**COURT MARTIAL**

**Citation:** *R v Wilks*, 2011 CM 4024

**Date:** 20111017
**Docket:** 201124

Standing Court Martial

Wolseley Barracks
London, Ontario, Canada

**Between:**

**Her Majesty the Queen**

- and -

**Ex-Petty Officer 2nd Class J.K. Wilks, Accused**

**Before:** Lieutenant-Colonel J-G Perron, M.J.

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**Restriction on publication: By court order made under section 179 of the *National Defence Act* and section 486.4 of the *Criminal Code*, information that could disclose the identity of the persons described in this judgement as the complainants shall not be published in any document or broadcast or transmitted in any way.**

## REASONS FOR FINDING

(Orally)

INTRODUCTION

[1] The accused, ex-Petty Officer 2nd Class Wilks, is charged with having committed six offences. He stands accused under section 130 of the *National Defence Act* of two charges of sexual assault contrary to section 271 of the *Criminal Code of Canada* and of four charges of breach of the public trust by a public officer contrary to section 122 of the *Criminal Code of Canada*.

THE APPLICABLE LAW

[2] Before the court provides its analysis of the evidence and of the charges, 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 criminal trials. Although these principles are well known to counsel, other people in this courtroom may be less familiar with them.

[3] It is fair to say that the presumption of innocence is most likely the most fundamental principle in our criminal law, and the principle of proof beyond a reasonable doubt is an essential part of the presumption of innocence. In matters dealt with under the Code of Service Discipline, as the cases dealt with under Canadian criminal law, every person charged with a criminal offence is presumed to be innocent until the prosecution proves his or her guilt beyond a reasonable doubt. An accused person does not have to prove that he or she is innocent. It is up to the prosecution to prove its case on each element of the offence beyond a reasonable doubt. An accused person is presumed innocent throughout his or her trial until a verdict is given by the finder of fact.

[4] The standard of proof beyond a reasonable doubt does not apply to the individual items of evidence or to separate pieces of evidence that make up the prosecution's case, but to the total body of evidence upon which the prosecution relies to prove guilt. The burden or onus of proving the guilt of an accused person beyond a reasonable doubt rests upon the prosecution and it never shifts to the accused person.

[5] A court must find an accused person not guilty if it has a reasonable doubt about his or her guilt after having considered all of the evidence. The term "beyond a reasonable doubt" has been used for a very long time. It is part of our history and traditions of justice.

[6] In *R v Lifchus*, [1997] 3 SCR 320, the Supreme Court of Canada proposed a model chart on reasonable doubt. The principles laid out in *Lifchus* have been applied in a number of Supreme Court and appellate court decisions. In substance, a reasonable doubt is not a far-fetched or frivolous doubt. It is not a doubt based on sympathy or prejudice, it is a doubt based on reason and common sense. It is a doubt that arrives at the end of the case, based not only on what evidence tells the court, but also on what that evidence does not tell the court. The fact that a person has been charged is no way indicative of his or her guilt.

[7] In R v Starr, [2000] 2 SCR 144, at paragraph 242, the Supreme Court held that:

> ... an effective way to define the reasonable doubt standard for a jury is to explain that it falls much closer to absolute certainty than to proof on a balance of probabilities.

On the other hand, it should be remembered that it is nearly impossible to prove anything with absolute certainty. The prosecution is not required to do so. Absolute certainty is a standard of proof that does not exist in law. The prosecution only has the burden of proving the guilt of an accused person, in this case Ex-Petty Officer 2nd Class Wilks, beyond a reasonable doubt. To put it in perspective, if the court is convinced, or would have been convinced, that the accused is probably or likely guilty, then the ac-

cused would be acquitted since proof of probable or likely guilt is not proof of guilt beyond a reasonable doubt.

[8] What is evidence? Evidence may include testimony under oath or solemn affirmation before the court by witnesses about what they observed or what they did. It could be documents, photographs, maps or other items introduced by witnesses, the testimony of expert witnesses, formal admissions of facts by either the prosecution or the defence, and matters of which the court takes judicial notice.

[9] It is not unusual that some evidence presented before the court may be contradictory. Often, witnesses may have different recollections of events. The court has to determine what evidence it finds credible.

[10] Credibility is not synonymous with telling the truth, and a lack of credibility is not synonymous with lying. Many factors influence the court's assessment of the credibility of testimonies of a witness. For example, a court will assess a witness's opportunity to observe, a witness's reasons to remember. Was there something specific that helped the witness remember the details of the event that he or she described? Were the events noteworthy, unusual and striking, or relatively unimportant and, therefore, understandably, more difficult to recollect? Does a witness have any interest in the outcome of the trial; that is, a reason to favour the prosecution or the defence, or is the witness impartial? This last factor applies in a somewhat different way to the accused. Even though it is reasonable to assume that the accused is interested in securing his or her acquittal, the presumption of innocence does not permit a conclusion that an accused will lie where that accused chooses to testify.

[11] Another factor in determining credibility is the apparent capacity of the witness to remember. The demeanour of the witness while testifying is a factor which can be used in assessing credibility; that is, was the witness responsive to questions, straightforward in his or her answers, or evasive, hesitant, or argumentative? Finally, was the witness's testimony consistent with itself and with the uncontradicted facts?

