COURT MARTIAL

Citation: *R. v. McGregor*, 2019 CM 4015

Date : 20190930
Docket : 201826

Standing Court Martial

Canadian Forces Base Esquimalt
Victoria, British Columbia, Canada

Between :

Her Majesty the Queen

- and –

Corporal C.R. McGregor, Accused

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

Restriction on publication: Pursuant to section 179 of the *National Defence Act* and section 486.4 of the *Criminal Code*, the Court directs that any information obtained in relation to this trial by Standing Court Martial that could identify anyone described in these proceedings as a victim or complainant, including the persons referred to in the charge sheet as "C.R.", "K.G". and "M.S." shall not be published in any document or broadcast or transmitted in any way.

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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)

Introduction

[1] Corporal McGregor has stood trial before this Standing Court Martial which commenced its proceedings on 10 September 2018 at Canadian Forces Base (CFB) Esquimalt, British Columbia (BC). The charge sheet contains seven charges. Five of those are laid under section 130 of the *National Defence Act* (*NDA*) alleging violations of the *Criminal Code* including one charge of sexual assault contrary to section 271, two charges of voyeurism contrary to subsection 162(1) and two charges of possession of a device for the surreptitious interception of private communication contrary to subsection 191(1). The other two charges are laid in the alternative, under sections 93 and 129 of the *NDA*, alleging that the interception of private communication between two persons by means of an audio recording device constitutes disgraceful conduct and conduct to the prejudice of good order and discipline respectively.

The evidence

[2] The Court dealt with a number of preliminary applications at the outset of the proceedings, most importantly, an application for the exclusion of evidence, which was dismissed on 13 September 2018. Following the plea of not guilty, the Court heard the testimony of witnesses called by the prosecution. These witnesses were military police investigators from the Canadian Forces National Investigation Service (CFNIS) and the two alleged victims. Most importantly, a significant quantity of electronic and computer equipment seized in the course of the investigation was introduced as exhibits, along with printouts of pictures, still shots of videos and screenshots of cell phone text messages. Audio and video evidence extracted from the items seized were presented in court. At the request of the parties, the evidence heard during the hearing on the application for the exclusion of evidence was incorporated as part of the main trial.

[3] A number of admissions were made by Corporal McGregor as it pertains to the continuity of the possession of evidence. For its part, the prosecution admitted that Corporal McGregor was deployed to Afghanistan on 15 July 2011. Finally, the Court took judicial notice of matters covered by Military Rule of Evidence 15 and two specific publications authorized for military use under Military Rule of Evidence 16. No evidence was offered by the defence.

Exceptional circumstances in the continuation of proceedings

[4] Counsel for the parties addressed the Court as to findings on 18 September 2018. The Court was scheduled to deliver its findings on the afternoon of 19 September 2018. However, that same morning, the Court Martial Appeal Court (CMAC) rendered its decision in *R. v. Beaudry*, 2018 CMAC 4 and declared paragraph 130(1)(a) of the *NDA* to be of no force or effect in its application to civil offences punishable by five years' imprisonment or more. This decision essentially removed the jurisdiction of the Court on two of the seven charges it was considering under paragraph 130(1)(a) of the *NDA*, namely the first charge for sexual assault contrary to section 271 of the *Criminal Code* and the third charge of voyeurism contrary to subsection 162(1) of the *Criminal Code*. Those offences were allegedly committed in Victoria, BC. The jurisdiction over

the other charge of voyeurism remained as the offence was allegedly committed in the United States of America (USA).

[5] The court was reopened in the afternoon of 19 September 2018 and on a number of occasions subsequently. Essentially, the Court agreed with the prosecution's recommendation to wait for the outcome of the appeal of the *Beaudry* decision to the Supreme Court of Canada (SCC). On 29 May 2019, the Court dismissed an application from defence for a stay of proceedings for excessive delay under paragraph 11(*b*) of the *Charter*. I found that even if the period of time between the charge and the likely outcome of this trial had by then exceeded the 18 month ceiling, after which the delay is presumptively unreasonable, the situation was due to the *Beaudry* decision by the CMAC which I considered an exceptional circumstance outside the prosecution's control. Having found that the prosecution's decision to wait for the outcome of the debate at the SCC was reasonable, I pledged my full collaboration to ensure that the proceedings of this Standing Court Martial continue as soon as possible after the SCC renders its decision.

[6] Counsel were invited to partake in a teleconference as soon as the date at which the SCC was to deliver its decision in the *Beaudry* matter was announced. On 26 July 2019, the SCC granted the prosecution's appeal and set aside the order of the CMAC concerning the invalidity of paragraph 130(1)(a) of the *NDA*. On 31 July 2019, a teleconference was held with counsel during which it was agreed that today, 30 September 2019, was the earliest date at which the Court could continue its proceedings and deliver its finding.

The facts

[7] I believe that a proper understanding of the facts of this case can best be obtained by referring to the sequence of the investigative activities, complemented and completed by the testimony heard in court, especially from the two alleged victims, C.R. and K.G.

[8] That sequence of events was related in its entirety by the lead investigator, Sergeant Partridge. He was informed that K.G., a member of the military staff at the Canadian Embassy in Washington, District of Columbia (DC) had told her military superior that two audio recording devices had been located in the bedroom of her home in Alexandria, Virginia (VA) in January 2017.

[9] K.G. testified that she found one of the devices, shaped like a universal serial bus (USB) key, plugged in a power outlet on a wall immediately behind the headboard of her bed, out of view. Having informed her partner, they searched the house together for other devices. Another personal audio device was found on a shelf of a built-in bookcase near her bed. K.G. plugged one of these devices in a computer and heard a recording which included what she believed to be the voice of Corporal McGregor, a friend of hers. Before Christmas, she had given Corporal McGregor the code to open the garage door by which he could enter her residence.

[10] K.G. also searched on the web to find out more about the recording devices she had located. In the course of that search, a purchase was suggested, described as a spy camera alarm clock. She had seen what appeared to be the exact same clock in the bathroom of Corporal McGregor's residence, which she had frequently used when visiting him. Understandably, K.G. became quite concerned. She informed her military superior by text message, placed the recording devices in a bag, changed the access code on her garage door and left to stay at her partner's mother's home.

[11] Sergeant Partridge arrived in Washington on 3 February 2017 to conduct the investigation. He obtained the two devices found in K.G.'s bedroom, as well as text messages from K.G.'s phone to and from a Colin McGregor, the accused. K.G. testified that following the discovery of the recording devices, she spoke a lot less with Corporal McGregor who was being posted back to Canada and who wanted to make amends with her. She wanted an apology from him and asked for one in a text. Commenting specifically on the text message exchange, subject of the printout entered as Exhibit 21, she confirmed that she was exchanging with the accused, recalling the exchange and his phone number, even if she could not remember the exact date. She said that Corporal McGregor texted to the effect that he was sorry for the recording, that it was not meant to be sinister and that he was trying to see what she said about him when he was not around.

