COURT MARTIAL

Citation: *R. v. McGregor*, 2019 CM 4016

Date : 20191003
Docket : 201826

Standing Court Martial

Canadian Forces Base Esquimalt
Victoria, British Columbia, Canada

Between :

Her Majesty the Queen

\- and -

Corporal C.R. McGregor, Offender

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

Restriction on publication: Pursuant to section 179 of the *National Defence Act* and section 486.4 of the *Criminal Code*, the Court directs that any information obtained in relation to this trial by Standing Court Martial that could identify anyone described in these proceedings as a victim or complainant, including the persons referred to in the charge sheet as "C.R.", "K.G." and "M.S." shall not be published in any document or broadcast or transmitted in any way.

NOTE: Personal data identifiers have been redacted in accordance with the Canadian Judicial Council's "*Use of Personal Information in Judgments and Recommended Protocol*".

REASONS FOR SENTENCE

(Orally)

Introduction

[1] Corporal McGregor was found guilty of five charges following trial by Standing Court Martial: four of these, under section 130 of the *National Defence Act* (*NDA*)

involve *Criminal Code* offences; namely, sexual assault contrary to section 271, two charges of voyeurism contrary to subsection 162(1) and one charge of possession of a device for the surreptitious interception of private communication contrary to subsection 191(1). He was found guilty of one other charge under section 93 of the *NDA*, for disgraceful conduct in intercepting private communications between two persons by means of an audio recording device.

[2] Prosecution and defence disagree as to the sentence that should be imposed. Following the findings and the production of documents required at paragraph 112.51(2) of the *Queen's Regulations and Orders for the Canadian Forces* (QR&O), the prosecution submitted two victim impact statements. The defence produced no evidence. Having heard counsel's submissions, it is now up to me to impose a just and appropriate sentence.

[3] It is understood that Corporal McGregor was released from the Canadian Armed Forces (CAF) on 22 September 2017, over two years ago. He is a civilian and has been so throughout his trial. Nevertheless, I will continue to refer to him as Corporal McGregor in these reasons as subsection 60(3) of the *NDA* provides that any person in his situation shall for the purposes of the Code of Service Discipline be deemed to have the same status and rank that he held immediately before leaving the military.

<u>Position of the parties</u>

Prosecution

[4] The prosecution submits that the Court should impose a sentence composed of imprisonment for more than two years; namely, a period of three and a half to four years which is 42 to 48 months, combined with the punishments of dismissal with disgrace from Her Majesty's service and a reduction in rank to the rank of private.

[5] The prosecution also requests that a number of ancillary orders be made. First, the mandatory orders provided for in the *NDA* by virtue of the conviction for sexual assault; that is, a DNA order (see section 196.14) and an order to comply with the *Sex Offender Information Registration Act* (see section 227.01). Second, the prosecution requests that the Court impose a discretionary weapons prohibition order under section 147.1 of the *NDA*. Finally, the prosecution asked that the Court use its power granted by section 179 of the *NDA* to make a forfeiture order under section 490.1 of the *Criminal Code* but abandoned its request after the Court had sent questions to counsel about the authority to ask for and make such an order in the context of a trial by court martial.

Defence

[6] The defence submits that a sentence of imprisonment for more than two years is an appropriate punishment in the circumstances of this case but argues that its duration should be between two and two and a half years which is 24 to 30 months and that no

other punishment should be imposed. The defence does not oppose the request for ancillary orders.

Factors for consideration

[7] In light of the diverging positions of the parties, how am I to perform my duty as judge to impose a just and appropriate sanction? The determination of a sentence by a judge must take into consideration the circumstances of the offences and of the offender. I will first review these circumstances as well as the impact of the offence on the victims in order to provide an adequate backdrop to the subsequent analysis and ultimate determination of an appropriate sentence.

The circumstances of the offences

The sexual assault offence

[8] Consistent with the findings the Court has made, I consider that the offence of sexual assault was committed on an occasion when Corporal McGregor was visiting C.R. at her home one evening in 2011. Both had met as junior clerks at Canadian Forces Base (CFB) Esquimalt, Corporal McGregor, having transferred from another military occupation, was senior in rank to other members of his cohort, including C.R. who looked up to him as a colleague and a friend. C.R. remembers having drinks and playing video games with her friend but, at one point, she said she blacked out, having no memory of what occurred subsequently that evening or night until she woke up the next morning on her couch, with Corporal McGregor rubbing her vaginal area over her clothes. She did not consent to that improper touching. That incident did have the effect of immediately ending her friendship with Corporal McGregor.

[9] Almost six years later, C. R. received the visit of military police investigators from the Canadian Forces National Investigative Service (CFNIS). She was shown video images found in Corporal McGregor's possession during a search of his residence. They depicted a male filming himself while sexually touching a woman who appeared to be lying unconscious on a bathroom floor. The video shows a close-up view of the fingers and forearm of a man. He is pushing aside clothing to obtain access to the breast and genital areas of a woman who appears unconscious. The fingers caress a nipple. They are inserted into her vagina. On a few occasions, a male voice is heard whispering the first name "C…". C.R. testified that she is indeed the woman being touched on that video and recognized the male voice as being Corporal McGregor's. The Court accepts that the images on the video have been filmed on the same occasion she remembers having been touched improperly as she woke up on her couch next to Corporal McGregor, most likely in the early hours of 10 July 2011.

The voyeurism offence involving C.R.

