Citation: *Captain(N) D.H. Banks*,2004 CM 22

Docket: S200422

STANDING COURT MARTIAL
CANADA
QUÉBEC
ASTICOU CENTRE, GATINEAU

Date: 24 June 2004

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

HER MAJESTY THE QUEEN
v.
CAPTAIN(N) D.H. BANKS
(Accused)

SENTENCE
(Rendered Orally)

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[1] Captain(N) Banks, having accepted and recorded your plea of guilty, the court now finds you guilty of the charge on the charge sheet. The court is now going to explain the reasons for the sentence it will impose, and impose a sentence. But it will allow you and your escort to be seated with your counsel while it explains, and then the court will have you stand when it imposes the sentence, so please, break off now and sit with counsel.

[2] ACCUSED: Thank you, Your Honour.

[3] MILITARY JUDGE: The court would thank counsel for the evidence it was presented and the submissions that they made, which were very useful to the court. The court will, as is its practice, review the purposes of sentencing at a court martial because it believes it's pertinent in this case.

[4] The court must and does follow certain principles in determining what is an appropriate sentence. And these principles are applied, not only in courts martial, but also generally in criminal trials in Canada. They've been expressed in many ways, but, in essence, they include: protection of the public; punishment of the offender; deterrence, both general and specific; and reformation and rehabilitation.

[5] In the context of a court martial, the primary interest for the Canadian Forces is the maintenance or restoration of discipline. And discipline, of course, is a fundamental requirement for any military force and a prerequisite for operational efficiency. Discipline has been described as a willing and prompt obedience to lawful orders, and it has to be kept in mind that lawful orders may have a detrimental, or in some cases even fatal consequence for Canadian Forces members. Nevertheless, their prompt and willing compliance is of fundamental importance. Discipline, while a group quality or characteristic is, in its final analysis, founded on personal choice. It's a personal quality, self-discipline, and this is something the Canadian Forces develops, encourages, and tries to maintain in its members. This is done through training, through example, and through practice, so the compliance with lawful commands can be relied upon in stressful or critical situations that Canadian Forces members are put into. In essence, members of the Canadian Forces do dangerous tasks and operate dangerous equipment and must obey the rules. The heart of discipline is not unthinking action, but rather, conscious, immediate and automatic response developed through practice, but ultimately resting on personal choice.

[6] I've spoken of the principles of sentencing, and one of those is general deterrence. General deterrence is a principle that means, at its most fundamental level, that the sentence imposed should deter not only the offender from re-offending, but also others in similar situations from engaging, for whatever reasons, in the same prohibited conduct.

[7] The prosecution and the defence, in this case, have both submitted that general deterrence is the most important principle for the court to consider in this matter and should be the principal goal of any sentence imposed. And the court accepts that. QR&O 112.48 sets out the various considerations that the court must take into account in determining what is an appropriate sentence. These include the previous character of the offender, the gravity of the offence, and the direct and the indirect impact of any sentence. In addition, both the general law in Canada and the law that applies to the Canadian Forces requires that the sentence be the minimum sentence necessary to achieve the goals.

[8] The offence here is a breach of DAOD 6001-1, which is described on its face as an order that applies to officers and non-commissioned members of the Canadian Forces as well as a directive that applies to employees of the Department of National Defence. The particular circumstances of the breach in this case was the unauthorized use of Canadian Forces equipment on loan to you, Captain Banks(N); that is, a laptop computer, over a three month period. It was used to access material whose main focus was nudity or sexual acts. The computer contained more than 5,400 images of adults in scenes of nudity or involved in various sexual acts. The information and the evidence before the court is that this Canadian Forces laptop computer was used for this purpose at your home and also on business trips. And the court infers that, given that

you are a Captain(N) in the Canadian Forces and the testimony, those are Canadian Forces trips.

[9] This occurred during a time that was stressful for you, both professionally and personally. This unauthorized use was discovered when information technology support personnel, who were scanning the computer to try and detect a virus, discovered the material. The matter was referred by, it appears from his testimony, Major-General Hearn, to the National Investigation Service for investigation in September 2003. You spoke with Major-General Hearn and admitted your unauthorized use and offered to relinquish, at that time, your secondary duty appointment as Branch Advisor for the Logistics Branch.

