



## COURT MARTIAL

**Citation:** *R. v. Hogarth*, 2019 CM 4008

**Date:** 20190429

**Docket:** 201854

Standing Court Martial

Halifax Courtroom Suite 505  
Halifax, Nova Scotia, Canada

**Between:**

**Her Majesty the Queen**

- and -

**Master Corporal R.A. Hogarth, Offender**

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

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### REASONS FOR SENTENCE

(Orally)

#### Introduction

[1] Master Corporal Hogarth, having accepted and recorded your plea of guilty in respect of the only remaining charge on the charge sheet, the Court now finds you guilty of that charge under section 114 of the *National Defence Act (NDA)*.

[2] However, this is a special finding of guilty under section 138 of the *NDA* in that Master Corporal Hogarth is found guilty of stealing a gift card.

[3] Indeed, from counsel submissions on the charge and the Statement of Circumstances, the facts reveal and Master Corporal Hogarth admits that, while employed as a postmaster at the Fleet Mail Office (FMO) Halifax, he stole a gift card that he found in an envelope addressed to Mr Philip Selig, showing a return address. The envelope was not taken from a mailbag. It had previously been ripped open and was on the ground in a smoking area near the FMO. Hence, the facts proven in respect

of the offence differ materially from the facts alleged in the statement of both the offence and the particulars of the charge sheet. These facts are, however, sufficient to establish the commission of the offence of stealing. Essentially, the offender is found guilty of stealing, but the aggravating circumstances of stealing while entrusted, attracting the higher punishment of imprisonment for a term not exceeding fourteen years, are not to be considered as part of the particulars and the statement of the offence. As provided in *Queen's Regulations and Orders for the Canadian Forces (QR&O)* article 112.25, the prosecution has informed the court that it concurs in the acceptance of the plea of guilty based on those facts.

**A joint submission is being proposed**

[4] 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 a reprimand and a fine in the amount of \$1500.

[5] This recommendation of counsel severely limits my discretion in the determination of an appropriate sentence. 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. This is the test promulgated by the Supreme Court of Canada in *R. v. Anthony-Cook*, 2016 SCC 43.

[6] Indeed, the threshold to depart from the joint submission being made 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 and expenses of a trial and allowing efforts to be channelled into other matters. Furthermore, offenders who are remorseful may take advantage of a guilty plea to begin making amends. The most important benefit of joint submissions is the certainty it brings to all participants in the administration of justice.

[7] Yet, even if certainty of outcome is important for the parties, it 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 recognized by the Supreme Court, 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. It is the only opportunity for the Court to deal with the disciplinary requirements brought about by the conduct of the offender, on a military establishment, in public and in the presence of members of the offender's unit.

[8] The imposition of a sentence at court martial proceedings, therefore, performs an important disciplinary function, making this process different from the sentencing usually performed in civilian criminal justice courts. Even 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 to an extent that may not always be necessary in other courts.

[9] The fundamental principle of sentencing found at section 203.2 of the *NDA* provides that a military judge shall impose a sentence commensurate with the gravity of the offence and the degree of responsibility of the offender.

### **Matters considered**

[10] In this case, the prosecutor read a Statement of Circumstances which was entered in evidence as an exhibit, along with other documents provided by the prosecution as required at QR&O article 112.51.

[11] Defence counsel read on the record and entered as exhibit a Joint Statement of Facts highlighting mitigating evidence on behalf of Master Corporal Hogarth, consisting of character evidence of three former supervisors as to the job performance and potential of the offender. The last paragraph of that document includes a statement of remorse and an apology from Master Corporal Hogarth to the two persons most directly affected by his actions.

[12] In addition to this evidence, the Court also benefitted from the submissions of counsel that support their position on sentence on the basis of the facts and considerations relevant to this case, as well as by comparison with judicial precedents. I note that none of the cases discussed dealt precisely with stealing by a member of a Canadian Forces Postal Unit or a postal worker in the workplace and all of the cases submitted by the prosecution were the result of guilty pleas and joint submissions, therefore of limited jurisprudential value. That said, the case of *R. v. Payne*, 2014 CM 1017 does include some interesting remarks about the trust required of medical technicians in the context of the theft of a small quantity of medication. Defence counsel also submitted a number of precedents with sentences in the lower range of gravity for the offence. Overall, I am confident I was offered a good idea of a range of punishment applicable to cases of stealing. I am also confident that the submissions of counsel and the evidence allow me to consider and apply the purposes and principles of sentencing to the circumstances of both the individual offender and the offence committed.

