Date: 20050308

Docket: CMAC-482

Citation: 2005 CMAC 3

CORAM: **LÉTOURNEAU J.A.**
LAYDEN-STEVENSON J.A.
O'REILLY J.A.

BETWEEN:

TPR NATHAN WENRUEY LUI

Applicant/Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Ottawa, Ontario, on February 11, 2005.

Judgment delivered at Ottawa, Ontario, on March 8, 2005.

REASONS FOR JUDGMENT BY: LÉTOURNEAU J.A.

CONCURRED IN BY: LAYDEN-STEVENSON J.A.

O’REILLY J.A.

Date: 20050308

Docket: CMAC-482

Citation: 2005 CMAC 3

CORAM: **LÉTOURNEAU J.A.**
LAYDEN-STEVENSON J.A.
O'REILLY J.A.

BETWEEN:

TPR NATHAN WENRUEY LUI

Applicant/Appellant

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

[1] Trooper Lui (the appellant) seeks leave to appeal against his sentence and appeals against both the legality and the severity of the sentence. He pleaded guilty before a Standing Court Martial to the following charges:

a) on or about August 5, 2003, drew a weapon against a superior officer, i.e. Corporal Hillar, contrary to section 84 of the *National Defence Act*, R.S.C. 1985, c. N-5 (Act);

b) on or about August 5, 2003, unauthorized possession of a prohibited weapon contrary to section 130 of the Act and subsection 91(2) of the *Criminal Code*, R.S.C. 1985, c. C-46 (Code); and

c) on or about August 5, 2003, used insulting language to a superior officer, i.e. Corporal Hillar, contrary to section 85 of the Act.

[2] All the charges resulted from a single incident. The appellant was sentenced to imprisonment for a period of forty-five (45) days. In addition, an order was issued pursuant to section 196.14 of the Act authorizing the taking of DNA samples. Moreover, an order of forfeiture of any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition, or explosive device in actual possession of the appellant was issued along with a prohibition order against the possession of any such items for a period of ten (10) years. Finally, the military judge extended the prohibition against possession of weapons to the appellant's military duty which, for all practical purposes, made his release from the Canadian Forces inevitable.

Facts and procedure

[3] At the time of the commission of the offences, the appellant was 20 years of age, with no criminal or disciplinary record. He was a high school student who had been in the Reserve for almost two years. By the time he appeared before the military court on May 26, 2004 for trial, almost ten months after the date the offences were committed, he was a student at the University of Toronto with a view to becoming an English teacher: see his testimony, appeal book, page 20.

[4] I reproduce the agreed statement of circumstances that was read in the record of the Standing Court Martial:

> On 5 August 2003, at approximately 0900 hours, T51 841 326 Private Lui, the accused, and A16 739 978 Corporal Hillar, were located in A Company's stores at Land Forces Central Area Training Centre in Meaford, Ontario.
>
> There was a dispute between the accused on one hand and Corporals Hillar and Bahbah on the other regarding the use of a truck.
>
> During that dispute Corporate Hillar told the accused to, "Fuck off", to which the accused stated, "Fuck you Hillar", while pointing his finger at Corporal Hillar. Corporal Hillar replied, "Don't you fuckin'" and slapped the accused's finger away. The accused replied, "Did you just fucking hit me?" To which Corporal Hillar responded, "Oh fuck you". The accused stated, "Yeah, well fuck you old man", then removed a seven-inch folding knife from a right-side pocket, rapidly unfolded the blade, and pointed it toward Corporal Hillar.
>
> After a short verbal exchange, the conflict was broken up by several onlookers and the accused left the immediate area. Corporal Hillar found a stick leaning on a cabinet, walked in the direction of the accused — that the accused had left, and snapped the stick on the ground. While shouting he proceeded to kick a counter several times. He was blocked from further progress and the incident was then defused.
>
> At 0950 hours, the accused presented himself at the LFCA TC Military Police Detachment. The accused was arrested and searched incident to arrest. The search revealed that the accused was in possession of the knife that had been pointed at Corporal Hillar.
>
> The folding knife in question was seven inches long with blade extended. The blade was capable of
>
> opening automatically by centrifugal force through a rapid motion with the hand.

[5] The evidence reveals that the victim was an old corporal who had a strained work relationship with the appellant. There was considerable tension between the two of them and the appellant tried to avoid Corporal Hillar as much as he could. According to the appellant's uncontradicted testimony, Corporal Hillar showed contempt towards the appellant and made disparaging remarks about him: *ibidem*, at page 21. Here is, in his own words, how he described the situation:

> Q. How was he behaving specifically towards you?
>
> A. Towards me specifically he would make random disparaging remarks about me. When I arrived at LFCA Meaford, my right leg was in a cast as I had previously broken my right fibula on a tasking at Wainwright just a few months prior. I had a 10-centimetre plate installed on the bone to support about six screws and when I arrived at Meaford I had to undergo physiotherapy after the cast was removed and sometimes he would make comments such as, Oh, if you're not careful, I'll break your other leg too, or, I'll break it again. Whether he was joking or not, it certainly didn't make me feel very comfortable as I was in quite a bit of pain generally, especially with the physiotherapy, as it was a very painful experience to undergo, especially while trying to perform my day-to-day duties and comments like that, he would almost go out of his way to just jab at me, would probably be the best way to describe it, sir.

