COURT MARTIAL

Citation: *R. v. Cadieux,* 2019 CM 2019

Date : 20190809
Docket : 201872

Standing Court Martial

4th Canadian Division Support Base Petawawa
Petawawa, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Corporal S. Cadieux, Offender

Before: Commander S.M. Sukstorf, M.J.

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information that could disclose the identity of the person described during these proceedings as the complainant shall not be published in any document or broadcast or transmitted in any way.

REASONS FOR SENTENCE

(Orally)

Introduction

[1] On 22 May 2019, the Court found Corporal Cadieux guilty of the first offence under section 130 of the *National Defence Act (NDA),* that is to say, sexual assault, contrary to section 271 of the *Criminal Code* and the second offence under section 97 of the *NDA* for drunkenness. The Court must now determine and pass sentence on the charges which read as follows:

"FIRST CHARGE AN OFFENCE PUNISHABLE UNDER SECTION 130 OF

Section130 *National Defence Act*	THE *NATIONAL DEFENCE ACT*, THAT IS TO SAY, SEXUAL ASSAULT, CONTRARY TO SECTION 271 OF THE *CRIMINAL CODE OF CANADA*.
	*Particular*s: In that he, on or about 27 November 2015, at or near Paradise Park, Savannah LA Mar, Jamaica, did sexually assault R.S.
SECOND CHARGE	DRUNKENNESS
Section 97 *National Defence Act*	*Particulars*: In that he, on or about 28 November 2015, while deployed on exercise Tropical Dagger, at or near Paradise Park, Savannah LA Mar, Jamaica, was drunk."

Circumstances surrounding the offences

[2] The circumstances or the facts surrounding the above two offences were set out fully in my decision delivered orally on 22 May 2019. Accordingly, I am only going to provide a brief summary for the purposes of this sentencing decision.

[3] In early November 2015, both Corporal Cadieux and the victim R.S. were members of the Canadian Special Operations Regiment (CSOR) and deployed to Jamaica on Exercise TROPICAL DAGGER (Exercise) on a camp called Forward Operating Base (FOB) Paradise located on a local resident's private estate called "Paradise Park." It was located on the outskirts of the town of Savannah La Mar, Jamaica. The objective of the Exercise was for the CSOR to train, advise and assist in the provision of joint collective training and mentoring of regional Special Operations Forces (SOF), which includes the Jamaican Defence Force (JDF) and the Belizean Defence Force (BDF).

[4] The complainant, R.S. and Corporal Cadieux knew each other strictly on a professional basis since they served in CSOR together. Although they were both friendly with each other and worked in the same building, there had never been any romantic interest between them, nor was there any evidence before the Court to suggest that either of them was interested in a romantic relationship.

[5] The Commander of the Canadian Special Operations Forces Command (Comd CANSOFCOM) and the Commanding Officer of the CSOR ordered the Exercise to be "dry", i.e. no consumption of alcohol permitted, except for the last two days at the end of the Exercise when members were authorized to hold a barbecue and bonfire event at FOB Paradise, with partners of the JDF and the BDF. There was no limit on the quantity or type of alcohol to be consumed provided that members exercised restraint, were responsible and took care of each other.

[6] The two charges before the Court emanate from events that unfolded after this barbecue and bonfire that occurred at the end of this Exercise, 27-28 November 2015.

By all accounts, the evening festivities slowly came to an end between midnight and 0130 hours on 28 November, 2015. All the parties admitted to having consumed a significant amount of alcohol.

[7] Access to the all-female tent was restricted, with males only being permitted entry after they knocked, stated their reason for entry and were authorized to enter.

Sexual assault

[8] In the early morning hours of 28 November 2015 after the party had waned, Corporal Cadieux knocked on the door to the all-female tent and requested permission to enter with the intention of recruiting the victim to return to the ongoing festivities. He was authorized entry by Master Corporal Hébert who showed him where the victim's cot was located. Corporal Cadieux approached the complainant's cot, knelt or bent down beside it and called her name loud enough that Master Corporal Hébert heard it.

[9] The victim had been asleep for almost two hours and was in a deep sleep. Next, Corporal Cadieux alleged that R.S. grabbed him by the back of his neck and pulled his head towards her kissing him and he kissed her back. He stated it was a strong kiss, with both their tongues involved. There was not enough evidence on the record for the Court to refute this allegation, but we cannot say definitively it happened that way. What we do know is that the kissing at one point was testified by a witness to having been consensual. Master Corporal Hébert heard the offender calling R.S.'s name and saw him leaning over her cot. The sloppy kissing was described by Master Corporal Hébert as similar to the sound of a child eating fruit with a mouth open or a child sucking on a soother. She indicated she saw movement with R.S.'s sleeping bag and then heard R.S. say "Stop" or "Stop it," in a panicked or pressing tone, which caused Master Corporal Hebert to go immediately to R.S.'s cot to tell Corporal Cadieux to "get the fuck out". The entire interaction took approximately two to three minutes maximum. After the incident, R.S. pulled her sleeping bag over her head and went back to sleep.

[10] The Court accepted that after she retired, the next thing R.S. remembered was waking up with the offender on top of her. He was laughing and saying something to the effect, "It is not Steve, it is Simon." R.S. has no memory of anything that occurred before this moment. When she became aware of what was going on, she reacted with a sense of urgency, clearly communicating her non-consent, transmitted in a sense of panic in telling the offender to "Stop" while pushing him off.

[11] After a review of all the evidence, the Court accepted the victim's testimony that she was asleep immediately prior to and during the kissing and, as a result, she was incapable of consenting to the kissing.

[12] Corporal Cadieux testified that he was shocked and confused by the kissing, and despite his knowledge that fraternization was not permitted and the fact that he was in the presence of Master Corporal Hébert, who was senior in rank to him, and the other female members, he recklessly engaged in passionate kissing with R.S.

[13] After Corporal Cadieux was ordered by Master Corporal Hébert to leave, he exited the tent and bragged to his friends about what happened. Although he thought it was funny, his actions support the fact that he had acted recklessly, with no regard for the victim, her tent mates or the policies that had been implemented by the chain of command. In doing so, he displayed disrespect to both R.S. and Master Corporal Hébert. Master Corporal Hébert trusted him when she let him in and he betrayed that trust.

[14] Given that the offender was unable to awaken R.S. just seconds before, it should have been obvious to him that he needed to take steps to ensure that R.S. was fully awake before he engaged further. He chose not to make such an inquiry.

[15] The Court found that the offender did not take reasonable steps in the context of the circumstances known to him at that time which included being in the all-female tent, on an international operation, in the early morning hours, the existence of Operation HONOUR, the relationship between the offender and the victim, as well as evidence about verbal and non-verbal conduct of the victim that evening.

[16] In short, R.S. and the offender were colleagues, friendly with each other. As professional colleagues, they owed a duty to each other to ensure that neither of them got into any trouble particularly when one of them was vulnerable. That is what soldiers, sailors and airmen and women do.

[17] The Court found that R.S. was in a very vulnerable state, asleep in her own personal space where she had every right to expect to be safe.

[18] The offender was well aware that R.S. had been drinking as he provided her with rum and Coke during the evening. R.S. had been asleep for several hours, did not invite him to the tent and had no reason to expect him to be there. Based on these circumstances, all known to the offender, the reasonable steps required in the circumstances were heightened and had to be of the highest standard.

[19] Based on the facts of this case, when an individual is sleeping and unconscious and has no reason to expect another individual to be beside their bed, in their bed, beside their cot or in their bunk aboard a ship, an unequivocal communication of consent is required on first contact. The Court found that the steps taken by the offender several minutes later after having engaged in several minutes of passionate kissing did not satisfy that requirement. It has to be clear that anyone who finds him or herself in the offender’s position when an individual is unconscious or unquestionably not awake, they should be taking the appropriate steps. This is particularly important given the line of work that we do. Because if we cannot do it in our day-to-day lives, what are we going to do when we are deployed and we are dealing with vulnerable people all the time? So there has to be a level of constraint and restraint that is constantly exercised, and that is one of the reasons why it is very important that the court emphasize this.

Charge of drunkenness

[20] On 28 November 2015, on the morning of the cultural day, Master Warrant Officer Moureau, who was Corporal Cadieux's overall supervisor on the Exercise Control (EXCON) and was also double hatted as the Company Sergeant Major (CSM) for the Exercise, witnessed Corporal Cadieux enter the all-female tent in search of alcohol and food. Master Warrant Officer Moureau yelled at Corporal Cadieux to get out of the tent, but Corporal Cadieux did not respond or react. He stayed in the all-female tent for approximately five minutes before someone entered the tent to escort him out.

[21] The Court found that Corporal Cadieux was drunk, tired, slurring his words stumbling around and not able to walk in a straight line. After drinking heavily in the early hours of the morning, Corporal Cadieux admitted to having taken sleeping pills intensifying the effects. He also drank that morning from a bottle of vodka, being Grey Goose.

[22] Master Warrant Officer Moureau testified that when Corporal Cadieux finally exited the all-female tent, he apologized to Master Warrant Officer Moureau. The Court found that later that morning, when they decided to go to a public resort, a decision was made to leave Corporal Cadieux back at the camp. He was upset and got into the rental car to drive back to EXCON. Master Warrant Officer Moureau took the keys away from him and Corporal Cadieux later thanked Master Warrant Officer Moureau for not letting him drive.

