



COURT MARTIAL

Citation: *R. v. Mainguy*, 2022 CM 4003

Date: 20220211

Docket: 202006

Standing Court Martial

Canadian Forces Base Borden
Borden, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Lieutenant-Colonel D. Mainguy, Accused

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

REASONS FOR FINDING

(Orally)

Introduction

[1] Lieutenant-Colonel Mainguy is facing two charges stemming from a single incident at Canadian Forces Base (CFB) Borden on 30 May 2019, during a mess dinner at the officers' mess, when it is alleged he approached a subordinate from behind and pushed himself up against her for several seconds. He is charged under section 130 of the *National Defence Act (NDA)* for assaulting Captain Côté-Jacques, contrary to section 266 of the *Criminal Code*. He is also charged under section 129 of the *NDA* for Conduct to the prejudice of good order and discipline for having inappropriately touched Captain Côté-Jacques without her consent.

[2] At the time of the alleged offences, Captain Côté-Jacques had recently been promoted to Lieutenant, despite the fact that she is described as Second-Lieutenant on the charge sheet. She had been posted to the Headquarter of the Canadian Forces Recruiting Group (CFRG HQ), in the summer of 2018, her first posting after joining the Canadian Armed Forces (CAF) in 2017 as a public affairs officer. She worked under the

direct supervision of a major who, in turn, worked for Lieutenant-Colonel Mainguy. When her first supervisor left the unit, she worked directly for Lieutenant-Colonel Mainguy for a period of time before another major was posted in as her immediate supervisor.

Overview of the evidence

[3] The resolution of this case is very much a matter of assessing the evidence and the credibility of witnesses to arrive at a conclusion as to whether the prosecution has discharged its burden of proving the two offences beyond a reasonable doubt.

[4] There is no legal debate in the case about what the essential elements of the two offences are. Where the parties diverge is on the issue of whether the evidence presented by the prosecution as part its case is sufficient to prove these elements and whether the discrepancies or contradictions in the version of witnesses are sufficient to leave the Court with a reasonable doubt. It is consequently appropriate to summarize the main outline of the narrative offered by witnesses as it pertains to the alleged assault/conduct, to allow a better understanding of the issues and the position of the parties. I will engage in a more detailed analysis of the evidence later in these reasons, as necessary, to arrive at my findings.

[5] The prosecution called two witnesses in support of its case: Captain Côté-Jacques and Sergeant Reavely, the person with whom Captain Côté-Jacques was engaged in a discussion at the time of the alleged assault and who witnessed the event.

Testimony of Captain Côté-Jacques

[6] Captain Côté-Jacques testified that she attended an all-rank mess dinner organized by her unit, CFRG HQ, on Thursday 29 May 2019. She arrived at the officers' mess just before 1800 hours, along with a colleague. Shortly after her arrival, participants were requested to gather outside for a group photo of all attendees. Once the photo was taken, attendees gathered inside for what was described as a cocktail hour, where many attendees took advantage of the fact that the bar was open to obtain a pre-dinner drink.

[7] Captain Côté-Jacques was standing on the left side of the bar and was engaged in conversation with Sergeant Reavely. She said they were about five persons at a table nearby, having conversations and enjoying themselves. However, she could not identify who they were, with the exception of a Sergeant Brown.

[8] At that moment, someone rang the bell located on a pillar in the middle of the bar area. This is a military tradition signaling that a person recently promoted is offering free drinks. Captain Côté-Jacques did not know who had rung the bell other than it was a man. However, she, along with others, converged towards the bar to line up to obtain free drinks before the dinner started. As she was waiting in line, just in front of the cashier on the left side of the bar, she engaged in a conversation with Sergeant Reavely,

who was complementing her about her mess dress. She said that she was facing the nearside of the room, her right side very close to the bar, and her left side exposed to the room. As the conversation developed to a question as to why there was only one stripe on her pants, Captain Côté-Jacques would have pointed towards Lieutenant-Colonel Mainguy who had two stripes. She then extended her leg to show her one stripe to Sergeant Reavely.

[9] At that point, Captain Côté-Jacques sensed a presence behind her. She turned her head to see Lieutenant-Colonel Mainguy right behind her, extending his left leg next to hers, and pressing his penis on her behind, making a rubbing movement from left to right and small circles, for about ten seconds, which Captain Côté-Jacques counted out loud during her testimony. She described the pressure placed on the upper part of her left buttock as a push back and forth on each side, with a slight movement of the waist by Lieutenant-Colonel Mainguy.

[10] Captain Côté-Jacques said that after her immediate reflex of turning her head to see who was behind her, she froze, with her head facing directly Sergeant Reavely, hearing only her own breathing and being incapable of moving. She asked herself what was happening, in disbelief. She said she was separated from Lieutenant-Colonel Mainguy by Sergeant Reavely who placed her two hands on her shoulders, pulling her back towards her and in doing so, creating space between her and her aggressor. She testified that Sergeant Reavely then said to her words to the effect that, "What has just happened? This is not okay; let's see other people." She said she was unable to look back at Lieutenant-Colonel Mainguy to see his reaction. She was adamant that what had happened was not an accident. She felt that her sexual integrity was impacted and her trust in her superior betrayed.

[11] Captain Côté-Jacques testified that after leaving the scene of the incident, she went to the restroom to recompose and convinced herself that she should not let the event ruin her evening. She decided to participate actively in the evening and, as she said, have conversations with other brothers-in-arm. She even had a conversation, later in the evening, after the dinner, with Lieutenant-Colonel Mainguy, then-Captain Ring and others about the possibility of taking over the job of executive assistant (EA) to the Commander of the CFRG, as Captain Ring was promoted to another position in the plans section. She had a discussion about the advantages of such a career move for her and, as it turned out, Lieutenant-Colonel Mainguy was not in favour of it, thinking she should gather more experience first. In any event, Captain Côté-Jacques testified leaving the officers' mess after the last call at two a.m., with the colleague with whom she had arrived, walking for a short time with Captain Ring and Lieutenant-Colonel Mainguy, as the two were heading for the quarters they had rented on base.

