Citation: *R. v. Warrant Officer (Retired) A.A. MacLellan, 2004 CM 48*

Docket: S200448

STANDING COURT MARTIAL
CANADA
NEW BRUNSWICK
CANADIAN FORCES BASE GAGETOWN

Date: 20 October 2004

PRESIDING: COLONEL K.S. CARTER, M.J.

HER MAJESTY THE QUEEN
v.
WARRANT OFFICER (RETIRED) A.A. MACLELLAN
(Accused)

SENTENCE
(Rendered verbally)

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[1] Having accepted and recorded a plea of guilty to the first charge, the court now finds you guilty of the first charge.

[2] The most important factors that the court has considered in determining an appropriate sentence in this case is; firstly, that the only conviction that you face is one of a section 117(f) *National Defence Act* charge. You have not been convicted of the much more serious offences of forgery. Secondly, the court has put great emphasis on the fact that this is a joint submission; that is, the prosecutor, who represents the interests of the Canadian Forces and the Canadian public has joined with your defence counsel, who represents your interests, in recommending to the court what they both considered a suitable punishment and the third important factor is your guilty plea.

[3] The general principles of sentencing have already been reviewed in this matter. The aim of sentencing is to restore respect for the law by applying the principles of denunciation, deterrence, both general and specific, and reform and rehabilitation. And specific deterrence is something that requires a punishment be one that would deter you from committing other offences, not just offences of this nature but any offences, military or civilian. And general deterrence is a principle that requires the sentence to deter people who are in your situation from committing similar offences.

[4] In the context of a court martial, the principal aim is the restoration of discipline in the military community and, if an individual is still serving in the Canadian Forces, in that Canadian Forces member. Queen's Regulations and Orders article 112.48, requires this court give consideration not only to the seriousness of the offence but also to the previous character and current circumstances of the offender and the impact of any sentence on the offender.

[5] The evidence of the nature of the offence here is set out, in large part, in the Statement of Circumstances. First there is the nature of the offence, which has as its maximum punishment, two years less a day imprisonment; that is, objectively it has a less serious maximum punishment than section 129 of the *National Defence Act*.

[6] This is a case of fraud, where you defrauded the Government of $4,425.98 over a 12-month period by a scheme which involved the use of—and I'll use the term colloquially—government credit cards to buy gasoline for your own purposes. There were 71 purchases made in amounts ranging from $16 to $91. Each credit card purchase had to be subsequently audited and this was also done by you. It was one of your subordinates, Petty Officer 2nd Class Moodie, who became suspicious and who, in August 2003, looking at the pattern of purchases, make further inquiries and then reported her suspicions and the results of her inquiry, up the chain of command to Captain MacDonald and Lieutenant Colonel Temple. It was, no doubt, a very difficult situation for her as your direct subordinate in an relatively isolated detachment, to have to go through this process and to deal with a situation that implicated her direct supervisor.

[7] A resulting military police and NIS investigation led to an interview with you in April 2004 during which you admitted your fraudulent actions and also your attempt to cover them up in part by using the names of other Canadian Forces members, on some of your purchase receipts. You subsequently admitted your fraudulent actions to your supervisors and also to your subordinates.

[8] You submitted your release. By the 1st of June, 2004, you were living with Ms Rietzel, your common-law spouse, in Moncton. According to the exhibits, your terminal leave began on the 5th of June and by the 9th or 11th of July, 2004, you had received your voluntary release from the Canadian Forces. So there was really very little time between the interview with the military police and the NIS and the end of your service with the Canadian Forces, regular force.

[9] Your previous character, as set out in the evidence before the court, is one that indicates that you served for 24 years with the Canadian Forces. Exhibit 6, which is the certificate, describes this as faithful and devoted, it's fair to say that it may well be the case for 23 years but was not the case for the full 24 years.

[10] Your were promoted warrant officer, acting lacking on the 3rd of July, 2002 which is two days before the offences that are set out in charge number one began. And you were appointed substantively to that rank on the 17th of March, 2004. Your Personnel Record Résumé indicated you've served predominantly with the Army and you served in places such as Lahr, Petawawa, Aldershot and Charlottetown. You also served overseas with the peacekeeping forces in UNDOF and Qunaytirah, Syria.