[23] The Court found that Corporal Cadieux clearly understood the policy for entering the all-female tent, yet he entered in flagrant disregard to that policy. The Court also found that after drinking heavily, Corporal Cadieux took pills which resulted in him urinating in his sleeping bag and he was suffering the effects of alcohol and drugs when he got into the rental vehicle with the intention to drive. Based on an examination of these two incidents, the Court found Corporal Cadieux guilty of drunkenness.

Evidence

[24] In this case, the prosecutor provided the documents required under *Queen's Regulations and Orders for the Canadian Forces* (QR&O) article 112.51 that were supplied by the chain of command. In addition, the prosecution read an Agreed Statement of Facts so that the Court could be informed of the facts specific to the personal circumstances of Corporal Cadieux.

Victim's statement

[25] In addition, pursuant to the new provision QR&O 112.481, R.S. prepared for the Court a victim impact statement. I am going to read a couple of her comments:

> "My confidence and confidence in the CAF after the sexual assault plummeted to an all-time low. I still do not understand how one of my co-workers and someone from my military family felt like I was worthless enough to take advantage of me while I was sleeping in my own 'safe' space."

[26] In her statement, R.S. writes about how she recently deployed to Operation LENTUS and the first thing she did when she got to her tent was make sure that the doors locked. The doors didn't lock and she spent the rest of the time in the field getting minimal sleep because she was worried that something similar may happen.

[27] I am glad to see the chain of command present. One of the recurring points that victims mention is that after reporting a sexual assault, they feel their chain of command treats them differently. There is no easy answer. These are difficult problems and not easy to manage, but in knowing that this is a consistent message that is coming from victims across the CAF, I think the chain of command needs to be aware of this fact and seek feedback from the victims to find out what it is that would have made them feel more comfortable. From what this court is hearing, the mere fact of reporting is the most stressful on a victim. In fact, sometimes it is not the incident itself that causes the problem; it is the actual process of reporting and the fact that they now feel extremely self-conscious about everything they do and say.

[28] R.S. goes on to explain later in her comments, which I think is also important, and the court took extreme care in considering this and it is something that is repeated by Corporal Cadieux. She explains:

> "The extremely long process of investigation, court martial, appeal process, the final court martial and finally sentencing took almost 4 years. That was 4 years of my life that these wounds kept being reopened repeatedly. Each time was harder than the last. I am thankful that this chapter of my life can finally close and hopefully with time I can move forward and overcome the emotional damage that was done."

[29] There was also a heartfelt exchange where Corporal Cadieux stood up, as a man, and apologized to R.S. directly in a manner that was extremely humbling. So I am hoping that people can move forward. As I explained earlier, this is an extremely difficult case. It is probably the hardest case I have had to preside over. The court heard from a stellar victim who did not exaggerate. She was forthcoming, she continued with her job, she demonstrated a level of resilience that reflects her service with the Special Forces. Similarly, the offender also demonstrates redeeming qualities. He made a very serious mistake when he was going through a very rough time period in his life.

[30] Recognizing the challenge here, the court appreciates what the chain of command faced in balancing the interests of the offender with the victim within the same unit. They owed a duty of care to Corporal Cadieux as a soldier suffering and who needed help, but they also had to consider that he did something that seriously offended

another soldier for which they also had a duty to of care. It is very important to recognize the challenge they faced because, we are often too quick to criticize and say, the chain of command did not support me or they made me feel isolated.

[31] The following additional evidence was adduced at the sentencing hearing in the court martial:

(a) Diagnostic Assessment of Corporal Cadieux by Major Peter Walker, dated 30 July 2019;

(b) email from Major Ward to Major Walsh, dated 31 July 2019

(c) testimony of Corporal Cadieux;

(d) video of a firefight in Afghanistan; and

(e) testimonies of the following defence witnesses, in order of appearance:

i. Warrant Officer Jocelyn Roy (via videoconference);

ii. Master Corporal Igor Petrenko;

iii. Sergeant Powell;

iv. Ms Jennifer Grenier; and

v. Ms Emily Woods.

[32] Furthermore, the Court benefitted from counsel's submissions to support their respective positions on sentence where they highlighted the facts and considerations relevant to Corporal Cadieux.

[33] Counsel's submissions and the evidence before the Court have enabled me to be sufficiently informed of Corporal Cadieux's personal circumstances so I may adapt and impose a sentence specifically for him, taking into account the rehabilitation and progress he has made to date.

Circumstances of the offender

[34] Corporal Cadieux is 29 years old. He enrolled in the CAF on 18 February 2009 and served his country for almost 11 years. Following basic and occupational training as an infantryman, he was posted to Valcartier with the 1st Battalion, Royal 22e Régiment in January 2010. He deployed in November 2010 for seven months in Afghanistan.

[35] Warrant Officer Roy testified that he was Corporal Cadieux's section commander in Afghanistan and described Corporal Cadieux as one of the best soldiers

he ever had. He described him as very calm and effective under fire and capable of receiving quick contingency orders under extreme stress and being able to execute the orders without exception. The Court also had the opportunity to view a few minutes of a video taken of their section during a firefight in Afghanistan that lasted five hours. In the video, both Warrant Officer Roy and Corporal Cadieux could both be seen as they brought to cover one of their wounded section members. Corporal Cadieux provided body cover to the live fire while they extracted their fellow soldier.

[36] Warrant Officer Roy testified that from his experience when engaged in combat, an individual's senses are at a heightened level and his or her moral fibre is transparent. He described that their deployment was particularly unique and challenging as they were required to transition regularly from live fire in combat to mingling in a village with nationals living their civilian lives. He explained how it demanded extreme mental agility and a completely different mindset. He emphasized how operating in extreme conditions brings out the character of a man or woman.

[37] Warrant Officer Roy also explained why that particular day in the video was challenging. On top of them having to respond to live incoming fire, the Taliban had specifically deployed women and children as a cover, forcing them to diligently discriminate in defending themselves to ensure that they did not wound any women or children being used as the Taliban's cover.

[38] While deployed, the entire section which included both men and women, served together and lived together in close confines. Warrant Officer Roy testified that he never once had a disciplinary issue with Corporal Cadieux either in combat, on leave or during training.

[39] The injured comrade shown in the video was one of Corporal Cadieux's best friends. As the helicopter could not return to extract his wounded friend, they had to physically carry him from the battlefield. Upon the wounded individual's return to Canada, he seriously suffered with mental health issues. At one point, his family reached out to Corporal Cadieux for help. Corporal Cadieux took annual leave and went to stay with his friend to convince him to get help and "get off the liquor". One morning, Corporal Cadieux awoke to the sound of crying and found his friend in his bathtub with his wrists slit open. He immediately reacted with first aid, called an ambulance to rush his friend to the hospital. Once he was stabilized, he took his friend to the mental health hospital, having to formally admit him for treatment.

[40] It was during the combat tour in Afghanistan that Corporal Cadieux was introduced to the Special Forces on operations and he decided to apply to become one of them. He was accepted and in August 2013, he successfully transitioned to become a Special Forces Operator.

[41] From the Personnel Development Reviews (PDR) included in the Agreed Statement of Facts before the Court, it was evident that in the early years working as a Special Forces Operator, Corporal Cadieux was very effective. He demonstrated an

ability to work very well with his fellow team members, SOF allies, as well as an indigenous partnered force while deployed. In March 2014, his strengths were described very positively, with him being referred to as a force multiplier to the SOF team. His ability to use his strong solid foundation of SOF operator skills to demonstrate to the partnered force the correct way of conducting individual drills gave the mentees a standard to strive for.

[42] In early September 2014, Corporal Cadieux had been identified and provided 24 hours' notice to move to deploy on Rotation (Roto) 0 to Iraq. However, on 10 September 2014, during one moment on a night-time live-firing exercise, Corporal Cadieux failed to apply the training requiring him to positively identify a target before pulling the trigger on his weapon. With that momentary lapse, he very seriously wounded a friend and a colleague and his personal life and career would soon start to spiral out of control.

[43] When Corporal Cadieux was Court-martialed for his negligence with respect to the above incident, he displayed early recognition of his mistake during the live-fire exercise as voiced to his colleagues, including the victim. He never tried to escape responsibility for the outcome of his actions and this was evident in his testimony before this court martial. During his court martial for sexual assault and drunkenness, he testified to his personal devastation suffered for having wounded his brother-in-arms. He could not sleep at night, became depressed and shortly thereafter sought his release from the CSOR and CAF. At the time, his chain of command properly counselled him to wait until the incident had been dealt with before making any rash decisions and convinced him to stay with the unit.

[44] Master Corporal Igor Petrenko testified that they had both been friends before the incidents that led to the charges before this court and have stayed friends since. He stated that for almost two years, he rented a room off of Corporal Cadieux and his then girlfriend. He described how Corporal Cadieux started to spiral downward after the accident. He became more and more depressed, his skin tone changed, he became more distant, did not talk as much, he just "would not be there", he would just stay in his room.

