

CANADA / JUDGMENT

R. v. Meeks

2024 CMAC 9

COURT

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Date: 20241121

Docket: CMAC-642

Citation: 2024 CMAC 9

CORAM:

CHIEF JUSTICE GLEASON
BENNETT J.A.
ROY J.A.

BETWEEN:

SERGEANT J.K. MEEKS
Appellant
and
HIS MAJESTY THE KING
Respondent
Heard at Ottawa, Ontario, on October 4, 2024.
Judgment delivered at Ottawa, Ontario, on November 21, 2024.REASONS FOR
JUDGMENT BY:

JUSTICE BENNETT

CONCURRED IN BY:

GLEASON, CHIEF JUSTICE ROY, J.A.
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REASONS FOR JUDGMENT

Order restricting publication: This Court has ordered pursuant to subsections 236(1) and (2) of the National Defence Act, R.S.C. 1985, c. N-5 that any information regarding the contents of the psychiatrist's assessment of Sgt. Meeks, dated April 5, 2024, shall not be broadcasted or transmitted in any way, except when the disclosure of such information is in the course of the administration of justice.

JUSTICE BENNETT

- [1] Sergeant Meeks appeals a sentence of thirty days' detention imposed for one count of assault causing bodily harm against Private Meadows pursuant to section 130 of the National Defence Act, RSC 1985, c N-5 (NDA) and section 267 of the Criminal Code, RSC 1985, c C-46. Initially, Sgt Meeks challenged the conviction, but has abandoned that appeal in light of the decision in *R. v. Edwards*, 2024 SCC 15.
- [2] Sgt. Meeks submits that as a result of being administratively released from the Canadian Armed Forces (CAF), his sentence of detention is inoperative, relying on *R. v. Tupper*, 2009 CMAC 5. He seeks to introduce new evidence in relation to the fact that he was deemed medically disabled and has been administratively released from the CAF as of 10 April 2024. He also seeks to file a psychiatric report of Dr. Roy in support of his argument that the period of detention should be suspended.
- [3] The prosecution does not oppose the admission of the new evidence in relation to Sgt. Meeks' release date and the reason for the release. It does not oppose the appeal being allowed and to the suspension of the period of detention in the circumstances. It opposes the admission of the evidence of Dr. Roy.
- [4] In addition, the prosecution contends that *Tupper* was wrongly decided and asks this Court to overturn that decision.
- [5] For the reasons that follow, I would dismiss the conviction appeal as abandoned. I would admit the new evidence in relation to the date of release and the reasons for the release of Sgt. Meeks from the CAF. I would allow the appeal and suspend the period of detention and would impose the statutory conditions of suspension as well as a no contact provision in relation to Pte. Meadows. I also conclude that *Tupper* should be read narrowly, and

therefore, the fact that Sgt. Meeks was administratively released does not render his sentence of detention inoperative.

I. Background [6] On 18 June 2019, Sgt. Meeks was in Kaiserslautern, Germany with members of the 3rd Battalion of the Royal Canadian Regiment (3 RCR), participating in an international exercise. On the evening before the events in question, the rear party had gone into town for dinner and drinks.

- [7] Sgt. Meeks went to dinner with a small group that included Captains Simmons and Korajlija and Pte. Meadows (Group A). The second group included Privates Melvin, Prupas, Berthe and Gebeshuber (Group B).
- [8] Although the two groups socialized and travelled separately, they both ended up at the same restaurant for dinner. After dinner, most of Group A decided to go to a bar located down the street. Members from Group B decided to check out the nightlife in Germany and they proceeded to visit multiple bars. At the end of the evening, members of Groups A and B coincidentally ended up at the same nightclub where they continued to consume alcohol until the two Captains were advised of a “communications lockdown”, and the need to return to the Ramstein Air Base immediately.
- [9] The members were not told the details of the incident that related to the communications lockdown, but they would learn the next day that a parachute accident had occurred during a jump into Bulgaria and that a bombardier had died. After the communications lockdown was initiated, Sgt. Meeks heard someone mention Warrant Officer (WO) Oakley, who was his close friend, and who would have been on the drop zone. Sgt. Meeks feared for his friend's safety.
- [10] Captain Simmons testified that Sgt. Meeks explained to the junior ranks what a communications lockdown was and its implications, while impressing upon them the seriousness of the situation. Although some soldiers exited immediately after Sgt. Meeks advised of the order, others did not. Sgt. Meeks became increasingly agitated. After concerted efforts to entice the stragglers out of the bar, the evidence suggested they were all standing outside waiting for taxis when Pte. Melvin went back into the nightclub to retrieve his cigarettes.
- [11] When Pte. Melvin returned from getting his cigarettes, an argument broke out between him and Sgt. Meeks that led to yelling, pushing, and shoving. In an effort to de-escalate the situation, Pte. Berthe placed himself as an obstacle between Sgt. Meeks and Pte. Melvin. Sgt. Meeks pushed Pte. Berthe to the side to get at Pte. Melvin, but then, Pte. Meadows intervened. Pte. Meadows was either pushed or tripped, and he fell to the ground.

