



COURT MARTIAL

Citation: *R. v. August*, 2021 CM 3006

Date: 20210430

Docket: 201762

Standing Court Martial

Asticou Centre
Gatineau, Quebec, Canada

Between :

Her Majesty the Queen

- and -

Private J. August, Accused

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

Restriction on Publication: By court order, pursuant to section 179 of the *National Defence Act* and section 486.4 of the *Criminal Code*, the Court directs that any information that could identify the persons described during these proceedings as the complainants shall not be published in any document or broadcast or transmitted in any way.

REASONS FOR FINDING

(Orally)

Introduction

[1] Private August is charged with two service offences punishable under paragraph 130(1)(a) of the *National Defence Act* (NDA) for sexual assault contrary to section 271 of the *Criminal Code*.

[2] It is alleged that those offences would have been committed at the Canadian Forces Leadership and Recruit School (CFLRS), St-Jean-sur-Richelieu, province of Quebec, on or about 13 November 2016.

[3] This decision is about the finding, guilty or not guilty, concerning these two charges following a trial that has lasted over two years, to date.

Summary of the proceedings

[4] On 13 August 2018 this trial commenced. It took two days for the prosecution to present its case. At the conclusion of its case, the prosecution presented to the Court an application concerning the admissibility of similar fact evidence. I provided my decision on this application on 17 August 2018. I granted it in part.

[5] At the close of the prosecution case, the accused, through his counsel, presented a motion of no prima facie with regard to the first charge on the charge sheet on the basis that the prosecution had failed to introduce before this Standing Court Martial any evidence concerning two essential elements related to the *actus reus* of sexual assault.

[6] On the same day, I granted Private August's application and found him not guilty of the first charge for sexual assault contrary to section 271 of the *Criminal Code*. This matter left then the court with two charges to deal with instead of three. I then adjourn the case to discuss trial management issues with counsels, considering that we had already took a full week for the hearing of the prosecution's case, which was more than anticipated.

[7] Further to a long discussion with both parties in chambers, a request was made by defence counsel to adjourn the case to 22 October 2018 because, although it was originally anticipated the trial would last no more than two consecutive weeks, which was no longer the case. As a third week of hearing was considered to proceed with the remaining of the trial, and that all participants concluded that it was difficult to schedule it in a consecutive manner to the two first weeks, defence counsel requested an adjournment in order to avoid having the presentation of its case being potentially split. I approved this request and I adjourned the case to the date suggested with the consent of the prosecution.

[8] Unexpectedly, the Court Martial Appeal Court (CMAC) decision in *R. v. Beaudry*, 2018 CMAC 4, delivered on 19 September 2018, put this court martial on hold for some time. In that decision, two out of three judges concluded that subsection 11(f) of the *Charter* provided that any person charged with an offence has the right to a trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment, except in the case of an offence under military law. They stated that civil offences are not offences under military law. Consequently, they said that paragraph 130(1)(a) of the *NDA* was unconstitutional because it deprived a member of the right to a trial by judge and jury for a civil offence for which the maximum sentence is five years or more.

[9] The CMAC declared that paragraph 130(1)(a) of the *NDA* was of no force or effect in its application to any civil offence for which the maximum sentence is five years or more, in accordance with subsection 52(1) of the *Constitution Act, 1982*.

[10] The Director of Military Prosecutions filed with the Supreme Court of Canada (SCC), on 21 September 2018, a notice of appeal of this CMAC decision and, at the same time, filed a motion to suspend the declaration of invalidity made by this same court.

[11] On 27 September 2018, I heard an application made by the accused at the Asticou Centre courtroom in Gatineau, province of Quebec, for a change of venue for the remainder of the trial from Saint-Jean-sur-Richelieu to the Asticou Centre in Gatineau. The prosecution objected to that request made by the accused and argued that the hearing for the remaining of the trial had to stay where it initially started. Alternatively, the prosecution suggested it should continue where the accused's unit was located, which is Canadian Forces Base Gagetown, in Oromocto, New Brunswick. On 4 October 2018, I informed counsel of both parties that in order to make a decision in a proper context, not knowing exactly if and when the trial could resume, I was suspending the hearing of the application for a change of venue until the matter concerning the constitutional validity of paragraph 130(1)(a) of the *NDA* was decided by the Supreme Court of Canada.

[12] On 30 October 2018, I heard at the Asticou Courtroom another application made by the accused to adjourn the trial until a final decision was rendered by the Supreme Court of Canada. The prosecution argued that considering it was expected that the motion to the SCC to suspend the declaration of invalidity may be heard shortly, there was no need to adjourn the court martial until a final decision was made by the SCC. I closed the hearing to decide on this adjournment motion presented by Private August.

[13] An order was made by the Supreme Court of Canada to the Registrar on 13 November 2019 to fix a hearing date for the motion to suspend made to the SCC by the Director of Military Prosecutions. The hearing of this motion to suspend the declaration of invalidity of paragraph 130(1)(a) of the *NDA* was fixed by the Registrar to 14 January 2019.

[14] On 14 January 2019, the Supreme Court of Canada dismissed the motion to suspend made by the Director of Military Prosecutions because it failed to establish that the balance of convenience favours granting the stay sought.

[15] On 26 March 2019, the hearing of the appeal took place before the Supreme Court of Canada.

[16] On 8 May 2019, I reopened the hearing concerning the request for an adjournment of the court martial made by Private August and I ordered that the proceedings resume on 19 August 2019 in the Asticou Centre Courtroom for hearing

the application concerning the change of venue of the court martial, and another *Charter* application announced by the accused.

[17] The Supreme Court of Canada delivered its decision in *Beaudry* on 26 July 2019 and the appeal was granted, confirming the constitutional validity of paragraph 130(1)(a) of the *NDA*.

[18] With the agreement of the parties, this court martial resumed its activities on 6 September 2019. At that time, I was informed of the change of prosecutor. With the concurrence of both parties, including the accused, and considering that the defence counsel was expected to give birth shortly, and would be on maternity leave for some time, I adjourned the trial to 20 April 2020 for a duration of two weeks.

[19] I finally heard the application for a change of venue made by the accused on 13 March 2020. Both parties jointly submitted that the remainder of the court martial should proceed on 20 April 2020 at the Asticou Centre in Gatineau, province of Quebec. I made an order accordingly to that suggestion.

[20] Considering the unexpected situation related to the COVID-19 pandemic, all court martial activities were suspended between 16 March and 31 May 2020.

[21] Further to a consultation with both parties, it was agreed to proceed with the remainder of the trial on 20 July 2020 for a period of two weeks.

[22] In fact, the hearing of the evidence lasted from 20 July to 4 August 2020. The address as to the finding was made by the prosecution on 5 August 2020, and the one made on behalf of the accused proceeded on 7 August 2020. On that same date, I closed the court martial to make a determination of the finding.

[23] To summarize, the prosecution presented its case from 13 to 17 August 2018, the accused offered his defence from 21 to 31 July 2020 and I heard final addresses from both parties on 5 and 7 August 2020.

