

**Citation:** *R. v. Captain Saint-Jacques*, 2005CM31

**Docket:** S200531

**STANDING COURT MARTIAL  
CANADA  
GATINEAU, QUEBEC  
ASTICOU CENTRE**

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**Date:** 29 June 2005

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**PRESIDING: LIEUTENANT-COLONEL M. DUTIL, M.J.**

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**HER MAJESTY THE QUEEN  
v.  
CAPTAIN M.A. SAINT-JACQUES  
(Accused)**

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**SENTENCE  
(Rendered orally)**

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[1] Captain Saint-Jacques, having accepted and recorded your plea of guilty to charge number one for possession of child pornography, this court now finds you guilty of that charge. And I will ask you at this time to break off and sit with your defence counsel.

[2] It is now incumbent on this court to determine a sentence upon you. And as it is well recognized now, the purpose of a separate system of military tribunals is to allow the Armed Forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military. The Supreme Court of Canada has recognized that breaches of military discipline must be dealt with speedily and frequently punished more severely than would be the case of a civilian engaged in similar conduct. However, the punishment imposed by any tribunal, military or civil, should constitute the minimum necessary intervention that is adequate in the particular circumstances.

[3] In determining sentence, the court has considered the circumstances surrounding the commission of the offence as revealed by the statement of circumstances filed by the prosecutor as well as the images and short videos presented by the prosecution as part of the statement of circumstances. Counsel agree that these images and videos represented a fair sample of the nature and extent of the material of

child pornography found in your possession. The court considered also the documentary evidence provided to the court as well as the testimony of your current supervisor Miss or Ms Diane Dixon.

[4] This court has examined the evidence in light of the applicable principles and objectives of sentencing, including those set out in section 718, 718.1 and 718.2 of the *Criminal Code* when they are not incompatible with the sentencing regime provided under the *National Defence Act*. The court has also considered the representations made by counsel, including the extensive list of case law provided to the court, and the direct and indirect consequences that the finding and the sentence will have on you.

[5] In summary, the facts of this case disclose that the offender was on course in Winnipeg, Manitoba between 11 May and 9 June 2004. On 20 May 2004, Canadian Forces analysts observed an irregular volume of computer traffic from Winnipeg that ultimately led National Investigation Service investigators, after obtaining a search warrant, to a DND computer assigned to Captain Saint-Jacques as well as to his personal computer located in his barracks room. On examination of Captain Saint-Jacques' computer, the investigators discovered four hard drives and the fact that his computer revealed Internet traffic between Captain Saint-Jacques with an Internet newsroom that contained child pornography. Captain Saint-Jacques maintained a paid subscription with the said newsgroup. Computer equipment was analysed and revealed that the four hard drives contained the greatest volume of child pornography ever analysed by the National Investigation Service detachment. The hard drives contained approximately 10,000 images and approximately 200 movies that met the *Criminal Code* definition of child pornography. The images of child pornography were organized in Captain Saint-Jacques' computer. During his course, he had used the DND computer to download images from the Internet, transfer them to his personal computer and then scrub the downloaded images from the DND computer removable software that he had installed on the DND computer. The analysis of Captain Saint-Jacques' personal computer indicates that the images were downloaded between 2001 and June 2004.

[6] The prosecution made a demonstration before the court as part of the statement of circumstances which shows a representative sampling of the nature and extent of the child pornography material found in Captain Saint-Jacques' possession. Counsel for the defence agreed to this demonstration. Counsel for the prosecution indicated that five to ten per cent of the still images were of a graphic nature, where 90 to 95 per cent of those images consisted of children, sometimes with adults, posing in different situations. Some of these poses would include sexual penetration as well as fellatio on adults by children. Images would also include children being handcuffed. Others would depict children going in and being in a large dog's travel crate. The court was also asked to view a series of videos ranging from a few minutes up to shortly under 25 minutes. The sampling of these videos showed a range of activities such as children taking a bath, washing and rubbing their private parts, to more explicit sexual