(emphasis added)

[6] A few weeks before the incident, Corporal Hillar came up to the appellant and they had a conversation. The appellant tried to ease the tension between the two, but to no avail. Corporal Hillar saw the appellant as one of those "young guys [who] don't show any respect": *ibidem*, at page 22.

[7] The appellant admitted that he got angry at the scene of the incident after the verbal abuse, provocation and assault on him by Corporal Hillar. Yet, immediately after the incident, he regretted it. He reported to military police where he was arrested, searched and detained for five

to seven hours in a cell. I cannot but wonder why the appellant who himself went to the military police and volunteered his account of the facts had to be arrested and detained for seven hours. It should be remembered that the military police force possesses the statutory power to arrest without warrant (article 156 of the Act), but operates under a Charter duty not to do so where it believes, on reasonable grounds, that the public interest may be satisfied without arresting the person: *Gauthier v. Sa Majesté la Reine*, CMAC-414, at paragraphs 22 to 29; *Caporal Chef Larocque v. Sa Majesté la Reine*, 2001 CMAC 002, at paragraph 13. Failure to comply with this Charter duty makes the police liable to pay damages: see the case of *Claude-Rolland M. du-Lude v. Sa Majesté la Reine*, A-907-97, September 7, 2000 (F.C.A.), where an award of $10,000 was made to a soldier who had been the victim of an abusive and unlawful arrest and detention by the military police.

[8] The appellant had his knife for two years and used it at work in the Forces. He had bought it at the House of Knives, at the Eaton Centre in Toronto. It was on display in a glass cabinet. It opened by flicking the wrist. It was described as a switchblade. He did not know that it was a prohibited weapon. He learned this from the military police when he was arrested and searched: *ibidem*, at page 25.

The decision of the military judge

[9] The military judge reviewed the principles governing sentencing, including in the military context the maintenance of discipline. He reminded the appellant that, under the penal

military justice system, a person found guilty of more than one offence will receive only one sentence although that sentence may consist of more than one punishment: *ibidem*, at page 44; see also sections 139 and 148 of the Act. This is a peculiarity of the penal military justice system that creates, at the level of sentencing, operational difficulties when one or more convictions are set aside. In such circumstances, it is simply impossible to know the impact and influence that these convictions had on the nature and length of the sentence imposed by the military judge: see *Larocque v. Sa Majesté la Reine*, *supra*, at paragraph 59.

[10] The judge considered as aggravating factors the nature of the offence that he described as very serious because of the immediate threat of serious harm. The fact that the weapon was a prohibited weapon, that the appellant was a subordinate and that his response to Corporal Hillar was "out of proportion to the verbal insults that preceded it" were also seen as aggravating factors that justified incarceration and the making of a DNA order: *ibidem*, at page 45.

[11] The judge took into account "several mitigating factors", namely the age of the appellant, the fact that he was a remorseful first offender and a good soldier, the absence of bodily harm, his voluntary surrender to military police after the incident, the verbal insults of which he was victim, his status as a student and the consequences of the sentence in his civilian life: *ibidem*, at page 46. In the end, he elected deterrence over rehabilitation.

[12] As for the weapons prohibition order, the judge appears to have been of the view that if the case had been prosecuted in the civilian courts, the prohibition order would have been

mandatory under the terms of section 109 of the Code. As he had been informed that the appellant would be released from the Forces pursuant to administrative proceedings, he extended the weapons prohibition order to the possession of weapons required in the course of the appellant's duties as a member of the Canadian Forces.

The standard of review on appeals against the legality or the severity of sentences

[13] Illegal sentences are reviewable on a standard of correctness. In other words, this Court will intervene to correct errors of law that make a sentence illegal, that is to say contrary to law.

[14] As for the standard of review applicable to appeals against the severity of sentences, this Court restated it in the following terms in the case of *Dixon v. Her Majesty the Queen*, CMAC-477, February 8, 2005. At paragraph 18, it wrote, subject to any express provision of the Act:

> This Court in *R. v. St-Jean*, [2000] C.M.A.J. No. 2, and more recently in *R. v. Forsyth*, [2003] C.M.A.J. No. 9, reasserted the principle enunciated by Lamer C.J. in *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500 that a court of appeal should only intervene if the sentence is illegal or demonstrably unfit. At page 565, the learned Chief Justice wrote:
>
> > Put simply, absent an error in principle, failure to consider a relevant factor, or an over-emphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit.

[15] This brings me to an analysis of the sentence imposed.

