



COURT MARTIAL

Citation: *R. v. Gagnon*, 2010 CM 1016

Date: 20100910

Docket: 201042

Standing Court Martial

Canadian Forces Base Bagotville
Saguenay, Quebec, Canada

Between:

Her Majesty the Queen

- and -

Corporal J.P.S. Gagnon, Offender

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

OFFICIAL ENGLISH TRANSLATION

REASONS FOR SENTENCE

(Orally)

[1] Corporal Gagnon pleaded guilty to two charges brought under section 129 of the *National Defence Act*, that is, acts to the prejudice of good order and discipline. Both charges are identical with the exception of the periods to which each of the charges applies. He was accused of having used a National Defence computer to access pornography and nudity, contrary to the 3 Wing Bagotville Metropolitan Area Network Information Systems Security Orders on the use of computer systems. The first count pertains to an act committed on or about 18 October 2008, whereas the second count pertains the period between 1 April and 27 June 2008.

[2] The first count refers to 18 October 2008, while the second count refers to the incidents that took place between 1 April and 27 June 2008. The facts surrounding this case show that on 26 June 2009, one of Corporal Gagnon's colleagues reported to the Meteorology Section in Wing Building 234 for his night shift in relief of Corporal

Gagnon, who was finishing his workday. This person then found two printed images of a pornographic nature showing two nude young women on top of the Section's printer. This person reported the incident to his superior. On 29 June 2009, the Information Systems Security Officer for the service, information and telecommunications group at 3 Wing Bagotville was notified that photographs of a pornographic nature had been found on a Meteorology Section printer. It was quickly established that the photographs were linked to Corporal Gagnon's user account. The next day, Corporal Gagnon met with his superior and the Information Systems Security Officer, who showed him the evidence from their research which implicated Corporal Gagnon. He admitted to his supervisor that he had printed the two pornographic photographs found on the printer on 26 June 2009.

[3] On 7 July 2009, at the request of military police, the Information Systems Security Officer conducted more in-depth searches on the server for the Meteorology Section printer, which allowed him to compile all of the photographs Corporal Gagnon had printed between 28 April and 27 June 2009. This person found 80 pornographic photographs. On 9 July 2009, the National Investigation Service (NIS) seized the hard drives of the computers determined to be the computers used by Corporal Gagnon and sent those drives to the RCMP for analysis. This analysis showed that 607 pornographic photographs had been on those hard drives, all in connection with the accused's user account. The RCMP's research also revealed that the pornography sites had mainly been accessed on 18 October 2008.

[4] At his meeting with the NIS, Corporal Gagnon acknowledged having accessed adult pornography sites using National Defence computer systems during his working hours, contrary to the 3 Wing Bagotville Metropolitan Area Network Information Systems Security Orders. In its investigation, the NIS determined that Corporal Gagnon had used National Defence computer systems to visit approximately 21 separate adult pornography sites. Corporal Gagnon was aware of the user policy for the 3 Wing Bagotville computer network, which prohibits accessing pornographic or obscene material using a computer system on the 3 Wing Bagotville Metropolitan Area Network.

[5] The prosecution recommends that this Court impose a sentence consisting of a reprimand and a \$1500 fine, whereas the defence submits that a \$200 fine would be a fair and appropriate sentence in the circumstances. Although both counsel are relying on the circumstances of the case and the evidence pertaining to sentencing presented at the hearing, they arrived at substantially different submissions. In support of their respective positions, they ask this Court to consider the reasons and findings from the following recent decisions: *R. v. Warrant Officer G. Charest*, 2007 CM 4010, 28 March 2007; *R. v. Corporal J.W. Campbell*, 2007 CM 1025, 20 November 2007; and *R. v. Lieutenant F. Déry*, 2008 CM 4018, 9 December 2008. The Court will not consider the decision of the Standing Court Martial on 16 August 2001, in *R. v. Commodore E.J. Lehre*, 2001 CM 26, since the reasons do not provide an understanding of the circumstances of that case and since the offender's particular situation is not in any way

comparable to that of Commodore Lehre. It is useful to go over the important points of the *Charest*, *Campbell* and *Déry* decisions.

