COURT MARTIAL

Citation: *R. v. Daigle*, 2017 CM 1003

Date: 20170309
Docket: 201636

Standing Court Martial

Halifax Courtroom Suite 505
Halifax, Nova Scotia, Canada

Between:

Her Majesty the Queen

- and -

Corporal M. Daigle, Offender

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

NOTE: Personal data identifiers have been redacted in accordance with the Canadian Judicial Council's "*Use of Personal Information in Judgments and Recommended Protocol*".

REASONS FOR SENTENCE

(Orally)

[1] Corporal Daigle has admitted his guilt to one count under paragraph 117(f) of the *National Defence Act* (*NDA*), for an act of a fraudulent nature not particularly specified in sections 73 to 128 of the Act. The statement of particulars reads as follows:

> In that he, on or about14 December 2014, at CFB Halifax, with intent to defraud, submitted an altered credit card statement in support of a claim for Compassionate Travel Assistance.

[2] For clarity, I have reproduced the content of the Statement of Circumstances that was filed with the court:

"Statement of Circumstances

1. At all material times Cpl M. Daigle

a. Was a member of the Regular Force, Canadian Armed Forces; and
b. Was a member of the Real Property Operations Section Halifax.

2. On 5 Aug 14, Cpl Daigle learned of the death of his father-in-law. He received a Compassionate CF100 Leave Pass and traveled with his wife and son to Newfoundland for the funeral.

3. Following their return, then-MCpl Daigle signed and filed a General Allowance Claim dated 4 Dec 2014 in the amount of $3,201.30 for the travel. He submitted boarding passes and a credit card statement in support of his claim for payment.

4. An investigation was initiated by the Military Police after they had been notified on 1 June 2015 by the unit orderly room that the claim was believed to be fraudulent. The Military Police obtained documentation from Westjet, Air Canada and the [bank name] via Production Orders.

5. The material received from those companies showed that the difference in the amount actually paid by MCpl Daigle for his travel and the amount claimed on the General Allowance Claim was $1,570.00.

6. Then-MCpl Daigle altered the credit card statement filed in support of the General Allowance Claim to inflate his claim. The following are examples of the alterations he made:

a. transaction #XXXX (5 Aug 14) – the [bank name] financial records show a purchase from "WESTJET CALGARY AB", in the amount of $294.54. The [bank name] bank statement submitted by then-MCpl Daigle shows "WESTJET CALGARY AB", in the amount of $694.54;

b. transaction #YYYY (5 Aug 14) – the [bank name] financial records show a purchase from "AIR CANADA 0142137442100AIRCANADA.COMMB", in the amount of $299.14. The [bank name] bank statement submitted by then-MCpl Daigle shows "AIR CANADA 0142137442100AIRCANADA.COMMB", in the amount of $799.14; and

c. transaction #ZZZZ (7 Aug 14) – the [bank name] financial records show a purchase from "AIR CANADA 0142137532786WINNIPEG MB", in the amount of $742.55. The [bank name] bank statement submitted by then-MCpl Daigle shows "AIR CANADA 0142137532786WINNIPEG MB", in the amount of $842.55.

7. Cpl Daigle has never been paid any money by the Canadian Armed Forces based on the General Allowance claim."

[3] Parties also agreed on certain facts in writing. The Court was informed of the following events:

"1. On 1 June 2015, the Military Police were notified that then-MCpl Daigle submitted a travel expense claim, which the orderly room believed to be fraudulent.

2. On 27 July 2015, the Military Police obtained two production orders in order to obtain relevant information from Air Canada and West Jet.

3. On 21 September 2015, the results of the production order to obtain information from Air Canada, which contained information useful to the investigation, were received by the Military Police.

4. On 9 October 2015, the results of the production order to obtain information from West Jet, which contained information useful to the investigation, were received by the Military Police.

5. On 14 Dec 2015, the Military Police obtained a production order in order to obtain relevant information from the then-MCpl Daigle's bank, the [bank name],

6. On 1 February 2016, the results of the production order to obtain information from the [bank name], which contained information useful to the investigation, were received by the Military Police.