[12] Minor discrepancies, which can and do innocently occur, do not necessarily mean that the testimony should be disregarded. However, a deliberate falsehood is an entirely different matter. It is always serious, and it may well tint a witness's entire testimony.

[13] The court is not required to accept the testimony of any witness, except to the extent that it has impressed the court as credible. However, a court will accept evidence as trustworthy unless there is a reason to disbelieve it.

[14] The court must focus its attention on the test found in the Supreme Court of Canada decision of *R v W.(D.)*, [1991] 1 SCR 742. As established in that decision, the test goes as follows:

> First, if you believe the evidence of the accused, obviously you must acquit.

> Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
>
> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

In *R v J.H.S.*, 2008 SCC 30 at paragraph 12, the Supreme Court of Canada quoted approvingly the following passage from *R v H.(C.W.)*, (1991) 68 CCC(3rd) 146 (BCCA) where Wood J.A. suggested the additional instruction:

> I would add one more instruction in such cases, which logically ought to be second in the order, namely: "If, after a careful consideration of all the evidence, you are unable to decide whom to believe, you must acquit."

[15] Having instructed myself as to the onus and standard of proof, I will now turn to the questions in issue put before the court.

THE EVIDENCE

[16] The evidence before this court martial is composed essentially of the following: judicial notice, testimonies and exhibits. Judicial notice was taken by the court of the facts and issues under Rule 15 of the Military Rules of Evidence. The testimonies heard in the order of their appearance before the court are those of Miss Robi Williams, Major Netterfield, Master Warrant Officer Thibeault, Warrant Officer Robertson, Miss A.D., Able Seaman E.C. and ex-Petty Officer 2nd Class Wilks. I will only use the initials of the complainants to protect their identity. Six exhibits were entered by the prosecution.

[17] This is a case that turns on credibility and I must assess the credibility and reliability of the witnesses. I will begin with ex-Petty Officer 2nd Class Wilks since he is the accused. The assessment of his evidence must be done within the context of the evidence as a whole. Petty Officer 2nd Class Wilks has flatly denied that he conducted breast examinations on Miss A.D., that he pressed his erect penis against Miss Robi Williams, that he conducted the examination as she described and that he examined Able Seaman E.C. as she described. He testified that he does not remember performing an enrolment medical examination on Able Seaman E.C. and Miss A.D. but recalls performing the enrolment medical examination on Miss Robi Williams. He explained why he could remember Miss Robi Williams.

[18] He stated that he never examined the breasts of applicants during an enrolment medical examination and the he always asked the female applicants if they wished to have a chaperone present during the medical examination.

[19] During his cross-examination, Petty Officer 2nd Class Wilks mentioned that he had asked Miss Robi Williams if she wanted a chaperone and that she had requested a chaperone. He then went to ask the housekeeper of the Armouries to act as a chaperone but she had gone for the day. He explained that he usually asked the housekeeper to act as a chaperone when an applicant requested one or when he expected a female appli-

cant. He could not remember the name of the housekeeper. He explained that he had not been told that Miss Robi Williams would come that day and he had not asked the housekeeper to be available. He came back and told Miss Robi Williams there was no chaperone. He asked her if she had a chaperone and she replied no. He explained to her that she could re-schedule the appointment but that it might take a few weeks and thus cause problems with her application or she could continue without a chaperone. She chose to continue without a chaperone. Petty Officer 2nd Class Wilks testified he had asked Miss Robi Williams at least three times if she wanted a chaperone.

[20] This important evidence was disclosed during the cross-examination of Petty Officer 2nd Class Wilks. It serves to confirm that he always asked applicants whether they wished a chaperone. Miss Robi Williams was not cross-examined on this important evidence, yet it contradicts her testimony on an important issue. She was told there would be evidence suggesting she had been asked if she wanted a chaperone but she was not cross-examined on this important piece of evidence emanating from Petty Officer 2nd Class Wilks' testimony. Petty Officer 2nd Class Wilks would have performed 100 to 200 medical examinations in Sarnia and over 100 examinations with chaperones but he does not remember the name of the housekeeper that served as a chaperone for a number of these examinations. He can remember that he has had a Swiss knife and a cell phone in his pant pockets for at least five years and in which pocket but he cannot remember the name of the housekeeper he has known for approximately two years and that has consistently acted as a chaperone during that time. The fact that Petty Officer 2nd Class Wilks cannot identify the housekeeper creates much doubt as to the veracity of this evidence. The absence of cross-examination on this important issue would also have greatly diminished the weight the court would give to this evidence had the court found it credible.

[21] When asked by the prosecutor whether patients had ever expressed concerns about their privacy, Petty Officer 2nd Class Wilks testified as to one incident in 2004-2005. He agreed it pertained to whether they were provided shorts or a covering like a gown to ensure their privacy. When asked if there had been any other concerns, he stated that he was not aware of any others. He then remembered when he was referred to Major Netterfield's testimony concerning her April 2007 meeting with him. He then specified his recollection of the meeting was that it focused on questioning and how he approached patients and not applicants. He stated he could not remember specifics but he finally agreed with the prosecutor that he was told not to perform breast examinations on serving members and applicants.

