



COURT MARTIAL

Citation: *R. v. Mosher*, 2019 CM 4014

Date: 20190620

Docket: 201866

Standing Court Martial

Asticou Courtroom
Gatineau, Quebec, Canada

Between:

Her Majesty the Queen

- and -

Lieutenant-Colonel B.C. Mosher, Offender

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

REASONS FOR SENTENCE

(Orally)

Introduction

[1] Lieutenant-Colonel Mosher, having accepted and recorded your plea of guilty in respect of the first charge on the charge sheet, the Court now finds you guilty of an act of a fraudulent nature contrary to section 117(f) of the *National Defence Act (NDA)*.

A joint submission is being proposed

[2] I now need to impose the sentence. This is a case where a joint submission is made to the Court. Both prosecution and defence counsel recommended that I impose a fine in the amount of \$10,000.

[3] This recommendation of counsel severely limits my discretion in the determination of an appropriate sentence. As any other trial judge, I may depart from a

joint submission only if the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest. This is the test promulgated by the Supreme Court of Canada in *R. v. Anthony-Cook*, 2016 SCC 43.

[4] Indeed, the threshold to depart from the joint submission being made is high as joint submissions respond to important public interest considerations. The prosecution agrees to recommend a sentence that the accused is prepared to accept, avoiding the stress and expense of a trial and allowing efforts to be channelled into other matters. Furthermore, offenders who are remorseful may take advantage of a guilty plea to begin making amends. The most important benefit of joint submissions is the certainty they bring to all participants in the administration of justice.

[5] Yet, even if certainty of outcome is important for the parties, it is not the ultimate goal of the sentencing process. I must also keep in mind the disciplinary purpose of the Code of Service Discipline and military tribunals in performing the sentencing function attributed to me as military judge. As recognized by the Supreme Court of Canada, courts martial allow the military to enforce internal discipline effectively and efficiently. Punishment is the ultimate outcome once a breach of the Code of Service Discipline has been recognized following either a trial or a guilty plea. It is the only opportunity for the Court to deal with the disciplinary requirements brought about by the conduct of the offender, on a military establishment, in public and in the presence of members of the offender's unit.

[6] The imposition of a sentence at court martial proceedings, therefore, performs an important disciplinary function, making this process different from the sentencing usually performed in civilian criminal justice courts. Even when a joint submission is made, the military judge imposing punishment should ensure, at a minimum, that the circumstances of the offence, the offender and the joint submission are not only considered, but also adequately laid out in the sentencing decision to an extent that may not always be necessary in other courts.

[7] The fundamental principle of sentencing found at section 203.2 of the *NDA* provides that a military judge shall impose a sentence commensurate with the gravity of the offence and the degree of responsibility of the offender.

Matters considered

[8] In this case, the prosecutor read a Statement of Circumstances which was entered in evidence as an exhibit, along with other documents provided by the prosecution as required at *Queen's Regulations and Orders for the Canadian Forces* article 112.51. For its part, the defence also produced an Agreed Statement of Facts describing the personal situation of Lieutenant-Colonel Mosher at the time and since the offence.

[9] In addition to this evidence, the Court also benefitted from the submissions of counsel that support their position on sentence on the basis of the facts and

considerations relevant to this case, as well as by comparison with judicial precedents in cases involving fraudulent conduct, thereby providing the Court with an idea of the range of sentence imposed in the past in similar cases. Along with the submissions of counsel and the evidence, I am confident that I can adequately apply the purposes and principles of sentencing to the circumstances of both the individual offender and the offence committed in this case.

The offender and the offence

[10] Lieutenant-Colonel Mosher is a 45-year-old Signals Officer who has joined the Canadian Armed Forces (CAF) in 1992. After graduation with a Bachelor in Electronics Engineering from the Royal Military College, he served with communications regiments, training establishments and headquarters in various locations in Canada, the United States and in support of operations overseas. He is married and has a 12-year-old daughter. He has a conduct sheet related to a fraudulent act of personation in May 1999, over 20 years ago.