[6] In *Campbell*, counsel presented a joint submission on sentencing asking the Court to impose a sentence consisting of a severe reprimand and a \$2000 fine. The Court approved that recommendation. The offender pleaded guilty to two counts of conduct to the prejudice of good order and discipline within the meaning of the *National Defence Act*. The case involved a violation of the internet use policy resulting from unauthorized use of a computer and disclosure of the offender's user name and password to colleagues posted abroad so that they could contact their families because those colleagues were unable to do so using their own accounts and passwords because of concerns over the reliability of computers. A particularly mitigating circumstance was that Corporal Campbell's Class "B" reserve service was prematurely terminated by military authorities because of an additional charge brought against the accused which was later withdrawn by the Director of Military Prosecutions before Court Martial proceedings began.

[7] In the Court Martial decision *Warrant Officer Charest*, counsel for the parties also made a joint submission on sentencing which was approved by the judge—in that case a reprimand and a \$1500 fine after he pleaded guilty to two counts of accessing pornographic sites using Defence computers. From the circumstances, it was not possible to establish whether the offender had visited those 275 sites during work hours. In addition to the offender's plea of guilty, the Court accepted that the offender was released from the Canadian Forces for those same actions and that, until then, his 25-year military career had been spotless.

[8] Last, *Dery* was the decision in the matter of an officer who was employed on class B service and held the positions of Information Technology Officer and Information Systems Security Officer of the Cap-Chat Cadet Summer Training Centre in the summer of 2005. More specifically, between 16 June and 19 August 2005, he viewed a pornographic video, downloaded music using a software program and connected a laptop to the network in spite of the fact that these actions were prohibited by an order. He also invited a corporal, a member of the Reserve Force and not a cadet, to view the pornographic video with him during his work hours. He knew that his conduct was prohibited. The prosecution submitted that the Court impose a sentence consisting of a severe reprimand and a \$1200 fine, whereas the defence proposed a \$500 fine. The Court considered as aggravating factors in the circumstances the fact that it was a serious breach by the offender of his duty as Information Systems Security Officer and, more specifically, the fact that one of the women in the video was a former cadet of his army corps. The Court considered that, in addition to the plea of guilty, the time of over three years that had elapsed since the offence had been committed and the offender's relatively young age at the time of the offence, there was the mitigating factor that he had been unemployed since February 2006 as a direct consequence of the investigation to which he had been subject. It is useful to reproduce here the reasons of the judge who heard that case, at paragraphs 6 and 8 of his judgment, before he imposed the \$750 fine:

[6] . . . The situation before this Court is very different from the two cases submitted to me by the prosecution. You were a young officer with little experience who made inappropriate use of computer systems, which is very different from the uses in *Captain(N) Banks* and *Corporal Campbell*. Your personal characteristics are also very different from those of these two other offenders.

. . .

[8] A fair and appropriate sentence in a case like this of breach of a directive so well known to all members of the Canadian Forces must reflect the seriousness of this type of offence but also the previous character of the offender. Having reviewed the case law and the facts of this case, I am of the opinion that the following sentence adequately incorporates the sentencing principles and is the lightest possible sentence to ensure the protection of the public and the maintenance of discipline in the Canadian Forces. Considering the attenuating factors in this case, I do not believe that a reprimand is a necessary punishment at this time.