[12] Having formed a reasonable belief that Corporal McGregor had been engaged in the interception of private conversations at K.G.'s residence and voyeurism using a spy camera in his residence, Sergeant Partridge concluded that he needed to obtain a warrant to search Corporal McGregor's residence in Alexandria, VA. Following communications and consultations, Sergeant Partridge sought the assistance of local police. He met with detectives from the Alexandria Police Department to explain his grounds to search Corporal McGregor's residence. Verifications of these grounds were made by local police and an affidavit in support of a request for a search warrant was drafted by a detective from Alexandria, VA. On 14 February 2017, a search warrant was authorized by a magistrate to search the residence of Corporal McGregor, whose diplomatic immunity had been lifted for that limited purpose by the Head of Mission at the Canadian Embassy in Washington, DC.

[13] The search of Corporal McGregor's house took place on 16 February 2017. Members of the Alexandria Police Department (APD) breached and secured the premises. CFNIS investigators were in charge of the search and seizure activities with the support of their APD colleagues who assisted with the search of the residence and tasks such as taking photographs. In my reasons dismissing the application for the exclusion of evidence, I found that the laws of the Commonwealth of Virginia applied to the actions of CFNIS investigators on site.

[14] During the search, items of electronic and computer equipment were brought by the personnel conducting the search to Lieutenant(N) Rioux, a computer forensic expert from the CFNIS. Assisted by an APD officer and using specialized equipment, they

performed an on-site triage of the items of interest found in the house before deciding to seize any items. For computer storage devices, once a file of interest was identified in the triage, the physical support on which the file was found was placed aside for seizure. Items which did not reveal any file of interest were not seized. At one point in the day, however, a decision was made to leave the premises and some electronic items were not previewed prior to being seized. To perform the screening, Lieutenant(N) Rioux used his knowledge of what was targeted in the warrant as well as his knowledge of the case. For instance, a file or folder named after K.G., a known alleged victim, would attract his attention. He also looked for images as he was investigating alleged acts of voyeurism.

[15] During the triage, Lieutenant(N) Rioux saw images taken from inside the main floor bathroom in Corporal McGregor's house, showing a lady using the facilities. Some of the images appeared to have been taken from the ceiling. Sergeant Partridge noticed holes on the ceiling of that bathroom, which could have been used to hold devices containing cameras. He also noted the base of a smoke detector installed immediately above the shower in another bathroom upstairs, an unusual location for such a device. He came to the conclusion that fake smoke detectors containing miniature cameras could have been installed in the house but had been removed.

[16] Sergeant Partridge was informed that a file containing video images of what could constitute a sexual assault was discovered during the triage, depicting a male filming himself while sexually touching a woman who appeared to be lying unconscious on a floor.

[17] As officers were about to leave the residence, they gathered their equipment and the seized items. One of the officers came upon a black backpack which he believed belonged to a colleague. As it turned out, the backpack did not belong to police officers. It contained personal effects, including Corporal McGregor's special passport as well as electronic equipment, some of which could allegedly be used to intercept private communications. The electronic items seized are depicted on a picture introduced as Exhibit 20. They include three fake smoke alarm cameras, one with no back cover; two remote controls for these cameras; two personal audio recorders of the same make and model as the ones found by K.G. in her bedroom; an oval camera alarm clock and a small square camera alarm clock with a remote.

[18] The items seized were bagged and placed in containers. Corporal McGregor was placed under arrest at his workplace at the Embassy in Washington, DC and his personal phone, a Galaxy S7, was seized incident to this arrest. Sergeant Partridge testified that he left Washington, DC for Ottawa sometime after 17 February 2017. The continuity in the chain of possession of the evidence has been admitted.

[19] The items seized were subsequently the object of Canadian warrants so that an in-depth search could be performed in Ottawa. That search revealed a number of files containing evidence relating to the charges, which were the object of analysis, summarized in a report of approximately 20,000 pages, placed on a mobile drive

admitted into evidence as Exhibit 28. The evidence deemed of interest by the prosecution was presented to the Court in the testimony of Sergeant Wilson, a CFNIS investigator who testified as an expert witness mainly to explain how he extracted the information from the devices seized to place them in his report. He voiced his opinion as to when the images and audio presented were created.

[20] A number of photos and videos were shown to the court as it pertains to allegations of voyeurism in relation to K.G.

(a) First, the Court was shown extracts from a file containing 280 pictures stored on two storage devices, two compact discs (CDs) and a laptop seized from the accused's residence. They show the legs of a female driving a car, wearing yellow shorts on some of the pictures, black athletic shorts on others. The clothing worn is short and reveals most of the legs and thighs of the person whose picture is taken. Another set of pictures were shown of close-up shots of the chest and cleavage of a female, taken from above. She is wearing a beige top and dark bottoms. Sergeant Wilson testified that all of these pictures had been extracted from the Galaxy S7 phone seized from the accused at the end of July or early August 2017. K.G. testified to the effect that she is the person depicted in these photos. She added that she did not know these pictures were being taken and obviously had not permitted anyone to take such photographs of parts of her body. These pictures are not related to any of the charges before the Court. At most, they reveal what can be characterized as an interest by Corporal McGregor towards K.G.

(b) Next, the Court was shown a video of a man who can be recognized as being Corporal McGregor, installing what appears to be a camera filming in his direction, from a waist-high vantage point. A conversation between a man and a woman is heard. At one point a woman enters the bathroom, lowers her pants and sits on a toilet. The camera appears to be installed on the toilet's water tank.

(c) The next video starts with a view of a man staring at the ceiling of a bathroom with, in his right hand, one of the remote controls appearing on the picture of the items found in the backpack at Exhibit 20. A still picture of that image was also produced at page 315 of Exhibit 20. That man is clearly Corporal McGregor. Again, the video has an audio component. A female voice is heard engaging in a conversation, apparently with Corporal McGregor. At one point the same woman shown in the previous video walks in, lowers her pants and uses the toilet. K.G. testified to the effect that it is her who has been so filmed and appears in the video. She added that she did not know she was being filmed and did not give permission to being filmed.

(d) A third video of the bathroom was shown, this time from a third vantage point, from a position waist-high on the right front of the toilet. The angle of view allows to clearly see the face of a lady coming in and sitting on the toilet. The Court could recognize K.G., especially during her testimony when the video was paused to a point where she is staring directly at the camera. K.G. confirmed that it is her who has been filmed. She added that she did not know she was being filmed and that she was in all likelihood looking at the clock when the video was paused. When shown pictures of the bathroom in Corporal McGregor's residence, she identified a corner shelving unit on which she remembered an oval alarm clock was positioned. The picture, taken the day of the search, shows an empty space where the oval alarm clock used to be.

(e) These three videos were taken from files extracted from the Seagate hard drive seized in Corporal McGregor's residence. They were also found on three other devices. They show a date and time stamp on each video at various dates in October 2013. From Sergeant Wilson's report at Exhibit 28 and in line with what he described as the most likely recording date, he opined that the videos shown in court and to K.G. during her testimony would have been recorded in October 2013. K.G. was posted to Canadian Defence Liaison Staff (CDLS) Washington at the end of May 2013 and left in August 2017. She started associating with Corporal McGregor while she was there. The evidence reveals that he would have been posted out shortly after the search of his residence in February 2017.