[45] Just prior to the end of the Exercise, Corporal Cadieux was served with formal charges and notification of a pending court martial related to the 10 September 2014 shooting accident. This notification triggered further his downward spiral. During the Exercise, due to his inability to sleep and his depression, in addition to other medications he was taking, Corporal Cadieux also took sleeping pills so he could sleep. On 27 November 2015 when authorized to consume alcohol, he did so, despite the fact he was on various other medications. The incidents before the Court unfolded during this 24-hour time period. During the main trial, Corporal Cadieux also testified that he was suffering from a serious hiatal hernia and the alcohol and spicy foods he consumed at the barbecue created acid reflux and upset his stomach. He told the Court that he had delayed a necessary surgery to close a hole in his diaphragm and to staple his stomach. He had the surgery done when he returned to Canada.

[46] On 28 November 2015, despite being intoxicated, Corporal Cadieux was clearly struggling and cognizant that he was not himself. During the main trial, Chief Warrant Officer Moureau testified that Corporal Cadieux confessed to him that morning that "the Simon you see here is not the Simon you know."

[47] By late 2015, the Court noted that the tone of Corporal Cadieux's PDRs had changed as they now reflected transgressions such as forgetting to dispose of an inert round of ammunition, damaging a vehicle, etc. Other uncharacteristic disciplinary and behavioural issues were now occurring. In Section 5b, in the Areas for Development, there were now comments recommending improvements to both his attitude and professional awareness. Nonetheless, in the PDR signed on 7 January 2016, there was still hope that Corporal Cadieux would improve and there was still a recommendation that he could deploy.

[48] However, shortly after Corporal Cadieux signed his PDR, on 23 January 2016, the victim R.S. reported the sexual assault to the CSOR chain of command. Shortly thereafter, while the investigation was ongoing, Corporal Cadieux was sent to work with the mechanics, and told very little to explain why. However, rumours quickly started to circulate that Corporal Cadieux was a rapist. Both Corporal Cadieux and Master Corporal Petrenko testified as to the impact that the pending sexual assault charges had on Corporal Cadieux. Given that Corporal Cadieux was a Special Forces Operator, news agencies sensationalized the charges and significant name calling and labelling within the surrounding community followed. At one point, someone placed a very damaging news article on the windshield of Corporal Cadieux's then-girlfriend. Corporal Cadieux's reputation was immediately and irreparably tarnished within the small military community, as well as within the surrounding civilian community. There was no escape.

[49] On the 6 May 2016, despite the fact that he would have to accept a significant drop in his monthly pay, Corporal Cadieux requested and was transferred out of CSOR to the Joint Personnel Support Unit (JPSU) to seek professional help for his ongoing depression.

[50] On 21 June 2016, at a General Court Martial, Corporal Cadieux was found guilty of one charge, contrary to section 127 of the *NDA*, for having negligently omitted to do something that may be dangerous to life, which omission caused bodily injury to some person. The charge related to the shooting accident that had occurred on 10 September 2014. Corporal Cadieux was sentenced to detention for 21 days, which was served at the Canadian Forces Service Detention Barracks in Edmonton.

[51] During the time he was serving detention in Edmonton, he became extremely depressed and, as a result, had to be sent to the mental health hospital for treatment because he was experiencing tremendous guilt from the shooting accident coupled with his impending court martial for sexual assault.

[52] Master Corporal Petrenko testified that when he eventually became aware that Corporal Cadieux was taking antidepressants, he confronted him. Being one of the individuals closest to him, he convinced Corporal Cadieux that he was mentally strong and needed to try to start living without medication. He testified that once Corporal Cadieux stopped taking the medication, he noticed a complete turnaround in him. He stated that his colour came back, he became more social and started to go out in public again. In his own testimony, Corporal Cadieux acknowledged his two-year downward spiral and testified that once he stopped taking the medication, he regained control of his life. He explained that the pills were a double-edged sword and he had to pick his battle. He said that he tried different types of pills, but the reality was that most gave him high energy, but they also reduced his inhibition and affected his judgement.

[53] Corporal Cadieux testified that during the last two years, he has worked hard to rebuild his life and relationships. Sergeant Powell of the JPSU testified that in the last two years, Corporal Cadieux began reporting to him at the JPSU. Sergeant Powell testified that during this time, he never had a problem with Corporal Cadieux, never having to prompt him, call him or hasten him. Sergeant Powell described Corporal Cadieux as always doing what needed to be done, reacting to orders and direction as provided and was never drunk or "stoned". Corporal Cadieux engaged in high school upgrading and then began courses in administrative marketing. Sergeant Powell described Corporal Cadieux's character as solid and open to discussing his future. He said that Corporal Cadieux did not demonstrate hidden alternatives and was open and forthcoming.

[54] In responding to inquiries from the Court, Corporal Cadieux explained that in January 2017, he had a job offer and requested his release from the CAF, but for some reason his release was refused due to the pending court martial.

[55] On 12 May 2017, in his first court martial on the same two charges before this Court, Corporal Cadieux was found not guilty. The prosecution for Her Majesty the Queen appealed the acquittal in relation to both charges pursuant to section 230.1 of the *NDA*. On 12 March 2018, the Court Martial Appeal Court (CMAC) heard the appeal in relation to both charges and on 10 September 2018 it ordered a new trial. The current court martial is the retrial of the original charges and on 22 May 2019, this Court found Corporal Cadieux guilty of both charges. In order to accommodate tragic family circumstances that unfolded during the proceedings, the sentencing hearing was postponed until August 2019.

[56] Ms Jennifer Grenier, Corporal Cadieux's clinical social worker also testified on his behalf. She explained that she became responsible for Corporal Cadieux's file on 20 January 2018 when his then-clinical social worker departed for maternity leave. She explained that she originally worked with Corporal Cadieux on a monthly basis, but when he started to demonstrate any symptoms, they progressed to biweekly sessions to address individual trauma with respect to the shooting accident. She explained that when she took on his file in January 2018, this issue was still outstanding for Corporal

Cadieux and contributed to his intense feelings of anxiety. He could not go back and change his past, but it was affecting his degree of anxiety and impeding his sleep.

[57] Ms Grenier described Corporal Cadieux as being open to intervention and proactive. He makes concerted efforts to keep himself busy and engages in regular exercise. She explained how he was resistant to medication at first, but they have been able to stabilize that part of it. She described that he experiences many symptoms from his anxiety, including throwing up, weight loss and a loss of sleep.

[58] Corporal Cadieux explained to the Court that when he releases from the CAF, he intends to go to Montreal to study to become an electrician. He explained that given the geographical restrictions placed upon him, he cannot leave the Petawawa area at this time. He also explained that he looked to see if there were appropriate courses available in this area and there are no similar courses offered. When asked whether he could be advantageously employed elsewhere in the area, he advised the Court that in light of the pending charges, his life has been on hold for the last four years.

[59] Ms Grenier explained that the last few years have taken both a physical and mental toll on Corporal Cadieux. She explained that the fact that his life was placed on hold for four years was the most stressful as he lost his identity, his sense of purpose and direction. This mental toll has been further exacerbated by the fact that there is no anonymity in a small community, either in the military community downtown Petawawa or downtown Pembroke.

[60] At Annex E to the Agreed Statement of Facts (ASOF) is a Diagnostic Assessment of Corporal Cadieux, completed by Major Walker. His assessment of Corporal Cadieux features trauma and stressor-related disorders. Major Walker writes that given the ongoing stress and uncertainty the member has experienced over the last four years, including this court martial, it was difficult for him to assess whether this diagnosis arises from the current situation or whether it is a lingering problem. Most notably, the report states that although there were no safety concerns at the date of the writing of the report, it strongly recommends that the member be seen for suicidality after this sentencing process. The report further notes that Corporal Cadieux declined a trial of antidepressants because he described what the doctor assessed could have been a medication induced mixed mood episode that occurred during the incidents in Jamaica. Further, the doctor recommends that before Corporal Cadieux initiates any psychiatric medication, he should be treated for an identified disorder. Further, the assessment recommended that if the member is incarcerated, he should be provided appropriate medication.

[61] The Court noted that in its cross-examination of all witnesses, the prosecution very diligently explored whether there was any alcohol or drug abuse by Corporal Cadieux. All witnesses were adamant that Corporal Cadieux did not have any problems with alcohol or drugs. Warrant Officer Roy and Sergeant Powell expressed familiarity with the risks of alcohol abuse and the fact that members often have problems, but they both stated with conviction that they have not witnessed any such issues with Corporal

Cadieux. Similarly, the prosecution canvassed the alcohol issue with Master Corporal Petrenko who would be intimately familiar with Corporal Cadieux's drinking habits. Master Corporal Petrenko was forthright in providing insight, but it was clear from his testimony that he does not believe that Corporal Cadieux has an alcohol problem. The Court also inquired with Corporal Cadieux to understand his weekly habits and is confident that there is no evidence that suggests that Corporal Cadieux is struggling with any alcohol or drug-related problems at this time.

[62] All the evidence before the Court both in the main trial and the sentencing hearing suggests that Corporal Cadieux is a highly empathetic individual. Ms Grenier explained that over the 26 sessions that she had with Corporal Cadieux, the one thing that stood out for her was the fact that he has always been empathetic towards the victim and remorseful for his actions. The evidence before the Court supports the fact that he cares very deeply for those who are close to him and demonstrates incredible courage in taking responsibility for his actions.