[9] The prosecution did not present any evidence at the hearing. Besides the statement of circumstances, the prosecution filed the usual documents regarding the accused's particulars of service and information on his pay and allowances. Corporal Gagnon, the accused, does not have a conduct sheet or a criminal record. The defence filed three documents in evidence with the consent of counsel for the prosecution. This evidence shows that Corporal Gagnon was charged for the events surrounding this case on 4 February 2010, and that in one of the three charges on the Record of Disciplinary Proceedings, he was accused of having accessed child pornography contrary to subsection 163.1(4.1) of the *Criminal Code*. The Director of Military Prosecutions decided not to prefer that charge. Corporal Gagnon was subjected to a remedial measure on 29 June 2010, in the form of counselling and probation, for the events leading to the charges before this Court. This remedial measure ceased at the end of the year. Last, a document entitled [TRANSLATION] "annual summary of errors 2009-10", which reports on Corporal Gagnon's adherence to his schedule during that period was filed in evidence. This document adds nothing to Corporal Gagnon's testimony regarding the way in which he performed his duties between April 2009 and March 2010.

[10] The Court heard the testimonies of Corporal Gagnon and his spouse. In addition to elaborating on the circumstances surrounding his commission of the offences, Corporal Gagnon's testimony brought to light the personal motivations that led him to commit those offences. Furthermore, this evidence reveals the events experienced by the Gagnon family following the charges as well as the personal and professional challenges they must face today and in the future as a result of Corporal Gagnon's reprehensible conduct.

[11] Corporal Gagnon is 31 years old and has been serving in the Canadian Forces for 10 years, the last seven of those in the Regular Forces. He is a meteorology technician. He and his spouse have been in a relationship for six years. They have two young children: their oldest son was born in May 2007, and their second son in February 2010. Corporal Gagnon is on parental leave until November 2010. Since they arrived in Bagotville, they have been living in the permanent married quarters.

[12] Corporal Gagnon testified that he feels he has had an unhealthy dependency on pornography for many years. He explained that he satisfied his desire to view pornography in secret from his spouse, who was deeply pained by it. She had asked him to stop that behaviour. Instead of stopping, he continued doing it, trying to leave no trace. That is what he submits led him to commit the acts of which he is accused before this Court and which appear in the statement of circumstances. Corporal Gagnon explained that his duties would often cause him to work alone in the evenings and on weekends. Everything began when he was surfing the Internet during work hours to find an image of a character he uses in the board game called "Dungeons & Dragons". He wanted to show the character to his colleagues who knew of his interest in that board game. However, his searches led him to a Web site where, to his great surprise, the image of a scantily clad woman was shown on the screen. He did not understand why the Internet network allowed him to access such material. That was all it took for him to see an opportunity to view pornography outside the house without his spouse's knowledge, since she deplored his behaviour. The statement of circumstances reminds us of the extent of that unauthorized viewing.

[13] Immediately after he was confronted by his superiors and NIS investigators on 30 June 2009, Corporal Gagnon admitted having accessed adult pornography sites on Defence computer systems during his work hours and confessed what had happened. Subsequently, there was a turn of events that he had not anticipated. According to him, police suspected him of having also accessed child pornography. He was informed of it on July 2009. In addition, he was charged to that effect on 4 February, 2010. Between July 2009 and February 2010, the Gagnon spouses went through a particularly difficult time waiting for charges. The rumour mill started churning.

[14] Corporal Gagnon was intensely affected. According to him, he could not accept being perceived as someone who would abuse children. He was devastated and felt dirty. He had suicidal thoughts. He no longer dared approach children, not even his own. Corporal Gagnon and his spouse stated that he became unrecognizable, verbally aggressive and impatient, even with his children. The Gagnon spouses often argued and cried. Since the events and, more specifically, since Corporal Gagnon was suspected of having accessed child pornography, he has had to take antidepressants and sleeping pills. This situation profoundly undermined the trust between him and his spouse, even though he told his spouse that he had not accessed child pornography. In spite of that, he had to defy the rumours and hold his head high. As the witnesses illustrated, Corporal Gagnon wore a mask to get through it.

