



## COURT MARTIAL

**Citation:** *R v Babineau*, 2011 CM 3009

**Date:** 20110930

**Docket:** 201133

Standing Court Martial

Saint-Jean Garrison  
Quebec, Canada

**Between:**

**Her Majesty the Queen**

- and -

**Captain M. Babineau, Offender**

**Before:** Lieutenant-Colonel L.-V. d'Auteuil, M.J.

---

### OFFICIAL ENGLISH TRANSLATION

#### REASONS FOR SENTENCE

[1] Captain Babineau, the Court Martial having accepted and recorded your admission of guilt on the second charge, the Court now finds you guilty of this charge. Since this charge is an alternative to the first charge, and the prosecution has accepted your plea of guilty on the second charge, as provided for by sub-paragraph 112.05(8)(a), the Court therefore orders a stay of proceedings on the first charge.

[2] It now falls to me, as the military judge presiding at this Standing Court Martial, to determine the sentence.

[3] In the special 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 Canadian Forces. The purpose of this system is to prevent misconduct, or, in a more positive way, to promote good conduct. It is through discipline that an armed

force ensures that its members will perform their missions successfully, confidently and reliably. 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.

[3] Sentencing is one of the most difficult tasks for a judge. In *R v Généreux*,<sup>1</sup> the Supreme Court of Canada held that, to maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently.<sup>2</sup> It also emphasized that, in the particular context of military justice, breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct.<sup>3</sup> However, the law does not allow a military court to impose a sentence that would be beyond what is required in the circumstances of the case. In other words, any sentence imposed by a court, be it civilian or military, must be adapted to the individual offender and constitute the minimum necessary intervention, since moderation is the bedrock principle of the modern theory of sentencing in Canada.

[4] In the case before us, prosecution and defence counsel have presented a joint submission on sentencing. They have recommended that the Court sentence you to a reprimand and a \$2,000 fine. The Court Martial is not bound by that recommendation. However, it is well established in the case law that there must be incontrovertible and compelling reasons for the Court to disregard it. It is also generally recognized that the Court should accept the recommendation unless doing so would be contrary to the public interest or bring the administration of justice into disrepute.<sup>4</sup>

[5] The fundamental purpose of sentencing in a Court Martial is to ensure respect for the law and the maintenance of discipline by imposing sentences that have one or more of the following objectives:

- a. to protect the public, which includes the Canadian Forces;
- b. to denounce unlawful conduct;
- c. to deter the offender and other persons from committing the same offences;
- d. to separate offenders from society, where necessary;
- e. to rehabilitate offenders; and
- f. to reform the offender.

---

<sup>1</sup> [1992] 1 S.C.R. 259.

<sup>2</sup> Ibid. at 293.

<sup>3</sup> Ibid.

<sup>4</sup> *R v Taylor*, 2008 CMAC 1, at paragraph 21.

[6] In imposing sentences, a military court may also take the following principles into account:

- a. the sentence should be proportionate to the gravity of the offence;
- b. the degree of responsibility and previous character of the offender should be taken into account;
- c. the sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
- d. before considering depriving an offender of liberty, the Court has the duty to consider whether less restrictive sanctions may be appropriate in the circumstances. In short, the Court should impose a sentence of imprisonment or detention only as a last resort; and
- e. last, all sentences should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender.

[7] The Court is of the opinion that sentencing in this case should focus, as suggested by counsel for the prosecution, on the objectives of denunciation of the unlawful conduct and general and specific deterrence. It is important to remember that the principle of general deterrence means that the sentence imposed should not only deter the offender from re-offending, it should also deter others in similar situations from engaging in the same prohibited conduct.

