

CANADA / JUDGMENT

R. v. Houde

2026 CMAC 4

COURT

Court Martial Appeal Court of Canada

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Date: 20260427

Docket: CMAC-644

Citation: 2026 CMAC 4

CORAM:

RENNIE J.A.
GLEESON J.A.
CHARBONNEAU D.J.A.

BETWEEN:

MASTER CORPORAL C. HOUDE
Appellant
and
HIS MAJESTY THE KING
Respondent
Heard at Quebec City, Quebec, on June 9, 2025.
Judgment delivered at Ottawa, Ontario, on April 27, 2026.REASONS FOR
JUDGMENT BY:

CHARBONNEAU D.J.A.

CONCURRED IN BY: RENNIE J.A.
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REASONS FOR JUDGMENT

CHARBONNEAU D.J.A.

I. INTRODUCTION [1] On July 27, 2023, a Standing Court Martial found Master Corporal Houde, the Appellant, guilty of two counts of sexual assault. He was sentenced to a period of imprisonment of 42 months. He now appeals his convictions and asks this Court to direct a stay of proceedings on both charges. In the alternative, he asks that this Court order a new trial.

[2] The trial, initially scheduled to last three weeks, took much longer to complete. The military judge was called upon to deal with a number of motions and issues. Many of those have no relevance to this appeal and need not be discussed here. Still, a brief overview of the context and aspects of the procedural history is helpful to put the appeal issues in context.

II. OVERVIEW [3] The Appellant and the complainant, C.C., met in 2017 while they were posted with the same unit. C.C. was married. The Appellant was also in a relationship. Eventually, C.C. and the Appellant began having an intimate relationship.

[4] C.C. and the Appellant had different perspectives on their relationship. The Appellant viewed it as a “friends with benefits” situation. He did not intend on pursuing a long-term relationship with C.C. She, on the other hand, fell in love with the Appellant and wanted them to build a future together.

- [5] From the summer of 2018 until January 2019, the Appellant and C.C. were both deployed to Romania. During this period, they spent a lot of time together and continued to be intimate with each other. They sometimes stayed in hotels to have more privacy. As C.C. held her credit card jointly with her husband, the Appellant paid for the rooms, on the understanding that C.C. would reimburse him for her share of the cost. This fact is only relevant because the issue of this debt would give rise to conflict later.
- [6] After the parties' return to Canada in January 2019, the Appellant's girlfriend left him. From that point on, he considered himself to be single. He continued having intimate relations with C.C. but also had other sexual partners. In June 2019, he met his current spouse. They developed a serious relationship and moved in together.
- [7] The intimate encounters between C.C. and the Appellant stopped but they remained friends. C.C. also became friends with the Appellant's new partner.
- [8] In December 2019 or January 2020, the Appellant asked C.C. to reimburse him for her share of the hotel expenses in Romania. When she refused, he threatened to tell C.C.'s husband about their relationship. Things deteriorated between them from that point on.
- [9] The military police first became involved in this matter when C.C. made a harassment complaint against the Appellant because he was contacting her and her spouse by phone. In February 2020, C.C. made a further statement to the military police, this time disclosing that he had sexually assaulted her on two occasions, once in Romania and once in Canada. At that time, she did not want to pursue formal complaints about those incidents.
- [10] In July 2020, the military police followed up with C.C. to ask if her position had changed about making a formal sexual assault complaint against the Appellant. It was suggested that she meet with his former girlfriend, who had made a complaint of a similar nature against him. C.C. met with her. After this meeting, she contacted the military police and made a formal sexual assault complaint against him. The military police conducted further interviews with C.C. and eventually charged the Appellant with four counts of sexual assault against her. Counts #1 and #2 pertained to events alleged to have happened in Romania. The Appellant was found not guilty of those counts and they are not part of this appeal.
- [11] Count #3 stemmed from C.C.'s allegation that in April 2019, she had stopped by the Appellant's residence on the Canadian Forces Base in Bagotville, before going to work. They had spoken over the phone before this visit. She told him that she did not want them to have sex that day, whereas he said repeatedly that they would. As soon as she arrived at his residence, he started to touch her and try to arouse her. Despite her having repeatedly refused to have sexual relations with him, he persisted and ultimately had intercourse with her.
- [12] Count #4 stemmed from an incident that C.C. alleged occurred at her residence some time between January 2019 and June 2019. She alleged that the Appellant visited her and they engaged in consensual sexual activity. The Appellant wanted to have a third party, a man,

join them later and suggested calling that man while he and C.C. were having sex. C.C. told the Appellant that she wanted the sexual activity to be just between them and asked him not to make the call. Despite this, the Appellant called the man and activated the speakerphone to allow him to listen to the sexual activity. The Appellant continued having intercourse with C.C., with the third party listening.

- [13] After he was charged, the Appellant chose French as the language for his trial. He elected to be tried by a General Court Martial (a trial before a panel). C.C., an Anglophone, was going to testify in English. Given this, the parties considered it preferable that panel members understand both English and French without requiring the services of an interpreter. They also were of the view that having simultaneous translation of the proceedings would be preferable than to have consecutive translation. On that basis, the parties presented a joint application for a bilingual trial, which the military judge granted: *R. v. Houde*, 2022 CM 3006 [Bilingual Trial Decision].
- [14] The Appellant eventually re-elected to have his trial by a Standing Court Martial, with a military judge sitting alone. The trial began in July 2022. The Appellant testified and denied that the incidents described by C.C. had happened. His position was that both allegations were completely fabricated.
- [15] Final submissions were made in January 2023. In April 2023, while the military judge had the matter on reserve, the Appellant filed a motion for a stay of proceedings, alleging that his right to be tried within a reasonable time had been breached. The military judge dismissed that application [Jordan Decision].
- [16] The military judge delivered his verdict on July 27, 2023: *R. v. Houde*, 2023 CM 3011 [Verdict].

