COURT MARTIAL

Citation: *R. v. Paquette*, 2014 CM 2014

Date: 20140723
Docket: 201374

Standing Court Martial

Canadian Forces Base Greenwood
Greenwood, Nova Scotia, Canada

Between:

Ex-Corporal M. Paquette, Offender

- and -

Her Majesty the Queen

Before: Colonel M.R. Gibson, M.J.

Restriction on publication: By court order made under section 179 of the *National Defence Act* and sections 486.3 and 486.4 of the *Criminal Code*, any information that could identify any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of section 163.1 of the *Code*, or any images constituting child pornography within such definition, shall not published in any document or broadcast or transmitted in any way.

The identity of any witness in these proceedings who is under the age of 18 years shall not be published in any document or broadcast or publically transmitted in any way.

REASONS FOR SENTENCE

(Orally)

[1] Corporal Paquette, having accepted and recorded your plea of guilty to the second charge; that is, an offence punishable under section 130 of the *National Defence Act*, that is to say, accessing child pornography contrary to subsection 163.1(4.1) of the *Criminal Code*; and to the third charge, conduct to the prejudice of good order and discipline, on the charge sheet, the court now finds you guilty of these charges. The court must now determine a just and appropriate sentence in this case.

[2] In doing so the court has considered the principles of sentencing that apply in the military justice system, the facts of the case as disclosed in the evidence introduced for the court's consideration, including the Statement of Circumstances introduced into evidence as Exhibit 5; and the Treatment Discharge Summary in evidence as Exhibit 4; as well as the submissions of counsel for the prosecution and the defence.

[3] The facts of this case, as disclosed in the Statement of Circumstances, may be briefly summarized as follows: at the time of commission of these two offences, Corporal Paquette was a Regular Force member of the Canadian Forces and was posted to 413 Squadron at Canadian Forces Base Greenwood as an aviation systems technician. As part of his duties, Corporal Paquette was briefed on Information System Access and Controls, which included advising him of the contents and prohibitions in DAOD 6002-2 (Acceptable Use of the Internet, Defence Intranet, Computers and other Information Systems). He also signed an IS Access Control and Authorization form, acknowledging this briefing and that he understood that while using DND Information Technology (IT) he would have no expectations of privacy due to frequent security scans or file searches conducted on files and email by IT security personnel.

[4] On 5 April 2011, the Canadian Forces National Operations Centre's, or CFNOC, automated security system issued a keyword alert based on the use of the term "pre-teen" on a CF computer system. This computer system was traced to an office in 14 Hangar, CFB Greenwood. Immediately the Wing Information Systems Security Officer, Mr Engelberts, notified the 14 Wing Military Police that a computer located in 14 Hangar may contain child pornography, and preparations were made to locate and seize the computer system and identify the user.

[5] Master Corporal MacEachern of the military police accompanied Mr Engelberts to room 279, 14 Hangar where the computer system that initiated the keyword alert was determined to be. It was determined that the system of interest was assigned to Corporal Paquette, who was currently logged onto the computer. Mr Engelberts seized the DND computer assigned to Corporal Paquette and then turned it over to Master Corporal MacEachern.

[6] A CFNOC report generated as a result of the keyword search indicated that on 31 March 2011, Corporal Paquette had been conducting internet searches for images of child pornography, in addition to visiting web sites associated with child pornography. In the course of these internet searches and visiting child pornography sites, Corporal Paquette knowingly viewed six images of child pornography. These images were of

pre-pubescent girls posing for the camera and displaying their breasts and sexual organs.

[7] On 21 June 2011, Master Corporal MacEachern sent the DND computer assigned to Corporal Paquette to the Integrated Technical Crime Unit, or ITCU, for computer forensic analysis. Following this analysis completed on 26 July 2011, it was confirmed that Corporal Paquette had accessed and viewed child pornography using his DND user account.

[8] On 28 July 2011, Corporal Paquette was arrested and spent some 15 hours in custody before being released on conditions.

[9] Charges were laid against Corporal Paquette on 25 April 2013. Corporal Paquette was released from the Canadian Forces on 10 February 2014.

[10] The fundamental purposes of sentencing by service tribunals in the military justice system, of which courts martial are one type, are: to promote the operational effectiveness of the Canadian Forces by contributing to the maintenance of discipline, efficiency and morale; and to contribute to respect for the law and the maintenance of a just, peaceful and safe society.

