



COURT MARTIAL

Citation: *R. v. Hykawy*, 2024 CM 3021

Date: 20241205

Docket: 202349

Standing Court Martial

2nd Canadian Division Support Base Valcartier
Courcellette, Quebec, Canada

Between:

His Majesty the King

- and -

Corporal L. R. Hykawy, Offender

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

REASONS FOR SENTENCE

(Orally)

Introduction

[1] Further to a trial by Standing Court Martial held from 16 to 19 September 2024, Corporal (Cpl) Hykawy was found guilty by this court martial on 8 October 2024 of one offence punishable under section 130 of the *National Defence Act (NDA)* for assault with a weapon, contrary to section 267 of the *Criminal Code*.

[2] The Court concluded that the prosecution proved beyond a reasonable doubt that on 22 May 2023, at Canadian Forces Base (CFB) Wainwright, Alberta, Cpl Hykawy threatened to use a knife in committing an assault upon Sergeant (Sgt) J.S. Ouellet.

[3] In response to that finding by this Court, Cpl Hykawy claimed that he was acting in self-defence. Having found that there was an air of reality for the application of the defence, the Court proceeded with an analysis to determine if the defence of self-defence was made out in the circumstances of this case.

[4] While the Court decided that the prosecution did not prove beyond a reasonable doubt, first, that Cpl Hykawy did not believe that force was being used against him or that his belief was not based on reasonable grounds, and, second, that Cpl Hykawy did not commit the act in order to defend himself or protect himself against the use of force, the Court concluded, however, that the prosecution proved beyond a reasonable doubt that Cpl Hykawy did not act reasonably in the circumstances, and accordingly dismissed the defence of self-defence presented by Cpl Hykawy.

[5] As Cpl Hykawy was found guilty as charged, it is now my duty to determine the sentence to be imposed by this court martial.

The circumstances of the commission of the offence

[6] During the month of May 2023, the 5th Combat Engineer Regiment (5 CER) was in Wainwright, Alberta to participate in exercise MAPLE RESOLVE 23, as a component of the 5th Canadian Mechanized Brigade Group (5 CMBG). A member of 5 CER, Cpl Hykawy was employed throughout the five-week exercise as driver of a light armoured vehicle (LAV). An officer was designated as crew commander for this vehicle for the duration of the exercise.

[7] At the end of the exercise, on 22 May 2023, Sgt Ouellet was tasked to act as crew commander of the LAV driven by Cpl Hykawy with the mission to prepare it for its return by train to its place of origin, namely CFB Valcartier, Quebec, the home base of 5 CER and its members.

[8] The mission consisted of three stages: first, drive the vehicles to the wash track to clean them up; second, to bring them to the Weapons Effect Simulator (WES) kit building to have the WES system removed from the vehicles; and finally to park them at that location so that they could eventually be loaded onto a train.

[9] Sgt Ouellet reported at 1300 hours and took his place as crew commanders on the LAV driven by Cpl Hykawy. They did not know each other and had never worked with each other before.

[10] The crew commander of the vehicle usually provides direction to the driver and helps him in the safe driving of the vehicle, considering its size and heaviness, which implies the existence of certain blind spots.

[11] The other LAV going with the one occupied by Sgt Ouellet and Cpl Hykawy took the lead in the direction of the wash track for the first stage of this mission. Sgt Ouellet directed Cpl Hykawy to follow the other vehicle, which he did.

[12] The drive to the wash track took about half an hour. During that drive, Cpl Hykawy felt that he did not obtain much interaction from Sgt Ouellet in helping him drive the vehicle properly. In addition, he was told by Sgt Ouellet to follow the lead

vehicle at a distance of two LAVs on a dusty road, and to have his vehicle positioned closer to the middle than the side of the road.

[13] Cpl Hykawy told the Court that driving in dusty conditions in such a way while following another vehicle made his drive harder and more exhausting. Because he had difficulty to see clearly what was going on, he had to constantly worry about the vehicle in front of his own slowing down suddenly or for any other vehicle arriving in the opposite way.

