

Citation: *R. v. Sergeant K.J. McLean*, 2008 CM 4005

Docket: 200749

**STANDING COURT MARTIAL
CANADA
NEW BRUNSWICK
CANADIAN FORCES BASE GAGETOWN**

Date: 6 May 2008

PRESIDING: LIEUTENANT-COLONEL J-G. PERRON, M.J.

**HER MAJESTY THE QUEEN
v.
SERGEANT K.J. MCLEAN
(Offender)**

**SENTENCE
(Rendered orally)**

[1] Sergeant McLean, having accepted and recorded your plea of guilty to charge number two, the court now finds you guilty of this charge. You may break off and sit with your counsel.

[2] You have pled guilty to a charge laid under sub-section 117(f) of the *National Defence Act*. The statement of circumstances, to which you formally admitted the facts as conclusive evidence of your guilt, provides this court with the circumstances surrounding the commission of this offence.

[3] You were posted from 2nd Regiment, Royal Canadian Horse Artillery, located at CFB/ASU Petawawa, to the Royal Regiment of Canadian Artillery School, located at CFB/ASU Gagetown, in January 2006. You indicated to the Royal LePage representative that you would travel to Gagetown with your wife and four children. On 2 February 2006, you signed your final claim for this posting and certified that the expenses claimed had been incurred, knowing full well that you had not traveled with your estranged wife and four children. An audit of this claim determined that you had defrauded the Department of National Defence in the amount of \$2,832.50.

[4] The principles of sentencing, which are common to both courts martial and civilian criminal trials in Canada, have been expressed in various ways. Generally, they are founded on the need to protect the public, and the public, of course, includes the Canadian Forces. The primary principles of sentencing are deterrence, that includes specific deterrence in the sense of deterrent effect on you personally, as well as general deterrence; that is, deterrence for others who might be tempted to commit similar offences. The principles also include the principle of denunciation of the conduct, and last, but not least, the principle of reformation and rehabilitation of the offender.

[5] The court must determine if protection of the public would best be served by deterrence, rehabilitation, denunciation, or a combination of those factors. The court has also considered the guidance set out in sections 718 to 718.2 of the *Criminal Code of Canada*. Section 718 sets out the fundamental purpose of sentencing as a means of contributing to ensure respect for the law and the maintenance of a just and peaceful society by the imposition of just sanctions that have one or more of the following objectives: the denunciation of unlawful conduct; deterring the offender and other persons from committing offences; separating the offender from society, where necessary; assisting in rehabilitating offenders; providing reparations for harm done to victims or to the community; and the promotion of a sense of responsibility in offenders in acknowledgement of the harm done to victims and to the community.

[6] The court is also required, in imposing a sentence, to follow the directions set out in article 112.48 of Queen's Regulations and Orders, which obliges it, in determining a sentence, to take into account any indirect consequences of the finding or of the sentence, and impose a sentence commensurate with the gravity of the offence and the previous character of the offender. Usually, the court must also give consideration to the fact that sentences of offenders who commit similar offences in similar circumstances should not be disproportionately different.

[7] I have not been able to accomplish this exercise in comparison since I was not provided with any case law by counsel. Although I have considered the principles and purposes set out in sections 718 to 718.2 of the *Criminal Code of Canada*, and have taken them into consideration when I considered the joint submission on sentencing, I am mindful that the ultimate aim of sentencing in the court martial process is the restoration of discipline in the offender and in military society. The court must impose a sentence that should be the minimum necessary sentence to maintain discipline.

[8] The prosecution, and your defence counsel, have jointly proposed a sentence of a reprimand and a fine in the amount of \$1,500. Your defence counsel has also recommended a monthly payment schedule for one year.

[9] The Court Martial Appeal Court has stated clearly that a sentencing judge should not depart from a joint submission unless the proposed sentence would bring the administration of justice into disrepute or unless the sentence is otherwise not in the public interest.

[10] I will first address the aggravating factors of this case. The amount that was defrauded is significant. You were 38 years old at the time of the offence, and you had the benefit of approximately 16 years of service. You are a sergeant. You had been in the CF long enough, and you had all the necessary experience to know better than to defraud the Canadian Forces.

