denied that he had asked, stating that she had been told to meet him there at 10 a.m. In any event, the conversation closed with her expressing an acknowledgement to meet. Asked to explain why she had not refused the invitation outright, she said she had run out of excuses at that point, was afraid of what Warrant Officer Buenacruz could do and felt she could not refuse without "pissing him off."

[16] Corporal XX testified that on the morning of 11 May, she showered, pulled her hair back, and wore a normal romper as she did not care how she looked given that Warrant Officer Buenacruz did not deserve her to look done up. As alluded to earlier, she did attend the location previously discussed. She entered Warrant Officer Buenacruz's SUV through the front passenger door. There, the discussion was brief, "Hi, how have you been," and soon thereafter Warrant Officer Buenacruz began kissing her and feeling her legs and breasts. Warrant Officer Buenacruz climbed over to the back seat from the driver's side. She said she was in panic mode and told herself to suck it up and go through the next 15 minutes, then maybe he will not want to do it again. She got out of the vehicle from the front passenger seat and went back in through the back passenger door. At that point, the sexual activity described earlier occurred. Corporal XX denied that Warrant Officer Buenacruz ever tried to ascertain her consent in the car. He never asked if she wanted to have oral sex with him, nor discussed the

difference in rank. She said she did not want to be there and felt disgusted afterwards. She said she felt powerless and weak as she could not gather the strength to refuse, being scared of the repercussions if she did. On cross-examination, Corporal XX confirmed that Warrant Officer Buenacruz never made any representations regarding benefits or detriments which could ensue as consequences for sexual activity between the two. As for what occurred after the return of her sunglasses from Warrant Officer Buenacruz, she stated that she drove directly home.

Evidence for the defence

[17] Corporal Dreyer testified first for the defence. He stated that he was a co-worker and friend of Corporal XX since her arrival at 1 RCHA in April 2013. He stated that she told him about the two incidents subject of the charges. Her said he relayed that information in the course of the CFNIS investigation. As for the first incident, he did hear Corporal XX tell him in April 2016 that Warrant Officer Buenacruz had offered her money in exchange for sexual favours. He could not remember the exact words spoken by his friend, but said that the concept of money in exchange for sexual favours was raised and she appeared disturbed by it. With respect to the second incident, Corporal Dreyer testified that a day in May, between the two exercises in Wainwright, he was walking back home from the Canex store on base when Corporal XX drove by in her vehicle and stopped to offer him a ride. He got in her car and she informed him that she was back in Shilo, just after having been with Warrant Officer Buenacruz. She said she had performed oral sex on him and commented on the size of Warrant Officer Buenacruz's penis. When asked about Corporal XX's mood on that occasion, Corporal Dreyer testified that she appeared "even-keeled" which he described in cross-examination as meaning neutral, neither bragging about nor being distraught in relation to what had apparently just occurred. Corporal Dreyer could not recognize the exact garment that his friend was wearing at the time of that encounter, but commented that she was in civilian clothes and that the romper in exhibit was the kind of clothing that she would wear.

Testimony of Warrant Officer Buenacruz

[18] For his part, Warrant Officer Buenacruz testified that, in relation to the first incident, it is Corporal XX who accosted him in mid-March and engaged in a conversation about his job at the Regiment and whether he liked it, as he looked stressed and unhappy. She mentioned that sex is a good stress reliever and he agreed, laughing. She asked if he liked his dick being sucked, to which he answered affirmatively. She then asked whether his wife does it. He answered negatively. She then offered to do it for him. His first reaction was to ask how much it was going to cost him for the blow job. Before the conversation could conclude, the regimental duty sergeant approached to talk to him and Corporal XX left. He said he did not see Corporal XX again for some time but that he was still thinking about her offer and was excited by it.

[19] He said that he was approached again by Corporal XX, about a week before Exercise PROMETHEAN RAM, when she stated that her offer was still there. He said he told her it was too bad she did not offer earlier as his wife was working Monday and Wednesday nights. By then, however, there was not enough time as they had to leave for Wainwright. He testified that she said, "Maybe after the exercise" and he replied, "Maybe, we will see." Before going on leave following the exercise, they had to work for a few days. He saw Corporal XX again on or about 8 May at the Regiment. She told him that she was off that week: if he still wanted it, it may be a good time.

[20] He decided to call her on 10 May, first from a payphone near his house. When he reached her later from a phone at the language school on base, she answered. He said he asked if her offer was still good. Having received a positive answer, he asked if she wanted to meet up tomorrow, and again received a positive response. She asked where they should meet: he provided the location and time. She agreed. On cross-examination, Warrant Officer Buenacruz denied ordering Corporal XX to attend the location. He agreed that there was not much time in that call allocated for discussion as to whether she really wanted to do this or not, especially given his rank. Yet, Warrant Officer Buenacruz said there was no need for much conversation as he had outright asked if her offer was still valid and she said yes.

[21] As for the events of 11 May, Warrant Officer Buenacruz testified that as Corporal XX entered his vehicle and sat in the front passenger seat, he asked her if she still wanted to do this. She said yes. So he climbed on the back seat, she got in the back using the doors and asked him to pull down his pants, which he did. The sexual activity described earlier took place but not before Corporal XX started kissing him. He testified that he told her he was not interested in kissing, that he just wanted her to give him oral sex, which she did. Warrant Officer Buenacruz testified that he was done quickly and told Corporal XX when he was about to ejaculate. After she came back in the car after having spat his semen, he told her he had to go. She asked him if he was going to leave his wife, but she was smiling and Warrant Officer Buenacruz did not think that she was serious. In any event, he asked her to keep their encounter a secret. As for what happened later, Warrant Officer Buenacruz stated that Corporal XX called then texted him to inform him that she had left her sunglasses in the back of his car. He did not answer the call but saw the text and turned around to meet her and return the sunglasses.

[22] Warrant Officer Buenacruz admitted lying to the CFNIS investigator during an interview which started just after midnight on 8 June 2016. On that occasion, he denied having had a sexual encounter with Corporal XX. He stated that he did so because he did not want to get caught cheating on his wife. On cross-examination, he admitted a secondary consideration was that he did not want the leadership at his unit to find out he had that sexual encounter. He admitted that he should have advised his chain of command about it at the first opportunity.

Evidence on collateral matters

[23] A great deal of time was spent in this trial on the introduction of evidence pertaining to collateral facts or opinion, with the objective of influencing findings of credibility about either the complainant or the accused. It is especially the case with the evidence of witnesses from the 1 RCHA who provided their opinion on the reputation of Corporal XX for credibility, which they invariably assessed as being bad. It is also the case with the evidence pertaining to the circumstances surrounding the making of complaints, including against Warrant Officer Buenacruz at the end of Exercise MAPLE RESOLVE. Generally, I don't find this evidence to be determinative in my analysis and, therefore, I will not refer to it further.

Theory of the case advanced by the parties

[24] The prosecution's theory is that Corporal XX was and still is, to a large extent, an outcast in the Artillery, and was especially seen as such by the leadership at 1 RCHA in 2016. That made her vulnerable in the eye of Warrant Officer Buenacruz, a much older man in a position of power who decided to prey on Corporal XX to obtain sexual favours he could not get from his wife. Should a complaint be made against him, Warrant Officer Buenacruz could safely be certain that no one would believe what she had to say in another of her complaints over his word as a respected senior non-commissioned officer within his unit.

