

**Citation:** *R. v. Ex-Able Seaman C.R. Hoddinott*, 2006 CM 24

**Docket:**200624

**STANDING COURT MARTIAL  
CANADA  
NOVA SCOTIA  
CANADIAN FORCES BASE HALIFAX**

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**Date:**24 February 2006

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**PRESIDING:**LIEUTENANT-COLONEL M. DUTIL, M.J.

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**HER MAJESTY THE QUEEN**

v.

**EX-ABLE SEAMAN C.R. HODDINOTT  
(Accused)**

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**FINDING**

**(Rendered orally)**

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***Introduction***

[1] Ex-Able Seaman Hoddinott is charged with having committed the following offences punishable under section 130 of the *National Defence Act*. All those offences contrary to the *Controlled Drugs and Substances Act*. The first three charges allege a contravention to subsection 5(1), where the fourth charge alleges a contravention to subsection 4(1) of the *Controlled Drugs and Substances Act*. The first charge relates to the traffic in a substance included in Schedule II; to wit, cannabis marihuana; the second charge, alternate to the first charge, relates to the traffic in a substance held out to be a substance included in Schedule II; to wit, cannabis marihuana. The third charge relates to the traffic in a substance included in Schedule I; to wit, cocaine; and the fourth charge, alternate to the third charge, relates to the possession of a substance included in Schedule I; to wit, cocaine. The offences would have been committed on or about 27 November 2004, at or near Halifax, Nova Scotia.

***The Evidence***

[2] The evidence before the court consists of the following:

- a) Exhibit 3: a document entitled "Agreed statements of facts" filed on consent, that constitutes an admission made by the defence under paragraph 37(b) of the Military Rules of Evidence;
- b) Exhibit 4: an evidence plastic bag case number 04-30272 containing a small jewellery bag with red-brown bulldog markings containing 0.7 gram of a white substance analysed as being cocaine;
- c) Exhibit 5: a drawing made by Master Corporal McComb during his testimony depicting the interior of ex-Able Seaman Hoddinott's apartment on 27 November 2004 as well as markings made by himself and by Mr Ingram during his testimony;
- d) The testimony of Master Corporal Chris McComb, the police officer who was acting as an undercover operator when the alleged offences would have been committed during the investigation;
- e) The testimony of ex-Able Seaman Clint Hoddinott, the accused in the present case; and
- f) The testimony of Mr Brad Ingram.

### ***The Facts***

[3] The facts surrounding this case arose from a series of events that occurred on the early evening of 27 November 2004, in the apartment of ex-Able Seaman Hoddinott, apartment 1409, which was located at Tower 2, Brunswick Towers, Halifax, Nova Scotia. Prior to that date, the National Investigative Service (Atlantic Region) Drug Detachment team had received information from a confidential informant that ex-Able Seaman Hoddinott and a person named "Joe" were involved together in drug trafficking, including cocaine and ecstasy. This information led to the setup of the police operation called OP ANCHOR in which ex-Able Seaman Hoddinott became the target.

[4] During OP ANCHOR, Sergeant Cam Hillier was tasked to act as cover manager for the undercover operator, Master Corporal Chris McComb. The latter testified that he first met with ex-Able Seaman Hoddinott at his apartment on 19 November 2004. Master Corporal McComb is a military police officer with approximately 15 years of experience. Throughout his career, he has received formal training in drug investigation techniques, including undercover operations. As the undercover operator in OP ANCHOR, Master Corporal McComb was to engage in conversation with Able Seaman Hoddinott with respect to buying a quantity of ecstasy

and cocaine. These drugs would be ordered and picked up at Able Seaman Hoddinott's apartment. Master Corporal McComb would pretend that he was an ex-telephone employee from Ontario, who had been released and who had received a substantial amount of money as workers' compensation for injury, and who was looking to spend some of that money in buying drugs from someone who would sell them to him.

[5] On 19 November 2004, the undercover operator went to ex-Able Seaman Hoddinott's apartment accompanied by a person referred to as "the confidential informant". Master Corporal McComb testified that the informant knocked at the door and that ex-Able Seaman Hoddinott would have opened that door and invited them in. According to Master Corporal McComb, they all went to the living room where they had a general conversation and during which drug related activities were discussed. Master Corporal McComb testified that ex-Able Seaman Hoddinott would have asked them if they wanted to do a bowl, which they declined. "Doing a bowl" is an expression used in the drug circle that refers to smoking cannabis in a certain fashion. He further testified that the confidential informant would have asked ex-Able Seaman Hoddinott if he could get him ecstasy or coke, to which the accused would have said that he would see with a person named Matt or Matty. Ex-Able Seaman Hoddinott would have made a phone call and after hanging up the phone, said that Matty would come over with some stuff. The undercover operator and the confidential informant would have said that they had to leave in order to meet somebody. As they were getting up to leave, ex-Able Seaman Hoddinott would have been to the kitchen area towards the fridge where he would have pulled down a plastic baggy that contained other baggies. Master Corporal McComb testified that he perceived these baggies to contain small round dark pieces of a substance which resembled to hashish, according to his training and experience. Finally, as they were leaving, ex-Able Seaman Hoddinott would have told them: "When you come back, we can do a line or a bowl".

[6] Further to that first encounter with the target, the OP ANCHOR team held a briefing in the afternoon of 27 November 2004 during which a scenario outline was discussed and agreed to. The undercover operator would try to purchase from the target six tabs of ecstasy. Master Corporal McComb would attend at ex-Able Seaman Hoddinott's apartment to order and pick up the drugs. He would also try to engage in a conversation about drugs, and the possibility of ordering additional ecstasy and cocaine for pickup at a later date. It was also agreed that if the target did not have the drugs on him, the undercover operator would leave the buying money with the target and pickup the drugs at a later date. It was also agreed that the undercover operator would compile detailed notes on the evening activities with particular attention paid to the contact with the target and complete basic notes on any associate. Master Corporal McComb was provided with buying money from a team member for the proposed drug purchase from ex-Able Seaman Hoddinott.