[14] Cpl Hykawy mentioned that he did not have much assistance from Sgt Ouellet when he had to immobilize the vehicle at stop signs during the transit. Normally, the crew commander indicates to the vehicle's driver whether the crossroad is safe due to the existence of certain blind spots. According to Cpl Hykawy, Sgt Ouellet did not help him in this aspect of the vehicle's operation. In addition, Sgt Ouellet was constantly hounding him to drive as fast as he could by telling him to, "Speed the fuck up" and to not really immobilize his vehicle at stop signs.

[15] According to Sgt Ouellet, he had no particular concerns about his driver while they went to the wash track. He confirmed that he had not much interaction with Cpl Hykawy. He said that he provided the minimal necessary directions to the driver, like going right, left or to follow the vehicle in front, to get to that location, assuming that Cpl Hykawy knew where he had to go and how to get there.

[16] Once they arrived at the wash track, Cpl Hykawy washed the vehicle, helped by Sgt Ouellet. Then, they sat back in the LAV.

[17] The vehicle which came with Cpl Hykawy's LAV left the wash track first to get to the WES kit building located not very far. Cpl Hykawy's vehicle left some time after for this second stage of the mission.

[18] Sgt Ouellet said that he did not know where the WES kit building was located. When he arrived at a crossroad with a stop, Cpl Hykawy stopped the vehicle. According to Sgt Ouellet, having seen the vehicle in front of him going straight, he directed his driver to go straight. However, Cpl Hykawy instead turned right.

[19] Cpl Hykawy said that after he left the wash track, he made a right turn at the stop, not knowing that he was supposed to go next to the WES kit building. It is at this time that Sgt Ouellet started yelling at him, being pretty angry, and made comments to make him feel bad.

[20] Cpl Hykawy told the Court that because he did not know what the next step was, and not being told where to go by his crew commander, he assumed that they were going back to the camp. He mentioned that he would have gone straight at the stop if he had been directed to, which was not done by the crew commander.

[21] According to Sgt Ouellet, Cpl Hykawy told him that because the LAV did not have a WES system, he assumed that they were going back to the camp.

[22] Sgt Ouellet told Cpl Hykawy that he had to follow his command. Cpl Hykawy would have responded that he did not want to work with him again. Sgt Ouellet found this comment strange, but it did not bother him at all. Cpl Hykawy made his way back with the vehicle to the WES kit building and once there, he parked the vehicle beside the other one.

[23] Sgt Gionet, who was the crew commander of the other LAV accompanying the one driven by Cpl Hykawy, confirmed that once his own vehicle left the wash track, he was not followed by Cpl Hykawy's vehicle. He said that once he arrived at the WES kit building, he waited for Sgt Ouellet's vehicle for about ten minutes. The latter finally arrived and parked the LAV beside his own.

[24] After the vehicle was parked, Sgt Ouellet then got out of his seat and went to Cpl Hykawy's position while remaining on the vehicle. He wanted to talk to him. Sgt Ouellet would have said something like, "When I told you to go straight, you go straight. I am the Sgt, I am in charge, you should listen to what I say." From Sgt Ouellet's perspective, Cpl Hykawy was disobeying an order provided by a superior, and he wanted to remind him how things must work.

[25] Sgt Ouellet spoke in a disciplinary manner, in a confident but not upset tone. In response to Sgt Ouellet, Cpl Hykawy said that he recently put his release in from the Canadian Armed Forces (CAF).

[26] From Cpl Hykawy's perspective, Sgt Ouellet seemed to be "pissed", and he appeared to him as having lost his cool because he shook the hatch to get him out of his position. Sgt Ouellet denied having done such thing and Sgt Gionet, who witnessed this part of the incident, never mentioned such a thing.

[27] From that moment on, and for the rest of the events, Cpl Hykawy had the impression that Sgt Ouellet wanted to physically fight him, that he wanted to attack him.

[28] Cpl Hykawy said that because Sgt Ouellet was unable to open the hatch, he stood back, which allowed Cpl Hykawy to fully open it and get out of the vehicle. He went down to get away from Sgt Ouellet.

