Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20180131

Docket: CMAC-577

Citation: 2018 CMAC 1

[ENGLISH TRANSLATION]

CORAM: **CHIEF JUSTICE BELL**
BENNETT J.A.
TRUDEL J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

WARRANT OFFICER J.G.A. GAGNON

Respondent

Heard at Québec City, Quebec, on September 22, 2017.

Judgment delivered at Ottawa, Ontario, on January 31, 2018.

REASONS FOR JUDGMENT:	TRUDEL J.A.
CONCURRED IN BY:	BENNETT J.A.
DISSENTING REASONS BY:	BELL C.J.

Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20180131

Docket: CMAC-577

Citation: 2017 CMAC 1

CORAM: **CHIEF JUSTICE BELL**
BENNETT J.A.
TRUDEL J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

WARRANT OFFICER J.G.A. GAGNON

Respondent

REASONS FOR JUDGMENT

TRUDEL J.A.

I. Introduction

[1] The appellant, Her Majesty The Queen, is appealing the not guilty verdict by the General Court Martial in the case of the respondent, Warrant Officer J.G.A. Gagnon, who faced the following charge:

[TRANSLATION]

AN OFFENCE PUNISHABLE UNDER SECTION 130 OF THE *NATIONAL DEFENCE ACT*, THAT IS TO SAY, OF HAVING COMMITTED A SEXUAL ASSAULT CONTRARY TO SECTION 271 OF THE *CRIMINAL CODE*

Particulars: In that he, on December 15, 2011, at the Régiment de la Chaudière Armoury, Lévis, Province of Quebec, did sexually assault V70 234 495 Cpl S.V.R.

[2] In this case, the main issue is whether the Chief Military Judge erred in law by submitting to the court martial panel a defence of honest belief in consent. Specifically, did the Chief Military Judge err in law in the legal exercise that he undertook before ultimately concluding that this defence could be submitted to the court martial panel? This issue requires, *inter alia*, an analysis of the interaction between the air of reality test — was there evidence on which a properly instructed panel acting reasonably could acquit if it accepted it as true? — and the exclusions in section 273.2 of the *Criminal Code*, R.S.C., 1985, c. C-46.

[3] With respect, in my view, the Chief Military Judge committed legal errors that justify a new trial with regard to the charge described above. The Chief Military Judge could not submit the defence to the panel before considering, at law, the statutory limitations set out in section 273.2 of the *Criminal Code*. Accordingly, I would allow the appeal.

II. The parties' positions

[4] The appellant summarizes her position at para. 13 of her memorandum of fact and law:

> [TRANSLATION]
>
> 13. The appellant's position is that, in her analysis regarding the air of reality of this defence, the military judge committed two errors: (1) he did not consider section 273.2 of the *Criminal Code*, which limits the use of this defence, (2) the evidence that the military judge relied upon was insufficient to establish the facial plausibility of the defence of honest but mistaken belief in consent. In the appellant's opinion, these two errors, individually or cumulatively, warrant this Court's intervention.

[5] As for the respondent, there is no specific legal argument in his memorandum of fact and law that addresses the statutory limitations set out in section 273.2 of the *Criminal Code*.

[6] During the hearing before this Court, the respondent nevertheless stated that the air of reality test that the Chief Military Judge should have applied did not include the analysis of these statutory limitations, *inter alia*, the one that requires the accused to take reasonable steps to ascertain consent. It was up to the triers of fact, namely, the members of the panel, to examine that limitation when assessing the evidence against the defence raised.

[7] While conceding that the Chief Military Judge does not discuss the statutory limitations of section 273.2 in his reasons, the respondent concludes that he correctly submitted the defence to the panel since the evidence in the record, considered most favourable for the accused, amply supports a conclusion that Warrant Officer J.G.A. Gagnon did not, in the circumstances, have to ascertain whether Corporal S.V.R. had consented.

III. Analysis

A. *The standard of review*

[8] The combined effect of sections 228 and 230.1 of the *National Defence Act*, R.S.C., 1985, c. N-5, is such that the appeal filed by the Crown (the Minister, or counsel instructed by the Minister for that purpose, according to the wording of section 230.1) must raise questions of law or questions of mixed fact and law in the context, *inter alia*, of the legality of any verdict of not guilty.

[9] As this appeal raises a pure question of law, namely the identification of the test that applies to determine whether the defence could be submitted to the triers of fact, I propose that the issue be examined using the standard of correctness.

B. *Criminal law defences*

[10] The *Criminal Code* and the common law both recognize a certain number of defences to criminal charges. In this case, the Court is faced with a defence raised by Warrant Officer J.G.A. Gagnon that seeks to demonstrate that he did not have a culpable mental state (*mens rea*) and therefore did not commit the alleged offence because he had honest but mistaken belief that Corporal S.V.R. consented to the sexual activities that were discussed at length in the proceedings before the General Court Martial.

[11] Given my conclusion and the proposed reasons underlying it, it is unnecessary to go over the factual framework, which is described at length in the Chief Military Judge's reasons and his instructions to the panel. I note, nevertheless, that there is no publication ban in this matter since Corporal S.V.R. waived it.

[12] In my opinion, a defence based on consent cannot be considered without specifically considering the statutory limitations provided by section 273.2 of the *Criminal Code*. Although section 273.2 does not codify *mens rea* in the context of sexual assault, the statutory limitations that it sets out are barriers, at law, to this defence.

[13] This section reads as follows:

273.2 It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where	**273.2** Ne constitue pas un moyen de défense contre une accusation fondée sur les articles 271, 272 ou 273 le fait que l'accusé croyait que le plaignant avait consenti à l'activité à l'origine de l'accusation lorsque, selon le cas :
(*a*) the accused's belief arose from the accused's	*a*) cette croyance provient :
(i) self-induced intoxication, or	(i) soit de l'affaiblissement volontaire de ses facultés,
(ii) recklessness or wilful blindness; or	(ii) soit de son insouciance ou d'un aveuglement volontaire;
(*b*) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.	*b*) il n'a pas pris les mesures raisonnables, dans les circonstances dont il avait alors connaissance, pour s'assurer du consentement.

