



COURT MARTIAL

Citation: *R v Ménard*, 2011 CM 3007

Date: 20110721

Docket: 201064

Standing Court Martial

Régiment de Maisonneuve
Montréal, Quebec, Canada

Between:

Her Majesty the Queen

- and -

Brigadier-General J.B.D. Ménard (Retired), Offender

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

OFFICIAL ENGLISH TRANSLATION

REASONS FOR SENTENCE

(Orally)

[1] Brigadier-General Ménard, the Court Martial having accepted and recorded your admission of guilt on the first and second counts, the Court now finds you guilty on both counts.

[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 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.

[4] Sentencing is one of the most difficult tasks for a judge. In *R v Généreux*,¹ the Supreme Court of Canada held that, “[t]o maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently.”² It also emphasized that, in the particular context of military justice, “[b]reaches 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”.³ However, the law does not allow a military court to impose a sentence that would be beyond what is required in the circumstances of a 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.

[5] In this case, the prosecution and defence counsel have presented a joint submission on sentencing. They have recommended that the Court sentence you to a demotion to the rank of colonel and a fine of \$7,000. The Court Martial is not bound by this recommendation; however, it is well established in case law that there must be 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.⁴

[6] The fundamental purpose of sentencing in a court martial is to ensure respect for the law and the maintenance of discipline by imposing punishments 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; and
- e. to rehabilitate and reform the offender.

[7] When imposing sentences, a military court may also take into consideration the following principles:

- a. proportionality of a sentence to the gravity of the offence;

¹ [1992] 1 SCR 259

² *R v Généreux*, 70 CCC (3d) 1, para 59

³ *Ibid.*

⁴ See *R v Taylor*, 2008 CMAC 1, para 21

- b. the degree of responsibility and previous character of the offender;
- c. a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
- d. the Court has a duty, before considering depriving an offender of liberty, 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.

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

[9] Here, the Court is dealing with two offences relating to conduct to the prejudice of good order and discipline. Essentially, the Court understands that Brigadier-General Ménard was promoted to his current rank and deployed as Joint Task Force Afghanistan Commander in November 2009. At that time, he was carrying on an extramarital relationship with Master Corporal Bianka Langlois which had begun in summer 2008 and which continued in Afghanistan because she too was there at the same time as the offender.

[10] When he arrived in the operational theatre, Brigadier-General Ménard signed an appendix to the theatre standing orders stating that he had read the camp policies, including the one prohibiting any sexual activity or intimate contact in the Joint Task Force's area of operations. However, the two individuals kissed and had sexual relations on several occasions during their stay in Afghanistan.

[11] At the end of April 2010, an American journalist referred in a blog to an intimate relationship between the offender and a soldier. Brigadier-General Ménard's assistant, Colonel Hetherington, was tasked with determining whether there was any basis whatsoever for this allegation. In the month that followed, that is, the month of May, while the offender formally denied having broken the rules of the unit under his command, Master Corporal Langlois confirmed, then denied, after Brigadier-General Ménard intervened, and finally reconfirmed, after a conversation with the chaplain, that she and the offender had engaged in sexual activities with each other.

[12] On May 29, 2010, Brigadier-General Ménard's superior, Lieutenant-General Lessard, confronted him concerning his conduct and gave him the opportunity to make

specific representations regarding the fact that he was considering relieving him from duty. After listening to him, and despite certain admissions regarding his conduct, Lieutenant-General Lessard relieved the offender of his command and had him repatriated to Canada immediately.

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

[14] The Court finds the following factors to be aggravating:

- a. The objective seriousness of the two offences. You have been found guilty of two service offences under section 129 of the *National Defence Act* for having taken part in activities of a sexual nature with a person at the rank of master corporal, contrary to the JTF Afghanistan Theatre Standing Orders, and for having obstructed the inquiries into the facts regarding the proper performance of your duties as commander. You are therefore liable to dismissal with disgrace from Her Majesty's service or less punishment.
- b. Regarding the subjective seriousness of the offences, I have gleaned four aspects from the evidence presented to me:
 - i. First, there has been a breakdown of the relationship of trust. Because of, on the one hand, your duties in the operating theatre in Afghanistan at the time and, on the other hand, because of your rank, it is clear that everyone present had to have complete trust in you. What is meant here by a breakdown in the relationship of trust is a breach of the trust placed in you, on the one hand, by your peers, that is, the generals, and you have seen how they reacted; by your superior, and I think that this was the reaction of Lieutenant-General Lessard in relieving you of your duties; and by the subordinates under your command at the time. The prosecution referred to certain ethical principles in the Canadian Forces, and I note two of them regarding the breakdown of the relationship of trust and the issue of integrity and honesty. I think that these two principles are central to the question that has occupied you to this very day as a soldier, that is, the question of leadership. Leadership, generally speaking, is defined as a process of influencing others around you to work toward a common goal. This definition I am using is a very general one, but in order get people to trust us and to influence them so that we are seen as leaders, we must demonstrate integrity and honesty. I understand full well that you are, with all the experiences you have had, in a better position than I am to understand the definition of leadership and what that means in

practice. The fact that you were lacking in integrity and honesty or transparency during that period is something that I think you have gleaned from this incident. Nevertheless, these are aggravating factors.

- ii. There is also the context in which the breach of trust occurred. It occurred, in my view, at the worst place and time, that is, in the operational theatre, where soldiers have specific missions, some easier, some harder than others, which can even end in death. Soldiers are entitled to have complete trust in you, and in acting as you have done, you have in a way betrayed that trust that these people had in you in an operational context. I realize that it is very limited, but the fact remains that you held at that time the highest position in the theatre of operations.
- iii. Finally, there is another principle in terms of ethics for soldiers, which is responsibility. You had the highest degree of responsibility in the operational theatre. This meant you had to set an example, which may have seemed harmless to you in the circumstances, and maybe you have been able to reflect on this since then, but the fact remains that for all the soldiers of all ranks to see someone who is not setting the example, this can affect how the hierarchy is respected.
- iv. Finally, the fourth factor, which I will consider to a lesser extent but which the Court must take into account, is the existence of a similar offence, that is, a conduct or act, in this case neglect of good order and discipline. It is similar, it is 129, but clearly it is an incident that is different but nevertheless shows that the year 2010 was not necessarily a good year for you in terms of discipline. Not once, but twice you found yourself in front of a court martial for actions that occurred in the operational theatre in Afghanistan during the year 2010, and the Court has no choice, to a certain extent in terms of the seriousness, but to consider this aspect.

[15] Now, that is one side of the coin. As I mentioned, the other side is the mitigating factors:

- a. On the one hand, the first fact that must be considered is your guilty plea. By pleading guilty to the two offences, you are clearly testifying to your remorse and your sincere intention to continue to be a strong and positive asset to Canadian society.
- b. I also note, as a mitigating factor, the lack of any real consequences. It is true that I mentioned that perhaps the Canadian Forces would have had

certain consequences, but I had nothing to demonstrate or any evidence to the effect that there were any consequences whatsoever to the fact that you were relieved of your duties, that you had to be replaced, and I have no evidence that this had an impact on any individuals in particular. Therefore, in this regard, I must find that there were no real consequences to your actions.

- c. There is your career, as you have testified about it and your counsel referred to it, and I think that counsel for the prosecution mentioned it too. Until these incidents, you had an exemplary career, such that you were put up for promotion to the rank of general very early, considering your age. I think that, in this regard, we must not lose sight of the fact that you have done many good things as an officer in the Canadian Forces and in terms of your career, and the Court must consider your accomplishments in the Canadian Forces as a mitigating factor.
- d. There is also your age. Because of your age, you have an enormous wealth of knowledge and experience that could benefit you and Canadian society as well.
- e. There are consequences that I consider to be administrative ones. As to what happened following your withdrawal from the Canadian Forces, there were some professional consequences. These are—I cannot consider that to be a sentence in itself, nor can I disregard it either, because your being relieved of your duties is in itself a form of general denunciation. The fact that you were reassigned to duties other than those that had been earmarked for you, namely Commander, Land Force Quebec Area, and sent someplace in Ottawa is also indicative of a form of denunciation for the conduct because it was directly related to what happened. What you stated in your testimony to the effect that it seemed to you that doors were closing, one after the other, in terms of your career as an officer at the rank of general, at least in the short term, in the Canadian Forces is another factor that I must take into account. Was this a form of denunciation? Perhaps not, but at least you were reproached for the incident, for the alleged incidents at the time. Bear in mind that when this happened, you were perhaps, you were being investigated. This is not clear to me. You were being investigated or had been formally charged; the fact remains that there is a presumption of innocence in this regard, and I must consider this as a mitigating factor.
- f. There were also consequences in your personal life. Watching the doors close on the possibility of a career in the Canadian Forces at the rank of brigadier-general and higher led you to reflect and make a request for release. You were released on request, Item 4(a), which is completely honourable, and this is a decision that you made because of what was happening. Therefore, I must also take that into account a little, as well