[29] Sgt Ouellet confirmed that Cpl Hykawy got out of the vehicle and started to walk in the opposite direction he was supposed to go. Sgt Ouellet got down from the LAV and asked Cpl Hykawy where he was going. Cpl Hykawy responded that he was walking back to the camp.

[30] Sgt Ouellet decided to join him with a quick walk as he could not let him go. Once he caught up with him, he positioned himself directly in front of him. Sgt Ouellet said that Cpl Hykawy seemed to be distressed. He was looking at the ground, he was

shaking, and he seemed to have a bizarre behaviour in the circumstances. He seemed to be beside himself.

[31] Sgt Ouellet told him that it was not a big deal. He wanted to comfort him more than making him an example from a disciplinary perspective. Cpl Hykawy did not say anything. Sgt Ouellet tapped him lightly on the left shoulder in order to get him out of his bubble, to get a reaction from him, and to confront him because of the way he had acted.

[32] Cpl Hykawy confirmed that Sgt Ouellet came after him after he jumped out of the LAV. Following this action by Sgt Ouellet, Cpl Hykawy took a second to figure out what he could do.

[33] Cpl Hykawy told the Court that after that, things did not occur as testified by Sgt Ouellet.

[34] Cpl Hykawy affirmed that after he heard Sgt Ouellet making some comments, he replied to him and got away from him for a second time.

[35] Cpl Hykawy said that he walked in the direction of the WES kit building. Sgt Ouellet caught up with him and positioned himself in front of him a second time. Sgt Ouellet started to poke him with the right hand on his left shoulder, while yelling at him. Sgt Ouellet would have said to him, "Let's fucking go." Cpl Hykawy interpreted these words as invitation to fight.

[36] He walked away again from Sgt Ouellet. The latter caught up with him again, came up around him and positioned himself in front of him, yelling at him and poke him hard on his left shoulder. Sgt Ouellet shoved him once, asking him what he will do.

[37] On these three different occasions, Cpl Hykawy said that Sgt Ouellet was shaking his fists with his arms pumping down, while yelling at him.

[38] In essence, Cpl Hykawy told the Court that while he was trying to get away from Sgt Ouellet, he feared to be hit by the latter at any moment. He felt pretty scared and unsafe.

[39] Cpl Hykawy finally responded by taking out a knife, pointing the blade in Sgt Ouellet's direction, while telling him to back away from him. At that moment, they were at a distance of thirty centimetres from each other.

[40] The knife was a Bowie knife, which measures a total of ten inches, with a fixed blade six inches long and one inch wide that ends in a point, and a four-inch brown handle.

[41] Cpl Hykawy said that he panicked and pulled out his knife and stepped back from Sgt Ouellet, while telling him to get the fuck away from him. Essentially, he was trying to avoid being physically attacked by Sgt Ouellet. He affirmed that he never intentionally

pointed his knife towards anybody specific. However, he did not recall where the blade of his knife was pointing. He recognized that it was not acceptable to pull out his knife from the sheath the way he did.

[42] Cpl Hykawy said that Sgt Ouellet put his hands in the air and mentioned that it was time to call the military police (MP). Sgt Ouellet left. Cpl Hykawy put his knife back in the sheath, threw it away on the ground and removed his combat shirt. He sat down on a concrete block and a civilian came to check on him.

[43] Sgt Ouellet went inside the WES kit building and asked some people to call the MP. He went outside and saw Cpl Hykawy still sitting on the concrete block, and he seemed to be calm. Cpl Hykawy told him that he would call his captain, but he did not. Sgt Ouellet left.

[44] The police arrived, seized his knife and arrested Cpl Hykawy. Sgt Ouellet provided to an investigator his version of the incident.

The evidence

[45] The prosecution provided the court martial with the documents referred to in article 111.17 of the *Queen's Regulations and Orders for the Canadian Forces*, which are:

- (a) a Statement as to particulars of service of the accused;
- (b) a copy of the offender's view pay entitlement for the months of September and October 2024; and
- (c) the Member's Personnel Record Résumé (MPRR) of the offender.