[10] During his presence in C.R.'s house, the investigator noticed that the layout of the rooms was familiar to what he had observed on another video found in files

obtained from computer equipment seized in Corporal McGregor's residence, showing a partial view of a couple engaged in sexual activity, filmed from afar, either from the back of the adjacent living room or from outside the house, through a window. It is obvious that the video depicts two persons engaged in sexual activity. The legs of a woman are visible as she is on her back with her male partner on top. It seems the images were taken from the outside of the living room window in the early morning of 18 July 2010.

[11] The Court accepted the testimony of C.R. to the effect that it is her who is engaged in consensual sexual activity in the video. She never allowed Corporal McGregor to film her engaging in sexual activity of any kind. The Court concluded on the basis of the evidence that at no point did C.R. know she was being filmed and never consented to such actions. As a result, Corporal McGregor was found guilty of voyeurism in relation to C.R.

The disgraceful conduct offence involving K.G.

[12] The reason that brought the CFNIS investigators to C.R.'s house originated through a text message several months earlier. In January 2017, K.G., a member of the military staff at the Canadian Embassy in Washington, District of Columbia (D.C.) advised her military superior that she had located two audio recording devices in the bedroom of her home in Alexandria, Virginia (VA). One of these devices, shaped like a universal serial bus (USB) key, was plugged into a power outlet on a wall immediately behind the headboard of her bed, out of view. Another personal audio device was found on a shelf of a built-in bookcase near her bed. K.G. plugged one of these devices in a computer and heard a recording which included what she believed to be the voice of Corporal McGregor, a friend of hers. Before Christmas 2016, she had given Corporal McGregor access to her residence so he could feed her pet fish in her absence.

[13] Following the discovery of the recordings, K.G. spoke less frequently with Corporal McGregor who was being posted back to Canada and wanted to make amends with her. She asked for an apology from him in a text. She produced in court a printout of a text message exchange which contained a text message from Corporal McGregor to the effect that he was sorry for the recording; that it was not meant to be sinister and that he was trying to see what she says about him when he is not around.

[14] The investigators who had travelled to Washington obtained the necessary authorizations to search Corporal McGregor's residence in Alexandria, VA. As a result of that search, they seized a large quantity of computer storage devices. They also seized a black backpack containing personal effects such as Corporal McGregor's special passport as well as numerous items of electronic equipment, some of which could allegedly be used to intercept private communications, including two personal audio recorders of the same make and model as the ones found by K.G. in her bedroom. Recordings of two of the personal audio recorders seized from that backpack were played in court during the testimony of K.G. On one of these recordings, women's voices can be heard. At that point, K.G. became emotional on the stand as she

recognized the voices as hers and her partner's discussing a Netflix movie. On the basis of that testimony and of the items seized in Corporal McGregor's possession, the Court concluded that Corporal McGregor had wilfully intercepted private conversations between K.G. and her partner and that such conduct constituted disgraceful conduct under section 93 of the *NDA*.

The voyeurism offence involving K.G.

[15] The analysis of computer storage devices found at Corporal McGregor's house revealed images taken from inside the main floor bathroom in the house, showing K.G. using the facilities. Some of the images appeared to have been taken from the ceiling, in all likelihood by one of three fake smoke alarm cameras found in the black backpack, along with two remote controls for these cameras, an oval camera alarm clock and a small square camera alarm clock with a remote. A number of photos and videos were shown to the Court as it pertains to allegations of voyeurism in relation to K.G.

(a) The Court was shown a video of a man who can be recognized as being Corporal McGregor installing what appears to be a camera filming in his direction, from a waist-high vantage point. Conversation between a man and a woman is heard. At one point a woman identifiable as K.G. enters the bathroom, lowers her pants and sits on the toilet. The camera appears to be installed on the toilet's water tank.

(b) The next video starts with a view of a man staring at the ceiling of a bathroom with, in his right hand, one of the remote controls found in the backpack. That man is clearly Corporal McGregor. A female voice is heard engaging in a conversation, apparently with Corporal McGregor. At one point K.G. walks in, removes her pants and uses the toilet.

(c) A third video of the bathroom was shown, this time from a third vantage point, from a position waist-high on the right front of the toilet. The angle of view allows to clearly see the face of K.G. coming in and sitting on the toilet. She is staring directly at the camera. The Court accepted K.G.'s testimony to the effect that she did not know she was being filmed and that she was in all likelihood looking at the clock when the video was paused. When shown pictures of the bathroom in Corporal McGregor's residence, she identified a corner shelving unit on which she remembered an oval alarm clock was positioned. The picture, taken the day of the search, shows an empty space where the oval alarm clock used to be.

[16] The Court concluded on the basis of the evidence that at no point did K.G. know she was being filmed and never consented to such actions. As a result, Corporal McGregor was found guilty of voyeurism in relation to K.G.

The possession of a device for surreptitious interception of private communication

[17] The camera alarm clock found in Corporal McGregor's backpack in his residence and used to film K.G. using the toilet has the capacity not only to surreptitiously film but also to capture sounds in its vicinity. The Court found that the primary purposes of the device were to both intercept private communications and record images at the same time and that Corporal McGregor should have known that. He was, therefore, found guilty of possession of that device, contrary to subsection 191(1) of the *Criminal Code*.

The impact on victims

[18] At the sentencing hearing, the Court heard the victim impact statement of both K.G. and C.R. The impact of the offences on them cannot be overstated. I wish to summarize what they told the Court, hoping that the necessary editing I need to make will not be interpreted as a minimization of the duress they endured.

