



## COURT MARTIAL

**Citation:** *R. v. Mark*, 2019 CM 2012

**Date:** 20190529

**Docket:** 201903

Standing Court Martial

Asticou Courtroom  
Gatineau, Quebec, Canada

**Between:**

**Her Majesty the Queen**

- and -

**Major A.T. Mark, Offender**

**Before:** Commander S.M. Sukstorf, M.J.

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### **REASONS FOR SENTENCE**

(Orally)

#### **Introduction**

[1] Major Mark was found guilty of one offence under section 129 of the *National Defence Act (NDA)*; that is to say, conduct to the prejudice of good order and discipline. The particulars of the charge read as follows:

“Section 129 of the  
*National Defence Act*

**CONDUCT TO THE PREJUDICE OF  
GOOD ORDER AND DISCIPLINE**

*Particulars:* In that he, on or about 9 October 2018, at Camp Érables, Erbil, Iraq, struck Master Corporal J. Morin on the buttock with his hand.”

[2] The Statement of Circumstances filed in court reads as follows:

**“STATEMENT OF CIRCUMSTANCES**

1. At all relevant times, Major A.T. Mark was a member of the Canadian Armed Forces, Regular Force. He was a member of 1 Dental Unit and deployed to Role 2 Medical Facility in Erbil, Iraq as a part of Operation IMPACT.

2. On Tuesday 9 October 2018, Major Mark participated in a physical training session led by a Personnel Support Program (PSP) instructor with approximately twenty other Canadian Forces members.

3. At the end of the session, the participants were instructed to gather in a circle facing one another and to assume the push-up position. Each participant was to take their turn running around the circle and then to re-assume the push-up position once back in their original location.

4. As Major Mark took his turn to run around the circle, he passed Master Corporal Morin in the push-up position. As he did so, he leaned in and slapped her on the buttocks with his hand. The slap was observed by Master Warrant Officer Walters.

5. Master Corporal Morin asked Major Mark why he had slapped her on the buttocks. He replied, “because I want you to stay awake,” or words to that effect.

6. Following the incident, Master Corporal Morin stated that she felt uncomfortable around Major Mark because she was embarrassed by the incident.

7. Shortly after the incident occurred, immediately following the physical training session, and without prompting, Major Mark apologized to Master Corporal Morin. He accepts full responsibility for his actions.”

**Joint submission**

[3] In a joint submission, both the prosecution and defence counsel recommend that I impose a sentence of a fine in the amount of \$2,000. In *R. v. Anthony-Cook*, 2016 SCC 43, the Supreme Court of Canada clarified that a trial judge must impose the sentence proposed in a joint submission “unless the proposed sentence would bring the administration of justice into disrepute, or is otherwise not in the public interest.” By entering into a plea bargain, the constitutional right to be presumed innocent is given up and this should never be done lightly. In fact, by virtue of the oath taken by all service members, this right is one we all stand to protect.

### **Evidence**

[4] In this case, the prosecutor read the Statement of Circumstances and provided all those documents required under the *Queen's Regulations and Orders for the Canadian Forces*. The Statement of Circumstances was introduced on consent to inform the Court of the context of the incident that led to the charge before the court. Further, the Court benefitted from counsel's submissions to support their joint submission on sentence, where they highlighted relevant facts and considerations. The Court also heard from Major Mark. The prosecution and defence counsel also provided the Court with judicial precedents for comparison.

### **The offender**

[5] Major Mark is 43 years old. He enrolled in the Canadian Armed Forces (CAF) on 20 August 1998 as a dental student. He was promoted to his current rank on 1 December 2011. He has served his country well for over twenty years and has no conduct sheet or criminal record for the Court to consider. He has done two operational tours and is the recipient of two commendations. He is married with a very supportive wife and they have four children.

### **The victim**

[6] It takes significant courage for a victim or a complainant to come forward to his or her chain of command to report conduct that has made him or her feel uncomfortable, and the Court recognizes this. It is absolutely imperative that victims feel comfortable doing so, and if we can stop this type of conduct early, in its infancy, then we can all move forward confidently and together.

[7] The prosecution advised the Court that he had consulted with the victim and advised her of her right to provide a victim impact statement. He stated that she was not interested in attending the court martial or providing a formal statement.

### **The purpose, objectives and principles of sentencing**

[8] The fundamental purpose of sentencing in a court martial is to promote the operational effectiveness of the CAF by contributing to the maintenance of discipline, efficiency and moral, and to contribute to respect for the law and maintenance of a just, peaceful and safe society. The fundamental purpose is achieved by imposing sanctions that have one of more objectives as set out in the *NDA* at subsection 203.1(2). The prosecution has emphasized that in negotiations, he and defence counsel closely considered the objectives set out therein. On the facts of this case, both prosecution and defence submit the objectives they considered most important are general and specific deterrence as well as denunciation and rehabilitation. I agree with their assessment.

