Date: 20090604

Docket: CMAC-508

Citation: 2009 CMAC 5

CORAM: **NADON J.A.**
PHELAN J.A.
TRUDEL J.A.

BETWEEN:

PRIVATE TUPPER, R.J.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT

TRUDEL J.A.

Introduction

[1] This is an application for leave to appeal and an appeal against the severity of a sentence.

[2] The appellant was tried by a disciplinary court martial and convicted of six charges laid under the *National Defence Act*, R.S.C. 1985, c. N-5 (NDA):

First charge
Subsection 87(d)
NDA

Broke out of Barracks

Particulars: In that he, at approximately 1930 hours, on or about 7 December 2006, at or near Canadian Forces Base Gagetown, New Brunswick, being under punishment of confinement to barracks, quit his barracks.

Second charge
Section 90
NDA

Absented himself without leave

Particulars: In that he, at approximately 1930 hours, on 7 December 2006, without authority was absent from 2nd Battalion Royal Canadian Regiment and remained absent until approximately 1058 hours, 14 December 2006.

Third charge
Section 85
NDA

Behaved with contempt toward a superior officer

Particulars: In that he, on or about 14 December 2006, at or near Canadian Forces Base Gagetown, New Brunswick, did behave with contempt towards K42 268 868 Master Warrant Officer Venus, K.R.

Fourth charge
Section 83
NDA

Disobeyed a lawful command of a superior officer

Particulars: In that he, on or about 14 December 2006, at or near Canadian Forces Base Gagetown, New Brunswick, did not stand near the 2nd Battalion Royal Canadian Regiment G Company office door at Building D-57, when ordered to do so by K42 268 868 Master Warrant Officer Venus, K.R.

Fifth charge
Section 87(c)
NDA

Resisted an escort whose duty it was to apprehend him

Particulars: In that he, on or about 14 December 2006, at or near Canadian Forces Base Gagetown, New Brunswick, while under escort of R54 545 459 Sergeant Russell, N.B., resisted the escort by struggling and pushing.

Sixth charge
Section 90
NDA

Absented himself without leave

Particulars: In that he, at approximately 0730 hours, on 11 January 2007, without authority was absent from 2nd Battalion Royal Canadian Regiment and remained absent until approximately 0945 hours, 11 January 2007.

[3] At the time of the offences, Private Tupper was a serving member of "G" Coy, Second Battalion RCR (2RCR) stationed at Canadian Forces Base Gagetown (CFBG), in New Brunswick. He was 22 years old, addicted to cocaine, and had been in the Forces for about three years (appeal book, vol. III at page 445).

[4] All these service offences were committed at CFBG between 7 December 2006 and 11 January 2007 immediately following an unrelated summary trial which had resulted in a sentence of 12 days confinement to barracks and a $700 fine handed down on 7 December 2006 (appeal book, vol. III at page 569). That punishment was never carried out as Private Tupper failed to report to the roll call, a failure which resulted in the issuance of a warrant for his arrest the very next day. Thus, the first charge for having broken out of the barracks (*supra* at paragraph 2; see conduct sheet in appeal book, vol. III at page 569).

[5] During the sentencing hearing, Private Tupper also admitted to a prior similar offence in a pending charge of absence without leave (appeal book, vol. III at pages 384-387; reasons for sentence, appeal book, vol. III at page 505) and asked the Chief Military Judge, Colonel M. Dutil (CMJ), to take that service offence into consideration for the purposes of the sentence.

[6] On 30 October 2007, the CMJ sentenced the appellant to dismissal with the accompanying punishment of detention for a period of 90 days. In addition, and pursuant to section 147.1 of the NDA, he imposed a seven-year weapons prohibition order ending on 29 October 2014. Finally, by order dated 30 October 2007, the CMJ, pursuant to section 248.1 of the DNA, granted the appellant

release from detention pending his appeal (appeal book, vol. III at page A-23: certification of Order, 22 February 2008).

[7] In appealing the severity of the sentence, Private Tupper raised two grounds of appeal. The first ground relates to the adequacy of the CMJ's reasons (appellant's memorandum of fact and law at paragraphs 18-35) (factum). The appellant submits that the CMJ erred by failing to make specific findings in regard to the defence witnesses called during the sentencing hearing and by failing to provide a detailed analysis of his reasons (appellant's factum at paragraphs 18-19). Simply providing brief summaries of the witnesses' testimonies in the decision was insufficient.

[8] The appellant argues that this failure led to an "analysis of the principles of sentencing which failed to balance the appropriate considerations" (*ibid.*).