[25] The defence's theory is that Corporal XX sought to have a romantic adventure with Warrant Officer Buenacruz but that she became increasingly upset: first by his remark about whether he would have to pay her for giving him a blow job, a remark which reduced her to a potential prostitute; second, by his rude behaviour when they met in his vehicle on 11 May, especially his refusal to kiss her, instead asking her to focus on oral sex; third by his hurry to leave as soon as he was done; and finally, she was upset not only that he would not consider leaving his wife, but that he did not appear to want to have anything else to do with her in the days and weeks following their interaction. It is the defence's position that when Corporal XX realized that her complaint against two sergeants from her unit was insufficient to be removed from fire picket duty in the field at the end of Exercise MAPLE RESOLVE, she decided to use lies to transform the fact of her past interactions with Warrant Officer Buenacruz into a credible sexual harassment or sexual assault complaint.

Credibility Analysis

[26] As recognized by counsel, the Court cannot come to conclusions as to guilt in this case without analyzing the credibility of witnesses, especially Corporal XX and Warrant Officer Buenacruz. Indeed, even if the acts subject of charges 1 and 2 are largely admitted, the content of the conversations that predated the acts and occurred during these acts is not. Those conversations provide context necessary in appreciating the essential elements of the offence at charges 1 and 2, as well as the acts complained of in charges 3, 4 and 5. Consequently, the findings I have to make will depend on the manner in which the evidence of the complainant and accused is assessed, as they are the only participants in these conversations.

[27] As highlighted by the prosecutor during submissions, with the assistance of the reasons of the Saskatchewan Court of Appeal in *R. v. Baxter*, 2013 SKCA 52, the assessment of credibility turns on a myriad of considerations, some personal to the trial judge's impressions born out of experience, logic and an intuitive sense of the matter. The Supreme Court of Canada (SCC) said in *R. v. R.E.M.*, 2008 SCC 51, that "it may be difficult for a trial judge 'to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events." Indeed, "assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization." Yet, I will attempt to provide as complete explanations as I can for my findings in this regard, not only because I believe it is my duty, especially if my reasons were to be reviewed on appeal, but also because I feel I owe it to those most concerned with my decision, mainly the accused sitting in front of me, the complainant watching by video feed and the members of the public and of the CAF in this room.

[28] In this case, I have at my disposal what I consider to be anchors on the facts, namely evidence of high or even unquestionable credibility and reliability which I can use as benchmarks to measure the reliability or credibility of other evidence. The first of those is the video footage from the surveillance camera sweeping the parking lot where the sexual interaction took place. The second is the statements given to CFNIS investigators, not for their content but rather for the fact that they were given at the time and place they were given. Finally, I consider the evidence of Corporal Dreyer to be highly credible and reliable and both counsel agree. As a witness, he was a model of thoughtfulness, took his time to provide precise answers and readily admitted and explained the limits of his testimony. Most importantly, he is the only person Corporal XX could identify during her testimony as a person she could turn to in Shilo, during her time with the 1 RCHA. The reliability and credibility of Corporal Dreyer is such that I have no reluctance to anchor findings of credibility on it as it pertains to other witnesses.

[29] I will assess the evidence by looking first at reliability, specifically contradictions or corroboration by other evidence which may reveal defects in the witness's ability to perceive, recall or communicate the evidence. I will also be evaluating credibility by paying attention to any internal inconsistencies in the witness's account of events and by the presence of or any lack of consistency in a witness's account over time which may be considered to impeach credibility, but generally not to bolster it. I will assess external consistency with other evidence. I will assess the inherent plausibility of the witness's account, including any motive to lie or lack thereof. I will also consider the witness's poor character for truthfulness, considering any prior conviction or reputation for credibility. Finally, I will consider a witness's demeanour while giving testimony, albeit to a very restricted level as the only demeanour considerations I find indicative of credibility are sudden changes in behaviour during examination of a witness which, depending on the question being asked at the time, may reveal a person's discomfort in being caught lying. I will endeavour to apply the same level of scrutiny to the evidence of both Warrant Officer

Buenacruz and Corporal XX. Most importantly, I will resist instinct and emotion in favour of reason and dispassionate analysis.

[30] In arriving at credibility findings, it is important for me to be careful not to reverse the burden of proof. Despite the preceding summary of the testimony of witnesses in the order that they were heard at trial, the method of evaluating the impact of testimony on the required findings responds to different imperatives. As Cory J. of the Supreme Court of Canada provided in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, at page 757, I am required to use the following method of assessing credibility in order to respect the fundamental principle obliging the prosecution to prove the offences beyond a reasonable doubt:

> (a) if I believe the testimony of the accused, I must find him not guilty;
>
> (b) if I do not believe the testimony of the accused but it leaves me with reasonable doubt, I must also find him not guilty; and
>
> (c) even if the testimony of the accused does not leave me with any reasonable doubt, I must ask myself whether, based on the evidence which I accept, I am convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[31] This case is somewhat different, however, as the prosecution submits that even if the accused is believed, he could be found guilty of some or all of the charges. I will keep that suggestion in mind in my analysis of the evidence in relation to specific charges.

Credibility of the accused

[32] Warrant Officer Buenacruz testified in his own defence in a straightforward manner, relating, uninterrupted and in his own words, the events relevant to his entire interaction with Corporal XX in the spring of 2016. His direct testimony was relatively short and mainly comprised of open questions requiring elaborate answers. An external inconsistency was revealed as it pertains to the sequence of phone calls made on 10 May, although Warrant Officer Buenacruz admitted to having made all four calls. The inconsistency was resolved in cross-examination with the assistance of a call log originating from Corporal XX and introduced as Exhibit 12. The cross-examination of Warrant Officer Buenacruz was extensive and quite pointed. The prosecutor asked numerous questions relating to the character of what he had done in terms of engaging in a sexual exchange with Corporal XX, as it pertains to potential harm to unit cohesiveness. Warrant Officer Buenacruz readily admitted to suggestions concerning things he should have known, said or considered. Presented with a number of hypothesis, he provided thoughtful and coherent answers without any attempt to avoid comments which may be detrimental to him. For instance, he admitted that having sex with a subordinate, even once, may alter the relationship between those involved, as well as impact the work environment and the proper functioning of a unit. He admitted

that he should have advised his chain of command of what had occurred between him and Corporal XX.

[33] On cross-examination, Warrant Officer Buenacruz was pressed on the issue of the words exchanged in the course of the first conversation with Corporal XX. He answered spontaneously when suggestions were put to him about whether he would have gone ahead and paid Corporal XX for sex if she had said yes to his question about whether he would have to pay. He said any hypothetical payment would be dependent on how much she would be asking for. He also readily admitted that he found it strange that a 23-year-old would offer him oral sex but said that it is his surprise with that proposition, which explained his immediate question about payment.

[34] After close examination of Warrant Officer Buenacruz's testimony, I found no significant reliability issues in what he relayed to the Court, nor could I find internal inconsistencies in what he said, with the obvious exception of his interview with CFNIS investigators, which I will come back to later. There were a few external inconsistencies in Warrant Officer Buenacruz's testimony, including the sequence of phone calls he made on 10 May, as he had difficulties testifying as to when this call was made in relation to the other calls that day. However, those were addressed on cross-examination and I don't see them as an attempt to mislead.

