COURT MARTIAL

Citation: *R. v. August*, 2022 CM 3014

Date: 20220218
Docket: 201762

Standing Court Martial

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

Between :

Her Majesty the Queen

- and -

Private J. August, Offender

Before: Lieutenant-Colonel L.-V. d'Auteuil, A/C.M.J.

Restriction on Publication: By court order, pursuant to section 179 of the *National Defence Act* and section 486.4 of the *Criminal Code*, the Court directs that any information that could identify the persons described during these proceedings as the complainants shall not be published in any document or broadcast or transmitted in any way.

REASONS FOR SENTENCE

(Orally)

Introduction

[1] Private August was found guilty by this Standing Court Martial on 30 April 2021 of two service offences punishable under paragraph 130(1)(a) of the *National Defence Act* (*NDA*) for sexual assault contrary to section 271 of the *Criminal Code.*

[2] The Court concluded that the prosecution proved beyond a reasonable doubt that on the morning of 13 November 2016, around 0500 hours, in Saint-Jean-sur-Richelieu,

Private August committed a sexual assault on two different fellow soldiers, which were identified as A.W. and C.K. in this trial.

[3] Essentially, on the evening of 12 November 2016, Private August left the Mega Complex at Saint-Jean Garrison in Saint-Jean-sur-Richelieu, where he had military training since his enrolment with the Canadian Armed Forces (CAF) in July 2016. He went downtown to go with some friends from his platoon to drink alcohol and celebrate the end of the Basic Military Qualification (BMQ). He came back to the Mega Complex at 0350 hours on 13 November 2016 and remembered making his way to bed after putting his thermals on.

[4] A.W. was woken up some time before 0530 hours, being flat on his back, by Private August over top of him, but he was not sure if Private August was completely on the bed or if he was half on. The offender had A.W.'s penis in his hand with A.W.'s boxer shorts underwear pulled down, gripping and squeezing it. Private August had his head quite close to A.W.'s penis, about two inches, and he was obviously trying to get him hard. It did not last long, as probably five seconds passed from the time the offender touched him to the time he left his cubicle. The offender seemed surprised that he woke up. Private August then side-stepped to his right, moving very slowly, and went out of his cubicle. A.W. was angry and confused and did not know what was going on. He went back to sleep, as he was not sure it was real and felt exhausted. He said that he had no erection. In some ways, he thought he was dreaming.

[5] C.K. was woken up between 0500 hours and 0530 hours by Private August touching him and kneeling beside him. He felt that he had an erection. He thought he was dreaming. He looked down and saw that the offender was grabbing his crotch and touching his penis with a hand. The hand was not underneath his boxers. He did not recall how exactly he was touched, but he knows that he was touched.

[6] Private August claimed that he acted involuntarily at the time of both incidents as he has no recollection of what happened. He said that after he went to bed, the next thing he remembered was being woken up by the military police while in his bed, around 0700 hours, in his thermals. He stated that in his childhood, he experienced sleepwalking episodes that tended to diminish as he became a teenager. He mentioned that during the indoctrination period of one month on the BMQ, he experienced sleepwalking episodes twice. He also described one episode of "sexsomnia", where he engaged in a sexual behaviour many years ago with his former boyfriend while asleep.

[7] He said that he did not know the complainants and he was forbidden, as it was for other recruits, accessing the sleeping quarters of a different platoon in the Green Sector of the Mega Complex, and he cannot explain how some clothes belonging to him were found there. Then, for Private August, the only explanation for what he did to the complainants on the morning of 13 November 2016 was he made involuntary actions of a sexual nature that occurred while he was asleep, precluding him from having the necessary intent to commit the crime of sexual assault.

[8] The Court concluded there was some evidence in the record upon which a panel, properly instructed and acting judicially, could reasonably conclude that the defence of automatism had been made out.

[9] As I mentioned previously, Private August claimed that he acted involuntarily when he committed the offences because he was experiencing a sleepwalking episode on the morning of 13 November 2016.

[10] On this very issue, the Court concluded that Private August established that through expert evidence, his claim of automatism was plausible; nothing more, and nothing less. The Court noted the absence of bystanders evidence, of past sleep disorders he experienced, and of medical history of sleep disorders such as sleepwalking.