### **The offender and the offence**

[13] Master Corporal Hogarth is a 36-year-old postal clerk. He joined the Canadian Armed Forces (CAF) in the infantry and served as rifleman until joining the postal clerk occupation in 2009. After training in that occupation, he served for just over 5 years in Trenton and has been posted to Halifax in 2015. In the course of that posting, he served for 35 days in Kuwait in 2017. He is in a common law relationship and has two sons.

[14] 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 Master Corporal Hogarth. These circumstances can be summarized as follows:

- (a) On 14 August 2017, Master Corporal Hogarth was employed as the postmaster in the FMO facilities on the dockyard, Halifax, Nova Scotia. As such, he was supervising the four postal clerks working that day and was in charge of the general operations of the office.
- (b) At some point on or about 14 August 2017, he found an envelope on the ground, in the smoking area, near the FMO. The envelope was wet and had previously been ripped open. The envelope displayed an addressee and a return address, contained a birthday card and a single gift card for a photography store in Dartmouth called *Henry's*.
- (c) This envelope was addressed to Mr Philip Selig and was posted by his father, Mr Lawrence Selig, a Department of National Defence (DND) employee, in the dockyard Rainbow Gate mailbox. When posted, the envelope contained other gift cards.
- (d) Master Corporal Hogarth took the gift card and discarded the birthday card and the envelope. He did not inquire about the owner of the envelope or its addressee.
- (e) On 1 September 2017, Master Corporal Hogarth went to *Henry's* and redeemed the gift card that turned out to be worth \$200 to purchase a drone for his son. When asked to provide his name and phone number, Master Corporal Hogarth provided a false name and a false phone number.
- (f) Mr Selig initially had to launch his own investigation to understand why his son had not received his birthday card. He then had to take part in the investigation that Canada Post was leading. When the Canada Post investigation was passed on to the Halifax Regional Police Service, he again had to take time to participate in it. He again gave more of his time in preparation for this trial.
- (g) Finally, Mr Selig was disturbed that he could not trust the safety of a mailbox on DND property. He lost trust in the Canadian Armed Forces' Postal Service and will never use a mailbox on the base again.

**Aggravating factors**

[15] This case is peculiar in terms of aggravating factors as the special finding I am compelled to make on the basis of what the offender was prepared to admit with the concurrence of the prosecutor was that he was not entrusted with the thing stolen. I cannot, therefore, sentence him as if he was so entrusted. I cannot and will not speculate

as to whether the enveloped was opened by another person and discarded on the ground or whether Master Corporal Hogarth may have had more involvement in the matter than he was prepared to admit. I have to conclude from the prosecution's concurrence that all that could be proven in this case was what was admitted.

[16] This does not mean, however, that the position occupied by the offender at the time he committed the offence is irrelevant in assessing the gravity of the act of stealing that he admits committing. With respect, I disagree with the defence's submission to the effect that what is before the court is a very minor case of theft. I believe to the contrary that it is a significant offence committed by a person who, by virtue of his position as postmaster on 14 August 2017, should have known how wrong it was to do what he did, namely taking an envelope found on the ground in the immediate vicinity of the post office, showing all of the signs of enveloped having been mailed or destined to be mailed, removing and keeping the gift card it contained, while discarding the birthday card accompanying it. I do agree with defence counsel that any citizen should have known it was wrong to dispose of an envelope and its content in that fashion, but I do believe that for a postal clerk to do the same thing, as a member of the very occupation whose *raison d'être* is the successful delivery of mail, is much worse. That is the very definition of an aggravating factor.

[17] This important aggravating factor pertaining to the position and occupation of the offender at the time of the offence is also compounded by his age and years of experience as a member of the CAF at the time. A 34-year-old master corporal at the time is indeed expected, when at work, to take into consideration his role in the organization and the broader impact of his actions. The final aggravating factor I consider is the impact and potential impacts of Master Corporal Hogarth's actions on the confidence that the public, including members of the CAF and their family, must have and maintain in the CAF Postal Service.

