COURT MARTIAL

Citation: *R. v. Luis*, 2022 CM 4016

Date: 20221110
Docket: 202124

Standing Court Martial

Halifax Courtroom Suite 505
Halifax, Nova Scotia, Canada

Between:

His Majesty the King

- and -

Private M. Luis, Offender

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

Restriction on publication: Pursuant to section 179 of the *National Defence Act*, I direct that any information obtained in relation to the proceedings of the Standing Court Martial of Private Luis which could identify anyone as a victim or complainant, including the person referred to in the charge sheet as "F.M.", shall not be published in any document or broadcast or transmitted in any way.

This order does not apply to disclosure of such information in the course of the administration of justice, when it is not the purpose of that disclosure to make the information known in the community.

REASONS FOR SENTENCE

(Orally)

Introduction

[1] Private Luis was found guilty of one charge of conduct to the prejudice of good order and discipline contrary to section 129 of the *National Defence Act* (*NDA*) for having sexually harassed F.M., the person identified as "F.M." in the charge sheet, in the course of a number of incidents while they were both undergoing basic military training on the same platoon at the Canadian Forces Leadership and Recruit School

(CFLRS) in Saint-Jean-sur-Richelieu, Quebec, in February 2020. He was also found guilty of another charge under section 130 of the *NDA* for sexual assault, contrary to section 271 of the *Criminal Code*. Indeed, during one of the harassment episodes he engaged in, Private Luis placed his hand on the thigh of his victim, slowly moving it up and inwards towards the area between her legs, while telling her that they could have sex and no one would notice.

[2] It is now my duty to impose an appropriate and fair sentence, on the basis of the evidence, precedents and arguments submitted by counsel for both parties in the course of the trial and the sentencing hearing.

[3] It is worth noting at the outset that Private Luis never completed basic training. He was injured and removed from training at the time the offences were committed. He was sent home, along with many others at CFLRS, shortly after the COVID-19 pandemic broke out in March 2020. He was honourably released from the Canadian Armed Forces (CAF) at his request, effective on 26 October 2020. Private Luis remains liable to be dealt with by this Court under section 60 of the *NDA*, which explains why he is being referred throughout these reasons as Private Luis, being deemed to have the same status and rank that he held immediately prior to ceasing to be a subject of the Code of Service Discipline (CSD).

Position of the parties

Prosecution

[4] The prosecution submits that Private Luis should be sentenced to imprisonment for a period of ninety days, as it is the punishment most likely to contribute to the maintenance of discipline, efficiency and morale in the CAF, in the circumstances of this case and of this offender, especially given the intent underlying the conduct and the harm caused to the victim.

Defence

[5] The defence submits that Private Luis should be sentenced to a fine or, at most, a sentence of dismissal from Her Majesty's Service, combined with a fine. No fixed amount has been stated for the amount of the fine. The defence submits that the offences in this case occurred in a very specific context, during basic training when both Private Luis and F.M. were underemployed and bored, having to sit in a room all day. A young Private Luis attempted to be funny and lacked the judgement to decide when it was time to stop. It is submitted therefore that this is not the most severe harassment case and that the sexual assault, of a minor nature, was simply an accessory of the more general harassing behaviour. Hence, the defence submits that incarceration is not necessary to meet the objectives of sentencing, especially in consideration for the circumstances of the offender, who has effectively served in the CAF for only a few weeks and is currently dealing with significant health challenges.

Ancillary orders

[6] As it pertains to ancillary orders, the parties agree that a DNA Order would be required. However, they disagree as to the impact of the recent, 28 October 2022, decision of the Supreme Court of Canada (SCC) in the case of *R. v. Ndhlovu*, 2022 SCC 38, on the requirement for Private Luis to be subjected to registration under the *Sexual Offender Information Registration Act* (*SOIRA*).

Evidence

[7] The facts revealing the circumstances of the offence were heard in the course of the trial. At the sentencing hearing, the prosecution introduced as exhibits the service records and pay information required in the application of the *Queen's Regulations and Orders for the Canadian Forces* (QR&O) paragraph 112.51(2). In addition, the prosecution called Colonel Tremblay, who testified on the disruption that is generally brought upon by any incident of sexual misconduct to the training environment at CFLRS, which he commanded at the time of the offences in February 2020. However, his testimony did not specifically relate to the offences in this case as he could not recall the specifics or the persons involved.

[8] To complete its evidence on sentence, the prosecutor read the victim impact statement filed by the victim, F.M., which was entered as an exhibit. The prosecution did not call any further evidence.

[9] For its part, the defence called seven witnesses in the course of the sentencing hearing to provide character evidence pertaining to Private Luis, from former neighbours, family friends, his wife and his mother.

[10] In addition, two character letters from Private Luis's sister and a former neighbour who has known Private Luis in his youth were introduced by the defence.

Facts

The circumstances of the offence

[11] At the outset, it is important to mention that the narrative of the events grounding the convictions in this case reveal several incidents of sexual harassment, including one during which the sexual assault was committed. The following facts, which I have accepted in convicting Private Luis of both charges, describe the circumstances of the offences in this case.

(a) Private Luis travelled from Nova Scotia to arrive in St-Jean-sur-Richelieu for basic training in mid-February 2020. Shortly after he began his basic military qualification course, he injured his knee and was removed from training. His routine required him to spend significant periods of time in a break room, along with any other member of his

platoon also excluded from training for whatever reason. It is in these circumstances that his interaction with F.M., who was also injured to her back and had been ordered to use a wheelchair to move around, turned to sexual harassment, on or about the 24 February 2020.

(b) The harassment first took the form of improper comments. Private Luis remarked towards F.M. that, in relation to her drinking from a smelly water bottle, she should be "used to gross things in her mouth and hitting the back of her throat". He told her that she was "damaged". Despite having expressed her refusal to partake or be submitted to such words, F.M. had to endure stories of how Private Luis was accused of rape but threatened or blackmailed the women involved in not submitting complaints. She was rightfully offended by that conduct, which harmed her and should have caused Private Luis to have known he was causing offence or harm.

(c) The harassment also materialized when Private Luis insisted to hand a business card of a centre offering abortion services to F.M., reiterating that she was "damaged" and "easy", hence that she could need such services, over her strong negative physical reaction and her verbal objections to the effect that it was not funny. F.M. had previously mentioned to Private Luis that she had suffered a miscarriage. In the circumstances, Private Luis should have thought better before offering the card in the first place but in any event, he should have known at the first refusal that he needed to stop and put the card away. Yet he kept showing the card and in doing so, he kept causing offence and harm.

(d) On 26 February 2020, Private Luis and F.M. were ordered by a superior to proceed to their quarters to join another member who had been ordered to rest for the remainder of the work day. They proceeded to her cubicle, a sleeping space assigned to her as one was assigned to all other members of her platoon on the ninth floor of the building. Once there, F.M. was left alone with Private Luis. As they were conversing, Private Luis insisted on placing a foot on her bed, at one point almost stroking her leg. She told him that he was not allowed to touch or be on her bed because it would not look good if a staff member observed them. Private Luis replied that nobody would be able to know what they were doing up there, it was just them. She became uncomfortable at that point and moved out of her bed, stating she needed to go in the washroom, an excuse to get away.

(e) Once inside the washroom, with the main door closed, F.M. positioned herself in front of a mirror to lift her shirt and lower her pants in order to be able to look at her injury. She then saw Private Luis looking at her, having cracked opened the door to the washroom, mentioning that he

wanted to see the wound on her back. She replaced her clothing and told Private Luis he was not allowed to come in. He complied.

(f) After leaving the washroom, F.M. went back to sit once again on her bed. Private Luis joined her and sat on a chair located near the foot of her bed, which he pulled closer to her. He started to talk about how they could have sex and nobody would know. She refused, adding that they could get in trouble. Private Luis then tried to move from the chair to sit on her bed. She refused to allow that but he leaned forward and placed his hand on her left thigh as he was talking about how they could have sex and nobody would know. She felt like he thought he would just keep asking until she eventually said "yes". He moved his hand up her thigh towards the area between her legs, slowly moving his hand inwards, stopping when he got up to where the outside of his hand was touching the crevice near her vaginal area from the outside of her pants. Throughout, he was looking at her up and down and kept saying that they could have sex and no one would notice.

(g) F.M. then told Private Luis that she needed to go to the washroom and asked him to get the other member who had been ordered to rest for the remainder of the work day so he could be wakened up and be ready to go with them to supper.

(h) She then left for the same female-only washroom as before, this time she really needed to use the facilities. She entered the middle toilet stall, took down her pants and started urinating. She heard Private Luis talking once again about being alone and them possibly having sex without anyone knowing. She looked under the door of the stall and saw Private Luis's feet. Looking up, she realized that he was staring at her through the space between the door and the stall. She panicked, stopped urinating, pulled up her pants and opened the stall door. She observed that Private Luis had already made his way out of the washroom and the door was held open by a stopper. She told him, pointing to a female-only sign, that this was a female-only washroom and reiterated that he was not allowed in. Private Luis replied that he would go wherever he wanted.

