



COURT MARTIAL

Citation: *R. v. Anderson*, 2019 CM 2034

Date: 20191219

Docket: 201920

Standing Court Martial

Canadian Forces Base Bagotville,
Saguenay, Quebec, Canada

Between:

Her Majesty the Queen

- and -

Captain H.C. Anderson, Accused

Before: Commander S.M. Sukstorf, M.J.

NOTE: Personal data identifiers have been redacted in accordance with the Canadian Judicial Council's "*Use of Personal Information in Judgments and Recommended Protocol*".

REASONS FOR FINDING

(Orally)

The case

[1] Captain Anderson is charged with two offences. The particulars of the charges read as follows:

“FIRST CHARGE
Section 125(a) of the
National Defence Act

**ATTEMPTED TO WILLFULLY MAKE
FALSE ENTRIES IN DOCUMENTS
THAT WERE REQUIRED FOR
OFFICIAL PURPOSES**

Particulars: In that she, on or about 2 August 2018, at or near the Canadian Forces Base Bagotville, attempted to make false entries on her previously flown third Clearhood Flying Mission (CH3) and second Instrument Flying Mission (IF2) report cards, to indicate that she did not successfully complete the Hawk Annual Proficiency Check (APC) and the Instrument Rating Test (IRT) missions.

SECOND CHARGE
Section 129 of the
National Defence Act

**AN CONDUCT TO THE PREJUDICE
OF GOOD ORDER AND DISCIPLINE**

Particulars: In that she, on or about 2 August 2018, at or near Canadian Forces Base Bagotville, tried to persuade XXXX captain C. Riediger to falsify official documents related to her CT-155 Hawk conversion training.”

[2] In reaching the Court’s decision, the court reviewed and summarized the facts emerging from the evidence and made findings on the credibility of the witnesses. I instructed myself on the applicable law and applied the law to the facts, conducting my analysis before I came to a determination on each of the charges.

Evidence

[3] The following evidence was adduced at the court martial:

- (a) The in-court testimony of the prosecution’s witnesses:
 - i. Lieutenant-Colonel C. Marks,
 - ii. Colonel F.W. Radiff, and
 - iii. Captain C. Riediger;
- (b) The in-court testimony of the defence witnesses:
 - i. Captain H.C. Anderson testifying in her own defence, and
 - ii. Captain M. Kutryk;
- (c) The following exhibits:

- i. Exhibit 1 - Convening order dated 10 June 2019,
- ii. Exhibit 2 - Charge sheet, dated 2 April 2019,
- iii. Exhibit 3 – Admissions and Agreed Statement of Facts,
- iv. Exhibit 4 - PH IV IPC 1805 – CH3, with respect to Captain Anderson,
- v. Exhibit 5 - PH IV IPA 1805 – IF2, with respect to Captain Anderson,
- vi. Exhibit 6- Example CF 456, IRT,
- vii. Exhibit 7 - NATO Flying in Canada (NFTC) Integrated Training Plan (ITP), Part 5D – RCAF CT-155 Hawk Conversion Training Plan,
- viii. Exhibit 8 - Training Plan (TP) - Fighter Lead-In Training Instructor Pilot Upgrade (FLIT IPUG),
- ix. Exhibit 9 - Section 3.7.2, Part 2 of the Flight Operations Manual,
- x. Exhibit 10 - Annex 3.7.2.1.E – CT-155 Hawk and CT-156 Harvard II Aircrew Standards,
- xi. Exhibit 11 - Email dated 11 July 2018,
- xii. Exhibit 12 - 2017 APC Open Book Exam CT-155 Hawk Part 1 of 3 with respect to Captain Anderson,
- xiii. Exhibit 13 - CT-155 Hawk Emergency Operating Procedures (AOI Closed Book Exam) with respect to Captain Andersen,
- xiv. Exhibit 14 - National Flying Orders B-GA-100-001àAA-000
- xv. Exhibit 15 - Compact Disc entitled, “*R. v. Anderson* Reference Materials”,
- xvi. Exhibit 16 - Record of Disciplinary Proceedings (RDP) with respect to Captain Anderson, and
- xvii. Exhibit 17 - 2018 APC Closed Book Exam CT-155 Hawk Part 2 of 3 with respect to Captain Kutryk;

- (d) A defence admission that the following publications contained in Exhibits 7 and 8 are admissible in evidence under Military Rule of Evidence paragraph 16(1)(e):
 - i. The fighter Lead-In Training Instructor Pilot Upgrade Training Plan,
 - ii. The CT-155 Hawk Conversion Training Plan;
- (e) Defence admissions that both the CH3 and the IF2 report cards are documents of the Canadian Armed Forces (CAF) in accordance with paragraph 53(c) of the *Military Rules of Evidence (MRE)* and can be introduced in evidence by secondary evidence in accordance with MRE, paragraphs 105(2)(a) and 104(2)(a);
- (f) Defence admissions as to the existence, authenticity, character and content of these two progress cards and therefore to their admissibility in evidence, but do not to the truthfulness of any information they contain; and
- (g) The Court also took judicial notice of the facts and matters covered by section 15 of the *MRE* as well as Operation HONOUR.

Background

[4] At all material times, the accused, Captain Anderson, was employed at the 433 Tactical Fighter Squadron (433 Squadron), Canadian Forces Base (CFB) Bagotville, as a fighter pilot.

[5] Late in 2017, both Captain Anderson and her spouse, Captain Kutryk, learned that they would both be posted as instructors to 419 Tactical Fighter Training Squadron (419 Squadron) in Cold Lake, Alberta, in the active posting season of 2018. 419 Squadron conducts lead-in fighter training for Canadian and North Atlantic Treaty Organization (NATO) pilots using the CT-155 Hawk. The role of 419 Squadron is to prepare future fighter pilots for follow up training on CF-188 Hornet. Upon completion of the training at 419 Squadron, selected Canadian students will join 410 Tactical Fighter Operational Training Squadron (410 Squadron), where the Royal Canadian Air Force (RCAF) trains its pilots on the CF-188 Hornet. The training at 419 Squadron is conducted using the CT-155 Hawk as it is a much more economical plane to fly and serves as an excellent aircraft for pilots to learn such skills as basic dog fighting, bombing, low-level attack and strike.

[6] For safety reasons, the RCAF policy has historically restricted a pilot to holding a captaincy qualification on only one type of aircraft at a time. Once a pilot successfully completes a conversion to a different aircraft, then they lose their captaincy qualification on any other aircraft. For this reason, it was always a challenge to entice a

pilot flying the CF-188 Hornet to relinquish captaincy on that aircraft to be posted to 419 Squadron where they become instructors on the CT-155 Hawk.

[7] However, in 2018, when the fighter pilot production was less than the annual attrition rates, the RCAF recognized its need to increase training. In order to facilitate CF-188 Hornet pilot absorption and production, the RCAF designed a pilot project that permitted some instructors posted to 419 Squadron to hold dual qualifications on both the CT-155 Hawk and the CF-188 Hornet. As with the introduction of any new pilot project in the CAF, there was a great deal of speculation. In fact, both Captains Anderson and Kutryk testified that at one point, they were both told that when they were posted to 419 Squadron, as instructors, they would be able to maintain qualifications on both the CT-155 Hawk and the CF-188 Hornet.