### **Mitigating factors**

[18] The Court also agrees with the representations of counsel as to significant mitigating factors in this case, including the following:

- (a) first and foremost, Master Corporal Hogarth's guilty plea, which avoided the time, energy and costs of running a full trial, demonstrating an offender who is taking full responsibility for his actions, in this public trial in the presence of members of the postal services here in Halifax.
- (b) second, the fact that Master Corporal Hogarth expressed remorse and apologized in a statement to the Court. I understand that Master Corporal Hogarth will compensate Mr Lawrence Selig for lost time from work and associated expenses incurred when Mr Selig was required to contribute to the investigations related to the missing item of mail.

- (c) third, the fact that Master Corporal Hogarth has no criminal or relevant disciplinary record, his conduct sheet showing a conviction in the course of basic infantry training that is in no way related to the offence currently before the court.
- (d) Finally, Master Corporal Hogarth's past performance and potential as evidenced by comments offered by three senior non-commissioned members who supervised him in the past. These show that he can make a positive contribution to society in the future, within and outside of the CAF.

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

[19] I agree with counsel that the circumstances of this case require that the focus be placed on the objectives of denunciation and deterrence in sentencing the offender. That said, as highlighted by defence counsel, any sentence imposed should not compromise the rehabilitation of Master Corporal Hogarth.

**Assessing the joint submission**

[20] 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 114 of the *NDA* while not entrusted are punishable by imprisonment for a term not exceeding seven years or less punishment.

[21] The submissions from counsel contained brief references to jurisprudential precedents, which assist me in assessing the joint submission and determine if it is acceptable. I may depart from the joint submission of counsel for a reprimand and a fine in the amount of \$1500 only if I consider that this proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest.

[22] The issue for me to assess as military judge is not whether I like the sentence being jointly proposed or whether I would have come up with something better. Any opinion I might have on an appropriate sentence is not sufficient to reject the joint submission that was made to me.

[23] The Supreme Court 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 joint submissions that reflect 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 the community's interest 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 bound professionally

and ethically not to mislead the Court. In short, they are entirely capable of arriving at resolutions that are fair and consistent with the public interest.

[24] 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 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.

[25] I do believe that a reasonable person aware of the circumstances of this case would expect that the offender, guilty of stealing from an envelope apparently destined for the mail, would receive a sentence that both expresses disapprobation for the failure in discipline involved and has a personal impact. In my view, a reprimand and fine of the amount proposed is aligned with these expectations.

[26] Considering 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. I must, therefore, accept it.

[27] Under subsection 145(2) of the *NDA*, the terms of payment of a fine are at the discretion of the service tribunal that imposes it. At the sentencing hearing, the prosecution did not object to the request made by defence as to payment of the fine in six monthly instalments of \$250.

[28] Master Corporal Hogarth, I believe the circumstances of the charge you pleaded guilty to reveal a very troubling behaviour that is unacceptable for a postal clerk in the CAF. I have a hard time imagining someone who could be displeased at receiving a birthday card and gift from a father. By your actions, you have deprived someone of that opportunity. More importantly, you have given reasons to a number of people to reconsider the trust they have placed in the part of the Canadian postal system operated by the CAF. I have witnessed, in my 33 years of service, outstanding performances from military postal clerks to deliver mail to its destination, regardless of any moves between ships, units, coasts and continents. I believe those members of the chain of command who say that you have made a positive contribution in your job and your community in the past. If you are allowed to continue in your career after these proceedings have closed, you may well be able to contribute further and be part of the best the CAF Postal Service can offer. It is up to you now to rebuild the trust that was lost as a result of your actions and achieve your full potential while respecting the law.

**FOR THESE REASONS, THE COURT:**

[29] **SENTENCES** you to a reprimand and a fine in the amount of \$1500 payable in six monthly instalments of \$250, the first being payable no later than 15 May 2019, the following five payments on or before the 15th of each month of June, July, August,

September and October 2019. 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.

[30] **ORDERS** that you pay Mr Lawrence Selig the sum of \$200 as restitution for the lost gift card under the authority granted to me by section 203.9 of the *NDA*.

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**Counsel:**

The Director of Military Prosecutions as represented by Major M.L.P.P. Germain

Major A. Gélinas-Proulx, Defence Counsel Services, Counsel for Master Corporal R.A. Hogarth