[14] I also mention that these statutory limitations are not in themselves new grounds to deny the accused the right to argue that he believed that there was consent. These limitations are implicitly included in subsection 265(4) of the *Criminal Code*, which codifies the common law rule on the sufficiency of evidence to determine whether the defence can legally be raised, and which also dictates the exercise that the trial judge must undertake when faced with this defence.

[15] Subsection 265(4) states:

265(4) Where an accused alleges that he believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, to consider the presence or absence of reasonable grounds for that belief.	**265(4)** Lorsque l'accusé allègue qu'il croyait que le plaignant avait consenti aux actes sur lesquels l'accusation est fondée, le juge, s'il est convaincu qu'il y a une preuve suffisante et que cette preuve constituerait une défense si elle était acceptée par le jury, demande à ce dernier de prendre en considération, en évaluant l'ensemble de la preuve qui concerne la détermination de la sincérité de la croyance de l'accusé, la présence ou l'absence de motifs raisonnables pour celle-ci.

B.1) *Defence based on consent and the air of reality test*

[16] A defence that does not have an air of reality must be removed from consideration by the jury. This is a question of law that requires the trial judge to first determine whether the evidence sought to be adduced is relevant and admissible, but especially whether it is sufficient to give rise to the defence. The accused bears a threshold evidential burden rather than a persuasive burden.

[17] In *R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3 [*Cinous*], the Supreme Court of Canada notes a well-established principle regarding the application of the air of reality test: “The question is whether there is evidence upon which a properly instructed jury acting reasonably could acquit if it accepted it as true.” (at para. 86; see also *R. v. Fontaine*, 2004 SCC 27, [2004] 1 S.C.R. 702, at para. 14 [*Fontaine*]). A defence should not go to the jury if it does not satisfy this test and would only confuse the jury and muddy its deliberations.

[18] In this case, in order to determine whether there is sufficient evidence to give an air of reality to the defence based on consent, the Chief Military Judge had to, in my opinion, review the evidence in light of the following questions: (1) did the respondent believe that Corporal S.V.R consented to the sexual activities? (2) was this belief honest and unrelated to his self-induced intoxication or to his recklessness or wilful blindness? (3) does the evidence show two diametrically opposed versions that could bar the defence within the meaning of *R. v. Park*, [1995] 2 S.C.R. 836, 169 A.R. 241 [*Park*]? and (4) was the statutory limitation of paragraph 273.2(b) of the *Criminal Code* engaged?

[19] The appellant does not strongly dispute the Chief Military Judge’s findings in regard to the air of reality of the defence with respect to the first two questions. I will therefore not discuss them further.

[20] As for the third question, the appellant argues that the testimony of Warrant Officer J.G.A Gagnon and that of Corporal S.V.R. cannot be realistically combined. In that case, within

the meaning of *Park*, the issue is purely one of credibility — of consent or of lack of consent. In such a case, the defence should not be submitted to the panel.

[21] I do not agree, and I accept instead the respondent's position (at paras. 19–22 of his memorandum of fact and law) citing in particular para. 22:

> [TRANSLATION]
>
> 22. … the respondent did not testify that the complainant had communicated voluntary consent. He also did not testify that the complainant had participated actively, passionately, and voluntarily. As for the complainant, she did not testify that she had strongly resisted. Accordingly, the parties' versions cannot be described as diametrically opposed and, on that basis, cannot prevent the accused from arguing that he had an honest but mistaken belief that the complainant had consented.

[22] It is the fourth question that is decisive in this appeal.

C. *Paragraph 273.2(b) of the Criminal Code*

[23] This provision has yet to be interpreted by a majority of the Supreme Court of Canada and few decisions address paragraph 273.2(*b*), namely, the requirement to take reasonable steps to ascertain consent (see Kent Roach, *Criminal Law*, 6th ed. (Toronto: Irwin Law, 2015) at 455).

[24] One of these decisions is that of the Alberta Court of Appeal in *R. v. Barton*, 2017 ABCA 216, 38 C.R. (7th) 316 [*Barton*]. At para. 250, the Court writes: "[T]here will be no air of reality if one of the statutory bars in s. 273.2 is present". In other words, the air of reality test cannot be satisfied if one of the exclusions to the defence of honest belief in consent is present.

[25] The respondent has not satisfied me that *Barton* is a wrong decision in law and that we should base our decision on *R. v. Ewanchuck*, [1999] 1 S.C.R. 330 at para. 60, 169 D.L.R. (4th) 193 [*Ewanchuk*], which reads as follows:

> In her reasons, Justice L'Heureux-Dubé makes reference to s. 273.2(*b*) of the Code. Whether the accused took reasonable steps is a question of fact to be determined by the trier of fact only after the air of reality test has been met. In view of the way the trial and appeal were argued, s. 273.2 (*b*) did not have to be considered.

[26] First, this passage was written in *obiter*. Also, paragraph 273.2(*b*) of the *Criminal Code* was not at issue in that case, contrary to this appeal where it is the central issue. Finally, *Barton* follows a series of other Canadian appellate court decisions that came to the same conclusion (*R. v. Dippel*, 2011 ABCA 129, 281 C.C.C. (3d) 33; *R. v. Despins*, 2007 SKCA 119, [2007] 299 Sask. R. 249; and *R. v. Cornejo* (2003), 68 O.R. (3d) 117, 18 C.R. (6th) 124 (C.A.), leave to appeal to the S.C.C. refused, 30158 (October 7, 2004)).

[27] In discussing the relationship between the air of reality test and the requirement to take reasonable steps, I cannot ignore Professor Hamish Stewart's explanation of this relationship. His legal reasoning is consistent with the jurisprudence and appears to me to be a model of clarity and logic:

> The air of reality test is for the trial judge and, if the air of reality test is satisfied, the facts are for the trier of fact to determine. L'Heureux-Dubé J. [who wrote concurring reasons in *Ewanchuk*] is of course correct to say that the defence of mistaken belief cannot arise until reasonable steps are taken, but that question needs to be asked twice, once by the trial judge ("Is there an air of reality to the accused's claim that he took reasonable steps?", and once more, if necessary, by the trier of fact ("Did the accused take reasonable steps?"). The defence of mistaken belief in consent is available if the accused has an honest belief in communicated consent that is not tainted by the various factors listed in ss. 273.1 and 273.2, <u>and if he takes reasonable steps in the circumstances known to him to ascertain consent</u>. The air of reality test

> applies to all of these elements: that is, before leaving the defence with the trier of fact, the trial judge must be satisfied that there is evidence on which a reasonable and properly instructed jury could find an honest, untainted belief in communicated consent and reasonable steps (Hamish C. Stewart, *Sexual Offences in Canadian Law*, loose-leaf, Toronto, Thomson Reuters, 2004 at pp. 3–50). [Emphasis added].