The evidence

Witnesses

[24] Regarding the charges themselves, the prosecution called three witnesses: A.W., C.K. and J.J. Concerning the defence of automatism raised by the accused, the latter called a witness, Dr Pressman, who was authorized by the Court to provide expert opinion evidence on:

- (a) sleep medicine and, more specifically, sleep disorders;
- (b) forensic sleep medicine, including clinical sleep medicine;

- (c) alcohol effect on sleep and relationship to sleep disorders;
- (d) polysomnograms (sleep studies);
- (e) rapid eye movement (REM) and Non-REM Sleep Arousal Disorder, sleepwalking type, with sleep-related sexual behaviour (i.e. “sexsomnia”);
- (f) obstructive sleep apnea/hypopnea; and
- (g) alpha-delta sleep electroencephalogram (EEG) abnormality.

[25] Dr Pressman attended the whole court proceedings, with leave of the Court, either in person or by connecting remotely.

[26] Private August testified about the alleged charges and also for establishing a factual basis concerning the defence of automatism.

[27] On this specific defence, he also called two witnesses, Dr Wagner and Dr Douglas. Dr Wagner was authorized by the Court to provide expert opinion evidence on toxicology, and more specifically on:

- (a) the science behind evaluating a person’s blood alcohol content/concentration (BAC) at a given time;
- (b) the impact of alcohol on a person’s physiology, cognitive function, motor skills and other general behaviour at various levels of BAC;
- (c) Private August’s approximate BAC at various points in time between 1900 hours on 12 November 2016 and 0700 hours on 13 November 2016;
- (d) the likely impact of Private August’s approximate BAC on his physiology, cognitive function, motor skills and other general behaviour at various points in time between 1900 hours on 12 November 2016 and 0700 hours on 13 November 2016; and
- (e) the likelihood that Private August was suffering from an “alcoholic blackout” between 0330 hours and 0530 hours on 13 November 2016.

[28] Dr Douglas was authorized by the Court to provide expert opinion evidence on:

- (a) psychiatry;
- (b) sleep medicine;

- (c) sleep disorders, including but not limited to:
 - i. “sexsomnia,” otherwise known as “REM and Non Rapid-Eye Movement (NREM) sleep arousal disorder, sleepwalking type, with sleep-related sexual behaviour”;
 - ii. obstructive sleep apnea/hypopnea; and
 - iii. alpha-delta sleep EEG abnormality.
- (d) polysomnograms (sleep studies).

[29] He was also permitted by the Court to provide expert opinion evidence on the following issues:

- (a) the factors that can cause or contribute to a sleepwalking episode;
- (b) the relationship between sleep disordered breathing and sleepwalking;
- (c) the effect of alcohol on sleep disordered breathing;
- (d) the effect of alcohol on sleepwalking;
- (e) the relationship between alpha-delta brainwave activity during sleep and sleepwalking;
- (f) the impact of sleepwalking on the formation of memories;
- (g) the likelihood that Private August was sleepwalking between the hours of 0330 and 0530 hours on 13 November 2016; and
- (h) the likelihood that Private August is malingering.

[30] Dr Douglas attended the whole court proceedings in person, with leave of the Court.

Documents

[31] Some documents were introduced by the prosecution in relation to the charges: pictures of clothes found in and around bed spaces, the floor plan and the training schedule (Exhibits 4 to 7 and Exhibit 12).

[32] The accused adduced the Direction on Release from Custody he signed further to his arrest on 13 November 2016 by the military police.

[33] Exhibits 13 to 41 are documents introduced by both parties and they are related to the defence of automatism.

[34] The accused also provided to the Court his video-recorded statement made to the police the day after the alleged incidents.

[35] Two Agreed Statement of Facts were introduced by the parties (Exhibits 3 and 11). The parties agreed on facts related to the existing context prior to and just after the incidents allegedly occurred.

[36] The Court granted in part the prosecution's application concerning the admissibility of similar fact evidence. Accordingly, the evidence of C.K. will be considered on the specific issue of the identity of the author of the alleged service offence regarding the second charge involving A.W. as the complainant.

[37] Finally, the Court took judicial notice of facts and matters contained and listed in Military Rule of Evidence (MRE) 15.

The facts related to the alleged incidents

[38] Private August is an Indigenous person who was interested in the Canadian Armed Forces (CAF) through a specific program for Indigenous people. Further to that program, he decided to enroll himself with the regular force component of the CAF during the summer of 2016.

[39] Essentially, he saw this opportunity as a redemption in his life, because it gave a sense to it and took him out of an environment where he had developed, in his teenage years, a serious addiction to alcohol. Basically, he told the Court that for the first time in his life, he had a goal.

[40] Further to his enrolment with the CAF, he was then put on a Basic Training Course (BTC) which started in August 2016 with the expectation to complete it in October of the same year, but he finally concluded it in November 2016. It is during the last weekend of the BTC in November 2016 that the incidents allegedly occurred.

Private August testimony

[41] Private August is originally from British Columbia where he grew up. He has seven brothers and seven sisters, all currently spread out around Vancouver Island. He had a hard and difficult childhood. He discovered the identity of his father when he was fourteen years old, thinking up to that time that this person was his uncle.

[42] He lived with his grandparents since the age of four, as his mother could not take care of him because she was an alcoholic. He tried alcohol at eleven years old and never really ceased consuming until the time he enrolled with the CAF. He dropped out of school early in life.

[43] Because his grandparents made the decision to live off the reserve, he was seen as a white man by the people of his tribe living on the reserve. He has always had difficulty making friends and started to drink for the sole purpose of being accepted by other people of his age. However, when he disclosed his homosexuality, he lost the few friends he had.

[44] He was drinking four to five days per week. He would consume a large quantity of alcohol each day. During a typical night, he may have had eight to twelve beers. He was able to consume a 24-pack of beer in a day. He has experienced a loss of memory, loss of consciousness and blackouts. He was not the only one dealing with the presence of alcohol in his life, as the majority of the members of his family has had problems with alcohol as well at some point in their life. He said that he has had, and he continues to have, memory problems when he drinks alcohol.

[45] Essentially, as a native in his teenage years, Private August felt he was constantly bullied by others. He was not entitled to stay on the reserve and felt discriminated because of his origin. The situation got worse as he told about his sexual orientation. All these reasons led him to drink alcohol heavily in order to be able to deal with this situation on a daily basis.

[46] He remembered hating going to bed when he was a child and a teenager. He would stay up late and wake up early because of such fear. He often experienced having nightmares.

[47] He also experienced some sleepwalking episodes during that time, sometimes waking up in a different place from where he initially laid down for sleeping. He gave an example where once he went to bed and woke up outside in the driveway. Sometimes, he would wake up with food around him in his bed without remembering anything about doing any such thing.

[48] To prevent this, he set up alarms at the front door of his house with aluminum cans or he would put chairs in a way he will knock over.

[49] The sleepwalking episodes were more frequent in his childhood, and they had a tendency to decrease when he became a teenager to the point he had only a few as a young adult.

[50] Once, he engaged in a sexual activity in his teenage years while he was sleepwalking. He went to his former boyfriend's house and slept on the couch. The next morning, he woke up naked in the bed with his former boyfriend. He was told by the latter that they had sexual encounters. He had his former boyfriend promised not to tell anybody and Private August did not tell anybody, as he was very embarrassed by the situation.

[51] Further to his enrolment with the CAF in July 2016, Private August started military training at St-Jean Garrison in Saint-Jean-sur-Richelieu, province of Quebec,

on 1 August 2016, with the expectation that he would finish his BTC during the month of October of the same year.

[52] However, during the fifth week of training, he suffered heatstroke and had to cease training. At that time, he was with Platoon Bravo 29.