[12] Captain Côté-Jacques testified that she went to see Lieutenant-Colonel Mainguy the next day, Friday, at his office located next to her cubicle. She said she discussed with him, while standing in the doorframe of his office, given that by then, she was afraid of him. She told him she was interested in changing position and become the EA to the Commander of the CFRG, in replacement of Captain, soon to be Major, Ring.

She testified that her aim was to no longer work for Lieutenant-Colonel Mainguy, and that he would no longer have control over her. She said that the next Monday, she met with the commanding officer and the adjutant of the unit, telling them about what had happened at the mess dinner the previous Thursday, 30 May 2019. She was asked to put a complaint in writing and did so immediately, providing a thirty-two-page document the next day. The document was presented to her by defence counsel in cross-examination, a document she recognized as her complaint, although she acknowledged that the complaint about the actions of Lieutenant-Colonel Mainguy were contained in just over a page of the document, after about five pages of complaints about her then-immediate supervisor. In that document, she asked to be assigned to the position of EA to the Commander of the CFRG, a demand which was met a few days later.

Testimony of Sergeant Reavely

[13] Sergeant Reavely, who is the other prosecution witness, explained that in May 2019, Captain Côté-Jacques was known to her due to the fact that she worked in close proximity to her husband, Major Reavely. She testified as to what she remembers of the evening of 30 May 2019, including seeing Lieutenant-Colonel Mainguy approach Captain Côté-Jacques from behind as she was extending her left leg, placing his left leg next to hers, almost touching, although she was not able to see very well if the two were indeed touching. She said she did see, however, Lieutenant-Colonel Mainguy making forward and back humping motions, moving his hips. She initially said the incident lasted approximately ten to fifteen seconds, correcting this in cross-examination to five seconds, with the assistance of defence counsel measuring time with his watch.

[14] She said that throughout, Captain Côté-Jacques was looking straight at her, eyes wide opened. She said she reached out and grabbed Captain Côté-Jacques' left hand, just below the wrist, to yank her towards herself. Sergeant Reavely testified that she said, "Oh my God" and that Captain Côté-Jacques would have replied, "Thank you". Sergeant Reavely had little recollection of the events of the evening following the incident, acknowledging that she may well have been with Chief Petty Officer 2nd Class Meaney outside the mess at the end of the evening, recognizing her feet in a picture shown to her in cross-examination, attributed to Chief Petty Officer 2nd Class Meaney.

[15] Sergeant Reavely said she spoke to Chief Petty Officer 2nd Class Meaney the next day, Friday morning, in the office, about the incident. She said she could not recall if she heard Chief Petty Officer 2nd Class Meaney express reservations about her recollection of the conversation she had the previous night about mess kit, which led to the incident she was discussing. Sergeant Reavely said she did not meet with Captain Côté-Jacques that Friday morning, but confirmed meeting with her on the next Monday, 3 June 2019. At that point, having spoken to her husband over the weekend, she was determined to report the incident, which she did the next day during a meeting with the adjutant of her unit and the commanding officer. She was asked to provide a written statement and did so.

[16] Following the close of the prosecution's case, the defence called two witnesses: Chief Petty Officer 2nd Class Meaney and Major Ring.

Testimony of Chief Petty Officer 2nd Class Meaney

[17] Chief Petty Officer 2nd Class Meaney testified briefly about her career to provide context as to what brought her to work at the CFRG HQ and her functions within the unit in the personnel management section. She testified about her evening at the mess dinner on 30 May 2019, stating that it was largely uneventful. When asked about a conversation she would have been engaged in with Sergeant Reavely and Captain Côté-Jacques as it pertains to the mess kit Captain Côté-Jacques was wearing, she was adamant that it is she who had raised the issue of why the mess kit of Captain Côté-Jacques was slightly different than the one worn by another officer in the same service and occupation. She said the conversation was short and did not result in any incident, let alone an assault of the kind that was discussed in the prosecution's evidence.

[18] She said that she was close to Sergeant Reavely throughout the evening and up to the very end, after she had used her phone to call her husband to pick her up. While outside at the front of the mess, she took pictures of hers and Sergeant Reavely's feet and shoes which, by that time, had become uncomfortable for both of them.

[19] Chief Petty Officer 2nd Class Meaney said that no one at the mess dinner related to her any kind of incident which would have happened involving Lieutenant-Colonel Mainguy or anyone else. She did state, however, that the very next day, Friday 31 May 2019, as she arrived in the office, she was informed that Sergeant Reavely wanted to see her. She obliged and a conversation ensued, in which Sergeant Reavely related to her an incident which she thought had occurred the previous night at the mess dinner, involving an apparent inappropriate conduct on the part of Lieutenant-Colonel Mainguy towards Captain Côté-Jacques, following a question she had asked about Captain Côté-Jacques' mess kit. This struck Chief Petty Officer 2nd Class Meaney as odd, given that she had asked the question about the mess kit, a detail Sergeant Reavely did not seem to remember.

[20] Chief Petty Officer 2nd Class Meaney is a specialist in military personal management. She was employed in the field at the time and is a trained harassment advisor. Sergeant Reavely was not certain about the details and nature of the conduct that she had witnessed the previous evening. Chief Petty Officer 2nd Class Meaney recommended that Sergeant Reavely speak to the alleged victim of the conduct to see how she felt about it. Chief Petty Officer 2nd Class Meaney said that Sergeant Reavely left and came back some time later the same day, to state that she had spoken to Captain Côté-Jacques and that, after all, there was nothing untoward that had occurred.

[21] Chief Petty Officer 2nd Class Meaney formed the impression, at this point, that the matter was resolved and was surprised to be informed some time later that it was not the case.