[8] Despite the speculation that preceded the introduction of the pilot project, only four instructors posted into 419 Squadron were permitted to maintain dual qualifications, and Captain Kutryk was one. Captain Anderson was not selected to hold qualifications on both the CF-188 Hornet and the CT-155 Hawk. Lieutenant-Colonel Marks testified that as the Commanding Officer (CO) of 419 Squadron, he personally briefed the Commander of 1 Canadian Air Division (1 CAD) via VTC on the pilot project. Other evidence before the court confirmed that the dual qualification pilot project was approved during that VTC on 10 April 2018 by Major General Drouin, then the Commander of 1 CAD.

[9] Captain Kutryk testified he was not aware that he was one of 4 pilots selected until September 2018. He testified that prior to arriving at 419 Squadron, in Cold Lake, he did not receive any formal documentation or notification that he was approved to maintain the dual qualifications. Although the decision was evident to the CO of 419 Squadron who prepared and briefed the Commander of 1 CAD combined with the fact that 419 Squadron was directly implicated, there was no evidence before the court that the pilots who were not yet posted to 419 Squadron received formal notification prior to their actual posting to 419 Squadron.

[10] In order to meet the qualifications required to become instructors at 419 Squadron, both Captains Anderson and Kutryk were required to complete a conversion course to earn their captaincy on the CT-155 Hawk as well as hold the Pilot Tactical Leadership Level 3 (PTLL3) qualification. Lieutenant-Colonel Marks described PTLL3 as an upgrade from flying as a wingman to becoming a two-plane flight lead. The upgrade is referred to as the Element Lead Upgrade (ELUG). He explained that the failure of a fighter pilot to progress to PTLL3 by the end of their first tour would likely mean the pilot could not continue to fly the CF-188 Hornet and would be moved into a different role. He described that prior to obtaining the PTLL3 qualification, a pilot is restricted to flying as a wingman and would not be able to lead which is when a pilot is in a position to give back to their squadron. As Captain Kutryk was a more senior fighter pilot, he had already achieved the required level, but Captain Anderson needed to complete the ELUG prior to her posting.

[11] In addition to holding the PTLL3 qualification, Captains Anderson and Kutryk needed to attend the CT-155 Hawk conversion course to gain their basic aircraft captaincy on the Hawk prior to proceeding to 419 Squadron, where they would then be put through a follow-up course on the CT-155 Hawk to learn how to instruct students, identify errors and ensure that the students became quick and successful graduates.

[12] On 12 June 2018, Captain Anderson and Captain Kutryk, each received a posting message to 419 Squadron, Cold Lake for a change of strength (COS) date effective 16 July 2018; however, on 18 June 2018, their posting messages were both amended to change the COS date to a date in August 2018.

[13] At some point in early 2018, Captain Anderson received what she described as a negative and acrimonious professional development report (PDR) which was a huge shock to her. In the PDR, she testified that her CO described her as an acrimonious borderline insubordinate officer who was toxic to the environment at 433 Squadron and he recommended that she seek guidance from her superior officers on how to rectify her behaviour. Sometime in July 2018, she submitted a grievance redressing the PDR. The grievance was forwarded to the Wing Commander, 3 Wing, Colonel Radiff, who also held the position of Base Commander and was the Initial Authority (IA) for the grievance.

[14] On 11 July 2018, Captain Anderson was advised by her CO that she had not been successful in obtaining the ELUG to achieve the PTLL3, a qualification she required for her upcoming posting as an instructor at 419 Squadron. At the same time, her CO told her that he had commenced an Air Operations File Review (AOFR) where her career as a fighter pilot was at stake. She understood that a decision on her future was likely to be made within thirty days. Captain Anderson also testified that her CO told her at that time, she could continue to fly as a wingman until she was posted.

[15] On the same day, 11 July 2018, Captain Anderson sent an email to a representative of 419 Squadron to advise the unit that she would not be able to make the CT-155 Hawk conversion course in Moose Jaw beginning the next week because she had not yet completed her ELUG. She apologized for the last-minute change. Her email precipitated follow up emails between her CO and the CO of 419 Squadron, Lieutenant-Colonel Marks. Their email exchange reflects the expectation that Captain Anderson would take the next week to focus on achieving the ELUG and then she could take the CT-155 Hawk conversion course when her ELUG tactical evaluation was complete.

[16] Nonetheless, a few days later, from 15 to 27 July 2018, both Captains Kutryk and Anderson attended the CT-155 Hawk conversion training in Moose Jaw, Saskatchewan. The evidence suggests that both Captains Anderson and Kutryk successfully passed two of the three required written examination as well as two flights referred to as the APC and IRT. They were both advised by their instructor, Captain Riediger that the third exam related to local orders and flying procedures would be completed when they arrived in Cold Lake.

[17] Captain Anderson testified that her understanding of the CH3 flight she conducted was that it met the APC profile and she had flown the sequences to the standard, but it did not provide her with a valid APC until she completed the final test in Cold Lake.

[18] On 30 July 2018, upon her return from the CT-155 Hawk conversion training, she opened an email from her CO that included his recommendation for the AOFR. He recommended she cease flying and then later that day, he met with her and advised her that he had also recommended that her career as a fighter pilot be terminated. Captain Anderson testified that in delivering the message, he conveyed words to the effect that she did not deserve an explanation. Further, in delivering the devastating news to her, Captain Anderson testified that the CO said words to the effect that she was a waste of money and that he was also revoking her captaincy on the CF-188 Hornet immediately and told her to vacate 433 Squadron. He revoked her access to the squadron and disabled her access cards. In her testimony, Captain Anderson described the delivery of the message as both upsetting and insulting.

[19] The Court did not get any insight into what else was said during that conversation, other than that Captain Anderson was later charged for having behaved with contempt; a charge that was not preferred by the Prosecution.

[20] The next day, on 1 August 2018, Captain Anderson received an invitation from the Wing Commander's executive assistant to attend a meeting between herself and the Wing Commander, Colonel Radiff. Colonel Radiff testified that the purpose of the meeting was to discuss her redress of grievance on the PDR as well as to discuss the way ahead. During the course of the meeting, there were a variety of topics discussed which included her AOFR, its terms of reference, and some discussion about Captain Anderson's pending move and posting. Near the end of the meeting, Colonel Radiff advised Captain Anderson that her CO had told him that she had not completed her conversion training, which she confirmed. Colonel Radiff testified to being "flabbergasted" and he undertook to investigate the matter. Captain Anderson was later charged for allegedly lying to him; a charge which was also not preferred.

[21] Lieutenant-Colonel Marks testified that when he learned from the CO of 433 Squadron, that Captain Anderson would not be joining 419 Squadron for an indefinite period of time, he called her CO and was also advised that Captain Anderson had not completed her conversion. After speaking with her CO, Lieutenant-Colonel Marks personally called Captain Riediger in Moose Jaw, the instructor who had conducted her evaluations and Captain Riediger informed him that Captain Anderson had very successfully completed the conversion.