[22] Major Netterfield testified the CO, Commanding Officer, of the Canadian Forces Recruiting Centre Detachment in Thunder Bay had contacted her in 2007 because he had certain concerns with medical examinations of applicants. At that time, Petty Officer 2nd Class Wilks was the medical technician in Thunder Bay and Major Netterfield was Petty Officer 2nd Class Wilks' immediate supervisor for all clinical matters. She met him in April 2007 to discuss methods and procedures pertaining to the examination of female patients. She walked him through the examination of a female patient step by step, what was said to the patient and how the patient was prepared, i.e. gowns. She

discussed the appropriate technique for the examination for his rank and the nature of his job. She also discussed medical-legal liability. She told him there was no need to have the person remove her brassiere, that the gown had to be worn and there was no need for him to examine a person for a lump in the breast. It was necessary to ask the person to contact her family doctor in such a case. She focused on the breasts when she spoke to him.

[23] Petty Officer 2nd Class Wilks' testimony pertaining to that meeting was vague and he specified it dealt with patients and not applicants. It is clear from Major Netterfield's testimony that, although the word "patient" was used, the topic of conversation was the examination of female applicants at a CFRC, Canadian Forces Recruiting Center. She did not discuss male applicants with Petty Officer 2nd Class Wilks. The court finds Petty Officer 2nd Class Wilks was evasive in answering questions on that issue and that his attempt to classify the meeting as one dealing with patients and not applicants shows that he does not want to acknowledge any notion that there might have been any concerns in the past pertaining to medical examinations of female applicants.

[24] I do not consider Petty Officer 2nd Class Wilks a credible witness. I do not believe his version of events. With this conclusion in mind, I will now examine every charge.

[25] Charge No. 1, the particulars of this charge read as follows:

> "In that he, on 20 November 2009, at London, Ontario, did commit a sexual assault on Miss A.D."

The prosecution had to prove the following essential elements for this offence beyond a reasonable doubt:

(a) the identity of the accused as the offender and the date and place as alleged in the charge sheet;

(b) that Petty Officer 2nd Class Wilks applied force to Miss A.D.;

(c) that Petty Officer 2nd Class Wilks intentionally applied force;

(d) that Miss A.D. did not consent to the force that Petty Officer 2nd Class Wilks applied; and

(e) that the force Petty Officer 2nd Class Wilks applied took place in the circumstances of a sexual nature.

[26] The identity of the offender is not in question in this charge or in any of the six charges. The date and place as alleged in the charge sheet have not been disputed by defence counsel and have been proven by the testimony of Miss A.D.

[27] Did Petty Officer 2nd Class Wilks apply force to Miss A.D.? Petty Officer 2nd Class Wilks does not remember performing an enrolment medical examination upon Miss A.D. He testified that he would never examine the breasts of a female applicant. Miss A.D. described how Petty Officer 2nd Class Wilks conducted the examination of her breasts. She testified that Petty Officer 2nd Class Wilks told her to only remove her blouse and brassiere and to put on a gown. Petty Officer 2nd Class Wilks examined her left breast with his fingers. He then examined her right breast. He pressed on her nipples with his fingers.

[28] The court has already stated it does not believe Petty Officer 2nd Class Wilks. Miss A.D. testified in a straightforward manner and her manner in answering was consistent throughout her testimony. While she admitted that the passage of time did make it difficult to remember exactly every event, she was consistent in her testimony and was not contradicted during the cross-examination. Defence counsel even stated that Miss A.D. was a reliable witness. She is deemed a credible and reliable witness. The court finds Petty Officer 2nd Class Wilks did apply force to Miss A.D. by touching her breasts with his hands.

[29] Did Petty Officer 2nd Class Wilks intentionally apply the force? Miss A.D. testified Petty Officer 2nd Class Wilks told her he had to perform an examination of her breasts and that he examined her breasts with his hands. The court concludes from this evidence that Petty Officer 2nd Class Wilks intentionally applied force to Miss A.D.

[30] Did Miss A.D. consent to the force that Petty Officer 2nd Class Wilks applied? Miss A.D. testified that Petty Officer 2nd Class Wilks told her he had to examine her breasts. She told him he had already examined her breasts on 4 November but he told her he had not done so since the documentation did not indicate he had examined her breasts. She stated Petty Officer 2nd Class Wilks did not ask her if she wanted a breast examination but that he stated he had to do one because it was part of the enrolment process. She testified she would have refused if she had known it was not part of the enrolment process because she did not need a breast examination. She testified she would have done anything to successfully complete the enrolment process.

[31] Petty Officer 2nd Class Wilks was in a position of authority vis-à-vis Miss A.D. He was involved in the official recruiting process. She had to report to him to participate in a medical examination as part of her recruiting process. The court finds Petty Officer 2nd Class Wilks induced Miss A.D. to engage in the activity by abusing his position of authority. The court finds Miss A.D. would not have consented to the touching of her breasts by Petty Officer 2nd Class Wilks if she had known the examination of her breasts was not a requirement of the enrolment process.