[22] In cross-examination, it was suggested to Chief Petty Officer 2nd Class Meaney that she may have missed something on the evening of 30 May 2019 as to what may have happened involving Lieutenant-Colonel Mainguy and Captain Côté-Jacques. Chief Petty Officer 2nd Class Meaney was adamant that she was present in company with Sergeant Reavely throughout the evening and that nothing untoward had happened.

[23] Asked about the delay in reporting what she witnessed and the details of her involvement, Chief Petty Officer 2nd Class Meaney said that unit authorities who were initially in charge of the investigation were aware of the information she had but did not ask her to relate it to them. She testified that the matter tormented her a great deal over time and that as a result of a conversation in November 2021, the Canadian Forces National Investigation Service (CFNIS) contacted her for her version, which she provided forthwith.

Testimony of Major Ring

[24] Major Ring was also called as the second defence witness. He provided information on his participation in the mess dinner of 30 May 2019 and his participation in a conversation, late in the evening, involving Lieutenant-Colonel Mainguy, Captain Côté-Jacques, and others about the possibility of Captain Côté-Jacques taking over the job that he had at the time, EA to the Commander of the CFRG, as he was being promoted to another position.

[25] Major Ring confirmed the gist of the conversation, as related by Captain Côté-Jacques earlier, including the fact that Lieutenant-Colonel Mainguy was not in favour of the idea of Captain Côté-Jacques becoming the EA, stating that Captain Côté-Jacques, in Lieutenant-Colonel Mainguy's view, should gather more experience first.

[26] Major Ring confirmed leaving the officers mess after the last call at two a.m. with Captain Côté-Jacques and her colleague, as well as Lieutenant-Colonel Mainguy, with whom he walked back to a room in the quarters they both had rented on base that evening.

[27] Major Ring stated that he was aware of an ongoing conflictual relationship between Lieutenant-Colonel Mainguy and Major Reavely, Sergeant Reavely's husband. He said he became aware that a complaint had been made against Lieutenant-Colonel Mainguy shortly after the 30 May 2019 mess dinner, but could not recall exactly when he became aware of that. He did inform the Court that an announcement had been made on 5 June 2019 to the effect that Captain Côté-Jacques was going to take over from him in the position of EA to the Commander of the CFRG. Sometime later, he learned that Lieutenant-Colonel Mainguy had been moved from his position in the CFRG HQ and replaced by Major Reavely. He said that he knew the staff was instructed not to have further contact with Lieutenant-Colonel Mainguy, although he could not remember when these instructions would have been given.

Other evidence

[28] In addition to the evidence of witnesses, the parties introduced a number of exhibits by consent. This included:

- (a) an Agreed Statement of Facts, previously produced in the course of the applications which showed that it is on 20 August 2019 that Lieutenant-Colonel Mainguy was removed from his position and instructed not to have contact with persons associated with the investigation and not to attend events related to CFRG HQ;
- (b) a picture of the bar area of the officers' mess;
- (c) two pictures taken during the evening of the mess dinner on 30 May 2019:
 - i. one picture of attendees gathered outside the officers' mess before the dinner, and
 - ii. another picture of Captain Côté-Jacques and Major Berdais, another public affairs officer, in one of the mess' room prior to the dinner; and
- (d) a drawing made by Chief Petty Officer 2nd Class Meaney on the stand, showing where and with whom she was standing for discussions near the bar before the dinner.

The essential elements of the offence

[29] I must state at the outset that I have been convinced beyond a reasonable doubt that the witnesses have identified Lieutenant-Colonel Mainguy as the alleged offender for the two charges. The time and place of the alleged offences have also been proven as particularized in the charges.

[30] The essential elements left to be analyzed are as follows. For the assault charge, the prosecution must prove:

- (a) that Lieutenant-Colonel Mainguy applied force to Captain Côté-Jacques;
- (b) that he did so intentionally;
- (c) that Captain Côté-Jacques did not consent to the force applied; and
- (d) that Lieutenant-Colonel Mainguy knew that Captain Côté-Jacques did not consent to the force he applied.

[31] For the conduct to the prejudice of good order and discipline charge, the prosecution must prove, on the basis of the particulars of the charge laid here:

- (a) that Lieutenant-Colonel Mainguy engaged in the conduct particularized in the charge, namely that, “he did inappropriately touch Captain Côté-Jacques without her consent”; and
- (b) that such conduct is conduct to the prejudice of good order and discipline. In this case, where no contravention of the *NDA*, regulations, orders or instructions is alleged, proof of the second element in effect requires that the prosecution to establish that the conduct proven, in all of its relevant circumstances, is conduct to the prejudice of good order and discipline.

The issues

[32] On the facts of this case and in light of the applicable law, the parties agree there are three live issues. The first is whether the prosecution has proven to the required standard that Lieutenant-Colonel Mainguy touched Captain Côté-Jacques. If not, then the accused must be found not guilty of both charges. If so, then I must assess, as the second issue, whether it has been proven beyond a reasonable doubt that the touching by Lieutenant-Colonel Mainguy was intentional and not accidental, an element of *mens rea* common to both charges. Finally, and as what defence counsel has identified as a subsidiary argument, the Court is invited to assess whether the defence evidence raising the possibility that one or both of the prosecution witnesses fabricated or embellished their version of events in furtherance of ulterior motives, is sufficient to leave the Court with a reasonable doubt as to the guilt of Lieutenant-Colonel Mainguy.

The position of the parties

The prosecution

[33] The prosecution generally argues that it has presented evidence proving all of the essential elements of the two offences. It is specifically argue that I should find the evidence of Captain Côté-Jacques compelling as to the essential elements at issue in this case, namely that she was touched by Lieutenant-Colonel Mainguy and that the actions of the accused could not be anything but voluntary.