[7] Master Corporal McComb left shortly after to go to ex-Able Seaman Hoddinott's apartment. According to his testimony, Master Corporal McComb knocked

at the door of apartment 1409. Ex-Able Seaman Hoddinott answered by opening the door. Master Corporal McComb testified that he had noticed already a strong odour of cannabis from the apartment. The undercover operator asked ex-Able Seaman Hoddinott if he knew where he could find the person referred to as the confidential informant to which ex-Able Seaman Hoddinott would have said "no". Master Corporal McComb testified that he then asked ex-Able Seaman Hoddinott if he could come in, the latter agreed. The undercover operator then asked ex-Able Seaman Hoddinott if he could hook him up. Ex-Able Seaman Hoddinott would have asked the undercover operator what he was looking for. Master Corporal McComb testified that he said that he was looking for cocaine or ecstasy. According to the testimony of Master Corporal McComb, ex-Able Seaman Hoddinott would have replied: "I don't, but I can get some from Joe". According to his testimony, he would have offered ex-Able Seaman Hoddinott to provide him with some money and come back later to pick up the drugs. This is where the target would have replied to the undercover operator that Joe would be back shortly and invited Master Corporal McComb in the apartment. According to the undercover operator's testimony, it was 1704 hours.

[8] Master Corporal McComb described the apartment in that the kitchen was on the left and the living room on the right upon entry. He said that the living room light was dimmed in that it was lit by a Christmas tree, which was in the far left corner of the living room. Music was playing. A round kitchen table was located at the edge of the living room. According to Master Corporal McComb, there were three female persons sitting on a couch located at the east of the living room. He described two of them and he identified them as No. 1, No. 2, and No. 3 on the drawing which was filed before the court as Exhibit 5. Lady No. 1 was described as being approximately five-foot-four, weighing 160 pounds with long and straight dark hair of east Indian origin. He referred to Lady No. 2 as a white Caucasian with dirty blond hair and weighing approximately 140 pounds and of the same height. He could not describe the third female. He didn't see any other person in the living room or in the kitchen area, nor was he introduced to anyone else in the room. In cross-examination, defence counsel suggested to him that the third person on the couch was a male; the witness replied that, in his opinion, the person was a female.

[9] Master Corporal McComb testified that a round coffee table was placed in a position west to the couch. The coffee table is marked with the letter "D" on Exhibit 5. He added that he could see objects on that table that he referred as to being drugs of different types that he described as cocaine, marihuana, magic mushrooms and drugs contained in 15 to 20 vials of an unknown substance. Counsel for the defence suggested to the undercover operator that there were no drugs on the coffee table to which he replied by maintaining his version. Master Corporal McComb testified that after being invited in, he sat on a chair by the round kitchen table located at the edge of the living room. The letter "P" on Exhibit 5 shows where he was, according to his testimony. He said that ex-Able Seaman Hoddinott sat between Lady No. 1 and Lady No. 2 which he marked as "H" on Exhibit 5. According to Master Corporal McComb,

ex-Able Seaman Hoddinott picked up a joint, which was sitting in an ashtray on the coffee table, smoked it and asked Master Corporal McComb if he wanted to have some pot. Ex-Able Seaman Hoddinott would have then handed the joint, later described as a small, rolled by hand, and less than an inch long that was lit and smelling of cannabis to the undercover operator using his right hand. Master Corporal McComb said that he picked the joint using both hands. The police officer testified that he noticed that the joint had a small cardboard spacer at the end of it, which is used according to the police officer, by the users to inhale more of the drug. Master Corporal McComb further testified that he then simulated smoking the joint twice. According to him, he motioned to give the joint to the first female, which she declined. According to his testimony, he then went to give it back to ex-Able Seaman Hoddinott who made a motion asking to give it to the same girl who declined again. Master Corporal McComb added that ex-Able Seaman Hoddinott then took the joint from him.

[10] Defence counsel put to Master Corporal McComb that such version would violate what is called "the toking circle"; he answered that he did not know whether or not the ladies beside ex-Able Seaman Hoddinott were drug users or not. Master Corporal McComb testified that shortly after someone knocked on the door. Ex-Able Seaman Hoddinott would have gone to answer the door to let in a white male person. Both men walked in the living room. Ex-Able Seaman Hoddinott was followed in by Joe. Ex-Able Seaman Hoddinott would have walked around the coffee table before sitting on the floor at the north end of the coffee table which Master Corporal McComb marked as "H2" on Exhibit 5. At that time, ex-Able Seaman Hoddinott would have told Master Corporal McComb: "That's Joe, that's the guy you gotta talk to". He further testified that Joe sat in between the girls identified as No. 1 and No. 2. Master Corporal McComb marked Exhibit 5 with the letter "J" to reflect that.

[11] Joe would have said to his host: "Thanks for waiting for me" to which ex-Able Seaman Hoddinott would have replied that he did as a favour for the half gram he gave him or words to that effect. According to McComb, Joe would have made comments about his father not being particularly happy having been in the same building previously in the context of the father not having seen the drugs on the coffee table. Master Corporal McComb testified that Joe started enumerating these drugs pointing and describing them individually, including the vials that he referred to as "K". According to the police officer, ex-Able Seaman Hoddinott would have asked Joe in the mean time, if he had seen the confidential informant by name to which Joe would have replied "no". Joe would have then said that he needed to do a line. Master Corporal McComb testified that he observed Joe make a line with a substance referred by the undercover as being cocaine which was located on the coffee table, take a small cylinder and inhale that substance. Joe would have then looked at the undercover officer before asking him if he wanted to do a line, to which Master Corporal McComb, according to his testimony, would have replied "no", but said that he wanted to buy some for later.

[12] After some general conversation during which Joe had rolled a joint, according to Master Corporal McComb's testimony, the undercover operator got up and said that he would not bother them anymore. This is where the undercover operator would have asked Joe if he could hook him up. Joe would have replied: "What are you looking for?" Master Corporal McComb said that he replied: "Half a gram". Master Corporal McComb testified that Joe reached to his wallet and gave him the small plastic bag contained in the evidence bag marked as Exhibit 4, which contains cocaine in exchange of 2 times \$20 bill of buying money. This transaction would have taken place at 1713 hours.