[9] The appellant's second ground of appeal is that the sentence imposed was harsh and excessive (appellant's factum at paragraphs 36-63), mostly because the sentence reflects an improper emphasis on denunciation and general deterrence to the detriment of competing principles of sentencing, such as specific deterrence, proportionality and rehabilitation.

[10] For ease of reference, the CMJ's reasons for sentence will be dealt with in sections as I analyze each of the appellant's submissions.

The standard of review

[11] In *R. v. R.E.M.*, 2008 SCC 51, [2008] S.C.J. No. 52 [*REM*], Chief Justice McLachlin wrote:

> …there is no absolute rule that adjudicators must in all circumstances give reasons. In some adjudicative contexts, however, reasons are desirable, and in a few, mandatory. As this Court stated in *R. v. Sheppard*, [2002] 1 S.C.R. 869, 2002 SCC 26 at para. 18, quoting from *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 43, (in the administrative law context), "it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision". A criminal trial, where the accused's innocence is at stake, is one such circumstance.

[12] The appellant's first ground of appeal involves the CMJ's duty of fairness. Generally, an appellate court will review a question of procedural fairness on a standard of correctness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraph 129, *per* Binnie J.).

[13] The second ground of appeal calls for a deferential standard of review. Sentencing is a fundamentally subjective and individualized process "where the trial judge has the advantage of having seen and heard all of the witnesses [while] the appellate court can only base itself upon a written record" (*R. v. L.M.*, 2008 SCC 31 at paragraphs 18 and 22; *R. v. Shrosphire*, [1995] 4 S.C.R. 227 at paragraph 46). It is certainly one of the hardest tasks confronting a trial judge (*R. v. Gardiner*, [1982] 2 S.C.R. 368). Absent an error in principle, failure to consider a relevant factor, or an over-emphasis of the appropriate factors, this Court should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit (*R. v. C.A.M.*, [1996] 1 S.C.R. 500; *R. v.*

Dixon, 2005 CMAC 2, 64 W.C.B. (2d) 50 at paragraph 18 [*Dixon*]; *R. v. Lui*, 2005 CMAC 3, 64 W.C.B. (2d) 276 [*Lui*]).

The first ground of appeal: The Adequacy of the reasons

[14] Reasons for judgment in a criminal trial serve three main functions. First, reasons tell the parties affected by the decision why the decision was made. Second, reasons provide public accountability of the judicial decision; thus, justice is not only done, but is seen to be done. Third, reasons permit effective appellate review (*REM*, *supra* at paragraph 11).

[15] The first and third functions are at the heart of the appellant's arguments. After a careful review of the transcript and a functional analysis of the reasons for sentence, I fail to see how the appellant could have been left in doubt about why a conviction had been entered on all charges and why the CMJ had crafted the sentence as imposed.

[16] Understandably, the appellant disagrees with the outcome of his sentencing hearing and wishes that the CMJ had given more weight to the evidence of the defence witnesses.

[17] However, the sufficiency test does not require a detailed description of the judge's process in arriving at his or her decision (*ibid.* at paragraph 35).

[18] Rather, it requires that the reasons, considered in the context of the record and the live issues at trial, disclose a logical connection between the evidence and the sentence sufficient to allow a meaningful appeal.

[19] In the case at bar, the live issues were easily identifiable. During the sentencing hearing, the prosecution evidence turned principally on discipline, while the defence evidence turned principally on the appellant's drug addiction and its effect on his behaviour (appellant's factum at paragraph 23).

[20] I hasten to add however, that all the military witnesses, whether testifying for the prosecution or the defence, stressed the critical importance of discipline, especially since 2RCR was getting ready to be deployed to Afghanistan in the summer of 2008 (appeal book, vol. III at pages 390, 395 and 506 lines 21 and following). While testifying, Major Basil Joseph Hartson, the appellant's Commanding Officer, indicated that Private Tupper served in Golf Company in Rear Party. At the time, Golf Company from 2RCR was on the road to high readiness getting ready to be deployed to Texas before leaving for Afghanistan.

[21] After having "accepted as proven all facts expressed or implied that were essential to the court martial panel findings of guilty" (reasons for sentence, appeal book, vol. III at page 505 lines 38-40), the CMJ turned his attention to the live issues and indicated which evidence he accepted or rejected.