The sentence of imprisonment

[16] As previously mentioned, the military judge imposed a period of incarceration of 45 days. With respect, I think that the sentence imposed requires the intervention of this Court for three reasons: the learned judge committed errors in principle, omitted to consider relevant factors and over-emphasized or downplayed appropriate factors. I shall consider the last two reasons together.

a) errors in principle

[17] Although the military judge alluded in his reasons, at page 43 of the appeal book, to the principle of parity in sentencing found in section 718.2 of the Code, a principle that this Court applied in *Dixon*, *supra*, at paragraph 33, along with the principles of equal and fundamental justice, I believe that, bearing in mind all the circumstances of this case, he failed to apply it correctly. This becomes apparent from a review of some of the judicial precedents in similar matters.

[18] In *C41 130 916, Sergeant Brown*, a decision rendered on July 11, 2002, the Standing Court martial favoured detention over imprisonment. It imposed a period of detention of twenty-one (21) days, the effect of which was suspended, and a fine of $4,000. There was no weapons prohibition order and no DNA testing order.

[19] Sergeant Brown had a previous record of a conviction for striking a subordinate and had been sentenced to a fine in the amount of $800. The sentencing judge was of the view that Sergeant Brown had not learned from the previous sentence. Yet, there was no imprisonment although the facts, as we will see, were much more serious than in our case.

[20] In fact, Sergeant Brown was found guilty of assault causing bodily harm on a Major. While sitting on a bar stool, the accused, who was under the influence of alcohol, after a heated discussion during which there was a demonstration of knives, bit the victim in the upper arm. The bite left a bruise for a period of two weeks. Later on, the accused pulled out his knife and stuck it in the upper right thigh of the victim. The accused realized what he had done. He showed no remorse and asked the victim to lie for him about the incident: see pages 123 to 125 of the transcript of those proceedings. He even threatened the victim by saying that he knew where to find him and his family.

[21] The *Brown* case is not an isolated case in which detention rather than imprisonment was imposed. In *H38 645 326 Pte Vanson and C78 787 979 Pte Winkler*, January 9, 2001, the accused pleaded guilty to assault causing bodily harm on a Captain. The offence occurred at a house party in the married quarters of the CFB, at Edmonton. Both accused were under heavy influence of alcohol. There was no provocation from the victim. The blows to the Captain were serious and the assault continued even after the Captain tried to leave the premises. Surgery was needed to correct his nose. Private Vanson was 21 at the time of the offence. Private Winkler was 23 and had a previous conviction for uttering threats for which a fine of $500 had been

imposed by civilian courts. Each of them was sentenced to detention for a period of 21 days and to a $6,000 fine.

[22] A period of detention of 30 days was imposed upon Corporal Turgeon who assaulted a soldier and caused him serious bodily harm. The victim suffered a fracture of the eyeball and of the cheek bone, lost all sensation on the left side of his face for three months, including his lips and teeth, and lost vision in one eye for three weeks. A weapons prohibition order for one year was also issued along with an order for DNA testing: see *N54 810 641 Corporal Turgeon J.J.*, October 7, 2003.

[23] The case of *Solarz* is yet another example where detention for a period of fourteen (14) days was imposed, but suspended. The accused, who was a corporal, pleaded guilty to a charge of using threatening language to a superior officer, in that case a Master Warrant Officer. The particulars of the offence reveal that he said to a superior, “don’t be surprised if I come up to your office some day with a shotgun and shoot you”, or words to that effect. The charge was laid pursuant to section 85 of the Act: *C14 635 940 Corporal Solarz F.M.*, August 22, 2000.

[24] The following precedents are also worthy of mention:

a) *Private J.S.D. Raymond*, January 16, 2001, entered guilty pleas to charges of disobedience of a lawful command of a superior (section 83 of the Act) and threat of violence against a superior, i.e. a Sergeant (section 85 of the Act). The sentence was

confinement to barracks for 14 days although the offence, a very serious one, was punishable by dismissal with disgrace from the Forces or a lesser punishment;

b) *Leading Seaman I.D. Strybosch*, on June 4, 2001, was sentenced on seven charges (disobeying a lawful command of a superior (section 83 of the Act), conduct prejudicial to good order and discipline (section 129 of the Act), contempt toward a superior officer (section 85 of the Act), disobeying a lawful command of a superior (section 83 of the Act), conduct prejudicial to good order and discipline (section 129 of the Act), absence without leave (section 90 of the Act) and disobeying a lawful command of a superior (section 83 of the Act)). All these offences were committed on various dates, on board an operational ship sailing on a NATO deployment. The two section 83 offences, like the section 84 charge that the appellant was found guilty of in our case, were punishable with imprisonment for life. The accused was sentenced to detention for a period of thirty (30) days;

c) *Private Travis F. Murphy* pleaded guilty to a charge of contempt toward a superior officer, i.e. a Sergeant, contrary to section 85 of the Act. As previously mentioned, the offence is punishable by dismissal with disgrace from the Forces or a lesser punishment. The accused received as a sentence a fine of $125 and confinement to barracks for a period of twenty-one (21) days;

d) *Corporal K.S. Boland* was sentenced on two charges of conduct prejudicial to good order and discipline (section 129 of the Act). He had illegally, in his possession, a CN Tear Smoke Tactical Grenade and carelessly discharged it in a Barrack, forcing the evacuation of its occupants. He was sentenced on September 17, 2003 to detention for a period of ten (10) days;