[46] The offender, through his counsel, introduced four job descriptions related to a locksmith, an application form with the required documentation for The Association of Ontario Locksmith (TAOL), the Performance and Competency Evaluation (PaCE) feedback notes for Cpl Hykawy from January 2023 to March 2024.

[47] He also introduced an Agreed Statement of Facts, which reads as follows:

“AGREED STATEMENT OF FACTS

1. Corporal (Cpl) Hykawy is a 27-year-old man, born in Thompson, Manitoba.
2. He grew up living with his parents, Maria and Kelvin Hykawy, having lived in Manitoba and Ontario.

3. Cpl Hykawy's mother is Portuguese-Canadian and his father is Ukrainian-Canadian.
4. Cpl Hykawy completed his secondary school education in 2015 and, following graduation enrolled in the Regular Force of the Canadian Armed Forces (CAF) in February 2016.
5. Cpl Hykawy is quite remorseful for and regrets his actions. He readily acknowledges that despite the circumstances making self-defence available, his brandishing of the knife was unacceptable.

Circumstances of the Accused

6. Cpl Hykawy does not have a criminal record.
7. Cpl Hykawy does not have a conduct sheet.
8. This incident represents an isolated incident and is out of character for Cpl Hykawy.
9. Notwithstanding the matter before this Court Martial, Cpl Hykawy continued to be gainfully employed by his Unit.

Counselling

10. In December 2022, Cpl Hykawy completed a workshop on Workplace Violence Prevention.
11. On 20 Nov 2024, Cpl Hykawy completed the Preventing Harassment and Violence in the Workplace for Employees.
12. On 20 Nov 2024, Cpl Hykawy completed the Preventing Harassment and Violence in the Workplace for Managers and Health and Safety Committees.
13. On 7 November 2024, Cpl Hykawy paid for, completed and received a certificate from the Peaceful Leaders' Academy for completing an online course on Conflict Resolution Fundamentals.
14. Additionally, since 13 April 2024, Cpl Hykawy has attended 10 sessions with Maj. Anne Morrisette, a padre and social worker in the CAF addressing various topics including psychological spirituality and tools for handling difficulties in day-to-day life, amongst others. He continues to see Maj. Morrisette.

Future Beyond CAF

15. Cpl Hykawy has sought a voluntary release prior to this incident in May 2023. Since this incident, Cpl Hykawy has also received a Notice of Intent to Recommend Release from his CO stemming directly from the assault with a weapon in May 2023.
16. Prior to and since joining the CAF, Cpl Hykawy had an express interest in becoming a locksmith. He nevertheless joined the CAF out of a desire to continue his family's military history.
17. Cpl Hykawy has plans to pursue a career as a locksmith once he is released from the CAF.

Military Career

18. Since joining the CAF in 2016, Cpl Hykawy has progressed to the rank of Corporal continuously and without reduction, having been promoted to Corporal on 27 Feb 2020.
19. Cpl Hykawy has positive Feedback Notes (FN) in Monitor Mass dating from 26 Jan 2023 to 15 Mar 2024.
20. The FN entries highlight Cpl Hykawy as being someone who takes initiative, is dedicated, has the ability to act autonomously with little supervision required, has been ascribed as a great asset to his Unit, has demonstrated abilities to manage and protect CAF assets, a good team member, adaptability, and demonstrating credibility and influence which allows the CoC to focus on other tasks.
21. The FN entries are consistent with Cpl Hykawy's PARs. Notably, in the period between 1 Apr 2022 and 31 Mar 2023, his PAR, the Reviewing Officer, Maj. Prevost, identified Cpl Hykawy as having set a benchmark in fleet management, showing initiative, and a candidate for PLQ suggesting that Cpl Hykawy should be employed in a 2IC position to hone his leadership skills.

Character References

22. Cpl Hykawy has the support of his family, friends and colleagues.
23. His mother, Maria Hykawy, is a Civilian Instructor (CI) with the cadet youth program. She notes, amongst other relevant things, that Cpl Hykawy has expressed remorse and recognized the shortfall in his judgment on 22 May 2023.

