COURT MARTIAL

Citation: *R. v. Ayers*, 2017 CM 1012

Date: 20170802
Docket: 201730

Standing Court Martial

Canadian Forces Base Edmonton
Edmonton, Alberta, Canada

Between:

Her Majesty the Queen

- and -

Corporal (Ret) L.J. Ayers, Offender

Before: Colonel M. Dutil, C.M.J.

REASONS FOR SENTENCE

(Orally)

[1] Corporal (Ret) Ayers admitted his guilt to two counts of absence without leave contrary to section 90 of the *National Defence Act* (*NDA*) and one count of failure to comply with conditions contrary to section 101.1 of the Act. The charges read as follows:

FIRST CHARGE **ABSENTED HIMSELF WITHOUT LEAVE**

Section 90 *NDA* *Particulars*: In that he, at 0730 hours on 14 October 2016, without authority was absent from 1 Canadian Mechanized Brigade Group Headquarters and Signals Squadron at Building 400, Canadian Forces Base Edmonton, Alberta and remained absent until approximately 0850 hours, 25 January 2017.

SECOND CHARGE ABSENTED HIMSELF WITHOUT LEAVE

Section 90 *NDA* *Particulars*: In that he, at 0730 hours on 3 February 2017, without authority was absent from 1 Canadian Mechanized Brigade Group Headquarters and Signals Squadron at Building 400, Canadian Forces Base Edmonton, Alberta and remained absent until approximately 1000 hours, 22 April 2017.

THIRD CHARGE FAILED TO COMPLY WITH A CONDITION IMPOSED UNDER DIVISION 3

Section 101.1 *NDA* *Particulars*: In that he, on Friday, 3 February 2017, at 1 Canadian Mechanized Brigade Group Headquarters and Signals Squadron at Building 400, Canadian Forces Base Edmonton, Alberta, without lawful excuse, failed to report to the duty personnel at 0730 hours, a condition of release imposed upon him under Division 3 of the Code of Service Discipline.

[2] Counsel have made a joint submission on sentence. They recommend that Corporal (Ret) Ayers be sentenced to the punishments of dismissal, reduction in rank and imprisonment for a term of one day. In *R. v. Anthony-Cook*, 2016 SCC 43, the Supreme Court of Canada exposed the legal test that trial judges must apply when they are facing a joint submission by counsel on sentence. In a nutshell, unless the proposed sentence is contrary to the public interest or will bring the administration of justice into disrepute, the presiding trial judge cannot depart from that joint recommendation. The Court voiced that it is a desirable practice for the prosecution and for the defence to agree on joint submissions on sentence, but it also highlighted the fact that counsel are responsible and accountable for those joint submissions. In other words, the judge cannot alter their recommendation by tweaking it even a little bit. Not only are agreements of that nature commonplace and are vitally important to the well-being of the criminal justice system and the military justice system, they free up resources and allow justice participants to put these resources to needier cases. Trial judges have to trust the judgement, the experience and the competence of counsel in the legal system making those submissions.

[3] Joint submissions have many benefits, including the fact that the prosecution can secure a conviction even when its case has some weaknesses. It saves resources by not having to call witnesses. It also assists the defence in knowing in advance or at least to provide them with some sense of certainty as to what they expose themselves to. So, it provides both parties with a high probability that if they discharge their burden, their recommendation will be accepted.

[4] A Statement of Circumstances was provided to the court as a result of the plea of guilty and it is reproduced to provide a detailed rendering of the events that led to

charges before the court as well as relevant information in the determination of a fair and fit sentence:

"STATEMENT OF CIRCUMSTANCES

1. At all material times, Corporal ("Cpl") Ayers was a member of the Regular Force and posted to 1 Canadian Mechanized Brigade Group Headquarters & Signal Squadron ("1 CMBG HQ & Sig Sqn"), Canadian Forces Base ("CFB") Edmonton, Alberta.

2. On 11 October 2016, Cpl Ayers contacted Warrant Officer ("WO") Burns, his immediate supervisor, to request leave as he was being evicted from his residence. He contacted WO Burns again on 12 October 2016 to request a one day extension of leave, which was granted.

