COURT MARTIAL

Citation: *R. v. Levi-Gould,* 2016 CM 4003

Date: 20160226
Docket: 201528

Standing Court Martial

Canadian Forces Base Halifax Courtroom
Halifax, Nova Scotia, Canada

Between:

Her Majesty the Queen

- and -

Ordinary Seaman T.A. Levi-Gould, Offender

Before: Commander J.B.M. Pelletier, Military Judge

REASONS FOR SENTENCE

(Orally)

INTRODUCTION

The Charges

[1] Terrance Levi-Gould has pleaded guilty to the two charges before this Standing Court Martial for desertion contrary to section 88 of the *National Defence Act* (*NDA*) and disobedience of a lawful command of a superior officer contrary to section 83 of the *NDA*. The charges were the result of the failure of the offender to return to his ship following Christmas leave on 7 January 2014. The next day, he spoke to a supervisor on the phone who ordered him to report to the local Royal Canadian Mounted Police (RCMP) detachment or to Her Majesty's Canadian Ship (HMCS) *Ville de Quebec*. The offender failed to do any of that and had no contact with the military until arrested by the military police on 2 April 2015.

[2] Even if the offender ceased to be a member of the Canadian Armed Forces on 16 October 2014 when administratively released for illegal absence, the military jurisdiction over him is established by subsection 60(2) of the *NDA* as the offences were committed while he was subject to the Code of Service Discipline. Also, for the purpose of the proceedings, the accused must be referred as Ordinary Seaman Levi-Gould as a result of the application of subsection 60(3) of the *NDA*, which deems the accused to have the same rank and status that he held prior to his release.

Matters considered

[3] It is now my duty as the military judge to determine the sentence. In so doing, I have considered the principles of sentencing that apply in the ordinary courts of criminal jurisdiction in Canada and at courts martial. I have also considered the facts relevant to this case and the exhibits introduced in the course of the sentencing hearing, including a report produced as a result of the fact that Ordinary Seaman Levi-Gould is of aboriginal descent. I have also considered the numerous legal precedents from the case law cited by counsel, as well as their submissions on behalf of the prosecution and the accused.

[4] The *Queen's Regulations and Orders for the Canadian Forces* (QR&O) require that the judge imposing a sentence at a court martial considers any indirect consequence of the finding or the sentence, and "impose a sentence commensurate with the gravity of the offence and the previous character of the offender". I will first discuss the offences, then the offender.

THE OFFENCES

Circumstances of the offences

[5] The circumstances of the offences were related to the court by means of a Statement of Circumstances entered as Exhibit 5 in these proceedings. As consented by counsel, the court has also considered the evidence submitted for the purpose of a preliminary application pertaining to the constitutionality of subsection 157(1) of the *NDA* and alleged violations of the accused *Charter* rights. The circumstances are as follows:

(a) In the fall of 2013, Ordinary Seaman Levi-Gould is a member of the Regular Force posted to HMCS *Ville de Quebec*, a ship of the Atlantic Fleet whose home port is Halifax, Nova Scotia. On 18 November 2013, he requests to be voluntarily released from the Canadian Armed Forces in May 2014. This request is approved on 30 November 2013 for a planned release date of 18 May 2014.

(b) On 22 November 2013, Ordinary Seaman Levi-Gould is granted leave from 11 December 2013 to 6 January 2014 inclusively by the Executive Officer of HMCS *Ville de Quebec*.

(c) On 2 December 2013, Ordinary Seaman Levi-Gould is posted to HMCS *Charlottetown*. The date for report to duty on his new ship is 7 January 2014. He is directed to complete "out-routine" on HMCS *Ville de Quebec* upon returning from leave on the morning of 7 January 2014, before proceeding to HMCS *Charlottetown*.

(d) On Tuesday, 7 January 2014, Ordinary Seaman Levi-Gould does not report on HMCS *Ville de Quebec* nor to HMCS *Charlottetown*. He is, on that day, in Elsipogtog, New Brunswick, on the First Nation Reserve where he has spent his holiday leave period. He is no longer on leave and has no authority to be absent from his place of duty.