[22] There were only two contentious issues and the CMJ made specific findings of fact before relying on them in determining the sentence. For the purposes of this appeal, a full account of the facts relevant to these issues is unnecessary. Suffice to say that they related (a) to the circumstances surrounding Private Tupper's attendance at a detoxification centre, on 7 December 2006, and (b) to the effect of Private Tupper's drug addiction on his behaviour (respondent's memorandum of fact and law at paragraph 14). On the first issue, the CMJ, as he was entitled to, preferred the testimony of one of the detoxification center's counsellor to that of the appellant (reasons for sentence, appeal book, vol. III at page 507 lines 4-20) whom, he found, had used deceit in trying to cover up his escape from barracks from 7 to 14 December 2006 by implicating health services in order to justify his absence from his place of duty (reasons for sentence, appeal book, vol. III at page 511 lines 19-36).

[23] On the second issue, the CMJ wrote:

> Private Tupper testified about his drug addiction and his recent encounter with the military justice system, as well as civilian justice system. It is clear from his testimony, that he feels that his chain of command has been unfair and unsupportive of him in his battle with drugs. Private Tupper testified that his superiors were picking on him all the time. He said that he wants out of the military and that he could not return to his current unit.
>
> I must say that the evidence before me clearly indicates that Private Tupper was treated as a pure disciplinary and administrative problem who was generating more than his fair share of concerns and paperwork. It may have been the only way to deal with the matter at the time, but in retrospect it is equally clear that the unit authorities did not see signs that could have alerted them to the source of that problem, i.e., Private Tupper's addiction to cocaine. They simply tried to deal with the matter, and they simply tried to deal with some of the consequences (reasons for sentence, appeal book, vol. III at page 508 lines 8-26).

[24] Nonetheless, he concluded:

> However, the Court is not satisfied that Private Tupper's attitude, unbecoming of a professional soldier, is only attributable to his addiction. His testimony highlights his disrespect for his chain of command (reasons for sentence, appeal book, vol. III at page 508 lines 27-30).

[25] Having made these findings, the CMJ then stated the sentencing principles and objectives in the context of military justice before proceeding to consider relevant aggravating and mitigating circumstances relating to the offences and the offender.

[26] The following factors were found by the CMJ to aggravate the sentence:

1. the objective gravity of offences under sections 83 and 85 of the NDA;
2. the context of insubordination and disobedience in which other less serious offences were committed;
3. the fact that the appellant had a conduct sheet for similar or related offences;
4. the fact that he tried to cover up his escape from barracks on December 7 to 14, 2006;
5. the fact that he never served the sentence of confinement to barracks awarded by a service tribunal; and
6. the fact that he was an experienced soldier who knew, or ought to have known, the importance of obedience and respect of chain of command (*ibid*. at pages 510-512).

The judge also considered the following two mitigating factors:

i. the appellant's young age and his precarious medical situation; and

ii. the fact that these incidents were largely attributable to his addiction to cocaine (*ibid.* at page 512 lines 8-22).

[27] Then, having reviewed the evidence, having addressed the contentious issues, and having listed the principles of sentencing, the CMJ concluded that:

> … the sentence imposed in this case shall answer the protection of the public and the Canadian Forces through punishments that will contribute to the maintenance of discipline and the interest of military justice, and emphasize the objectives of general deterrence, punishment, and denunciation of the conduct (reasons for sentence, appeal book, vol. III at page 509 lines 24-30).
>
> …
>
> However, the sentence must allow for rehabilitation, considering the young age of the offender, and not impede his attempts to cure his drug and alcohol addictions that played a significant role in the commission of most of these offences (*ibid.* at lines 31-41).

[28] Based on the foregoing, I agree with the respondent that the sentencing reasons of the CMJ do not leave any doubt as to how and why the sentence was imposed. Considered in the context of the record and the live issues at trial, I am satisfied that the reasons disclose a logical connection between the evidence and the sentence, including the aggravating and mitigating factors considered by the CMJ in a military context. These reasons provide for a meaningful appellate review. Therefore, I would dismiss this first ground of appeal. I now turn to the appellant's second ground of appeal.

The fitness of the sentence

A. The legislative background

[29] Appeals against the severity of a sentence are governed by sections 230 and 240.1 of the NDA, which provide:

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;
…	[…]
R.S., 1985, c. N-5, s. 230; 1991, c. 43, s. 21; 2000, c. 10, s. 2; 2007, c. 5, s. 5, c. 22, s. 45.	L.R. (1985), ch. N-5, art. 230; 1991, ch. 43, art. 21; 2000, ch. 10, art. 2; 2007, ch. 5, art. 5, ch. 22, art. 45.
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.
1991, c. 43, s. 26.	1991, ch. 43, art. 26.

B. General Principles

[30] When crafting a sentence, a trial judge must consider the fundamental purposes and goals of sentencing as found in sections 718 and following of the *Criminal Code*, R.S.C. 1985, c. C-46 (Cr. C.). I mention below the most relevant to the case at bar.

