



COURT MARTIAL

Citation: *R. v. Cogswell*, 2021 CM 2021

Date: 20211119

Docket: 201935

Standing Court Martial

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

Between:

Her Majesty the Queen

-and-

Bombardier C.H. Cogswell, Offender

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

REASONS FOR SENTENCING

(Orally)

The case

[1] On 18 August 2021, this Court found Bombardier Cogswell guilty of nine charges arising from an incident that occurred on 21 July 2018, involving members of W Battery, Royal Regiment of Canadian Artillery School (RCAS). The facts related to my findings are set out in my decision delivered orally on that date. It is now my duty to determine the sentence on the following charges for which Bombardier Cogswell was convicted:

“FIRST CHARGE

Section 93 of the

National Defence Act

(Alternate to the Second Charge)

**BEHAVED IN A DISGRACEFUL
MANNER**

Particulars: In that she, on or about 21 July 2018, in the training area at 5 CDSB Gagetown, New Brunswick, did distribute cupcakes containing cannabis to Canadian Forces personnel during a domestic live fire exercise.

THIRD CHARGE

Section 130 of the
National Defence Act
(Alternate to the Fourth charge)
[Fourth charge withdrawn 4 August 2021]

**AN OFFENCE PUNISHABLE
UNDER SECTION 130 OF THE
NATIONAL DEFENCE ACT, THAT
IS TO SAY ADMINISTERING A
NOXIOUS THING, CONTRARY TO
SECTION 245(1)(B) OF THE
CRIMINAL CODE**

Particulars: In that she, on or about 21 July 2018, in the training area at 5 CDSB Gagetown, New Brunswick, did cause Dylan Eoll to use cannabis with intent to aggrieve or annoy.

FIFTH CHARGE

Section 130 of the
National Defence Act
(Alternate to the Sixth charge)
[Sixth charge withdrawn 4 August 2021]

**AN OFFENCE PUNISHABLE
UNDER SECTION 130 OF THE
NATIONAL DEFENCE ACT, THAT
IS TO SAY ADMINISTERING A
NOXIOUS THING, CONTRARY TO
SECTION 245(1)(B) OF THE
CRIMINAL CODE**

Particulars: In that she, on or about 21 July 2018, in the training area at 5 CDSB Gagetown, New Brunswick, did cause Connor Chubry to use cannabis with intent thereby to aggrieve or annoy.

SEVENTH CHARGE

Section 130 of the
National Defence Act
(Alternate to the Eighth charge)
[Eighth charge withdrawn 4 August 2021]

**AN OFFENCE PUNISHABLE
UNDER SECTION 130 OF THE
NATIONAL DEFENCE ACT, THAT
IS TO SAY ADMINISTERING A
NOXIOUS THING, CONTRARY TO
SECTION 245(1)(B) OF THE
CRIMINAL CODE**

Particulars: In that she, on or about 21 July 2018, in the training area at 5 CDSB Gagetown, New Brunswick, did cause

Lyann Lechman to use cannabis with intent thereby to aggrieve or annoy.

NINTH CHARGE

Section 130 of the
National Defence Act
(Alternate to the Tenth charge)
[Tenth charge withdrawn 4 August 2021]

**AN OFFENCE PUNISHABLE
UNDER SECTION 130 OF THE
NATIONAL DEFENCE ACT, THAT
IS TO SAY ADMINISTERING A
NOXIOUS THING, CONTRARY TO
SECTION 245(1)(B) OF THE
CRIMINAL CODE**

Particulars: In that she, on or about 21 July 2018, in the training area at 5 CDSB Gagetown, New Brunswick, did cause Jordan Slade to use cannabis with intent thereby to aggrieve or annoy.

ELEVENTH CHARGE

Section 130 of the
National Defence Act
(Alternate to the Twelfth charge)
[Twelfth charge withdrawn 4 August 2021]

**AN OFFENCE PUNISHABLE
UNDER SECTION 130 OF THE
NATIONAL DEFENCE ACT, THAT
IS TO SAY ADMINISTERING A
NOXIOUS THING, CONTRARY TO
SECTION 245(1)(B) OF THE
CRIMINAL CODE**

Particulars: In that she, on or about 21 July 2018, in the training area at 5 CDSB Gagetown, New Brunswick, did cause Liam Jarbeau to use cannabis with intent thereby to aggrieve or annoy.

THIRTEENTH CHARGE

Section 130 of the
National Defence Act
(Alternate to the Fourteenth charge)
[Fourteenth charge withdrawn 4 August 2021]

**AN OFFENCE PUNISHABLE
UNDER SECTION 130 OF THE
NATIONAL DEFENCE ACT, THAT
IS TO SAY ADMINISTERING A
NOXIOUS THING, CONTRARY TO
SECTION 245(1)(B) OF THE
CRIMINAL CODE**

Particulars: In that she, on or about 21 July 2018, in the training area at 5 CDSB Gagetown, New Brunswick, did cause William Vallerand to use cannabis with intent thereby to aggrieve or annoy.

FIFTEENTH CHARGE

Section 130 of the
National Defence Act
(Alternate to the Sixteenth charge)
[Sixteenth charge withdrawn 4 August
2021]

**AN OFFENCE PUNISHABLE
UNDER SECTION 130 OF THE
NATIONAL DEFENCE ACT, THAT
IS TO SAY ADMINISTERING A
NOXIOUS THING, CONTRARY TO
SECTION 245(1)(B) OF THE
CRIMINAL CODE**

Particulars: In that she, on or about 21
July 2018, in the training area at 5 CDSB
Gagetown, New Brunswick, did cause
William Long to use cannabis with intent
thereby to aggrieve or annoy.

SEVENTEENTH CHARGE

Section 130 of the
National Defence Act
(Alternate to the Eighteenth charge)
[Eighteenth charge withdrawn 4 August
2021]

**AN OFFENCE PUNISHABLE
UNDER SECTION 130 OF THE
NATIONAL DEFENCE ACT, THAT
IS TO SAY ADMINISTERING A
NOXIOUS THING, CONTRARY TO
SECTION 245(1)(B) OF THE
CRIMINAL CODE**

Particulars: In that she, on or about 21
July 2018, in the training area at 5 CDSB
Gagetown, New Brunswick, did cause
Nathan Penner to use cannabis with
intent thereby to aggrieve or annoy.”

Evidence

[2] In this case, the prosecutor provided the documents required under *Queen’s Regulations and Orders for the Canadian Forces* (QR&O) article 112.51 that were supplied by the chain of command.

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

- (a) victim impact statements from five of the eight soldiers who consumed the cupcakes that contained cannabis;
- (b) unit impact statement delivered by Lieutenant-Colonel Katherine Haire who was the Commandant of RCAS between the summer of 2019 and 2021;
- (c) character letters of support for Bombardier Cogswell on sentencing;

- (d) the testimony of military psychiatrist Dr Vinod Joshi, who has treated Bombardier Cogswell; and
- (e) the testimony of Nurse Practitioner (NP) Lisa A. Chapman.

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

[5] Counsel's submissions and the evidence before the Court have enabled me to be sufficiently informed of Bombardier Cogswell's personal circumstances so I may adapt and impose a sentence specifically for her.

