COURT MARTIAL

Citation: *R. v. Clancy*, 2019 CM 2033

Date: 20191127
Docket: 201910

Standing Court Martial

Her Majesty's Canadian Ship *York*
Toronto, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Lieutenant(N) R.M. Clancy, Accused

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

Restriction on publication: By Court order, pursuant to section 179 of the *National Defence Act*, information that could disclose the identity of the person described during these proceedings as the complainant shall not be published in any document or broadcast or transmitted in any way.

REASONS FOR FINDING

(Orally)

The case

[1] Lieutenant(N) Clancy is charged with three offences. Two charges relate to allegations contrary to section 129 of the *National Defence Act* (*NDA*), that is to say, conduct to the prejudice of good order and discipline and one charge relates to alleged conduct contrary to section 93 of the *NDA*, for behaving in a disgraceful manner.

[2] The particulars of the charges read as follows:

"First Charge Section 93 N.D.A.	BEHAVED IN A DISGRACEFUL MANNER

(Alternative to Second Charge)	Particulars: In that he, on or about 28 July 2017, at or near the Canadian Forces Base Esquimalt, Esquimalt, British Columbia, kissed J.P., his student, without her consent.
Second Charge Section 129 N.D.A. (Alternative to First Charge)	CONDUCT TO THE PREJUDICE OF GOOD ORDER AND DISCIPLINE Particulars*:* In that he, on or about 28 July 2017, at or near the Canadian Forces Base Esquimalt, Esquimalt, British Columbia, kissed J.P., his student, without her consent.
Third Charge Section 129 N.D.A.	CONDUCT TO THE PREJUDICE OF GOOD ORDER AND DISCIPLINE In that he, between 28 July 2017 and 25 August 2017, at or near the Canadian Forces Base Esquimalt, Esquimalt, British Columbia, did evaluate the academic performance of J.P., while he had had a personal relationship with her.”

[3] In reaching the Court’s decision, I 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

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

(a) In-court testimony of the prosecution’s witnesses:

i. Acting Sub-Lieutenant C. MacLennan;

ii. Sub-Lieutenant N. Hennerbichler;

iii. Sub-Lieutenant J.P. Gagnon; and

iv. Sub-Lieutenant J.P. (complainant);

(b) In-court testimony of Lieutenant(N) R. M. Clancy (accused) testifying in his own defence;

(c) In-court testimony of the following defence counsel witnesses:

i. Sub-Lieutenant A. Ferguson; and

ii. Acting Sub-Lieutenant D. Nguyen;

(d) Exhibit 1: Convening Order;

(e) Exhibit 2: Charge Sheet;

(f) Exhibit 3: Code of Values and Ethics;

(g) Exhibit 4: DAOD 5019-5, Sexual Misconduct and Sexual Disorders;

(h) Exhibit 5: DAOD 5019-1, Personal Relationships and Fraternization;

(i) Exhibit 6: Copy of text messages;

(j) Exhibit 7: Course Report;

(k) Exhibit 8: MARS PROGRESSION ACADEMIC SUMMARY SHEET;

(l) PP1-1: Notice of application – Publication ban

(m) The Court also took judicial notice of the facts and matters covered by section 15 of the *Military Rules of Evidence* (*MRE*) as well as Operation HONOUR.

Facts

[5] From 1 May 2017 until 25 August 2017, Lieutenant(N) Clancy was the Course Training Officer (CTO) on the Naval Warfare, Phase 3 course, also referred to as maritime surface and sub-surface (MARS III) training. The course took place at Naval Officer Training Centre (NOTC) Venture, the Naval Fleet School (Pacific) in Esquimalt, British Columbia. The academic portion of the course consisted of eight weeks of classroom instruction, which covered Officer of the Watch (OOW) core skills, radar theory, ship handling, engineering, stability, collision regulations, relative velocity, tides and astronomic, radar navigation and meteorology. In the practical phase of training, students were introduced to the navigation and bridge simulator (NABS), spending two weeks developing OOW core skills such as fixing, contact avoidance, block reporting and bridge routine. Two weeks were then spent at sea on an Orca-class vessel further developing and evaluating OOW core skills. For the final three weeks of training, students returned to the NABS for the OOW manoeuvres developmental and assessment phase.

[6] The consistent evidence before the Court was that Lieutenant(N) Clancy had been a fair instructor who treated all candidates well. There was no evidence given by

anyone from the divisional system within NOTC Venture to describe what his exact role as a CTO entailed; however, witnesses who were candidates on the course described what he actually did. Lieutenant(N) Clancy taught and evaluated the candidates on the core skills in the academic phase and then oversaw the administration and coordination of the remaining training elements of their MARS III training, which involved being a liaison between the candidates and the other instructors and evaluators. The Court heard there were a number of different personnel, both military and civilian who instructed and evaluated the candidates throughout the various phases of the course.

[7] The evidence suggested that Lieutenant(N) Clancy fulfilled an important function ensuring candidates who needed assistance received it, and his efforts focused primarily on looking out for the best interests of the candidates undergoing training.

[8] Working from the performance assessment sheets completed by all the different instructors and a matrix of scores compiled from completed performance checks, Lieutenant(N) Clancy drafted all the candidates course reports and drafted comments which were then forwarded to the divisional officer, Lieutenant Commander Wetmore, for final signature.

[9] The complainant, J.P., was a candidate on the same MARS III course where the accused was the CTO. The accused drafted and signed off J.P.'s course report on 24 August 2017 as the reporting officer, and Lieutenant Commander Wetmore signed his portion on 25 August 2017. J.P. signed her course report in the presence of the accused on 25 August 2017.

[10] The alleged event set out in the particulars of charges 1 and 2 took place after a training mess dinner on 28 July 2017.

[11] Acting Sub-Lieutenant MacLennan was a reservist and candidate on the same MARS III course and she described J.P. as a friend. She has since completed her component transfer to the regular force. She described that the afternoon before the mess dinner, she initiated a text exchange with Lieutenant(N) Clancy where they discussed a course outing planned for the next day. In the text exchange, the accused indicated that he could give a ride to approximately four people. When asked why she had Lieutenant(N) Clancy's personal cell number, Acting Sub-Lieutenant MacLennan explained that he had given it to all the students in the event that any of them needed to get a hold of him.

[12] All the Venture candidates and instructors involved in the various levels of naval warfare training attended the mess dinner. In their respective testimony, all witnesses were relatively consistent in saying that the mess dinner was a standard mess dinner and lasted approximately three to three and a half hours. Lieutenant(N) Clancy was the vice-president of the mess committee (VPMC) for the Starboard table.

[13] After the mess dinner, the candidates and Lieutenant(N) Clancy engaged in various activities at either the gunroom which is described as an extension of the wardroom, located at NOTC Venture at Work Point or they went downtown, but at some point very late on 28 July 2017 or in the early morning hours of 29 July 2017, several of the witnesses, including both Lieutenant(N) Clancy and J.P., found themselves at an after party in the common room of the Welland room, which is in the Kingsmill building, which was the building where all the candidates resided while attending their respective courses. The gunroom was connected by a pathway to the adjacent Kingsmill accommodation building.

[14] Acting Sub-Lieutenant MacLennan also attended the mess dinner, but did not attend the after party at the Welland room.

[15] The alleged conduct, particularized in charges 1 and 2 allegedly unfolded in the Welland room, during the after party in the early morning hours of 29 July 2017. The witnesses present during the dancing and the alleged kiss testified that the lights were on and there was clear visibility and an unobstructed view of both the accused and J.P. dancing together.

[16] Sub-Lieutenant Gagnon testified that after being downtown, he returned to the Welland room between midnight and one a.m. He described the atmosphere as pleasant with music playing, alcohol being consumed and people talking and drinking. He estimated that he stayed in the Welland room for about three and a half hours (which would indicate he departed around 0330 or 0430 hours). He explained that as the party progressed, there was more alcohol being consumed, the music got louder and there was dancing.

[17] Sub-Lieutenant Hennerbichler testified that after the mess dinner, she went to the gunroom and then later to the Welland room. She described the mood in the Welland room as a fun atmosphere with music and dancing. She testified that she drank with her friends, engaged in a bit of dancing and chatting into the evening.

[18] The accused testified that when the gunroom closed at 0100 hrs both he and a colleague tended to a sick candidate and then went to the Welland room. He stated that after arriving in the Welland room, he didn’t immediately notice J.P. until she joined him while he chatted with a colleague. He admitted to supplying alcohol for the after party.

[19] J.P. testified that the day of the mess dinner, they had just returned from the sea portion of their training and were all very tired. She stated she did not drink before the mess dinner, but during it, she consumed about five glasses of wine. She described her level of intoxication as “a little tipsy”. Later, while at the after party in the Welland room, she testified she drank some beer, Pernod and had a bit of white wine. She told the court that she brought the Pernod for herself and the wine was provided by Lieutenant(N) Clancy. She estimated that she consumed about eight glasses of various types of alcohol. She described her state of intoxication in the Welland room as “tipsy”.

[20] When asked to describe his own level of intoxication, Sub-Lieutenant Gagnon explained that by the time he returned to the Kingsmill, he had slowed down his drinking, stating that he might have had one beer. He described himself as being clear-headed and having all his wits about him.

[21] Sub-Lieutenant Gagnon explained that the accused and J.P. danced to a bit of "everything", but what struck him was the salsa-style dancing which involved a great deal of hip swaying with their hands moving about. He explained that the accused and J.P. danced with their bodies pressed against each other with no distance between them. He described their interaction as mutual with them both rubbing up against each other. He estimated that J.P. and the accused danced together for at least an hour; however, under cross-examination, he estimated it could have been for an hour and a half.

[22] Sub-Lieutenant Hennerbichler told the Court that at one point, the accused and J.P.'s dancing together was the only thing happening in the room so she was just watching them. However, Sub-Lieutenant Hennerbichler also admitted that she did not look at them the entire time because she was not comfortable with the way they were dancing. Under cross-examination, she described them as moving at the same tempo, swinging back and forth. When asked why she was not comfortable with the way they were both dancing, she explained that even though she has been dating her boyfriend for four years, they do not dance like that.

