COURT MARTIAL

Citation: *R. v. Levesque,* 2023 CM 2001

Date: 20230112
Docket: 202128

General Court Martial

Canadian Forces Base Esquimalt
Esquimalt, British Columbia, Canada

Between:

His Majesty the King

-and-

Petty Officer, 1st Class J.R. Levesque (retired), Offender

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

Restriction on publication: Pursuant to section 179 of *the National Defence Act* and section 486.4 of the *Criminal Code*, I order that any information that could disclose the identity of the person described during these proceedings as the victim or complainant, including the person referred to in the charge cheet as "C.H.", shall not be published in any document or broadcast or transmitted in any way, excepting when disclosure of such information is necessary in the course of the administration of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] Following a trial by General Court Martial (GCM), Petty Officer, 1st Class J.R. Levesque (retired) was found guilty of three charges: sexual assault; assault; and uttering threats. The charges alleged various forms of abuse by him directly against a young naval cadet, C.H., who had just turned twenty years of age after completing her second year at the Royal Military College (RMC) and was posted to Her Majesty's

Canadian Ship (HMCS) *Oriole* for the summer of 2006. C.H. was one of only three females on the HMCS *Oriole* that summer on a ship of approximately twenty-four persons. It now falls to me to impose a fit sentence for the offences which the panel determined were proved beyond a reasonable doubt.

[2] The relevant charges read as follows:

"FIRST CHARGE *NDA* Section 130	AN OFFENCE PUNISHABLE UNDER SECTION 130 OF THE NATIONAL DEFENCE ACT, THAT IS TO SAY, SEXUAL ASSAULT, CONTRARY TO SECTION 271 OF THE CRIMINAL CODE *Particulars*: In that he, between 1 June and 31 July 2006, while aboard HMCS ORIOLE, in coastal waters of the province of British Columbia, did sexually assault C.H.
SECOND CHARGE *NDA* Section 130	AN OFFENCE PUNISHABLE UNDER SECTION 130 OF THE NATIONAL DEFENCE ACT, THAT IS TO SAY ASSAULT CONTRARY TO SECTION 266 OF THE CRIMINAL CODE *Particulars*: In that he, between 1 June and 31 July 2006, while aboard HMCS ORIOLE, in coastal waters of the province of British Columbia, did commit an assault on C.H.
THIRD CHARGE *NDA* Section 130	AN OFFENCE PUNISHABLE UNDER SECTION 130 OF THE NATIONAL DEFENCE ACT, THAT IS TO SAY UTTERING THREATS, CONTRARY TO SECTION 264.1 OF THE CRIMINAL CODE *Particulars*: In that he, between 1 June and 31 July 2006, while aboard HMCS ORIOLE, in coastal waters of the province of British Columbia, did knowingly convey to C.H. a threat to cause her bodily harm."

[3] The appropriateness of a sentence is a function of the purpose and principles of sentencing set out in sections 203.1 to 203.3 of the *National Defence Act* (*NDA*) as applied to the facts that led to the three convictions.

[4] Unlike a Standing Court Martial where a judge sitting alone has a duty to give reasons for their finding, the panel gives only its ultimate verdict on each of the charges. Consequently, as the sentencing judge, I must do my best to determine the facts necessary for sentencing drawn from the issues before the panel and from the panel's respective verdicts. This does not require me to arrive at a complete theory of the facts; but I am only required to make those factual determinations necessary for deciding the appropriate sentence in the case at hand.

[5] There are two governing principles I must follow. Firstly, I am bound by the "express and implied factual implications of the jury's verdict": see *R. v. Brown*, [1991] 2 S.C.R. 518 (S.C.C.), page 523. Accordingly, I "shall accept as proven all facts, express or implied, that are essential to the jury's verdict of guilty" (see *Criminal Code*, subsection 724(2)(a)), and must not accept as fact any evidence consistent only with a verdict rejected by the jury: *see R. v. Braun*, (1995), 95 C.C.C. (3d) 443 (Man. C.A.).

[6] In this particular court martial, the offences set out in charges one and two relied upon more than one incident. The panel was instructed that proof beyond a reasonable doubt of any one of the incidents was sufficient to establish guilt on the relevant charge. Further, in coming to a finding, there was no legal requirement that the individual panel members had to rely on the same incident in reaching a verdict of guilty on the charge. The unanimity requirement applied only to the essential ingredients of the offence, not to the facts which establish them.

[7] In their deliberations on the first charge of sexual assault, the panel considered the facts of three different incidents, any one of which could have provided sufficient proof of the essential ingredients of sexual assault. Similarly, in consideration of the second charge, the panel relied upon two separate incidents, where proof of either of the two incidents could have grounded the essential elements of the offence of assault.

[8] In cases such as this, when the factual implications of the panel's verdict are ambiguous, as the sentencing judge, I must not attempt to follow the logical process of the panel, but rather, I should come to my own independent determination of the relevant facts: see *R. v. Brown*, [1991] 2 S.C.R. 518 (S.C.C.); *R. v. Fiqia*, (1994), 162 A.R. 117 (Alta. C.A.).

[9] In so doing, I "may find any other relevant fact that was disclosed by evidence at the trial to be proven" (section 724(2)(b) of the *Criminal Code*). However, to rely upon an aggravating fact or a previous conviction, I must be convinced of the existence of that fact or conviction beyond a reasonable doubt; to rely upon any other relevant fact, I must be persuaded on a balance of probabilities: (sections 724(3)(d) and 724(3)(e) of the *Criminal Code*).

[10] The judge should first identify the issues on sentencing, and then find such facts as are necessary to deal with those issues. Importantly, a judge should only find those facts necessary to permit a proper sentence to be imposed in the case at hand.

Facts

[11] The following description of the incidents that unfolded between 1 June and 31 July 2006 is based on the implications flowing from the panel's verdicts on the three charges as well as my own independent determination of relevant facts: see *Brown*, at paragraph 14.

[12] In coming to a finding of guilty on all three of the charges, I find that the panel clearly accepted most, if not all of C.H.'s evidence describing the various incidents. It is therefore open to me to find on the evidence that multiple incidents occurred with respect to the first two charges.

First charge of sexual assault

[13] C.H. testified as follows with respect to the three incidents that underlie the first charge:

(a) "Ass grab" incident:

i. about a week into their longer sail, while in port, she was on her hands and knees cleaning when somebody walked up behind her and grabbed her ass. She jumped up and turned around and she observed the Buffer (who was Petty Officer, 1st Class Levesque) standing there,

ii. she described how she was facing forward toward the aft on the starboard side of the ship when she heard footsteps but did not look back until someone grabbed her,

iii. she stood up, turned around and said "What the fuck are you doing?",

iv. the ass grab lasted for a couple of seconds and she described it as something you could feel through your clothes and was "very distinct involving a full hand", and

v. in response to her comments, Petty Officer, 1st Class Levesque put his hands up in the air like "I am not doing anything" and he walked away;

(b) "Crotch grab" incident:

i. after the ass grab incident, she was admittedly on edge and trying to keep an eye open to ensure that an incident like the first did not occur again,

ii. a few days later, when the HMCS *Oriole* came alongside, she was doing her duties when she heard somebody approaching from behind her. This time she stood up on purpose and saw the Buffer walking towards her and, this time, instead of grabbing her ass, he grabbed her genitals or crotch area,

iii. on a scale of one to ten, she described the pain as a seven,

iv. she said that she was in shock for about a second and then she pushed him away with both hands and the grabbing stopped when he stepped back,

v. she described herself as very upset, shaking and scared as she did not feel safe on the ship,

vi. she told him "Don't fucking touch me" and does not recall him saying anything in response as he just walked away,

vii. she spoke immediately with Naval Cadet Brien, who was also serving on the ship at the time,

viii. she recalls reporting the incident to Petty Officer, 1st Class Bagnell on that same day,

ix. she described telling Petty Officer, 1st Class Bagnell about the incidents and the inappropriate comments that Petty Officer, 1st Class Levesque had been making. She explained that she could not sleep, did not feel safe and was struggling while serving on the ship. She said that Petty Officer, 1st Class Bagnell seemed surprised, but said that he would talk to Petty Officer, 1st Class Levesque and tell him to stop,

x. the day after she spoke with Petty Officer, 1st Class Bagnell, she switched sleeping bunks, and

xi. she has no knowledge whether Petty Officer, 1st Class Bagnell ever spoke with Petty Officer, 1st Class Levesque, but told the Court that Petty Officer, 1st Class Levesque's conduct towards her did not stop;