[63] Similarly, it is also clear on the evidence that Corporal Cadieux has maintained the trust and loyalty of those close to him. Ms Emily Woods, Corporal Cadieux's common-law partner, explained that Corporal Cadieux is a caring and supportive partner who has always been transparent and she supports him one hundred percent no matter what lies ahead. During the court martial proceedings, she suffered the loss of her father and despite the jeopardy Corporal Cadieux was facing personally in the court martial, his attention and concern rested with her.

[64] Master Corporal Petrenko was also clear that he trusts Corporal Cadieux alone with his own young daughter. All the evidence before the Court suggests that the incidents of 27-28 November 2015 were an aberration and are not reflective of Corporal Cadieux's true character and moral fibre. Although neither Corporal Cadieux nor his defence attempted to rationalize the incidents before the Court, upon review of the diagnostic assessment, the Court found that there is some medical evidence to support the fact that the incidents in question were isolated. Based on what Corporal Cadieux described to Major Walker, Major Walker acknowledged that Corporal Cadieux may have experienced a medication-induced mixed mood episode in Jamaica. This is not a defence to the charges, particularly since the ingestion of the alcohol and pills were self-induced, but if true, it provides support to the other evidence that these incidents were out of character for the offender and with proper management will not happen again.

[65] During his testimony before the Court, Corporal Cadieux was genuinely remorseful and apologetic. Notwithstanding underlying mental health issues, on the surface, his comportment reflects exceptional determination, resilience and stamina to overcome the obstacles and the complications that lie ahead for him. He understands that his career in the CAF has come to an end and he is preparing for his transition to civilian life. On 31 July 2019, in an email from Major Ward to Major Walsh, the CSOR confirmed that Corporal Cadieux will no longer have an opportunity to pursue his career in Special Forces, as his demonstrated conduct and performance are inconsistent with the CSOR ethos. The CSOR will be recommending that Corporal Cadieux be

administratively released from the CAF. A recommendation for release based upon a medical category inconsistent with universality of service has already been initiated with a likely release date in the fall of 2019.

[66] In reviewing Annex D of the ASOF, which is the CSOR ethos, it is clear that despite his personal failings that gave rise to the charges before the Court, there is evidence that reflects that Corporal Cadieux is now demonstrating qualities that explain why he was originally selected and successful as a Special Forces Operator. In responding to the Court's questions, he displayed humility, intelligence, humble confidence and a straightforward willingness to endure the various hardships that lie ahead for him. His contingency planning for his future is based on a logical and practical assessment of identified obstacles and he has identified the paths that he will need to overcome. He genuinely seems committed to pursuing the right path forward. If he continues to rely upon these inner strengths and the ethos in navigating his future, he will find success in his chosen field.

[67] Importantly, he impressed the Court with his resolve and candidness while at the same time accepting full responsibility for his action. He clearly stated that he understands what he did was wrong and he gave a mature, heartfelt apology to R.S. and her family. That means a lot. He is in a stable and loving relationship and the support of the many witnesses that provide comfort and I am confident that he has the requisite support to do whatever he sets out to do.

Sentencing

Position of the parties

Prosecution

[68] The prosecution submits that the Court should impose a sentence of imprisonment for a period of 9 to 14 months with dismissal from the CAF. The prosecution argued that given the gravity of the offence, being a sexual assault against a sister-in-arms who was in a vulnerable sleeping position, the offence constitutes an abhorrent breach of trust so severe as to require imprisonment as a minimum sentence to maintain discipline. Commensurate with that sentence, the prosecution considers that Corporal Cadieux is unfit for further service with the CAF and recommends dismissal.

[69] The prosecution argues that the sexual assault took place in her workplace and bedroom and the offender was ejected from the tent after she cried out in panic.

Defence

[70] The defence submits that a sentence of an absolute discharge is most appropriate based on the facts of this case. He argued that the facts of this case are somewhat unique and are easily distinguished from the case law upon which the prosecution seeks to rely. He strenuously argued that the evidence is clear that the offender is not a sexual

predator and the incidents before the Court were an aberration. He argued that the offence of sexual assault under the *Criminal Code* captures everything from a stolen kiss to rape and that a sentence must be proportionate to the gravity of the underlying facts.

Purposes, objectives and principles of sentencing to be emphasized in this case

[71] The fundamental purposes of sentencing in a court martial are to promote the operational effectiveness of the CAF by contributing to the maintenance of discipline, efficiency and morale and to contribute to respect for the law and the maintenance of a just, peaceful and safe society. In order to accomplish this, it is imperative that members be provided the best opportunities for success in reforming their conduct and shortcomings.

[72] The fundamental purposes of sentencing are achieved by imposing sanctions that have one or more of the objectives set out within the *NDA* at subsection 203.1(2). The prosecution has emphasized that he feels that objectives of sentencing that the Court must consider are: denunciation and deterrence. Defence Counsel did not oppose this or take a different position.

[73] The offence of greatest concern before this Court is the sexual assault which involved a sleeping military colleague. Upon reviewing much of the case law that the prosecution relied upon in supporting its submission, it is evident that almost all of the cases present facts which are much more aggravating than the facts before this Court. Most recently, in the Supreme Court of Canada (SCC) decision in *R. v. Stillman*, 2019 SCC 40, at paragraph 100, the SCC reinforced why serious offences committed by persons subject to the Code of Service Discipline need to be sentenced within the military justice system to truly account for the seriousness of the offence in light of purposes of discipline, efficiency and morale. The prosecution referred the court to this principle as supported by the comments of Cattanach J. in *MacKay v. Rippon*, [1978] 1 F.C. 233, at pages 235-36:

> Many offences which are punishable under civil law take on a much more serious connotation as a service offence and as such warrant more severe punishment.

[74] However, it is important for the court to remind all that the CMAC has recognized that sentencing in light of the purposes of discipline, efficiency and morale does not always require a more severe punishment than that awarded in a civilian case. Létourneau J.A. clarified in *R. v. St. Jean,* (2000) CMAC-429:

> [38] In this regard, it is worth re-emphasizing that Lamer C.J. did not say that more severe punishment is required in every case. In addition, there has to be a breach of military discipline. The chief purpose of military discipline is the harnessing of the capacity of the individual to the needs of the group. I have no doubt that Lamer C.J., when he referred to breaches of military discipline, contemplated breaches of the imposed discipline which is necessary to build up a sense of cooperation and forgo one's self-interest. He would also have contemplated a breach of self-discipline in the

> context of a military operation or one which affects the efficiency, the operational readiness, the cohesiveness and, to some extent, the morale of the Armed Forces.

[75] Sexual assault is one such offence that warrants more serious consideration and more severe punishment depending on the facts. I agree entirely with the comments of Perron M.J. in the case of *R. v. Royes*, 2013 CM 4034 who stated at paragraphs 32 to 35 as follows:

> [32] Women represent a small minority in a predominately male garrison. Although the court has not taken judicial notice of this fact, it is well known that men greatly outnumber women in the Canadian Armed Forces. Women must feel they are treated as equals and that they are safe. You did not help a drunken fellow soldier; you took advantage of a drunken female soldier.
>
> [33] A sexual assault such as the one you committed is a repulsive crime in Canadian society, but committing a sexual assault such as you did is a most heinous crime in the military context and it is far from being a simple breach of discipline. It is both a crime against the physical, psychological and emotional integrity of the victim and against the dignity of the victim as well as a significant attack on our values of respect and trust between fellow service members.
>
> [34] Without minimizing the effects of a sexual assault on any victim, the court finds that a sexual assault in a military context is much more serious than a similar sexual assault in a civilian context because of the impact this sexual assault has on the fundamental principles of cohesion, trust and respect that are needed to ensure a strong and disciplined military force. Simply said, this type of conduct hurts the victim and degrades our operational capability.

Parity

[76] Despite relatively straightforward facts, the recommendations on sentence by counsel are at polar extremes, reflecting the complexity of emotions that underlay the offence. The facts are relatively minor, but assessing the impact of the sexual assault in the military context is not.

[77] Nonetheless, it is a fundamental principle that the sentence imposed be proportionate to the gravity of the offence and the degree of responsibility of the offender, see *R. v. Nasogaluak*, 2010 SCC 6, at paragraph 41. Proportionality means a sentence must not exceed what is just and appropriate in light of the moral blameworthiness of the offender and the gravity of the offence.

[78] The *NDA* has established a structured and military centric approach to sentencing with well-defined objectives and principles. Paragraph 203.3(b) of the *NDA* requires that "a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances."

[79] This principle of sentencing was reinforced by Gleeson J.A., writing for the CMAC in *R. v. Hoekstra*, 2017 CMAC 5, at paragraph 25:

> Prior sentences and sentencing ranges are not binding on sentencing judges. This reflects the individualized nature of the sentencing process. However, where a sentencing judge determines that an appropriate sentence is one that is markedly more lenient or harsh than the sentences awarded in similar circumstances the judge has a duty to address the reasons for the disparity.
>
> [Emphasis added]

[80] What follows are my reasons and concerns with respect to the disparity of the precedents presented.