Victim impact statements

[6] The Court considered the victim impact statements, which the prosecution read into the court proceedings. The Court summarizes the following pivotal parts of the statements as follows:

- (a) Master Bombardier Lechman: "[T] he impact of this incident has had irreversible effects on me."
 - i. "Until July 21, 2018, I had not consumed any form of recreational drug. It was a conscious decision that I made with myself which allowed me to have a sense of control. I wore that decision proudly, as a badge of honour because I was able to show restraint and mental resiliency";
 - ii. "As a person our consent is the one thing that we have to protect our wellbeing and to know that someone blatantly disrespected and abused that is horrifying";
 - iii. "From the beginning of my career it has been instilled in me the importance of teamwork and to trust my peers because of the high risk in our profession. After this incident I find myself questioning the intent of my peers and do not trust anyone anymore"; and
 - iv. "As a woman in the Canadian Armed Forces, I feel ashamed".
- (b) Bombardier Chubry: "I am familiar with how the use of drugs can primarily be the cause of the destruction of even the closest of families, diminish trust and break the strongest of bonds of any relationship."
 - i. Consent – "The ability to choose to partake or not should be afforded to every living being on this planet. When you have the

right to choose and the ability to make your own informed decisions taken away from you; that is where the feeling of helplessness, of being taken advantage of and the feeling of being closed off from everyone else weighs you down”; and

- ii. “Being in the profession of arms one of the most significant things you need to be able to share with your peers is trust. There is a comfort in knowing that you are surrounded by people who will support you at times when you might not be able to support yourself. Trust however, is not just a key component in the military, every relationship is based on trust. From your significant other, your spouse, your siblings, your pet, your children etc. without the ability to trust, it is next to impossible to lead a fruitful and fulfilling life for you and for the people who we hold most dear. My willingness to trust in turn, has been shaken to the point where it has almost ruined such relationships, until I adopted a philosophy of forgiveness and understanding”.
- (c) Bombardier Jarbeau: “After this incident, my anxiety peaked. My trust in the chain of command at the school, was and IS none existent. Having a co-worker, someone who was a higher rank than I (at the time) betray me, and fellow soldiers caused a lot of distress.”
- i. “During this time frame, I was also on the tail end of recovering from a severe head injury. Which I had been cleared medically of the symptoms. However, that day I felt like everything returned. The headaches, the anxiety and mood swings I experienced during my recovery phase. uncertainty and doubt in myself that never use to be there”; and
 - ii. “After this event, any meetings with the C.O.C back at the school would cripple me with anxiety. A distinct distrust had developed. This effected me everyday, and how I interacted with my leaders, and friends. Always questioning whether I can trust them. Asking myself if they are actually looking out for my interests. There was constant anger that ensued”.
- (d) Master Bombardier Long: “Prior to the incident, I had been sober 8 years which was something I was very proud of. I had gone from being homeless and an alcoholic to having a career, a place to live and trusted to lead troops. My sobriety is something I nurtured for almost a decade and now it was gone.”
- i. “Going back to work was hard. It seemed everyone in the Army thought it was funny. Needless to say, I did not. For the last 8 years I had taken my sobriety as serious as cancer, now it being

the brunt of everyone's jokes it was like constantly being slapped in the face. There was a number of times I got into confrontations with my coworkers. This also meant I could not trust others around food. No birthday cake, or cookies or anything which was not prepared by the base kitchen"; and

- ii. "People knew I did not drink before the incident; but they did not know I was in recovery. Now people at work have seen me in a condition which I thought they never would. Impaired. Also, this case has made national news and my anonymity across Canada has been compromised which has led to stress".
- (e) Bombardier Eoll: "This event took away the trust I thought I could give unconditionally to the fellow soldiers I worked with. It made me vulnerable and thus makes me think twice about trusting people in the CAF. It has made it hard to believe people at face value with the thought that they may have ulterior motives or just aren't truthful in how they speak. This has affected the team cohesion I used to have working as a unit especially with new people as I don't believe I can give people the benefit of the doubt anymore. Over time I believe that basic level of trust will come back but I don't think it will ever be what it once was."

Unit impact statement

[7] Lieutenant-Colonel Haire provided her perspective on the impact this incident had upon the RCAS:

"So I will say immediately on that day, it affected the operational effectiveness of that gun line. So the mission of the School is to support and deliver individual training to soldiers and officers of the Artillery, and on that day, we had to pause training and so it certainly impacted the operational effectiveness due to the victims' inability to focus and perform their tasks in line to enable us to achieve the mission. But in a more longer term manner, as I mentioned earlier, I know that Bombardier Slade has released from the Canadian Armed Forces. I did not conduct his release interview, but I did conduct release interviews of every soldier that released from the School during my two years in command. And on multiple occasions, the mistrust in leadership and the eroded trust based on the fact that this situation evolved was a contributing factor to some of the members releasing. And so, I would say that it has degraded the operational effectiveness from that. And the final way that I would say is that, as I said, there were students, so our mission is, is to train students. So there were students on that gun line and that impacted their confidence potentially in the Artillery. This has garnered significant media attention and so it has had a lasting impact on the reputation of the unit and perhaps the Artillery as a whole. And so, certainly, I believe it has degraded operational effectiveness."

“The artillery, as you may or may not know, is a trade that requires the greatest of discipline. We’re firing ammunition at very long ranges. That day, the soldiers who were victims were manoeuvring guns firing live on ranges and that required their utmost discipline, a great amount of focus and that was not the case. These individuals were not able to focus, they were not able to perform their duties to their full ability and so the actions of Bombardier Cogswell placed, potentially placed individuals in a great amount of danger.”

[8] Further, the evidence on how the incident impacted the level of trust within the unit, Lieutenant-Colonel Haire stated:

“I would say, in general terms, that this certainly had an impact on eroding the trust of all individuals within the unit. I had, as I went out and visited training, I had the opportunity to engage with multiple students and this situation weighed heavily on not just students, but the staff at the School in how this, such an incident that, you know, we had never encountered anything like this, how this could have transpired at the School and the potential risk that that situation caused. And so many people felt betrayed. Those that did not, that were on the gun line and did not accept something from the canteen that day, you know, the canteen is supposed to improve morale in the unit and that day, those that did indulge, their morale were certainly deteriorated. But those that didn’t indulge felt a sense of guilt that they didn’t, and those that were on the gun line in supervisory roles indicated to me that they felt that they had left their subordinates down in not being able to protect them from such a situation.”

[9] Unfortunately, the incident did not just impact the school and unit, but given the presence of international students, it has had a broader and more reaching effect within both the Artillery as well as internationally. Lieutenant-Colonel Haire explained:

“I think the final thing I don’t believe I said yet today is there were international students on that gun line as well as candidates and students from Royal Military College who come to Canada to conduct training. And so that eroded our credibility as an Army, as an institution. That they experienced that, while they weren’t immediate victims, again, they shared the same burden as I indicated that some of the other Canadian members on that gun line experienced, that was experienced by international colleagues as well. And I think that these actions have had a lasting impact to the end of my command, which was three plus years after the incident, I continued to hear impacts of soldiers, not just on those victims directly impacted, but also on all members of the unit.”

Circumstances of the offender

[10] Bombardier Cogswell is twenty-seven years old. She enrolled in the Canadian Armed Forces (CAF) on 23 June 2011, having served Canada for 10 years. Following basic and occupational training as a gunner in the Artillery, she was posted to 1 Royal Canadian Horse Artillery in Shilo, Manitoba and then she was posted to the RCAS in Gagetown, New Brunswick in March 2017. She is currently posted to the Canadian Forces Transition Unit New Brunswick/Prince-Edward Island (CFTU NB/PEI) at Canadian Forces Base (CFB) Gagetown due to a permanent medical category.

[11] Bombardier Cogswell is married and has no children.

[12] Bombardier Cogswell suffers from the following significant mental health issues arising in part from her service in the CAF:

- (a) post-traumatic stress disorder (PTSD) related to a sexual incident in 2016 involving a fellow soldier while posted to CFB Shilo;
- (b) adjustment disorder with depressed mood, which involves the presence of clinically significant emotional or behaviour symptoms in response to an identifiable stressor (the 2016 sexual incident and workplace stressors); and
- (c) a tentative diagnosis of cyclothymia, which is a chronic, fluctuating mood disturbance involving numerous periods of hypomanic symptoms and periods of depressive symptoms that are distinct from each other.

[13] Bombardier Cogswell is working towards completing her post-secondary education. She has taken some business courses through Yorkville University and is considering completing her degree at the University of New Brunswick.

[14] Bombardier Cogswell benefits from the love and support of her family. She is described by those around her as loving, welcoming, vivacious, and caring. Notable is her love of animals and her efforts to rescue stray kittens or dogs. The letters of support before the Court revealed the following:

- (a) Andrew Cogswell (husband):
 - i. “Through the years Chelsea has proven to be very family oriented. This was quickly shown early in our relationship as she had immediate warmth and excitement upon discovering she was pregnant. Within a week of learning this we purchased everything we thought we would need in anticipation of this new life in our lives, everything from a stroller to a car-seat etc. This however ended in our own personal tragedy, as we lost the child 1-2 months into the pregnancy. Unfortunately, from then on every subsequent attempt has ended unsuccessfully.”