acts ranging from a very young age to prepubescent boys and girls being engaged in sexual acts with adults of both sexes. These acts included fellatio on and by children, anal and vaginal intercourse, cunnilingus, anal and vaginal penetration with objects of different shapes and sizes. A video even showed acts of fellatio where a child was led into swallowing down adult semen during which that child showed clearly its disgust. Other videos displayed a variety of other explicit and degrading sexual activities between adults and children. One movie included lengthy scenes of a prepubescent girl being abused when she is profoundly asleep. In that movie, she was penetrated vaginally, sodomized with various objects and by an adult male for several minutes. Movies would also depict a male adult sodomizing a child who is tied up to pieces of furniture by both hands and feet. These examples may constitute only but a few extreme examples of the massive material possessed by Captain Saint-Jacques at the time. The court also understands that it represents a significant amount of the material which was depicted by counsel to be a fair display both in terms of the nature and the extent of the material.

[7] When a court must sentence an offender for an offence that he has committed, certain objectives must be pursued in light of the applicable sentencing principles. It is recognized that these principles and objectives will slightly vary from case to case, but they must always be adapted to both the circumstances of the offence and of the offender. In order to contribute to one of the essential objectives of military discipline; that is, the maintenance of a professional and disciplined armed force that is operational, effective and efficient, within a free and democratic society, the sentencing principles and objectives could be listed as: first, the protection of society and this includes the Canadian Forces; second, the punishment and the denunciation of the unlawful conduct; third, the deterrence of the offender and other persons from committing similar offences; fourth, the separation of offenders from society, including from members of the Canadian Forces where necessary; fifth, the rehabilitation of offenders; sixth, the proportionality to the gravity of the offence and the degree of responsibility of the offender; seventh, the sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances; eight, an offender should not be deprived of liberty if less restrictive punishment or combination of punishments may be appropriate in the circumstances; and finally, the court shall consider any relevant aggravating or mitigating circumstances relating to the offence or the offender.

[8] In *R. v. Sharpe* [2001] 1 S.C.R., 45, the Supreme Court of Canada has enunciated that the primary goal of child pornography laws is to prevent harm to children. It is widely recognized that child pornography inflicts harm on children in many ways. Children are clearly abused in its production. It can be used to groom or seduce victims. It may reduce pedophiles' inhibition respecting abuse of children. Because the market of child pornography is fueled by the demand of those who wish to possess it, it is believed that criminalizing it may reduce that demand. In *Sharpe* the Supreme Court noted that section 163.1 of the *Criminal Code* reflects Canada's

obligations under article 34 of the Convention on the Rights of the Child to protect children from sexual exploitation and abuse. And in particular, to prevent the exploitative use of children in pornographic performances and materials.

[9] It is of general knowledge that the explosion of Internet access has amplified the making, distribution and mere access of child pornography over the recent years. It is therefore easy to understand why courts have emphasized that denunciation and deterrence ought to be the primary sentencing objectives for this offence; that is, possession of child pornography.

[10] The review of sentences across the country clearly shows that sentences of incarceration are often imposed on offenders for this behaviour. In this case, there's no reason to adopt a different approach. Protection of the society and of the Canadian Forces must be achieved by a sentence that will emphasize denunciation of the conduct as well as general and specific deterrence. The sentence must also assist, but to a lesser degree, to rehabilitate the offender.

[11] In arriving at what the court considers a fair and appropriate sentence, the court has considered the following mitigating and aggravating factors. The court considers as aggravating:

- a) the objective seriousness of this offence in its prescribed maximum punishment. Although possession of child pornography is not objectively as serious as making or distributing it, nonetheless, it still carries with it a maximum period of five years imprisonment;
- b) the nature and the extent of the material possessed by the offender. First, the material possessed by Captain Saint-Jacques consisted of approximately 10,000 images and approximately 200 movies that met the *Criminal Code* definition of child pornography. Not only the material seized from Captain Saint-Jacques' computer contained the greatest volume of child pornography ever analysed by the National Investigation Service detachment, the volume of the material found in his possession would fall within the higher end of cases dealing strictly with the offence of possession of child pornography. Second, the nature of the material is extremely explicit and often very severe. Counsel for the defence submitted that the material did not depict scenes of violence against the children. In response to the court's question, he clarified his answer stating that there was no scene where children would be beaten up. It must be made clear that the videos and some images showed to the court demonstrated a high degree of violence and abuse against children. Sexual acts

of sodomy on children when they are tied up to furniture and a rape of a young girl who has been put profoundly asleep are extremely violent in the court's view, whether the children are physically beaten or not. These acts are by definition a demonstration of unlawful exercise of force by adult on children who are not in any position to physically or mentally defend themselves. However, it must be recognized that Captain Saint-Jacques was not charged with making or distributing child pornography, nor is there any evidence that he may have been involved in such activities;