[53] He went on the training reintroduction program (TRP) for two weeks and four days and joined Platoon Alpha 13 at the stage of the fourth week of training, and stayed until graduation. Essentially, Private August started his BTC with one group, had to temporarily stop training because of a medical condition, and then continued and completed his BTC with another group.

[54] With Platoon Alpha 13, the second group he was with, Private August had his sleeping quarters on the fifth floor of the Mega Complex in Green Sector T. He resided specifically in cubicle T-25.

[55] At some point during the BTC, he let know to others about his sexual orientation. He said that once the others knew he was gay, they kept away from him. He felt disliked or threatened by others and had nobody to turn to talk to about it. He expected to find a family, but he did not. He was basically doing things on his own. When he asked for some help or even offered his help to perform some platoon tasks, he was told to do it himself. He found it stressful to combine his personal situation with the requirements of basic training.

[56] During the first four weeks of training, recruits were not allowed to go anywhere. Private August was sober because he was not allowed to drink alcohol and he had no place he could go for doing it. Then, after that period of indoctrination, he went out with friends every weekend and started to drink again. During the period of sobriety, he experienced some physical signs of discomfort.

[57] He would drink less when it was a non-payday weekend than when it was a payday weekend. He would borrow money from others on a non-payday weekend and drink between 6 and 12 beers on a weekend night. On a payday weekend, he would drink more than that.

[58] On the BTC, he said that his sleep did not make him fully recovering. He mentioned that it was good enough for the day, but that he experienced falling asleep during some lessons.

[59] From 7 to 10 November 2016, on the last week of the course, he went on a field exercise with his platoon in Farnham. The exercise lasted four days and three nights. It was a very intense field exercise with not much sleep. Basically, you got sleep as you can. He performed the duty of fire picket overnight and was woken up frequently during the night by artillery simulators.

[60] On 11 November 2016, the entire platoon participated in the parade for Remembrance Day. Private August mentioned that he felt groggy, tired and a bit disoriented on that day. He remembered one person passing out on parade.

[61] Private August did not recall at what time he woke up on the day prior to the alleged incidents. He left the Mega Complex at approximately 1130 hours and returned on 12 November 2016 at 1723 hours. He said he had dinner.

[62] He left the Mega Complex again on that same day at 2009 hours and returned on 13 November 2016 at 0350 hours. Essentially, he left the Mega Complex on that evening to go downtown with some friends from the platoon to drink and celebrate the end of the course and he came back in the early morning the day after.

[63] On that night, he wore black pants, a black shirt and runners from physical training. He went to bars that are very popular among military members, such as O'Bock, Tequila and Route 66. He said he went first to O'Bock because of the happy hour and then he went on foot to another bar. The bars were at a walking distance from each other.

[64] From the time he left the Mega Complex to the time he came back there, he drank a quarter to a half pitcher of Blue Lagoon, one shot of Tequila, a sip of spiced rum and four to six beers. However, in his version of events to Dr Douglas, Private August mentioned that he consumed about thirteen beer plus some shots, and shared with those at the table a pitcher of Blue Lagoon to celebrate their graduation from the course. He conceded during cross-examination that he may have underestimated the number of beers he consumed in his response during his examination-in-chief on this issue. As being a non-payday weekend, he knows that he drank less than if it was a payday weekend, which may explain his impression that he drank less beer. He recognized that he may have initially misled the Court on that issue.

[65] He left downtown at the closing of the bars, around 0300 hours. He then took a taxi with a friend, Ordinary Seaman (Recruit) Christy Royle, to come back to the Mega Complex. While waiting for a cab to take them from the Tequila bar to the Mega Complex, he expressed to his friend suicidal ideations.

[66] He came back to the Mega Complex at 0350 hours on 13 November 2016 and remembered making his way to bed. He put on his thermals underwear for sleeping and laid down on his bed. He got up to urinate and went back to sleep. He did nothing different than any other night as a matter of routine before going to bed.

[67] On the morning of 13 November 2016, around 0700 hours, he was awoken and arrested by two military police members while sleeping in his bed. He was still wearing his thermals underwear as pyjamas. One of the military police members informed him that he was being arrested for an offence of sexual assault. He was handcuffed and a search incident to the arrest was performed on him by one of the military police members. Private August's rights were read by one military police member. He

indicated that he understood his rights and that he wanted to speak to a lawyer. He was taken by car to the military police detachment located outside the Mega Complex on the base.

[68] He was placed in an interview room and he was given an opportunity to talk with a lawyer. After he signed the Direction on Release from Custody form, he was then released with conditions by the Custody Review Officer on the same day. These conditions included that he remain under military authority, that he abstain from communicating with the three potential victims, was forbidden from going on the sixth floor of the Green Sector where the incidents allegedly occurred, and that he abstain from the consumption and possession of alcohol or any intoxicating substance. He was taken back to the Mega Complex by a member of his chain of command.

[69] He was then placed in a new room at the Mega Complex. He had casual conversation with some people but he did not have any discussion about the incidents. He said that he was very stressed, considering that he was suspected of serious allegations and liable to serious offences that may have consequences on his career. He tried on his own to understand what happened and to piece things together. He said that he felt very anxious, scared and very lonely at that time.

[70] He remembered having consumed alcohol. He considered sleepwalking as an explanation for what might have happened. He said that during the one-month indoctrination period on BTC, he experienced sleepwalking episodes . He said that concerning the incidents, he did not know about what he did in his sleep, and he did not wake up in any weird place.

[71] He told the Court that he did not recall anything concerning the allegations. He affirmed that he did not know the complainants and that he was not allowed to go to the quarters where members of another platoon resided.

[72] He mentioned to the Court that he was a smoker and he was used to going outside of the Mega Complex in a specific area for smoking.

[73] He confirmed that the clothes found on the sixth floor by the military police on the morning of the alleged incidents were his. He affirmed that he remembered washing the white sweat pants with three stripes at the bottom of the right leg and that he left them on the desk in his cubicle with other clothes on 12 November 2016. He affirmed that the clothes were at this same place when he went to bed prior to the alleged incidents.

[74] He willingly attended a police interview with a military police investigator on the morning of 14 November 2016 at the military police detachment on the base. It was not a surprise for him to learn who the complainants were and the nature of the accusations.

[75] However, during the interview, Private August appeared a bit confused about what was revealed to him by the investigator. He expressed remorse for what he did, if he did really do it. He did not hide anything, confirming most of what he told the Court. He also clearly said that he did not recall anything about what it is claimed he did to the complainants.

A. W. testimony

[76] A.W. was living in the province of Manitoba at the time he testified before the Court in August 2018. He left the CAF in 2017 while on the awaiting training platoon at Canadian Forces Base Borden, after having successfully completed in BTC in 2016.

[77] A.W. enrolled with the CAF to become a photographer. His BTC started in September 2016. He was with Platoon C23 or C32. For the purpose of this course, his room was in cubicle 29, on the sixth floor, in Green Sector R of the Mega Complex. His cubicle was located on the left side, past the main door providing access to the stairs and elevators located between Green Sector P and R. Usually, he would lay in his bed with his head toward the entrance of his cubicle and his feet toward the window.

[78] On the weekend of 12 to 13 November 2016, A.W. was allowed to go out, as was other members of his platoon, because they had passed the period of indoctrination of the first four weeks where recruits have to stay at the Mega Complex without authorization to leave for the weekend.