[81] In making his recommendation on sentence, the prosecution relied upon a significant number of civilian precedents which the Court reviewed. They provide excellent assistance on pivotal points of law, but provide little assistance in the assessment of the specific facts before the court. In most cases, the facts relate to major sexual assaults and in most of the cases, the trial judge employed a starting point of three years' incarceration in assessing the cases.

[82] There were three military precedents; However, the facts of these cases are also much more severe:

(a) *R. v. Rivas,* 2011 CM 2012: was found guilty of sexual assault contrary to section 271 of the *Criminal Code,* and in the third charge, an offence of drunkenness contrary to section 97 of the *NDA.* The facts of that case involved the offender entering uninvited into the victim's room twice and on one occasion performed oral sex on her while she was sleeping. She awoke to him masturbating in her room. The trial judge classified it as a major serious sexual assault. The member was sentenced to a period of nine months' imprisonment.

(b) *R. v. Cooper*, 2018 CM 2014: was found guilty of sexual assault as well as guilty for ill-treating a person who by reason of rank or appointment was subordinate to him. The court found that he groomed his victim, his subordinate throughout a day and evening encouraging him to drink until he was heavily intoxicated. He was also well aware that his subordinate had not slept after having had a duty the night before. When his victim finally went to sleep, he entered his bunk and performed oral sex on him. The factors in *Cooper* were much more aggravating then the case at bar, he showed no remorse and he lied emphatically on the stand. He was given 22 months' imprisonment and dismissal. It was also classified as a major sexual assault.

(c) *R. v. Adams*, 2012 CM 2002: was found guilty of three charges, that is to say, two charges of sexual assault and one charge of drunkenness. This case involved two complainants. A.F. testified that after she retired for the night, she was awoken around 0200 hrs because someone was stroking her hair and upper arm to her elbow. She recognized the

> offender and told him in strong terms to get out. From his lethargic movements and smell, she believed he was intoxicated. She was starting to drift off to sleep again when she heard something from the area of V.S.'s rack.
>
> When V.S retired for the night, she had changed into her sweatpants and a top. She awoke with someone lying on top of her between her legs pinning her down. She pushed the person away, identifying the offender, a shipmate, wearing only his boxer-style briefs. She kicked him off her rack and he landed on the deck. At that point A.F.'s curtain opened and A.F. told the offender to get out. When V.S. got out of her rack, she realized that her pyjama bottoms were not on. She found them, put them on, and demanded to know where the offender's mess was, and she sought him out. She found him awake in his rack, and she kicked and punched him until her strength was gone. She was escorted away by the duty coxswain.

[83] The above courts martial cases provide little assistance to this Court in assessing parity for the facts before the Court. They all constitute more aggravating scenarios and constitute serious sexual assaults. In each case, the actions of the offenders were predatory and reflected some level of premeditation. Based on the *Arcand* analysis, the sexual assaults would all fall into the category of major sexual assaults.

[84] The facts before the Court are somewhat unique in that it was the victim who initiated first contact by kissing the offender. The sexual contact in question was short and the Court cannot speculate as to whether it would have progressed further. The evidence supports the fact that Corporal Cadieux did not enter the all-female tent with a sexual purpose in mind and while he attempted to awake the victim, she kissed him. The Court found that the victim had been asleep and unconscious when this occurred. The offender knew that she had been in a deep sleep and should have taken reasonable steps to ensure she was awake before allowing the situation to develop. The accused was reckless and willfully blind to the fact that R.S. was not fully awake. The transgression before the Court was not calculated, premeditated or executed in the same predatory manner as the cases referred to by the prosecution.

[85] Interestingly, the case most similar to the facts before this court, is the case submitted by the prosecution of *R. v. Steven*, 2016 CM 1013. In the *Steven* case, the prosecution exercised its discretion to pursue charges under section 129 of the *NDA* rather than under section 130 (sexual assault), but the facts are strikingly similar, with the exception that the *Steven* incident occurred on a warship. In that case, the incident also occurred while the members were deployed on an international Exercise.

[86] The *Steven* incident occurred onboard HMCS *Whitehorse* where there was a ship's company of 43 and only 3 females. The three female crew members shared a similar all-female cabin in the forward part of the ship. The complainant was the only female officer onboard and held the position of navigating officer. Similar to the

restrictions placed by CSOR in Jamaica, the warship restricted the access of males to the all-female sleeping quarters. In the Ship Standing Orders AL9 Change 1 Article 2132 entitled "MIXED GENDER IN MESS DECKS/LIVING SPACES" (page 2-72), paragraph 1 stated, "Personnel shall not enter mess decks and any other spaces temporarily designated as sleeping quarters of the opposite sex unless on official business."

[87] While the ship's company were in downtown San Diego celebrating Canada Day, Leading Seaman Steven became seriously intoxicated. When they all returned back to the ship, the victim retired to her cabin and went to bed. She woke up at two o'clock in the morning, disorientated, thinking that the man in her bed was her husband until she realized he wasn't. She becomes alarmed and demands that the person identify himself. After numerous demands, believing it to be the offender, she specifically asked him if he was Leading Seaman Steven, as he then was, to which he agreed. She told him to get out of her cabin, which he did immediately. She provided a victim impact statement almost identical to the one we heard today, leaving no doubt that the incident had an impact on her life. Keep in mind that any sleeping victim who wakes up with someone in their bunk will be traumatized. It is the worst violation that any member could ever feel, so the impact on the victim will always be significant.

[88] In the *Steven* case, the Court noted that despite the pending charges, the member was promoted from leading seaman to master seaman. In a joint submission, the sentence imposed was that of a severe reprimand and a fine in the amount of $3,000. When this Court asked the prosecution why he was proposing such a disparity in sentence when the facts were so similar to the *Steven* case, he was quick to point out that the charges in that case did not include an offence of sexual assault.

[89] Notwithstanding the position of the prosecution, there is no escaping that the facts in the *Steven* case are actually more aggravating than the case before me. In that case, the member secretly entered the all-female sleeping quarters of a warship, in the pitch black, against a strict protocol prohibiting the entrance of males. The offender purposefully and intentionally got into the rack of a commissioned officer, who was significantly higher in rank than he, who was similarly drunk and fast asleep, as the victim R.S. was in this case. In contrast, Corporal Cadieux knocked on the door of the all-female tent and requested permission to enter. In the lighted tent, surrounded by other female members, he attempted to awake the victim.

[90] Although I am not privy to the negotiations that unfolded between counsel in the *Steven* case and I am not questioning the joint submission, the Court must highlight that Master Seaman Steven was not dismissed from the CAF for his conduct, but rather he was promoted.

[91] There has been much debate as to whether lower level sexual misconduct should be charged as sexual assault or as conduct to the prejudice of good order and discipline. That decision is left to the discretion of the Director of Military Prosecutions. However, sentencing requires military judges to adhere to similar precedent in order to stabilize

and set the appropriate expectations for members of the CAF. As such, the Court must assess the facts of a case against the backdrop of similar facts, notwithstanding how they are charged. It is important for the maintenance of discipline in the military context that similar conduct be treated with parity.

[92] As referenced earlier, there is an imperative for military authorities to respond to minor cases of sexual assault in the CAF in a serious manner. The decision itself to proceed with sexual assault charges, rather than charges under section 129 for conduct to the prejudice of good order and discipline sends a very strong message of deterrence and denunciation just by the choice of the charge itself. The panoply of ancillary orders that are automatically triggered when a member is convicted of sexual assault reinforces the messages of deterrence and denunciation.

[93] I agree with the prosecution's approach to proceeding with sexual assault charges in cases similar to that before the Court; however, in attempting to treat similar misconduct in a similar fashion, this Court was compelled to review courts martial precedents for similar conduct, which I gave to counsel earlier.

[94] In the case of *R. v. Lieutenant(N) Pearson*, 2012 CM 1004, the offender pleaded guilty to the lesser offence of assault, and to conduct to the prejudice of good order and discipline under section 129 of the *NDA* for harassment contrary to Defence Administrative Orders and Directives 5012-0. He received a severe reprimand and a fine in the amount of $8,000. He had made inappropriate comments, on multiple occasions, towards the victim that a reasonable observer would conclude were sexual in nature and demonstrated harassing behaviours towards her.

[95] Further, on 22 June 2011, when HMCS *Ottawa* was in port at Pago Pago in the American Samoa, while the victim, junior in rank to him was having a drink of water in the wardroom, the offender approached the victim from behind, placed his face on her neck, and then proceeded to put his hand down under her shorts and undergarments, reaching the beginning of her pubic hair. As this was occurring, the victim felt extremely uncomfortable to the point where she just froze up. After a few seconds, a female officer arrived in the wardroom and seeing the offender's behaviour and the victim visibly in distress, she said loudly to the offender, "Stop being so creepy" or words to that effect. The offender backed off and removed his hand from her pants; he then left the wardroom.

[96] In assessing the appropriate sentence, the military judge in *Pearson* relied upon precedent in the courts martial decisions of: *Able Seaman G.G. Bernier v Her Majesty The Queen*, 2003 CMAC 3; *R. v. Master Corporal J.E. Hopkins*, 2004 CM 3015; *R. v. Warrant Officer Quirk*, 2006 CM 1023; *R. v. ex-Warrant Officer J.A.G. Deschamps*, 2009 CM 1013; *R. v. MacDonald*, 2010 CM 2018; *R v Amirault*, 2011 CM 2017; and *R v Rayment*, 2012 CM 1003, as they provide an adequate range of sentences.