[21] Sergeant Wilson's work in conducting the in-depth search of the items seized also allowed a more precise examination of the video images of what could constitute a sexual assault, as mentioned earlier. These depicted a male filming himself while sexually touching a woman who appeared to be lying unconscious on a floor. During his testimony, Sergeant Wilson has shown these images which were contained in nine files, given that a new file was created every time the user ceased to film, even for a moment. These files were stored on three hard drives, two laptops and one tablet in the possession of Corporal McGregor at his house. For ease of reference, these images will be described as the sexual touching video.

[22] The sexual touching video shows a close-up view of the fingers and forearm of a man. He is pushing aside clothing to obtain access to the breast and genital areas of a woman who appears unconscious. The fingers caress a nipple. They are inserted into her vagina. On a few occasions, a male voice is heard whispering the first name "C…". The male person in the video has a distinct tattoo on the inside of his left forearm. In Sergeant Wilson's opinion, these images had been most likely taken in the early morning hours of 10 July 2011.

[23] Once provided with the details of that video in the course of his investigation, Sergeant Partridge viewed pictures of Corporal McGregor, stored on electronic devices

found at Corporal McGregor's residence. A close-up analysis revealed that Corporal McGregor does have, on the inside of his left forearm, a tattoo of a similar design as the man seen on the sexual touching video.

[24] Sergeant Partridge inquired with K.G. who had been friends with Corporal McGregor for a number of years, whether he would have been in contact with a person whose first name was "C…" around 2011. It turned out he had been in contact with two such persons, members of the Canadian Armed Forces (CAF), which Sergeant Partridge was able to contact and visit. Having ruled out the first person, Sergeant Partridge met the second at her home in Victoria, BC. C.R. confirmed having had a friendly relationship with Corporal McGregor. The relationship ended abruptly following what she described as an incident of improper touching. She recognized herself and her home when shown images of the sexual touching video, even if she had no recollection of the specific event she was seeing. Sergeant Partridge saw that the features of the bathroom seen in the video such as details of the baseboards, an electric heater and floors were exactly the same as those in C.R.'s house, as shown in pictures at Exhibit 23.

[25] C.R. testified she is indeed the woman on the sexual touching video. She recognized and described the features of the location that are unique to her home. She recognized the clothing she was wearing. She said she believed the images on the video had been filmed on the same occasion as the incident of improper touching she had mentioned to the investigator. She described that incident as waking up early one morning on her couch with Corporal McGregor touching her vaginal area over her clothes. She recalled that the previous evening Corporal McGregor was at her home sharing drinks and playing videogames. What is peculiar about that evening, in her mind, is that she does not recall anything of what would have occurred; something she described as a blackout from the time she had been playing *Mario Cart* with Corporal McGregor to waking up the next morning with him rubbing her vagina over her clothes. She could not remember the date this would have happened. However, it was some time after her posting to Esquimalt in 2009 and before 2012. Sergeant Wilson testified that the images on the video would have been taken in all likelihood on 10 July 2011 at 0227 hours but could not be one hundred per cent certain as it could have been earlier.

[26] During his presence in C.R.'s house, Sergeant Partridge noticed that the layout was familiar to another video found in files obtained from computer equipment seized in Corporal McGregor's residence, showing a partial view of a couple engaged in sexual activity, filmed from afar, either from the back of the adjacent living room or from outside the house, through a window. Discussing with C.R., he formed grounds to believe that the video was indeed of the inside of her home and that it showed her engaging in sexual activity.

[27] Sergeant Wilson showed the video in court, which was stored on four of the same supports found in Corporal McGregor's house, on which the sexual touching video was located. The video of the sexual activity was also on similar file paths on an external hard drive, a laptop and a tablet. In his opinion, the video was taken from an unknown device on 18 July 2010 at 07:12:40. The image was quite dark, but with the

audio it is obvious that the video depicts two persons engaged in sexual activity. The legs of the lady are visible as she is on her back with her male partner on top. On occasions an arm of the male partner appears partly in the door frame as he bends backwards. At the same time, the person taking the video appears to move away on its side and the image of the door frame is then lost, only to be regained afterwards. It looks as if the person filming, fearing detection, hides for a moment, the camera then pointing to a wall, away from the intended scene. At one point in the video a dog is seen crossing the doorframe leading to the bedroom. It seems the images may have been taken from the outside of the living room window as the dog is oblivious to any presence in the living room.

[28] In her testimony, C.R. confirmed that it was her who is engaged in consensual sexual activity in the video. She recognized the inside of her house and some features of the outside patio furniture, visible from the bedroom window. She also recognized her dog. She said she would not have allowed Corporal McGregor to film her engaging in sex and that she would not have allowed him to be in her home while she was engaged in sexual activity of any kind, especially with her bedroom door left open.

[29] As a final element in his testimony, Sergeant Wilson played recordings taken from Exhibit 26, one of the personal audio recorders seized from the black backpack found in Corporal McGregor's residence on 16 February 2017. It contains about 26 hours of recording as the devices are not activated by voice but have to be placed on "record" by a user and, from that point, record for the duration of their memory, which is about 26 hours. At the 25 hours 40 minutes mark, Sergeant Wilson was directed by the prosecution to an indication of grunting sounds being recorded. No words could be distinguished when the extract was played.

[30] The prosecution also played extracts of recordings found on Exhibit 26, the same exhibit, during the testimony of K.G. She remarked that the apparatus was very similar to one that was found in her house, produced as Exhibit 6. At the 25 hours 45 minutes mark, some noises are heard. This time, the grunting noises played were clearer, and a word or two can be distinguished. K.G. testified to the effect that she had heard a voice and it was the voice of Corporal McGregor. She was then shown Exhibit 27, which is the other voice recorder found in the black backpack in Corporal McGregor's house. On that recording, from approximately 10:02, women's voices can be heard. Upon hearing those voices on the recording, the witness K.G.became emotional. She had recognized the voices as hers and her partner's discussing a Netflix movie.

[31] K.G. was not asked when that recording would have been made. However, she stated that she had given access to her house to Corporal McGregor on two separate occasions when she was away, so he could feed her pet fish. On one occasion he was given a spare key which was recovered upon her return. On another occasion he was given the code for access through the garage, the door leading from inside the garage to the house being left unlocked. She said that one of those occasions was Christmas 2016. She said that once they had found and listened to the recording devices in her home in

January 2017, she changed the code to the garage door. From Sergeant Wilson's report at Exhibit 28, the metadata reveals that the recordings would have been accessed on 21 January 2017.

Assessment of the evidence

The proper frame of analysis

[32] The role of this Court is not to make a general judgment on the behaviour or character of Corporal McGregor, but to come to findings by analyzing the actions of the accused in light of the charges before it, no less and no more.