[79] On the evening of 12 November 2016, he went out to Montreal in the afternoon and spent most of his evening there. He got a lift with another recruit. He had between five and eight drinks while in Montreal. He came back with somebody else around 2300 hours and stopped at a Tim Hortons. He went to Saint-Jean-sur-Richelieu downtown bars where he had two to three beers, and after, he walked by himself to the Mega Complex.

[80] He arrived around 0300 hours at the building. He had a chat with two guys. He went to bed around 0330 hours and watched a movie on his phone and felt asleep within three to five minutes.

[81] In his usual sleep routine, which he did on that night, he testified that he slept under the blanket, covering himself, turning on the side to face the wall of the cubicle with a towel on his back to prevent him falling from his bed.

[82] He was woken up, being flat on his back, by somebody over top of him, but he is not sure if this person was completely on the bed or if he was half on. This person had A.W.'s penis in his hand with A.W.'s boxer shorts underwear pulled down, gripping and squeezing it. The person had his head quite close to A.W.'s penis, about two inches, and he was obviously trying to get him hard. It did not last long, as probably five seconds passed from the time the person touched him to the time he left his cubicle. The person seemed surprised that he woke up. He then side-stepped to his right, moving

very slowly, and went out of his cubicle. A.W. was angry and confused and did not know what was going on. He went back to sleep, as he was not sure it was real and felt exhausted. He said that he had no erection. In some ways, he thought he was dreaming.

[83] He did not know that person, as at the time of the alleged incident, he had never seen him before. He described to the Court that person as medium build, not super fat or thin, with dark hair a bit longer than usual. He could not say for certain if the individual he saw was clothed.

[84] Later in the morning of the alleged incident, he was woken up by somebody yelling. He also heard footsteps. He found out that it was Private J.J. who did that. He heard the latter talking on the phone and after hearing about what was going on, he concluded that what was described by Private J.J. was similar to what he thought had happened to him earlier that morning. He got up at about 0530 hours and went to the public phone where Private J.J. was located. Private C.K. joined them and confirmed that a similar incident allegedly occurred to him. He also noticed clothing articles on the outside part of his cubicle that he did not recognize.

[85] The military police members came on their floor and asked them to meet with them downstairs. A.W. decided to take a shower and to dress properly before going there. It is at that point that he saw semen on his boxers. He brought them with him and gave them to a military police member when he went downstairs with Privates J.J. and C.K. They all provided individual statements to the police. The DNA found in the white spot on A.W.'s boxer shorts was identified as that of Private August. The analysis confirmed that it was not sperm.

C.K. testimony

[86] At the time he testified before the Court in August 2018, C.K. was no longer in the military. He had just become a junior site superintendent for a construction company in British Columbia. He was released from the CAF in May 2017 after having completed his BTC and started his training as a combat engineer in Gagetown.

[87] He joined the military in September 2016 and started his BTC on 10 September 2016. He was with Platoon C32. For the purpose of this course, his room was in cubicle R-04, on the sixth floor, in Green Sector R of the Mega Complex. His cubicle was in a corner at the end of a hallway on the right side, past the main door providing access to the stairs and elevators located between Green Sectors P and R.

[88] On 12 November 2016, C.K. spent all day at the Mega Complex and came back to his cubicle for sleeping between 2200 hours and midnight, this specific period of time representing when he went to bed. He slept under covers and wearing just his underwear. He was woken up between 0500 hours and 0530 hours by a person touching him and kneeling beside him. He felt that he had an erection. He thought he was dreaming. He looked down and saw that this person was grabbing his crotch and

touching his penis with a hand. The hand was not underneath his boxers. He did not recall how exactly he was touched, but he knows that he was touched.

[89] Realizing what was going on while coming out of his sleep, C.K. yelled at that person, "What the fuck are you doing?"

[90] The person stopped what he was doing, stood up and fled. C.K. made his way slowly out of the cubicle and started to chase down this person, who looked scared to him. The person made his way by sprinting to cubicle R-01 and made a right in the hallway toward cubicle R-19. He made another right and took the exit between cubicles R-15 and R-16. C.K. was the only one chasing down this person, as others who were sleeping in this area did not seem to be awake.

[91] C.K. lost that person quickly, considering that he was half awake, and came back to his cubicle. He was mad and angry about what happened. On his way, he met J.J. who was woken up by him yelling. C.K. explained to J.J. what he thought had just happened. J.J. told him that he thought that something similar had just happened to him, too. J.J. then called the Green Desk, where there was a person on duty at all time. In the middle of his call, A.W. joined them.

[92] C.K. did not know the person who touched him. He described this person to the Court as being of native origin, with brown skin, having a medium body build with short brown hair, and not wearing any shirt. He did not recall if this person was entirely naked or not. He was told on the evening of the alleged incidents or the next day by J.J. that it was Private August he chased down.

[93] C.K. said that the person's face who woke him up by touching him in the early morning of that day will be imbedded in his mind for the rest of his life. During his testimony before the Court, C.K. identified Private August sitting at the defence table as being the person who touched him by pointing at him

[94] Once the call was made by J.J. on the morning of the alleged incidents, the military police members came to their floor and took J.J., A.W. and C.K. downstairs. They were kept separated and they made an individual statement to the investigator.

[95] Since the alleged incident, C.K. has thought about it every day. He has talked to therapists to be able to live with what occurred and he hired a lawyer to initiate a class action law suit against the CAF, considering the manner the matter was handled and the personal damage he suffered.

J.J. testimony

[96] J.J. is an infantryman who joined the CAF at the end of the month of August 2016. He started his BTC on 10 September 2016 and completed the course.

[97] At the time of the BTC, his room was in cubicle R-01, on the sixth floor, in Green Sector R of the Mega Complex.

[98] On the early morning of 13 November 2016, while sleeping, he heard another recruit soldier screaming and he also heard footsteps. He heard somebody passing by his cubicle and somebody else running after that person. He recognized C.K.'s voice.

[99] He stood up and saw C.K. chasing Private August who was naked. He realized that they were both the persons who passed by his cubicle. He saw Private August leave by the exit between cubicle R-15 and R-16.

[100] J.J. said that he was able to identify Private August because he had seen him frequently before at the smoking area (smoke pit) for recruits located outside the Mega Complex, close to an exit beside the kitchen. It is while being there, that he learned his last name was "August".

[101] The day prior to the alleged incidents, which was on 12 November 2016, J.J. saw Private August during the daytime entering the Mega Complex, wearing the same sweat pants found later with other clothes on the sixth floor just after the alleged incidents occurred.

[102] J.J. confirmed that he called the Green Desk and that members of the military police came to take A.W., C.K., and him downstairs. They placed them in separate rooms where they provided individual statements.

Positions of the parties

Position of the prosecution

[103] The prosecution affirmed that it proved beyond a reasonable doubt all essential elements of the offence of sexual assault related to the two charges before the Court martial.

[104] For the prosecution, Private August was intoxicated with alcohol on the night of the incident, which resulted in impairing his judgement and memory to the extent that he violated the privacy of two fellow soldiers and committed on them the crime of sexual assault.

[105] Concerning the fact that Private August wants to negate the existence of any intent of committing these offences by raising a defence of automatism, which may lead the Court to conclude that he acted involuntarily, the prosecution suggested that he failed to demonstrate, on a balance of probabilities, that this was the case.