(e) Once it is determined that Ordinary Seaman Levi-Gould is absent at 0800 hours on 7 January 2014, a number of verifications are made by Chief Petty Officer 2nd Class Meredith to try to locate him. This includes contacting his mother by telephone on 8 January 2014 and leaving his coordinates. Later that day, Ordinary Seaman Levi-Gould contacted Chief Petty Officer 2nd Class Meredith by telephone. Chief Petty Officer 2nd Class Meredith informed Ordinary Seaman Levi-Gould that he was considered absent without leave and that he was required to proceed to the nearest RCMP detachment or to HMCS *Ville de Quebec.* I note that this fact is different from the particulars stated in the second charge, as it pertains to the name of the ship to which the offender was to report. As this difference between the facts proved and the facts alleged in the statement of particulars has not prejudiced the accused, who has admitted to the veracity of the Statement of Circumstances, I will make a special finding in that regard.

(f) On 8 January 2014, a warrant for Ordinary Seaman Levi-Gould's arrest was issued by the commanding officer of HMCS *Ville de Quebec*. The warrant purported to authorize the arrest of Ordinary Seaman Levi-Gould within the dwelling house at 9120 Route 116, Elsipogtog First Nation. That same day, the warrant for arrest was transmitted to Military Police Unit Halifax (MPU Halifax) and entered into the Canadian Police Information Centre (CPIC). On 9 January 2014, MPU Halifax requested the support of the Elsipogtog RCMP detachment.

(g) Although the whereabouts of Ordinary Seaman Levi-Gould were reasonably known by members of the RCMP in Elsipogtog, there was reticence to enter a dwelling house on Elsipogtog First Nation to effect an arrest in the absence of a threat to the safety in the community, due to certain tensions at the time between the police and the community and, to a lesser extent, as a result of concerns regarding the legal strength of a commanding officer's warrant. As a result, the RCMP informed MPU

Halifax that Ordinary Seaman Levi-Gould would only be arrested if he came in contact with police.

(h) On 13 March 2014, Commander Druggett, the commanding officer of HMCS *Charlottetown*, sent a letter to Ordinary Seaman Levi-Gould's last known address at 7 Army Street, Elsipogtog, New Brunswick, E4W 2R6, to inform him of the charges he could potentially face and to urge him to come back. According to the registered mail receipt, the letter was accepted at Ordinary Seaman Levi-Gould's sister's house. Commander Druggett sent a second letter to Ordinary Seaman Levi-Gould's same last known address on 10 July 2014 to inform him that a charge of desertion had been laid and to inform him of how to contact Defence Counsel Services. During his testimony, Ordinary Seaman Levi-Gould denied having seen these letters.

(i) On 3 September 2014, the Regional Military Prosecutor (Atlantic) preferred against Ordinary Seaman Levi-Gould a charge of desertion, contrary to section 88 of the *NDA*, and a charge of disobeying a lawful command, contrary to section 83 of the *NDA*.

(j) Attempts were made by a process server, without success, to serve the charge sheet on Ordinary Seaman Levi-Gould on 8, 11 and 14 October 2014.

(k) Around 14 December 2014, Ordinary Seaman Levi-Gould reported to the Elsipogtog RCMP Detachment for an unrelated matter. The RCMP did not arrest Ordinary Seaman Levi-Gould but informed him of the arrest warrant issued by the military against him and recommended that he report to military authorities.

(l) On 8 February 2015, a warrant for arrest was issued by Commander Druggett to reflect the fact that the member had been charged with desertion and disobedience of a lawful command. On 9 February 2015, the information in CPIC was updated accordingly.

(m) On 1 April 2015, Ordinary Seaman Levi-Gould was arrested by the RCMP for unrelated alleged criminal offences. He was brought to the courthouse in Moncton, New Brunswick on 2 April 2015 and was released on conditions by a provincial court judge. The RCMP had previously informed MPU Halifax of the arrest and that Ordinary Seaman Levi-Gould would be brought to Moncton. Two military police members from MPU Halifax arrested Ordinary Seaman Levi-Gould on 2 April 2015 at the Moncton courthouse and transported him to MPU Halifax where he was placed in pre-trial custody. Ordinary Seaman Levi-Gould was released under conditions by a military judge on 8 April

> 2015. To this day, there are no indications that he breached those conditions.

