



## COURT MARTIAL

**Citation:** *R. v. Richard*, 2019 CM 2006

**Date:** 20190221

**Docket:** 201827

Standing Court Martial

Halifax Courtroom, Suite 505  
Halifax, Nova Scotia, Canada

**Between:**

**Her Majesty the Queen**

- and -

**Leading Seaman M.H. Richard, Offender**

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

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### **REASONS FOR SENTENCE**

(Orally)

#### **Introduction**

[1] Leading Seaman Richard, after having found you guilty of the one charge on the charge sheet, the Court must now determine and pass sentence on the charge which reads as follows:

“First charge  
Section 129 N.D.A.

**CONDUCT TO THE PREJUDICE OF GOOD  
ORDER AND DISCIPLINE**

*Particulars:* In that he, between 1 February 2016 and 10 December 2016, all dates inclusive, at or near Halifax, Nova Scotia, did use a drug, to wit cocaine, contrary to Queen’s Regulations and Orders 20.04.”

#### **Facts**

***Positions of the parties on sentencing***

**Prosecution**

[2] In his submissions, the prosecution requested that the Court impose a reprimand and a fine in the amount of \$4,000. He submitted, that based on the gravity of the offence and the degree of responsibility of the offender, it is a fit and appropriate sentence. He argued that it is pivotal that the Court send the strongest message of deterrence regarding illicit drug use.

**Defence**

[3] Defence submitted that, under the circumstances, the Court should impose only a fine of \$2,000. He further argued that there is ambiguity in the current drafting of the *National Defence Act (NDA)*, subsection 249.27(1) on the types of sentences that trigger a criminal record and, in the circumstances of this case, he argues that a criminal record is not merited.

**Analysis**

***Evidence***

[4] In the case at bar, 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.

[5] The Court heard from four witnesses:

- (a) from the prosecution, Chief Petty Officer 1st Class Tooke, Coxswain of Her Majesty's Canadian Ship (HMCS) *Montreal*;
- (b) from the defence:
  - i. Chief Petty Officer 2nd Class Jones (former chief petty officer of the Combat Systems Department (CSE));
  - ii. Petty Officer 2nd Class Yarrow (former Senior Sonar Technician on HMCS *Montreal* and current instructor at the Naval Fleet School Atlantic; and
  - iii. Petty Officer 2nd Class Hippern (Senior Sonar Maintainer on HMCS *Montreal*);

[6] Chief Petty Officer 1st Class Tooke provided evidence on the impact of prohibited drug use within the ship. In his role as coxswain, he is part of the command team and responsible for the discipline and morale of the ship's company. He explained

that on HMCS *Montreal* there have been multiple incidents of prohibited drug use, the sale of drugs and even an allegation of the importation or distribution of drugs. He explained that HMCS *Montreal* is currently working out of a shore office, as the ship is in refit, but the five departments still report to the command triad. He specifically commented on the fact that the drug use identified was centralized in the CSE department.

[7] At this time, HMCS *Montreal* role is to provide support to the fleet. As there is currently a shortage of fit personnel to sail on the ships, Chief Petty Officer 1st Class Tooke explained that the fit personnel were sent to operational ships and sailors with problems of any sort were sent to the HMCS *Montreal*. In effect, they currently have an abnormal number of personnel with personal issues or medical problems who are vulnerable. He worries that these sailors may become involved in prohibited drug use or activity. He stated that a strong message of general deterrence is important to reduce the probability that members from HMCS *Montreal* will engage in this sort of activity.

[8] Further, the Court benefitted from very meaningful submissions from counsel to support their respective positions on sentence, where they highlighted the facts and considerations relevant to Leading Seaman Richard's personal circumstances.

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

### ***The offender***

[10] Leading Seaman Richard is 30 years old and has a high school education, enrolling in the Canadian Armed Forces (CAF) in October 2010. He has served for over eight years. He is formally trained as a Weapons Engineering (WEng) – Sonar Technician. He is living in a long-term common law relationship and has two children.

[11] The Court noted that as a result of prior disciplinary issues, Leading Seaman Richard has also been the subject of significant administrative action.