[13] According to the undercover operator, ex-Able Seaman Hoddinott was sitting on the floor by the coffee table during the drug transaction that took place with Joe at a distance of approximately six feet from Master Corporal McComb. Master Corporal McComb added that he further asked Joe for his telephone number. Joe would have looked at ex-Able Seaman Hoddinott as to whether Master Corporal McComb was trustworthy to which, according to his testimony, ex-Able Seaman Hoddinott would have said "yes". Master Corporal McComb said then Joe gave him his telephone number. The undercover operator left the apartment at 1716 hours on 27 November 2004 to attend the National Investigative Section Detachment Headquarters to meet with Sergeant Hillier for debriefing. The debriefing took place at 1734 hours on 27 November 2004 where Master Corporal McComb, according to him, would have given the small plastic bag with bulldog markings to Sergeant Hillier. This plastic bag contained cocaine and the court refers to the agreed statements of facts on this issue.

[14] In cross-examination, counsel for the defence raised several issues with the testimony of Master Corporal McComb. For example, counsel for the defence suggested to Master Corporal McComb that ex-Able Seaman Hoddinott never passed a joint to him. Master Corporal McComb replied that this suggestion was incorrect. Counsel for the defence also suggested to Master Corporal McComb that Clint Hoddinott never sat on the couch and passed him a joint, but rather started making phone calls on his cell phone to locate the confidential informant. Master Corporal McComb replied that ex-Able Seaman Hoddinott made only one phone call and that the phone call was made after Joe had arrived. Counsel for the defence also suggested that Joe never knocked on the door but just walked in. Master Corporal McComb again rejected that proposal.

[15] Master Corporal McComb testified that he met ex-Able Seaman Hoddinott on another occasion; that is, on 1 December 2004, where he went again to the target's residence accompanied by the confidential informant. The informant was looking for "easy", a street term for ecstasy. The accused would have referred them to call Joe. Master Corporal McComb testified that he would have told ex-Able Seaman Hoddinott that he no longer had Joe's telephone number. The accused would have then given the number. They left shortly thereafter. According to the undercover operator, there was no further contacts with ex-Able Seaman Hoddinott after 1 December 2004.

Master Corporal McComb testified that ex-Able Seaman Hoddinott never introduced Joe to him, nor that he called Joe in advance for him, nor that ex-Able Seaman Hoddinott discussed or fixed the price, or arrange for the delivery with regard to the transaction that took place with Joe. Master Corporal McComb testified that the drug transaction with Joe was not the result of a three party discussion, which would have included the accused, nor that ex-Able Seaman Hoddinott discuss any drug matters with Joe when he came in the apartment. In addition, Master Corporal McComb said that, to his knowledge, Joe had no idea that the undercover operator was in the apartment to buy drugs. No arrest were made that evening as a result of this undercover operation.

[16] Ex-able Seaman Hoddinott testified at his trial. He vehemently denies the version of Master Corporal McComb on every issue that would tend to incriminate him. According to his version, at approximately 1630 hours on 27 November 2004, some friends came over his apartment, where they normally hung out. He testified that people usually walked in his apartment without knocking at the door. According to him, these friends had brought some beer, coolers, etc., in order to have a drink, and simply chat between friends. Ex-Able Seaman Hoddinott said that the undercover operator arrived at approximately 1700 hours by knocking at the door. He had met him briefly before. He testified that Master Corporal McComb asked him where he could find his friend Matt because he was looking for him. According to his testimony, the undercover operator was persistent and asked him to get that person for him. He further testified that the undercover operator asked him to come in, which he did. Ex-Able Seaman Hoddinott said that Master Corporal McComb remained in the threshold of the living room at the limit of the kitchen, where he went to the other side of the living room and started making phone calls to, at least, three persons in order to locate the person named Matt, including a person located in Antigonish. He testified that he spent most of the period during which the undercover operator was present on the phone and watching TV. While he was on the phone, he moved once to turn the TV down a bit, which was on the Much Music channel. The TV was located in front of the coffee table. He said that he was not paying attention as to what was going on in the room, but he said that the undercover operator was standing there in the hallway between the kitchen and the living room. According to his testimony, when Joe came in, Master Corporal McComb went straight to him and he could not hear what they were saying. He said that he never introduced the undercover operator to Joe, and that no one let Joe in because as usual the apartment being a "come and go" apartment, Joe walked in without knocking.

[17] Ex-Able Seaman Hoddinott denied in direct examination that there was any drug on the coffee table, nor that there was any drug consumed in his apartment that particular evening. He stated that he never passed a joint of pot to the undercover operator and he further testified that Joe never sat with a female person on his couch when the undercover operator was present. According to his testimony, Joe did not use drugs in his apartment at that time. He testified that Joe came to the living room and sat down only after the undercover operator had left his apartment. Ex-Able Seaman

Hoddinott stated that he never offered the undercover operator to do a bowl because he never owned a pipe to smoke hashish. He also stated that Master Corporal McComb's version of events with regard to the small plastic bags seen in his kitchen in their previous encounter was incorrect, because the plastic bag simply contained small pouches of sugar twin which he normally uses to put in his tea. In his testimony, he said that he never tried to set up Master Corporal McComb with Joe and that he did not know that Joe had drugs on him on the night of 27 November 2004. He stated that the undercover operator never entered in his living room. In cross-examination, he admitted having used drugs in the past, and although he tried not to answer the question asked by the prosecutor, he recognized that he was released from the Canadian Forces for drug-related matters. He admitted using drugs in the same time frame; that is, November 2004. With regard to the ladies referred to by Master Corporal McComb during his testimony, ex-Able Seaman Hoddinott said that they were only two, but that he didn't know their last name. He said that he did not know where they now lived, but he thought they were in Ontario. According to his testimony, there were two male persons present in his apartment that evening, namely Brad Ingram and Matt Simpson. He also said that he did not know the last name of his friend Joe. At the end of his cross-examination, he stated that it was possible that, as he was watching TV, someone could have put drugs on the table because he could not see. Ex-Able Seaman Hoddinott denies also having met Master Corporal McComb on 1 December 2004 at his apartment.