3. On 13 October 2016, Cpl Ayers reported to work and requested additional leave to complete his move. One additional day of leave was granted, and Cpl Ayers was told by WO Burns that he was to report to work on 14 October 2016 at 0730 to Building 400, CFB Edmonton.

4. On 14 October 2016, Cpl Ayers failed to report to work. He did not notify anyone in his chain of command. WO Burns made multiple attempts to contact Cpl Ayers and left voice mails, to which he received no response. Cpl Ayers would not again report for work until 25 January 2017.

5. At no point between 14 October 2016 and 25 January 2017 did anyone in Cpl Ayers chain of command authorize him not to attend work.

6. On 17 October 2016, Cpl Ayers emailed WO Burns to advise that he had car issues and would call. After Cpl Ayers failed to call, WO Burns attempted to contact Cpl Ayers, leaving voice mails, to which he received no response.

7. On 18 October 2016, WO Burns again attempted to contact Cpl Ayers, receiving no response. Cpl Ayers contacted WO Burns on 19 October 2016, updating him regarding recent events and his state of mind, and again on 20 October 2016.

8. From 24 October to 28 October 2016, Cpl Ayers contacted WO Burns and Major ("Maj") MacRae, Padre for 1 CMBG HQ & Sig Sqn, via email, to advise that he was attending civilian therapy. He advised he would call, but never did. WO Burns made multiple attempts to call Cpl Ayers, all of which failed.

9. On 7 November 2016, Cpl Ayers emailed WO Burns and Maj MacRae, to advise on his mental condition. Maj MacRae responded, advising him that he should return to work, and that there are options available for him.

10. On 15 November 2016, Cpl Ayers again emailed Maj MacRae and WO Burns, advising them on his mental condition, and that he wished to at least leave the Canadian Forces in an honourable way. He requested that they meet him on 16 November 2016 at 1600 hours at a location off base.

11. On 16 November 2016 at 1537 hours, Cpl Ayers advised that he was getting his vehicle repaired, and would not make the 1600 timing. Maj MacRae responded, advising him that it would be better to come in early on Friday so that he and WO Burns could take him to mental health.

12. On 1 December 2016, Cpl Ayers again emailed Maj MacRae and WO Burns, advising on his mental condition and that he wished to get his life "back on track". Maj MacRae responded, again advising him to return to the base and obtain help.

13. On 2 December 2016, Cpl Ayers again email Maj MacRae and WO Burns, confirming that he intended to return to the base the following Monday, but was concerned that he and his partner were about to be evicted, as well as advising on his mental condition. Maj MacRae responded, again advising him to return to the base and obtain help, as well as advising that Cpl Ayers could at least get a room on base so as not to be homeless.

14. On 12 December 2016, Cpl Ayers emailed Maj MacRae and WO Burns, asking them to notify the 1 CMBG HQ & Sig Sqn Adjutant that he had been arrested the previous evening, and that he had to appear in court on 28 January 2017.

15. On 12 December 2016, Chief Warrant Officer ("CWO") Stevens, 1 CMBG HQ & Sig Sqn Regimental Sergeant Major ("RSM"), emailed Cpl Ayers to advise that he has been posted out of the unit owing to his ongoing absence, and that he should send any further correspondence to the military police ("MPs"). Cpl Ayers inquired how he should contact his new unit, and was advised to contact the MPs.

16. On or about 24 December 2016, CWO Stevens emailed Cpl Ayers advising him to return to the unit to receive help, and that it was still possible that his career was not beyond repair. Cpl Ayers responded, advising that he wishes to rejoin his unit, but that his mental condition was still poor.

17. On 27 December 2016, Cpl Ayers emailed Maj MacRae, WO Burns and CWO Stevens asking for financial assistance.

18. On 1 January 2017, Cpl Ayers emailed Maj MacRae, CWO Stevens and WO Burns advising them that his father has died and that his mental condition was poor. Maj MacRae responded, offering condolences and advising him to return to the base. Cpl Ayers and Maj MacRae engaged in email discussion over the following day regarding Cpl Ayers mental state and the consequences of his actions.