- [12] When Pte. Meadows got up, Sgt. Meeks punched Pte. Meadows with a single, close-fisted punch on the left-hand side of his face that appeared to knock him out. After Pte. Meadows fell to the ground, Sgt. Meeks soccer-kicked him in the face. Pte. Meadows did not respond to the soccer kick, and while Captains Simmons and Korajlija pulled Sgt. Meeks away, Sgt. Meeks “kind of dropped his heel” on Pte. Meadows’ head.
- [13] Sgt. Meeks was arrested by German police and was released to Warrant Officer Royce the next morning.
- [14] Pte. Meadows was severely injured. A brain scan revealed multiple fractures. Pte. Meadows was medically evacuated back to Canada.
- [15] At trial, Sgt. Meeks offered a defence of not criminally responsible by reason of mental disorder based in part on significant evidence that Sgt. Meeks suffered from post-traumatic stress disorder. He apparently recalled little of what had occurred. The defence was not accepted by the military judge. Sgt. Meeks was acquitted of aggravated assault but convicted of assault causing bodily harm. He was sentenced to detention for thirty days in reasons indexed at 2023 CM 2016.
- [16] On 28 October 2023, the morning after Sgt. Meeks’ sentence, the Court received an application for release pending appeal (RPA). Sgt. Meeks was in detention at 2 Military Police Detachment (2 MP Det) Petawawa awaiting transfer to the detention barracks in Edmonton, Alberta.
- [17] The Military Judge convened a hearing with Sgt. Meeks’ defence counsel to acknowledge the receipt of his application on the court record. Upon seeing and hearing from Sgt. Meeks, the Military Judge became alarmed and asked about the availability of mental health supports in the event he was released pending appeal. The Military Judge found that the mental health resources were not readily available over the weekend.
- [18] The Military Judge asked Sgt. Meeks if he would be willing to attend the Pembroke Hospital for an assessment prior to his release, to which he agreed. On 28 October 2023, the Court ordered that Sgt. Meeks be transported to the hospital. After an initial assessment and a follow-up consultation with a specialist, Sgt. Meeks remained in the hospital until 3 November 2023. He had at that point served eight days of his thirty-day sentence.
- [19] Sgt. Meeks’ counsel requested that the Court reconsider the suspension of the sentence or, alternatively, that the Court consider the RPA application. The Court ordered the release of Sgt. Meeks pending appeal. The Court concluded, correctly in my view, that it was functus and did not have jurisdiction to grant the suspension of a sentence that the Court had already imposed.

[20] On 4 February 2024, the Director Military Careers Administration (DMCA) issued Decision / Release Instructions directing Sgt. Meeks' release from the CAF under item 5(d) (not advantageously employable) effective 10 April 2024. The DMCA further directed that Sgt. Meeks be deemed medically disabled as defined in section 2(1) of the Canadian Forces Superannuation Act, RSC 1985, c C-17.

[21] Sgt Meeks. was released from the CAF on 10 April 2024.

[22] On 6 May 2024, Sgt. Meeks filed a Notice of Motion to Admit Fresh Evidence. He is seeking to admit into evidence the date of his release, the reasons for his release from the CAF and his CAF medical assessment by Dr. Roy. As noted above, the prosecution does not oppose the admission of the release and the reason for the release but opposes the admission of the report of Dr. Roy.

II. Issues on Appeal [23] The issues are i) whether to admit the fresh evidence; ii) whether the administrative release of Sgt. Meeks renders the sentence of detention inoperative; and iii) whether the sentence of detention should be suspended. The admission of the fresh evidence affects the substantive grounds, and therefore I will address that first.