[32] Did the force Petty Officer 2nd Class Wilks applied take place in the circumstances of a sexual nature? Petty Officer 2nd Class Wilks examined Miss A.D.'s breasts using his hands and fingertips. He pressed on her nipples with his finger. She had not requested an examination and she had not indicated she had any concerns with her

breasts. Petty Officer 2nd Class Wilks testified he was aware of the policy prohibiting the examination of breasts during enrolment physical examinations.

[33] Sexual assault is an assault as defined by the *Criminal Code* and where the sexual integrity of the victim is violated. As stated in paragraph 11 of *R v Chase*, [1987] 2 SCR 293:

> The test to be applied in determining whether the impugned conduct has the requisite sexual nature is an objective one: "Viewed in the light of all the circumstances, is the sexual or carnal context of the assault visible to a reasonable observer" [*Taylor*, supra, per Laycraft C.J.A., at p. 269]. The part of the body touched, the nature of the contact, the situation in which it occurred, the words and gestures accompanying the act, and all other circumstances surrounding the conduct, including threats which may or may not be accompanied by force, will be relevant [see S.J. Usprich, "A New Crime in Old Battles: Definitional Problems with Sexual Assault" (1987), 29 Crim. L.Q. 200, at p. 204.] The intent or purpose of the person committing the act, to the extent that this may appear from the evidence, may also be a factor in considering whether the conduct is sexual. If the motive of the accused is sexual gratification, to the extent that this may appear from the evidence, it may be a factor in determining whether the conduct is sexual. It must be emphasized, however, that the existence of such a motive is simply one of many factors to be considered, the importance of which will vary depending on the circumstances.

[34] Defence counsel argues that, should the court conclude that Petty Officer 2nd Class Wilks did actually examine the breasts of Miss A.D., the court should accept the evidence of the complainant that the examinations were done in a clinical and professional manner and that they were done in the interest of the Canadian Forces. Thus, they were not conducted for a sexual purpose.

[35] The problem with that suggestion is that there is no evidence there was a need for a breast examination. Miss A.D. did not want one nor did she indicate that there were any issues with her breasts. The evidence accepted by this court is that Petty Officer 2nd Class Wilks told her he had to perform a breast examination as part of the enrolment physical examination. It is clear from the evidence of Major Netterfield, Master Warrant Officer Thibeault and Exhibits 5, 6, and 7 that breasts examinations are not a part of the enrolment physical examination. Warrant Officer Robertson described the QL6A course that existed until 2009. She described how a breast exam was conducted. The touching of the nipple was not part of the breast exam. She stated that only a physician's assistant could perform a breast examination and that medical technicians were taught anatomy and diagnosis and to assist in but not to do breast examinations. Petty Officer 2nd Class Wilks was a medical technician at the time of the alleged offences. He agreed with the prosecutor that pressing on the nipple was not part of the breast examination procedure that had been taught to him on his QL6A course.

[36] Based on Miss A.D.'s testimony, it appears that Petty Officer 2nd Class Wilks did examine her breasts in a clinical and professional manner except for the way in which he touched her nipples. But the analysis does not end there. Why did he do it? It surely was not because he had to perform the breast exam as a part of his duties. He did not examine her breasts because she asked him. This incident occurred on 20 No-

vember 2009. He had examined her breasts on 4 November 2009. She only became suspicious of his actions after this second examination.

[37] So what would the reasonable observer conclude from this evidence? While Petty Officer 2nd Class Wilks generally did touch Miss A.D. in a clinical manner except for the way in which he touched her nipples, he had no valid reasons to do so. He hid his true intention behind a cloak of official duties. The court concludes that Petty Officer 2nd Class Wilks intentionally touched Miss A.D.'s breasts for his personal gratification and not for a clinical purpose.

[38] The court finds that the force Petty Officer 2nd Class Wilks applied did take place in the circumstances of a sexual nature. The court finds the prosecution has proven beyond a reasonable doubt every essential element of this offence.

[39] Charge No. 2, sexual assault, the particulars of this charge reads as follows:

> "In that he, on 17 December 2009, at Sarnia, Ontario, did commit a sexual assault on Miss Robi Williams."

The prosecution had to prove the following essential elements for this offence beyond a reasonable doubt:

(a) the identity of the accused as the offender and the date and place as alleged in the charge sheet;

(b) that Petty Officer 2nd Class Wilks applied force to Miss Robi Williams;

(c) that Petty Officer 2nd Class Wilks intentionally applied force;

(d) that Miss Robi Williams did not consent to the force that Petty Officer 2nd Class Wilks applied; and

(e) that the force Petty Officer 2nd Class Wilks applied took place in the circumstances of a sexual nature.

[40] The identity of the offender is not in question in this charge or in any of the six charges, as I've already said. The date and place as alleged in the charge sheet have not been disputed by defence counsel and have been proven by the testimony of Miss Robi Williams.