[23] The accused testified to dancing exclusively with J.P., describing that at first they danced facing each other and then, as time wore on, they danced more intimately, with him standing behind her, with his right hand on her right hip and his left hand on her left hip, with her hand holding his. He explained that as they danced more intimately, they were swaying their hips together and grinding. Under cross-examination, J.P. confirmed that the nature of the way they were dancing, with her bum pressing against the front of the accused. She confirmed that it could have been perceived by the accused as grinding. The accused estimated that they danced for about an hour, while J.P estimated that they danced for about 30 minutes.

[24] What happens during the dancing is where the evidence diverges.

[25] J.P. testified that while dancing, Lieutenant(N) Clancy kissed her on the neck three or four times without her consent. She also testified that she blacked out shortly after that and woke up the next morning in the spare bedroom beside the accused's bedroom. The conduct before the Court is only the alleged non-consensual kisses.

[26] The accused admitted to dancing with J.P., but testified to having no recollection of ever kissing her while they were dancing. Under cross-examination, he left open the possibility that while dancing close to her, with her positioned in front of him, both facing the same direction, that in speaking with her, he could have touched her ear or neck.

[27] Although neither Sub-Lieutenant Gagnon nor Sub-Lieutenant Hennerbichler witnessed the alleged kisses, J.P. told the military police (MP) during her interview, that they had. During cross-examination, she testified that what she meant was that Sub-Lieutenant Hennerbichler and Sub-Lieutenant Gagnon were both present and she just assumed that they saw it. Either way, J.P. was insistent that both Sub-Lieutenant Hennerbichler and Sub-Lieutenant Gagnon were both present at the time of the alleged event.

[28] Both Sub-Lieutenants Gagnon and Hennerbichler testified that when they retired from the party, only J.P. and Lieutenant(N) Clancy remained and they were slow dancing and talking. Sub-Lieutenant Gagnon recounted that when they left, J.P. had her back to Lieutenant(N) Clancy and they were swaying back and forth with his hands on her hips and no distance between them.

[29] When Sub-Lieutenant Hennerbichler was asked to describe both J.P.'s and Lieutenant(N) Clancy's demeanour, she said they were both calm. She described J.P. as being intoxicated, but she could not describe to what level. She knew that J.P. had been drinking.

[30] Acting Sub-Lieutenant MacLennan explained that the morning after the mess dinner, which she said was a Saturday, Lieutenant(N) Clancy texted her to ask if they were still on for the outing and then he texted her saying he was "so hungover", but still game. Acting Sub-Lieutenant MacLellan responded that they were meeting downstairs at "3ish". Afterwards, Lieutenant(N) Clancy asked her what room J.P. was in as he thought he had her shoes, to which Acting Sub-Lieutenant Maclellan replied, "Omg lol 407 I think". Lieutenant(N) Clancy then asked for J.P.'s number which she provided. In explaining what the text acronyms meant, she defined "OMG" as "oh my God!" and "LOL" as "laugh[ing] out loud".

[31] Acting Sub-Lieutenant MacLennan testified that when she received the text, she was a bit taken aback as it was unusual to get texts from an instructor asking for a candidate's room number so she was a bit suspicious at first, but then assumed it was not bad and she gave him the info.

[32] In their respective testimonies, both J.P. and the accused admitted that several weeks after the mess dinner where the alleged kisses occurred, but before the end of the course, they both spent time together where sexual activity occurred.

[33] Acting Sub-Lieutenant MacLennan testified that near the end of the summer, she heard serious allegations regarding the conduct of the accused towards J.P. and the day before their graduation parade, she advised Lieutenant-Commander Wetmore, their divisional officer of the allegations. When asked why she delayed in reporting the alleged misconduct, she stated that she did not originally know what had happened and heard some details from J.P., but when she found out the rest of the story, it bothered her because she knew that they were all still being assessed.

[34] When Acting Sub-Lieutenant MacLennan was asked how she felt knowing that Lieutenant(N) Clancy was evaluating both her and J.P., she replied that it was not an issue for herself, and for J.P., she could not say. She also testified that she did not have time to think about the situation during the next week as they had "a lot going on" as it was a stressful time for them. She explained that, in retrospect, a candidate could fail very easily and if an instructor does not have your best interests at heart, it could be a problem.

[35] She did explain that she was concerned about reporting it, but not necessarily for herself. Under cross-examination, Acting Sub-Lieutenant MacLennan was asked whether she disliked Lieutenant(N) Clancy, which she denied. Acting Sub-Lieutenant MacLennan testified that she was successful on her MARS III course and received decent marks. She does not recall seeing anything unfair with Lieutenant(N) Clancy's marking, but she could only account for herself and not for others. She did not recall who assessed her on the simulator, but confirmed that her course evaluation was signed by Lieutenant(N) Clancy.

[36] After the course, when she returned home to Saskatchewan, she provided a written statement which she forwarded to Lieutenant-Commander Wetmore and Lieutenant(N) Dignard.

Presumption of innocence

[37] That presumption of innocence remains throughout the court martial until such time as the prosecution has, on the evidence put before the Court, satisfied the Court beyond a reasonable doubt that the accused is guilty on the charge before it.

[38] 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.

[39] In essence, this means that even if I believe that Lieutenant(N) Clancy is probably guilty or likely guilty, that is not sufficient. If the prosecution fails to satisfy me of his guilt beyond a reasonable doubt, I must give him the benefit of the doubt and acquit him.

[40] 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 Lieutenant(N) Clancy guilty of the charges before the Court, the onus is on the prosecution to prove something less than an absolute certainty, but more than probable guilt for the charges set out in the charge sheet (*see R. v. Starr*, 2000 SCC 40, [2000] 2 S.C.R. 144, paragraph 242).

The law

Section 93 of the NDA– disgraceful conduct

[41] In order to prove the first charge before the Court, the prosecution is required to prove a number of elements of the offence. Based on the unrefuted evidence before the Court, the Court has no problem concluding that the elements of identity, time and place have been met. The elements left to be proven beyond a reasonable doubt for the charge are as follows:

(a) the conduct alleged in the particulars of the charge;

(b) the fact that the accused behaved in a cruel or disgraceful manner; and

(c) that the accused had the wrongful intent.

[42] The first issue the court must decide is whether the particulars, as detailed in the charge, were proven beyond a reasonable doubt. With respect to the first charge, it is for the prosecution to prove beyond a reasonable doubt that the accused did kiss J.P., his student, without her consent and that that act was disgraceful. The finding on the charge depends not only on my assessment of the credibility of the witnesses and that the act particularized in the charge sheet has been proven beyond a reasonable doubt, but the prosecution must also prove that the actions of the accused were disgraceful within the context of section 93 of the *NDA*.

[43] Section 93 of the *NDA* states:

> Every person who behaves in a cruel or disgraceful manner is guilty of an offence and on conviction is liable to imprisonment for a term not exceeding five years or to less punishment.

[44] A finding that the alleged conduct constituted disgraceful conduct requires an assessment of the accused's conduct in its context.

[45] As the Court Martial Appeal Court of Canada (CMAC) decided in *R. v. Bannister*, 2019 CMAC 2, in most cases, the military judge's expertise will usually be all that is needed to draw the necessary inferences. At paragraph 16, the CMAC summarized some of the challenges faced in the past:

> [16] In *R. v. Boyle*, 2010 CMAC 8, 417 N.R. 237 [*Boyle*], at paragraph 15, the court suggested that the "[…] law of disgraceful conduct is not well-settled". But the court did not go on to provide guidance as to what the appropriate test was to establish disgraceful conduct under s. 93 of the *NDA*. Since *Boyle*, military judges have been divided on whether accusations under s. 93 of the *NDA* should be assessed by applying a "harm-based test" or whether a reasonable person would find the conduct "shockingly unacceptable". In my view, it serves no useful purpose to parse words and create separate

> silos. Harm and unacceptability inform one another as to whether an incident is disgraceful. Context counts.

[46] In *Bannister*, the CMAC confirmed that the determination as to whether the actions of the accused were disgraceful must be determined on an objective standard. In deciding whether the alleged proven conduct under section 93 of the *NDA* is disgraceful, the military judge must consider the perspective of a reasonable person with military experience and general service knowledge, before becoming convinced beyond a reasonable doubt that the actions of the accused were disgraceful in the context of the military community.

[47] At paragraph 18, the CMAC stated, "A court martial must consider the context of the events in any incident, using its experience and general service knowledge to assess that incident." At paragraph 22, the CMAC also clarified the following:

> [22] Ultimately, what is required is a contextual assessment of the incidents from the perspective of the Canadian Armed Forces [CAF] and the military community. In some incidents, the contextual assessment must also involve consideration as to the manner by which the incidents might be viewed in the non-military community. As stated earlier, s. 93 criminalizes actions that would not constitute crimes in non-military settings. The severity of the offence is reflected in the maximum penalty, which is imprisonment for a term not exceeding five years. That punishment alone suggests that the offences targeted are ones that do more than raise a level of discomfort, insult, or somewhat offend those in the military community. The term "shockingly unacceptable", the use of which I have noted above, captures some incidents that could attract a charge under s. 93, but is only part of a contextual assessment.

[48] In addition, the CMAC provided the following guidance:

> [25] In addition to "shockingly unacceptable", there are many other descriptions that capture the essence of what is meant by the term disgraceful. In some cases, any reasonable person might consider an incident as being disgraceful, saying, "I know disgraceful when I see it". However, the application of an objective standard can never be that simple.
>
> [26] Whether incidents are disgraceful are not to be determined by considering harm as a separate issue. That is to say, there are not two separate silos, one for "shockingly unacceptable" conduct and one for consequences related to "harm or risk of harm". 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.
>
> [27] I offer an example as to how context can inform the inquiry. It is unacceptable, though not necessarily shockingly so, for a person to point an unloaded revolver at another and pull the trigger, even after it has been checked to ensure that it is not loaded. It would, however, be shockingly unacceptable to take that same revolver, insert one live round, point it and pull its trigger in a Russian roulette fashion. That incident is not to be judged based on whether the gun fired. Rather, it is to be judged based on the risk of harm combined with the other surrounding circumstances. It can be either the "harm" or "the risk of harm" that informs the assessment as to whether the action was shockingly unacceptable/disgraceful in the context of a s. 93 of the *NDA* charge.

[49] Persons in the military community are well equipped to evaluate the issue of disgraceful conduct in the context of the CAF without relying on outside experts. It is the reasonable military member that is equipped to make an objective determination of whether or not the conduct is disgraceful in its context. An outside expert can do nothing more than opine on the ultimate issue.