[33] In this frame of mind as it relates to the charges, it is important to discuss the presumption of innocence and the standard of proof beyond a reasonable doubt, two notions fundamental to findings for Code of Service Discipline and criminal trials.

[34] In this country, a person facing criminal or penal charges is presumed to be innocent until the prosecution has proven his or her guilt beyond a reasonable doubt. This burden rests with the prosecution throughout the trial and never shifts. There is no burden on an accused to prove that he or she is innocent.

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

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

The assessment of credibility

[37] In coming to conclusions on this case, the Court must assess the credibility of witnesses who testified for the prosecution. The CMAC in the case of *Clark v. The Queen*, 2012 CMAC 3, provided guidance as to the assessment of the evidence. Justice Watt explained a number of principles starting at paragraph 40, including as follows:

> [40] First, witnesses are not "presumed to tell the truth". A trier of fact must assess the evidence of each witness, in light of the totality of the evidence adduced in the proceedings, unaided by any presumption, except perhaps the presumption of innocence. [Citations omitted.]

> [41] Second, a trier of fact is under no obligation to accept the evidence of any witness simply because it is not contradicted by the testimony of another witness or other evidence. The trier of fact may rely on reason, common sense and rationality to reject uncontradicted evidence. [Citations omitted.]
>
> [42] Third, as juries in civil and criminal cases are routinely and necessarily instructed, a trier of fact may accept or reject, some, none or all of the evidence of any witness who testifies in the proceedings. Said in somewhat different terms, credibility is not an all or nothing proposition. Nor does it follow from a finding that a witness is credible that his or her testimony is reliable, much less capable of sustaining the burden of proof on a specific issue or as a whole.

[38] In arriving at credibility findings, it is important for me to be careful not to reverse the burden of proof. If this Court has a reasonable doubt about Corporal McGregor's guilt arising from the credibility of the witnesses, then it must find him not guilty.

[39] Having considered the testimony of the prosecution witnesses who appeared before me, I find that they are entirely credible. Witnesses from the CFNIS were extremely professional, provided facts in a neutral and impartial manner and did not hesitate to specify the limits of their beliefs, observations and opinions.

[40] For their part, C.R. and K.G. were understandably nervous given the challenge of testifying on delicate and private matters, but their testimony was clear and complete. They did not exaggerate, understate or misrepresent the facts. They admitted when their memory would not allow reaching firm conclusions and they testified without demonstrating animosity towards the accused. They were both highly credible and reliable witnesses.

[41] I do not agree with the submission made by defence to the effect that C.R. was less than truthful on the basis of variations in the views she submitted as to why she did not report the improper touching on her couch one morning in 2011. There are no good or bad reasons not to report an assault at the time it occurs. The differences between the explanations given by C.R. at trial and explanations provided earlier to investigators are minor and are most likely the result of the introspection C.R. described quite convincingly having made from the moment she realized, upon seeing the sexual touching video, that what had happened to her in 2011 was much worse than she initially thought, as she testified. Her initial beliefs to the effect that she may have contributed by allowing herself to become intoxicated in the presence of Corporal McGregor may well have changed following the much more nuanced and profound introspection she had made since that time. I accept her explanations. As she alluded to, she has done nothing wrong in inviting a friend over for drinks.

[42] As for her allegedly belligerent attitude on the stand when defence counsel asked her about the circumstances of a motor vehicle accident in 2012, she was right in stating that it had nothing to do with what would have occurred previously in relation to Corporal McGregor.

[43] I find C.R. was an entirely credible witness. I have no reason to doubt the reliability of her testimony as it pertains to the details of her having been touched inappropriately to her vagina over her clothing as she awoke in the presence of Corporal McGregor in her home. Even if she may have been intoxicated the previous evening and testified having strangely blacked out, she was awake and able to remember the inappropriate touching. She acted immediately, discontinuing her friendship with Corporal McGregor. I do believe her testimony to the effect that the touching occurred on the same occasion as the touching depicted in the video shown in court. Her hesitations as to the date of that event do not influence my conclusion as to the fact that the event did occur.

Analysis

The charge of sexual assault

[44] The first charge laid under section 130 of the *NDA* for sexual assault contrary to section 271 of the *Criminal Code* has been particularized as follows, following the Court's decision to allow the prosecution to amend the particulars as it pertains to the dates of the offence:

> "In that he, between 1 January 2010 and 15 July 2011, at or near "a residential address", Victoria, British Columbia did sexually assault C.R."

[45] The essential elements of this charge are well known but are worth repeating as follows:

(a) the identity of the accused;

(b) the date and place the offence occurred;

(c) that Corporal McGregor applied force to C.R. intentionally;

(d) that C.R. did not consent to the force that Corporal McGregor applied;

(e) that Corporal McGregor knew that C.R. did not consent to the force that he applied; and

(f) that the force was applied in circumstances of a sexual nature.

[46] The defence concedes that the last four elements have been proven in relation to the touching displayed in the video but submits I should have doubts relating to the credibility of C.R. in relation to the touching she said occurred as she awoke in the morning. The defence also challenges the elements of identity and time.

[47] As it pertains to the element of time, the testimony of C.R. is convincing as to the fact that the incident would have occurred in 2011 as she stated on two occasions in her examination-in-chief. She also stated that her brother was living in the basement suite of her house at the time, having moved in 2010. The admission by the prosecution to the effect that Corporal McGregor would have left the country on deployment on 15 July 2011 does not contradict the testimony of C.R. which is strengthened, if not confirmed, by the testimony of Sergeant Wilson who opined as an expert that the videos would have been taken in the early hours of 10 July 2011, around 2:27 a.m., as evidenced by the "modified by" date on the files. Although he could not say he was one hundred per cent certain that the video was not created before that date, I am convinced beyond a reasonable doubt by the testimony of C.R. regarding the year in which her brother moved in with her, that the offence would have been committed during the period covered by the particulars of the charge, being between 1 January 2010 and 15 July 2011.

[48] As for the identity of Corporal McGregor as the perpetrator, the defence adopted the view that the tattoo visible on the left forearm of the perpetrator is only similar to Corporal McGregor's tattoo. As no evidence was received as to how common such a tattoo is, it is submitted that I should be left with a reasonable doubt as to the identity element. With respect, the defence's suggestion makes abstractions of the other evidence received. Most importantly, C.R. testified that she recognized the male voice saying the first name "C…" on a few occasions to be Corporal McGregor's voice. Acknowledging the frailty of that evidence given the sound quality of the recording, I wonder what the odds are that a video of sexual touching by a person having virtually the same tattoo as Corporal McGregor, assaulting a woman Corporal McGregor was friends with at the time the video was shot can find its way in numerous files kept on Corporal McGregor's electronic devices at his home. I am satisfied beyond a reasonable doubt that Corporal McGregor is the person in the video as it is the only rational inference that can be drawn from the whole of the evidence. As found by the SCC in *R. v. Villaroman,* 2016 SCC 33, an accused cannot ask the court to rely on supposition or conjecture that flows from a purely hypothetical narrative, to conclude that the Crown has not proven the offence. The burden on the prosecution does not extend to negating every conjecture. As I have not been provided with any evidence through the cross-examination of prosecution witnesses or otherwise that would be sufficient to support the speculative possibilities raised by the defence, I must conclude that I cannot make any other inference than the one suggested by the prosecution, to the effect that Corporal McGregor is the person depicted in the sexual touching video.