[106] The prosecution put forward two reasons supporting such a conclusion: first, the testimony of the accused was not credible and reliable, especially considering that he attempted to manipulate the truth and that he was the sole source of information for the

Court to make a determination on this issue; and, second, that the lack of memory he claimed is rather the result of an alcoholic blackout associated with the consumption of alcohol he had on that night prior to the incidents.

Position of Private August

[107] Private August pleaded not guilty to both charges before the Court as he denies having had any intent to commit such crimes.

[108] Essentially, he claimed that he was subject to a sleep disorder while asleep on that night, which is sleepwalking, making him involuntarily do what it is claimed he did, and leaving him without any recollection of it.

[109] He said that he put forward the necessary evidentiary basis, composed of his testimony and that of Dr Douglas and Dr Wagner, to allow the Court to conclude that he has proven involuntariness on a balance of probabilities due to automatism.

[110] As the law presumes that automatism is a consequence of a mental disorder, he put to the Court that he has proven on a balance of probabilities that there is no significant risk posed by the potential recurrence of the conduct he had, and as such, he shall be acquitted on both charges.

[111] If, for any reason, the Court does not come to this conclusion, then he submitted that the Court shall make a finding of not criminally responsible on account of mental disorder for both charges.

The issues

[112] In order to make a final decision on the proper finding concerning both charges, especially considering that Private August raised involuntariness due to automatism as a defence, the Court will have to make a determination on some issues:

- (a) Did the prosecution prove beyond a reasonable doubt all essential elements for each charge? If the answer is no for both charges, then the deliberation of the Court would be over. If the answer is yes for either or both of the charges, then it will have to consider the next question;
- (b) Did Private August prove on a balance of probabilities that his actions related to the charges were not voluntary? If the answer is no for any of the charges, then Private August must be found guilty of the charge. If the answer is yes to any of the charges, then the Court would have to consider the next question; and
- (c) Did Private August prove on a balance of probabilities that this condition is not the result of mental disorders?

Analysis

Presumption of innocence and proof beyond a reasonable doubt

[113] Before this Court provides its legal analysis, it is appropriate to deal with the presumption of innocence and the standard of proof beyond a reasonable doubt; a standard that is inextricably intertwined with the principle fundamental to all Code of Service Discipline and criminal trials. And these principles, of course, are well known to counsel, but other people in this courtroom may well be less familiar with them.

[114] The first and most important principle of law applicable to every Code of Service Discipline and criminal case is the presumption of innocence. Private August entered these proceedings presumed to be innocent and the presumption of innocence remains throughout the case unless the prosecution, on the evidence put before the Court, satisfies it beyond a reasonable doubt that he is guilty.

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

[116] The burden of proof rests with the prosecution and never shifts. There is no burden on Private August to prove that he is innocent. He does not have to prove anything.

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

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

[119] The important point for the Court is that the requirement of proof beyond a reasonable doubt applies to each of those essential elements. It does not apply to individual items of evidence. The Court must decide, looking at the evidence as a whole, whether the prosecution has proven Private August’s guilt beyond a reasonable doubt.

[120] Reasonable doubt applies to the issue of credibility. On any given point, the Court may believe a witness, disbelieve a witness, or not be able to decide. The Court need not fully believe or disbelieve one witness or a group of witnesses. If this Court has a reasonable doubt about Private August's guilt arising from the credibility of the witnesses, then it must find him not guilty.

[121] Regarding the evidence, it is important to say that the Court must consider only the one presented in the courtroom. Evidence is the testimony of witnesses and things entered as exhibits, including documents and pictures. It also comprises admissions. The evidence includes what each witness says in response to questions asked. Only the answers are evidence. The questions are not evidence unless the witness agrees that what is asked is correct.

[122] The Court has heard Private August testify. When a person charged with an offence testifies, it must assess that evidence as it would assess the testimony of any other witness, keeping in mind what it said earlier about the credibility of witnesses. It may accept all, part, or none of Private August's evidence.

[123] Of course, if it believes the testimony of Private August that he did not commit the offences charged, it must find him not guilty.

[124] However, even if the Court does not believe the testimony of Private August, if it leaves it with a reasonable doubt about his guilt or, about an essential element of an offence charged, it must find him not guilty of that offence.

[125] If the court does not know whom to believe, this means it has a reasonable doubt and it must find Private August not guilty.

[126] Even if the testimony of Private August does not raise a reasonable doubt about his guilt or about an essential element of one of the offences charged, if after considering all the evidence, the Court is not satisfied beyond a reasonable doubt of his guilt, it must acquit.

[127] If the Court has a reasonable doubt about Private August's guilt arising from the evidence, the absence of evidence, or the credibility or the reliability of one or more of the witnesses, then it must find him not guilty.

Sexual assault charges

[128] Private August is charged with two offences referring to the offence of sexual assault.

[129] This offence is enunciated at section 271 of the *Criminal Code* and reads in part as follows:

271 Everyone who commits a sexual assault is guilty of

(a) an indictable offence and is liable to imprisonment for a term of not more than 10 years or, if the complainant is under the age of 16 years, to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year . . .

[130] In *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, it was established that a conviction for sexual assault requires proof beyond reasonable doubt of two basic elements that the accused committed the *actus reus* and that he had the necessary *mens rea*.

[131] The *actus reus* of the offence of sexual assault is unwanted sexual touching and is established by the proof of three elements: touching; the sexual nature of the contact; and, the absence of consent.

[132] The *mens rea* of this same offence is the intention to touch, knowing of, or being reckless of or willfully blind to, a lack of consent, either by words or actions, from the person being touched and it contains two elements: intention to touch and knowing of, or being reckless of or willfully blind to, a lack of consent on the part of the person touched.

[133] The Court must find Private August not guilty of sexual assault unless the prosecution proves beyond a reasonable doubt that Private August is the person who allegedly committed the offence on the date and in the place described in the charge. In addition to these essential elements of the offence, the prosecution must prove specifically each of the following additional essential elements of the offence beyond a reasonable doubt:

- (a) that Private August touched the complainant directly or indirectly;
- (b) that the touching by Private August was intentional;
- (c) that the touching by Private August took place in circumstances of a sexual nature;
- (d) that the complainant did not consent to the sexual activity in question; and
- (e) that Private August knew that the complainant did not consent to the sexual activity in question.

[134] Touching is any physical contact with another person. The contact may be direct, for example, touching a person with a hand or other part of the body, or indirect, for example, touching a person with an object.

[135] The touching must be intentional, as opposed to accidental. To decide whether Private August intentionally touched the complainant, the Court has to consider all the evidence, including anything said or done in the circumstances.

[136] The prosecution must prove beyond a reasonable doubt that Private August touched the complainant in circumstances of a sexual nature such that the complainant's sexual integrity was violated.

[137] To answer this question, the Court must consider whether the sexual nature of the touching would be apparent to a reasonable observer.

[138] To decide whether the physical contact was made in circumstances of a sexual nature such that the complainant's sexual integrity was violated, the Court must examine all the evidence. It must consider, for example, the part of the body Private August touched, the nature of the contact, and the situation in which it occurred. It may take into account any words or gestures that may have accompanied the conduct and all the other circumstances. Private August's purpose in touching the complainant may also help the Court to decide whether the physical contact was of a sexual nature.

[139] The prosecution must prove beyond a reasonable doubt that the complainant did not consent to the sexual activity in question. To answer this question, the focus is placed on the complainant's state of mind, and Private August's perception of that state of mind is irrelevant.