(i) F.M. then washed her hands, Private Luis got her wheelchair for her and wheeled her to the room leading to the elevator while he got the other member to come with them to attend supper.

[12] These events reveal, together and in some cases on their own, a harassing conduct by Private Luis. This is especially the case for the words uttered repeatedly by Private Luis to the effect that there was no one around and he and F.M. could have sex without anyone knowing. I inferred from these facts that Private Luis engaged in this improper conduct hoping that F.M. would say yes, eventually. That is exactly what sexual harassment is and why it is prohibited in the workplace given its potential to

cause harm, not only to the target of the conduct, but also to the work environment, with resulting negative consequences on operational effectiveness, productivity, team cohesion and morale, as explained at Defence Administrative Orders and Directives (DAOD) 5012-0.

[13] The conduct also included a sexual assault when Private Luis placed his hand on F.M.'s thigh and moved it up as far as touching the crevice near her vaginal area from the outside of her pants while talking about the fact that they were alone, could have sex and nobody would know. F.M. did not consent to this touching and had to escape the situation by telling Private Luis that she needed to go to the washroom.

The circumstances of the offender

[14] Private Luis is twenty-one years old. He grew up in rural Nova Scotia and, along with his sister, played sports in his youth. His mother and two neighbours testified that he went through a difficult phase in adolescence when his father passed away unexpectedly when he was fourteen. That crisis worried his mother, especially that it was accompanied by withdrawal as well as alcohol and marihuana use. However, it did not result in troubles with the law. About a year after his father's death, Private Luis was back on track as his former self, playing sports once again and hanging out with friends. He graduated from high school and, as suggested by his mother, joined the CAF on 30 January 2020, arriving in St-Jean-sur-Richelieu for basic training in mid-February. He was then eighteen years old. Shortly after his arrival, he injured his knee and was removed from training.

[15] The authorities were informed of the alleged incidents on or about 27 February 2020. Private Luis gave a statement to military police on 5 March 2020. After being sent back home to Nova Scotia towards the end of March 2020, Private Luis asserted more independence: he obtained civilian employment, bought a car and within a few months moved out of his mother's home with his girlfriend, whom he married last summer. However, Private Luis health began to deteriorate in December 2021 with an episode of clotting which was soon associated with a digestive condition which has not yet been fully diagnosed or cured. Private Luis was hospitalized for three weeks and lost his job. He has been unable to work since. He is supported by his wife, who works at a fast food restaurant and by his mother, who is assisting the couple as much as she can.

[16] Private Luis was qualified by all defence witnesses as a generous man who would do everything possible to assist others. Witnesses who travelled to testify on his behalf at the sentencing hearing mentioned that he has manifested this trait of character since his adolescence, as testified by neighbours at the time, and is continuing today as he has been assisting a couple who used to live in his apartment building after they have lost their home.

[17] There is significant uncertainty as it pertains to Private Luis's future given his health.

The impact of the offence

[18] Even if the sexual assault committed in this case is at the low end of the gravity scale for that offence, it remains that the sexual harassment which occurred was significant and caused lasting suffering to F.M. since it occurred, especially since she came back from basic training in March 2020. The victim impact statement reveals the following details:

(a) F.M. wanted to have a long career in the CAF, had prepared for basic training and was determined to succeed;

(b) however, she was not prepared for what she experienced in her interaction with Private Luis, who she perceived would not take "no" for an answer, was testing how far he could go and if he would get away with taking his harassment one step further;

(c) since the events, F.M. has been diagnosed with Post Traumatic Stress Disorder, suffers from depression and hyper vigilance, as she is "consistently looking over my shoulder assessing for the next threat or person that feels they are entitled to take whatever they want from me regardless of how I feel about it";

(d) she has been medicated and has undergone counselling and therapy and could use more if she could afford it;

(e) F.M. has significant difficulty when out in public as she cannot use a multi-stall bathroom or even a bathroom at all unless accompanied by a person she trusts who will insure no one intrudes or looks at her. When in public bathrooms her hearth is racing and she is prone to panicking, feeling like someone is watching her;

(f) she cannot stay the night anywhere other than home as she gets anxious for her safety, needing to ensure that every door is locked and yet jumping at any creak or light flicker; and

(g) she feels ashamed for letting the events have so much effect on her and taking so much away but she is trying to reconstruct her life.

[19] This summary does not do justice to the statement read in court. Suffice to say that the events have had a traumatic impact on F.M., causing significant harm that I feel no sentence, regardless of how severe, could ever fix. These consequences will remain on my mind throughout my decision and for some time after. I truly wish F.M. will find ways to recover from this to live a full life.

Analysis

The purpose and objectives of sentencing

[20] The purpose, objectives and principles applicable to sentencing by service tribunals are found at sections 203.1 to 203.4 of the *NDA*, reproduced at QR&O article 104.14. As provided at section 203.1 of the *NDA*:

> **203.1 (1)** The fundamental purposes of sentencing is to maintain the discipline, efficiency and morale of the Canadian Forces.

[21] This wording is relatively new. It was part of Bill C-77, introduced in Parliament on 10 May 2018 and assented to on 21 June 2019. The new provision on the purpose of sentencing came into force only on 20 June 2022, however. Prior to that date, the *NDA* recognized two purposes of sentencing:

> (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.

[22] In light of the fact that I am engaging in the sentencing of an offender who is and has been a civilian for most of his life, with an effective participation in the activities of the CAF for a matter of a few weeks only, I have inquired with counsel as to what should I make of the fact that Parliament has dropped an objective of sentencing which used words similar to those used to state the fundamental purpose of sentencing found at section 718 of the *Criminal Code*. Indeed, the fundamental purposes of sentencing used to be twofold to recognize the dual nature of the Code of Service Discipline which, as specified by the Supreme Court of Canada in *R. v. Généreux*, [1992] 1 S.C.R. 259, at page 281, not only serves to regulate conduct that undermines discipline and integrity in the CAF, but also serves a public function by punishing conduct which threatens public order and welfare. Counsel had no comments to offer.

[23] The research obtained by the Court from the information contained in the material relating to Bill C-77, namely the clause-by-clause analysis and the legislative summary, reveals that the most likely reason why the second purpose of sentencing was dropped from the previous version of section 203.1(1) is to ensure that the purpose of sentencing applicable to service tribunals match the statement of purpose of the CSD, found in a new paragraph 55(1), enacted with Bill C-77. That way, the fundamental purpose of sentencing is identical to the purpose of the CSD. The same research reveals that the change in the purpose of sentencing was not specifically discussed during the debates which lead to the adoption of Bill C-77 in 2019.

[24] I conclude that, for the purpose of sentencing, Private Luis is to be considered as any other offender sentenced by courts martial. Fundamentally, the sentence I impose on Private Luis must maintain the discipline, efficiency and morale of the military force to which he belonged at the time he committed the offences, just like any other offender

who would still be serving in the CAF. This is in line with the provisions of paragraphs 60(3) and 60(4) of the *NDA* governing how persons subject to the CSD at the time of the commission of service offences continue to be liable to be charged, dealt with and tried by courts martial. This is not to say that the civilian status of Private Luis at the time of sentencing is irrelevant. It is very much part of the equation. For one thing, the objectives of sentencing found at paragraph 203.2 of the *NDA*, which have not substantially changed from the previous version despite changes to sub-paragraphs (c) and (i), are not all applicable to those who have left the service. Indeed, paragraph 203.1(2) reads as follows:

> (2) The fundamental purposes is to be achieved by imposing just punishments that 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 and the harm done to victims or to the community that is caused by 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.

[25] Although some of the objectives are geared towards military needs, for instance the objectives of promoting a habit of obedience and of assisting in reintegrating offenders into military service, it remains that a just sanction must try to achieve objectives whose effects reach outside the bounds of the military. For instance, the objectives of denouncing, providing reparation and promoting acknowledgement of the harm done to victims and the community which may be civilian, as the victim is in this case.

[26] As far as purposes and objectives are concerned therefore, Private Luis will not be sentenced exclusively in relation to purely military objectives aimed at enhancing discipline, efficiency and morale without consideration of the actual situation in which he finds himself now and his minimal time as member of the CAF.

Objectives to be applied in this case

[27] 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.

[28] Indeed, the offences in this case involve behaviour which calls for denunciation. Sexual harassment and sexual assaults are crimes that must be denounced and must be addressed by a sentence that communicates society's condemnation of the offender's conduct, in both its civilian and military components. As Lamer 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 should be punished for encroaching on our society's basic code of values". This is particularly applicable here. It is also important that the sentence serves as a deterrent to others who may be tempted to engage in the same type of conduct.