[31] With regard to the main goals of sentencing, the Cr. C. outlines the following: general deterrence, specific deterrence, rehabilitation and reform, and denunciation (see section 718 Cr. C.).

[32] The sentence must also be "proportionate to the gravity of the offence and the degree of responsibility of the offender" (see section 718.1 Cr. C.), as well as "similar to sentences imposed on similar offenders for similar offences committed in similar circumstances" (paragraph 718.2(*b*) of the Cr. C.).

[33] Finally, an offender should not be deprived of liberty, if less restrictive sanctions other than imprisonment may be appropriate in the circumstances (see paragraph 718.2(*d*) Cr. C.; *Lui, supra* at paragraph 28; *R. v. Forsyth*, 2003 CMAC 9 at paragraph 33).

[34] The excerpts from the reasons for sentence cited above show that the CMJ was alert to these goals and principles, which apply in the context of the military justice system (*R. v. Taylor*, 2008 CMAC 1 at paragraph 11). Of course, this particular context may, in appropriate circumstances,

"justify and, at times, require a sentence which will promote military objectives" (*Dixon, supra* at paragraph 33).

C. The sentence under review

[35] The scale of punishments that may be imposed in respect of service offences is found under subsection 139(1) of the NDA:

Scale of punishments	Échelle des peines
139. (1) The following punishments may be imposed in respect of service offences and each of those punishments is a punishment less than every punishment preceding it:	**139.** (1) Les infractions d'ordre militaire sont passibles des peines suivantes, énumérées dans l'ordre décroissant de gravité :
(*a*) imprisonment for life;	*a*) emprisonnement à perpétuité;
(*b*) imprisonment for two years or more;	*b*) emprisonnement de deux ans ou plus;
(*c*) dismissal with disgrace from Her Majesty's service;	*c*) destitution ignominieuse du service de Sa Majesté;
(*d*) imprisonment for less than two years;	*d*) emprisonnement de moins de deux ans;
(*e*) dismissal from Her Majesty's service;	*e*) destitution du service de Sa Majesté;
(*f*) detention;	*f*) détention;
(*g*) reduction in rank;	*g*) rétrogradation;
(*h*) forfeiture of seniority;	*h*) perte de l'ancienneté;
(*i*) severe reprimand;	*i*) blâme;
(*j*) reprimand;	*j*) réprimande;

(*k*) fine;	*k*) amende;
(*l*) minor punishments.	*l*) peines mineures.

[36] Pursuant to section 172 of the NDA, a Disciplinary Court Martial may not pass a sentence that includes a punishment higher than dismissal with disgrace from Her Majesty's Service.

[37] At the sentencing hearing, the prosecution suggested that the minimal punishment should consist of imprisonment for a period of three to six months. The defence argued that any sentence of incarceration should be suspended because the offences were the result of the appellant's use of cocaine (reasons for sentence, appeal book, vol. III at page 512 lines 26-32).

[38] Relying on *R. v. Gladue*, [1999] 1 S.C.R. 688 and *R. v. Baptista*, 2006 CMAC 1 for the principle that imprisonment should be the penal sanction of last resort (*ibid.* at lines 34-41), the CMJ wrote:

> … Your convictions clearly indicate a profound disrespect for military authority, obedience, and for the rule of law. They are extremely serious in the circumstances, and they take all their significance in the context of the Canadian Forces' involvement in the war against terrorism. These institutional values and skills distinguish members of the military with other members of the society.
>
> If your actions had not been enhanced by your drug addiction to cocaine, a punishment for imprisonment for a period of five months would be totally adequate. In addition, the evidence before me does not provide me with compelling reasons that would allow me to suspend such period of imprisonment (*ibid.* at page 513 lines 8-22).

[39] He then added:

> Moreover, the evidence before me, including your own testimony, supports the conclusion that there's no place for you in the Canadian Forces anymore. The objective seriousness of these offences, but more particularly the circumstances in which they were committed are so severe that the court must impose a punishment of last resort to effectively meet the required sentencing principles and objectives, as well as maintaining discipline and confidence in the administration of military justice.
>
> However, the sentence of this court can deter others, denounce and punish your conduct with punishments lower in the scale of punishments, and leave room to assist you in the battle against your drug addiction. For these reasons, the court sentences you to dismissal with the accompanying punishment of detention for a period of 90 days (*ibid.* at page 513 lines 22-38).