[50] As courts martial have found on a number of occasions and as counsel for the accused highlighted, the CMAC in *R.v. Marsaw*, CMAC-395 did find conduct akin to sexual assault to be disgraceful.

Section 129 of the NDA – conduct to the prejudice of good order and discipline

[51] The second and third charges before the Court allege a violation of section 129 of the *NDA* for conduct to the prejudice of good order and discipline. Based on the unrefuted evidence before the Court, the Court has no problem concluding that the elements of identity, time and place have been met. The elements left to be proven beyond a reasonable doubt for the charges are as follows:

(a) the conduct alleged in the charges;

(b) the fact that the conduct is prejudicial to the good order and discipline; and

(c) that the accused had the wrongful intent.

[52] The first issue for this Court to decide is whether the particulars as detailed in the charges were proven beyond a reasonable doubt. The onus is on the prosecution.

[53] In order to prove that the alleged conduct is prejudicial to good order and discipline, there are a number of paths to do so. Firstly, provided the prosecution could prove the accused had actual or deemed knowledge of Defence Administrative Orders and Directives (DAOD) 5019-1 on Personal Relationships and Fraternization, the prosecution will have proven prejudice, if the military judge is satisfied that the actions of the accused contravened the DAOD. Actual or deemed knowledge must be proven beyond a reasonable doubt.

[54] Secondly, the prosecution can prove the offence was committed if there is actual or direct evidence of prejudice to good order and discipline based on objective criteria of prejudice or likelihood of prejudice.

[55] Thirdly, absent evidence of actual prejudice, the prosecution can prove prejudice by inference. As part of an inferential reasoning process, a military judge must, based on his or her experience and general service knowledge, ask whether the proven conduct in this case can be considered conduct to the prejudice of good order and discipline. The military judge using his or her knowledge and experience must ask

whether, on the totality of the evidence, in the circumstances of the case, prejudice to good order and discipline could be inferred from the facts as proven. This reasoning process would take into account all the contextual circumstances of the case.

Charges 1 and 2: alternative offences with respect to the alleged kiss?

Issues

[56] With respect to the first two charges before the Court, the critical issues for this court martial to decide are:

(a) is the Court convinced beyond a reasonable doubt that the conduct occurred as described in the particulars, i.e.:

i. that the accused kissed J.P.; and

ii. that J.P. did not consent to be kissed.

(b) did the accused have wrongful intent, i.e.:

i. did the accused intend to kiss J.P? The physical contact must be intentional, as opposed to accidental. To decide whether the accused intentionally kissed her, the Court has to consider all the evidence, including anything said or done in the circumstances; and

ii. did the accused know that J.P. did not consent or want to be kissed by him;

(c) was the proven conduct disgraceful or alternatively, prejudicial to good order and discipline?

Position of the prosecution

[57] The prosecution submitted that this case turns on credibility and that J.P.'s version of the events is the most reliable and accurate and is supported by the testimony of Sub-Lieutenant Gagnon and Sub-Lieutenant Hennerbichler. It is the prosecution's position that J.P. is credible and should be believed. He further argued that even if the Court finds that J.P. consented, her consent is vitiated because the accused abused his position of trust or authority. In short, the essence of the prosecution's argument is that this is a case about Lieutenant(N) Clancy's abuse of authority and not about the lack of J.P.'s consent. He submitted that the defence of mistaken belief in consent is not available to the accused because he did not take reasonable steps in the circumstances. Finally, the prosecution argued that the alleged conduct amounted to disgraceful conduct or, alternatively, was at least prejudicial to good order and discipline.

Position of the defence

[58] The position of the defence is that the accused entered these proceedings presumed to be innocent and that Lieutenant(N) Clancy's evidence is credible and should be believed. He argued that this case is about the application of the *R. v. W.(D.),* [1991] 1 S.C.R. 742 test and that the prosecution has not proven the alleged conduct beyond a reasonable doubt. He further 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.

Analysis

[59] 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.

[60] 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 witnesses with respect to charges 1 and 2

[61] Given that the event in question took place well over two years ago, it is not unusual that some of 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.

[62] With respect to the first two charges, the main prosecution witnesses, Sub-Lieutenant Gagnon, Sub-Lieutenant Hennerbichler, the complainant J.P., as well as the accused were all intoxicated to varying levels. Intoxication in the context of this case affected the Court's assessment of the reliability of some of the evidence and the Court needed to assess the evidence from all the witnesses in order to make a determination of what evidence as a whole should be believed.

[63] In the context of Operation HONOUR, it is very important to be aware that, notwithstanding the chain of command's and the investigators' responsibility to believe a complainant when they report misconduct, a court martial must not fall into the trap of believing that J.P.'s version of the facts is more truthful or has more merit than that of the accused. To do this would, in effect, transfer the burden of proof from the prosecution to the defence. This would be an error of law and would violate the accused's presumption of innocence.

[64] The role of the court martial is to determine whether or not the alleged offences have been proven beyond a reasonable doubt and in many cases the Court may never be able to determine what exactly happened.

[65] Although much of the factual evidence of both the accused and J.P. can be reconciled, J.P.'s allegation that while dancing the accused kissed her without her consent, is what is contested. Although there were no witnesses to support this specific allegation, there is no legal impediment to a Court convicting an accused based on her uncorroborated evidence, provided the prosecution proves the particulars and the elements of the offence to the evidentiary standard of proof beyond a reasonable doubt.

[66] In a case like this where there is really only the testimony of the complainant that the Court is being asked to rely upon, I must scrutinize the testimony of the complainant to determine whether, based on that evidence alone, the guilt of an accused has been proven beyond a reasonable doubt. It is important that all members understand that the court martial is the first time the prosecution's evidence is vigorously challenged and the accused puts forward his own defence.

[67] Vigorous cross-examination by the defence is not intended to harass or humiliate a complainant who comes forward. In fact, cross-examination is a necessary element of the criminal proceedings. If cross-examination by the defence is not allowed, the evidence will not be fairly tested. The Court is always mindful of the dangers in permitting cross-examination from going too far and there are specific evidentiary rules that protect against it; however, cross-examination is the main tool for challenging testimony. In *R. v. Osolin*, [1993] 4 S.C.R. 595, Cory J. reviewed the relevant authorities and, at page 663, explained why cross-examination plays such an important role in the adversarial process particularly, though of course not exclusively, in the context of a criminal trial:

> There can be no question of the importance of cross-examination. It is of essential importance in determining whether a witness is credible. Even with the most honest witness cross-examination can provide the means to explore the frailties of the testimony. For example, it can demonstrate a witness's weakness of sight or hearing. It can establish that the existing weather conditions may have limited the ability of a witness to observe, or that medication taken by the witness would have distorted vision or hearing. Its importance cannot be denied. It is the ultimate means of demonstrating truth and of testing veracity. Cross-examination must be permitted so that an accused can make full answer and defence. The opportunity to cross-examine witnesses is fundamental to providing a fair trial to an accused. This is an old and well established principle that is closely linked to the presumption of innocence.
> [Citations omitted.]

[68] The same is true for the testimony of the accused. Although the accused is not required to take the stand in his own defence, when he does, he opens himself up to cross-examination by the prosecution to the same level of scrutiny that the complainant and other witnesses undergo.

[69] This Court benefitted from the artful and very skilful cross-examination conducted by both the prosecution and the defence on both the accused and the complainant, testing their evidence and revealing frailties and inconsistencies in their respective testimonies in comparison with the evidence as a whole. With respect to the

first two charges, the evidence surrounding the alleged kiss or kisses before the Court is what is contested.

Assessing conflicting versions

[70] A finding that a witness is credible does not require a judge to accept all the witness's testimony without qualification. Further, a finding that a witness is credible does not mean that all his or her testimony is reliable and credibility is not co-extensive with proof (see *R. v. Clark*, 2012 CMAC 3, paragraph 47). Accordingly, a court may accept or reject, some, none or all of the evidence of any witness who testifies in the proceedings.

[71] In fact, a witness may be completely sincere and speaking to the truth as that witness believes it to be, but he or she may have completely different perceptions of the same event. Witnesses will often see and hear things very differently. Discrepancies in testimony or with other aspects of the evidence does not necessarily mean that the witness's testimony should be discredited. Discrepancies in trivial matters may be completely irrelevant. Due to a number of reasons including, but not limited to, intoxication, the passage of time, memory, their state of wakefulness or the lighting, the actual accuracy of the witness's account may not be reliable. So, in effect, the testimony of a credible or an honest witness may be nonetheless unreliable (see *R. v. Morrissey*, [1995] 97 CCC (3d) 193).

[72] In assessing a case with competing versions of what happened, credibility is a central issue and in a case where the accused has testified, the Supreme Court of Canada (SCC) recommends that the issue be considered in three steps, commonly referred to as the "*W.(D.)* instruction" found in *W.(D.),* at page 758.

> (a) first, if I believe the evidence of Lieutenant(N) Clancy, I must acquit;
>
> (b) second, if I do not believe the testimony of Lieutenant(N) Clancy, but I am left in reasonable doubt by it, I must acquit; and
>
> (c) third, even if I am left in doubt by the evidence of Lieutenant(N) Clancy, 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.

[73] In *R. v. H. (C.W.)*, [1991] 68 C.C.C. (3d) 146 (B.C. C.A.), 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."

Credibility of J.P.

[74] J.P. testified clearly with respect to the evidence that she could recount, and when she could not recall something she said so. She admitted to being tired on the evening and morning in question because they had just returned from the sea phase of the training. She also admitted to consuming a significant amount of alcohol on the evening in question and to blacking out.

[75] Under both direct and cross-examination, J.P. was calm, reasonable and not argumentative. She did not try to hide anything or embellish what happened to her. However, the Court found that in her testimony, she had a tendency to continually underplay her own conduct, desires and subjective feelings that she may have honestly held and displayed at the time of the alleged events. As an example, her testimony on how they were dancing was significantly underplayed in comparison to the evidence recounted by the prosecution's witnesses Sub-Lieutenant Gagnon and Sub-Lieutenant Hennerbichler. When defence counsel confronted her on her own active participation in the dancing by grinding against the accused, she was embarrassed, but without explaining why, she conceded that her conduct may have appeared that way.

[76] At first, while under cross-examination, when she was specifically asked about details that were embarrassing and intimate, she responded overwhelmingly by saying that she did not recall. Her inability to recall was so persistent that the defence asked her specifically if she had memory problems. The Court accepted as a fact that her memory was fragmented, which is understandable based on the combination of her level of tiredness and her alcohol consumption during the evening in question, as well as the time that has passed since the alleged incident.

