Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20100820

Docket: CMAC-517

Citation: 2010 CMAC 7

CORAM: **PELLETIER J.A.**
TRUDEL J.A.
COURNOYER J.A.

BETWEEN:

EX-PTE ST-ONGE, D.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Québec, Quebec, on February 26, 2010.

Judgment delivered at Ottawa, Ontario, on August 20, 2010.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: TRUDEL J.A.
DISSENTING REASONS BY: COURNOYER J.A.

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REASONS FOR JUDGMENT

PELLETIER J.A.

INTRODUCTION

[1] This appeal from the decision of a Disciplinary Court Martial raises two issues. The first is whether the appellant, Ex-Private St-Onge, waived the benefit of the limitation period with respect to his prosecution for possession of a small quantity of marihuana. The second is whether the sentence of 30 days imprisonment imposed on the appellant was appropriate, having regard to all the circumstances, including the fact that the appellant had been administratively discharged from the Canadian forces some time prior to sentencing.

THE FACTS

[2] The appellant was a member of the regular forces, specifically B Company, 2nd Battalion, Royal 22nd Regiment. On August 25, 2006, the appellant was late for parade for the second day in a row. When the Warrant Officer in charge reprimanded him in the presence of other members of the platoon, the appellant uttered words which the Warrant Officer took to be a threat. The appellant was escorted to the office of the company Sergeant Major where the Warrant Officer explained the circumstances which brought them there. While the Warrant Officer was doing so, the appellant said words to the effect that if the Warrant Officer did not leave the room, he would assault him. At that point, the company Sergeant Major asked the Warrant Officer to leave the room. The appellant subsequently apologized to the Warrant Officer for his conduct.

[3] On September 28, 2006, the appellant's former spouse complained to the military police that he was harassing her. In the course of her interview with the military police, she mentioned that the appellant had ammunition and explosives belonging to the Canadian Forces at his residence. She also indicated that the appellant regularly consumed illegal drugs.

[4] As a result of this information, the military police executed a search warrant at the appellant's residence, on October 10, 2006, in the course of which they seized:

- six live 5.6 mm cartridges;
- 200 blank 5.6 mm cartridges;
- one live 25 mm cartridge; and
- one 40 mm training cartridge.

[5] In the course of executing the search warrant, members of the military police observed in plain view certain drug paraphernalia. On the strength of this information, a second search warrant

was obtained by the National Investigation Service which was also executed on October 10, 2006. As a result of the second search, the following items were seized:

- one half tablet of a substance which subsequent analysis showed to be methamphetamine;
- residue of green vegetable matter which subsequent analysis showed to be cannabis;
- five pieces of glass on which were traces of green vegetable matter which subsequent analysis showed to be cannabis resin;
- an ashtray containing remains of hand rolled smoking material which subsequent analysis showed to be cannabis;
- ten bottle caps on which there was residue of a substance which subsequent analysis showed to be cannabis resin.

Possession of each of these substances is prohibited by the *Controlled Drugs and Substances* Act, S.C. 1996, c. 19.

[6] On October 20, 2006, the appellant was interrogated by the military police with respect to the ammunition found at his residence. After having been cautioned, and having waived his right to consult a lawyer, the appellant voluntarily declared that he had obtained the munitions while on military exercises at Wainwright, Alberta, and Baie St- Paul, Quebec. At the conclusion of those exercises, the appellant falsely declared to military authorities that he had no munitions in his possession.

[7] On November 2, 2006, the appellant was questioned by members of the National Investigation Service. He was again cautioned and once again waived his right to consult a lawyer.

The appellant voluntarily declared that the drugs found at his residence were his. He also stated that he regularly purchased marihuana with his room-mate which he stored in his freezer. He also admitted consuming marihuana and cannabis oil. Further inquiries by the National Investigation Service disclosed that the appellant purchased one ounce of marihuana every two months or so.

[8] In March 2008, the appellant was released from the Canadian Forces pursuant to paragraph 15.01(5)(*f*) of the *Queen's Regulations and Orders* (QR&O) as being unsuitable for further service. Paragraph 15.01(5)(*f*) applies to military personnel who, either wholly or chiefly because of factors within their control, develop personal weakness or behaviour or have domestic or other personal problems that seriously impair their usefulness to or impose an excessive administrative burden on the Canadian Forces.

PROSECUTION BY MILITARY AUTHORITIES

[9] On December 1, 2006, the appellant's unit laid charges with respect to the incident of insubordination. On April 18, 2007, the National Investigation Service laid the charges with respect to the appellant's possession and trafficking in controlled drugs. On July 19 2007, the drug charges were forwarded to the referral authority who, in turn, referred the matter to the Director of Military Prosecutions on September 19, 2007 (Appeal Book, Volume 1, page 153).

[10] On March 13, 2008, the appellant was charged in an indictment containing seven counts. The indictment provides as follows: (translation by the Court)

> 1rst Count
> Section 130 of the *National Defence Act*

An offence punishable pursuant to section 130 of the *National Defence Act*, to wit trafficking in a substance, contrary to subsection 5(1) of the *Controlled Drugs and Substances Act.*

Particulars: That, between the month of July 2005 and the month of November 2006, at or near 1489 rue Corail, Val-Bélair, Québec City, Province of Quebec, he did traffic in a substance which he represented or held out to be a substance included in Schedule II of the *Controlled Drugs and Substances Act*, namely cannabis (marihuana).

2nd Count
Section 130 of the *National Defence Act*

An offence punishable pursuant to section 130 of the *National Defence Act*, to wit, possession of a substance, contrary to subsection 4(1) of the *Controlled Drugs and Substances Act.*

Particulars: That, between the month of July 2005 and the month of November 2006, at or near 1489 rue Corail, Val-Bélair, Québec City, Province of Quebec, he did unlawfully have in his possession a substance included in Schedule II of the *Controlled Drugs and Substances Act*, namely cannabis (marihuana).

3rd Count
Section 129 of the *National Defence Act*

Conduct prejudicial to good order and discipline

Particulars: That, between the month of July 2005 and the month of November 2006, at or near 1489 rue Corail, Val-Bélair, Québec City, Province of Quebec, he did engage in the unauthorized use of a drug included in Schedule II of the *Controlled Drugs and Substances Act*, namely cannabis (marihuana), contrary to section 20.04 of the *Queen's Regulations and Orders for the Canadian Forces.*

4th Count
Section 129 of the *National Defence Act*

Conduct prejudicial to good order and discipline

Particulars: That, between the month of July 2004 and the month of November 2006, at or near the vicinity of Québec City, Province of Quebec, he did engage in the unauthorized use of a drug included in Schedule III of the *Controlled Drugs and Substances Act*, namely methamphetamine, contrary to section 20.04 of the *Queen's Regulations and Orders for the Canadian Forces.*

5th Count
Section 115 of the *National Defence Act*
(Alternative to the 6th Count)

Had in his possession goods obtained by the commission of a service offence, knowing that it had been so obtained.

