



COURT MARTIAL

Citation: *R. v. Morton*, 2017 CM 4003

Date: 20170214

Docket: 201614

Standing Court Martial

5th Canadian Division Support Base Gagetown
Oromocto, New Brunswick, Canada

Between:

Her Majesty the Queen

- and -

Master Corporal K.P. Morton, Offender

Before: Commander J.B.M. Pelletier, M.J.

REASONS FOR SENTENCE

(Orally)

INTRODUCTION

[1] On the late morning of 12 June 2015, a Coyote Armoured Vehicle was heading down a track on Canadian Forces Base Gagetown (CFB) when it came upon a fallen tree blocking its progression at almost a right angle. Private Tanner was driving. By then she had approximately 45 to 50 minutes of formal experience driving that vehicle, being on her first day of practical instruction on the Coyote as part of her Development Period 1 (DP 1) Armoured Crewman course. Above her in the gunner's position was her course mate Private Wuerch, who had his first experience driving the vehicle earlier that morning. Commanding the vehicle was Master Corporal Morton, her course instructor, in the crew commander position. Upon sighting the obstacle, the vehicle was brought to a halt. Master Corporal Morton told Private Tanner that they were going to turn around, but then suggested that she could drive through the fallen tree if she wanted to. Following a short discussion, Private Tanner agreed and positioned the vehicle close to the tree, which trunk reached the upper portion of the hull of the vehicle, to a point where the wire cutter

in front of her was in contact with the tree. Private Wuerch activated his personal video camera to film what he thought would be the vehicle smashing through the tree. What occurred next was unforeseen and tragic. As Master Corporal Morton told Private Tanner to press on the accelerator, the vehicle surged forward, the fallen tree severed the wire cutter and violently impacted Private Tanner's head, causing significant injuries to her face.

[2] As a result of this incident, Master Corporal Morton faced three charges under the Code of Service Discipline: the first under section 130 of the *National Defence Act (NDA)* for causing bodily harm by criminal negligence, contrary to section 221 of the *Criminal Code*; the second under section 124 of the *NDA* for negligent performance of a military duty and the third under section 129 of the *NDA*, for committing an act to the prejudice of good order and discipline.

[3] After consenting to the introduction of several exhibits and hearing two witnesses testify at the trial, I granted Master Corporal Morton's request to change his plea of not guilty on charges two and three to a plea of guilty. The prosecution subsequently withdrew the remaining charge under section 130. Having accepted and recorded the guilty plea in respect of charges two and three on the charge sheet, the Court found Master Corporal Morton guilty of those charges under sections 124 and 129 of the *NDA*.

[4] I now need to determine and impose an appropriate, fair and just sentence.

FACTS AND CIRCUMSTANCES

[5] The facts relevant to the determination of sentence were either admitted in exhibits or through witnesses heard during the trial before the plea and at the sentencing hearing. The most significant item of trial evidence is the video footage of the incident obtained from Private Wuerch's camera, which allows the court to understand the circumstances of the incident I have described above. In addition, I have considered all of the evidence heard and received at the sentencing hearing, including the Statement of Circumstances read by the prosecutor, admitted as accurate by the offender, as well as the testimony and documents received as exhibits. Some of this evidence is worth mentioning specifically.

[6] I have received in exhibit an agreed statement of facts which explains the extent of the injuries suffered by Private Tanner in the incident, the medical treatment she has undergone since, a description of further treatment which may be required, and her prognosis for the longer term. For the purpose of the imposition of sentence, it is not contested that the offences resulted in life-altering injuries. Private Tanner has been posted to an Armoured Regiment in Edmonton and has been recently promoted to the rank of corporal. She testified at trial and remained present for the sentencing hearing. I have been impressed by the courage she has shown, the efforts she invested in moving forward with her life as well as by the forgiveness she expressed in relation to Master Corporal Morton, despite the traumatic experience she has gone through.

[7] Lieutenant-Colonel Hutt, the Commandant of the Royal Canadian Armoured Corps School and Commanding Officer (CO) of the offender, explained at the sentencing hearing that Master Corporal Morton has been removed from his previous duties as crew commander and instructor following the incident. He has not been crew commander since but has instructed at the school for a period of one week shortly after the incident. Lieutenant-Colonel Hutt explained his expectations regarding instructors and crew commanders, emphasizing the importance of sound judgement and care for safety, especially in relation to students. In addition from removal from previous duty at the school, Master Corporal Morton faced the remedial measure of counselling and probation (C&P) for a period that has now been completed. The Commandant views the incident of 12 June 2015 as an unfortunate demonstration of a significant failure by Master Corporal Morton to exercise the judgement and leadership required of an instructor and crew commander. As a result, he has lost confidence in the ability of Master Corporal Morton to serve in those capacities and has employed him in other duties, at times with other units at CFB Galetown. He said it would be difficult for him to regain trust in Master Corporal Morton but not impossible, although it would take a lot of time. Three annual Personnel Evaluation Reports (PER) covering the period of 1 April 2013 to 31 March 2016 were produced, showing a significant drop in the evaluation of the performance and potential of Master Corporal Morton following the incident in June 2015.

[8] The defence called Master Corporal Morton on sentencing. He expressed his regrets for what has happened and delivered an emotional apology directly to Corporal Tanner in court, saying how sorry he is for what she has had to endure and still has to go through because of his actions.

[9] Master Corporal Morton also described his family situation. His wife is serving as a medical technician here in Galetown but is currently on a five-month career course at CFB Borden until May, a requirement for a promotion to her next rank. Master Corporal Morton is therefore currently sole-parenting his two young children aged two and four. Although he can count on strong family support from in-laws and parents in Saint John, he said his children are more at ease in his company than the company of their grandparents.