[11] I will now deal with the evidence in mitigation of sentence. You do not have a conduct sheet, you are a first-time offender. You cooperated with the military police investigation and you admitted your wrong-doing during your interview with the military police. You also indicated, a few months ago, that you wished to plead guilty at your trial.

[12] Canadian jurisprudence generally considers cooperation in the investigation of a crime, and an early guilty plea, as tangible signs that the offender feels remorse for his or her actions, and that he or she takes responsibility for these illegal actions and for the harm done as a consequence of these actions. Therefore, such conduct, and an early plea of guilty, will usually be considered as mitigating factors. This approach is generally not seen as a contradiction of the right to silence and of the right to have the Crown prove, beyond a reasonable doubt, the charges laid against the accused, but is seen as a means for the courts to impose a more lenient sentence because the plea of guilty usually means that the accused wants to take responsibility for his or her unlawful actions. Also, witnesses do not have to testify, and a guilty plea greatly reduces the costs associated with a judicial proceeding.

[13] You have served Canada and the Canadian Forces for 19 years, and you have deployed once to Afghanistan. It would appear that you had an unblemished record until today. I have carefully reviewed the course reports that form Exhibit 7, the letters of appreciation and letters of assessment that form Exhibit 8, the letter from Captain Little, Exhibit 10, and the character letter from your present commanding officer, Lieutenant-Colonel McPherson, Exhibit 11. They describe the qualities and the traits of character that we wish to see in a non-commissioned officer. They describe a solid soldier who puts the interests of the organization ahead of his own interests. They also describe a soldier who takes care of his subordinates.

[14] I agree with your defence counsel when he asserts that you have maintained the full confidence of your chain of command. The letter from Lieutenant-Colonel McPherson is unequivocal in his description of your performance and potential as a soldier and as a leader. Captain Little has also demonstrated unfailing support for

you, and he would not hesitate in employing you during his upcoming tour in Afghanistan.

[15] Lieutenant-Colonel McPherson states that, "The situation at hand represents a momentary lapse of judgement." He also feels that, "An uninformed mistake," should not be held against you. The situation that has led to these disciplinary proceedings do appear to have been quite out of character when one takes into account the evidence found at Exhibits 7, 8, 10, and 11. It also seems to be a lapse of judgement. I cannot go as far as to say it represents an uninformed mistake, because I have not been provided with any evidence to explain why you would have set yourself on this path. You have admitted your responsibility by pleading guilty, but you have not explained to the court why you would do such a thing.

[16] Although you had the impending disciplinary proceedings hanging over your head, and you had to suffer through the tragic loss of your son, you have persevered in maintaining the high standard of performance that you have exhibited throughout your whole career. As is the common practice, you will have to reimburse to the Canadian Forces the amount of \$2, 832.50. I have also reviewed the SISIP Financial Counselling Programme at Exhibit 9 when determining a just sentence in this case.

[17] Sergeant McLean, please stand up. You made some very foolish decisions in early 2006. You admitted your error the first opportunity, when confronted by the military police. I hope you have learned from this. At first glance, I find the proposed sentence to be relatively lenient when I compare it to other fraud cases I have tried that involve amounts quite similar to the one in the present case. But after reviewing the totality of the evidence and the representations made by the prosecutor and your defence counsel, I have come to the conclusion that the proposed sentence would not bring the administration of justice into disrepute, and that the proposed sentence is in the public interest. Therefore, I agree with the joint submission of the prosecutor and of your defence counsel. This sentence, while giving the clear message that fraudulent claims will be punished, must also take into account the gravity of the offence and the previous character of the offender. I have also taken into consideration indirect consequences of the sentence.

[18] Sergeant McLean, I sentence you to a reprimand and a fine in the amount of \$1, 500. The fine shall be paid in monthly installments of \$150 commencing on the 1st day of June, 2008. If you are released from the Canadian Forces, the entire amount then outstanding shall become due and payable the day before your effective date of release from the Canadian Forces.

[19] The proceedings of this Standing Court Martial in respect of Sergeant McLean are terminated.

LIEUTENANT-COLONEL J-G. PERRON, M.J.

COUNSEL:

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