Particulars: That, on or about the 10th day of October 2006, at or in the vicinity of 1489 rue Corail, Val-Bélair, Québec City, Province of Quebec, he did unlawfully have in his possession munitions belonging to the Canadian Forces, namely six live 5.6mm type cartridges, two hundred blank 5.6mm type cartridges, one live 25 mm type cartridge, and one live 40 mm type cartridge, knowing that these munitions had been obtained by the commission of a service offence.

6th Count
Section 129 of the *National Defence Act*
(Alternative to the 5th Count)

Conduct prejudicial to good order and discipline

Particulars: That, on or about the 10th day of October, 2006, at or in the vicinity of 1489 rue Corail, Val-Bélair, Québec City, Province of Quebec, he did unlawfully have in his possession munitions belonging to the Canadian Forces.

7th Count
Article 85 of the *National Defence Act*

Verbally threatening a superior

Particulars: That, on or about the 25th day of August, 2006, at or in the vicinity of Building 313 at the Valcartier Garrison, Coucelette, Province of Quebec, he did say to Warrant Officer Lapalme: "Get out of here or I'll give you a good one." or words to like effect.

[11] By order dated March 25, 2008, the Court Martial Administrator convened a Disciplinary Court Martial, to be presided over by Lt. Colonel L-V D'Auteuil (the Military Judge) to hear the charges against the appellant. The Disciplinary Court Martial convened at Valcartier, Quebec, on May 26, 2008. In light of the discussion to come with respect to the issue of waiver, it is important to understand what transpired before the Military Judge at the opening of the proceedings.

[12] After dealing with various formalities, and after the appellant confirmed his choice of trial before a Disciplinary Court Martial, as required by the case of *Trépanier v. HMTQ*, 2008 CMAC 3, the Military Judge called upon the accused to plead to the charges. The appellant entered pleas of not guilty to counts 1 and 5 of the indictment and guilty pleas to all other counts. The prosecutor advised the Military Judge that he did not intend to lead any evidence with respect to the 1rst count, trafficking in a controlled substance. Defence counsel took the position that the count was to be withdrawn. The Military Judge advised counsel that the distinction was important since only the panel could acquit the appellant on the 1rst count if the prosecution lead no evidence. He did not have the jurisdiction to do so.

[13] The Military Judge ordered a brief adjournment to allow counsel to consult. When the Court reconvened, the prosecutor advised the Military Judge that the prosecution requested the leave of the Court to withdraw the 1rst count of the indictment. The prosecutor indicated that it had always been understood between counsel that the prosecution would lead no evidence on the 1rst count, on the understanding that guilty pleas would be entered with respect to the other counts. But since only the panel could acquit the accused on the 1rst count, and since counsel did not consider it to be in the interests of justice to convene the panel to dispose of a count on which no evidence would be lead, the prosecutor requested leave to withdraw the 1rst count. Defence counsel confirmed that it had always been the understanding that no evidence would be led on the 1rst count. Defence counsel supported the prosecutor's request for leave to withdraw the 1rst count. The Military Judge granted the prosecutor's request and gave him leave to withdraw the 1rst count of the indictment.

[14] The Military Judge then asked the prosecutor, as he was required to do by subsection 125.12(2) of the *Queen's Regulations and Orders*, if he accepted the appellant's guilty plea with respect to count 6, given that it was alternative to count 5 and less serious than the former. The prosecutor indicated that he accepted the guilty plea, as a result of which the Military Judge entered a stay of proceedings with respect to count 5.

[15] As a result, the Military Judge was called upon to sentence the appellant with respect to:

- one count of unauthorized possession of a marihuana, contrary to sections 130 of the *National Defence Act* and subsection 4(1) of the *Controlled Drugs and Substances Act;* (simple possession)

- two counts of conduct prejudicial to good order and discipline, pursuant to section 129 of the *National Defence Act*, by reason of his unauthorized use of controlled substances, namely marihuana and methamphetamine contrary to section 20.04 of the *Queen's Regulations and Orders*;

- one count of possession of property obtained by the commission of a service offence, namely munitions which were the property of the Canadian Forces, contrary to section 115 of the *National Defence Act*; and

- one count of insubordination by verbally threatening a superior officer, contrary to section 85 of the *National Defence Act*.

[16] Before sentencing the appellant, the Military Judge was provided with a joint submission as to the surrounding circumstances. He then heard evidence from the appellant's company Commander and from the appellant himself. He then heard submissions on the appropriate sentence from the prosecutor and counsel for the appellant

[17] With respect to the issue of possession of marihuana, the Military Judge was required to determine the objective gravity of the offence, as determined by the maximum punishment which could be imposed upon conviction. This required a consideration of the quantity of marihuana which the appellant had in his possession because while subsection 4(1) of the *Controlled Drugs and Substances Act* creates an offence which may be prosecuted either by indictment or by summary conviction, subsection 4(5) stipulates that if the defendant has in his possession less than 30 grams of marihuana, the offence is a summary conviction offence only.

[18] In that regard, the prosecutor noted that the evidence showed that the appellant bought one ounce of marihuana, 28 grams, every two months. Perhaps, he suggested, there were times when the appellant had more than 30 grams in his possession, though the prosecution was not able to prove that he did. The Military Judge interrupted the prosecutor to ask him how he was to determine the objective gravity of the offence (i.e. whether the appellant had in his possession more than 30 grams of marihuana). The prosecutor agreed that the only evidence was that every two months the appellant purchased 28 grams. The Military Judge could not assume that the appellant only bought more marihuana when he had exhausted his supply, nor could he assume that he replenished his supply before exhausting it completely. In the end, the Military Judge concluded that the only conclusion open to him on the evidence was that the greatest amount in the appellant's position at any given time was 28 grams, and thus the objective gravity of the offence was determined by a maximum period of imprisonment of 6 months pursuant to subsection 4(5) of the *Controlled Drugs and Substances Act.*

[19] In his review of the mitigating factors, the prosecutor referred to the delay between the time of the offence and the time of trial. The prosecutor also identified as a mitigating factor that the appellant had been released from the Canadian Forces, which led the Military Judge to inquire whether that measure had not in fact gone some way to resolving the disciplinary issues raised by the appellant's conduct.

[20] In his remarks with respect to sentence, counsel for the appellant dwelt at some length on the time elapsed between the dates of the commission of the offences and the date of the hearing. He noted that the count relating to the use of methamphetamine referred to a time period beginning in 2004, whereas the most recent events related to a time in 2006. In counsel's view, given that the appellant had made incriminating statements with respect to all the counts to which he had pleaded guilty, the delay in bringing the matter to trial, in May 2008, was excessive. Counsel considered that, as a result of this delay, the appellant had been under investigation for some 19 months, which was very hard on the appellant. This lead the military judge to make the following intervention:

> MILITARY JUDGE: He was not under investigation for 19 months. I think we don't agree on the meaning of "under investigation". He was the object of an investigation by the military police, OK, then he was the object of charges six months after the execution of the search warrants. As a result, he was under investigation for drugs for 6 months then he was charged. OK. At that point, he was the object of charges. He was not under investigation at that point, are we agreed.
>
> DEFENCE COUNSEL (CAPTAIN TREMBLAY): We are agreed. We are agreed on that point.
>
> [Emphasis added.]
>
> (Appeal Book, p. 193.)