[29] That being said, this case involves an offender who was eighteen years of age at the time of the offence and has been a member of civilian society since. As for most cases, the objective of rehabilitation remains important. The sentence must not be so excessive as to create additional barriers to the rehabilitation of this first-time offender who still has the potential to make a positive contribution to society. As is often the case, the principle of rehabilitation militates for a less severe sentence but not at the detriment of the other principles of sentencing that must be addressed. A meaningful sentence needs to be imposed in light of the serious crimes committed. Therefore, this case calls for a delicate balancing of the sentencing objectives at play.

[30] Having established the objectives to be pursued, it is important to discuss the principles to be considered in arriving at a just and appropriate sentence.

Main principle of sentencing: proportionality

[31] The most important of these principles is proportionality. Section 203.2 of the *NDA* provides that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. In conferring proportionality such a privileged position in the sentencing scheme, Parliament acknowledges the jurisprudence of the Supreme Court of Canada, which has elevated the principle of proportionality in sentencing as a fundamental principle in cases such as *R. v. Ipeelee*, 2012 SCC 13. At paragraph 37 of *Ipeelee*, 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.

[32] The principle of proportionality thus obliges a judge imposing sentence to balance the gravity of the offence with the degree of responsibility of the offender. Respect for the principle of proportionality requires that the determination of a sentence by a judge, including a military judge, be a highly individualized process. As it applies to Private Luis, proportionality demands that I consider his personal situation at the time of sentencing him, including his status as a civilian.

Other principles

[33] Having reviewed the circumstances directly relevant to the principle of proportionality, I now need to discuss other principles relevant to the determination of the sentence, which are listed as the paragraphs of 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 aggravating circumstances are listed in this section, none of them being applicable here.

> (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.

> (b) 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;
>
> (d) a sentence should be the least severe sentence required to maintain discipline, efficiency and morale of the Canadian Forces; and

Those paragraphs embody the principle of restraint, especially for Aboriginal offenders; and, finally,

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

[34] I will now discuss some of these factors in relation with the circumstances of this case.

Aggravating and mitigating factors

[35] 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. That being said, 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.

[36] 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 under section 130 of the *NDA* for an offence under section 271 of the *Criminal Code,* which brings a maximum punishment of imprisonment for ten years. He was also found guilty of harassing F.M., a conduct to the prejudice of good order and discipline contrary to section 129 of the *NDA*, punishable by dismissal with disgrace from Her Majesty's service or less punishment in the scale of section 139 of the *NDA*, lesser punishments including, amongst other options, imprisonment for less than two years and dismissal. Objectively, these are very serious offences.

[37] The circumstances of the offences and the offender in this case reveal four aggravating factors as follows:

(a) the sexual harassment here was of a repetitive nature, over a few days;

(b) the harassing conduct of looking at F.M. while she was urinating through the space separating the door and the stall of the toilet is particularly egregious, by its nature and also its context, immediately after touching her inappropriately, in a gesture which constituted sexual assault. Such a voyeuristic conduct constitutes exactly what is referred to in the fifth criteria at section 3.6 of DAOD 5012-0 as "one severe incident" which has the real potential to leave a lasting impact on a victim or complainant;

(c) the sexual assault offence occurred when the victim was vulnerable, in a state of limited mobility due to a previous injury which largely confined her to a wheelchair, which Private Luis had pushed for a while on his way to her shared sleeping quarters. This provided limited opportunity to move away from Private Luis as he sat close to her, in a place where she should have been safe, in the company of another CAF member on a military establishment; and

(d) the profound impact that the offence had on F.M., as evidenced by her victim impact statement to which I alluded before. This is not unforeseeable harm. Orders and directives on sexual misconduct have for years and still describe 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 victim and the impact that the actions of Private Luis had on her hope to be able to overcome the

consequences of her physical injury and persist in her training to become a member of the CAF.

[38] The Court also considered the following as mitigating factors arising either from the circumstances of the offence or the offender:

(a) first, the fact that Private Luis is a first-time offender, the character evidence heard at trial and on sentencing demonstrating that the offence was out of character for him;

(b) second, the young age of Private Luis, both at the time of the offence and now;

(c) the indirect consequences of the offence and the conviction which include the challenge that Private Luis faces in overcoming the stigma attached to being identified as a convicted sex offender;

(d) the uncertainty that Private Luis now faces as it pertains to his future employment prospects due to his medical condition, making rehabilitation more difficult in his unique circumstances; and

(e) Private Luis' potential to make a positive contribution to Canadian society in the future.

[39] I recognize that this list of aggravating and mitigating factors does not exactly correspond to what was argued by counsel. They are the factors that the Court accepts in the way in which I have decided to list them, often combining in one factor matters enumerated by counsel as distinct.

[40] In accepting as mitigating the fact that the offence appeared out of character for Private Luis, I have not been convinced by the prosecution's insistence that Private Luis' mention of having sexually assaulted other women in the past and convinced them not to complain, is indicative of past character flaws in relation to the specific behaviour subject of the charges in this case. I believe it is important to distinguish between the Court's acceptance, beyond reasonable doubt, that Private Luis said these things about past offences and the evidence or absence thereof relating to whether these offences were, in fact, committed. In the context when these words were spoken and in light of the evidence I have heard concerning the character of Private Luis, both at trial and during sentencing, I am not convinced beyond reasonable doubt that these previous offences were committed. I cannot, therefore, consider these offences as aggravating.

[41] Further, while I do agree with the prosecution that the context of the sexual harassment and relationship with the sexual assault, including the absence of consideration for the dignity of F.M. and her desire to escape the situation she found herself in, suggests that Private Luis intended to cause harm to F.M., this is very much part of the definition of harassment at DOAD 5012-0, which I paraphrase as including

improper conduct that the perpetrator knew would cause offence or harm. I have concluded that this is part of the offence and its immediate circumstances, not an aggravating factor *per se*.

[42] Finally, I have not accepted all factors that were proposed by the defence, as some constitute core characteristics of the offence and others an absence of aggravating factors. Specifically, I have not been convinced that the limited military experience of Private Luis should be mitigating in light of the circumstances of the offences in this case. The lack of military experience cannot, in my view, reduce the moral culpability of an offender who engages in unwanted touching of a sexual nature or in the type of harassing conduct that the facts reveal, especially as it pertains to the actions in the female washroom.

Parity and the sentencing range

Introduction

[43] The next principle to be taken into account is the principle of parity. The parties have brought a number of cases to my attention in attempting to demonstrate an appropriate range of sentences imposed in the past for similar offences and to show how their respective submissions are reasonable in relation to that range, distinguishing them from the facts in this case. Unsurprisingly, the prosecution mentioned what it perceives to be the aggravating features of this case while the defence instead focused on the mitigating features.

[44] Before diving further into the analysis of some of these cases, I wish to discuss a representation made to me by the prosecution, to the effect that cases resolved by means of guilty pleas and joint submissions are unhelpful in assisting the Court to decide on a fit and fair sentence where the parties disagree as to what sentence is appropriate. These cases are seen by the prosecutor as irrelevant and it is submitted they should be disregarded. As a result, the prosecution did not research, mention or let alone discuss any of these cases, which are, arguably, numerous. This kind of submission is becoming more frequent from prosecutors and I feel that expressing my disagreement verbally during submissions is no longer sufficient. Hence, the time has come for me to address this issue more substantially, albeit as briefly as possible.

Joint submissions and the sentencing range

[45] The argument on the limited value of sentences imposed as result of joint submissions rests on the fact that judges agreeing to accept a joint submission on sentence are not required to assess whether the sentence is fit by applying some kind of fitness test. As clarified by the SCC in the case of *R. v. Anthony-Cook*, 2016 SCC 43, judges may depart from a joint submission only if the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest.

[46] It is unquestionable that the context of sentencing hearings are different when one compares the task of a sentencing judge to whom a joint submission is made to the task of assessing the circumstances of the offender and the offence, and the applicable sentencing principles in contested sentencing hearings. The assessment of a joint submission requires a consideration of the critical systemic benefits that flow from joint submissions, namely, the ability of the justice system to function fairly and efficiently. That is, of course, not the case for contested sentencing hearings, nor on appeal.