[11] The fundamental purposes are achieved by the imposition of just sanctions that have one or more of the following objectives: to promote a habit of obedience to lawful commands and orders; to maintain public trust in the Canadian Forces as a disciplined armed force; to denounce unlawful conduct; to deter offenders and other persons from committing offences; to assist in rehabilitating offenders; to assist in reintegrating offenders into military service; to separate offenders, if necessary, from other officers or non-commissioned members or from society generally; to provide reparations for harm done to victims or to the community; and to promote a sense of responsibility in offenders and an acknowledgement of the harm done to victims and to the community.

[12] The fundamental principle of sentencing is that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[13] Other sentencing principles include: a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances; a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances; an offender should not be deprived of liberty by imprisonment or detention if less restrictive sanctions may be appropriate in the circumstances; a sentence should be the least severe sentence required to maintain discipline, efficiency and morale; and any indirect consequences of the finding of guilty or the sentence should be taken into consideration.

[14] In the case before the court today, I must determine if the sentencing purposes and objectives would best be served by deterrence, denunciation, rehabilitation, or a combination of these factors.

[15] The court must impose a sentence that is of the minimum severity necessary to maintain discipline, efficiency and morale. Discipline is that quality that every Canadian Forces member must have that allows him or her to put the interests of Canada and of the Canadian Forces before personal interests. This is necessary because members of the Canadian Forces must promptly and willingly obey lawful orders that may potentially have very significant personal consequences, up to injury or even death. Discipline is described as a quality because ultimately, although it is something which is developed and encouraged by the Canadian Forces through instruction, training and practice, it is something that must be internalized, as it is one of the fundamental prerequisites to operational effectiveness in any armed force. One of the most important components of discipline in the military context is self-discipline. This includes resisting the temptation to use DND computer systems for unauthorized or illegal purposes. The actions of Corporal Paquette demonstrate that this is an area in which he has been deficient.

[16] The court considers that the aggravating factors in this case are the following:

(a) the objective gravity of the offences to which Corporal Paquette has pleaded guilty. The offence of accessing child pornography under section 163.1(4.1) of the *Criminal Code* is punishable by imprisonment for up to five years if prosecuted by indictment, and eighteen months if prosecuted as a summary conviction offence. Moreover, this is one of the offences for which Parliament has prescribed a minimum punishment and for which it has recently increased the quantum of the minimum punishment. I shall say more about the applicable minimum punishment shortly. The offence of conduct to the prejudice of good order and discipline under section 129 of the *National Defence Act* is punishable by dismissal with disgrace from Her Majesty's service or to less punishment, as indicated in the Scale of Punishments at section 139 of the *National Defence Act*;

(b) the nature of the offences committed by Corporal Paquette as he himself acknowledged during his testimony during the sentencing phase of the trial, this is not a victimless crime. The abuse of children inherent in the production of child pornography occurs because there is a market for the images. By viewing such material, Corporal Paquette has indirectly contributed to this abuse; and

(c) that Corporal Paquette used a DND computer system in the commission of the offence, and did so while on duty on a defence establishment.

[17] The mitigating factors in this case include the following:

(a) first and foremost, that Corporal Paquette has pleaded guilty to the offences. This is always an important mitigating factor, reflecting that the offender has accepted responsibility for his actions;

(a) the apology for his actions made by Corporal Paquette during his testimony on sentencing, and what struck the court as his genuine expression of remorse for the commission of these offences;

(b) the absence of a conduct sheet or any other indication of prior convictions;

(c) that Corporal Paquette has engaged in therapy related to his use of child pornography;

(e) the conclusion in the Treatment Discharge Summary of the Kentville Forensic Sexual Behaviour Program, dated 7 June 2012, in evidence as Exhibit 4 that Corporal Paquette's risk to sexually recidivate is considered to be low; and

(f) the significant period of time that has elapsed since the commission of the offences (three years). Corporal Paquette was arrested on 28 July 2011; charges were not laid until 25 April 2013. The prosecutor has explained that this delay was partly attributable to staffing shortages and workload in the ITCU. This matter came on for trial in July 2014. A section 11(*b*) *Charter* motion for unreasonable delay was not made in this case, and the court is not fully aware of all of the reasons for the delay, but it must be observed that a period of three years does not accord with the duty to act expeditiously contained at section 162 of the *National Defence Act*, which provides that charges laid under the Code of Service Discipline shall be dealt with as expeditiously as the circumstances permit. This matter has been hanging over Corporal Paquette's head during this extended period, and that is a relevant factor in mitigation.