[11] When you retired from the Canadian Forces in July 2004, your gross pay was in the range of $57,750 a year and your net pay was in the range of $38,700 a year. It appears from the history that is set out in the documents and from the charge sheet that things went awry when you were promoted as an acting lacking warrant officer and effectively, given day-to-day supervision independently over a detachment, a separated detachment in July 2002.

[12] The court has reviewed carefully your PERs that are set out in Exhibit 20 and it has—as your defence counsel has asked it to do—reviewed them carefully. First of all, it would say they are written, generally, by different people and so, the assessment there is something that reflects a number of different opinions. In relation to the PER from '98/'99, it describes you as a good leader, as a good communicator and as a good planner. In '99/2000, you're described as reliable, as providing support beyond the scope of your duties, of applying your knowledge logically and capably and positive comments are made on your volunteering with various community events. In 2000/2001, you're described as innovative, positive and a skilled leader. In 2001/2002, it is indicated that you employ financial innovations, you have a high standard of ethics and that you're an excellent planner and organizer.

[13] Exhibit 19 is also one of your PERs and it deals with your conduct during the time frame of the charge but outside of the charge. In essence, it was written before any of this came to light. So, during that time period, the assessment outside of your activities that are set out in the charge sheet, assess you as an excellent resource manager with a genuine concern for your subordinates, someone who uses his initiative. It comments very positively on your volunteering with both the Black Heritage Society and the Cadets. And it indicates there, that Warrant Officer MacLellan is ready for promotion.

[14] The court has also heard from the people who supervised you during that time frame and here, the court would refer to the testimony of Captain MacDonald, and Exhibit 8, the letter from Lieutenant Colonel Temple. Both of them indicate that they feel that what happened was not fully reflective of your character but they also both indicate that although they could see future employment for you, that future employment might well have to include limitations, such as the removal of financial authority. And so, that leaves the court with some consideration as to what kind of work you could do within the Canadian Forces as a warrant officer if you couldn't be

trusted with financial authority. Lieutenant Colonel Temple made this clear in his letter in Exhibit 8 and Captain MacDonald also indicated that there would have to be some limitations.

[15] What the court has considered significant, however, is neither of them have indicated that there was a negative impact of your conduct on other personnel of the Charlottetown detachment, other than what the court has already covered, which is, clearly there had to be negative impact on your subordinate who had to bring this matter to light and go around you, up the chain of command, to deal with it.

[16] So, the court will accept that what was done here was out of character. At least, it was out of character until you were promoted and became a detachment 2/IC in an unsupervised location. The court could not consider it out of character in that context because that is exactly when this happened. The court has also considered your current situation as it's been presented in the evidence. You were given your voluntary release in July 2004. Your current pension, gross, is approximately $26,000 a year and net, approximately $21,000 a year. In July of this year, you received approximately $29,000 in severance pay and approximately $28,500 of that is now expended, either on debts or on living expenses between July and, presumably, October of 2004.

[17] Your Personnel Record Résumé indicates you have five years of high school and a high school graduate and that you are functionally bilingual.

[18] The issue of restitution took up some amount of time, yesterday. The court takes the position, given the documents before it and the testimony, that no restitution has been made to date. There have been a number of promises and undertakings that have been filed. There has also been attempts, attempts which it appears began last Thursday, four days before the court martial began. Actual reimbursement of any of the amount seems to have been thwarted by an unfortunate series of events.

[19] The prosecution has submitted that the applicable principle here, given the nature of the offence, is general deterrence and in that regard, the prosecution referred to an extract from the Court Martial Appeal Court decision, *CMAC* 429 of *R. v. St Jean*, where the Court Martial Appeal Court said:

"In a large and complex public organization such as the Canadian Forces which possesses a very substantial budget, manages an enormous quantity of material and Crown assets and operates a multiplicity of diverse programs, the management must inevitably rely upon the assistance and the integrity of its employees. No control system, however efficient it may be, can be a valid substitute for the integrity of the staff in which the management puts its faith and confidence. A breach of that faith by way of fraud is often very difficult to detect, costly to investigate. It undermines public respect for the institution and results in losses of public funds.