e) *Corporal Corey E. Wilson* was a fully trained member of the Regular Force, Military Police. His military training included the proper use and handling of his pistol. He was charged with nine offences committed on different dates. He pleaded guilty to three very serious charges: unlawfully pointing a firearm at the back of the head of another military police member (section 130 of the Act); assault and threat to use a weapon (section 130 of the Act and paragraph 267(*a*) of the Code); and, conduct prejudicial to good order and discipline, that conduct consisting of the downloading of his pistol at the patrol desk (section 130 of the Act and paragraph 5 of the Canadian Forces Base Shilo Military Police Standard Order # 25). The fact that he was a police officer, authorized to bear and use a firearm, was a most aggravating circumstance. Yet, on June 25, 2003, he was fined $2,000 and sentenced to detention for a period of five days; and

f) *Sergeant M. Hunter* underwent a trial on seven charges for offences committed during an operational tasking in Kosovo. He was found guilty on the following counts after the trial judge found him to be evasive and argumentative and ruled that his testimony was inconsistent and not credible: knowingly uttering a threat to cause death (section 130 of

> the Act and section 264.1(2) of the Code) and three different charges of using a service pistol while committing an assault on a person (section 130 of the Act and section 267(*a*) of the Code). His rank was reduced to the rank of corporal. In addition, a weapons prohibition order was issued for a period of five years, but not made applicable to his duties or employment in the Canadian Forces.

[25] These judicial precedents show that detention has been preferred over imprisonment, even in cases more serious than the present instance, and suggest that, in the case at bar, the principle of parity in sentencing has been overlooked. There are significant differences resulting from the choice of one punishment over the other: see an excellent article by Colonel (Ret.) Me M. Drapeau where he compares the impact of the various sentences available under section 139 of the Act, *Canadian Military Law*. *Sentencing under the National Defence Act: Perspectives and Musings of a former soldier*, (2003), vol. 82, Nos. 1 to 3, *Can. Bar Rev.* 391, at page 451. Perhaps the most important distinction relates to career implications.

[26] Indeed, while imprisonment most likely results in a release from the Forces pursuant to an administrative decision taken by a Career Review Board, the focus of detention is rehabilitation and training. This means that the career of the detainee is not compromised. The following note under section 104.09 Detention of the Queen's Regulations & Orders explains the purpose of this kind of punishment:

> 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 members from other members of society... Once the sentence of detention has been served, the member will normally be returned to his or her unit without any lasting effect on his or her career.

(emphasis added)

[27] Finally, the learned military judge put too much emphasis on deterrence at the expense of rehabilitation. The appellant is a first offender, young with a promising future. As we shall see, the judge's failure to consider some relevant factors and his overemphasis and downplaying of others account for his error in principle.

[28] Imprisonment is a measure of last resort, especially in the case of a first offender where, as in the present instance, the offence was provoked by the victim and resulted in no injury. Section 718.2 of the Code enunciates some principles that the sentencing Court must take into account: an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances, and all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders. There was a range of other sentences available to the military judge to further the objectives of deterrence and rehabilitation without sacrificing one to the other.

b) relevant factors omitted, downplayed or over-emphasized

[29] Corporal Hillar suffered no injury at all and the appellant made no physical contact whatsoever with Corporal Hillar. Nor was there any attempt by the appellant to make physical

contact. Indeed, he immediately disengaged from the dispute and walked away from the scene. In my respectful view, the military judge over-emphasized the threat posed by the appellant. The evidence shows that there were people present who intervened immediately.

[30] The learned judge also over-emphasized the question of rank. The status of corporal is one that, in the normal course of events, is obtained by the mere lapse of time, generally after four years. While it is true that it is one rank higher than private, it does not, in terms of insubordination, compare with cases like *Brown*, *Vanson* and *Solarz*, precited, where the victims were respectively Major, Captain and Master Warrant Officer.

[31] While the military judge recognized that the victim had provoked the appellant, he underestimated and downplayed that fact. There was evidence of an abuse of authority and intimidation by Corporal Hillar (I'll break your other leg too, or, I'll break it again, *supra*, paragraph 5). Not only did the military judge omit to consider Corporal Hillar's provocation in the context of abuse of authority and intimidation, he failed to take into account Corporal Hillar's assault on the appellant, which precipitated the appellant's response.