[18] The principles of sentencing that the court considers should be emphasized in the present case are denunciation, and general and specific deterrence.

[19] Members of the Canadian Forces are rightly held to a very high standard. The actions of Corporal Paquette constitute a significant derogation from those standards. He must be specifically deterred from ever repeating these actions, and other members of the Canadian Forces must also understand that such actions are simply not tolerable, and be deterred from committing them. Accessing child pornography, and thereby contributing to the abuse of children, is odious, and the use of DND computer systems for such a purpose must be vigorously deterred.

[20] In *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, the Supreme Court of Canada has expressed the primary goal of child pornography laws. Chief Justice McLachlin, for the majority, stated the following, at paragraph 28:

> .... Just as no one denies the importance of free expression, so no one denies that child pornography involves the exploitation of children. The links between possession of child pornography and harm to children are arguably more attenuated than are the links between the manufacture and distribution of child pornography and harm to children. However, possession of child pornography contributes to the market for child pornography, a market which in turn drives production involving the exploitation of children. Possession of child pornography may facilitate the seduction and grooming of victims and may break down inhibitions or incite potential offences.

I would add that that this same logic would apply to the offence of accessing child pornography, as well as to possession.

[21] There is no doubt that these offences are considered objectively serious in Canada. In *R. v. Labaye*, [2005] 3 S.C.R. 728, 2005 SCC 80, the Chief Justice made the following remarks at paragraph 109:

> According to contemporary Canadian social morality, acts such as child pornography, incest, polygamy and bestiality are unacceptable regardless of whether or not they cause social harm. The community considers these acts to be harmful in themselves. Parliament enforces this social morality by enacting statutory norms in legislation such as the *Criminal Code*.

[22] In recent years, Parliament has continued to send a clear message that these offences merit unequivocal denunciation. The recent increase of mandatory minimum punishments for those found guilty of possession and accessing child pornography evidence this.

[23] Although, as the defence submits, the particular digital images accessed by Corporal Paquette that are the subject of the second charge may not be amongst the most egregious of their type in the spectrum of such images unfortunately available on the Internet, they clearly constitute child pornography.

[24] In the circumstances of this case, the court considers that a custodial sentence is warranted and would be the minimum sentence necessary to maintain discipline, efficiency and morale, as well as to accord with the parity principle of sentencing for these types of offences.

[25] Moreover, as referred to earlier, the offence of accessing child pornography under section 163.1(4.1) is one for which Parliament has prescribed a minimum sentence in the *Criminal Code*. The second charge was laid and prosecuted under section 130 of the *National Defence Act*. Paragraph 130(2)(*a*) of the *National Defence Act* provides:

> Subject to subsection (3), where a service tribunal convicts a person under subsection (1), the service tribunal shall,
>
> (a) if the conviction was in respect of an offence
>
> (i) committed in Canada under Part VII, the *Criminal Code* or any other Act of Parliament and for which a minimum punishment is prescribed ...
>
> ...
>
> impose a punishment in accordance with the enactment prescribing the minimum punishment for the offence ...

[26] The enactment prescribing the minimum punishment for the offence, in this case section 163.1(4.1) of the *Criminal Code*, currently provides for a minimum punishment of imprisonment for a term of six months if prosecuted as an indictable offence, and imprisonment for a term of ninety days if prosecuted as a summary conviction offence.

[27] However, paragraph 11(*i*) of the *Canadian Charter of Rights and Freedoms* provides that any person charged with an offence has the right, if found guilty of the offence and if the punishment for the offence has been varied between the time of commission of the offence and the time of sentencing, to the benefit of the lesser punishment.