[47] However, the task of the sentencing judge who evaluates a joint submission is not performed in a vacuum. When discussing the meaning of the threshold to be met to reject a joint submission, Moldaver J., writing for the SCC in *Anthony Cook*, referred at paragraphs 32 to 34 to helpful decisions of the Newfoundland and Labrador Court of Appeal, quoting from one of those at paragraph 33:

> [A] a joint submission will bring the administration of justice into disrepute or be contrary to the public interest if, despite the public interest considerations that support imposing it, it is so "markedly out of line with the expectations of reasonable persons aware of the circumstances of the case that they would view it as a break down in the proper functioning of the criminal justice system"

[48] How do reasonable persons evaluate whether a proposed sentence is markedly out of line with their expectations then? I believe this cannot be done otherwise than by, amongst other factors, comparing the proposed sentence with a range of sentence imposed previously for similar offences in similar circumstances. Indeed, the existence of a range is mentioned in the conclusion of Moldaver J in *Anthony Cook*, applying the newly promulgated test to the case at hand, at paragraph 63 of his reasons:

> [63] In my respectful view, there was no basis for the trial judge to substitute his opinion for the considered agreement of counsel. The custodial term proposed, while low, was not so low as to bring the administration of justice into disrepute or be contrary to the public interest. It was close to the range of sentence identified by the trial judge, and, as I have said, joint submissions promote the smooth operation of the criminal justice system. The appellant gave up his right to a trial and any self-defence argument he may have had. In the end, the trial judge's deviation from the recommended custodial sentence — by only six months — amounts to little more than tinkering.

[49] The prosecution does not deny that the range is relevant. However, it is submitted that the range applicable to joint submissions following guilty pleas is different and necessarily lower than the range for contested sentences, hence irrelevant to the later. In support of that submission, mention was made that the judge accepting a joint submission is not necessarily informed of all of the circumstances that brought about the resolution of the case. This may be true to an extent, but not entirely. As mentioned at paragraphs 53 and 54 of *Anthony-Cook*, counsel are obliged to ensure that they amply justify their position on the facts of the case as presented in open court, which may include the benefits obtained by the Crown or concessions made by the accused: "The greater the benefits obtained by the Crown, and the more concessions made by the accused, the more likely it is that the trial judge should accept the joint submission, even though it may appear to be unduly lenient."

[50] Further, guilty pleas and joint submissions are not the only circumstances where a sentencing judge is potentially benefitting from less than a complete picture. Indeed, as I have experienced a short time ago in the case of the sentencing hearing for *Sergeant Bluemke*, not yet reported, there can still be contested sentencing resulting from a guilty plea. In such cases the information on the circumstances of the offence is provided in written form by the prosecution and the sentencing judge does not have full visibility on what goes in that document, which is often the result of back and forth negotiations between counsel for the prosecution and the defence. Would that mean there is a third type of range to be added to the guilty plea joint submission and the contested trial and sentence? What about the joint submission following a contested trial or the contested submissions following a guilty verdict by the panel of a General Court Martial?

[51] I do believe there is <u>one</u> range and that sentences resulting from guilty pleas and joint submissions are part of that range, hence relevant to the task that I need to accomplish in deciding the sentence in this case where the parties do not agree on the sentence to be imposed. Of course, the fact that a given sentence was the result of a joint submission is relevant in assessing its value as a precedent. However, it is the accumulation of various sentences, <u>the range</u>, which is in issue here. It would be problematic to automatically exclude from the range the sentences that are agreed by parties in exchange for guilty pleas or otherwise.

[52] Indeed, what the *Anthony-Cook* decision has effectively done is recognize the value of the work of counsel in arriving at joint submissions which reflect the interests of both the public and the accused. In protecting in large part these agreements from judicial scrutiny, the Supreme Court of Canada has effectively shifted some of the responsibility for determining the sentence from the ambit of the Courts to those of counsel.

[53] Consequently, the prosecution must remain accountable for the sentence it agrees to jointly submit. Part of that accountability rests in accepting that the sentence proposed will, over time and along with other sentences, form a range applicable to similar situations and offenders. Otherwise, a sentencing scale will be set on the basis of considerations that are not always fully known, potentially placing over emphasis on circumstances unrelated to the offence or the offender, hence undermining the key principle of proportionality. Such a situation also risks placing significant pressure on accused person who may have a defence to submit at trial but would prefer pleading guilty if the negative impact of a contested trial on the sentence ultimately imposed loses its proportion with the sentence imposed following a guilty verdict or, in other words, the guilty plea goes from being a mitigating factor on sentencing to an overwhelming factor thumping all others.

[54] I have not made these remarks with the intent of lecturing the prosecution but because I feel I need to in the circumstances of this case. The defence argues that the circumstances of the offence here are very much those of sexual harassment, with the minor sexual assault as an accessory. To counter the prosecution’s position to the effect that Private Luis should be sentenced to imprisonment for ninety days, the defence

argues that the range of sentences for harassment in similar circumstances does not and has never included incarceration. Many of these sentences are the result of joint submissions following guilty pleas. In asking that those be excluded from the relevant range, the prosecution is inviting me to consider this case as one of a kind and place significant emphasis on the gravity of the circumstances of the offence to send the offender to prison. The issue is not academic.

[55] Having concluded that sentences resulting from joint submissions following guilty pleas are relevant to the range of sentence, with necessary consideration in specific cases, I may comment on some of these cases discussed by the defence during submissions. In line with its position, the prosecution did not bring any of these cases to my attention. However, the prosecutor conceded in argument that he was not aware of any case of sexual harassment which would have led to a sentence of incarceration by a court martial. This does not settle the issue of what sentence would be appropriate in this case. However, it does confirm that the defense's position is built on credible foundations.

The challenge of associating precedents to the applicable circumstances

[56] As alluded to earlier when mentioning the objective gravity of the offences, the baseline for the determination of an appropriate sentence must be grounded in the offence or offences for which the offender was found guilty. The statute that creates the offence provides the range of punishments available, hence providing sentencing judges with arcs of legality of a sentence. As provided for at section 203.95 of the *NDA*, only one sentence shall be passed on an offender at a trial under the CSD.

The submissions and precedents discussed by the prosecution

[57] The maximum sentence applicable here is the one applicable to sexual assault, punishable with ten-year's imprisonment, with no minimum. 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, of course, leads to a broad range of sentences being imposed. The prosecution concedes that the sexual assault offence here is at the low end of the gravity scale. However, the prosecution also points to the gravity of the sexual harassment, arguing that Private Luis was on notice that his demeaning comments were unwelcome but nevertheless proceeded further, including solicitation for sexual activity which cumulated with the unwanted touching, followed by the harmful behaviour of looking through the gap in front of the bathroom stall. As alluded to earlier, the prosecution attributes a strong intent to harm to the behaviour of Private Luis, stating that he showed F.M., by his words and actions, how he could get to her regardless of her action, thereby acting as a true perpetrator of violence targeting women. This "nefarious intent", strongly opposed by the defence, is what animates the prosecution's argument to support its submission that the appropriate punishment in this case is imprisonment, as it is the only punishment which can recognize the harm caused by the offender's actions and intent.

[58] In support of this submission, the prosecution brought my attention to a number of cases, although there is no precedent exactly on point in comparison with the circumstances of the offence and of the offender in this case.

[59] A number of military precedents were produced. At the outset, the prosecution mentioned *R. v. Cadieux*, 2019 CM 2019, where a punishment of sixty days' detention, suspended, was imposed along with a severe reprimand, following a conviction for sexual assault involving forced kissing initiated by the victim after the offender had approached the bed she was sleeping in, in a tent reserved for female members, in the course of a deployment to Jamaica. The offender was also found guilty of one charge of drunkenness. At the sentencing hearing, the prosecution submitted that *Cadieux* relates to a very minor sexual assault, as we have here. Yet, the prosecution did not consider the case to be so insignificant at the time of sentencing Corporal Cadieux: it was requesting a term of imprisonment of nine to fourteen months combined with dismissal. As stated in the sentencing decision in *R. v. Turner,* 2022 CM 4002, I do believe that *Cadieux* is an anomaly but I cannot deny that it is there and that it can be legitimately referred to as the lower end of the range. That said, the circumstances in *Cadieux* are different than this case and, as such, it does not constitute a determining precedent.

[60] The prosecution also referred me to the military cases of *R. v. Yurczyszyn*, 2014 CM 2005 and *R. v. Leading Seaman C.M. Ritchie,* 1997 CM 39. In the first case, Major Yurczyszyn was found guilty of sexually assaulted a civilian woman at a party in a residence, by touching her left breast without her consent. He also pleaded guilty to one charge of drunkenness which circumstances were significant as he made repeated sexual advances to another CAF member of the same rank at the party, in her residence and in her car, including unwanted kissing and touching of her crotch. He was sentenced to a reduction in rank to captain, the sentence proposed by the prosecution, although to the rank of lieutenant. For his part, Ritchie, was found guilty of sexual assault for unspecified acts which occurred in the bedroom of the victim, a United States (US) Navy servicewoman, in a house he was visiting on a US Navy station, and commenced when she was asleep. He did stop and leave shortly after the unwanted touching commenced, after having been pushed back, saying he was sorry. The sentencing military judge commented that the acts were towards the lower end of the range or scale for sexual assault and sentenced the offender to imprisonment for a period of sixty days.