[18] Mr Brad Ingram also testified at trial. He described himself as a good friend of ex-Able Seaman Hoddinott. He admitted using marihuana in the past. He now lives in Toronto having spent a few years studying at Dalhousie University in Halifax and preparing to enter the architecture program at Carleton University in Ottawa. He testified that he was present in the accused's apartment on 27 November 2004 where the incidents would have taken place. He said that he arrived in late afternoon to have some fun, drink a couple of beers which he had brought with him, four, the court recalls, and hang out with some friends. He said that ex-Able Seaman Hoddinott apartment's door was normally locked and people usually knocked at the door before entering. According to Mr Ingram, the light was dimmed, because the main light was the kitchen light and the TV was on in the living room. Mr Ingram testified that there were no drugs on the coffee table or anywhere else for that matter, but that there were beer bottles and glasses on that table.

[19] Mr Ingram testified that he was sitting at the far end of the living room about 12 feet from the entrance door, close to the patio door, throughout the period where the undercover operator was present in the apartment. He testified that there was a knock at the door and Clint, ex-Able Seaman Hoddinott, answered. Mr Ingram said that a tall, bald and large man came in. According to that witness, the man asked Clint about a guy and asked him to make a phone call or to phone around for him. He testified that the man invited himself in. He added that Clint went to the living room, sat on the floor and started using his cellular telephone. Mr Ingram said that the TV



was to Clint's right. During that period, the man he learned later from his friend Clint Hoddinott that the man was an undercover operator—so during the period, the man stayed in the kitchen and never entered in the living room. He stated that he remembers that Joe came in shortly after, because the door made a loud sound and that the man, the person he referred to as the "MP", had to move out of the way. He added that, as this was happening, he observed that Clint was still making phone calls although he did not hear Clint on the phone. He testified that Joe would have asked Clint if he knew that guy and if he could give him his number. Clint would have answered: "I don't really know him, it's up to you". He added that Clint was sitting on the floor until the very end where he said: "I can't find him".

[20] Mr Ingram testified that his friend Clint Hoddinott told him about the charges that are before the court and that he may need him, but that they did not talk about the specifics of the case together. He added that he would not lie for his friend. He does not remember when he arrived at his friend's apartment on 27 November 2004, nor does he remember whether there were any girls in the apartment. According to the evidence received at trial, two of these girls would have been in his sight at all times. Mr Ingram said also that Exhibit 5 did not depict correctly the position of the undercover operator and of his friend Clint. He testified that Clint was sitting further down on the drawing. Mr Ingram marked Exhibit 5 with "H3" to reflect that. He said also that the undercover operator was standing closer to the kitchen area and closer to the door. Mr Ingram testified that he had a clear view from the door. He said also that he was watching TV and that he did not remember if Clint had been drinking that night. Mr Ingram said that the man was in the room approximately 10 minutes, during which Clint would have spent eight minutes on the phone trying to locate another person. According to his testimony, he remembers these events, because they were out of the ordinary and because the man was persistent. In a nutshell, this is a brief summary of the evidence heard at trial.

### ***The Law and the Essential Elements of the Charges***

#### *The First Charge (Section 130 of the National Defence Act contrary to subsection 5(1) of the Controlled Drugs and Substances Act)*

[21] The first charge alleges a contravention of section 130 of the *National Defence Act* contrary to subsection 5(1) of the *Controlled Drugs and Substances Act*. It is alleged that ex-Able Seaman Hoddinott, on or about 27 November 2004, at or near Halifax, Nova Scotia, did traffic in a controlled substance; to wit, cannabis marihuana. In addition to the elements of the offence dealing with the identity of the offender as well as the date and place where the alleged offence was committed, the prosecution must prove beyond a reasonable doubt that:

1. That ex-Able Seaman Hoddinott trafficked in a controlled substance;

2. That the substance was cannabis marihuana;
3. That ex-Able Seaman Hoddinott knew that the substance was cannabis marihuana; and
4. That ex-Able Seaman Hoddinott intentionally trafficked in cannabis marihuana.

[22] The second charge, alternate to the first charge, alleges a contravention of section 130 of the *National Defence Act* contrary to subsection 5(1) of the *CDSA*. It is alleged that ex-Able Seaman Hoddinott, on or about 27 November 2004, at or near Halifax, Nova Scotia, did traffic in a substance held out to be a substance included in Schedule II; to wit, cannabis marihuana. In addition to the elements of the offence dealing with the identity of the offender as well as the date and place where the alleged offence was committed, the prosecution must prove beyond a reasonable doubt that:

1. That ex-Able Seaman Hoddinott trafficked in a controlled substance;
2. That ex-Able Seaman Hoddinott held out the substance as a controlled drug within the meaning of the *Act*, i.e., that the drug as held out can be found in one of the schedules to the *Act*. Here, the substance held out to be is cannabis marihuana, which is included in Schedule II of the *Act*;
3. That ex-Able Seaman Hoddinott knew that the substance held out to be cannabis marihuana is a controlled substance; and
4. That ex-Able Seaman Hoddinott intentionally trafficked in a substance held out to be cannabis marihuana.

[23] The third charge alleges a contravention of section 130 of the *National Defence Act* contrary to subsection 5(1) of the *CDSA*. It is alleged that ex-Able Seaman Hoddinott, on or about 27 November 2004, at or near Halifax, Nova Scotia, did traffic in a controlled substance; to wit, cocaine. In addition to the elements of the offence dealing with the identity of the offender as well as the date and place where the alleged offence was committed, the prosecution must prove beyond a reasonable doubt that:

1. That ex-Able Seaman Hoddinott trafficked in a controlled substance;
2. That the substance was cocaine;

3. That ex-Able Seaman Hoddinott knew that the substance was cocaine; and
4. That ex-Able Seaman Hoddinott intentionally trafficked in cocaine.