[15] Corporal Gagnon's spouse was also deeply wounded by the events. Of course, she knew that her spouse had been viewing adult pornography long before the incidents and had told him that she did not like him doing that. The fact that her spouse was charged with unauthorized use of Defence computer systems to access adult pornography most certainly did not please her, but that is not what destroyed their relationship. There can be no doubt that the rumours that began circulating early on, saying that Corporal Gagnon had accessed child pornography, were devastating. According to the evidence, they soon felt ostracized from their neighbourhood, even before the charges were laid in February 2010. She testified that it crushed her. Corporal Gagnon's spouse became depressed and, since summer 2009, has been constantly wondering about the future of their relationship and their children. She does not know if she will be able to see her spouse in the same light as she did before. They testified that they have been receiving psychological help for many months, particularly Corporal Gagnon, who is attempting to resolve his need to view pornography.

[16] However, one major and even troubling incident is particularly revealing. Some time before charges were laid, on the pretext of getting details about the investigation concerning Corporal Gagnon, a neighbour went so far as to make comments to Corporal Gagnon's spouse which caused her to lose trust in him. From what she was told, she did not know whether or not she should confront Corporal Gagnon about the allegations regarding child pornography. According to Corporal Gagnon's spouse, this neighbour was none other than the spouse of a military police officer. The court must clarify that when a person is formally accused of a serious offence, the information becomes public domain. This reality often means that the accused and his or her family are stigmatized. When a person is suspected of having committed a crime and the incident that is at the root of that suspicion is also public domain, for example as reported by the media or crime scene witnesses, the resulting effect is often the same. Such a reality is inevitable. However, that is not the case here. In this case, a police officer having knowledge of the details of an investigation that is not public domain shared some information concerning the investigation with his spouse, who then made use of that information to share her feelings with a suspect's spouse. If there were the least shred of evidence, this situation would raise serious questions regarding the respect of rules of confidentiality governing police officers in the course of their duties. Police authorities will perhaps want to clarify the facts surrounding this apparent breach of the duty of confidentiality by one of their own.

[17] Imposing a sentence is the most difficult task 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." It 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. 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

¹ [1992] 1 S.C.R. 259.

necessary intervention, since moderation is the bedrock principle of the modern theory of sentencing in Canada.

[18] In imposing an appropriate sentence on an accused for the wrongful acts that he or she has committed in relation to offences of which he or she is guilty, certain objectives must be aimed for in light of the principles applicable to sentencing, though they vary slightly from one case to the next. Those principles and objectives include, where consistent with the *National Defence Act*, those set out at sections 718, 718.1 and 718.2 of the *Criminal Code*, and must also take into account the mandatory requirements for maintaining a disciplined, operational and effective armed force.

[19] The fundamental purpose of sentencing in a Court Martial is to build respect for the law and maintain military discipline by imposing fair sanctions having one or more of the following objectives:

- (a) To denounce unlawful conduct;
- (b) To deter the offender and other persons from committing offences;
- (c) To separate the offender from society, where necessary;
- (d) To assist in rehabilitating offenders to return to their environment in the Canadian Forces; and
- (e) To promote a sense of responsibility in military members who are offenders.

[20] The sentence must also take into consideration the following principles. It must be proportionate to the gravity of the offence, the previous character of the offender and his or her degree of responsibility. The sentence should also take into consideration the principle of consistency in sentencing, that is, a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. Before considering depriving an offender of liberty, the Court has a duty to consider whether less restrictive sanctions may be appropriate in the circumstances. Last, all sentences should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender and to account for any indirect consequence of the verdict or the sentence on the offender.

[21] In this case, the Court considers the following to be aggravating:

- (a) The objective seriousness of an offence contrary to section 129 of the *National Defence Act* which is punishable by dismissal with disgrace from Her Majesty's service or less punishment. This is a serious offence.