[34] I am also asked to take note of the confirming evidence brought by Sergeant Reavely going to these essential elements. As it pertains to the defence evidence raising the possibility that one or both of the prosecution’s witnesses fabricated or embellished their version of events in furtherance of ulterior motives, the prosecution submits that it does not need to disprove such a farfetched theory as part of its burden of proving the charges. It is submitted that the evidence supporting this collusion or fabrication theory is insufficient to justify that I give it any credence as it cannot possibly leave the Court with a reasonable doubt on the guilt of Lieutenant-Colonel Mainguy.

[35] When challenged about the contradictions in the narrative offered by the two prosecution witnesses, the prosecution acknowledged the existence of contradictions, but submit that they go to minor issues, peripheral to the core of the offences and that I should not be swayed by any of them.

The defence

[36] The defence, for its part, suggests that the prosecution's case should leave me with a sea of reasonable doubt, notably on the basis of the evidence brought by Chief Petty Officer 2nd Class Meaney for the defence. It is also submitted that I should be left with a reasonable doubt on the basis of the implausibility of the prosecution witnesses' description of the alleged assault, as well as their contradictions on significant details directly related to the circumstances surrounding it.

[37] The defence concludes that in the circumstances, it would be imprudent to convict the accused. The defence has stressed that its evidence on the possibility that one or both of the prosecution witnesses fabricated or embellished their version of events in furtherance of ulterior motives constitutes a subsidiary argument. It was stressed, however, that it is not a frivolous argument because the evidence demonstrate a serious concern which should make the possibility of fabrication and collusion more than a mere possibility in the mind of the Court. It is submitted that a plausibility of fabrication or significant embellishment should generate a reasonable doubt and lead to a not guilty verdict, should the Court not be convinced with the defence's primary argument.

Analysis

[38] The essential elements left to be analyzed in the case are as follows. For the assault charge, I must determine if the prosecution has proven that Lieutenant-Colonel Mainguy intentionally applied force to Captain Côté-Jacques and that there was no consent to the force being applied. As for the conduct to the prejudice of good order and discipline charge, the burden is essentially the same: I must determine if Lieutenant-Colonel Mainguy did inappropriately touch Captain Côté-Jacques without her consent.

[39] It is undisputed and obvious from the evidence and the applicable law that the elements of non-consent and of knowledge of non-consent on the part of the accused have been proven beyond a reasonable doubt. It is also the case for the categorization of Lieutenant-Colonel Mainguy's conduct, if proven, as conduct that meets the criteria to be considered conduct to the prejudice of good order and discipline. The defence has not offered any argument to the contrary on these elements.

[40] Therefore, on the facts of this case and in light of the applicable law, the parties agree there are two live issues. The first is whether the prosecution has proven to the required standard that Lieutenant-Colonel Mainguy touched Captain Côté-Jacques. If not, then the accused must be found not guilty. If so, then I must assess, as a second

issue, whether it has been proven beyond a reasonable doubt that the touching by Lieutenant-Colonel Mainguy was intentional.

The applicable standard of proof

[41] Underlying the analysis of charges by any court is the constitutional requirement for the prosecution to prove its case beyond a reasonable doubt. The accused enters penal proceedings presumed to be innocent. The burden of proof rests on the prosecution throughout the trial and never shifts to the accused. The standard of proof beyond a reasonable doubt is inextricably intertwined with the principal fundamental to all criminal trials: the presumption of innocence. This means that before an accused can be convicted of any offence, the judge must be satisfied beyond a reasonable doubt of the existence of all of the essential elements of the offence.

[42] 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. It is not sufficient for me to believe the accused is probably guilty or likely guilty. In those circumstances, I must give the accused the benefit of the doubt and acquit him because the prosecution has failed to satisfy me of the guilt of the accused beyond a reasonable doubt.

[43] On the other hand, however, we must keep in mind that it is virtually impossible to prove anything to an absolute certainty. The prosecution is not required to do so. It is worth noting that a reasonable doubt applies to issues of credibility. On any given point, I may believe a witness, disbelieve a witness or not be able to decide. I am entitled to accept all, some or none of the testimony of any witness. If I have a reasonable doubt about Lieutenant-Colonel Mainguy's guilt, arising from the credibility of the witnesses, then I must find him not guilty.

Assessment of credibility

[44] I have used a generic term "credibility" as a mean to refer to both credibility and reliability. Testimony has credibility problems if the witness is intentionally offering, in whole or in part, false, exaggerated or minimized information. Credibility, in its narrow technical sense, relates to whether the witness was attempting to be honest or truthful. In contrast, reliability is about honest mistakes. Evidence has reliability problems if an honest witness is inadvertently offering inaccurate information. Credibility problems can arise because the witness is not a trustworthy person, but generally, credibility problems are almost always contextual. This means that in particular circumstances, witnesses may choose to offer a fabricated, exaggerated or minimized account. As with credibility problems, some reliability problems arise from a witness's personal circumstances, but are more commonly situational.

[45] Many of the factors relevant in evaluating credibility can assist in making reliability conclusions. For instance, accounts most rationally trusted for their accuracy are plausible, consistent with what can confidently be known to be true, may even be

supported by independent information, and the witness who provides that account would not have offered materially different versions on other occasions.

[46] It is important to know that a criminal trial, including before a court martial, is not an enquiry as to what happened or who's version is stronger. The ultimate function of the trial, in which complainants are not parties, is to determine whether the prosecution has proven the specific allegations it has made in the charge beyond a reasonable doubt. The trial judge may well prefer a witness's narrative to the one offered by an accused, but that does not resolve whether he or she has a reasonable doubt about the accused's guilt. This is because there are other options requiring acquittal, including the legitimate possibility of the judge being unable to resolve the conflicting evidence and, accordingly, be left with a reasonable doubt.

[47] The defence position is to the effect that the resolution of this case can be achieved on the basis of reasonable doubt arising out of the credibility of witnesses, suggesting that the credibility analysis could be collapsed in the analysis of whether the offences were proven to the required standard.