[41] Did Petty Officer 2nd Class Wilks apply force to Miss Robi Williams? The prosecution submits the force applied to Miss Robi Williams by Petty Officer 2nd Class Wilks was the rubbing of his erect penis against her leg. Petty Officer 2nd Class Wilks testified he was wearing his naval combat uniform on the day he examined Miss Robi Williams. The naval combat uniform consists of a blue shirt and black pants. The pants have pockets on the side and in the back. He stated that he keeps his keys attached to a

Swiss army knife in one pocket and his cell phone in the other pocket and that he has had these items in his pockets for the last five years. He would have had these items in his pockets when he examined Miss Robi Williams. He was not cross-examined on this portion of his testimony. He stated that he never rubbed himself against an applicant. He denied rubbing his erect penis on Miss Robi Williams' leg but he stated his thigh could have come in contact with her leg. He explained it could happen because he was not a small person and there was not much room between the sink and the examination table. He further stated that he might inadvertently come in contact with an applicant during an examination because he sometimes had to be close to the applicant such as when he was using a stethoscope.

[42] Miss Robi Williams testified he rubbed his penis on her leg when he was listening to her by putting the stethoscope on her back. She moved to get away from him and he moved closer to her and rubbed his penis on her leg. She was sure he had rubbed his penis more than five times. She stated his penis felt hard when he pushed against her leg. She testified he was wearing a shirt and dark pants. During her cross-examination, she asserted that it was not an object in his pockets because she had looked down when he had rubbed himself on her. She felt disgusted. She stated his pockets were at the side of his pants and that Petty Officer 2nd Class Wilks was rubbing his crotch on her the whole time. She did not know if he had any objects in his pants.

[43] The court has already stated it does not find Petty Officer 2nd Class Wilks to be credible. Petty Officer 2nd Class Wilks was not cross-examined on his testimony pertaining to the contents of his pockets. The court finds Miss Robi Williams testified in a straightforward manner and her manner in answering was consistent throughout her testimony. Her reaction to a number of questions during her cross-examination was mostly due to the inability to understand the lengthy question posed by defence counsel. She is deemed a credible witness. She admitted that the passage of time did make it difficult to remember exactly every event.

[44] While the court has already stated it does not believe Petty Officer 2nd Class Wilks' version of events, the court must decide if it raises a reasonable doubt. Miss Robi Williams admitted that she felt uncomfortable during the medical examination. While she stated she knew what was rubbing against her leg she did not provide the court any description or explanation to explain her belief. Is it a reasonable possibility that Petty Officer 2nd Class Wilks had a pocket knife or a cell phone in his pant pockets and that he inadvertently pressed his leg against hers while he was examining Miss Robi Williams? Is it a reasonable possibility that Miss Robi Williams mistook one of these objects for an erect penis? Based on the evidence before this court, the court finds this evidence leaves it with a reasonable doubt that Petty Officer 2nd Class Wilks did rub his erect penis against Miss Robi Williams’ leg.

[45] The court finds the prosecution has not proven this essential element of the offence beyond a reasonable doubt and finds Petty Officer 2nd Class Wilks not guilty of that offence.

[46] Charges 3, 4, 5 and 6, breach of public trust by a public officer, the particulars of these charges read as follows:

Charge No. 3:

> "In that he, on 4 September 2008, at Sarnia, Ontario, being an official Medical Technician of the Canadian Forces did commit a breach of trust in connection with his duties of his office by conducting an enrolment medical examination on OS E.C. in a manner contrary to Canadian Forces Health Services Group policies and procedures."

Charge No. 4:

> "In that he, on 4 November 2009, at London, Ontario, being an official Medical Technician of the Canadian Forces did commit a breach of trust in connection with his duties of his office by conducting an enrolment medical examination on Miss A.D. in a manner contrary to Canadian Forces Health Services Group policies and procedures."

Charge No. 5:

> "In that he, on 20 November 2009, at London, Ontario, being an official Medical Technician of the Canadian Forces did commit a breach of trust in connection with his duties of his office by conducting an enrolment medical examination on Miss A.D. in a manner contrary to Canadian Forces Health Services Group policies and procedures."

And finally, charge No. 6:

> "In that he, on 17 December 2009, at Sarnia, Ontario, being an official Medical Technician of the Canadian Forces did commit a breach of trust in connection with his duties of his office by conducting an enrolment medical examination on Miss Robi Williams in a manner contrary to Canadian Forces Health Services Group policies and procedures."

The prosecution had to prove the following essential elements for these offences beyond a reasonable doubt:

(a) the identity of the accused as the offender and the date and place as alleged in the charge sheet;

(b) that Petty Officer 2nd Class Wilks is an official;

(c) that Petty Officer 2nd Class Wilks was acting in connection with the duties of his office;

(d) that Petty Officer 2nd Class Wilks breached the standard of responsibility and conduct demanded of him by the nature of his office;

(e) that the conduct of Petty Officer 2nd Class Wilks represented a serious and marked departure from the standards expected of an individual in Petty Officer 2nd Class Wilks' position of public trust; and

(f) that Petty Officer 2nd Class Wilks acted with the intention to use his public office for a purpose other than the public good, for example, for a dishonest, partial, corrupt of oppressive purpose.