[97] In the case of *Amirault*, the accused was found guilty of sexual assault contrary to section 271 of the *Criminal Code*. The underlying facts revealed that the

complainant, a female bombardier, was taking part in an exercise with her unit in the Petawawa training area. As part of her reconnaissance duties, she was sitting by herself in the backseat of a military vehicle when the accused approached her. They engaged in small talk before he put his hand on her left thigh and massaged her thigh up to the region of her groin and groped her vaginal area over her combat clothing. She was stunned and shocked, laughed nervously and brushed his hand away with her own hand. Then he reached out and touched her breast area inside her outer clothing, but over her T-shirt. He finally stopped when she became more forceful and aggressive in pushing him away. He chuckled and stated that "both of them could get in trouble for this." The incident lasted approximately five minutes. She felt unsafe and went elsewhere in order to be around other people. He was found guilty of sexual assault and sentenced to a severe reprimand and a fine of $8,000.

[98] In the case of *MacDonald*, the offender was a sergeant. The victim was a master corporal working for the offender and training to be his chief clerk in Afghanistan.

[99] After a day of drinking in the barracks, the victim fell asleep on one of the couches and slept for an unknown period of time. She was awakened by her legs being moved, placed on someone's lap and rubbed, her breasts and thorax being touched from the outside of her jacket. She then felt her jacket being unzipped and hands rubbing up and down her upper body and her stomach. The offender kept rubbing her legs and body and touched her over her shorts in her vagina area. The victim was still not awake and was confused and pushed him away.

[100] When she woke up, he asked if she wanted him to rub her legs and her "pussy." She then felt his hand under her shorts and underwear and his fingers on the exterior of her vagina. Now fully awake and realizing what was happening, she got up, hit him on the head, punched him, then jumped up and ran up the stairs to her room.

[101] While the victim was running away, the offender threatened to send her back to her unit, told her she was going to lose her rank, her career was over and that she would no longer be deploying. She was distraught and felt betrayed. The offender was her supervisor and she was about to deploy to Afghanistan with him. Ultimately the chain removed the offender from the deployment and kept the victim as part of the deployed team.

[102] The court sentenced the offender, Sergeant MacDonald to a severe reprimand and a fine in the amount of $4,500.

[103] This Court also noted the CMAC case in *Able Seaman G.G. Bernier v Her Majesty The Queen*, 2003 CMAC 3, where the appellant appealed his convictions for two counts of assault and one count of conduct to the prejudice of good order and discipline involving sexual harassment, which also involved minor level touching. He also appealed his sentence of reduction in rank to that of able seaman and a fine in the amount of $1,500. And in that case, Ewaschuk J.A. for the CMAC said that he felt:

> [13] [T]he Trial Judge erred in law by not considering the appropriateness of a severe reprimand coupled with a fine. In the circumstances, I am satisfied that the appropriate sentence for the non-violent assaults and sexual harassment will be a severe reprimand and a $5,000.00 fine. Accordingly, the appeal against sentence will be allowed.

[104] Similarly, in 1994, the CMAC overturned the case of *R. v. Page*, 1994 CM 29 where the accused was found guilty of sexual assault and sentenced to dismissal. The CMAC found that it was actually "a welcome" sexual assault. I'm not sure that is technically possible. However, for the basis of comparison with the facts before the court, the conduct was similarly on the low level and CMAC found the punishment of dismissal to be too severe and overturned the sentence.

[105] The current climate and approach to taking sexual misconduct seriously is long overdue. If anybody had any question as to the veracity of the content in Madame Deschamps's report, the review of the sentences imposed in the above cases is evidence that the CAF has not been taking sexual assault and sexual misconduct seriously enough. However, the efforts of the CAF to hold all members accountable for all types of sexual misconduct needs to be appropriately balanced across an acceptable sphere of punishments. For example, lower levels of sexual assault which might not be pursued within the civilian criminal justice system are nonetheless important to address in the CAF because of their significant prejudice on multiple levels. The reason being is that if the CAF can control the minor misconduct, then the more serious misconduct will be pre-empted.

[106] However, in taking this approach, it is absolutely imperative that courts not conflate all types of sexual misconduct into the same grouping with respect to sentencing. Institutional attempts to provide a one-size-fits-all response sentence are counterproductive and serve as a disincentive for anyone to step forward to report. We must all be cognizant of the fact that flexibility, discretion and good judgement are all key to eliminating harmful conduct. Importantly, it is imperative that any sentence imposed by the court reinforces the fundamental principle set out at paragraph 203.3(b) of the *NDA* that "a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances."

Accounting for relevant aggravating or mitigating circumstances

[107] In the military justice system, under section 203.3 of the *NDA*, in imposing a sentence, the court shall take into consideration a number of principles relevant to the case. Firstly, the Court shall increase or reduce its sentence to account for any relevant aggravating or mitigating factors relevant to the offence or the offender.

Aggravating factors

[108] After hearing the submissions of counsel, the Court highlights the following aggravating factors for the record:

(a) EXCON – The offender held a position in EXCON, as a staff member and was aware of the great efforts that the chain of command had made to remind everybody of the concerns identified in Operation HONOUR. As part of the EXCON staff, the offender had a responsibility of upholding those guidelines. Earlier that evening, the offender had been warned to be cautious with his behaviour.

(b) Fraternization rules – The chain of command set in place rules and protocols that prohibited any type of fraternization between the members and they set up an all-female tent in furtherance of this goal. Yet Corporal Cadieux still entered the all-female tent and engaged in passionate kissing recklessly, in flagrant disregard to the policy.

(c) Breach of trust –R.S. was a sister-in-arms to Corporal Cadieux and on her first international deployment. He owed her the same duty that he owed to his male comrades to ensure she was protected when she was vulnerable. As an example, just as he thanked MWO Moureau for taking away the keys from him when he wanted to drive drunk, he owed R.S. a similar duty if he thought she was going to do something she wouldn't normally have done.

(d) Vulnerable and sleeping – R.S. had a reasonable expectation of privacy as she was asleep in her bed, in her workplace.

(e) Deployed context – CAF members are expected to be on a heightened level of discipline when deployed outside of the country. With respect to the drunkenness charge, the offender was mentoring other foreign nationals and was visibly drunk and obnoxious in their presence.

(f) Impact on the victim – The court has already discussed this earlier in this decision.

Mitigating factors

[109] After hearing the submissions of counsel, the Court highlights the following mitigating factors for the record:

(a) Geographical restrictions – the offender has basically been under house arrest for much of the last four years due to the restrictions that have been placed upon him.

(b) Stress – The offender's social worker identified the significant stress that he suffers from, which I note is similar to the stress that R.S. has

suffered. The court recognizes that this journey has not been easy and it gives him significant credit for that.

(c) Genuine remorse – During the sentencing hearing Corporal Cadieux expressed genuine remorse.

(d) Prior service – Corporal Cadieux has served his country well and contributed meaningfully on two international deployments on behalf of the CAF.

Moderation

[110] Also, under the principles of sentencing set out in section 203.3 of the *NDA*, which means an offender should not be deprived of liberty by imprisonment or detention if less restrictive sanctions would apply.

Any indirect consequences of the finding of guilty or the sentence should be taken into consideration.

[111] Defence counsel made extensive submissions on the indirect consequences of the finding and the sentence of the charges before the Court. There is no escaping the fact that having been found guilty of sexual assault, in accordance with section 196.14 of the *NDA*, Corporal Cadieux must submit samples of his DNA for forensic analysis. Further, in accordance with section 227.01 of the *NDA*, he will be ordered to comply with the *Sex Offender Information Registration Act* for 20 years. The courts have no discretion with respect to these ancillary orders.

[112] Defence strongly argued that the facts of this case do not merit the sentence of dismissal. This principle was reinforced by the CMAC in the case of *Page*, where it found that dismissal for a minor sexual assault was too severe.

[113] This court also thinks it is important to distinguish this case from that of *Cooper*. As the presiding judge in *Cooper*, I had no hesitation in recommending dismissal. In that case, not only was the gravity of the sexual assault much more severe, but the offender in that case did not accept responsibility nor did he show any remorse. When a judge considers whether to consider dismissal as a punishment, these factors are closely reviewed.

[114] In addition, based on the evidence before the Court, the expectation at this time is that the offender will be released from the CAF, based upon either his diagnosed medical conditions or following an ongoing administrative review.

[115] Not only does the evidence not support the judicial punishment of dismissal, it runs the risk of complicating the offender's ongoing medical and administrative reviews. Without the proper basis, it is improper for the court to impose a sentence that circumvents these processes simply to send a strong message of deterrence.

Importantly, in this case, the imposition of such a penalty could jeopardize the offender's release benefits or any annuity he might be entitled to for a medical release.

Absolute discharge

[116] One of the new powers set out in the *NDA* is the ability of a military judge to direct that a member, who either pleaded guilty or is found guilty of an offence, be discharged absolutely. Defence argued that the absolute discharge is appropriate for the facts of this case. The prosecution argued strenuously against it.