III. ANALYSIS [17] The Appellant raises a number of issues in this appeal. He claims that:

- a) the military judge and the prosecution breached his language rights;
- b) the military judge erred, in the Jordan Decision, in his attribution of delay;
- c) the military judge erred in his assessment of the evidence on the issue of consent when dealing with count #4;
- d) the military judge erred in his ruling on the admissibility of text messages that the Defence sought to adduce; and
- e) the military judge made several errors in his treatment of the defence of motive to fabricate, both with respect to admissibility of evidence and in reversing the burden of proof.

There are also two motions before the Court that are addressed as part of my analysis on issue (b).

A. Whether the Appellant's language rights were breached [18] The Appellant argues that his linguistic rights were breached by the prosecution because some of the prosecutors assigned to the case were not fluent in French and because prosecutors, at certain points during the trial, addressed the court in English. He argues that the military judge, by allowing these things to happen, also breached his linguistic rights.

- [19] This ground of appeal requires me to consider the legislative framework that governs language rights in the military justice system.
- [20] In the Bilingual Trial Decision, the military judge found that the provisions of the Criminal Code, R.S.C. 1985, c. C-46 [Criminal Code] that deal with language rights do not apply directly to court martial proceedings. I agree. Courts martial are statutory courts governed by Part III of the National Defence Act, R.S.C. 1985, c. N-5 [NDA]. For any provision of another act, including the Criminal Code, to apply in the military justice system, it must be incorporated in the NDA or Parliament must use language that clearly extends its applicability. Neither is the case with the Criminal Code's language rights provisions.
- [21] Having noted that there were no provisions in the NDA dealing specifically with the issue he was being asked to decide, the military judge relied, rightfully so in my view, on the general powers given to a court martial in "all other matters necessary or proper for the due exercise of its jurisdiction": NDA, s. 179(1)(d); Bilingual Trial Decision at paras. 11–12.
- [22] Hence, while the military judge referred to the Criminal Code's provisions dealing with linguistic rights, and to an extent inspired himself from them in crafting his order, the statutory basis for his order was paragraph 179(1)(d) of the NDA, not the Criminal Code.
- [23] In his written submissions, the Appellant asserted that the military judge's order was made pursuant to section 530 of the Criminal Code and relied on the jurisprudence that describes the consequences that flow from such orders. At the hearing of the appeal, the Appellant conceded that the military judge's order was not made pursuant to the Criminal Code. He argued, instead, that there is a legislative void with respect to language rights in the military justice system. He urged this Court to fill this void by declaring, in effect, that the Criminal Code's legislative framework applies to that system.
- [24] The difficulty with that submission is that contrary to what the Appellant asserts, there is a legislative framework in place that governs language rights in the military justice system. That framework is derived from a number of legislative and constitutional sources.
- [25] First, section 133 of the Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3 [Constitution Act, 1867], reads in part as follows:

Use of English and French Languages

Usage facultatif et obligatoire des langues française et anglaise

133 Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.

133 Dans les chambres du parlement du Canada et les chambres de la législature de Québec, l'usage de la langue française ou de la langue anglaise, dans les débats, sera facultatif; mais dans la rédaction des archives, procès-verbaux et journaux respectifs de ces chambres, l'usage de ces deux langues sera obligatoire; et dans toute plaidoirie ou pièce de procédure par-devant les tribunaux ou émanant des tribunaux du Canada qui seront établis sous l'autorité de la présente loi, et par-devant tous les tribunaux ou émanant des tribunaux de Québec, il pourra être fait également usage, à faculté, de l'une ou de l'autre de ces langues.

[26] The Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 [Charter] also includes provisions that protect language rights:

Interpreter

Interprète

14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.
14. La partie ou le témoin qui ne peuvent suivre les procédures, soit parce qu'ils ne comprennent pas ou ne parlent pas la langue employée, soit parce qu'ils sont atteints de surdité, ont droit à l'assistance d'un interprète.

...

[...]

Proceedings in courts established by Parliament

Procédures devant les tribunaux établis par le Parlement

19 (1) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament.

19 (1) Chacun a le droit d'employer le français ou l'anglais dans toutes les affaires dont sont saisis les tribunaux établis par le Parlement et dans tous les actes de procédure qui en découlent.

[27] These provisions set out legal guarantees that ensure federal institutional bilingualism: *Mazraani v. Industrial Alliance Insurance and Financial Services Inc.*, 2018 SCC 50 at paras. 21–23; *R. v. Tayo Tompouba*, 2024 SCC 16 at para. 30.

[28] In addition, the Official Languages Act, R.S.C. 1985, c. 31 (4th Supp.) [OLA] governs the implementation and exercise of these rights in proceedings before federal courts:

Administration of Justice

Administration de la justice

Official languages of federal courts

Langues officielles des tribunaux fédéraux

14 (1) English and French are the official languages of the federal courts, and either of those languages may be used by any person in, or in any pleading in or process issuing from, any federal court.

14 (1) Le français et l'anglais sont les langues officielles des tribunaux fédéraux; chacun a le droit d'employer l'une ou l'autre dans toutes les affaires dont ils sont saisis et dans les actes de procédure qui en découlent.

Appearing in official language of choice

Choix d'une langue officielle — comparution

14 (2) The choice of either official language by a person appearing before a federal court shall not be prejudicial to that person.

14 (2) Le choix de l'une ou l'autre langue officielle par une personne qui comparaît devant un tribunal fédéral ne doit lui causer aucun préjudice.