7. On 17 February 2016, the Military Police conducted an interview with then-MCpl Daigle.

8. On 4 March 2016, the Commanding Officer of the Military Police Unit Halifax sent the file to then-MCpl Daigle's Commanding Officer, with a recommendation for charges to be laid.

9. On 11 May 2016, charges were laid via a Record of Disciplinary Proceedings.

10. On 19 May 2016, the Commanding Officer of then-MCpl Daigle's referred the file to the referral authority.

11. On 16 June 2016, the Referral Authority forwarded the file to the Office of the Director of Military Prosecutions in Ottawa.

12. On 19 July 2016, the file was received at the office of the Regional Military Prosecutor (Atlantic) for post-charge assignment."

[4] During the sentencing hearing, the prosecution called one witness, namely Chief Warrant Officer Burgher, the offender's unit Chief Warrant Officer at the Real Property Operations Section Halifax. In a nutshell, he testified that he learned of the investigation that led to this trial when he arrived in his position approximately 10 months ago. After having inquired as to the nature of the investigation involving Corporal Daigle, he obtained and reviewed the offender's personal file to find that the offender had a conduct sheet that contained three entries which were the result of convictions at Summary Trial on 15 July 2011. The conduct sheet "Description" column showed entries for three offences. Firstly, two offences under section 129 of the Act. One entry for a failure to properly conduct water testing, as it was his duty to do so and another entry for having lied to his supervisors in order to cover up his negligence regarding the testing of water used by Canadian Armed Forces (CAF) members. The third entry referred to an offence under section 125 of the Act for willfully making a false entry in a document made by him that was required for official purposes. The statement of particulars of that offence referred to false entries in the Damage Control Division School treatment plant operational documents, indicating that he had performed water testing by entering false water data values, knowing that the said water testing had not been performed. Corporal Daigle was sentenced to a reprimand and a fine of $1,000 by his commanding officer.

[5] Chief Warrant Officer Burgher testified that the unit authorities decided then to remove Corporal Daigle from his responsibilities as a master corporal, as he then was, in his section in light of the ongoing investigation and his conduct sheet that displayed a previous history of dishonesty. The decision was made without any discussion with the offender on that matter. Chief Warrant Officer Burger explained how the unit's decision, to take away Corporal Daigle's responsibilities as a junior leader, impacted on his section, on his co-workers and the unit. No other evidence was called by the prosecution during the sentencing hearing.

[6] The defence called no testimonial evidence. The Court was provided with two documents related to recent Medical Employment Limitations issued by the Director of Medical Policy-Medical Standards, seeking an assessment because of a chronic medical condition that is considered of high risk for universality of service and the upcoming review by the Director of Military Careers Administration.

[7] In the particular context of an armed force, the military justice system constitutes the ultimate means of enforcing discipline, which is a fundamental element of military activity in the CAF. The purpose of this system is to prevent misconduct or, in a more positive way, promote good conduct. It is through discipline that an armed force ensures that its members will accomplish, in a trusting and reliable manner, successful missions. The military justice system also ensures that public order is maintained and that those subject to the Code of Service Discipline are punished in the same way as any other person living in Canada. The fundamental purpose of sentencing at courts martial is to contribute to the respect of the law and the maintenance of military discipline by imposing punishments that meet one or more of the following objectives:

(a) to denounce the unlawful conduct;

(b) to deter the offender, but also others who might be tempted to commit such offences;

(c) to separate offenders from society, where necessary;

(d) to provide reparations for harm done to the victims or to the community;

(e) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to the victims and to the community; and

(f) the reformation and rehabilitation of the offender.