[10] Master Corporal Morton testified about the guilt he felt as a result of the incident and how it has affected his life since. He described how his family life was affected at home by his fear of misjudging a potentially dangerous situation which would result in injuries or death to his children. He described how his feelings of guilt and shame led him to draw up a plan to commit suicide, thoughts which he did not act on given his concern for his kids which he would leave behind. He was hospitalized after sharing his suicidal thoughts with mental health professionals. He is currently seeing a psychiatrist and a social worker for regular psychotherapy. He is under medication for treatment of the symptoms related to his mental health condition.

[11] Dr. Walker is the treating psychiatrist of Master Corporal Morton. He testified at the request and consent of his patient to provide details on the mental condition, treatment and prognosis for Master Corporal Morton, who is suffering from Major

Depressive Disorder and has recently been diagnosed as suffering from Post-Traumatic Stress Disorder (PTSD) as a result of the incident of June 2015. Dr. Walker explained precisely his observations and the treatment plan he designed with Master Corporal Morton, who he sees once every three to four weeks since June 2016. Dr. Walker explained his role as part of a group of three healthcare professionals, including the psychotherapist who sees Master Corporal Morton the most often. He stressed the importance of establishing a rapport and maintaining continuity of care to increase the chances of success and return to wellness. He discussed the remorse Master Corporal Morton felt in relation to the incident of June 2015 and provided insight on a number of symptoms suffered by Master Corporal Morton, and his approach in treating them. He also explained suicidal ideations suffered by Master Corporal Morton and how his children are a major preventative factor, despite being also a source of guilt due to doubts and anxiety experienced about parenting abilities. Finally, Dr. Walker explained the circumstances which led him to come to diagnose Master Corporal Morton with PTSD recently, and explained how difficult it is to simulate such a condition.

[12] Additional information was obtained from Master Corporal Morton's therapist, Lieutenant(N) Donovan, by way of a letter. She describes the symptoms experienced by Master Corporal Morton as a result of the stress caused by the incident of June 2015 and its aftermath, including the disciplinary process and current court proceedings. She confirmed the guilt and shame he feels and how these feelings manifest themselves. She explained her treatment plan for the recently diagnosed condition of PTSD and expressed her views as to the negative impacts that the incarceration of Master Corporal Morton would have on the efforts he will need to make to get better.

POSITION OF THE PARTIES

Prosecution

[13] The prosecution submits that I should impose a sentence composed of the punishments of detention for a period of 90 days and reduction in rank to private, a reduction of one rank given that master-corporal is an appointment and not a rank. The prosecutor stressed the objectives of denunciation and general deterrence, while also submitting that specific deterrence and rehabilitation were considered in his decision to give precedence to the rehabilitative punishment of detention over imprisonment in his submission.

[14] The prosecution further argues that a custodial sentence is required given that the conduct of Master Corporal Morton was not only sufficient for criminal liability but constituted a most egregious case of negligence in commanding an armoured vehicle with an outcome that the offender had the most basic duty to consider and protect against. The prosecutor argues that the reduction in rank is required as this is a textbook case of failure in leadership given the basic responsibility of leaders for the safety of their troops. As for the potential to suspend the punishment of detention, the prosecutor submitted that resources are available to attend to the mental health needs of the offender at the

Canadian Forces Prison and Detention Barracks (CFPDB) in Edmonton and that family support is available to provide care for the children during the offender's absence. The prosecution expressed the view that if the detention is not actually served, it will erode the trust in the administration of military justice.

Defence

[15] As a result of an agreement with the prosecution in relation to the guilty plea and withdrawal of the first charge, defence counsel submitted that he was duty bound to submit that a punishment of detention for a period of 90 days was warranted. However, he added that exceptional circumstances relating to the family and mental health condition of the offender in this case call for the suspension of that period of detention. The defence suggests that the objectives of sentencing in this case can be met without imposing a punishment of reduction in rank, recommending instead a substantial fine of up to \$10,000 which would get the attention of others and allow meeting the objective of deterrence while imposing less financial strain on Master Corporal Morton than the drop in pay consequential to a reduction in rank.

[16] In response to submissions by the prosecution, the defence stressed the consequences of the incident on Master Corporal Morton, who will punish himself forever for what has happened, no matter what sentence is imposed. Acknowledging the importance of the objectives of deterrence and denunciation, defence counsel mentioned the need to ensure that the sentence imposed does not impede the offender's rehabilitation. On the basis of the evidence of healthcare professionals, this would be the case if the sentence of detention is not suspended and if the offender loses his rank. The defence did not try to minimize the egregious circumstances of the offence and its significant impact on Corporal Tanner. I am invited to consider the human element in relation to Master Corporal Morton and be careful not to sentence solely on the basis of the powerful evidence I saw in the video of the incident and the extent of the injuries to Corporal Tanner.

ANALYSIS

Purpose, Objectives and Principles of Sentencing

[17] This case deals with military offences, committed in military circumstances, involving an offender who is serving full time on active service in the Regular Force. In performing my duty to determine the sentence, it is therefore particularly important that I keep in mind the purpose of the military justice system, namely the promotion of good conduct by allowing the proper sanction of misconduct. Sentencing by military tribunals allows discipline, efficiency and morale essential to the operational effectiveness of the Canadian Armed Forces (CAF) to be enhanced, creating conditions essential for mission accomplishment.

[18] This military specificity does not mean that the purposes, objectives and principles applicable to sentencing at courts martial need to be different than those

applicable in the courts of criminal jurisdiction in Canada. The fundamental purpose of sentencing in a court martial is to ensure respect for the law and maintenance of military discipline by imposing punishments that have one or more of the following objectives, referred to at section 718 of the *Criminal Code*:

- (a) to denounce unlawful conduct and the harm done to victims and the community;
- (b) to deter the offender and other persons from committing the same offences, in so doing protect the public, including the CAF;
- (c) to separate offenders from society where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done.