### ***Defence witnesses***

#### **Chief Petty Officer 2nd Class Jones**

[12] Chief Petty Officer 2nd Class Jones is currently the unit chief at Queen's harbour master in Halifax. He was the former chief for the CSE department on HMCS *Montreal*. The CSE department takes care of weapon systems, radars, emitters, radios and phone line systems. In his testimony, he explained that when he first joined HMCS *Montreal*, he learned that Leading Seaman Richard could be a bit of a handful, but he said he waited to make up his own mind and intentionally did not read Leading Seaman Richard's personnel file for a while. He stated that in the first six months, he found

Leading Seaman Richard to be a hard worker, always showing up, willing to do anything. He explained that when he met Leading Seaman Richard, he had just returned from the Canadian Forces Service Prison and Detention Barracks (CFSPDB) in Edmonton. He summarized Leading Seaman Richard's performance as outstanding, describing him as very hardworking, always looking for something to do and heavily involved with the other sections on the ship; if someone asked for a hand, he helped and never turned anyone down. When he eventually reviewed Leading Seaman Richard's personnel file, he realized that he had completely changed his life.

[13] He stated that Leading Seaman Richard was under an administrative review that recommended releasing him. He stated that he took exception to the recommendation given his performance at that time. After consulting with the previous coxswain, they felt that it was a wrong decision as Leading Seaman Richard was demonstrating the potential to excel and to become a chief petty officer. He stated that the change was the result of Leading Seaman Richard's own personal efforts.

[14] A course report from Leading Seaman Richard's Qualification Level 5 (QL5) course, WENG Applications course, Equipment phase, (4 September 2018 – 31 January 2019) was introduced as Exhibit 16. Upon completion of the course, Leading Seaman Richard became a fully qualified technician. He explained that there were obstacles in loading him on the course, due to objections from Director Military Career Administration (DMCA) with respect to the ongoing administrative review. He stated that he first tried to load Leading Seaman Richard on the QL5 course in September 2016, March 2017, September 2017, but they eventually got him loaded in September 2018.

[15] Upon reviewing Leading Seaman Richard's QL5 Course Report, he stated that his performance was consistent with his work performance, which he described as being outstanding. He explained that prior to attending the course, Leading Seaman Richard was one of the best leading seaman they had for fixing the sonar equipment even though he was not qualified to be working on the equipment by himself.

[16] When asked to comment on Leading Seaman Richard's potential and ability to serve in the CAF, he stated that Leading Seaman Richard has demonstrated the potential to excel, move up the ranks very quickly to become a departmental coordinator or coxswain of a unit.

### **Petty Officer 2nd Class Yarrow**

[17] Petty Officer 2nd Class Yarrow is a WEng – Sonar Technician and currently an instructor at the Naval Fleet School Atlantic teaching the sonar section. He testified that in 2014, he was the senior sonar technician on HMCS *Montreal*. He stated that he was one of Leading Seaman Richard's supervisors. He was responsible for overseeing Leading Seaman Richard's administrative review, his day-to-day employment, taskings and assisting him in completing his training package. He testified that during this time frame, Leading Seaman Richard was a bit wild. He explained that when Leading

Seaman Richard was at work, he was a good worker, but it was getting him to work that was the issue. In the spring of 2016, Leading Seaman Richard served time in CFSPDB because he had been late returning to the ship and missed his ship's sailing. He said that when Leading Seaman Richard came back from CFSPDB, there was a noticeable difference in him. He found that Leading Seaman Richard took more responsibility for his actions. Petty Officer 2<sup>nd</sup> Class Yarrow stated that up until the time he was personally posted off the ship, he had no issues with Leading Seaman Richard at all. According to Petty Officer 2nd Class Yarrow, Leading Seaman Richard matured as a young adult. Prior to the time he went to Edmonton, he had the potential to be a good technician, but not necessarily the best sailor as he behaved as though everything was about him. However, he explained that when Leading Seaman Richard returned, it had all changed and he became a significant team player and wanted to further his career.