[35] The prosecution has inferred that Warrant Officer Buenacruz's version of events as it relates to his conversation of a sexual nature with Corporal XX in April 2016 was implausible given the age differential between the two and the fact that she testified that she was not attracted to him. I don't agree. Even if she said that she was not physically attracted to him, she stated that she respected and trusted him, that he was a role model respected by his troops and that she wanted to be like him. Sexual activity is not always about physical attractiveness and age differences are not determinative. The prosecution in submissions also referred to the discrepancy in the evidence as it pertains to the sequence of events which led Warrant Officer Buenacruz and Corporal XX to rejoin so that her sunglasses can be returned two minutes after parting ways. It is submitted that it is implausible that Warrant Officer Buenacruz had received a text message as he alleges and that he simply turned around and invented the text message testimony to weaken the reliability of Corporal XX's version of events and bolster his. I do recognize that the issue of how exactly the two came to turn around and meet again is unresolved, as are issues sometimes in trials. However, absent cross-examination on this issue, I am not ready to accede to the argument that this portion of the accused' testimony reveals a lie on his part. This episode is collateral to real issues and has no impact on my credibility findings.

[36] The prosecutor pressed Warrant Officer Buenacruz on the reasons why he had lied to the CFNIS investigators when he was asked to submit to an interview just after midnight on 8 June 2016. He repeated that his first concern was his wife, but admitted he was suggesting an alibi when he mentioned that he was picking up dandelions on the day of the alleged sexual interaction, even if it was true. In submissions, the prosecution assessed that Warrant Officer Buenacruz lying to police and being unfaithful to his wife

should demonstrate to me that he cannot be relied on for truthfulness. I do not agree that this evidence is so damning. The lie to police is not part of an established pattern of dishonesty as evidenced by all witnesses in this trial who commented on Warrant Officer Buenacruz's stellar reputation, including Corporal XX. Furthermore, an explanation has been provided for lying to police: Warrant Officer Buenacruz did not want his wife to know about his sexual interaction with Corporal XX. This explanation is not implausible. The evidence is clear to the effect that he did not want his wife to know he had an interest in Corporal XX, as evidenced by his calls from payphones on 10 May. After their interaction, he asked her to keep it a secret. It is not implausible for a married man engaged in extramarital sexual activities to want to keep those activities secret. In these circumstances, the fact that Warrant Officer Buenacruz lied to police causes me to be cautious, but not to dismiss his testimony as non-credible for that reason alone.

[37] Finally concerning demeanour, the prosecution suggested that I watch the video of the 8 June interview Warrant Officer Buenacruz gave to the CFNIS, look at the demeanour displayed by Warrant Officer Buenacruz as he lied to police and draw some parallel with his demeanour in court to infer negatively about his credibility. I do not see the need to do that and I doubt the reliability of such an exercise. I have watched Warrant Officer Buenacruz carefully throughout his testimony and in court and did not see any change in demeanour throughout the trial that could cause me concern about lies being told by him. That is so despite the extremely rigorous cross-examination he was subjected to, including questions on another alleged affair dating back several years, which he denied.

[38] As a consequence, I cannot find determinative reasons to reject Warrant Officer Buenacruz's testimony on the basis of a lack of credibility.

Credibility and reliability of the prosecution witnesses

[39] Besides Corporal XX, the prosecution called Master Corporal Lawrence and Sergeant Martin. They both testified in a frank and objective manner without any excessive animosity towards the accused and I have no difficulty admitting their testimony as credible and reliable. Yet, at the end of this trial, the testimony that is most important for the prosecution to meet its burden of proving the charges was given by Corporal XX. I was impressed by her courage and her capacity to recount emotionally painful incidents despite the inherent stress of testifying in public on very personal matters, in close physical proximity to someone she considers to have caused her harm.

[40] Corporal XX displayed a good capacity to recall, especially as it pertains to the sequence of events on 11 May which was confirmed by the video images in all but one inconsequential aspect, relating to the issue of which door she used to re-enter the vehicle after spitting in the bushes. Her capacity to communicate was excellent, the product of an obviously bright mind. She did volunteer a lot of information on cross-examination and argued with counsel in doing do. Even if these admissions supported her narrative in large part, she did concede some elements not so favourable to this

narrative as well. I have not noticed any major internal inconsistency in her testimony. I acknowledge the efforts of defence to contradict her on her 7 June statement as it pertains to where exactly she started crying after her discussion with Warrant Officer Buenacruz and whether any soldier saw her, but it is of no significance to me. She did however, have some issues with remembering dates, as evidenced by her repeated assertion that she had left Wainwright on 6 June 2016 to drive to Shilo on a Medium Support Vehicle System (MSVS) truck, when in fact she was still in Wainwright giving a statement to the CFNIS on the evening of 7 June. This example of external inconsistency is not determinative to the conclusion I have to make.

[41] I have to say, however, that I have been troubled by external inconsistency demonstrated by her testimony as it pertains to what she did and how she felt after the sexual encounter of 11 May in comparison with the testimony of Corporal Dreyer, that I recognize as a neutral and extremely reliable witness, as explained earlier. During her testimony, Corporal XX stated that after recovering her sunglasses in the parking lot behind the Shoppers Mall, she went directly home and that by 10:30 she was almost home. As for her emotional state following the encounter on 11 May, she was asked on cross-examination if she was crying during the 30-minute drive home. She volunteered that she was numb at first, then pretty upset when she got to the turn-off to Shilo and once home was inconsolable. In his testimony, Corporal Dreyer testified that on the same day, Corporal XX drove by in her vehicle and stopped to offer him a ride as he had just left the Canex store on base. She informed him that she had just been with Warrant Officer Buenacruz and that she had given him a blow job. He said that she commented on the size of Warrant Officer Buenacruz's penis. Asked about her mood, he testified that she appeared "even-keeled", which he described in cross-examination as meaning neutral, neither bragging about nor being distraught in relation to what had apparently just occurred. This assessment is to an extent corroborated by the video images showing her exiting Warrant Officer Buenacruz's vehicle, looking at him, then moving towards her car while rearranging her clothes. These images do not show a person that is distraught or numb.

[42] This discrepancy is disturbing not because Corporal XX failed to remember that she had picked up Corporal Dreyer and certainly not because she did not appear to display to Corporal Dreyer an emotional reaction compatible with what some could think a typical victim should display. Victims of sexual assault may react in a variety of ways. What I have difficulty with is what she volunteered in cross-examination: that she was stunned, then upset, then inconsolable. This is not only incompatible with observations made with her best and perhaps only friend in Shilo, but it also reveals a tendency to exaggerate, to adapt her narrative to what she may perceive as a victim's narrative, irrespective of the truth. This concerns me greatly with respect to credibility.

[43] The defence brought my attention to other discrepancies in Corporal XX's testimony which I don't feel the need to mention in detail as I don't agree with most of them, especially defence's assertion to the effect that her complaint was largely invented and formulated at the time of Exercise MAPLE RESOLVE to get her off the field and fire picket duties. In reality, there is corroborating evidence to the effect that

the two communications and the sexual encounter event she complained of did occur so I do not see the invention alleged. Also, Corporal XX's assertion that the first discussion involved exchanging sex for money was mentioned by Corporal Dreyer in his testimony: she had mentioned that to him at the time. His testimony does not make Corporal XX's testimony as to the content of her conversation with the accused more credible - it can't as it is hearsay. What it does, however, is discredit the allegation implied by defence that the sex for money discussion was invented at the time of the initial complaint in June 2016.