[22] After the meeting with the Colonel Radiff, Captain Anderson testified that there were alarm bells ringing in her head so she texted Captain Riediger to try to speak with him.

[23] On 2 August 2018, Captain Anderson had a telephone conversation with Captain Riediger and it is what occurred during that telephone call which is the subject of the two charges before the Court. Captain Kutryk testified that he was with Captain Anderson during that telephone call and he heard Captain Anderson's side of the conversation. Later that same day, Captain Riediger entered Captain Anderson's APC and IRT cards into the FlightPro system, an aviation operations management software application and database where flight information is input, safeguarded and accessed. The court also heard evidence that although Captain Kutryk completed the same flights and exams as Captain Anderson, his APC and IRT cards were not entered into the FlightPro system.

[24] Both Captains Anderson and Kutryk testified that although they knew that they had successfully completed the course in Moose Jaw, since they were still missing one of the compulsory exams, they did not consider that they held valid captaincy on the CT-155 Hawk. Captain Kutryk explained that he felt that by completing the conversion course, it simply qualified him as good enough to move on to the next level of training in Cold Lake. He testified that he understood that his qualifications would not become substantive until he completed the last examination and another ride when he arrived in Cold Lake.

[25] Captain Kutryk further testified that when he left Moose Jaw, he understood that he could not fly the CT-155 Hawk solo or with a student and it was for this reason he did not consider himself to have a valid captaincy on the CT-155 Hawk. He testified that he earned his APC and captaincy on the CT-155 Hawk on 19 September 2018, after he completed the final exam and another flight after arriving in Cold Lake. He testified that the date of 19 September 2018 is reflected in FlightPro.

[26] On 2 August 2019, Captain Anderson submitted a harassment complaint, which included eight allegations of harassment. This harassment complaint was submitted against her former CO, the CO of 433 Squadron in Bagotville, spanning from September 2017 to 11 September 2018.

[27] On 19 August 2019, Colonel Gagné, the new Wing Commander, 3 Wing, CFB Bagotville Base Commander and the Responsible Officer (RO) for the harassment complaint, acknowledged receipt of the said complaint.

[28] On 6 September 2019, Colonel Gagné submitted a situational assessment of the allegations, concluding that seven of the eight allegations met the definition of harassment as per Defence Administrative Orders and Directives (DAOD) 5012-0, Harassment Prevention and Resolution.

[29] On 18 October 2019, the CO of 433 Squadron responded to Colonel Gagné with his written submissions. On 28 November 2019, the Colonel Gagné notified the parties involved of his intention to proceed with a formal administrative investigation.

[30] On 10 December 2019, Captain Anderson was contacted by Gagan Kisana, harassment investigator for the Director General Integrated Conflict and Complaint Management (DGICCM) with the Vice Chief of the Defence Staff to schedule a formal interview.

Presumption of innocence and reasonable doubt

[31] It is important to remind everyone of the importance of the presumption of innocence and the standard of proof beyond a reasonable doubt that underpins our criminal judicial system.

[32] In this court martial, as with other criminal courts, Captain Anderson is facing penal consequences and she is presumed to be innocent until the prosecution has proven her guilt beyond a reasonable doubt. This burden rests with the prosecution throughout the trial and never shifts. There is no burden on Captain Anderson to prove she is innocent.

[33] So, what does the expression “beyond a reasonable doubt” mean? The term “beyond a reasonable doubt” is anchored in our history and traditions of justice. It is so entrenched in our criminal law that some think it needs no explanation, but its meaning bears repeating (see *R. v. Lifchus*, [1997] 3 S.C.R. 320, paragraph 39):

A reasonable doubt is not an imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.

[34] In essence, this means that even if I believe that Captain Anderson is probably guilty or likely guilty, that would not be sufficient. If the prosecution fails to satisfy me of her guilt beyond a reasonable doubt, I must give her the benefit of the doubt and acquit her.

[35] On the other hand, it is virtually impossible to prove anything to an absolute certainty and the prosecution is not required to do so. Such a standard of proof is impossibly high. Therefore, in order to find Captain Anderson guilty of the charges before the Court, the onus is on the prosecution to prove something less than an absolute certainty, but something more than probable guilt for the charges set out in the charge sheet (see *R. v. Starr*, 2000 SCC 40, paragraph 242).

The law

First charge – Paragraph 125(a) of the National Defence Act (NDA) – Attempted to wilfully make false entries in documents that were required for official purposes

[36] The first charge alleges a violation of paragraph 125(a) of the *NDA* that reads as follows:

125 Every person who

(a) wilfully or negligently makes a false statement or entry in a document made or signed by that person and required for official purposes or who, being aware of the falsity of a statement or entry in a document so required, orders the making or signing thereof,

...

is guilty of an offence and on conviction is liable to imprisonment for a term not exceeding three years or to less punishment.

Elements of the offence – Wilfully made a false statement

[37] In the context of the first charge before the Court, paragraph 125(a) of the *NDA* is meant to address the alleged making of an intentional false entry in official military documents. The accused is charged with an attempt to commit the offence, using Captain Riediger as her instrument.

[38] The accused has already admitted the identity, date and place of the offence. In order to establish an offence under paragraph 125(a) of the *NDA*, the other essential elements that must be proven beyond a reasonable doubt are:

- (a) that there was a false entry in a document;
- (b) that the false entry or false statement on the document was made by the accused;
- (c) that the document is required for official purposes;
- (d) that there was an intention on the part of the accused to author the false statement or false entry on the document; and
- (e) that the accused had a blameworthy state of mind.

The second charge, section 129 of the NDA and elements of the offence

[39] The second charge before the Court alleges a violation of section 129 of the *NDA* for conduct to the prejudice of good order and discipline which states in part:

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.

Elements of the offence – Conduct to the prejudice of good order and discipline

[40] As with the first charge, the accused conceded the elements of identity, time and place; hence, I conclude that they have been met. Defence counsel has further admitted that should the alleged conduct, as set out in the particulars, be proven beyond a reasonable doubt, the alleged conduct would have caused prejudice to the good order and discipline thereby dispensing the prosecution from having to prove prejudice, which

is an essential element of the offence. Therefore the elements left to be proven beyond a reasonable doubt for the second charge are as follows:

- (a) the conduct alleged in the particulars; and
- (b) that the accused had the wrongful intent.

Particulars of both charges

[41] With respect to the above two charges, the first issue for this Court to decide is whether the particulars as detailed in the respective charges, were proven beyond a reasonable doubt. The onus is on the prosecution.

[42] With respect to the first charge, the allegation is whether the accused attempted to make false entries on her previously flown third CH3 and second IF2 report cards, to indicate that she did not successfully complete the CT-155 Hawk APC and the IRT missions.

[43] The allegation on the second charge relates to whether the accused tried to persuade Captain Riediger to falsify official documents related to her CT-155 Hawk conversion training.