[19] K.G. has suffered life altering mental trauma from the offence and its aftermath. She suffers from post-traumatic stress disorder (PTSD). She attends weekly mental health counselling and has been prescribed medication to treat major depressive disorder or generalized anxiety disorder. Instead of the outgoing person she used to be, she is now sceptical of people's intentions and honesty. She has been unable to make new connections with people since the offence. She feels secure at home but only after checking if someone may be watching her from outside, closing the blinds as soon as it gets dark and checking if any device is plugged in any of her outlets. She is prone to panic attacks when using public bathrooms and bathrooms at friends' places. Consequently, she stays close to home where she can go back to use her own bathroom, as required. She does not feel safe allowing others to enter her residence without her supervision, which limits her possibility to own pets and leave her home for extended periods. This has had an effect on family relationships and her career progression, along with a limited work schedule due to her PTSD.

[20] C.R. courageously read in court a letter; part of her victim impact statement. She addressed Corporal McGregor directly as to the trust that she had in him that was shattered and the violation she felt watching him invade her body and her personal, intimate moments to appease his sick and twisted desires. She is not certain of the full effects the offences will have on her life as it is difficult to live without knowing the extent or how many times she was violated. She nevertheless decided that she should not hold hate in her heart and wanted Corporal McGregor to know that she forgives him for the hurt and pain he has caused her.

The circumstances of the offender

[21] I know very little about Corporal McGregor as he chose, as he is entitled to, to remain silent at trial and at the sentencing hearing. No negative inference flows from that. Yet, the nature of his behaviour, especially involving voyeurism and recording private conversations of female friends over a significant period of time, from July 2010

to January 2017, suggests the possibility of a sexual deviance which may be a factor in evaluating risks of reoffending and potential for rehabilitation and reintegration in society. I do not have access to and have no authority to order the production of a pre-sentence psychological report. I will, therefore, not speculate on whatever such a report might have revealed.

[22] I have been given Corporal McGregor's career summary. I note that he has served for over 14 years, from July 2003 until 22 September 2017. He began his career in the infantry but does not appear to have served in that capacity with a battalion as he was posted to a clerk position in Esquimalt in 2006. He deployed six months to Bahrain in 2006-2007; 11 months in Kabul, Afghanistan in 2011-2012 and in Kuwait for six months in 2014-2015. He served at the Canadian Embassy in Washington from August 2015 until March 2017 and completed his career in Gagetown, New Brunswick (NB). He reached the rank of master corporal on an acting basis in 2015 and wore that rank until he was reverted to the rank of corporal in February 2017, possibly due to his arrest and search of his home in relation to this case.

[23] Corporal McGregor has no criminal record but his conduct sheet reveals disciplinary infractions arising out of one incident of absence without leave in 2007 and another incident of disobedience to an order not to possess alcohol and of drunkenness in 2016. These previous convictions at summary trials are not related or relatable to the offences before the Court and are, therefore, not considered aggravating.

[24] Corporal McGregor was arrested on two occasions in the course of the investigation in relation to the charges he was convicted of. The first time was in Washington, D.C., and he was released within a few hours. The second occasion was in Gagetown, NB and he was detained for a few days before his release on conditions by a military judge. In total, he has spent seven days in pre-trial custody.

Analysis

[25] The position of the parties reveals an important area of convergence as they both agree, in reference to the applicable scale of punishments found at section 139 of the *NDA*, that the punishment of imprisonment for two years or more is warranted in the circumstances of this case. The issue of contention is primarily the duration of the period of imprisonment that is warranted and whether and which accompanying punishments would be appropriate. There are no contentious issues as to ancillary orders. It is useful to review the applicable legal provisions aimed at assisting military judges in making a decision between these differing points of view to arrive at a just and fair sentence.

Purpose, objectives and principles of sentencing

[26] The purpose, objectives and principles applicable to sentencing by service tribunals have been included in an amendment to the *NDA* which came into force on 1 September 2018. They are found at sections 203.1 to 203.4, reproduced at QR&O

article 104.14. As provided at subsection 203.1(1) of the *NDA,* the fundamental purposes of sentencing are two-fold:

(a) to promote the operational effectiveness of the Canadian Forces by contributing to the maintenance of discipline, efficiency and morale; and

(b) to contribute to respect for the law and the maintenance of a just, peaceful and safe society.

[27] The fundamental purposes of sentencing recognize the dual nature of the Code of Service Discipline, which, as found by the Supreme Court of Canada (SCC), not only serves to regulate conduct that undermines discipline and integrity in the CAF but also serves a public function by punishing specific conduct which threatens public order and welfare (see *R. v. Généreux*, [1992] 1 S.C.R. 259 at page 281). The objectives that a just sanction must try to achieve may include considerations reaching outside the bounds of the military, especially in a case like this one where the offender has been a civilian for over two years at the time of sentencing.

[28] In order to achieve these dual purposes, subsection 203.1(2) provides that just sanctions imposed must have one or more of the following objectives:

(a) to promote a habit of obedience to lawful commands and orders;

(b) to maintain public trust in the Canadian Forces as a disciplined armed force;

(c) to denounce unlawful conduct;

(d) to deter offenders and other persons from committing offences;

(e) to assist in rehabilitating offenders;

(f) to assist in reintegrating offenders into military service;

(g) to separate offenders, if necessary, from other officers or non-commissioned members or from society generally;

(h) to provide reparations for harm done to victims or to the community; and

(i) to promote a sense of responsibility in offenders, and an acknowledgment of the harm done to victims and to the community.