[24] The fourth charge, alternate to the third charge, alleges a contravention of section 130 of the *National Defence Act* contrary to subsection 4(1) of the *Controlled Drugs and Substances Act*. It is alleged that ex-Able Seaman Hoddinott, on or about 27 November 2004, at or near Halifax, Nova Scotia, did possess a controlled substance; to wit, cocaine. In addition to the elements of the offence dealing with the identity of the offender as well as the date and place where the alleged offence would have been committed, the prosecution must prove beyond a reasonable doubt that:

1. That ex-Able Seaman Hoddinott possessed a controlled substance;
2. That the substance was cocaine;
3. That ex-Able Seaman Hoddinott knew that the substance was cocaine; and
4. That ex-Able Seaman Hoddinott intentionally possessed cocaine.

***Presumption of Innocence and Reasonable Doubt***

[25] Before this court conducts its legal analysis, it is appropriate to deal with the presumption of innocence and the standard of proof beyond a reasonable doubt. These principles are certainly well known to counsel, but other people in this courtroom may well be less familiar with them.

[26] It is fair to say that the presumption of innocence is perhaps 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 in cases under Criminal Law, every person charged with a criminal offence is presumed to be innocent until the prosecution proves his guilt beyond a reasonable doubt. An accused person does not have to prove that he is innocent. It is up to the prosecution to prove its case, on each element of the offence, and that beyond a reasonable doubt.

[27] 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.

[28] A court must find an accused person not guilty if it has a reasonable doubt about his 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 tradition of justice. The prosecution referred the court to the decision of the Supreme Court of Canada in *R. v. Lifchus* [1997] 3 S.C.R. 320, the Supreme Court of Canada proposed a model charge on reasonable doubt. The principles laid out in *Lifchus* have been applied in a number of Supreme Court and appellate courts subsequent decisions. In substance, a reasonable doubt is not a far-fetched or frivolous doubt. It is not a doubt that is based on sympathy or prejudice. It is a doubt based on reason and common sense. It is a doubt that arises at the end of the case based not only on what the evidence tells the court but also on what that evidence does not tell the court. The fact that a person has been charged is in no way indicative of his or her guilt and only the charges that are faced by an accused person are those that appear on the charge sheet before the court.

[29] In *R. v. Starr* [2000] 2 S.C.R. 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-Able Seaman Hoddinott, beyond a reasonable doubt. To put it in perspective, if the court is convinced that the accused is probably or likely guilty, then the accused shall be acquitted since proof of probable or likely guilt is not proof beyond a reasonable doubt.

[30] 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. Credibility is not synonymous with telling the truth and a lack of credibility is not synonymous with lying. Many factors will influence the court's assessment on the credibility of the testimony of a witness. For example, a court will assess a witness' opportunity to observe; a witness' reasons to remember, like, 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 either the prosecution or the defence, or is the witness impartial? This last factor applies in a somewhat different fashion when we deal with an accused person. Even though it is reasonable to assume that an 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 has chosen to testify.

[31] Among other factors useful in determining the credibility of witnesses is the apparent capacity of the witness to remember. The demeanour of the witness while testifying is also a factor which can be used in assessing credibility. The court would look at, for example, was the witness responsive to questions? Was he straightforward in providing his answers or was he evasive, hesitant? Did he have a tendency to argue with counsel rather than answering. Finally, was the witness' testimony consistent within itself and with the uncontradicted facts?

[32] It is recognized that minor discrepancies, which can and do innocently occur, do not necessarily mean that the testimony of a witness should be rejected or disregarded. However, a deliberate falsehood is an entirely different matter. It is always serious and may well tint a witness' entire testimony.

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

[34] As the rule of reasonable doubt also applies to issues of credibility, the court is not required to definitely decide on the credibility of a witness or a group of witnesses, nor does the court need to fully believe or disbelieve one witness or a group of witnesses.

[35] In a case such as this one where credibility is critical and where the accused testified on his own behalf, the law requires that a court instruct itself in the following manner:

1. If the court believes the testimony of ex-Able Seaman Hoddinott that he did not commit the offence charged, the court must find him not guilty;
2. Even if the court does not believe the testimony of ex-Able Seaman Hoddinott, if it leaves the court with a reasonable doubt about his guilt or, about an essential element of the offence charged, the court must find him not guilty of that offence;
3. If the court does not know whom to believe, it means that the court has a reasonable doubt and the court must find ex-Able Seaman Hoddinott not guilty;
4. Even if the testimony of ex-Able Seaman Hoddinott does not raise a reasonable doubt about his guilt or about an essential

element of the offence charged, if after considering all the evidence that the court does accept, the court is not satisfied beyond a reasonable doubt of his guilt, the court must acquit.

This approach on the assessment of credibility, as it relates to the issue of reasonable doubt, is often referred as the "*W. (D.)* Instruction" to which defence counsel referred previously, and it is Justice Cory, as he then was, who used that instruction in *R. v. W. (D)* [1991] 1 S.C.R. 742, at page 757. However, it must be emphasized that this instruction is appropriate where the evidence of the accused, or a statement introduced by the prosecution, constitutes a complete defence to the offence charged. In this case, this approach applies equally to all charges.

[36] Having instructed myself as to the onus and standard of proof, I will now examine the facts of this case as revealed by the evidence put before this court in light of the applicable legal principles.

### ***Questions in Issue***

*The First and Second Charges (Section 130 of the National Defence Act contrary to subsection 5(1) of the Controlled Drugs and Substances Act)*

[37] The court believes that this case raises several issues. There is no doubt that the key issue is one of credibility. But once the issue of credibility is determined, the remaining issue, if any, as it relates to the first charge, can be narrowed to whether the prosecution has proved beyond a reasonable doubt the proof of substance. As to the second charge, the issue, if any, would consist in the determination of whether the prosecution established beyond a reasonable doubt that ex-Able Seaman Hoddinott held out the substance as a controlled drug within the meaning of the *Act*, i.e., that the drug as held out can be found in one of the schedules to the *Act*. Here, the substance held out to be is cannabis marihuana, which is included in Schedule II of the *Act*. The next element would be that ex-Able Seaman Hoddinott knew that the substance held out to be cannabis marihuana is a controlled substance; and that ex-Able Seaman Hoddinott intentionally trafficked in a substance held out to be cannabis marihuana.