[11] The Court, being left with an assertion of involuntariness made by Private August when he committed the offences of sexual assault, a medical diagnosis of a sleep disorder of the type of sleepwalking, and that he had no motive for the crimes to make this assessment, it concluded that the offender failed to prove, on a balance of probabilities, that his actions related to both charges were involuntary. The evidence heard made it a possibility, more than a mere allegation, but not more likely possible than not.

Summary of the proceedings

[12] As the Court provided in its decision on the finding with an extensive summary of the proceedings going from the beginning of the trial up to the time of its finding for both charges, I will then provide only a brief summary for this period of time with an update on what occurred since the time the finding was provided to today.

[13] On 13 August 2018, this trial commenced. The prosecution presented its case from 13 to 17 August 2018 at the Mega complex in Saint-Jean-sur-Richelieu, province of Quebec. Unfortunately, for many unexpected reasons, this trial was adjourned at different times for about two years, as I explained in my decision on the finding (see *R. v. August*, 2021 CM 3006 at paragraphs 8 to 21).

[14] I want to highlight that during this period of two years, the place to proceed with the remaining of the trial was subject to some discussions, and finally, on 13 March 2020, both parties jointly submitted that the remainder of the court martial should proceed at the Asticou Centre in Gatineau, province of Quebec. I accepted the suggestion and made an order accordingly.

[15] The accused presented his defence from 21 to 31 July 2020 at Asticou Centre and I heard final submissions from both parties on 5 and 7 August 2020. The Court delivered its finding on 30 April 2021.

[16] On 13 May 2021, further to a hearing at the Asticou Centre, I considered that in accordance with the Supreme Court of Canada decisions in *R. v. Gladue*, [1999] 1 S.C.R. 688, and *R. v. Ipeelee*, 2012 SCC 13, and because Private August has identified himself

as an Aboriginal offender, I then had a statutory duty, as the sentencing judge, to consider the unique circumstances of Aboriginal offenders for sentencing purposes in order to give effect to paragraph 203.3(c.1) of the *NDA*. This provision prescribes that in imposing a sentence, the court martial shall take into consideration 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. Accordingly, I required information pertaining to the offender by the way of a pre-sentencing report, known as a *Gladue* report.

[17] With the concurrence of both parties, the period of 7 to 10 September 2021 was reserved for the sentencing proceedings. The Court also ordered a second change of venue for this trial in order for it to proceed in the area where the unit supporting the court martial is located, which is at 5th Canadian Division Support Base Gagetown (5 CDSB), in Oromocto, province of New Brunswick, and closer to where the offender resided, which eased the presence of the offender in person to these proceedings.

[18] In the meantime, on 20 July 2021, Private August filed a notice of application seeking a determination by this Court concerning a violation of his right under paragraph 11(*b*) of the *Charter* to be tried within a reasonable time, concerning specifically the time taken by the military judge presiding at his court martial to render a verdict. As a remedy for such an infringement to his *Charter* right, he suggested that a stay of the proceedings shall be considered and ordered by the Court. He filed an amended version of his notice of application on 9 August 2021.

[19] In the same notice of application, Private August, through his counsel, also raised an objection to the military judge presiding at his court martial. Essentially, his counsel submitted that there was a reasonable apprehension of bias existing from the fact that the trial judge should be asked to review if he made an error in the way he managed his time between the time the Court closed to determine its finding, on 7 August 2020, to the time it delivered its decision, on 30 April 2021. The Court held a *voir dire* on 19 August 2021 for making a determination on the objection made to the military judge by Private August. I dismissed his objection and provided my reasons on 25 August 2021. I concluded that a reasonable person, aware of all relevant circumstances concerning this case, would conclude that my conduct during the verdict deliberation time does not give rise to a reasonable apprehension of bias for making a determination on the *Charter* application filed by Private August.

[20] The Court then held a hearing on 25 August 2021 at the Asticou Centre, concerning the *Charter* application made by the offender. On 3 September 2021, the Court provided its reasons at the same location. The Court concluded that a reasonable and informed observer, viewing the matter realistically and practically would conclude that the trial judge’s verdict deliberation time took longer than it reasonably should have in all the circumstances, but not markedly longer. The Court then dismissed the application.

[21] The Court accepted to adjourn the proceedings to 14 February 2022 to provide Private August with an opportunity to allow him to participate in a residential treatment program during the fall period, with the potential support of CAF medical authorities. In addition, this situation was viewed by the Court as an opportunity for the parties to gather additional relevant information concerning the potential for Private August to rehabilitate himself by maintaining sobriety and positive behaviours.