24. Cpl Hykawy's Father, Kelvin Hykawy, a mining logistical superintendent, highlights some personal achievements of his son, including an early interest in the military with having joined the cadets and further showing insight that the split-decision he made was not the correct decision.
25. Brian Moss, an RCMP member, has known Cpl Hykawy since 2004/2005. Cpl Hykawy grew up with Mr. Moss' son, Shawn and quickly welcomed Cpl Hykawy into the Moss family. He describes this incident in May 2023 as shocking and out-of-character. He's known Cpl Hykawy to be an even-tempered person and, in speaking with Cpl Hykawy about the incident revealed that this incident has caused Cpl Hykawy substantial grief and stress.
26. From a professional perspective, WO Flibotte, provided a character reference. In his letter, he describes Cpl Hykawy as a hard worker, keen to complete tasks, always ready and willing to volunteer his time. WO Flibotte, having been present during the exercise in Wainwright, indicates that Cpl Hykawy was subjected to the circulation of rumours, hearsay and mockery which the WO tried to quell.
27. MCpl Côté describes Cpl Hykawy in a consistent way as others have: reliable, hard-working, quick to volunteer, kind and always positive. He further describes Cpl Hykawy's actions for which he was found guilty as out-of-character and that even before the trial thought that self-defence must have been a factor.
28. Sgt. Loughlin has known Cpl Hykawy since 2018 and further describes him as having a level head and a good demeanour. This incident was surprising, but adds that Cpl Hykawy has been the subject of poor treatment by the CoC and the victim of uninformed rumours. He will continue to support Cpl Hykawy in the future and hopes he can put this matter behind him."

[48] Finally, the Court took judicial notice of the facts and matters contained and listed in article 15 of the *Military Rules of Evidence*.

Position of the parties

The prosecution

[49] The prosecution recommended that the Court impose a severe reprimand and a fine in the amount of \$4,000.

[50] According to the prosecution, the imposition of such a sentence would reflect the objectives of maintaining public trust in the CAF as a disciplined armed force, specific and general deterrence, and the denunciation of such conduct.

[51] For the prosecution, having Cpl Hykawy taking out a knife, pointing the blade in Sgt Ouellet's direction, while telling him to back away from him as a response to the enforcement of discipline by a superior is absolutely unacceptable and has no place in the CAF.

[52] In such circumstances, the prosecution considers that the sentence it proposes is the least severe combination of punishments required for achieving the fundamental purpose of sentencing, which is to maintain the discipline, efficiency, and morale of the CAF.

[53] It would also be proportionate to the gravity of the offence and the degree of responsibility of the offender, especially considering the relevant aggravating and mitigating factors identified by the prosecution.

Cpl Hykawy

[54] Cpl Hykawy submitted, through his counsel, that instead of convicting him, the Court should direct that he be discharged absolutely pursuant to section 203.08 of the *NDA*.

[55] He claimed that the offence he was found guilty of is one for which an absolute discharge is available.

[56] He submitted that he proved that it was in his best interest that an absolute discharge be granted by the Court because he demonstrated that he is a person of good character, without a previous conviction, that it is not necessary to enter a conviction against him to deter him from future offences or to rehabilitate him, and that the entry of a conviction against him may have significant adverse consequences on his plans to obtain employment as a locksmith.

[57] Cpl Hykawy finally expressed that the granting of an absolute discharge is not contrary to the public interest because the offence had limited consequences, considering that it had no impact on the discipline and the morale of his unit, that it was an out of character and an isolated incident for which he recognized that it went beyond what was necessary, both in the manner and result.

[58] If, for any reason, the Court does not accept this suggestion, then Cpl Hykawy invites the Court to consider imposing a reprimand and a fine in the range of \$500 to \$1,500.

The law

[59] When a military judge determines the sentence to be imposed on an offender, he or she must consider the purposes and principles of sentencing as found in sections 203.1 to 203.3 of the *NDA*.

[60] The fundamental purpose of sentencing in a court martial is to maintain the discipline, efficiency and morale of the CAF.

[61] 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.

