COURT MARTIAL

Citation: *R. v. Topp*, 2023 CM 5016

Date: 20231116
Docket: 202251

Standing Court Martial

The Royal Westminster Regiment Armoury
New Westminster, British Columbia, Canada

Between:

His Majesty the King

- and -

Warrant Officer J.F. Topp, Offender

Before: Commander C.J. Deschênes, M.J.

REASONS FOR SENTENCE

(Orally)

I. Introduction

[1] Warrant Officer (WO) Topp pled guilty to two charges under section 129 of the *National Defence Act* (*NDA*) for conduct to the prejudice of good order and discipline. The particulars of both charges 1 and 2 allege that WO Topp made statements opposed to the Government of Canada vaccine mandate policy, contrary to the *Queen's Regulations and Orders for the Canadian Forces* (QR&O), on or about 12 February 2022 at or near Abbotsford, British Columbia (BC). With leave of the Court, the prosecution withdrew the remaining charges 3 and 4. After WO Topp was provided with the explanations required by the QR&O, the Court accepted and recorded his guilty plea. As part of his submissions at the sentencing hearing, the prosecution recommended that I impose a severe reprimand combined with a fine in the amount of $5,200 while defence counsel proposed that I direct an absolute discharge. I must, therefore, first ask myself whether directing an absolute discharge would be in the offender's best interests and not contrary to the public interest. Should I come to the

conclusion that it is not, I must determine a sentence that is proportionate to the gravity of the offences and to the offender's degree of responsibility.

Facts

[2] As part of the sentencing hearing, WO Topp admitted as true the relevant facts as they were summarized in the Statement of Circumstances, which contains the following information:

> **"STATEMENT OF CIRCUMSTANCES (QR&O 112.51(3))**
>
> **Background**
>
> 1. WO Topp joined the CAF in October 1990 and transferred to the Primary Reserve in October 2019.
>
> 2. At all material times, WO Topp was a member of the Primary Reserve with the Royal Westminster Regiment.
>
> 3. In May 2020, WO Topp completed the COVID-19 Awareness course required of all CAF members. This course taught WO Topp the impacts of COVID-19 on Canadian society and on the CAF workforce.
>
> 4. In November 2021, WO Topp was informed of the CDS Directives 001 and 002 on CAF COVID-19 Vaccination – Implementation of Accommodation and Administrative Action. Pursuant to these Directives, he was required to attest to his vaccination status.
>
> 5. Between November and February 2021 despite multiple reminders and recorded warnings from his chain of command, WO Topp failed to attest to his vaccination status.
>
> **Incident**
>
> 6. On 12 February 2022, [in Abbotsford, BC,] WO Topp uploaded a video of himself opposing the Federal Government COVID-19 vaccination policies to the social media platform called TikTok.
>
> 7. In this first video, WO Topp is wearing the PPCLI Regimental #1 order of dress (DEUs with medals and accoutrements). WO Topp admits wearing the uniform without authority and accepts the consequences of his actions.
>
> 8. Again, on 12 February 2022, at [border crossing, Abbotsford, BC], Vancouver, WO Topp uploaded a second video of himself taking part in the Freedom Convoy protest at the Pacific Border Crossing in Surrey, B.C.

> Notably, this protest forced the closure of the highway at the Canada-US border. This video was uploaded to the online video sharing service called You Tube.
>
> 9. In this second video, WO Topp is wearing the PPCLI Regimental #1 order of dress (DEUs with medals and accoutrements).
>
> 10. In this second video, WO Topp:
>
> a. Admits that he is not authorized to wear the military uniform;
> b. States that he opposes Federal Government COVID-19 policies;
> c. Calls for all Canadians, including CAF members, to rally against Government COVID-19 policies; and
> d. Recognizes that there may be repercussions for his actions and takes full responsibility.
>
> 11. WO Topp was not authorized to wear any CAF uniform while making these videos.
>
> 12. Furthermore, WO Topp was a member of the Royal Westminster Regiment, and was therefore not authorized – under any circumstances – to wear the PPCLI Regimental order of dress – a Regiment to which he had not belonged since 1993."

Evidence for the prosecution

[3] As part of its evidence at the sentencing hearing, the prosecution called to the witness stand Chief Warrant Officer (CWO) Hennebery, the Regimental Sergeant Major (RSM) of The Royal Westminster Regiment. CWO Hennebery testified that he was informed of the existence of the video recordings showing WO Topp making the impugned statements, which informed the initiation of an investigation into WO Topp's actions. CWO Hennebery collected and saved both videos from two online social media platforms, TikTok and YouTube. Both videos were viewed in court.