19. On 25 January 2017, WO Burns attended the Edmonton Law Courts, where he identified Cpl Ayers to the MPs. Cpl Ayers was subsequently taken into custody by the MPs. Following a custody review held the same day, Cpl Ayers was released by the Custody Review Officer, Captain N. Masood. Cpl Ayers direction on release from custody included, among other things, that he report at 0730 to Building 400, CFB Edmonton, Monday to Friday.

20. On 1 February and 2 February 2017, Cpl Layers failed to report to work. He did not notify anyone in his chain of command. Multiple attempts were made to contact him by Petty Officer Second Class ("PO2") Thompson and WO Burns, with no response. WO Burns was contacted by Cpl Ayers partner later on 2 February 2017, advising that Cpl Ayers had been in the hospital since 1 February 2017, but that he would be present for work the following day.

21. On 3 February 2017 at 0515, Cpl Ayers texted WO Burns, apologizing for his absence over the previous two days. WO Burns told him to report to work at 0730, Building 400, CFB Edmonton, then to the Care Delivery Unit. Cpl Ayers did not report to work that day, nor would he again.

22. At no point between 3 February 2017 and 22 April 2017 did anyone in Cpl Ayers chain of command authorize him not to attend work.

23. On 6 February 2017, Cpl Ayers emailed WO Burns at 0617, advising that he would be coming in for 0730. He then texted at 0651, advising of issues he was having with his partner. WO Burns told him that he was required to come in to work. Cpl Ayers did not report work.

24. On 16 February 2017, WO Burns contacted the Courts and was advised that Cpl Ayers had a court date of 21 February 2017.

25. On 21 February 2017, WO Peters attended the provincial court in Edmonton. Cpl Ayers did not arrive for his court appearance.

26. On 22 April 2017, the MPs were contacted by the Edmonton Police Service ("EPS"), who advised that they had arrested Cpl Ayers on a different matter and that they would release him on a notice to appear. The MPs attended the EPS Downtown Division and arrested Cpl Ayers following his release by the EPS at 0038 hours, on 23 April 2017.

27. Following this arrest, Cpl Ayers was retained in custody after a custody review held on 24 April 2017. A show cause hearing was held on 26 April 2016, following which Cpl Ayers was released on conditions by Chief Military Judge, Colonel Dutil.

28. That same day, after his show cause hearing, Cpl Ayers was released from the Canadian Armed Forces under item 5f - Unsuitable for Further Service.

29. Also on 26 April 2017 the Director of Military Prosecutions preferred three charges against Cpl Ayers. A convening order was issued on 12 May 2017.

30. On 23 May 2017 Cpl Ayers was served with the convening order, charge sheet and a summons to attend his court martial, which was scheduled to begin on 19 July 2017 at CFB Edmonton.

31. On 19 July 2017 a Standing Court Martial was convened to try Cpl Ayers for three offences under the Code of Service Discipline. When Cpl Ayers did not present himself, the presiding Military Judge, Commander Sukstorf signed an order for Cpl Ayers` arrest.

32. Military Police were unable to locate Cpl Ayers. On 20 July 2017, the Standing Court Martial resumed. As Cpl Ayers had not been arrested or located, the trial was adjourned until a time at which the accused could be brought before the court.

33. On 26 July 2017 Cpl Ayers, through counsel, indicated his intention to turn himself in to Military Police. The trial was reassigned to Chief Military Judge, Colonel Dutil, and all parties were convened to CFB Edmonton for 29 July 2017.

34. On 29 July 2017 Cpl Ayers turned himself in to Military Police at CFB Edmonton. At this time he indicated his intention to plead guilty to all three offences as charged in the charge sheet.

35. Following a Show Cause Hearing before Chief Military Judge Colonel Dutil, Cpl Ayers was released on conditions, and the Court Martial was adjourned until Monday, 31 July 2017."