[21] On the issue of the appropriate sentence, counsel for the appellant noted that in order for a sentence to give rise to general deterrence, it must follow soon after the commission of the offence,

otherwise those to be deterred lose sight of the facts and the effect of the sentence is diminished. In this case, the appellant had been progressively withdrawn from B Company and was no longer a member of the Canadian Forces. Counsel considered that the time taken to bring the matter to trial was inconsistent with the alleged need for general deterrence.

[22] Counsel for the appellant also noted that, as a result of the appellant's release from the Canadian Forces, the range of penalties available to the Military Judge was considerably reduced. In fact, there were realistically only three possibilities: warning, fine and imprisonment. While dismissal with disgrace was theoretically available, it was rarely invoked in the case of a person who had already been released from the Canadian Forces. Counsel suggested that imprisonment was a measure of last resort and the fact that the appellant had been released from the Canadian Forces was a factor to be considered in assessing appropriateness of such a sentence. Counsel submitted that the appropriate sentence was a fine of $3,000, payable in monthly installments of $150.

THE MILITARY JUDGE'S DECISION

[23] The Military Judge began his decision by recalling that, in fixing a sentence, a court must impose the least intrusive measure appropriate to the circumstances. The Military Judge then set out the sentencing principles set out in the *Criminal Code*, R.S.C. 1985, c. C-46, which are applicable to the extent that they are not incompatible with scheme of penalties set out in the *National Defence Act*. He enumerated these principles as follows: first, the protection of the public, including the interests of the Canadian Forces; second, the punishment of the offender; third, deterrence, both

general and specific; fourth, where necessary, the separation of the offender from society including members of the Canadian Forces; fifth, consistency of sentences between persons charged with similar offences committed in similar circumstances; sixth, the rehabilitation and reintegration of the offender.

[24] Having considered these principles, the Military Judge concluded that the protection of the public required the imposition of a sentence which emphasized general deterrence, then specific deterrence, denunciation and punishment of the offender.

[25] The Military Judge then listed the following aggravating factors:

- the objective gravity of the offences as determined by the maximum sentence. In the case of the charge of possession of less than 30 grams of marihuana (count 2 of the Indictment), the maximum sentence is a $1,000 fine or a period of imprisonment of 6 months, which the Military Judge considered to be relatively serious. With respect to the other counts, all were subject to a maximum sentence of dismissal with disgrace, which made them objectively serious offences;

- the subjective gravity of the offences. In so far as the counts alleging drug offences are concerned the following factors were considered relevant:

    a. the length of time during which the appellant possessed and used illegal drugs;
    b. the significant quantity of the drugs, even if the amount did not exceed 30 grams;
    c. the context of the drug use, that is in the presence of other members of the Canada Forces while socializing with them at his home or elsewhere;
    d. the appellant's previous history of drug use and of attempts by his superiors to assist him to terminate this use;
    e. the appellant's total indifference to consequences of his drug use.

[26] In relation to the count relating to unauthorized possession of munitions, the Military Judge noted:

a. the nature of the munitions;
b. the absence of any intention to return the munitions;
c. the false declaration made to military authorities at the conclusion of the military exercises at which the munitions had been obtained.

[27] In relation to the count of insubordination, the following facts were considered:

a. the nature of the words spoken which were designed to make the victim fear for his physical integrity;
b. the rank of the superior who was threatened.

[28] The Military Judge also considered the following mitigating circumstances:

a. the fact that the appellant had pled guilty indicated a degree of remorse and a desire to be a contributing member of society;
b. the absence of a disciplinary file or criminal record for offences of a similar nature;
c. specific factors related to individual offences, namely:
    i. the fact that appellant made a choice not to use drugs on Canadian Forces property or during his periods of duty.
    ii. the fact that unauthorized possession of munitions is not a widespread problem coupled with the fact that the munitions were left to be seen by others.
    iii. with respect to the insubordination, the history of personal difficulties between the appellant and the superior who was threatened.

d. the appellant's age and his potential for advancement in Canadian society;
e. the fact that the appellant had to appear in open court to face the charges against him;
f. the delay in bringing the charges to trial;
g. the fact that the appellant's military career was terminated as a result of his drug use and these charges, on the ground that the Canadian Forces considered him unsuitable for further service. While this is not a punitive measure, in and of itself, it is a matter to be considered in imposing sentence.

[29] The Military Judge then reviewed the evidence with respect to the appellant's character. He noted that the appellant understood that he had contravened important rules as to the possession and

use of illegal drugs but he also noted that the appellant maintained that his drug use did not pose a problem in the military context because of the steps he took to ensure that it did not influence his on-duty performance. The Military Judge was somewhat taken aback by the appellant's admission that he continued to use drugs, even while facing charges related to the consumption of illegal drugs. He saw in this evidence that the appellant had no understanding of the societal norms embodied in Canada's drug legislation.

[30] This led him to observe that the appellant had difficulty accepting that his opinions were not always accepted, particularly in the context of the exercise of authority by a superior.

[31] The Military Judge took note of the Supreme Court's decision in *R v. Gladue*, [1999], 1 S.C.R. 688, in which it was held that incarceration must be the sentence of last resort, to be used when no other form of sanction is appropriate to the circumstances of the offender and the offence. This approach has also been affirmed by the Court Martial Appeal Court in *R v. Battista*, 2006 CMAC 1.

[32] The Military Judge noted the parallel between, in the civilian context, a suspended sentence in which the convicted person serves his or her sentence in the community in those circumstances where correctional and punitive considerations can be combined and, in the military context, detention which seeks to rehabilitate the offender and to instill in him those values and skills which are unique to members of the Canadian Forces. Detention may be seen as having elements of deterrence and denunciation without, at the same time, stigmatizing offenders to the same extent as

a period of imprisonment. This appears in notes following sections 104.04 and 104.09 of the *Queen's Regulations and Orders.*

[33] The Military Judge went on to note that where a member of the Canadian Forces has been released, the objectives sought by a sentence of detention are no longer relevant so that imprisonment is the only other form of incarceration available in the scale of punishment for military offenders. Furthermore, where the reprehensible conduct is not merely a breach of discipline but is criminal in nature, the sentencing Court must consider the offence not only in light of those considerations which are unique to members of the Canadian Forces but must also consider them from the point of view of its exercise of its concurrent criminal jurisdiction.