*The Third Charge (Section 130 of the National Defence Act contrary to subsection 5(1) of the Controlled Drugs and Substances Act)*

[38] There again, once the issue of credibility has been determined, the central issue as it relates to the third charge, if any, is to determine whether or not ex-Able Seaman Hoddinott can be considered a party to the offence of trafficking in cocaine in the circumstances of this case because he would have aided or abetted the trafficker Joe, pursuant to section 72 of the *National Defence Act*. The prosecution relies on the evidence that would support the view that the accused located the seller Joe, that the type of drug was determined by the accused, that he identified Joe to the

undercover operator. The prosecution argues that there would have been no transaction without the accused's assistance, because the undercover operator had no prior connection with the dealer. The prosecution relies also on the evidence concerning what has been referred to as the vouching by ex-Able Seaman Hoddinott with regard to telling Joe to give his phone number to the undercover operator for future drug transactions and the alleged discussion that would have taken place in the accused's apartment between Mr Hoddinott and Master Corporal McComb on 1 December 2004.

*The Fourth Charge (Section 130 of the National Defence Act contrary to subsection 4(1) of the Controlled Drugs and Substances Act)*

[39] With regard to the fourth charge beside the issue of credibility, there would be two issues. First, does the evidence establish beyond a reasonable that the accused was in possession of cocaine? Here, the prosecution relies also on the application of section 72 of the *National Defence Act* to the effect that the accused aided or abetted Joe in the possession of cocaine in his apartment. Alternatively, the prosecution argues that the evidence establishes beyond a reasonable doubt that the accused was in joint possession of cocaine, mainly because:

1. He had control over his apartment,
2. He knew that Joe would be coming to his apartment with drugs,
3. That he consented implicitly to Joe bringing cocaine in his apartment,
4. That he watched Joe and the undercover operator when the drugs changed hands, and
5. He knew that a drug transaction was taking place, that would also apply in the context of trafficking with the third charge.

## ***Decision***

### *Issues of Credibility*

[40] The court has carefully reviewed the testimony of the accused as well as the testimony of all other witnesses. The court examined that evidence separately for internal inconsistencies but also in light of the entirety of the evidence introduced before the court, including the admissions made by the defence contained in the agreed statements of facts.

[41] There is no magic formula to decide how much or how little to believe of a witness' testimony or how much to rely on it in deciding this case. As it is often the

case in these situations, the court reflected on several questions. For example, did the witness seem honest? Is there any reason why the witness would not be telling the truth? Did the witness have an interest in the outcome of the case, or any reason to give evidence that is more favorable to one side than to another? Was the witness in a position to make accurate and complete observations about the event? Did he or she have a good opportunity to do so? What were the circumstances in which the observations were made? What was the condition of the witness, if it's known to the court? Was the event, by itself, unusual or routine?

[42] The court considered also whether the witness seemed to have a good memory or if the witness had any reason to remember the things about which he testified? Did any inability or difficulty that the witness had in remembering events seem genuine, or did it seem made up, rehearsed, as an excuse to avoid answering questions? Did the witness seem to be reporting what he saw or heard, or simply putting together an account based on information obtained from other sources, rather than personal observation?

[43] Did the witness' testimony seem reasonable and consistent? Was it similar to or different from what other witnesses said about the same events? Do any inconsistencies in the witness' evidence make the main points of the testimony more or less believable and reliable? And the court paid particular attention to that. Is the inconsistency about something important or a minor detail? Did it seem like an honest mistake or a deliberate lie? If something was inconsistent, was there any explanation for it? Did the explanation make sense?

[44] Although looks can be deceiving, what was the witness' manner when he or she testified? It is recognized that giving evidence in a trial is not a common experience for many witnesses. People react and appear differently. Witnesses come from different backgrounds. They have different abilities, values and life experiences. There are simply too many variables to make the manner in which a witness testifies the only or most important factor in a court's decision.

*Ex-Able Seaman Hoddinott*

[45] Ex-Able Seaman Hoddinott testified in this case. The court has reviewed his testimony in light of all the evidence, especially the testimonies of Mr Ingram and Master Corporal McComb. After having carefully reviewed the totality of the evidence, the court does not find ex-Able Seaman Hoddinott's testimony to be credible nor reliable. The court simply does not believe him when he described the events that took place in his residence on 27 November 2004.

[46] Firstly, the court will state that the admitted use of drugs by Mr Hoddinott and his release from the Canadian Forces had no significant effect in the court's conclusion as to his credibility as a witness, none whatsoever. Based on his



version of events, a reasonable person would have seen nothing of a particular concern or striking in the events that took place in his apartment on 27 November 2004. Basically, a person that he had met once previously is looking for a person they both know and he seeks Mr Hoddinott's assistance. In the context of this case, the fact that the person asked to be hooked up for drugs should not be of a concern to him, because he is also a drug user.

[47] The court noted that there was no arrest made that evening. It is only several days later that Mr Hoddinott realized that Master Corporal McComb was an undercover police officer. Despite that, he showed a surgically precise version of the events that would have taken place in his apartment that evening, where everyone supposedly was there to have a good time, drink beer, and chat. Although the court has to be careful with the assessment of the witness' demeanour, it found that Mr Hoddinott was not truthful. He said that his apartment was an open place where everybody would come and go, although his good friend, Ingram, stated the contrary. He said that the door was always open and people would just walk in. Mr Ingram, not only said that this was not the case, but he said that the door was usually locked, not closed, locked. He would also state that during this particular evening, he was with friends that were used to come in and out of his apartment, although he says that he did not know them by their last names or where he could find these people today. Mr Hoddinott justified his answer by saying that they were not the kind of people who lived on the last name basis.