[77] Notwithstanding her inability to recall most details that occurred both before and after the alleged kisses, J.P. unswervingly stated that the accused kissed her on the neck while they were dancing and that she did not consent to it. J.P. testified that although she recalls dancing and talking with the accused, she blacked out after the alleged kisses and has no memory of what followed until she woke up the next morning.

[78] She was challenged by defence on the inconsistency in her statement made to the MPs when she told them that Sub-Lieutenant Gagnon and Sub-Lieutenant Hennerbichler witnessed the kisses. In response, she clarified that what she meant was that they were both present at the time and she assumed they saw it.

[79] However, defence questioned how her version could make sense when she testified that she did not remember events that the Court determined unfolded both before and after the alleged timing of the kiss and when she blacked out.

[80] As the cross-examination progressed, J.P. provided what the Court found to be a truthful and consistent recollection of what unfolded in the weeks after the mess dinner in question. Although she was hesitant to admit very intimate and embarrassing details, her effort to be truthful confirmed her as a credible witness with respect to those details she could remember.

[81] With respect to the post-offence conduct, the Court found J.P. clearly accounted for why she made certain decisions in her interactions with the accused, but once again, the Court found that when compared to the evidence of the whole, in her testimony, she underplayed what the evidence suggests were her subjective feelings at the time.

[82] When assessing an offence that is akin to a sexual assault but is particularized as either disgraceful conduct under section 93 of the *NDA* or conduct to the prejudice of good order and discipline under section 129 of the *NDA*, the applicable provisions set out in the section 276 regime regarding sexual activity within the *Criminal Code* are not automatically triggered. However, in the case of *R. v. Barton*, 2017 ABCA 216, (reversing in part by the Supreme Court of Canada in *R. v. Barton* 2019 SCC 33), the Alberta Court of Appeal confirmed that section 276 of the *Criminal Code* was not limited to instances in which accused was "charged" with listed offences. It held that it applied to proceedings conducted in relation to or in connection with a listed offence "in respect of" a sexual offence or when a sexual offence was underlying, predicate or lesser included offence such as under s. 231(5) of the *Criminal Code* and unlawful act manslaughter. As such, in *Barton*, sexual activity that occurred the night before the deceased died was caught by section 276 of the Code as it was evidence of prior sexual conduct.

[83] More specific to the charges before the court, in *Barton*, the Alberta Court of Appeal ruled that if section 276 does not apply directly, the trial judge should nevertheless conduct a similar admissibility analysis under the common law evidentiary principles set out in *R. v. Seaboyer*, [1991] 2 S.C.R. 577. In *Seaboyer*, the Supreme Court of Canada articulated common law principles governing the admissibility of sexual activity evidence.

[84] The common law principles enunciated in *Seaboyer* provide critical guidance to military judges when assessing allegations of sexual misconduct that are pursued under the *NDA*, rather than under the *Criminal Code*.

[85] The following were suggested guidelines for the reception and use of sexual conduct evidence, not judicial legislation cast in stone, but an attempt to describe the consequences of the application of the general rules of evidence governing relevance and the reception of evidence:

> 1. On a trial for a sexual offence, evidence that the complainant has engaged in consensual sexual conduct on other occasions (including past sexual conduct with the accused) is not admissible solely to support the inference that the complainant is by reason of such conduct:
>
> > (a) more likely to have consented to the sexual conduct at issue in the trial;
> >
> > (b) less worthy of belief as a witness.
>
> 2. Evidence of consensual sexual conduct on the part of the complainant may be admissible for purposes other than an inference relating to the consent or credibility of the complainant, where it possesses probative value on an issue in

> the trial and where that probative value is not substantially outweighed by the danger of unfair prejudice flowing from the evidence.
>
> By way of illustration only, and not by way of limitation, the following are examples of admissible evidence:
>
> > (A) Evidence of specific instances of sexual conduct tending to prove that a person other than the accused caused the physical consequences of the rape alleged by the prosecution;
> >
> > (B) Evidence of sexual conduct tending to prove bias or motive to fabricate on the part of the complainant;
> >
> > (C) Evidence of prior sexual conduct, known to the accused at the time of the act charged, tending to prove that the accused believed that the complainant was consenting to the act charged (without laying down absolute rules, normally one would expect some proximity in time between the conduct that is alleged to have given rise to an honest belief and the conduct charged);
> >
> > (D) Evidence of prior sexual conduct which meets the requirements for the reception of similar act evidence, bearing in mind that such evidence cannot be used illegitimately merely to show that the complainant consented or is an unreliable witness;
> >
> > (E) Evidence tending to rebut proof introduced by the prosecution regarding the complainant's sexual conduct.
>
> 3. Before evidence of consensual sexual conduct on the part of the victim is received, it must be established on a voir dire (which may be held in camera) by affidavit or the testimony of the accused or third parties, that the proposed use of the evidence of other sexual conduct is legitimate.
>
> 4. Where evidence that the complainant has engaged in sexual conduct on other occasions is admitted on a jury trial, the judge should warn the jury against inferring from the evidence of the conduct itself, either that the complainant might have consented to the act alleged, or that the complainant is less worthy of credit.

[86] Applying the above principles, the Court would not normally have permitted evidence of additional sexual activity unrelated to the first two charges, however the prosecution chose to pursue a third charge within the same court martial where the court found that the evidence of a second incident of sexual activity was required to prove the allegation set out in the charge. Hence, the probative value of the evidence of the second incident outweighed the prejudice as it was critical to the prosecution in proofing the third charge.

[87] After discussion with both counsel, the court permitted the evidence of the second incident of sexual activity to be used for the sole evidentiary purpose of matters related to the third charge. The Court was particularly careful not to draw an inference that because of a second incident of sexual activity, that J.P. was more or less likely to consent to the first encounter or vice versa. Further, the Court also permitted the use of the evidence of the second incident of sexual activity in the strict context of the court’s

assessment of whether the accused abused his authority, thereby vitiating any consent of the complainant. In addition, there was some evidence that inadvertently slipped into evidence during the cross examination of J.P. with respect to the complainant's use of Tinder, which the Court immediately stopped and instructed itself to disregard. It was not considered as evidence in any of the charges.

[88] In short, I found J.P. to be a very brave witness, but due to her level of intoxication at the time of the allegations set out in charges 1 and 2 and her inability to recall important details, compounded by the fact that she testified to blacking out and not remembering a significant amount of what unfolded, her evidence given on the first two charges did raise concern with respect to its reliability.

[89] I want to be clear in saying that I felt J.P. was making every effort to be honest, but it was her fragmented memory regarding the event described in charges 1 and 2 and what appeared to be latent regret which coloured her testimony and required the Court to be particularly cautious in weighing her evidence.

Credibility of the accused

[90] The accused testified in a straightforward, logical and coherent manner. He did not hesitate to admit facts that were embarrassing or which cast him in a negative light.

[91] The prosecution submitted that he had a selective memory with respect to certain events that occurred on the evening in question, but conveniently had no memory of the alleged non-consensual kiss. He argued that he was able to recount many details regarding a discussion about a book that J.P. was interested in, his discussions with his colleague and what specific things he did on the evening in question, but not the specific conduct before the Court.

[92] The prosecution argued that his testimony revealed skilful exaggeration of details with partial suppression of the truth, being his personal acknowledgement of J.P.'s level of intoxication. He argued that the accused should have been aware of how tired J.P. was, as well as her level of intoxication. The prosecution submitted that the accused was twice J.P.'s size and after having spent hours with her, drinking roughly drink for drink, he had to have been aware of her signs of impairment and if he was not, he was being wilfully blind.

[93] Although the Court accepts the prosecution's characterization of what the accused should have known in terms of J.P's alcohol consumption, there is little evidence supporting when the alleged non-consensual kissing occurred. We know that the accused did not arrive at the Welland room before 0100 hours and we know from J.P.'s testimony that she distinctly remembers that Sub-Lieutenant Gagnon and Sub-Lieutenant Hennerbichler being present when it occurred. Using these facts to anchor the timeline, it would lead the Court to believe, based on the whole of the testimony, the alleged kissing would have occurred at some point between 0100 hours and 0430 hours which is within a three and a half hour span of drinking.

[94] Overall, I found the accused to be relatively credible and honest in his assertions regarding the alleged non-consensual kiss, but despite this finding, I was not prepared to accept all his testimony. I found that his responses to questions on the third charge regarding whether he was in a relationship to be evasive and calculated.

[95] Given his years of service, both serving in the regular and reserve forces, his experience serving on international operations and his experience working in the naval divisional system, I found it troubling that he suggested he was not aware it was impermissible for an instructor to have clandestine sexual relations with his student.

[96] The accused testified that this was all new territory for him; however, with the greatest of respect, I do not find that assertion credible. Based on his testimony and his military experience recounted, the Court noted that he has served in the Navy during a time when women have always served alongside men. He would have been a MARS student at Venture while women attended his course and women would have been on other courses he attended, including the operational ships he sailed in. How would he have felt if he knew that his CTO was secretly sleeping with other candidates? Simply by passing his command boards, which he testified to doing, his success confirms that he had an understanding of the command responsibilities expected of officers within the divisional system. In essence, by denying any knowledge of the parameters required to be respected between instructors and students, it suggests that this type of expectation is absent within the Navy's divisional system, which I find very difficult to believe and I can't accept.

[97] I appreciate that he is currently a reservist who retired from his full-time regular force service and may not have signed as having acknowledged, read and understood the various DAODs and Operation HONOUR; however, for reasons I will explain later, the expectations and duties of an officer working within a divisional system exist independent of those documents.

Credibility of Sub-Lieutenant Gagnon and Sub-Lieutenant Hennerbichler

[98] I found both Sub-Lieutenant Gagnon and Sub-Lieutenant Hennerbichler to be both credible and reliable witnesses.

[99] Neither of these witnesses displayed bias towards either side and they each testified in a straightforward manner providing meaningful evidence in corroborating important facts and observations of how J.P. and the accused were interacting around the time when the alleged incident occurred. Neither Sub-Lieutenant Gagnon nor Sub-Lieutenant Hennerbichler were candidates on the same MARS III course, but they knew J.P. as she often spent time with members on their MARS IV course. Sub-Lieutenant Hennerbichler confirmed that in terms of a one-on-one friendship between the two of them, there was not really anything.