[28] In my opinion, Professor Stewart's explanation gives meaning to paragraph 273.2(b). Parliament decided that the honest but mistaken belief defence is only available to the accused if the accused took reasonable steps, under the circumstances, to ascertain the complainant's consent for each sexual act in the course of their activities. If the accused cannot adduce evidence susceptible to be interpreted as such by the jury, the defence cannot go to the jury. Since the legislator restricted the honest but mistaken belief defence to situations where the accused took reasonable steps in the circumstances known to the accused to ascertain consent, the judge must first determine whether there is an air of reality to those steps.

[29] The respondent argues before this Court that the circumstances known by the General Court Martial were such that a reasonable person would perhaps not have taken other steps to ascertain consent. According to the respondent, [TRANSLATION] "in his reasons, the Chief Military Judge described the circumstances of the sexual activity which, in themselves, identify the reasonable steps taken within the meaning of section 273.2" (respondent's memorandum of fact and law, at para. 34, referring to the Chief Military Judge's reasons, Appeal Record, Volume III at pp. 363–365). In my opinion, this statement does not resolve the issue.

[30] Even giving the Chief Military Judge's reasons a generous interpretation, I agree with the appellant that they do not support a finding that the exclusion under paragraph 273.2(b) was

considered in the analysis of the air of reality test. The Chief Military Judge could not simply leave this issue to the members of the panel, namely to the triers of fact. First, he had to address the air of reality of the evidence as to the reasonable steps taken by Warrant Officer J.G.A. Gagnon to ascertain Corporal S.V.R.'s consent. If the respondent failed to meet its evidential burden, then that defence could not, at law, be submitted to the panel.

[31] I cannot agree, either, with the respondent's argument that, if the Chief Military Judge's reasons were insufficient, it would have no bearing on the verdict since the evidence easily supports a finding that the air of reality test is met with respect to the reasonable steps.

[32] First, I will turn to the sufficiency of the Chief Military Judge's reasons.

D. *The sufficiency of the Chief Military Judge's reasons*

[33] In *R. v. Vuradin*, 2013 SCC 38, [2013] 2 S.C.R. 639, the Supreme Court of Canada reminds us that:

> [10] An appellate court tasked with determining whether a trial judge gave sufficient reasons must follow a functional approach: *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, at para. 55. An appeal based on insufficient reasons "will only be allowed where the trial judge's reasons are so deficient that they foreclose meaningful appellate review": *R. v. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788, at para. 25.

[34] The functional approach is defined in *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3 as follows:

> [15] This Court in *Sheppard* and subsequent cases has advocated a functional context-specific approach to the adequacy of reasons in a criminal case. The reasons must be sufficient to fulfill their functions of explaining why the

> accused was convicted or acquitted, providing public accountability and permitting effective appellate review.
>
> [16] It follows that courts of appeal considering the sufficiency of reasons should read them as a whole, in the context of the evidence, the arguments and the trial, with an appreciation of the purposes or functions for which they are delivered (see *Sheppard*, at paras. 46 and 50; *R. v. Morrissey* (1995), 22 O.R. (3d) 514 (C.A.), at p. 524).
>
> [17] These purposes are fulfilled if the reasons, read in context, show why the judge decided as he or she did. The object is not to show *how* the judge arrived at his or her conclusion, in a "watch me think" fashion. It is rather to show *why* the judge made that decision.
>
> [Emphasis in original].

[35] Using the functional and contextual approach, I will review the framework of the Chief Military Judge's reasons more closely.

[36] First, the Chief Military Judge never mentions the words "reasonable steps". The only discussion regarding the ascertainment of Corporal S.V.R.'s consent is found at page 363, when he sets out the prosecution's theory:

> [TRANSLATION]
>
> The prosecution also relies on the lack of evidence, and the accused's admission that he did not ascertain whether or not the complainant consented, despite the existence of apparent doubts.
>
> (Chief Military Judge's reasons, Appeal Record, Volume III at page 363)

[37] This statement comes after the Chief Military Judge set out the general test according to which a defence should not be submitted to the panel if it does not have an air of reality. In support of this principle, he cites *Cinous*, *Fontaine*, and *R. v. Tran*, 2010 SCC 58, [2010] 3 S.C.R. 350.

[38] From these decisions and others mentioned in the same context (*R. v. Osolin*, [1993] 4 S.C.R. 595, 109 D.L.R. (4th) 478; *R. v. VandenElsen* (2003), [2003] 175 O.A.C. 71, 177 C.C.C. (3rd) 332), the Chief Military Judge found that:

> [TRANSLATION]
>
> … the trial judge must consider that the defence evidence is credible. The trial judge does not have to weigh the evidence, make findings of fact, or draw specific inferences of fact. The trial judge must, however, make a finding on inferences of fact that could reasonably be made on the evidence. It is rather a matter of whether, if the evidence is weighed in the best light possible for the accused, the jury could reasonably make the required inferences. In the case of honest but mistaken belief to consent, the error does not have to be reasonable to be exculpatory. The prosecution must refute any exculpatory error that is raised by the evidence. The issue of reasonability is relevant to the air of reality of the alleged error. In short, the belief does not have to be reasonable, it is sufficient that it is simply honest"
>
> (Chief Military Judge's reasons, Appeal Record, Volume III at page 362).

[39] That said, the Chief Military Judge then reviewed the parties' positions in the context of the prosecution's argument that Warrant Officer J.G.A. Gagnon's belief was based on stereotypes and that he never ascertained Corporal S.V.R.'s consent (prosecution's submissions, Appeal Record, Volume III at page 352; see also the Chief Military Judge's reasons at page 362 starting at line 32).