[19] When deciding what sentence would be appropriate, a sentencing judge must also take into consideration a number of principles:

- (a) a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender;
- (b) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating either to the offence or the offender;
- (c) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
- (d) an offender should not be deprived of liberty by imprisonment or detention if less restrictive sanctions may be appropriate in the circumstances; and
- (e) a sentence should constitute the minimum necessary intervention adequate in the applicable circumstances. For a court martial, this means imposing a sentence composed of the least severe punishment or combination of punishments required to maintain discipline, efficiency and morale.

[20] The *Queen's Regulations and Orders for the Canadian Forces* (QR&O) require that the judge imposing a sentence at a court martial considers any indirect consequence of the finding or the sentence and impose a sentence commensurate with the gravity of the offence and the previous character of the offender. Indeed, sentencing is an

individualized process both at courts martial and in the courts of criminal jurisdiction in Canada. I will first comment on the offender, then on the offence.

The offender

[21] Master Corporal Morton is a 30-year-old armoured crewman who was, at the time of the offences, employed as an instructor with the Royal Canadian Armoured Corps School here in Gagetown. He joined the Regular Force in Saint John, NB in October 2005. Following completion of basic training and qualification as a crewman in 2007, he was posted with the Royal Canadian Dragoons in Petawawa. He deployed in Afghanistan for close to seven months in 2009-2010. He was posted to Gagetown in his current role, supporting training in August 2014. Prior to the June 2015 incident, he had been a driving instructor on at least three other DP1 Coyote driver courses.

[22] The evidence reveals that the incident of 12 June 2015 had a significant impact on the military career of Master Corporal Morton, as can be expected given the gravity of the injuries sustained by a student under his care. Master Corporal Morton has not served as a crew commander since. Apart from a period of one week shortly after the incident, he has not been employed as an instructor at the Armoured Corps School; instead being assigned various administrative duties at the School and on base. He was placed on C&P and assessed for a period of six months, although it is difficult to see how some of the conditions of the C&P could be fully monitored if Master Corporal Morton was not employed as an instructor during that period. That formal career measure indicates to me that Master Corporal Morton could validly be concerned about his future with the CAF, as C&P is the last administrative step before a compulsory release. That formal remedial measure, combined with the removal from instructor duties and the content of his 2015-16 PER, would have made it clear to Master Corporal Morton that his chain of command had lost confidence in his abilities.

[23] That situation at work provides context and coherence to the testimony of Master Corporal Morton and the two healthcare professionals who treated him in relation to his symptoms of depression and anxiety. I find the explanations of Dr. Walker to be compelling on the general feelings of guilt felt by Master Corporal Morton, having as source the fear that he could not provide for his family. I accept that Master Corporal Morton felt significant remorse following the incident of June 2015, which is the source of the Major Depressive Disorder he was diagnosed with in March 2016, a few weeks after Master Corporal Morton had been back to military duty following a period of parental leave. It has also been established that Master Corporal Morton has recently been diagnosed with PTSD resulting from the incident, that diagnosis having been arrived at following recognitions of symptoms at a time when Master Corporal Morton had decided to stop his medication by fear that it would prevent him from adequately caring for his children. Even if the diagnosis of PTSD as a medical condition is new in Master Corporal Morton's life, it will soon require treatment, commencing with psycho-education regarding PTSD.

[24] What has an immediate impact on Master Corporal Morton is the situation at home, with his wife away on course until May, during which he is the daily caregiver for two young children. That being said, Master Corporal Morton can benefit from the support of his parents and in-laws as required. However, I have been advised that support from the grandparents involves travel and associated expenses and generates loss of employment income for them.

The offences

[25] To assess the submissions of counsel on sentence the Court has considered the objective seriousness of the offences as illustrated by the maximum punishment that can be imposed. Offences under sections 124 and 129 of the *NDA* are punishable by dismissal with disgrace from Her Majesty's service or less punishment.

[26] The circumstances of the immediate commission of the offences were described earlier. They were conveyed by way of the video of the incident played in court, as well as a number of pictures showing either portions of the incident, the Coyote Armoured Vehicle and the fallen tree involved. I have considered all of the evidence admitted in my analysis of the offences, including the information on the injuries sustained as a result.

[27] Although Master Corporal Morton pleaded guilty to two offences, the act to the prejudice of good order and discipline he admitted committing appears to consist of a violation of the operating instructions for the Coyote Armoured Vehicle, essentially an "owner's manual", prepared by the manufacturer but formatted and issued for use by the CAF on authority of the Chief of the Defence Staff (CDS). This charge is a technical subset of the main offence under section 124 of the *NDA* for negligent performance of a military duty. As agreed by the prosecution, the conduct to be sanctioned for purposes of sentencing is the failure of Master Corporal Morton, as a crew commander, to ensure the safety of Private Tanner, his student driver, when he allowed her to push a tree with the Coyote Armoured Vehicle he was commanding on 12 June 2015.

Gravity of the conduct

[28] As it pertains to the gravity of the conduct, I consider that the actions attempted by Master Corporal Morton on 12 June 2015, in allowing his driver to push a fallen tree with a Coyote Armoured Vehicle, to be much more than simply a marked departure from the expected standard of conduct of a crew commander in the performance of his military duty.

[29] The operating instructions for the vehicle warn operators to exercise caution when approaching obstacles and "avoid striking trees larger than 3 inches in diameter". The fallen tree involved in the incident was approximately 10.5 inches in diameter and had a circumference of approximately 2 feet 9 inches. It was approximately 69 feet long and lay horizontally amongst a number of apparently healthy upright trees, growing in a typical wooded area of moderate density. The fallen tree blocked the track at almost a right angle. It could be observed easily by anyone approaching, as it was quite high in relation

to the ground. When the vehicle was positioned close to the fallen tree, its trunk reached the upper portion of the hull.