Hearing of witnesses in official language of choice

Droits des témoins

15 (1) Every federal court has, in any proceedings before it, the duty to ensure that any person giving evidence before it may be heard in the official language of his choice, and that in being so heard the person will not be placed at a disadvantage by not being heard in the other official language.

15 (1) Il incombe aux tribunaux fédéraux de veiller à ce que tout témoin qui comparaît devant eux puisse être entendu dans la langue officielle de son choix sans subir de préjudice du fait qu'il ne s'exprime pas dans l'autre langue officielle.

Duty to provide simultaneous interpretation

Services d'interprétation : obligation

15 (2) Every federal court has, in any proceedings conducted before it, the duty to ensure that, at the request of any party to the proceedings, facilities are made available for the simultaneous interpretation of the proceedings, including the evidence given and taken, from one official language into the other.

15 (2) Il leur incombe également de veiller, sur demande d'une partie, à ce que soient offerts, notamment pour l'audition des témoins, des services d'interprétation simultanée d'une langue officielle à l'autre langue.

Federal court may provide simultaneous interpretation

Services d'interprétation : faculté

15 (3) A federal court may, in any proceedings conducted before it, cause facilities to be made available for the simultaneous interpretation of the proceedings, including evidence given and taken, from one official language into the other where it considers the proceedings to be of general public interest or importance or where it otherwise considers it desirable to do so for members of the public in attendance at the proceedings.

15 (3) Ils peuvent faire aussi ordonner que soient offerts, notamment pour l'audition des témoins, des services d'interprétation simultanée d'une langue officielle à l'autre s'ils estiment que l'affaire présente de l'intérêt ou de l'importance pour le public ou qu'il est souhaitable de le faire pour l'auditoire.

Duty to ensure understanding without interpreter

Obligation relative à la compréhension des langues officielles

16 (1) Every federal court has the duty to ensure that

16 (1) Il incombe aux tribunaux fédéraux de veiller à ce que celui qui entend l'affaire :

- (a) if English is the language chosen by the parties for proceedings conducted before it in any particular case, every judge or other officer who hears those proceedings is able to understand English without the assistance of an interpreter;
- a) comprenne l'anglais sans l'aide d'un interprète lorsque les parties ont opté pour que l'affaire ait lieu en anglais;
- (b) if French is the language chosen by the parties for proceedings conducted before it in any particular case, every judge or other officer who hears those proceedings is able to understand French without the assistance of an interpreter; and
- b) comprenne le français sans l'aide d'un interprète lorsque les parties ont opté pour que l'affaire ait lieu en français;

- (c) if both English and French are the languages chosen by the parties for proceedings conducted before it in any particular case, every judge or other officer who hears those proceedings is able to understand both languages without the assistance of an interpreter.
 - c) comprenne l'anglais et le français sans l'aide d'un interprète lorsque les parties ont opté pour que l'affaire ait lieu dans les deux langues.
- [29] Courts martial are established by the NDA and when convened carry out adjudicative functions with respect to service offences allegedly committed by service members. They are "federal courts."
- [30] The Appellant argued at the hearing that the OLA applies only to civil courts, pointing to section 18 of the OLA. Admittedly, section 18 specifically contemplates civil proceedings before a federal court. However, the Appellant's submission overlooks sections 12 to 16 of the OLA, which apply to all federal courts, not just those that hear civil proceedings.
- [31] The language rights applicable to courts martial are conferred by section 133 of the Constitution Act, 1867, sections 14 and 19 of the Charter, and sections 14 to 16 of the OLA. There is no void to be filled. It is neither necessary nor advisable to judicially incorporate the Criminal Code provisions into this framework.
- [32] The record establishes that the matter proceeded in accordance with the parties' understanding and expectations regarding the conduct of the bilingual proceedings from the outset: while French was the Appellant's choice for trial language, the main Crown witness, C.C., would testify in English; during her testimony, counsel would be able to address the court in English, including for objections; simultaneous interpretation services would be available to the Appellant throughout the proceedings whenever English was used. This aligns with the constitutional and quasi-constitutional language rights guaranteed by section 133 of the Constitution Act, 1867, sections 14 and 19 of the Charter, and sections 14 to 16 of the OLA.
- [33] These rights were respected. At all times during the proceedings, the Appellant used the official language of his choice: he addressed the court in French in all instances, including the preliminary proceedings, and during his testimony at trial. The military judge addressed the Appellant directly and asked him to speak up if there were any issues with the simultaneous interpretation or anything that he did not understand. The Appellant benefited from this simultaneous interpretation service throughout the proceedings any time English was being used, whether during the evidence of witnesses, interactions between the court and counsel, and during the prosecution's final submissions.
- [34] The military judge was vigilant about ensuring that the Appellant's language rights, and the terms of the Bilingual Trial Decision, were respected. Upon being advised by Defence counsel that the prosecution had filed a Notice of Motion in English, he immediately directed that the Notice of Motion be re-filed in French. This was done the same day. The military judge reiterated that the language chosen by the Appellant for his trial was French

and noted the importance of the Appellant understanding all proceedings in the matter given their criminal nature.