[32] A sequential build up of abuse of authority over time, intimidation and provocation by Corporal Hillar, culminating in Corporal Hillar's physical assault on the appellant, are what led to the appellant's anger, loss of self-control and over-reaction. With respect, I think that the military judge either overlooked or did not give proper weight to the context in which the appellant's reaction took place. The appellant's behaviour was and remains unacceptable, but the

over-reaction is certainly easier to understand when viewed in its context. It should be remembered that the appellant was at the beginning of his career in the Reserve Force with limited training compared to Corporal Hillar who had been a full-time member of the Forces for quite some time. The lack of self-discipline and respect originated with Corporal Hillar. We were informed, at the hearing, that Corporal Hillar, who was the instigator, merely received counselling.

c) conclusion on the sentence of imprisonment

[33] A review of the judicial precedents and a careful analysis of the circumstances of the incident, including the objective and subjective gravity of the offence, have convinced me that the sentence of imprisonment needs to be replaced with one of detention. Prosecution of the offences and a period of detention achieve the purpose of denunciation and disapproval of the appellant's behaviour while, at the same time, favouring rehabilitation. Both in the military (if so desired by the Canadian Forces and the appellant) and in civilian life, rehabilitation is better achieved in this case by detention than by imprisonment. A sentence of detention would facilitate the return of the appellant to the Canadian Forces and place him in the position that he was in before his release. The principles of parity in sentencing and equal and fundamental justice require a sentence of detention rather than one of imprisonment. This substitution would provide equality and equity in the treatment of offenders.

[34] Therefore, looking towards the future of this young university student, I would substitute, *nunc pro tunc* (now for then), a period of detention for forty-five (45) days in place of the period of imprisonment imposed and deem it to have been satisfied by the forty-five (45) days of imprisonment already served. Had the imprisonment not been served, I would have suspended the detention in order to achieve better parity.

The weapons forfeiture and prohibition order

[35] A military judge's authority to impose a weapons prohibition order is found in section 147.1 of the Act. The section reads:

Prohibition order	**Ordonnance d'interdiction**
147.1 (1) Where a person is convicted by a court martial of an offence	**147.1** (1) La cour martiale doit, si elle en arrive à la conclusion qu'il est souhaitable pour la sécurité du contrevenant ou pour celle d'autrui de le faire, en plus de toute autre peine qu'elle lui inflige, rendre une ordonnance interdisant au contrevenant d'avoir en sa possession des armes à feu, arbalètes, armes prohibées, armes à autorisation restreinte, dispositifs prohibés, munitions, munitions prohibées et substances explosives, ou l'un ou plusieurs de ces objets, lorsqu'elle le déclare coupable, selon le cas_:
(*a*) in the commission of which violence against a person was used, threatened or attempted,	*a*) d'une infraction perpétrée avec usage, tentative ou menace de violence contre autrui;
(*b*) that involves, or the subject-matter of which is, a firearm, a cross-bow, a prohibited weapon, a restricted weapon, a prohibited device, any ammunition, any prohibited ammunition or an explosive substance,	*b*) d'une infraction relative à une arme à feu, une arbalète, une arme prohibée, une arme à autorisation restreinte, un dispositif prohibé, des munitions, des munitions prohibées ou des substances explosives;
(*c*) relating to the contravention of subsection 5(3) or (4), 6(3) or 7(2) of the Controlled Drugs and Substances Act, or	
(*d*) that is punishable under section 130 and that is described in paragraph 109(1)(b) of the Criminal Code, the court martial shall, in addition to any other punishment that may be	

imposed for that offence, consider whether it is desirable, in the interests of the safety of the person or of any other person, to make an order prohibiting the person from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, or all such things, and where the court martial decides that it is so desirable, the court martial shall so order.

Duration of prohibition order

(2) An order made under subsection (1) begins on the day the order is made and ends on the day specified in the order.

Application of order

(3) Unless the order specifies otherwise, an order made under subsection (1) against a person does not apply to prohibit the possession of any thing in the course of the person's duties or employment as a member of the Canadian Forces.

Notification

(4) A court martial that makes an order under subsection (1) shall without delay cause the Registrar of Firearms appointed under section 82 of the Firearms Act to be notified of the order.

c) d'une infraction aux paragraphes 5(3) ou (4), 6(3) ou 7(2) de la Loi réglementant certaines drogues et autres substances;

d) d'une infraction visée à l'alinéa 109(1)b) du Code criminel punissable en vertu de l'article 130.

Durée de l'ordonnance

(2) Le cas échéant, la période d'interdiction commence à la date de l'ordonnance et se termine à la date qui y est fixée.

Application de l'ordonnance

(3) Sauf indication contraire de l'ordonnance, celle-ci n'interdit pas à l'intéressé d'avoir en sa possession les objets visés dans le cadre de ses fonctions comme membre des Forces canadiennes.

Notification

(4) La cour martiale qui rend l'ordonnance en avise sans délai le directeur de l'enregistrement des armes à feu nommé en vertu de l'article 82 de la Loi sur les armes à feu.

(emphasis added)

[36] Following a conviction for one of the types of offences described in paragraphs 147.1(1)

(a), (b), (c) or (d), subsection 147.1(1) makes it mandatory for a military judge to consider

whether it is desirable to make a weapons prohibition order. An order shall issue only if the judge decides that it is desirable to do so. The provision grants the judge the power to assess the desirability of resorting to this kind of measure.

[37] However, the provision is silent as to the duration of such an order. Thus, the military judge possesses discretion as to the length or duration of the order. In my respectful view, he could not and should not legally have imposed a prohibition for ten (10) years.

[38] According to counsel for both parties, the military judge appears to have felt compelled to impose a prohibition order for a duration of ten years. I reproduce the short justification that he gave for his ruling (see page 47 of the appeal book):

> I also consider that this is a proper case for a weapons prohibition order. If this case had been prosecuted in the civilian courts, a weapons prohibition order would be mandatory under the terms of section 109 of the *Criminal Code*.