III. Fresh evidence [24] As noted, the prosecution has consented to the admission of the fresh evidence in relation to the release of Sgt, Meeks. In my view, applying the principles in *Palmer v. The Queen*, [1980] 1 SCR 759, 106 DLR (3d) 212 and *R. v. Sipos*, 2014 SCC 47 at paras. 30-31, it is appropriate to admit the evidence of the release and the reasons for the release. On the other hand, Dr. Roy's report was appended as an exhibit to the affidavit of Sgt. Meeks. Dr. Roy did not swear an affidavit. The prosecution objects to the admission of Dr. Roy's report on the basis that it is hearsay, and he cannot be cross-examined. Given the disposition I am proposing, it is not necessary to admit the report of Dr. Roy, as it would not affect the outcome of the appeal.

IV. Administrative release of Sgt. Meeks [25] Sgt. Meeks was administratively released from the CAF effective 10 April 2024. He submits that, based on this Court's decision in *Tupper*, his sentence should be suspended as it is no longer a fit sentence. The prosecution contends that the majority in *Tupper* stated that after an administrative release, a previously imposed sentence of detention was "inoperative", and that we should revisit the decision for correctness.

[26] In *Tupper*, the appellant was convicted of a number of military offences and sentenced to dismissal from the CAF and 90 days' detention. He was released from the CAF while he was released pending his appeal and prior to serving the 90 days in detention. Justice Trudel, writing for the majority, concluded that once released from military service, Pte. Tupper could no longer be subjected to punishment reserved for soldiers (paras. 64-67).

[27] We are asked to conclude that this decision was wrongly decided. Generally, if a court is considering overturning a decision and not following horizontal stare decisis, a five-justice division is ordered to consider the arguments.

- [28] The difficulty this Court faces is that it does not have the ability, under the NDA, to order a five-justice division of the Court. It is limited to three-judge panels (s 235(2) of the NDA). This Court addressed the issue of horizontal stare decisis in *R. v. Déry*, 2017 CMAC 2 at paras. 87-91:
- [87] Despite our disagreement with the reasoning in *Royes*, we believe we are nonetheless bound to follow it due to the principle of comity or horizontal stare decisis. Under this principle, subject to certain rather narrow exceptions – none of which pertains here – our Court, which lacks the ability to sit in panels of more than three judges, should follow decisions made by earlier panels of the Court on the same point of law.
- [88] A useful starting point for the discussion of comity is the approach taken by the Court of Appeal of England and Wales, an intermediate appellate court whose decisions are appealable to the United Kingdom Supreme Court (formerly the House of Lords). In *Velasquez, Ltd. v. Inland Revenue Commissioners*, [1914] 3 K.B. 458 at 461, Lord Cozens-Hardy M.R. noted that:
- [...] there is one rule by which, of course, we are bound to abide – that when there has been a decision of this court upon a question of principle it is not right for this court, whatever its own views may be, to depart from that decision. There would otherwise be no finality in the law. If it is contended that the decision is wrong, then the proper course is to go to the ultimate tribunal, the House of Lords, who have power to settle the law and hold that the decision which is binding upon us is not good law.
- [89] In *Young v. Bristol Aeroplane Co. Ltd.*, [1944] EWCA Civ 1, [1944] 2 All E.R. 293, Lord Greene M.R., while echoing this principle, identified three circumstances that would justify overturning a prior decision: to resolve conflicting decisions of the same court; to correct inconsistency with a decision of the House of Lords; or where the prior decision was given per incuriam or in disregard of binding legal or statutory authority. In the specific matter before the Court, Lord Greene M.R. expressed discontent with the reasoning underlying the binding precedent, but nevertheless felt bound to apply it. On appeal to the House of Lords in *Young v. Bristol Aeroplane Co. Ltd.*, [1945] UKHL 2, [1946] A.C. 163, Viscount Simmons agreed with Lord Greene M.R. on all accounts; the precedent had been wrongly decided, but only the House of Lords had authority to correct the mistake.
- [90] These three narrow exceptions to the binding nature of a prior decision of an intermediate appellate court have been recognized by Canadian courts as setting out the circumstances where such a court, when sitting in the typical formation of a three-person panel, may decline to follow a prior decision on a point of law. For example, the Federal Court of Appeal in *Miller v. Canada (Attorney General)*, 2002 FCA 370 at paras. 8-10, 220 D.L.R. (4th) 149 [Miller] acknowledged that these exceptions are available to a three-person appellate panel of the Court, but noted they were not lightly exploited given the Court's responsibility to ensure consistency in the law. At least four provincial appellate courts have adopted a comparable approach for three-person panels: *British Columbia v. Worthington (Canada)*