- ii. “Chelsea has also proven to be quite empathetic, especially towards animals.”
- iii. “She came from a broken family, her sister being 10 years older than her leaving the family nest early in Chelsea’s childhood made Chelsea the sibling role model for her special needs younger brother.”
- iv. “Times have been harsh to my wife. Before both COVID and the criminal charges. Life has come to a grinding halt for both of us. Uncertainty of what the future holds has forcefully put off expanding both our family and our respective careers.”

(b) Dan Fraser (father):

- i. “I have raised my daughter to be an honest hard worker and to believe she is the equal of any man. Chelsea wanted to soldier and was successful in basic training. However, in Soldier Qualification, she frequently started calling me about sexist remarks made by her course peers and what she do about it.”
- ii. “Over the past five years, I have observed Chelsea’s mental health decline. She told me that she has struggled with frequent misogyny in [the] military which she did not experience before the military and was at a lost to understand discrimination based on sex. [S]he has told me that the situation has led her to feeling isolated.”
- iii. “Chelsea told me about a sexual assault that led to further clashes with peers and superiors including ordering her to not call herself a victim by her superiors [. . .]. The continued name calling and exclusion from unit social life she endured since 2016 has left her mentally fragile and afraid of her entire chain of command.”

(c) Marjorie Austin (sister):

- i. “Chelsea is my sister and she is truly a good person. I am so proud that she gets up every day continues to fight the internal battle against her mental health conditions. I am proud that she strives to improve herself. I am proud that she still has hope.”

(d) Vanessa Wilson (sister-in-law):

- i. “As I grew to know Chelsea, I understood her to be a welcoming, considerate, and vivacious person; I have never encounter[ed] evidence to question her being a moral person.”

Position of the parties

Prosecution

[15] The prosecution suggested that the minimal punishment should consist of imprisonment for a period of twelve months.

[16] The prosecution argues that based on the precedents in the case law submitted this is the minimum sentence to be imposed to deter others from engaging in similar misconduct.

Defence

[17] The defence submits that, in the unique circumstances of this case, the just and appropriate sentence is a non-custodial one. He argued that the appropriate sentence is dismissal from Her Majesty's service and a reduction in rank to gunner.

[18] He submitted that the facts of this case are somewhat unique and are easily distinguished from the case law upon which the prosecution seeks to rely and argues that this Court must be cautious in importing the civilian courts' range of sentences for administering a noxious thing due to the limited jurisprudence and differences in available sentencing options in each system. To support his recommended sentence, he argued:

- (a) a non-custodial sentence best serves the accused's rehabilitation and reintegration into the community;
- (b) a non-custodial sentence satisfies any residual interest in denunciation and general deterrence, and gives effect to the principle of restraint; and
- (c) should a sentence of imprisonment be imposed, it should be suspended pursuant to subsection 215(1) of the *National Defence Act (NDA)*.

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

[19] In its recent decision in *R. v. Parranto*, 2021 SCC 46, the Supreme Court of Canada (SCC) described sentencing as "one of the most delicate stages of the criminal justice process. It requires judges to consider and balance a multiplicity of factors and it remains a discretionary exercise."

[20] When crafting a sentence, I must first consider the fundamental purposes and goals of sentencing. The objectives and principles of sentencing in the military justice system are codified at sections 203.1 to 203.3 of the *NDA*. They are consistent with Canadian values and are specifically modelled upon similar provisions found in the *Criminal*

Code, but are adapted to the special circumstances associated with the military service of the armed forces and its military members.

[21] 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.

[22] The fundamental purposes of sentencing are achieved by imposing sanctions that have one or more of the objectives set out within the *NDA*. The prosecution has emphasized that they feel that the objectives of sentencing that the Court must consider in the case at bar are denunciation and deterrence.

[23] Conversely, defence submitted that the paramount principles of sentencing in this case also include rehabilitation and restraint. He argues that Bombardier Cogswell's mental health illnesses contributed to her offending conduct, and therefore a punitive sentence designed primarily for denunciation and general deterrence is not necessary.

[24] Further, defence argued that Bombardier Cogswell is relatively youthful and has no meaningful prior record. He submits that the primary objectives in sentencing for such offenders are individual deterrence and rehabilitation, and a court must be slow to impose incarceration.

Analysis

[25] With respect to how the fundamental purposes shall be achieved by imposing a punishment that has one or more of the objectives set out in the military justice sentencing regime, I think it is important to first explain the different principles being advocated for on behalf of counsel as these principles set the framework for the crafting of an appropriate sentence.

Denunciation – denounce unlawful conduct (NDA 203.1(2)(c))

[26] Although constantly referred to in sentencing decisions, denunciation is not always explained. It is important to note that a sentence represents the judicial condemnation of the specific conduct displayed to the affected community.

[27] As stated by Lamer C.J. in *R. v. M.(C.A.)*, [1996] 1 S.C. R. 500 at paragraph 81:

Our criminal law is also a system of values. A sentence which expresses denunciation is simply the means by which these values are communicated. In short, in addition to attaching negative consequences to undesirable behaviour, judicial sentences should also be imposed in a manner which positively instills the basic set of communal values shared by all Canadians as expressed by the *Criminal Code*.

[28] The principle of denunciation is particularly important in the imposition of sentences for conduct captured under the offence of disgraceful conduct (section 93 of

the *NDA*) or, for example, conduct to the prejudice of good order and discipline (section 129 of the *NDA*). These offences are by their very construction flexible enough to embrace a broad range of unacceptable and/or disgraceful behaviour that is not otherwise captured in neither the *Criminal Code* nor the *NDA*.

[29] A sentence imposed for the particularized conduct serves to communicate to members the specific consequences of engaging in similar conduct. As Perron M.J. described in *R. v. Semrau*, 2010 CM 4010, at paragraph 13, a sentence is a “form of judicial and social censure”. What this means is the sentence should express the CAF’s shared values.

[30] In the military justice system, the *NDA* sets out nine objectives of sentencing that have been specifically provided to military judges by Parliament. In sentencing, military judges have discretion over which sentencing objectives to prioritize, such as denunciation, deterrence, and rehabilitation, and how much weight to afford to the secondary sentencing principles that are also set out therein.

Deter offenders and other persons from committing offences (NDA 203.1(2)(d))

[31] Crafting a sentence where one of the objectives is deterrence depends on whether the primary purpose is focussed on deterring Bombardier Cogswell individually from recommitting a similar act versus whether the purpose is to send a broader message of general deterrence to the larger CAF community. Where the purpose of the sentence is to deter others who may be inclined to copycat or commit the same offence, then the court must carefully consider the sentence from an objective perspective based on the facts and the context of the offence.

[32] If the purpose is to deter Bombardier Cogswell personally from ever repeating this offence, then the court must give greater consideration to her individual needs, her attitude, motivation and her rehabilitation. It is for this reason, defence has introduced extensive character evidence on Bombardier Cogswell including letters of support and included the evidence of her family members.

[33] In a case where the purpose is one of general deterrence, the court must consider the gravity of the offence, the incidence of this type of offence within the military community, the harm caused by it, with respect to the individuals directly affected, the military community and the reputation of the CAF at large as well as its effect on the confidence of the Canadian public. It is for this reason that the prosecution has led extensive evidence of the victim impact statements as well as the impact the incident had within the unit, the Artillery and the CAF.

[34] In hoping to achieve the purpose of deterring others, the challenge lies in reconciling what is needed to deter others from the consideration of ever committing something similar.

[35] Based on the facts of this case, and after considering the comments of Lieutenant-Colonel Haire and the affected victims, it is my assessment that the purpose of general deterrence must take precedence over individual deterrence with respect to Bombardier Cogswell.

To assist in rehabilitating offenders (NDA 203.1(2)(e))

[36] When conducting an individualized sentencing analysis, military judges are still expected to account for other relevant sentencing objectives.

[37] In my assessment, on the specific facts of this case, the restorative principle built into the military justice sentencing regime, being the rehabilitation of Bombardier Cogswell is less salient and if I was to prioritize it, I would place the individual and specific deterrence ahead of the general deterrence which I have decided must be given the greatest priority. To be clear, it is not that rehabilitation should not be considered, but in my assessment, it must be provided less weight due to the priority to be afforded to general deterrence.