[10] In October 2003, you were interviewed by NIS investigators and admitted your unauthorized use. In November 2003, a forensic computer analysis of the hard drive of the CF computer which had been on loan to you was completed. In February 2004, the charge before the court was laid by the National Investigation Service, and at that time Major-General Hearn, apparently, effectively accepted your offer and you were replaced as the Logistics Branch Advisor. In May 2004, a charge sheet in this matter was signed, your counsel advised the prosecution that you intended to plead guilty to the charge, and this court martial was convened. In June, there was, apparently, some publicity about this matter as is evidenced by Exhibit 7, and on the 23rd of June, 2004, you pleaded to the charge. That, then, is the nature of the offence.

[11] The evidence before the court also provides information about your previous character and your current circumstances, both of which the court must take into consideration. You've been a member of the Canadian Forces for more than 32 years, and all of that time in the Navy. You have a Bachelors of Business Administration from Acadia University and completed logistics training in 1974. You've had some rather unusual highlights in your career. The documents indicate that you are qualified as parachutist, and in addition, you seem to have served with HMCS HURON on both the east and the west coasts. You've attended the Canadian Forces Staff College and served in joint and combined headquarters. You attended the NATO Defence College in Rome in 1993, and you have been posted to Ottawa since 1998, and have been a Captain(N) since that date. You were also deployed during the 1990/'91 Gulf War, overseas.

[12] You are 52 years old and you are married. Your current income from the Canadian Forces is something in excess of $100,000 a year, gross, and you are currently the Director of Strategic Finance, and as I understand from Major-General Hearn's testimony, this also includes costing at National Defence Headquarters. Your performance throughout the 32 years has generally been excellent, and this comes through in the documentation in the obvious progress of your career and also the testimony of your current supervisor, Major-General Hearn.

[13] The court has had a close look at your two performance evaluation reports that have been presented to it. I would like to refer to some extracts. In regard to the 2001/2002 performance evaluation report, it says that under "potential at next higher rank,"

> **Captain(N) Banks is a capable manager and leader. His depth of professional knowledge and operational experience is constantly evident.**

And it also goes on to say:

> **As both officer and logistician, Captain(N) Banks has served the Navy with vigour and loyalty. He has dealt with the frustrations and potentials of changed management in the most positive of ways and worked diligently to serve as an example.**

[14] In the personnel evaluation report from 2002 and 2003, it is said, in your leadership assessment, that:

> **Captain(N) Banks is respected by his personnel. He leads his directorate in an atmosphere of trust where all were respected and heard.**

It further goes on to say, under "potential at the next higher rank":

> **Captain(N) Banks is a dean of naval logistics. He is highly respected for his knowledge and dedication.**

And concludes:

> **He has both the experience and the intellectual ability to be an effective flag officer.**

[15] So in summary, that is the information before the court on your previous character and service with the Canadian Forces.

[16] In regard to the future, the indication from Major-General Hearn is that you are doing well. There appears no evidence before the court of any other administrative or career action that might flow from this matter. And from all the information here it could be expected that you will continue to have excellent evaluation reports and you still have a number of years to serve in the Canadian Forces.

[17] The submissions of the prosecution, I will summarize briefly as relating to the nature of what is required for general deterrence. The prosecution has submitted that a fine in the amount of $1500 is the minimum that is required to serve the needs of general deterrence. He indicated the aggravating factors in this matter as your rank, the number of images that were downloaded, the period of time over which this occurred;

that is, approximately three months, and the fact that other people had to view the images in the analysis process.

[18] He identified the mitigating factors as your guilty plea, your acceptance of responsibility, and your cooperation with the police and others once the offence was discovered. He took pains to distinguish two cases which were provided; that of, *Major Conway* and *Commodore Lerhe*, and stressed that $200, which was the fine that was imposed in both of those matters, was not sufficient to meet the requirements of general deterrence. The prosecution also indicated, that in his view neither a reprimand nor a severe reprimand was required.