[44] The defence did not raise issues of demeanour relating to Corporal XX. What I have noticed is that Corporal XX did engage in argument with defence counsel on a number of occasions during cross-examination, demonstrating her intelligence and capacity to come back with counterarguments quickly, as well as an awareness of her status as a victim of sexual assault. The defence brought my attention to a number of exaggerations Corporal XX may have made in stating her complaint, to the effect that she had told Lieutenant-Colonel Taylor she wanted Warrant Officer Buenacruz off her back and that he was pestering her. I have noted this in her testimony as well.

[45] I also noted that throughout her testimony Corporal XX manifested a marked reluctance to admit she had done anything wrong, of course in relation to the incidents, subject of the charges, but also in relation to collateral facts. When the issue of her summary trial conviction was raised in direct examination, she placed the event in the context of her difficulties in recovering from her miscarriage and minimized the severity of the incident which she characterized as a stupid drunken bar fight, probably not an unfair assessment. Yet, she made a point of stating that she was defending herself after having been pushed by a soldier from another unit, a soldier who was never charged, inferring another example of the poor treatment she had received at her unit. A similar tendency was observed in her responses concerning her alleged abrasive treatment of her subordinates, to the effect that she simply wanted to complain about subordinates who had refused to do what she expected and that it had nothing to do with her leadership style. It would be unfair to expect Corporal XX or any other complainant to be perfect. It may well be that Corporal XX was badly treated at 1 RCHA; it is not for me to decide. Yet, deflecting responsibility for her acts on others is an indication that I must be aware of the possibility that she embraces a certain narrative as a defence mechanism in the context of the shabby treatment she manifestly feels she was given during her time with 1 RCHA in Shilo, including in the course of her personal interaction with Warrant Officer Buenacruz. I must be wary of of possible exaggerations as a result of that.

[46] I will, therefore, keep these credibility observations in mind when analyzing the evidence, especially as it pertains to the credibility of the version Corporal XX advanced in relation to the discussions between her and Warrant Officer Buenacruz prior to the sexual activity that took place between them on 11 May 2016. My doubts relating to her credibility may also influence the assessment I need to make of her description of events pertaining to what exactly occurred and what was said or not in Warrant Officer Buenacruz's vehicle on 11 May 2016. More importantly, the credibility

of Corporal XX may be a key factor when analyzing her assertions on the issue of consent on those occasions.

[47] Before I turn to the analysis of the charges, I want to clarify that the assessment of credibility is not a competition between Corporal XX and Warrant Officer Buenacruz. The purpose of this trial is not to determine if she wins her case against him. There is no case for her to win and whatever the outcome, she is no loser. This is Warrant Officer Buenacruz's trial and his trial only. Like any judge-alone criminal trial, what I need to do as judge is determine whether the prosecution has proven its case against Warrant Officer Buenacruz beyond a reasonable doubt. As with any other accused, Warrant Officer Buenacruz is presumed to be innocent right from the beginning of his court martial. The burden of proof rests on the prosecution throughout the trial and never shifts to the accused. The standard of proof beyond a reasonable doubt is inextricably intertwined with a principle fundamental to all criminal trials: the presumption of innocence. This means that, before an accused can be convicted of an offence, the trier of fact must be satisfied, beyond a reasonable doubt, of the existence of all of the essential elements of the offence.

[48] As for the meaning of the expression "beyond a reasonable doubt," the Supreme Court of Canada, in *R. v. Lifchus*, [1997] 3 S.C.R. 320, tells us that a reasonable doubt is not an imaginary or frivolous doubt, and must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense, and logically derived from the evidence or absence of evidence. It is not sufficient for me, as the trier of fact, to believe the accused is probably guilty or likely guilty. In those circumstances, the accused must be given the benefit of the doubt and acquitted because the prosecution has failed to satisfy me of the guilt of the accused beyond a reasonable doubt. On the other hand, I must keep in mind that it is virtually impossible to prove anything to an absolute certainty, and the prosecution is not required to do so.

The Evidence Applied to the Elements of the Offences

The first charge

[49] The first charge is laid under section 130 of the *NDA*, alleging sexual assault contrary to section 271 of the *Criminal Code*. The particulars are essentially to the effect that on 11 May 2016 in Brandon, Manitoba, Warrant Officer Buenacruz did commit a sexual assault on Corporal XX.

[50] The elements of identity, date and place of the offence are not in contention. Nor are the elements of the intentional application of force in the form of touching, as well as the sexual nature of the touching that occurred. What is at issue is whether the prosecution has proven beyond a reasonable doubt that Corporal XX did not consent to that touching. If the prosecution has met this burden, the issue becomes whether Warrant Officer Buenacruz knew that Corporal XX did not consent to that touching.

[51] In the course of her direct examination, in response to specific questions from the prosecutor, Corporal XX testified that she did not consent generally to sexual activity with the accused in his vehicle on 11 May 2016, but also specifically that she did not consent to a number of sexual acts performed at that time, including oral sex.

[52] My interpretation of the legal signification of that testimony at the time, on the basis of how the evidence was presented by the prosecution, was that Corporal XX was really saying that the apparent consent on her part was vitiated by the fact that she had been induced to engage in the activity by Warrant Officer Buenacruz abusing his position of trust, power or authority. I was therefore surprised at the stage of submissions to hear the prosecutor state her position to the effect that there was no consent at all to the sexual activity that took place.

[53] The prosecution's submission is to the effect that the negative answers of Corporal XX to specific questions at trial about whether she was consenting to sexual activity on 11 May are sufficient to establish the absence of consent element of the sexual assault charge. Indeed, consent to sexual activity is subjective, in that it is assessed on the basis of the complainant's state of mind at the time the sexual activity takes place. The prosecutor submits that every other consideration is part of the *mens rea* of the offence relating to whether Warrant Officer Buenacruz knew that Corporal XX did not consent to the sexual activity.

[54] I agree, consent is subjective. Yet, the absence of consent is not automatically established beyond a reasonable doubt the moment the complainant indicates an absence of consent in response to questions of the prosecutor at trial. The assertion of the complainant that she did not consent to sexual activity does not evacuate my obligation as trier of facts to assess the credibility of such a statement offered in testimony. The assertion of non-consent does not oblige the Court to conclude that there is an absence of consent if that assertion is not credible in light of the words or actions of the complainant at the time of offence, as established in the evidence. In light of the evidence heard in this case, I do have a doubt about the credibility of such assertion as it is internally inconsistent with the rest of the testimony of Corporal XX and externally inconsistent with other evidence.

[55] Indeed, the events of 11 May constitute the end result of a series of conversations which started in April 2016 within 1 RCHA unit lines, when, according to her own testimony, Corporal XX was asked whether she would provide oral sex or sleep with Warrant Officer Buenacruz. The next time she hears from him is in a one-minute telephone conversation on 10 May when she expresses agreement to join Warrant Officer Buenacruz behind the Shoppers Mall at 1000 hours the next day. There was little time for any other discussion on that occasion. In cross-examination, Corporal XX volunteered that upon getting up on the morning of 11 May, knowing that she was going to meet Warrant Officer Buenacruz, she made no effort to be done up as Warrant Officer Buenacruz did not deserve that she be done up for him. Her own evidence points strongly to the conclusion that she knew there would be sexual activity if and when she attended behind the Shoppers Mall in Brandon on 11 May.