(c) "Bug spray" incident:

i. the very next day after the crotch incident, C.H. described an incident that occurred when they went ashore to a fishing resort and all the crew were participating in a bonfire,

ii. due to the fact that the ship was at anchor, and they had to ferry everyone ashore, she described herself as one of the last ones to arrive at the resort and by that time the other crew members were already there, and the bonfire was going,

iii. she described walking through a trail in the woods and entering a rock beach area where everyone was gathered,

iv. as she approached the gathering, someone made a comment about the number of bugs in the woods, and when she told them that she had put on bug spray, Petty Officer, 1st Class Levesque immediately approached her and started rubbing himself against her,

v. she described how he pressed himself against her side and pushed his center of mass and groin against her, above her shorts and waist as if he was humping her,

vi. she explained that he humped her for just a few seconds as she stepped aside and said, “What the fuck are you doing?”,

vii. in response, she said Petty Officer, 1st Class Levesque made a comment about her bug spray, or something to that effect,

viii. she stated that when she looked across the bonfire, she made eye contact with the Coxswain who just shrugged his shoulders at her and she realized that the incidents were not going to stop,

ix. she explained that she stayed at the beach for approximately an hour until she had another interaction with Petty Officer, 1st Class Levesque,

x. while still at the beach bonfire, chatting and joking, Petty Officer, 1st Class Levesque approached, picked her up and started carrying her towards the water. She stated that she screamed at him to let her down, and

xi. she left the beach/bonfire after Petty Officer, 1st Class Levesque put her down.

Second charge of assault

[14] With respect to the second charge of assault, C.H. testified as follows:

(a) "Mid-ship" incident:

i. while sailing on the open water, her job when they tacked the sailboat was to break the main sails, which required her to be around the mid-ship point. From that position, she could see the Buffer talking to the Commanding Officer who was at the helm, at the aft part of the ship,

ii. from that mid-ship point, she then saw the Buffer walking towards her, and she tried to walk away to the other side of the ship. However, in passing by her, Petty Officer, 1st Class Levesque reached out and grabbed her by her arms and dug his fingers in right to the back of both her arms and just squeezed. She struggled and after a few seconds he let her go,

iii. she described the area where she was grabbed on both arms as the bicep triceps area above the elbows,

iv. on a scale of pain ranging from one to ten, she described the forcefulness of his grab as an eight and he held her arms for three or four seconds,

v. nothing was said by either of them at the time that she could recall, but she admitted that she swore a lot,

vi. after he let her go, she does not recall anything being said by Petty Officer, 1st Class Levesque, but she confirmed that the interaction ended when he let her go and walked away, and

vii. the degree of force he used was hard enough to leave bruises on her;

Naval Cadet Brien testified that:

i. due to the physical nature of the work they did on the *Oriole*, it was not uncommon for them to be bruised,

ii. in general, both she and in her opinion C.H. felt uncomfortable with the sexual atmosphere on the ship, acknowledging that the level of sexualized jokes increased when there was drinking, and

iii. that the bruises on C.H. were so noticeable that the male members did not want to be seen walking out with them for fear that people would think that they were responsible for giving them the bruises;

(b) "Buffer's cabin" incident:

C.H. testified as follows:

i. after Petty Officer, 1st Class Levesque returned to the ship, she was assigned to do cleaning stations in Petty Officer, 1st Class Levesque's cabin and the heads located there,

ii. she estimated that the date of the Buffer cabin incident was approximately the fifth or sixth of July,

iii. she was in his cabin alone cleaning when she saw him approaching. Thinking he was going to walk in the room, she tried to leave,

iv. she said she almost got past him when he grabbed her hair. Because she was wearing a ball cap, her hair was coming out the back hole of it and he grabbed it and pulled her backwards into the cabin, pulling her hair out and causing her to bang up against the bulkhead there,

v. Petty Officer, 1st Class Levesque pulled her hair hard enough that he pulled the bun out but she does not recall losing any hair,

vi. after pulling her hair, she explained that Petty Officer, 1st Class Levesque told her that she had done a poor job cleaning. She explained that it was just like having a normal conversation, as he advised her that she had used too much Pledge, and

vii. she responded by saying, "Yes, yes Buffer, yes P-O", and then he left.

Third charge of uttering threats

[15] C.H testified as follows:

(a) "Uttering threats" incident:

i. the day after Petty Officer, 1st Class Levesque grabbed her arms, he saw the bruises on her arms and said to her "when we have sex, I'll leave bruises all over you",

ii. she understood the above comment to mean that he would rape her,

iii. she was in such shock; she does not recall saying anything in response, and

iv. she believed that the threat was serious and went out of her way to ensure that she was never left alone with him.

[16] I find that based on the context of the evidence, Petty Officer, 1st Class Levesque did what he did in efforts to intimidate C.H. as a young officer cadet. This does not in any way minimize his unacceptable conduct, but it does help the Court in assessing his motive. This is also confirmed in the testimony of C.H. where she told the Court that when she found herself alone with Petty Officer, 1st Class Levesque in his cabin, she was convinced she would be sexually assaulted, but she testified that it was surreal as the only thing that unfolded was a discussion of her overuse of the cleaning agent, Pledge.

Evidence

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

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

(a) victim impact statement (VIS);

(b) financial statement on the household income of Petty Officer, 1st Class Levesque;

(c) character letters of support for Petty Officer, 1st Class Levesque on sentencing from:

i. Peter Hamilton, and

ii. Cheryl Compagnat;

(d) Forensic Psychological Assessment completed by Jacqueline Leland, M. Psych. (For.) Registered Clinical & Forensic Psychologist; and

(e) the following witnesses provided in-court testimony in direct support for Petty Officer, 1st Class Levesque:

i. Arlene Winstanley,

ii. Jodine (Jodie) Lacombe,

iii. Del Lacombe,

iv. Mary Lelonde,

v. James Nault,

vi. Darlene Levesque,

vii. Suzanne Levesque, and

viii. Pamela Jackson (via video teleconferencing).

[19] Furthermore, the Court benefitted from counsel's submissions to support their respective positions on sentence where they highlighted the facts and considerations relevant to Petty Officer, 1st Class Levesque.

[20] Counsel's submissions and the evidence before the Court have enabled me to be sufficiently informed of Petty Officer, 1st Class Levesque's personal circumstances, so I may impose a sentence specifically for him.

Victim impact statement

[21] The Court considered the victim impact statement of C.H., which the prosecution read into the court proceedings. The Court summarizes the following pivotal parts of her statement as follows:

(a) "When I received the message that I would be sailing on HMCS ORIOLE for the summer I was so excited. It would be my first ship and really marked the start of my career in the navy. I had just turned 20 years old and was a Naval Cadet who had just completed my second year of university at the Royal Military College in Kingston.

Almost immediately that excitement turned to fear because of the actions of the ship's buffer. Someone who was in a position of authority over me.

I was constantly on edge, looking over my shoulder trying to keep an eye on where PO1 Levesque was, trying to do what I could to stop him from sexually assaulting me. I would always coordinate where I was going with someone else, which meant I lost all freedom of movement. Even the simplest things like going to do laundry, shower at the marina or going for a run I did not feel safe being alone. I had to request to change bunks to try to put some distance between where I slept and PO1 Levesque but even then, significant sleep issues persisted including nightmares." and

(b) "Reporting to the police three years ago and going through the 2 weeks of trial has taken a significant toll on me. I was transported back in time to being a scared naval cadet on my very first ship. Once again I cannot sleep, I am on edge looking over my shoulder,

> I was nauseous and could barely eat the entire trial and the nightmares are back. I initially tried counseling after I had reported to the police and feel I need to try again"

Circumstances of the offender

[22] Petty Officer, 1st Class Levesque is fifty-nine years old. He enrolled in the Canadian Armed Forces (CAF) on 17 February 1983, serving with the CAF until March 2017, a period just over thirty-four years. He was a boatswain (BOSN) which is a naval trade that focusses on the maintenance of ship's surfaces including its upper deck equipment and machinery. Petty Officer, 1st Class Levesque is married and has one daughter and currently resides in Diamond Valley, AB where he has settled in his retirement.