(1) Dismissal for misconduct

[40] The appellant does not point to any error made by the CMJ in imposing dismissal from the military apart from the CMJ's failure to recognize that one of the indirect consequences of dismissal would be to "deprive the appellant of treatment he could only have received as a serving member of the Canadian Forces" (appellant's factum at paragraph 51).

[41] I accept the respondent's answers to the appellant's grievance:

> 46. This argument fails to recognize that addiction treatment is available to service convicts serving a period of incarceration in the detention barracks…
>
> 47. It also ignores the fact that Private Tupper was not following a treatment program for addictions (…) at the time of trial (it had been one month since his last session) and was equivocal regarding his need for further treatment. Private Tupper indicated that he could get better without following the treatment recommendations made by [his counsellors]. It

> also ignores the fact that Private Tupper was eager to leave the Canadian Forces, and expressed this sentiment during his testimony (respondent's memorandum of fact and law at paragraphs 46-47).

[42] Therefore, I find that the punishment of dismissal was not inappropriate, especially in view of Major Hartson's testimony on the impact of the appellant's behaviour on his unit. At the trial, he had stressed the fact that the rear party was a very small organization where "Private Tupper's actions were seen and known to all" (appeal book, vol. III at pages 393-394) adding that:

> "In Tupper's case, I almost had to assign a senior NCO to watch him full time because of his various disciplinary problems. In part [*sic*] to Private Tupper, we had to then begin almost regular inspections in the quarters, which we were not doing before hand. We had to do almost fire piquet security on the quarters to try and prevent problems, and indeed the administrative levels for the safety sensitive drug aspect, although not relating to this trial, was significant. So his actions had a huge impact on the unit, and indeed his actions in the quarters also caused problems for other units on the base, because the quarters are mixed between units. They don't solely belong to 2 RCR, so any problems in the quarters had to be shared equally across the base" (appeal book, vol. III at page 394).

[43] It was also mentioned that Private Tupper's conduct "had a significant impact on the operational effectiveness of 2RCR" (*ibid.* at page 395).

[44] There was compelling evidence on record highlighting the importance of maintaining discipline in the infantry, which supported the CMJ's conclusion that there "was no place for [Private Tupper] in the Canadian Forces anymore" (reasons for sentence, appeal book, vol. III at page 513).

(2) Weapons Prohibition Order

[45] Paragraph 147.1(1)(*a*) of the NDA made it mandatory for the CMJ to consider whether it was desirable to make a weapons prohibition order.

[46] Section 147.1 of the NDA reads:

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;
…	[…]
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	Durée de l'ordonnance
(2) An order made under subsection (1) begins on the day the order is made and ends on the day specified in the order.	(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 of order	Application de l'ordonnance
(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.	(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	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.	(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*.
1995, c. 39, s. 176; 1996, c. 19, s. 83.1.	1995, ch. 39, art. 176; 1996, ch. 19, art. 83.1.
Requirement to surrender	Remise obligatoire

[47] In the case of Private Tupper, the order was based on terms that were jointly proposed by the prosecution and the defence (appeal book, vol. III at pages 498 and 502), both suggesting that the weapons prohibition not extend to the appellant's service in the military (appeal book, vol. III at page 497 lines 40-50).

[48] This joint proposal was not contrary to the public interest and including this Order in the sentence did not bring the administration of justice into disrepute. "Appellate Courts, increasingly in recent years, have stated time and again that trial judges should not reject jointly proposed sentences unless they are unreasonable, contrary to the public interest, unfit or would bring the administration of justice into disrepute" (*R v. Castillo*, 2003 CMAC 6). This is not the case.

[49] Therefore, I am of the view that the CMJ correctly exercised his discretion in that regard.

(3) Detention

[50] This leaves the punishment of detention. According to the appellant, all the relevant circumstances were in place to favour individual deterrence, proportionality and rehabilitation as driving forces in the sentence imposed by the CMJ: the CMJ had accepted the appellant's evidence in regard to his drug addiction to cocaine and its effect on his military conduct; the appellant was a first-time offender. Therefore, the CMJ should not have ordered his detention as imprisonment is a punishment of last resort reserved for more serious offences. In doing so, the CMJ failed to adequately consider the appellant's specific circumstances.

[51] I have two answers to the appellant' submission. First, his statement of the facts is not supported by the record. Private Tupper was not a first time offender when he received his sentence. His conduct sheet listed five previous convictions, including two convictions for absence without leave and one conviction for insubordinate behaviour (appeal book, vol. III at page 569).

[52] Second, he was serving a period of confinement to barracks at the time of the offences and, as a result of his actions, had not served that sentence. The offences of disobedience and insubordination for which the appellant had been convicted were serious offences "as they undermine the foundation of a military organization" (reasons for sentence, appeal book, vol. III at page 509 line 34).