[29] I agree with counsel that the circumstances of this case require that the focus be primarily placed on the objectives of denunciation and deterrence in sentencing the offender. The need for denunciation is illustrated by the sexual assault and sexual misconduct characterizing the offences in this case. It must be addressed by a sentence

that communicates society's condemnation of the offender's conduct, in both its civilian and military component. As McLachlin C.J. wrote in *R. v. Proulx,* 2000 SCC 5 at paragraph 102, "a sentence with a denunciatory element represents a symbolic, collective statement that the offender's conduct be punished for encroaching on our society's basic code of values." This is particularly applicable here. Deterrence is also required as the concept refers to the imposition of sanctions for the purpose of discouraging the offender and others from engaging in the kind of prohibited conduct which occurred in this case.

[30] That being said, the objective of rehabilitation cannot be ignored as this is not one of those rare cases where an offender's actions are so grave and his circumstances so hopeless that no prospect for rehabilitation is present.

[31] In attempting to achieve the objectives of sentencing, a judge must respect a primary principle, that of proportionality. As provided at section 203.2 of the *NDA*, a sentence must be proportionate to two things: the gravity of the offence and the degree of responsibility of the offender. The gravity of the offence is directed to what the offender did wrong. It includes two components: (1) the harm or likely harm to the victim or victims; and (2) the harm or likely harm to society and its values. The "degree of responsibility of the offender" includes the *mens rea* level of intent, recklessness or wilful blindness associated with the *actus reus* of the crime committed: the greater the harm intended or the greater the degree of recklessness or wilful blindness, the greater the moral culpability. However, the "degree of responsibility of the offender" also includes other factors affecting culpability such as the offender's personal circumstances, mental capacity or motive for committing the offence.

[32] The jurisprudence of the SCC has recognized the primary importance of the principle of proportionality in sentencing in cases such as *R. v. Ipeelee*, 2012 SCC 13 where at paragraph 37, Lebel J. explains the importance of proportionality in these words:

> Proportionality is the *sine qua non* of a just sanction. First, the principle ensures that a sentence reflects the gravity of the offence. This is closely tied to the objective of denunciation. It promotes justice for victims and ensures public confidence in the justice system. . . . Second, the principle of proportionality ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender. In this sense, the principle serves a limiting or restraining function and ensures justice for the offender. In the Canadian criminal justice system, a just sanction is one that reflects both perspectives on proportionality and does not elevate one at the expense of the other.

Principles relevant to this case

[33] Having reviewed the circumstances directly relevant to the principle of proportionality, I now need to discuss the secondary principles relevant to the determination of the sentence, which are listed at the paragraphs found in section 203.3 of the *NDA* as follows:

(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender

A number of specific aggravating circumstances are listed in this section, none being applicable to this case. I will discuss aggravating and mitigating circumstances in a moment.

(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances

That is known as the principle of parity;

(c) an offender should not be deprived of liberty by imprisonment or detention if less restrictive sanctions may be appropriate in the circumstances . . .

(d) a sentence should be the least severe sentence required to maintain discipline, efficiency and morale;

Those two paragraphs embody the principle of restraint, the first being inapplicable to this case as both parties submitted that a punishment of imprisonment for more than two years was necessary and I agree with them.

(e) any indirect consequences of the finding of guilty or the sentence should be taken into consideration.

[34] The purposes and principles of sentencing which I have just discussed, are provided for at sections 203.1 to 203.4 of the *NDA*. They are very similar to the principles found in the *Criminal Code* for good reasons: the needs of the CAF cannot be detached from those of the society in which it belongs, as evidenced by the dual purpose highlighted previously. The circumstances of this case, where I am sentencing an offender who has been a civilian for over two years, illustrates that point.

[35] There is one exception, however, as it pertains to the secondary principle of totality, found at paragraph 718.2(c) of the *Criminal Code* to the effect that “where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh”. The reason why such principle is not found at section 203.3 of the *NDA* between the principles of parity and restraint is because there are no consecutive sentences in the Code of Service Discipline. All sentences run concurrently by virtue of section 203.95 of the *NDA* which provides that only one sentence shall be passed on an offender and, if the offender is convicted of more than one offence, the sentence is good if any one of the offences would have justified it. There is little point in trying to circumvent the effects of this rule through separate trials; section 149 provides that where a person is under a sentence of incarceration imposed by a service tribunal and another service tribunal subsequently passes a new sentence of incarceration, both punishments of

incarceration shall run concurrently but the punishment higher in the scale of punishments having to be served first.

[36] The obligation to pass one sentence presents a challenge where a judge must deal with a number of offences arising from separate transactions, as I have here, given that it does not allow offences to be individually recognized as being worth a specific sentence. I have to pass one sentence for all five guilty findings rather than a specific sentence for each offence as would a civilian judge. That said, the totality principle applicable in the civilian justice system could well, in a case like this one, require that a civilian judge adjust the sentence below the figure which would be appropriate for each offence taken in isolation, so that the total sentence respects the totality principle. At the end of the day we arrive at the same result.

[37] The challenge passing one sentence is compounded here because the offence of sexual assault attracts a much greater maximum sentence (ten years) than the other four infractions (five and two years), making it objectively more severe. I have to deal with the sexual assault primarily. There is a risk that if I deal with the other offences individually I end up imposing a crushing sentence not in keeping with the offender's circumstances, hence disproportionate. Adjustments will be required to lower the cumulative sentence to a level that respects the totality principle. This should not be seen as a trivialization of the harm caused by the offences of less objective gravity.