[40] It is at this point that the Chief Military Judge draws support from the decision in *R. v. Flaviano*, 2013 ABCA 219, 309 C.C.C" (3d) 163, aff'd 2014 SCC 14, [2014] 1 S.C.R. 270 [*Flaviano*], a decision that reaffirms the principle set out in *Park*, referred to above at para. [18], and concludes as follows:

> [TRANSLATION]
>
> In the matter before this Court, the evidence indicates that the complainant's version supports the assertion that she indicated her refusal to the accused on several occasions or, at the very least, to continue to be touched sexually. Unlike the *Flaviano* case, the accused does not submit in any way that the complainant expressly consented to sexual acts. If that were the case, as it was in *Flaviano*, the honest but mistaken belief defence would not be available. The facts raised by the defence support the argument that there is sufficient evidence to meet the required air of reality test.
>
> Accordingly, the Court is satisfied that this defence should be submitted to the panel in its final instructions.
>
> (Chief Military Judge's reasons, Appeal Record, Volume III at page 366).

[41] It seems to me that the Chief Military Judge is responding here to the prosecution's argument that the defence is not available when there are contradictory versions.

[42] Speaking of *Flaviano*, it is interesting to note that in that case, the trial judge had considered the issue of whether the accused had taken steps to ascertain the complainant's consent (*Flaviano* at para. 29).

[43] I also observe that, in his analysis, the Chief Military Judge did not address the air of reality of the respondent's honest belief of Corporal S.V.R.'s consent <u>to each sexual act</u>. It is apparent, *inter alia*, from section 273.1 of the *Criminal Code* that, for the legislator, consent involves the complainant's voluntary agreement to each of the sexual acts performed on a specific occasion (*R. v. J.A.*, 2011 SCC 28, [2011] 2 S.C.R. 440 at para. 39):

> [39] Section 273.1(2)(*d*) provides that there can be no consent if the "complainant expresses, by words or conduct, a lack of agreement to engage in the activity". Since this provision refers to the expression of consent, it is clear that it can only apply to the accused's *mens rea*. The point here is the

> linking of lack of consent to any "activity". This suggests a present, ongoing conception of consent, rather than advance consent to a suite of activities.

[44] Therefore, the Chief Military Judge was required, as a matter of law, to ask whether there was an air of reality to the respondent's belief of consent to the first fondling, as well as to the subsequent acts. The Chief Military Judge was then required to ask whether that belief was supported by any evidence that the respondent had taken reasonable steps to ascertain consent to each sexual act. The Chief Military Judge failed to meet this obligation; he examined only the evidence bearing on the facts leading to the first kisses between the parties (he also examined the respondent's evidence on the complainant's vaginal secretions, but recognized, in any event, that the evidence did not support a finding of consent) (Chief Military Judge's reasons, Appeal Record, Volume III, page 364, lines 38–47 and page 365, lines 1 and 2).

[45] With respect, the Chief Military Judge's reasons are therefore inadequate to fulfil their function and do not give full effect to the relevant provisions of the *Criminal Code*. There is no explanation given for the reason for submitting the defence to the panel in light of paragraph 273.2(*b*), nor is there an air of reality analysis of the respondent's belief with respect to each of the sexual acts introduced in evidence. These omissions are such that the public interest is not well served and that our Court cannot effectively discharge its duties.

[46] Certainly, there is no doubt that the Chief Military Judge correctly instructed the panel as to the defence raised by the respondent, including the issue of taking reasonable steps (for the Chief Military Judge's instructions to the panel, see the Appeal Record, Volume IV, final instructions, at page 443 and resumed hearing at pages 454 ff.). This finding, in itself, as well as

a reading of the Chief Military Judge's reasons according to the test set out in *Sheppard*, nevertheless do not support a conclusion that he properly directed himself in law from the outset.

[47] I now turn to the second part of the respondent's argument: if there was an omission by the Chief Military Judge, it had no bearing on the final result.

E. *Material bearing on the acquittal*

[48] In *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609 [*Graveline*], the Supreme Court of Canada states that not every error of law by the trial judge will lead to a new trial. To obtain a new trial, the appellate court must be persuaded that "the error (or errors) of the trial judge might reasonably be thought, in the concrete reality of the case at hand, to have had a material bearing on the acquittal" (at para. 14, see also *R. v. George*, 2017 SCC 38, [2017] S.C.J. No. 100 (QL) at para. 27). The onus on the Crown in such a case is "a heavy one" (*R. v. Morin*, [1988] 2 S.C.R. 345 at p. 374, 44 C.C.C. (3rd) 193*; R. v. Sutton*, 2000 SCC 50, [2000] 2 S.C.R. 595 at para. 2).

[49] It is therefore necessary to decide whether the errors of law discussed above are determinative. On the evidence before him, was it possible or probable that the Chief Military Judge would find that the respondent had not taken reasonable steps to ascertain consent to each sexual act, and consequently, decide that this defence could not be submitted to the panel?

[50] In my opinion, the Chief Military Judge could have made such a finding. The respondent's statements suggest that the complainant's neutral acts could have led to an honest but mistaken belief to consent and relieved the respondent of the obligation to take reasonable

steps to ascertain consent (see the respondent's memorandum of fact and law at para. 23). In support of this defence, the respondent submits the fact that the complainant had followed him to the armoury, went with him to the second floor, did not turn on the lights and did not flee or ask him to stop (*idem* at paras. 12 and 26).

[51] These elements could never support this defence because they do not demonstrate that there was consent. These elements would not be sufficient to absolve the respondent of the requirement to take steps to ascertain consent. The only elements that the respondent alludes to that do not show purely passive or ambiguous behaviour are in the respondent's testimony to the effect that the complainant sat on him, kissed him, and moved her hips when he took off her pants and underwear. The defence to negate *mens rea* cannot be raised unless the accused honestly believed that the complainant communicated her consent.

[52] In my opinion, this evidence is clearly not enough to give an air of reality to the respondent's contention that he had an honest but mistaken belief that the complainant had consented to kiss him, to be undressed, and to cunnilingus *and* that he had taken reasonable steps in the circumstances known to him at the time to ascertain the complainant's consent to continue these activities. If it were open to the judge to find that the defence had an air of reality in regard to the kissing and undressing, in my view, it would be difficult to conclude that the defence had an air of reality with respect to the cunnilingus or on the issue of reasonable steps.

[53] The circumstances known to the respondent at the time, according to his own testimony, include the following: the accused and the complainant had known each other only in a

professional capacity before the facts that led to the charge; it was the first time they had had sexual relations; in the regiment, his rank was much higher than the complainant's.