- c) the court considers as aggravating the fact that not only the offender was in possession of child pornography, it was also accessed and obtained, at least in part according to the evidence, through a paid membership to a newsgroup that contained child pornography. Captain Saint-Jacques, your possession was not of a mere coincidence or the product of a sudden curiosity or interest; and
- d) the court considers to be aggravating the fact that you are an officer of the Canadian Forces and also that you have used a DND computer in commission of the offence, although it appears that the hard drives containing the material were not public property.

[12]  
sentence:

The court considers that the following circumstances mitigate the

First, the fact that you have acknowledged responsibility for your actions by pleading guilty before this court at the first opportunity. The court accepts that by doing so you accept the responsibility for your actions and it is certainly a step in the right direction towards rehabilitation. I consider this admission of guilt as a genuine acknowledgement of your misconduct and it is a factor that I consider essential in the reformation and rehabilitation of any offender. Your counsel has described you as a collector of child pornography. There's no evidence before this court that you are more than that.

Second, your record of service in the Canadian Forces. That is often described as your rank and equity in the Canadian Forces. You have served your country for 18 years. Your current supervisor thought highly of you as an officer and specialist in the field of aerospace engineering. She considered your performance to be of a superior quality. You displayed good work ethics as well as being organized and dependable

and you continued to perform in that manner after the charges were laid. Ms Dixon testified that it is also unlikely that you will be allowed to continue to perform your current functions in that she does not see any role for you in her organization as a result of your unlawful conduct. Your counsel indicated also that you will likely be released from the Canadian Forces as a consequence of this conviction in accordance with the Canadian Forces policy on sexual misconduct entitled Canadian Forces Administrative Order 19-36, Sexual Misconduct, and that, prior to the completion of 20 years of service for which you would have been entitled to receive an immediate annuity. Although this information is somewhat speculative at this stage, the Canadian Forces policy on sexual misconduct is such that this scenario is highly probable in the circumstances. There's no doubt that if you are released from the Canadian Forces you will lose a significant income as well as other benefits. In this regard, the information before the court indicates that your current pay entitlement is approximately \$85,000 annually.

And finally, the court considers as mitigating the fact that you did not have a conduct sheet or any criminal record.

[13] Counsel agree that incarceration is the punishment of last resort and that the circumstances of this case warrant imprisonment. The prosecution recommends a period between six to nine months, where counsel for the defence submits that a period of three to five months would serve the interest of justice and still achieve the maintenance of discipline. The prosecution also seeks an order that the offender provides samples of DNA as the offence of possession of child pornography is a secondary designated offence under section 487.04 of the *Criminal Code* and section 196.11 of the *National Defence Act*. The defence is not opposed to this order. The making of this order is within the discretion of the court pursuant to paragraph 196.14(1)(b) if the court martial is satisfied that it is in the best interest of the administration of justice to do so considering the nature of the offence and the circumstances surrounding its commission, any previous conviction and the impact that such an order would have on the privacy and security of the person.

[14] The offence of possession of child pornography is a public offence in the sense that a public media, the Internet, is often used in its commission. It is also of a public nature, in that it stimulates the demand for the production of child pornography, which production often involves criminal acts against children. Although the offender has no previous criminal or disciplinary record, there's no evidence before this court to indicate that taking a DNA sample will have an unusual or particular effect on him. The court believes that the impact on his privacy and security of the person's interest is lower following conviction, and that it would constitute a minimal infringement on the offender in the circumstances by the giving of samples under proper terms and conditions. It is therefore my view after reviewing the factors listed in subsection

196.14(3) and the position taken by both the prosecution and defence that this is a proper case to issue such an order.