[56] She voluntarily drove her car there. The video images show her voluntarily exiting her vehicle and moving towards Warrant Officer Buenacruz's vehicle. Images show her on the front seat of the vehicle; show her exiting the front passenger side to immediately enter through the back; show her re-entering the back of the vehicle after spitting in the bush; then show her, as the back door opens again, looking directly in the direction of Warrant Officer Buenacruz, shutting the door and going towards her car while readjusting her clothes. At no time do these images show anything other than voluntary activity, in conformity with what she described in her testimony. Furthermore, Corporal XX's remarks to Corporal Dreyer that she had just been with Warrant Officer Buenacruz and had given him a blow job, are consistent with the account of voluntary actions. Consent can be inferred from the evidence of voluntary activity.

[57] I realize there is conflicting testimony on the issue of whether there was any effort on the part of Warrant Officer Buenacruz to ascertain consent as Corporal XX first entered his car. He stated that he asked whether she still wanted to do this, referring to the sexual activity previously discussed between the two. She denied such question was asked. Also, Corporal XX testified about some kissing and touching which occurred soon after she had entered the front of the car. Warrant Officer Buenacruz denies that, testifying that it is she who kissed him first and that he asked that she focus instead on performing oral sex on him. There is no independent evidence available to assist in resolving this conflict. Even if both are partly visible on video footage, that evidence is inconclusive.

[58] Both participants testified to the effect that Warrant Officer Buenacruz attempted to stimulate Corporal XX's genital area, attempt which stopped when she expressed her refusal, saying that this should be about him. On the evidence, consent was not sought nor obtained regarding these activities specifically. The absence of a "no" does not mean "yes" to sexual activities. However, the discussions preliminary to the sexual activity of 11 May are relevant to understand the context of that sexual encounter. Both Corporal XX and Warrant Officer Buenacruz testified that during their initial conversation the sexual activities specifically discussed included oral sex and generally "sleeping together". Warrant Officer Buenacruz said that he asked Corporal XX whether she still wanted to do this as she entered his vehicle. It is reasonable to infer "this" referred to activity previously discussed, namely oral sex and generally "sleeping together". She replied "yes" and engaged in sexual activities. On the basis of these circumstances, I conclude that the activities for which no specific consent had been obtained were of the type that were covered by the understanding of participants as a result of the preliminary discussions between them. That consent was not exceeded at any point as evidenced by communications between the participants on occasions during the activity, allowing for instance Corporal XX to signify that she did not want Warrant Officer Buenacruz to pursue vaginal stimulation on her and that she did not want to perform anal stimulation on him. When the evidence of Corporal XX and Warrant Officer Buenacruz differ on these issues, I prefer the evidence of Warrant Officer Buenacruz by virtue of the reservations I expressed about the credibility of

Corporal XX earlier. In other words, her testimony as to the absence of consent to these specific activities is insufficient to convince me that non-consent has been proven beyond a reasonable doubt.

[59] It is also agreed that Warrant Officer Buenacruz ejaculated in Corporal XX's mouth, something she testified not having consented to. For his part, Warrant Officer Buenacruz testified that he announced that he was about to ejaculate. I have no reason to disbelieve his testimony on that point. I find that in the circumstances, he attempted to seek consent to a foreseeable consequence of the oral sex that was taking place. It is reasonable to infer that by her action of keeping her mouth on Warrant Officer Buenacruz's penis after he announced his imminent ejaculation, Corporal XX consented to receive ejaculate in her mouth. For these acts also I find that non-consent has not been proven beyond a reasonable doubt, especially considering the reservations I expressed about the credibility of Corporal XX.

[60] Even if non-consent had been proven beyond a reasonable doubt for the specific acts for which no consent was specifically obtained, I would agree with defence counsel that the defence of mistaken, but honestly held, belief in consent was available to the accused on the facts of this case. Indeed, to find guilt in relation to these acts it must be proven beyond reasonable doubt that Warrant Officer Buenacruz knew that Corporal XX did not consent to the touching of a sexual nature. There is indeed an air of reality to that defence. Again, the discussions preliminary to the sexual activity of 11 May reveal that the context of that sexual encounter was oral sex and generally "sleeping together". I have no reason to disbelieve Warrant Officer Buenacruz's testimony to the effect that he asked Corporal XX whether she still wanted to do "this" as she entered his vehicle. It is reasonable to infer "this" referred to activity previously discussed, namely oral sex and generally "sleeping together". She replied "yes" and engaged in sexual activities. In the circumstances, I find that Warrant Officer Buenacruz was not reckless or willfully blind to the issue of consent. He took reasonable steps to ascertain that Corporal XX was consenting.

[61] As for the circumstances of the sexual activity, Corporal XX testified that in the back of the SUV, she was positioned with her head towards the back of the vehicle and was performing oral sex on him. The evidence reveals that he was the first to take position in the back of the vehicle, she entered subsequently through the back passenger door. He testified that she asked him to pull his pants down and started kissing him, to which he said he simply wanted his dick sucked. Her genital area was positioned very close to his face. He said he could see her vagina, as he observed she was not wearing any underwear. He said he inserted his finger in her vagina, as he thought she wanted him to do it. Then she said, "No, just let me take care of you." As for the ejaculation, Warrant Officer Buenacruz testified that he told her he was about to ejaculate. The inference being that she ended up with ejaculate in her mouth voluntarily.

[62] I conclude that the defence of honest but mistaken belief in consent has been made out in relation with the sexual acts for which no prior consent was given. It is important to remember, in the context of this finding, that the law does not require that I

be convinced that Corporal XX did consent. It is the prosecution's burden to convince me beyond a reasonable doubt that she did not consent. The prosecution has failed to meet this burden.

[63] I will now turn to the real issue that permeates this case from the start, namely whether the apparent consent at the time of the sexual activity on 11 May 2016 was vitiated by the operation of s. 273.1(2) of the *Criminal Code*, providing that "no consent is obtained [where] the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority."

[64] This provision reveals two elements that must combine for consent to be vitiated on the facts of this case. First, Warrant Officer Buenacruz must have been in a position of trust, power or authority over Corporal XX. Second, he must have abused that position to induce Corporal XX to engage in sexual activity with him on 11 May 2016.

First requirement - position of trust, power or authority

[65] The prosecution has introduced evidence and made submissions in an attempt to convince the Court that Warrant Officer Buenacruz was in a position of trust and power in relation to Corporal XX based on the fact that he had been in her direct chain of command during a career course in the past; that she believes he is friends with her immediate supervisor and could convince her chain of command to punish her administratively with extra duties; because she thinks he could block her career by refusing to place her on courses; and, more generally, because she trusted and respected him. I find very little credibility in the testimony of Corporal XX as to what she thought Warrant Officer Buenacruz could do to her and I reject the arguments of the prosecution as it pertains to trust and power. What I am prepared to find is that in the circumstances of the unit in which Corporal XX served, as well as the rank and specific responsibilities of Warrant Officer Buenacruz within that unit, he was in a position of authority in relation to her. The first requirement for consent to be vitiated is therefore met.

Second requirement - an abuse of that position

[66] The existence of a relationship of authority is insufficient on its own to vitiate consent to sexual activity. The prosecution is required to prove an affirmative inducement to sexual activity by an abuse of that position of authority, as explained by the Ontario Court of Appeal in *R. v. L. (F.S.)*, 2009 ONCA 813, at para 5. The prosecution's evidence on that requirement fell short of the mark. Indeed, all that could be argued on the basis of the evidence in this trial are omissions on the part of Warrant Officer Buenacruz, for instance, to ensure that Corporal XX be well aware that she does not have to engage in sexual activity with him by virtue of his rank.