[54] In these circumstances, even if the complainant had begun to kiss him, I have difficulty accepting that this kiss was, in itself, the basis for an honest but mistaken belief that the complainant consented to cunnilingus, and certainly not in the five to seven minutes that followed the kiss. By his own admission, the respondent did not take any step to ascertain the complainant's consent to be undressed, touched, and kissed in the genital area, and penetrated without a condom. The mere fact that he stopped after the complainant's refusal in respect to this last act is not in any way a reasonable step to ascertain her consent. The respondent's reliance on the complainant's silence and her implied consent must be rejected as a defence (*Ewanchuk*).

[55] Yet, whether or not my conclusion differs from the Chief Military Judge's does not matter. This Court does not have to make a final determination on the issue: it is sufficient that the appellant persuades it with "a reasonable degree of certainty" within the meaning of *Graveline* that a judge who rehears this matter in the correct legal framework is likely to deny the defence and that the jury, without this defence, could not have acquitted. In my opinion, the appellant has discharged this burden.

[56] In my view, the errors in law made by the Chief Military Judge had a sufficiently important bearing on the verdict to justify referring the matter for a new trial.

IV. Conclusion

[57] For these reasons, and in accordance with subsection 239.1(1) of the *National Defence Act*, I would allow the appeal, set aside the verdict of not guilty and order a new trial.

"Johanne Trudel"
J.A.

"I agree.
Elizabeth A. Bennett J.A."

B. RICHARD BELL, CHIEF JUSTICE (DISSENTING)

I. Overview

[58] After all the evidence was filed and all testimonies were heard in his trial for sexual assault, the accused asked the trier of law, the Chief Justice of the Court Martial [Chief Justice], to instruct the committee on the defence of honest but mistaken belief in the consent of the complainant. In his decision, rendered before the instructions were given to the committee, the Chief Justice did not specifically cite section 273.2 of the *Criminal Code*, R.S.C. 1985, c. C-46 [*Criminal Code*], which reads as follows:

Where belief in consent not a defence	**Exclusion du moyen de défense fondé sur la croyance au consentement**
273.2 It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where	**273.2** Ne constitue pas un moyen de défense contre une accusation fondée sur les articles 271, 272 ou 273 le fait que l'accusé croyait que le plaignant avait consenti à l'activité à l'origine de l'accusation lorsque, selon le cas :
(*a*) the accused's belief arose from the accused's	*a*) cette croyance provient :
(i) self-induced intoxication, or	(i) soit de l'affaiblissement volontaire de ses facultés,
(ii) recklessness or wilful blindness; or	(ii) soit de son insouciance ou d'un aveuglement volontaire;
(*b*) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.	*b*) il n'a pas pris les mesures raisonnables, dans les circonstances dont il avait alors connaissance, pour s'assurer du consentement.

[59] The appellant submits, correctly in my opinion, that there must be evidence as to each element of the defence before it can be put to the committee. The appellant thus submits that the defence of honest belief should not have been put to the committee since the Chief Justice had not determined whether the accused had taken reasonable measures to ascertain that the complainant consented, as required under paragraph 273.2(*b*) of the *Criminal Code*. On this second point, I disagree, yet the controversy remains unresolved. It must be determined whether, in the circumstances, the defence of honest but mistaken belief had an air of reality.

[60] I would answer this question in the affirmative. For that reason, I would dismiss the appeal. In these reasons, I examine the following topics before determining whether, in the circumstances, the defence of honest but mistaken belief had an air of reality and should have been put to the committee: the adequacy of the reasons, examined in the light of the presumption that a judge knows the law; the duty of a judge to instruct the committee on all defences for which there is an air of reality, even if they have not been raised by the accused; and the elements of the air of reality test applicable to the defence of honest but mistaken belief in the consent of the complainant.

II. The relevant case law

A. *The adequacy of the reasons, examined in the light of the presumption that a judge knows the law*

[61] The Supreme Court of Canada has stated many times that a trial judge is deemed to know the law that he or she applies on a daily basis. In *R. v. Burns* [1994] 1 S.C.R. 656, 29 C.R. (4th) 113, the Court stated:

> To require trial judges charged with heavy caseloads of criminal cases to deal in their reasons with every aspect of every case would slow the system of justice immeasurably. Trial judges are presumed to know the law with which they work day in and day out. If they state their conclusions in brief compass, and these conclusions are supported by the evidence, the verdict should not be overturned merely because they fail to discuss collateral aspects of the case. (para. 18)

[62] The Court also upheld the principle that a trial judge does not need to explain in detail the process he or she has followed to reach a given decision (see: *R. v. Boucher*, [2005] SCC 72, [2005] 3 S.C.R. 499, at para. 29; *R. v. Vuradin*, 2013 SCC 38, [2013] 2 S.C.R. 639, at para. 21; *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, at para. 24).

[63] This is a principle that has been followed by appeal courts across the country in recent years. For example, in *R. v. Armacki*, 2015 ONCA 910, [2015] O.J. No. 6811, the Court stated that, although more details in the judge's reasons would have been preferable, a trial judge is presumed to know the law, and the judge implicitly demonstrated a knowledge of the law in his analysis of the evidence. In *R. v. T.(S.)*, 2015 MBCA 36, [2015] M.J. No. 112, the Court stated that trial judges are presumed to know the law, that there is no mandatory method to follow in making findings of credibility, and that trial judges do not have to explain in detail the process they have followed in reaching a decision as long as the chain of thought leading to the decision is intelligible (at para. 6).

[64] Notwithstanding these observations, it is important to note that <u>significant</u> shortcomings in decisions cannot be justified by the presumption that judges know the law. In *R. v. Sheppard*, [2002] 1 S.C.R. 869, 210 D.L.R. 4th 608, and *R. v. O'Brien*, 2011 SCC 29, [2011] 2 S.C.R. 485, the Court stated that reasons are inadequate if it cannot be determined, in view of the context,

whether the judge considered and applied the relevant jurisprudence and law. Thus, a court of appeal must be able to determine that the appropriate law was applied.