[15] In determining sentence the court has totally reviewed not only those court decisions provided by counsel but it has considered also other court decisions. This review led the court to conclude that this case must be considered with those at the higher echelon of cases of possession of child pornography in light of the nature and the extent of the material. Considering the sentencing regime under the *National Defence Act* and its particularities, this court believes that a fair punishment should include a significant period of imprisonment. The range suggested by the prosecution can achieve the relevant principles and objectives of sentencing in this case. The sentence of imprisonment for a period of three to five months as suggested by counsel for the defence would not, in my view, adequately reflect the need for denunciation and general deterrence. In *R. v. Dixon*, 2005 CMAC 2, the Court Martial Appeal Court examined the facts and circumstances surrounding the commission of the offence of possession of child pornography and placed it towards the lower end of the spectrum of child pornography offences. In *Dixon* the quantity of material was small. It consisted of seven pictures and three movies. The pictures did not depict explicit sexual activities although the movies did. In its examination of some of the disparities that exist between the military justice system and the criminal justice system, Justice Létourneau, writing for the court, stated at paragraph [23] and [24], and I quote:

[23] Another disparity of treatment between a civilian and a member of the C.A.F. for a *Criminal Code* offence committed in civilian-like circumstances originates from the fact that possession of child pornography, like all offences contained in the *Code*, is treated and charged as a breach of the *Code of Service Discipline*. This means that, in the military context, this *Criminal Code* offence loses its hybrid character and cannot be prosecuted according to the *Criminal Code* procedures applicable to summary conviction offences.

[24] In enacting the prohibition against child pornography, Parliament recognized that there may be instances where the behaviour, although in breach of the prohibition, is relatively minor and does not require the full force of a prosecution by indictment. That is why it made the offence a hybrid one which can be summarily prosecuted with a lesser penalty and a limit of \$2000 on the fine that can be imposed. The case of *R. v. Turcotte*, [2001] A.J. No. 202 (Alta Q.B.) is an example of a summary prosecution for possession of child pornographic material. However, many cases have been prosecuted by way of indictment because of the need to denounce this kind of behaviour and the subjective gravity of the offence in terms of the large quantity possessed, the hard core nature of the material or the criminal record of the offender.

[16] In *R. v. Patterson*, published at 33 C.R. (5th) page 45, a decision from the Ontario Court of Justice, the trial judge expressed the view that the prosecution's approach can be of assistance to the court. At the end of paragraph 13 of its decision, the court held that, and I quote:

3. Where, as here, a Crown Attorney elects to proceed summarily against an accused

charged with a single count of possession of child pornography, the maximum period of imprisonment to which the accused is exposed is 6 months. While Parliament has recently increased the maximum potential summary penalty for certain sexual offences to 18 months imprisonment, it decided not to extend this legislation to lesser offences of possession of child pornography.

4. By taking the decision to proceed summarily against this accused, Crown counsel has - rightly in my view - signalled the view of the prosecuting authorities that this is not among the worst cases of possession of child pornography. It further flows from this that where the Crown additionally limits itself to seeking a sentence of imprisonment halfway to the maximum permitted under the summary conviction procedure, it is the view of the prosecuting authorities that the accused's behaviour does not approach even that lesser maximum. While Crown counsel's views as to the severity of an offence are not binding on me, they are of considerable assistance to me in assessing how seriously this accused's criminality should be considered.

[17] This is this court martial's view that this case is one that would have been likely prosecuted by way of indictment as opposed to summary conviction, unlike the case of *R. v. Patterson*, mainly because of the extensive amount of material possessed and its severe nature. I would also note that the prosecution's recommendation on sentence; that is, imprisonment for a period of six to nine months, would necessarily imply that the offence would fall in this category.

[18] Stand up, Captain Saint-Jacques. For all these reasons, the court sentences you to imprisonment for a period of six months. The sentence is imposed at 11 hours 10 minutes on 29 June 2005. In addition, the court makes an order authorizing the taking of such samples of bodily substances from the offender for the purpose of DNA analysis as may be required pursuant to Section 196.14 of the *National Defence Act*. You may be seated.

LIEUTENANT-COLONEL M. DUTIL, MJ

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