[100] Sub-Lieutenant Gagnon and Sub-Lieutenant Hennerbichler were the last individuals present when J.P. and Lieutenant(N) Clancy were still dancing in the early morning in question. Their individual testimonies were consistent in describing the type of dancing that the accused and J.P. were engaged in as well as their individual perceptions of the dancing. Based on their respective testimonies, J.P. and Lieutenant(N) Clancy were intimately dancing, with Lieutenant(N) Clancy snuggled behind J.P. with both their hips swaying and grinding.

[101] Although the Court noted that there was some discrepancy in their evidence with respect to timings, whether they asked J.P. if she wanted to leave with them, as well as what J.P was wearing, these inconsistencies were understandable given the time frame that has elapsed as well as the fact that they would individually have different reasons to remember some details rather than others.

Credibility of defence witnesses – Sub-Lieutenant Ferguson and Acting Sub-Lieutenant Nguyen

[102] The Court found the defence witnesses, Sub-Lieutenant Ferguson and Acting Sub-Lieutenant Nguyen were both credible and reliable with respect to the evidence that they could testify to. Although they were of limited assistance with respect to the alleged conduct before the Court, they testified in an unbiased manner and recounted details on the course that were helpful in assisting the Court in determining whether or not the accused may have abused his position of authority.

Overall analysis of charges 1 and 2

Did the prosecution prove the alleged kisses took place and the complainant's absence of consent with respect to it?

[103] The whole of the evidence before the Court was consistent with the fact that although J.P. and the accused knew each other from their instructor/candidate relationship on the MARS III course, until the evening of 28 July, 2017, J.P. and the accused were never romantically involved.

[104] On the facts of this case, not only is the alleged conduct in the particulars disputed, but the absence of consent is a live issue. Hence, the Court proceeded first to assess if the prosecution proved beyond a reasonable doubt that the alleged act occurred and, if so, whether the complainant, J.P. did not consent or, alternatively, whether such consent was vitiated and the accused was aware that she did not consent and kissed her despite this.

Did a kiss occur?

[105] It is important to remember that the burden of proof remains on the prosecution, even in a case such as this one where the complainant does not recall very much.

Lieutenant(N) Clancy does not bear the burden of proving that the incident did not happen or that J.P. consented.

[106] J.P. testified that the three or four kisses took place while the two were dancing, with the accused pressed against her back in what the Court would describe as a spoon-type position. J.P. told the Court that she did not push the accused away and let him do it as she did not consider it too serious at the time. The Court was particularly careful not to conflate her lack of resistance with the fact that the incident did not occur. J.P. testified that the kisses all occurred during one song and that both Sub-Lieutenants Gagnon and Hennerbichler were both present. Although all the evidence suggests they were both present during the time the two were dancing, and they both admitted to paying close attention to the two dancing, neither of them witnessed any kissing nor attempts by the accused to kiss J.P.

[107] Lieutenant(N) Clancy testified that he does not recall kissing J.P. on the neck while they were dancing. As suggested by the prosecution, and not dismissed as a possibility by the accused, it is also entirely possible that, in the position they were dancing, the accused attempted to speak into her ear and that could also have been confused with a kiss.

Absence of consent

[108] Both parties made submissions on the issue of consent, which included references to the relevant portions of *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 and the *Criminal Code*. The charge before the Court is not a sexual assault, but rather the primary charge is disgraceful conduct, where the particulars essentially set out an allegation akin to a sexual assault.

[109] Consequently, the consent analysis for sexual assault set out in common law in the case of *Ewanchuk* is particularly instructive. The consideration of whether there was consent relates to the subjective intent of J.P. and whether she voluntarily and knowingly agreed to be kissed. Further, the prosecution submitted that if the court finds that J.P. consented, then it argued that such consent was vitiated.

[110] In *R. v. Hutchinson*, 2014 SCC 19, [2014] 1 S.C.R. 346, the majority reasons penned by McLachlin C.J. and Cromwell J. suggested courts engage in a two-step approach analysis in cases where consent may be an issue. The Court recommended at page 347, that the trial judge should:

> determine whether the evidence establishes that there was no 'voluntary agreement of the complainant to engage in the sexual activity in question' . . . If the complainant consented, or her conduct raises a reasonable doubt about the lack of [consent], the second step is to consider. . . whether there are any circumstances that may vitiate [her apparent consent].

[111] With respect to the first step described in the above approach set out in *Hutchinson*, the court must determine whether J.P. agreed to being kissed by the

accused. Consent must be given at the time of the conduct, with respect to the specific act, and passivity does not equate to consent. Further, consent cannot be assumed or implied.

[112] In the first step of a consent analysis, the fundamental question to ask: did the complainant want the accused to do what he did at the time he did? In other words, did J.P. want to be kissed by the accused at the time they were dancing? It is as simple as that.

[113] J.P. testified that she did not want the accused to kiss her. However, defence argued that her conduct before, during and after the dancing raises a reasonable doubt of the veracity of her assertion. Hence, the Court's determination of the absence of consent is a matter of credibility to be weighed in light of all the evidence, including any ambiguous conduct J.P. may have displayed.

[114] As stated at paragraph 29-30 in *Ewanchuk*:

> While the complainant's testimony is the only source of direct evidence as to her state of mind, credibility must still be assessed by the trial judge, or jury, in light of all the evidence. It is open to the accused to claim that the complainant's words and actions, before and during the incident, raise a reasonable doubt against her assertion that she, in her mind, did not want the sexual touching to take place. If, however, as occurred in this case, the trial judge believes the complainant that she subjectively did not consent, the Crown has discharged its obligation to prove the absence of consent.
>
> The complainant's statement that she did not consent is a matter of credibility to be weighed in light of all the evidence including any ambiguous conduct. The question at this stage is purely one of credibility, and whether the totality of the complainant's conduct is consistent with her claim of non-consent. The accused's perception of the complainant's state of mind is not relevant. That perception only arises when a defence of honest but mistaken belief in consent is raised in the *mens rea* stage of the inquiry.
> [My emphasis.]

[115] In deciding whether or not there was an absence of consent, difficulties present themselves when a complainant, due to fatigue and excessive drinking of alcohol does not have a reliable memory of all the events in question. J.P. testified that she essentially blacked out after the alleged kisses. The Court was particularly mindful of the fact that there is no typical manner upon which a victim will behave; however, in light of J.P.'s admitted memory lapses and the evidence of other witnesses, the court is required to assess whether the totality of J.P.'s conduct was consistent with her claim of non-consent.

[116] In light of the doubt raised by the accused and other witnesses, in conducting my analysis regarding the likelihood that J.P. consented, I looked not just at J.P.'s evidence that she did not consent, I also examined the whole of the evidence from the other witnesses and all the surrounding circumstances, including any circumstantial evidence that could assist the Court.

[117] Defence argued that consent need not be by spoken word, but rather he argued that actions speak louder than words and that the unrebutted evidence was that while dancing, she was pressing back on the accused's groin, grinding back and forth against him and that it was reasonable, with the way they were dancing, that she might be open to a kiss.

[118] Both Sub-Lieutenant Gagnon and Sub-Lieutenant Hennerbichler gave evidence that did not just raise doubt as to whether the kisses happened, but their evidence on J.P.'s demeanour and conduct at the critical time is also capable of raising doubt that if the kisses did happen that J.P. did not consent.

[119] J.P. testified that, after the kisses, she remembers very little other than waking up the next morning. The accused is not charged with anything other than kissing J.P. while dancing without her consent.

[120] The Court noted that there was post-conduct evidence that, in the days and weeks after the first encounter, the accused obtained J.P.s cell number and sent her texts inviting her to have drinks with him. J.P. testified that she consistently found excuses to avoid meeting up with him. This evidence supports the fact that under normal circumstances, she was neither interested in the accused nor was she afraid to refuse his advances. However, notwithstanding this, the test is not whether she later regretted her decision or whether she would have made the same decision if she had been sober, but rather, the test is whether, at the time that he allegedly kissed her, she did not want to be kissed by him.

[121] When I reviewed the evidence of J.P. on the first two charges against the evidence as a whole, I found several issues with the overall reliability of her evidence. In their own ways, Sub-Lieutenants Gagnon and Hennerbichler both described that they paid particular attention to the accused and J.P. dancing as one of them stated that they were the "only thing happening" in the room. Sub-Lieutenant Gagnon described J.P. and the accused as voluntarily dancing together with no distance between them as they mutually rubbed up against each other.

[122] At the time of the alleged offence, although there was no pre-existing personal relationship between J.P. and the accused, witnesses reported that the two danced together for a lengthy period of time, estimated to be at least an hour.

[123] The accused testified to dancing exclusively with J.P. and, as the night wore on, he admitted that they danced more intimately, with him positioned behind her, with his right hand on her right hip and his left hand on her left hip and her hand holding his. He explained that they were swaying their hips together and grinding.

[124] Under cross-examination, J.P. confirmed that the nature of the way they were dancing, with her bum pressed against the front of the accused, it could be perceived as grinding. Sub-Lieutenant Hennerbichler explained that she was not comfortable with the way they were dancing, explaining that she has been dating her boyfriend for four years and they do not dance like that. This evidence infers that they were voluntarily

dancing in a very intimate and provocative way, which the Court accepted would have attracted the attention of the two witnesses because it was a CTO dancing with a candidate.

[125] When Sub-Lieutenants Gagnon and Hennerbichler finally departed in the early morning hours, both the accused and J.P. were still dancing together, in what they described as a close and intimate manner. Sub-Lieutenant Gagnon testified that when they were departing, he asked J.P. if she wanted to leave with them, but she expressed a clear and unequivocal "no", so they did not force it and left. When asked why he asked J.P. if she wanted to leave, he explained that he knew J.P. was not in a relationship with Lieutenant(N) Clancy and he thought she might not want to be there with him. He explained that J.P. gave a clear "no" and did not appear upset. When asked to describe J.P.'s level of intoxication when they departed, he said she was not sober.

[126] Under cross-examination, when Sub-Lieutenant Hennerbichler was asked whether they had asked J.P. to leave with them, she said no. When asked if J.P. could see they were leaving, she said yes. She explained that it did not appear that J.P. wanted to leave nor did it appear that she was being held against her will. She stated it looked like J.P. was having a good time. When asked if she would have noticed if J.P. was trying to distance herself from the accused, she confirmed she would be able to tell, but in her assessment she was not. In her view, J.P. and Lieutenant(N) Clancy were in their own little world.