[47] The identity of the offender and the date and place of the offences are not in issue in these proceedings. Office is defined in the *Criminal Code of Canada*. Although CF members are not employed by a public department as is the case for public servants, the Canadian Forces is a part of the federal government and CF members work for the Canadian government. This falls within the definition of office as found at section 118 of the *Criminal Code of Canada*. Therefore, a CF member is an official since he or she is a person who holds an office. This finding applies to this element in charges 3, 4, 5 and 6.

[48] I will now deal with the third element of these offences, specifically that Petty Officer 2nd Class Wilks was acting in connection with the duties of his office. It is clear from the evidence that Petty Officer 2nd Class Wilks was employed as a medical technician at the time of the alleged offences. He was responsible to conduct enrolment medical examinations in Sarnia and in London. He performed enrolment medical examinations on the three complainants. The court concludes from this evidence that Petty Officer 2nd Class Wilks was acting in connection with the duties of his office at the time of these alleged offences.

[49] I will now deal with the fourth element of theses offences, specifically that Petty Officer 2nd Class Wilks breached the standard of responsibility and conduct demanded of him by the nature of his office. As stated at paragraph 49 of the Supreme Court of Canada decision in *R v Boulanger*, 2006 SCC 32, the *actus reus* of this offence "defies precise definition because of the range of conduct it is designed to cover." Later, at paragraph 50, the Supreme Court of Canada states that:

> Any attempt to limit the offence to specific acts or omissions would undoubtedly fail to foresee all the circumstances in which an official might breach the public's trust. That being said, it cannot be ... *every* breach of the appropriate standard of conduct, no matter how minor, will engender a breach of the public's trust.

The purpose of the offence of breach of trust by a public officer is described at paragraph 52 of that decision. It reads as follows:

> The purpose of the offence of misfeasance in public office, now known as the s. 122 offence of breach of trust by a public officer, can be traced back to the early authorities that recognize that public officers are entrusted with powers and duties for the public benefit. The public is entitled to expect that public officials entrusted with these pow-

> ers and responsibilities exercise them for the public benefit. Public officials are therefore made answerable to the public in a way that private actors may not be. This said, perfection has never been the standard for criminal culpability in this domain; "mistakes" and "errors in judgment" have always been excluded. To establish the criminal offence of breach of trust by a public officer, more is required. The conduct at issue, in addition to being carried out with the requisite *mens rea*, must be sufficiently serious to move it from the realm of administrative fault to that of criminal behaviour. This concern is clearly reflected in the seriousness requirement of *Shum Kwok Sher* and the *Attorney General's Reference*. What is required is "conduct so far below acceptable standards as to amount to an abuse of the public's trust in the office holder" (*Attorney General's Reference*, at para. 56). As stated in *R. v. Creighton*, [1993] 3 S.C.R. 3, "[t]he law does not lightly brand a person as a criminal".

[50] Petty Officer 2nd Class Wilks testified there was no need to conduct breast examinations during enrolment medical examinations. Master Warrant Officer Thibeault also testified there was no need to conduct breast examinations during enrolment medical examinations. Major Netterfield had discussed medical examinations of female applicants with him in 2007. Female applicants had to wear their underwear at all times. They also had to wear shorts and a T-shirt or a gown during the medical examination (see Exhibits 5 and 6).

[51] Able Seaman E.C. testified Petty Officer 2nd Class Wilks told her to remove her clothing except for her panties. She was not provided with a gown or shorts. He left the examination room when she changed and then came back into the room. He had her perform different movements to examine her range of motion. He left the room while she put on her brassiere and then he returned to continue the examination. She learned the medical examination procedures during her QL3 course. She remembered her enrolment medical examination and spoke with an instructor because she questioned whether her medical examination had been performed properly. She testified in a straightforward and consistent manner. Her recollection of her medical examination was consistent. Able Seaman E.C. is deemed a reliable and credible witness. Defence counsel stated that Able Seaman E.C. was a reliable witness. Petty Officer 2nd Class Wilks testified he does not remember examining Able Seaman E.C. but he has admitted that he performed an enrolment medical examination in Sarnia on Able Seaman E.C.

[52] It is clear from the evidence that an applicant had to be dressed in a manner that would ensure the dignity and the privacy of the applicant was respected at all times. The court concludes Petty Officer 2nd Class Wilks had to ensure Able Seaman E.C. wore her underwear, brassiere and panties, shorts and a gown or T-shirt and that he failed to do so. The court finds this omission on the part of Petty Officer 2nd Class Wilks is not a simple mistake or error in judgment in light of the evidence from Major Netterfield, Master Warrant Officer Thibeault, Petty Officer 2nd Class Wilks and Exhibit 6. The court finds the prosecution has proven beyond a reasonable doubt that Petty Officer 2nd Class Wilks breached the standard of responsibility and conduct demanded of him by the nature of his office for charge No.3.

