



## COURT MARTIAL

**Citation:** *R. v. Osborne*, 2021 CM 4005

**Date:** 20210510

**Docket:** 202129

Standing Court Martial

8th Canadian Hussars (Princess Louise's)  
Moncton, New Brunswick, Canada

**Between:**

**Her Majesty the Queen**

- and -

**Captain M. Osborne, Offender**

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

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### **REASONS FOR SENTENCE**

(Orally)

#### **Introduction**

[1] Captain Osborne, having accepted and recorded your plea of guilty in respect of the two charges on the charge sheet, the Court now finds you guilty of these charges for having committed acts to the prejudice of good order and discipline, contrary to section 129 of the *National Defence Act (NDA)*.

#### **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 consisting of a reprimand and a fine of \$3,500.

[3] 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.

[4] 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 expense 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 they bring to all participants in the administration of justice.

[5] 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 a military judge. As recognized by the Supreme Court of Canada, 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 either a 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.

[6] 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.

[7] 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**

[8] In this case, the prosecutor read a Statement of Circumstances which was formally admitted as accurate by Captain Osborne. It was entered in evidence as an exhibit, along with other documents provided by the prosecution as required at *Queen's Regulations and Orders for the Canadian Forces* (QR&O) article 112.51.

[9] For its part, the defence produced an Agreed Statement of Facts describing the personal situation of Captain Osborne before and since the offence. Annexed to that document were two letters assessing the performance of Captain Osborne, first under the supervision of Major (Retired) Mahoney for a period of just over a year in 2016 and 2017 and secondly, under the supervision of his current commanding officer,

Lieutenant-Colonel Halfkenny since September 2020. The defence also produced Captain Osborne's last Personnel Evaluation Report.

[10] In addition to this evidence, counsel made submissions to support their position on sentence on the basis of the facts and considerations relevant to this case, in order to assist the Court to adequately apply the purposes and principles of sentencing to the circumstances of both the individual offender and the offence committed.

[11] The Statement of Circumstances, the Agreed Statement of Facts, the submissions of counsel and the information on the documents entered as exhibits reveal the following circumstances relevant to the offence and the offender.

### **The offence**

[12] The Statement of Circumstances reveals the following information as it pertains to the two offences:

- (a) On or about 3 January 2019, Captain Osborne intentionally sent an email to the positional mailbox for the Directorate of Honours & Recognition (DH&R), stating that he had received four medals from a cadet organization in Newfoundland, knowing this to be false. The four medals referred to are: the Queen Elizabeth II Silver Jubilee medal, the Queen Elizabeth II Gold Jubilee medal, the Queen Elizabeth II Diamond Jubilee medal and the 125th Anniversary of the Confederation of Canada medal. Captain Osborne was not awarded these medals by any organization, and he was aware that he was not authorized to wear them.
- (b) At the time, Captain Osborne was posted to Niederheid, Germany as the finance officer for the Canadian Forces Support Unit (Europe) (CFSU(E)), a small administrative unit responsible for providing support services to Canadian Armed Forces members and Department of National Defence personnel stationed in Europe. The email Captain Osborne sent to DH&R started a chain of events that ultimately led to the generation of four medal receipts by his orderly room, and the four medals being improperly added to his Military Personnel Record Résumé by DH&R, on or about 26 August 2019.
- (c) Captain Osborne wore the four medals with his uniform at a CFSU(E) Change of Command parade on 5 July 2019, and at a Remembrance Day parade on 11 November 2019. Wearing the medals was prohibited by paragraph 18.11(1) of the QR&O, a regulation known by him.

### **The offender**

[13] Captain Osborne joined the Canadian Armed Forces (CAF) in St-John's, Newfoundland and Labrador in April 1997 and served as a reservist non-commissioned

member, mainly in schools, field engineers unit and service battalions across Canada. After obtaining a university degree, he was commissioned in December 2005 and continued serving mainly in staff positions in the Reserve Force until he transferred to the Regular Force in June 2014 as a logistics officer. After more than three years in Ottawa, he was posted to Germany in 2017. He was posted back to Canada in September 2020 to his current position as the Comptroller for 37 Canadian Brigade Group Headquarters in Moncton, New Brunswick.

[14] Captain Osborne is 42 years old and married. He comes before the Court without a record or conduct sheet. Major (Retired) Mahoney, who supervised him in Ottawa in 2016 and 2017 speaks highly of him as a strong performer who has detailed knowledge of cost analytics and contributes extra hours to his work. His current commanding officer reports that Captain Osborne is an excellent performer who has shown openness, honesty and transparency in both his work and interaction with subordinates, peers and supervisors. This has engendered trust and confidence in his abilities. Captain Osborne's potential to progress as a logistics officer is assessed as outstanding.

### *Seriousness of the offence*

[15] The Court has considered the objective gravity of the offence in this case. The offence of conduct to the prejudice of good order and discipline contrary to section 129 of the *NDA* attracts a maximum punishment of dismissal with disgrace from Her Majesty's service. It is therefore an objectively serious offence going to the core of the need to maintain a disciplined armed force.