[48] He took great care to say how busy he was when he was trying to find the whereabouts of the undercover operator contact by using his cellular phone during this period. The court will not repeat the details of his testimony, but only to say that it contradicts every detail of Master Corporal McComb's testimony that would incriminate him. The court found him to be extremely cautious and guarded during his testimony. He would pause frequently and look at his counsel before answering the questions. In cross-examination, he was very defensive, somewhat argumentative and not forthright in his answers. The court could accept that Mr Hoddinott's testimony be contrary to the testimony of Master Corporal McComb if that was the only evidence before the court. However, the significant contradictions with regard to the accessibility of his own apartment and the persons present in his apartment during the evening of 27 November 2004 between his version and that of his good friend Mr Ingram are highly disturbing in the context of this case. And in reaching its conclusion, the court strictly applied the test of *W.(D)*.

*Mr Ingram*

[49] The testimony of Mr Ingram is problematic in many ways. The court does not find him credible or reliable in his recollection of events. As I said previously, lack of credibility is not necessary synonymous with lying in this case. The court does not accept his reasons as to why he would remember what happened in the apartment that night. The fact that a man, stranger to him, was looking for another person and that

his friend Clint spent eight of ten minutes sitting on the floor trying to locate that person on the phone is not significant. His testimony is extremely precise when it comes to the description of where was his friend Clint and the undercover operator at the time. In fact, the only reasonable conclusion that the court can infer from his testimony is that he was focused solely and exclusively on these two persons during 10 minutes. However, he can't even remember whether or not there were female persons, at least two, according to Mr Hoddinott's version, that would have been there even before the undercover officer arrived in the apartment. There is no doubt in the court's view that he tried to assist his friend in providing his testimony. The court is not convinced that he is deliberately lying, but his recollection of the events is, at the very least, tainted. He is not a convincing witness and his testimony appeared overly prepared.

*Master Corporal McComb*

[50] Master Corporal McComb was particularly credible and reliable during his testimony. He testified in a manner that the court would describe as very calm, polite and respectful. The court accepts his entire testimony. He testified consistently and provided coherent explanations to issues put to him by the defence counsel. Unlike counsel for the defence suggested, his version does not defy common sense. In particular, the court accepts his version of events with regard to the tokening circle or with the fact that he did not obtain a search warrant after he left the apartment. The court accepts that as the undercover operator, he could only pass the information to his superiors. The court does not find suspicious his testimony with regard to the issue raised by the defence that the accused could not have told the undercover operator that he had been on HMCS CHARLOTTETOWN despite making an entry to that effect in his police notebook, because Mr Hoddinott's testimony or records show the contrary. The court cannot speculate as to the reasons why Mr Hoddinott would have made that statement if it was not true, but it does not mean that the statement was not made. Master Corporal McComb is an experienced police officer with no interest in this case. Throughout his testimony, he testified in a totally dispassionate and fair manner. In particular, the court refers to the part of his testimony dealing with the acts, the words, and the interaction of Mr Hoddinott concerning the drug transaction with Joe. He did not try to embellish his testimony or to say anything that could have been perceived to increase the role of Mr Hoddinott in the transaction. His entire testimony was solid, precise, straightforward, and candid. During his whole testimony, he was never shaken. Master Corporal McComb testified in a respectful, firm, forthright and neutral manner. The court believes that his testimony is both credible and reliable.

***Legal Analysis***

*The First and Second Charges (Section 130 of the National Defence Act contrary to subsection 5(1) of the Controlled Drugs and Substances Act)*

[51] Having rejected the testimonies of Mr Hoddinott and Mr Ingram, the court is left with the evidence of Master Corporal McComb as well as Exhibits 3, 4 and 5. With regard to the first charge, the court is not satisfied that the prosecution has established beyond a reasonable doubt that the joint that was passed by Mr Hoddinott to the undercover operator contained cannabis marihuana. The testimony of Master Corporal McComb as to his belief of the nature of the substance is not sufficient to establish that essential element of this offence in absence of accepting this witness as an expert witness for that purpose. Based on that reason alone, Mr Hoddinott shall be found not guilty of the first charge.

[52] As to the second charge, the court is satisfied that the prosecution has established beyond a reasonable doubt that ex-Able Seaman Hoddinott held out the substance as a controlled drug within the meaning of the *Act*, i.e., that the drug as held out can be found in one of the schedules to the *Act*. Here, the substance held out to be is cannabis marihuana, which is included in Schedule II of the *Act*. The court is also satisfied that there is sufficient evidence to establish beyond a reasonable doubt that ex-Able Seaman Hoddinott knew that the substance held out to be was a controlled substance; and that ex-Able Seaman Hoddinott intentionally trafficked in a substance held out to be cannabis marihuana. The evidence that the court has accepted as credible and reliable indicates that Mr Hoddinott smoke the joint himself before he asked the undercover operator: "Do you want some pot?" Mr Hoddinott then handed that joint to Master Corporal McComb who simulated to smoke it before the joint was ultimately taken back by Mr Hoddinott. The defence admitted in the agreed statement of facts that the word "pot" is a street name for "cannabis marihuana", which is a substance included in Schedule II of the *CDSA*, therefore, cannabis marihuana is established. This evidence and the circumstances described by Master Corporal McComb as to the presence of illicit substances on the coffee table and his experience as an undercover operator in drug investigations is also relevant in establishing that the accused trafficked in a substance held out to be cannabis marihuana. The evidence of the accused would also confirm that he was aware of what "pot" was.