[53] In his oral argument, counsel for the appellant opined that the combined punishments of dismissal and detention amplified the severity of the sentence stressing that this combination is, as of a general rule, inappropriate and counterproductive.

[54] He asked: "What is the purpose of detention, which generally seeks to rehabilitate service detainees before returning them to their unit (article 104.09 complete), if immediately followed by dismissal from the Canadian Forces? In that context, aren't the objectives sought by detention averted?"

[55] A careful review of the reasons for sentence convinces me that the CMJ pondered these questions along with all the relevant aggravating and mitigating circumstances in taking "into consideration any indirect consequence of the finding of guilt or of the sentence and imposing a sentence commensurate with the gravity of the offence and the previous character of the offender" (*R. v. St-Jean*, [2000] C.M.A.J. No. 2 at paragraph 20) (*Queen's Regulations and Orders* (QR&Os), article 112.48). I do not quarrel with the need for general deterrence and denunciation that the CMJ favoured in his reasons.

[56] Although detention could no longer serve as facilitating Private Tupper's return to the military, this punishment still could serve the purpose of general deterrence while leaving "room to assist [Private Tupper] in [his] battle against [his] drug addiction" (reasons for sentence, appeal book, vol. III at page 513 lines 34-36.

[57] As well, I would add that it reflected and honoured the Canadian Forces' rich legacy and pride. Detention, with its daily routine and treatment options, would have hopefully reformed Private Tupper and prepared him for a safe return to his civilian life as a healthy and strong individual ready to undertake new challenges and successfully achieve his new goals.

[58] Therefore, I conclude that the second ground of appeal must also fail.

[59] There is no doubt that the sentence is severe. Nonetheless, I would have ended the matter here but for one reason: in June 2008, pending this appeal, Private Tupper was administratively released from the Canadian Forces for unsatisfactory conduct, pursuant to QR&Os 15.01 (item 2(a)).

Administrative release pending appeal

[60] This new fact raises the question of the enforceability of the sentence. Considering its terms, one would have expected Private Tupper to serve his time in detention, as a member of the Canadian Forces, and then to be dismissed.

[61] This sequence of events would have served the purposes and goals of the sentence meticulously crafted by the CMJ where denunciation and general deterrence were emphasized while considering the personal circumstances of Private Tupper and his need for treatment to control his dependency to drugs.

[62] The reality is now completely different. Private Tupper has resumed his life as a civilian. He has since gained control over his drug addiction and is attending school to obtain a high school diploma.

[63] Had the CMJ known that Tupper would be administratively released pending his appeal, I am convinced that he would have crafted a sentence better suited to the appellant's new status as a civilian, one that could be executed even after the appellant's release.

[64] However, I need not speculate as to what the proper sentence might have been as I believe that the finality of the administrative release has made the punishments of dismissal and detention inoperative.

[65] It appears clearly from the record that the CMJ was totally unaware of the upcoming release. The record shows the following:

1. while discussing the weapons prohibition order, counsel for both parties submitted that it should not apply to Private Tupper's duties or employment as a member of the Canadian Forces (section 147.3 of the DNA; reasons for sentence, appeal book, vol. III at page 497 lines 30-43 and page 502 lines 16-21).

b) at the hearing on the application for release from detention pending appeal, the prosecution, although objecting to the application, proposed that certain conditions

be imposed if the CMJ agreed to release the offender. All these conditions suggested a continued relationship between the appellant and the Canadian forces (minutes of proceedings of an application for sentence pending appeal, appeal book, vol. III at page A-17 lines 4-40, see also page A-15 lines 25-27).

c) twice the CMJ expressed the wish that the sentence be served "as quickly as possible for the proper administration of military justice".

[66] As a result, the CMJ granted the application in the following terms, which Private Tupper undertook to obey:

> Therefore, I will grant the application made by Private Tupper if he undertakes to obey the following conditions: To remain under military authority; to report twice daily, that is 0715 hours and 1630 hours, to the military police detachment here at CFB Gagetown, or as directed by his Commanding Officer; to remain within the confines of CFB Gagetown, the City of Fredericton, and Oromocto; to refrain from establishments whose primary business is the sale of liquor, except as directed by his chain of command; to abstain from the consumption of alcohol or – and non-prescription drugs; to keep the peace and be of good behaviour; to report any change of address or employment to the military police at CFB Gagetown; to surrender, as directed by authorities; and to surrender his passport, if any (minutes of proceedings of an application for release pending appeal, appeal book, vol. III at page A-21 lines 22-40).