[22] On 14 February 2022, the hearing on sentencing took place at 5 CDSG, New Brunswick and it lasted one day.

The evidence

[23] As a matter of evidence, the Court was provided with documents related to the conduct and the military career of Private August since his enrolment with the CAF in the summer of 2016; with two victim impact statement forms filled out and signed by C.K. and A.W.; with a *Gladue* report dated 20 August 2021 and prepared by a *Gladue* report writer, which is Anisa White; and with an agreed statement of facts, which reads as follows:

"**AGREED STATEMENT OF FACTS**

1. Private (Ret) Jeremy August was released from the Canadian Armed Forces (CAF) on 17 November 2021. Since then, Pte August has been living in an apartment in Fredericton, New Brunswick with his partner, K.

2. K has been in a relationship with Pte August for the past 4 years. K and Pte August love each other deeply. K would like to marry Pte August one day and perhaps start a family. K describes Pte August as "kind," "loving," and "wonderful." K has been accepted by Pte August's family and he receives love and support from them, despite not having met them because of their physical distance. K and Pte August depend on each other for love and emotional support.

3. Pte August currently suffers from suicidal thoughts on a daily basis. His desire to commit suicide is at the stage that it involves a plan for how to carry out the act. He has expressed that he wants to die.

4. Pte August struggles with a desire to resort to alcohol as a way to numb his pain, though he has managed to abstain from alcohol at this time.

5. Pte August suffers from feelings of hopelessness. He also experiences feelings of guilt for how his emotional state may impact his partner.

> 6. Because Pte August's family lives in British Columbia, Pte August's primary source of support is K. K works hard every day to support Pte August and help him cope with his emotions.
>
> 7. Pte August recently got a job with Circle K in Fredericton. He started working there on 11 February 2022.
>
> 8. Pte August participates in counselling sessions virtually with a nurse practitioner and counsellor who resides in Pte August's hometown and specializes in providing counselling to Indigenous persons. He started sessions with her in December of 2021 and has had four sessions to date."

[24] In addition, during the hearing, C.K. read, in person to the Court, a victim impact statement he prepared. Incidentally, I would like to thank A.W. and C.K. for having provided and shared to the Court the impacts these incidents have had on them.

[25] Finally, the Court took judicial notice of the facts and matters contained and listed at article 15 of the *Military Rules of Evidence* (*MRE*).

[26] I would like to mention that the Court, as indicated by the Supreme Court of Canada in *Ipeelee* at paragraph 60, took judicial notice of the systemic and background factors affecting Aboriginal peoples in Canadian society in order to be provided with the necessary context for understanding and evaluating the case-specific information presented by counsel concerning the offender. It must be remembered that the Court accepted and recognized the offender as being an Aboriginal person. I want to reiterate that it is a statutory duty for the Court to take judicial notice of such a thing, as it is for the other items listed at article 15 of the *MRE*.

The law

[27] As the military judge presiding at this Standing Court Martial, it is now my duty to determine the sentence.

[28] In the particular context of an armed force, the military justice system constitutes the ultimate means of enforcing discipline, which is a fundamental element of military activity in the CAF. The purpose of this system is to prevent misconduct or, in a more positive way, promote good conduct. It is through discipline that an armed force ensures that its members will accomplish, in a trusting and reliable manner, successful missions. The military justice system also ensures that public order is maintained and that those subject to the Code of Service Discipline are punished in the same way as any other person living in Canada.

[29] As indicated in section 203.95 of the *NDA*, the court martial shall pass only one sentence even if the offender was convicted of more than one offence, and it may include more than one type of punishment.

[30] The military judge must consider the purposes and principles of sentencing as found in sections 203.1 to 203.3 of the *NDA*.

[31] The fundamental purposes of sentencing in a court martial are to promote the operational effectiveness of the CAF by contributing to the maintenance of discipline, efficiency and morale, and to contribute to respect for the law and the maintenance of a just, peaceful and safe society.

[32] However, the law does not allow a military court to impose a sentence that would be beyond what is required in the circumstances of the case. In other words, any sentence imposed by a court must be adapted to the individual offender and constitute the minimum necessary intervention since moderation is the bedrock principle of the modern theory of sentencing in Canada.

[33] Keeping in mind this legal context, the fundamental purposes of sentencing in a court martial are to ensure respect for the law and maintenance of discipline by imposing sanctions 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;

(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.