[67] The evidence reveals that no work factors played out in any discussions prior to, during or after the sexual activity. There were no threats, promises or allusions of favourable treatment made by Warrant Officer Buenacruz. Even if I had accepted the

testimony of Corporal XX, her evidence is that Warrant Officer Buenacruz approached her to ask a personal favour. The request she related would be totally inappropriate and liable to generate sanctions. However, in itself it would hardly be an affirmative abuse of a position of authority, especially when this authority is limited, as Warrant Officer Buenacruz was not a superior in Corporal XX's direct chain of command.

[68] The prosecution's submission is essentially based on rank alone. Agreeing with it would have the effect of making sexual relationships between persons of different ranks presumably abusive on the part of the member of higher rank unless that person takes measures to alleviate any potential ill effects resulting from that rank differential. The recognition of such a presumption is undesirable for a number of reasons. It is also unnecessary as section 273.1 (2) of the *Criminal Code* targets a specific ill, namely the *abuse* of a position of trust, power or authority to induce a person to engage in sexual activity.

[69] Even if there was a power imbalance between the parties in this case by virtue of rank, the law requires that the accused use this imbalance to apply some form of pressure, even subtle, on the complainant to consent to sexual activities. The consent is vitiated by the accused's affirmative abuse of his position of authority over the complainant which abuse subjectively induced the complainant to consent (*R. v. Long*, 2015 ONSC 4509).

[70] The prosecution relies on this notion of subjective inducement to invite me to consider the belief expressed by Corporal XX in testimony that she thought Warrant Officer Buenacruz could hurt her career. I am asked to find that this belief was objectively reasonable. With respect, I cannot arrive at that conclusion.

[71] While I do agree that in certain circumstances some junior (more likely female) members may feel that they have little choice but to go along with the sexual advances of more senior (more likely male) members, I am not convinced in this case that the sexual advances came from Warrant Officer Buenacruz in the first place, as I find no reason to disbelieve his testimony in which he stated that it is Corporal XX who initiated the conversation on sex. Even on the basis of Corporal XX's testimony alone, I find too much incoherence to be left convinced that she is the type of person that would feel she had little choice but to go along with sexual activity with a superior. Indeed, the evidence reveals that Corporal XX was familiar with the complaints mechanisms available to members of the CAF, including harassment complaints. She demonstrated a capacity to request and obtain support for changes in assignment and courses allowing her to be employed in areas that interested her in her unit. She was active online and complained about improper Internet posts. She fought with an infantry soldier and requested a review of the sentence imposed upon her at summary trial as a result of that incident. At the end of Exercise MAPLE RESOLVE, about three weeks after having been sexually involved with Warrant Officer Buenacruz, she complained about two sergeants, immediate superiors, in part as a result of sexist and insensitive comments they had allegedly made. She was aware of the *Deschamps Report* on sexual misconduct in the CAF and of Operation HONOUR. In the months following the

incident, she challenged a posting to Suffield, Manitoba with the assistance of a letter to a Member of Parliament contacted by her father, a retired artillery officer.

[72] Corporal XX testified that she did not know what to do following the initial conversation during which she said Warrant Officer Buenacruz offered her money in exchange for sex. She said she waited, hoping it would go away. On 10 May she said she got up and took a bath. Her phone rang at 10:43 and she saw Warrant Officer Buenacruz's name as the caller but decided not to pick up. After two unusual calls from payphones, she picks up a call from a base extension at 13:16 as she is still in her bath and speaks to Warrant Officer Buenacruz for a minute. She justified having accepted to meet the next day because she had run out of options by then and was terrified of him and by what he could do in terms of blocking all advancement for her. It is not clear to me which options she had run out of. She testified she had hoped it would go away and chose not to engage the complaints mechanisms she was familiar with. Even after seeing on 10 May that the man she said she was terrified of was trying to reach her, she testified that she likely stayed in her bath reading a good book, adding warm water and bubbles as required. I am not suggesting that a victim needs to complain at the first occasion to be credible. I simply feel I need to explain in as clear and straightforward way possible why I have doubts about the assertion of Corporal XX to the effect that she thought she had no choice other than to comply with Warrant Officer Buenacruz's demand to meet for sexual activity feeling she had no options and was terrified of him and what he could do to her career. I do not find the subjective belief she expresses to be credible.

[73] I have considered the possibility that an order on the part of Warrant Officer Buenacruz may have constituted an affirmative abuse of authority that induced Corporal XX to consent to attend the 11 May meeting. This possibility finds some support in the evidence as, during her cross-examination, Corporal XX corrected defence counsel by stating that during the one-minute phone call of 10 May 2016, Warrant Officer Buenacruz did not *ask* her to meet the next day, but *told* her. The context of that phone call was sexual activity. In fairness, she did not say she was ordered to attend and the prosecution did not press the issue of order in arguments. Nevertheless, it should be clear that in my view, an order by a superior to attend at a given place and time with a view to provide sexual favours would be unlawful, hence non-enforceable in law. This is clear from the *Queen's Regulations and Orders for the Canadian Forces* (QR&O) article 103.16 and section 83 of the *NDA*. Furthermore, such an order would be manifestly unlawful, hence could be ignored. In fact, if such an order was obeyed, it could expose the subordinate to sanctions and engage his or her responsibility as explained in QR&O 19.015. These are basic propositions of military law. There are very few members of the CAF who would consider an order such as this one to require obedience, the same way as there are very few members of the CAF who would consider that they have no option but to comply with a demand of that kind that is not formulated as an order. Once again, be it an order or a demand, I am not convinced that the testimony of Corporal XX to the effect that she felt compelled to participate in sexual activities with Warrant Officer Buenacruz to be credible.

[74] As a consequence, I have not been convinced that the consent provided by Corporal XX to sexual activity with Warrant Officer Buenacruz was vitiated in application of s. 273.1(2)(c) of the *Criminal Code*. The prosecution has, therefore, failed to prove non-consent to sexual touching beyond a reasonable doubt. Warrant Officer Buenacruz must, therefore, be found not guilty of the first charge.

The second charge

[75] I must now proceed to apply the facts to the elements of the second charge laid under section 93 of the *NDA* for disgraceful conduct. The particulars are essentially to the effect that on 11 May 2016 in Brandon, Manitoba, Warrant Officer Buenacruz behaved in a disgraceful manner by pursuing a sexual relationship with Corporal XX.

[76] The facts related to this charge are the same as the relevant facts in the first charge. The elements of identity, date and place of the offence are not in contention. What is to be decided is whether Warrant Officer Buenacruz pursued a sexual relationship with Corporal XX and whether such conduct is disgraceful.

[77] It is not unusual to see section 93 charges laid on the same or similar facts as sexual assault charges. As commented by the Court Martial Appeal Court (CMAC) in *R. v. Marsaw*, [1997] CMAC 395, section 93 creates a specific service offence which aim is the promotion of unique requirements of good order, high morale and discipline, so essential in the military context. While intention and/or consent may be relevant, the issue is whether the conduct in question is disgraceful within the meaning of the section. The prosecution submitted that if the conduct amounted to the crime of sexual assault on the first charge, such conduct would be disgraceful. However, a guilty finding could not be returned on the second charge in application of the rule against multiple convictions. As I found that the conduct subject of the first charge did not amount to sexual assault, it becomes necessary for me to evaluate if the pursuit of a sexual relationship amounts to disgraceful conduct within the meaning of section 93.