[62] 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 CAF 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.

[63] When imposing a sentence, a court martial 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;
- (g) a sentence should be the least severe sentence required to maintain the discipline, efficiency and morale of the CAF; and
- (h) any indirect consequences of the finding of guilty or the sentence should be taken into consideration.

[64] Cpl Hykawy asked this Court to direct that he be discharged absolutely pursuant to section 203.08 of the *NDA*.

[65] Subsection 203.08(1) of the *NDA* reads as follows:

If an accused person pleads guilty to or is found guilty of an offence, other than an offence for which a minimum punishment is prescribed by law or an offence punishable by imprisonment for 14 years or for life, the court martial before which the accused appears may, if it considers it to be in the accused person's best interests and not contrary to the public interest, instead of convicting the accused person, direct that they be discharged absolutely.

[66] I agree with Sukstorf M.J.'s statement in *R. v. Goulding*, 2023 CM 2019, at paragraph 63 that the military judge shall proceed first to determine whether the imposition of an absolute discharge is appropriate in the particular circumstances and then proceed to sentence should an absolute discharge not be directed.

[67] However, in order to clearly identify the particular circumstances in this case for such analysis, it will be useful for me to first discuss the applicable sentencing objectives and principles.

[68] Having the context in mind, I will then be in a position to decide if an absolute discharge may be directed or not.

[69] The Court shall determine first if an absolute discharge is available based on the offence charged. If the answer to this question is positive, then the Court shall decide if it

is in the best interest of the offender that an absolute discharge be directed by the Court, and if the granting of an absolute discharge is not contrary to the public interest.

[70] The court martial adopted the judicial test set out in *R. v. Fallofield*, [1973], 13 C.C.C. (2d) 450 in deciding whether the facts of the case are those where an absolute discharge should be directed pursuant to section 203.08 of the *NDA*.

Analysis

[71] 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 any military activity. 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.

Seriousness of the offence

[72] The maximum punishment that a court martial may impose for assault with a weapon is imprisonment for a term of not more than ten years. Objectively speaking, this is a serious offence.

Objectives considered by the Court for sentencing

[73] Accordingly, the punishment to be imposed by this Court shall consider the following objectives:

- (a) to maintain public trust in the CAF as a disciplined armed force;
- (b) to denounce the unlawful conduct;
- (c) to deter the offender and other persons from committing offences. 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; and
- (d) to assist in rehabilitating the offender.

[74] A sentence must also be proportionate to the gravity of the offence and the degree of responsibility of the offender. As I have already mentioned, in many of my previous decisions, the Supreme Court of Canada has elevated the principle of proportionality in sentencing as a fundamental principle, making the determination of a sentence by a judge, including a military judge, a highly individualized process. Parliament reflected the importance of this principle in the same manner in the *NDA* by labelling section 203.2 as “Fundamental principal of sentencing”.

[75] I will now discuss the sentencing principles. The first one is to account for any relevant aggravating and mitigating factors that may increase or reduce the sentence to be imposed by the Court.

Aggravating factors

[76] Subjectively, this offence shall be considered as a serious one because it was committed by using a knife in Cpl Hykawy's possession with the purpose of creating a real fear of harm for pushing away from him a superior while the latter legitimately inquired about the reasons why he had temporarily left his position as a vehicle driver, and while that same superior tried to make him understand that his recent actions amounted to a certain form of insubordination, all this occurring in a military training environment.

[77] Accordingly, I have identified three aggravating factors:

- (a) the disrespect by Cpl Hykawy for the authority of a superior;
- (b) the disrespect by Cpl Hykawy towards the physical integrity and safety of others; and
- (c) the denial by Cpl Hykawy of the importance of acting in a disciplined manner in the context of a military exercise which was expressed by his failure to recognize the importance of acting respectfully and appropriately in a training environment, which is supposed to be a form of rehearsal before moving on to a real context.