[6] Ordinary Seaman Levi-Gould testified on sentencing as well as at the hearing of the preliminary application. In relation to the circumstances of the offences, he testified that he had joined the Navy to better himself but in the 17 months of his service, he spent too much time away from his family and two sons. He stated that he was drunk most of the time, except while on the ship. As it pertains to the Christmas holidays in 2013, he was confronted with the resistance of the mothers of his kids as to him visiting them and essentially went on a drinking binge which lasted several months. He remembers having spoken to Chief Petty Officer 2nd Class Meredith. He knew that he had to get back to his ship but somehow did not have the capacity to take steps to get out of the illegal situation he was in. In fact, he did not care about anything else at the time and even contemplated suicide. He testified to the fact "when you don't care for your life, it is hard to care for anything else".

[7] In relation to the impact the incidents had on the offender's unit, Chief Petty Officer 1st Class Lenehan testified that he was engaged in the efforts to apprehend Ordinary Seaman Levi-Gould from 28 January 2015, when the responsibility of the file was transferred to him, as the coxswain of HMCS *Charlottetown*. He said that although Ordinary Seaman Levi-Gould had not served on the ship, the matter of his absence was known to the crew, especially given the fact that at the time, another member of the ship's company was regularly absent without leave and had to be apprehended on a few occasions. Chief Petty Officer 1st Class Lenehan said that two sailors approached him, wondering about the apparent difference in treatment between the two offenders involved. He said he did explain the situation to them and others on a few occasions in the main cafeteria.

[8] Chief Petty Officer 1st Class Lenehan did relate the duties that Ordinary Seaman Levi-Gould would have had to perform on the ship and the impact of his absence on the workload of others, until he could be replaced several months later. However, Chief Petty Officer 1st Class Lenehan did not appear to the court as being entirely aware of the fact that Ordinary Seaman Levi-Gould was to be released from the Navy in May 2014. During the period of time that his absence would have been felt, his ship was in dry dock at a private shipyard and the crew's duty was to test and maintain equipment and engage in training in anticipation of the ship's return to the Navy. At that time, sailors from HMCS *Charlottetown* were loaned to other ships. Even if Ordinary Seaman Levi-Gould would have been gainfully employed between January and May 2014, I conclude that his absence did not have a significant impact on the morale, efficiency or overall state of discipline on HMCS *Charlottetown*.

THE OFFENDER

Circumstances of the offences

[9] Ordinary Seaman Levi-Gould is 28 years old and has neither a conduct sheet nor a criminal record. This is his first conviction. The incident related to Ordinary Seaman Levi-Gould's arrest on 1 April 2015 has so far been handled by the Healing and Wellness Court in Elsipogtog, as explained in the testimony of Mrs Catherine Piercey, the court's primary case manager with the New Brunswick Department of Justice. She mentioned that Ordinary Seaman Levi-Gould is progressing well in the program he joined in May 2015, which could last up to 18 months. He is very engaged, communicates well, benefits from the assistance of several resources on the Reserve and takes pride in his work with the Band Council. Progress is monitored regularly by a judge of the Provincial Court. Ordinary Seaman Levi-Gould is in the maintenance phase and the next milestone is a review in June. The end result is that the Crown may decide not to proceed with any outstanding charges against him.

[10] In his testimony, Ordinary Seaman Levi-Gould described the challenges he faced during the period of 17 months he served in the Navy. He made the choice to join to improve his prospects in life and was told what life in the Canadian Armed Forces and, especially, the Navy would entail. After attending basic training in Saint-Jean, Quebec, he was immediately booked on a flight to Esquimalt, British Columbia for the next phase of his training, on a course which commenced only three months later. He said his understanding was that the Canadian Armed Forces supported the family but he had failed to realise how having only 20 days of leave annually would be difficult in terms of travelling to see his kids and family in Elsipogtog. Concerning his time in British Columbia, he said that he was able to complete his Qualification Level 3 for Boatswain but that he was drinking as soon as he was off duty. In June of 2013, he was posted on HMCS *Ville de Quebec* in Halifax but the ship left for sea immediately after he got on board. Being at sea was not easy, as he suffered a back injury early on causing constant pain, especially at sea, with the motion of the ship. Also, the cheap price of alcohol on board did not help his drinking problems and he said that on port visits he would drink first on ship, then ashore, to the point of blacking out. He said the coxswain briefed him about his alcohol habits towards the end of the fall of 2013 and the bar staff was instructed to stop serving him alcohol; however, he did not seek and was not offered specialized alcohol addiction treatment.

