

Citation: *R. v. Captain K.W. Hynes*, 2007 CM 3001

Docket:200653

**STANDING COURT MARTIAL
CANADA
GREENWOOD, NOVA SCOTIA
405 SQUADRON**

Date:10 January 2007

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

HER MAJESTY THE QUEEN

v.

**CAPTAIN K.W. HYNES
(Offender)**

SENTENCE

(Rendered orally)

[1] Captain Hynes, having accepted and recorded a plea of guilty in respect of the charge at number 1, the Court finds you now guilty of this charge. You can now dismiss and sit beside your counsel.

[2] The military justice system constitutes the ultimate mean to enforce discipline in the Canadian Forces, which is a fundamental element of the military activity. The purpose of this system is to prevent misconduct, or in a more positive way, see the promotion of good conduct. It is through discipline that an armed force ensures that its members will accomplish, in a trusty and reliable manner, successful missions.

[3] As stated by Major Jean-Bruno Cloutier in his thesis, the military justice system, and I translate, "has for purpose to control and influence the behaviors and ensure maintenance of discipline with the ultimate objective to create favorable conditions for the success of the military missions." 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 been long 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 respect of 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 to 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 article 112.48(2)(b). Here, in this case, the prosecutor and the counsel for the defence made the same submission on sentence. The prosecutor recommended that this court sentence you to a severe reprimand and a fine between \$2450 and \$3450. Your defence counsel informed this court that serious consideration should be given to a severe reprimand and a fine to the amount of \$3450. Even though it does not constitute a joint submission per se, this court will consider that this shared recommendation should be departed from only where to accept it would be contrary to public interest and would bring the administration of justice into disrepute.

[5] The Court has considered this common recommendation in light of the relevant facts set out in the statement of circumstances and their significance, and I have also considered the recommendation 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 and the public includes the interest 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; and fourthly, the reformation and rehabilitation 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.

[6] I must say that I agree with the prosecutor when she expressed the view that the protection of the public must be ensured by a sentence that would emphasize general deterrence and denunciation. It is important to say that general deterrence means that the sentence imposed should deter not simply the offender from re-offending but also others in similar situations from engaging, for whatever reasons, in the same prohibited conduct. As stated by Judge Létourneau at paragraph 22 of the Court Martial Appeal Court decision in *Private St. Jean and Her Majesty the Queen*, CMAC-429:

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 and confidence vested in them by their employer as well as the public and that will discourage them from embarking upon this kind of conduct.

[7] Here, the court is dealing with an offence for stealing money from a

private charitable organization. It is a very serious offence. However, the court will impose what it considers to be the necessary minimum punishment in the circumstances in light of the recommendations made by counsel.

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

[9] The court considers as aggravating:

- a. Firstly, the objective seriousness of the offence. The offence you were charged with was laid in accordance with section 114 of the *National Defence Act* for stealing when entrusted by reason of your employment, with the custody and control of the thing stolen. This offence is punishable by 14 years of imprisonment or to less punishment.
- b. Secondly, the subjective seriousness of the offence. At the time that this offence occurred and up to the time of your confession confirming it, you were a commissioned officer at the rank of 2nd lieutenant and lieutenant. For about two years, you disclosed an uncooperative, evasive and dishonest attitude when requested to help settle this matter involving the reputation of the Canadian Forces and the RMC among the Kingston civilian community. In fact, you lied in order to avoid the consequences of your behaviour. This offence was committed for a relatively important amount, about \$2500, and this money was entrusted to you. You decided conscientiously that instead of giving the money back to the Boys and Girls Club of Kingston, as it was supposed to be, it would be more useful to you for your own needs. Your lack of integrity, courage, honesty and loyalty was totally contrary to the obligations and principles of ethic you were taught as an officer of the Canadian Forces and resulted in a long deprivation of these funds for the charitable organization.