[53] Miss A.D. testified that Petty Officer 2nd Class Wilks told her to remove her clothing except for her brassiere and panties and to put on a gown when she underwent

her enrolment medical examination on 4 November 2009. She was not expecting to have to remove her clothes and had worn a thong that day. She was not provided with shorts. Petty Officer 2nd Class Wilks asked her to expose her left breast and he examined her left breast with his fingers. He then told her to expose her right breast and he examined her right breast. He examined her breasts in that manner on 4 and 20 November 2009. On 20 November 2009, he told her to only remove her blouse and brassiere and to put on a gown. On 4 November 2009, while standing behind her, he told her to bend down so he would examine the curvature of her spine. Miss A.D. felt very uncomfortable in that position because she was only wearing a thong at the time. Petty Officer 2nd Class Wilks does not remember examining Miss A.D. He testified that he always ensured female applicants wore shorts and a gown. The court has already stated it does not find Petty Officer 2nd Class Wilks to be credible. Miss A.D. is deemed a reliable and credible witness.

[54] The court concludes Petty Officer 2nd Class Wilks had to ensure Miss A.D. wore her brassiere, panties, shorts and a gown or a T-shirt and that he failed to do so. The court finds this omission on the part of Petty Officer 2nd Class Wilks is not a simple mistake or error in judgment in light of the evidence from Major Netterfield, Master Warrant Officer Thibeault, Petty Officer 2nd Class Wilks and Exhibit 5. The court finds the prosecution has proven beyond a reasonable doubt that Petty Officer 2nd Class Wilks breached the standard of responsibility and conduct demanded of him by the nature of his office for charges No. 4 and 5.

[55] Miss Robi Williams testified that Petty Officer 2nd Class Wilks told her to remove her clothing except for her brassiere and panties and to put on a gown when she underwent her enrolment medical examination on 17 December 2009. She was not provided with shorts. Petty Officer 2nd Class Wilks used his fingertips to examine her breasts when she was still wearing her brassiere. He then told her to remove her brassiere. He told her to raise one breast and then the other. He told her to raise her arms and her gown fell to her waist exposing her breasts. He did not touch her breasts after she had removed her brassiere.

[56] Petty Officer 2nd Class Wilks has denied these allegations. The court has already stated it does not find Petty Officer 2nd Class Wilks to be credible. Miss Robi Williams has been found to be a credible witness. Her testimony on these events is deemed reliable. It was consistent and straightforward and not contradicted.

[57] The court concludes Petty Officer 2nd Class Wilks had to ensure Miss Robi Williams wore her brassiere, panties, shorts and a gown or a T-shirt and that he failed to do so. The court finds this omission on the part of Petty Officer 2nd Class Wilks is not a simple mistake or error in judgment in light of the evidence from Major Netterfield, Master Warrant Officer Thibeault, Petty Officer 2nd Class Wilks and Exhibit 5. The court finds the prosecution has proven beyond a reasonable doubt that Petty Officer 2nd Class Wilks breached the standard of responsibility and conduct demanded of him by the nature of his office for charge No. 6.

[58] I will now deal with the fifth element of these offences, specifically that the conduct of Petty Officer 2nd Class Wilks represented a serious and marked departure from the standards expected of an individual in Petty Officer 2nd Class Wilks' position of public trust. Exhibit 6 contains an email that was sent to recruitment center medical technicians in 2007. It includes directions on medical examination procedures to be followed by Canadian Forces Recruiting Centres. It reviews the basic principles concerning privacy during these procedures. It reads partly as follows:

> "Applicants must have privacy when they disrobe and get dressed again, this could be with a curtain or the examiner must leave the room.
>
> An applicant may request a chaperone to be present during the exam. Applicants must be reminded of this prior to the physical exam.
>
> Genital examinations are not done and therefore applicants must at all times be wearing their undergarments.
>
> All applicants must wear shorts during the physical examination. They can bring their own or alternatively disposable ones must be provided by the CFRCs. Female applicants must also wear a T-shirt or must be provided with a gown.
>
> The 'Medical Examination Procedure' form has been updated to reflect the changes described above. This form must be signed by all the applicants. It can be given as part of the recruiting package but it would be prudent to review it and the general examination procedure with the applicants just before their exam.
>
> A thorough exam is important and is possible with the above procedure in place. Discussing this procedure with the applicant in advance should help with this process."

[59] Exhibit 5 is another email sent to recruitment center medical technicians in November 2009. It also reviews the basic principles concerning privacy during medical examinations. It reads partly as follows:

> "Applicants must have privacy when they undress and dress during their physical examination, and whether it is with a curtain or the examiner will have to leave the room.
>
> All applicants may request a chaperone of their choice to be present during the physical examination. Applicants must be reminded of this fact prior to their physical examination.
>
> For CFRCs that do not have the luxury of having a female chaperone available, you must include in your administrative instructions to the ap-

> plicant that, due to the unavailability of female personnel, if the applicant wishes to have a chaperone present she will need to bring her own.
>
> Genital examination is not permitted, and therefore applicants must be wearing their underwear at all times. Underwear includes a bra, if worn, for female applicants.
>
> All applicants must wear shorts during the physical examination. They can bring their own or disposable ones must be provided by CFRCs.
>
> All female applicants must wear shorts and a T-shirt. They must be provided with a gown in replacement of theT-shirt should they not have one. Female applicants must be reminded to keep their bra on, if worn, as well as their panties.
>
> To avoid any uncomfortable situations for the female applicants, the gown, if worn, must be worn with the opening in the back. If the applicant has to perform push-ups in the office, the gown must be tied in the back to avoid any chest exposure or the examiner must wait for the applicant to get dressed before asking the applicant to perform the push-ups.
>
> Similar common sense must be applied when the applicant has to perform a back range of motions. The examiner or the chaperone must either hold the gown from the back during the motions to avoid any unnecessary exposure or the gown must be tied up."