- (b) The nature of the order that was violated and the nature of that violation, namely, of having accessed adult pornographic material as identified in the user policy for 3 Wing Bagotville's electronic networks. This policy is intended to ensure the protection of the computer network. The prosecution asked the Court to consider as aggravating the fact that the offender's actions could present a risk to the network's security and the possibility that it could have been contaminated as a result of his actions. This risk would be an aggravating factor if the Court had heard evidence to that effect, since it is not a matter of judicial notice. Yet, there is no evidence of the risk of contamination to the computer network in the circumstances of this case.
- (c) Third, the acts of which you stand accused, Corporal Gagnon, took place during normal work hours on multiple occasions. The evidence shows that from the seized hard drives it was possible to compile 607 photographs of adult pornography associated with your user account and determine that 21 adult pornography sites had been viewed.

[22] The Court considers the following factors to have a mitigating effect on the sentence:

- (a) your plea of guilty to the two charges that are the subject of this Court Martial. The evidence clearly shows that this was a sincere acknowledgment of your faults and an acceptance of your responsibilities;
- (b) the fact that you do not have a conduct sheet or a criminal record;
- (c) your family and financial situations. You and your spouse are parents of a very young family with two children of very tender years. You will be on parental leave for a few more months, and your financial situation is precarious. Your spouse does not have a paying job;
- (d) the circumstances surrounding the investigation process which led to the charges laid on 4 February 2010, in particular the charge of having accessed child pornography. That charge was not formally preferred by the Director of Military Prosecutions, who deemed there to be insufficient evidence to lay such a charge. The Court is satisfied that the circumstances surrounding the trial caused significant harm to your family which is beyond the harm that normally results when a person is accused of having committed a criminal or penal offence. There is abundant and

uncontradicted evidence that the events surrounding the investigation were the subject of indiscretions which had a particularly serious impact on your family as a whole. The abusive stigmatization was beyond what is normally acceptable. Regardless of whether or not your neighbour acted in good faith when she discussed, with your spouse, the events being investigated in connection with you, she should never have had that information in the first place, as it was not public domain and had been disclosed to her by her husband, a military police officer. That indiscretion had a serious impact on your family; and

- (e) last, the fact that you were already subjected to a remedial measure of counselling and probation in June 2010 for the events subject to the charges before this Court.

[23] The Court is satisfied that all of the events which preceded the holding of this Court Martial for the offences of having accessed adult pornography during your work hours contrary to the Wing's policy on computer systems use, had a significant negative impact on your and your family. It must be understood that accessing adult pornographic material in the comfort of one's own home on the Internet or otherwise is not a matter of criminal or penal law, but one of morals and interpersonal relationships. That is not the issue before this Court. In the case at bar, the Court must consider the express violation of a specific provision which prohibits viewing pornography on National Defence computers, be it during work hours or otherwise.

[24] The Court is of the opinion that the sentence in this case must contribute to implementing the principles of denunciation of wrongful conduct and both general and specific deterrence. The Court declares that it is satisfied that Corporal Gagnon, by pleading guilty before the Court, accepts his responsibilities. The Court acknowledges that the risk of Corporal Gagnon's reoffending is a reality until he resolves what he himself considers to be an addiction to adult pornographic material, but the Court is satisfied and confident that the risks of Corporal Gagnon's reoffending are nonetheless quite slim in the context of what he experienced and put his family through over the course of the last year.

[25] Like my colleague Perron M.J. in *Déry*, I find that a reprimand is unnecessary in the circumstances. However, a fine of the order suggested by counsel for the defence would trivialize the acts complained of and would fail to sufficiently account for the aggravating circumstances surrounding the commission of the offences and give way exclusively to Corporal Gagnon's mitigating circumstances. The imposed sentence must maintain balance.

[26] Corporal Gagnon, please stand up. For these reasons, the Court makes a finding of guilty with regard to the first and second counts laid under section 129 of the *National Defence Act* for acts to the prejudice of good order and discipline and

sentences the offender to a fine in the amount of \$700. The fine will be paid in equal \$100 monthly instalments beginning today.

Counsel:

Major St-Amant, Canadian Military Prosecution Service
Counsel for Her Majesty the Queen

Lieutenant(N) M. Létourneau, Directorate of Defence Counsel Services
Defence counsel for Corporal J.P.S. Gagnon