[117] There is a judicial test set out by the British Columbia Court of Appeal in *R. v. Fallofield* (1973), 13 C.C.C. (2d) 450 (BCCA) to guide judges in considering whether the imposition of an absolute discharge is appropriate. It sets out a number of factors that should be considered. When I applied the factors to this case, the court concluded that it is eligible to be considered:

[118] Sections 203.8 of the *NDA* provides:

> **Absolute discharge**
>
> 203.8(1) If an accused person pleads guilty to or is found guilty of an offence — other than an offence for which a minimum punishment is prescribed by law or an offence punishable by imprisonment for 14 years or for life — the service tribunal before which the accused appears may, if it considers it to be in the accused person's best interests and not contrary to the public interest, instead of convicting the accused person, direct that they be discharged absolutely.
>
> **Effect of discharge**
>
> (2) If a service tribunal directs that an offender be discharged absolutely of an offence, the offender is deemed not to have been convicted of the offence, except that
>
> (a) they may appeal from the determination of guilt as if it were a conviction in respect of the offence;
>
> (b) in the case of a direction to discharge made by a court martial, the Minister may appeal from the decision not to convict the offender of the offence as if that decision were a finding of not guilty in respect of the offence; and
>
> (c) the offender may plead *autrefois convict* in respect of any subsequent charge relating to the offence.
>
> **References to section 730 of *Criminal Code***
>
> (3) A reference in any Act of Parliament to a discharge under section 730 of the *Criminal Code* is deemed to include an absolute discharge under subsection (1).

[119] Section 730 of the *Criminal Code* concerns absolute and conditional discharges. It reads in part as follows:

Conditional and absolute discharge

730 (1) Where an accused, other than an organization, pleads guilty to or is found guilty of an offence, other than an offence for which a minimum punishment is prescribed by law or an offence punishable by imprisonment for fourteen years or for life, the court before which the accused appears may, if it considers it to be in the best interests of the accused and not contrary to the public interest, instead of convicting the accused, by order direct that the accused be discharged absolutely or on the conditions prescribed in a probation order under subsection 731(2).

[. . .]

Effect of discharge

730 (3) Where a court directs under subsection (1) that an offender be discharged of an offence, the offender shall be deemed not to have been convicted of the offence except that

[. . .]

Where person bound by probation order convicted of offence

730 (4) Where an offender who is bound by the conditions of a probation order made at a time when the offender was directed to be discharged under this section is convicted of an offence, including an offence under section 733.1, the court that made the probation order may, in addition to or in lieu of exercising its authority under subsection 732.2(5), at any time [. . .] take action under that subsection, revoke the discharge, convict the offender of the offence to which the discharge relates and impose any sentence that could have been imposed if the offender had been convicted at the time of discharge, and no appeal lies from a conviction under this subsection where an appeal was taken from the order directing that the offender be discharged.

[120] The British Columbia Court of Appeal in *Fallofield* came to a number of conclusions about this section of the *Criminal Code* which have subsequently been adopted by the Saskatchewan Court of Appeal in *R. v. Anderson*, [1982] S.J. No. 577 and *R. v. Sorenson*, [1994] S.J. No. 24. In *Fallofield*, the Court set out the guidelines for determining when a discharge is appropriate as follows at paragraph 21:

> (1) The section may be used in respect of *any* offence other than an offence for which a minimum punishment is prescribed by law or the offence is punishable by imprisonment for 14 years or for life or by death.
>
> (2) The section contemplates the commission of an offence. There is nothing in the language that limits it to a technical or trivial violation.
>
> (3) Of the two conditions precedent to the exercise of the jurisdiction, the first is that the Court must consider that it is in the best interests of the accused that he should be discharged either absolutely or upon condition. If it is not in the best interests of the accused, that, of course, is the end of the matter. If it is decided that it

> is in the best interests of the accused, then that brings the next consideration into operation.
>
> (4) The second condition precedent is that the Court must consider that a grant of discharge is not contrary to the public interest.
>
> (5) Generally, the first condition would presuppose that the accused is a person of good character, without previous conviction, that it is not necessary to enter a conviction against him in order to deter him from future offences or to rehabilitate him, and that the entry of a conviction against him may have significant adverse repercussions.
>
> (6) In the context of the second condition the public interest in the deterrence of others, while it must be given due weight, does not preclude the judicious use of the discharge provisions.
>
> (7) The powers given by s. 662.1[now s. 730(1)] should not be exercised as an alternative to probation or suspended sentence.
>
> (8) Section 662.1 [now s. 730(1)] should not be applied routinely to any particular offence. This may result in an apparent lack of uniformity in the application of the discharge provisions. This lack will be more apparent than real and will stem from the differences in the circumstances of cases.
>
> [Emphasis in original]

Is a discharge available for the offence of sexual assault?

[121] No minimum punishment is prescribed for the offence of sexual assault. The maximum punishment for the offence of sexual assault is less than 14 years where the Crown proceeds by indictment. In the CAF military justice system, the prosecution doesn't draw a distinction between indictable or summary conviction offences. However, in his submissions, the prosecution did not propose anything close to the upper range and with the maximum punishment being less than 14 years, the offence is eligible to be considered. Next, I will consider whether it is in the interests of the accused to be discharged and whether it would be contrary to the public interest to grant such a discharge.

Is it in the best interest of the accused?

[122] This concept has been considered to presuppose that "the accused is a person of good character, without previous conviction, that it is not necessary to enter a conviction against him in order to deter him from future offences or to rehabilitate him, and that the [. . .] conviction against him may have significant [. . .] repercussions." (see *Fallofield* at paragraph 21). Although Corporal Cadieux has a previous record on his conduct sheet, because it was entered after the incident before the court occurred, it is not to be considered. The evidence supports the fact that the incident before the court is an aberration and the court does not need to ensure that the conviction stands in order to deter Corporal Cadieux from future offences or to rehabilitate him.

Not contrary to the public interest:

[123] "Not contrary to the public interest" is a concept which requires the consideration of the need for the deterrence of others from criminal offences or general deterrence.

[124] The sexual assault was minor, brief and the evidence suggests that it was out of character for the offender. However, on the facts of the case before me, it fails most predominantly at the public interest level.

[125] Non-consensual sexual touching of another person is a criminal offence and when done within the military context, even minor touching is aggravating. In this case, the non-consensual sexual touching occurred when the victim was vulnerable and asleep. Others must be deterred from acting in a similar manner given the prevalence of incidents identified under Operation HONOUR.

Assessment of sentencing options

[126] On the facts before the Court, the prosecution argued that general deterrence and denunciation were the primary objectives for sentencing. This Court actively weighed and analyzed, at length, the relevant factors to ensure proportionality. Proportionality is determined both on an individual basis and by comparison with sentences imposed for similar offences committed in similar circumstances. Individualization and parity of sentences must be reconciled for a sentence to be proportionate" (see *R. v. Lacasse*, [2015] 3 SCR 1089 at paragraph 53). This is imperative to ensure confidence in the credibility of the court martial system, particularly in light of the extreme variance in the sentences proposed by counsel.

[127] The punishments available to a court martial are set out in subsection 139(1) of the *NDA* which is found within Division 2 Service Offences and Punishments. The prosecution is seeking a 9 to 14 month period of imprisonment with a dismissal from Her Majesty's service. I have already decided that dismissal is not appropriate based on the facts before the court. The punishments recommended by the prosecution are both situated within the most serious of punishments in the *NDA* which are reserved for the more abhorrent acts.

[128] Given the ongoing prevalence of sexual misconduct in the CAF that must be denounced and deterred, I do believe a custodial sentence for offenders must be considered. The punishment of detention or imprisonment is included at paragraph 139(1)(f) of the *NDA*.

[129] The facts of this case are somewhat unique from civilian case law, but as discovered when I canvassed similar cases that have occurred recently within the CAF, it becomes apparent that a strong message of deterrence must be sent and the earlier sentences the court reviewed in case law are not the measure to be followed. I agree

with the prosecution that a custodial sentence is the best way to send the message as we move forward.

[130] When the court works its way through the mitigating and aggravating factors, the fact that Corporal Cadieux has had geographical restrictions placed upon him for almost four years is a factor that goes very strongly in his favour to mitigate sentence. Although he has had the support of the JPSU and his health care providers in this area, as his social worker very appropriately stated, he needs to have a sense of purpose each day and that more appropriately is accomplished through meaningful work or schooling. His life has been on hold for longer than one should ever have to wait, so it must be given significant credit. From a public interest perspective, members who are subjected to strict conditions must be afforded some recognition for the impact they have had on not just them, but their families.

[131] With respect to deterrence and denunciation, it is important to recall that Master Corporal Petrenko testified that during Operation HONOUR training, Corporal Cadieux is referred to as an example. He testified that, at first, they did not refer to him by name, but now they are all advised, "Don't pull a 'Cadieux'." Although this statement was not offered up in mitigation, it is important to be aware that the mere fact that Corporal Cadieux was charged with sexual assault and convicted and has been made to account has had a clear deterrent effect. So there are two levels of deterrence that the Court must think about: specific deterrence relates to him specifically; general deterrence relates to his unit and to the CAF at large. The fact that people are saying, "Don't pull a 'Cadieux'" means that the deterrence on the general level is recognized. With respect to specific deterrence, the evidence also clearly suggests that it has been met.