[5] The offender transferred to the Regular Force in 2012 as a cook. He had enrolled as a reservist in 2008. He has two entries on his conduct sheet for absence without leave committed in January and June 2016. Prior to being released on conditions awaiting trial on the present charges, he had spent six days in custody.

[6] Corporal Ayers testified with regard to what contributed to his misery in the last couple of years that led not only to the charges before the court but to significant problems with the criminal justice system, extreme financial difficulties, including him and his partner becoming homeless for significant periods. He explained that he had lost motivation in his work and had suffered from severe depression, anxiety and sleep disorder in 2014 when his partner was facing serious criminal charges. Things spiralled downward as a result and he was not able to focus on his military duties and obligations, including showing up to work, because he was incapable of dealing with his personal issues or unwilling to do so.

[7] He is 28 years of age and has lived with his partner for the last 4 years, where they have faced and continue to face serious challenges. It seems, however, that the offender's and his partner's near future is brighter. They have secured new accommodation and their financial situation, although critical, is likely to improve in the next few months, but it remains extremely fragile. Corporal Ayers is also facing pending criminal charges in the Alberta Provincial Court, which will hopefully be resolved shortly. He has enrolled in an education program for adults during weeknights that will begin next September. He is also seeking employment. In a nutshell, Corporal (Ret) Ayers has recently started to take measures to become again an active member of our society. It is unfortunate because Corporal (Ret) Ayers' performance in the military prior to 2016 was very positive. His frustration at not being promoted, despite his good performance, combined with his personal issues made him completely detached from the military. He now concedes that it was unacceptable and he fully assumes responsibility for his actions and omissions.

[8] In making this joint recommendation on sentence, counsel took into consideration the relevant aggravating and mitigating factors surrounding the commission of the offences as well as those of the offender. The most serious aggravating factor is the period of absence, nearly six months. In addition, the conduct of Corporal (Ret) Ayers showed that he had become totally unreliable and not deserving the trust of his chain of command. He also showed little or no respect for the rule of law. The offender repeatedly breached the trust of his chain of command.

[9] Mitigating factors are also present in this case, including the pleas of guilty of the offender, his age, his financial situation and the offender's mental health condition during the commission of the offences of absence without leave. Counsel have also made sure that it addressed the applicable principles and objectives of sentencing in this case. Prosecution is satisfied that the proposed submission would meet the need for general deterrence, denunciation of the conduct and rehabilitation. In addition, the proposed sentence would also address the need for specific deterrence as the offender is facing

other charges in Provincial Court, where conditions and dates for court appearance must be respected.

[10] After the court closed to determine sentence, the parties were given the opportunity to provide additional submissions as to whether the proposed punishments were available to the court in light of the Court Martial Appeal Court (CMAC) decision in *R. v. Tupper*, 2009 CMAC 5, where the majority allowed the appeal and although it found the sentence imposed by the trial judge to be demonstrably fit, it set aside the punishments of dismissal and detention on the basis that they were inoperative following the appellant's administrative release from the Canadian Armed Forces (CAF). In *Tupper*, the trial judge sentenced the appellant, on 30 October 2007, to dismissal with the accompanying punishment of detention for a period of 90 days. In addition, he imposed a seven-year weapons prohibition order ending on 29 October 2014. The court granted the appellant release from detention pending his appeal. However, the offender Tupper was administratively released from the CAF for unsatisfactory conduct, pursuant to *Queen's Regulations and Orders for the Canadian Forces* (QR&O) 15.01 (item 2(a)), after his court martial and prior to the hearing of his appeal.

[11] In its analysis of the effect of the administrative release of the offender prior to the hearing of his appeal on the punishments imposed at court martial, the majority wrote at paragraphs 60-64:

> [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.
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> [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.
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> [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.
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> [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.
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> [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.

And at paragraphs 67-79:

> [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.
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> **Conclusion**
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> [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.