[30] Master Corporal Morton was not only a trained crew commander but also an instructor, entrusted with conveying the parameters for the operation of the vehicle to students, especially in those situations where caution is required as provided for in the operating instructions. He should have been able to recognize the situation as unsafe. In addition to the technical knowledge which should have alerted him to an unsafe situation, Master Corporal Morton should have been aware of his specific duty to ensure the safety of his subordinates in relation to the movement of the vehicle, as it was one of the critical tasks expected of him as DP1 course instructor as specified in a document he had signed in February 2015.

[31] It is difficult for me to understand how Master Corporal Morton could act in a way so contrary to the technical knowledge and safety awareness he should have possessed. I believe it should have been obvious to him that a dangerous situation was developing. He had time to consider the situation and make a sound decision to avoid the danger that should have been foreseeable for him as a trained crew commander. It is not as if that fallen tree had appeared on the other side of a crest or a corner in the track. He saw the tree early, the vehicle stopped well ahead of the obstacle and he considered turning around. Yet he chose the worst possible course of action in offering his student, engaged in showing her instructor that she could confidently drive the vehicle, the possibility to attempt to drive through the fallen tree.

[32] Despite what I consider from the images I have seen to be an obviously dangerous situation, I understand how Private Tanner would have been keen to answer positively to her instructor's invitation to attempt driving through the tree. She had had by then less than one hour of experience, she wanted to prove that she had what it takes to succeed in her course and she trusted her instructor to know what was safe. Upon approaching closer, her face was protected from the trunk of the tree only by a quarter-inch thick wire cutter. Yet, she did not hesitate to lunge the vehicle forward without hesitation while her colleague Private Wuerch was filming, also convinced they were going to successfully smash through that tree. This situation of trust is not unique to the military environment: supervisors have been held liable for putting subordinate workers at risk, in the construction industry for instance. Yet the military may involve greater risks due to the unfamiliar nature of the equipment that junior personnel are asked to operate, the habit of obedience instilled in them and the inherently dangerous nature of what members of the military ultimately train for, namely combat.

[33] That makes the role of instructors in relation to safety even more important. The people entrusted to instructors represent the future of the CAF and the Army. They are not just a name and a rank. They are someone's daughter or son, brother, sister, friend and increasingly mother or father. The instructor's efforts in relation to students are aimed at instilling confidence in handling whatever platform, vehicle or equipment they are to be trained on. The moment the trainee acquires that confidence is one of accomplishment for the trainer. It is also a moment of danger as indeed the trainee is then

full of enthusiastic confidence, but is almost empty of practical knowledge, especially knowledge of all of the risks involved in the operation of the equipment. It is at that moment that trainees are most in need of their instructor's vigilance, if only to protect them from themselves. Unfortunately, it is at such a moment that Master Corporal Morton let his students down with dire consequences. The offence constitutes a significant failure in ensuring safety. It also constitutes a significant failure in leadership, given the duty of leaders to consider the safety of subordinates in all of their decisions. That is so even if making the safe decision often involves rejecting suggestions of subordinates who may perceive risk differently than their leaders. Promotion of safety is also very unglamorous, as success is usually obtained through non-occurrence of undefined or misunderstood negative outcomes.

Moral blameworthiness of the offender

[34] In evaluating the gravity of the failures in Master Corporal Morton's conduct, I am aware that I am dealing with an offender who did not intend on hurting anyone. Negligence offences are of a different nature than for instance offences of assault where the offender wilfully applies force to someone, often with the intent to injure. It is important to understand that the conduct of Master Corporal Morton is blameworthy nevertheless. Indeed, in the words of McLachlin, J. as she then was in *R. v. Creighton*, [1993] 3 S.C.R. 3 at page 66:

In a society which licenses people, expressly or impliedly, to engage in a wide range of dangerous activities posing risk to the safety of other, it is reasonable to require that those choosing to undertake such activities and possessing the basic capacity to understand their danger take the trouble to exercise that capacity. Not only does the absence of such care connote moral fault, but the sanction of the criminal law is justifiably invoked to deter others who choose to undertake such activities from proceeding without the requisite caution. [citation omitted]

And at pages 69-70:

In unregulated activities, ordinary common sense is usually sufficient to permit anyone who directs his or her mind to the risk of the danger inherent in an activity to appreciate that risk and act accordingly -- be the activity bottle throwing (as in *R. v. DeSousa*) or a barroom brawl. In many licensed activities, such as driving motor vehicles, there must be a basic amount of knowledge and experience before permission to engage in that activity will be granted (see *R. v. Hundal*). (...)

The criminal law imposes a single minimum standard which must be met by all people engaging in the activity in question, provided that they enjoy the requisite capacity to appreciate the danger, and judged in all the circumstances of the case, including unforeseen events and reasonably accepted misinformation. Without a constant minimum standard, the duty imposed by the law would be eroded and the criminal sanction trivialized.

[35] There is no doubt that moral blameworthiness was present here on the part of Master Corporal Morton. He was trained and qualified as crew commander and was specifically assigned the responsibility for the safety of his students. He enjoyed the requisite capacity to appreciate the danger posed by the fallen tree blocking the track. He

should have taken the trouble to exercise that capacity in directing his mind to the risk and act to preserve the safety of all involved. His failure to do so not only connotes moral fault, but requires sanction.

Objectives of sentencing to be emphasized in this case

[36] I agree with counsel that the circumstances of this case require that the focus be primarily placed on the objectives of general deterrence and denunciation in sentencing the offender. The objective of rehabilitation is always to keep in mind as I must consider the impact of any sentence being proposed on the rehabilitation of the offender.