[140] Consent means the voluntary agreement of the complainant to engage in sexual activity in question. The consent must be to each and every act that occurred. A complainant is not obliged to express a lack of consent either by words or conduct.

[141] Consent cannot be inferred solely from the relationship between the person charged and the complainant.

[142] There is no consent unless the complainant has agreed in his mind to the sexual activity at the time it was occurring.

[143] The Court must keep in mind that agreement to one form of sexual activity is not agreement to any or all forms of sexual activity. For example, an agreement to some force is not agreement to greater force; an agreement to touching one part of the body is not agreement to touching other parts of the body; an agreement to one form of touching is not agreement to all forms of touching. In addition, a person may revoke consent or limit its scope at any time.

[144] Silence does not constitute consent, nor does submission or lack of resistance.

[145] For consent to be valid, the complainant must be conscious and capable of consent throughout the activity.

[146] The prosecution must prove beyond a reasonable doubt that Private August was aware that the complainant did not consent to the sexual activity in question. To answer this question, then the focus at this stage shifts to the mental state of the accused.

[147] To prove that Private August was aware of the complainant's lack of consent, the prosecution must prove one of the following:

- (a) that Private August actually knew that the complainant did not consent to the sexual activity in question; or
- (b) that Private August knew there was a risk that the complainant did not consent to the sexual activity in question and Private August proceeded in the face of that risk; or
- (c) that Private August was aware of indications that the complainant did not consent to the sexual activity in question, but deliberately chose to ignore them because Private August did not want to know the truth.

[148] As Private August has no recollection of what happened in relation to the alleged incidents on the morning of 13 November 2016, it makes it difficult for him to have said anything that could have raised a reasonable doubt, even if believed or not by the Court, on any essential element of both charges.

[149] Consequently, it brings the Court directly to the stage where it has to consider if the prosecution has proven all the essential elements for each charge beyond a reasonable doubt. If not, then the Court must acquit Private August.

[150] Concerning the date and the place as alleged in the particulars of both charges, the testimony of both complainants and the Agreed Statement of Facts are more than sufficient for the Court to conclude that the prosecution proved beyond a reasonable doubt that both incidents occurred on the morning of 13 November 2016, at around 0500 hours, on the sixth floor of the Green Sector, at the Mega Complex, in Saint-Jean-sur-Richelieu, as alleged in the particulars of each charge.

[151] As to the issue of identity of the person who committed both offences, the Court concludes that the prosecution proved beyond a reasonable doubt that Private August is the person who did it. The combination of a number of evidence led the Court to that conclusion: the clothes found on the sixth floor and belonging to Private August, the semen found on A.W.'s boxers identified as belonging to Private August, the physical description provided by A.W. and C.K. of the individual they saw in their respective cubicle at the time of the alleged incidents, the identification made by C.K. of Private August during his testimony before the Court, and the description made by J.J. during his testimony before the Court of the individual he saw at the time of the incidents as being Private August and the reasons for him being able to make such identification at the time. In addition, considering that what happened to C.K. is similar to what occurred to A.W., then the evidence of C.K. is used for this determination, in addition to any other evidence, to make such conclusion on the issue of identity concerning the charge relating to A.W.

[152] Now, as for other essential elements of the offence concerning the *actus reus*, which is the touching; the sexual nature of the contact; and, the absence of consent, the Court concludes that the prosecution also proved all of them beyond a reasonable doubt for both charges. Obviously, no one can consent to any sexual activity if he or she is asleep. The same can be said for anybody waking up and realizing what is happening to them. Absent of any consent communicated in such a situation, the Court shall consider that no consent was provided.

[153] Both complainants described that they woke up while having their penis being touched by Private August on the early morning of 13 November 2016. They both went to bed alone and they were woken up by somebody touching their genitals. They clearly never asked for or permitted such a thing to be done to them by this person. In addition, considering the complainants' area of the body touched and the way it was touched by Private August, the Court concludes that in both cases the contact was of a sexual nature.

[154] Concerning the *mens rea* required to be proven, which is concerning Private August's intention to touch and knowing of, or being reckless of or willfully blind to, a lack of consent on the part of the person touched, it appears that both complainants were then intentionally touched by Private August for a sexual purpose without their consent. As the issue of mistaken belief in consent is not a live issue in this case, it is without any difficulty that the Court is able to conclude that Private August knew or was willfully blind to the fact that neither complainant was consenting to the sexual activity or was reckless and chose to take that risk. Both complainants were unable to provide any consent as they were sleeping while all this happened, and they never asked or communicated in any way such a desire to be touched in this way by Private August, and the accused was aware of this situation.

[155] It is on the specific issue of *mens rea* that Private August decided to put to the Court whether his consciousness was impaired to the degree that he was incapable of voluntary action. This question goes directly to the determination by the Court if Private August knew what he was doing, or intended to do what he did, when he sexually assaulted A.W. and C.K.

The defence of automatism

[156] This issue was raised by the defence counsel through the defence of automatism. In 1999, the Supreme Court of Canada reconsidered the state of the law pertaining to automatism. On behalf of the majority of the Court in *R. v. Stone*, [1999] 2 S.C.R. 290, Bastarache J. developed a general test applicable to all cases involving claims of automatism. Before this new *locus classicus*, the decision in *R. v. Rabey*, [1980] 2 S.C.R. 513, at page 518, has defined automatism as an unconscious involuntary behaviour. A new legal definition in *Stone* was enunciated by Bastarache J. at paragraph 156, much broader, and founded on the medical literature which speaks of different levels of consciousness:

I therefore prefer to define automatism as a state of impaired consciousness, rather than unconsciousness, in which an individual, though capable of action, has no voluntary control over that action.

[157] Such a condition may be caused by a mental disorder, and hence it is the wording of section 202.13 of the *NDA* that applies. On the contrary, true automatism only includes involuntary behaviour which does not stem from a disease of the mind, and, if successful, entitles the accused to an acquittal. However, such a classification is a problem because there may be cases in which the facts simply are not conducive to such strict categorization.

[158] Accordingly, the Supreme Court of Canada has adopted in *Stone* a general test applicable to all cases involving claims of automatism. First, the accused must establish a proper foundation for a defence of automatism. Second, the Court must determine whether mental disorder or non-mental disorder automatism has application.

[159] Finally, the decision in *Stone* has established that the presumption of mental disorder applies to any automatism. Then, it belongs to an accused who succeeded in establishing automatism, to reverse this presumption. This explains why it is for the accused to demonstrate, on a balance of probabilities, that automatism does not result from mental disorders in order to obtain an acquittal.

[160] In order to establish the proper foundation for automatism, Private August has the legal burden to prove it on a balance of probabilities. It is also important to say that satisfying this burden is a question of mixed law and fact for the trial judge. As automatism is easily feigned, and all knowledge of its occurrence rests with the accused, two conditions apply:

- (a) the accused must claim that he acted involuntarily at the relevant time; and, in addition;
- (b) the defence must present expert evidence confirming its claim.

[161] However, as stated in *Stone* at paragraph 192, it would be a mistake for this Court to conclude that the defence burden has been satisfied simply because Private August has met these two requirements. The Court could conclude that the accused acted involuntarily on a balance of probabilities after a proper examination of the psychiatric or psychological evidence and inquire into the foundation and nature of the expert opinion. The Court may also consider a number of other relevant factors, such as:

- (a) the severity of the triggering stimulus;
- (b) corroborating evidence of bystanders;
- (c) corroborating medical history of automatistic-like dissociative states;
- (d) whether there is evidence of a motive for the crime; and

- (e) whether the alleged trigger of the automatism is also the victim of the automatistic violence.