- [35] As for the language capabilities of the prosecutors, neither the applicable legal framework nor the Bilingual Trial Decision required that all the prosecutors working on the Appellant's case be bilingual. In support of his argument to the contrary, the Appellant relies on *R. v. Munkonda*, 2015 ONCA 309 [Munkonda], where the Ontario Court of Appeal concluded that in a bilingual trial held pursuant to section 530 of the Criminal Code, all Crown prosecutors must be bilingual and capable of participating fully in the trial in both official languages: Munkonda at paras. 66–67. Munkonda interprets a provision that does not apply here. I would decline to extend the scope of that decision to military justice proceedings.
- [36] Similarly, there was nothing objectionable about the fact that there were portions of this trial where the English language was used by counsel. A review of the record shows that this was what everyone contemplated from the start.
- [37] Aside from the motion that was filed in English, the Defence did not raise any concerns about linguistic rights as the trial was unfolding. While the absence of objection cannot cure a breach of linguistic rights if one occurs, the conduct of the parties can be helpful contextual information in determining their intentions and expectations about how things should unfold.
- [38] In this case, there were various points in the trial where the use of English by counsel was discussed without any concerns being raised: Appeal Book vol. 3 at pp. 358–359; Appeal Book vol. 7 at p. 1244; Appeal Book vol. 16 at p. 2810. In addition, when the lead prosecutor withdrew from the case, Defence counsel himself suggested that the second chair prosecutor continue with the case, using English: Appeal Book vol. 16 at p. 2756. This is very telling as far as the parties' expectations and understanding of the parameters set out in the Bilingual Trial Decision.
- [39] I conclude that the Appellant's linguistic rights were not breached in this trial.
- [40] Before leaving this ground of appeal, I wish to address the Respondent's assertion, at paragraph 28 of its Memorandum of Fact and Law, that the Bilingual Trial Decision became moot once the Appellant re-elected his mode of trial. Although this argument was not pressed at the hearing, I want to make it clear that I disagree with it. I fail to see any reason in principle why a change in mode of trial would, on its own, nullify an order dealing with an accused's linguistic rights.

B. Whether the military judge erred in dismissing the Jordan application [41] This ground of appeal relates to the Jordan Decision, and more specifically, with the military judge's assessment that the delay that occurred as a result of the trial having to be adjourned on November 24, 2022, was solely attributable to the Defence.

- [42] The Respondent filed a motion before this Court seeking to adduce fresh evidence about the circumstances that arose on November 24, 2022. The Appellant opposes the admission of this evidence and filed a motion of his own seeking to strike the portions of the Respondent's written submissions that make reference to it.
- (1) Legal Framework [43] An allegation of a breach of the right to be tried within a reasonable time, as guaranteed by paragraph 11(b) of the Charter, must be examined in accordance with the framework set out in *R. v. Jordan*, 2016 SCC 27 [Jordan]. Jordan sets presumptive ceilings beyond which delay is presumptively unreasonable. In the context of military prosecutions, a presumptive ceiling of 18 months has been consistently applied: *R. v. Thiele*, 2016 CM 4015; *R. v. Cubias-Gonzalez*, 2017 CM 3003; *R. v. Stacey*, 2019 CM 3017; *R. v. McGregor*, 2019 CM 4011; *R. v. Remington*, 2021 CM 5023; *R. v. Kohlsmith*, 2021 CM 3008; *R. v. Goulding*, 2022 CM 2013; *R. v. Tuckett*, 2019 CM 3006; and *R. v. Zapata-Valles*, 2022 CM 3011. This approach has recently been endorsed by the Court Martial Appeal Court of Canada: *R. v. Jacques*, 2026 CMAC 3.
- [44] The net delay for comparison to the presumptive ceiling is calculated by subtracting any defence delay from the total delay, starting on the date of the charge and extending to the actual or anticipated end date of trial.
- [45] Defence delay has two components: delay waived by the defence, and delay caused solely by the conduct of the defence, including situations where the accused's acts "solely or directly" caused the delay: Jordan at para. 66. If the net delay exceeds the presumptive ceiling, then the delay is presumptively unreasonable, and the Crown bears the burden of establishing exceptional circumstances. If the Crown is unsuccessful in this regard, a stay of proceedings will follow: Jordan at para. 47.
- [46] Exceptional circumstances are things that lie outside the Crown's control in the sense that they are reasonably unforeseen or reasonably unavoidable, and Crown counsel cannot reasonably remedy the delays emanating from those circumstances once they arise: Jordan at para. 69.
- [47] Deference is owed to a trial judge's underlying findings of fact, which are reviewable only for palpable and overriding error; such findings include the attribution of the delay (i.e., determinations regarding who caused a delay and why): *R. v. Laird*, 2024 SKCA 61 at para. 70. The characterization of periods of delay and the ultimate decision of whether there has been unreasonable delay are reviewable on a standard of correctness: *R. v. Pauls*, 2020 ONCA 220 at para. 40, *aff'd* *R. v. Yusuf*, 2021 SCC 2 at paras. 2–3.
- (2) The November 24th Adjournment [48] On November 24, 2022, the trial was at the stage of the Defence presenting its case. The Appellant's spouse was being cross-examined. The Appellant made a comment to the lead prosecutor, who was visibly pregnant, to the effect that he hoped things would not go well with her baby [translation] ("I hope things do not go well with her child"). The lead prosecutor reported this to the court and sought an adjournment. She then withdrew from the case and filed a formal complaint with the

Canadian Forces National Investigation Service.