Aggravating and mitigating factors

[37] As provided in the enumeration of principles of sentencing, a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating either to the offender or the offence. That being said, it is important to remember that one aggravating or mitigating factor, in isolation, cannot operate to increase or decrease the sentence to a level that would take it outside of the range of what would be adequate.

[38] The circumstances of the offences in this case reveal the following aggravating factors:

- (a) The fact that Master Corporal Morton was specifically entrusted with the safety of the students: The offender was in a position of knowledge and authority towards his students, including his driver at the time of the accident, who depended entirely on him for their safety, as a result of their lack of knowledge and experience, in this case less than one hour, in driving the vehicle. This is aggravating in comparison with negligence in commanding a vehicle driven by a qualified driver. In this case, an additional duty as instructor was breached.
- (b) The fact that Master Corporal Morton had time to make a proper assessment of the risk: The incident is not a situation where a crew commander, confronted with a sudden and unforeseen situation, made a wrong decision. Here the vehicle was stopped at the obstacle, time allowed a number of actions which could have been taken to properly assess the risk posed by the tree blocking the track and mitigate or eliminate that risk.
- (c) Finally, and most importantly, the effects of the offences on Corporal Tanner: Corporal Tanner suffered extensive injuries to her face in the incident. Those injuries have limited her capacity to train and contribute in her military occupation, notably because her ongoing medical needs prevent her to deploy. The injuries continue to require medical treatment

and procedures. They have and will continue at times to cause her prolonged and intense pain, and may never completely heal.

[39] The Court also considered the following as mitigating facts arising either from the circumstances of the offences or the offender in this case:

- (a) Master Corporal Morton's guilty plea: Even if it was not expressed at the first occasion, the guilty plea indicates that the offender is taking responsibility for his actions. When pressed by the prosecutor on cross-examination about the details of his conduct, he did not attempt to deflect any responsibility away from himself for what had happened.
- (b) Master Corporal Morton's apologies to Corporal Tanner and the regrets he expressed: I do believe the regrets expressed are sincere, especially considering elements of confirmation I perceive from the feelings verbalized by Master Corporal Morton to healthcare professionals in the last year as it pertains to the incident. Master Corporal Morton apologized directly to Corporal Tanner in open court for what she has had to endure and still has to go through because of his actions on 12 June 2015. These apologies were, in my view, heartfelt and sincere.
- (c) Master Corporal Morton's collaboration with authorities: This collaboration manifested itself in the course of the investigation and throughout this trial by admissions made by the defence and consent given to the introduction of evidence.
- (d) Master Corporal Morton's mental health condition: It has been proven that Master Corporal Morton suffers from Major Depressive Disorder and PTSD as a result of the incident of 12 June 2015 and its aftermath. Mental illness may be a mitigating factor even if it is a consequence, as in this case, rather than a circumstance of the offence. It is to be noted that even if this factor is not determinative for the imposition of a proper sentence, it is appropriate to take the mental condition of the offender into consideration where it would render incarceration a more severe penalty for the offender than for a person who does not suffer from the same mental condition. It has been proven to be the case here on the basis of the testimony of Dr Walker on the importance of the rapport established between a patient and members of his mental health team which would be compromised by incarceration, even in an institution that provides access to mental health support.
- (e) Master Corporal Morton's family situation: Master Corporal Morton currently cares for his two young children alone. Where possible, courts avoid imposing sentences that will prejudice children or other members of the family. This principle operates only where there are no other or more important aspects requiring severe or deterrent sentences.

- (f) The fact that Master Corporal Morton has no previous criminal or disciplinary record.
- (g) Finally, the age of Master Corporal Morton and his past honourable service: The offender has over 11 years of service including a deployment overseas and has made what can be presumed to be a valuable contribution on operations and training on the basis of the information available to me. It is clear that Master Corporal Morton is facing mental health challenges but recovery is entirely achievable to allow him to fulfil his potential to continue, at his young age, to make a positive contribution to Canadian society for many years in the future.

The punishment of detention

[40] As mentioned previously, both the prosecution and defence recommend that the punishment of detention for 90 days be imposed as the main sanction or component of the sentence in this case. The period of 90 days is the maximum that can be imposed for detention. That punishment, applicable only to non-commissioned members, serves a rehabilitative objective, in opposition to the punishment of imprisonment. The extent of the agreement of parties is limited, as the defence submits that the execution of the detention should be suspended to account for the exceptional family and mental health situation of Master Corporal Morton. Yet, the issue of whether the detention should be suspended does not arise unless and until the punishment of detention is found to be appropriate in all of the circumstances of the offence and the offender. I first need to determine if detention is an appropriate punishment.

[41] Detention has not often been imposed for offences of negligence when injuries result, in all likelihood due to its low maximum duration, the fact that it cannot be imposed to officers and has been held inappropriate for offenders who have been released from the CAF at the time of sentencing. Yet, detention has been imposed, for instance in the cases of *R. v. Orton*, 2010 CM 3020 and more recently in *R. v. Cadieux*, 2016 CM 4008, both cases involving mishaps in the use of firearms resulting in injuries. Clearly then, detention is in the range of appropriate punishments courts martial may impose in circumstances such as those present in this case. The question remains as to whether it should be. Detention is a punishment involving incarceration and before it can be imposed, I must be satisfied that no other punishment short of it can constitute the main sanction in the circumstances of this case. I conclude that the aggravating factors mentioned above, coupled with the objectives of denunciation and general deterrence that my sentence must achieve, make detention the minimum appropriate punishment in this case. This conclusion is in line with the submissions of counsel.