[18] Petty Officer 2<sup>nd</sup> Class Yarrow stated that upon his return, Leading Seaman Richard could be relied upon to do anything. He explained that there were no further issues with Leading Seaman Richard being late or absent. Petty Officer 2nd Class Yarrow later moved to the Naval Fleet School Atlantic to teach, however, he remained in contact with Leading Seaman Richard's chain of command, particularly when the administrative review was still ongoing. He stated that they were impressed with Leading Seaman Richard when he returned and they did not want to lose a good technician. He stated that the reports were consistently very positive.

[19] When asked for feedback on how Leading Seaman Richard performed on his QL5 course, Petty Officer 2<sup>nd</sup> Class Yarrow described him as always being on time, investing everything into the course, receiving good marks and taking the time to help the weaker students to understand the systems. He confirmed that he personally wrote the course report that was Exhibit 16. He described Leading Seaman Richard's performance – as excellent with respect to both the theory and the practical work on equipment. He described him as having great knowledge, ability to troubleshoot on the equipment without having to refer to the manual, which is very rare. When asked to compare Leading Seaman Richard to other students of the same rank in training, he stated that he was one of his best students in terms of knowledge and dedication to the trade.

[20] When asked to comment on Leading Seaman Richard's potential and ability to serve in the CAF, he stated that if Leading Seaman Richard continues the way he has recently progressed, that he has the potential to be his boss one day, because he is just that smart as a technician and knowledgeable in the trade. He feels strongly that Leading Seaman Richard should continue serving with the Navy.

### **Petty Officer 2nd Class Hippern**

[21] Since 1 April 2016, Petty Officer 2nd Class Hippern has been a senior sonar maintainer for HMCS *Montreal*. He is responsible for the integrity and operability of the sonar systems on-board ship as well as the custody and mentorship of those working for him. He described Leading Seaman Richard as a highly capable technician,

maintainer and sailor on-board HMCS *Montreal* having served together since April 2016. He described Leading Seaman Richard's performance as outstanding. He said he is a highly qualified technician that he routinely relies upon to maintain his section's commitments.

[22] When asked to comment on Leading Seaman Richard's potential and ability to serve in the CAF, he stated that he could go through the ranks as quickly as anyone else he knows, in terms of pure ability, capability and just his work ethic alone. He described his potential technical ability as already high, but it is only getting better in terms of overall system knowledge and capability in rectifying and correcting maintenance issues.

[23] In addition, he described how Leading Seaman Richard now takes the initiative in recognizing what needs to be done and gets it done as opposed to waiting until he is directed. He described his reliability as exemplary. He stated that he only needs to give Leading Seaman Richard an initial statement and he immediately identifies what needs to be done, the parts he needs and who must be contacted. He described one specific example that occurred in the fall of 2017, while HMCS *Montreal* was away on a three month exercise. While in Norway, Defence Research and Development Canada sent the ship a new system that required installation. On a rare day off, Leading Seaman Richard and his colleague worked from sun up to sun down to install the system and verify its operation. The successful installation and verification of the system provided the HMCS *Montreal* with improved capability when the ship returned to sea.

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

[24] 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 opportunities for reforming their conduct and shortcomings. Leading Seaman Richard has already successfully availed himself of the opportunity.

[25] 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). On the facts of this case, the prosecution submits that the objectives they considered most important are general and specific deterrence as well as denunciation.

[26] It is a fundamental principle that the sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender. Although the offence before the Court is not a criminal offence, the use of illicit drugs in the CAF threatens all of us. We serve together in operational environments and we need to know that we can depend on one another. Members who engage in illicit use, expose themselves to a number of risks that are passed on to their unsuspecting colleagues. Failure to address illicit drug use compromises our overall CAF mission success. Further, the nature of the

illicit drug being cocaine, and the fact that it was purchased from another CAF member increases the seriousness of this offence.

[27] The Court found that Leading Seaman Richard's conduct was blameworthy with respect to one incident of use. The evidence suggests that Leading Seaman Richard was not an experienced drug user and by the time he was confronted by the Canadian Forces National Investigation Service, he had already taken steps to turn his life around.