[78] I have no difficulty finding that Warrant Officer Buenacruz pursued a sexual relationship with Corporal XX on 11 May 2016, by inviting her in his vehicle and engaging in sexual acts with her.

[79] Once that conduct is established, the question becomes whether, in adopting such conduct, Warrant Officer Buenacruz behaved in a disgraceful manner.

[80] In attempting to answer questions such as these, courts martial have focussed on the dictionary definition of "disgraceful" as "shockingly unacceptable," sometimes adding adjectives such as "shameful, dishonourable, degrading" (*R. v. Marsaw*, Docket # 1994-42); "something which is sudden, upsetting, surprising, inducing strong revulsion or profound indignation and is not satisfactory or allowable." (*R. v. Captain W.A. Cotton*, 2001 CM 51); "shockingly unacceptable in the circumstances. 'Shocking' [meaning] causing indignation or disgust." (*R. v. Semrau*, 2010 CM 4010). In all cases,

the test to be applied was to be objective – what a reasonable person would consider a disgraceful conduct to be in all of the surrounding circumstances.

[81] With *R. v. Ex-Second Lieutenant D.S. Short*, 2002 CM 19, courts martial started referencing community norms in evaluating whether a certain behaviour constitutes disgraceful conduct, specifically asking whether a reasonable person, viewing the matter objectively, would conclude that the behaviour was so outside community norms that the behaviour was shockingly unacceptable. That community norm test was not applied uniformly however. This may have led to analysis in certain cases which were essentially dependent on the opinion of the trier of facts and failed to produce adequate reasons, as found by the CMAC in *R. v. Boyle*, 2010 CMAC 8.

[82] Starting in 2012 with *R. v. Larouche*, 2012 CM 3009 courts martial departed from the traditional test of "shockingly unacceptable in the circumstances" to adopt an objective test based on harm, inspired by the reasons of the SCC in *R. v. Labaye*, [2005] 3 S.C.R. 728. The same test was applied in *R. v. Morel*, 2014 CM 3011, *R. v. Lloyd-Trinque*, 2015 CM 3001 and earlier this year in *R. v. Jackson*, 2017 CM 3001. I believe the objective harm test is an adequate tool to evaluate what "disgraceful conduct" means and I will apply it here.

[83] In order for a given conduct to constitute disgraceful conduct, the prosecution must prove two things beyond a reasonable doubt:

(a) First, that by its *nature* the conduct at issue has caused harm or a significant risk of harm to individuals or society, including the CAF, in a way that undermines or threatens to undermine a value reflected in and thus formally endorsed through the Constitution or similar fundamental laws of Canada; and

(b) Second, the harm or risk of harm is of a *degree* that is incompatible with the proper functioning of society, including the CAF.

[84] The prosecution submits that Corporal XX suffered psychological harm by virtue of Warrant Officer Buenacruz pursuing a sexual relationship with her and an exploitive sexual relationship in the context of the CAF generates a risk of harm that is incompatible with the proper functioning of society, including the CAF.

[85] Respectfully, I cannot accept these submissions as the evaluation of harm must be done in relation to the *nature* of the conduct, not its consequences in a given case. I recognize that Corporal XX has suffered significant psychological harm. However, it is the nature of the conduct of pursuing a sexual relationship on 11 May 2016 that must be evaluated, on the basis of the circumstances of this case on the basis of the facts that I do accept. The objective harm test is a good tool, but as with any test, there is a risk that too much focus on the details could lead one to no longer being able to see the forest for the trees. Indeed, the prosecution has failed to convince me beyond a reasonable doubt that the conduct evaluated here, on the basis of the charge as particularized, is anything

other than consensual sexual intercourse between two adults in the form of almost fully clothed oral sex in the back of an SUV parked in a secluded part of a parking lot.

[86] In my opinion, there is nothing in the nature of this conduct to cause harm or a significant risk of harm to individuals or society in a way that undermines or threatens to undermine a value reflected in and thus formally endorsed through the Constitution or similar fundamental laws of Canada. Therefore, I am unable to conclude that this conduct amounts to disgraceful conduct.

[87] Of course, I reach this conclusion on the basis of the finding I made in relation to the first charge, specifically on the issue of consent. Consent may be relevant to the outcome of a disgraceful conduct charge that rests on similar facts as a sexual assault charge. Such was the case earlier this year in *Jackson*, *supra*, where d'Auteuil MJ found that the first issue for him to decide was one of consent; if there was no consent to the sexual encounter, the accused's behaviour would be clearly one that caused harm and is incompatible with the proper functioning of the CAF and society in general. In the end he found that the prosecution had not proven beyond a reasonable doubt that the complainant did not consent to the sexual encounter she had with the accused. Consequently, the accused was found not guilty of both the sexual assault and the disgraceful conduct charges.

[88] Similarly, Warrant Officer Buenacruz must be found not guilty of the second charge of disgraceful conduct in this case.

The third charge

[89] The third charge is laid under section 130 of the *NDA*, alleging an attempt to obtain sexual services for consideration contrary to subsection 286.1(1) and section 463 of the *Criminal Code*. The particulars are to the effect that between 1 April 2016 and 1 May 2016, inclusive, at or near CFB Shilo, Warrant Officer Buenacruz did communicate with Corporal XX for the purpose of obtaining sexual services for consideration.

[90] The elements of identity, date and place of the offence are not in contention. The *actus reus* of that offence consists of communicating for the purpose of obtaining the sexual services of a person for consideration. Here, there is no contention that there was communication between Warrant Officer Buenacruz and Corporal XX in April 2016. What is at issue is whether the prosecution has proven beyond a reasonable doubt that communication by Warrant Officer Buenacruz was for the purpose of obtaining the sexual services of Corporal XX, for consideration. The testimony of Corporal XX is to the effect that Warrant Officer Buenacruz approached her to ask whether he could pay her to obtain a blow job or to sleep with him. The testimony of Warrant Officer Buenacruz is that in the course of a conversation initiated by Corporal XX about his dissatisfaction with his job and how stressed he appeared to be, Corporal XX offered to give him oral sex to relieve his stress, given that his wife would not do it. Warrant Officer Buenacruz's first reaction was to ask if it would cost him for the blow job. He

testified that she said no. It is not contested that no sum or amount of money was ever discussed and no money ever changed hands between the two in relation to sexual activity or anything else. There were no discussions about money for sexual favours between the two ever again.

[91] The defence position is that, even on the version of events advanced by Corporal XX, the offence in section 286.1(1) of the *Criminal Code* was not made out as the purpose of the communication was not to obtain sexual services for consideration, but to inquire as to whether Corporal XX would be willing to provide sexual services for consideration. That difference is subtle but important in light of the background for the legislation which enacted section 286.1 in the *Criminal Code* on 6 November 2014, namely Bill C-36 *Protection of Communities and Exploited Persons Act*, S.C. 2014, c.25, described earlier this year by the Provincial Court of Nova Scotia in the case of *R. v. Mercer*, 2017 N.S.J. No. 146 at paragraphs 6 to 9 and 38 to 41. It would indeed appear that the legislation was adopted in the context of the sex trade. It could well be that the starting point for the situation envisaged by the prohibition at section 286.1(1) is communication between a person interested in obtaining sexual services and another person engaged or believed by the accused to be engaged in providing such services. The prosecution was unable to inform the Court as to any instances where that provision was applied outside of the context of the sex trade or of police officers posing as prostitutes.