- [49] The prosecutor acting as “second chair” on the matter had limited abilities in French. She was not prepared to take over as lead prosecutor. She also told the military judge that she was not prepared to continue with conducting the prosecution on her own. The matter was adjourned. The prosecution service appointed a replacement lead prosecutor and the trial resumed on December 14, 2022.
- [50] The military judge attributed the delay resulting from the withdrawal of the lead prosecutor solely to the Defence. This, combined with other delays attributed to the Defence, resulted in a net delay of 547 days, just below the presumptive ceiling.
- (3) Fresh Evidence Motion and Motion to Strike [51] The fresh evidence that the Respondent seeks to adduce pertains to consequences that the Appellant’s comment had outside of the military proceedings. The Respondent claims that this evidence is necessary to properly assess the nature and seriousness of the Appellant’s conduct and is relevant to the attribution of the delay that ensued.
- [52] The test for allowing new evidence on appeal is well established. To be admissible, fresh evidence must not have been available at the time of trial; it must be relevant; it must be credible; and it must be evidence that, if believed, could reasonably be expected to have affected the result: *Palmer v. The Queen*, [1980] 1 S.C.R. 759 at p. 775, 106 D.L.R. (3d) 212.
- [53] To be relevant, evidence must tend, as a matter of logic and human experience, to prove or disprove a fact in issue: *R. v. White*, 2011 SCC 13 at para. 36. Here, the Appellant does not dispute that he made the comment, that it was highly inappropriate, and that it was the reason the prosecutor withdrew from the case. He also does not dispute the reasonableness of the lead prosecutor’s decision to withdraw. Given this, the fresh evidence relates to a fact that is not in issue. For that reason, it does not meet the relevance test and is not admissible on this appeal.
- [54] As for the Appellant’s motion to strike portions of the Respondent’s Memorandum of Fact and Law, I would dismiss it as well. There is nothing objectionable about a party relying on fresh evidence in written submissions when the admissibility of that evidence has yet to be determined: *Canada (Justice) v. Khadr*, 2008 SCC 29 at para. 19. Having concluded that the new evidence is inadmissible, I have disregarded it.
- (4) Whether the military judge erred in the attribution of the delay [55] The military judge concluded that the Appellant’s intimidating comment at trial was the underlying cause of the adjournment and, therefore, the sole reason for the delay. This is a finding of fact that is owed deference. It is also amply supported by the record. As noted previously, the Appellant concedes that his actions instigated the lead prosecutor’s withdrawal. A party who causes an adjournment is responsible for the entire period of delay until the matter can be rescheduled, unless the other party is unavailable for an unreasonable length of time: *R. v. Picard*, 2017 ONCA 692 at para. 117.

- [56] I would defer to the military judge's finding that the prosecution did what it could to minimize the impact of the incident. The replacement prosecutor familiarized himself with the file in an expeditious manner and the trial resumed relatively quickly.
- [57] The Appellant argues that one of the underlying causes of the delay was that the second chair prosecutor was not sufficiently fluent in French to immediately take over the case when the other prosecutor had to withdraw. This circles back to the Appellant's contention, relying on Munkonda, that the second prosecutor should have been fully fluent in French and able to take over as lead prosecutor immediately after the other prosecutor's withdrawal. As I have already explained, Munkonda is distinguishable. The Constitution Act, 1867, the Charter, and the OLA do not require that all military prosecutors assigned to an accused's Standing Court Martial be bilingual. The language abilities of the second chair prosecutor were irrelevant to the attribution of the delay. Moreover, from a practical point of view, it cannot be assumed that every lawyer on a prosecution team, or a defence team for that matter, should necessarily be in a position to step into the shoes of lead counsel at a moment's notice. What can be reasonably expected in such a situation depends on the nature and complexity of the case. And it is beyond dispute that this was not a straightforward case.
- [58] In any event, what happened on November 24 constitutes "exceptional circumstances" as described in Jordan. The inappropriate comment that the Appellant made and its effect on the lead prosecutor was clearly an unusual event and one that was outside the Crown's control. The prosecution could not have foreseen it or avoided it. And the prosecution remedied it to the extent possible by replacing counsel and that counsel being diligent in getting up to speed.
- [59] The military judge did not commit any reversible errors in dealing with the Jordan application. This ground of appeal must fail.

C. Whether the military judge erred in assessing the evidence regarding C.C.'s withdrawal of consent (count #4) (1) Evidence [60] C.C.'s evidence with respect to this charge was that on the day of the incident, the Appellant visited her residence. They went to her bedroom and engaged in sexual activity. While this activity was ongoing, the Appellant mentioned that he wanted a third party, a man, to join them at some later point. He suggested calling that man right away, while their sexual activity was ongoing. C.C. protested and told him that she wanted to engage in sexual activity with him only. She asked him not to make the phone call. The Appellant insisted that he should make the phone call to arouse the man. C.C. continued to refuse.

- [61] Despite her repeated refusal, the Appellant called the man and activated his speakerphone to allow him to listen to the sexual activity. C.C. laid on her back with her legs in the air while the Appellant was on his knees, penetrating her vagina with his penis. The Appellant groaned and made noises, in C.C.'s view, to arouse the man listening to their sexual activity. C.C. stopped moving and making noises, expressing that she no longer consented. The Appellant nevertheless continued until he ejaculated inside her, talking to the man on the

phone throughout. The Appellant then ended the call.

- [62] In his trial testimony, the Appellant denied that this happened. He claimed it was a complete fabrication on C.C.'s part.
- [63] The military judge did not believe the Appellant's denial on this matter, nor did it leave him with a reasonable doubt. He accepted C.C.'s version of events.
- [64] The Appellant does not challenge these findings. Rather, he submits that C.C.'s expressions of disagreement related only to the phone call to the third party during the intercourse, and not to the act of intercourse itself. He claims that there is no evidence that C.C. withdrew her consent to sexual activity with him. He argues that even if she did withdraw her consent, there is no evidence that the Appellant knew that she had done so.
- (2) Legal Framework – Consent and Knowledge of Lack of Consent [65] Lack of consent is an essential element of the charge of sexual assault. For these purposes, consent is defined as the voluntary agreement of the complainant to engage in the sexual activity in question. It is the conscious agreement to engage in every sexual act in a particular encounter. It must exist at the time the sexual activity occurs and can be revoked at any time: *R. v. Barton*, 2019 SCC 33 at para. 88. Lack of consent is determined subjectively from the complainant's perspective: *R. v. Hutchinson*, 2014 SCC 19 at para. 17; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 at para. 26; *R. v. G.F.*, 2021 SCC 20 at para. 25.
- [66] In addition to proving lack of consent, the Crown must prove that the accused knew that the complainant was not consenting. This element, the mens rea of the offence, is concerned with the accused's state of mind at the time of the events.
- [67] The defence of honest but mistaken belief in communicated consent is an assertion by an accused that he or she lacked the mens rea required to commit the alleged sexual assault. The availability of this defence is curtailed by section 273.2 of the Criminal Code:

