Citation: *R. v. Petty Officer 1st Class J.R.G. Pelletier*, 2008 CM 3002

Docket: 2007-05

STANDING COURT MARTIAL
CANADA
NOVA SCOTIA
CANADIAN FORCES BASE GREENWOOD

Date: February 5, 2008

PRESIDING: LIEUTENANT-COLONEL L.-V. D'AUTEUIL, M.J.

HER MAJESTY THE QUEEN
(Prosecutor)
v.
PETTY OFFICER 1ST CLASS J.R.G. PELLETIER
(Offender)

SENTENCE
(Rendered orally)

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[1] Ex-Petty Officer 1st Class Pelletier, the Court having accepted and recorded your admission of guilt in respect of charges 4, 6 and 7, the Court now finds you guilty of these charges. Accordingly, the Court directs that the proceedings be stayed on charges 3 and 5. Note that charges 1 and 2 were withdrawn by the prosecution before you entered a guilty plea in respect of the other charges.

[2] The military justice system constitutes the ultimate means to enforce discipline in the Canadian Forces, which is a fundamental element of military activity. 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 accomplish, in a trustworthy and reliable manner, successful missions.

[3] As stated by Major Jean-Bruno Cloutier in his thesis on the use of section 129 of the *National Defence Act* in Canada's military justice system

> [TRANSLATION]
>
> Ultimately, to maximize the chances of success of the mission, the chain of command must be able to enforce discipline to deal with any

> misconduct that threatens military order and effectiveness, not to mention national security, the organization's *raison d'être*.

The military justice system also ensures that public order is maintained, and that those who are subject to the Code of Service Discipline are punished in the same way as any other person living in Canada.

[4] It has long been recognized that the purpose of a separate system of military justice or tribunals is to allow the Armed Forces to deal with matters that pertain to the Code of Service Discipline and the maintenance of efficiency and morale among the Canadian Forces. That being said, the punishment imposed by any tribunal, military or civilian, should constitute the minimum necessary intervention that is adequate in the particular circumstances. It also goes directly to the duty imposed on the Court to impose a sentence commensurate with the gravity of the offence and the previous character of the offender, as stated at QR&O paragraph 112.48(2)(*b*).

[5] In this case, the prosecution and the defence counsel presented the Court with a joint submission on sentencing. They recommend that the Court impose a sentence of imprisonment for a term of 30 days. The Court Martial is not bound by this recommendation. However, it is well established in the case law that there must be compelling reasons to enable the Court to disregard it. It is also generally recognized that the Court should accept the recommendation unless it would be contrary to the public interest or it would bring the administration of justice into disrepute to do so.

[6] Let me also reiterate that, as I mentioned during my explanation of the offence of accessing child pornography when I accepted your admission of guilt, the current provisions of the *Criminal Code* providing for the imposition of a minimum punishment of imprisonment for a term of forty-five days for the offence of accessing child pornography are not applicable in the circumstances of this case because the alleged offences were committed before the provisions came into effect.

[7] The Court has considered the submissions of counsel in light of the facts set out in the statement of circumstances and of their significance. It has also considered the submissions in light of the relevant sentencing principles, including those set out in sections 718, 718.1 and 718.2 of the *Criminal Code*, when those principles are not incompatible with the sentencing regime provided under the *National Defence Act*. These principles are the following:

> firstly, the protection of the public includes the interests of the Canadian Forces;
>
> secondly, the punishment of the offender;

> thirdly, the deterrent effect of the punishment, not only on the offender, but also upon others who might be tempted to commit such offences;
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> fourthly, the separation, where necessary, of offenders from society, including from members of the Canadian Forces;
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> fifthly, the imposition of sentences similar to those imposed on offenders who commit similar offences in similar circumstances; and
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> sixthly, the rehabilitation and reintegration of the offender.

The Court has also considered the representations made by counsel, including the case law provided to the Court and the documentation introduced.

[8] The Court agrees with counsel for the prosecution that the protection of the public requires a sentence that emphasizes punishment and denunciation, as well as individual and general deterrence. This 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. Here the Court is dealing with two offences of accessing child pornography and one of unauthorized and prohibited use of Canadian Forces electronic networks and computers for these purposes, almost entirely committed in the workplace. These are serious offences in the circumstances, but the Court will impose what it considers to be the minimum punishment applicable.

[9] In 1991, Canada ratified the United Nations *Convention on the Rights of the Child*, thereby undertaking, among other commitments, to protect children from all forms of sexual exploitation and sexual abuse. In 1993, in response to this undertaking, Canada added to its *Criminal Code* a comprehensive scheme to attack child pornography at every stage: production, distribution and possession. In 2002, the *Criminal Code* was again amended to include accessing such material. The purpose of these measures, as explained by the Supreme Court of Canada in *R. v. Sharpe*, [2001] 1 S.C.R. 45, is to protect children, one of the most vulnerable groups in Canadian society, from the abuse and exploitation associated with child pornography. These legislative measures also aim to promote and protect the Canadian ideal that every member of society be treated with dignity and respect.

[10] It is generally recognized that access to the Internet has encouraged an explosion in the production and distribution of child pornography in recent years. As Chief Justice McLachlin wrote at paragraph 28 of *Sharpe*, possession of, and by extension access to, child pornography drives its production and distribution, contributing in turn to the exploitation of children.