[8] The sentence must also take into consideration the following principles:

(a) the sentence must be commensurate with the gravity of the offence, the previous character of the offender and his or her degree of responsibility;

(b) it should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(c) a court must also respect the principle that an offender should not be deprived of liberty if less restrictive punishments may be appropriate in the circumstances. In other words, punishments in the form of incarceration should be used as a last resort; and

(d) the sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or to the offender. However, the court must act with restraint in determining sentence in imposing such punishment that should be the minimum necessary intervention to maintain discipline.

[9] The prosecution is seeking a sentence that would be composed of a severe reprimand and an accompanying fine in the amount of $2,000. The prosecution provided various court martial decisions related to sentences imposed on offenders found guilty of offences under paragraph 117(f) of the Act to illustrate the applicable range of sentences. These decisions include *R. v. Cyr*, 2012 CM 4020; *R. v. Ruttan*, 2014 CM 1023; *R. v. Downer*, 2016 CM 4006; *R. v. Harding*, 2016 CM 1007; and, *R. v. Merriam*, 2010 CM 3021. The prosecution also provided the Court with two decisions of the Court Martial Appeal Court, namely *R. v. St-Jean* (2000), CMAC-429 and *R. v. Castillo*, 2003 CMAC 6. The prosecution submits that sentence imposed must emphasize the principles of general and specific deterrence and denunciation of the conduct. In addition, counsel for the prosecution submits that the Court should apply the step-up principle of sentencing in using the previous record of Corporal Daigle for offences of dishonesty resulting from a summary trial held in 2011, particularly the offence under section 125 of the Act. The prosecution submits that the Court should apply the step-up principle in imposing a sentence more severe than if the offender had no previous record because the recommended sentence of a severe reprimand and a fine of $2,000 is not so harsh that it would impair the offender's rehabilitation. Finally, the prosecution states that should Corporal Daigle have no conduct sheet for offences related to dishonesty, a sentence of reprimand and a fine of $1,000 would have been sufficient.

[10] The defence submits that a fair and just sentence should consist of a reprimand and a fine of $1,000 payable at a rate of $200 per month. The defence asks this Court to distinguish this case from those submitted by the prosecution. In addition, it is submitted that the range for this type of offence would normally indicate that a reprimand and a fine generally equal to the amount of the fraudulent act is imposed on first time offenders where the amount of the fraud sits at the lower end of the range. The defence provided the Court with several previous court martial decisions, including *R. v. Hull*, 2014 M 1001; *R. v. Baptista*, 2002 CM 32; *R. v. Brake*, 2002 CM 62; and *R. v. Kennedy*, 2010 CM 1011. The defence strongly argues that convictions and sentences imposed at summary trial in 2011 should be given no weight for the purpose of applying the step-up principle at courts martial. In support of his position, counsel for the defence strongly argues that a summary trial is not a proper trial by an independent and impartial tribunal when it is presided by the offender's Commanding Officer who has no legal training other than a basic certification training to preside at summary trials. The defence highlights the fact that there is no record from the proceedings held by summary trial and a court martial cannot be provided with any circumstances that would assist a presiding judge at a court martial in determining whether the previous conviction has any value to apply the step-up principle. It also suffers from the absence of proper legal representation for an accused and the rules of evidence do not apply. Therefore, the defence submits that although the conduct sheet consists of a disciplinary record, entries resulting from convictions at summary trial cannot be used to apply the step-up principle.

[11] This case raises significant issues. Firstly, the court will address the fundamental principle of sentencing that a sentence must be proportionate to the gravity of the

offence in the particular context of the offence under paragraph 117(f) of the Act for an act of a fraudulent nature not particularly specified in sections 73 to 128. In the decision referred to by the prosecution, namely *R. v. Cyr*, 2012 CM 4020, Perron M.J. made the following remarks, at paragraph 13:

> I will firstly examine the aggravating factors. I do not find that the offence is objectively serious. I say that because Parliament has chosen to impose a maximum sentence of two years when this type of offence is prosecuted as an indictable offence. As such, this is at the lowest end of the spectrum of sentences for indictable offences.