[11] The facts surrounding the commission of the offence in this case are disclosed in the Statement of Circumstances read by the prosecutor and formally admitted as accurate by Lieutenant-Colonel Mosher. These circumstances can be summarized as follows:

- (a) During the period from August 2015 to January 2016, Lieutenant-Colonel Mosher was the Chief of Staff - Operations of Canadian Forces Information Operations Group, located at National Defence Headquarters in Ottawa. He was in possession of an Individual Designated Travel Credit (IDTC) card, a credit card issued by BMO Bank of Montreal and provided to him for use in relation to authorized government travel expenses. A condition of use of the IDTC card was that the account balance not exceed \$5,000.
- (b) Beginning in August 2015, Lieutenant-Colonel Mosher used his IDTC card for numerous transactions that were not authorized government travel expenses. This misuse was discovered by appropriate officials. Lieutenant-Colonel Mosher was informed that his use of the card was in violation of the relevant Treasury Board Directive and the terms of the user agreement.
- (c) Lieutenant-Colonel Mosher then acknowledged the misuse on 28 August 2015 and asked for the card not to be cancelled, promising that he would cease his improper use of the card. That arrangement was agreed to by a responsible official.
- (d) However, on 3 September 2015, Lieutenant-Colonel Mosher deposited a cheque for \$4,819 to the IDTC card account to pay off the balance, knowing that he did not have sufficient funds to cover this payment.

Although he knew that the cheque would ultimately not be honoured, the deposit temporarily reset the account balance, allowing him to continue to use the card to carry out transactions.

- (e) Lieutenant-Colonel Mosher made a total of eight such deposits and continued to use the IDTC card for unauthorized expenses until the Bank of Montreal became aware of the activity on Lieutenant-Colonel Mosher's account and on 8 January 2016 cancelled the card. The outstanding balance on the account was by then \$24,513.53.
- (f) Lieutenant-Colonel Mosher has repaid the Crown the amount owed on the IDTC card as of the date of cancellation, arranging for the sum to be garnished from his pay from March to June 2016.

[12] In addition, the defence informed the Court of a number of facts pertaining to the personal circumstances of Lieutenant-Colonel Mosher, both at the time and since the commission of the offence in an Agreed Statement of Facts. The following facts are especially relevant for the Court:

- a) During the 2008 financial crisis Lieutenant-Colonel Mosher became subject to the impacts of a margin call which affected the stability of his financial position, resulting in a debt of approximately \$150,000. In 2011, he filed a consumer proposal.
- b) Lieutenant-Colonel Mosher disclosed his financial situation to his chain of command, both following his losses during the 2008 financial crisis and after submitting the consumer proposal.
- c) Lieutenant-Colonel Mosher eventually turned to credit instruments to cover expenses and service his debts, specifically a personal line of credit, and various credit cards. By December 2015, he had leveraged all credit available to him under these instruments.
- d) Between August 2015 and January 2016, Lieutenant-Colonel Mosher used his IDTC card for personal and household expenses, such as at the Gap store, Loblaws, Ikea, Costco, and Lululemon. There is no evidence that he used his IDTC card for expenses other than what would be normal expenses to support his family. By August 2016, Lieutenant-Colonel Mosher's efforts to obtain a debt consolidation loan were successful. He obtained a debt consolidation loan in the amount of \$150,000.
- e) In a recorded interview with the Canadian Forces National Investigation Service (CFNIS) on 19 June 2017, Lieutenant-Colonel Mosher voluntarily admitted writing and depositing the cheques to the IDTC

account, knowing that he did not have sufficient funds to cover these payments.

- f) Lieutenant-Colonel Mosher received a recorded warning, and was placed on counselling and probation on 17 April 2018 following the investigation into these events; he was also relieved of his command at Canadian Forces Network Operations Centre on 6 April 2018.

Seriousness of the offence and aggravating factors

[13] The Court has considered the objective gravity of the offence in this case. Committing an act of a fraudulent nature contrary to section 117(f) of the *NDA* attracts a maximum punishment of imprisonment for less than two years.

[14] The circumstances of the offender and the offence in this case reveal, in my opinion, the following aggravating factors:

- (a) The rank and position of Lieutenant-Colonel Mosher in the CAF at the time of the offence, those being relevant in two distinct ways:
 - i. the issue of an IDTC card is done on the basis of one's position and duties, hence a misuse of a fraudulent nature constitutes an abuse of that position of trust;
 - ii. the high expectations in terms of financial probity from an officer serving as Chief of Staff - Operations of an organization as important as the Canadian Forces Information Operations Group.
- (b) The repetitive nature of the offence and its degree of sophistication, especially with respect to the scheme designed by Lieutenant-Colonel Mosher to submit cheques he knew would ultimately not be honoured just to temporarily reset his IDTC account balance, thereby allowing him to continue to use the card after he had promised to a departmental official that he would cease his improper use. That constituted a further breach of the trust given to him at the time.
- (c) Finally, Lieutenant-Colonel Mosher's conduct sheet, even considering the date of conviction over 20 years ago. Indeed, the fraudulent behaviour described on the conduct sheet is similar to the offence admitted here. Members of the CAF are given increased ranks and responsibilities on the basis of what they have accomplished, good or bad. It is therefore proper that the previous offence in this case be considered, albeit in a limited way given the passage of time.