[11] A review of the decisions of various Canadian tribunals, including the Court Martial, clearly demonstrates that for this type of offence, a term of imprisonment

is often imposed as punishment. The Court sees no reason to adopt a different approach in the circumstances of this case.

[12] It is also worth noting that with Internet access becoming increasingly widespread within the Canadian Forces, the policy on its acceptable use, first published in 1999, was completely overhauled in 2003 to clarify the concepts of authorized, unauthorized and prohibited use by members of the Canadian Forces using computers and electronic networks at work.

[13] In arriving at what it considers a fair and appropriate sentence, the Court has also considered the following aggravating and mitigating factors.

[14] The Court considers that the following factors aggravate the sentence:

a. Firstly, the objective seriousness of the offences. You have been found guilty of two offences under section 130 of the *National Defence Act*, for accessing child pornography contrary to subsection 163.1(4.1) of the *Criminal Code*. This specific offence is punishable by five years of imprisonment or less punishment. This is an objectively serious offence. You have also been found guilty of an offence under section 129 of the *National Defence Act*, for an act to the prejudice of good order and discipline involving the unauthorized and prohibited use of Canadian Forces electronic networks and computers. This offence is punishable by dismissal with disgrace from Her Majesty's service or less punishment.

b. Secondly, the subjective seriousness of the offence. The nature and quantity of images accessed by the offender. It appears that the images you accessed via the Internet were strictly photographs. These photographs were described to the Court as images representing prepubescent and pubescent children exposing their genitals or performing sexual acts such as fellatio or masturbation on adult males or adult males penetrating children vaginally or anally. According to the evidence, you accessed a total of 173 such images, a substantial number. You also used a Canadian Forces computer to access pornographic photographs that do not fall under the definition of child pornography. You accessed 146 such images, also a considerable number.

c. You committed these offences with some sort of premeditation, in that you deliberately searched for the images with a search engine, as evidenced by the statement of circumstances.

d. You voluntarily used three Canadian Forces portable computers, which constitute public property, and one of which was used by one of your subordinates, as well as the electronic networks in your work environment, the mess, for unauthorized and prohibited uses, despite the fact that you were well aware of the rules governing such uses.

e. Your rank, Petty Officer 1st Class, your age and your experience, resulting in heightened expectations with regard to your conduct. Your level of knowledge and experience should have clearly indicated to you that such conduct was entirely inappropriate in the circumstances. You displayed carelessness and a total lack of judgment.

[15] The Court considers that the following factors mitigate the sentence:

a. Your plea of guilty is clearly a sign of remorse and that you are sincere in your intention to remain a valid asset to the Canadian Forces and to Canadian society. The Court does not wish in any way to hinder your chances of success, since rehabilitation is always a key factor in sentencing.

b. The fact that you did not have a conduct sheet or criminal record.

c. The fact that the offence was accessing child pornography, which is objectively less serious than producing or distributing such material. Also, despite the fact that this offence includes an inherent form of violence, it appears that the images that accessed did not contain any additional violent content. Moreover, the access to these images was limited to a short period of time, approximately two weeks.

d. Your excellent record of service in the Canadian Forces. All the reports presented to the Court clearly demonstrate that professionally, you possess the necessary potential to attain higher ranks because of the qualities that you have demonstrated.

e. Paragraph 112.48(2)(*a*) of the QR&O requires the Court to take into consideration any indirect consequence of the sentence. Furthermore, the fact that your excellent military career has been so tarnished by the commission of these offences that it was subject to an administrative review and that the Canadian Forces terminated it by releasing you under item 5(*f*) because you were considered unsuitable for further service, constitutes a mitigating factor that must be taken into consideration.

f. The fact that you have displayed no apparent signs of pedophilia and are unlikely to re-offend must be seriously taken into consideration. It is clear from the evidence that since the beginning of the investigation in 2005, your attitude has changed with respect to this problem that has cost you so much both personally and professionally. Your voluntary decision to see, at your own expense, a psychotherapist who specializes in this area clearly demonstrates your desire to deal with the source of all your problems as effectively as possible. The Court can only encourage you to continue in this direction.

g. The fact that you have had a permanent address since your release from the Canadian Forces and that you are an active participant in the workforce.

[16] Finally, Ex-Petty Officer 1st Class Pelletier, I would like to point out that the Court has taken note of your decision to make good use of the time that this case has taken in order to rebuild your personal life constructively. I can only encourage you to continue in these efforts. This also shows that you have maintained and applied to your own life the qualities identified by your Canadian Forces supervisors that enabled you to attain your status of senior non-commissioned officer. That being said, you will fully understand that a fair and equitable sentence should take into account the seriousness of the offences you have committed and your degree of responsibility in the particular circumstances of this case.

[17] The Court believes that the joint submission is not unreasonable in the circumstances. Accordingly, it will accept the recommendation made by counsel to sentence you to imprisonment for a term of 30 days, considering that this sentence is not contrary to the public interest and would not bring the administration of justice into disrepute.

[18] Ex-Petty Officer 1st Class Pelletier, stand up. The Court sentences you to imprisonment for a term of 30 days.

LIEUTENANT-COLONEL L.-V. D'AUTEUIL, M.J.

Counsel:

Lieutenant-Commander M. Raymond, Regional Military Prosecutor, Eastern Region
Counsel for the Prosecution

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