[38] I will discuss the punishments proposed by counsel and assess both the ranges for the punishment of imprisonment and the impact of the other punishments proposed on the cumulative sentence. I will then discuss the aggravating and mitigating factors present in this case to arrive at a determination of the appropriate sentence.

The sentence of imprisonment

The sexual assault charge

[39] The parties agree that the sentence must include imprisonment for more than two years as a primary punishment. The prosecution has bolstered its argument first by referring to extracts from *R. v. Arcand,* 2010 ABCA 363, a decision from the Alberta Court of Appeal, which includes a deep and thorough analysis of sexual assault offences. The prosecution concedes that the categorization of offences with a starting point for sentencing is not applicable to the military justice system, but the case was submitted to highlight the significant harm caused by sexual assaults, hence the need for punishment through imprisonment for significant periods.

[40] The challenge with the offence of sexual assault is that it encompasses a broad range of actions, from unwanted touching of a sexual nature to rape. This has led to disparity in sentencing and the efforts in Alberta to place sexual assaults in categories associated with a starting point for sentence. The circumstances of this case as it pertains to the assault on C.R. while she was unconscious on the bathroom floor, involving fondling and digital penetration, make it a comparatively serious sexual

assault. It is an act of violence, involving force applied without consent. That kind of conduct carries inherent harm not only to the victim but also to society. It is a serious violation of a person's bodily integrity and an equally serious violation of their sexual autonomy and freedom of choice. These breaches of one's physical integrity and privacy are indisputable and undeniable. The harm caused by sexual assault includes the likelihood of serious psychological or emotional harm. In Alberta, the starting point for such an offence is three years; i.e. 36 months' imprisonment.

[41] The case of *Arcand*, at paragraph 283, recognizes that a sexual assault on an unconscious victim is an aggravating factor on sentencing.

> An offender who sexually assaults a person who is asleep or passed out is treating that person as if the person were an object to be used – and abused – at will. Since the offender knows full well that the person is not consenting, this reveals an enhanced degree of calculation and deliberateness by the offender. Further, at that point, the person is at their most vulnerable, unable to defend themselves in any way and unable to call for help from others. The offender knows this too, adding further to the high level of moral blameworthiness for the illegal conduct.

[42] The prosecution also submitted to the Court's attention the case of *R. v. Rosenthal*, 2015 YKCA 1, from the Court of Appeal of Yukon where Schuler J.A. mentions that the sentencing range in that province is between 12 and 30 months' imprisonment in cases involving non-consensual sexual intercourse with a sleeping or unconscious victim, adding that there was no logical basis on which to exclude assault by digital penetration from the range, it being a serious and invasive form of sexual assault. I agree with that conclusion.

[43] The prosecution discussed the case of *R. v. M.R.,* 2018 ONSC 583 where a review of the case law in Ontario, especially *R. v. Smith,* 2015 ONSC 4304 reveals that the applicable range for invasive sexual assault on a sleeping or unconscious victim is between 18 and 36 months.

[44] As for British Columbia, the case of *R. v. Berry,* 2014 BCSC 284 was brought to my attention. The facts bear some similarities with the offences here as an offender filmed himself assaulting a sleeping victim, rubbing her breasts and digitally penetrating her vagina and anus. The Court found that two years' imprisonment was a fit sentence on the sexual assault count.

[45] As for cases in the military justice system, I was referred to the case of *R. v. Royes,* 2013 CM 4034, where a master corporal was found guilty of sexual assault on a female private in his room on CFB Wainright. The offender had left a bar at closing time with the victim and two others to return to base. The victim was severely intoxicated to the point of vomiting, was not responding to questions and had trouble walking when she was taken by the offender to his room where he committed a sexual assault involving vaginal intercourse with ejaculation. The offender was sentenced to 36 months' imprisonment. The case of *R. v. Lough,* 2011 CM 2022 was also discussed, where the offender had pleaded guilty to three charges; two for breaking and entering

and committing the offence of sexual assault and one for ordinary assault. He was sentenced to 34 months for assaulting three cadets in their beds.

[46] The defence brought to my attention the case of *R. v. Rivas,* 2011 CM 2012, where a corporal was found guilty by the panel of a General Court Martial of having intruded into the room of a female colleague and performed cunnilingus on her while she was asleep. The military judge rejected a joint submission of counsel for a sentence of 90 days' detention and a fine of $2,000, instead imposing a sentence of imprisonment for a period of nine months. Defence counsel also mentioned the August 2019 Court Martial decision in *R. v. Cadieux*, where a punishment of sixty days detention, suspended, was imposed along with a Severe Reprimand, following a conviction for sexual assault. However, I understand the circumstances of that case were quite peculiar, which would take the case below the normal range for such an offence.

[47] Finally, a mention was made on the military side of the case of *R. v. Beaudry,* 2016 CM 4011. Corporal Beaudry was found guilty of sexual assault causing bodily harm in the context of what constituted the violent rape of a woman who would not agree to have sex with him after they had gotten back from a bar to the house he shared on base. I sentenced him to imprisonment for 42 months and dismissal from Her Majesty's service. However, the circumstances and the charge in the case of *Beaudry* were more severe than the sexual assault committed by Corporal McGregor in this case.