[61] The final case offered by the prosecution is *R. v. Abdullahi,* 2010 YKTC 76, a civilian case where a forty-nine year old taxi driver, after picking up the victim, turned his taxi away from the direction of her nearby residence, grabbed her hand and put it on his upper thigh and groin area. She pulled her hand away but the offender again grabbed it and put it on his exposed penis. The victim once again removed her hand and the offender desisted, driving her to her intended destination. The sentencing judge noted the breach of trust involved but also mentioned that the sexual assault was brief and, as conceded, towards the lower end of the scale of sexual assaults as evidenced by the Crown's decision to proceed by summary conviction, limiting the maximum sentence to eighteen months. In a thoroughly substantiated decision, the sentencing judge found that

conditional discharge would not be a fit disposition as it would undermine the public's confidence in the administration of justice given the need for denunciation of the conduct and general deterrence. He found that a jail sentence is warranted, in line with the Crown's counsel suggestion for a period of ninety days. However, the sentencing judge found that a conditional sentence would be appropriate, allowing the offender to serve his sentence in the community through a conditional sentence order of three months with a number of conditions, followed by a probation order of nine months.

The challenge with these precedents

[62] What strikes me the most with the cases brought to my attention by the prosecution is the fact that they all, with the exception of *Ritchie*, resulted in sentences that are not available to me. Indeed, Private Luis, as a civilian, cannot be sentenced to detention. As a private, he cannot be reduced in rank. As an offender before a court martial, he cannot be tried by summary conviction and is not eligible to receive a conditional sentence or a probation order, sentencing options that are not available to me in the military justice system. The only precedent revealing a sentence available to me is the case of *Ritchie*, sentenced to sixty days imprisonment, but this is a very short decision which tells little about the details of the offence, the submissions of counsel and any other sentencing options being considered.

[63] That being said, I find that the little that *Ritchie* reveals is sufficient for me to conclude that the circumstance of an offender entering a sleeping's woman bedroom to sexually assault her are more significant that the ones in this case. Similarly, the behaviour of Major Yurczyszyn and Mr Abdullahi, the taxi driver, are more egregious.

[64] That said, the precedents show that a short period of imprisonment is within the range of sentences previously handed down for low-level sexual assaults as we have here. That is so especially given a factor which plays rather loudly in this case: the extent of the harm caused to F.M. by the actions of Private Luis.

The submission and precedents from the defence

[65] For its part, the defence referred me to nine cases. I wish to refer to three of these, as they occurred during basic military training courses at the CFLRS in St-Jean-sur-Richelieu, as is the case here.

[66] The first of these cases is *R. v. Ex-Private Gabriel*, 2008 CM 3006, where a former member at the rank of private pleaded guilty to two counts, for having harassed and assaulted a fellow female candidate. There are few details in the decision but mention is made about continual and persistent demands relating to the offender's wish to pursue a more intimate relationship with the victim over her clear indications that she was not interested, and her shock and embarrassment at the offender's conduct, leading her to fear for her physical integrity, appropriately considering the assault eventually committed. There is no indication of the age of the offender but the matter was resolved by a joint submission for a reprimand and a fine of $800.

[67] The second and more recent decision is the case of *R. v. Bruce* 2020 CM 5011 where my colleague, Deschênes, M.J., in October 2020, agreed to a joint submission for a reprimand combined with a fine in the amount of $3,000 resulting from the guilty plea of a twenty-six year old Private Bruce to one count under section 129 referring to successive instances when, while a candidate at CFLRS, he made flirtatious and sexually suggestive comments to a colleague on course, placing his hand on her thigh, touching her neck, slapping her buttocks on a number of occasions and grabbing her breast once. The Court concluded that the joint recommendation met the parity principle, was not contrary to the public interest and would not bring the military justice system into disrepute.

[68] A few months earlier, in *R. v. Koutsogiannis*, 2020 CM 2010, rendered in July 2020, my colleague Sukstorf M.J. accepted the guilty plea of a twenty-nine year old Private Koutsogiannis to one count under section 129 of the *NDA* for inappropriately touching the genitals, inner thighs and buttocks of several other CAF members without their consent. There were ten incidents of improper touching involving five victims. The military judge accepted a joint submission of counsel for a sentence of a severe reprimand and a fine in the amount of $4,000, payable in eighteen monthly instalments, by a still-serving member. My colleague noted that the sentence recommended in the joint submission was clearly within an acceptable range for the type of punishment historically awarded for this type of offence. Interestingly, she found that the recommended sentence not only was not contrary to the public interest but that it was in the public interest and that it did not bring the administration of military justice into disrepute.

[69] These brief summaries are sufficient to encapsulate the thrust of the defence's argument on parity of sentence. They are also sufficient to understand why the prosecution insisted on submitting that sentences resulting from guilty pleas and joint submissions should not be considered.

[70] The three cases I just discussed reveal similar behaviour in the same military environment as Private Luis' conduct, yet were resolved by sentences that bear little relationship with the ninety days' imprisonment suggested by the prosecution in this case, even when taking into account the "discount" which would invariably accompany a guilty plea or pleas and a joint submission. That is so especially considering the recent remarks of two different military judges in these cases as to the fact that the sentences being proposed were within the applicable range.

[71] That is not to say that all similar cases resulted in guilty pleas and joint submissions. I could have mentioned other cases where, for instance, offenders were of a higher rank than their victim, notably the case of *R v Amirault*, 2011 CM 2017, where Captain (Retired) Amirault was found guilty of one count of sexual assault for having touched the breast and groin of a subordinate over her clothing during an army exercise in the field. He was sentenced, following a contested hearing, to a severe reprimand and a fine of $8,000. I have already mentioned the case of *Cadieux*, also the result of a contested sentencing hearing after a full trial.

Concluding remarks on parity

[72] What I conclude from the cases is not only that sentences such as reprimands and severe reprimands are within the range of sentences imposed previously for similar offences and offenders, they are also most frequently imposed than any other combination of punishment. Custodial sentences, although possible given the sexual assault conviction here, are rare on the basis of the circumstances of the offence, most notably the low severity of the sexual assault perpetrated. Indeed, not only did the prosecution admit that sexual harassment cases never resulted in custodial sentences, I have not been shown any case where a sexual assault of such a low level as we have here has been sanctioned by a sentence resulting in the offender being sent to serve imprisonment or detention.

[73] I have chosen these words carefully. Both *Cadieux* and *Abdullawi*, the taxi driver, were the object of a sentence involving incarceration. However, the sentence of detention was ultimately suspended for the first and the imprisonment served in the community for the other. This leads me nicely to the discussion I need to have on the principle of restraint.

The principle of restraint

[74] The principle of restraint obliges me to sentence the offender with the least severe sentence required to maintain discipline, efficiency and morale in the CAF. In this case, I must consider all available punishments, paying particular attention to the circumstances of Private Luis now and at the time of the offence.

[75] As indicated previously, the difficulty I am faced within this case is the fact that there are few options available to me outside of a custodial sentence. I must look at the scale of punishments in section 139 of the *NDA* in the context of the submissions of counsel and the actual status of the offender as a civilian, although deemed to be considered a private. The options open for me, from more severe to less are essentially: imprisonment, the ninety days proposed by the prosecution being considered the top of the range; dismissal from Her Majesty's service, the alternate option proposed by defence; severe reprimand or reprimand which neither counsel suggested should be imposed; and a fine, the primary position of the defence.

[76] The principle of restraint applies particularly to the consideration of sentences which deprive offenders of their liberty under paragraphs 203.3 (c) and (c.1) of the *NDA*, quoted above. Simply put, when envisaging imposing a sentence which includes imprisonment, as suggested by the prosecution in this case, I must consider whether any other available punishment or combination of punishments would both meet the objectives of sentencing previously identified as relevant to this case and would be consistent with the harm done to victims or to the community. It is important to note that although it is possible for a court martial to suspend the application of a sentence of incarceration, a sentence of imprisonment that is suspended is not a distinct punishment.

The matter of suspending the imprisonment arises only when imprisonment has been considered to be appropriate. It is not relevant at this stage of the analysis. The suspension of detention or imprisonment in military law should not be equated with suspended sentences or conditional sentences of imprisonment in the *Criminal Code*.

[77] The circumstances of some cases require that a powerful signal of denunciation and deterrence be sent, especially when the conduct departs significantly from the norm of conduct of society and of the CAF. Sexual misconduct are situations which may require that a sentence which includes a punishment of imprisonment be imposed, even in consideration of the principle of restraint. Non-custodial punishments may not be sufficient to accomplish the objectives that the sentence must achieve, namely to denounce and deter.