[16] Of course, a broad range of circumstances can lead to offences under section 129. The two offences for which Captain Osborne has pleaded guilty to relate to a false statement and improper wearing of commemorative medals. Generally speaking, it refers to dishonest behaviour and it is of significant subjective gravity in the military context. As stated in *R. v. Fancy*, 2016 CM 1010 at paragraph 8, the offender's actions show a lack of respect for the profound meaning of medals and decorations for the Canadian Armed Forces and for those who have gained the right to wear them. Improperly wearing medals to which one is not entitled is actually cited in Note G to QR&O article 103.60 as a paradigm example of an action prejudicial to good order and discipline. It is so because, as stated in *R. v. Miller*, 2014 CM 2018 at paragraph 14, "medals and decorations only retain their meaning if there is rigour in the qualification criteria used to award them, and rigour in ensuring that they are worn only by those who have truly earned them and are entitled to wear them in accordance with the specified authority."

[17] I acknowledge the fact that the medals that Captain Osborne has worn without authority are commemorative in nature and not awarded specifically for bravery or valour. Yet, it remains that the distribution of limited commemorative medals is subject to an assessment by superiors to the effect that chosen recipients have distinguished themselves one way or another. The award is also a statement by the chain of command

to the effect that recipients are deserving and worthy, not only of their superiors' recognition but also of the recognition of other members of their unit, the CAF and indeed the general public. Most importantly, any award must make the recipient proud and motivated to aspire to even greater accomplishments.

[18] It is difficult to imagine how it can be so if instances of awards being attributed and worn without authorization appear in any way to be condoned or otherwise tolerated.

[19] For these reasons, the actions of Captain Osborne in attributing recognition to himself without authority trivialize the accomplishments of others and compromise the integrity of the Canadian Forces Honours Policy, especially the principles of credibility and respect explained at paragraph 18.03(3) of the QR&O.

**Aggravating factor**

[20] The circumstances of the offence and the offender in this case reveal an aggravating factor, namely the rank, experience and position of authority occupied by Captain Osborne at the time of the offences. Referring to the precedents cited previously, although Captain Osborne did not occupy a position of sergeant major such as Master Warrant Officer Fancy nor did he wear a senior officer's rank such as Lieutenant-Colonel Miller, it remains that, when he displayed four medals without authority on two parades in 2019, he was an officer who occupied important functions within his small unit. The offences must have raised significant questions about his integrity and judgement. The punishment that must ensue has to take this aggravating factor into consideration.

**Mitigating factors**

[21] That said, the Court acknowledges the following mitigating factors:

- (a) First, Captain Osborne's guilty plea today, which avoided the expense and energy of running a trial and demonstrates that he is taking full responsibility for his actions in this public trial in the physical and virtual presence of members of his unit and of members of the broader military community;
- (b) Second, the fact that Captain Osborne is a first-time offender; and
- (c) Third, the accomplishments of Captain Osborne as a member of the CAF in over 22 years as well as his more recent performance as a finance officer and his potential for significant future contribution.

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

[22] The circumstances of this case require that the focus be placed on the objectives of denunciation and deterrence in sentencing the offender. Specifically, the sentence proposed must be sufficient not only to deter Captain Osborne from reoffending, but must also denounce his conduct in the community and act as a deterrent to others who may be tempted to engage in the same type of unacceptable behaviour. In short, it must show that misbehaviour has consequences. At the same time, I cannot lose sight of the objective of rehabilitation: the sentence proposed must not compromise the efforts that have been made and will still need to be made by Captain Osborne to rehabilitate himself within his unit and the community following these proceedings.

**Assessing the joint submission**

[23] The submissions from counsel included references to a number of previous court martial cases, providing some assistance in determining that the sentence being proposed is not outside of the range of sentences imposed in the past.

[24] In any event, 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. As stated earlier, I may depart from the joint submission of counsel only if I consider that the proposed sentence would bring the administration of justice into disrepute or would otherwise be contrary to the public interest.

[25] In determining whether that is the case, 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. In this case, I do believe that a reasonable person aware of the circumstances would expect the offender to receive a sentence which includes punishments expressing disapprobation for the failure in discipline involved and have a personal consequence for the offender. The sentence being proposed, composed of the punishments of reprimand and a fine, is aligned with these expectations.

[26] As recognized by the Supreme Court of Canada, trial judges must refrain from tinkering with joint submissions if their benefit can be maximized. Indeed, 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 they are with the strengths and weaknesses of their respective positions. The prosecutor who proposes the sentence is in contact with the chain of command and victims. 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, as they have demonstrated in this case.

[27] Considering the circumstances of the offence and of the offender, the applicable sentencing principles, and the aggravating and mitigating factors mentioned previously, I believe that the sentence being jointly proposed would not bring the administration of justice into disrepute or would otherwise be contrary to the public interest. I will, therefore, accept it.

[28] Captain Osborne, your counsel essentially invited me to consider your conduct as a significant lack of judgement on the part of an otherwise reliable high-performing officer with strong potential. I am prepared to do that. I invite you, however, to keep in mind that the offences raise significant questions about your integrity and judgement. I am confident that you now realize the importance of regaining the trust of your superiors, peers and subordinates, and that you are determined not to commit similar acts again.

**FOR THESE REASONS, THE COURT:**

[29] **SENTENCES** Captain Osborne to a reprimand and a fine of \$3,500. The fine is payable as follows: \$2,000 payable on or before 1 June 2021 and the remainder of \$1,500 payable on or before 1 August 2021. Should the offender be released from the CAF prior to the fine being paid in full, any unpaid amount will be due on the date of release.

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**Counsel :**

The Director of Military Prosecutions as represented by Major M. Reede and Major C.S. Thain

Lieutenant-Commander F. Gonsalves, Defence Counsel Services, Counsel for Captain M. Osborne