Military offenders convicted of fraud and other military personnel who might be tempted to imitate them should know that they expose themselves to a sanction that will unequivocally denounce their behaviour and their abuse of the faith or confidence vested in them by their employer as well as the public and that will discourage them from embarking upon this kind of conduct."

[20] The prosecution has described the offence committed as one that was a breach of trust and that involved a web of deceit. The mitigating factors as set out by the prosecution are: your guilty plea; your positive performance over 23 years; and your efforts to reimburse. The aggravating factors as set out by the prosecution were: the fact that this was a breach of trust; your rank; the fact that the money was stolen from the Canadian Forces; and also the fact that you used the names of colleagues in order to try and cover up the fraud that you had perpetrated. The prosecution submitted in a number of cases that an appropriate range would be a severe reprimand and a fine and they reviewed fines that range from $2700 to $7,000.

[21] Not surprisingly since this is a joint submission, your defence counsel was in general agreement with much that the prosecution had submitted. Your counsel indicated this was a serious offence, that it was a breach of trust and that general deterrence was required. He put much more emphasis on the mitigating factors; that is, your guilty plea, the fact that you have no conduct sheet, your acceptance of responsibility, not only with a guilty plea, not only with the military police, but as he described it, with you facing your superiors and then your subordinates.

[22] Your defence counsel emphasized your good performance. He described the scheme as not very sophisticated. The court would disagree that simply because people are inevitably caught does not mean that a scheme is not very sophisticated. And, your defence counsel also stressed your attempts at restitution. In terms of aggravation, your counsel accepted that the fact that you were entrusted while a warrant officer was an aggravating factor. Major Appolloni stressed that this was something that was out of character for you and also the challenges of your current situation; that is, the financial, unemployment challenges as well as the social responsibilities that you have undertaken.

[23] He made reference to a case that he described as the *Svend Robinson* case. I believe that for the purposes of the records, the citation has been provided to me as *R. v. Robinson* [2004] British Columbia judgements number 1829, and reference was made to the *Quicklaw* citation. And, the reason for that is that your counsel wish to stress that, in some ways, he believed the court should take a similar approach; that is, he described you as calling in your credit today and coming forward saying, "please, give me some credit for what I have accomplished in my life and the things that I've tried to do for others, and please put a large amount on that. Please make it a large amount of credit

that I have built up." That, in essence, is the words that the judge used in paragraph 31 of the *Robinson* decision.

[24] So, the court has considered the testimony of the witnesses before it, the large number of documents and the Statement of Circumstances. The court agrees with the submissions of counsel that general deterrence is the most important factor here and, unsurprisingly, this reflects the decision of the Court Martial Appeal Court in *St Jean*.

[25] If this had not been a joint submission, the court would have imposed reduction in rank as well as other punishments. The court believes reduction in rank is a useful punishment even if a person is released from the Canadian Forces. In essence, you would become Sergeant (Retired) MacLellan and that would have an impact on you in any of your dealings, subsequently with the Canadian Forces or with members of the Canadian Forces. It would have an impact, that you would be not ex-Warrant Officer MacLellan. It would also have an impact on your severance pay; that is, you would owe more money because your severance pay would be at the rank of sergeant, not at the rank of warrant officer.

[26] The court, as it has indicated, if this had not been a joint submission, would have considered that as part of a punishment and the court would consider that because there is the issue of future employment. Your counsel, whose already raised the issue of whether or not you might be interested in future service with the reserves. The court is aware that there is a service battalion in Moncton and given your background, given the difficulties that you may face, although it's not clear you will face, in terms of becoming bondable and your options, it will no doubt become very attractive for you to try and integrate yourself into the reserves, and the court thinks that's something that should be considered very carefully by the Canadian Forces before they accepted any such actions on your behalf, given this conviction. That is, the court is not convinced that you're suitable to be a warrant officer with independent responsibility at this time, certainly not until you have satisfied everyone that this incident is behind you.