[162] Private August claimed that he acted involuntarily at the time of both incidents as he has no recollection of what happened. He stated that in his childhood, he experienced sleepwalking episodes that tended to diminish as he became a teenager. As a young adult, he also experienced some episodes. He said that he found himself lying down for sleep at a specific place and would wake up later at a different one without having any memory of moving from one place to another. He also experienced waking up in weird places, such as outside the house or building although he went to bed inside, or waking up in the bed with food around him while he had no memory of getting any, prior to going to bed.

[163] He mentioned that during the indoctrination period of one month on the BTC, he experienced sleepwalking episodes twice.

[164] He also described one episode of “sexsomnia”, where he engaged in a sexual behaviour with his former boyfriend while asleep. At that time, he laid down on the couch and fell asleep and woke up naked in the bed with his former boyfriend. The latter told him that they had sexual intercourse but Private August had no recollection of such a thing.

[165] He said that he did not know the complainants and he was forbidden, as it was for other recruits, accessing the sleeping quarters of a different platoon in the Green Sector of the Mega Complex.

[166] Then, for Private August, the only explanation for what he did to the complainants on the morning of 13 November 2016 is he made involuntary actions of a sexual nature that occurred while he was asleep, precluding him from having the necessary *mens rea* to commit the crime of sexual assault.

[167] To support his claim, Private August called a witness who was authorized by the Court to provide expert opinion evidence. Dr Douglas, a psychiatrist, concluded that it is highly probable, from a medical perspective, that Private August was suffering from parasomnia, specifically sexual activity while sleepwalking, or “sexsomnia”, when the offences are alleged to have occurred.

[168] He based his opinion on information he gathered from a limited number of interview hours with Private August, a laboratory sleep study of Private August looking for parasomnia behaviours, and a number of self-report psychological tests taken by Private August.

[169] The psychological tests confirmed that there is high suspicion that Private August is having current sleep disorders and he is someone with current or past alcohol problems consistent with persons described as alcoholics.

[170] The sleep-laboratory study revealed that Private August suffers from moderately severe sleep apnea and that he has abnormal pattern brainwaves while sleeping.

[171] Dr Douglas stated that considering the significant cumulative sleep deficit Private August experienced during the week prior to the incidents, combined with the two factors revealed by the sleep-laboratory study, he can conclude from a medical perspective that it is highly probable that Private August suffered from a sleep disorder, such as sleepwalking, with sexual activities while committing both sexual assaults.

[172] Therefore, it would explain and support the fact that Private August acted involuntarily and that he does not have any recollection of what happened on that morning.

[173] From Dr Douglas' perspective, alcohol may have increased sleep apnea, which may have made higher the potential for triggering a sleep disorder such as sleepwalking for Private August.

[174] He said that sleepwalking will usually occur during the first three hours of sleep, which is outside of deep sleep. As the incidents occurred between one to two hours after Private August went to bed, it makes it really possible that such thing happened.

[175] During his testimony, Dr Douglas said there is nothing inconsistent with a sleepwalker navigating some distance as Private August did when he went from the fifth floor, took the stairs and ended up on the sixth floor. Being in an environment designed and organized in a very similar way as the one he resided in for his BTC, it seemed that Private August used his routine, which is to get up and get dressed, go for training and have a shower. It would appear that he got up, dressed with the clothes on his desk, travelled some distance, got naked and was seen with a towel around his neck as if he had taken a shower. It is only when he was confronted that he suddenly fled the scene because he was chased by somebody else.

[176] Nothing in these things is inconsistent with somebody experiencing a sleepwalking episode because sleepwalkers are good in moving around familiar places, especially if there are similarities in the architecture of the place, and it is common for them to find their way back to bed.

[177] For Dr Douglas, it is possible that Private August was able to find his way back to his own bed, got dressed for sleeping, laid down in his bed and returned to sleep. According to him, this is not unusual for somebody encountering a sleepwalking experience.

[178] For Dr Douglas, another factor, which is more specific for somebody experiencing sleepwalking, is the fact that Private August clearly expressed that he was experiencing amnesia and confusion during his interview when the military police

member told him what he did. He said that these post-episode feelings are something occurring often to those having been through sleepwalking episode.

[179] As Private August provided evidence of alcohol addiction since he was a teenager and that he consumed alcohol on the night prior to the commission of the sexual assault offences, he decided to call Dr Wagner in order to provide expert opinion evidence on toxicology, and more specifically on BAC and its impact on Private August's physiology, cognitive function, motor skills and other general behaviour.

[180] It is important to say that some controversy arose during the trial concerning the quantity of alcohol consumed by Private August. When Private August initially testified before the Court that he consumed a total of nine beers and shooters, it was quickly pointed out to him that he made a different statement to Dr Douglas, as it was stated in the expert report that he declared having taken a total of thirteen beers and some shooters.

[181] During his cross-examination, while being questioned on this issue, Dr Douglas immediately referred the prosecutor to a handwritten note he made at the time he interviewed Private August to explain that he used the plus sign between the words "beers" and "shots" to indicate a total of thirteen drinks, and not to mean thirteen beers with the addition of some shots, which was the way he wrongly dictated it two days after the interview.

[182] For the Court, this would be in accordance with the statement made by Private August at the beginning of his testimony before the Court to the effect that on non-payday weekends he would consume less alcohol, which he clearly identified as being between six and twelve beers.

[183] Then, the Court accepts the evidence that Private August consumed a total of thirteen beers and shots. Among these drinks, the majority of them shall be considered as being beer as related by Private August.

[184] That being said, Dr Wagner calculated approximate blood alcohol levels for Private August based on various hypotheticals. With a calculation of thirteen beers and shots as described by the accused, his calculation resulted in having Private August's blood alcohol level at the possible time for the commission of the offences, which is about 0500 hours on 13 November 2016, below the threshold considered by the scientific literature for considering somebody suffering from an alcohol-induced blackout.

[185] As stated during his testimony, Dr Wagner's expert opinion is that levels during blackout periods often begin at levels around 0.20 per cent and it is more than likely that a person is suffering from an alcohol-induced blackout when the level is at or above 0.25 per cent. The calculation made by Dr Wagner for Private August never put him higher than 0.19 percent at the time the incidents occurred.

[186] Then, it is the Court's conclusion that the evidence of Dr Wagner ruled out the possibility of an alcohol-induced blackout for Private August to explain his lack of memory concerning the commission of the offences and also ruled out the suggestion made to the Court to not consider a medical conclusion of sleep disorder in the presence of alcohol intoxication.

[187] Dr Pressman was called by the prosecution and authorized by the Court to provide expert opinion evidence about sleep disorders. He said that the results of the tests made by Dr Douglas on Private August and the account he made on previous sleepwalking episodes he had in his life would have been sufficient to make a diagnosis of sleepwalking, but insufficient to reveal anything about what could have occurred on the morning of the incidents or at any other specific time in the past.

[188] For Dr Pressman, what a sleep study can tell is limited, in the sense that it would tell us how a person was sleeping at the time of the study and nothing more.