[49] As it pertains to the other elements of the offence of sexual assault in relation to the sexual touching video, I have no difficulty finding that the offence occurred at the location specified on the charge sheet, that is the location of C.R.'s home. The evidence gathered by Sergeant Partridge, confirmed by his observations of the inside of C.R.'s home and her own conclusions are simply overwhelming. I find that Corporal McGregor applied force to C.R. intentionally: it is obvious from the images and the audio on the sexual touching video that the actions depicted are the result of someone who is fully aware of what he is doing. As for the element of absence of consent, the

video images reveal that C.R. was unconscious at the time that she was assaulted and, therefore, incapable of consenting to the touching of her breasts and vagina, as provided for at paragraph 273.1(2)(b) of the *Criminal Code*. In *R. v. J.A*, [2011] 2 S.C.R. 440, the SCC confirmed that consent requires ongoing, conscious consent throughout the sexual activity in question. I also find that Corporal McGregor knew that C.R. did not consent to the touching that he did to her body as he was touching a person who was obviously unconscious. Corporal McGregor could not have a belief that C.R. was consenting as any such belief would be the result of his willful blindness and he never took any reasonable steps to ascertain that C.R. was consenting. Finally, it is clear from the images of the assault, especially the parts of the body being touched and the manner of the touching, that the force was applied in circumstances of a sexual nature.

[50] As it pertains to the touching that C.R. witnessed as she awoke, for the reasons I outlined in my analysis of her credibility, I am convinced that the touching she described occurred as she described and that Corporal McGregor is the perpetrator. As she awoke to the feeling of touching of her vagina over her clothes, it is clear she could not consent and Corporal McGregor knew or ought to have known that. The touching was clearly of a sexual nature.

[51] Consequently, the Court is convinced that the offence of sexual assault, the first charge, has been proven beyond a reasonable doubt.

The charges of voyeurism

[52] The second and third charges were laid under section 130 of the *NDA* contrary to subsection 162(1) of the *Criminal Code*. The particulars of the third charge were amended just before the prosecution closed its evidence as to the dates of the offence. Both charges now read as follows:

> **Second Charge:** "In that he, between 1 January 2016 and 27 January 2017, at or near Alexandria, Virginia, United States of America, did surreptitiously make visual recordings of K.G. while she was in a bathroom."
>
> **Third Charge: "**In that he, between 1 August 2009 and 15 July 2011, at or near "a residential address", Victoria, British Columbia, did surreptitiously make visual recordings of C.R. for sexual purpose."

[53] The essential elements of these charges are as follows:

(a) the identity of Corporal McGregor as the offender;

(b) the date and place of the offences for each of the charges;

(c) that Corporal McGregor – *actus reus*:

(i) surreptitiously;

(ii) made visual recordings;

(iii) of a person who is in circumstances that give rise to a reasonable expectation of privacy; and

(iv) one of the following circumstances applies:

1. first, the person is in a place in which a person can reasonably be expected to be nude, to expose his or her genital organs or anal region or her breasts, or to be engaged in explicit sexual activity (see paragraph 162(1)(a) of the *Criminal Code*, relevant to the second charge, as detailled);

2. second, the person is nude, is exposing his or her genital organs or anal region or her breasts, or is engaged in explicit sexual activity, and the observation or recording is done for the purpose of observing or recording a person in such a state or engaged in such an activity (see paragraph 162(1)(b) of the *Criminal Code*); and

3. third, the observation or recording is done for a sexual purpose (see paragraph 162(1)(c) of the *Criminal Code*, relevant to the third charge, as detailed);

(v) that Corporal McGregor "did possess, at the time of the offence, the following *mens rea*:

1. for the second charge – Corporal McGregor intended to surreptitiously make the recordings; and

2. for the third charge – Corporal McGregor made the recording for a sexual purpose.

Voyeurism involving K.G. using the bathroom

[54] As for the second charge, the prosecution submits that the charge has been proven beyond a reasonable doubt in all respects, as evidenced by the images shown in court, complemented by the testimony of K.G. For its part, the defence argues that the element of time of the offence has not been proven to an extent that could leave me convinced beyond a reasonable doubt that the charge has been proven as particularized.

[55] Leaving time of offence aside, the Court is of the view that all the other essential elements of the offence of the second charge have been proven beyond a reasonable

doubt. The images were filmed in Corporal McGregor's bathroom. He is seen on one of the videos handling the remote control which had obviously commanded the recording and they were found in his possession. Therefore, the identity is proven. A bathroom is a place in which a person can reasonably be expected to be nude, to expose his or her genital organs or anal region. Corporal McGregor's intentions are clear from the circumstances, including the possession of spy cameras, the images found in his possession and the images in one video showing him activating a camera.

[56] As for the time element, as highlighted in the summary of the facts, both the time stamp on the video images and the "modified by" date on the metadata found in Sergeant Wilson's report coincide in establishing that the images would have been taken in October 2013. Although there was no evidence of the time Corporal McGregor was posted to the Canadian Embassy in Washington, DC, and would have therefore moved to his residence of Alexandria, VA, there is no evidence to the effect that he would have been posted later than October 2013. Indeed, K.G. testified that she arrived in May 2013 and that he came in a short time later. This could well have been in the summer of 2013, as postings are normally done in the summertime.

[57] I find that the evidence reveals that the images would have been taken in October 2013. This is a case where section 138 of the *NDA*, found at *Queen's Regulations and Orders for the Canadian Forces* article 112.42, can apply. This section reads in part as follows:

> Where a service tribunal concludes that
>
> (*a*) the facts proved in respect of an offence being tried by it differ materially from the facts alleged in the statement of particulars but are sufficient to establish the commission of the offence charged, and
>
> (*b*) the difference between the facts proved and the facts alleged in the statement of particulars has not prejudiced the accused person in his defence,
>
> the tribunal may, instead of making a finding of not guilty, make a special finding of guilty and, in doing so, shall state the differences between the facts proved and the facts alleged in the statement of particulars.

[58] I do not believe that the difference between the facts proved and the facts alleged in the statement of particulars have prejudiced the defence. There was no defence presented and no efforts were made by defence to cross-examine or explore in any way the difference in the times in evidence and those alleged. The offence of voyeurism at charge 2 has been proven beyond a reasonable doubt. In the circumstances, the time of the offence is not material (*E.L. c. R*, 2014 QCCA 1910). Even if it may not be necessary to do so on the basis of the CMAC decision of *R. v. Bernier*, 2003 CMAC 3 at paragraph 11, a special finding will be made to stipulate the date of the offence to be between 1 September 2013, date at which both persons depicted in the videos were possibly present in Alexandria, VA, and 27 January 2017, the end date stipulated in the particulars.