[4] The first video, posted on TikTok and lasting one minute and fifty-four seconds, shows the offender in distinctive environmental uniform (DEU) standing on a lawn by a fence introducing himself as a warrant officer who has served in the Canadian Armed Forces (CAF) for over twenty-five years. Amongst other things, he tells viewers that he is wearing his uniform of the regimental affiliation of the unit he served without the authorization of his chain of command, and that he takes full responsibility for his actions and the consequences that may arise. WO Topp also says that he "make[s] a statement against government policy, for federal government employees to have a vaccination as a term of employment [. . .] I do not agree with it. I do not believe that the state should have the power over my body, and what goes into it. End of story." The

offender then announces that, as a protest, he intends to march to Ottawa from Vancouver, indicating that his march is meant to be peaceful. WO Topp concludes by saying that people of this country should "not have others think your thoughts for you."

[5] The second video posted on YouTube lasts six minutes and forty-one seconds. The offender is seen in DEU walking amidst the honking on a bustling road. Similar to the first video, WO Topp introduces himself as a warrant officer in the CAF, unauthorized to wear his uniform, accepting full responsibility for his actions, and that he may suffer repercussions for what he is doing. Once again, he states his opposition to the "overbearing government mandate" and announces his march to Ottawa. WO Topp also addresses CAF members, stating he wants them to understand that they have the right to make themselves heard. The quality of the image of the second video recording, the audio and the different views, going from WO Topp's face and cutting to the activities surrounding him with music playing in the background, show that the video is of high, professional quality and was edited for quality and enhanced viewing.

Unit impact statement

[6] The RSM also testified that he felt disappointed and frustrated when he saw the first video, while viewing the second video made him sad because of "the production value" of the recording where the impugned statement was used. He also testified that there were soldiers at the unit who were indecisive regarding vaccine mandate, and while he recognized that he did not know if the offender's conduct had a direct influence for some of them to decide to resist the vaccine policy, he construed the influence of WO Topp's rank to have had some detrimental effects on them, in part because of the role of a warrant officer to mentor both junior ranks and junior officers. He believed that the offender's conduct created morale issues amongst the soldiers and discredited the unit, especially as the videos are still accessible online. He also testified that one of the videos garnered over 130,000 views on TikTok.

[7] The Commanding Officer (CO) of the unit, Lieutenant-Colonel (LCol) Chan, provided a military impact statement. He wrote that WO Topp's conduct "set a poor example for our soldiers." It had a negative effect on unit cohesion, morale, retention, and harmed the trust of the unit soldiers in their unit-level chain of command and CAF leadership. He further stated that "WO Topp's actions have degraded and tarnished the image of the Royal Westminster Regiment, PPCLI and the CAF in our local communities . . . reduced our ability to attract and recruit soldiers in the Fraser Valley." He also mentioned that the resources to deal with the disciplinary and administrative measures imposed as a result of WO Topp's conduct were significant for the unit.

[8] Because parts of his statement were contested by the defence, LCol Chan was called to be cross-examined. LCol Chan testified that following CAF orders, he was required to commence an administrative review against any unit members refusing or unable to provide proof of vaccination status. He explained that WO Topp was released from the CAF based on a combination of factors, in particular for breaching articles 19.14 and 19.36 of the QR&O. His unvaccinated status had little impact on his

release. Additionally, the decision to release the offender under article 15.01, item 5(f) was not meant as a punitive measure. LCol Chan confirmed that the decision to release a senior leader such as a warrant officer is not made lightly since it takes a considerable amount of time and resources to train a non-commissioned member (NCM) who attains a senior rank, and because of the scarcity of this rank at the unit. He explained that the release was preceded by a recommendation he received and supported. As for his claim that WO Topp's conduct detrimentally influenced recruiting and retention, LCol Chan confirmed that unit members knew the offender was a member of their unit when they became aware or viewed the recordings of the statements, and he provided establishment numbers to demonstrate the decline of the unit strength in the last three years: thirty-five members left the unit during this period. The company WO Topp served with (Delta company) decreased by forty per cent in strength. Three members left because of the administrative burden the conduct caused them. He testified that his perspective on recruiting issues was based on unit's records, but that the issue now is solely retention.

