



COURT MARTIAL

Citation: *R. v. Winters*, 2011 CM 4002

Date: 20110218

Docket: 201002

Standing Court Martial

Régiment de Maisonneuve
Montréal, Québec, Canada

Between:

Her Majesty the Queen

- and -

Captain S. Winters, Offender

Before: Lieutenant-Colonel J-G Perron, M.J.

OFFICIAL ENGLISH TRANSLATION

REASONS FOR SENTENCE

[1] Captain Winters, the Court Martial Appeal Court of Canada, in *R v. Winters* CMAC-540, dated 3 February 2011, restored and recorded your plea of guilty on the sole count appearing in the charge sheet dated 12 January 2010, as amended on 4 May 2010. I now find you guilty on this count, namely, having contravened the LFQA Information Systems Security Orders by connecting an unauthorized peripheral to the Defence Intranet Network.

[2] In August 2008, you were an employee on Class “C” service performing the duties of a watch officer at LFQA HQ/JTFE. You connected a personal hard drive to your work computer, which was connected to the Defence Intranet Network (DIN). You had received this disk drive as a tour gift while you were deployed to Afghanistan from July 2007 to March 2008. A virus attempted to infect the DIN. A computer technician was alerted to the infection and came to your workstation. You were fully aware of the content of the LFQA Information Systems Security Orders at the time of the offence.

[3] Counsel for Her Majesty and your counsel filed a joint submission on sentencing and recommend that I impose a fine of \$500, to be paid in 10 monthly instalments of \$50. The final decision in determining the appropriate sentence lies with the judge, who has the right to dismiss counsel's joint submission. However, I must accept the joint submission of counsel unless it is found to be inadequate, unreasonable or contrary to public order or would bring the administration of justice into disrepute.

[4] To determine what constitutes the appropriate sentence in this case, I took into account the circumstances surrounding the commission of the offence as revealed in the statement of circumstances, which you have acknowledged to be true. I also considered your testimony, the documentary evidence and case law filed and the oral arguments made by counsel. I analyzed these various factors in light of the objectives and principles applicable in sentencing. The Court will also consider any relevant aggravating or mitigating factors in the circumstances relating to the offence and the personal situation of the offender.

In this case, the protection of the public will be ensured by a sentence that primarily focuses on collective deterrence.

[5] Therefore, in considering what sentence would be appropriate, I took into consideration the aggravating and mitigating factors that follow. I consider the following to be aggravating factors:

- a. The nature of the offence and the punishment provided for by Parliament. You are guilty of an act prejudicial to good order and discipline and punishable by dismissal with disgrace from Her Majesty's service. Objectively, this is a serious offence.
- b. You have breached a regulation, namely, the LFQA Information Systems Security Orders, which safeguards our computer systems and the data on them. Although the statement of circumstances indicates that a virus tried to infect the DIN, I was not presented with any evidence regarding the nature of this virus or the damage caused by this incident, if any. Therefore, although I find that the contravention of this regulation is an aggravating factor, I give it little weight.
- c. Counsel for Her Majesty asks me to consider as an aggravating factor the fact that there was classified information on the disk drive. Again, I was not presented with any specific evidence regarding the nature of this information, particularly as to whether it was classified "confidential", "secret" or "top secret". Captain Winters explained during his testimony that this classified information was in the portion of the disk drive that contained documents from the previous rotation and that he had been unaware of this until a military police officer told him during his interview. The police officer also allegedly told him that these

documents were classified “secret”. Given the lack of solid evidence on this factor, I will give it only a little weight on sentencing.

As for the mitigating factors, I note the following:

- a. You have no conduct sheet. You have expressed your remorse, which was amply demonstrated in your testimony, through your co-operation with the investigators and by your intention to plead guilty at the earliest opportunity.
- b. The charge sheet contains only one count, for an offence which took place on 18 August 2008. It appears that the police investigation started in early September 2008, but the Court does not know on what date it ended, although it must have been before 28 July 2009. The record of disciplinary proceedings dated 28 July 2009 contains two counts: a first count apparently dealing with the incident of 18 August 2008, and a second count alleging a contravention of the National Defence Security Instructions between 3 August 2007 and 26 February 2008 while Captain Winters was on deployment in Afghanistan. In light of this second count, the option of being tried by summary trial that was offered to Captain Winters on 30 July 2009 appears to be illusory, since subsection 163(1.1) of the *National Defence Act* clearly states that an accused person cannot be tried by summary trial unless the summary trial commences within one year after the day on which the service offence is alleged to have been committed. Captain Winters opted for a summary trial on 31 July but was informed several weeks later that he would be tried by court martial.
- c. Although I have received only a little information on the police investigation and the other measures taken as part of the disciplinary proceedings, I wonder if the individuals having a role in those disciplinary proceedings—be they the military police officers in their investigation, the legal officers or the various officers involved in the disciplinary proceedings—acted in as timely a manner as they should have in such circumstances. The argument based on the need for general deterrence falls flat if the trial’s impact on discipline is watered down by a delay that could have and should have been avoided.
- d. That said, I cannot say with any certainty that this is a unequivocal case of unjustified delay that could be considered to be a mitigating factor, since I have not been presented with any evidence clearly leading to such a finding.

[6] Captain Winters, please rise. Having closely examined the parties’ joint submission, I am of the opinion that, given the particular facts of this case, it properly incorporates the sentencing principles and that the choice of sentence is the lightest

possible sentence to ensure the protection of the public and the maintenance of discipline in the circumstances of this case.

FOR THESE REASONS, THE COURT:

[7] **SENTENCES** the offender to a fine of \$500, to be paid in 10 monthly instalments of \$50. The first instalment will be paid on the 15th day of March 2011, followed by nine instalments on the 15th day of each subsequent month.

Counsel:

Captain E. Carrier, Director of Military Prosecutions
Counsel for Her Majesty the Queen

Captain H. Bernatchez, Directorate of Defence Counsel Services
Counsel for Captain S. Winters