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
- a) cette croyance provient :
- (i) the accused's self-induced intoxication,

- (i) soit de l'affaiblissement volontaire de ses facultés,
- (ii) the accused's recklessness or wilful blindness, or
- (ii) soit de son insouciance ou d'un aveuglement volontaire,
- (iii) any circumstance referred to in subsection 265(3) or 273.1(2) or (3) in which no consent is obtained;
- (iii) soit de l'une des circonstances visées aux paragraphes 265(3) ou 273.1(2) ou (3) dans lesquelles il n'y a pas de consentement de la part du plaignant;
- (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; or
- b) il n'a pas pris les mesures raisonnables, dans les circonstances dont il avait alors connaissance, pour s'assurer du consentement;
- (c) there is no evidence that the complainant's voluntary agreement to the activity was affirmatively expressed by words or actively expressed by conduct.
- c) il n'y a aucune preuve que l'accord volontaire du plaignant à l'activité a été manifesté de façon explicite par ses paroles ou son comportement.
- (3) Analysis [68] Findings of fact and the assessment of credibility and reliability are entitled to deference and reviewable only for palpable and overriding error: R. v. Kruk, 2024 SCC 7 at para. 82 [Kruk]. I find no error in the military judge's assessment of those issues. I also find no indication that he made any errors in law.
- [69] The encounter between the Appellant and C.C. involved two distinct sexual activities: the sexual activity they engaged with initially, and the sexual activity that occurred in the virtual presence of the third party after the phone call was made. The latter was what formed the subject-matter of count #4.
- [70] The fact that C.C. consented to having sexual intercourse with the Appellant initially does not mean, nor did it imply, that she also consented to having sexual intercourse with him while a third party, unknown to her, listened over the phone.
- [71] The military judge accepted C.C.'s testimony that she told the Appellant "no" multiple times before he made the phone call, and that she told him that she did not want the third person to be involved with their sexual activity. This was unequivocal evidence of her lack of consent. Having accepted this evidence, the military judge's conclusion that the complainant was not consenting to the sexual activity that took place after the phone call was not only reasonable, but inescapable.
- [72] In addition, having accepted this testimony, it was reasonable for the military judge to draw the inference that the Appellant was aware that C.C. was not consenting to sexual activity with him while the third party was listening. On the evidence accepted by the military judge,

section 273.2 of the Criminal Code foreclosed reliance on the defence of honest but mistaken belief in communicated consent, for several reasons: there was no evidence that C.C.'s agreement to having sex with the third party listening in was "affirmatively expressed by words or actively expressed by conduct"; any belief the Appellant might have held that she was consenting despite her repeated refusals would necessarily have to be the result of recklessness or willful blindness; and the Appellant took no steps at all, let alone reasonable ones, to ascertain that she was consenting.

[73] This ground of appeal must fail.

D. Whether the military judge erred in dealing with the admissibility of certain text messages between C.C. and the Appellant [74] At trial, the Defence sought to introduce screenshots of several text messages, including messages between the Appellant and C.C. from September 2018 to June 2019 and from June 2020.

[75] The Defence's application required the military judge to apply the legislative framework that governs the admissibility of private records, set out at sections 278.92 to 278.94 of the Criminal Code. The Defence's position was that this regime did not apply to many of these messages, and that even if it did, they were admissible. Defence argued that the messages were relevant because they helped show that C.C. had a motive to fabricate the allegations against the Appellant.

(1) Legal Framework – Private Records Regime [76] The private records regime limits the ability of the accused in sexual assault cases to use any material in their possession that contains private information relating to the complainant. An accused seeking to adduce such records as evidence in their defence must submit an application detailing particulars of the evidence and its relevance to an issue at trial. This framework was analyzed in detail by the Supreme Court of Canada in *R. v. J.J.*, 2022 SCC 28 [J.J.].

[77] The regime only applies to a "record" as defined in section 278.1 of the Criminal Code. It reads:

Definition of record

Définition de dossier

278.1 For the purposes of sections 278.2 to 278.92, record means any form of record that contains personal information for which there is a reasonable expectation of privacy and includes medical, psychiatric, therapeutic, counselling, education, employment, child welfare, adoption and social services records, personal journals and diaries, and records containing personal information the production or disclosure of which is protected by any other Act of Parliament or a provincial legislature, but does not include records made by persons responsible for the investigation or prosecution of the offence.

278.1 Pour l'application des articles 278.2 à 278.92, dossier s'entend de toute forme de document contenant des renseignements personnels pour lesquels il existe une attente raisonnable en matière de protection de la vie privée, notamment : le dossier médical, psychiatrique ou thérapeutique, le dossier tenu par les services d'aide à l'enfance, les services sociaux ou les services de consultation, le dossier relatif aux antécédents professionnels et à l'adoption, le journal intime et le document contenant des renseignements personnels et protégé par une autre loi fédérale ou une loi provinciale. N'est pas visé par la présente définition le dossier qui est produit par un responsable de l'enquête ou de la poursuite relativement à l'infraction qui fait l'objet de la procédure.