[127] In short, based on the independent observations of both Sub-Lieutenants Gagnon and Hennerbichler, J.P. appeared to be having a good time and in their assessment did not, appear to be in distress.

[128] With both J.P. and the accused dancing together in such an intimate way, with him positioned behind her, embracing her, the Court is firstly not sure whether a kiss actually took place and, if there was contact, whether it was the result of a kiss or an attempt to communicate while standing so close. Keeping in mind that J.P. was insistent that Sub-Lieutenants Gagnon and Hennerbichler either witnessed the kisses or alternatively were present when the kisses occurred and although they testified to paying very close attention to the accused and J.P. dancing together, neither of them witnessed any kissing or attempts by the accused to kiss J.P. Further, both Sub-Lieutenants Gagnon and Hennerbichler were clear in stating that when they left, J.P. and the accused were still dancing together and having a good time.

[129] While I certainly do not disbelieve J.P., when I weigh her evidence against the evidence as a whole, it does not leave me with the level of confidence required to determine beyond a reasonable doubt that the kisses actually occurred and even if they did that J.P. did not consent to being kissed at the time of the events. It accepts that it is possible that a fleeting type kiss might have taken place, however, based on the witness testimony of the totality of J.P.'s conduct during the dancing and after the alleged kiss to be inconsistent with her claim of non-consent.

[130] In case the court is wrong on whether a kiss occurred, the court went further in its analysis and found that the prosecution did not prove the absence of consent beyond a reasonable doubt. Consequently, in accordance with the guidance set out in *Hutchinson* and the position advocated by the prosecution, since J.P's conduct raised some doubt about the lack of consent, the court proceeded to assess whether J.P.'s consent was vitiated.

Was J.P.'s consent vitiated?

[131] As discussed previously, although the *NDA* is silent on consent, in interpreting whether or not consent is vitiated, the prosecution submitted that, in such a situation, the Court must also rely upon the common law. The prosecution argued that based on the jurisprudence established in *Ewanchuk,* subsections 265(3) and (4) of the *Criminal Code* simply codified the long-standing common law rules (see paragraph 26).

[132] The Court notes the wording in section 273.1 of the *Criminal Code* on consent supplements the definition of consent in section 265 which defines assault for all of the assault offences, including sexual assault. However, section 273.1 of the *Criminal Code* goes further and expands the circumstances set out in section 265(3) of the *Criminal Code* for assault. It essentially establishes that agreement to engage in activity cannot be reached where a complainant is incapable of giving consent as a result of an abuse of a position of trust power or authority, the complainant expresses lack of consent or the complainant, having originally consented, expresses a change of mind.

[133] Further, after hearing the submissions from the prosecution, the court accepted as fact that in recent years, subsection 265(3) and section 273.1 are codifications of the common law and provide some assistance to this Court in the absence of guidance on consent within the *NDA.* As LaForest J. stated in In *R. v. Audet*, [1996] 2 S.C.R. 171, at paragraph 20:

> The relative positions of the parties have always been relevant to the validity of consent under Canadian criminal law. The common law has long recognized that exploitation by one person of another person`s vulnerability towards him or her can have an impact on the validity of consent.
> [Citations omitted.]

[134] Since J.P's conduct raised some doubt about her lack of consent, the Court then proceeded to examine whether her consent was vitiated because the accused induced J.P. to engage in the activity by abusing his position of trust, power or authority or in his exercise of that authority.

Was consent vitiated?

[135] The prosecution argued that because the accused was J.P.'s instructor, J.P. did not push him away and let him kiss her as she feared that things might go badly for her and she might receive a reprimand. Relying upon this position, the prosecution argued that if the Court finds that the complainant consented, such consent was vitiated by the

fact that the accused was in a position of trust or authority as a 35-year-old instructor, senior in rank with power over the complainant being a 22-year-old Naval Cadet.

[136] In *R. v. Alsadi*, 2012 BCCA 183, at paragraph 19, the Court quoted and relied upon the following distinction between the differences between subsection 265(3) and subsections 273.1(1) and (2):

> [19] In *R. v. Lutoslawski*, 2010 ONCA 207, 326 D.L.R. (4th) 637, aff'd [2010] SCC 3 S.C.R. 60, the Ontario Court of Appeal addressed the scope of s. 265(3)(d) as compared to that of paragraph 273.1(2)(c) at paras. 12 and 13:
>
> > I agree with Crown counsel's submissions that s. 273.1(2)(c) is broader than s. 265(3)(d). Section 273.1(2)(c) speaks not only to the abuse of a position of authority but also to the misuse of a position of power or trust. The section addresses the kinds of relationships in which an apparent consent to sexual activity is rendered illusory by the dynamics of the relationship between the accused and the complainant, and by the misuse of the influence vested in the accused by virtue of that relationship. The term "exercise of authority" in s. 265(3)(d) suggests a coercive use of authority to overcome resistance to a consent. Inducing consent by abusing the relationships set out in s. 273.1(2)(c) does not imply the same kind of coercion. An individual who is in a position of trust over another may use the personal feelings and confidence engendered by that relationship to secure an apparent consent to sexual activity.
>
> The distinction between s. 273.1(2)(c) and s. 265(3)(d) was also addressed in R. v. Makayak, 2004 NUCJ 5 (CanLII) at para. 70:
>
> > > Section 273.1(2)(c) broadened the scope of criminal conduct to include breach of trust and power. However, the section also added the words "induces the complainant ... by abusing a position of trust, power, or authority". Does this mean there has to be some form of coercion? In my view, these words remove the need for coercion that may be present for section 265(3)(d). It is clear from *R.* v. *Matheson* [Citation omitted.] that it is the exploitation of the imbalance that is the key consideration. Section 273.1(2)(c) was passed a number of years after the courts had struggled with section 265(3)(d). Parliament had the opportunity to consider the case law that had developed up to that point. The use of the word "induces" introduces a more subtle form of pressure that can be inferred from the circumstances of the exercise of the power or authority.

[137] The ultimate determination of whether Lieutenant(N) Clancy induced J.P. to engage in the kisses by abusing a position of trust, power or authority begins by first deciding whether Lieutenant(N) Clancy occupied either a position of trust or authority.

Was Lieutenant(N) Clancy occupying a position of trust, power or authority over J.P.?

[138] Although prosecution submitted that the accused was in a position of trust, he provided little explanation for the nature of the trust relationship nor any particular court martial or CMAC precedent for the Court to rely upon. After an inquiry by the Court, the prosecution did provide it with the court martial case of *R. v. Simms*, 2016 CM 4001; however, the context of that case is very different from the case before the

Court and it provides little assistance. As courts have repeatedly found, the determination of whether an accused occupies a position of trust is not easy and there is no straightforward definition. Courts have found it more applicable when considered in the context of accused persons interacting with children or persons connected by some level of dependency.

[139] The determination as to whether someone is in a position of trust requires a contextual analysis which must be supported both objectively and subjectively, having regard to all the circumstances (see paragraph 62 of *R. v. Kiared*, 2008 ABQB 767). In *Audet*, the SCC provided some guidance on what constitutes a position of trust, confirming the difficulty in defining what it is at paragraph 37:

> . . . the concept of a "position of trust" is difficult, perhaps even more than that of a "position of authority", to define in the abstract in the absence of a factual context. For this reason, it would be inappropriate for this Court to try to precisely delineate its limits in a factual vacuum, especially since very few judicial decisions have so far commented on this relatively recent provision of the *Criminal Code*.

[140] Without going into a longer analysis, the Court was provided with no evidence nor submissions, upon which it could conclude that the accused occupied a position of trust with respect to J.P., who was an adult.

Abuse of authority?

[141] In order to prove that J.P.'s consent was vitiated by an abuse of authority, there must be some evidence that demonstrates a clear power imbalance between the accused and J.P. and the exploitation of that imbalance by him in determining whether J.P.'s apparent consent was obtained through either inducement or coercion.

[142] The first step in assessing whether the accused might have abused his authority first requires confirmation that he held a position of authority. Despite the prosecution raising the argument that J.P.'s consent was vitiated by an abuse of authority, the Court was not provided with a job description nor evidence to describe the actual authorities held by Lieutenant(N) Clancy. The evidence the Court heard came from very young junior officers who were students on the same course, rather than authoritative members of the divisional system who could explain exactly the accused's role and his authorities. Although the evidence of these very junior officers was important to understand the subjective view of the students, including J.P., in the future, the Court would also benefit from evidence and testimony from someone who could speak specifically to the role and authorities that an accused holds with respect to a complainant.

[143] From the evidence that came out in the testimony of the accused himself, he voluntarily accepted a four-month full-time Class B contract to fill the position as the CTO for the MARS III course. It was also clear from the evidence that although Lieutenant(N) Clancy did have a significant amount of influence in the day-to-day administration of the MARS III course, he did not fill a functional role as a divisional

officer within the school nor with respect to the students on course. Further, the evidence suggests that there was a set procedure for assessing candidates who were struggling and a set protocol whereby a candidate would undergo a training review before a candidate could fail. As such, his power to terminate a student on his own accord was functionally limited. Aside from the power to evaluate the students on the courses that he taught, he did fulfil the role of being the focal point, aggregating feedback and the evaluations that the candidates received from other instructors. He held the role of providing the students with ongoing feedback and providing them with tips on how they could improve their performance and be successful. From that perspective, he did have significant influence on how they would perform overall. It was not clear from the evidence whether this influence was from his own personal approach or whether it was built into the position he held as CTO, but the evidence suggests that his input and guidance were both valuable, appreciated and respected by the candidates.

[144] The course candidates were reservists, who primarily served during the summer months while they were not attending post-secondary education. There was no evidence to suggest that their success or course report would qualify them for specific postings to a desired ship or a specific geographical location. The MARS III course was an important and pivotal step in the training of a MARS officer, but there was no evidence that its successful completion, on its own, would trigger major career consequences other than the right to continue on in their training, which is not insignificant itself.

[145] Although the Court was not provided a definition for what constitutes a position of authority, jurisprudence suggests that when an individual holds a position of power or authority over another, then this may be sufficient. The context requires that the person in authority, being Lieutenant(N) Clancy was empowered to provide direction to J.P., the complainant who was in a position where she was required to follow the direction or orders given by him. Based primarily on his rank, his position of influence over the students and the fact that he was older than the complainant, and the subjective viewpoint of the students, including J.P., I accepted that he held a position of authority.