[23] During his military career, following basic and occupational training as a boatswain, he was posted to several ships, some multiple times: HMCS *Saskatchewan*, *Provider*, *Terra Nova*, *Algonquin*, *Winnipeg*, *Ottawa*, *Vancouver*, *Oriole*, *Protector* and *Calgary*. In addition, he was also posted to Canadian Forces Fleet School Esquimalt, Royal Military College, Fourth Maritime Operations Group Headquarters, as well as Canadian Forces Bases Esquimalt and Kingston. His Member Personal Record Résumé reveals that he had just been promoted from Master Seaman (as the rank then was) to the rank of Petty Officer, 2nd Class in March 2006, just prior to his posting as the Buffer on HMCS *Oriole* in April 2006. Consequently, it was a position that he had just been promoted to fill. As the Buffer on HMCS Oriole, he was responsible for supervising all the ship's seamanship evolutions. It is an important senior leadership role.

[24] During his service, he earned the following military decorations and medals: Canadian Peacekeeping Service Medal; Special Service Medal; and the 2nd clasp of the Canadian Forces' Decoration.

[25] Petty Officer, 1st Class Levesque is very active in both his community and his church.

<u>Positions on sentencing</u>

Prosecution

[26] The prosecution suggested that the minimal punishment the court should impose is imprisonment for a period of six months. He argued that sexual crimes are inherently violent. Based on the precedents in the cases, he submitted this is the minimum sentence to be imposed to deter others from engaging in similar misconduct.

Defence

[27] The defence submits that based on the circumstances of this case, a just and appropriate sentence is a non-custodial one. He argues that the appropriate sentence in this case is a reprimand and a fine ranging from $4,000 to $6,000.

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

[28] When crafting a sentence, I must first consider the fundamental purpose and goal of sentencing which is to maintain the discipline, efficiency and morale of the Canadian Forces. The fundamental purpose of sentencing is achieved by imposing a just punishment that meets one or more of objectives codified in the *NDA*. The objectives set out in the *NDA* are consistent with Canadian values and modelled upon similar provisions in the *Criminal Code* but are adapted to the special circumstances associated with the military service of the armed forces and its military members. They are as follows:

> (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 or to the community.

[29] In *R. v. Friesen,* 2020 SCC 9**,** at paragraph 30, the Supreme Court of Canada (SCC) indicated that "[a]ll sentencing starts with the principle that sentences must be proportionate to the gravity of the offence and the degree of responsibility of the offender. The principle of proportionality has long been central to Canadian sentencing". The *NDA* codifies this "fundamental principle" at section 203.2.

[30] A just sentence is one which reflects the seriousness of the crime and fits the individual circumstances of the accused. Sentences must be imposed in accordance with the principles set out at 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, and aggravating circumstances include, but are not restricted to, evidence establishing that

(i) the offender, in committing the offence, abused their rank or other position of trust or authority,

(ii) the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or gender identity or expression, or on any other similar factor,

(iii) the offender, in committing the offence, abused their spouse or common-law partner,

(iv) the offender, in committing the offence, abused a person under the age of 18 years,

(v) the commission of the offence resulted in substantial harm to the conduct of a military operation,

(vi) the offence was committed in a theatre of hostilities,

(vii) the offence was committed for the benefit of, at the direction of or in association with a criminal organization, or

(viii) the offence was a terrorism offence;

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

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

(c.1) all available punishments, other than imprisonment and detention, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders;

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

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

[Emphasis added.]

[31] The prosecution emphasized that those objectives of sentencing that the Court must consider are denunciation and deterrence. The defence agrees with this, but carefully pointed out that based on the evidence before the Court and the forensic expert's assessment, there is no need for specific deterrence.

[32] It is important to begin my analysis by laying out the different principles being advocated by counsel, as they set the framework for the crafting of an appropriate sentence.

Analysis

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

[34] The nine objectives of sentencing referred to above have been specifically provided by Parliament to guide military judges in the sentencing process. Military judges have discretion over which sentencing objectives to prioritize, and how much weight to afford to the secondary sentencing principles that are also set out therein.

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

[35] One of the objectives of sentencing is to denounce unlawful conduct and the harm caused to victims or to the community. In courts martial, the sentence represents the judicial condemnation of the sanctioned conduct to the affected CAF community. Consequently, judicial sentences should be imposed in a manner that positively enforces the communal values of all serving CAF members as expressed by the *NDA*.

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

[36] Where the purpose of the sentence is to deter others who may be inclined to engage in similar conduct, then the Court must carefully consider the sentence from an objective perspective based on the facts and the context of the offence. I must consider the gravity of the offence, the incidence of this type of offence within the military community, the harm caused by it, with respect to the individuals directly affected, the military community and the reputation of the CAF at large.

[37] If the purpose is to deter Petty Officer, 1st Class Levesque from personally re-engaging in this type of offence, then the court must consider his individual needs, attitude, motivation and his personal rehabilitation. This is referred to as specific deterrence. It is for this reason; defence has introduced extensive character evidence in support of Petty Officer, 1st Class Levesque, including a forensic report on his risk of recidivism, witnesses and letters of support. Upon review of all the evidence, I agree with defence counsel that there is no need for the Court to focus on specific deterrence.

Priority of objectives

[38] Based on the facts of this case, and after considering the context of what unfolded on the HMCS *Oriole*, I find that the objectives of sentencing that must be given the highest priority are general deterrence and denunciation. In hoping to achieve the purpose of deterring others, the challenge lies in reconciling what is needed to deter others from committing something similar.

Gravity of offence and degree of responsibility

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

[40] I find that the totality of the conduct captured in the three charges amounts to a clear intention by Petty Officer, 1st Class Levesque to intimidate a young twenty-year old female officer cadet who was newly posted to the HMCS *Oriole* for the summer. He was successful and he not only intimidated C.H,. but the evidence suggests that his conduct altered the course of her military career as a naval warfare officer.

[41] Consequently, it is for this reason, the Court must carefully consider the impact of the offences on the victim, C.H.. Although I find that the offences were indeed serious in the manner upon which they were executed and their effect on C.H., factually, for reasons which I will explain in my forthcoming analysis, I must situate the sexual assault at the low end of the spectrum as it primarily involved "fleeting touching" over the clothes.

[42] I am also conscious of the fact that sexual assault is a crime of violence, and there was excessive force applied by Petty Officer, 1st Class Levesque, at sporadic times, such as when he grabbed and squeezed C.H.'s arm in a manner that left bruising. I am mindful of the fact that in coming to their finding on the assault charges, it was not necessary for the panel to accept that bruises occurred. However, I am also attentive to the fact that the panel found the offender guilty of uttering the threat to C.H. that she would encounter greater bruising when they had sex, which in the context of what had transpired, she interpreted it to be a threat of rape.

[43] In the passing of a sentence, notwithstanding that there are findings of guilty for three different charges before the Court, it is an important characteristic of courts martial that "only one sentence shall be passed" and "the sentence is good if any one of the offences would have justified it" (see *NDA* section 203.95).

[44] The offence of greatest concern before this Court is the offence of sexual assault where Petty Officer, 1st Class Levesque, on two different occasions, grabbed C.H.'s ass and her crotch and on a third occasion, rubbed his body up against hers. The offence of sexual assault is the most serious of the three charges within the *Criminal Code*.

[45] The military justice system does not draw a distinction between indictable or summary conviction offences. For indictable offences, the maximum punishment an offender is liable to for sexual assault contrary to section 271 of the *Criminal Code* is imprisonment for a term of not more than ten years. For the offence of uttering threats, contrary to section 264.1 of the *Criminal Code*, an offender is liable to imprisonment for a term not exceeding five years. For the offence of assault contrary to section 266 of the *Criminal Code,* an offender is liable to imprisonment for a term not exceeding five years.

[46] Based on the submissions of counsel and the case law precedents provided to the Court, its clear that the prosecution intends for the Court to consider the more serious offence of sexual assault as the primary basis of the punishment to be imposed.