Priority of objectives

[38] In summary, the Court concludes that the objectives of sentencing that must be given the highest priority are general deterrence and denunciation.

Gravity of offence and degree of responsibility of the offender

[39] It is a fundamental principle that the military judge must impose a proportionate sentence by reasonably appreciating the gravity of the offence and the degree of responsibility of the offender in the specific circumstances of the case.

[40] However, this case is unique with no similar cases in existence to draw direct comparisons. In my finding, I found that Bombardier Cogswell distributed cannabis to fellow CAF members under the guise of a special treat. She had to know that the members consuming the cupcakes would proceed unknowingly under its mind-altering effects to conduct military operations using live fire. Not only did this conduct substantially elevate the risk of harm in an otherwise very dangerous military activity, but it placed the other members participating in the exercise as well as the property surrounding them in grave danger. Further, it also exposed innocent third parties to potential deadly second and third order effects that could flow from any errors from the improper firing of explosives while those operating the guns were impaired.

[41] Aside from the eight *Criminal Code* offences for which Bombardier Cogswell was convicted, she was also found guilty of disgraceful conduct for surreptitiously putting cannabis in cupcakes which she distributed as a special treat to soldiers firing artillery rounds on a live-fire range. She holds a high degree of responsibility for what she did.

[42] The offence of disgraceful conduct is one of the most serious offences found in the Code of Service Discipline for which the maximum punishment is imprisonment for five years. In assessing the gravity of the offence before the Court, I examined the conduct of Bombardier Cogswell as well as the reasons why I found her behaviour to be disgraceful.

[43] In coming to my finding of guilty on this charge, I found that there was indeed evidence of harm flowing directly from the physical mind-altering effects suffered by the complainants, the interference in their bodily integrity by the introduction of a drug that they did not consent to, as well as the fact that the military exercise was interrupted and pivotal summer training was affected. The risk of harm associated with this act was significant. Specific examples include:

- (a) Master Bombardier, (then Gunner) Long was unknowingly driving a heavy vehicle, filled with several detachment members when he started to feel the mind-altering effects of the drug and while following the command-post vehicle in front of him, he started veering off. He testified that he could see the dust plume ahead of him and it appeared almost animated;
- (b) members of a detachment were trying to record a gun and fuse a live round while impaired; and
- (c) the type of gun to be fired was a howitzer, which is a close support, field artillery weapon that is mobile, general purpose, light towed and according to the testimony of Warrant Officer Sampson, has a fourteen kilometre range and a hundred foot casualty radius.

[44] The above circumstances presented the potential for significant harm, including death. Many of those affected testified that they did not know what was happening or alternatively, some recognized the feeling of being high, but they were afraid to say anything given the fact that the use of cannabis was prohibited.

[45] The saving grace was that when several of the more senior soldiers recognized how they were feeling, they immediately addressed their concerns to their chain of command which enabled efforts to be focussed on identifying the cause. It took a great deal of courage for then-Master Bombardier Vallerand to directly confront then-Sergeant Sampson and say, "I am fucking high." In fact, Warrant Officer Sampson told the Court he originally believed that then-Master Bombardier Vallerand was joking and told him to get back to work, but then-Master Bombardier Vallerand was insistent telling then-Sergeant Sampson at least three times before Sergeant Sampson finally realized that there was something going on.

[46] Further, it was also fortunate that then-Sergeant Sampson had deferred eating a cupcake to ensure that the soldiers could enjoy them first. Consequently, he was sober, alert and addressed the problems that ultimately surfaced. If it had not been for the

proactive action taken quickly on the ground to resolve this unique incident, an accident would have been highly likely.

[47] Notwithstanding my finding that the conduct was shockingly unacceptable, it is important to highlight that there was no direct personal injury that ensued. This is a factor that trial judges must also consider when the offender's conduct introduced a risk of harm.

[48] In order for a sentence to be proportionate, individualization and parity of sentences must be reconciled.

Parity

[49] The *NDA* sets out a structured and military-centric approach to sentencing with well-defined objectives and principles and, pursuant to paragraph 203.3(b), it requires that a sentence be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.

[50] It is noted that the available sentence for disgraceful conduct is five years' imprisonment or less punishment. The available sentence for administering a noxious substance with intent to aggrieve or annoy is two years' imprisonment or less punishment. There is no mandatory minimum sentence for either offence.

[51] With respect to the charges of administering a noxious thing with intent to aggrieve or annoy, there are very few reported sentencing decisions, and no similar military cases upon which the context of the offence in the military milieu can be examined. Consequently, I find that there is no clear established range for the specific facts of the case before this Court.

[52] Nonetheless, a survey of the civilian case law provided by the prosecution reveals that, in almost every case, there has been custodial sentences imposed for the criminal offence for which Bombardier Cogswell was found guilty. After reviewing the cases submitted primarily by the prosecution, I find that only one case which comes close to the facts of this case is that of *R. v. Johnson*, 2014 SKCA 10, affirming the trial decision reported at *R. v. Johnson*, 2013 SKQB 184, which was a four-month conditional sentence, twelve-month probation and a \$250 fine. The sentence was upheld on appeal.

[53] In the *Johnson* case, the offender was an employee in a long-term care home who held a position of trust responsible for the personal care of the residents who were completely dependent. In *Johnson*, the accused put hand sanitizer in the eyes of a long-term care resident and was also found guilty of two counts of assault for putting lemon juice in a resident's eyes and attempting to force a resident to chew peppercorns.

[54] However, based on the specific facts of the other cases provided by the prosecution, I do not find them to be particularly helpful. In most of the cases, the

administration of the noxious substance was done for the sole purpose of committing another criminal offence, such as sexual assault and several of the cases involved the abuse of minors.

- (a) *R. v. Franchino*, 2018 ONCA 350, in which the accused was convicted of putting GHB into the complainant's wine at his apartment, although acquitted of sexual assault and a sexual assault motive, he received a sentence of nine months' imprisonment. The sentence was upheld on appeal;
- (b) *R. v. D.Y.*, 2019 ONSC 6548, in which the accused induced his eleven-year-old great-niece to smoke cocaine after which he induced her to touch his penis, he received a nine-month imprisonment sentence;
- (c) *R. v. J.A.B.*, 2014 ABPC 143, in which the accused forced her biological daughter to eat feces and hair from a drain as punishment on three occasions and she also pleaded guilty to a number of very serious assaults, she received a twelve-month imprisonment sentence;
- (d) *R. v. J.H.*, [1999] 135 CCC (3d) 338, in which the accused gave cocaine to her young son, she received a time-served of approximately nine months' imprisonment sentence;
- (e) *R. v. Fournel*, 2014 ONCA 305, in which the accused gave a sleeping agent to her daughter-in-law, put her to bed and set her house on fire, she received a consecutive sentence of two years' imprisonment for administering a noxious substance and three years' imprisonment for the fire; and
- (f) *R. v. Reyes*, 2018 CM 4015, in which aggravating factors included repeated violation of the dignity of a subordinate and a significant betrayal of trust, he received a five-month imprisonment sentence.

[55] With respect to the available cases, defence also argued that the above cases are distinguished based on the following reasons:

- (a) the noxious substance at issue (cannabis), although illegal at the time, fell at the very low end of seriousness. Cannabis simply does not compare to the seriousness of cocaine or the dangerousness of GHB (*Franchino*, *D.Y.*, *J.H.*);
- (b) the victims were not children being abused by adults acting in *loco parentis* (*J.A.B.*, *D.Y.*, *J.H.*), nor were they vulnerable senior citizens being abused in a care home (*Johnson*); and

- (c) the cannabis was given to the troops to aggrieve or annoy them and not in furtherance of any nefarious aim (*D.Y.*). Further, the offence of administering a noxious thing with intent to aggrieve or annoy was not committed alongside other distinct offences (*Johnson, D.Y., J.A.B.*).

[56] I agree with most of the submissions of defence counsel. Bombardier Cogswell was convicted of the less serious offence of administering a noxious substance, being paragraph 245(1)(b) of the *Criminal Code* where the intent required is to aggrieve or annoy which is significantly less serious than the intent to endanger the life of or to cause bodily harm where the sentence that could be imposed is imprisonment not exceeding fourteen years.