[44] In assessing whether the particulars of either charge have been met, it all boils down to what occurred during an approximate nine-minute telephone call between Captain Riediger and Captain Anderson on 2 August 2018.

Captain Riediger's version of the telephone call

[45] Captain Riediger told the Court that during the telephone call, Captain Anderson told him that "some stuff [had] gone down", or stuff [was] going down", and then she asked him to write her APC and IRT exams such that they were the normal CH3 and IF2 missions. He explained that it was clear that he was being asked to enter false information into the FlightPro system. He said that she asked him a couple of times.

[46] Captain Riediger confirmed under cross-examination that at no time was Captain Anderson aggressive, threatening, nor did she use provoking words or threaten to complain. He described their exchange as a polite conversation.

Captain Anderson's version of the telephone call

[47] Captain Anderson testified to having a sincere belief that she had not completed a valid APC. She explained that she was confused and the purpose of her call was to clarify her interpretation of the validity of the APC since the Wing Commander was going to investigate. She said she did not want to appear to be claiming captaincy of an aircraft where there was ambiguity.

[48] Captain Anderson's version of what transpired during the telephone call is that she called Captain Riediger and opened the conversation with general pleasantries. She explained that they were both friendly as they have known each other for several years. She told him that she wanted to talk to him about the conversion. She testified that they spoke about the IRT and he was looking for information on her flying hours, which she informed him she had at work. She testified that they then spoke about the APC. She did tell him that there was "stuff going down" and asked him to hold off on issuing her cards on the APC. She said that she specifically indicated to Captain Riediger she was not asking him to lie for her but simply to hold off on publishing the cards. She testified that Captain Riediger appeared bewildered, so she did not press the conversation and that throughout the conversation they remained on friendly terms. She described the call as very casual.

Assessing conflicting versions

[49] In assessing a case where an accused has testified and there are competing versions of what occurred, the Supreme Court of Canada (SCC) provides a three-step test as guidance to judges in weighing the evidence at issue. It is commonly referred to as the "*W.(D.)* instruction" found at *R. v. W.(D.)*, [1991] 1 SCR 742, at page 758 and is described as follows:

- (a) first, if I believe the evidence of Captain Anderson, I must acquit;
- (b) second, if I do not believe the testimony of Captain Anderson, but I am left in reasonable doubt by the evidence, I must acquit; and
- (c) third, even if I am left in doubt by the evidence of Captain Anderson, I must ask myself whether, on the basis of the evidence, which I do accept, I am convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[50] In *R. v. H. (C.W.)*, [1991] 68 C.C.C. (3d) 146, Wood J.A. suggested an addition to the second part of the three-part test set out in *W.(D.)*. At page 155 of *H.(C.W.)*, His Lordship said:

If, after a careful consideration of all of the evidence, you are unable to decide whom to believe, you must acquit.

[51] As Charron J. wrote for the majority in *R. v. Dinardo*, 2008 SCC 24, at paragraph 23, the assessment of credibility does not always follow the three distinct analytical steps in *W. (D.)*. Rather it depends on the context. In a case such as this, context is particularly important and I must direct my mind to the decisive question of whether Captain Anderson's evidence, considered in the context of the evidence as a whole, raises a reasonable doubt as to her guilt.

Credibility

[52] Given that the event in question took place almost two years ago, it is not unusual that the evidence presented before the Court is contradictory. Witnesses may have different recollections of the events and the Court has to determine what evidence it finds credible and reliable.

[53] Many factors influence the Court's assessment of the credibility of the testimony of a witness. For example, a Court will assess a witness's opportunity to observe events, as well as a witness's reasons to remember. Was there something specific that helped the witness remember the details of the event that he or she described? Were the events noteworthy, unusual and striking or relatively unimportant and, therefore, understandably more difficult to recollect? There are other factors that come into play as well. For example, does a witness have an interest in the outcome of the trial; that is, a reason to favour the prosecution or the defence or is the witness impartial?

[54] In a case such as this, in addition to Captain Riediger and Captain Anderson, who had conflicting versions of what was said during the telephone call, there was one other witness to Captain Anderson's side of the telephone call, who was Captain Anderson's spouse, Captain Kutryk.

Position of the prosecution

[55] It is the prosecution's position that when Captain Anderson realized that she could no longer fly the CF-188 Hornet because she had gained her captaincy on the CT-155 Hawk the week before, she contacted Captain Riediger to ask him to record her flights in FlightPro as not being APC and IRT missions which would enable her to maintain her captaincy on the CF-188 Hornet.

[56] Part of the prosecution's theory was also predicated on the fact that Captain Anderson adopted the story that she had not completed her conversion course in order to stay in Bagotville to fly the CF-188 Hornets and avoid a posting to Cold Lake.

Position of the defence

[57] The position of the defence is that the accused entered these proceedings presumed to be innocent and that Captain Anderson's evidence is credible and should be believed. Defence counsel argued that this case is about the application of the *W.(D.)* test and that the prosecution has not proven the alleged conduct beyond a reasonable doubt. He said there are just too many questions. He argued that there are two contradictory versions offered and there is clearly reasonable doubt. He argued that proof beyond a reasonable doubt requires a high level of certainty and based on the totality of the evidence, reasonable doubt is present.

[58] He further argued that Captain Anderson was under a high level of scrutiny over a prolonged period of time and that level of scrutiny resulted in her exhibiting an elevated level of caution, as she was anxious and felt harassed. With respect to the scrutiny, there was a PDR grievance between her and her CO to address assessments

directly linked to her personal character and “social personality”, and she was told that he recommended that she cease any further training in a conversation that led to a charge on 11 September 2018, which was not preferred.

[59] Defence counsel entered the facts of the other charges into evidence because they form an important part of a narrative to explain the level of scrutiny she was under. When she met with her CO on 30 July 2018, it resulted in her being charged for having behaved with contempt towards him. When she was called into the Base Commander’s office a few days later to discuss the PDR grievance, posting and the CT-155 Hawk conversion training, it led to two things: a charge for lying to Colonel Radiff; and secondly, being told that Colonel Radiff would investigate further as to why she did not complete her course.

[60] He submits that Captain Anderson was being overly cautious with her results and she did not want to claim something that she had not formally achieved and that is what led to the phone call to Captain Riediger.

Analysis

[61] Having instructed myself on the presumption of innocence, reasonable doubt, the onus on the prosecution to prove their case, the required standard of proof and the essential elements of the offence, I now turn to address the legal principles.

[62] As I explained earlier, the onus is on the prosecution to prove the particulars as alleged. In conducting my analysis, I proceeded first in assessing the evidence and credibility of all the witnesses and determining whether the particulars of the charge have been made out.

Credibility of the witnesses

Lieutenant-Colonel Marks

[63] Lieutenant-Colonel Marks testified in a very logical, detailed and helpful manner. He provided the Court with critical information to help it understand the background behind Captain Anderson’s pending posting to 419 Squadron as well as describing the format and progression of fighter pilot training in 419 and 410 Squadrons in Cold Lake. He was able to simplify and present technical and occupational specific pilot training in a straightforward manner.