- [78] This definition captures two groups of records: enumerated records (those that fall within the categories listed in this definition) and non-enumerated records (records that do not fall within the enumerated categories, but otherwise contain personal information, for which there is a reasonable expectation of privacy): J.J. at para. 38.
- [79] To determine whether a non-enumerated record will fall within the definition of section 278.1 of the Criminal Code, a presiding judge must consider both the content and context of the record: J.J. at para. 54.
- [80] Once the evidence is determined to constitute a “record,” an application to produce it proceeds in two stages.
- [81] At stage one, the presiding judge reviews the accused’s application to determine whether the evidence sought to be adduced is capable of being admissible having regard to the threshold tests in paragraphs 278.92(2)(a) and (b) and the applicable factors in subsections 276(3) or 278.92(3), depending on the type of evidence: J.J. at para. 23. If the judge concludes that the evidence is capable of being admissible, the judge holds a hearing (stage two) to determine whether the evidence is admissible.
- [82] At stage two, the admissibility of the evidence is determined based on the test set out in subsection 278.92(2) of the Criminal Code: a private record is admissible if it “is relevant to an issue at trial and has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice”; this determination is made in accordance with the factors listed in subsection 278.92(3): J.J. at para. 32.
- [83] A trial judge’s determination of admissibility under subsection 278.92(2) or 276(2) of the Criminal Code is deemed, for the purpose of rights to appeal, to be a question of law: Criminal Code, s. 278.97. However, the admissibility of evidence offered under section 278.92 lies very much in the exercise of the trial judge’s discretion. Assuming the trial judge applies the correct legal principles, does not misapprehend material evidence, does not fail to consider relevant evidence, and does not arrive at an unreasonable result, an appellate court will defer to the trial judge’s ruling: R. v. T.W.W., 2024 SCC 19 at para. 20.

- [84] Decisions as to relevance are reviewed on the standard of correctness: *R. v. Stewart*, 2022 CMAC 9 at para. 25; *R. v. Schneider*, 2022 SCC 34 [Schneider]. Errors in the treatment of animus and motive to fabricate involve the application of legal principles and are reviewed on a standard of correctness: *R. v. H.P.M.*, 2023 ABCA 292 at para. 30.
- (2) Analysis [85] In his decision, the military judge divided the messages in five groups of underlying themes: work; family activities; sexuality; expressions of intimate and personal feelings in the context of the couple's relationship ("Relationship Messages"); and logs of video calls made or missed. This ground of appeal focuses specifically on the military judge's treatment of the "Relationship Messages."
- [86] As noted above, the first determination that the military judge had to make was whether these were "records" captured by the private records regime. The military judge concluded that they were, and gave several reasons to explain his conclusion:
- the "Relationship Messages" were shared in the context of a relationship of trust and vulnerability;
 - the "Relationship Messages" constituted one-on-one communications, and the information was not publicly available on social media or otherwise; and
 - the "Relationship Messages" contained information that the complainant would have confided in the Appellant and not others, and that was of an intimate and personal nature, integral to the complainant's physical, psychological and emotional well-being.
- [87] I agree with the military judge's assessment, which is in line with the teachings of J.J. A relationship of trust may be sufficient to establish a reasonable expectation of privacy: J.J. at para. 59; one-on-one communications between a complainant and an accused may attract an enhanced reasonable expectation of privacy: J.J. at para. 60; and the content of the communications was personal and integral to C.C.'s psychological and emotional well-being. J.J. at para. 55.
- [88] The Appellant argues that even if these were private records, they were capable of being admissible because they were relevant to C.C.'s motive to fabricate. He argues that the military judge erred in not holding a stage two hearing.
- [89] The Appellant first argues that the military judge erred in the process he followed to reach his decision, because he approached the admissibility issue based on categories rather than through a review of each individual message. On my review of the record, I disagree with this characterization of what the military judge did. As I read his ruling, I find that his identification of the five groups of messages was simply his way of articulating his decision, in an organized manner, after having analyzed each of the messages individually.

- [90] The Appellant argues that the military judge erred in concluding that the evidence was not capable of being relevant. He argues that the “Relationship Messages” demonstrated the complainant’s deep love for him, her level of hurt, all of which made it more likely that she would have fabricated her allegations in order to hurt him after their break-up.
- [91] The military judge found that there was no connection between the “Relationship Messages” and any element of the alleged offences, and that even though the messages spanned over the time when the alleged incidents occurred, they did not contain any reference to any of those incidents. He concluded that they were not relevant and not capable of being admissible. I agree.
- [92] To determine relevance, a judge must ask whether the evidence tends to increase or decrease the probability of a fact in issue: *Schneider* at para. 39. As noted above at paragraph 53, relevance is evaluated as a matter of logic and human experience. However, this evaluation must be made without reliance on myths or stereotypes: *R. v. Seaboyer*, [1991] 2 SCR 577 at pp. 651–653; *R. v. A.G.*, 2000 SCC 17 at para. 3; *R. v. Goldfinch*, 2019 SCC 38 at para. 33.
- [93] Our law recognizes that it is stereotypical reasoning to say that women regularly fabricate allegations of sexual assault out of spite or as a means of revenge. This does not mean that the evidence of the circumstances of a particular case cannot support the existence of a motive to fabricate. Where the defence adduces evidence on this point, a trial judge is obliged to consider it to give full effect to the presumption of innocence. Failure to do so constitutes a reversible error: *Kruk* at paras. 64–65.
- [94] The Appellant’s position at trial and on this appeal about why the “Relationship Messages” were relevant is captured clearly at paragraph 88 of his Memorandum of Fact and Law:
- The relationship messages show that C.C. deeply loved the Appellant, that she was scared he would end their relationship, and that she would have a profound emotional reaction to this event. These messages show her animus towards the Appellant when he was not sensitive to her feelings, her jealousy when he slept with other women, and that she felt she was treated like “trash”. These messages tend to make it more likely that C.C. would have fabricated her allegations in order to hurt the Appellant after he had broken her heart. To that end, these messages were relevant to the defence.
- [95] The military judge examined the messages and carefully considered whether their content could support the existence of a motive to fabricate, aside from reliance on stereotypical reasoning. He concluded that they could not. I find no error in his assessment.
- [96] Allowing the messages into evidence in support of that theory would have amounted to enabling the Defence to rely on the general assumption that women falsely report sexual assaults to seek revenge or out of spite. The military judge did not err in concluding that this evidence was not, on the record before him, capable of being admissible.