[12] This decision from the CMAC has since been considered in sentencing an offender at court martial whether it is known that he or she will be administratively released from the CAF after being convicted at court martial under Chapter 15 of the QR&O or whether the person has already been released from the CAF before his or her court martial is held, through the provisions found in subsections 60(2) and (3) of the *NDA* that read as follows:

> **60 (2)** Every person subject to the Code of Service Discipline under subsection (1) at the time of the alleged commission by the person of a service offence continues to be liable to be charged, dealt with and tried in respect of that offence under the Code of Service Discipline notwithstanding that the person may have, since the commission of that offence, ceased to be a person described in subsection (1).
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> **(3)** Every person who, since allegedly committing a service offence, has ceased to be a person described in subsection (1), shall for the purposes of the Code of Service Discipline be deemed, for the period during which under that Code he is liable to be charged, dealt with and tried, to have the same status and rank that he held immediately before so ceasing to be a person described in subsection (1).

[13] Subsequent interpretations of *Tupper* appear somewhat inconsistent or taken outside of its own context. For example, the Canadian Encyclopedic Digest (CED) 4th (online), *Military Law* "Code of Service Discipline: Punishments" (XI.11) at § 234 illustrates this situation:

> **§234** The scale of punishments that may be imposed in respect of service offences is: (a) imprisonment for life; (b) imprisonment for two years or more; (c) dismissal with disgrace; (d) imprisonment for less than two years; (e) dismissal; (f) detention; (g) reduction in rank; (h) forfeiture of seniority; (i) severe reprimand; (j) reprimand; (k) fine; and (l) minor punishments. Minor punishments are designated as: confinement to ship or barracks, extra work and drill, stoppage of leave, and a caution. A sentence of detention imposed after a member has been released may be moot, as the purpose of detention is for discipline and operational effectiveness — these two principles do not apply to a member who has resumed civilian life. Punishments of dismissal and detention are inoperative by reason of administrative release from the Canadian Armed Forces.

[14] In *R. v. Lewis*, 2012 CM 2006, counsel on behalf of the offender argued that the punishment of reduction in rank was not a lawful punishment because the offender had been released from the CAF since the date of the offence pointing to the decision of the

CMAC in *Tupper*, in support of the proposition that the distinctively military punishments set out in section 139 of the *NDA* do not apply to an offender who has been released from the CAF. According to counsel, the only punishments that could lawfully be imposed upon a released former member were imprisonment and a fine. Military Judge Lamont made the following comments:

> [18] In the present case, the offender has already been released. It may be that because of this circumstance some of the punishments available under section 139 of the *National Defence Act* would not have the same effect upon the present offender as they would upon a member who continues to serve, and for that reason would not advance the goals of sentencing to which I have already referred. But these are reasons for carefully weighing whether a particular punishment is appropriate, not for holding that a certain punishment is not legally available at all. In *Tupper*, the CMAC was not addressing the question of what punishments were available to be imposed upon a former member of the CF. Rather, the court was dealing with the question of whether the specific punishments imposed upon Tupper continued to be efficacious given the change in Tupper's circumstances.
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> [19] In the result, I conclude that *Tupper* is not authority for the wide proposition advanced by counsel for the offender in this case. I hold that reduction in rank is a legally available sentencing option in this case notwithstanding the release by retirement of the offender since the date of the offence. I turn, therefore, to the question of whether reduction in rank is appropriate in this case.

The approach adopted by Lamont MJ was not followed by Perron MJ in two subsequent court martial decisions. Firstly, in *R. v. Weldam-Lemire*, 2011 CM 4019, the court martial had found him guilty of having disobeyed the lawful command of a superior officer and of being absent without leave on two occasions. The prosecution and defence counsel had jointly proposed a sentence of imprisonment for a period of 10 days and a fine in the amount of $1000 to be paid within 90 days. They also proposed the court suspend the carrying into effect of the punishment of imprisonment. The offender had been administratively released from the CAF under item 5(f) prior to his trial by court martial. In his analysis of the fitness of the joint proposal made by counsel, Perron MJ issued these remarks at paragraph 21 before accepting the joint submission of counsel:

> [21] The majority in the *Tupper* decision has concluded that the punishments of dismissal from Her Majesty's Service and of detention cannot be imposed on an offender after his administrative release from the Canadian Forces. I am bound by that decision.