[67] As Private Tupper has already been released from military service, it follows that he can no longer be subjected to punishments reserved for soldiers. Having been released, he cannot subsequently be dismissed from the Canadian Forces. Similarly, he cannot be placed back into a uniform to serve a period of detention in military barracks.

[68] Members of the Canadian Forces can be subject to both administrative and disciplinary sanctions. If a Canadian Forces member has been charged with an offence under the NDA, Criminal Code or other federal statute, the chain of command may, regardless of the outcome of the offence charged, take administrative action to address any conduct or performance deficiencies arising from the same circumstances (DAOD 5019-0, Conduct and Performance Deficiencies).

[69] According to Dr. Chris Madsen (*Military Law and Operations,* looseleaf, Aurora: Canada Law Book, 2008 at 2:20.40), administrative action may be initiated against convicted soldiers especially in the case of repeat and habitual offenders. He notes:

> Release as no longer suitable for military service is one common outcome, which either compounds or supplants the punishment awarded at trial.

[70] In the present instance, the remission of sentence is the direct result of an administrative intervention into the military judicial process.

[71] I am not suggesting that the Canadian Forces cannot act the way it did and administratively sanction an offender despite the court martial proceedings. The application of military law is influenced not only by the particular circumstances of an offence, but also by the broader circumstances faced by the Canadian Forces, such as its current combat role in Afghanistan.

[72] I can imagine cases where the military would want to swiftly remove a problematic individual in order to restore discipline and promote confidence among its ranks, especially in cases where that individual has expressed the wish to leave the Canadian Forces.

[73] There could also be instances where the need to suspend carrying into effect a period of imprisonment or detention would arise, for example because the expertise of a convicted soldier is required in the field. (See sections 216 and following of the NDA; QR&Os 114.01 and 114.02.)

[74] Major Hartson testified to the effect that self-discipline and general discipline were "critical to the Canadian Forces mission in Afghanistan" (Major Hartson's testimony, appeal book, vol. III at page 396). This could have been a case where the chain of command felt justified to request Private Tupper's release, as he was seen as an administrative burden at a time where any disturbance was harmful to the interests of service and unit.

[75] However, such a decision comes with important consequences as it may very well circumvent a given sentence which then becomes in part, or in whole, incompatible with the administrative release. As mentioned before, this is the conclusion that I have reached in this appeal.

[76] It was suggested at the hearing that a more expedient appeal process might have prevented this situation. Looking at this particular file, I am unable to accept this proposition.

[77] Firstly, knowing the importance of the sentence in terms of denunciation and general deterrence, the chain of command could have opted to have Private Tupper relieved from the performance of his military duties while the proceedings lasted, as it was done in the case of *Dixon*, *supra* at paragraph 17, rather than have him released with the ensuing consequences on the sentence.

[78] Secondly, an examination of the Summary of Recorded Entries, reveals that this appeal was scheduled to be heard within 5 months of the requisition for hearing. All other delays are attributable to the parties. The notice of appeal was filed on 30 November 2007 but the memoranda could not be filed before the issuance, by the Appeal Committee, of its decision on Private Tupper's application for military Counsel on this appeal, which application was authorized on 21 May 2008. Finally, each party sought an extension to file its memorandum.

Conclusion

[79] For these reasons, I would grant leave to appeal and allow this appeal and although I have found the sentence to be demonstrably fit, I would set aside the punishments of dismissal and detention as they are inoperative following the appellant's administrative release from the Canadian Forces.

"Johanne Trudel"

J.A.

"I agree
M. Nadon"

PHELAN J.A. (Dissenting Reasons)

[80] I have had the benefit of reading the majority's reasons in this case. With the greatest of respect, I find that I cannot concur in the result.

[81] I agree with the majority in everything except the analysis of the effect of "administrative release pending appeal" on the merits of the appeal. On that ground alone, the majority would grant the appeal in part and set aside the punishment of dismissal with disgrace (commonly called a dishonourable discharge) and detention. In effect the appellant is left with only a seven-year weapons prohibition despite having been convicted of among the most serious offences in the military - disobeying a lawful command of the superior officer. He was found to have shown complete disrespect for the chain of command.

[82] In my view, this Court has no grounds for allowing the appeal under section 240.1 of the *National Defence Act* and therefore has no basis for substituting the sentence of the CMJ. This Court has found that the sentence, as passed, was appropriate and neither too severe nor unfit.