[48] The prosecution submitted that an appropriate range of sentences in military cases for a similar offence if charged alone would be between two and a half and three years. I agree with the upper limit on the basis of *Royes,* but I believe the lower limit to be closer to nine months on the basis of *Rivas*. In any event, the circumstances of the present case fit close to the ceiling illustrated by *Royes*, in line with the arguments of counsel proving defence counsel recognizes that imprisonment for more than two years is required.

The offences of voyeurism

[49] As it pertains to the offences of voyeurism, the prosecution provided useful information from the case of *Berry* as to the gravamen of the offence, which constitutes a clear violation of the essential human dignity of the people shown on pictures, videos or other recordings. The offender in that case was sentenced to two months for placing a video camera in a bathroom and for nine months for filming a sexual assault in circumstances similar to this case.

[50] The Ontario case of *R. v. B.H.,* 2017 ONCJ 377 was brought to my attention. A school vice-principal, admired in his community, had placed a camera in the ceiling of the male staff bathroom. Justice Gee performed a review of a number of cases, revealing a range from a suspended sentence to nine months' imprisonment. The Alberta case of *R. v. Keough,* 2011 ABQB 312 was submitted by the prosecution as it illustrates the upper range of gravity for this kind of offence where the offender

recorded 15 and 16-year-old girls engaged in consensual sex with their boyfriends. He was sentenced to nine months in jail.

[51] As for illustrations of how this offence was dealt with in the military justice system, the case of *R. v. Reyes*, 2018 CM 4015 was brought to my attention. Rendered a year ago, this case dealt with a charge of disgraceful conduct under section 93 of the *NDA,* but the behaviour involved was voyeurism and the charge was changed simply as a result of the constitutionality issue which at the time prevented the use of a voyeurism charge. Master Warrant Officer Reyes had installed his iPhone under the sink of a single-person type washroom used by women to change into and out of uniform near his office. He pled guilty and a joint submission for a sentence of five months' imprisonment and a reduction in rank to the rank of sergeant was accepted by the Court.

[52] As far as the punishment of imprisonment goes in the context of military tribunals, I conclude that a proper range for voyeurism offences standing alone would be between two and nine months. In the context of this case, the offence of voyeurism at the second charge targeting K.G. belongs towards the top of the range while the offence of voyeurism at the third charge, targeting C.R. through her living room window fits closer to the bottom.

The offences of disgraceful conduct and possession of a device

[53] As it pertains to the offences of disgraceful conduct, the prosecutor had no case law to offer to illustrate a range described as between one and three months while acknowledging that the circumstances may warrant the imposition of lesser punishment in the scale at section 139 of the *NDA*. The same applies to the offence of possession of a device. These submissions by the prosecution reveal that the requirement of imposing one sentence has had the effect of decreasing the importance of these two offences in arriving at a proper sentence. I do believe, however, that the disgraceful conduct does warrant specific consideration for punishment in this case. The offence has caused significant harm to K.G. and it is what initiated the investigation. In the circumstances of this case, it is worth one to three months' imprisonment or a significant alternative punishment. The possession offence, however, does not factor in the determination of a quantum of required imprisonment in the circumstances of this case as it can be fully addressed by the global sentence being imposed in relation to the other, much more serious offences. If it was charged alone, sentences of detention, reduction in rank, reprimand or fine, alone or in combination, may have constituted adequate punishments.

The punishments of dismissal with disgrace and reduction in rank

[54] The prosecution is requesting that the Court impose the punishments of dismissal with disgrace and reduction in rank in addition to the punishment of imprisonment. It is acknowledged that these two punishments would be symbolic as the offender has been released from service. However, the prosecutor states that symbols are important and that imposing these punishments will address the objectives of general deterrence and denunciation. I do not disagree with that assessment. I did

impose a punishment of dismissal on Corporal Beaudry even if he was to be released administratively shortly after the trial. He was, however, still serving at the time the sentence was pronounced.

[55] After a period of uncertainty in relation to the Court Martial Appeal Court (CMAC) decision of *R. v. Tupper,* 2009 CMAC 5, courts martial have come to conclude that punishments such as reduction in rank and dismissal can be imposed at courts martial even if the offender has been released from service. This was the conclusion reached by Dutil C.M.J. in the case of *R. v. Ayers,* 2017 CM 1012 where he reviewed *Tupper* and subsequent jurisprudence from the CMAC and the SCC to conclude that he could accept a joint submission that included such punishments, in combination with imprisonment. My colleague Sukstorf M.J. came to the same conclusion subsequently in the case of *R. v. W. (T.S.),* 2018 CM 2004 where she too approved a joint submission that included that same combination of punishments, citing *Ayers* in approbation.

[56] Dismissal with disgrace from Her Majesty's service is an exceptional form of punishment imposed when the nature and circumstances of the offence make the sentence of dismissal inadequate to reflect the displeasure with which the Court regards the offender's conduct. It is the highest sentence of a military nature that can be awarded. It ranks above imprisonment for less than two years in the scale of punishment at section 139 of the *NDA*. I agree that the use of such a punishment for denunciation and deterrence would be consistent with the objective of sentencing identified in the facts of this case. However, given its consequences, especially the incapacity of an offender given such a punishment to subsequently serve Her Majesty again in any military or civilian capacity, it is a punishment which may impact on rehabilitation and should not be imposed lightly. In fact, this punishment has not been imposed in a contested sentencing hearing at courts martial of recent memory.