**Accounting for relevant aggravating or mitigating circumstances**

[28] In the military justice system, in imposing a sentence, the Court must increase or reduce a sentence to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender.

***Aggravating factors***

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

- (a) Unit impact. The court heard from Chief Petty Officer 1st Class Tooke, the Coxswain on HMCS *Montreal*, on the effects of the drug use within the unit. He explained that there is a strong need for general deterrence. HMCS *Montreal* is in refit and working out of a shore office. Due to the lack of fit sailors within the fleet, the fit sailors are posted to the ships going to sea, leaving a significant number of vulnerable sailors posted to HMCS *Montreal*. He explained that there is a strong need for deterrence to ensure that those members do not get tempted to engage in prohibited drug use.
- (b) Purchased from another CAF member. At the time, Leading Seaman Richard served on an operational ship and the evidence suggests that the department, where he worked, was influenced by the activities of Leading Seaman Stow. The fact that CAF members serving together were availing themselves of illicit drugs and consuming them is extremely aggravating.
- (c) Previous conduct. Leading Seaman Richard has had a colourful past with a fair representation of convictions for minor misconduct during the first part of his career. Although most of the offences on his conduct sheet relate to conduct unrelated to the current charge before the court, the Court did note that he spent over three weeks in the CFSPDB in Edmonton in the spring of 2016 which the evidence suggests was a catalyst for his significant turnaround. Although this incident before the court followed his time in the CFSPDB, the Court acknowledges that it does take time for a ship to change its course. There has been nothing of significance that concerns the Court since the beginning 2017.

- (d) Age and experience. Based upon some of the evidence, the first part of his career was marked by a lack a discipline. As Petty Officer 2nd Class Yarrow stated, once he was at work, he was great, but it was getting him to work that was the challenge. At the time of the offence in question, the offender would have been 26 years old and would have served for at least six years. He should have known better.

*Mitigating factors*

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

- (a) Post-charge conduct. Based on the testimony before the Court, upon his return from the CFSPDB in Edmonton, the offender's supervisors noted a significant difference in his attitude, behaviour and work ethic. He was hard-working, focussed and a team player. They cited examples of how he worked unselfishly, helping the department get work done (Norway incident). As Chief Petty Officer 2nd Class Jones indicated, he has "matured out" and is a very responsible and valued member.
- (b) Genuine remorse. Prior to sentencing, Leading Seaman Richard was given the opportunity to address the Court. He spoke extremely eloquently and in front of his CAF peers, he took responsibility for his actions. He explained that the decisions he made were his, but they were not the right ones. He explained that he cannot dwell on the past, but he must put it behind him and move forward positively. He explained how he has achieved success in attending various addiction programs both on base and within his unit. He endeavours to put his best foot forward in the future.
- (c) Future potential. The evidence before the Court was consistent in confirming that Leading Seaman Richard is highly skilled, committed to military service and capable of making not simply a continued positive contribution, but he has the potential to excel and reach the highest rank. The testimony also confirmed that notwithstanding this lack of judgement with respect to the charge before the Court, Leading Seaman Richard is well regarded and respected, particularly for the positive change that he has made. There was unanimous agreement that he has both the skill set, as well as the work ethic to be an outstanding technician. Petty Officer 2nd Class Yarrow, who is an instructor at the Naval Fleet School Atlantic stated that in his experience, Leading Seaman Richard was one of the best candidates he has ever had come through the course. All defence witnesses testified to the positive potential for Leading Seaman Richard's continued future service with the CAF.



**Parity**

[31] Pursuant to the new provisions in the *NDA* at paragraph 203.3(b), the law requires that the sentence be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. In making its recommendation on sentence, the prosecution relied upon a significant number of precedents which the Court reviewed. They include *R. v. Racine, 2014 CM 1011*, *R. v. Ex-Petty Officer 1st Class C.G. Carlson, 2008 CM 1012*, *R. v. ex-Corporal P.J. Prince, 2007 CM 4020*, *R. v. Harding, 2018 CM 4017* and *R. v. Private S.C. Johnstone, 2007CM4007*. Prosecution was unable to provide precedent of contested drug use in courts martial. In his submissions, defence relied upon the following precedents: *R. v. Edwards, 2018 CM 4018*, *R. v. Weiers, 2016 SKPC 159*, *R. v. Scott, 2018 CM 2034* and *R. v. Bergeron-Larose, 2012 CM 1013*.