[57] I specifically asked the prosecution for any case law that related more to the offence of disgraceful conduct that might be more helpful, but he admitted that there is very little available to help establish meaningful precedent.

[58] Defence provided one example that could inform this particular case of disgraceful conduct where the offender's actions had similarly introduced a level of risk into military operations. They are far from similar, but can help establish a range of punishment.

- (a) *R v Ravensdale*, 2013 CM 1001, in which the accused was found guilty of four charges relating to events that occurred on 12 February 2010, in Afghanistan: one charge for having in his care or control an explosive substance, failed without lawful excuse to use reasonable care to prevent the death of Corporal Baker by that explosive substance; one charge of having in his care or control an explosive substance, failed without lawful excuse to use reasonable care to prevent bodily harm to four soldiers by that explosive substance; one charge of unlawfully caused bodily harm to four soldiers; and one charge of giving the order to fire a live weapon without ensuring, as it was his duty, that all persons were either under cover or withdrawn from the danger area. He received a sentence of six-months' imprisonment, a reduction in rank to sergeant and a fine in the amount of \$2,000 as sentence, but the imprisonment was suspended pursuant to section 215 of the *NDA*;
- (b) *R v Lunney*, 2012 CM 2012, in which the accused pled guilty to an offence under section 124 of the *NDA* for having negligently performed a military duty. All other charges were withdrawn by the prosecution and, on a joint submission, he received a reduction in rank to captain and a severe reprimand as sentence; and
- (c) *Semrau*, in which he was found guilty of having behaved in a disgraceful manner for having intentionally shot an unarmed injured insurgent, he received a dismissal from Her Majesty's service and a reduction in rank to second-lieutenant as sentence.

[59] It is clear that these cases are very different and not directly comparable to the facts before the Court, but the circumstances of this case might be considered less severe than *Ravensdale* and *Lunney* where one soldier was killed and four injured as a result of the negligence of the offenders. Similarly, the case before me is much less severe than the case of Captain Semrau who was found guilty of shooting an unarmed and injured insurgent.

Accounting for relevant aggravating or mitigating circumstances

[60] In the military justice system, under section 203.3 of the *NDA*, in imposing a sentence the Court shall take into consideration a number of principles relevant to the case. Firstly, under paragraph 203.3(a) of the *NDA*, the Court shall increase or reduce its sentence to account for any relevant aggravating or mitigating factors relevant to the offence or the offender. Aggravating circumstances include, but are not restricted to, evidence establishing any of the statutory factors set out in subparagraphs 203.3(a)(i) to (viii).

Aggravating factors

[61] In their written and oral submissions, Bombardier Cogswell accepts the following as aggravating factors:

- (a) the provision of cupcakes during a live-fire exercise created a serious risk to the health and safety of the troops operating the guns and to the students participating in the exercise;
- (b) the cupcakes were eaten by several people;
- (c) some of the victims were significantly affected by the effects of the cannabis; and
- (d) the offences involved deceiving her fellow soldiers as she surreptitiously gave them cannabis under the ruse of a treat for their hard work.

[62] In addition, after hearing the submissions of counsel, the Court notes the following additional aggravating factors that should be considered:

- (a) the offence involved the violation of the bodily integrity of eight colleagues: they involuntarily consumed illegal drugs in breach of the CAF program;
- (b) the disruption of a major exercise: this was the first time the entire RCAS exercised as a unit, 150 staff and students in the field including visiting forces. It was to be a marquee exercise;

- (c) the creation of a dangerous situation: as discussed above, the introduction of the cannabis during the exercise introduced the risk of significant harm, such as impaired driving and inability to properly fuse and fire the howitzers;
- (d) the eight innocent members were affected: although there was evidence of frustration towards the chain of command from Bombardier Cogswell, the persons ultimately affected were eight different soldiers;
- (e) the breach of trust: she delivered a kind service in the middle of the exercise, during the hot summer months where the soldiers were tired and needed an emotional lift. Prosecution said the arrival of the mobile canteen truck was viewed as a desert oasis to them so they gladly accepted her generous offer of a cupcake;
- (f) the impact on the victims: as expressed in their respective victim impact statements, they all felt violated, their confidence and trust were shaken and they needed to understand why such a thing occurred;
- (g) the cannabis: it was prohibited at the time and she brought a prohibited substance into the field and intentionally distributed it;
- (h) the degree of premeditation: this was not done in the heat of the moment. She baked the cupcakes the night before, then drove them to the field where she delivered them; and
- (i) the attempt to inculcate other innocent personnel: she had the right to silence, but she took a greater step when she said to the military police that she did not do it, but knew who did; she was ready to jeopardize the innocence of others in order to disculpate herself.

Mitigating factors

[63] After hearing the submissions of counsel, the Court has determined that the following mitigating factors must be considered:

- (a) with respect to her own conduct, Bombardier Cogswell does not have a criminal record, but has a single dated finding of guilt on her conduct sheet for an unrelated offence;
- (b) she has started retraining herself by completing courses through Yorkville University; and
- (c) she has sought out, accepted and is receiving treatment for her mental health illnesses.

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

[64] Defence counsel submitted that there are two indirect consequences of the finding of guilty and the sentence that will have a significant punitive effect on the offender that the Court should consider:

- (a) the criminal record: by registering a conviction and not directing that the offender be discharged, she will receive a permanent criminal record. As a person who will necessarily transition to civilian life, a criminal record will negatively impact her employment prospects; and
- (b) the media attention: this case was the subject of domestic and international media attention, which itself bears a punitive effect on Bombardier Cogswell. Her offending conduct will not fall into history with relative obscurity, unlike the vast majority of offenders who pass through Canada's military and criminal justice systems. Rather, the details of her conduct will be forever on display simply through an Internet search of her name.

[65] Although I am not prepared to disregard the above two submissions of defence counsel entirely, I am also not prepared to provide them with significant consideration in reducing any punishment as they are the natural consequences that flow from committing the offences before the Court.

Determination of sentence

[66] As Dutil C.M.J., as he then was, found in the case of *R. v. Ayers*, 2017 CM 1012, some of the punishments that are available in the military justice system have no equivalence or resemblance in the civilian context, but military judges tasked with imposing sentences are fully aware of their significance within the military community. The scale of punishments that may be imposed in respect of service offences is found under subsection 139(1) of the *NDA* and reads as follows:

139. (1) The following punishments may be imposed in respect of service offences and each of those punishments is a punishment less than every punishment preceding it:

- (a) imprisonment for life;
- (b) imprisonment for two years or more;
- (c) dismissal with disgrace from Her Majesty's service;
- (d) imprisonment for less than two years;
- (e) dismissal from Her Majesty's service;
- (f) detention;

- (g) reduction in rank;
- (h) forfeiture of seniority;
- (i) severe reprimand;
- (j) reprimand;
- (k) fine; and
- (l) minor punishments.

[67] Upon a review of this subsection, it is evident that except for imprisonments and fines, there is no direct parity to those sentences generally available in the criminal justice system. Although some punishments might serve the same purpose and objectives found in criminal courts, others do not.

Custodial or non-custodial sentence?

[68] Defence strenuously argued that a non-custodial sentence would best serve Bombardier Cogswell's rehabilitation and reintegration into the community. He argued that it would permit her to transition her mental health support from her military treatment team to a community-based team without a loss of service. Further, he argued that a non-custodial sentence would ensure she remains close to her support system, her husband and family, an important goal for a person managing a mental illness.

[69] It is his position that a sentence of imprisonment would accomplish none of these objectives while possibly harming her mental health. He further submitted that placing Bombardier Cogswell into a locked institution for many months, possibly under the command of male guards, could aggravate her PTSD. In short, he argues that a sentence that not only limits but impairs a member's rehabilitation ought to be avoided.

[70] I have determined that the predominant principles of sentencing that apply to this case are general deterrence and denunciation. However, it is an error in law to consider that the principle of general deterrence can only be achieved by imposing a period of incarceration. Section 203.3 of the *NDA* is clear that an offender should not be deprived of liberty if less restrictive sanctions other than imprisonment may be appropriate in the circumstances. It reads:

203.3 A service tribunal that imposes a sentence shall also take into consideration the following principles:

[. . .]