Whereas, d'Auteuil M.J., appeared to have held a different view of the objective gravity of the offence in *R. v. Merriam*, 2010 CM 3021, when he stated, at paragraph 11:

> Here the court is dealing with an offence for an act of a fraudulent nature not particularly specified in sections 73 to 128 of the *National Defence Act*, which is, with intend to defraud, submitted claims for rent for a monthly rate higher than it was in reality, in order to deprive the CF of the total amount of $9,100 for his own benefit, knowing the expense had not been incurred. It is a serious offence per se as defined in the *National Defence Act*.

[12] I conclude that there is no contradiction between *Cyr* and *Merriam*. In *Cyr*, the accused was found guilty of obtaining by false pretence contrary to section 362(1)(a) of the *Criminal Code*, an offence punishable under section 130 of the *NDA* unlike the case of *Merriam* who pleaded guilty to the offence under paragraph 117(f) of the *NDA*. Whether one judge uses the word "serious" or "not serious" in trying to categorize a specific offence must be taken in context. The law requires the presiding judge to consider the gravity of the offence, not to qualify it as serious or not serious. However, it must be understood that the gravity of the offence is not an aggravating circumstance related to the offence. It is a principle of sentencing on its own. In the context of paragraph 117(f) of the Act, it serves no purpose to assess the gravity of the offence on the basis of the maximum sentence prescribed in section 362 of the *Criminal Code*. The offence created in section 117 of the *NDA* covers a wide spectrum of prohibited conduct, including an act of a fraudulent nature at paragraph 117(f). A charge laid under this paragraph requires the proof beyond a reasonable doubt of practically the same essential elements of the offence of fraud under section 380 of the *Criminal Code*, which carries a maximum term of imprisonment of 14 years when the value of the subject-matter of the offence exceeds five thousand dollars or to imprisonment for a term not exceeding two years where the value of the subject-matter of the offence does not exceed five thousand dollars if it is dealt with as an indictable offence. The objective gravity of the offence of fraud is serious, particularly when the fraudulent activity involves values exceeding $5,000 if prosecuted on the basis of a *Criminal Code* offence. Otherwise the objective gravity is the same whether an accused is charged under paragraph 117*(*f) of the *NDA* or under section 130 of the Act, contrary to section 380 of the *Criminal Code*. Both offences must emphasize the principles of general deterrence and denunciation. Although the Court Martial Appeal Court decision dealt with an appeal against the legality and the severity of a sentence imposed at a Standing Court Martial further to a plea of guilty for the offence of a fraud in excess of $30,000, under section 130 of the Act, contrary to section 380 of the *Criminal Code*, the remarks

of Justice Létourneau at paragraph 22 of the decision in *R. v. St-Jean* (2000), CMAC-429 apply equally to the offence charged under paragraph 117(f) of the *NDA*:

> After a review of the sentence imposed, the principles applicable and the jurisprudence of this Court, I cannot say that the sentencing President erred or acted unreasonably when he asserted the need to emphasize deterrence. In a large and complex public organization such as the Canadian Forces which possesses a very substantial budget, manages an enormous quantity of material and Crown assets and operates a multiplicity of diversified programs, the management must inevitably rely upon the assistance and integrity of its employees. No control system, however efficient it may be, can be a valid substitute for the integrity of the staff in which the management puts its faith and confidence. A breach of that faith by way of fraud is often very difficult to detect and costly to investigate. It undermines public respect for the institution and results in losses of public funds. Military offenders convicted of fraud, and other military personnel who might be tempted to imitate them, should know that they expose themselves to a sanction that will unequivocally denounce their behaviour and their abuse of the faith and confidence vested in them by their employer as well as the public and that will discourage them from embarking upon this kind of conduct.

It is worth noting that Parliament has increased the maximum penalty for the offence of fraud found at section 380 of the *Criminal Code* in recent years. A similar amendment has not been made in the context of the *NDA*. If a person subject to the Code of Service Discipline is charged of the offence found at paragraph 117(f) of the Act for an act of a fraudulent nature, where the subject-matter of the fraudulent act is more than $5,000, the prosecutorial discretion to prefer such charge, as opposed to a charge under section 380 of the *Criminal Code*, would have a direct impact on the objective gravity of the offence in a particular case.