[78] That is so even in considering mitigating factors and the objective of rehabilitation. Indeed, offender's circumstances, however how favourable, cannot operate to take over the sentencing process at the detriment of other sentencing objectives. Denunciation and general deterrence require a punishment that is perceived as significant and commensurate with the circumstances of the offence and the harm done.

Choosing a fit sentence

[79] In line with the principle of restraint, I favor approaching the determination of a fit sentence with the less severe options. I will therefore begin my analysis with the two sentences proposed by the defence, namely a fine alone and dismissal from Her Majesty's Service coupled with a fine.

[80] I can immediately confirm what I have hinted at previously, to the effect that a fine alone would not in my view be sufficient to achieve the objectives of denunciation and deterrence in this case, especially in light of the sexual assault conviction. A fine may be sufficient to sanction sexual harassment, just as a reduction in rank is, in the appropriate circumstances, given its financial impact on the offender. However, a fine is not a sanction that carries enough stigma to be, in most cases, sufficient to sanction a sexual assault, unless it is substantial. In this case, the offender has very limited ability to pay any substantial fine as he is unemployed by virtue of significant medical limitations. A substantial fine, consistent with the gravity of the offence and the harm done to the victim in this case, would have limited effect on the offender himself. Its consequences would be felt most acutely by Private Luis's mother and wife, who would become innocent collateral victims of the sentence. This is not desirable.

[81] That being stated, a moderate fine, which could be paid by the offender himself, may be desirable in the circumstances of the offender in this case, as it would ensure that the offence has a direct impact on him. I will therefore impose a fine of $1,200. However, the fine will need to be coupled with one or more other punishments.

[82] Moving up the scale of gravity, counsel have not submitted that a severe reprimand or reprimand should be imposed for good reason. Such entirely symbolic punishments would not be adequate, not so much because the offender is no longer serving but because it is in my view hardly adequate for an offender who has effectively served for only a few weeks in the CAF at the lowest possible rank and has been released as an untrained recruit. Severe reprimands and reprimands have little effect beyond constituting a blemish on a service record. This can be significant for a member of the CAF who has had a long and successful career. However, when a service record consists of so little as a few weeks at recruit school without qualifications of any kind, the imposition of such punishments serves little purpose and may even be counter-productive: it hardly achieves the objectives of sentencing and risks damaging the repute in the administration of military justice.

[83] The alternate proposition of the defence, to couple the fine with a sentence of dismissal from Her Majesty's service is deserving of thoughtful consideration. Although my reluctance to impose a substantial fine remains, the punishment of dismissal has been imposed before, often in combination with other punishments such as imprisonment, in cases of sexual assault. See, for instance, *R. v. Beaudry*, 2016 CM 4011.

[84] One may wonder what impact a sentence of dismissal would have on a person who has already left the military. First, in military law, an offender sentenced to dismissal is to be released from the CAF for misconduct under item 1(a) of the table to QR&O article 15.01 which, for Private Luis, would require amending his item of release from "voluntary - on request" under item 4(c), a much less favourable reason for release which will be reflected in service records. Of course, this remains symbolic but it is not insignificant. Symbolism matter in the military. It also matters for sentencing of offenders in Canadian law given that the punishment of dismissal constitutes a statement by a military tribunal of the extent and gravity of the encroachment caused by the offender's conduct on the military's code of values. It adds a powerful denunciatory element to the sentence of the kind envisaged by Lamer, C.J. in the quote I referred to earlier at paragraph 102 of *R. v. Proulx*, showing to those viewing the outcome of this trial and sentencing hearing how seriously the Court views the offender's conduct.

[85] A sentence of dismissal also has an important indirect consequence, in certain circumstances, of doubling the amount of time that must elapse before the offender can apply for a record suspension as provided under paragraph 44(1)(a) of the *Criminal Records Act*.

[86] I will therefore impose a sentence which includes the punishment of dismissal from Her Majesty's service, in addition to the fine.

[87] What remains to be decided is whether the dismissal and fine should be accompanied with a punishment of imprisonment and if so, for what period.

[88] Defence counsel submits that imprisonment is not necessary to punish the actions of Private Luis, in line with its argument that the sexual assault was, on the facts of this case, simply an accessory of the more general harassing behaviour of the offender. Defence finds obvious support for this argument in the fact that the vast majority if not all previous court martial sentences for sexual harassment have not included the punishment of imprisonment, even when sexual touching is involved. Cases which best illustrate this state of affairs are those of *Bruce* and *Koutsogiannis* which settled by means of guilty plea and joint submission in 2020.

[89] I do not disagree with the notion that the sexual assault on the facts before me was very much part of and a continuation of the sexual harassment that was taking place at the time, most notably the sexual advances made by Private Luis towards F.M., in a manner similar to the cases of *Bruce* and *Koutsogiannis*.

[90] Yet, the prosecution has exercised its discretion differently in this case. I am dealing here with an additional conviction for sexual assault, a crime of significant gravity often punished by incarceration, but not always, as evidenced by the outcomes in the cases of Major Yurczyszyn, which resulted in a reduction in rank and Captain (Retired) Amirault, which resulted in a severe reprimand and a fine.

[91] These cases date back to 2014 and 2011 respectively, however. The heightened societal awareness of the unacceptable nature of sexual misconduct, as well as the need to address this challenge within the CAF, as highlighted in the recent reports of Justices Fish in April 2021 and Arbour in May 2022 should, in my opinion, have the effect of calling upon the actors in the military justice system to take a renewed look at sentencing for sexual misconduct offences, including in cases where the sexual integrity of a victim is encroached upon, especially when an offender is found or pleads guilty to sexual assault.

[92] I find judicial support in this direction from our court of appeal. Although the case was not mentioned during submissions, the Court Martial Appeal Court (CMAC) has signaled its sensitivity for a more severe approach in its 23 December 2021 decision in the case of *R. v. Duquette*, 2021 CMAC 10, leave to appeal dismissed 29 September 2022 (40074). This is an appeal where the Court decided not to interfere with the reduction in rank of Major Duquette to captain imposed by the military judge at trial despite ordering a new trial for two of the three convictions on which this sentence was based. Indeed, Major Duquette was found guilty at trial of three charges for his behaviour in relation to one subordinate of the rank of master corporal during a social event: sexual assault; harassment; and ill-treatment of a subordinate by touching her buttocks. The CMAC left, in effect, a sentence of reduction in rank stand to punish the offender's sexual harassment of a subordinate. Although the analysis of the reasons for not interfering with the sentence is limited, a reasonable inference which can be drawn was that the Court felt the initial sentence was lenient for the three charges, including sexual assault, as its conclusion is that it was adequate for the one remaining charge of harassment.

[93] I believe this case demands that a strong signal of denunciation and deterrence be sent considering the gravity of the sexual misconduct revealed by the facts, the conviction for sexual assault, as well as the significant harm that has been caused to F.M. by the conduct of Private Luis. I have concluded that a sentence which includes a punishment of imprisonment must be imposed, even in consideration of the principle of restraint. Alternatives, such as the imposition of a fine with dismissal as alternatively proposed by the defence, will not be sufficient to accomplish the objectives that the sentence must achieve, namely to denounce and deter.

[94] In arriving at that conclusion, I have taken the mitigating factors mentioned previously in consideration. I do recognize that Private Luis was eighteen years of age at the time of offending. I also recognize that the events in question appear to be an anomaly and occurred as he was in an unusual situation as a member of the CAF in basic training. He has since left the military, never had a record and will need to establish his place in society. Rehabilitation is therefore an important principle and the need for individual deterrence reduced. Yet, the mitigating factors cannot operate to take over the sentencing process at the detriment of other sentencing objectives. Other young people undergoing basic training need to be protected, too. This is a case where denunciation and general deterrence require a punishment that is perceived as significant and commensurate with the circumstances of the offence and the harm done.

[95] In consideration of the principle of restraint, however, the length, hence the impact of the period of imprisonment which may be required will need to be limited to a minimum in light of the circumstances of the offender. This can be facilitated by the coupling of the punishment of imprisonment with dismissal and a fine to reach the objectives of denunciation and deterrence even with a minimal period of imprisonment.

[96] The prosecution argues that the imprisonment must be for a duration of ninety days, in consideration not only of the harm done but also of the nefarious intent it attributes to Private Luis as a predator who targeted F.M. and insisted to show her she had no other choice than to comply with his demand for sex. I have doubts about this characterisation. The evidence I have heard as to the behaviour and character of Private Luis, both at trial and on sentencing, leads me to believe that he was then an eighteen year old young man who tends to joke a lot at the detriment of others, in manners that are not always sensitive and proper. In fact, the prosecutor elicited that information from Private Luis in cross-examination at the trial, suggesting that his mother was afraid he would get in trouble with his jokes in basic training because he has a habit of pushing jokes a little too far. It is consequently difficult for me now to agree with an argument by the same prosecutor to the effect that Private Luis calculated his words and actions precisely to demean F.M. to a point where she could no longer resist his advances as an experienced and calculated sexual predator would do.