[34] When imposing a sentence, a military court must also take into consideration the following principles:

(a) a sentence must be proportionate to the gravity of the offence;

(b) a sentence must be proportionate to the degree of responsibility of the offender;

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

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

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

(f) 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;

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

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

Position of the parties

[35] In this case, the prosecutor suggested the Court sentence the offender to imprisonment for a period of twelve months.

[36] The offender's defence counsel recommended this Court impose the punishment of dismissal from Her Majesty's service. Alternately, she suggested that if any period of imprisonment is considered by the Court, it should be for less than two years. She specified that according to her, it should not go beyond a period of six months, shall be suspended and combined with the punishment of dismissal from Her Majesty's service.

The analysis

[37] A sexual assault is considered a very serious offence in our Canadian society, as it is for the Canadian military community. The personal integrity, both physical and psychological, of every individual must be protected. It is fundamental for a proper functioning of the Canadian society, considering that the dignity of each person is at the core of our values as mention in our constitution, and at the one of the military community as reflected in the CAF ethical principles.

[38] In addition, in a military environment, such an offence has a huge impact on cohesion, trust and respect necessary for a strong and disciplined military force, as mentioned by Perron M.J. in *R. v. Royes*, 2013 CM 4034 at paragraph 34.

[39] Accordingly, the Court is of the opinion that sentencing, in this case, should focus on the objectives of denunciation, deterrence and rehabilitation of the offender, and general deterrence. It is important to remember that the principle of general deterrence means that the sentence imposed should deter not only the offender from reoffending, but also deter others in similar situations from engaging in the same prohibited conduct.

[40] As I have already mentioned in my decision of *R. v. Sorbie*, 2015 CM 3010 and *R. v. MacDonald*, 2018 CM 3011, the Supreme Court of Canada has elevated the principle of proportionality in sentencing as a fundamental principle (see *Ipeelee* at paragraph 37 and *R. v. Nur*, 2015 SCC 15 at paragraph 42-43), making the determination of a sentence by a judge, including a military judge, a highly individualized process.

[41] As LeBel J. expressed in ***Ipeelee*** at paragraph 37:

> 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.

[42] I will now discuss the sentencing principles. The first one is the gravity of the offence. Objectively speaking, the offence of sexual assault is considered as a serious one. The maximum punishment provided by section 271 of the *Criminal Code* for such an offence is imprisonment for a term of not more than ten years.

[43] From a subjective perspective, the manner the offences were perpetrated, which was on fellow soldiers while they were sleeping safely and peacefully in their own quarters, and the nature and the manner in which the part of their body was touched, which is the grabbing of their genitals for some few moments, lead me to conclude that a severe punishment shall be considered.

[44] Concerning the degree of responsibility of the offender for the commission of each offence, the evidence indicated that since it happened, and throughout the proceedings, he said that he has no recollection of doing such a thing. However, despite his lack of recollection, he also mentioned during his interview by the police the day after the incidents that he recognized his addiction to alcohol was at the heart of the problem. In addition, he told the police that if the incidents really occurred as it was reported to him, he recognized that they have had serious consequences on those who have been victims of his actions.

[45] I understand that the offender never explicitly accepted responsibility for what he did, but the Court perceives clearly that he is sensitive to the impact it had on others. That being said, it must be said that by having to constantly fight his own demons throughout

the proceedings from a mental health perspective, his personal situation has not left much place for him to give or express more serious consideration for his own responsibility in this matter vis-à-vis the others who were impacted. While it does not constitute at all an excuse for what he did, the Court considers that the offender recognized, to some extent, that what he did was wrong.

[46] Now, in order to appreciate the circumstances for sentencing purpose, the Court considered the aggravating and mitigating factors.

Aggravating factors

[47] As a matter of aggravating factors, the Court considered two things:

(a) the harm caused to both victims. Their personal physical and psychological integrity has been impacted since the day of the incidents and they are still trying to cope with this situation in their daily life, even though they left the military. They still have difficulty dealing with the anxiety and the state of increased alertness created by this unwanted experience which was caused by your actions on that morning. There is no place for fellow soldiers to fear each other in such a situation; and

(b) the manner the two offences were perpetrated. Clearly, the only small safe and personal space enjoyed by the victims in the context of a demanding BMQ was subject to a violation by another fellow soldier while being asleep. Essentially, the trust that must exist among soldiers in order to create and maintain cohesion was violated. In short, such breach of trust has no place in this training environment.