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

Parity

[48] The *Criminal Code* creates a single offence of sexual assault which encompasses a wide range of conduct. All incidents of sexual assault are abhorrent and unacceptable. Because of the parity principle that is articulated in the *NDA,* this Court must consider cases with similar facts, to assist it in its sentencing analysis. (See *Friesen*, at paragraphs 39-41).

[49] In *Friesen*, at paragraph 89, the Court said:

> All forms of sexual violence, including sexual violence against adults, are morally blameworthy precisely because they involve the wrongful exploitation of the victim by the offender — the offender is treating the victim as an object and disregarding the victim's human dignity ...

[50] Sexual offences raise particular considerations in the proportionality analysis. In *Friesen*, at paragraph 75, the SCC recognized that, “courts need to take into account the wrongfulness and harmfulness of sexual offences against children when applying the proportionality principle. Accurately understanding both factors is key to imposing a proportionate sentence.”

[51] In *Friesen*, the SCC provided broad guidance to courts on several points that sexual offences against children should generally be punished more severely than sexual offences against adults and suggested that an “upward departure” from precedents may be required.

[52] In *R. v. Brown*, 2020 ONCA 657, at paragraph 59, the Ontario Court of Appeal (ONCA) wrote that it found no reason why the principle set out in *Friesen* should not apply to all sexual offences at large. In short, “taking the harmfulness of these offences into account ensures that the sentence fully reflects the 'life-altering consequences' that can and often do flow from the sexual violence.” Pragmatically, this means that in sentencing, courts should be cautious in relying on dated precedents.

[53] In assessing the type of sentence that is appropriate for this offender, based on the facts before the Court, I must first determine the appropriate range of sentence for an offence of this type. The inquiry here is objective. The appropriate range is based on the general characteristics of the typical offence and on the assumption that the accused is a person of good character with no criminal record.

[54] The sentencing process requires military judges to closely analyze the established precedent and assess the facts of a case against the backdrop of similar facts. It is important for the maintenance of discipline in the military context that similar conduct be treated with parity. It does not matter whether the conduct was charged under a section 129 charge for conduct that is prejudicial to good order and discipline or under sexual assault. It is the facts that unfolded in each case that I must review.

[55] The prosecution relied upon three precedents from the military justice system and one precedent from the civilian courts in arguing that a sentence of six months' imprisonment is merited on the facts of this case:

(a) *R. v. Turner*, 2022 CM 4002. After offering the victim his bed to sleep in, opting to sleep on the couch, the offender intruded the bed occupied by the complainant. In the early morning, while she was sleeping, he sneaked under the sheets at the foot of the bed, restrained her legs, removed her undergarments and performed cunnilingus without her consent, despite her pleas for him to stop and her physical resistance. The offender was sentenced to imprisonment for a period of nine months and to a reduction to the rank of sergeant;

(b) *R. v. Marshall*, 2022 CM 2008. The offender pleaded guilty to five different offences of disgraceful conduct that involved four different victims who were younger in age and lower in rank to him. He followed the first victim around the ship, making him feel uncomfortable by making inappropriate comments of a sexual nature and when they were alone, he grabbed the victim's genitals and attempted to give him a "hand job". Both parties were under the influence of alcohol at the time.

The second victim was sexually harassed by the offender who said things like "Give me a smoke and I'll blow yah," or "Want a handy before you go to bed?" or words to that effect.

A third victim reported that during a night sea trial exercise, while he was under the supervision of the offender, the offender became flirtatious with him. The offender suggested they play a game to pass the time, to which he agreed. The offender then placed one hand on the victim's thigh saying "Let's play 'red light, green light'" while the offender moved his hand up to the genitals of the third victim. Once he realized what the offender meant, he immediately said "Red light," but the offender continued to move his hand up until he touched the genitals. The victim said "No," and pulled away.

The offender made frequent sexual comments to a fourth victim, including offering oral sex. The offender slapped the victim on the buttocks two or three times and touched his genitals five to ten times. While on night watch with the fourth victim, the offender said it was

very dark on the bridge and no one could see what they were doing, and he offered money to the victim if he let him touch his penis. He persistently offered various amounts of money. After initially thinking it was a joke, the victim realized that the offender was serious and over the next several days, approached him to tell him that his behaviour made him feel weird, and he reported the incident to his chain of command. Accepting the joint submission, the Court imposed sixty days of imprisonment.

(c) *R. v. Paradis*, 2010 CM 3025. A cadet instructor pleaded guilty to the sexual exploitation of a young cadet of sixteen years of age. The young cadet came to speak to him because he was questioning his own sexual orientation, and in a vulnerable position. There were four episodes of a sexual nature over a six-week period, including one incident involving explicit sexual relations. It was a violation of an abuse of trust and authority. In a joint submission, the prosecution and defence counsel recommended that the Court impose a sentence of forty-five days' imprisonment and a $3,000 fine and they also suggested that the Court suspend the sentence of imprisonment. A violation of section 153 of the *Criminal Code* required Courts to impose a sentence of imprisonment for a minimum term of forty-five days.

(d) *R. v. JJP*, 2012 ONCJ 699. The offender worked as store manager at a store his wife owned. The victim was the lone employee and worked as a sales clerk fulltime under the direct supervision of the offender. In the first incident, while seated on chairs inside the store, the offender got up off his chair, grabbed the victim's arm and dragged her ten to twelve feet toward the back stockroom to kiss her. She resisted. He then grabbed her left wrist and dragged her, with her watch digging into her wrist. She took a picture of the mark on her wrist. On another occasion, when the victim went to the stockroom to get her purse, she heard the door close behind her and lock. She turned to find the offender facing her. He put his arms underneath her sides, grabbed her pants and tried to put his hands down her pants. Her pants were secured by a belt and his thumb got stuck. While she tried to push him back, he put his other hand down her pants to just above her underwear. She pushed him back and said, "What are you doing?" He said he was "Going for it". She pushed him away, got around him, unlocked the door and left the store, immediately disclosed the sexual assault. Both the assault and sexual assault involved the abuse by a person in a position of authority and there was a significant power imbalance and given that the offender was her boss, he put her in a vulnerable position. She needed the job for herself and her three children. She was economically vulnerable due to her prior financial difficulties and her limited working experience. The offender preyed upon her vulnerability. During the trial, he lied to the Court that he had been engaged in a five-month affair with the victim. The victim

described her experience with the offender as traumatic, repulsive, and "a living nightmare". In addition, the offender engaged in the following obsessive sexual behaviour towards the victim which included:

i. speaking to the victim about his marriage problems,

ii. inviting her to his house for family celebrations and inviting her out to hockey games and other outings,

iii. making comments to her at work about how beautiful she was, her beautiful eyes, and how he liked the shape of her body,

iv. sending her text messages when she was not at work telling her that he loved her; he wanted to meet up with her; he wanted her to come into work early,

v. sending flowers to her home with a card that said "WOW",

vi. writing a sex story about her that he entitled "Candle Picture Couch" which the judge found provided clear and compelling evidence of the offender's obsessive sexual fantasy about the victim. The content was crude and disturbing,

vii. texting her "Miss u xxoo". In another text he referred to himself as her "other boyfriend". In another text he stated "U hate me.",

viii. intending to punish her for reporting the offences to the police by manipulating her record of employment, knowing it would delay her ability to receive unemployment insurance benefits, and

ix. hacking into her personal email account and accessing the victim's personal photographs, which were provocative. When her laptop was opened, at her workplace, for the purpose of the offender helping the victim with her resume, and without her knowledge or consent, the offender forwarded her photos to a Gmail account he created so that he could view this material whenever he wanted.

The judge found that the offender was sexually obsessed with the victim and at risk of repeating the behaviour if he was in a position of power and control over another vulnerable female employee. Based on the contents of his pre-sentence report, acting inappropriately toward female employees was not out of his character. The judge found the need for specific deterrence was high and concluded that a conditional sentence was not appropriate. The judge found that imposing house arrest would do little to specifically deter the offender as it would have only a minor impact on his day-to-day routine and found that in his case, incarceration was necessary. As the assault was separate in time from the sexual

assault, the judge imposed consecutive sentences with the jail portion of the sentence of: thirty days on the assault; and ninety days on the sexual assault.