### **Accounting for relevant aggravating or mitigating circumstances**

[9] Also under section 203.3 of the *NDA*, in imposing a sentence, the court shall increase or reduce a sentence to account for any aggravating and mitigating circumstances relevant to the offence or the offender.

***Aggravating factors***

[10] After hearing the submissions of counsel, the Court highlights the following aggravating factors for the record:

- (a) Rank of the accused. At the time of the incident, the accused held a higher rank than the victim and was responsible for upholding the policies of the CAF. With his conduct, he failed to meet the standards expected from a senior officer.
- (b) Deployed environment. During military service, we are often required to work in foreign countries as well as within close confines with other members. It is imperative that the personal space of our colleagues, subordinates and superiors is safeguarded. Major Mark's actions took place while they were deployed out of the country and reflect a lack of respect for Master Corporal Morin.

***Mitigating factors***

[11] However, the court notes there are several mitigating factors that must be highlighted:

- (a) Guilty plea. Major Mark's plea of guilty for this offence as described in the Statement of Circumstances must be given its full weight. The Court noted that immediately after the incident, he apologized to the victim. He has displayed courage in stepping forward at an early opportunity and accepting responsibility. His guilty plea has helped the victim, in that she does not have to testify and be cross-examined nor endure a lengthy trial. As highlighted by defence counsel during submissions, Major Mark's guilty plea saved the court, counsel and the unit supporting the court considerable time.
- (b) First-time offender and isolated incident. This is the first disciplinary hearing of any form for Major Mark. He has had a successful career as a dentist. Defence counsel submitted this is an isolated incident and is not representative of who he is as an officer, a professional and a man. Defence counsel also noted that the victim acknowledged the strong professional attributes of Major Mark in her statement.
- (c) Sincere remorse. Major Mark showed sincere remorse and provided a statement to the Court where he acknowledged the impact the events have

had on his wife and family. He admitted his lapse in judgement and understands why he was held accountable by his peers and supervisors. He thanked them for not judging him and understands why action needs to be taken to respond to minor instances, particularly within the dental profession where they work closely together in close confines.

### **Parity**

[12] Pursuant to section 203.3 of the *NDA*, the law requires that the sentence imposed be similar to sentences imposed on similar offences. The prosecution provided me with five decisions being *R. v. Bernier*, 2015 CM 3015, *R. v. Morgan*, 2015 CM 4005 and *R. v. Duvall*, 2017 CM 2008, *R. v. Mitchell*, 2018 CM 4020, *R. v. Taylor*, 2018 CM 2031. In short, based on the case law and the submissions made by counsel, it is clear that the sentence recommended in the joint submission is within an acceptable range for the type of punishment historically awarded for this type of offence.

[13] After considering counsel's submissions in their entirety and all the evidence before the Court, I must ask myself whether the proposed sentence would be reviewed by the reasonable and informed CAF member, as well as the public at large, as a breakdown in the proper functioning of the military justice system. In other words, would the acceptance of the sentence cause the general public to lose confidence in the military justice system?

### **Conclusion**

[14] As this Court has stated in earlier decisions, stopping inappropriate conduct in its infancy is not an easy task. As damaging as each act may be, even the smallest indiscretion may have far-reaching effects and is unacceptable between colleagues, leaders and subordinates. The failure to address even the smallest instance of inappropriate conduct is exactly what threatens and undermines the military ethos, values, norms and ethics expected of every CAF member. The joint submission before the Court recognizes that even the lower-level misconduct must be addressed and resolved at an appropriate level.

[15] Considering all the factors, the circumstances of the offence, the consequence of the finding, the sentence, the gravity, I am satisfied that counsel have discharged their obligations in making their joint submission. The recommended sentence is in the public interest and does not bring the administration of justice into disrepute.

### **FOR THESE REASONS, THE COURT:**

[16] **FINDS** Major Mark guilty of one charge contrary to section 129 of the *NDA* for conduct prejudicial to good order and discipline.

[17] **SENTENCES** Major Mark to a fine in the amount of \$2,000 which is payable in four equal instalments of \$500 beginning in the July 2019 pay period.

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**Counsel:**

The Director of Military Prosecutions as represented by Lieutenant-Colonel T.P. Farris  
and Captain C.J.M. Tuttle

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