B. *The duty of a judge to instruct the committee on all defences for which there is an air of reality*

[65] The law is well settled : a judge has a duty to instruct the committee on all defences that have an air of reality, even if those defences were not raised by the accused (*R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3, at para. 51 [*Cinous*]; *R. v. Gauthier*, 2013 SCC 32, [2013] 2 S.C.R. 403, at para. 24; *Pappajohn v. R.*, [1980] 2 S.C.R. 120, 111 D.L.R. (3rd) 1 at p. 128 [*Pappajohn*]). However, that does not mean that the judge is required to submit all defences raised by the accused. The evidence must contain elements that support the defence (*Pappajohn* at p. 133).

[66] In the case at hand, the Chief Justice commenced his reasons by stating that a defence cannot be submitted to a committee unless it has an air of reality (*Cinous*; *R. v. Fontaine*, 2004 SCC 27, [2004] 1 S.C.R. 702), which means that the trier of fact must determine whether the evidence is "such that, if believed, a reasonable jury properly charged could have acquitted" (*R. v. Osolin*, [1993] 4 S.C.R. 595, 109 D.L.R. (4th) 478, at para. 198 [*Osolin*]). The Chief Justice then stated that the evidence in support of that defence is not limited to testimony by the accused, but can also flow from the examination or cross-examination of all witnesses, including the complainant. He summarized the applicable law as follows:

> [TRANSLATION]
>
> The trial judge must therefore conclude that the evidence presented in defence is trustworthy. He is not to weigh the evidence, make findings of fact or draw specific factual inferences. However, he must make a conclusion regarding

> inferences of fact that could reasonably be drawn based on the evidence. Rather, the issue is whether, if the jury were to adopt the interpretation of the evidence that is most favourable to the accused, it could reasonably draw the necessary inferences. (at p. 362)

[67] I must note that the Chief Justice was not required to make any comment before putting the defence of honest but mistaken belief to the committee. If, in the solitude of his chambers, he believed that the defence was available on the facts, his duty was to put that defence to the committee. For this reason, I do not place a lot of importance on the Chief Justice's reasons regarding the preliminary motion to put the defence to the committee.

[68] That being said, I note that the Chief Justice analyzed the evidence of the respondent and the complainant, noted the discrepancies in their respective versions, noted the similarities, and concluded that the defence had to be put to the committee. I also note that, although the Chief Justice did not explicitly mention the reasonable measures requirement in his decision, he had clearly described it in his instructions to the committee. He followed the wording of the draft instructions in *CRIMJI: Canadian Criminal Jury Instructions* created by the Canadian Judicial Council's National Committee on Jury Instructions. The instructions to the committee read as follows:

> [TRANSLATION]
>
> Examine this evidence to determine whether Warrant Officer Gagnon was aware of signs that Ms. Raymond did not consent to the touching that occurred and deliberately chose to ignore them because he did not want to know the truth. Also examine all the evidence to determine whether Warrant Officer Gagnon took reasonable measures under the circumstances he was aware of at the time to ensure that Ms. Raymond consented throughout the events that took place at the sergeant's mess on the 2nd floor of the armoury. [Emphasis added.]

[69] I find that those instructions further reinforce the presumption that the Chief Justice was familiar with the law applicable to the defence of honest but mistaken belief. Knowing that law and having analyzed the evidence, the Chief Justice concluded that the defence of honest but mistaken belief was available in view of the facts. He therefore acted in accordance with his duty to put all defences that have an air of reality to the committee. I make this observation despite my conclusion that he could have decided to put the defence to the committee without the defence having been raised by one of the parties and without providing reasons in that regard for the benefit of the parties.

C. *The elements of the air of reality test for the defence of honest but mistaken belief*

[70] There must be an air of reality to a defence before it can be put to the jury, or, in this case, the committee (see *Osolin*; *Cinous*; *R. v. Ewanchuk* [1999] 1 S.C.R. 330, 169 D.L.R. (4th) 193 [*Ewanchuk*]). To put a defence to a jury where this "air of reality" is not revealed by the evidence would be to risk confusing the jury and to invite verdicts not supported by the evidence (*Osolin*; *Cinous*).

[71] A defence has an "air of reality" if a properly instructed jury acting reasonably could acquit the accused on the basis of the defence (*Cinous* at para. 2). This test is impossible to meet without at least some evidence as to each element of the defence.

[72] The defence of honest but mistaken belief in consent can be raised in the context of a charge of sexual assault as a means of casting doubt on whether the accused had the necessary *mens rea* or guilty mind. Under this defence, the accused asserts that he or she had an honest,

though mistaken, belief that the complainant was consenting, even though the sexual acts occurred without consent.

[73] *Osolin* holds that, for there to be an "air of reality" to the defence of honest but mistaken belief in consent in an allegation of sexual assault, there must be: (1) evidence of lack of consent to the sexual acts; and (2) evidence that, notwithstanding evidence of lack of consent, the accused honestly but mistakenly believed that the complainant was consenting. In other words, the evidence must show that the accused believed that the complainant had affirmatively communicated, by words or conduct, consent to engage in the sexual activity in question, in spite of a lack of consent (*Ewanchuk* at paras 46–49).

[74] In addition, the defence of honest but mistaken belief in consent will have an air of reality only if the evidence meets the criteria established by section 273.2 of the *Criminal Code*, in particular: the belief must not have arisen out of self-induced intoxication, recklessness or wilful-blindness; and the accused must not have failed to take reasonable steps, in the circumstances known to him or her, to ascertain affirmatively that the complainant communicated consent.

[75] The evidence of lack of consent may be derived from the complainant's own testimony. To prove honest but mistaken belief, however, the accused cannot simply state that he or she honestly believed the complainant consented. The assertion must be "supported to some degree by other evidence or circumstances" (*Osolin* at para. 116; see also *R. v. Bulmer*, [1987] 1 S.C.R. 782, 39 D.L.R. (4th) 641 at p. 790 [*Bulmer*]; *R. v. Esau*, [1997] 2 S.C.R. 777, 148 D.L.R. (4th) 662 at para. 15 [*Esau*]; *Ewanchuk* at paras 53–60). The support for this assertion may come from

the accused or from other sources, but the support must be established before the defence of honest but mistaken belief can be put to the jury (*Cinous* at para. 53; *Osolin*; *Esau*; *Ewanchuk*). For instance, an inference drawn from the circumstances or the conduct of the complainant may ground the assertion where the circumstances or the specific conduct are described by the accused.