Mitigating factors

[78] I also identified some mitigating factors:

- (a) the admission that his gesture was inappropriate. Cpl Hykawy was quite remorseful, and he expressed regrets for his actions. He acknowledged that his brandishing of the knife was unacceptable;
- (b) the fact that it was an isolated and an out of character incident. Obviously, the evidence adduced demonstrates that he is a positive asset to his co-workers and his chain of command. Clearly, it was very unusual for him to act the way he did;
- (c) the absence of any annotation on his conduct sheet for the commission of a similar offence and the absence of a criminal record, showing that he is a first-time offender;
- (d) his age and his career potential as a member of the society. He has many years ahead to continue contributing positively to the society in general.

He showed to this Court that he wants to turn the page and, once released from the CAF, he intends to contribute to the society by becoming a locksmith;

- (e) the fact that he had to face this court martial, which was announced and accessible to the public and which took place in the presence of some of his peers, has no doubt had a very significant deterrent effect on him and on them. The message is that the kind of conduct that he displayed will not be tolerated in any way and will be dealt with accordingly;
- (f) Cpl Hykawy's counselling efforts made after the incident to better respond to emotional situations he may find himself in with other persons; and
- (g) the absence of any evidence demonstrating any temporary or permanent consequences on the victim, and on the morale and discipline of unit members.

Sentencing precedents

[79] The second sentencing principle is to consider sentences imposed on similar offenders for a similar offence committed in similar circumstances.

[80] From case law presented by both counsel, I note that for similar offenders committing a similar offence in similar circumstances, courts martial usually imposed punishments such as fines, reprimand, severe reprimand, or a combination of some of these punishments.

Absolute discharge

[81] As I mentioned previously, before deciding what is the least severe sentence required in the circumstances of this case to maintain discipline, efficiency and morale of the CAF, I must address first if I can direct that Cpl Hykawy be discharged absolutely of the offence.

Can the Court discharge absolutely Cpl Hykawy based on the offence charged?

[82] Under section 203.8 of the *NDA*, for an offender to be eligible for consideration by the court martial of an absolute discharge, the offence committed must be one for which there is no minimum punishment prescribed by law or not punishable by imprisonment for fourteen years or for life.

[83] Considering that the offence of assault with a weapon is punishable by imprisonment for a term of not more than ten years without minimum, the offence is one available for consideration by the Court to direct that Cpl Hykawy be discharged absolutely.

Is it in the best interest of the offender that he be discharged absolutely by this court martial for the offence?

[84] In *Fallofield*, at pages 454-455, the British Columbia Court of Appeal said:

Generally, the first condition would presuppose that the accused is a person of good character, without any previous conviction, that it is not necessary to enter a conviction against him in order to deter him from future offences or to rehabilitate him, and that the entry of a conviction against him may have significant adverse repercussions.

[85] As mentioned previously, Cpl Hykawy is without any previous conviction. He has no criminal record. He is a first-time offender.

[86] Cpl Hykawy joined the regular force in February 2016, after completing his high school education in 2015. He has progressed to the rank of corporal continuously and without reduction, having been promoted to this rank on 27 February 2020.

[87] The PaCE feedback notes entries, before and after the incident, highlight Cpl Hykawy as being someone who takes initiative, is dedicated, has the ability to act autonomously with little supervision required, has been ascribed as a great asset to his unit, has demonstrated abilities to manage and protect CAF assets, a good team member, adaptability, and demonstrating credibility and influence which allows the chain of command to focus on other tasks.

[88] The information presented by Cpl Hykawy is to the effect that the actions for which he was found guilty are out of character for him. Despite what he did, he still has the support of his family and his friends.

[89] Cpl Hykawy has plans to pursue a career as a locksmith once he is released from the CAF. To become a member of TAOL, a criminal background check is made.

[90] All the evidence he presented to the Court tends to show that he is a person of good character, and that it is not necessary to enter a conviction against him to deter him from future offences or to rehabilitate him.

[91] Cpl Hykawy provided evidence that demonstrates that a conviction against him may have significant adverse repercussions. The four job descriptions related to a locksmith he submitted to the Court as evidence disclose the fact that an absence of criminal record is a mandatory requirement to be considered for such employment.