[92] In trying to assist the Court, the prosecution provided the precedent of *R. v. Ellison,* [2017] N.S.J. No. 36, where the accused was acquitted on the basis that the Crown had failed to prove the intention of the accused at the time of the communication to obtain sexual services of a person for consideration. The circumstances of that case were different than the facts here as it was clear for Mr. Ellison that he was talking to a prostitute when he said he wanted a blow job and was told the price for the service. The fact that he stated having only been curious, coupled with him driving in the opposite direction to where the exchange was to take place was likely sufficient to raise a doubt concerning his intent at the time of the communication.

[93] Similarly, a doubt has, in my view, been raised here, even if I was to accept the version of Corporal XX as to the content of the communication. The fact that she was not interested in providing sex in exchange for money, that no time, place or price were ever set and that ultimately a sexual encounter of the type discussed occurred without any exchange of money or discussion about money are all circumstances from which the intent of the accused at the time of the communication can be inferred. I accept that the offence is complete when the communication occurs, not at the time the service is to be delivered. However, at that time of the communication, Warrant Officer Buenacruz did not know whether it was even possible to obtain from Corporal XX sexual services for consideration. What I take from *Ellison*, *supra*, is that the purpose foreseen by section 286.1 is the purpose at the time of the communication. In other words, the immediate purpose, not a conditional one. The purpose is extrinsically linked to the *mens rea* that the prosecution must establish beyond a reasonable doubt. Even if I accept that Warrant Officer Buenacruz's ultimate goal may have been to arrive at an

arrangement to obtain a sexual service or services from Corporal XX, should the price demanded and conditions fixed were acceptable, the charge here targets a communication which did not extend past an inquiry about whether the person communicated with would be open to further discussion in order to agree on basic ingredients to arrive at such an arrangement. Indeed, on the evidence of Corporal XX the communication or conversation in this case ended before an agreement on basic ingredients could be reached, given her testimony to the effect that she found a way to get out of the situation. On the basis of the response she said she gave to Warrant Officer Buenacruz, "I don't know, maybe, we will have to see," there could have been a further communication of the type foreseen at section 286.1(1) which would have left no doubt as to the purpose of the conversation. There was none. As a result I am not convinced beyond a reasonable doubt, even on the evidence of Corporal XX alone, that at the time of his communication, the intent of Warrant Officer Buenacruz was to obtain the sexual services of Corporal XX for consideration. Consequently, the prosecution has not convinced me beyond a reasonable doubt of that essential element of the offence.

[94] As explained earlier, I do have concerns about the credibility of Corporal XX and I am not prepared to rely on her testimony alone to conclude that an essential element of an offence has been proven beyond a reasonable doubt. The testimony of Warrant Officer Buenacruz is to the effect that it is Corporal XX who initiated a conversation during which she offered to provide a blow job to him, and in that context he asked if it would cost him. As stated before, I am unable to consider this alleged conversation in its entire context to constitute what the prosecution characterized as an implausible randomly offered blow job. It is plausible that this constitutes a very bold and inappropriate flirt. The testimony of Warrant Officer Buenacruz on that point leaves me with a doubt on the active element of communication for the purpose of obtaining sexual services that the prosecution must prove beyond a reasonable doubt.

[95] Consequently, I conclude that the accused must be found not guilty of charge 3.

The fourth charge

[96] The fourth charge is laid under section 93 of the *NDA* for disgraceful conduct. The particulars are to the effect that between 1 April 2016 and 1 May 2016, inclusive, at or near CFB Shilo, Manitoba,Warrant Officer Buenacruz behaved in a disgraceful manner by offering Corporal XX money in exchange for sex.

[97] The facts related to this charge are the same as the relevant facts in the third charge. The elements of identity, date and place of the offence are not in contention. What is to be decided is whether Warrant Officer Buenacruz offered Corporal XX money in exchange for sex and, if he did so, whether such conduct is disgraceful.

[98] As stated in relation to charge 3, I have what I consider to be a reasonable doubt in relation to the evidence adduced by the prosecution as to whether Warrant Officer Buenacruz offered Corporal XX money in exchange for sex. For the reasons mentioned

earlier, I must conclude that the conduct alleged has not been proven to the required standard.

[99] Warrant Officer Buenacruz must, therefore, be found not guilty of the fourth charge. There is no need to analyze whether such conduct meets the test to be considered disgraceful conduct.

The fifth charge

[100] The fifth charge is laid under section 129 of the *NDA* for conduct to the prejudice of good order and discipline. The particulars are that between 1 April 2016 and 1 May 2016, inclusive, at or near CFB Shilo, Manitoba, Warrant Officer Buenacruz offered Corporal XX money in exchange for sex.

[101] The facts related to this charge are the same as the relevant facts in the third and fourth charges. In submitting that Warrant Officer Buenacruz could only be found guilty of one of the last three charges, the prosecutor conceded that charges 3, 4 and 5 are essentially alternative to each other. The prosecution appears to have charged Warrant Officer Buenacruz with offences of decreasing gravity in order to ensure that any ensuing conviction would fit the crime. It is indeed quite possible that a given conduct not be found to be of a nature to cause harm or a significant risk of harm of a sufficient degree to constitute an offence under section 93, but nevertheless be found to constitute conduct to the prejudice of good order and discipline under section 129.

[102] In this case, however, given that I have what I consider to be a reasonable doubt in relation to the evidence adduced by the prosecution as to whether Warrant Officer Buenacruz offered Corporal XX money in exchange for sex for the reasons mentioned earlier, I must conclude that the conduct alleged has not been proven to the required standard.

[103] Warrant Officer Buenacruz must, therefore, be found not guilty of the fifth charge under section 129 of the *NDA*. There is no need to analyze whether such conduct meets the test to be considered conduct to the prejudice to good order and discipline, although this may not have been a contentious issue as conceded by the defence on the basis of recent jurisprudence of the CMAC in *R. v. Golzari*, 2017 CMAC 3.

Conclusion

[104] The conclusions I have reached on the charges on the basis of the reasonable doubts I am left with on the facts of this case mean that the accused will be found not guilty. That is so even if he admitted he should have revealed his personal relationship with Corporal XX to his superiors. Yet, he could have done better than that – if he is truthful in his testimony that it is his subordinate who first offered to provide him with sexual services, the proper reaction of a senior leader should have been to recognize such proposition as inappropriate in a workplace and to take action accordingly. Proper action along those lines is more likely to prevent harm to those involved and promote

the operational efficiency of the CAF. It would also be in line with the suggested need to address an underlying sexualized culture identified in the *Deschamps Report* as being harmful to the CAF and its members. Since the charges were laid, the CMAC has clarified the law pertaining to conduct to the prejudice of good order and discipline in a manner that could assist addressing similar failures in leadership. In this case, no charge under section 129 was laid in relation to the sexual encounter which occurred.

[105] As alluded to earlier, my findings concern the issue of whether Warrant Officer Buenacruz was guilty of what he was charged for and no more. In concluding as I did, I followed the law which demands high standards to obtain a conviction, in consideration of the harsh consequences of a finding of guilt, particularly on the thing that is most precious for all - freedom. I trust the outcome of this case will be understood in that context.

FOR THESE REASONS, THE COURT:

[106] **FINDS** Warrant Officer Buenacruz not guilty of all charges.

Counsel:

The Director of Military Prosecutions as represented by Lieutenant-Commander S. Torani and Major R. Gauvin

Lieutenant-Colonel D. Berntsen, Defence Counsel Services, counsel for Warrant Officer J.N. Buenacruz