[56] The defence provided the following precedents to support his position on sentencing:

(a) *R. v. Amirault*, 2011 CM 2017. The accused was found guilty of sexual assault contrary to section 271 of the *Criminal Code*. The underlying facts occurred while the complainant, a female bombardier, was taking part in a military exercise with her unit in the Petawawa training area. As part of her reconnaissance duties, she was sitting by herself in the backseat of a military vehicle when the accused approached her. They engaged in small talk before he put his hand on her left thigh and massaged her up to her groin region and then groped her vaginal area over her combat clothing. She was stunned and shocked, laughed nervously and brushed his hand away with her own hand. Then he reached out and touched her breast area inside her outer clothing, but over her T-shirt. He finally stopped when she became more forceful and aggressive in pushing him away. He chuckled and stated that both of them "could get in trouble for this." The incident lasted approximately five minutes. She felt unsafe and went elsewhere to be around other people. The trial judge commented specifically on the fact that the touching was outside of her clothes. He was found guilty of sexual assault and sentenced to a severe reprimand and a fine of $8,000;

(b) *R. v. Lieutenant(N) Pearson*, 2012 CM 1004. In this case, the offender pleaded guilty to the lesser offence of assault, and to conduct to the prejudice of good order and discipline under section 129 of the *NDA* for harassment contrary to Defence Administrative Orders and Directives 5012-0. He made inappropriate sexual comments on multiple occasions to the victim and demonstrated harassing behaviours towards her. While in port at Pago Pago in the American Samoa, while the victim, junior in rank to him, was having a drink of water in the wardroom, the offender approached the victim from behind, placed his face on her neck, and then proceeded to put his hand down her shorts, underneath her undergarments, reaching the beginning of her pubic hair. The victim felt extremely uncomfortable and froze. A female officer arrived in the wardroom and seeing the offender's behaviour and the victim visibly in distress, she told the offender "Stop being so creepy", or words to that effect. The offender backed off and removed his hand from the victim's pants and left the wardroom. He received a severe reprimand and a fine in the amount of $8,000;

(c) *R. v. Bernier,* 2003 CMAC 3. This case has some similarity to the facts before the court. In *Bernier*, the victim was serving as an assistant to the

offender. At court martial, the offender was convicted of three separate charges (two charges of assault and one charge of harassment) that flowed from the following facts set out in the trial level decision at paragraph 2 of *R. v. Leading Seaman G.G. Bernier,* 2002 CM 15:

> Leading Seaman Balogh testified to the effect that she was assaulted twice by the accused, once in a vehicle en route to the Fleet Diving Unit at Canadian Forces Base Esquimalt, and the second time at the Fleet Diving Unit. She said that on both occasions, the accused grabbed her arms and that she had to pull away from him. Each incident lasted only a few minutes and was preceded by conversations of a sexual nature from the accused. She also testified to the effect that the accused was constantly asking her questions on her sexual life and that she felt very offended by his attitude. The accused asked her if she was performing oral sex and if she swallowed. He asked her if she likes anal sex. He made a comment that he was hung like a horse and asked her if she wanted to verify. According to the witness, the accused made several comments of this nature and each time she felt humiliated and became upset.

The offender appealed his convictions on the two counts of assault and one count of conduct to the prejudice of good order and discipline involving sexual harassment. He also appealed his sentence of reduction in rank to that of able seaman and a fine in the amount of $1,500. The appeal against the sentence was allowed and the Court Martial Appeal Court (CMAC) changed the sentence to a severe reprimand and a $5,000 fine.

[57] The case law makes it clear that it is absolutely imperative that trial judges not conflate all types of sexual misconduct into the same realm in the consideration for sentencing. Judges must look closely at the facts and before the imposition of the more serious punishments, such as imprisonment or reduction in rank, they must first assess whether lesser punishments would be appropriate to meet the sentencing objectives. The sentences must be individually crafted and turn on the specific facts of the case at hand. At paragraph 106 of *R. v. Cadieux*, 2019 CM 2019, I wrote:

> However, in taking this approach, it is absolutely imperative that courts not conflate all types of sexual misconduct into the same grouping with respect to sentencing. Institutional attempts to provide a one-size-fits-all response sentence are counterproductive and serve as a disincentive for anyone to step forward to report. We must all be cognizant of the fact that flexibility, discretion and good judgement are all key to eliminating harmful conduct. Importantly, it is imperative that any sentence imposed by the court reinforces the fundamental principle set out at paragraph 203.3(b) of the *NDA* that "a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances."

[58] In an attempt to delineate or identify the type of conduct captured under the offence of sexual assault that requires serious punishment by trial judges, the Alberta Court of Appeal (ABCA), at paragraph 171 in *R. v. Arcand*, 2010 ABCA 363, provided

guidance to assist judges in crafting a sentence, by distinguishing the types of facts that are deserving of the most serious punishments:

> A sexual assault is a major sexual assault where the sexual assault is of a nature or character such that a reasonable person could foresee that it is likely to cause serious psychological or emotional harm, whether or not physical injury occurs. The harm might come from the force threatened or used or from the sexual aspect of the situation or from any combination of the two. A major sexual assault includes but is not limited to non-consensual vaginal intercourse, anal intercourse, fellatio and cunnilingus.
> [Footnotes omitted.]

[59] In *Arcand*, the ABCA also established a starting point for assessing punishment in cases where a major sexual assault occurs. At the court martial level, we are not bound by the starting point established for sentencing in *Arcand*, and in *Friesen*, the SCC emphasized, "that sentencing ranges and starting points are guidelines, not hard and fast rules" (at paragraph 37). Nonetheless, the guidance in *Arcand* is instructive as it reflects the requirement for judges to appropriately situate the nature of the sexual assault along a sphere of conduct when crafting a fair and fit sentence. In reviewing this guidance, I find that the facts of the case at bar do not fall within the realm of a major sexual assault.

[60] Similarly, in *Friesen*, at paragraphs 138-39, Chief Justice Wagner and Justice Rowe, for the Court, provided specific guidance on assessing harm:

> [T]he degree of physical interference is a recognized aggravating factor. This factor reflects the degree of violation of the victim's bodily integrity. It also reflects the sexual nature of the touching and its violation of the victim's sexual integrity.
>
> [139] The degree of physical interference also takes account of how specific types of physical acts may increase the risk of harm. For instance, penile penetration, particularly when unprotected, can be an aggravating factor because it can create a risk of disease and pregnancy. Penetration, whether penile, digital, or with an object, may also cause physical pain and physical injuries to the victim.
> [Citations omitted.]

[61] In determining a sentencing baseline for offences of sexual assault, identifying the degree of physical interference is critical. Consequently, in my review of the case law, I paid particularly close attention to those cases that were similar to the physical intrusion that C.H. experienced to her personal integrity and space.

[62] In conducting my analysis, I found that the precedents relied upon by the prosecution involve more serious sexual touching than the facts before the Court. Importantly, the case of *Turner* involves a major sexual assault as defined in *Arcand*, which on the facts and the case law would automatically necessitate a significant sentence of imprisonment. It is of no assistance.

[63] The case of *Paradis* involved a cadet instructor who pleaded guilty to sexually exploiting a sixteen-year-old cadet, who was under his chain of command and had

sought his counsel. The level of sexual exploitation was significant. At the time of the decision, the offence of sexual exploitation under section 153 of the *Criminal Code,* required the imposition of a mandatory minimum term of imprisonment. It is also noteworthy that the mandatory minimum term of imprisonment has since been increased. Comparing the sentence awarded in *Paradis,* which involved an offence committed by a person in authority against a young person, to the conduct of adults is exactly the situation that the SCC in *Friesen* warns against. All sexual offences involving children or minors as victims must be treated more seriously.

[64] The prosecution suggested that the case of *Marshall* was a less serious case then the facts before me. I do not agree. The fact that in exchange for a plea bargain the offences of sexual assault were withdrawn in favour of the offences of disgraceful conduct does not make the facts less serious. It is the specific conduct that must be closely examined. *Marshall* involved multiple victims who were all actively pursued by him in a very persistent and predatory manner. Notwithstanding his persistent advances, Marshall engaged in inappropriate touching on multiple occasions on multiple victims. With the first victim he grabbed his genitals and attempted to give him a hand job. He then inappropriately touched the third victim. The evidence was that he inappropriately touched the fourth victim two to three times on the buttocks and five to ten times on the genitals.