[27] The court has looked very carefully at the situation, your current situation. As was indicated, you have, since the 1st of June, 2004, accepted certain responsibilities. You've moved in with Ms Rietzel and this happened in June, apparently, you and she moved according to the exhibits in August. Her two dependant children live with the two of you and currently a son moved back in August 2004 and has become, it appears, a temporary dependant. Ms Rietzel has health problems and has not worked since September 2003. The evidence before the court is, she was diagnosed in April '04 with bone cancer, that she's received no treatment for this but that it is now in remission. About three weeks ago, in September 2004, there's indications that bronchial problems were identified by her doctor and at that same time, it appears that you have become involved in, potentially, another move in November of this year.

[28] Ms Rietzel's only means of support, at this time, other than support from you, appears to be $328 a month child allowance. It appears she can make some claims against her children's father but these claims have not been pursued to date. The average expenses that appear to be estimated for housing and various utilities are in the range of $1100 a month and in that regard, the court has not included the cable and the related expenses that are assigned to S. Bowes, and it appears that approximately $2,000 a month is the income of your family unit with no family member working.

[29] Exhibit 18, which is the document which indicates that the new lease has been signed is a written obligation that at this time appears only to apply to Ms Rietzel. So, you're in a situation where you are voluntarily sharing expenses and there is no indication of any joint bank account.

[30] You are 43 years old. The indications are that you are healthy from the documentation and you've indicated to the court that you are available and indeed willing to seek work. The court has taken into account that this conviction, as it is indicated, may limit your ability to work in your area of expertise if that job description requires trust and integrity; i.e., bondability. As the court has indicated, in the absence of a joint submission, it would impose a more severe punishment. But the joint submission in the proposed matter is one which the court must review from the point of view of determining whether to accept it would bring the administration of justice into disrepute or otherwise be against the public interest; that is the principle as set out in civilian courts and that is the principle applied in courts martial as set out in the Court Martial Appeal Court decision of *R. v. Paquette.*

[31] The court has come to the conclusion that it is not something that would bring the administration of justice into disrepute if it accepted the joint submission. You have a voluntary release but the results of this court martial may impact on your release item, and I'm sure your defence counsel has explained that to you. The court is satisfied that a very large fine, a severe reprimand, which is a strong indicator to anyone in the Canadian Forces in the future, that your reliability was questionable and the fact that you're no longer in the Canadian Forces should deter, not only you, but anyone else from a similar source of conduct.

[32] The court has considered that the mitigating factors are important here: your plea of guilty and the court would stress here; that is, your plea of guilty as an acceptance of responsibility. It is not a question of saving resources or time of the court. Every member of the Canadian Forces, or in your case, every former member, is entitled to a full court martial, a full hearing of the matter and so it is not a saving of resources that accumulates to your credit, it is the acceptance of responsibility. Your previous good conduct, and that is set out in your personnel evaluation reports, and the fact that you have no conduct sheet. In terms of aggravation, however, the court has said that the

breach of trust issue is important and also the fact that you were a warrant officer and the rank and responsibility that comes with that.

[33] This was a planned, deliberate, continuing offence and you did implicate colleagues in it. Your counsel said, "we don't know why". That's absolutely true, we don't know why. You were on the stand, you could or did not choose to provide any explanations as to why you did it. It seems, when you look at the simple figures of how much you were making, frankly something that doesn't make logical sense. At the same time, it occurred 71 times in one-year period, so it was obviously regular and re-occurring. So, although it may not make sense to everyone else, at some level, it must have made sense to you as to why you were doing it.

[34] It is unfortunate, indeed, perhaps that the $29,000 that you received, somewhere between July and October 18th has all been expended and that the $4400 here was not one of the debts that you considered a personal debt to pay off. Nevertheless, the court is in the situation where the indications are that money has been spent and, as the court has indicated, there are various promises to reimburse that $4,425.98 but none of it has actually been reimbursed to date.

[35] Having accepted the joint submission, the court would impose a sentence of a severe reprimand and an $8,000 fine.

COLONEL K.S. CARTER, M.J.

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