[28] These offences were committed in 2011. In the interim, Parliament has changed the law regarding the applicable minimum punishment for this offence to the current levels mentioned previously, which changes came into force in August 2012. The previous minimum punishments which were applicable at the time of the commission of the section 163.1(4.1) offence were 45 days imprisonment if prosecuted by indictment, and 14 days imprisonment if prosecuted as an offence punishable on summary conviction. Pursuant to paragraph 11(*i*) of the *Charter*, Corporal Paquette is thus entitled to the application of the lesser punishment. These are thus the levels of minimum punishment prescribed by Parliament applicable in the present case.

[29] This then raises the question of the interface between section 130(2)(a)(i) of the *National Defence Act*, and the minimum punishment provisions of section 163.1(4.1) of the *Criminal Code*, given that, of course, the *National Defence Act* does not replicate the characterization of offences made in the *Criminal Code* between indictable, summary conviction and hybrid offences. In the *National Defence Act*, Parliament has rather chosen to characterize all offences over which service tribunals have jurisdiction as "service offences," which are defined at section 2 of the *National Defence Act* as an offence under the *National Defence Act*, the *Criminal Code* or any other Act of Parliament, committed by a person while subject to the Code of Service Discipline. Which minimum punishment should then be applicable in the present case: that prescribed in the *Criminal Code* for offences prosecuted by indictment, or by summary conviction?

[30] Following the course taken by the Chief Military Judge, Colonel Dutil, in the General Court Martial of Ordinary Seaman Cawthorne, 2014 CM 1014, I conclude that it is open to this court martial to assess whether, on the facts of the case in evidence, it is likely that, had they been prosecuted in the civilian criminal justice system to which the provisions of the *Criminal Code* are fully applicable, these charges would have been prosecuted as summary conviction or indictable offences. In the present case, the prosecutor has indicated his view that, had they been prosecuted in the civilian criminal justice system, they would most likely have been prosecuted as offences punishable on summary conviction. On the facts, I accept that view. I, therefore, consider that the applicable minimum punishment in the present case would be 14 days' imprisonment.

[31] The prosecution and defence have made a joint submission for a sentence of imprisonment for 21days.

[32] In the case of a joint submission, as reiterated by the Court Martial Appeal Court in the case of *R. v. Private Taylor*, 2008 CMAC 1, the question that the Court must ask itself is not whether the proposed sentence is one that the court would have awarded absent the joint submission; rather, the court is required to consider whether there are cogent reasons to depart from the joint submission; that is, whether the proposed sentence is unfit, unreasonable, would bring the administration of justice into disrepute, or be contrary to the public interest.

[33] I have carefully canvassed all of the cases submitted to me by counsel as precedents for sentencing. The submissions of counsel in this case are consistent with the range of those particular precedents.

[34] The court does not consider that the proposed sentence is unfit, unreasonable, would bring the administration of justice into disrepute, or be contrary to the public interest. Thus, the court will accept the joint submission of counsel for the prosecution and defence as the sentence.

[35] Because the offence of accessing child pornography under section 163.1 of the *Criminal Code* is a primary designated offence within the meaning of section 487.04 (a)(i.8) of the *Criminal Code* and section 196.11 of the *National Defence Act*, section 196.14 requires that an order be issued from the court martial in the prescribed form authorizing the taking of the number of bodily substances that is reasonably required for the purpose of forensic DNA analysis.

[36] Further, because the offence of accessing child pornography is a designated offence within the meaning of section 490.011(1)(a)(viii) of the *Criminal Code* and section 227 of the *National Defence Act*, section 227.01 of the *National Defence Act* requires the court martial to issue an order in the prescribed form requiring Corporal Paquette to comply with the *Sex Offender Information Registration Act* for the applicable period specified in section 227.02(2)(a), which in this case is 10 years.

FOR THESE REASONS, THE COURT:

[37] **FINDS** you guilty of the second and third charges on the charge sheet.

[38] **SENTENCES** you to the punishment of imprisonment for 21 days.

[39] **MAKES** the order under section 196.14 of the *National Defence Act* for the taking of bodily substances for the purpose of forensic DNA analysis.

[40] **MAKES** the order under section 227.01 of the *National Defence Act* to comply with the *Sex Offender Information Registration Act* for 10 years.

Counsel:

Lieutenant-Commander D.T. Reeves, Canadian Military Prosecution Service
Counsel for Her Majesty the Queen

Lieutenant-Commander P.D. Desbiens, Directorate of Defence Counsel Services
Counsel for ex-Corporal M. Paquette