[65] In the case at bar, the victim C.H. testified to three incidents of inappropriate sexual touching, once on her buttocks, once on her vaginal area and then the third incident occurred when the offender rubbed himself against her while at the beach bonfire. Importantly, notwithstanding the fear that C.H. legitimately held, the evidence does not suggest that the assaults were done as a prelude or an attempt of a major sexual assault. By comparison, in *Bernier* and in *JJP*, the assaults involved the offenders attempting to drag the victims into private rooms where it was clear that a major sexual assault was likely.

[66] I am conscious of the conviction by the panel regarding the uttering of threats, and I have no doubt regarding the fear that C.H. held. However, all the assaults in the case at bar unfolded while C.H. was in open areas. C.H. testified to ensuring that she was never left alone with the offender and testified that on the one occasion, when she found herself alone with the offender in his cabin, the only thing that arose was him providing her direction regarding her excessive use of the Pledge cleaning product.

[67] Further, in the case of *JJP*, although the charged facts are not on their face as alarming as other cases, they involved the offender placing his hands under the victim's clothes and multiple attempts to drag her into the storage room. I noted that in rejecting the defence's recommendation for a conditional sentence, the trial judge provided extensive rationale for why a term of imprisonment was necessary. She emphasized that due to the significant number of aggravating factors, which included the offender's continued obsession and delusions towards the victim, his failure to receive treatment and the likelihood he would reoffend, she felt that the objective of specific deterrence could only be achieved through incarceration. The case of *JJP* is easily distinguishable

from the case at bar where counsel recognized and the evidence supports that there is no need for a sanction to encourage specific deterrence. Unlike the case of *JJP*, Petty Officer, 1st Class Levesque has been classified to be in the very low category of risk for general recidivism, reflecting the fact that he has lived a very stable and pro-social life overall.

[68] On the facts before me, all the instances of sexual touching that were testified to by C.H. were short or fleeting and they were done over C.H.'s clothing. This is a factor that I must consider and weigh carefully and the case law establishes a trend for how these offences should be addressed. As Justice Durno, as he then was, stated at paragraph 93 in *R. v. Racco*, 2013 ONSC 1517:

> The distinction between sexual touching over and under the clothing is generally a relevant consideration in assessing the seriousness of the sexual assault in imposing sentence. Both appellate and trial courts refer to whether the touching was over or under the clothing.
> [Citations omitted.]

[69] The case of *R. v. Chrispen*, 2009 SKCA 63, 331 Sask. R. 212 is instructive for assessing cases that involve brief sexual contact over clothing. The Saskatchewan Court of Appeal overturned a nine-month custodial sentence imposed at the trial level and imposed a conditional sentence. *Chrispen* involved an eighteen-year-old victim, who had advertised her vehicle for sale and the offender was on a test drive with her. On two occasions the offender braked sharply and put his arm across the front of the victim's body touching her breast. Afterwards, he stretched across the victim to reach for his cell phone and in doing so, he brushed her breast with his right arm and then squeezed both of her breasts with his left.

[70] The Court of Appeal found that the sexual touching fell at the low end of the spectrum with respect to sexual offences involving inappropriate sexual touching. The victim was an adult, there was no violence involved, and the touching was brief and took place over clothing. Although the accused had a significant prior criminal record, none of his prior convictions involved sexual offences. In these circumstances, the Court of Appeal concluded that in accordance with the principle of parity, a fit sentence would be a nine-month conditional sentence.

[71] I also closely reviewed the precedents provided by the defence, which were more closely aligned to the facts before this Court. They involved similar assaults and sexual touching over clothes, but since they are dated, I felt I needed additional guidance, particularly after the SCC decision rendered in *Friesen* and the ONCA statement enunciated in *Brown*. It was for this reason, after the close of their submissions, I specifically asked counsel to go back and look for additional case law that was closer to the facts before the Court.

[72] Firstly, I will address the precedents provided by the defence.

[73] I note that in the case of *Bernier*, the totality of the conduct was arguably worse than the facts before this Court. In *Bernier,* the offender engaged in persistent inappropriate sexual conversations with the victim, who worked directly for him as his assistant. Bernier demanded that the victim answer sexually explicit questions regarding her personal life despite her persistent rejection. Bernier was convicted of both sexual harassment and two counts of assault. One assault occurred when the victim was travelling in the van with the offender and he grabbed her by the wrist and pulled her hand towards his groin to show her that he was "hung like a horse". The second charge occurred while she was working in the kitchen of the Fleet Diving Unit and he grabbed her wrists and forearms dragging her to the boiler room where he said they had twenty minutes before anyone returned. She struggled and applied all her weight to pull herself back. In coming to his findings, the trial judge found that the offender was not a credible witness. He imposed a reduction in rank to the rank of able seaman and a fine of $1,000. However, on appeal, Ewaschuk J.A., for the CMAC, wrote:

> [13] [T]he Trial Judge erred in law by not considering the appropriateness of a severe reprimand coupled with a fine. In the circumstances, I am satisfied that the appropriate sentence for the non-violent assaults and sexual harassment will be a severe reprimand and a $5,000.00 fine. Accordingly, the appeal against sentence will be allowed.

[74] The incident in the *Bernier* case took place five years before the case at bar and given the fact that the CMAC raised the fine by $4,000, considering the much lower salaries at that time, it is debatable whether this decision financially favoured the offender. However, the decision makes it clear that trial judges must consider the appropriateness of lower punishments first.

[75] I also conducted a short survey of case law that relates to minor sexual assault, over the clothes, some of which were decided post-*Friesen* and others from earlier dates from various jurisdictions:

(a) *R. v. Mustafa*, 2021 ONSC 3088. In this case, the offender had been hit by a car and received nursing care three times per week. The victim was his nurse. During an appointment, Mr Mustafa tried to kiss the victim but she pulled away and told him to stop. He apologized. However, as he was getting ready to leave the treatment room, he lunged at the victim. He placed her in a headlock, squeezed her breast and kissed her on the side of her neck. The victim again told him to stop and eventually he let her go. He apologized again to the victim only to lunge at her again before she escaped. He was given a suspended sentence with eighteen months' probation. On appeal, the sentence was upheld. He had sexually assaulted the victim in her place of employment and the assault had a significant impact on the victim. Mr Mustafa had a criminal record. The sentencing judge found that it was not an isolated incident but part of a pattern of unwanted, sexually aggressive conduct that he had displayed towards the victim;

(b) *R. v. Szymanski*, 2021 ONSC 5482. The victim was employed as a senior financial advisor at a bank. The offender had been her customer for several years. The appellant attended a pre-scheduled meeting with the victim to discuss transferring some of his funds from another bank:

> [6] In her Reasons for Sentence, the trial judge described the attack as follows (at paragraphs 1 and 33, respectively):
>
> During the meeting the defendant used very graphic language and expressed his desire to have intercourse with her. At one point he used his hand to brush across her breast over her clothing. [The complainant] immediately told him no. Within five minutes of this assault he grabbed her shirt at her cleavage and pulled her towards himself.
> [Emphasis in original.]
>
> Some sexual assaults fall at the much more serious end of the spectrum and this would include forced intercourse with gratuitous violence. The offence before me involved a touching of the complainant's breast over her clothing and a grab at the complainant's shirt in the area of her cleavage while the defendant told her he wanted to have intercourse with her. Objectively this offence falls towards the lower end of the range of sexual assaults. However, it has had a significant impact on the complainant's life.
> [Emphasis in original.]