[64] His testimony did not reveal any bias nor did he attempt to speculate on what had occurred. He provided an honest recollection of his own concerns and action taken in addressing various issues regarding Captain Anderson’s pending posting to 419 Squadron from his perspective as the then CO of 419 Squadron.

[65] I found his evidence to be both very credible and reliable.

Colonel Radiff

[66] Colonel Radiff testified from his perspective as the Wing Commander, 3 Wing and Base Commander of Bagotville during the pivotal times. As expected, he provided a higher level overview of what unfolded.

[67] He described his personal efforts to ensure that Captains Anderson and Kutryk were posted together. He presented with a genuine concern and willingness to assist Captain Anderson on several fronts, one of which led to him telling Captain Anderson that he would investigate what occurred to her during the CT-155 Hawk conversion course. His proactive leadership to investigate appears to have triggered Captain Anderson's phone call to Captain Riediger.

[68] His role managing the human resource aspect of the fighter pilots training placed him in a unique position for understanding options that existed with respect to waivers and other possible postings. He was able to provide important context as to what was occurring at the higher level.

[69] With respect to those matters he could testify to, I also found him credible and reliable.

Captain Riediger

[70] Captain Riediger testified in a calm, thorough and logical manner. He was straightforward, helpful and highly knowledgeable of his craft. He did not display any bias or motivation to do anything more than to tell the truth as he understood it to be.

[71] He was careful and thoughtful in responding to questions, often searching to ensure that he provided the most accurate and thorough response possible. It was his testimony that formed the underlying basis of the charges before the Court.

[72] When he was cross-examined, he was calm, clear-headed and provided helpful clarity on important details that were pivotal to the Court, such as the difference between solo and APC flights.

[73] I found him to be both credible and reliable.

Possible collusion between Captains Kutryk and Anderson

[74] The prosecution argued that Captains Kutryk and Anderson concocted their interpretation of whether or not they had achieved their captaincy on the CT-155 Hawk in order to provide an "out" for Captain Anderson. Further, the prosecution submitted that they lied to the Court. In light of these submissions, in weighing the evidence, the Court has a duty to consider the possibility of collusion between the two captains.

[75] In short, there is no absolute bar that prohibits the admission of evidence when the Court learns of collaboration or possible collusion between witnesses (see *R. v. Illes*, 2013 BCCA 169).

[76] The Court recognizes that there are very few women in the fighter community and Captains Kutryk and Anderson are a couple reliant upon the support of one another as they endured a challenging time for them both personally and professionally. While navigating an arduous career and life transition in the summer of 2018, to expect that they did not communicate regularly on the issues facing them would be counter to human nature. This is completely normal and is not in any way to be condemned or discouraged.

[77] Based on the evidence they provided, the Court found that it was undeniable that there had been some collaboration between them, but definitely not to the extent that they either intentionally or unintentionally concocted evidence. However, the Court was alerted to the possibility that their communication may have had an effect, whether consciously or subconsciously, of colouring and possibly tailoring their representations of what had occurred. As such, the Court did exercise increased caution in measuring the individual testimony of these witnesses.

Captain Kutryk

[78] Captain Kutryk testified in a very detailed, articulate and thoughtful manner. He took the time to accurately explain himself and easily provided examples and detail furnishing background and context in his responses. In his testimony, despite undergoing aggressive and challenging cross-examination on a personal and emotional level, he remained steadfast, calm and never once raised his voice or lost his cool.

[79] His testimony demonstrated that he has a propensity to provide significantly more detail than Captain Anderson provided in her testimony. He was tactfully honest and forthright in describing how he was treated differently than Captain Anderson with respect to his conversion training and posting. He also provided the court with logical reasons why neither he nor Captain Anderson were too concerned about their status when they left Moose Jaw as they had more pressing issues to resolve with their posting, including the fact that Captain Anderson's posting to Cold Lake was in jeopardy. He told the court that when he learned that there would be an investigation into the conversion course in Moose Jaw, he personally became more concerned about what he thought was a small issue.

[80] He testified to being a witness to the conversation between Captain Anderson and Captain Riediger on 2 August 2018. In comparing his testimony to that of Captain Anderson, the Court noted that it was consistent with his responses to other questions in that he provided much greater detail and context than that provided by Captain Anderson. For example, he described how at the beginning of the call, Captain Anderson provided the background context that she was unsure if she would still be going to 419 Squadron to instruct because she had not passed the ELUG; that she and

Captain Riediger discussed the ILT hours; and that she simply asked him to delay publishing the final grade sheets until she knew what was going on. He admitted that she said this several times and clarified that she was just asking him to delay and stand by until she knew what was going on. He provided helpful confirmation of content that came out in both Captain Riediger's and Captain Anderson's respective testimonies.

[81] When challenged by the prosecution as to why he did not provide a statement to the military police or advise them he was a witness to Captain Anderson's side of the telephone conversation, he explained that he was never asked. He also explained that they never thought that this matter would ever end up at a court martial. The court noted that he also testified that he arrived in Cold Lake on the evening of 15 August 2018, and the evidence suggests that Captain Anderson was not advised of a unit disciplinary investigation until 20 August 2018, when Captain Kutryk would have been thousands of miles away in Cold Lake. Further, upon learning of the investigation, Captain Anderson called the 1-800 number and spoke to a lawyer at Defence Counsel Services who advised her not to say anything. She later advised her chain of command that she had nothing further to add. She was served with an RDP with three charges three weeks later, on 11 September 2018.

[82] Notwithstanding the practical reasons of geography preventing him from doing so, it is important to understand that there was no obligation on Captain Kutryk to come forward and as such no negative inference may follow. A court martial is often the first time that an accused will put forward his or her defence as was done in this case. There is no requirement for the accused to disclose anything earlier.

[83] The court was also sensitive to the fact that both Captains Kutryk and Anderson were a military service couple trying to migrate careers within a fishbowl, in what the prosecution described as the National Hockey League of piloting. It would have been very stressful. Captain Kutryk testified as to how embarrassed he was when he was approached at the mess in Cold Lake by a senior ranking air force officer inquiring as to what was going on with his wife. They were both captains with careers ahead of them and given what was going on, it likely could have been "career suicide" for him to come forward or implicate himself in her personal situation unless required to.

[84] When challenged again by the prosecution on his integrity, Captain Kutryk remained very poised, responding calmly, refuting the suggestion that he would testify in front of his former Wing Commander and CO and lie. He explained that given their importance to his future, he had every reason to be accurate and honest as the repercussions of not being so would be significant.

[85] In light of the audience he was testifying before, the court was particularly impressed with his courage and candidness to admit facts that might have been hard to admit in front of senior leadership in the fighter pilot community. Importantly, he provided excellent insight into the different understanding and information flow circulating at the Captain tactical level when compared to the understanding of the same issues at the higher levels of command.

[86] When his evidence was compared to the evidence as a whole, the court was left with no doubt as to its veracity. I found his testimony to be both very credible and reliable.