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

(c.1) all available punishments, other than imprisonment and detention, that are reasonable in the circumstances and consistent with the harm done to victims or

to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders;

[71] In short, I must ask myself if only a term of imprisonment could resonate with would-be offenders as a consequence and seriousness of engaging in this sort of conduct.

[72] Imprisonment is afforded when there is a need to separate an offender from society. In the CAF, which is our military society, this goal may be achieved through incarceration, but it is also accomplished through dismissal from Her Majesty's service which on the scale of punishments set out in the *NDA*, is considered more severe than imprisonment. Consequently, I will begin the analysis in reviewing the other available punishments as set out at subsection 139(1) of the *NDA*.

Dismissal and dismissal with disgrace from Her Majesty's service

[73] The prosecution submitted that he did not propose dismissal from Her Majesty's service as a punishment in light of Bombardier Cogswell's pending release under item 5(f) of the Table to article 15.01 of the QR&O. Instead, he has advocated for a twelve-month term of imprisonment relying upon a broad range of case law where civilian courts have awarded sentences for the administration of a noxious substance, which was the *Criminal Code* offence for which Bombardier Cogswell was found guilty.

[74] A 5(F) administrative release from the CAF relates to Bombardier Cogswell's unsuitability for further service. It applies to the release of an officer or non-commissioned member who, either wholly or chiefly because of factors within their control, develops personal weakness or behaviour or has domestic or other personal problems that seriously impair their usefulness to or imposes an excessive administrative burden on the CAF. Although the submissions before the Court were such that her administrative release has already been recommended and is expected, the punishments of dismissal and dismissal with disgrace from Her Majesty's service have no equivalence or resemblance in the civilian context and should not be confused or equated with being dismissed from one's employment or even the equivalent of a 5(F) administrative release.

[75] Dismissal with disgrace from Her Majesty's service is a most severe punishment. As Perron M.J. in *Semrau* stated:

[50] Dismissal with disgrace from Her Majesty's service is a most severe punishment. A punishment of dismissal with disgrace from Her Majesty's service means you are not eligible to serve Her Majesty again in any military or civil capacity unless there is an emergency or the punishment is set aside or altered. It also affects some of the benefits you could receive upon release from the CF.

[76] Based on the victim impact statements and the unit impact statement provided by Lieutenant-Colonel Haire, there is evidence of the widespread disapproval of the reprehensible conduct in the context of the expected trust between military members

serving together. In fact, the consistency in all the statements was that the very commission of the offence either destroyed or shook the trust relied upon by the members serving together.

[77] Although both counsel were of the view that dismissal with disgrace from Her Majesty's service was not appropriate, the imposition of the punishment of dismissal sends a serious and clear message to the military community, promoting the sentencing objectives of general deterrence and denunciation of the conduct.

[78] Although the facts of this case are indeed unique, it is clear that the particular commission of the offence is incompatible with further military service in the CAF. Lieutenant-Colonel Haire testified as follows:

“So at this point, I would not have confidence in employing Bombardier Cogswell in the Army. As soldiers, we need to have the utmost trust in our comrades or our brothers and sisters in arms. And I would not have confidence in her abilities nor do I believe that she would have the trust of her peers or superiors in order to effectively execute missions.”

[79] In committing the offences, Bombardier Cogswell demonstrated that she is not deserving of the required trust from either her chain of command or her brothers and sisters in arms. In cases where the CAF leadership and its members have lost confidence in the continued service of the member, the sentence must reflect this fact.

[80] Every role in the CAF places trust at its premium. Courts martial have repeatedly held that dismissal meets the objective of general deterrence to effectively communicate the clear consequence for conducting oneself in a manner where the loss of trust has been irretrievably lost.

[81] In *R v Leaman*, 2013 CM 4004, Perron M.J. wrote:

[22] One can see that dismissal from Her Majesty's service is a more severe punishment than detention. The punishment of detention has a rehabilitative purpose as well as a punitive purpose, while the punishment of imprisonment only has a punitive purpose. Basically, detention is used to help a soldier become a better soldier. Dismissal from Her Majesty's service sends a message to the offender and to society that the offender is not the type of person we wish to keep within the profession of arms, because he or she has not demonstrated the qualities we seek in our soldiers.

[82] Dismissal by itself can have far-reaching consequences on a retired CAF member when they have transitioned to civilian life. It can be awarded with or without either imprisonment or detention, and in combination with any other punishment. It is effectively a dishonourable separation from the CAF and is treated far more seriously than a 5(F) administrative release. It sends a general and public message to the CAF population at large that those members who do not uphold the qualities expected of serving members will be expelled from the CAF.

[83] I find that, given the age of Bombardier Cogswell and the future that lies ahead for her, imposing a punishment of dismissal from Her Majesty's service, rather than dismissal with disgrace is most appropriate. One of the distinguishing differences between the two punishments is with respect to future employment with Her Majesty. Although she would likely never be able to serve in the military again, dismissal is more conducive to her rehabilitation at large as it leaves open the potential for a future career as a public servant should she so qualify whereas the imposition of dismissal with disgrace would foreclose that possibility.

Reduction in rank

[84] A reduction in rank was proposed by the defence to accompany the main punishment of dismissal from Her Majesty's service, which defence argued was more appropriate to the facts of this case. Reduction in rank is a punishment that must be considered when the offence to be sanctioned reflects a failure in the expectations of someone of their rank and experience.

[85] Reduction in rank has been imposed on numerous occasions in courts martial. In *R v Moriarity*, 2012 CM 3022, d'Auteuil M.J. had this to say regarding a reduction in rank:

[37] In the Court Martial Appeal Court decision of *R v Fitzpatrick*, [1995] C.M.A.J. No. 9, Judge Goodfellow described at paragraph 31 the nature of such a sentence:

The sentence of reduction in rank is a serious sentence. It carries with it career implications, considerable financial loss, plus social and professional standing loss within the services. It is a truism that rank has its privileges, and to reduce one to the lowest rank is a giant step backwards which undoubtedly serves not only as a deterrent to the individual but also a very visible and pronounced deterrent to others. There are occasions when a sentence in the military context justifiably departs from the uniform range in civic street and certainly the reduction in rank is a purely military sentence.

[38] Justice Bennett also expressed clearly the meaning of such a sentence, when she said in the Court Martial Appeal Court decision of *Reid v. R.; 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.

[86] In short, although reduction in rank is a purely military sentence, it reflects the loss of trust in the offender and their inability to comport themselves in the manner expected of their rank and experience. I find that, based on Bombardier Cogswell's inability to fulfil the duties and expectations of her rank due to the loss of confidence that has been expressed, a reduction in rank to that of gunner is appropriate.

Imprisonment

[87] After the extensive review conducted on the other applicable punishments available and upon the consideration of the victim and the unit impact statements, I must consider whether the sentence should also include a term of imprisonment.

[88] I acknowledge that sending a strong message of general deterrence does not require the imposition of a sentence of imprisonment, but I find that based on the facts of this case, as well as the sentence provided in the *Johnson* case where the victims were vulnerable and dependant, the sentence of imprisonment set out in that case provides a helpful starting point.

[89] Arguably, the level of interdependency and trust that members rely upon serving together in the field is not dissimilar to the level of trust that a dependent elder expects of a caregiver in a long-term care home. It is the closest case to the one at bar. However, the case before me is significantly more severe because it involved the covert distribution of an illicit drug to fellow soldiers when the offender knew very well that the soldiers were engaged in dangerous activity. I have already explained both the specific harm and potential harm that the unit and soldiers were exposed to. This was not simply a laxative put into the food to be a nuisance nor was it cannabis served at a social gathering, also unacceptable on their own facts. This offence was committed on a live-firing range where discipline and attention to detail were critical to safety. The context of what was administered and where are important and the facts of this case set it apart from other case law.

[90] After reviewing the facts of this case, I conclude that a sentence that falls short of the imposition of the punishment of imprisonment is not a fit sentence. The sentence must reflect both the level of moral blameworthiness of Bombardier Cogswell and the gravity of the offences for which she was found guilty. The general deterrence requires a strong message that is unequivocal to ensure that the consequences are clear for anyone who tampers with a food or water supply to the detriment of those dependent upon it. There must be a punitive element to the sentence.