The Crown sought a ninety-day jail sentence with a period of probation for nineteen months; the defence requested a conditional discharge with a period of probation. The trial judge imposed a suspended sentence and a probationary period of twelve months. The appeal on sentence by defence was dismissed;

(c) *R. v. P.G.*, 2020 ONSC 4438. The offender sexually assaulted a Walmart employee while she was alone in an aisle stocking shelves. He walked past her two times and on the third time, he walked between her and the shelf, where there was very little room, and touched her buttocks. He said, "Excuse me" as he walked by. The complainant felt uncomfortable and was concerned. After touching her, the appellant continued walking for about ten seconds, stopped, and then looked at her before he continued walking to another aisle. He stood watching her and pretended to look busy. The victim was scared and left the area to call security. The security guard observed the offender and recorded the appellant masturbating in the store within eight minutes of the sexual assault. The Crown sought a suspended sentence and probation while the appellant sought a conditional discharge with probation. The trial judge imposed a suspended sentence and probation. Amongst a number of other issues, the offender appealed the sentence alleging it was too harsh. The sentence imposed by the trial judge was upheld on appeal;

(d) *R. v. Mohammadi*, 2007 ABPC 43. The offender hugged the victim, a nurse at a Calgary hospital, kissed her neck, attempted to kiss her on the lips and grabbed her left breast. The victim was able to disengage and move to another room in the hospital. The offender had no criminal record. The VIS advised how the sexual assault had adversely affected her work, her personal eating and sleeping patterns and her relationship with her husband. It caused her long term post-traumatic stress, adversely affecting every aspect of her life. The Court noted a number of aggravating features. The assault occurred at the victim's place of employment, a location where the complainant was in a position of increased vulnerability and required to be in the room where the assault occurred, attending to the needs of the offender as a patient. Secondly, the assault occurred in the presence of the offender's family member, a child. The final aggravating feature was the effect of the crime upon the complainant, which had a major negative impact on the performance of her duties as a nurse. The Court imposed a period of incarceration of one day, followed by twelve months of probation with a number of conditions;

(e) *R. v. Alderman,* 2013 ONSC 2710. The offender was convicted of sexually assaulting the victim at a branch of the Royal Canadian Legion by kissing and touching her and groping her breast. The Crown recommended a significant fine and a period of probation for at least two years, whereas defence agreed that a probationary order was reasonable. The Court imposed a period of probation for a term of twenty-four months;

(f) *R. v. H.A.E.,* 2018 ONSC 5690. The victim worked part-time as needed in an administrative role for the offender's business. She agreed to accompany the offender on a drive to the country to have lunch and resolve work issues. While on the drive, the offender directed conversation towards sexual matters and despite the victim's objections and protests, touched the victim's thigh and vaginal area and rubbed her vagina over her clothing. The trial judge imposed a sentence which included a six-month conditional sentence, (with a curfew rather than house arrest), followed by one year of probation; and

(g) *R. v. Harvey*, 2019 NLPC 1318A00325. The accused pleaded guilty to the offences of assault and uttering a threat for having pushed his former partner and threatening to burn down her residence. The Court imposed a conditional discharge with twelve months of probation.

[76] A review of the above sentences suggests that for cases of minor assault or sexual assault over the clothes, trial judges regularly impose meaningful sentences other than imprisonment. The analysis of the various precedents also confirmed that the decisions rendered in *Friesen* and *Brown* do not appear to have shifted the sentences for

lower-level sexual assaults, which somewhat confirms the SCC's direction that trial judges must impose harsher sentences where there is a greater violation of a victim's personal integrity. The case law suggests that the delineating line between imprisonment and other punishments is determined based on the weighing of the relevant aggravating and mitigating factors. The case of *JJP* provides excellent insight into why, based on aggravating factors, imprisonment must be imposed in some cases.

Accounting for relevant aggravating or mitigating circumstances

[77] Using the above ranges of sentence as a starting point, the second step of a judge's role in sentencing involves adjusting the sentence upward or downward based on aggravating or mitigating factors. The judge must consider factors personal to the accused and the victim, and the actual consequences of the offence.

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

Aggravating factors

[79] After hearing the submissions of counsel, the Court notes the following aggravating factors that should be considered:

(a) position of authority and a power imbalance over C.H.. Petty Officer, 1st Class Levesque as the ship's Buffer. He was one of the most senior Non-Commissioned Officers on HMCS *Oriole* and responsible for supervising all the seamanship on the deck. Although C.H. was a naval cadet and theoretically was higher in rank, practically, a naval cadet has no power over someone in a position such as the Buffer;

(b) degree of force in the assaults and sexual assault. With respect to each of the assaults, there was force used. The grasp he made on C.H.'s arm left bruises;

(c) repetitive nature of the contact. There was a repetitive nature to the assaults; and

(d) significant and long-lasting effect on the victim. It was clear in the evidence before the Court that C.H. was personally frightened and that the incidents have had a lasting effect on her. It shaped how she approached much of her career as an officer in the CAF. Her VIS provides insight into how the interactions have negatively affected her.

Mitigating factors

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

(a) Petty Officer, 1st Class Levesque does not have a criminal record and is a first-time offender;

(b) length of military service. He has served honourably in the CAF for over thirty-four years;

(c) out of character. The very positive character evidence heard during sentencing demonstrated that the offences before the Court were out of character for him. Although only one of the witnesses who testified worked directly with him at some point, the evidence was clear in that he generally treats those around him in his personal life with great respect;

(d) very low category of risk for general recidivism. He volunteered to undergo a forensic assessment and submitted the forensic report as an exhibit. The evidence suggests that since the incidents are dated and given his age, there is a very low level of risk that he will re-offend;

(e) community and church involvement. The evidence of the witnesses provided in court suggest that he is a very committed and hardworking man who volunteers to help anyone in need. He is active and constantly pursues opportunities to assist others; and

(f) the individual responsibilities of the offender, which includes caring for his wife. His wife is currently undergoing a number of medical issues and he provides hands on assistance to her on an ongoing basis.

Determination of sentence

[81] It is noteworthy that Petty Officer, 1st Class Levesque is currently retired and this is a factor to be considered in the determination of a meaningful sentence. The scale of punishments that may be imposed in respect of service offences is found under subsection 139(1) of the *NDA*:

> **Scale of punishments**
>
> **139(1)** The following punishments may be imposed in respect of service offences and each of those punishments is a punishment less than every punishment preceding it:
>
> **(a)** imprisonment for life;
>
> **(b)** imprisonment for two years or more;

(c) dismissal with disgrace from Her Majesty's service;

(d) imprisonment for less than two years;

(e) dismissal from Her Majesty's service;

(f) detention;

(g) reduction in rank;

(h) forfeiture of seniority;

(i) severe reprimand;

(j) reprimand;

(k) fine; and

(l) minor punishments.

[82] Upon a review of section 139, it is evident that except for imprisonment and fines, there is no direct parity to those sentences generally available in the civilian criminal justice system. Although some punishments might serve the same purpose and objectives found in criminal courts, others do not.

[83] My review of the case law for minor assaults, or sexual touching over the clothes, reveals that most of the sentences imposed were conditional and absolute discharges, probation, conditional and suspended sentences. Sadly, these sentencing options imposed in most of the civilian cases are simply not available within the military justice system. For a retired member, the most meaningful sentences available are that of either imprisonment or a fine. Ultimately, the decision before me is whether or not the facts of this case militate towards a custodial punishment.

Custodial or non-custodial sentence?

[84] Defence argued that a non-custodial sentence would be most appropriate, whereas the prosecution argued that a six-month period of imprisonment is warranted.

[85] I have already determined that the predominant objectives of sentencing that apply to this case are general deterrence and denunciation. However, it is an error in law to consider that the objectives of general deterrence can only be achieved by imposing a period of incarceration. Section 203.3 of the *NDA* is clear that an offender should not be deprived of liberty if less restrictive sanctions other than imprisonment may be appropriate in the circumstances. It reads that a service tribunal that imposes a sentence <u>shall</u> also take into consideration the following principles:

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

> **(c.1)** all available punishments, other than imprisonment and detention, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders;

[86] In short, I must ask myself if only a term of imprisonment could resonate with would-be offenders, the seriousness of engaging in this sort of conduct?

[87] Based on the balancing of the mitigating factors and the aggravating factors, I find that if Petty Officer, 1st Class Levesque had been tried within the civilian justice system, the civilian precedents suggest that he would have received a punishment of something other than imprisonment. It is not his fault that those sentencing options do not exist within the military justice system.

[88] Based on my exhaustive review of the case law and considering the nature of the assaults, the fact that Petty Officer, 1st Class Levesque has already retired, and he is not considered to be at risk to the community, I find that the most appropriate sentence is that of a significant fine. I see no reason why he needs to be separated from society. Based on the above case law, I find that a fine in the amount of $7,000 to be the minimum to be assessed.