Inc., 1988 CanLII 175 (BC CA), [1989] 1 W.W.R. 1, 29 B.C.L.R. (2d) 145 (BCCA) [Worthington]; Nathanson, Schachter & Thompson v. Inmet Mining Corp., 2009 BCCA 385, 96 B.C.L.R. (4th) 342; R. v. Lee, 2012 ABCA 17, 58 Alta. L.R. (5th) 30; R. v. Grumbo (1998), 1998 CanLII 12345 (SK CA), 159 D.L.R. (4th) 577, 168 Sask. R. 78 (SKCA); and Thomson v. Nova Scotia (Workers' Compensation Board), 2003 NSCA 14, 223 D.L.R. (4th) 193 [Thomson].

- [91] Similarly, this Court has previously noted that it was bound by its prior legal determinations except where they could be said to have been made per incuriam or were manifestly wrong: R. v. Vezina, 2014 CMAC 3 at paras. 12-15, 461 N.R. 286; see also Larouche at para. 121.

I note that a more expansive view as to when this Court may overturn one of its prior decisions was adopted in R. v. Beaudry, 2018 CMAC 4. I need not decide which approach is correct as both cases agree that this Court may reverse a decision that was per incuriam.

- [29] In this case, the prosecution argues that the decision was per incuriam. In R. v. Kirkpatrick, 2022 SCC 33, the concurring judgment of the Supreme Court of Canada confirmed that a per incuriam decision constitutes one of the three circumstances in which overturning precedent may be warranted. The majority did not discuss the issue.

- [30] The standard to establish that a decision was per incuriam is high. The test in Kirkpatrick requires a litigant to show that:

- 1) the Court failed to consider a binding authority or relevant statute; and
- 2) the Court's failure to consider the missing binding authority or relevant statute affected the judgment.

- [31] The majority in Tupper did not cite authority or the relevant provisions of the NDA as set out below in relation to the continuing jurisdiction of the military justice system.

- [32] It is important to consider the reasons as a whole, rather than isolate parts of the decision. First, the Court in Tupper found that the sentence imposed by the Military Judge was a fit sentence. It examined the purpose of a sentence of detention, as opposed to imprisonment, referencing Queen's Regulations and Orders art 104.09. The relevant provisions are set out below:

104.04 – IMPRISONMENT FOR SHORTER TERM

Section 140 of the National Defence Act provides:

"140. Every person who, on conviction of a service offence, is liable to imprisonment for life, other than as a minimum punishment, or for a term of years or other term may be sentenced to imprisonment for a shorter term."

NOTES

(A) Although specialized treatment and counselling programmes to deal with drug and alcohol dependencies and similar health problems will be made available to a person serving a term of imprisonment, a member serving a sentence that includes imprisonment will in most cases be considered unfit for further military service. As a result, service prisoners and service convicts will ordinarily not be subjected to the same regime of training that service detainees undergo. In certain cases, exceptions may be made for service prisoners serving a short term of imprisonment provided that it has either been decided to retain the member or no decision to release the member has been made but the circumstances suggest that retention in the Canadian Forces is likely. A punishment of imprisonment will be considered to be of short duration where the term does not exceed 90 days.

(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.

104.09 – DETENTION

Section 142 of the National Defence Act provides:

142 (1) The punishment of detention is subject to the following conditions:

- (a) detention may not exceed ninety days and a person sentenced to detention may not be subject to detention for more than ninety days consecutively by reason of more than one conviction; and
 - (b) no officer may be sentenced to detention.
- (2) A non-commissioned member above the rank of private who is sentenced to detention is deemed to be reduced to the rank of private until the sentence of detention is completed.”

NOTES

(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.

[33] The NDA contains the following provisions:

Persons subject to Code of Service Discipline

60 (1) The following persons are subject to the Code of Service Discipline:

- (a) an officer or non-commissioned member of the regular force;
- (b) an officer or non-commissioned member of the special force;
- (c) an officer or non-commissioned member of the reserve force when the officer or non-commissioned member is
 - (i) undergoing drill or training, whether in uniform or not,
 - (ii) in uniform,
 - (iii) on duty,
 - (iv) [Repealed, 1998, c. 35, s. 19]
 - (v) called out under Part VI in aid of the civil power,
 - (vi) called out on service,
 - (vii) placed on active service,
 - (viii) in or on any vessel, vehicle or aircraft of the Canadian Forces or in or on any defence establishment or work for defence,
 - (ix) serving with any unit or other element of the regular force or the special force, or
 - (x) present, whether in uniform or not, at any drill or training of a unit or other element of the Canadian Forces;

...