[91] I note that in the *Johnson* case the Court imposed a four-month conditional sentence of imprisonment on the offender, followed by probation and a fine. As I explained, this case before me is significantly more serious.

[92] Although it is a negligence case, I find that *Ravensdale* included a period of six months' imprisonment in a case where the consequences of his actions led to the actual death and injury of fellow soldiers. It is a very different case as well, but the reality is that it does help to guide the Court by providing an upper limit of what could be imposed in a situation where significant harm occurs. In *Ravensdale*, the Court notes that although he was reduced in rank, he was not awarded a sentence of dismissal and the sentence was later suspended. I do not see this case to be as serious as that in *Ravensdale* where there were actual lives lost.

[93] I am of the view that a range for the sentence of imprisonment is between three to five months when accompanied by the punishments of dismissal from Her Majesty's service and a reduction in rank to the rank of gunner.

Summary of punishments

[94] I turn next to consider the circumstances of Bombardier Cogswell and any mitigating and aggravating factors that should be considered in the sentence of imprisonment which I have determined should be in the range from three to five months when accompanied with the punishments of dismissal from Her Majesty's service and a reduction in rank to the rank of gunner in order to be an appropriate, fair and just sentence.

[95] In his submissions, defence counsel argued that there is clear evidence before the Court that the offender is suffering from mental health illnesses that he suggests either directly or indirectly led to her decision to drug the troops with cannabis. Her PTSD and adjustment disorder rendered her unable to cope with the negative circumstances she faced in her unit at that time and contributed to her negative decision making.

[96] In 2012, Bombardier Cogswell was posted to the Personnel Awaiting Training Platoon at CFB Gagetown. One evening, she alleges, she returned home quite intoxicated. Two male members entered her room and sexually assaulted her. She reported this incident at the time, but no investigation resulted. Although no details were provided, Dr Joshi confirmed that, in 2012, Bombardier Cogswell was also diagnosed with PTSD as a result of sexual trauma.

[97] In rendering my finding, in assessing possible motive, I outlined the evidence before the Court that suggested that Bombardier Cogswell was suffering from significant mental health challenges at that time of the alleged incidents. In my reasons, I wrote:

[164] There is evidence to suggest that Bombardier Cogswell was suffering from a number of mental health issues well before the incident in question. In her 20 September 2018 interview, Bombardier Cogswell tells the investigator that she is still recovering from an incident that occurred in Shilo, Manitoba and, since that time, she has kept to herself. She tells Sergeant LeBlanc that she is waiting for a transfer to the Joint Personnel Support Unit as she cannot stay in the unit any longer as it is "too much, way too much". She tells him that she is awaiting a PCat for PTSD after everything that happened to her. She anticipates it will be granted either on 9 or 19 October 2018. With respect to her assimilation within her unit, she explains:

"The unit's been very difficult since I came here. At first, they were very supportive but, as soon as that court martial was done, it just it flipped. They turned completely not supportive any more. They expected me to be good to go a month after. And it just it's just been constant bugging, like, the rumour mill. They're always telling me what is going on in the accused or the person's life.

AIGs [NCOs] from the school, they all took him out to dinner and drinks when he went up to Shilo.”

[165] Further, the investigation reveals that there was animosity flowing from a perception, whether warranted or not, that the senior non-commissioned members (NCO) were somehow celebrating with the accused from an earlier court martial that involved her as the complainant. She says:

“So a bunch of them went to Shilo to shoot, I think it was a PKG trial or something, I can't remember bu[t] they all wound up taking him out for drinks, celebrate him getting off the hook for the court martial and then I found out about that and then all the rumours, all the other harassment stuff. It just it hasn't stopped and I'm just worn out.”

[. . .]

[169] In her interviews, she also appeared intent on implicating or projecting blame on then-Bombardier Slade who was in Master Bombardier Vallerand's detachment. In then-Bombardier Slade's testimony, he did admit to smoking marihuana with the accused on one occasion. Bombardier Cogswell also appeared intent on undermining or blaming some of the senior NCOs, who possibly could be the same people who met with the individual implicated in Shilo, MB. It is unclear.

[170] Nonetheless, there is animosity seeded in these statements and they are directed at the unit RCAS and senior NCOs in general.

[98] The medical evidence presented in sentencing confirms my finding that in the months prior to the incident, Bombardier Cogswell was emotionally struggling with her assimilation within the RCAS. In her 16 May 2018 visit to NP Chapman, it was clear that she was not doing well. During that visit, it appeared that Bombardier Cogswell was struggling with processing the snide comments she said she was receiving from her chain of command. She explained that news of an incident that had occurred in Shilo, Manitoba had been circulated within the RCAS and, since her alleged aggressor was deeply ingrained in the artillery trade and knew all the senior staff, she felt triggered when she went to the gun lines. Based on her observations of Bombardier Cogswell on that day, NP Chapman strongly recommended that she be immediately posted to the CFTU NB/PEI as a “pause button”.

[99] On 6 June 2018, Bombardier Cogswell presented to Ms Ellen Morris, a Registered Nurse and Ms. Morris' clinical note suggests Bombardier Cogswell was requesting to be moved away from the Artillery School so she did not feel put on display while working at the unit canteen everyday serving coffee and selling chips. She explained to Ms. Morris that she is faced everyday with comrades who are totally aware of her legal case and trial. She constantly feels “on display”, and she claimed that this has a profound effect on her mood and energy. Working at the canteen, without even access to a computer, she finds that very degrading and humiliating. She feels judged.

[100] In an appointment on 26 June 2018, Dr Joshi observed that Bombardier Cogswell was functioning well but had had a rough few weeks. Bombardier Cogswell reported continuing to experience harassment, name-calling at work, which she found

very demoralising. She advised that her mood and anxiety have worsened since the increased presence of stressors at work.

[101] In a follow-up appointment on the same day, 26 June 2018, with NP Chapman, Bombardier Cogswell described that she had experienced “a fair interval”, but the worst issues she faced were arising from her workplace. She admitted to “liking the ideal of her trade” and the idea of serving her country, but she was still being subjected to what she described as catcalls, name-calling, workplace and chain of command harassment. Bombardier Cogswell advised that she was working in the canteen as she could not tolerate the field tempo.

[102] On 18 July 2018, Dr Joshi noted that Bombardier Cogswell had presented for an appointment and she was feeling better. She reported feeling less anxious as most of her peers were out in the field.

[103] The incident, for which she is to be sanctioned, occurred three days later on 21 July 2018.

[104] Defence counsel argued that when faced with harassment and maltreatment by other members of the RCAS, including apparently being aware that some personnel had congratulated her alleged prior aggressor on his acquittal, she was triggered and it extended beyond her point of resilience, and she hit a breaking point. Defence counsel suggested that her animosity towards the unit, as exacerbated by her PTSD, was the motive for the incident.

[105] In units where teamwork is the foundation of their role, few can identify with the alienation that she would have felt being unable to properly integrate herself back into the Artillery. She served them in managing the mobile canteen and in return they referred to her as “the canteen bitch”. She would have felt completely alienated, a victim consumed in her own self-imposed blame while suffering from PTSD. She may or may not have intended to cause harm to those affected by her actions, but she clearly reached a breaking point and lashed out and harm flowed from her actions.

[106] Defence counsel strongly argued that, in light of the facts, we cannot dismiss the mental health concerns of Bombardier Cogswell. Although defence counsel was clear that the PTSD diagnosis does not absolve her of the offence, it should carry weight at the time of sentencing. He further argued that Bombardier Cogswell’s family is instrumental to her recovery and to cut her off from her support system would be extremely detrimental to her rehabilitation. There is also evidence before the Court that Bombardier Cogswell has been actively engaged in her own medical recovery.