[34] In this case, the Military Judge noted, four of the offences to which the appellant pleaded guilty were disciplinary in nature and one, possession of cannabis, was a criminal matter. Simple possession, as the Military Judge had noted in other cases, did not necessarily lead to a sentence of incarceration. However, when possession of a drug was combined with other disciplinary offences and where the Court took into account all the aggravating and mitigating factors, as well as the offender's state of mind with respect to all of the offences, both at the time of their commission as well as at the time of sentencing, it appeared to the Military Judge that a period of incarceration was the only adequate sanction and that there was no other sanction or combination of sanctions appropriate for the offences and the offender. The Military Judge concluded that imprisonment was necessary for the protection of the public and the maintenance of discipline.

[35] The only remaining question for the Military Judge was the length of the period of imprisonment. Had it not been for the mitigating factors which the Military Judge had previously set out, he would have had no hesitation in imposing on the appellant a sentence of imprisonment for a period in excess of 60 days. However, with a view to allowing the appellant to get on with his life following his release from the Canadian Forces, the Military Judge was prepared to consider a shorter period. In the result, the Military Judge imposed a sentence of 30 days imprisonment.

THE GROUNDS OF APPEAL

[36] In his Application for Leave to Appeal and Notice of Appeal, the appellant appealed from both his conviction and from his sentence, listing four questions of law or mixed fact and law as the grounds of his appeal. By the time the matter came forward for hearing, the appellant had abandoned three of the original four questions and had added a new question which had not previously been raised. The grounds argued before this Court were:

1- The Military Judge erred in fact and in law in imposing a sentence of imprisonment for 30 days.

2- The Military Judge erred in law in finding the appellant guilty of an offence whose prosecution was barred by a limitation period.

[37] The second question, which did not appear in the original notice of appeal, deals with the conviction for simple possession of marihuana. Since the criminal character of this offence was a factor in the Military Judge's determination of the appropriate sentence, I propose to deal with this question first because, if the appellant is successful on this ground, the question of the severity of sentence must be reviewed in light of that success.

ANALYSIS

The appeal against conviction for simple possession

[38] The question of limitation periods for the prosecution of service offences is dealt with at section 69 of the *National Defence Act* which, as of the date of trial, provided as follows:

69 A person who is subject to the Code of Service Discipline at the time of the alleged commission of a service offence may be charged, dealt with and tried at any time under the Code, subject to the following:	69. Toute personne qui était justiciable du code de discipline militaire au moment où elle aurait commis une infraction d'ordre militaire peut être accusée, poursuivie et jugée pour cette infraction sous le régime de ce code, compte tenu des restrictions suivantes :
(a) if the service offence is punishable under section 130 or 132 and the act or omission that constitutes the service offence would have been subject to a limitation period had it been dealt with other than under the Code, that limitation period applies; and	a) si le fait reproché est punissable par le droit commun en application des articles 130 ou 132, la prescription prévue par le droit commun pour cette infraction s'applique;
(b) the person may not be tried by summary trial unless the trial begins before the expiry of one year after the day on which the service offence is alleged to have been committed.	b) nul ne peut être jugé sommairement à moins que le procès sommaire ne commence dans l'année qui suit la prétendue perpétration de l'infraction.

This section was amended in 2008 but the amendments are not material to the issues in this matter.

[39] For present purposes, the important feature of section 69 is the fact that it preserves the limitation period applicable to an offence which is made a service offence by sections 130 or 132 of the *National Defence Act*:

130.(1) An act or omission	130. (1) Constitue une infraction à la présente section tout acte ou omission :

(a) that takes place in Canada and is punishable under Part VII, the *Criminal Code* or any other Act of Parliament, or	a) survenu au Canada et punissable sous le régime de la partie VII de la présente loi, du *Code criminel* ou de toute autre loi fédérale;
(b) that takes place outside Canada and would, if it had taken place in Canada, be punishable under Part VII, the *Criminal Code* or any other Act of Parliament,	b) survenu à l'étranger mais qui serait punissable, au Canada, sous le régime de la partie VII de la présente loi, du *Code criminel* ou de toute autre loi fédérale.
is an offence under this Division and every person convicted thereof is liable to suffer punishment as provided in subsection (2).	Quiconque en est déclaré coupable encourt la peine prévue au paragraphe (2).
…	[…]
132. (1) An act or omission that takes place outside Canada and would, under the law applicable in the place where the act or omission occurred, be an offence if committed by a person subject to that law is an offence under this Division, and every person who is found guilty thereof is liable to suffer punishment as provided in subsection (2).	132.(1) Tout acte ou omission survenu à l'étranger et constituant une infraction au droit du lieu constitue également une infraction à la présente section, passible, sur déclaration de culpabilité, de la peine prévue au paragraphe (2).

[40] In the present case, Count 2 of the Indictment preferred against the appellant charged him with an offence punishable pursuant to section 130 of the *National Defence Act*, namely, possession of a substance, contrary to subsection 4(1) of the *Controlled Drugs and Substances Act.* As a result, any limitation period applicable to the offence created by section 4(1) of the *Controlled Drugs and Substances Act* would be applicable to the appellant in a prosecution for that offence under the *Code of Service Discipline*.

[41] Subsection 4(1) of the *Controlled Drugs and Substances Act* must be read in conjunction with subsection 4(5) of the same Act:

4.(1) Except as authorized under the regulations, no person shall possess a substance included in Schedule I, II or III.	4. (1) Sauf dans les cas autorisés aux termes des règlements, la possession de toute substance inscrite aux annexes I, II ou III est interdite.
…	[…]
(5) Every person who contravenes subsection (1) where the subject-matter of the offence is a substance included in Schedule II in an amount that does not exceed the amount set out for that substance in Schedule VIII is guilty of an offence punishable on summary conviction and liable to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months, or to both.	(5) Quiconque contrevient au paragraphe (1) commet, dans le cas de substances inscrites à la fois à l'annexe II et à l'annexe VIII, et ce pourvu que la quantité en cause n'excède pas celle mentionnée à cette dernière annexe, une infraction punissable sur déclaration de culpabilité par procédure sommaire et passible d'une amende maximale de mille dollars et d'un emprisonnement maximal de six mois, ou de l'une de ces peines.

[42] It is not contentious that marihuana (cannabis) is a substance listed in Schedule II to the Act, nor is it contentious that the amount listed in Schedule VIII to the Act is 30 grams.

[43] The designation of possession of less that 30 grams of marihuana as a summary conviction offence brings into play the limitation period applicable to summary conviction offences, found at section 786 of the *Criminal Code*:

786.(1) Except where otherwise provided by law, this Part applies to proceedings as defined in this Part.	786.(1) Sauf disposition contraire de la loi, la présente partie s'applique aux procédures définies dans cette partie.

(2) No proceedings shall be instituted more than six months after the time when the subject-matter of the proceedings arose, unless the prosecutor and the defendant so agree.	(2) À moins d'une entente à l'effet contraire entre le poursuivant et le défendeur, les procédures se prescrivent par six mois à compter du fait en cause.