[48] The prosecution adopted a more classic approach, suggesting its witnesses were credible by virtue of having been balanced, consistent, non-contradicted and supported.

[49] What I propose to do is offer general remarks about the credibility of each witness. I will then move to the analysis of their evidence and the impact of the evidence on the findings I am required to make.

[50] The prosecution has offered remarks referring to the demeanour of its witnesses and the fact that their testimony was balanced, a quality that exists when a witness shies away from apparent exaggeration or evident minimization, admits unflattering or personally difficult facts, or credibly acknowledges the weakness in their evidence. All of these things can enhance confidence that the witness is intent on being truthful. I have considered also a number of other factors in my general evaluation of the credibility of witnesses, including: the internal and external consistency of the evidence; the presence of independent supporting or contradicting evidence; and the plausibility of the evidence. I believe the most dependable way to evaluate credibility is to pay heed to the specific testimony offered, rather than the source or manner of presentation. For that reason, I will comment on the plausibility assessment and the impact of contradictions in my analysis of whether the prosecution has proven the offences at the required standard.

Captain Côté-Jacques

[51] Captain Côté-Jacques testified first for the prosecution. She came across as an extremely intelligent, dedicated and in many ways model officer who is evidently very busy making a significant contribution to the CAF recruiting efforts in a challenging environment, especially with the pandemic. Major Ring was complimentary of her, qualifying her as ambitious and the kind of person not satisfied with the *status quo*.

These are important and useful qualities, but they do not make her testimony forthright as submitted by the prosecution.

[52] Indeed, forthright and balanced witnesses do not answer strategically; they answer the questions asked and they do not attempt unreasonably to control the narrative. Witnesses who are selective or controlling or who otherwise appear to have an agenda given the way in which they testified are not forthright. After Captain Côté-Jacques' testimony, I was left with a feeling that she had spent much effort to find ways to answer questions in a manner that strategically lined up with the narrative she wanted to pursue. Instead of focussing on the questions asked and try her best to assist the Court in advancing the search for the truth, her attempts to control the narrative were obvious, especially in cross-examination. For instance, to the first question she was asked as to whether the picture that had been placed in front of her was indeed the officer's mess' bar at CFB Borden, her answer was "It could be the officer's mess' bar". That answer was in stark contrast with what other witnesses, later shown the same photo, answered and was odd given that this was a place she had testified having attended on numerous occasions during her examination-in-chief. I even had to make a very rare interjection to insist in obtaining a clear answer to that very easy question. With respect for the prosecution's view, that is not forthright testimony.

[53] That said, I make these remarks reluctantly because I felt I needed to address the prosecution's argument as part of my duty. I recognize that stress and the challenge of testifying may have caused Captain Côté-Jacques to retreat to a style of locution that is more in line with her training in dealing with aggressive journalists adverse to the interest she had been hired to pursue on behalf of the CAF. It is reasonable to assume that her training and day job may include trying to control the narrative. Perhaps my observations will outline the importance of explaining to witnesses their role in a court of law, and in their duty to try to assist the Court in answering legitimate questions of counsel.

[54] In any event, it remains that Captain Côté-Jacques' testimony, unfortunately, left me with the feeling that her priority was not to attempt to be honest or truthful in assisting the Court. This generates credibility concerns. However, those are not determinative in my conclusion.

[55] Other than these concerns, which I had to express in light of the prosecution's argument, I do recognize that Captain Côté-Jacques brought forth evidence on all of the essential elements of the offences. There were no internal consistency problems raised in relation to previous statement she had made. And her testimony was in large part consistent with other evidence on the core aspects of the incidents, on which I will elaborate later. There were no obvious concerns about her reliability, namely her capacity to observe, remember or communicate the evidence.

[56] That said, there were inherent challenges arising from the circumstances of the incident, such as the fact that it occurred for a relatively brief period and was not expected; it was observed for a brief period only; it caused shock and in the case of

Captain Côté-Jacques specifically, an auditory exclusion for some time. And, of course, the incident happened over two and a half years ago.

Sergeant Reavely

[57] The same reliability challenges applied to all of the other witnesses, including the second prosecution witness, Sergeant Reavely. I do not have concerns about her efforts to be honest or truthful in assisting the Court. However, her recollection of the details and sequence of events of the evening's activities was limited. For instance, the sequence of events she related with a picture being taking immediately before dinner, after drinks, is different than other witnesses and appears less plausible. Also, her memory of spending time with Chief Petty Officer 2nd Class Meaney was weak, even after being shown a picture of their feet as they stood together outside the mess, shoes removed, at the end of the evening. Her recollection of events closely related to the incident of assault was also different than that of Captain Côté-Jacques, a matter that I will cover shortly.

Chief Petty Officer 2nd Class Meaney

[58] The first witness for the defence was Chief Petty Officer 2nd Class Meaney. The prosecution suggested that I should be cautious about her testimony given the fact that she did not come forward to request to be formally interviewed by CFNIS investigators when they first visited her unit to investigate the matter. She did so only in November 2021, to share her concerns about the complaints, the investigation and its outcome, specifically the charges. She had these concerns in the days following the alleged offences.

[59] Respectfully, I do not agree with the suggestion made by the prosecution that the delay in Chief Petty Officer 2nd Class Meaney speaking to the CFNIS impacts significantly on her credibility. First, Chief Petty Officer 2nd Class Meaney did give a formal statement in ample time for the parties to consider what she had to say and make decisions about their respective cases accordingly. She was not a surprise witness who appeared in the middle of the trial. It is safe to infer that an earlier contribution on her part would not have made a difference in how the case was handled from the preferral of charges to this trial. Secondly, the evidence reveals that the investigation of this matter was handled initially at the unit level, and unit authorities contacted the CFNIS when apprised of the fact that an offence or offences may have been committed.