[39] If the military judge felt obliged by section 109 of the Code to impose a prohibition order for ten (10) years, this was an error of law and principle. As we shall see, section 109 had no direct application and was an inappropriate guideline for this case. If the ten-year prohibition that the judge imposed is the result of an exercise of discretion under section 147.1 of the Act, the duration of the order is abusive and not justified in the circumstances of this case.

[40] Many of the offences under the *National Defence Act* have direct counterparts under the *Criminal Code*. As such, it may be helpful for military judges to consider the way such offences are punished in the civilian context when they are determining what will constitute a fit sentence in a given case. However, any comparison with the civilian context will have limits because not all charges have direct *Criminal Code* counterparts and there are also considerations in sentencing that are particular to the military context.

[41] With this in mind, it is difficult to understand why the military judge felt that a comparison with section 109 of the Code was appropriate. Section 109 of the Code, which deals with mandatory weapons prohibition orders, reads as follows:

Mandatory prohibition order

109. (1) Where a person is convicted, or discharged under section 730, of

(*a*) an indictable offence in the commission of which violence against a person was used, threatened or attempted and for which the person may be sentenced to imprisonment for ten years or more,

(*b*) an offence under subsection 85(1) (using firearm in commission of offence), subsection 85(2) (using imitation firearm in commission of offence), 95(1) (possession of prohibited or restricted firearm with ammunition), 99(1) (weapons trafficking), 100(1) (possession for purpose of weapons trafficking), 102(1) (making automatic firearm), 103(1) (importing or exporting knowing it is unauthorized) or section 264 (criminal harassment),

(*c*) an offence relating to the contravention of

Ordonnance d'interdiction obligatoire

109. (1) Le tribunal doit, en plus de toute autre peine qu'il lui inflige ou de toute autre condition qu'il lui impose dans l'ordonnance d'absolution, rendre une ordonnance interdisant au contrevenant d'avoir en sa possession des armes à feu, arbalètes, armes prohibées, armes à autorisation restreinte, dispositifs prohibés, munitions, munitions prohibées et substances explosives pour la période fixée en application des paragraphes (2) ou (3), lorsqu'il le déclare coupable ou l'absout en vertu de l'article 730, selon le cas_:

a) d'un acte criminel passible d'une peine maximale d'emprisonnement égale ou supérieure à dix ans et perpétré avec usage, tentative ou menace de violence contre autrui;

b) d'une infraction visée aux paragraphes 85(1) (usage d'une arme à feu lors de la perpétration d'une infraction), 85(2) (usage d'une fausse

subsection 5(1) or (2), 6(1) or (2) or 7(1) of the Controlled Drugs and Substances Act, or
(*d*) an offence that involves, or the subject-matter of which is, a firearm, a cross-bow, a prohibited weapon, a restricted weapon, a prohibited device, any ammunition, any prohibited ammunition or an explosive substance and, at the time of the offence, the person was prohibited by any order made under this Act or any other Act of Parliament from possessing any such thing, the court that sentences the person or directs that the person be discharged, as the case may be, shall, in addition to any other punishment that may be imposed for that offence or any other condition prescribed in the order of discharge, make an order prohibiting the person from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition and explosive substance during the period specified in the order as determined in accordance with subsection (2) or (3), as the case may be.

arme à feu lors de la perpétration d'une infraction), 95(1) (possession d'une arme à feu prohibée ou à autorisation restreinte avec des munitions), 99(1) (trafic d'armes), 100(1) (possession en vue de faire le trafic d'armes), 102(1) (fabrication d'une arme automatique), 103(1) (importation ou exportation non autorisées — infraction délibérée) ou à l'article 264 (harcèlement criminel);

c) d'une infraction relative à la contravention des paragraphes 5(1) ou (2), 6(1) ou (2) ou 7(1) de la Loi réglementant certaines drogues et autres substances;

d) d'une infraction relative à une arme à feu, une arbalète, une arme prohibée, une arme à autorisation restreinte, un dispositif prohibé, des munitions, des munitions prohibées ou des substances explosives, perpétrée alors que celui-ci était sous le coup d'une ordonnance, rendue en vertu de la présente loi ou de toute autre loi fédérale, lui en interdisant la possession.