[97] In the circumstances, I find that the submission for ninety days imprisonment to be excessive. In terms of parity, the fact that a forty-nine year old taxi driver was sentenced to ninety days served in the community for assaulting a customer, the case of *Abdullahi* referred to by the prosecution, in what clearly constitutes a breach of trust,

reveals that Private Luis deserves less for his actions. That is so even considering the harm he caused, which, once again, is acknowledged.

[98] The determination of the length of a required period of imprisonment is not a scientific exercise. However, it is governed by principles, most importantly the principle of restraint, obliging me to impose the minimum period necessary to maintain discipline, efficiency and morale of the CAF. In doing so in this case, I must consider the combined impact of the accompanying punishments of dismissal from Her Majesty's service and the fine which I have decided to impose.

[99] I do believe that a period of thirty days of imprisonment, considering that it is combined with the punishments of dismissal and a fine, is the minimum appropriate to sanction the behaviour of Private Luis. This period takes into account the gravity of the offence in the circumstances and the impact on the victim and balances it with the mitigating factors. It has denunciatory and deterrent effects while taking into consideration the objective of rehabilitation

Suspension of the sentence of imprisonment

[100] The defence submits that the sentence should be suspended in consideration of the specific situation of Private Luis, specifically his health challenges which have been documented and substantiated in the course of this case, when the trial had to be postponed in April 2022. Witnesses in sentencing also testified as to the medical condition of Private Luis, specifically his stomach ailments, and the measures that need to be taken for him to be able to try to overcome this condition with limited success, considering his steady loss of weight since his symptoms first appeared in December 2021.

[101] Indeed, the carrying into effect of the punishment of imprisonment can be suspended under the authority of section 215 of the *NDA* which provides as follows, in its relevant portion:

> **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.

[102] As mentioned earlier, this provision makes it clear that the issue of suspension of a sentence of incarceration does not arise unless, and until, the sentencing judge has determined that the offender is to be sentenced to imprisonment or detention, after having applied the proper sentencing principles appropriate in the circumstances of the offence and the offender. We are at that stage now.

[103] The question of whether a custodial sentence should be suspended can be answered by the application of the two-step test first developed by d'Auteuil M.J. in *R. v. Paradis*, 2010 CM 3025, at paragraphs 74 to 89, and subsequently re-affirmed at paragraph 23 of *R. v. Boire*, 2015 CM 4010, the source most-often quoted. This test is

still valid despite the significant changes to section 215 of the *NDA* on 1 September 2018 which brought into play mandatory conditions to be imposed on an offender who benefits from the suspension of a sentence of incarceration. The CMAC has recently confirmed the validity of the *Boire* test at paragraph 45 of *R. v. Cogswell*, 2022 CMAC 7, stating that a suspension may be obtained, at the request of the offender, if the following requirements are met:

> (a) the offender demonstrates, 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 considers that the suspension of the punishment of imprisonment or detention would not 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.

[104] Counsel for Private Luis submits that the offender's circumstances justify suspending the imprisonment on the basis of the health challenges he is suffering from, which would make incarceration particularly difficult for him. The prosecution opposes the demand, arguing that the civilian establishment where Private Luis is to be imprisoned in Dartmouth, Nova Scotia, can provide the necessary care to him, probably to a level that he does not even have access to in rural area where he lives. The defence concedes that Private Luis could obtain care in prison. However, the point that the defence makes is that Private Luis' physical condition would make imprisonment particularly difficult for him.

[105] I agree with the defence. I find that Private Luis has established on the balance of probabilities that his particular circumstances justify a suspension of the punishment of imprisonment or detention.

[106] Indeed, doctor's notes have been presented to the Court confirming the physical ailments that he is suffering from to a sufficient level of precision. Testimony heard during the sentencing phase of the proceedings reveals that he suffers from frequent nausea and other ailments which prevent him from keeping food down and obtaining sufficient nourishment for his needs in any given day. He is unable to work. Private Luis has been observed in court. He has literally melted between the trial in June and the sentencing hearing in November. His condition is visibly serious. It is obvious to me that being imprisoned in that condition will be significantly more difficult for him than for other offenders or inmates. The first requirement has been met.

[107] As it pertains to the second requirement, the Court must consider whether a suspension of the punishment of imprisonment would undermine the public trust in the military justice system, in the circumstances of the offences and the offender, including the particular circumstances justifying a suspension. I find that the particular circumstances relating to the health of Private Luis, justifying the suspension of the

punishment of imprisonment in this case, are of such a nature to be readily understood as compelling for a reasonably informed observer. Yet, those particular circumstances are not the only factors relevant to the determination of whether the suspension would undermine the public trust in the military justice system.

[108] Indeed, the same observer would also consider the evidence heard on sentencing. This evidence demonstrates that the offences committed by Private Luis are out of character for him, despite their gravity. They were committed in the brief period of his life when Private Luis was a candidate at the CAF recruit school in circumstances very different from his life in rural Nova Scotia which he lead before and since, during which he committed no other offences. The evidence of Private Luis' mother also shows that on the one occasion when she worried about her son's choices in life, shortly after the death of his father, she decided to move away to isolate her son from the "wrong crowd" he had been associating with and this gave result, demonstrating that Private Luis may be especially susceptible to negative influences if he is in the company of persons associated with crime in prison. It seems to the Court that the risk is hardly worth taking for such a duration of imprisonment.

[109] On the other side of the coin, I am aware of the risk that an observer concludes that an offender who has been found guilty of sexual harassment will effectively walk out of his court martial without significant and meaningful consequences, with the exception of a fine and the potential for the punishment of imprisonment to be put into execution in the thirty days following its imposition if conditions are broken. Yet, it seems to me that this observer would also consider the impacts of the punishment of dismissal. In the circumstances, I am confident the suspension of the punishment of imprisonment would not undermine the public trust in the military justice system when all of the circumstances are taken into account.

[110] Recent amendments to the *NDA* now require at subsection 215(1.1) that a court martial making a decision that the execution of a punishment of imprisonment be suspended must include in its decision a statement that it has considered the safety and security of every victim of the offence. I can confirm that I have. There has been no evidence of any further interaction or communication between the offender and F.M. since their time at CFLRS in 2020, with the exception of the testimony of F.M. at the trial and her presence at the sentencing hearing. As far as the Court is aware, F.M. does not live in the same locality as the offender and there has been no fears expressed by her in her victim impact statement or otherwise on her behalf that there are credible threats to her safety and security from the offender. I conclude that a suspension of the period of imprisonment would not endanger the safety of F.M.in the circumstances of this case.

[111] Subsection 215(2) of the *NDA* provides that the court martial suspending the execution of a punishment shall impose conditions of the offender. Those will be provided directly to Private Luis at the close of these reasons for sentence.

Orders which may be imposed

DNA

[112] In accordance with section 196.14 of the *NDA*, considering that the offence for which I have passed sentence is a primary designated offence within the meaning of section 196.11 of the *NDA*, I order, as indicated on the attached prescribed form, that the number of samples of bodily substances that is reasonably required be taken from Private Luis for the purpose of forensic DNA analysis.

Consideration of weapons prohibition order

[113] Pursuant to paragraph 147.1(1)(a) of the *NDA*, since Private Luis was found guilty of sexual assault, which carries a ten-year maximum sentence of imprisonment and the charge itself constitutes a violent offence, this Court must consider whether it is desirable, in the interests of the safety of the person or of any other person, to make a weapons prohibition order. Based on the position taken by the prosecution, I have concluded that it is not appropriate to impose a weapons prohibition order because such an order is neither desirable nor necessary for the safety of the offender or of any other person in the circumstances.

Sex offender registry

[114] In accordance with section 227.01 of the *NDA*, and considering that the offence for which I am sentencing the offender is a designated offence within the meaning of section 227 of the *NDA*, I would normally have ordered Private Luis to comply with the *SOIRA* for twenty years.

[115] However, the situation is not normal.

[116] On 28 October 2022, five days before the start of the sentencing hearing, the Supreme Court of Canada rendered its decision in the case of *R. v. Ndhlovu*, 2022 SCC 38, finding that section 490.012 of the *Criminal Code*, obliging compliance with *SOIRA* for persons sentenced by civilian criminal courts for designated offences for varying periods of time, infringe section 7 of the *Charter*, and cannot be saved by section 1. The provision was therefore declared of no force or effect under section 52(1) of the *Constitution Act, 1982*, a declaration suspended for one year and applying prospectively.

[117] This lead the defence to file an application in this case on behalf of the offender to ask this Court to recognize by an order that section 227.01, specifically paragraph 227.01(1) of the *NDA*, violate Private Luis rights under section 7 of the *Charter*, and cannot be saved by section 1.