[92] The offence for which the offender was found guilty in this case is not included in the list found at section 249.27 of the NDA as not constituting an offence for the purpose of the *Criminal Records Act*. Therefore, in the absence of a discharge, any sentence imposed on Cpl Hykawy will result in him having a criminal record.

[93] Having a criminal record will have a significant impact on his ability to obtain a job in the province of Ontario as a locksmith and could compromise his membership to TAOL.

[94] The prosecutor conceded that it could be in the best interest of the offender that he be discharged absolutely by this court martial for the offence. As he said, the Court is not facing the worst offender having committed the worse crime.

[95] Based on the evidence before the Court, Cpl Hykawy meets the first condition. The Court concludes that it in his best interest that he be discharged absolutely by this court martial for the offence.

Is it contrary to the public interest that the offender be discharged absolutely by this court martial for the offence?

[96] The second condition requires the Court to consider whether the granting of a discharge is in the public interest. In determining this question, the Court must examine the nature of the offence, the prevalence of the offence within the CAF community and whether the circumstances of the offence are something that should be a matter of public record.

[97] According to the prosecution, it is this second condition which cannot be met by Cpl Hykawy, preventing him from being absolutely discharged by the Court for the offence, especially considering the nature of the offence he committed, and the operational context in which it was committed.

[98] Yet, the fact that the offender was charged, held to account, and was found guilty by this court martial for the offence not only denounces the conduct, but it sends a strong message of general deterrence. Any member of 5 CER now knows that if they assault a supervisor with a weapon, they will be charged and dealt with accordingly under the Code of Service Discipline.

[99] The nature of the offence committed by Cpl Hykawy is serious. However, there is no evidence demonstrating that the operational readiness of the unit and the morale and discipline of its members were compromised by the action of Cpl Hykawy.

[100] This isolated and out of character incident for Cpl Hykawy had very limited impact and did not result in any kind of disturbance of any sort. As suggested by Cpl Hykawy's defence counsel, it is not the dispute itself that was a concern, but the fact that for a very short moment, Cpl Hykawy's response was totally disproportionate to what he was facing.

[101] There was no evidence adduced before the Court to demonstrate that there was prevalence for committing such a crime within the unit or even the CAF.

[102] I do not see the need for that conviction to be registered to prevent Cpl Hykawy from committing another offence or to warn the public. There is no indication in the evidence that Cpl Hykawy poses a risk to the public by reoffending at any point in the future.

[103] As said by my colleague in *Goulding* at paragraph 108:

Although the demands of military service require the pursuit of greater discipline, resulting in more charges and often stiffer penalties, it is imperative to separate the imposition of tough punishments with the adverse effects that flow from the entering into one's record a *Criminal Code* conviction that will linger longer than any punishment.

[104] It is my conclusion that considering all the circumstances, it is not contrary to the public interest that the offender be discharged absolutely of the offence by this court martial.

Restitution order

[105] Cpl Hykawy requested this Court to order the restitution of his Bowie knife, and the sheath, seized by the MP patroller on 22 May 2023. He mentioned that this item as some sentimental value, as it was given to him by somebody when he enrolled with the CAF.

[106] The prosecution objected to this request, because it considered that the knife was used in the commission of a crime for which the offender was convicted by this Court, and accordingly it should be kept for proper destruction.

[107] Cpl Hykawy is the owner of the knife and there is no law or evidence whatsoever supporting the argument made by the prosecution.

[108] Then, this Court has no reason not to grant the request made by the offender.

[109] Accordingly, I will order restitution of the Bowie knife and its sheath to Cpl Hykawy, as indicated in the order signed by myself as I render this decision.

FOR ALL THESE REASONS, THE COURT:

[111] **DIRECTS** that Cpl Hykawy be discharged absolutely on the first and only charge before the Court.

[112] **ORDERS** that the Bowie knife with the sheath be returned to Cpl Hykawy after expiration of the appeal delay.

Counsel:

The Director of Military Prosecutions as represented by Majors R. Gallant and É. Baby-Cormier

Major C. Da Cruz, Directorate of Defence Counsel Services, Counsel for Corporal L.R. Hykawy