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

[32] Pursuant to paragraph 203.3(e) of the *NDA*, defence counsel made extensive submissions on the indirect consequences of the finding and the sentence to be imposed.

[33] He argued that evidence of drug use triggers a mandatory reporting requirement by the chain of command to DMCA. Given that the offender has had a prior administrative review, his potential for continued service in the CAF is unknown. Although the conduct before the Court is different from the last conduct considered, it will, at a minimum, trigger a requirement for counselling and probation, which essentially puts the offender under probation for a year.

**Criminal record**

[34] Counsel for both the defence and the prosecution made submissions on what appears to be an unresolved ambiguity of subsection 249.27(1) of the *NDA* regarding criminal records. Defence argued that under the strict reading of the French wording of the subsection that two or more of the sentences leave the member with a criminal record. He is correct. He also noted that although Bill C-77 aims to clarify this provision, it is still making its way through the legislative regime. It was argued that, given the circumstances, should Leading Seaman Richard need to seek work outside of the CAF, having a criminal record could be a substantial roadblock. The Court agrees with the defence that there is indeed an ambiguity in the legislation. There are amendments in place to resolve any confusion, which will be retroactive. However, that may not happen for a while. In the short term, it undeniably poses a challenge for Leading Seaman Richard which he asked the Court to consider.

**Overall assessment of sentence**

[35] In the Court's view, Leading Seaman Richard has demonstrated progress in his rehabilitation and with his training, background, skills and demonstrated commitment to the CAF; his continued service is of significant benefit to the CAF. The Court is of the view that given his particular rehabilitation on the shortcoming that led to the charge before the Court, the need for specific deterrence is not pressing, but not without consideration.

[36] Based on all the factors as well as the indirect consequences of the finding and the sentence discussed above, I have considered both the defence and prosecution's recommendation on sentence.

[37] In terms of denunciation and general deterrence, the public court martial and conviction for simple use of a prohibited substance, combined with the accompanying administrative action that it automatically triggers will send a message to all members, that they will be held accountable for their conduct. The Court is of the view that the most significant deterrent will be a significant fine. The Court is aware of the precedent of *Harding* and the differences in that case.

[38] However, the Court must ensure that Leading Seaman Richard's positive rehabilitation is taken into account. The Court can impose a fit sentence reflective of the seriousness of the offence that does not impair Leading Seaman Richard's rehabilitation process by imposing a fine with flexibility in terms of payment.

### **Final Comments to the Accused**

[39] Before I render the final sentence, I would like to emphasize that it takes a lot of strength and courage to pick oneself up, accept responsibility for one's conduct and change the entire course of your life. You have done this and it is not an easy task. It appears that 2017 was your year of change and I hope that this incident will serve as an important catalyst to remind you not to succumb to peer pressure and to continue to focus on your family and the straight and narrow life you have been pursuing in the last few years. You heard the glowing comments from your superiors on the positive change you have made. Some of them have gone out of their way to enable your career. It is clear that they all want you to rise to the level of coxswain one day.

[40] We all make mistakes; it is how we deal with our mistakes that governs our success moving forward. I wish to congratulate you on the rehabilitative progress you have made to date and I wish you the best of luck as you move forward.

### **FOR THESE REASONS, THE COURT:**

[41] **SENTENCES** Leading Seaman Richard to a fine in the amount of \$3,500, payable in monthly installments of \$150, until it is paid off, commencing no later than 1 April 2019. In the event, you are released from the CAF for any reason before the fine is paid in full, then any outstanding unpaid balance will be due the day prior to your release.

**Counsel:**

The Director of Military Prosecutions as represented by Major M.L.P.P. Germain

Major A.H. Bolik and Captain P.C. Briffett, Defence Counsel Services, Counsel for  
Leading Seaman M.H. Richard