Credibility of the accused

[87] The accused testified in a straightforward, logical and detailed manner. She also remained calm and was poised during cross-examination. She did not hesitate to admit facts that were not flattering or were hard to admit, such as failing her ELUG.

[88] The prosecution submitted that she wanted to avoid her posting to Cold Lake and stay in the fighter community; however, defence counsel argued, for the reasons that follow her narrative makes more sense:

- (a) It was clear she felt harassed in Bagotville from January 2018 and extending a period of nine months. Normal people do not want to stay or go back to a situation where they are being harassed;
- (b) She had already been told by her CO that her captaincy on the CF-188 Hornet was revoked so the prosecution's narrative does not make sense;
- (c) Colonel Radiff testified that there were plans to try to post them together to 419 Squadron, which would have been ideal for them as a couple;
- (d) For practical reasons, if she really wanted to go back to Bagotville, she could have failed the exams or any of the other flights;
- (e) She could have declared that she did not have the time to complete the conversion, but instead she was ahead of schedule and exceeded standard;
- (f) In cross-examination, Lieutenant-Colonel Marks conceded that her results and her behaviour represent an intent to succeed in any course.
- (g) Normally, when people engage in offences similar to those before the court, they are looking to gain an advantage, seek a benefit to which they are otherwise not entitled or alternatively they are trying to hide something. In this case, there was clearly no evidence of a benefit to be gained. Captain Anderson was losing a posting, the conversion training, and the allegations run counter to common sense.

[89] For reasons the court will explain in depth in its analysis of the facts, the court found her narrative to be likely and plausible when considered within the context of what was unfolding in her life both professionally and personally. There was nothing that came out in the evidence or under cross-examination that negatively affected her

reliability and credibility. There were no glaring inconsistencies in her version of events.

Analysis of the facts

[90] The evidence on the incident before the Court is clearly contradictory and as I stated earlier, I found both Captain Riediger and Captain Anderson to be credible and reliable witnesses.

[91] The Court approached the evidence first from the perspective of the accused to determine whether the evidence supported the fact that she had a reasonable belief that she had not completed her captaincy on the CT-155 Hawk. It is not for the Court to assess or determine what a valid captaincy is. The court is not qualified to decide this. However, in order for Captain Anderson's narrative to be plausible, the court must first assess whether on the whole facts before the court, her belief was reasonable.

[92] The testimonies of Captain Riediger and Lieutenant-Colonel Marks both described that after having passed the two flights in question, Captain Anderson achieved her APC and, therefore, she obtained a valid captaincy on the CT-155 Hawk.

[93] The evidence also suggested that there are caveats to ensure a pilot has familiarized himself or herself with the local orders, guidelines and policies. For example, a pilot cannot fly solo or with a student if he or she has not been certified as knowing the local flying orders, policies or directives in the area he or she is flying in.

[94] The evidence suggests the CT-155 Hawk conversion course was designed specifically for instructors going directly to 419 Squadron in Cold Lake and was necessarily flexible, accommodating the fact that the pilots have fighter pilot experience but come from various training backgrounds. Lieutenant-Colonel Marks testified that the CT-155 Hawk conversion course is a command-driven course and he has never heard of anyone not successfully completing it.

[95] The training on the CT-155 Hawk conversion course is standardized to ensure that the candidates meet all the requirements of the syllabus prior to advancing to the follow-up course to be held at 419 Squadron in Cold Lake. The court observed that upon completion of the course, there appeared to be no specific protocol that marked a change in a pilot's captaincy on the aircraft. There was no issuance of a certificate, qualification paper, or other mechanism providing clarity. Exacerbating the vagueness, Captain Anderson did not even receive a course report for having completed the conversion course until December 2019, just prior to this court martial and eighteen months after she completed the training.

[96] The Court heard evidence of the fact that flight information and qualifications such as captaincy are input into FlightPro; however, the Court also heard evidence that Captain Kutryk's APC and IRT flights, completed in Moose Jaw at the same time as Captain Anderson's, were never input into FlightPro. Captain Kutryk testified that

FlightPro reflects him as having completed his APC and captaincy on the CT-155 Hawk on 19 September 2018, after he arrived in Cold Lake. In 99.9% of the cases, since the pilots would be proceeding immediately to 419 Squadron in Cold Lake, the timing of the flight input into the FlightPro and the specific dates reflected therein are not critical, and in fact, they only become relevant if the pilot does not advance to the next stage of training in Cold Lake as was the case of Captain Anderson.

[97] As Captain Kutryk testified, they were not originally concerned with their status as they were both being posted to Cold Lake. The policy appears to be clear in theory for pilots migrating immediately to a new position flying the CT-155 Hawk aircraft. However, Captain Anderson's case was different as her posting was now in question.

[98] In light of Captain Anderson's failure on the ELUG, the email exchange on 11 July 2018 between Captain Anderson's CO and Lieutenant-Colonel Marks, CO of 419 Squadron, Lieutenant-Colonel Marks clarified that the logical order was for Captain Anderson to complete the ELUG the next week and then attend the CT-155 Hawk conversion course when the tactical evaluation was complete.

[99] Notwithstanding the logical progression recognized by Lieutenant-Colonel Marks, Captain Anderson was sent to the CT-155 Hawk Conversion course a few days later and the court heard no evidence as to why. Lieutenant-Colonel Marks testified that the decision was made at Captain Anderson's squadron CO level in Bagotville. He suggested that her CO was likely waiting for a decision on the AOFR that was underway. In his experience, he felt that the result of that AOFR could provide multiple opportunities for Captain Anderson's future, including providing an extra ten hours on the Hornet and the chance to complete the PTLL3, or it could recommend that she be provided with no more training hours on the Hornet and issue a decision that she not fly the Hornet again, with a decision to proceed to a different fleet of aircraft, or, equally, it could recommend a return to Moose Jaw as an instructor to complete the CT-155 Hawk conversion.

[100] The missing piece to the puzzle lies with the CO of 433 Squadron, who directed that she attend the CT-155 Hawk conversion course. He did not testify. Captain Anderson testified that in her meeting with her CO on 11 July 2018, days before she travelled to Moose Jaw for the CT-155 Hawk conversion course, he told her that notwithstanding the fact that she was ceased training on ELUG, she could continue to fly the CF-188 as a wingman until her posting. With the ongoing AOFR, it is very likely that she proceeded to Moose Jaw based on the understanding that she could possibly be granted additional hours on the CF-188 Hornet to complete the ELUG and she could continue to fly as a wingman until her posting.

[101] Part of the prosecution's theory is predicated on the fact that Captain Anderson adopted the story after she learned she lost her captaincy on the CF-188 Hornet. The prosecution further contends that she suggested that she had not completed her conversion course in order to stay in Bagotville to fly the CF-188 Hornets and to avoid

a posting to Cold Lake. For the reasons that follow, this theory of the prosecution is inconsistent with the whole of the evidence.

[102] Proof of the prosecution's theory would necessitate evidence that Captain Anderson did not know what was at risk when she went to Moose Jaw. This same evidence supports Captain Anderson's narrative. In other words, the policy regarding captaincy on an aircraft was either not well understood or Captain Anderson went to Moose Jaw under a mistaken belief of the consequences of her succeeding on the course. The evidence supports both scenarios.