[57] In *Beaudry*, I decided to impose dismissal over dismissal with disgrace out of respect for the rehabilitation principle. However, in that case I was not asked to impose either dismissal or dismissal with disgrace in the submission of the prosecution. Here I am asked to impose such a punishment and the issue of rehabilitation of the offender is more difficult to assess given the prolonged nature of the voyeurism or voyeurism-like conduct in this case as opposed to the one-time incident in *Beaudry*. Indeed, the circumstances of the voyeurism charges, especially involving K.G., are particularly egregious in this case. They cry out for a punishment that can uniquely express the disdain of the Court and send a clear message of denunciation that this type of conduct, in relation to colleagues in the CAF, is incompatible with military service. I believe imposing a punishment of dismissal with disgrace in the circumstances of this case would also serve as an adequate substitute to imprisonment, as it pertains to the need to punish in relation to the voyeurism charges as the gravity of these charges may not be fully recognized given the need to sanction primarily the offence of sexual assault while respecting the principles of totality and proportionality. As I alluded to in paragraph 32 of *Beaudry*, punishments of dismissal and dismissal with disgrace, when imposed, are a substitute for length of time of imprisonment.

[58] The prosecution has also requested that the Court impose a punishment of reduction in rank to the rank of private, in conjunction with imprisonment and dismissal with disgrace. Although neither the *NDA* nor its regulations mention the option to impose a punishment of reduction in rank to accompany a dismissal or dismissal with disgrace, there is no legal impediment to such a combination. This was recognized by Dutil C.M.J. in *Ayers* when he stated, at paragraph 17, that punishments in section 139 are available unless specifically restricted by the provisions of the Act and regulations. He did accept a joint submission which included the three punishments of imprisonment, dismissal with disgrace and reduction in rank. So did my colleague Sukstorf M.J. in *W. (T.S.).*

[59] The fact that such a combination is legal, however, does not mean that it is advisable. The task of my colleagues in the cases of *Ayers* and *W.(T.S.)* was to assess whether the joint submission brought the administration of justice into disrepute or was otherwise contrary to the public interest. Their approval of the joint submission is not a statement as to the desirability of combining these three punishments. Bennett, J.A. explained the meaning of the punishment of reduction in rank in the CMAC decision of *Reid and Sinclair v. R.,* 2010 CMAC 4, at paragraph 39:

> 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.

[60] It is difficult for me in this case to imagine a stronger way than a dismissal with disgrace to express the military's loss of trust in the offender, who has returned to civilian life for two years now. Respectfully, I believe adding a reduction in rank to the mix would serve no purpose in the circumstances.

Aggravating and mitigating factors

[61] 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 offence or the offender. However, 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 an adequate sentence. In taking these factors into consideration, the Court must keep in mind the objective gravity of the offences. The offender was found guilty of sexual assault; an offence carrying a maximum penalty of ten years' imprisonment; of two charges of voyeurism and one charge of disgraceful conduct carrying a maximum of five years; and one count of possession of a device, a less severe offence, carrying a maximum of two years' imprisonment.

[62] The circumstances of the offences and the offender in this case reveal the following aggravating factors:

(a) The profound effect that the actions of Corporal McGregor have caused to his victims, especially their feelings of betrayal and the stress from the uncertainty as to what else Corporal McGregor may have captured of their intimacy and privacy. It is strikingly true for C.R. whose bodily integrity was violated. The statement of K.G. is also revealing as to the loss of her sense of privacy and security in places where she used to feel safe and the profound impact this has had on her social life and mental health. The harm to these victims' dignity is unfortunately likely to remain with them for some time in the future. My hope is that, with time, they will both be able to put this deplorable event behind them and move on.

(b) The fact that C.R. was unconscious when she was sexually assaulted.

(c) The fact that the sexual assault on C.R. was video-recorded using a smart phone and the images subsequently transferred and stored on computer devices in Corporal McGregor's home.

(d) The fact that Corporal McGregor targeted both K.G. and C.R. in their home, where they should most expect to enjoy security of their person and privacy, most specifically in their bedroom.

(e) The length of time of almost six and a half years between the offences of voyeurism targeting C.R. engaged in sexual activity and the offence of disgraceful conduct targeting private conversations of K.G. in her bedroom shows that the offender had engaged in continuous deviant conduct without taking the opportunity to reflect on his behaviour.

(f) The increase in sophistication of the voyeuristic activities, as it pertains to the required planning to target K.G. and the acquisition, installation and use of specialized equipment.

(g) The fact that Corporal McGregor offended in relation to two colleagues, fellow members of the CAF. Of course, he physically attacked C.R., but, most importantly, he attacked the dignity of both his victims and abused their trust. As stated in my reasons in *Beaudry*, CAF members contribute to a military force that is regularly confronted with various threats and consequently agree to place their personal safety at risk to help fight those threats, hand-in-hand with colleagues. They should not face additional threats from their brothers or sisters-in-arms. Defence Administrative Order and Directive (DAOD) 5019-5, on sexual misconduct, describes the negative impact of this type of conduct on security, morale, discipline and cohesion in the CAF. In simple terms, these behaviours weaken the CAF as it has been amply demonstrated in this case given the harm caused to the victims and their operational effectiveness. This is an aggravating factor. Corporal McGregor was an

experienced member of the CAF at the time of the offences and should have been familiar with the standard of conduct expected of him regarding the respect for the dignity of all persons.

