



## COURT MARTIAL

**Citation:** *R. v. Hamelin*, 2017 CM 4005

**Date:** 20170317

**Docket:** 201638

Standing Court Martial

Asticou Centre  
Gatineau, Quebec, Canada

**Between:**

**Her Majesty the Queen**

- and -

**Major T.N.A. Hamelin, Offender**

**Before:** Commander J.B.M. Pelletier, M.J.

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### REASONS FOR SENTENCE

(Orally)

#### Introduction

[1] Major Hamelin, having accepted and recorded your guilty plea in respect of charge one on the charge sheet, the Court now finds you guilty of that charge under section 129 of the *National Defence Act (NDA)* for the unauthorized use of a Department of National Defence (DND) computer system to access material whose main focus is pornography, nudity or sexual acts.

#### *A joint submission is being proposed*

[2] I now need to impose the sentence. This is a case where a joint submission is made to the court. Both prosecution and defence counsel recommended that I impose a sentence composed of the punishments of a reprimand and a fine of \$1800.

[3] This recommendation by counsel severely limits my discretion in the determination of an appropriate sentence. I am not obliged to go along with what is

being proposed. However, as any other trial judge, I may depart from a joint submission only if the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest, as promulgated by the Supreme Court of Canada in *R. v. Anthony-Cook*, 2016 SCC 43.

[4] While it is my duty to assess the acceptability of the joint submission being made, the threshold to depart from it is high as joint submissions respond to important public interest considerations. The prosecution agrees to recommend a sentence that the accused is prepared to accept, avoiding the stress of a trial and providing an opportunity for offenders who are remorseful to begin making amends. The benefits of joint submissions extend to victims, witnesses, the prosecution and the administration of justice generally; by saving time, resources and expenses which can be channelled into other matters. The most important gain to all participants is the certainty a joint submission brings, of course, to the accused, but also to the prosecution who wishes to obtain what a military prosecutor concludes is an appropriate resolution of the case in the public interest.

[5] Yet, certainty of outcome is not the ultimate goal of the sentencing process. I must also keep in mind the disciplinary purpose of the Code of Service Discipline and military tribunals in performing the sentencing function attributed to me as military judge. As noted by the Supreme Court of Canada in *R. v. Généreux*, [1992] 1 S.C.R. 259, the Code of Service Discipline is primarily concerned with maintaining discipline and integrity in the Canadian Armed Forces (CAF), but serves a public function as well by punishing specific conduct which threatens public order and welfare. Courts martial allow the military to enforce internal discipline effectively and efficiently. Punishment is the ultimate outcome once a breach of the Code of Service Discipline has been recognized following trial or a guilty plea. The sentencing takes place on a military establishment, in public, in the presence of members of the offender's unit.

[6] The imposition of a sentence at a court martial, therefore, performs a disciplinary function. Article 112.48 of the *Queen's Regulations and Orders for the Canadian Forces* (QR&O) provides that a military judge shall impose a sentence commensurate with the gravity of the offence and the previous character of the offender. When a joint submission is made, the military judge imposing punishment should ensure, at a minimum, that the circumstances of the offence, the offender and the joint submission are not only considered but also adequately laid out in the sentencing decision. This requirement of sentencing at courts martial does not detract from the guidance provided by the Supreme Court on joint submissions, as laid out at paragraph 54 of *R. v. Anthony-Cook*, *supra*.

### **Matters considered**

[7] In this case, the prosecutor read a statement of circumstances and provided the documents required by QR&O 112.51. The statement of circumstances refers to a confession made by Major Hamelin to investigators at the first opportunity and provides

details as to his personal circumstances at the time. The defence did not provide any further evidence in mitigation.

[8] In addition to this evidence, the Court also benefitted from the submissions of counsel that support their joint position on sentence on the basis of the facts and considerations relevant to this case, as well as by comparison with judicial precedents in other cases. These submissions and the evidence allow me to be sufficiently informed to meet the requirement to consider any indirect consequence of the sentence, and impose punishment adapted to the individual offender and the offence committed.

### ***The offender***

[9] Major Hamelin is a 30-year-old construction engineering officer who was, at the time of the offence, employed at the Canadian Forces Real Property Operations Group in Ottawa, having just been posted from Gagetown on promotion to his current rank. He joined the Regular Force in July 2003, attended the Royal Military College of Canada and on completion of training as a logistician he was posted to Bagotville. He obtained an occupational transfer in January 2009 and worked as a construction engineer in Borden and Gagetown, at the Canadian Forces School of Military Engineering. He has a spouse and two young children.

[10] Major Hamelin is still serving at the Canadian Forces Real Property Operations Group. It has been reported to the Court that his performance with that unit since the time of the offence has been entirely satisfactory. He has not been the subject of adverse administrative action as a result of the offence and none is foreseen as the leadership considers that he has rehabilitated himself.

### ***The offence***

[11] To assess the acceptability of the joint submission, the Court has considered the objective seriousness of the offence, as illustrated by the maximum punishment that can be imposed. Offences under section 129 of the *NDA* are punishable by dismissal with disgrace from Her Majesty's service.

[12] The facts surrounding the commission of the offence in this case are disclosed in the statement of circumstances read by the prosecutor and formally admitted as accurate by Major Hamelin. These circumstances can be summarized as follows:

- (a) In June 2015, a civilian information technician (IT) Security Investigator informed the Canadian Forces National Investigation Service (CFNIS) of suspicious activity on Major Hamelin's user log. A subsequent analysis of his hard drive revealed that 90 files containing pornographic images were either downloaded or viewed between 8 and 18 June 2015, then deleted;

- (b) During an interview with CFNIS investigators on 11 February 2016, Major Hamelin admitted to having viewed the images in question at his work. He said he was surprised to have been granted access to pornographic sites despite firewalls. He was aware that Defence Administrative Orders and Directives prohibit the use of DND computers and networks to access pornography;
- (c) Despite knowing his actions were wrong, Major Hamelin persisted in continuing to test the limits of the firewalls by accessing and downloading pornographic images for nearly two weeks. He told investigators that he accepted the risk and found there was a “thrill” in not being caught.