[60] Chief Petty Officer 2nd Class Meaney testified having engaged these same unit authorities early on to the effect that she may have something to contribute; yet, she heard nothing from them. While it is true that quite a bit of time passed before she spoke to CFNIS investigators, I can appreciate that in today's climate within the CAF, a decision that a woman, senior non-commissioned officer may have to make to come forward and testify in defence of a male senior officer suspected of sexual misconduct may be difficult to make. Chief Petty Officer 2nd Class Meaney testified that the matter troubled her for some time. That is a highly credible statement. I do not agree with the

prosecution's suggestion that her hesitation to come forward demonstrates that she was in doubt about what she saw or did not see the night of the mess dinner, on 30 May 2019. In fact, Chief Petty Officer 2nd Class Meaney denied that suggestion on the stand. I do believe that the context of Chief Petty Officer 2nd Class Meaney's involvement in the investigation of the case, albeit late, nevertheless demonstrates her honesty and commitment in offering what she believed may be useful in the authority's quest to find the truth.

[61] As a result of her involvement, she was called by the defence in this court and displayed on the stand what I witnessed to be a consistent and honest attempt at telling the truth to the best of her ability. She did face the same challenging circumstances as the other witnesses as it pertains to reliability, but I found that her capacity to observe, remember and communicate the evidence of what did occur was markedly better than the other witnesses. Generally, I have no hesitation to find that Chief Petty Officer 2nd Class Meaney is a highly credible witness.

Major Ring

[62] I also have no credibility concerns about Major Ring's evidence, which was limited to peripheral matters. I say that despite the fact that his memory of events was generally weak and may have created reliability concerns if he had been testifying about matters of more substance.

[63] As I alluded to previously, I must be convinced beyond a reasonable doubt that Lieutenant-Colonel Mainguy voluntarily touched Captain Côté-Jacques before I can find him guilty of the charges laid against him. I am left with significant doubts on the evidence because of the evidence presented by the defence as well as the weakness of the prosecution's evidence. I need to explain why that is the case and how it affects the findings I need to make.

W.(D.) framework

[64] The defence, during its submissions, suggested that the Court analyzes the evidence and performs its reasonable doubt analysis using the well-known framework developed by the Supreme Court of Canada in the case of *R. v. W.(D.)*, [1991] 1 SCR 742 even if the accused exercised his right not to testify. Defence counsel qualified his proposition as "novel", but in fact, after verification, it is not. It is exactly what then-Professor David Paciocco, now Judge at the Ontario Court of Appeal, said should be done, in an article published in the *Canadian Criminal Law Review* in February 2017 titled, "*Doubt about Doubt: Coping with R. v. W. (D.) and Credibility Assessment*", 22 *Canadian Criminal Law Review* 31. The article, which will be well known to the prosecution, suggests that the "*W.(D.)* rule" can best be understood not so much by its language, but through its underlying purpose and the principles that the purpose generates.

[65] The author's first proposition is that the *W.(D.)* framework applies in determining guilt during criminal trials where there is evidence, whether from the testimony of the accused or defence witnesses or arising even from the prosecution's case, that, if true, is capable of preventing the prosecution from proving beyond a reasonable doubt an element of the offence. That is the case here.

[66] Chief Petty Officer 2nd Class Meaney has testified that she was present in company with Sergeant Reavely throughout most of the evening and took part in the conversation about the mess kit worn by Captain Côté-Jacques. Although Captain Côté-Jacques did not remember and Sergeant Reavely denied that Chief Petty Officer 2nd Class Meaney was involved in that conversation, they did not refer to any other conversation having occurred on this subject throughout the evening. I do acknowledge the prosecution's argument that Chief Petty Officer 2nd Class Meaney may have been witness to only part of the conversation, but the evidence is to the effect that there was only one conversation on this issue, and that it was brief, as submitted by the defence. As the alleged assault was tied in with that conversation, the testimony of Chief Petty Officer 2nd Class Meaney to the effect that she was there, that she even initiated that conversation about the mess kit and that there was no assault resulting from that conversation constitute evidence that, if true, is capable of preventing the prosecution from proving beyond a reasonable doubt that the assault occurred.

[67] Of course, the evidence of Chief Petty Officer 2nd Class Meaney must be evaluated for its credibility and reliability before it can be acted upon. As stated previously, the evidence comes from a highly credible witness. Her recollection was excellent throughout her testimony and she had no hesitation to admit when it was not the case. Although she stated that the evening of 30 May 2019 was uneventful, as it was from her perspective at the time, her testimony is convincing as to why her attention was brought back to the conversation on the mess kit the very next day, following serious concerns expressed to her by Sergeant Reavely. Chief Petty Officer 2nd Class Meaney had a credible reason to remember the mess kit conversation and the associated events from that point in time. The subsequent events and the torment she felt about the information she had both support the conclusion that the information would not fade away from her memory. She gave a formal statement to the CFNIS in November 2021 and at no time was she confronted with inaccuracies or inconsistencies with what she would have said previously to the CFNIS or anyone else.

[68] Chief Petty Officer 2nd Class Meaney is an independent witness who has no interest whatsoever in the outcome of the case. She resisted politely but firmly to several suggestions in cross-examination that her memory was inaccurate or that she was, at some point, in doubt about her recollection of the evening of 30 May 2019. I find her evidence to be both credible and reliable. I must accept it.

[69] I acknowledge that the version of Chief Petty Officer 2nd Class Meaney is contradicted by the version of prosecution witnesses. It would be wrong for me to decide this case where there is conflicting evidence about whether the accused is guilty simply by deciding which version of events I prefer. The decisive question is whether,

considering the evidence as a whole, the prosecution has proven the guilt of the accused on the specific charges alleged, beyond a reasonable doubt.

[70] In deciding whether the prosecution has proven the accused to be guilty beyond a reasonable doubt, I must ask myself whether I have just accepted as accurate evidence that cannot coexist with the finding that the accused is guilty. If that is the case, I must acquit. The evidence of Chief Petty Officer 2nd Class Meaney is to the effect that no incident of assault occurred. It is convincing evidence that is obviously incompatible with the guilt of the accused.