Voyeurism involving C.R. engaged in sexual activity

[59] As for the third charge, the prosecution addressed its timing challenge by obtaining that the particulars of the charge be amended, as they were initially not within the range of time of the offence outlined in the testimony of Sergeant Wilson to the effect that the images were in all likelihood taken on 18 July 2010 at 07:12:40. The amended particulars with a start date of 1 August 2009 cover the time of the offence as testified to by Sergeant Wilson which is not contradicted by the evidence received by C.R. herself, who did not remember when those images of her engaging in intimate activity may have been filmed.

[60] The defence raised two points in arguing that I should be left with a reasonable doubt on the third charge. The first is based on the credibility of C.R. as to her testimony to the effect that she recognized herself in the video, given the absence of corroborating evidence, for instance, through her boyfriend of the time. As stated, I found C.R. to be an entirely credible witness generally. In her testimony upon seeing the sexual activity video in court, she was clear and precise as to what she recognized as her home, her dog and her bedroom. Even if her brother may have been living with her at the time as a tenant in her home, she was positive that the images did not depict him engaged in sexual activity with someone else. I have no reason to doubt the accuracy of her statement as to who is depicted in these images.

[61] The defence also mentioned the implausibility of Corporal McGregor having positioned himself at the front of the house in broad daylight to film inside. This argument calls for some speculation as to how discreet the actions of a person filming might have been, given the absence of details as to how busy it is or was on the street where the images were taken. I note that 18 July 2010, the date the images were presumably taken, was a Sunday. It is possible that it would have been very quiet at 7:12 a.m. in the morning on C.R.'s street. The testimony of C.R., matched with the images seen in Court giving an idea of the area being filmed and the surroundings, as well as the absence of reaction of the dog, leave me with no doubt that the images were taken from outside the house.

[62] I consider the element of identity of the offender to have been proven beyond a reasonable doubt. Indeed, the evidence is overwhelming as to the fact that it is Corporal McGregor who made the recordings, given the fact that it was discovered in his possession and targeted someone he knew and frequented, at her home, around the time the recordings were made. I do believe the recordings were made surreptitiously given the likely position of the person manipulating the camera outside of the house and the fact that that person was manifestly trying to move out of sight on occasions when the male partner engaged in the activity could possibly lay his eyes on him. C.R. was clearly in circumstances that give rise to a reasonable expectation of privacy: she was in her bedroom, located away from the front of the house as appears obvious from the images taken which show a partial view of the sexual activity through the door frame of the bedroom door, through the living room.

[63] As for the *mens rea*, I find that by virtue of the specific reference to the words found at paragraph 162(1)(c) of the *Criminal Code* to the effect that the recording was done for a sexual purpose, the prosecution burdened itself with proving the specific intent of Corporal McGregor to make the recording for that sexual purpose. As recognized by the prosecutor in arguments, that additional burden was not necessary because the circumstances of the alleged offence fit squarely within the general offence described at paragraph 162(1)(b).

[64] I do believe that in all of the circumstances of this case, images of persons engaging in consensual sexual activities as described by C.R. herself, are indeed made for a sexual purpose as the term has been defined in *R. v. Sharpe*, 2001 SCC 2, where McLachlin C.J. stated, at paragraph 50, that she would interpret that phrase "in the sense of reasonably perceived as intended to cause sexual stimulation to some viewers." As was the case in the recent Ontario Court of Appeal decision of *R. v. Jarvis*, 2017 ONCA 778, there was no other reasonable inferences to be made on the evidence heard in this case that the purpose of the video was sexual.

[65] Consequently, the Court is convinced that the offence of voyeurism at charge 3 has been proven beyond a reasonable doubt.

The charges of possession of a device for interception of private communication

[66] The fourth and fifth charges were laid under section 130 of the *NDA* contrary to subsection 191(1) of the *Criminal Code*. The particulars of both charges read as follows:

> Fourth Charge: "In that he, on or about 16 February 2017, at or near Alexandria, Virginia, United States of America, did possess devices knowing their design thereof rendered them primarily useful for the surreptitious interception of private communication, to wit personal audio recorders."
>
> Fifth Charge: "In that he, on or about 16 February 2017, at or near Alexandria, Virginia, United States of America, did possess a device knowing their design thereof rendered them primarily useful for the surreptitious interception of private communication, to wit a camera alarm clock."

[67] It is worth reproducing the full text of the disposition supporting the charge, as it was at the time of the offence and of the trial:

> **Possession, etc.**
>
> **191 (1)** Every one who possesses, sells or purchases any electro-magnetic, acoustic, mechanical or other device or any component thereof knowing that the design thereof renders it primarily useful for surreptitious interception of private communications is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

[68] The essential elements of these charges are as follows:

(a) the identity of Corporal McGregor as the offender;

(b) the date and place the offence occurred for each of the charges;

(c) *actus reus*: that Corporal McGregor possessed personal audio recorders/camera alarm clock, the design thereof rendered them primarily useful for the surreptitious interception of private communication; and

(d) *mens rea*: that Corporal McGregor knew that the design of the personal audio recorders/camera alarm clock rendered them primarily useful for the surreptitious interception of private communication.

[69] There are no issues raised in relation with the first and second elements as Corporal McGregor was clearly in possession of both the personal audio recorders and the camera alarm clock when these items were seized at this residence on 16 February 2017. As highlighted during the arguments of counsel, difficulties arise with the third and fourth elements as to whether the design of the personal audio recorders and the camera alarm clock rendered these items primarily useful for the surreptitious interception of private communication and whether Corporal McGregor knew that.

Possession of personal audio recorders

[70] In relation to the fourth charge, I note that the personal audio recorders found in K.G.'s house were described by CFNIS investigators as being unsophisticated. Immediately when they saw those, they ruled out any possibility of espionage. The recorders seized at Corporal McGregor's residence are of the same make and model. Having examined these exhibits myself, I find that they are no different than the devices used by anyone doing dictation or wanting to record a conversation. They are relatively small but not stealth by any means. In fact, they are no different than the recorder used as backup recorder during this trial. The evidence of Sergeant Wilson is to the effect that the recorders are not activated by voice but have to be placed on "record" by a user and, from that point, record for the duration of their memory, which is about 26 hours. This is not a very practical feature for a device designed primarily for the surreptitious interception of private communication.

[71] I asked whether the personal audio recorders found in K.G.'s bedroom were designed to be primarily useful for the surreptitious interception of private communication or if this was a secondary role in which Corporal McGregor would have used them. The prosecution had no satisfactory answer. There appears to be no case law demonstrating any instances where such devices were recognized as being primarily used to surreptitiously intercept private communications. In fact, the law appears to

target specialized devices that are small and difficult to see or devices that are camouflaged as something they are not.

[72] In the circumstances, I have not been able to conclude beyond a reasonable doubt that the personal audio recorders that were in the possession of Corporal McGregor at his residence on 16 February 2017 were designed to be primarily used for the surreptitious interception of private communication.