Mitigating Factors

[48] I also considered the following mitigating factors:

(a) your age and your career potential as a member of the Canadian community. Being now twenty-seven years old, you still have many years ahead to contribute positively to the society in general;

(b) your recent release from the CAF as a result of your overall conduct, including the one reflected in the charges before this Court. I recognize clearly that this administrative measure does not constitute a disciplinary sanction in itself; however, it had some specific deterrence on you and might have limited general deterrence on others. It also reflects some kind of denunciation in relation to your conduct. You were released under Item 5(f), which means “unsuitable for further service”. It is important to know that this specific item “[a]pplies to the release of an officer or non-commissioned member who, either wholly or chiefly because of factors within his control, develops personal weakness or behaviour or has

domestic or other personal problems that seriously impair his usefulness to or impose an excessive administrative burden on the Canadian Forces", as stated at table to article 15.01 of the QR&O;

(c) the absence of a criminal record and the absence of any annotation on your conduct sheet for an offence of similar nature as the one for which you are before this Court; and

(d) the delay to deal with this matter. In practice, the closer to the incident the disciplinary matter is dealt with, the more relevant and efficient will be the punishment on the cohesion and the morale of the unit members. That being said, the Court cannot ignore that you faced unique and unexpected circumstances which resulted in a court martial that lasted three years and six months. Making you wait for so long in order for you, and others involved in this process, to turn the page and move on with their life shall be considered as a factor mitigating the sentence to be imposed by this Court.

What is the least severe sentence required in the circumstances of this case to maintain discipline, efficiency and morale of the CAF?

[49] Over the years, the court martial has approached sentencing for a sexual assault on a fellow member of the CAF in circumstances where this person was resting or sleeping in quarters or a room in the exact same manner: incarceration is considered the least severe sentence required to maintain the discipline, efficiency and morale of the CAF because it concluded that there is no less restrictive punishments to be considered appropriate for such crime in this specific context.

[50] Such an approach is in line with the objectives of denunciation and general deterrence considered by the Court, and I agree with it. I do not see any reason to deviate from this way to deal with this offence committed in such circumstances. It reflects the gravity of the offence and does not exceed what it is appropriate.

[51] What type of incarceration shall be considered by this Court? Detention is designed to rehabilitate an offender in a military context with the expectation to reintegrate him at some point in his career, and obviously here it is something that cannot happen. In addition, the nature of the offence, which is a criminal offence, calls for considering for a more serious type of incarceration than detention in the circumstances of this case. As such, I conclude imprisonment is the appropriate type of incarceration that this Court shall consider.

[52] I considered all available punishments, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community, with particular attention to the circumstances of the offender, considering he is an Aboriginal person.

[53] It was suggested by defence counsel by doing such analysis, the Court should conclude that the punishment of dismissal from Her Majesty's service has to be considered. I agree with her suggestion that in the circumstances of this case, it is the only other punishment this Court shall consider.

[54] Dismissal is a unique and purely military punishment that may be imposed alone or in conjunction with imprisonment. The very purpose of such punishment is the denunciation of the striking failure by a non-commissioned or commissioned member of the CAF in the fulfillment of his or her duties and responsibilities as well as his betrayal of the trust vested in him by the CAF and his chain of command.

[55] However, in the context of a crime such as a sexual assault on a fellow member of the CAF, considering the harm done to the victims, and the consequences on them, including the fact that they decided to release from the CAF, I do not see how dismissal could be considered. In addition, two members who were duly trained were lost by the CAF because of these incidents.

[56] If the Court accepts the suggestion made by the defence counsel, the Court fears that it would undermine the message to victims and the military community that such behaviour is unacceptable in all circumstances, which may bring the administration of justice into disrepute. It appeared to me that the objectives of denunciation and general deterrence cannot be better reflected in the imposition of imprisonment and that no other punishment than imprisonment can be considered by this Court.

[57] The Court does not consider, either, that dismissal shall be considered in addition to any term of imprisonment to shorten the length of it. Dismissal from Her Majesty's service is a distinct punishment, and when it is added to any other, it is done with the idea of imposing a harsher punishment, not to compensate any term of incarceration.