(emphasis added)

[44] The closing words of subsection 786(2) are particularly relevant in the context of this case since the question in issue is whether the prosecutor and the appellant agreed to proceed with the charge of simple possession, knowing that the limitation period had expired. The error of law alleged by the appellant can only be established if Count 2 of the Indictment, relating to possession of marihuana, was in fact statute barred and the prosecutor and the appellant had not agreed to waive the limitation period. Consent can be explicit or it can be implied from all of the surrounding circumstances. Clearly, an explicit waiver, noted on the Court record, is the preferred practice but the absence of an explicit waiver does not preclude the Court from drawing the inference, on the basis of the surrounding circumstances, that the appellant did in fact waive his right to the benefit of the limitation period: see *R. v. Morin*, [1992] 1 S.C.R. 771, at paragraphs 37 and 38. .

[45] The issue of the limitation period cannot have gone unnoticed, given the discussion before the Military Judge as to whether the appellant had more or less than 30 grams of marihuana in his possession. The Military Judge's conclusion that the appellant's possession was limited to less than 30 grams of marihuana, and was therefore a summary conviction offence, had two important consequences: the maximum punishment was a fine of $1,000 or a period of incarceration to a

maximum of six months or both, and the limitation period for prosecution was six months. It is improbable that counsel were aware of one of those consequences but not of the other.

[46] The appellant was represented by experienced counsel who negotiated a plea bargain with the prosecutor. It appears that the original agreement was that the appellant would plead guilty to the lesser charge of simple possession of marihuana and in return the prosecutor would lead no evidence on the more serious charge of trafficking in a controlled substance (Count 1). A dismissal of the charge of trafficking would act as a defence of *autrefois acquit*, in any subsequent attempt to prosecute the appellant on that charge.

[47] When the Military Judge pointed out that he lacked the jurisdiction to enter an acquittal, on a charge in respect of which a not guilty plea had been entered, the prosecutor and the appellant's counsel sought an adjournment for the purpose of further consultations. As a result, when the Court reconvened, the prosecutor sought, and was granted, leave to withdraw Count 1, the charge of trafficking in a controlled substance. It seems to me that experienced defence counsel would have recognized that his client's interests were best served by proceeding with the possession charge, even if it would otherwise be statute barred, since the effect of raising the limitation defence would be to have the prosecution proceed with the trafficking charge, where the consequences of a conviction were substantially more serious. The circumstances surrounding the plea bargain, including the benefit which the appellant derived from it, supports the inference that he knowingly waived the six month limitation period applicable to the possession charge.

[48] Another factor which supports the inference that the appellant waived his right to invoke the limitation defence is the extended discussion which occurred between defence counsel and the Military Judge as to the delay in bringing the matter to trial. In the course of that discussion, specific reference was made to the fact that the appellant was charged six months after the execution of the search warrant. Given that the relevant dates were known, the failure to refer to any limitation issue is a persuasive indication that the prosecution and the defence had agreed to proceed notwithstanding the expiry of the limitation period.

[49] These considerations lead me to infer that the appellant, as part of his plea bargain with the prosecutor, agreed to waive the six month limitation period applicable to the charge of simple possession in return for the prosecutor's agreement to withdraw Count 1 which alleged the more serious issue of trafficking in a controlled substance. This inference could have been rebutted by the appellant who raised this issue for the first time in his Memorandum of Fact and Law, after having obtained new counsel. If it were the case that the issue of the limitation period had never been discussed by the appellant and his counsel at trial, one would expect that the appellant would have sought leave to put that evidence before this Court. Since he has not done so, there is nothing to rebut the inference which the Court is in a position to draw from the whole of the surrounding circumstances.

[50] As a result, I find that there is no merit to this ground of appeal.

The appeal against sentence

[51] The appellant's right of appeal to this Court from the severity of the sentence imposed on him arises from section 230 of the *National Defence Act*:

230. Every person subject to the Code of Service Discipline has, subject to subsection 232(3), the right to appeal to the Court Martial Appeal Court from a court martial in respect of any of the following matters:	230.Toute personne assujettie au code de discipline militaire peut, sous réserve du paragraphe 232(3), exercer un droit d'appel devant la Cour d'appel de la cour martiale en ce qui concerne les décisions suivantes d'une cour martiale :
(a) with leave of the Court or a judge thereof, the severity of the sentence, unless the sentence is one fixed by law;	a) avec l'autorisation de la Cour d'appel ou de l'un de ses juges, la sévérité de la sentence, à moins que la sentence n'en soit une que détermine la loi;
…	[…]

[52] The powers of this Court when hearing an appeal from the severity of sentence are found at section 240.1 of the *National Defence Act*:

240.1 On the hearing of an appeal respecting the severity of a sentence, the Court Martial Appeal Court shall consider the fitness of the sentence and, if it allows the appeal, may, on such evidence as it thinks fit to require or receive, substitute for the sentence imposed by the court martial a sentence that is warranted in law.	240.1 Si elle fait droit à un appel concernant la sévérité de la sentence, la Cour d'appel de la cour martiale considère la justesse de la sentence et peut, d'après la preuve qu'elle croit utile d'exiger ou de recevoir, substituer à la sentence infligée par la cour martiale la sentence qui est justifiée en droit.

[53] The objectives to be met in the sentencing of an offender are set out at section 718 of the *Criminal Code*, modified as necessary to meet the particular requirements of the Canadian Forces :

718.The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:	718. Le prononcé des peines a pour objectif essentiel de contribuer, parallèlement à d'autres initiatives de prévention du crime, au respect de la loi et au maintien d'une société juste, paisible et sûre par l'infliction de sanctions justes visant un ou plusieurs des objectifs suivants :
(*a*) to denounce unlawful conduct;	*a*) dénoncer le comportement illégal;
(*b*) to deter the offender and other persons from committing offences;	*b*) dissuader les délinquants, et quiconque, de commettre des infractions;
(*c*) to separate offenders from society, where necessary;	*c*) isoler, au besoin, les délinquants du reste de la société;
(*d*) to assist in rehabilitating offenders;	*d*) favoriser la réinsertion sociale des délinquants;
(*e*) to provide reparations for harm done to victims or to the community; and	*e*) assurer la réparation des torts causés aux victimes ou à la collectivité;
(*f*) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.	*f*) susciter la conscience de leurs responsabilités chez les délinquants, notamment par la reconnaissance du tort qu'ils ont causé aux victimes et à la collectivité.

[54] The fundamental principle of sentencing is that the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender: see section 718.1 of the *Criminal Code*. As noted by this Court in *R v. Ellis*, 2010 CMAC 3, at paragraphs 14 and 15, section 112.48 of the QR&O expresses this principle of proportionality differently, referring to the offender's previous character rather than to his degree of responsibility for the offence. I agree with

the view expressed in *Ellis* that proportionality in sentencing must reflect the individual's degree of responsibility for the offence with which he is charged as opposed to his past conduct.