Mitigating factors

[15] That said, the Court acknowledges the following mitigating factors in this case, including the following:

- (a) First, Lieutenant-Colonel Mosher's guilty plea today, which avoided the expense and energy of running a trial and demonstrates that he is prepared to take responsibility for his actions in this public trial in the presence of members of his unit and of the broader military community.
- (b) Second, the fact that Lieutenant-Colonel Mosher was under exceptional financial stress at the time of the offence as the sole financial provider for his family.
- (c) Third, the full restitution of the amounts appropriated through the misuse of the IDTC card.
- (d) Finally, the conduct of Lieutenant-Colonel Mosher following the offence, in collaborating with the CFNIS in the course of their investigation and in the successful completion of a period of counselling and probation. This reveals that Lieutenant-Colonel Mosher's entirely satisfactory service to the CAF in almost 27 years in increased rank and responsibility is given appropriate consideration and that his chain of command recognizes his continued potential to contribute to the CAF and society in the future.

Objectives of sentencing to be emphasized in this case

[16] I agree with counsel that the circumstances of this case require that the focus be placed on the objectives of denunciation and general deterrence, as well as rehabilitation in sentencing the offender. Counsel submitted that the fine proposed would be sufficient to denounce and act as a deterrent, yet, allow its consequences to be manageable for an offender who is well engaged on the road to rehabilitation. I agree.

Assessing the joint submission

[17] The submissions from counsel contained brief references to previous cases, which assist me in determining that the fine being proposed is within the range of sentences imposed in similar cases in the past. The issue for me to assess as military judge is not whether I like the sentence being jointly proposed or whether I would have come up with something better. As stated earlier, I may depart from the joint submission of counsel only if I consider that this proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest.

[18] In determining whether that is the case, I must ask myself whether the joint submission is so markedly out of line with the expectations of reasonable persons aware of the circumstances of the case that they would view it as a breakdown in the proper functioning of the military justice system. I do believe that a reasonable person aware of the circumstances of this case would expect that the offender receive a punishment which expresses disapprobation for the failure in discipline involved and has a real impact on the offender, without jeopardizing his career. The significant fine being proposed is, in my view, aligned with these expectations.

[19] As recognized by the Supreme Court of Canada, trial judges must refrain from fidgeting with joint submissions of counsel if their benefit can be maximized. Indeed, prosecution and defence counsel are well placed to arrive at joint submissions that reflect the interests of both the public and the accused. They are highly knowledgeable about the circumstances of the offender and the offence, as with the strengths and weaknesses of their respective positions. The prosecutor who proposes the sentence is in contact with the chain of command. He or she is aware of the needs of the military and civilian communities and is charged with representing the community's interest in seeing that justice be done. Defence counsel is required to act in the accused's best interests, including ensuring that the accused's plea is voluntary and informed. Both counsel are bound professionally and ethically not to mislead the Court. In short, they are entirely capable of arriving at resolutions that are fair and consistent with the public interest.

[20] Considering the circumstances of the offence and of the offender, the applicable sentencing principles, and the aggravating and mitigating factors mentioned previously, I am unable to conclude that the sentence jointly proposed by counsel would bring the administration of justice into disrepute or would otherwise be contrary to the public interest. I must, therefore, accept it.

[21] Under subsection 145(2) of the *NDA*, the terms of payment of a fine are at the discretion of the service tribunal that imposes it. At the sentencing hearing, the prosecution did not object to the request made by defence as to payment of the fine in ten monthly instalments of \$1,000, starting on 1 July 2019.

[22] Lieutenant-Colonel Mosher, the offence of dishonesty you pleaded guilty to is in my view incompatible with what should be expected of an officer of your rank and responsibilities. I have acknowledged the difficult situation you were in at the time of the offence and the efforts you have made since, both to repay the sums you owed and to regain the trust of your chain of command. I join your superiors in recognizing your potential to contribute significantly to the CAF in the future but, as a servant of the law, I invite you to reflect on your actions and decide not to reoffend.

FOR THESE REASONS, THE COURT:

[23] **SENTENCES** you to a fine in the amount of \$10,000, payable in ten monthly instalments of \$1,000, the first being payable no later than 1 July 2019, the following

nine payments being due on or before the first day of each subsequent month from August 2019 to April 2020. In the event you are released from the CAF for any reason before the fine is paid in full, then any outstanding unpaid balance will be due the day prior to your release.

Counsel:

The Director of Military Prosecutions as represented by Lieutenant(N) J.M. Besner and Lieutenant-Commander G.J.M. Benoit-Gagné

Major F.D. Ferguson and Captain K. Gordon, Defence Counsel Services, Counsel for Lieutenant-Colonel B.C. Mosher