[103] In his position as the CO and having been the one who initiated her AOFR, the Court must infer that her CO was acutely aware of the range of options available and the consequences that could flow from the various options. Her CO's comments on 11 July 2018 that she could fly as a wingman until her posting provides further support to Captain Anderson's assertion that she did not believe that by successfully completing the CT-155 Hawk conversion course that she gained captaincy on that aircraft to the exclusion of her captaincy on the CF-188 Hornet.

[104] The court cannot dismiss the speculation that circulated at the captain rank level regarding the new pilot project that permitted some instructors posted to 419 Squadron to maintain qualifications on both the CT-155 Hawk and the CF-188 Hornet. The court learned that at one point, both Captains Anderson and Kutryk were under the belief that they would be permitted to hold dual qualifications.

[105] Even if the chain of command felt that based on her training deficiencies or the facts of her particular case, a particular decision on the AOFR was a foregone conclusion, sending her on the conversion course did not make sense for other reasons. Without having passed the ELUG nor having been granted a waiver, based on the testimony of Lieutenant-Colonel Marks, she was unemployable at 419 Squadron as a CT-155 Hawk instructor. The mere fact that she was sent on the conversion course, designed specifically for pilots advancing to 419 Squadron would have suggested that she might be given a second chance to complete her ELUG on the CF-188 Hornet. Captain Anderson knew she needed to succeed on the ELUG to advance as an instructor at 419 Squadron, and to do so would require her to fly the CF-188.

[106] The court was not provided with evidence or insight into the AOFR process itself or its final decision, but there was evidence before the court permitting it to identify procedural deficiencies in the procedure followed that also lend support to Captain Anderson's narrative. Captain Anderson testified that with respect to her AOFR, a local board sat to determine her future and then both her CO and the Wing Commander made final recommendations that were forwarded directly to 1 CAD for a final decision. Although her CO did advise her on 30 July 2018 that he had recommended her career as a Hornet pilot be terminated, for some reason, he felt he was either not required or he could not provide her with his reasons. When Captain Anderson pressed, she testified that he told her she was not deserving of an explanation. Colonel Radiff confirmed in his testimony that when he met with Captain Anderson on

1 August 2018, he told her that he had also written a letter with his recommendation that he had forwarded to Commander of 1 CAD, but that he could not share it with her as he felt that it was up to the Commander of 1 CAD to do so.

[107] There is no evidence before the court to suggest that either the CO or the Wing Commander held back their recommendations in bad faith. Notwithstanding this, in doing so, this part of the AOFR process was inconsistent with the principles of natural justice and procedural fairness. Since the AOFR on Captain Anderson led to a significant career decision on her plight and career as a fighter pilot, she had significant interests at risk and was therefore entitled to participate in the process before a final decision was made. The evidence suggests that on 30 July 2018 and 1 August 2018, neither her CO nor her Wing Commander provided her with the necessary disclosure and transparency she was entitled to. The decision to revoke a pilot's captaincy on the CF-188 is a major career decision, and Captain Anderson had significant interests at risk and should have been invited to provide feedback in the AOFR process.

[108] Further, the final decision on the AOFR to be made by the Commander of 1 CAD must be impartial and not biased and that cannot be achieved if the implicated member, being Captain Anderson, was not invited to participate in the AOFR, which she was not.

[109] In his testimony, Colonel Radiff appeared to genuinely believe, in good faith, that this was the proper protocol. However, notwithstanding the law, CAF policy requires that members understand the grounds upon which a career recommendation is based and the member should be permitted to make representations. Captain Anderson was not privy to the information and perspective shared by her CO to Colonel Radiff nor was she privy to his recommendation as Wing Commander. The evidence before the Court was that their recommendations were sent directly to the Commander of 1 CAD without inviting her input or perspective.

[110] The CO's decision to revoke her captaincy on the CF-188 compounded by the fact that she was being denied information on the AOFR which would decide the fate of her flying career left her understandably feeling frustrated, betrayed and isolated. When she pressed for information, to which she was entitled to, she was told that she was not deserving of an explanation.

[111] The whole of the evidence supports the fact that both Captains Anderson and Kutryk were preparing and hoping for a co-located posting to Cold Lake in spite of her not being successful on the ELUG. Captain Kutryk's testimony was genuine and he was very emotive when he expressed the emotional turmoil and depression he personally suffered when he proceeded to Cold Lake unaccompanied.

[112] Colonel Radiff testified that there were other posting opportunities available in Cold Lake and that he even inquired with Lieutenant-Colonel Marks to determine if a waiver could be sought in her case as he explained that the PTLL3 requirement was intended to be a required standard for admitting international students. This is also

confirmed in Lieutenant-Colonel Marks' testimony. The evidence suggests that both Colonel Radiff and Lieutenant-Colonel Marks were trying to find a solution. The Court notes that Captain Anderson's outgoing CO controlled the flow of all information that they both received regarding her and she was stuck in an impossible situation with no voice, while being denied information with respect to the biggest decision of her career. It was clear that their intentions were good, however, absent direct feedback from Captain Anderson herself, their good intentions were subordinated to the procedural flaws in the AOFR process.

[113] Sadly, the evidence suggests that every time Captain Anderson attempted to express herself, she was shut down and worse yet, she was actually charged. In spite of the professional predicament she was facing, it appears that nobody in the chain of command took her aside, sat her down, offered to mentor her or provide counsel and guidance on the possible next steps in her career.

[114] In a normal situation when a command relationship has deteriorated and becomes toxic, it is possible to consult with the officer next higher in the chain of command. However, Captain Anderson testified that during her meeting with Colonel Radiff on 1 August 2018, he told her that he and the CO of 433 Squadron were good friends going way back and that they like to have a beer together in the private married quarters. She was shocked that Colonel Radiff revealed to her that he was such good friends with her CO when he was the IA on her PDR grievance. Whether this was true or not, this was the perception that Captain Anderson held, and the perception which appears to have informed her actions the next day when she called Captain Riediger.

[115] Whether it was intended or not, the evidence is that Captain Anderson received mixed messaging prior to attending the CT-155 Hawk Conversion in Moose Jaw. Although the week before she went to Moose Jaw, she knew she had failed the ELUG and an AOFR had been commenced, the Court heard that her CO told her that until she was posted, she could still fly the CF-188 Hornet as a wingman. Further, as Lieutenant-Colonel Marks explained, an AOFR decision permitted a range of options, including the opportunity to complete her PTL3 on the CF-188 Hornet. There was no evidence that prior to attending the CT-155 Hawk Conversion course that Captain Anderson was told or understood that after her successful completion of the course that she would have lost her captaincy on the CF-188 Hornet, replacing it with the CT-155 Hawk. In fact, the whole of the evidence suggests otherwise.