[55] The *Criminal Code* also identifies a series of principles to be taken into account in determining the fitness of the sentence: see section 718.2. Two of those principles deal specifically with imprisonment:

718.2 A court that imposes a sentence shall also take into consideration the following principles:	718.2 Le tribunal détermine la peine à infliger compte tenu également des principes suivants :
…	[…]
(*d*) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and	*d*) l'obligation, avant d'envisager la privation de liberté, d'examiner la possibilité de sanctions moins contraignantes lorsque les circonstances le justifient;
(*e*) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.	*e*) l'examen de toutes les sanctions substitutives applicables qui sont justifiées dans les circonstances, plus particulièrement en ce qui concerne les délinquants autochtones.

[56] Finally, an appellate court must maintain a considerable reserve when reviewing issues of fitness of sentence. It should intervene only if it is satisfied that the sentence is clearly demonstrably unfit: see R. v. M. (C.A.) [1996] 1 S.C.R. 500 at p. 565, R. v. Dixon, [2005] C.M.A.J. No. 2 at paragraph 18.

[57] The issue of the fitness of the sentence is raised by the decision of this Court in *R. v. Tupper*, [2009] C.M.A.J., No. 9. In that case, this Court examined the effect of the administrative release of an offender from the Canadian Forces in the assessment of an appropriate sentence. It found that the sentence of detention and dismissal with disgrace which had been imposed on the appellant were overtaken by the appellant's administrative release from the Canadian Forces. The Court found that, as a civilian, the appellant was not subject to punishment which was specifically reserved to soldiers. Dealing specifically with the sentence that the appellant serve a period of detention, the Court commented that "he cannot be placed back into a uniform to serve a period of detention in military barracks.": see *R. v. Tupper*, previously cited, at paragraph 67.

[58] The sentence in question in *Tupper* included a period of detention. In the military context, detention is a form of incarceration which has a specific objective of rehabilitation of the offender as a member of the Canadian Forces. This is clearly set out in the note to section 104.09 of the QR&O which provides as follows:

(A) In keeping with its disciplinary nature, the punishment of detention seeks to rehabilitate service detainees, by re-instilling in them the habit of obedience in a structured, military setting, through a regime of training that emphasizes the institutional values and skills that distinguish the Canadian Forces member from other members of society. Specialized treatment and counselling programmes to deal with drug and alcohol dependencies and similar health problems will also be made available to those service detainees who require them. Once the sentence of detention has been served,	(A) Comme pour toute mesure disciplinaire, la détention est une punition qui vise à réhabiliter les détenus militaires et à leur redonner l'habitude d'obéir dans un cadre militaire structuré. Ces derniers seront donc soumis à un régime d'entraînement qui insiste sur les valeurs et les compétences propres aux membres des Forces canadiennes, pour leur faire voir ce qui les distingue des autres membres de la société. Des soins spécialisés et des programmes d'orientation seront offerts par ailleurs aux détenus militaires qui en auront besoin pour

the member will normally be returned to his or her unit without any lasting effect on his or her career.	les aider à surmonter leur dépendance aux drogues et à l'alcool ou à régler des ennuis de santé analogues. Une fois la peine de détention purgée, le militaire retournera à son unité, en temps normal, sans que sa carrière n'en souffre à long terme

[59] On the other hand, imprisonment, in the military context, is seen as a prelude to the return of an offender to civil society. This also is made clear in the notes to the relevant provision of the QR&O, in this case, section 104.04:

(B) Service prisoners and service convicts typically require an intensive programme of retraining and rehabilitation to equip them for their return to society following completion of the term of incarceration. Civilian prisons and penitentiaries are uniquely equipped to provide such opportunities to inmates. Therefore, to facilitate their reintegration into society, service prisoners and service convicts who are to be released from the Canadian Forces will typically be transferred to a civilian prison or penitentiary as soon as practical within the first 30 days following the date of sentencing. The member will ordinarily be released from the Canadian Forces before such a transfer is effected.	(B) Les prisonniers et les condamnés militaires auront besoin le plus souvent d'un programme intensif de recyclage et de réadaptation en vue de se réinsérer dans la société au terme de leur incarcération. Les prisons et les pénitenciers civils possèdent les ressources voulues pour offrir ce genre de programme aux détenus. Dans le but de faciliter leur conversion à la vie civile, les prisonniers et les condamnés militaires qui sont censés être libérés des Forces canadiennes seront transférés, en règle générale, dans une prison ou un pénitencier civil le plus rapidement possible dans les 30 jours suivant la sentence. Le militaire sera d'ordinaire libéré des Forces canadiennes avant son transfert dans un établissement civil.

[60] The Court's decision in *Tupper* reflects the fact the sentence of detention no longer served a military objective once the offender was released. For its own reasons, the Canadian Forces had concluded that the offender was not a suitable candidate for a continuing military career. The sentence of detention therefore was moot.

[61] On the other hand, a sentence of imprisonment serves a different function but, once again, the offender's release from the Canadian Forces must be considered in deciding whether the sentence of imprisonment serves a military or a correctional purpose. It appears to me that the focus, in cases of release from the Canadian Forces prior to the imposition of a sentence, should not be solely on the question of status, that is, whether the punishment is one which can be imposed on a civilian, but also on the issue of whether the offender's change in status undermines the military and correctional objectives of the sentence which was imposed.

[62] In this case, the Military Judge placed great emphasis on the factors of general and specific deterrence in the context of the Canadian Forces. In doing so, he was influenced by the appellant's essentially unrepentant attitude towards his drug use and his poor attitude to authority. If the appellant were to return to his unit following completion of his sentence, one can see that his imprisonment would serve as a warning to other members of the unit should they be inclined to engage in similar conduct. However, since the appellant will simply take up his civilian life at the point at which it was interrupted by his period of imprisonment, the impact of his imprisonment on others in the Canadian Forces will be significantly diminished. Similarly, since the appellant is now a civilian, the objective of specific deterrence in the military context simply has no foundation.

Whether the appellant continues to consume drugs as a civilian will have absolutely no impact on military discipline.

[63] The Military Judge also based his sentencing decision on the combination of the criminal offence of possession of marihuana with the four disciplinary offences with which he was charged. These disciplinary offences, it will be recalled, were two counts of conduct to the prejudice of good order and discipline relating to his use of marihuana and methamphetamine, one count of unauthorized possession of munitions, as well as one count of insubordination by threatening a superior. The Military Judge was of the view that, having regard to this combination of offences, as well as the aggravating and mitigating factors which he had previously identified, together with the appellant's attitude to his offences, only a sentence of imprisonment was adequate for the protection of the public and the maintenance of discipline.