[71] That being stated, the prosecution has made an argument to the effect that Chief Petty Officer 2nd Class Meaney may have lost sight of Captain Côté-Jacques and Sergeant Reavely for a moment in the early part of the evening, at the exact time that the assault took place. Recognizing the plausibility of that argument and by respect for the efforts that went into the testimony of prosecution witnesses, I will assess the prosecution's evidence in isolation from the defence evidence to explain why I will be left with a reasonable doubt on the whole of the prosecution's evidence even if I had rejected the defence's evidence and had not been left with a reasonable doubt by it.

[72] Indeed, I find that the prosecution's evidence leaves me with plausibility concerns. A passage frequently quoted from a civil case, *Faryna v. Chorny*, 1951 CarswellBC 133, [1952] 2 D.L.R. 354 (C.A.) at 356-357 makes the point about the important role plausibility plays in the assessment of evidence:

“The test [for credibility] must reasonably subject [a witness's] story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness . . . must be its harmony with the preponderance of the probabilities.”

[73] This “experience of human affairs” can help criminal fact-finders to test the likelihood of a story being true. While it is always necessary to be humble and cautious when relying on personal experiences and expectations, if an account does not have an air of reality or is hardly plausible, that is an important and legitimate basis for refusing to credit it.

[74] In this case, I must acknowledge the defence's argument on the extraordinary and exceptional nature of the conduct being attributed to Lieutenant-Colonel Mainguy on 30 May 2019. As a senior officer, during an official all-ranks function, on base, in a room filled with fifty to a hundred other officers, civilian employees, non-commissioned members, at the beginning of an evening while he was not intoxicated, Lieutenant-Colonel Mainguy would have taken the opportunity to get close and assault, for five to ten seconds, a subordinate with whom he had a professional and friendly relationship, in close contact for almost a year, including significant interactions such as a temporary duty trip without concern of any sort. He would have performed this brazen act in a room filled with so many people and he would have left the scene immediately without being heard uttering a word before, during or after the alleged touching.

[75] Despite the media attention justifiably accorded to sexual misconduct incidents by senior officers recently, it remains that such conduct is an exceptional occurrence. It does not mean that it does not have an air of reality and could not have happened. Robberies at corner stores are exceptional occurrences too. Yet, they happen. It could be the case for Lieutenant-Colonel Mainguy's conduct.

[76] When doubts are raised as to whether an incident occurred, as is the case here with the evidence of Chief Petty Officer 2nd Class Meaney, the account of the incident must be analyzed closely, as submitted by the defence. The most direct source of evidence as to what occurred is, obviously, coming from the testimony of Captain Côté-Jacques, the alleged target of the assault.

[77] The most striking, troubling and, to an extent surprising part of her evidence, especially given that no sexual assault charge was laid, was the fact that she claims that she felt Lieutenant-Colonel Mainguy's penis being rubbed on her upper left buttock for ten seconds. It is understood both were fully clothed. Immediately before the assault, there was a discussion on the mess kits, during which a finger had been pointed at Lieutenant-Colonel Mainguy who was standing some distance away. As Captain Côté-Jacques extended her left leg forward as part of the same discussion, Lieutenant-Colonel Mainguy would have moved towards her and rubbed his penis in a circular motion left and right for ten seconds. It is difficult to imagine that Captain Côté-Jacques would have been able to feel Lieutenant-Colonel Mainguy's penis on her buttock through clothing if he did not have an erection. It is also difficult to imagine Lieutenant-Colonel Mainguy walking around the room with an erection or having a sudden erection upon seeing Captain Côté-Jacques pointing towards him and extending her leg. It is also difficult to believe Lieutenant-Colonel Mainguy would have been able to hold the position describe without placing one or both hands on Captain Côté-Jacques' body, something that was not done, according to her testimony.

[78] All of these difficulties cause me to conclude that the version of events offered by Captain Côté-Jacques suffered significant plausibility concerns.

[79] The defence has brought to the Court's attention a number of hypotheses as to what may have happened. The evidence reveals that it would have been very crowded in the vicinity of the bar of the officers' mess minutes before the start of the dinner, shortly after the bar had been open, and in all likelihood, just after the bell had been rung to signify that free drinks were available. The photos of all participants and of the room are conclusive in supporting the testimony of Chief Petty Officer 2nd Class Meaney to that effect. In that crowded environment, the submission of the defence to the effect that it may well have been someone's elbow who had contacted Captain Côté-Jacques' behind is a plausible alternative. If one accepts that Captain Côté-Jacques may have misidentified the person that was behind her throughout the incident, after having recognized Lieutenant-Colonel Mainguy initially. The alternative submission of the defence is to the effect that Lieutenant-Colonel Mainguy may have been pushed or otherwise lost his balance and impacted with Captain Côté-Jacques' body accidentally.

[80] My task is not to choose between versions nor determine everything that happened at the CFB Borden officers mess on 30 May 2019. I have to keep in mind that the defence is not obliged to prove anything. The bottom line is that I do have plausibility concerns with the evidence of Captain Côté-Jacques and I am concerned that there are other plausible alternatives explaining what she may well have felt on her body which do not involve a voluntary act from Lieutenant-Colonel Mainguy. I assess these concerns as sufficient to generate a reasonable doubt as to whether the prosecution has met its burden.

[81] However, there is more. The plausibility concerns are also associated with the testimony of Sergeant Reavely, as it pertains to details of the alleged assault. Those details are in many ways similar to those provided by Captain Côté-Jacques and in that sense, their testimonies are intertwined to an extent, as suggested by the defence.