[58] Then, what should be the length of this sentence of imprisonment? The prosecution suggested that, according to decisions from courts of criminal jurisdiction in Canada other than the court martial, it would be between twenty-two and twenty-six months. However, she recommended that the Court consider a duration of twelve months in order to reflect consideration to the offender as an Aboriginal person.

[59] The defence counsel put to the Court that if it imposed the punishment of imprisonment, then twelve months should be considered as appropriate. However, she suggested that it could be shortened to six months and combined with the punishment of dismissal from Her Majesty's service. For the reasons expressed previously by the Court, it will not consider the punishment of dismissal from Her Majesty's service for compensating any part of a jail term.

[60] Considering all the sentencing principles previously discussed and the sentencing objectives taken into account by this Court, it concludes that the punishment of imprisonment for a period of six months shall be imposed.

The suspension of the execution of the punishment

[61] That being said, the Court cannot ignore the request made by the offender to suspend the carrying into effect of this sentence.

[62] Section 215 of the *NDA* reads as follows:

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

[63] This section is in Division 8 of the Code of Service Discipline in the *NDA*, which contains the provisions applicable to imprisonment and detention. The suspension of a punishment of imprisonment is a discretionary and exceptional power that may be exercised by a service tribunal, including a court martial. The *NDA* does not contain any particular criteria for the application of section 215. To this day, the court martial's interpretation of its application is quite clear and has been established by various military judges in other cases.

[64] Essentially, if the offender demonstrates, on a balance of probabilities, that his or her particular circumstances or the operational requirements of the CAF justify the necessity of suspending the sentence of imprisonment or detention, the Court will make such an order. However, before doing so, the Court must consider, once it has found that such an order is appropriate, whether or not the suspension of that sentence would undermine the public trust in the military justice system as part of the Canadian justice system in general. If the Court finds that that it would not, the Court will make the order.

[65] There are particular circumstances to the offender that were put forward to the Court by the defence counsel:

(a) the particular circumstances of the offender as an Aboriginal person;

(b) the mental health consequences on the offender in relation to this case;

(c) the delay to deal with this matter; and

(d) the attempt made by the offender to rehabilitate himself and reintegrate the Canadian society since his release from the CAF in November 2021.

[66] The prosecution is of the view that the offender failed to meet the requisite burden to have this Court consider suspending the sentence of imprisonment. If the Court concludes differently, it submitted that such decision would undermine the public trust in the military justice system.

Factors identified in the Gladu report

[67] In the *Gladue* report for Private August, the drafter identified several *Gladue* factors being specific to the offender:

(a) He is a twenty-six-year-old Nuuchahnulth man;

(b) He was abandoned by his mother and father, due to their alcoholism, at age four and his maternal grandparents obtained guardianship until he aged out at age nineteen;

(c) He has lived through social and economic deprivation with a lack of opportunities for positive development due to his constrained circumstances;

(d) His childhood was unstable due to his mother and father's absence;

(e) He has a grade twelve education;

(f) He experienced significant events during his teen and adult years in the form of neglect, poor supervision, early exposure to substances from family members (resulting in addiction), alienation from his biological parents, his negative experiences with navigating being homosexual in high school, and the death of his half-brothers to overdoses while away in the military;

(g) He reported that he suffers from alcoholism and uses alcohol to self-medicate. He started self-medicating with alcohol at age thirteen and self-medicating with marijuana at age fourteen although his exposure to alcohol began earlier (aged eleven). He developed a pattern of using alcohol to the point of excess and was unable to control his behaviours;

(h) He has had limited employment opportunities prior to entering the military;

(i) He has experienced inter-generational impacts of colonization on Nuuchahnulth. While he has had a handful of opportunities to participate in potlatches and fish with his grandparents, after age thirteen, he became largely disconnected from his family, community and culture, and he has not had access to land-based activities or community activities, predominantly due to his addictions and fragmented family connections. He acknowledges the connection between his trauma and his untreated alcohol addiction;

(j) He reported being deprived of the support and comfort of family, particularly when he was experiencing addictions within the military;

(k) He reported that he experienced discrimination from other privates and from some individuals within his chain of command. He is of the view the discriminatory treatment manifested in decisions made by some individuals within his chain of command resulting in an absence of fair treatment. He reports the attitudes and beliefs toward him from other privates and some individuals within his chain of command adversely impacted his mental health. He reports there was a notable pattern that developed. He reports being in the military has left him with the impression there is a negative perception toward Indigenous peoples. He further stated he was discriminated against directly for his homosexuality and his untreated alcohol addiction on numerous occasions. He reports the ongoing discrimination resulted in him withdrawing socially from his peers;

(l) His direct supervisor reported that Private August to be mentally capable and having the intelligence to be successful and able to progress, if he is able to put in the proper time and effort into training; and

(m) He reported that he is ready to address his offending behaviour by participating in programming that will allow him to understand the underlying aspects of his offence cycle. He is committed to living a crime-free life, strengthen his social skills, obtaining an understanding of his mental wellness, and developing his emotional communication skills.