[146] However, it is important to start the next part of the analysis by clearly enunciating that the prosecution must prove beyond a reasonable doubt that Lieutenant(N) Clancy induced J.P.'s apparent consent to the subject matter of the charge, being a kiss, by an actual abuse of his authority, as explained by the Ontario Court of Appeal in *R. v. F.L.*, 2009 ONCA 813, at paragraph 5.

[147] The determination of whether apparent consent is vitiated by an accused abusing a position of authority first requires an examination of the nature of the relationship between the accused and the complainant, as well as the specific circumstances surrounding the apparent consent to the conduct in issue. There is no closed list of factors relevant to the assessment of the nature of the relationship and no one factor is more determinative of the nature of the relationship then the other.

[148] Without defining quantifiable parameters, the prosecution's position would suggest that any consensual contact occurring between members of different ranks, is automatically criminal, which surely cannot be the case.

[149] In this case, the accused was a Lieutenant(N) and the complainant was a naval cadet and there was also a significant age gap between the two. Although rank difference, by itself, does not necessarily amount to a clear power imbalance, when placed in the context of an instructor/student relationship in a school, there was clear imbalance.

[150] It is important to be aware that for consent to be vitiated, there must be something that induced the junior person to engage in conduct or submit to conduct which he or she did not want to do, but did only as a result of the abuse of a position of authority.

[151] In determining whether consent was induced from an abuse of the accused's authority, it is helpful to review the word "induces". The word "induces" suggests a subtle form of pressure that can be inferred from the circumstances of the exercise of the power or authority. "Induce" is defined in the *Concise Oxford English Dictionary* as:

> "induce / succeed in persuading or leading (someone) to do something. 2 bring about or give rise to. …"

[152] Without facts, it is difficult to clearly delineate what type of action would give rise to "inducement". In a military context it is clear that a circumstance where a senior-ranked person, who is in a position of authority and threatens a subordinate explicitly in a quid pro quo scenario is without question an abuse of one's authority. Similarly, if by the sheer nature of his personal attention, he provided J.P. access to certain privileges that the other candidates did not have access to, then arguably, it could provide the necessary basis. For example, if he only offered to provide J.P. with assistance, insight into exams and tips on how to succeed on the course that was not available to the other candidates, then this could provide indicia of an abuse. However, this was not the case. The overwhelming evidence of all the witnesses, whether from the prosecution or the defence, was that the accused was perceived as very fair and he regularly met with any student needing assistance.

[153] All relationships within the CAF workplace, by their mere existence, are hierarchical. Within the hierarchical system of military command, there is always one party who is more powerful than the other. To put the required analysis into perspective, consider a case where there is a senior-ranked officer who has enormous power to affect the career, promotion or a geographical posting of a junior officer. Control and authority are inherently present in that senior-ranked officer even if he or she never once threatens or offers to use the power explicitly. By the sheer nature of the rank differential and the position the individual holds, there will always be an inherent risk that the senior officer could retaliate against the subordinate for turning down his sexual

advances. Consequently, the crux of the issue in this case is whether the mere potential for abuse is sufficient to meet the test of abuse of authority that vitiates consent to sexual activity in two otherwise consenting adults?

[154] The case law is clear that the mere possibility that one individual has the potential to exert power over the other cannot be the test for determining whether a higher-ranked individual abused their position or authority. Hence, the mere fact that Lieutenant(N) Clancy had some limited power and authority over J.P. cannot be the sole foundation for vitiating consent in sexual activity between two otherwise consenting adults. There needs to be some evidence that the sexual activity that occurred between them was induced by the specific abuse or influence of the senior member's authority.

[155] A helpful consideration is to determine whether the senior member used his or her military rank and authority impermissibly to invade the personal space of the junior ranked member. In other words, did the senior ranked person use their work life role or authority to actively pursue and induce the junior ranked member into sexual activity?

[156] With respect to charges 1 and 2, it was never clarified in the evidence as to who asked who to dance nor was there evidence to suggest who instigated the evolution of the dancing to what was described as a very intimate manner. Since the doctrine of abuse of authority seeks to prevent the overstepping of the person in authority, any evidence that Lieutenant(N) Clancy was the initiating party or that he actively pursued J.P. based on a known vulnerability in J.P., then this evidence would become extremely important. Based on the evidence before the court, the event set out in charges 1 and 2 appears to have simply evolved between the two following a mess dinner, during the after party that was described by witnesses as full of fun, drinking and dancing. There was no evidence of any prior planning, discussion or calculated pursuit by Lieutenant(N) Clancy prior to the event in question.

[157] The second question that must be asked is why J.P. consented or alternatively, might have appeared to have consented. Even if the Court finds J.P. to have been a willing participant, the fundamental question is whether she was a willing participant because of an inducement held out by the accused. A contextual view of the evidence from the perspective of J.P. is critical to this assessment.

[158] If the evidence suggested that J.P. was struggling to succeed on the course and for whatever reason, she subjectively believed that Lieutenant(N) Clancy was in a position to sway success in her favour, then depending on the facts, this might present a viable argument. However, there was no evidence that at the time of the event in question, J.P.'s success on the course was in significant jeopardy nor that she believed that interacting with Lieutenant(N) Clancy the way she did could personally assist her.

[159] J.P. testified that she let the accused kiss her because he was her instructor and she feared that, if she rejected him, she might be reprimanded. This assertion was not properly tested nor explored by counsel. Based on the accused's rank and his position, he had no official powers to issue what is commonly known in the CAF as a reprimand, if that was the nature of the fear. Recognizing that at the time of the events, J.P. was a

very young naval cadet, it is distinctly possible that J.P.'s reference to reprimand was in a colloquial sense, however there was simply no evidence to assist the court in understanding what that fear meant to her in substance. It is also not clear if the accused was known to have issued reprimands in the context described by J.P. In other words, was this a real risk or potential outcome if she did not reject the accused?

[160] The evidence of both the accused and J.P. was such that the next morning when they spoke, the accused asked her if she was okay to which he testified that she said "yes". The accused testified that he told J.P. that if she was not okay, he could get another instructor for the course. He testified that he reiterated it again and said he could remove himself from the course. He also testified that he offered not to attend that day's planned activities if it would make her feel more comfortable, to which it was agreed that he should attend. The evidence overwhelmingly supported the fact that there was indeed an option raised by the accused to ensure that J.P. was aware that there was an outlet from his personal influence.

[161] In her testimony, J.P. explained that she did not want to change instructors for the second part of the course which was the part of the training she was most stressed about. She testified that she understood that part of the course to be very difficult and as a francophone undergoing her training in English, she knew it would be even harder for her. She explained that as the CTO, the accused helped all the students, sharing tips on how to pass the course and she expressed concern that if she changed instructors, she would have to adapt to a new instructor and possibly new classmates. The evidence also confirmed that Lieutenant(N) Clancy did not hold an integral role in J.P.'s evaluation for the next phase of training for which she testified that she was most stressed.

[162] Despite the fact that there was no evidence that Lieutenant(N) Clancy did anything to pursue or induce J.P. prior to the events that led to charges 1 and 2, the Court noted that the post conduct evidence suggested otherwise as he did send J.P. private text messages. J.P. told the Court that after the first incident, she received texts from the accused inviting her for drinks. The Court also noted that after the first encounter, J.P. successfully made up excuses and had the courage to deflect Lieutenant(N) Clancy's invitations.

[163] On the examination of the isolated facts in the first two charges, it is clear that J.P.'s consent related to charges 1 and 2 was not induced as a result of an abuse of authority. However what is clear is that by becoming intimate with J.P., his candidate, at the time he did, from that point on, J.P. was particularly vulnerable and the accused opened himself up to serious potential to abuse his authority. The fact that he started to text her afterwards repeatedly inviting her for drinks was problematic. It is for this reason, that fraternization on training courses is prohibited and if relationships do evolve, for the reasons provided above, they must be reported immediately to the chain of command so any potential abuse of authority is pre-empted.

[164] In summary, based on the facts and evidence before the court, the mere existence of the rank differential and the two parties being in an instructor/student

relationship were not, by themselves, based on the facts of this case sufficient to vitiate consent in sexual activity between two otherwise consenting adults. However, the evolution of an unreported relationship between a student and an instructor left the two parties extremely vulnerable to potential abuse and that is exactly what DAOD 5009-1 seeks to prevent.

Conclusion on charges 1 and 2

[165] Now that I have determined that there was no evidence upon which consent might be vitiated, I return to the fundamental legal issues.

[166] The accused is charged with offences under the Code of Service Discipline which demand a criminal standard of evidentiary proof. With respect to charges 1 and 2, the first question I must answer is whether I am satisfied, beyond a reasonable doubt, that the prosecution has discharged its onus of proving the particulars of the offence that the complainant was kissed by the accused and, secondly, that he kissed her without her consent.

[167] In applying the *W. (D.)* instruction to the element of whether the kissing occurred, although I do not accept all the accused's evidence, I must ask myself whether, on the basis of the evidence which I do accept, that the particulars have been proven beyond a reasonable doubt. The determination of these charges depends entirely on the reliability and credibility of the complainant. As I explained earlier, I have concerns regarding the reliability of her evidence when it was weighed against the evidence as a whole.

[168] In short, after careful consideration of all the evidence, this Court is unable to decide whom to believe. I cannot make a finding of guilt based on evidence where I have some doubt about whether it occurred and secondly, whether the complainant did not consent. It is simply not safe to convict.

Third charge

[169] The particulars on the third charge require the prosecution to prove that between 28 July 2017 and 25 August 2017, at or near the Canadian Forces Base Esquimalt, Esquimalt, British Columbia, the accused did evaluate the academic performance of J.P., while he had a personal relationship with her.

Position of the prosecution

[170] The prosecution argued that the accused evaluated J.P.'s performance while he had a personal relationship with her. He argued that although the first part of the course where he had been the primary instructor had concluded, he drafted the comments on her course report and made the final comment assessing her overall leadership qualities. He argued that the alleged conduct is prejudicial to good order and discipline and invited the Court to rely upon its military knowledge and experience to come to this

conclusion. With respect to the charge before the Court, the prosecution asks the court to rely upon the definition set out in DAOD 5009-1 to assist the Court in what constitutes a personal relationship.