as the financial loss you spoke of and, of course, the job loss, because, as you said, at the age you were when you left the Canadian Forces, you still had 10 to 12 years ahead of you in the Canadian Forces, and this is a factor. Clearly, this was your decision, but one you made because of special circumstances.

- g. Another factor that the Court must take into account is the fact that you had to face this court martial. It is under this category that I want to touch on or rather to tackle the question of the fact that this received extensive media coverage. First off, I want to point out that the Court Martial is always public, just like any other court in Canada, and the Office of the Chief Military Judge has court martial offences and trial dates posted on its Internet site, I agree, and yours was no exception; people were interested in that. They were also, perhaps I should say, unusually interested, in that just the fact that a court martial was held today was publicized across the country. Therefore, it is much bigger than what goes on normally; usually it is in the local area, the surrounding area or the province, so it is something that is public. That said, the Court Martial is public and therefore accessible to people who are interested in knowing what is going on. It is a part of military justice. The fact that it is public keeps everything above board and rightly prevents things being hushed up or kept secret. That said, this clearly has a deterrent effect as well, and it is in this context that I must take this aspect into account as a mitigating factor because that fact that it is not only known to those close to you or a certain segment of the military community, but also known or at least accessible to the entire population, both the military community and the civilian community, makes it so that anyone who would be tempted to commit the same act might think twice before having to—facing all these consequences.
- h. I also take into account that, regarding the media aspect, there is absolutely no doubt that this had a wider impact than on just you yourself. You clearly said that this had an impact on your family because they had to approach things and act differently, and on your personal situation in relation to your family and to a potential job. The fact that it was more widely known, the fact that it was more widely publicized makes it such that, in terms of looking for work, as you have clearly said, puts employers somewhat on the defensive while waiting to see what will happen. Therefore, there are some consequences that I place in the category of mitigating factors.
- i. There is another thing that has not been mentioned, but there is the fact that you will have a criminal record. This fact limits to a certain extent, I do not know what sort of work you will be looking for, but having a criminal record, you will have to go through a pardon application process once the sentence has been fully served. There are waiting periods

provided for in the legislation on criminal records, and that too is a consequence, and I think that should fall into the category of mitigating factors.

[16] The Court must take another factor into account, that is, parity in sentencing. Despite there being little case law on an offence of this nature involving the same or similar circumstances with offenders at a similar or identical rank, I nevertheless consider those cases as setting a useful scale for the Court in determining whether the joint submission that was made is reasonable in the circumstances. I think that what we must bear in mind is that, considering the prominent role that an individual, at the rank and in the function you had at the time, is liable to a sentence ranging from a reprimand to a substantial fine up to a demotion and a substantial fine. Therefore, we end up faced—the proposal that was made by counsel ends up somewhat in line with that scale.

[17] In passing sentence today, Brigadier-General Ménard, this will put an end to the legal proceedings to which you have referred and, I hope, will allow you, on the one hand, to turn the page and, on the other, to finally get on with your reintegration into society. In this regard, I am absolutely convinced, because you had the benefit of a great deal of leadership experience, that you will be able to put all this experience to wise and proper use once you are back home, and that you will try to simply change the direction of your life yourself as well as your family.

[18] A just and equitable sentence should take into account the seriousness of the offence and the offender's degree of responsibility in the particular circumstances of the case. Accordingly, the Court will accept the recommendation made by counsel to sentence you to a demotion to the rank of colonel and a fine of \$7,000, considering that this sentence is not contrary to the public interest and would not bring the administration of justice into disrepute.

[19] Brigadier-General Ménard, please stand up.

FOR THESE REASONS, THE COURT:

[20] **SENTENCES** Brigadier-General Ménard to a demotion to the rank of colonel and a fine of \$7,000 payable immediately.

Counsel:

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