[189] In addition, he disagreed with Dr Douglas that there was sleep apnea for Private August. He said that the result of the test is not conclusive. Despite his disagreement, he agreed that the presence of alcohol may have been the cause of sleep apnea at the time of the incidents.

[190] Essentially, from a clinical perspective, he agreed with a diagnosis of sleep disorders such as sleepwalking for Private August, but from a forensic perspective and looking at the entire incidents as they were described in Court, he totally disagrees with Dr Douglas that it is highly probable, from a medical perspective, that Private August was suffering from parasomnia, specifically, sexual activity while sleepwalking or "sexsomnia", when the offences are alleged to have occurred.

[191] From his perspective, the capacity of orienting himself in an environment different than the one he was used to, and the absence of any evidence from anybody having been in contact with Private August on that morning revealing specific characteristics attached to sleepwalking, like being unresponsive to people, it is sufficient for him to conclude, from a forensic perspective, that Private August was not suffering from a sleep disorder such as sleepwalking at the time he committed the offences.

[192] He agreed with Dr Douglas that a sleep disorders breathing, a sound or some internal change may act as a trigger to a sleep disorder such as sleepwalking. However, he quickly noticed that there was no evidence before the Court that such a thing really happened. He also mentioned that the diagnosis of sleep apnea is not proof that sleepwalking occurred.

[193] He also agreed with Dr Douglas that sleep deprivation prior to an alleged incident is a factor that can lead to a conclusion that a sleepwalking episode occurred. However, he indicated to the Court that while it is true that the field exercise resulted in some important sleep deprivation for Private August, there is no evidence as to what

extent he recovered from that situation during the three days following the exercise and being prior to the incidents.

[194] In short, not knowing exactly how Private August managed his sleep during the three days prior to the sexual assaults he committed, is not very helpful in assessing the impact of sleep deprivation, if any. As such, this factor cannot play in the assessment to be made in relation with the existence of a sleepwalking episode.

[195] In addition, according to Dr Pressman, post-episode confusion and amnesia are not, by themselves, proof of sleepwalking.

[196] The Court concludes that, at this stage, Private August discharged the evidential burden on automatism. As mentioned in *R. v. Fontaine*, 2004 SCC 27, at paragraphs 93 and 94, the accused gave evidence tending to establish that he was acting involuntarily at the time of the offence. He also adduced expert evidence to support his own testimony. The evidence went beyond a mere allegation of the existence of a defence, as it included a description of the accused's perception of the facts just prior and after the incidents and a description of the factual background which led the accused to believe that his involuntary actions could have come from a sleepwalking episode he experienced at that time. As such, Private August testified as to the circumstances that gave rise to his state of mind at the relevant time.

[197] This is why this Court's conclusion is that there was some evidence in the record upon which a panel, properly instructed and acting judicially, could reasonably conclude that the defence of automatism had been made out.

[198] Then, the Court turns now to the next question, which is for Private August to prove, on a balance of probabilities, that his actions relating to the charges were involuntary. Essentially, it is at this time that the Court must decide how the issue relating to automatism, as raised by the accused, should be decided. This was identified in *Fontaine* as being the persuasive burden to be discharged by the accused.

[199] Private August claimed that he acted involuntarily when he committed the offences because he was experiencing a sleepwalking episode on the morning of 13 November 2016. For that reason, he was unaware of what he was doing and could not have the necessary intent to commit a sexual assault on both complainants.

[200] Dr Douglas confirmed a medical diagnosis for Private August of a sleep disorder of the type of sleepwalking, to which Dr Pressman concurred. For the Court, it makes Private August's claim of automatism plausible; nothing more, and nothing less.

[201] The Court notes that there is no evidence of the triggering stimulus that may have caused Private August to experience such sleep disorder on that morning. It is true that it is possible that some kind of apnea resulting from his own condition, as diagnosed by Dr Douglas, or related to the consumption of alcohol he had on that night, triggered the sleep disorder. However, it is still a possibility, not a certainty. To the

same effect, a sound or a touch could have been sufficient. As for the triggering stimulus, the Court shall conclude that there is not much to say about it other than it is plausible that it may have occurred, if it did.

[202] The only persons who testified about Private August's behaviour on that morning are the complainants. None of them noticed anything coming from Private August to make them conclude that he was unresponsive or acting in a way that he did not know what he was doing. Essentially, A.W. and C.K. were woken up by Private August being beside them and touching their genitals. When A.W. woke up, Private August stopped doing what he was doing and left the cubicle. When C.K. woke up and yelled at him, Private August left the cubicle, fled and ran to an exit. It is true, as put by Dr Douglas, that such behaviour shown by Private August is not an indicia that he was not experiencing a sleepwalking episode. However, neither it is evidence that he experienced one.

[203] Nothing in the manner in which Private August acted that morning, as described by witnesses, can help the Court to conclude anything in relation to sleepwalking. However, the absence of corroboration is not indicative of anything either. It is just that the Court notes the absence of any evidence of bystanders to help it make a proper determination.

[204] To the same effect, confirmation of past sleep disorders such as sleepwalking or sleep-eating witnessed by those who knew Private August as a child and a teenager would have been helpful in assisting the Court to make a proper determination.

[205] As Private August has no medical history of sleep disorders such as sleepwalking, it makes it difficult for the Court to rely on such type of evidence to make a determination.

[206] The Court has no reason to believe that Private August had any motive of any sort to commit such crimes. Here, the Court's observations are that there is nothing in the evidence put before it that could support such a conclusion.

[207] For Private August, to prove on a balance of probabilities that his actions related to the charges were involuntary means it is more likely than not that he was in a dissociated state, such as the one caused by sleepwalking, which made him act involuntarily when he committed the offences of sexual assault on the complainant.

[208] The Court is left with an assertion of involuntariness made by Private August when he committed the offences of sexual assault, a medical diagnosis of a sleep disorder of the type of sleepwalking, and that Private August had no motive for the crimes to make this assessment.

[209] From a legal perspective, it appears that such evidence is not convincing enough to make this Court conclude, on a balance of probabilities, that Private August's actions

related to both charges were involuntary. It makes it a possibility, more than a mere allegation, but not more likely possible than not.

[210] As illustrated in the decisions of *R. v. Desrosiers*, 2017 ONCJ 299, *R. v. B.M.*, 2018 ONCJ 582, *R. v. Hartman*, 2018 ONCJ 899 and *R. v. T.M.*, 2019 ONCJ 61, in order to succeed, it takes more than what has been put before this Court as evidence for the defence to meet its burden of persuasion.

[211] Then, the Court concludes that the prosecution proved beyond a reasonable doubt that Private August intentionally touched both complainants, and that he knew that neither complainant consented to the sexual activity in question, knowing of, or being reckless of or willfully blind to, a lack of consent on their part.

[212] For the Court, Private August was not suffering from a sleep disorder such as sleepwalking at the time of both sexual assaults. His actions were voluntary and he knew what he was doing at the time he committed both offences.

[213] Consequently, the Court concludes that the prosecution has proven beyond a reasonable doubt that Private August committed a sexual assault on A.W. and C.K.

FOR ALL THESE REASONS, THE COURT

[214] **FINDS** Private August guilty of the second and third charges of sexual assault contrary to section 271 of the *Criminal Code*.

Counsel:

The Director of Military Prosecutions as represented by Lieutenant-Commander J.M. Besner and Major L. Langlois

Major F. Ferguson, Defence Counsel Services, Counsel for Private J. August