[13] With regard to the issue concerning the application of the step-up principle sought by the prosecution in this case, on the basis of the offender's previous convictions and the sentence imposed on him at summary trial in 2011, particularly the conviction for an offence under section 125 of the *NDA*, the Court does not accept that such approach is legally sound. However, the Court finds that the consideration of a conduct sheet for offences of dishonesty may be considered as an aggravating circumstance.

[14] It is understood that "[t]he theory of "step-up", also known as the "jump principle", holds that a sentence must generally have regard to prior sentences imposed on the accused so that it is *not* disproportionate in comparison. It contemplates a "progression in the length of sentences" imposed in the event of recidivism for the same type of offences". (see Ewaschuk, *Criminal Pleadings and Practice* 18:0267). This principle shall not be used to increase the sentence in a way suggested by the prosecution. This principle serves another purpose. As stated by Fenlon J.A, for the British Columbia Court of Appeal, in *R. v. Nelson*, 2015 BCCA 371, at paragraph 12:

> "The step-up principle is not a principle or goal set out in the *Criminal Code*. It is a shorthand way of expressing the idea that sentencing requires a measured approach, even for repeat offenders": *R. v. Jimmie*, 2009 BCCA 215 at para. 20, citing *R. v. Robitaille*, [1993] 31 B.C.A.C. 7. However, the principle that sentences should go up only in

> moderate steps rests on the sentencing principle of rehabilitation and applies in cases in which rehabilitation is a significant sentencing factor. *R. v. Robitaille* at para. 8.

In other words, the step-up principle applies where rehabilitation is a significant factor and where the sentence to be imposed does not cause the offender to be discouraged in his effort of rehabilitation. The Court is not required to apply this principle in the circumstances of this case.

[15] In the case at bar, the Court considers that the subjective seriousness of the offence, as revealed in the Statement of Circumstances and the conduct sheet of the offender are the only aggravating factors. This is an offence of breach of trust by a long-time service member who was or should have been aware of the process and procedures involved for travel benefits. The Statement of Circumstances highlights also that the actions made by the accused were not spontaneous but planned and deliberate to some extent. With regard to the existence of the conduct sheet, despite the fact that these previous convictions arose of charges that were dealt with at summary trial, the entries indicate that it is not the first encounter with the military justice system for the offender and that his convictions relate to a dishonest behaviour. The Court cannot attribute any other weight to the conduct sheet in absence of the relevant facts that led to these findings of guilt. Finally, the Court is not satisfied that the prosecution has met its burden of proof to establish, as an aggravating factor, that the unit of the accused suffered significant harm or negative impact as a result of the commission of the offence. The Court is satisfied that the decision of his chain of command to limit Corporal Daigle's responsibilities and the performance of his duties, because they had lost trust in him, had an impact on his co-workers, but only marginally.

[16] In light of the limited evidence provided during the sentencing hearing, the Court considers that the plea of guilty of Corporal Daigle and his record of service are mitigating factors. The Court is satisfied that his plea of guilty reflects a full acceptance of his responsibility for his actions. He has served in the CAF since 1994. Corporal Daigle is 41 years old. He is married and they have one son born in 2012. The Court is not satisfied that the delay in bringing this matter to trial should mitigate the sentence in the circumstances.

FOR THESE REASONS, THE COURT:

[17] **FINDS** you guilty of one offence under paragraph 117(f) of the *National Defence Act* of an act of a fraudulent nature not particularly specified in sections 73 to 128.

[18] **SENTENCES** you to a reprimand and a fine in the amount of $1,400. The fine will be paid through consecutive instalments of $200 per month commencing on 15 March 2017.

Counsel:

Major D. Martin for the Director of Military Prosecutions

Lieutenant-Commander B. Walden, Defence Counsel Services, Counsel for Corporal M. Daigle