[76] It must be noted that, in the absence of circumstances or conduct supporting an assertion of belief in consent, that belief will no doubt fall into the realm of "wilful blindness" (*Osolin*). Similarly, it would be impossible to conclude that the accused had taken reasonable steps in the circumstances to have affirmative confirmation that the complainant was consenting if he is incapable of describing the circumstances or the conduct of the complainant that led him to believe in the consent of the latter. Hence, additional support is necessary to satisfy the requirements contained in section 273.2 of the *Criminal Code* and to show that the defence of honest, but erroneous belief has an air of reality.

[77] Once this threshold has been met, subject to my comments below at paragraph 78, it is for the jury to determine whether the Crown has proven the accused guilty beyond a reasonable doubt.

[78] Normally, where the versions of events as to what occurred are diametrically opposed, there can be no air of reality to the defence of honest but mistaken belief in consent, and a judge should refuse to put the defence to the jury. This will normally arise where the acceptance of one version necessarily involves the rejection of the other; the sole issue is one of credibility (consent

or absence of consent) and the defence of mistaken belief in consent should not be put to the jury (*R. v. Park*, [1995] 2 S.C.R. 836, 169 A.R. 241 at para. 25 [*Park*]). However, it must always be borne in mind that a jury may decide to accept all or none of a witness's testimony, or accept parts of it in conjunction with other versions.

III. Issues

[79] Given my opinion that the Chief Justice had a duty to put all defences that had an air of reality to the committee, even defences that had not been raised, without being required to state grounds for doing so, there is only one issue to determine:

> On the basis of all of the evidence, was there some evidence as to each element of the defence such that a properly instructed jury could have reasonably concluded the defence of honest but mistaken belief in consent was established in the circumstances of the case?

IV. Analysis

A. *In view of the circumstances, were the elements of the air of reality test met?*

[80] This now leads me to my analysis of the law and the facts to determine whether, in view of the circumstances, the defence of honest but mistaken belief had an air of reality and should have been put to the committee. Given that the decision to put a defence to a jury is a question of law, the standard of review applicable herein is the standard of correctness.

[81] I will commence my analysis with the undisputed facts: Warrant Officer Gagnon [respondent] and former Corporal Stéphanie Raymond [Ms. Raymond] were both members of the Regiment de la Chaudière reserve unit [Regiment]. The respondent was of a higher rank than

Ms. Raymond, but they did not work in the same chain of command. They had an exclusively professional relationship.

[82] The events in question took place on December 15, 2011, on the evening of the annual dinner for the permanent members of the Regiment. After the dinner at the Vieux Duluth restaurant, some members of the Regiment, including the respondent and Ms. Raymond, remained at the restaurant to talk and have some more wine. They then decided to attend a concert at the school of Master Corporal Desbiens' son. The respondent and Ms. Raymond thus travelled with her and her husband to the concert. However, sensing a discomfort between the spouses, the respondent and Ms. Raymond decided to get out of the vehicle and leave.

[83] Ms. Raymond testified that, after getting out of the vehicle, she and the respondent went to a woman's apartment to call a taxi. While waiting for the taxi to arrive, the respondent asked Ms. Raymond if she wanted to continue the evening at the bar la P'tite Grenouille. She refused. The respondent then left on foot for the armoury, about two kilometres away, and Ms. Raymond followed him. On this point, Warrant Officer Gagnon testified that he never called a taxi and that Ms. Raymond offered to have him go to her place. He testified that he replied: [TRANSLATION] "No, I ain't going to your place, that could be too dangerous. I ain't going to your place. I'm going straight to the armoury".

[84] It must be noted that Ms. Raymond also testified that she had suggested that the two go to her place, but the chronological order given by her differed somewhat from that of the respondent. She stated that, after arriving at the armoury, and unable to reach a taxi, she

suggested that the respondent go to her place for a drink and to call a taxi. Ms. Raymond stated that the accused replied: [TRANSLATION] "[no], I won't go to your place because if I go, I'll definitely want to have a fling with you".

[85] Before leaving the armoury, Warrant Officer Gagnon asked Ms. Gagnon to "go upstairs" to talk. Ms. Raymond testified that, while going upstairs, she had two possibilities in mind: either the respondent wanted to talk about the trouble between Master Corporal Desbiens and her spouse, or he wanted to express his desire to have sexual relations with her. She testified that the respondent had offered her his hand while going up the stairs (which the respondent denied) and that she took it. According to Ms. Raymond's version of the facts, they then went upstairs, hand in hand.

[86] The respondent testified that, once upstairs, they went to the mess, that there were no lights and that the room was dark. Ms. Raymond testified that it was not too dark because the television was on. Regardless: the room was empty, except for them, and no lights were on. Neither of them tried to turn on the lights after entering the room. It was dark at the time (around 19:00) in Quebec.

[87] Up to that point, although there are some discrepancies between the two versions of events, it cannot be said that they are diametrically opposed. It is rather at that point that significant differences begin to emerge. That being said, there are nonetheless some similarities.

[88] Ms. Raymond testified that, once upstairs, Warrant Officer Gagnon had her sit on a couch and began to kiss her, but that she turned her face to try to avoid it. She stated, however, that her mouth was partly open during the kiss and that the respondent could have interpreted that as consent to kiss her on the mouth. She stated that the respondent then pulled down her bra and touched her breasts with his hands and his mouth. She replied [TRANSLATION] “ouch”, but Warrant Officer Gagnon told her to be quiet. She testified that she did not say anything else about him touching and kissing her breasts.

[89] Ms. Raymond testified that she expressed her discomfort, particularly as she was afraid of becoming pregnant, and that the respondent replied that he had had a vasectomy. He continued by pulling down Ms. Raymond’s pants and underwear, laying her on the floor and performing cunnilingus. She testified that she told him she did not want to go any further. She then tried to crawl backwards on her elbows and buttocks, but Warrant Officer Gagnon did not change his position and inserted two or three fingers in her vagina. She testified that she repeated that she did not want to continue and that he stopped.

[90] Ms. Raymond stated that she wiped vaginal secretions from the respondent’s face after the cunnilingus ended. When she got up to collect her personal effects, she stated that Warrant Officer Gagnon stood in front of her with his penis partially erect. She testified that he turned her around to face the couch with her back toward him and tried to penetrate her, unsuccessfully. She stated that she asked him to stop, and he did. The respondent and Ms. Raymond then got dressed.