[60] It is clear from this evidence that the privacy of the applicant is a key concern. Master Warrant Officer Thibeault and Petty Officer 2nd Class Wilks testified breast examinations were not to be conducted during an enrolment medical examination.

[61] Petty Officer 2nd Class Wilks had an important role to play in the enrolment process. He had to perform a medical examination on applicants to ensure the CF enrols individuals that are fit and capable of executing the duties that will be imposed on them. He had to perform these medical examinations in accordance with the directives he had received from his superiors. These directives were meant to ensure medical examinations were performed to a standard that ensured the needs of the CF were met while ensuring the dignity and privacy of the applicant were respected. The complainants testified they trusted Petty Officer 2nd Class Wilks when he performed the medical examinations and they assumed he was doing what he was supposed to do. Every reasonable person would expect that the person in the position Petty Officer 2nd Class Wilks occupied at the time of the alleged offences would perform his or her duties in accordance with these directives and with due respect for the dignity and privacy of the applicant.

[62] Petty Officer 2nd Class Wilks had to ensure female applicants wore their brassiere, underwear, shorts and a gown or T-shirt at all times during the medical examinations. He was not authorized to perform breast examinations. He examined Able Seaman E.C. and Miss Robi Williams in a manner that allowed him to see their naked breasts. He examined Miss A.D.'s breasts with his hands on two occasions. He also examined Miss A.D. on 4 November 2009 in a manner that made her quite uncomfortable when he asked her to bend over when she was only wearing a thong. Based on the evidence accepted by the court, the court finds the conduct of Petty Officer 2nd Class Wilks represented a serious and marked departure from the standards expected of an individual in Petty Officer 2nd Class Wilks' position of public trust for charges 3, 4, 5 and 6.

[63] I will now examine the *mens rea* element of each offence, specifically that Petty Officer 2nd Class Wilks acted with the intention to use his public office for a purpose other than the public good, for example, for dishonest, partial, corrupt or oppressive purpose. As stated at paragraph 56 of *Boulanger*:

> In principle, the *mens rea* of the offence lies in the intention to use one's public office for purposes other than the benefit of the public. In practice, this has been associated historically with using one's public office for a dishonest, partial, corrupt or oppressive purpose, each of which embodies the non-public purpose with which the offence is concerned.

The court continues at paragraph 57 as follows:

> As with any offence, the *mens rea* is inferred from the circumstances. An attempt by the accused to conceal his or her actions may often provide evidence of an improper intent ... Similarly, the receipt of a significant personal benefit may provide evidence that the accused acted in his or her own interest rather than that of the public. However, the fact that a public officer obtains a benefit is not conclusive of a culpable *mens rea*. Many legitimate exercises of public authority or power by a public servant confer incidental advantages [to] the actor.

The Supreme Court of Canada also indicates the offence may be proven even if the accused did not benefit personally.

[64] Every medical examination of these complainants was performed in a manner that would permit Petty Officer 2nd Class Wilks to see or touch the breast of these young complainants. There was no public good resulting from this since the directives clearly indicated there was no need for female applicants to expose their breasts or for breast examinations during an enrolment medical examination. It is amply evident that Petty Officer 2nd Class Wilks had no official reason to perform the medical examinations in the manner he did.

[65] Petty Officer 2nd Class Wilks told the complainants he had to examine their breasts. They acquiesced to this request because they thought it was a part of the enrolment medical examination. Petty Officer 2nd Class Wilks was dishonest with the applicants. The court finds Petty Officer 2nd Class Wilks performed these medical ex-

aminations in a manner that would permit him to see the breasts of the applicants and to touch the breasts of Miss A.D. and Robi Williams.

[66] Based on the evidence accepted by the court, the court finds Petty Officer 2nd Class Wilks acted with the intention to use his public office for a purpose other than the public good, specifically for a corrupt purpose, for charges 3, 4, 5 and 6. More specifically, he was dishonest and used his public office to see or touch the breasts of the complainants. He intentionally acted dishonestly in return for personal gain. The court concludes this personal gain was the gratification of seeing or touching the breasts of the complainants. The court finds the prosecution has proven beyond a reasonable doubt every essential element of the offences for charges 3, 4, 5 and 6.

**FOR THESE REASONS THE COURT:**

[67] **FINDS** Petty Officer 2nd Class Wilks guilty of charges 1, 3, 4, 5 and 6.

**AND**

[68] **FINDS** Petty Officer 2nd Class Wilks not guilty of charge No. 2.

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**Counsel:**

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Counsel for Her Majesty the Queen

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Counsel for ex-Petty Officer 2nd Class J.K. Wilks