Circumstances of the offender

[9] I must now turn to WO Topp's personal circumstances. The documentary evidence listed at article 111.17 of the QR&O, as well as the evidence that was provided by both parties, reveal that the offender is fifty-three years old. He has no dependants. He enrolled in the CAF on 17 October 1990 as a regular force member and served with the Princess Patricia's Canadian Light Infantry (PPCLI), deploying in Vukovar, Croatia from October 1992 to April 1993. He released in January 1994 but re-enrolled in October that same year where he served with the 1st Battalion, Royal Canadian Regiment (RCR), then with the Canadian Airborne Regiment in 1995. While serving with the 3rd Battalion, RCR, he deployed to Bosnia from March to October 2001, then to Kabul from August 2003 to January 2004 and, finally, to Kandahar from September 2008 to April 2009. In addition to serving in the regular force in other positions, WO Topp transferred to the reserve force in October 2019, a date that coincides with his promotion to his current rank. In this capacity, he served a total of 267 days on Class B Reserve Force service, with his last day being 3 October 2020. WO Topp was put on leave without pay from his civilian employment effective 15 November 2021. He was released from the CAF on 19 June 2023.

[10] Suffice to say, considering his operational experience and number of years in the Forces, WO Topp is a well-seasoned military man with a wealth of operational experience. His six reference letters from family members and acquaintances support the conclusion that he has always been a dedicated soldier, a hard worker, and had given most of his life to military service here and overseas. He is also known to possess admirable qualities. One reference wrote that they witnessed his "grace to others through fatigue" and his "wisdom in dealing with division." Mr Isbesecu, a former CAF member who met WO Topp when he joined him during his march, wrote about his calm resolve and determination despite the physical and emotional demands put on him during the seven-month-long march. He also testified about WO Topp's organizational skills, composure, and his "inspiring" demonstration of respect. In addition, one of the

offender's siblings read her letter in court describing his numerous qualities. She mentioned that the CAF vaccine policy took a toll on him, however, the truckers' convoy that protested governmentally imposed COVID restrictions created a spark in the offender. She also quoted positive comments made by WO Topp's former superiors.

[11] On this note, it is quite noticeable that no one from WO Topp's chain of command, past or present, provided evidence regarding his performance. While his Military Personnel Record Résumé contains a summary of his career, and that it can be inferred from his attainment of the rank of warrant officer that he is, or was, a high achiever, testimonies or character letters from superiors would have assisted the Court in having a more precise view or understanding of his performance, particularly during his over twenty-five years of regular force service. I do not know whether there is a reluctance or concern to be perceived as supporting an offender, but I have observed a decrease in cases where this evidence is offered at courts martial. This is unfortunate. Provided objectively, evidence offered by the offender's chain of command assists the Court in ensuring that the punishment takes into consideration the personal and professional situation of the offender as a CAF member in a more precise manner.

[12] I have also considered the offender's financial situation, which was detrimentally affected either because of his stance on the vaccination policy, or as a consequence of the conduct forming the basis of the charges, being unemployed for seventeen months from November 2021 to March 2023. During this period, he did not receive any pay. Although he received his pension from the CAF, WO Topp had to use his savings to keep his house, which presumably means that he used the funds saved for use post- retirement to continue paying off the mortgage loan. The offender now makes $72,000 a year serving as a public servant with the Royal Canadian Mounted Police (RCMP) and receives Veterans Affairs Canada benefits in relation to a diagnosis of post-traumatic stress disorder.

Attitude toward the offence/efforts toward rehabilitation

[13] During his testimony, WO Topp provided a comprehensive picture of his career in the military, beginning with his reasons to enrol in the CAF, which were partly because he wanted to travel, to train, and to be a part of a team; he wanted "to be tested". He testified that he left the forces in 1994 and applied to be a police officer. After this option failed, he re-enrolled in the CAF. He was offered a position with 1 RCR and rebadged with PPCLI in 2017. When he became an NCM, he described having a "rebirth", wanting to lead subordinates, overseeing and promoting their welfare. He transferred to the reserve force because he felt he needed a change. He also applied to work as a public servant with the RCMP as a facility manager and moved to Hope, BC. In 2021, he started his new career with the public service, which was, and continues to be, a meaningful professional experience.

[14] WO Topp also explained how the events concerning the impugned conduct unfolded and the mental health issues he was dealing with at the time. It is in August 2021 that he became aware of the Government of Canada vaccine policy. This caused

him some difficulties because he felt the vaccine policy was coercive; he believed it was going to open the door to other practices, inhibiting the way Canadians conduct their lives. The offender also had concerns that vaccination measures were done in haste; he had issues with the safety of the product, particularly as he was aware that there had been issues in the past with another vaccine used by the CAF for personnel deploying, mefloquine.