Secondly, in *R. v. Bailey*, 2013 CM 4026, Perron MJ adopted the same approach with regard to the impact of the CMAC decision in *Tupper*. Bailey had pleaded guilty to three charges of absence without leave contrary to section 90 of the *NDA*. Here again, the prosecution and defence counsel had jointly proposed a sentence of imprisonment for a period of 10 days and a fine in the amount of $500. They also proposed that the execution of the sentence of imprisonment be suspended. Military Judge Perron accepted the joint submission, but only after explaining why he felt detention was not available to him because the offender was no longer a serving member, at paragraphs 15-16:

> [15] I agree with counsel this case is one where incarceration is an appropriate punishment. This is a case where detention is the appropriate punishment for an offender who is still a member on the Canadian Forces. The Court Martial Appeal Court in *ex-Private St-Onge v R*, 2010 CMAC 7 stated the following at paragraphs 58 and 59:
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> [Quotation omitted.]
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> [16] A serving member in ex-Private Bailey's exact situation could well be sentenced to detention. The purpose of that sentence would be to make the offender a more disciplined soldier. The Court Martial Appeal Court has indicated that CF members who have been released by the CF could not be sentenced to detention since detention no longer served a military objective once the offender was released. Hence the only type of incarceration available in this case would be imprisonment. However, imprisonment does not appear to be the appropriate punishment in this case when one considers the facts of this case. It is, in fact, a substitute for detention.

[15] Should the court conclude that the decision of the CMAC in *Tupper* precludes a court martial to impose punishments like dismissal with disgrace from Her Majesty's service, dismissal, reduction in rank, severe reprimand or reprimand and detention once an offender has been released from the CAF prior to his trial by court martial, it must reject the joint submission made by counsel in the case at bar as they would amount to illegal punishments. If the court adopts the approach followed by Lamont MJ in *Lewis*, the court must apply the test enunciated by the Supreme Court of Canada in *R. v. Anthony-Cook* and determine whether the joint submission is contrary to the public interest or will bring the administration of justice into disrepute.

[16] The court agrees with the approach and conclusion reached by Lamont MJ in *Lewis* that the CMAC in *Tupper* was dealing with the question of whether the specific punishments imposed upon Tupper continued to be effective given the change in Tupper's circumstances. *Tupper* only stands within the realm of what constitutes a fit sentence in a specific case as opposed to whether a specific punishment can be legally imposed. In *R. v. St-Onge*, 2011 SCC 16, [2011] 1 S.C.R. 625, the Supreme Court of Canada dealt with the appeal against a decision by the majority in the CMAC of Canada (2010 CMAC 7, [2010] C.M.A.J. No. 7 (QL)) allowing the respondent's appeal from the sentence imposed on him by the trial judge. Justice Fish, for the court, held at paragraphs 3-4:

> [3] In this case, Cournoyer J.A., who dissented in the Court of Appeal, would have dismissed the respondent's appeal on the basis that, if the appropriate standard were applied, it was not open to the Court of Appeal to interfere with the trial judge's decision.
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> [4] After reviewing the record and hearing counsel's submissions, we are satisfied that the dissent was on a question of law within the meaning of s. 245(2)(*a*) of the *National Defence Act*. Moreover, with all due respect for the majority of the Court of Appeal, we would allow the appeal for the reasons given by Cournoyer J.A. and would restore the sentence imposed by the trial judge.