[91] Ms. Raymond testified that, before leaving, she sat on the respondent's lap and they talked about their sex lives. They then went to their respective vehicles, as agreed.

[92] For his part, the respondent testified that, when they arrived at the mess, he sat on the floor, offering a hand to Ms. Raymond, and, to his surprise, she came to him and sat straddling him. In that position, they talked for about fifteen minutes about work, their personal lives and their sexuality. According to the respondent, he touched Ms. Raymond's breasts, she opened her mouth and they began to kiss. The respondent testified that he then helped her lie on the floor, removed her pants and underwear and performed cunnilingus. He then inserted a finger in her vagina and she cried out with pleasure. He testified that he then took Ms. Raymond's hand to help her up and that he positioned her to bend slightly over the couch. He stated that he pulled down his underwear and tried to penetrate her, unsuccessfully. It was then that Ms. Raymond asked him to stop. He stopped, and they got dressed. The respondent testified that was the only time that Ms. Raymond expressed a desire to stop what they were doing, and he respected that request.

[93] Neither the respondent nor Ms. Raymond testified in any material way about the effects of the alcohol, and the parties did not contend that alcohol should be a consideration in the analysis of the issue of consent or in the examination of section 273.2 of the *Criminal Code*.

[94] In his factum, counsel for the respondent cited *Park*, where the Supreme Court of Canada stated that the trier of fact can accept parts of the complainant's evidence and parts of the accused's evidence, to find that there is a scenario — a third version of events — that supports a

defence of honest but mistaken belief. In his factum, counsel describes that third version as follows:

- [TRANSLATION] "The respondent believed that the complainant wanted to have sexual relations given that — just prior to the sexual activities — the complainant voluntarily sat straddling him."

- "The respondent believed that the complainant wanted to have sexual relations given the sexual nature of the conversation that he had with the complainant while she sat straddling him."

- "The respondent believed that the complainant wanted to be kissed given that the complainant opened her mouth as though to be kissed."

- "The respondent believed that the complainant was enjoying the cunnilingus and the finger penetration because she let out a little cry."

- "The respondent believed that the complainant consented to the sexual activities given the gradual progression of the sexual contact, including the touching and kissing of her breasts, without any reluctance from the complainant."

- "The respondent believed that the complainant wanted to have sexual relations given that she then let herself be undressed and lifted her buttocks to help him remove her underwear."

- "The respondent believed that the complainant was comfortable with him and [consented] to the sexual activities given that she came to him to wipe the vaginal secretions from his face."

- "The respondent believed that the complainant wanted to have sexual relations given that she [presented] her nude buttocks, bent over with her hands on the couch, her legs spread, for 30 seconds."

[95] I note that the versions of events provided by Ms. Raymond and the respondent are not diametrically opposed. Both testified that Ms. Raymond sat on the respondent's lap; Ms. Raymond claimed that it was after the sexual relations, while the respondent claimed that it was before. Moreover, in a prior statement to the police, Ms. Raymond stated that she had [TRANSLATION] "opened [my] mouth as though I was receptive" and that the respondent "could have thought that I wanted to" when she let out a little cry, that cry being an event confirmed by both witnesses. Finally, Ms. Raymond testified that she raised herself up on her elbows to get away from the respondent, while he stated that she raised herself to help him take off her underwear. Those stories are not diametrically opposed.

[96] As stated above, it must be determined that the defence of honest but mistaken belief has an air of reality before it is put to the jury, or, in this case, to the committee (see: *Osolin; Cinous; Ewanchuk*).

[97] The defence of honest but mistaken belief in consent will have an air or reality only if certain elements are established, in particular : (1) a lack of consent to the sexual acts must be shown, and; (2) it must be shown that, notwithstanding the lack of consent, the accused sincerely, but erroneously, believed in the consent of the complainant (*Osolin*). In other words, the evidence must show that he believed that the complainant affirmatively communicated, by words or conduct, her consent to engage in the sexual activity in question, in spite of her lack of consent (*Ewanchuk*, at. paras. 46-49). In addition, the evidence must satisfy the criteria established in section 273.2 of the *Criminal Code*, in particular: the belief must not have arisen from the accused's self-induced intoxication, recklessness or wilful blindness, and the accused must not have failed to take reasonable steps, in the circumstances, to affirmatively ascertain that the complainant had communicated her consent.

[98] In this case, the testimony of Ms. Raymond is proof of her lack of consent, and the testimony of the accused is more than a bare assertion of belief in consent. He described words and specific acts on the part of the complainant that led him to believe that she was consenting. Certain important aspects of the respondent's evidence were corroborated by the complainant. Under the circumstances, I am of the opinion that the respondent did not fail to take reasonable steps, in the circumstances known to him at the time, to ascertain that the complainant had affirmatively communicated, by words or conduct, her consent.

[99] In view of these considerations, and since the respective versions of events were not diametrically opposed, it was for the committee to determine whether the respondent was guilty beyond a reasonable doubt. The Chief Justice correctly put to the committee the defence of honest but mistaken belief in consent.

[100] For the foregoing reasons, I would dismiss the appeal.

"B. Richard Bell"
Chief Justice

COURT MARTIAL APPEAL COURT OF CANADA

SOLICITORS OF RECORD

DOCKET:	CMAC-577
STYLE OF CAUSE:	HER MAJESTY THE QUEEN v. WARRANT OFFICER J.G.A. GAGNON
PLACE OF HEARING:	QUÉBEC CITY, QUEBEC
DATE OF HEARING:	SEPTEMBER 22, 2017
REASONS FOR JUDGMENT:	TRUDEL J.A.
CONCURRED IN BY:	BENNETT J.A.
DISSENTING REASONS BY:	BELL C.J.
DATED:	JANUARY 31, 2018

APPEARANCES:

Major Dominic Martin	FOR THE APPELLANT
Lieutenant-Commander Mark Létourneau Lieutenant-Colonel J-B. Cloutier	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Canadian Military Prosecution Service National Defence Ottawa, Ontario	FOR THE APPELLANT
Defence Counsel Services National Defence Gatineau, Quebec	FOR THE RESPONDENT