[89] In addition, although it is not of as much import given the retirement of Petty Officer, 1st Class Levesque, I also feel it is appropriate in sending a message of general deterrence and denunciation to those who commit such offences and are still serving, to impose a severe reprimand. Based on the scale of punishments set out within the *NDA*, the imposition of a severe reprimand is reserved for serious offences. Together, they send a message to the larger defence community that any inappropriate conduct of this type, even minor, is unacceptable and will be punished. The severe reprimand will be a stain that stays on a member's record for the foreseeable future.

[90] It is absolutely imperative that offences involving sexual misconduct be classified according to the degree of physical interference that the victim has suffered. This does not in any way minimize the harm that a victim suffers for lower-end conduct. It remains imperative that it be addressed. However, the law must distinguish and take into account how specific types of physical acts may increase the risk of harm. It does not achieve this goal by treating all physical acts the same.

Ancillary Orders

DNA Order

[91] As it pertains to ancillary orders, the parties accept that a DNA order is required. Consequently, in accordance with section 196.14 of the *NDA*, considering that the offence for which I will pass 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 Petty Officer, 1st Class Levesque for the purpose of forensic DNA analysis.

Consideration of weapons prohibition order

[92] Pursuant to subparagraph 147.1(1)(a) of the *NDA*, since Petty Officer, 1st Class Levesque was found guilty of sexual assault, an offence which carries a ten-year maximum sentence of imprisonment and qualifies as 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 no position being taken by the prosecution and the evidence before me, 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.

Registration under the *Sexual Offender Information Registration Act* (*SOIRA*)

[93] In accordance with section 227.01 of the *NDA* and considering that the offence for which I am sentencing Petty Officer, 1st Class Levesque is a designated offence within the meaning of section 227 of the *NDA*, I am required to impose an order subjecting Petty Officer, 1st Class Levesque to registration under the *SOIRA* for twenty years.

[94] Unlike civilian courts, where the prosecution can proceed summarily where the offence involves a lower end sexual assault, all offences under the military justice system are treated as indictable, which means that the required *SOIRA* order for offences of sexual assault are automatically imposed for a period of twenty years despite the nature of the offence.

[95] However, relying upon the 28 October 2022 decision of the SCC in the case of *R. v. Ndhlovu*, 2022 SCC 38, Petty Officer, 1st Class Levesque has filed a Notice of Constitutional Question (NCQ) and a Notice of Intended Application seeking a declaration that paragraphs 227.01(1) & 227.02(2.1) of the *NDA* are contrary to his right to liberty as protected by section 7 of the *Charter*.

[96] In *Ndhlovu*, the SCC held that mandatory *SOIRA* orders, found at sections 490.012 and 490.013(2.1) of the *Criminal Code*, which are in substance identical to paragraphs 227.01(1) and 227.02(2.1) of the *NDA,* violate section 7 of the *Charter* and cannot be saved under section 1. In short, the finding in *Ndhlovu* is applicable *mutatis mutandis* to the *NDA* provisions and accordingly, the suspension in effect applies equally to section 227.01 of the *NDA*.

[97] After declaring the section unconstitutional, the SCC suspended the declaration for one year to allow Parliament to remedy the legislation. However, in doing so, they allowed the exemption that had been granted to Mr Ndhlovu to stand (see paragraph 143). In practical terms, on application from offenders, the SCC's decision in *Ndhlovu* provides trial judges with discretion to determine whether, on the facts of the case before them, the offender's registration in the *SOIRA* violates their section 7 rights. It is not automatic. It is noteworthy that in the absence of a NCQ, trial judges have no

discretion with respect to the issuance of a *SOIRA* order, but in this case, the offender has filed the required notice.

[98] In seeking a remedy under section 24(1) of the *Charter,* Petty Officer, 1st Class Levesque asks me to decline to apply section 227.01 of the *NDA*.

[99] The onus in establishing that a provision is overbroad and in violation of section 7 of the *Charter* rests with Petty Officer, 1st Class Levesque. The purpose of the *SOIRA* is to help police services prevent and investigate crimes of a sexual nature by requiring the registration of certain information relating to sex offenders. Petty Officer, 1st Class Levesque must show that based on the facts of his case, the imposition of the *SOIRA* order is grossly disproportionate or bears no connection to the *SOIRA*'s purpose of assisting police in the prevention and investigation of sex offences.

[100] In *Ndhlovu*, the Court found that, "registering offenders who are not an increased risk of reoffending bears no connection" to that purpose (see paragraphs 76 and 79 of *Ndhlovu*). Therefore, the core issue for me to determine is whether Petty Officer, 1st Class Levesque is an increased risk of committing a future sex offence.

[101] At paragraph 109 of *Ndhlovu*, the SCC advised judges that they can be assisted by "the best expert evidence." It wrote:

> Moreover, judges make risk assessments routinely, including those informed by expert assessments. Notwithstanding these assessments may not be certain, they are capable of being well informed by an individual's personal circumstances and the best expert evidence. Clearly, there are instances where a sentencing judge can reasonably conclude that it is remote or implausible that an offender's information will ever prove useful to police.

[102] The defence asks this Court to conclude that Petty Officer, 1st Class Levesque is deserving of a personal remedy under section 24(1) of the *Charter* on the basis that he is considered highly unlikely to reoffend, similar to the circumstances of Mr Ndhlovu, as explained in the decision of the SCC.

[103] Petty Officer, 1st Class Levesque has voluntarily undergone a forensic assessment which he filed with the Court. The report, completed by an expert forensic psychologist, provided specific evidence on his risk of recidivism. Further, in evidence, he relied on his personal circumstances, including his personal responsibilities in the ongoing care of his wife, his direct involvement within his community and church, his extensive community support network, lack of previous criminal record, as well as the length of time it has been since the incident with no other similar reported incidents of its kind. There is extensive evidence before the Court from family, friends, and colleagues etc. to support the position that he is a very low risk to re-offend.

[104] The evidence before me also suggests that Petty Officer, 1st Class Levesque will turn sixty years of age within days of this decision, on 14 January 2023, which I understand from Jacqueline Leland's, M. Psych. (For.) assessment, marks a significant

threshold for lowering any risk of recidivism. Based on the assessment from Jacqueline Leland, if all his scoring remains the same, relative to other sexual offenders, he is placed in the "Very Low" category of risk for general recidivism. She described his risk as follows:

> "Mr. Levesque's risk was found to be in the Very Low category of risk for general recidivism, reflecting the fact that he has lived a very stable and prosocial life overall. When completing evaluations to determine risk for sexual and violent recidivism, it was imperative to take into account the significant time that has passed since the index offences occurred (2006) without any evidence to suggest that Mr. Levesque has committed any additional violent or sexual offences. Further to this, Mr. Levesque's age is also a factor to consider, as recidivism tends to organically decrease with advancing age. Based on the available information for this assessment and taking all of these factors into consideration, Mr. Levesque's risk was found to be in the Low category for sexual and violent recidivism."

[105] I find that based on the above report as well as the evidence before the Court regarding Petty Officer, 1st Class Levesque's personal circumstances, he is not at an increased risk of reoffending and consequently the requirement for him to register undermines any real possibility that his information on the *SOIRA* will ever prove useful to police.

[106] Therefore, imposing *SOIRA* registration on him, especially for the time period of twenty years as required in the *NDA*, would generate significant violation of his rights as described in the *Ndhlovu* decision for such a long period and I find that he ought to be exempted from that requirement.

FOR THESE REASONS, THE COURT:

[107] **SENTENCES** Petty Officer, 1st Class Levesque to a severe reprimand and a fine in the amount of $7,000, payable in fourteen monthly instalments of $500 starting in the month of February 2023.

[108] **ORDERS**, pursuant to section 196.14 of the *NDA* that the number of samples of bodily substances that are reasonably required be taken from Petty Officer, 1st Class Levesque for the purpose of forensic DNA analysis by personnel of the military police from Canadian Forces Base Esquimalt to be done immediately after the proceedings are terminated.

Counsel:

The Director of Military Prosecutions as represented by Major C.R. Gallant, Respondent

Lieutenant-Colonel D. Berntsen, Defence Counsel Services counsel for the Offender, Petty Officer, 1st Class J.R. Levesque (retired)