[63] As for mitigating factors, there is very little that I can mention, unfortunately. Defence counsel brought to my attention an apology that was given via text message to K.G., as outlined previously, shortly after she had located the recording devices in her home. I find from the entire exchange that the apology was not forthcoming; it took two statements from K.G. to the effect that whatever was said was not an apology to finally have Corporal McGregor state that he was sorry for the recordings. He then attempted to explain the unexplainable expressing that he was sorry and his wish that he could be forgiven. I understand the difficulty of apologizing in the course of litigation, but there was an occasion to deliver an apology to C.R. and to K.G. at sentencing. That opportunity was not seized and the early text message has very little mitigating weight in my appreciation.

[64] The only mitigating factor I am prepared to consider is Corporal McGregor's past contribution to public service in the CAF, including three deployments overseas. This contribution should be proof to him that he still has the potential to make a positive contribution to Canadian society in the future.

The term of the required period of imprisonment

[65] The disagreement between parties in this case relates to the duration of the sentence of imprisonment, the prosecution arguing for a minimum of 42 months while the defence is of the view that 30 months should be a maximum.

[66] My duty is to impose one sentence that for all offences is similar to sentences imposed on similar offenders for similar offences committed in similar circumstances and that constitutes the least severe sentence required to maintain discipline, efficiency and morale.

[67] As mentioned in my analysis, I have decided to impose a punishment of dismissal with disgrace which will address the requirements to denounce and deter in relation to the offences of voyeurism and disgraceful conduct.

[68] Focusing on the most severe of the offences for sexual assault, I consider the precedent of *Royes* to be relevant. A sentence of 36 months was imposed for circumstances that are different than what we have here, but as I stated in *Beaudry*, I agree entirely with the reasons of Perron M.J. in *Royes*, and I find that the sentence he imposed in that case was entirely appropriate for its circumstances; namely, sexual assault of an unconscious colleague with penile penetration and ejaculation, whom Master Corporal Royes had brought back to his room on base. I do take note of the remarks of defence counsel to the effect that digital penetration may be less severe in this case; however, there are significant aggravating factors in this case that simply cannot be ignored, especially the assault of C.R. in her home, the same home where a

year earlier she was filmed by the offender engaging in sexual activity. The circumstances of this case reveal a degree of deviant predation on a colleague which prevents me from sentencing the offender to fewer than 36 months' imprisonment, that period taking into account the seven days spent in pre-trial custody.

[69] It is a difficult decision but I am of the view that 36 months' imprisonment in this case is the minimum sentence required to respect parity and avoid an excessive period of imprisonment that would be disproportional. The addition of the punishment of dismissal with disgrace is required to address the other offences of voyeurism and disgraceful conduct which would have otherwise required up to nine months' imprisonment to address the abhorrent behaviour of the offender.

Orders to be imposed

[70] Given that the offence of sexual assault, as set out at section 271 of the *Criminal Code*, constitutes a primary designated offence within the meaning of paragraph 196.11(a) of the *NDA* and of section 487.04 of the *Criminal Code*, I am required, under subsection 196.14(1) of the *NDA*, to issue an order authorizing the taking from the offender of a number of bodily substances that is reasonably required for the purpose of forensic DNA analysis.

[71] In addition, with respect to the application for an order that the offender comply with the *Sex Offender Information Registration Act*, the offence of sexual assault is a designated offence within the meaning of section 227 of the *NDA* and paragraph 490.011(1)(a) of the *Criminal Code*. The order sought is therefore mandatory. Section 227.02 of the *NDA* deals with the duration of the order. Given that the offence of sexual assault is punishable by a term of imprisonment of ten years, I order, pursuant to subsection 227.02(2) of the *NDA*, that the offender comply with the *Sex Offender Information Registration Act* for a period of 20 years.

[72] In accordance with the prosecution's request, I find that the circumstances of this case clearly reveal the use of violence in the commission of a sexual assault. Section 147.1 of the *NDA* asks that military judges consider whether persons committing crimes involving violence should be able to possess weapons. In my opinion, an order is warranted that would prohibit the offender from possessing any firearm, crossbow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, pursuant to section 147.1 of the *NDA*. This order will be for a period of ten years from today's date, being 3 October 2019.

Conclusion and disposition

[73] Corporal McGregor, the circumstances of the offences for which you have been found guilty are extremely troubling to me. What you have done to colleagues you befriended for years is depraved. It shows a total disregard for their dignity and sexual integrity for your own personal gratification which I cannot comprehend. Most

importantly, what you have done is criminal. In performing my duties I must treat you like a convict and send you to a penitentiary to protect society.

[74] Your conduct in relation to military colleagues was also totally incompatible with service in the CAF. I will therefore use the powers conferred upon me by law to signal, even so symbolically, that you must be separated from this institution of which you have rendered yourself unworthy.

[75] The behaviour you have shown reveals a potential for sexual deviance for which I urge you to seek help. You will be imprisoned for a while and will have time to reflect on what led you to offend. The correctional service will hopefully provide professional assistance and opportunities for you to work on your weaknesses. You have shown, in the past, your capacity to make a positive contribution to society in a demanding military environment. The choice is yours to decide to get better because I believe that you have the potential to rehabilitate yourself.

FOR THESE REASONS, THE COURT:

[76] **SENTENCES** you to a term of imprisonment of 36 months and dismissal with disgrace from Her Majesty's service.

Counsel:

The Director of Military Prosecutions, as represented by Major G. Moorehead, Commander S. Torani, Major A. van der Linde and Lieutenant-Commander D. Reeves

Mr David Hodson, Defence Counsel Services, Counsel for Corporal C.R. McGregor