One of the issues in *St-Onge* was whether the sentence of 30 days imprisonment imposed on the appellant was appropriate, having regard to all the circumstances including the fact that the appellant had been administratively discharged from the CAF some time prior to sentencing. The majority of the panel of the CMAC allowed the appeal from the sentence imposed by the military judge as they believed that the most appropriate and less restrictive sentence was a fine of $3000. Justice Pelletier dealt with the scope of the *Tupper* decision in the context of the fitness of the punishment of imprisonment imposed on the appellant. He wrote at paragraphs 57-61:

> [57] The issue of the fitness of the sentence is raised by the decision of this Court in *R. v. Tupper*, [2009] C.M.A.J., No. 9. In that case, this Court examined the effect of the administrative release of an offender from the Canadian Forces in the assessment of an appropriate sentence. It found that the sentence of detention and dismissal with disgrace which had been imposed on the appellant were overtaken by the appellant's administrative release from the Canadian Forces. The Court found that, as a civilian, the appellant was not subject to punishment which was specifically reserved to soldiers. Dealing specifically with the sentence that the appellant serve a period of detention, the Court commented that "he cannot be placed back into a uniform to serve a period of detention in military barracks.": see *R. v. Tupper*, previously cited, at paragraph 67.
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> [58] The sentence in question in *Tupper* included a period of detention. In the military context, detention is a form of incarceration which has a specific objective of rehabilitation of the offender as a member of the Canadian Forces. This is clearly set out in the note to section 104.09 of the QR&O which provides as follows:
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> | (A) In keeping with its disciplinary nature, the punishment of detention seeks to rehabilitate service detainees, by re-instilling in them the habit of obedience in a structured, military setting, through a regime of training that emphasizes the institutional values and skills that distinguish the Canadian Forces member from other members of society. Specialized treatment and counselling programmes to deal with drug and alcohol dependencies and similar health problems will also be made available to those service detainees who require them. Once the sentence of detention has been served, the member will normally be returned to his or her unit without any lasting effect on his or her career. | (A) Comme pour toute mesure disciplinaire, la détention est une punition qui vise à réhabiliter les détenus militaires et à leur redonner l'habitude d'obéir dans un cadre militaire structuré. Ces derniers seront donc soumis à un régime d'entraînement qui insiste sur les valeurs et les compétences propres aux membres des Forces canadiennes, pour leur faire voir ce qui les distingue des autres membres de la société. Des soins spécialisés et des programmes d'orientation seront offerts par ailleurs aux détenus militaires qui en auront besoin pour les aider à surmonter leur dépendance aux drogues et à l'alcool ou à régler des ennuis de santé analogues. Une fois la peine de détention purgée, le militaire retournera à son unité, en temps normal, sans que sa carrière n'en souffre à long terme |

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

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

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

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

Justice Cournoyer in his dissenting reasons stated:

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

[88] I believe that we must not intervene. Even taking into account the appellant's administrative release from the Canadian Forces, I was not convinced by my colleague's

> analysis that the military judge exercised his discretion unreasonably or that he made an error in principle.
>
> [89] The sentence proposed by my colleague, like that imposed by the military judge, is fair and appropriate. However, I believe that we cannot intervene because we would have weighed the factors differently than the military judge did. For that reason, it seems to me that, for functional reasons, to repeat Justice Lebel's expression in the French version of his reasons in *L.M.*, we cannot vary the sentence imposed by the military judge.
>
> [90] For these reasons, I would dismiss the appeal from the sentence.

[17] In my view, the availability of the punishments listed in section 139 (1) of the *NDA* is only restricted by the relevant specific provisions of the Act and the regulations, including where subsections 60(2) and (3) apply. For example, no officer may be sentenced to detention (see section 142(1)(b)), and the authority of a service tribunal to impose punishments may be limited in accordance with regulations made by the Governor in Council (see section 147). It is understood that notes to QR&O, including note B to article 104.04 or note A to 104.09, are useful guidance, but they shall not be interpreted as reflecting a legally binding proposition. Article 1.095 of the QR&O provides:

> The notes appended to articles in QR&O
>
> > (*a*) are for guidance of members; and
> >
> > (*b*) shall not be construed as they had the force and effect of law but should not be deviated from without good reason.

[18] Unless it is determined that any particular punishment violates a specific provision of the *Charter* when it is imposed on a person subject to the Code of Service Discipline who has been administratively released from the CAF, the only issue with the propriety of imposing a punishment is one of fitness of that punishment. The purpose of the system of military justice is to maintain the discipline, efficiency and morale of the military. The purpose and principles of sentencing at courts martial do not apply in a vacuum, but under the umbrella of the overall purpose of that system. It may well be that, in most cases, detention or dismissal or other unique military punishment serve no sentencing objective on a now civilian offender. This could make the punishment inefficient and ineffective or moot. However, these punishments are not invalid and of no force and effect.