E. Whether the military judge erred in his treatment of motive to fabricate evidence [97] The Appellant claims that the military judge erred in several respects in dealing with his proposed defence of motive to fabricate. He argues that the military judge's evidentiary rulings prevented him from establishing the building blocks of that defence and ultimately amounted to a reversal of the burden of proof.

[98] This ground overlaps in part with the challenge of the military judge's conclusions about the admissibility of the "Relationship Messages," which I have already addressed. I reiterate that I agree with the military judge's conclusion that these messages, while they demonstrated C.C.'s deep feelings for the Appellant, as well as the toxic and dysfunctional nature of their relationship, could not, for that reason alone, form the basis of an argument that she had a motive to falsely accuse him.

[99] Other messages that the Appellant sought to have admitted in support of his defence of motive to fabricate were messages between the Appellant and C.C. that were related to (1) a sexual encounter involving C.C., the Appellant, and a man, and (2) a phone call involving C.C., the Appellant, and a woman. The Defence wanted to introduce those messages to suggest that C.C. used those other events to fabricate the allegation underlying count #4. The military judge refused to allow the Defence to use those messages for that purpose. He, however, ruled them admissible for the purpose of suggesting that C.C. may have been confused and had conflated those events with what she alleged occurred in the events underlying count #4.

[100] The Appellant states in his Memorandum of Fact and Law that it is "prohibited by law and in defiance of logic" that the military judge would prohibit the Defence from using admissible evidence to support a theory of fabrication. I disagree. It is not uncommon for evidence to be admissible for one purpose and not another.

[101] In my respectful view, the military judge's decision to allow the evidence of these messages to be used to suggest that C.C. was conflating different incidents was, if anything, generous to the Appellant. The mere fact that they had consensually engaged in a form of threesome sexual encounter does not strike me as particularly probative of C.C. conflating that event with an entirely different incident. Under that reasoning, virtually any sexual activity unrelated to the charge before the court could arguably be admissible on the ground that the complaint is the result of conflation or confusion between events.

[102] I see no error or unfairness to the Appellant with the military judge's treatment of those messages.

- [103] The Appellant also challenges the military judge's decision regarding the use that could be made of messages between C.C. and the Appellant's spouse. The military judge ruled those messages admissible, with some redactions, but only inasmuch as they were relevant to the overall circumstances of how C.C.'s complaint to the military police came to be. The military judge refused to allow those messages to be used to suggest that C.C. had a motive to fabricate.
- [104] The Appellant's position about these messages is essentially the same as the one advanced in support of the admissibility of the "Relationship Messages." It goes back to the assertion that C.C.'s feelings towards the Appellant and how hurt she was by him, in and of itself, was admissible to establish that she had a motive to falsely accuse him of sexual assault as a means of revenge. For the same reasons as those already discussed, I find no error with the military judge's treatment of that issue. The military judge was correct in concluding that the messages could not be used for that purpose. He was also correct to find that there was nothing in the evidence suggesting that C.C. had a motive to falsely accuse the Appellant. Aspects of the evidence suggested the opposite, including the fact that she did not mention the sexual assault when she made her harassment complaint against him, and her initial refusal to pursue formal complaints of sexual assault against him. These are not consistent with someone making false accusations for the purpose of seeking revenge.
- [105] The Appellant also argues that the military judge reversed the burden of proof, pointing to statements that the military judge made at various points in his rulings and in his Verdict.
- [106] Reasons must be examined in the context of the record, and as a whole, in order to determine whether an error has occurred: *R. v. Stirling*, 2008 SCC 10 at para. 13; *R. v. L.A.O.*, 2023 ABCA 347 at para. 42.
- [107] In my view, the excerpts that the Appellant relies on in support of his argument that the military judge reversed the burden of proof are presented in isolation and out-of-context. The comments made in his rulings about the absence of evidence of motive to fabricate were made in the context of addressing the submissions that the Defence had made about the relevance and admissibility of the records. Read in context, I do not interpret those comments as a reversal of the burden of proof.
- [108] A review of the Verdict as a whole shows that the military judge correctly instructed himself about the onus of proof, the standard of proof, that the requirement for proof beyond a reasonable doubt applies to the issue of credibility, and that the fact that his conclusion that C.C. did not have a motive to fabricate was not something that enhanced her credibility: Verdict at paras. 116, 120–123, 160. His disposition of counts #1 and #2 further illustrates that he understood and applied these principles correctly, giving full effect to the reasonable doubt he was left with on the whole of the evidence.
- [109] I would dismiss this ground of appeal.

IV. CONCLUSION [110] For these reasons, I would dismiss the two motions before this Court—the Respondent’s fresh evidence motion and the Appellant’s motion to strike portions of the Respondent’s Memorandum of Fact and Law—as well as this appeal.

[111] The Appellant was released on bail pending appeal on consent on February 29, 2024, on a number of conditions, including one that he surrender himself into the custody of the military police within 48 hours of the dismissal of his appeal. I therefore direct that he surrender himself within 48 hours of the filing of these Reasons.

“Louise A. Charbonneau”

D.J.A.

“I agree.”

Donald J. Rennie J.A.”

“I agree.”

Patrick K. Gleeson J.A.”

COURT MARTIAL APPEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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CMAC-644

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CONCURRED IN BY:

RENNIE J.A.

GLEESON J.A.

DATED:

april 27, 2026

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