[107] Whether Bombardier Cogswell is legally a “victim” with respect to the 2016 incident that underpins the alleged maltreatment she feels she experienced at the Artillery school is not relevant. The evidence before the Court is that she sees herself as a victim. She was diagnosed with PTSD for sexual trauma in 2012, well before the incident before the court occurred. Dr Joshi explained that PTSD is characterized by

negative alterations in mood and cognition as well as marked alterations in arousal and reactivity associated with the traumatic events. He explained that PTSD can manifest itself in many ways and the evidence suggests that she was and continues to be hypersensitive to the alleged incident in Shilo that occurred in 2016.

[108] Whether the alleged sexual interaction was found to be consensual or not, her social work records suggest she personally shouldered a perceived responsibility for “ruining his family.” There was indeed a great deal packed into the emotions she carried at the time of the incident that led to the charges before the court for which she is to be sanctioned.

[109] It would be improper for this Court to dismiss the PTSD suffered by Bombardier Cogswell as a result of sexual trauma as less deserving of the Court’s recognition than other forms of PTSD arising from combat stress.

[110] This Court is cognizant of the ongoing struggle that the CAF is confronting with respect to its handling of complaints of sexual misconduct. In her statement, her sister, Master Corporal Austin, writes that, based on their differing experiences in the CAF, it is like they literally joined two different armed forces. Her statement is possibly the best example of the competing tension that currently resides within the CAF as it strives to change its culture. Quite frankly, not all serving members have had the same experiences and institutional attempts to provide a one-size-fits-all response can be counterproductive and serve as a hurdle to progress.

[111] Further, not everyone reacts the same way to the stressors placed upon them and a member’s reactions will depend upon their psychological state on any given day. Dr Joshi described that, at various times, he noted that Bombardier Cogswell reported suffering multiple PTSD symptoms, including nightmares, flashbacks, difficulties with socialization, avoidance, and becoming triggered. She denied suicidal thoughts. She admitted to experiencing self-blame and feeling guilty.

[112] In the last few months, there has been a clear reckoning and recognition that the CAF may not have taken sufficient or appropriate action in responding to alleged sexual harassment or misconduct. It has been described as an “existential crisis” within the ranks. There has been a settlement of a \$900 million class action lawsuit against the federal government and an apology is expected under the terms of that agreement.

[113] It is absolutely imperative that those persons suffering from PTSD be provided their best opportunity to heal. As I explained above, PTSD arising from sexual trauma is no less of a disease than if it arose from a combat injury.

[114] To be clear, I am not suggesting that there was a specific catalyst or person or persons to blame for why Bombardier Cogswell did what she did. This is not about casting fault or justifying her conduct. She is legally and morally responsible for her actions and she alone must serve the punishment. However, by understanding the reasons why she lashed out as she did, as an institution, the CAF can ensure that this

type of incident does not occur again and we can pursue the required cultural changes needed to ensure that members suffering do not reach an emotional breaking point as has occurred in this case.

[115] Consequently, I have considered the above factors, including the mental health diagnosis of Bombardier Cogswell as well as her personal circumstances in my determination of the appropriate sentence of imprisonment to be imposed. I find that a reduced sentence of imprisonment for a period of thirty days is the most appropriate.

Suspension of imprisonment

[116] In his oral and written submissions, defence argued that if this Court finds that a sentence of imprisonment is required, the accused requests that the sentence be suspended pursuant to section 215 of the *NDA*.

[117] Conversely, the prosecution argued that the Court should not consider suspension and further advised the Court that the prosecution's submission for sentence had taken into account the offender's mental health. He argued that given the importance of denunciation and deterrence as the overriding sentencing objectives, suspending a sentence of imprisonment would undermine public trust in the military justice system.

[118] Firstly, it is important to highlight that the consideration of a suspension of a term of imprisonment does not come into play until the Court has made a determination that imprisonment is at least one of the appropriate punishments, which I have done in this case. A court martial must avoid conflating an order for suspension of execution of a punishment of imprisonment into a distinct form of punishment that does not exist within Division 2 of the *NDA*. It is not a punishment similar to a conditional sentence imposed in the civilian criminal justice system. The punishment itself is imprisonment.

[119] Subsection 215(1) of the *NDA* reads as follows:

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

[120] Further, subsection 216(2) of the *NDA* states:

(2) A suspending authority may suspend a punishment of imprisonment or detention, whether or not the offender has already been committed to undergo that punishment, if there are imperative reasons relating to military operations or the offender's welfare.

[121] The *NDA* does not contain particular criteria for the application of section 215, nor does it stipulate what types of reasons would be sufficient to qualify as "imperative" with respect to an offender's welfare.

[122] In considering whether or not to suspend the execution of a punishment of imprisonment, the Court must weigh a number of factors. As explained earlier, this is the first case of its kind and, consequently, it is imperative that a strong message of denunciation and general deterrence be clear and unequivocal.

[123] Based on court martial jurisprudence, in order to obtain a suspension of the custodial punishment, there are two requirements that must be met:

- (a) the offender must demonstrate, on the balance of probabilities, that his or her particular circumstances justify a suspension of the punishment of imprisonment or detention; and
- (b) 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.

[124] In advocating for the Court to suspend the execution of the period of imprisonment, defence counsel argued that there is clear evidence before the Court that the offender is suffering from mental health illnesses that he suggests either directly or indirectly led to her decision to drug the troops with cannabis. Her PTSD and adjustment disorder rendered her unable to cope with the negative circumstances she faced in her unit at that time and contributed to her poor judgement with respect to the incident.

[125] As detailed exhaustively in my consideration of her individual circumstances, I have already considered Bombardier Cogswell's mental health diagnosis in reducing the sentence of imprisonment.

[126] It is important to note that although there was significant evidence before the Court of her mental health illnesses that contributed to the commission of the offences for which she is being sentenced, there is no evidence that suggests that, for mental health reasons, she is unable to serve a thirty-day period of imprisonment.

[127] By means of an Agreed Statement of Fact submitted in the context of the sentencing hearing the prosecution presented the following evidence to the Court:

“The following accommodations for continuing care will be made by the New Brunswick Women's Correctional Centre:

1. Access to CAF psychiatric services will be accommodated while a CAF member is incarcerated;

2. Access to CAF nurse practitioner will be subject to discussion with the Centre's medical doctor, who makes weekly on-site visits for all inmates, and is available to the Centre on an on-call basis;
3. Current prescriptions will be continued subject to the Centre's policy on reducing access to certain addictive narcotics within the prison; and
4. Any recommended changes to medication by CAF psychiatrists will generally be accommodated, but are considered on a case-by-case basis by the Centre's medical doctor."

[128] Although I find that based on her personal circumstances, a reduced period of incarceration is appropriate, I do not find that her personal circumstances justify, on the balance of probabilities, a suspension of the punishment of imprisonment.

Concluding comments

[129] Members serve together in austere circumstances and the interdependency and trust placed upon each member and the various units are necessary for survival. Trust is a cornerstone upon which a member's loyalty, duty, integrity and courage rests. Without it, members would be unable to embrace the military values required within the Canadian military ethos. While serving on operations and on exercises, members rely upon each other for the delivery and provision of water, rations or fresh food and any other necessary supplies. They cannot constantly be second-guessing whether something might have been added to their water or food. Trust is implicit in service, but it also makes every one of us vulnerable and that is why so many members feel exposed by the offences before the Court.

[130] Consequently, I find that based on the particular circumstances related to Bombardier Cogswell's mitigating circumstances, and in light of my decision that dismissal from Her Majesty's service, combined with a reduction in rank to the rank of gunner, a reduced sentence of imprisonment of thirty days is appropriate. I find that the imposition of a period of imprisonment is imperative to send the required message of general deterrence.

FOR THESE REASONS, THE COURT

[131] **SENTENCES** Bombardier Cogswell to imprisonment for a period of thirty days, dismissal from Her Majesty's service and a reduction in rank to that of gunner.

[132] The sentence was pronounced at 1545 hours, on 19 November 2021. I advise Gunner Cogswell that in light of your sentence today, you are entitled to submit an application for Release Pending Appeal. As set out in QR&O article 118.03, you have twenty-four hours to submit it to me. If you are considering this, please discuss with your defence counsel as soon as possible.

Counsel:

The Director of Military Prosecutions as represented by Majors H. Bernatchez and M. Reede

Mr I. Kasper, assisting the Director of Defence Counsel Services, counsel for Bombardier C.H. Cogswell, Offender