[19] Your counsel submitted that a $200 fine would be an appropriate minimum sentence, but if the court felt it could not accept that then a fine of no more than $500 would be the minimum sentence. Your counsel stressed that the number of pictures should not be considered an aggravating factor because, really, the issue here is unauthorized use and it was not before the court how many unauthorized uses there were that resulted in that number of images being on the computer; that is, there was no evidence before the court, in what was put before it, on that matter, and the court was not in a position to draw any inferences. He also submitted that the objective gravity of this offence was one that could be determined as being of the least serious nature, in part by the fact that DAOD 6001-1 indicated that unauthorized uses would normally be dealt with by administrative action. He also stressed that a civilian employee doing the same thing would face only administrative action and not a trial in this matter.

[20] In terms of mitigating factors, your counsel stressed the fact the unauthorized use was not done on duty, your exemplary service, as demonstrated by both the documents and the testimony of Major-General Hearn, your guilty plea, and in that regard and in mitigation he stressed the fact that it was an indication of remorse and a recognition of what he characterized as a monumental error in judgement, and also, that by pleading guilty, you saved the cost of a court martial; that is, the cost presumably of calling witnesses. He also argued that a mitigating factor was the delay. It appeared from the evidence in front of the court that, by November 2003, most of the information in the investigation had been obtained and it is not until now, June 2004, that the court martial is taking place. Your counsel also argued that the two cases of *Conway* and *Lerhe* were essentially of the same level of seriousness, and that was one of the reasons why a $200 fine was appropriate.

[21] The court has reviewed the precedents that have been provided; that is, in essence, the case of *Major Conway*, which is from 2000, and *Commodore Lerhe* from 2001. These both occurred under a previous policy which was referred to by your counsel, and at the time of these cases there was a policy which left no scope for non-work related but authorized use; that is, at that time there was an absolute ban on the use of laptop computers, which figured in both of these cases, for other than work related

items. Though, in that policy, there was still, in addition to that ban, another reference which said that laptops should not be used to view sexual materials in any form for non-work related use.

[22] The *Conway* case was a trial, and it was one where Major Conway was convicted of letting his son use the Canadian Forces Internet service provider for his son's own purposes. It led to the inadvertent downloading of pornographic images while his son was looking for games. And part of the evidence before the court was that Major Conway had not taken the time to get acquainted with and observe the rules.

[23] In the case of *Commodore Lerhe*, this was a guilty plea. And very simply, it was a situation where, as it was put before the court, Commodore Lerhe had, in essence, turned himself in. It was described by the military judge as an extreme gesture of integrity and honesty. In that particular case, the material that was downloaded was sexual images and text and this was done over a two-day period. There was, as has been indicated, extensive media coverage. Commodore Lerhe had been relieved of command approximately two months before the court martial occurred, and this had resulted in a financial loss to him of approximately $700 because of a loss of pay.

[24] The court's view of the objective seriousness of this matter is very much founded on the fact that it is a breach of something that is identified as an order generally applicable to Canadian Forces members, and that the breach has been committed by a senior officer.

[25] Your counsel dealt with the fact that this is something that would not be an offence if it was done by a civilian employee, even though it is contrary to directives that apply to civilian employees, and raised the example of a military and a civilian clerk working side by side at National Defence Headquarters. There are a number of differences between military and civilian workers. In the same context as your counsel raised, you would have a civilian clerk and a military clerk, both of whom were supposed to turn up for work at eight o'clock in the morning. The consequences for one of not turning up for work would be significantly different than it would be for the other. Equally, at the end of the working day, a civilian clerk may well end up, if they have to work late, being paid overtime while a military member won't. So the fact that the directives apply in a different way to civilian employees than military members, does not, in and of itself, indicate that this offence is not serious.

[26] It is true, and again your counsel has made the point, that there is no order that prohibits Canadian Forces members from viewing this kind of material privately. Indeed, it's quite clear that, at home, on one's own computer or on a business trip, if an individual brings their own computer, they can legitimately look at this material. It appears that the purpose of the DAOD 6001-1, is really two-fold: first, it

deals with the issue of resource responsibility; and secondly, it deals with what the military considers inappropriate use of its resources. One of the aspects of DAOD 6001-1, is that, in essence, CF resources should only be used for Canadian Forces purposes, and this is not, certainly, unique to something such as a laptop computer. In very much the same vein, the Canadian Forces probably has a large amount of china and cutlery being unused at various points in time, this cannot be borrowed and used for personal purposes.