The background of the offender and his status as an aboriginal

[11] Defence counsel, recognizing the aboriginal status of Ordinary Seaman Levi-Gould at the time of the Custody Review Hearing, obtained a pre-sentence *Gladue* report in anticipation of an eventual sentencing hearing. He requested the introduction of this report as an exhibit, a request objected to by the prosecution, essentially for procedural reasons, as there is no mechanism in the *NDA* or the QR&O for the admission into evidence of the hearsay statements contained in that document. I am told

this was the first time that a request was made for the introduction of a *Gladue* report as an exhibit in a court martial.

[12] Using my powers under section 179 of the *NDA*, I ordered the production of the report under QR&O 112.55 as I do consider that the admission of the *Gladue* report is proper for the due exercise of my jurisdiction, specifically my duty to impose a sentence on an aboriginal offender as outlined in the Supreme Court decisions of *R. v. Gladue* [1999] 1 SCR 688 and *R. v. Ipeelee* [2012] 1 SCR 433. Indeed, the Court Martial Appeal Court stated in *R. v. Tupper*, 2009 CMAC 5 that a military judge crafting a sentence must consider the fundamental purpose of sentencing found in subsections 718 and following of the *Criminal Code*. These include section 718.2(*e*) which provides for the obligation of sentencing judges to consider all available sanctions other than imprisonment, with particular attention to the circumstances of aboriginal offenders.

[13] To be clear, I came to that conclusion with the full knowledge that the corresponding foreseen provision of the *NDA* at section 203.3 passed by Parliament through Bill C-15 in June 2013 but which has not yet been brought into force does not provide for consideration of the particular circumstances of aboriginal offenders. It is not clear to me as to why the particular circumstances of aboriginal offenders were omitted from the future sentencing provision of the *NDA*. Today, however, as a sentencing judge dealing with an aboriginal offender who has not been wearing a military uniform for over two years, I estimate that denying examination of aboriginal status would be denying what has been recognized by courts as an essential requirement for the imposition of just sanctions which do not operate in a discriminatory manner.

[14] The information contained in the *Gladue* report is useful for me to fulfil my duty to take judicial notice of the matters listed at paragraph 60 of *Ipeelee*, such as the history of aboriginal people, especially the Mi'kmaq nation to which the offender belongs. Even if the report is deficient with respect to details about its author and the reliability of some of its sources, it contains case-specific information that, in combination with the testimony of the offender, is convincing to this Court

[15] Indeed, the offender testified at length on his background, including a very complex family situation at birth and at a young age, the impact of alcohol and substance abuse of members of his family, his own experimentations with alcohol commencing in his early teens, the impact of suicide in his community, including directly impacting one of his sons, employment difficulties, past and present, as well as other issues. It is not necessary to elaborate on those as the prosecution does not contest the veracity of what was advanced by the offender in that regard. Suffice it to say, I have been provided with more than enough evidence to appreciate the context and influence of the systemic and background factors affecting aboriginal people as it applies to the case specific information in both the *Gladue* report and the testimony of the offender. I conclude, contrary to the position expressed by the prosecution, that these background factors played a significant role in bringing Ordinary Seaman Levi-Gould before the court, specifically in deciding to disengage from his obligation of service towards the Canadian Armed Forces in January 2014.

POSITION OF PARTIES ON THE SENTENCE

Prosecution

[16] In terms of the determination of an appropriate sentence, the prosecution stressed the objectives of denunciation and deterrence, asking this court to impose a sentence of imprisonment between 30 to 60 days which, considering the 7 days spent by the offender in pre-trial custody, would translate into 23 to 53 days of imprisonment. The prosecution added that the duration of imprisonment requested takes into account the personal circumstances of the accused and is the minimum required to maintain discipline.

Defence

[17] In response to submissions by the prosecution, defence counsel submitted that a custodial sentence was not warranted. It is suggested that an appropriate punishment would be a severe reprimand only.

ANALYSIS

Objective gravity of the offences

[18] In arriving at evaluating what would be a fair and appropriate sentence, the court has considered the objective seriousness of the two offences committed, as illustrated by the maximum punishments that the court could impose. Offences under section 88 of the *NDA* for desertion are punishable with a maximum term of imprisonment of five years where, as in this case, the prosecution chooses not to establish that the offender was on active service. Offences under section 83 of the *NDA* for disobedience of a lawful command are punishable with imprisonment for life or less punishment. Under section 148 of the *NDA*, only one sentence can be imposed for all offences.