[42] In terms of length, the period of 90 days, the maximum duration of detention that can be imposed, constitutes in my view a minimum duration for a period of incarceration in the circumstances of this case. The total absence of care displayed by Master Corporal Morton, the extent of the injuries suffered as a result and the requirement to deter others

who may be involved in similar military duties from proceeding without the requisite caution would normally militate for a longer period of incarceration, requiring an increase in the severity of the sentence by the use of the punishment of imprisonment. That being said, in due consideration for the principle of restraint that I am bound to follow, I agree with the parties to the effect that the presence of strong mitigating factors, most notably the guilty plea, the apologies, as well as the mental health and family situation of the offender, allow me to recognize that detention for a period of 90 days constitutes the minimum necessary intervention adequate in the circumstances. The fact that a punishment of detention was imposed and its duration of 90 days will stand as the precedential value in relation to this case, regardless whether I decide to suspend the carrying into effect of the period of detention at the request of the defence. Although it is tempting to bridge the gap which separates the parties, I concluded that the period of detention should not be reduced to a lesser number of days which would allow it to be imposed without suspension, as it would render the duration of the punishment of detention inadequate.

The punishment of reduction in rank

[43] A reduction in rank is proposed by the prosecution to accompany the main punishment of detention in this case. In the case of an offender wearing what is known by most as the rank of master corporal, that punishment would reduce the offender to the rank of private, as in law, Master Corporal Morton is effectively a corporal benefitting from an appointment to master corporal. In the circumstances, the imposition of this punishment generates a significant drop in status and pay for the offender not unlike the reduction in rank of a sergeant, who is reduced to corporal.

[44] Reduction in rank has been imposed on numerous occasions for cases of negligent performance of military duties, for instance in the early 2000s in the cases of *Major Paik* and *Captain Ives* whose negligence contributed to the death of a sapper by electrocution. A reduction was imposed in the case of *Major Hirter* who improperly conducted a live fire range, resulting in the death of a soldier. Reductions were also imposed in the cases of *Major Lunney*, 2012 CM 2012, *Major Watts*, 2013 CM 2006 (conviction quashed on appeal) and *Warrant Officer (Retired) Ravensdale*, 2013 CM 1001, the three persons charged in relation to an explosion which killed one soldier and injured four others during a range exercise conducted in Afghanistan in 2012. I conclude that reduction in rank is within the range of punishments available to a sentencing judge in a case such as this one.

[45] The evidence of Lieutenant-Colonel Hutt, the CO of the offender, to the effect that he removed Master Corporal Morton from positions of instructor and crew commander as he no longer trusted him to exercise leadership and sound judgement, suggests that the punishment of reduction in rank may be appropriate in the circumstances of this case. Reduction in rank is a punishment that must be considered when the offence to be sanctioned reveals a failure in the exercise of the authority conferred by rank. This is the conclusion reached by Bennet J.A. writing for the CMAC in dismissing the sentence appeals of *Leading Seamen Reid* and *Sinclair*, 2010 CMAC 4,

as it pertains to their reduction in rank from Petty Officer 2nd Class. She commented on the punishment of reduction in rank as follows:

A reduction in rank is an important tool in the sentencing kit of the military judge. It signifies more effectively than any fine or reprimand that can be imposed the military's loss of trust in the offending member. That loss of trust is expressed in this case through demotion to a position in which the offenders have lost their supervisory capacity. A demotion was a necessary component of a fit sentence in this case.

[46] I have considered the argument from defence counsel to the effect that the offence is out of character for the offender. Of course it is, as are most offences of negligence occurring as a result of a significantly improper response by a person confronted with risk in the course of a given activity. Usually, deterrence operates to prevent those who may consider committing an unlawful act. In cases of negligence however, deterrence is aimed at persons who have no ill intentions. In *R. v. Lacasse*, 2015 SCC 64, Justice Wagner, of the Supreme Court of Canada, wrote that the objectives of deterrence and denunciation "are particularly relevant to offences that might be committed by ordinarily law-abiding people." Stating further that "[i]t is such people, more than chronic offenders, who will be sensitive to harsh sentences." I believe those law-abiding persons are the most likely to be deterred by the threat of severe penalties. It would be a mistake to avoid the imposition of a reduction in rank based on the fact that Master Corporal Morton had no ill intentions. Indeed, that punishment is one that may deter similar persons from neglecting their responsibilities for the safety of others. Many persons are entrusted with such responsibilities in the army, on this base and at the offender's unit.

[47] Equally, I fully appreciate the hardship that the offender will face, having to walk around his unit and base at the rank of private. I, as much as anyone who has ever had the privilege of being promoted above a basic rank in the CAF, imagine how bad this may feel. However, that feeling is the very reason why a punishment of a reduction in rank may well be effective in achieving the objectives of denunciation and general deterrence in this case.

[48] I do realize that the imposition of a reduction in rank will have as consequence a monthly reduction in pay of over a thousand dollars before taxes. I believe that consequence is necessary in the circumstances. As recognized by Lamont MJ in sentencing *Major Lunney (supra)* to a reduction in rank, it is important to remember that rank is not lost forever. It can be regained much quicker than when it was initially obtained as the person reduced possesses the prerequisites for promotion. All that is required is an opportunity to regain the confidence of the chain of command.

Potential lesser punishments

[49] I have considered the suggestion of defence counsel to impose a substantial fine instead of a reduction in rank. However, I do not believe such punishment would carry sufficient effect to meet the objectives of denunciation and deterrence, even if it was a fine of \$10,000, as alluded to during submissions. In the field of negligence, I believe a fine may well be entirely appropriate, especially for technical violations which did not

result in significant injuries. However, a fine may not send the right signal when the consequences of the offence were severe, life-altering injuries, especially when suffered by a subordinate. The risk for perception of offenders of higher rank, hence higher pay, being in a better position to afford monetary punishment than others of lesser pay is to be taken into consideration. Indeed, life and security has the same value for everyone.