### ***Aggravating Factors***

[13] The circumstances of the offence in this case reveal, in my view, a significant lack of respect on the part of Major Hamelin for his functions as a senior officer and for his obligation to comply with orders pertaining to the protection of the security of DND computers and information systems.

[14] Specifically, I find aggravating the fact that the offence was committed at work, during a time when Major Hamelin should have been performing official duties. This constitutes a breach of the trust granted to him as a senior officer. The offence involved 90 pornographic images accessed or downloaded over a period of several days, not a one-time weakness. Finally, and importantly, the offence reveals a conscious violation of an important order relating to computer security, an issue that should be taken very seriously by DND and CAF personnel.

### ***Mitigating factors***

[15] The Court also considered the following as mitigating factors arising either from the circumstances of the offences or the offender in this case:

- (a) First and foremost, Major Hamelin’s guilty plea, which I consider as a clear indication that the offender is taking full responsibility for his actions, in this public trial in the presence of members of the military community. The plea was communicated at the first occasion.
- (b) Second, the significant period of time that has passed since the commission of the offence. During that period of 18 months, the offender has performed adequately despite having this matter hanging over his head, having collaborated with authorities and admitted his responsibility at the earliest opportunity, 13 months ago.
- (c) Finally, the fact that Major Hamelin has no criminal or disciplinary record. The behaviour displayed in the offence appears to be out of

character for him, given that he has had a successful career before and since. I have little doubt he has the potential to continue making a positive contribution to Canadian society in the future.

***Objectives of sentencing to be emphasized in this case***

[16] The circumstances of this case require that the focus be placed on the objectives of denunciation and general deterrence in sentencing the offender. At the same time, any sentence imposed should not compromise the continuing rehabilitation of Major Hamelin.

***Assessing the joint submission***

[17] The first thing I need to do is to assess the joint submission and determine if it is acceptable. The prosecutor and defence counsel both recommended that this Court impose the punishments of a reprimand and a fine of \$1800 to meet justice requirements. I may depart from the joint submission only if I consider that this proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest.

[18] As a military judge, the issue for me to assess is not whether I like the sentence being jointly proposed or whether I would have come up with something better. Indeed, the threshold for departing from joint submissions is very high and any opinion I might have on an appropriate sentence is not sufficient for me to reject the joint submission that was made.

[19] The Supreme Court of Canada has required such a high threshold as it is necessary to allow all of the benefits of joint submissions to be obtained. Prosecution and defence counsel are well placed to arrive at a joint submission that reflects the interests of both the public and the accused. They are highly knowledgeable about the circumstances of the offender and the offence, as with the strengths and weaknesses of their respective positions. The prosecutor who proposes the sentence is in contact with the chain of command. He or she is aware of the needs of the military and civilian communities and is charged with representing those interests in seeing that justice be done. Defence counsel is required to act in the accused's best interests, including ensuring that the accused's plea is voluntary and informed. Both counsel are professionally and ethically bound not to mislead the court. In short, they are entirely capable of arriving at resolutions that are fair and consistent with the public interest.

[20] In determining whether a jointly proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest, I must ask myself whether, despite the public interest considerations that support imposing it, the joint submission is so markedly out of line with the expectations of reasonable persons aware of the circumstances of the case that they would view it as a breakdown in the proper functioning of the military justice system. Indeed, I have to

avoid rendering a decision that causes an informed and reasonable public, including members of the CAF, to lose confidence in the institution of the courts.

[21] I do believe that a reasonable person aware of the circumstances of this case would expect that the offender, a senior officer, would receive a sentence composed of punishments that both express disapprobation for the failure in discipline and breach of trust involved and have a personal impact on the offender. A sentence composed of a reprimand and a fine is aligned with these expectations.

[22] Considering all of these factors, as well as the circumstances of the offence and of the offender, the applicable sentencing principles and the aggravating and mitigating factors mentioned previously, I am unable to conclude that the sentence jointly proposed by counsel would bring the administration of justice into disrepute or would otherwise be contrary to the public interest. The Court must, therefore, accept it.

[23] Under section 145(2) of the *NDA*, the terms of payment of a fine are in the discretion of the service tribunal that imposes it. At the sentencing hearing, the prosecution did not object to the request made by defence that the fine be payable by instalments of \$300 per month.

[24] Major Hamelin, the circumstances of the charge you pleaded guilty to reveal a very bad choice you made to disregard orders applicable to the use of DND computer systems. I do accept that this episode reflects a mistake on your part, for which you have been held accountable before the military justice system. I understand your rehabilitation is well underway and that you can look forward to many more years of positive contribution to the CAF and indeed Canadian society in any capacity.

**FOR THESE REASONS, THE COURT:**

[25] **SENTENCES** you to a reprimand and a fine of \$1800 payable in 6 monthly instalments of \$300, commencing no later than 15 April 2017. In the event you are released from the CAF for any reason before the fine is paid in full, then any outstanding unpaid balance will be due the day prior to your release.

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**Counsel:**

The Director of Military Prosecutions as represented by Major M. Pecknold and Captain L.L. Scantlebury

Major A.H. Bolik, Defence Counsel Services, Counsel for Major Hamelin