Subjective gravity – the nature of the infractions

[19] Despite the fact that there are two charges before me, they are essentially related to the same behavior on the part of the offender; namely, disengagement from his obligation of service towards the Canadian Armed Forces. Service in the Canadian Armed Forces is not a regular job. It is a legal obligation assigned at section 23 of the *NDA* that binds the person enrolled to serve until lawfully released. This makes sense. The main asset the Government of Canada obtains from the Canadian Armed Forces is a pool of trained personnel available at the government's call, not only for deployment overseas but also for domestic operations of all sorts in which military personnel may be required to engage to help civil authorities on short notice.

[20] Indeed, what Canada requires of those in military service is a trained capability. That training is hard. It is difficult to imagine anyone going through military training who, at one point, did not think of leaving. Yet, sailors cannot unilaterally decide for themselves that they want to pick up their marbles and go home. To use the words of Justice Gibson in *R. v. deJong*, 2014 CM 2008:

> The Canadian Forces cannot indulge fits of pique in which members abandon their responsibilities in the face of perceived adversity. They are expected and required to show sufficient depth of character to persevere in their duty. This is a deadly serious business that we are in. … It is difficult to imagine an offence more corrosive of discipline and operational effectiveness than that of desertion, of voluntary abandonment of one's post, and it must be denounced and deterred.

[21] A deserter unlawfully deprives the government of his or her services. That person degrades the military capacity of Canada. Even if the degradation of capability brought about by one person will not in itself degrade the overall capability of the Canadian Armed Forces, the tolerance of desertion may lead to such degradation. The impact of desertion, therefore, cannot be assessed solely on the basis of the impact on a deserter's unit.

[22] This is not to say that persons should be kept in the Canadian Armed Forces against their will. There are many ways to leave lawfully. The facts of this case reveal that the offender was 15 months into a 4-year engagement when he requested his release on 18 November 2013. Twelve days later, his request was approved with an effective date of May 2014, exactly as he requested. I am confident in saying the Navy is not interested in keeping personnel who do not wish to be within its ranks. Yet, it is entirely legitimate for those wishing to leave to obey the law in doing so.

The aggravating factors

[23] The circumstances of the offences demonstrate to the court one important aggravating factor; namely, the duration of the absence and the failure of the offender to take the opportunity, first, to return to his unit and, later on, to surrender to the RCMP. I don't agree with defense counsel to the effect that the duration of the absence is somehow subsumed into the intent element of the offence of desertion. I believe a person who leaves his or her post without intent to return commits the offence of desertion but if he or she has a change of heart and returns, the treatment of that person should be different from another deserter who is finally apprehended much later.

[24] That being said, I disagree with what appears to be the position of the prosecution, as per the particulars of the charge of desertion, that Ordinary Seaman Levi-Gould committed the offence of desertion until apprehended on 2 April 2015. On that date, he was a civilian since 16 October 2014, having been administratively released from the Canadian Armed Forces under item 1(*c*) of the Table to QR&O Article 15.01, applying to a person "who has been illegally absent and will not be required for further service under existing service policy". From the moment Ordinary Seaman Levi-Gould was lawfully released as being no longer required, section 23 of the

NDA was no longer binding on him. Without the obligation to serve, there can be no offence of desertion. When challenged on that issue, the prosecution had nothing to reply and, therefore, has not fulfilled its obligation to prove this aggravating factor to the extent alleged. A special finding will accordingly be made in the disposition of this case.

[25] The other aggravating factors mentioned by the prosecution are essentially natural consequences of the offence of disobedience of a lawful command and not aggravating per se.

The mitigating factors

[26] There are a number of significant mitigating factors applicable in this case, as mentioned in the submissions of counsel and demonstrated by the evidence heard during these proceedings:

(a) The guilty plea of the offender before this court. It demonstrates that he is taking full responsibility for his actions.

(b) The fact that the offender has no prior criminal or disciplinary record.

(c) The significant challenges faced by Ordinary Seaman Levi-Gould at the time of the offences and his apparent depressive condition, which lead him to fall into a drunken haze where nothing mattered anymore. I recognize the evidence in support of this factor comes exclusively from the offender but I believe what he related to the court. It is clear that his young age and the systemic and background factors affecting him as an aboriginal person played a role in limiting his skills to deal with the challenges he was faced with, including the challenge of adapting to life in the Navy. I am dealing with an offender who was a young ordinary seaman, the lowest non-commissioned rank. Clearly, these factors do not absolve him of responsibility for the offences but they offer an element of explanation for his conduct.