Duration of prohibition order — first offence

(2) An order made under subsection (1) shall, in the case of a first conviction for or discharge from the offence to which the order relates, prohibit the person from possessing

(*a*) any firearm, other than a prohibited firearm or restricted firearm, and any crossbow, restricted weapon, ammunition and explosive substance during the period that
(i) begins on the day on which the order is made, and
(ii) ends not earlier than ten years after the person's release from imprisonment after conviction for the offence or, if the person is not then imprisoned or subject to

Durée de l'ordonnance — première infraction

(2) En cas de condamnation ou d'absolution du contrevenant pour une première infraction, l'ordonnance interdit au contrevenant d'avoir en sa possession_:

a) des armes à feu — autres que des armes à feu prohibées ou des armes à feu à autorisation restreinte —, arbalètes, armes à autorisation restreinte, munitions et substances explosives pour une période commençant à la date de l'ordonnance et se terminant au plus tôt dix ans après sa libération ou, s'il n'est pas emprisonné ni passible d'emprisonnement, après sa déclaration de culpabilité ou son absolution;

imprisonment, after the person's conviction for or discharge from the offence; and	
(*b*) any prohibited firearm, restricted firearm, prohibited weapon, prohibited device and prohibited ammunition for life.	*b*) des armes à feu prohibées, armes à feu à autorisation restreinte, armes prohibées, dispositifs prohibés et munitions prohibées, et ce à perpétuité.

(emphasis added)

[42] Even the serious charge of assault with a weapon under section 267(a) of the Code, which is incorporated under section 130 of the *National Defence Act* (a charge which was stayed), would not necessarily have triggered the application of section 109 of the Criminal Code. The offence of assault committed in the circumstances described in paragraph 267(*a*) of the Code is a hybrid offence, that is to say one that can be prosecuted by way of summary conviction with imprisonment of less than ten (10) years or by way of indictment with imprisonment for ten (10) years or more. Therefore, it is not a foregone conclusion that the offence is one for which the offender could be sentenced to imprisonment for ten (10) years or more because it cannot be assumed that the prosecution would necessarily have been by way of indictment. In fact, at the hearing, counsel for the respondent conceded that in the civilian context, prosecution by way of indictment would have been unlikely. Consequently, there is no certainty that the requirements of paragraph 109(1)(*a*) would have been met.

[43] The charge under section 84 of the Act was for drawing a weapon against a superior officer. This offence does not incorporate a *Criminal Code* offence, thus any evaluation of the

potential application of section 109 is rendered doubly hypothetical. As for the charge of unauthorized possession of a weapon, also charged under section 130 of the Act, but incorporating section 91(2) of the Code, not only is this a hybrid offence, the maximum sentence is one of five years' imprisonment, thereby removing that offence from the ambit of section 109.

[44] If the military judge sought guidance from the Code as to the appropriate length for a weapons prohibition order, he should more appropriately have looked to section 110 of the Code, which deals with discretionary prohibition orders.

Discretionary prohibition order
110. (1) Where a person is convicted, or discharged under section 730, of

(*a*) an offence, other than an offence referred to in any of paragraphs 109(1)(a), (b) and (c), in the commission of which violence against a person was used, threatened or attempted, **or**

(*b*) an offence that involves, or the subject-matter of which is, a firearm, a cross-bow, **a prohibited weapon**, a restricted weapon, a prohibited device, ammunition, prohibited ammunition or an explosive substance and, at the time of the offence, the person was not prohibited by any order made under this Act or any other Act of Parliament from possessing any such thing,
the court that sentences the person or directs that the person be discharged, as the case may be, shall, in addition to any other punishment that may be imposed for that offence or any other condition prescribed in the order of discharge, consider whether it is desirable, *in the interests of the safety of the person or of*

Ordonnance d'interdiction discrétionnaire110. (1) Le tribunal doit, s'il en arrive à la conclusion qu'il est souhaitable pour la sécurité du contrevenant ou pour celle d'autrui de le faire, en plus de toute autre peine qu'il lui inflige ou de toute autre condition qu'il lui impose dans l'ordonnance d'absolution, rendre une ordonnance lui interdisant d'avoir en sa possession des armes à feu, arbalètes, armes prohibées, armes à autorisation restreinte, dispositifs prohibés, munitions, munitions prohibées et substances explosives, ou l'un ou plusieurs de ces objets, lorsqu'il le déclare coupable ou l'absout en vertu de l'article 730_:

a) soit d'une infraction, autre que celle visée aux alinéas 109(1)a), b) ou c), perpétrée avec usage, tentative ou menace de violence contre autrui;

b) soit d'une infraction relative à une arme à feu, une arbalète, une arme prohibée, une arme à autorisation restreinte, un dispositif prohibé, des munitions, des munitions prohibées ou des

any other person, to make an order prohibiting the person from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, or all such things, and where the court decides that it is so desirable, the court shall so order.

substances explosives, perpétrée alors que celui-ci n'est pas sous le coup d'une ordonnance, rendue en vertu de la présente loi ou de toute autre loi fédérale, lui en interdisant la possession.

Duration of prohibition order

(2) An order made under subsection (1) against a person begins on the day on which the order is made and ends not later than ten years after the person's release from imprisonment after conviction for the offence to which the order relates or, if the person is not then imprisoned or subject to imprisonment, after the person's conviction for or discharge from the offence.

Durée de l'ordonnance

(2) Le cas échéant, la période d'interdiction — commençant sur-le-champ — expire au plus tard dix ans après la libération du contrevenant ou, s'il n'est pas emprisonné ni passible d'emprisonnement, après sa déclaration de culpabilité ou son absolution.