[83] The guiding principle on sentence appeals is set forth in *R. v. C.A.M.*, [1996] 1 S.C.R. 500 at paragraph 90:

> Put simply, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit. Parliament explicitly

> vested sentencing judges with a discretion to determine the appropriate degree and kind of punishment under the *Criminal Code*. As s. 717(1) reads:
>
> > 717. (1) Where an enactment prescribes different degrees or kinds of punishment in respect of an offence, the punishment to be imposed is, subject to the limitations prescribed in the enactment, in the discretion of the court that convicts the person who commits the offence. [Emphasis added.]

This principle applies equally to the Court Martial Appeal Court.

[84] This Court acknowledges that the CMJ applied all the right principles to the sentence, did not fail to consider a relevant factor or overemphasize an appropriate factor. The CMJ recognized the importance of maintaining discipline in the military and the need to ensure confidence in the administration of military justice.

[85] The maintenance of discipline is so fundamental to the military that it is virtually the *sine qua non* of a military organization. It is an essential feature which distinguishes military life from that of civilian life. Discipline is essential to the effectiveness of the military, its control of its personnel for the protection of the civilian population and the exercise of civil control of the military.

[86] Tupper's conduct directly undermined that core value at a critical time in his infantry unit's life – preparation for combat operations.

[87] There was clear evidence of Tupper's adverse impact on unit effectiveness and morale during the time of his misconduct. Dismissal from the military appears to be the only viable option. He was unable to function as a member of the military, required special attention and was disruptive to his unit and other units on the base (see paragraph 42 of the Court's Reasons).

[88] The point on which this appeal turns is whether the military must keep on its roster a wholly unsatisfactory soldier pending appeals so that the member can serve the entirely justified penalty of detention and dismissal with disgrace.

[89] In my view, the military is not required to make this "either-or" choice. Moreover, this Court should not decide this aspect of the case without a proper record of the circumstances which led to the military's decision to grant administrative release. It must be remembered that Tupper was more determined to separate from the military than the military had been to separate from Tupper.

[90] The Court only heard of Tupper's release at the appeal. It has no record of the options which the military had or the circumstances which may have necessitated or justified administrative release. The Court had been left to speculate on this matter. There is too thin a record upon which to base the Court's decision that administrative release vitiates the otherwise justifiable sentence.

[91] I do not see anything unfair requiring Tupper to serve his sentence even after having left the service as occurs for a civilian who has been released from custody pending an appeal. The change

in his circumstances cannot vitiate his sentence. Tupper is being punished for his wrongful acts while he was in the military, a life which he chose.

[92] The Court was pointed to no authority that the military lacks the jurisdiction to carry out the sentence even after the member has been administratively discharged or that changed circumstances renders the sentence excessive.

[93] Administrative release itself cannot be grounds for overturning a sentence. Administrative releases can be granted in many circumstances - unfitness, medical circumstance, compassionate grounds, etc. How could it be that as a result of the myriad of circumstances for granting administrative release, a member of the military can escape legally sound consequences for wrongful conduct?

[94] The impact of granting this appeal is to reward Tupper by letting him escape the serious elements of his punishment, detention and dismissal with disgrace, because he was potentially such a burden on the military that his administrative release was necessary.

[95] The ultimate effect of administrative release is to allow the perpetrator to escape the consequences of his action and to punish the victim by undermining its justice system.

[96] With greatest respect to my colleagues on this bench, general deterrence is such an important aspect of military discipline and punishment that it ought not to be undermined nor should appropriate punishment be foregone.

[97] The preservation of respect for military justice should be reinforced by this Court by upholding a sentence which is considered, at the time it was passed, as being entirely appropriate.

[98] Therefore, I would dismiss this appeal in whole, require Tupper to serve his sentence of detention and have it recorded that he was dismissed with disgrace.

"Michael L Phelan"

J.A.

COURT MARTIAL APPEAL COURT OF CANADA

SOLICITORS OF RECORD

DOCKET:	CMAC-508
STYLE OF CAUSE:	PRIVATE TUPPER, R.J., appellant
	HER MAJESTY THE QUEEN, respondent
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	MARCH 20, 2009
REASONS FOR JUDGMENT BY:	TRUDEL J.A.
CONCURRED IN BY:	NADON J.A.
DISSENTING REASONS BY:	PHELAN J.
DATED:	JUNE 4, 2009

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Date: 20090604

Docket: CMAC-508

Citation: 2009 CMAC 5

CORAM: **NADON J.A.**
PHELAN J.A.
TRUDEL J.A.

BETWEEN:

PRIVATE TUPPER, R.J.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Ottawa, Ontario, on March 20, 2009.

Judgment delivered at Ottawa, Ontario, on June 4, 2009.

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