[64] If the public, in this context, is the Canadian Forces, it is apparent that the objective of protecting the public was significantly advanced by removing the appellant from the public, by means of his administrative release. Furthermore, if one of the purposes of imprisonment is to prepare an offender for his return to civil society, a sentence of imprisonment serves no purpose if the offender has already been returned to civil society at the time sentence is imposed. There may be cases where the offender's conduct is so egregious that the objectives of denunciation and punishment are paramount, so that the imposition and execution of a sentence of imprisonment following the offender's administrative release from the Canadian Forces would be justified but, in

those cases, the military and correctional objectives of the sentence would be advanced, in spite of the offender's administrative release.

[65] In the circumstances of this case, I find that the Military Judge did not establish that a term of imprisonment was the most appropriate and least restrictive sanction, having regard to the fact that the appellant had previously been released from the Canadian Forces on an administrative basis. In my view, the sentence imposed was demonstrably unfit.

[66] I would therefore grant the appellant leave to appeal from the severity of the sentence imposed and I would allow his appeal.

[67] Having regard to the preceding discussion, I am of the view that the least intrusive and the most appropriate sentence is a fine of $3,000, payable in installments of $300 per month,

commencing September 1, 2010. I would therefore substitute that fine for the sentence of imprisonment. Pursuant to subsection 145(2) of the *National Defence Act*, that in default of payment, sections 734 and 734.6 of the *Criminal Code* shall apply to the recovery of the fine.

"J.D. Denis Pelletier"

J.A.

"I agree:

Johanne Trudel J.A."

COURNOYER J.A. (Dissenting Reasons)

INTRODUCTION

[68] I have read the reasons of my colleague Justice Pelletier. Like him, I would dismiss the appeal from the conviction on the second count. However, with respect, I am of the opinion that this Court must not intervene with regard to the sentence imposed by the military judge.

LIMITATION PERIOD

[69] I share Justice Pelletier's conclusion that the appellant may not claim the benefit of the limitation period in subsection 786(2) of the *Criminal Code* with respect to the second count. I arrive at this conclusion for a slightly different reason.

[70] The second count alleged that the appellant committed an offence punishable under section 130 of the *National Defence Act* in violation of subsection 4(1) of the *Controlled Drugs and Substances Act*.

[71] In accordance with subsection 112.51(3) of the QR&O, the prosecution read the summary of circumstances. The summary established that the appellant had in his possession, between the months of July 2005 and November 2006, one ounce of marijuana every two months. The appellant admitted these facts.

[72] When the military judge determined and passed sentence on the appellant, he stated that the appellant had been found guilty of possession of less than 30 g of marijuana, in violation of subsection 4(1) of the *Controlled Drugs and Substances Act*.

[73] The record does not contain any document or statement to that effect, and the certification of the military judge does not establish this either.

[74] The exchanges between the military judge and the parties during sentencing show that there seemed to be a mistaken belief that the quantity of drugs in the appellant's possession during the period of time covered by the second count was less than 30 g.

[75] However, as the prosecutor rightly pointed out several times to the military judge, the quantity at issue was 28 g every two months. The quantity of marijuana in the appellant's possession between the months of July 2005 and November 2006 had to have been more than 30 g, that is, more than 200 g. It should be recalled that the appellant admitted these facts.

[76] The appellant's admission of guilt and other admissions were not limited in law or in fact to a quantity of drugs of less than 30 g.

[77] If the military judge's statement, in his sentencing decision, regarding the quantity of drugs is to be considered as a finding of fact, I believe that the military judge committed a palpable and overriding error in that respect. In any event, the appellant cannot now claim that the quantity of

drugs in his possession during the period covered by the second count was less than 30 g after having admitted to a quantity of more than 30 g during sentencing.

[78] In the circumstances, the appellant cannot argue that "expiry of the limitation period bars entirely proceedings in respect of an offence that may be prosecuted only by way of summary conviction": *R. v. Dudley*, [2009] 3 S.C.R. 570, para. 31.

[79] The appellant's argument is without merit.

SEVERITY OF THE SENTENCE

[80] Justice Pelletier proposes allowing the appeal from the sentence imposed by the military judge. He believes that the most appropriate and less restrictive sentence is a fine of $3,000. For the following reasons, I believe that we cannot intervene.

[81] First, it must be recalled that, "[f]ar from being an exact science or an inflexible predetermined procedure, sentencing is primarily a matter for the trial judge's competence and expertise. The trial judge enjoys considerable discretion because of the individualized nature of the process": *R. v. L.M.*, [2008] 2 S.C.R. 163, para. 17.

[82] The Supreme Court, in *R. v. Nasogaluak,* [2010] 1 S.C.R. 206, recently summarized the principles of sentencing and the appellate courts' power to intervene in this regard.

[83] For a proper understanding of my conclusion, I believe that it is essential to reproduce in full, despite its length, a long excerpt from Justice Lebel's summary of these issues in *Nasogaluak*.

[84] Justice Lebel wrote the following at paragraphs 39 to 46:

> The objectives and principles of sentencing were recently codified in ss. 718 to 718.2 of the *Criminal Code* to bring greater consistency and clarity to sentencing decisions. Judges are now directed in s. 718 to consider the fundamental purpose of sentencing as that of contributing, along with crime prevention measures, to "respect for the law and the maintenance of a just, peaceful and safe society". This purpose is met by the imposition of "just sanctions" that reflect the usual array of sentencing objectives, as set out in the same provision: denunciation, general and specific deterrence, separation of offenders, rehabilitation, reparation, and a recent addition: the promotion of a sense of responsibility in the offender and acknowledgement of the harm caused to the victim and to the community.
>
> The objectives of sentencing are given sharper focus in s. 718.1, which mandates that a sentence be "proportionate to the gravity of the offence and the degree of responsibility of the offender". Thus, whatever weight a judge may wish to accord to the objectives listed above, the resulting sentence *must* respect the fundamental principle of proportionality. Section 718.2 provides a non-exhaustive list of secondary sentencing principles, including the consideration of aggravating and mitigating circumstances, the principles of parity and totality, and the instruction to consider "all available sanctions other than imprisonment that are reasonable in the circumstances", with particular attention paid to the circumstances of aboriginal offenders.
>
> It is clear from these provisions that the principle of proportionality is central to the sentencing process (*R. v. Solowan*, 2008 SCC 62, [2008] 3 S.C.R. 309, at para. 12). This emphasis was not borne of the 1996 amendments to the *Code* but, rather, reflects its long history as a guiding principle in sentencing (e.g. *R. v. Wilmott* (1966), 58 D.L.R. (2d) 33 (Ont. C.A.)). It has a constitutional dimension, in that s. 12 of the *Charter* forbids the imposition of a grossly disproportionate sentence that would outrage society's standards of decency. But what does proportionality mean in the context of sentencing?
>
> For one, it requires that a sentence not *exceed* what is just and appropriate, given the moral blameworthiness of the offender and the gravity of the offence. In this sense, the principle serves a limiting or restraining function. However, the rights-based, protective angle of proportionality is counter-balanced by its alignment with the "just deserts" philosophy of sentencing, which seeks to ensure that offenders are

held responsible for their actions and that the sentence properly reflects and condemns their role in the offence and the harm they caused (*R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 81; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at pp. 533-34, *per* Wilson J., concurring). Understood in this latter sense, sentencing is a form of judicial and social censure (J. V. Roberts and D. P. Cole, "Introduction to Sentencing and Parole", in Roberts and Cole, eds., *Making Sense of Sentencing* (1999), 3, at p. 10). Whatever the rationale for proportionality, however, the degree of censure required to express society's condemnation of the offence is always limited by the principle that an offender's sentence must be equivalent to his or her moral culpability, and not greater than it. The two perspectives on proportionality thus converge in a sentence that both speaks out against the offence and punishes the offender no more than is necessary.