[50] I have also considered the punishments of severe reprimand or the lesser punishment of reprimand but in my view, neither of those would be sufficient to meet the objectives of sentencing in this case, where someone was seriously injured. I believe this conclusion is in line with the reasons expressed by the CMAC in *R. v. Major A.G. Seward*, 1996 CMAC-376 when it intervened to vary the decision of the panel of a General Court Martial who had imposed a severe reprimand, substituting instead punishments of imprisonment for three months and dismissal.

Determination of the appropriate sentence

[51] For all of these reasons, I have concluded that a sentence composed of the punishments of detention for a period of 90 days and a reduction in rank to the rank of private constitute the minimum necessary intervention adequate in the applicable circumstances of this case. In coming to this conclusion, I have considered any indirect consequence of the finding or of the sentence, including those discussed during submissions as it pertains to the loss of eligibility for the Canadian Forces Decoration as a result of the findings of guilt, the fact that the offender now has a criminal record and, as mentioned, the financial consequences of a sentence of reduction in rank.

Suspension of the punishment of detention

[52] The defence submitted that the punishment of detention for a period of 90 days should be suspended. Section 215 of the *NDA* provides that:

Where an offender has been sentenced to imprisonment or detention, the carrying into effect of the punishment may be suspended by the service tribunal that imposed the punishment.

[53] I believe this provision supports the proposition that the issue of suspension of a sentence of incarceration does not arise unless and until the sentencing judge has determined that the offender is to be sentenced to imprisonment or detention, after having applied the proper sentencing principles applicable in the circumstances of the offence and the offender.

[54] How should military judges determine whether a sentence should be suspended? In the absence of legislated criteria for suspension, military judges sentencing offenders at courts martial have developed over time two requirements which must be met. 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. 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, in the circumstances of the offences and the offender including, but not limited to, the particular circumstances justifying a suspension.

[55] This two-step test is illustrated in decisions I rendered in *R. v. Boire*, 2015 CM 4010 and *R. v. Caicedo*, 2015 CM 4020, in which I relied on a test first enunciated by d'Auteuil M.J. in *R. v. Paradis*, 2010 CM 3025, paragraphs 74 to 89.

The existence of circumstances justifying a suspension

[56] In this case, Master Corporal Morton submits that his current mental health condition, coupled with the difficult family circumstances he finds himself in, would justify suspending the sentence of detention. In support of this submission, defence counsel referred to the testimony of Master Corporal Morton, supported by the testimony of his treating psychiatrist Dr Walker and the observations submitted on consent by his current psychotherapist, Lieutenant(N) Donovan. In reply, the prosecution points to an Agreed Statement of Facts it produced, revealing that mental health services are available to those detained at the Canadian Forces Service Prison and Detention Barracks (CFSPDB) in Edmonton, where the offender will have to serve the punishment of detention if it is not suspended. The prosecution also submits that care is available for the children in the absence of Master Corporal Morton.

[57] From a mental health perspective, Dr Walker stressed the importance of the rapport himself and Lieutenant(N) Donovan have cultivated over time with Master Corporal Morton, ensuring in his view optimal conditions for treatment and an enhanced prognosis for recovery. This is not a case where the particular circumstances which could justify a suspension of the punishment of detention are established solely on the basis of the testimony of an offender, direct beneficiary of such suspension. The facts related by Master Corporal Morton in his testimony were confirmed, explained and expanded upon in the evidence of two mental health professionals. Notably, Dr Walker discussed the importance of Master Corporal Morton's family in providing him with a reason to live, an important factor given a relatively recent episode of active suicidal ideation. It cannot be contested on the evidence heard that Master Corporal Morton's children are his major motivation for mental wellness. Knowing they exist cannot produce the same benefit as seeing them every day.

[58] I acknowledge the efforts by the prosecutor to demonstrate that moments of isolation from outside distractions offered by the detention regime in Edmonton may allow an offender to reflect and concentrate on rehabilitation. Yet, the CFSPDB is not a wellness centre. Its daily routine is demanding, the supervision is constant and the drill and maintenance of kit and quarters can best be described as "basic training on steroids". It has also been established that Master Corporal Morton suffers from anxiety and experiences mental health symptoms such as flashbacks, emotional numbing and insomnia. These symptoms are active, even if they are controlled, amongst other things with medication prescribed by Dr Walker. The evidence offered by mental health professionals is to the effect that introduction to a detention barracks with the stress of

adhering to a strict routine would cause significant anxiety while separating Master Corporal Morton from his main sources of wellness, namely his children and mental health team.

[59] I have heard no evidence to the effect that Master Corporal Morton cannot be sent to serve a sentence of detention. However, demanding such evidence would provide too high a burden. Master Corporal Morton has demonstrated that the increased stress that would invariably accompany his adaptation to detention would place him at risk of exacerbation of his mental health condition, specifically his anxiety. It has also been established that detention at this time would delay his planned treatment for his PTSD through focused therapy with the psychotherapist with whom he has a rapport. In light of the kind of exceptional circumstances of a similar nature that have been accepted in past court martial cases, including the cases of *Ravensdale*, *Boire* and *Caicedo* mentioned earlier, as well as the case of *R. v. Paradis*, 2015 CM 1002, I find that Master Corporal Morton has met the burden upon him to demonstrate, on the balance of probabilities, that his particular circumstances justify a suspension of the sentence of detention.

The public trust in the military justice system

[60] Turning now to the second requirement, the Court must consider whether a suspension of the punishment of detention in this case would undermine the public trust in the military justice system, in the circumstances of the offences and the offender, including the particular circumstances justifying a suspension. I find that the particular circumstances relating to the mental health of Master Corporal Morton are of such a nature to be readily understood as compelling for a reasonably informed observer. Yet, those particular circumstances are not the only factors relevant to the determination of whether the suspension would undermine the public trust in the military justice system.