(d) I consider as mitigating the efforts and the progress made by Ordinary Seaman Levi-Gould to address his difficulties using the resources available in his community, including his employment. This is an offender who is now a different person than he was at the time the offences were committed.

(e) I consider as mitigating the age and potential of Ordinary Seaman Levi-Gould to contribute to Canadian society in the future. He can look forward to finding a trade and contributing his talents to the civilian workforce.

[27] Although not necessarily a mitigating factor per se, I am keeping in mind the fact that the offender in this case has spent seven days in pre-trial custody. However, I disagree with defence counsel to the effect that this is a result of state misconduct. Although errors were committed in the written reasons given to justify the committal and maintenance in custody, they were made in good faith by those authorities entrusted with discretion under the *NDA*. There were no *Charter* violations resulting from those errors. I found in my Finding on the preliminary application that there were sufficient reasons to keep the offender in custody.

OBJECTIVES AND PRINCIPLES OF SENTENCING

[28] The fundamental purpose of sentencing in a court martial is to ensure respect for the law and maintenance of discipline by imposing sanctions that have one or more of the following objectives:

(a) to protect the public, which includes the Canadian Armed Forces;

(b) to denounce unlawful conduct;

(c) to deter the offender and other persons from committing the same offences;

(d) to separate offenders from society, where necessary; and

(e) to rehabilitate and reform offenders.

[29] When deciding what sentence would be appropriate, a sentencing judge must take into consideration the following principles:

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

(b) a sentence must be proportionate to the responsibility and previous character of the offender;

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

(d) an offender should not be deprived of liberty, if applicable in the circumstances, if less restrictive sanctions may be appropriate; and

(e) all sentences should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender.

[30] That being said, the punishment imposed by any tribunal should constitute the minimum necessary intervention that is adequate in the particular circumstances. For a

court martial, this means imposing a sentence composed of the minimum punishment or combination of punishments necessary to maintain discipline.

Objectives of sentencing to be emphasized in this case

[31] I came to the conclusion that in the particular circumstances of this case, the focus in sentencing should be placed on the objectives of denunciation, general deterrence and rehabilitation. It must be made clear to anyone in the Canadian Armed Forces that should one wish to disengage from the military, it must be done legally. Also, the sentence must deter anyone from engaging in any conduct showing disrespect for the authority of superior officers, an essential element for a functioning military organization.

[32] I also consider that rehabilitation is an important objective of sentencing here. The offender had a very difficult upbringing and has nevertheless been able to complete his education, excel at one point in sports and join the Canadian Armed Forces. As mentioned by defence counsel, it is very rare indeed to find an offender before a military court who has had such a difficult childhood. I suspect this is because such difficulties most often prevent those persons from meeting recruiting requirements to join the military. The offender here has been able to do that. Even if his prospects for a full military career have disappeared during a rather dark period of his life, he is now on a plan to recover and try to find a place in society. Any sentence I impose should not compromise this progress.

Determination of the appropriate sentence

[33] In determining an appropriate sentence in this case, I have carefully canvassed all of the precedent sentencing cases provided by the prosecution and defence. There are very few cases involving desertion, which is a good thing. It is clear from the jurisprudence that a sentence of incarceration is a possibility for offences of desertion. Yet, in the very few recent cases where the issue of sentence was contested, imprisonment to be actually served (i.e. not suspended) was not imposed.

[34] I agree with defence counsel to the effect that it is difficult to ignore the precedent of Lieutenant(N) deJong, 2014 CM 2008 to which I referred earlier. In that case, an officer very publicly deserted from his ship during a port visit in Florida, between two important deployments. He flew back to Halifax and reported to the military police. There were significant mitigating factors in that case, including the outstanding performance of the offender post-offence and the fact that he surrendered immediately. He was sentenced to a severe reprimand and a fine of $5,000. In that case, the prosecution had not sought a sentence of imprisonment.