Continuing liability

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).

Retention of status and rank

60 (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).

Released persons serving sentence

62 (3) Every person described in paragraph 60(1)(i) who is alleged to have committed, during the currency of the imprisonment or detention of that person, a service offence shall, for the purposes of the Code of Service Discipline, be deemed to be under the command of the commanding officer of the service prison or detention barrack, as the case may be, in which that person is imprisoned or detained.

Punishment limitation

166.1 A General Court Martial that tries a person other than an officer or a non-commissioned member may only pass a sentence that includes a punishment of imprisonment or a fine.

Punishment limitation

175 A Standing Court Martial that tries a person other than an officer or a non-commissioned member may only pass a sentence that includes a punishment of imprisonment or a fine.

[34] These provisions in the NDA, which were in effect at the time Tupper was decided, were not cited by the majority. In dissenting reasons, Justice Phelan noted, at para 92, that 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.”

[35] The majority said the following:

[60] This new fact [the administrative release from the CAF] 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 of 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.

- [36] As is apparent, the majority considered the fact that Pte. Tupper had, since his release, made advances with his rehabilitation in terms of his drug addiction and was attending school. At para. 64, the majority said that the administrative release made the punishments of dismissal and detention inoperative. However, the majority also stated at para. 75 that administrative release “may very well circumvent a given sentence” when it becomes incompatible with administrative release.
- [37] In *R. v. St-Onge*, 2010 CMAC 7 at para 57, the majority of the Court considered Tupper. Justice Pelletier, concurred in by Justice Trudel, noted that the issue in Tupper was the fitness of sentence. It pointed out that the purpose of detention, as outlined in the Queen’s Regulations and Orders, has the military objective of rehabilitating the offender and instill in them the values and skills that are unique to members of the CAF (para. 58). The majority held that Tupper reflects the fact that the sentence of detention no longer served a military objective once the offender was released from the CAF. The majority set aside the 30 days of imprisonment imposed by the military judge. Justice Curnoyer, in dissent, would have upheld the sentence. He did not refer to Tupper. The Supreme Court of Canada restored the sentence, essentially for the reasons of Curnoyer J.A. at 2011 SCC 16.
- [38] Thus, in my view, when Tupper is read in conjunction with *St-Onge*, the decision in Tupper was not about limiting the jurisdiction of the military justice system or overturning a valid sentencing order of the court by operation of an administrative decision, but a question of whether, once Pte. Tupper was released and had recommenced his civilian life, the sentence of detention was a fit sentence. In my view, Tupper should be limited to its facts. The fact of an administrative release, supported by a motion to adduce fresh evidence, may be a circumstance that the CMACC may take into consideration when considering the fitness of a sentence. However, as noted in *Sipos*, at para. 30: “Routinely deciding sentence appeals on the basis of after-the-fact developments could both jeopardize the integrity of the criminal process by undermining its finality and surpass the appropriate bounds of appellate review: *Lévesque*, at para. 20; *R. v. Smith* (2005), 376 A.R. 389 (C.A.), at paras. 21-25.” Thus, while post-sentence factors may be considered, there is no hard and fast rule in terms of when such evidence will result in an alteration of the sentence. Each case is determined on its own facts. See *Sipos* at para. 31.
- [39] Returning to the legislation, in my view, when the words of the legislation are considered in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament, (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at para. 21) it is clear, in my opinion, that the NDA clearly intends that someone discharged from the CAF is still subject to military law and procedures for offences that occurred while they were serving.
- [40] Although it is not necessary for the decision, I note that a number of military judges have considered the effect of the Tupper decision in the context of the effect of sentences imposed, including dismissal with disgrace, in the face of an administrative release. In *R. v. McGregor*, 2019 CM 4016, Military Judge Pelletier pointed out the importance of the effect of

a dismissal with disgrace as part of a sentence. A dismissal with disgrace is the highest sentence of a military nature, may have significant consequences as well as a deterrent and denunciatory effect, and thus, may be imposed despite an administrative release. In *R. v. Ayers*, 2017 CM 1012, Chief Military Judge Dutil concluded that in *Tupper* the propriety of imposing a punishment on an administratively released CAF member is one of fitness of that punishment. Where detention, dismissal or other unique military punishment serve no sentencing objective on a released offender, the punishment may be inefficient and ineffective or moot. However, these punishments are not invalid and of no force and effect. I concur with the reasons of Dutil C.M.J. and Pelletier M.J. in that regard. For similar reasons noted above, in my view, *Tupper* does not stand for the proposition that an administrative release expunges or makes inaccessible, a dismissal with disgrace as a sentence.