[8] Here, the Court is dealing with an offence related to an act to the prejudice of good order and discipline. Essentially, while he was deployed in Afghanistan from August 2010 to July 2011, more specifically in November 2010, Captain Babineau acquired 14 magazines at an American PX because one of his magazines, supplied by the Canadian Forces, had malfunctioned. Afterwards, he realized that these magazines could not be used without particular concerns related to safety or to the negligent discharge of his weapon. He therefore decided not to use these magazines. Since he was unable to return the magazines to the store in question or be reimbursed for them, he decided to send the magazines to Canada to his spouse, along with a telescope for mounting on a weapon. It is clear, from the circumstances, that Captain Babineau knew or, at least, should have known, that having regard to the Joint Task Force Afghanistan Theatre Standing Order 108, he could not send these devices, which are prohibited by law, to Canada in this manner. He sent the magazines by mail in a parcel, and this parcel was intercepted by a Canada Border Services Agency officer. Nothing was, in fact, hidden in the parcel because the parcel was clearly marked that it contained magazines. The officer in question intercepted the parcel and noted that it contained prohibited devices. He even had a discussion with Captain Babineau and advised the military police of the situation. Then, in early 2011, the National Investigation Service conducted an investigation, in which Captain Babineau cooperated fully, and this resulted in the charges which are before this Court today.

[9] In arriving at what it considers to be a fair and appropriate sentence, the Court has considered the aggravating and mitigating factors presented by the facts of this case. The Court finds the following factors to be aggravating:

a. First, the objective seriousness of the offence. You have been found guilty of a service offence under section 129 of the *National Defence Act* for having imported into Canada 14 magazines, devices that are prohibited by law, contrary to the JTF Afghanistan Theatre Standing Orders, for which you are liable to dismissal with disgrace from Her Majesty's service or to less punishment.

b. In terms of subjective seriousness, I have retained three aspects from the evidence presented to me:

i. The first aspect is respect for the law, which has several components:

a. First, on account of your occupation as a military police officer, you will understand that Canadian Forces military members and the general public have somewhat above-average expectations of you because you represent a specific authority within the Canadian Forces that sees to the respect and enforcement of the law.

b. Second, there is your training. The various documents submitted to the Court show clearly that you have had excellent training, as a military member and as an infantryman, and are therefore familiar with weapons and weapons handling. As a military police officer, not only do you have the general training for your occupation, you also have specific training in the field of investigations, which means you are more familiar with law enforcement than are most military police officers. You have training in criminology, which also gives you a particular outlook on the commission of offences. When considered as a whole, all of that training shows you to be a particular type of individual in regard to what you did.

c. There is also your experience. It must be understood that you were sent to that location because you had sufficient experience in and knowledge of weapons handling and compliance with the statutes and regulations of the Canadian Forces. One of the particular ethical principles within the Canadian Forces, which applies to every one of its members, is to obey and support lawful authority. Your role as a military police officer accentuates the fact that, in acting as you did, you failed to follow this principle. You obviously have certain responsibilities, both in relation to weapons handling and, to reiterate, law enforcement. You were

also a role model for all other military members in the operating theatre. The standing orders, as drafted, state that where there is any doubt as to the possibility of mailing weapons or prohibited devices, the military police may be consulted. That does not mean that you have inherent knowledge of the *Criminal Code*, but at least you are immersed in an environment in which you can consult your colleagues or, failing that, direct yourself to a particular place simply to obtain further information. For other military members, however, you are also someone to count on for guidance in such circumstances as those in which you found yourself. You were also an instructor to Afghan military police officers, so you were in a position, not only as a military police officer but also as an instructor, of being someone with very specific knowledge of what can and cannot be done. And when all of those facets are considered together, the impression that comes through is that, in that moment, you failed in your duty, obviously from the perspective of the aggravating factors.

ii. The second aspect at the subjective level which I considered is your lack of judgment at that time. You have given a clear account of the circumstances that led you to act as you did, and the only question the Court has, and probably that many stakeholders have as well, is this: why did you not consult anyone, whereas even the standing order requires it, and this is at the very core of the offence itself? This lack of judgment, that is, if you had sought advice from someone before taking action, before mailing the parcel in question, it could have spared you a good many problems. I am not saying that you failed completely, and I will return to that point, but at the very least you acted first and sought advice afterwards as a result of other circumstances that arose and made you reflect, whereas probably what is expected from an officer, and from a military police officer having your training and experience, is surely the reverse, that is, to think before acting.

iii. There is also, of course, the nature of the objects, since they are clearly prohibited items. I think that this is something that will remain in your mind, and not just yours but in the minds of other military police officers and military members who are here, that is, the magazine of five rounds or less, and I think that is a clear number. When they are for more than five rounds, objects of this sort, devices like these are prohibited devices. So, the nature of the objects is also an aggravating factor in and of itself.