The language in ss. 718 to 718.2 of the *Code* is sufficiently general to ensure that sentencing judges enjoy a broad discretion to craft a sentence that is tailored to the nature of the offence and the circumstances of the offender. The determination of a "fit" sentence is, subject to some specific statutory rules, an individualized process that requires the judge to weigh the objectives of sentencing in a manner that best reflects the circumstances of the case (*R. v. Lyons*, [1987] 2 S.C.R. 309; *M. (C.A.)*; *R. v. Hamilton* (2004), 72 O.R. (3d) 1 (C.A.)). No one sentencing objective trumps the others and it falls to the sentencing judge to determine which objective or objectives merit the greatest weight, given the particulars of the case. The relative importance of any mitigating or aggravating factors will then push the sentence up or down the scale of appropriate sentences for similar offences. The judge's discretion to decide on the particular blend of sentencing goals and the relevant aggravating or mitigating factors ensures that each case is decided on its facts, subject to the overarching guidelines and principles in the *Code* and in the case law.

The wide discretion granted to sentencing judges has limits. It is fettered in part by the case law that has set down, in some circumstances, general ranges of sentences for particular offences, to encourage greater consistency between sentencing decisions in accordance with the principle of parity enshrined in the *Code*. But it must be remembered that, while courts should pay heed to these ranges, they are guidelines rather than hard and fast rules. A judge can order a sentence outside that range as long as it is in accordance with the principles and objectives of sentencing. Thus, a sentence falling outside the regular range of appropriate sentences is not necessarily unfit. Regard must be had to all the circumstances of the offence and the offender, and to the needs of the community in which the offence occurred.

The discretion of a sentencing judge is also constrained by statute, not only through the general sentencing principles and objectives enshrined in ss. 718 to 718.2 articulated above but also through the restricted availability of certain sanctions in the *Code*. For instance, s. 732 prohibits a court from ordering that a sentence of imprisonment exceeding 90 days be served intermittently. Similar restrictions exist

for sanctions such as discharges (s. 730), fines (s. 734), conditional sentences (s. 742.1) and probationary terms (s. 731). Parliament has also seen fit to reduce the scope of available sanctions for certain offences through the enactment of mandatory minimum sentences. A relatively new phenomenon in Canadian law, the minimum sentence is a forceful expression of governmental policy in the area of criminal law. Certain minimum sentences have been successfully challenged under s. 12 of the *Charter* on the basis that they constituted grossly disproportionate punishment in the circumstances of the case (*R. v. Smith*, [1987] 1 S.C.R. 1045; *R. v. Bill* (1998), 13 C.R. (5th) 125 (B.C.S.C.)), while others have been upheld (*R. v. Morrisey*, 2000 SCC 39, [2000] 2 S.C.R. 90). Absent a declaration of unconstitutionality, minimum sentences must be ordered where so provided in the *Code*. A judge's discretion does not extend so far as to override this clear statement of legislative intent.

Appellate courts grant sentencing judges considerable deference when reviewing the fitness of a sentence. In *M. (C.A.)*, Lamer C.J. cautioned that a sentence could only be interfered with if it was "demonstrably unfit" or if it reflected an error in principle, the failure to consider a relevant factor, or the over-emphasis of a relevant factor (para. 90; see also *R. v. L.M.*, 2008 SCC 31, [2008] 2 S.C.R. 163, at paras. 14-15; *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, at paras. 123-26; *R. v. McDonnell*, [1997] 1 S.C.R. 948, at paras. 14-17; *R. v. Shropshire*, [1995] 4 S.C.R. 227). As Laskin J.A. explained in *R. v. McKnight* (1999), 135 C.C.C. (3d) 41 (Ont. C.A.), at para. 35, however, this does not mean that appellate courts can interfere with a sentence simply because they would have weighed the relevant factors differently:

> To suggest that a trial judge commits an error in principle because in an appellate court's opinion the trial judge gave too much weight to one relevant factor or not enough weight to another is to abandon deference altogether. The weighing of relevant factors, the balancing process is what the exercise of discretion is all about. To maintain deference to the trial judge's exercise of discretion, the weighing or balancing of relevant factors must be assessed against the reasonableness standard of review. Only if by emphasizing one factor or by not giving enough weight to another, the trial judge exercises his or her discretion unreasonably should an appellate court interfere with the sentence on the ground the trial judge erred in principle.

[Emphasis added.]

[85] An appellate court's corridor of intervention in sentencing is therefore very narrow. The rationale for this rule is set out as follows by Justice Lebel in *R. v. L.M.*, [2008] 2 S.C.R. 163, para. 15:

> Owing to the profoundly contextual nature of the sentencing process, in which the trier of fact has broad discretion, the standard of review to be applied by an appellate court is one based on deference. The sentencing judge has "served on the front lines of our criminal justice system" and possesses unique qualifications in terms of experience and the ability to assess the submissions of the Crown and the offender (*M. (C.A.)*, at para. 91). In sum, in the case at bar, the Court of Appeal was required — for [functional] reasons, since the trier of fact was in the best position to determine the appropriate sentence for L.M. — to show deference to the sentence imposed by the trial judge.

[86] It is with these principles in mind that the appeal from the sentence must be determined.

[87] My colleague finds that the imprisonment imposed does not serve the sentencing objectives established by the *Criminal Code* and the *Queen's Regulations and Orders for the Canadian Forces.* In his view, the military judge attached inordinate weight to general and specific deterrence, given all the circumstances and especially the appellant's administrative release from the Canadian Forces.

[88] I believe that we must not intervene. Even taking into account the appellant's administrative release from the Canadian Forces, I was not convinced by my colleague's analysis that the military judge exercised his discretion unreasonably or that he made an error in principle.

[89] The sentence proposed by my colleague, like that imposed by the military judge, is fair and appropriate. However, I believe that we cannot intervene because we would have weighed the factors differently than the military judge did. For that reason, it seems to me that, for functional reasons, to repeat Justice Lebel's expression in the French version of his reasons in *L.M.*, we cannot vary the sentence imposed by the military judge.

[90] For these reasons, I would dismiss the appeal from the sentence.

"Guy Cournoyer"

j.a.

Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

COURT MARTIAL APPEAL COURT OF CANADA

SOLICITORS OF RECORD

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