[73] As a consequence, Corporal McGregor must be found not guilty of the fourth charge.

Possession of the camera alarm clock

[74] Turning now to the fifth charge, I must ask the same question as it pertains to the camera alarm clock. Is this a device the design of which renders it primarily useful for surreptitious interception of private communications?

[75] The camera alarm clock is somewhat more sophisticated than the personal audio recorders as it contains the hidden capacity to surreptitiously film and capture sounds in its vicinity. It was not used by Corporal McGregor to intercept private communications, but rather to obtain images of one of his guests undressing to use the bathroom. The evidence presented to the Court is to the effect that the camera alarm clock used in this case recorded a conversation in which its owner was participating. There is no evidence it was used to intercept the private communications of other persons.

[76] That being said, the use or intended use of the camera alarm clock that is evidenced in the circumstances of this case is not an element of the offence. Accepting as proven the possession of the camera alarm clock as it was seized in a backpack found in Corporal McGregor's residence, the issue I must resolve is whether the design of that item renders it primarily useful for the surreptitious interception of private communications. That question was answered in the affirmative in the case of *R. v. Alexander,* 2005 CanLII 32566 (ON CA) where, at paragraph 96, Doherty J.A. found that audio video cameras concealed in clock radios were devices:

> [. . .] designed to surreptitiously intercept private communications and at the same time surreptitiously videotape those involved in the private communications. It cannot be said that the primary purpose of the devices was either to intercept private communications or to videotape. The primary purpose was to do both at the same time.

He concluded, at paragraph 97, that "[t]he criminal prohibition in s. 191 attaches as long as the primary, if not the exclusive, purpose of the device is to surreptitiously intercept private communications."

[77] The defence argued that the device is available for sale at electronic stores such as *La Source* and, therefore, it could not be captured in the sale prohibition of subsection 191(1) of the *Criminal Code*. However, there was no evidence of that availability for sale presented in this trial. In any event, that evidence would not be

determinative as the issue here is possession. I conclude that the *actus reus* of the offence has been proven beyond a reasonable doubt.

[78] As for the *mens rea*, the evidence in this case reveals that Corporal McGregor must have known that the design of the camera alarm clock rendered it primarily useful for the surreptitious interception of private communications given that he had the results of the recordings of that camera on storage devices found in his residence. No other reasonable inferences can be made on the evidence presented in this case.

[79] As all of the elements of the offence have been proven beyond a reasonable doubt, I must, in the circumstances, find Corporal McGregor guilty of the fifth charge.

The alternative charges of disgraceful conduct and conduct to the prejudice of good order and discipline

[80] The sixth and the seventh charges, which are alternative charges, have the exact same particulars as follows:

> "In that he, between 14 January 2017 and 30 January 2017, at or near Alexandria, Virginia, United States of America, by means of an audio recording device, wilfully intercepted private conversations between K.G. and M.S"

[81] The charges as particularized once again raise questions as to the timing of the offences in light of the evidence heard. As mentioned in summarizing the facts, K.G. was not asked when that recording would have been made. However, she testified that Corporal McGregor had access to her house in December 2016, around Christmas, to care for her pet fish.

[82] Yet, the times on the particulars of the charge as laid is between 14 January 2017 and 30 January 2017. I believe that the start time of the time window can also be changed by making a special finding under section 138 of the *NDA* so that it reads 14 December 2016.

[83] That being said, it remains that the offences must be proven.

Disgraceful Conduct

[84] First, the sixth charge of disgraceful conduct. The first step of the analysis requires to determine what conduct has been proven, conduct which will then be analyzed to determine if it rises to the level of disgraceful conduct. Based on the particulars of the charge, the conduct in question is the wilful interception of private conversations between K.G. and her partner M.S by means of an audio recording device. The evidence heard in this case reveals that Corporal McGregor had in his possession audio recorders in which audio recordings of conversations between K.G. and M.S. were found. He had access to K.G.'s home. One of the recorders found in his

possession was of the same make and model of a recorder found in K.G.'s home. He was manifestly obsessed with K.G. as evidenced by his actions in surreptitiously taking photos of her legs and buttocks and, of course, by filming her while she used the bathroom by means of hidden cameras. He said in a text message that he was sorry for the recording and that he was just trying to know what K.G. said about him in his absence.

[85] The defence argues that the grunting noises heard by K.G. on the recorders found in her home are not reliable enough to ground a belief beyond a reasonable doubt that Corporal McGregor is the person who placed these recorders. However, this is not the sole piece of evidence. I find that in considering all of the evidence in this case, the only inference that can be drawn is that Corporal McGregor wilfully placed the devices, later found in his possession, in the bedroom of K.G. to intercept her conversations with her partner, with whom she was living at the time. He admitted as such in his text message.

[86] Once the conduct is established, the question remaining to be answered is whether the actions of the accused constitute disgraceful conduct under section 93 of the *NDA*. The submissions of the prosecution on this issue were essentially limited to state that the Court should find that the conduct of Corporal McGregor, in all of the circumstances of this case, was disgraceful, that is "shockingly unacceptable" in the circumstances.

[87] Since counsel provided arguments in this case, the CMAC has rendered a decision in *R. v. Bannister,* 2019 CMAC 2, an appeal by the prosecution of the acquittal of a cadet instructor of the reserve force, commanding officer of a Cadet Corps, who had made explicit remarks of a sexual nature to a cadet. The appellant discussed the shift that had occurred in court martial decisions since 2012 from a "shockingly unacceptable" test to a "harm-based test". A slightly different harm test contextualized to meet the objectives of the offence of disgraceful conduct, unique to the military justice system, was proposed should the CMAC decide that such a shift is warranted.

[88] The CMAC, in a unanimous decision penned by Scanlan, J.A. found that in analyzing whether a conviction under section 93 of the *NDA* ought to be rendered, the issue is whether the military judge, considering the perspective of a reasonable person with military experience and general service knowledge, is convinced beyond a reasonable doubt that the actions of an accused were disgraceful in the context of the military community. The term "shockingly unacceptable" captures some incidents that could attract a charge under section 93, but is only part of a contextual assessment which also includes harm or risk of harm to inform the analysis but not as a separate issue. The CMAC did not offer a specific harm test to be applied. However, harm or risk of harm remains important in the analysis. As Scanlan J.A. wrote at paragraph 26:

> Whether something is shockingly unacceptable can be informed by the nature of the harm. The more severe the harm or risk of harm, the more likely something is to bring disgrace to the CAF. Conversely, the more shockingly unacceptable an incident is in

> light of CAF operational and military community norms, the less is required on the scale of harm assessment.

[89] The challenge, however, is the fact that the analysis done by the CMAC in *Bannister* was very much centred on the offence at hand in that case, namely improper comments of a sexual nature, as opposed to the behaviour in this case, which is similar to offences of interception of private communications or even voyeurism under the *Criminal Code*. Surprisingly, in his analysis, Scanlan J.A. stated that section 93 of the *NDA* criminalizes actions that would not constitute crimes in non-military settings. That is not entirely accurate as section 93 charges are often seen used in conjunction with or instead of *Criminal Code* charges as evidenced in several court martial cases, including *R. v. Buenacruz*, 2017 CM 4014 and *R. v. Larouche*, 2012 CM 3023 referred to in *Bannister*. Understandably, few of these cases were the subject of CMAC decisions but the high-profile case of *R. v. Marsaw*, [1997] CMAC-395 is an example of consideration of disgraceful conduct instead of a *Criminal Code* charge.