[61] Indeed, the same reasonably informed observer evaluating the sanction resulting from a court martial would not only consider the punishments imposed. It would also be aware of their actual impact on the offender walking out of the court martial at the close of proceedings. As I found in *R. v. Boire, supra*, the effective impact of the sentence in its entirety is relevant to the issue of whether suspension of a custodial punishment would undermine the public trust in the military justice system. In my view, a reasonable observer would expect that an offender, who has admitted his negligence in the circumstances of this case, causing the severe injuries Corporal Tanner is still suffering, would walk out of his court martial with significant, concrete consequences. I believe it is the case here, with the punishment of reduction in rank which will be imposed on the offender, with very real direct impacts in terms of status and reduction in pay.

[62] The prosecution, in objecting to the suspension of the period of detention, argued that a reasonable observer's trust in the military justice system would be undermined should the detention time imposed not be served, despite the circumstances in which Master Corporal Morton finds himself. I disagree. The prosecution does not have the burden of establishing beyond a reasonable doubt the trust level of a fictive reasonable observer. However, the observer presented to me by the prosecution is one who does not

appear to have any flexibility in its views that time imposed must be time served. That observer does not seem aware of the very real impact of mental illnesses on the life of those affected as recognized by the CAF's leadership, especially in its efforts to reduce the stigmatization that for too long has been attached to such condition in our military. It is difficult for me to imagine a circumstance when that observer's trust in the military justice system would not be undermined by any suspension of a sentence of incarceration.

[63] I prefer to imagine a reasonable observer as one who has enough empathy to appreciate the predicament Master Corporal Morton finds himself in as a result of his mental health condition, and the importance of the relationship with his children as motivation for wellness. The reasonable observer I imagine would also be knowledgeable about cases where mental health was recognized as an exceptional circumstance justifying suspension; about the fact that the precedential value of the sentence is based on the punishment imposed and its duration, not on its suspension, and would also be aware of the other cases of negligence in the performance of military duties where sentences of incarceration were suspended. Finally, the reasonable observer I imagine would appreciate the value for denunciation and general deterrence of a punishment of reduction in rank on an offender of the rank of master corporal, who continues to serve at the rank of private in the CAF, even in consideration of the gravity of the negligence displayed by the offender and the severity of the injuries suffered by Corporal Tanner.

[64] For these reasons, I am unable to find that a reasonable observer aware of all the circumstances surrounding the events in this case would conclude that the suspension of the carrying into effect of the punishment of detention is likely to undermine the public trust in the military justice system in the specific circumstances of Master Corporal Morton. Consequently, the carrying into effect of the punishment of detention will be suspended.

A last look at the sentence

[65] After giving this issue significant thought, I have concluded that I must impose a sentence composed of the punishments of detention for a period of 90 days and a reduction in rank to private to meet the ends of justice, deciding also to suspend the carrying into effect of the sentence of detention. I am aware of the fact that the only real impact of the sentence on the offender will be through the punishment of reduction in rank. I nevertheless believe that this reduced impact is sufficient both to preserve the repute in the administration of military justice and meet the applicable objectives of sentencing.

[66] In closing, both counsel referred to the case of *Warrant Officer (Retired) Ravensdale, supra*, in their submissions. I do believe that the circumstances of this case are less severe than those in *Ravensdale*, where one soldier was killed and four injured as a result of the negligence of the offender. Legally, the sentence I impose today is less severe than the sentence imposed on *Ravensdale*. Yet, I am fully aware that the practical impacts of the sentence I am imposing on Master Corporal Morton are in fact more severe than in the case of *Ravensdale*, whose imprisonment for six months was

suspended, and whose reduction in rank to sergeant was symbolic as he had taken his release from the CAF over a year before his trial. At the end, even if Warrant Officer (Retired) Ravensdale walked out of his court martial with a \$2,000 fine as the only effective punishment, this outcome was a result of extraordinary circumstances, especially in relation to the very lenient sentences imposed on his superiors who were found at trial to have had a role in the deadly incident. The *Ravensdale* case does not set a benchmark for other cases of negligence, especially those involving serious injuries or death.

CONCLUSION AND DISPOSITION

[67] The sentence I had to impose will have significant impact on you, Master Corporal Morton. However, your negligence in the performance of your duties on 12 June 2015 was also significant and had disastrous impacts on Corporal Tanner. I am convinced you have realized the gravity of your lapse in judgement and leadership. As stated by your counsel, there are no winners here. You will discuss this sentence with your counsel and also with the healthcare professionals who are treating you. I hope the sentence I am imposing brings closure to a very difficult episode. You are only 30. After a pause to reflect, you will commence the rest of your life and continue your efforts to get healthy. Should you decide to continue your military career, do it with your head up. You have faced the consequences of your actions in the course of this trial, and with my sentence I believe you will have paid your debt. Returning to duty as a private will no doubt be difficult. However, you too are much more than a name and a rank. You are a husband, a son, son-in-law, a friend and most importantly a father. Regardless of rank, you are entitled to the same respect as any other member of the Army. I trust you will be given a meaningful chance to regain the confidence of your peers and superiors, who have decided less than a year ago that you should be retained in the military. You are owed the opportunity to achieve your full potential and contribute fully to your country.

FOR THESE REASONS, THE COURT:

[68] **SENTENCES** you to detention for a period of 90 days and a reduction in rank to the rank of private.

[69] **SUSPENDS** the carrying into effect of the punishment of detention, pursuant to section 215 of the *NDA*.

Counsel:

The Director of Military Prosecutions as represented by Major D. Martin and Captain G. Moorehead

Mr. D. Hodson and Captain P. Cloutier, Defence Counsel Services, Counsel for Master Corporal K.P. Morton