(emphasis added)

[45] Under section 110 of the Code, a discretionary prohibition order has a maximum duration of ten (10) years. Not unlike sentences of imprisonment, where the “maximum sentences ought to be reserved for the worst offender committing the worst type of offence” (see *R. v. C.A.M.*, [1996] S.C.R. 500, at paragraph 36 per Lamer C.J.), the imposition of the maximum duration should be reserved for the most serious cases and worst offenders. Nothing in the present case could or would justify the imposition of a discretionary weapons prohibition order for the maximum length of time authorized by section 110 of the Code.

[46] In fixing the duration of the prohibition order, the military judge had to exercise his discretion judicially. As previously mentioned, he was not bound by the terms of section 109 of the Code, which has no application here. If the military judge had wanted to seek guidance from the Code, he could have appropriately referred to section 110 for assistance in determining how best to exercise his discretion under section 147.1 of the Act.

[47] Moreover, and I find this fact to be significant, the Director of Military Prosecutions, who prefers a charge, also determines the type of court martial that is to try the accused: see section 165.14 of the Act. In this case, he opted for prosecution before a Standing Court Martial. That Court, as opposed to a General Court Martial, suffers limitations on sentencing: it cannot impose a sentence that includes a punishment higher in the scale of punishments than dismissal with disgrace from Her Majesty's service: see section 175 of the Act. In view of the hierarchy of punishments contained in section 139 of the Act, this means that the Court's power to impose imprisonment is limited to a sentence of imprisonment for less than two years. Both legally and practically, this limit on the military judge's sentencing power, which results from the prosecution's choice of court, is akin to the limitation on sentencing placed on a civilian court which stems from the prosecution's choice of proceeding by way of summary conviction rather than indictment. The civilian court's power to impose imprisonment is then limited to a maximum period of six months.

[48] In effect, the choice of military Court by the prosecution, not unlike the choice of a summary conviction procedure before a civilian court, is indicative of the prosecutorial intent

and understanding regarding the objective and subjective gravity of the offence charged. The judge's discretion in imposing sentence is curtailed by the statutory limitation of his sentencing powers. A determination of the length of a weapons prohibition order requires a judicial exercise of discretion reflective of the same statutory restraint that is imposed upon the Court concerning the length of the period of imprisonment.

[49] Finally, the facts and circumstances surrounding the commission of the offence does not support a prohibition order of the duration imposed by the military judge. It is disproportionate. I would reduce the order to a period of two years starting from May 26, 2004 and ending on May 25, 2006.

Extension of the weapons prohibition order to the military duties of the appellant

[50] Pursuant to subsection 147.1(3) of the Act, a weapons prohibition order does not apply to prohibit the possession of any thing in the course of a person's duties or employment as a member of the Canadian Forces. This is so unless the order specifies otherwise. The military judge has the authority to make the order applicable to the military duties of the accused.

[51] Counsel for the appellant requested, before the military judge, that there be no derogation to subsection 147.1(3) of the Act and that the order not be extended to the appellant's military duties. Counsel for the prosecution informed the sentencing judge that he did not object to the

defence's request: see the appeal book, page 37. Accordingly, no submissions were made with respect to extending the order to the military duties of the appellant.

[52] This Court held in *R. v. Jackson*, 2003 CMAC 8, CMAC-470 that extending the prohibition to the accused's military duty without notifying him and giving him the opportunity to present evidence and make submissions was a serious breach of procedural fairness in relation to an important element of the sentence. It quashed that part of the order.

[53] Counsel for the respondent, rightly so in my view, concedes that the ruling in *Jackson* applies to this case. Therefore, I would also vary that part of the order to delete its application to the appellant's duties as a member of the Canadian Forces.

Conclusion

[54] For the reasons that I have expressed, I would grant the application for leave to appeal against the legality and severity of the sentence and I would allow the appeal. I would substitute, *nunc pro tunc* (now for then), a period of detention for forty-five (45) days in place of the forty-

five (45) days of imprisonment and I would deem it to have been satisfied by the period of imprisonment already served. In addition, I would reduce the duration of the weapons prohibition order to two years from the date such order was imposed by the military judge, i.e. May 26, 2004 until May 25, 2006. I would also vary the weapons prohibition order so as to eliminate its application to the appellant's military duties.

"Gilles Létourneau"
J.A.

"I agree
Carolyn Layden-Stevenson J.A."

"I agree
J. O'Reilly J.A."

COURT MARTIAL APPEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	CMAC-482
STYLE OF CAUSE:	TPR NATHAN WENRUEY LUI v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	February 11, 2005
REASONS FOR JUDGMENT BY:	LÉTOURNEAU J.A.
CONCURRED IN BY:	LAYDEN-STEVENSON J.A. O'REILLY J.A.
DATED:	March 8, 2005

APPEARANCES:

Lieutenant-Colonel J.M. Dugas	FOR THE APPLICANT/APPELLANT
Lieutenant-Commander C.J. Deschênes	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Office of the Directorate of Defence Counsel Services Ottawa, Ontario	FOR THE APPLICANT/APPELLANT
Office of the Directorate of Military Prosecutions Ottawa, Ontario	FOR THE RESPONDENT