*The Third Charge (Section 130 of the National Defence Act contrary to subsection 5(1) of the Controlled Drugs and Substances Act)*

[53] The central issue as it relates to the third charge is to determine whether or not ex-Able Seaman Hoddinott can be considered a party to the offence of trafficking in cocaine in the circumstances of this case because, according to the prosecution's theory, he would have aided or abetted the trafficker Joe pursuant to section 72 of the *National Defence Act*. The prosecution relies on the evidence that would support the view that the accused located the seller Joe; that the type of drug was determined by the accused; that he identified Joe to the undercover operator. The prosecution argues that there would have been no transaction without the accused's assistance, because the undercover operator had no prior connection with the dealer. The prosecution relies also on the evidence concerning what has been referred to as the vouching of ex-Able

Seaman Hoddinott with regard to telling Joe to give his phone number to the undercover operator for future drug transactions and the alleged discussion that would have taken place in the accused's apartment between Mr Hoddinott and Master Corporal McComb on 1 December 2004.

[54] As I said here, the prosecution relies on aiding and abetting. A person commits an offence by aiding if he does anything, or fails to do anything that is his duty to do, for the purpose of helping another person to commit the offence. A person commits an offence by abetting rather, as opposed to aiding where that person actively encourages somebody else to commit an offence. Based on the evidence accepted by the court, it can not be inferred that Mr Hoddinott knew that Joe would come to deal with drugs that night, nor that Joe had drugs in his possession when he entered the apartment. The accused made no attempt to facilitate a transaction. The combined fact that he knew that Joe would come in and that Joe was a drug trafficker would not be sufficient for the purposes of aiding and abetting. Master Corporal McComb said that ex-Able Seaman Hoddinott never introduced Joe to him, nor that he called Joe in advance for him, nor that ex-Able Seaman Hoddinott discussed or fixed the price or arrange for the delivery with regard to the transaction that took place with Joe. Master Corporal McComb testified that the drug transaction with Joe was not the result of a three party discussion, which would have included the accused, nor that ex-Able Seaman Hoddinott discuss any drug matters with Joe when he came in the apartment. In addition, Master Corporal McComb said that, to his knowledge, Joe had no idea that the undercover operator was in the apartment to buy drugs. The fact that he let the undercover operator to stay in his apartment until Joe arrived cannot amount to facilitate a drug transaction if he was not aware that Joe had drugs on him at the time. The evidence indicates that Joe was never introduced to the undercover operator. The policeman took the initiative with Joe. The court fails to see how in this context Mr Hoddinott could be considered an aidor or an abettor. The fact that Mr Hoddinott would have told Joe that he could give his phone number to the undercover operator if he so wished cannot, in the circumstances of this case, amount to aiding or abetting. In addition, the fact that Mr Hoddinott would have given Joe's phone number to the undercover operator on 1 December 2004, could certainly be rightfully considered in the context of aiding and abetting, but this fact would be relevant only to a transaction that would have taken place on or about 1 December 2004 as a result of that information. Therefore the court is not satisfied that the prosecution has established that offence beyond a reasonable doubt.

*The Fourth Charge (Section 130 of the National Defence Act contrary to subsection 4(1) of the Controlled Drugs and Substances Act)*

[55] With regard to the fourth charge, there is two issues. First, does the evidence establish beyond a reasonable doubt that the accused was in possession of cocaine? Here, the prosecution relies also on the application of section 72 of the *National Defence Act* to the effect that the accused aided or abetted Joe in the

possession of cocaine in his apartment. For the same reasons, the court rejects that proposition.

[56] Alternatively, the prosecution argues that the evidence establishes beyond a reasonable doubt that the accused was in joint possession of cocaine, mainly because:

1. He had control over his apartment,
2. He knew that Joe would be coming to his apartment with drugs,
3. That he consented implicitly to Joe bringing cocaine in his apartment,
4. That he watched Joe and the undercover operator when the drugs changed hands, and
5. He knew that a drug transaction was taking place.

A person who has actual physical control of a substance as, for example, by holding it in his hand, or keeping it in his pocket, has that substance in his possession. In this case, it is clear that Joe had possession of the substance contained in the plastic bag that he handed to Master Corporal McComb.

[57] A person who knowingly has a substance in the actual possession or custody of somebody else, or in some place for the use or benefit of himself or somebody else, has that substance in his possession, provided he has some control over that substance. Knowingly means here that Mr Hoddinott was aware of the possession or custody of the substance by Joe, or in another place, and did not act through ignorance, mistake, or accident. Here again, the evidence does not indicate that Mr Hoddinott was aware that Joe had drugs on him when he entered his apartment. There is also no convincing evidence to support the proposition that he watched Joe as well as the undercover operator when the drugs changed hands, and that he knew that a drug transaction was taking place. The court can not make this inference based on the evidence.

[58] There are also circumstances in which several persons may have possession of a substance at the same time. Where any one of two or more persons, with the knowledge and agreement of the others, has a substance in his possession or custody, all of them are in possession of that substance, provided he has some control over that substance. Knowledge and agreement by the others who are not in actual possession of the substance is essential. Mere indifference or doing nothing about it is not enough. The evidence does not support this proposition in the circumstances. However, the court could have reached a different conclusion if the alleged drugs would

have been those that were placed on the coffee table as Master Corporal McComb described it. But this proposition can not stand for drugs that were in the pockets of Joe or passed to the undercover operator without proof of the knowledge of others present.

[59] The prosecution argues finally that the circumstances of this case would support the view that Mr Hoddinott could be considered as the agent of the purchaser, Master Corporal McComb, and thus should be found guilty of that offence. The court disagrees. Based on the evidence, the court is not satisfied that Mr Hoddinott would have provided more than incidental assistance to the undercover operator in order to buy drugs from Joe. The evidence is limited to telling Master Corporal McComb that Joe could hook him up, that Joe would be there shortly, that the undercover operator could stay in his apartment until Joe's arrival and indicating to the undercover operator that Joe was the guy to talk to after he had arrived in the apartment. The court has a reasonable doubt on this issue and this doubt must benefit to the accused.

***Disposition***

[60] Mr Hoddinott, please stand up.

[61] For these reasons, the court finds you not guilty of the first charge, the court finds you guilty of the second charge and the court finds you not guilty of the third and fourth charges.

LIEUTENANT-COLONEL M. DUTIL, M.J.

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