[10] Now, there is also a series of mitigating factors that the Court must take into account:

- a. First, there is your plea of guilty. In pleading guilty to the offence under the second charge, you showed very clearly that you are remorseful and sincerely intend to remain a solid asset within the Canadian Forces.
- b. Another mitigating factor is the fact that you have no criminal record and no entries on your conduct sheet for similar or identical offences.
- c. I also note your cooperation. The way you have conducted yourself shows another side of certain ethical values that are central to the actions of Canadian Forces members; you demonstrated courage, integrity and honesty when you were asked what had happened and whether you had truly done what was alleged. You demonstrated those values towards the agency that contacted you, towards your superior, towards the investigator, and you continue to demonstrate them today; you came to testify, clearly explained what guided you at the time and just as clearly acknowledged that you had been at fault in failing to consult anyone before acting.
- d. There is also the fact that you had to face this Court Martial, which has a dissuasive effect, not only on you but also on your peers and on the persons in attendance at this Court Martial, which is made public and will surely be known at least in this region or within your unit.
- e. I am also taking into account your career within the Canadian Forces, be it as a member of the Reserve or the Regular Forces, in the occupations you have held. It is clear that you have always been successful and have progressed very well within the Canadian Forces, to the point that you continue to enjoy the support of the chain of command, of your chain of command, and that you are being considered for a position of command. You heard me list all of the aggravating factors, particularly as they relate to respect for the law. Despite all of those factors, I am certain that the chain of command has taken this aspect into account and remains confident that you will retain this lesson and probably share everything you have learned with those under your command, and that your experience will perhaps be of use in other matters or in terms of how other situations are handled.
- f. I also note that this is an entirely isolated incident when your career is considered as a whole, which clearly shows that you have absolutely no propensity to commit either disciplinary or criminal offences. It is clear that you have no tendency for completely voluntary law-breaking.
- g. I must also take into account parity in sentencing, which is an important factor. A selection of case law, of cases, was submitted to me, which illustrate

that for a similar offence in similar circumstances, that is, in the theatre of operations, what the appropriate sentence would be in the circumstances.

h. I must also mention the fact that, in being found guilty and convicted by this Court, you will have a criminal record. The law provides that you will have a criminal record and, as a result, an entry on your conduct sheet, which entry cannot be removed until the day you are granted a pardon under the *Criminal Records Act*.

[11] A just and equitable sentence must take into account the seriousness of the offence and the offender's degree of responsibility in the particular circumstances of the case. Consequently, the Court will accept counsel's recommendation that you be sentenced to a reprimand and a fine of \$2,000, considering that this sentence is not contrary to the public interest and would not bring the administration of justice into disrepute.

### **FOR THESE REASONS, THE COURT**

[12] **FINDS** the accused guilty on the second charge.

[13] **UPHOLDS** the stay of proceedings on the first charge.

[14] **SENTENCES** the offender, Captain Babineau, to a reprimand and a fine of \$2,000, payable immediately.

[15] After having heard the submissions of counsel, the Court finds that it is not desirable, in the interests of the safety of the offender or of any other person, to make an order prohibiting him from possessing any firearm or prohibited weapon or any other such device.

---

### **Counsel:**

Major P. Rawal, Canadian Military Prosecution Service  
Counsel for Her Majesty the Queen

Lieutenant-Commander M.P. Létourneau, Directorate of Defence Counsel Services  
Counsel for Captain M. Babineau