[10] The court considers that the following circumstances mitigate the sentence:

- a. Through the facts presented to this court, the court considers that your plea of guilty is a sign of remorse and that you are sincere in your pursuit of becoming again a valid asset to the Canadian Forces and the Canadian community.
- b. The court considers also your record of service in the Canadian

Forces.

- c. Your age and your career potential as a member of the Canadian Forces; being 26 years old, you have many years ahead to contribute positively to the society in general as well as the Canadian Forces.
- d. The fact that you did not have a conduct sheet or criminal record related to similar offences.
- e. The restitution you made recently. Even though it was made just some time before this court martial took place, the end result is that the Boys and Girls Club of Kingston finally got the money they were entitled to.

[11] Considering that imprisonment should be imposed as a last resort, as established by the Court Martial Appeal Court in the decision of *Second Lieutenant Baptista and Her Majesty the Queen*, CMAC-485, the Court believes that the shared recommendation is not unreasonable in the circumstances.

[12] In consequence, even though the Court considers lenient the common recommendation made by both counsel to sentence you to the punishment of a severe reprimand and a fine to the amount of \$3450, it is considered that it would not be contrary to the public interest and would not bring the administration of justice into disrepute.

[13] It is important to say that considering the circumstances of this case, particularly the fact that Captain Hynes was recently promoted, and the comments made by the prosecution on the aggravating factors, this Court had some difficulties to understand the position taken by the prosecution. The court wants to be clear that in deciding to recommend a severe reprimand and a fine, the prosecution limited in some ways the possibility for this court to consider any more serious sentence, taking into consideration that its position matched the lenient but reasonable recommendation made by the defence counsel.

[14] Additionally, this court has some concerns about the position of the chain of command toward Captain Hynes' career. The MPRR (exhibit 4) and the Promotion Screening Form (exhibit 6) do not disclose any sort of effort taken by the chain of command in order to initiate any corrective measure that would denounce and prevent Captain Hynes' conduct to be repeated. To the contrary, this court got the impression from the prosecution and the chain of command that, even though Capt Hynes' attitude while committing the offence and the objective seriousness of the offence, there is still the exact same level of trust in this individual as if he had done something very, very minor. And I just want, and it is just a comment in my decision, to point out that the

Statement as to Particulars of Service of Accused (exhibit 3), signed by Lieutenant-Colonel Vaughn Cosman, stated, as an example, that "The accused has served in the following ranks" and the last one was lieutenant, and it was signed on 8 January 2007. So his rank was lieutenant. And defence counsel introduced the Promotion Screening Form, signed by the same Lieutenant-Colonel Cosman in December '06, stating that Captain Hynes was suitable for promotion in accordance with the reference, with the message. So it is just special to see that in the way that this thing was administered, nobody saw what was happening. And, in fact, the court got the message that things were going well for Captain Hynes, so far.

[15] Captain Hynes, the court wants to tell you clearly that it hopes that you see this court martial as an opportunity for a new start and to disclose from now a much better attitude towards the privilege that was given to you when you became an officer in the Canadian Forces. Your educational background, your trade, and your recent new rank, as discovered by this court, will probably bring the Canadian Forces to task you in positions requiring a high level of trust. I sincerely hope that you will meet the expectations that your peers and your country have in you. Integrity, courage, loyalty, honesty and responsibility are principles that you shall respect.

[16] Captain Hynes, please stand up. Therefore, the Court sentences you to a severe reprimand and a fine to the amount of \$3450. The fine is to be paid in monthly installments of \$575 each commencing on 1 February 2007, and continuing for the following five months. In the event you are released from the Canadian Forces for any reason before the fine is paid in full, the then outstanding unpaid amount is due and payable the day prior to your release.

[17] Officer of the court, march out Captain Hynes. The proceedings of this standing court martial in respect of Captain Hynes are terminated.

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

Counsel:

Major S.A. MacLeod, Director of Military Prosecutions
Counsel for Her Majesty The Queen
Major C.E. Thomas, Director of Defence Counsel Services
Counsel for Captain K.W. Hynes