[132] Having considered all of the above factors, the range of precedents provided, the court is of the view that a period of detention of 60 days is the appropriate sentence.

Suspension of the execution of punishment

[133] Provisions that relate to the suspension of the execution of punishment are found in section 215 in Division 8 of the *NDA*. Division 8 sets out the provisions applicable to imprisonment and detention. Section 215(1) of the *NDA* reads as follows:

> 215 (1) If an offender is sentenced to imprisonment or detention, the execution of the punishment may be suspended by the service tribunal that imposes the punishment or, if the offender's sentence is affirmed or substituted on appeal, by the Court Martial Appeal Court.

[134] I thank the prosecution for the extensive submissions he made on the utility of the suspension provisions in the *NDA*. They do not replicate suspended sentences in the civilian criminal justice system. As such, a court must avoid conflating an order for suspension of execution of punishment of detention into a distinct form of punishment that does not exist within Division 2 of the *NDA*. In fact, that provision for suspension is not even supposed to be considered by a military judge unless he or she is considering a sentence of detention or imprisonment.

[135] The *NDA* does not contain any particular criteria for the application of section 215. To this day, courts' martial interpretation of its application has been established by various military judges in other cases. Similarly, the prosecution provided the Court with parliamentary information with respect to Bill C-15, the first independent review by the Right Honourable Antonio Lamer, regarding the use of suspension, as well as guidance on how it should be applied.

[136] To obtain the suspension of a punishment of imprisonment or detention, the offender must demonstrate, on the balance of probabilities, that his or her particular circumstances, justify such a suspension. As we saw within the references of the prosecution, it must be for the offender's welfare. If the offender has met this burden, the court must consider whether a suspension of the punishment of imprisonment or detention would undermine the public trust in the military justice system. This two-step test is illustrated in decisions rendered in *R. v. Boire*, 2015 CM 4010 and *R. v. Caicedo*, 2015 CM 4020, in which Pelletier M.J. relied on a test first enunciated by d'Auteuil M.J. in *R. v. Paradis*, 2010 CM 3025, paragraphs 74 to 89.

[137] Based on the diagnostic assessment and all the evidence before the Court, there is sufficient information to suggest that Corporal Cadieux might need to be medicated if he is detained or imprisoned. His last experience confirms that a relapse in his mental health is not simply speculative, in fact it presents a real possibility.

[138] On his own initiative and through the support and encouragement of his brother, his brother-in-arms, Master Corporal Petrenko, his common-law spouse, his social worker, and his counsellor at JPSU, he has been able to decrease or stop taking the medication that caused problems for him. He has spent the last two years turning his life around.

[139] Based on the facts before this Court, it seems nonsensical for me to send an already reformed offender to prison, four years after being charged when he has had no further disciplinary problems. The risk to the member's ongoing positive rehabilitation is simply not worth it. A custodial sentence is the message of deterrence and few members who will be sentenced to detention will have the personal circumstances that I described very detailed in this decision that would substantiate a suspension of punishment.

[140] I am of the view, in the unique circumstances of this case, that it is not contrary to the public interest to suspend the detention.

DNA

[141] In accordance with section 196.14 of the *NDA*, considering that the offence for which I have passed sentence is a primary designated offence within the meaning of section 196.11 of the *NDA*, I order, as indicated on the attached prescribed form, that

the number of samples of bodily substances that is reasonably required be taken from Corporal Cadieux for the purpose of forensic DNA analysis.

Sex offender registry

[142] In accordance with section 227.01 of the *NDA*, and considering that the offences for which I have passed sentence are designated offences within the meaning of section 227 of the *NDA*, I order Corporal Cadieux, as per the attached regulation form, to comply with the *Sex Offender Information Registration Act* for 20 years.

Consideration of weapons prohibition order

[143] Pursuant to paragraph 147.1(1)(a) of the *NDA*, since Corporal Cadieux was found guilty of sexual assault which carries a ten-year maximum sentence of imprisonment and the charge itself constitutes a violent offence, this Court must consider whether it is desirable, in the interests of the safety of the person or of any other person, to make a weapons prohibition order. Based on the position taken by the prosecution, I have also considered whether this is an appropriate case for a weapons prohibition order and in my opinion, such an order is neither desirable nor necessary for the safety of the offender or of any other person in the circumstances of this trial.

[144] The Court is going to impose a penalty of 60 days' detention and a severe reprimand. Just for his personal circumstances in the exhaustive reasons I provided, I have decided that that the sentence of detention should be suspended, but the message here is that anybody engaged in anything similar on a sleeping colleague, the starting point now is 60 days. And I hope that is the message that gets out. It is not a conflated sentence. The sentence is unique to him personally and very few people that will come before me will have a similar unique set of circumstances. It recognizes his mental frailties, but also the fact that he has displayed such significant strengths. To have that powerful combination is rare. So I have confidence in him that he can move forward in a very responsible way.

Explanation of the suspension order and consequences of breaching its conditions

[145] The suspension order lasts for one year.

[146] Before I pass sentence, I need to ensure that you understand the proposed order and the consequences that will flow if you fail to comply with the order or the conditions imposed.

[147] Firstly, I will explain the conditions of the order and bring your attention to the following:

(a) *NDA*, section 101.1 – Failure to comply with conditions. If you fail to comply with the order, you may be found guilty of an offence and on

conviction, you could be liable to imprisonment for less than two years or to less punishment;

(b) *NDA*, subsection 215.2(1) – Hearing into breach of conditions. On application by the Director of Military Prosecutions, the court may conduct a hearing to determine if you breached a condition imposed by the court under section 215. If this should occur, you will be provided full opportunity to make representations;

(c) If the court determines that you have breached a condition, the court may:

i. revoke the suspension of a punishment and commit you to serve the sentence of detention; or

ii. vary any conditions imposed under subsection 215 (3) or section 215.1 and add or substitute other conditions as the court sees fit.

(d) QR&O 113.08 – Notice of application. You may make an application to the Chief Military Judge, under section 215.1 of the *NDA*, to vary a condition of the order or to substitute another condition for such a condition; and

(e) QR&O 113.10 – Representation of offender. You are entitled to free legal counsel by the Director of Defence Counsel Services with respect to an application under section 215.1 of the *NDA* to vary a condition of the order or to substitute another condition. Please talk to your counsel about any concerns you may have with this suspension order, either now or in the future. This will stay in place for a period of one year. In the event that you regress, you start doing anything stupid, you breach any of the conditions then you will be back before me and you could be going to prison.

Final comments

[148] Corporal Cadieux, you are congratulated on the steps you have taken to turn your life around and rehabilitate yourself. You are surrounded by a lot of love. You have many people to thank, including: your brother, your comrade-in-arms Master Corporal Petrenko; your partner Ms Woods; all your health care providers. You are only 29 years of age and you have your whole life and career ahead of you.

[149] Your efforts to date have demonstrated that no matter what challenges you face, you are indeed a strong man and you are well positioned to earn and enjoy rewarding opportunities that lie ahead in both your career and personal life. The Court is encouraged by your fortitude as you move forward.

Conclusion

[150] The punishment of 60 days' detention sends a message that this type of conduct, particularly directed towards a vulnerable sleeping colleague, will not be tolerated in the CAF.

[151] The suspension of the sentence of detention is unique to your personal circumstances and should not be understood to be the norm in sentencing for this type of offence. The consideration of suspension of your punishment reflects your personal circumstances and the concern for your personal welfare moving forward. In short, there is no doubt the public interest test is met because of the significant credit that you have earned from your rehabilitative efforts and the remorse demonstrated in your humble and heartfelt apology to R.S. Your personal circumstances and your personal welfare should be treated with privacy at this point. However, I do not believe it is effective to medicate simply in order to send you to prison to send a message. In your case, it only elevates your risk of a relapse. The suspension of the punishment is also consistent with the principle of moderation and addresses the indirect consequences that would flow from the sentence.

[152] Although you will no longer be part of the CSOR, I will remind you of one of the lines in its ethos that I hope will help steer you as you venture forward. "I know that success in battle tomorrow is built on discipline, commitment and trust today." You do not know where your battleground will be or what you will be doing or where you will be, but if you continue to maintain your focus and discipline as you have in the last two years, you will endure and find success. Even as a civilian, I encourage you to live and stay true to your CSOR motto and ethos.

FOR THESE REASONS, THE COURT:

[153] **SENTENCES** Corporal Cadieux to 60 days' detention and a severe reprimand.

[154] **ORDERS**, pursuant to *NDA*, section 196.14, that the number of samples of bodily substances that is reasonably required be taken from Corporal Cadieux for the purpose of forensic DNA analysis.

[155] **ORDERS**, pursuant to *NDA*, section 227.01, Corporal Cadieux to comply with the *Sex Offender Information Registration Act* for 20 years.

[156] **SUSPENDS** the execution of the sentence and imposes the associated conditions under *NDA*, paragraph 215(2). Those conditions will remain in force for one year when his sentence is deemed to be wholly remitted, subject to paragraph 215(4) of the *NDA*.

Counsel:

The Director of Military Prosecutions as represented by Major C. Walsh

Mr D. Hodson, Defence Counsel Services, Counsel for Corporal S. Cadieux