[27] The old, and by the old I mean the pre-March 2003 DAOD, took very much a similar view to laptop computers as it would, perhaps, to knives and forks and plates; that was, it could only be used for official military purposes. In March 2003, there was a revision, and the revised view permitted the use of DND/CF computers that were on loan to individuals for other than official purposes. These non-official uses were characterized as authorized uses and they included things such as communicating with family and friends for other than official purposes, conducting routine banking transactions, pre-authorized union activity, though it was also required that all such authorized uses had to be of reasonable duration and frequency.

[28] There was then a description of something called unauthorized use, and this was defined as something that was not an official or authorized or a prohibited use, all of which had already been defined. And prohibited use was a use which contravenes federal or provincial statutes or regulations or could reasonably harm others or was an intentional action which jeopardized the integrity of DND computers or which was otherwise unlawful.

[29] So having taken all of those out of the equation what was left was unauthorized use. And unauthorized use, as I've indicated, was generally defined as not falling into any of the other definitions. But specific examples were provided and they seem to focus on four areas. The first was personal use of DND and CF computers which interfered or could interfere with official use, so very much a resource issue again. The second area was personal use of those computers for profit; that is, running a business. The third was the use contrary to certain specific directives, and this is the one that would lead, eventually, to the issue of what is before the court, because listed in here are uses which apparently have the potential to be contrary to other policies and amongst those is, "such as accessing or distributing, for personal reasons, any material whose main focus is pornography, nudity, sexual acts or the incitement of hatred." And also, "use which would reflect discredit upon DND and the Canadian Forces."

[30] The unauthorized accessing of any material whose main focus is nudity or sexual acts is, in fact, one of the most clearly described and least subjective and interpretive of all of the unauthorized uses that are listed. So in short, having considered the fact that the other cases were cases which occurred under the former DAOD, the court is of the view that the revised DAOD appears to be one which

incorporates more flexibility than the previous DAOD, but still remains clear as to what is contrary to its provisions.

[31] Your counsel also submitted that the fact that the DAOD indicated that unauthorized use should normally be something which leads to administrative action rather than disciplinary action, is one of the factors which would make this a much less serious matter; that is, he invites the court to infer that if disciplinary action is taken in such a situation, this must still be the least serious type of offence. The court would indicate it can't draw that inference, but at the same time neither will it draw the inference that the fact that disciplinary action has been taken would lead to the conclusion that this is the most serious of the type of unauthorized uses that could be envisioned. So the court would neither accept the submission of counsel, nor would it infer the contrary.

[32] In terms of objective seriousness, very simply, this is a section 129 offence. The maximum punishment is dismissal with disgrace or two years—less than two-years' imprisonment. It is one of the lower maximums that is found in the Code of Service Discipline. Other offences, such as stealing or stealing while entrusted, have maximums of seven and fourteen years. So objectively, the court accepts, but for different reasons than submitted, that this is a less serious offence.

[33] In terms of the circumstances, the court considers as mitigating factors: first of all, your cooperation; secondly, your guilty plea; and in that, it would also include your testimony here today of your acceptance of responsibility for your actions. The court would indicate that it is that acceptance of responsibility which is important, rather than the fact that no trial is necessary. Clearly, inherent in the acceptance of responsibility in a guilty plea is that no trial would follow, so it is not the saving of money which is the mitigating factor from the perspective of the court, it is the plea of guilty and the acceptance of responsibility.

[34] The court has accepted that this is out of character for you, given the fact that you have 32 years of good service and given the information it has on the nature of that service. And finally, the court accepts that the circumstances in which this occurred have now changed; that is, in essence, the stresses in your job have been reduced because you are no longer the Branch Advisor, and also your stresses have been reduced by the actions you've taken.

[35] However, the court has also taken into account some aggravating factors. And the first one is the, essentially, length of time and the number of images. It is clear, although the court does not know, essentially, how often the unauthorized use occurred, that the length of time and the number of images itself can lead to the inference of repetitiveness in this matter, and the court does draw that inference. Secondly, it is, from the court's point of view, an aggravating factor that this was committed by an

officer of a senior rank, who knowingly disregarded an order applicable to him. In very much a reverse of the credit which you received on your personnel evaluation forms, the credit which goes for leadership has a counterpart; which is, the more senior the person, the greater the responsibility for ensuring orders are followed and for setting an example, and the greater the responsibility and the impact if you choose not to follow them yourself. And that, indeed, seems to be the situation which existed in the case of *Commodore Lerhe*, where he ran into a very direct conflict between the fact that he was being required to enforce an order that he wasn't following himself.