Position of the defence

[171] Conversely, defence argued that the prosecution has not placed any evidence before the Court to show that the accused had knowledge of the DAOD on personal relationships and, therefore, the prosecution is unable to rely upon the presumption of prejudice. He further argued that there was no evidence presented on any actual prejudice. With respect to whether or not the accused and J.P. were in a relationship, he questioned whether the existence of two brief encounters constitutes a relationship. Further, he argued that due to the nature of the accused's administrative role as the CTO, from the time they first became sexually involved until the end of the course, he did not evaluate J.P.

Analysis

[172] The Court accepts the evidence that near the end of the MARS III course, the accused and J.P. engaged in consensual sexual relations. However, the issues at play are whether during that time, he evaluated her academic performance and whether the fact that they engaged in sexual relations constituted a personal relationship for the purpose of proving the particulars. With respect to the particular fact that he evaluated J.P., the prosecution relies upon the fact that Lieutenant(N) Clancy did sign J.P.'s course report as Reporting Officer on 24 August 2017. The prosecution's position is that, in signing her course report, he was evaluating her.

[173] Conversely, the defence takes the position that in compiling the course report, Lieutenant(N) Clancy simply aggregated the marks awarded from other instructors. He argued that his role teaching and evaluating the core skills had been completed before they had any encounter.

[174] The definition of personal relationship set out in the DAOD 5019-1 states:

> **personal relationship** (*relation personnelle*)
>
> > An emotional, romantic, sexual or family relationship, including marriage or a common-law partnership or civil union, between two CAF members, or a CAF member and a DND employee or contractor, or member of an allied force. (Defence Terminology Bank, record number 43170)

[175] The *Concise Oxford English Dictionary* defines "relationship" and "evaluate" as follows:

> "**relationship** / **noun 1** the way in which two or more people or things are connected, or the state of being connected. ■ the way in which two or more people or groups regard and behave towards each other. **2** an emotional and sexual association between two people.

evaluate / **verb 1**. . . assess."

[176] Based on the definition within the DAOD and with the assistance of the definitions set out in the *Concise Oxford English Dictionary*, this Court has no problem inferring that if both J.P and Lieutenant(N) Clancy engaged in a sexual encounter, they were connected by this fact and this was a type of conduct intended to be captured within the definition of "personal relationship".

[177] Further, the mere art of aggregating the marks of J.P., in formulating them together to form a picture of her overall assessment, including the drafting of overall remarks that captured her performance and overall leadership potential, is an assessment, which is akin to an evaluation.

[178] I have no problem concluding that the particulars of the offence as drafted have been proven beyond a reasonable doubt. The next issue for this Court is to determine whether the proven conduct amounted to prejudice to good order and discipline.

Is the alleged conduct prejudicial?

[179] In order to prove that the proven conduct is prejudicial to good order and discipline, there are a number of paths.

[180] Firstly, if the prosecution proves the accused had actual or deemed knowledge of DAOD 5019-1 - Personal Relationships and Fraternization, the prosecution will have proven prejudice if the Court is satisfied that the actions of the accused contravened the DAOD. As defence counsel argued, proof of actual or deemed knowledge must be beyond a reasonable doubt and this was not proven. Despite having entered the DAOD 5019-1 as an exhibit to assist the Court with a definition of what constitutes a personal relationship, the prosecution did not tender proof that the accused had either actual or deemed knowledge of the DAOD 5019-1 beyond a reasonable doubt.

[181] Secondly, the prosecution can prove the offence was committed if there is actual evidence of prejudice to good order and discipline based on objective criteria of prejudice or likelihood of prejudice. Defence argued that not a single witness proffered evidence of prejudice. He argued that the evidence was consistent with the fact that he was a good instructor and did everything to assist all the candidates to succeed. The Court noted that even Acting Sub-Lieutenant Maclennan, who defence argued did not like Lieutenant(N) Clancy, testified that he treated all the students fairly.

[182] Lastly, absent direct evidence of actual prejudice, the prosecution can prove prejudice by inference. As part of an inferential reasoning process, the Court must, based on its military experience and general service knowledge, ask whether the proven conduct in this case can be considered conduct to the prejudice of good order and discipline. Using its knowledge and experience, the Court must ask whether, on the totality of the evidence, in the circumstances of the case, prejudice to good order and discipline could be inferred from the facts as proven. This reasoning process should take into account all the contextual circumstances of the case, which includes the

environment where the conduct occurred, the age of the parties, ranks involved and the nature of the conduct itself.

[183] The risk of relationships eroding lawful authority and operational effectiveness is not a new phenomenon in the CAF and, as I explained to counsel during the proceedings, the fact that there is a DAOD on it, is evidence of the requirement to manage the risks associated with the evolution of any type of personal relationship, while doing everything possible to respect the personal lives of CAF members.

[184] Notwithstanding the accused's personal lifestyle choices, his relationship and agreement with his wife or other personal beliefs he holds, there are established norms and expectations that all CAF members must comply with in the performance of their duties that take paramountcy.

[185] Although the DAOD provides guidance on how the risks associated with relationships must be managed, it does not set out a blueprint nor does it set out prescribed recommendations on how such relationships must be mitigated. This type of flexibility provides necessary latitude to the chain of command to appropriately manage the effect of such relationships in a particular unit, based on the particular facts of the case. It is often as simple as an internal unit transfer to ensure that there are no direct reporting conflicts within the chain of command. Notwithstanding the above mentioned shortfalls, the critical concern that underpins the policy is that while the development of relationships between CAF members are unavoidable, it is the clandestine or secretive nature of such relationships that carries the most significant risk to both the CAF and the individuals involved and must be avoided.

[186] Without having to rely upon a DAOD or Operation HONOUR or any other orders that exist, this Court can rely upon its 37 plus years of military experience and general service knowledge to conclude that there has always been a norm that prohibits secretive sexual relations between instructors and students in military training or between two members in the direct chain of command.

[187] It was particularly notable that the accused testified that he spoke with J.P. the morning after the first incident to specifically inquire whether she would feel more comfortable switching groups or instructors. The accused testified that he asked twice and offered to remove himself from the course. From his own testimony, his actions confirmed that he was acutely aware that the actions unfolding between them had compromised their instructor student relationship. His desired intention to de-conflict their personal situation confirmed that he knew that it was not appropriate for him to continue as her instructor.

[188] Further, whether or not she had an axe to grind with Lieutenant(N) Clancy or not, if it was obvious to Acting Sub-Lieutenant Maclennan, with her limited military experience, to immediately recognized that it was inappropriate for her instructor to be sexually involved with her course mate, then it should be obvious to everybody else in uniform. However, in case it is not, here are my reasons.

[189] All regular force and primary reserve members of the CAF, of all ranks, are members of the profession of arms. As military officers, operating within a profession, our conduct must contribute and reflect the highest standards and the commission we hold as officers is a reflection of the public trust that is placed in us.

[190] By virtue of the fact that we are military officers, we are expected to respect the roles and responsibilities that come with wearing the rank. There are expectations and responsibilities that we all inherently hold when interfacing with members of other ranks. The fact that lower ranks salute an officer reflects and recognizes the rank hierarchy that we are privileged to be part of. In short, outside the existence of the DAODs and other orders, there are established norms that are inherent in our specific ranks and roles.

[191] For many of the reasons I explained when I did an exhaustive overview of what constitutes an abuse of authority, members do not need to be told that it is wrong for an instructor to engage in sexual dalliances with a young course candidate. The accused's actions were both selfish and reckless.

[192] As I explained earlier, although I did not find that the accused abused his authority in the first encounter, he was seriously dancing on the head of a pin in the weeks that followed, when he continued to text J.P. to invite her for drinks. She became particularly vulnerable after the first encounter and his persistence could have led to an abuse of his authority. His conduct with respect to the entire situation with J.P. was not honourable. It was wrong on many levels, but I will confine my comments to the context of the third charge.

[193] One of the fundamental reasons for avoiding such conduct between instructors and students is to safeguard the integrity of command. How could he, as the CTO, remain objective without compromising the instructor/student relationship between both he and J.P, but also with respect to the other candidates on the same course? I was particularly bothered by the casual nature upon which both Lieutenant(N) Clancy and J.P. openly admitted that after being intimate, they discussed the other candidates on the course. This type of exclusive pillow talk, possibly to the detriment of other course candidates is exactly the type of consequence that must be avoided. It is just wrong. It has the potential to create jealousy amongst candidates and more particularly, it leads to undue influence through the sharing of information that the other would not otherwise have access to.

[194] Another reason it is imperative to avoid a conflicting personal relationship while in a role as an instructor, is to ensure the personal protection of both the candidate and the instructor. By entering into a sexual activity with a candidate, he exposed not only himself and J.P. to significant risk, but as I concluded earlier, also the NOTC Venture, the Navy and the CAF as an institution.

[195] A military force relies primarily upon the human element of its members to achieve mission success and as commissioned officers we all have a responsibility to

manage this human element by setting, following and enforcing established norms. These professional norms are not codified in a DAOD, but rather they are inherent in our role as officers within the military profession and they underlie our vital responsibilities.

[196] Consequently, the professional norm that instructors not engage in clandestine sexual relations with course candidates is a basic tenet of fundamental leadership that does not need to be set out in an order. On the facts of this case, for all the aforementioned reasons explained in my decision, when an officer engages in conduct that undermines the expectations of a reasonable military member, such as the conduct before the Court, it inevitably leads to the prejudice of good order and discipline. This is exactly the type of prejudicial conduct that the CMAC emphasized in *R. v. Golzari*, 2017 CMAC 3 and in *Bannister* that a military judge is well positioned to recognize and infer from the facts before the Court.

[197] With respect to Charge 3, I am convinced beyond a reasonable doubt that the proven conduct is likely to have an adverse effect on discipline and, as such, the required element of prejudice is proven.

Conclusion on the third charge

[198] The Court is satisfied beyond a reasonable doubt that the particulars of the offence were proven and that there was prejudice to good order and discipline that flowed from the proven conduct.

FOR THESE REASONS, THE COURT:

[199] **FINDS** Lieutenant(N) Clancy not guilty of charges 1 and 2 and guilty of charge 3.

Counsel:

The Director of Military Prosecutions as represented by Major M.-A. Ferron and Captain D.G. Moffat

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