[68] These unique systemic and background factors played a part in bringing Private August before this Court, especially regarding his addiction to alcohol. As he stated himself during the interview made by the military police, it is his dependence to alcohol that may explain in part, why he found himself committing these offences. He suffers from alcoholism and uses alcohol to self-medicate. However, he is sober since that time, but it is a daily fight for him to maintain such condition.

[69] The Court cannot also ignore that he has suffered mentally from such condition. The fact that these proceedings lasted longer than they should have, due to very unique circumstances, did not help much on this issue.

[70] Private August decided once to join the CAF with the hope to find a sense to his life and a potential new family. However, he came to the CAF with some personal problems which are the result of a systemic failure from our Canadian society to support Aboriginal peoples in dealing with these issues. As it is for the victims of his crime, such dream with the military was broken forever.

[71] As a result, these problems brought him before this Court. He asked this Court to exercise its authority to suspend the carrying into effect of the punishment of imprisonment for a period determined by this Court as being a fit and just sentence in the circumstances. By doing so, he is claiming that it will give him the opportunity to rehabilitate himself properly.

[72] Private August was released from the CAF about three months ago. He managed to maintain his relationship with his boyfriend, which is actually his sole support. He participates in counselling sessions virtually with Tessa Brohart, a nurse practitioner and counsellor who resides in Private August's hometown and specializes in providing counselling to Indigenous persons. He started sessions with her in December of 2021 and has had four sessions to date. He recently got a job in Fredericton, New Brunswick, which started last Friday. Essentially, he took steps to begin to rehabilitate himself by contributing positively to society, despite having been released from the CAF.

[73] The Court concludes that the offender demonstrated, on a balance of probabilities, that his particular circumstances justify the necessity of suspending the sentence of imprisonment. By suspending the carrying into effect the sentence of imprisonment, the Court concludes that it would not undermine the public trust in the military justice system as part of the Canadian justice system in general.

[74] It must not be forgotten that some indirect consequences will arise from the finding of guilty from this Court: you will get a criminal record and some ancillary orders will be issued which cannot be underestimated.

[75] Let me be clear: the particular circumstances of the offender as an Aboriginal person would not have been sufficient by itself for ordering the suspension of the sentence of imprisonment. It is the combination of this factor with others that arise from the unique circumstances of this case that made this Court conclude that the offender met his burden of proof for suspending the execution of the punishment of imprisonment. It is this same combination of factors that made this Court concluded that in proceedings in such a way, this decision of the court would not undermine the public trust in the military justice system.

[76] Accordingly, the Court suspends the execution of the punishment of imprisonment for six months.

Ancillary orders

[77] 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 August for the purpose of forensic DNA analysis.

[78] In accordance with section 227.01 of the *NDA* and considering that the offences for which I have passed sentence are designated offences within the meaning of section 227 of the *NDA*, I order Private August, as per the attached regulation form, to comply with the *Sex Offender Information Registration Act* for life.

FOR ALL THESE REASONS, THE COURT

[79] **SENTENCES** Private August to imprisonment for a period of six months.

[80] **ORDERS**, pursuant to section 196.14 *NDA*, that the number of samples of bodily substances that is reasonably required be taken from Private August for the purpose of forensic DNA analysis.

[81] **ORDERS**, pursuant to section 227.01 *NDA*, Private August to comply with the *Sex Offender Information Registration Act* for life.

[82] **SUSPENDS** the execution of the sentence of imprisonment and imposes the associated conditions under subsection 215(2) *NDA*. Those conditions will remain in force for six months when his sentence is deemed to be wholly remitted, subject to paragraph 215(4) of the *NDA*.

Counsel:

The Director of Military Prosecutions as represented by Lieutenant-Commander J.M. Besner

Major F. Ferguson, Defence Counsel Services, Counsel for Private J. August