[82] The main feature of the testimony of Sergeant Reavely as to the assault is that she was unable to confirm whether the accused was touching Captain Côté-Jacques at any point. What I conclude from her testimony is that Lieutenant-Colonel Mainguy had his chin next to Captain Côté-Jacques' left shoulder, his left leg extended very close to her left leg, and was moving his hips in a humping back-and-forth motion.

[83] However, Lieutenant-Colonel Mainguy is significantly taller than Captain Côté-Jacques, a height similar to Major Berdais, who is standing next to Captain Côté-Jacques on the picture at Exhibit 6, with his shoulders arriving approximately at the top part of Captain Côté-Jacques forehead. A man with such a height differential in relation to his victim could not possibly have his left leg extended and be bent over for his chin to be next to the victim's shoulder and at the same time, be able to be humping back and forth anywhere near his victim's buttock. His right knee would necessarily have to be bent, preventing or at least seriously limiting such movement.

[84] Of course, it could be that the chin on the shoulder position was before the back and forth humping movement began, but the problem is that I do not know that. The prosecutor did not seem to realize that the evidence elicited was depicting an impossible position. Clarifications were not sought nor obtained. The prosecutor moved on to the next question. Consequently, I am left deliberating about this case with a mental image of Lieutenant-Colonel Mainguy's left leg extended, chin near a much shorter Captain Côté-Jacques' shoulder, hence with necessarily his right knee bent in a position that hardly allows a back and forth hip movement as described by Sergeant Reavely, very near his victim's buttocks, or a push with his penis on Captain Côté-Jacques buttock, with a left and right and circle movement as described by Captain Côté-Jacques.

[85] I am also concerned with the natural consequence of someone pushing an unsuspecting victim in the fashion described by Captain Côté-Jacques. Even if she froze, would the pushing force she described not result in her body leaning forward, even unconsciously? I am left in torment with many unanswered questions generally as to what exactly happened and specifically, whether an assault has occurred.

[86] In those circumstances, there is only one outcome, and it is an acquittal. My doubts are not eliminated by what the prosecution described as a confirmatory evidence of Captain Côté-Jacques' version elicited from Sergeant Reavely. As I just highlighted, there are significant discrepancies between the testimony of Captain Côté-Jacques and Sergeant Reavely as to the movement of Lieutenant-Colonel Mainguy: left, right and in circle with a slight movement of the waist according to the testimony of Captain Côté-Jacques and in a back and forth humping motion according to the testimony of Sergeant Reavely.

[87] There are also significant differences about how exactly the contact ceased; Captain Côté-Jacques testifying that Sergeant Reavely placed her two hands on her shoulders and pulled her back towards her, while Sergeant Reavely testified that she reached out and grabbed Captain Côté-Jacques' left hand just below the wrist to yank her towards her. There were discrepancies about the words exchanged afterwards as well; Captain Côté-Jacques testifying that Sergeant Reavely said to her words to the effect of, "What has just happened? This is not okay; let's go see other people", while Sergeant Reavely testified that she said, "Oh my God" and that Captain Côté-Jacques would have replied, "Thank you".

[88] What is concerning with these discrepancies in particular is that they relate to actions taken and words spoken at the time of or very shortly after the alleged assault. If the recollection of the two prosecution witnesses is inconsistent on these points, what about the rest of the interaction? I do recognize that discrepancies are not contradictions on the core of the offence. This is not a situation where one witness' version is to the effect that the offence occurred and the other witness is to the effect that it did not. Yet, these discrepancies diminish the impact of what is described by the prosecution as confirmatory evidence of Captain Côté-Jacques' version. They also compound to an extent that the doubts I am left with as to whether the prosecution's evidence has convinced me at the required standard to ground a guilty verdict.

[89] To be clear, I want to state that there is nothing in the doubts that I have expressed so far in these reasons which relate in any way to the conduct of Captain Côté-Jacques after the alleged incident, whether in the rest of the evening or in subsequent days.

Conclusion

[90] I believe the doubts I have just outlined in relation to the occurrence of the incident in consideration of the evidence brought by Chief Petty Officer 2nd Class Meaney, the plausibility of the movements and the touching attributed to the voluntary actions of Lieutenant-Colonel Mainguy by the prosecution witnesses and the discrepancies in the evidence of these witnesses are amply sufficient to ground a doubt that I believe to be reasonable as to an essential element of both offences, namely whether the touching occurred.

[91] I have not, to that point, analyzed the strength of the position advanced by the defence on the basis of its evidence on the possibility that one or both of the prosecution witnesses fabricated or embellished their version of events in furtherance of ulterior motives. I do not need to enter into such an analysis, in light of the conclusions I have reached and just stated on the other evidence.

[92] Any conclusions I may have wished to state about this issue would have required that I discuss matters of morale, discipline and performance of some specific individuals and groups of individuals who were not called as witnesses before this court martial. This could have reflected negatively on persons named or unnamed in the course of the evidence that was elicited on these issues. I concluded that the disadvantages of making the necessary comments relating to this analysis will outweigh any advantages in the circumstances of my conclusions about the evidence.

[93] That said, my conclusion on the possibility of fabrication or embellishment should not be interpreted as a finding that the position of the defence was frivolous, as argued by the prosecution. The evidence heard was troubling, even if any hypothetical impact on findings I need to make does not need to be addressed.

[94] In conclusion, I am left in doubt about whether Lieutenant-Colonel Mainguy did touch Captain Côté-Jacques as described in the charge and whether he did so intentionally.

[95] As a result of these doubts which I have described, I am unable to conclude that the prosecution has discharged its burden of proving the offences beyond a reasonable doubt. Consequently, it is my duty to acquit.

FOR THESE REASONS, THE COURT:

[96] **FINDS** Lieutenant-Colonel Mainguy not guilty of charges 1 and 2.

Counsel:

The Director of Military Prosecutions as represented by Majors A. Dhillon and G. Moorehead

Lieutenant-Colonel A. Bolik, Defence Counsel Services, Counsel for Lieutenant-Colonel D. Mainguy