[36] There are two other issues that I want to mention. One is something that was raised by the prosecution, was the fact that other people; that is, the computer people, were exposed to what was seen and what was on the computer in the process of checking it for viruses and then checking out the directories. The court would indicated it cannot infer that this necessarily had any negative effect on them. There is no evidence before the court that it did, and so the court will not draw that inference and nor is it a factor. The final issue is one that your counsel raised; which is, the one of delay. And the court would indicate this matter has taken some time, and as with every other case, it would be preferable that every resource be devoted to completing a case in the shortest period of time, that neither investigators, nor prosecutors, nor defence counsel, nor judges ever took vacations and that there were no conflicting priorities.

[37] However, that's not reality, and there is no information before the court that there was any particular part of this process that dragged. In this case, on the evidence before the court, the adverse impact due to the passage of time has been minimal. Before the charge was laid, there was no evidence of the impact on you personally. When the charge was laid, certainly, the information is that you were removed from your position as Branch Advisor because it was recognized at that time that you should no longer stay as Branch Advisor. But this was something that you, yourself, had indicated was appropriate, and also it is something that did not occur until February of this year.

[38] In terms of the publicity that proceeded this matter, it appears that that has occurred in the past month; that is, immediately before trial, rather than something which occurred at the time of laying of the charge or before that time. So the court has concluded that, really, the impact appears to be principally the issue of the Branch Advisor position, and this was something that you identified as one of the stresses that you were under at the time, and also something that you, yourself identified as being appropriate, to give up in this particular situation. So the court has not looked at the delay as causing a particular hardship in this case.

[39] With both the *Conway* and the *Lerhe* case, the court would say it considers those less serious than this matter. In the case of *Conway*, because of the indication there was a lack of deliberation; that is, the court apparently accepted that

Major Conway didn't know, even though he ought to have known, about the order and the policy that applied to him. And in the *Lerhe* case, the scale is much less. The court would also indicate that, in the *Lerhe* case, there was also a joint submission on sentence which imposes additional considerations on the court.

[40] Your counsel has described this as a monumental error in judgement, and the court would agree. But it's a monumental error in judgement with consequences; that is, in the course of your monumental error in judgement, you committed an offence. And it's not unusual in court martials to find people committing errors in judgement and ending up committing offences. The court also would accept this characterization, because this is really a situation which would be so easy to avoid. As has been pointed out, it's really a matter of buying and using your own laptop computer, and if that happens no offence is committed.

[41] The court accepts that specific deterrence is not a requirement here, but it is concerned about the general deterrence issue. It seems clear that the cases in *Conway* and *Lerhe* and the sentences have not resulted in general deterrence, and that is the situation even when the case of Commodore Lerhe received extensive publicity when it occurred in the spring of 2002. One might think that the certainty of discovery might be a disincentive or serve as a deterrence in this matter. Certainly, the court has seen a number of cases where civilian and military police experts appear to be able to identify everything that anyone has been able to look at or download on their computer at any time, no matter when or how there's been an attempt to change that. And certainly, with material and with computers that are on loan, it would seem inevitable that they are going back some time and they will be accessible to such analysis. However, that does not seem to have been sufficient for general deterrence.

[42] So the court is of the view that general deterrence requires a higher punishment than a $200 fine. The court would also say that it has spent some time considering whether or not a reprimand is required, given your rank. It has accepted that that's not the case in this situation; that is, that the minimum punishment that could serve the purposes of general deterrence, in particular, may well be within the range of a fine rather than a reprimand. And that would also be consistent with the proportionality issue; that is, both Major Conway and Commodore Lerhe received fines, and so it may well be that a larger fine would be something that would serve the requirements of general deterrence.

[43] Captain(N) Banks, please stand. The court sentences you to a fine in the amount of $1,200. Now, I will ask your counsel whether or not there is any requirement to give you time to pay the fine, and I would allow you sit down and consult with him so he's in a position to advise the court in that matter. So please, be seated.

COLONEL K.S. CARTER, M.J.

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