[90] Nevertheless, sufficient evidence was heard in this trial to allow a decision to be made as to whether the actions of Corporal McGregor were disgraceful in the context of the military community. Indeed, the prosecution pleaded that the actions of Corporal McGregor were shockingly unacceptable. Even if the harm element of what was then the test of disgraceful conduct was not specifically addressed, there is sufficient evidence before me as it pertains to the actions of the offender to identify the nature of the conduct and the threat of harm to a value endorsed in our society. Here, the nature of the conduct is clear. The value at stake is also self-evident: privacy. I wish to borrow the words of Huscroft J.A. in his dissenting reasons in *Jarvis*:

> The importance of privacy is, as a matter of general principle, uncontroversial. Everyone values privacy – at least as far as their own affairs are concerned – and especially against state intrusion.

[91] I, too, believe that the importance of privacy is uncontroversial. It is an important value for those citizens who are also members of the CAF and for the organisation in general, especially as it deals with its members. I have no difficulty concluding that, by its nature, the conduct of Corporal McGregor on the evidence of this case has caused harm. It was evident to me by witnessing the emotional distress of K.G. when the recordings were played in court. That harm undermines privacy, a value reflected in and thus formally endorsed through fundamental laws of Canada. A reasonable person looking at the circumstances of this case would, in my view, conclude that there is harm or risk of harm to privacy by recording conversations of persons in their homes.

[92] I also have no difficulty in concluding that the harm involved in this case rises to a degree that is incompatible with the proper functioning of society. I do believe that a reasonable person looking at the circumstances of this case would conclude that the degree of harm caused to the value of privacy by recording conversations of persons in their homes is incompatible with the proper functioning of society.

[93] From the CAF's perspective, the conduct of Corporal McGregor constituted a significant breach of the trust that must exist between colleagues. In my and any reasonable person's view, it is shockingly unacceptable to place a recording device in a colleague's home. Corporal McGregor must be found guilty of disgraceful conduct, contrary to section 93 of the *NDA*.

The charge of conduct to the prejudice of good order and discipline

[94] As it pertains to the last charge of conduct to the prejudice of good order and discipline, the prosecution has not presented any direct evidence of prejudice, instead referring to the CMAC decision in *R. v. Golzari*, 2017 CMAC 3, at paragraphs 76 to 79 to the effect that there is no requirement that physical manifestation of injury to discipline be proven to obtain a conviction. The more recent *Bannister* decision at the CMAC confirms that it is sufficient to prove that the conduct tends to or is likely to result in prejudice to discipline. The Court is therefore invited to determine whether the proven conduct is prejudicial to good order and discipline based on its experience and general service knowledge.

[95] The prosecution submits that the breach of trust and invasion of privacy between the two CAF members involved in this case, as well as the ensuing impact on the unit in Washington, who had to carry on a number of administrative actions as a result, is sufficient for me to conclude that discipline was prejudiced by these actions.

[96] Respectfully, I cannot agree. Even using the full extent of my experience and general service knowledge, I cannot see how the events that transpired in this case would constitute conduct to the prejudice of good order and discipline as it pertains to the wilful interception of private conversations between K.G. and M.S. An alleged crime was reported to unit authorities, these authorities acted expeditiously. Investigators were dispatched to gather evidence, they arrested the accused and searched his house. In due course charges were laid and proceeded with, leading to this trial. Of course, all of these actions had an impact on the unit. However, in itself, this is not sufficient for me to infer that the good order and discipline of other members of the CAF could be prejudiced by what occurred. As I found in the past, the administrative actions taken by a unit as a result of an offence committed by one of its members cannot in themselves be seen as evidence of prejudice to discipline, let alone be attributed to the accused. I do not see how CAF members witnessing the actions taken by authorities in this case could be left in a diminished state of discipline. Quite the contrary in my view.

[97] I do agree that what Corporal McGregor did is wrong. However, finding prejudice to good order and discipline in the circumstances would mean that an offence under section 129 of the *NDA* is committed every time a member of the CAF is found to have committed a wrong or an offence. I understand, as found by the SCC, that offences committed by members of the military outside of work can have an impact on discipline. Yet, this does not mean that the specific offence of conduct to the prejudice

of good order and discipline was committed every time a CAF member has done something wrong.

[98] It can be said that the norm of conduct violated in the Washington, DC / Alexandria, VA incident was similar to the offence of interception of private communications and perhaps voyeurism found in the *Criminal Code*. Yet, there is no specific military order or even norm of conduct that was breached which would attract the application of subsection 129(2) of the *NDA*. As for the existence of prejudice, my service knowledge does not point to proof or inference of prejudice as explained earlier. In fact, I am aware that the conduct in question could be seen as an important incident in the course of the friendly private relationship between Corporal McGregor and K.G. Defence Administrative Orders and Directives 5019-1, an order issued by or on behalf of the Chief of the Defence Staff, states that the CAF are committed to respecting the inherent right of its members to form personal relationships of their choosing and to respect the privacy of those relationships. Even if the friendship between Corporal McGregor and K.G. may not have constituted a personal relationship under the definition of that order, it remains that the breach of trust which led to the end of that relationship may well be considered a private affair as opposed to a military one. The offence or offences committed in the course of that relationship were governed by the very same laws as those applicable to society in general. In fact, that law was applied in the course of the proceedings of this trial.

[99] In the circumstances, I have not been convinced beyond a reasonable doubt that the prejudice alleged by the prosecution here carries a real risk of adverse effects on good order and discipline.

[100] Consequently, Corporal McGregor must be found not guilty of the seventh charge for conduct to the prejudice of good order and discipline.

Disposition

FOR THESE REASONS, THE COURT:

[101] **FINDS** Corporal McGregor guilty of the first charge.

[102] **FINDS** Corporal McGregor guilty of the second charge with a special finding to the effect that the date of the offence is between 1 September 2013 and 27 January 2017.

[103] **FINDS** Corporal McGregor guilty of the third charge.

[104] **FINDS** Corporal McGregor not guilty of the fourth charge.

[105] **FINDS** Corporal McGregor guilty of the fifth charge.

[106] **FINDS** Corporal McGregor guilty of the sixth charge with a special finding to the effect that the date of the offence is between 14 December 2016 and 27 January 2017.

[107] **FINDS** Corporal McGregor not guilty of the seventh charge.

Counsel:

The Director of Military Prosecutions, as represented by Major G. Moorehead, Commander S. Torani, Major A. van der Linde and Lieutenant-Commander D. Reeves

Mr David Hodson, Defence Counsel Services, Counsel for Corporal C.R. McGregor