[118] Parliament first passed section 227.01 of the *NDA* in 2007 through Bill S-3, (*An Act to amend the National Defence Act, the Criminal Code, the Sex Offender Information Registration Act and the Criminal Records Act*, S.C. 2007, c.5) to create a scheme that requires offenders who have committed service offences of a sexual nature

to provide information for registration in a national database under *SOIRA* in a scheme which parallels the one in the *Criminal Code*, and since amended it so it remains conformed to the *Criminal Code* scheme. It is therefore unescapable that any analysis of section 227.01 of the *NDA* under section 7 of the *Charter* by a court martial could only lead the court martial to conclude that the provision is unconstitutional given that Supreme Court decisions are binding on subordinate courts.

[119] During arguments on the application, counsel agree and the prosecution has conceded that on the basis of the *Ndhlovu* decision by the Supreme Court of Canada, the Court can consider as a legal fact that section 227.01 of the *NDA* violate section 7 of the *Charter* and cannot be saved by section 1. However, counsel also agreed that no declaration needs to be made by this Court to the effect that the provision is of no force and effect, thereby availing me of the need to discuss the issue of whether a court martial can even make such a declaration with effects extending beyond the case it is hearing.

[120] In any event, counsel agree that this court martial has the power to provide Private Luis with a personal remedy under section 24(1) of the *Charter* as the offender is before this Court to be sentenced and subjected to this Court's authority as it pertains to registration to *SOIRA*, essentially placing this accused in the same position as an accused before any civilian court in the situation where the legislative provision is found to violate *Charter* rights with prospective effects but with a suspended declaration of invalidity.

[121] The defence asks this Court to conclude that Private Luis is deserving of a personal remedy under section 24(1) of the *Charter* on the basis that he is unlikely to reoffend, just like Mr Ndhlovu was, as explained in the decision of the SCC. Therefore imposing *SOIRA* registration on him, especially for twenty years as provided for in the *NDA*, would generate significant violation of his rights as described in the *Ndhlovu* decision for such a long period that he ought to be exempted from that requirement in light of the evidence heard about his character in sentencing and at trial, showing a low potential to reoffend.

[122] The prosecution concedes that the sexual assault offence in this case would have proceeded summarily if this was a civilian prosecution, thereby causing the offender to be under a *SOIRA* order for ten years under paragraph 490.013(2)(a) of the *Criminal Code*. However, as the offender committed the same offence as a military member and in a military environment, there is nothing improper with him being subjected to *SOIRA* registration for a duration of twenty years, twice the period which would have been imposed to an offender in the civilian criminal justice system, despite the fact that Private Luis has been a civilian after an effective military career of only a few weeks. The prosecution argues that the evidence on record is insufficient for the Court to conclude that Private Luis is unlikely to reoffend and therefore, that he deserves to belong in a very limited class of offenders who can benefit from a personal remedy under section 24(1) of the *Charter*.

[123] I have to admit that I had not previously recognized the extent of the restrictions on an offender's liberty interests brought about by the obligation to register under *SOIRA*, highlighted in the *Ndhlovu* decision. In that sense, the impact of registration for twenty years for a relatively low-level sexual assault, as we have here, which would have been prosecuted summarily in civilian courts is somewhat troubling, especially when the offender being sentenced by the court martial is a civilian at the time of sentencing and has had such a short military career, as Private Luis did.

[124] Now that *SOIRA* registration has been formally recognized by our highest court as generating significant infringements on offender's liberty interests, it is hoped that legislative modifications that will certainly be made in the next year to the scheme in both the *Criminal Code* and *NDA* will address discrepancies in the treatment of offenders in the military compared with the civilian justice systems so as to make impacts more similar. That will be warranted by the fact that at the outset, the *SOIRA* scheme if the *NDA* was meant to parallel the one in the *Criminal Code* and because it must be recognized that a great number of sexual offenders, by the time they are sentenced by a court martial, have become civilians by virtue of engaging in behaviour contrary to the ethos and expectations of the CAF. That being said, the inequality in treatment does not impact the decision I need to make today.

[125] Indeed, although I have challenged counsel in submissions regarding the possibility of granting a personal remedy which would constitute a middle ground, namely a reduction in the length of the period of registration under *SOIRA* from the mandated twenty years to the ten years that would have been issued by a civilian court or to a lesser duration commensurate with the perceived recidivism risk caused by Private Luis, I have concluded that I do not need to explore that avenue. To be clear, I am not ruling on whether that avenue is even a possibility in law, given that it does not seem to have been considered in the *Ndhlovu* decision and may be directly in contradiction with the legislator's intent in setting up the *SOIRA* scheme.

[126] I do not need to decide on the availability of the middle ground option because I have concluded that I have enough information to make a determination that Private Luis is at little risk to reoffend on the basis of the evidence I have heard during the sentencing hearing. While, unlike the trial judge in *Ndhlovu*, I did not have the benefit of expert evidence opining about some precise characteristics that Private Luis has which would make him more or less likely to reoffend in comparison with other offenders, I believe it is generally known that risk assessment is an individualized exercise involving many variables.

[127] The production of pre-sentence reports by experts is not frequent at courts martial, especially given the impetus to arrive at a sentence quickly as part of proceedings held in military installations and often witnessed by members of the military community most affected. In this case, defence counsel stated that he privileged the need of his client to get on with the sentencing hearing and the rest of his life post-conviction as quickly as possible rather than in obtaining an expert report which, in his view, would have certainly resulted in an opinion that the offender was at low risk of

reoffending. Of course, when making his call of the advantages of obtaining an expert opinion, defence counsel did not have the benefit of the *Ndhlovo* decision which could have alerted him of the possibility of more easily obtaining a personal *Charter* remedy with it than without.

[128] I believe that requiring an expert opinion on Private Luis' risk to reoffend before I can be comfortable ruling on that issue would, in the circumstances, be unfairly prejudicial for the accused. I also believe it is not required on the facts of this case. Indeed, Private Luis has strong family support, from his mother, sister and wife. He has not committed offences other than those for which I found him guilty and maintains positive relationships with law abiding members of his community, including those who travelled quite a distance to attest to his good character before me. I have commented on the character evidence before and do not feel the need to repeat myself now. I note that the prosecution has not presented any evidence pointing to a risk that Private Luis reoffends.

[129] Although it is impossible to arrive at a conclusion on the risk of reoffending with one hundred per cent certainty, I am not required to do so. I find that on the balance of probability, Private Luis has proven that he is unlikely to reoffend. In fact, I am ready to go further and state that I have no concerns that he will reoffend. For that reason and in light of the finding of the Supreme Court of Canada in *Ndhlovo* I will grant a personal remedy requested by the offender under section 24(1) of the *Charter* and will not order that he complies with the *Sex Offender Information Registration Act* as such an order would violate his rights under section 7 of the *Charter* in a manner which cannot be justified under section 1.

Conclusion and disposition

[130] As recognized by the Supreme Court of Canada, the imposition of a sentence by a judge is not an entirely precise process. Guided by the applicable principles, I have tried to arrive at a fair and fit solution for an offender who did not match the profile usually seen in courts martial and I am confident that the sentence imposed meets the ends of justice while impeding as little as possible the rehabilitation of Private Luis.

FOR THESE REASONS, THE COURT:

[131] **SENTENCES** Private Luis to imprisonment for a period of thirty days, dismissal from Her Majesty's Service and a fine in the amount of $1,200 dollars.

[132] **SUSPENDS** the carrying into effect of the punishment of imprisonment.

[133] **ORDERS** Private Luis to respect the following conditions for the next thirty days, that is until the punishment of imprisonment is remitted under subsection 217(2) of the *NDA*:

(a) to keep the peace and be of good behaviour;

(b) to attend any hearing into a breach of condition under section 215.2 of the *NDA* if and when ordered to do so by a military judge; and

(c) to provide the personnel of the military police from CFB Halifax present within the facilities of the court with your current coordinates and occupation and to notify the military police at CFB Halifax in advance of any change of name or address, and to promptly notify the military police of any change of employment or occupation.

[134] **ORDERS** that the fine be paid by means of a personal cheque, post-dated to 15 January 2023, to be handed to the officer of the court at the conclusion of these proceedings.

[135] **ORDERS**, pursuant to section 196.14 of the *NDA*, that the number of samples of bodily substances that is reasonably required be taken from Private Luis for the purpose of forensic DNA analysis by personnel of the military police from CFB Halifax present within the facilities of the court to do so immediately after the proceedings are terminated.

Counsel:
The Director of Military Prosecutions as represented by Majors M. Reede

Lieutenant-Colonel D. Berntsen, Defence Counsel Services, Counsel for Private M. Luis