[41] In summary, the NDA provisions including the Code of Service Discipline, in my opinion, apply to someone discharged from the military for conduct that occurred when they were serving. The decision in *Tupper* should be narrowly read as standing for the proposition that an appellate court may consider a post-sentence administrative discharge when considering the fitness of the sentence.

V. The suspension of the sentence [42] The prosecution does not oppose allowing the appeal and suspending the sentence pursuant to s. 215 of the NDA. S. 215 states:

Suspension of execution of punishment

215 (1) If an offender is sentenced to imprisonment or detention, the execution of the punishment may be suspended by the court martial that imposes the punishment or, if the offender's sentence is affirmed, is substituted or is imposed on appeal, by the Court Martial Appeal Court.

Consideration of victim's safety and security

215 (1.1) If the court martial or the Court Martial Appeal Court, as the case may be, makes a decision that the execution of the punishment be suspended, it shall include in the decision a statement that it has considered the safety and security of every victim of the offence.

Copy to victim

215 (1.2) The court martial or the Court Martial Appeal Court, as the case may be, shall, on request by a victim of the offence, cause a copy of the decision to be given to the victim.

Conditions

215 (2) In suspending the execution of a punishment, the court martial or the Court Martial Appeal Court, as the case may be, shall impose the following conditions on the offender:

(a) to keep the peace and be of good behaviour;

- (b) to attend any hearing under section 215.2 when ordered to do so by the appropriate person referred to in paragraph 215.2(1)(a) or (b); and
- (c) in the case of an offender who is not an officer or a non-commissioned member, to notify the Provost Marshal in advance of any change of name or address, and to promptly notify the Provost Marshal of any change of employment or occupation.

Other conditions

215 (3) The court martial or the Court Martial Appeal Court may, in addition to the conditions described in subsection (2), impose any reasonable conditions.

[43] In accordance with the provision, the prosecution seeks that the following conditions be imposed for a term of one year:

That he keeps the peace and be of good behaviour; That he surrenders himself to the Military Police Detachment in Petawawa within 24 hours if ordered to do so; If released from the CAF, that he notifies the Provost Marshal in advance of any change of name or address, and that he promptly notifies the Provost Marshal of any change of employment or occupation: and That he abstains from communicating with or associating, directly or indirectly, with the victim, Pte. Meadows.

[44] In my view, the original sentence was a fit sentence. However, in light of the new evidence, the position of the prosecution, and the significant change in circumstances of Sgt. Meeks, it is appropriate to suspend the period of detention. I have considered the safety and security of the victim. In my view, adding a condition of no contact with the victim should be sufficient to ensure the safety and security of Pte. Meadows. I add, parenthetically, that there is no suggestion that Sgt. Meeks is an on-going threat to Pte. Meadows.

[45] In addition, I would include all of the statutory conditions for a period of one year. I would not impose the term that Sgt. Meeks surrender himself to the Military Police Detachment in Petawawa within 24 hours if ordered to do so. That term is vague and does not take into account where Sgt. Meeks may be living. The statutory reporting provision is sufficient.

[46] Therefore, I would dismiss the conviction appeal as abandoned.

[47] I would allow the appeal against sentence and suspend the remaining term of detention. In addition, I would place Sgt. Meeks on the following conditions for one year:

That he keeps the peace and be of good behaviour; To attend any hearing under section 215.2 when ordered to do so by the appropriate person referred to in paragraph 215.2(1)(a) or (b) that is a military judge or a Court Martial Appeal Court of Canada Judge; That he notifies the Provost Marshal in advance of any change of name or address, and that he promptly notifies the Provost Marshal of any change of employment or occupation; and That he abstains from communicating with or associating, directly or indirectly, with the victim, Pte. Cole Meadows.

"Elizabeth A. Bennett"

Justice

"I concur.

Mary J.L. Gleason, Chief Justice"

"I concur.

Yvan Roy, J.A."

COURT MARTIAL APPEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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REASONS FOR JUDGMENT BY:

JUSTICE BENNETT

CONCURRED IN BY:

GLEASON, CHIEF JUSTICE. ROY, J.A.

DATED:

NOVEMBER 21, 2024

APPEARANCES:

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