[35] Even if sentences of incarceration are within the range of possibilities for cases of desertion, it remains that sentences privative of liberty are measures of last resort. Given the mitigating factors that I mentioned and the important factors which I accepted in relation to the status of the offender as an aboriginal, I do not believe that ordering

the offender to serve a sentence of imprisonment is appropriate. Of course, it would be in some way easier for me to impose a punishment of imprisonment and then suspend the execution of that punishment; however, I have stated in *R. v. Boire,* 2015 CM 4010 that the issue of suspension of a sentence of incarceration does not arise unless and until the sentencing judge has determined that the offender is to be sentenced to imprisonment or detention, after having applied the proper sentencing principles appropriate in the circumstances of the offence and the offender. In this case, we have not gotten to that point. If we had, the burden would be on the defence to show exceptional circumstances affecting the offender at the time of sentencing to justify the suspension of the punishment of imprisonment. I do not believe in the suspension of custodial sentences on the basis of mitigating factors.

[36] The less severe options available in this case from the list of punishments at section 139 of the *NDA* are limited by the rank of the accused and the fact that he is no longer serving in the Canadian Armed Forces. The prosecution urges me not to impose a sentence of dismissal as they are not confident the item of release can be amended to reflect that sentence administratively. The prosecutors were unable, however, to point to any authority to that effect. This is not much of a concern for me. What is a concern, however, is the fact that such a punishment would, in my view, be disproportionate in light of the *deJong* precedent, taking into consideration the rank and age differential between the two offenders.

[37] Obviously, the sentence of a reduction in rank is not available in this case. I arrive at the sentence of a severe reprimand recommended by the defence. The concern, of course, is whether such a punishment would be sufficient to meet the objectives of denunciation and deterrence that I have identified as important here. I note that given that the offender is no longer serving, such a sentence could well be seen as entirely inconsequential, which would reduce its deterrent effect. Yet, subsection 60(3) of the *NDA* provides that a person who, since the commission of an offence, has ceased to be liable under the Code of Service Discipline, must be deemed, in relation to trial and punishment for that offence, to have the same status and rank held immediately prior to being so liable. I must be careful not to treat such offenders more harshly than an offender still serving. A severe reprimand carries some symbolic signification which could serve the objectives of denunciation and deterrence.

[38] Normally, such a punishment imposed on a person who has been released from the Canadian Armed Forces would be coupled with a fine, a punishment which has and will be seen to have an actual impact on the offender, hence meet the objectives of denunciation and deterrence; however, in this case, the objective of rehabilitation is also important. The offender has testified that the program under which he is currently employed will end very soon. Employment prospects in his aboriginal community are extremely limited. He needs to retrain to improve his future prospects for employment. He is the sole support for a spouse and her child. She is pregnant with their child.

[39] In light of these facts, I have to be careful not to impose a punishment that would be detrimental to the rehabilitation of the offender. A severe reprimand without a

fine may appear to have limited actual impact on the offender. Yet, an informed observer, aware of the circumstances of this case, would know that the offender here was detained for seven days over the Easter weekend in 2015. This is an actual impact that I must take into consideration in determining the sentence. In light of this, I conclude that a severe reprimand alone is sufficient to meet the interests of justice in this case.

[40] Ordinary Seaman Levi-Gould, the charges you pleaded guilty to are serious and I am confident you recognize that they deserved to be dealt with. That being now done, you can move on and close the chapter of your life relating to the Canadian Armed Forces. I am confident you are well engaged, with the help of your community, in a program that will assist your rehabilitation and give you the tools to make a positive contribution to your kids, your family and, indeed, to society. The path you will need to follow to reach your objectives is going to be fraught with significant challenges. I hope you can come to take something positive from your experience in the Navy as you try to overcome some of them.

FOR THESE REASONS, THE COURT:

[41] **FINDS** you guilty of charges one and two and makes a special finding as follows:

(a) For charge number one, the facts prove that the absence ended on 16 October 2014, the date of the offender's release from the Canadian Armed Forces. Indeed, the offender does not remain absent to this date, as stated in the particulars of the charge.

(b) For charge number two, the facts prove that the order given to the offender by Chief Petty Officer 2nd Class Meredith was to report to the local RCMP detachment or to HMCS *Ville de Quebec*, not HMCS *Charlottetown* as stated in the particulars of the charge.

[42] SENTENCES you to a severe reprimand.

Counsel:

The Director of Military Prosecutions as represented by Major P. Rawal

Lieutenant-Commander B. Walden and Captain F. Ferguson, Defence Counsel Services, Counsel for Ordinary Seaman Levi-Gould