[116] The court noted that when Lieutenant-Colonel Marks described the potential options that could flow from the AOFR, aside from the possible option of gaining additional hours on the CF-188 Hornet, he explained another option could be that she go to Moose Jaw as an instructor where she would then complete the CT-155 Hawk conversion. In short, given that Captain Anderson was attending the CT-155 Hawk conversion, while the AOFR was in process, it is no wonder that Captain Anderson was confused as to what the CT-155 conversion course meant for her pilot career. Furthermore, when the Court considers the ambiguity and speculation circulating regarding the possibility of instructors posted to 419 Squadron being permitted to

maintain dual qualifications, it becomes even more muddled. The evidence suggests there was significant confusion surrounding her specific case that was not the result of her own doing. She should never have been sent on the CT-155 Hawk conversion course until the AOFR was complete and she understood its implication as well as the next steps in her career.

[117] The telephone call that makes up the charges before the court took place on 2 August 2018, the day after Captain Anderson met with Colonel Radiff.

The telephone call

[118] It is important to be aware that notwithstanding the chain of command's or the prosecution's understanding of the telephone call prior to getting to trial, a court martial must not fall into the trap of believing that Captain Riediger's version of the phone call is more truthful or has more merit than that of Captain Anderson's. To do this, would, in effect, transfer the burden of proof and is an error of law violating Captain Anderson's presumption of innocence.

[119] It is under the context provided above and the above legal framework that the telephone conversation between Captain Anderson and Captain Riediger must be viewed. Captain Anderson testified that she called Captain Riediger to seek clarity as to whether she was correct in her interpretation that she had not completed the Hawk Conversion. She wanted to make sure that her understanding of the orders were correct. Captain Riediger was somewhat her equal and perhaps one of the few people she felt she could trust. The evidence suggests that she desperately needed clarity as she had received confusing messaging, felt betrayed by her chain of command, was denied information on the AOFR that would decide her career as a fighter pilot and on top of all of that, her Wing Commander was going to investigate her situation.

[120] The evidence before the Court was that Captain Riediger received her call after he received an email from Lieutenant-Colonel Marks so he was aware that there was scrutiny on Captain Anderson's flights, for which he was the instructor. He testified that he could not recall whether he read the email to Captain Anderson or not, but that he remembers telling her that he had an email on the subject.

[121] Although he did not testify to the exact words that were shared between them, he testified that he was left with the impression that she wanted him to reflect her last two missions as normal CH3 and IRT flights rather than for the purpose of her APC. It is distinctly possible that this could have been discussed or at least understood. Based on the email and other queries he had received from senior ranking officers in the CF-188 Hornet community, Captain Riediger would also have been under stress.

[122] In reviewing all the facts that arose from the whole of the testimony, both Captain Riediger's and Captain Anderson's versions of what occurred during the telephone conversation are consistent in their description of its nature and tone. They both independently described the conversation as polite and friendly. When I consider

both their testimonies against the evidence of the whole, which includes the side of the conversation that Captain Kutryk overheard, there is increased possibility that Captains Riediger and Anderson are both telling the truth, but they individually interpreted the same discussion differently. A person's perspective is informed by their own personal knowledge and background. Context is important and this entire case is about context.

[123] When a member perceives he or she is being harassed particularly in a hierarchical environment such as the military, the stress of that situation will manifest itself in varying ways. The evidence on the court record supports the fact that Captain Anderson was shouldering significant expectations, combined with complications, roadblocks and emotional stress. It would be improper for anyone to suggest that there is a predetermined manner upon which someone in this situation will react. It goes without saying that when a member is so highly scrutinized, he or she will often become overly anxious, and anticipate problems which, under normal circumstances, would not otherwise be perceived.

[124] Captain Kutryk testified that from the part of the conversation that he overheard, Captain Anderson explained her predicament with respect to her posting to 419 Squadron. Both Captains Kutryk and Anderson testified that the sole request Captain Anderson made was to hold off issuing the cards until she could figure things out. They both testified that they did not believe either of them had gained true captaincy status on the CT-155 Hawk and in light of the scrutiny Captain Anderson was under, they wanted to be sure.

[125] No matter what the cause, Captain Anderson was now serving under a magnifying glass regarding every aspect of her life. On a personal level, she had been harshly criticized by her CO and he had revoked her captaincy on the CF-188 Hornet. Having been forced to vacate 433 Squadron, her pass deactivated, she would have been humiliated and completely isolated. She was effectively trapped in a toxic environment where everything she did was scrutinized for perceived impropriety. She had nobody in her chain of command she could speak with and she was being denied basic procedural fairness in the AOFR that would render a decision on her career as a fighter pilot.

Conclusion

[126] As the court explained earlier, this case is about context, but it boils down to two contradictory versions of what transpired in a nine-minute phone call on 2 August 2018, between two captains, both of whom I found to be credible and reliable.

[127] In order for the Court to find Captain Anderson guilty, the onus was on the prosecution to meet the required criminal standard of evidentiary proof on every element of the offences. With respect to charges 1 and 2, the first question I needed to answer is whether I am satisfied beyond a reasonable doubt that the prosecution had discharged its onus of proving the particulars of the offences.

[128] It does not matter whether Captain Anderson was correct in her belief as to whether her flights amounted to an APC or not. What is important is whether she held that subjective belief and whether in the context of the whole of the evidence, it makes sense. Captain Anderson found herself in an untenable predicament having lost her captaincy on the CF-188 Hornet and not being qualified to assume the planned posting as an instructor on the CT-155 Hawk. As such, it is not unreasonable for the court to believe that she was confused and wanted time to clarify her status.

[129] After assessing all the evidence, the court finds it is distinctly possible that Captain Anderson and Captain Riediger are both being completely sincere and speaking to the truth as they individually perceived it to be, but based on the context of facts known to them, they each have different perceptions of the same telephone conversation. Witnesses will often see and hear things differently and the Court must not fall into the trap of trying to pick between competing versions. Based on the evidence before it, the Court does not know exactly what happened during that call, but I do not need to. The onus is on the prosecution to prove to the court that Captain Anderson committed the acts as described. She does not need to prove she is innocent.

[130] Based on the above described context, Captain Anderson's narrative that she subjectively believed that she had not completed the CT-155 Hawk conversion has merit. When I consider her belief in the context of the whole of the evidence, I cannot rule out the fact that she was reaching out to Captain Riediger in an attempt to clarify both the policy and her personal situation. Her version of what transpired in the telephone call is indeed plausible.

[131] In short, in applying the required *W.(D.)* analysis, while the Court made every effort to resolve the conflicting evidence bearing on the guilt or innocence of Captain Anderson, after careful consideration of all the evidence, this Court is left in reasonable doubt and, therefore, must acquit her on both of the charges.

[132] I cannot make a finding of guilt on either charge as I have sufficient doubt about whether the allegations occurred as described. It is simply not safe to convict.

FOR THESE REASONS, THE COURT:

[133] **FINDS** Captain Anderson not guilty of both the first and second charges on the charge sheet.

Counsel:

The Director of Military Prosecutions as represented by Major J.D.H. Bernatchez and Major P.E. Craig

Major B.L.J. Tremblay, Defence Counsel Services, Counsel for Captain H.C. Anderson