[19] The joint submission of counsel to sentence Corporal (Ret) Ayers to dismissal, reduction in rank to the rank or private and imprisonment for a period of one day must contribute to the maintenance of discipline and meet the need for general deterrence, denunciation of the conduct and rehabilitation. In addition, the proposed sentence should address the need for specific deterrence as the offender is facing other charges in Provincial Court. If the court is satisfied that the parties have made that demonstration, the proposed sentence meets the threshold imposed by the Supreme Court of Canada in *Anthony-Cook*.

[20] Whether a punishment is effective or not in the situation where an offender has been administratively released by the CAF prior to the imposition of a sentence requires a contextual approach. The analysis must consider the purpose and principles of sentencing and apply them accordingly. For example, should a very short period of incarceration be warranted in the circumstances, elements such as the location where it would be served, transportation costs for the offender and CAF personnel accompanying him or her to the incarceration facility, the impact on the offender, the use of resources may well be considered to recommend one type of incarceration over another.

[21] The punishments found in section 139 (1) of the *NDA* have no real equivalence in the criminal justice system, except for those of imprisonment and fines. Some may serve the same purpose and objectives found in criminal courts, others not. The punishments of dismissal with disgrace from Her Majesty's service and dismissal have no equivalence or resemblance in the civilian context. The punishment of dismissal from Her Majesty's service is deemed to be carried out as of the date on which the release of an officer or a non-commissioned member from the CAF is effected (see section 141 (1.1) of the Act).

[22] Dismissal is not similar in nature to that of being dismissed, discharged or fired by your employer in the civilian context. The fact that a person has been administratively released from the CAF prior to receiving his or her sentence at court martial, does not make the punishment of dismissal ineffective or moot per se. Not only does such reasoning evacuate the rationale for this punishment in military law, but it ignores the fact that dismissal either with or without disgrace from Her Majesty's service can have far-reaching consequences on a former service person in civilian life. In addition, the punishment of dismissal sends a serious message to the military community in promoting the sentencing objectives of general deterrence and denunciation of the conduct. In the case at bar, counsel for the prosecution explained to the court that the punishment of dismissal was justified by the long absence of the offender to his place of duty, which totalled approximately six months. This aggravating factor was not the only one present. The conduct of Corporal (Ret) Ayers showed that he had become totally unreliable and not deserving the trust of his chain of command as well as showing little or no respect for the rule of law. He repeatedly breached the trust of his chain of command. This reasoning is equally applicable to the punishment of reduction in rank. Any rank carries with it the level of trust and confidence of the chain of command. The reduction in rank proposed by counsel also serves to promote general deterrence and denunciation. Finally, the court agrees with counsel that the punishment of imprisonment is warranted in the circumstances because it serves both a military and a correctional purpose. Finally, counsel have taken into account the mitigating factors present in this case, including the pleas of guilty of the offender, his age and financial situation and the role played by the offender's mental health condition during the commission of the offences of absence without leave. Therefore, I am satisfied that the underlying facts and the rationale behind the sentence jointly proposed by counsel before this court have been thoroughly exposed to the court and that it is not contrary to the public interest and that it will not bring the administration of justice into disrepute.

FOR THESE REASONS, THE COURT:

[23] **FINDS** you guilty of two counts of absence without leave contrary to section 90 of the *NDA* and one count of failure to comply with a condition imposed under Division 3 contrary to section 101.1 of the Act.

[24] **SENTENCES** you to dismissal, reduction in rank to the rank of private and imprisonment for a term of 1 day.

Counsel:

Major A. Van der Linde and Captain A. Clark for the Director of Military Prosecutions

Lieutenant-Colonel D. Berntsen, Defence Counsel Services, Counsel for Corporal (Ret) L.J. Ayers