[15] In September 2021, WO Topp became alarmed by the rhetoric surrounding the vaccine; he believed it was a polarizing issue. He understood that it was mandatory for CAF members to get vaccinated; otherwise, a release from the CAF was inevitable. Consequently, he believed this was not something that could be discussed with his chain of command. He made it clear to his unit that he would not take the vaccine. He described the career consequences he had to face, and the anguish that resulted from them, particularly that he could not be part of the CAF efforts to support his own community in Hope during the 2021 flooding disaster that saw peoples' houses being washed away.

[16] After receiving a notice of release, WO Topp experienced a lot of stress and had to look for civilian employment for the first time. He found employment with a tow truck company. Through emotional testimony, the offender told the Court that he reached a point where he did not want to live anymore; he had suicidal ideation. In February of 2022, he decided he needed to do something, so he donned his PPCLI uniform because the PPCLI is the regiment that he felt he experienced his formative years and because he did not have the proper accoutrements for the Royal Westminster Regiment and never felt he belonged to the unit. WO Topp recorded himself making the two impugned statements and had the recordings posted, or agreed to them being posted, thus widely available on the Internet, because he felt what was happening to him and others was wrong.

[17] WO Topp clarified that the first video posted on TikTok was made with the assistance of his niece in Abbotsford, BC, while the second video was made the same day near Abbotsford, BC at the Sumas border crossing. The offender went to the Sumas border crossing because he knew there was going to be some visibility. He wanted others to see him and hear his message. WO Topp saw a videographer with a "fancy camera". He approached them, and they recorded his statement for production. After editing, it was posted on YouTube. The offender testified that he knew exactly what he was doing and why, and was ready to bear the consequences of it. He further testified that he was contacted by the RSM in the context of the investigation. He then asked his niece to take down the first video from the Internet.

[18] WO Topp felt disappointed that nobody in the CAF approached him to explain to him why what he was doing was wrong and he never intended to gain fame or notoriety. He did not expect the level of interest the recordings eventually attracted, and he testified that he received support for his statements. He also received backlash. WO Topp testified that, during this ordeal, he learned a lot about himself. Regaining his employment with the RCMP was challenging but he is now "in a good place". He stated

that he was unhappy that people had to do extra work as a result of his misplaced conduct.

II. Whether directing an absolute discharge would be in the offender's best interests and not contrary to the public interest. Otherwise, what is the appropriate punishment in this case?

Position of the parties

[19] In my determination of a proper punishment to impose in the circumstances, I considered the position of the prosecution. Counsel for the prosecution recommended that the Court impose a severe reprimand with a fine in the amount of $5,200. He explained that the objective gravity of the offences is serious, considering the maximum punishment that can be imposed, a dismissal from His Majesty's service. He contended that the case is also subjectively serious. The conduct of an experienced CAF member wearing the wrong uniform, making public statements contrary to orders and policy, is a conduct that results in the erosion of trust that the chain of command and Canadians placed in that individual, trusting the individual would be loyal to the elected government and comply with those orders. The prosecution further contended that WO Topp knew that posting videos would have an impact. The impugned conduct as particularized in the charge sheet is the most serious conduct captured by an infraction contrary to section 129 of the *NDA*. As a result, general deterrence and denunciation should be the most important objectives for the offender's punishment. The sentence must be severe enough to deter and denounce the conduct, particularly when the statements were made at the time the world was fighting a devastating pandemic.

[20] In support of his recommendation, the prosecution referred to the case of *R. v. Cribbie*, 2018 CM 3008, a military police corporal who pled guilty for posting anti-Semitic, anti-Catholic, homophobic comments and comments that served to insult the offender's own trade on social networking websites. The joint submission of a fine in the amount of $1,550 was accepted. The prosecution also submitted *R. v. Fancy*, 2016 CM 1010, *R. v. Miller*, 2014 CM 2018, and *R. v. Osborne*, 2021 CM 4005, three cases that pertained respectively to a retired master warrant officer and two officers who admitted their guilt for conduct to the prejudice of good order and discipline under section 129 of the *NDA* for having worn decorations or medals without authority. The prosecution relied more heavily on *R. v. Kenderesi*, 2022 CM 4012, the case of a cadet instructor who recently pled guilty to conduct very similar to WO Topp's, also while in uniform. However, the prosecution noted in that case that Officer Cadet (OCdt) Kenderesi did not know he was being recorded by a bystander. Also in that case, the offender had completed eighty hours of community work at the time of his sentencing. Counsel for the prosecution explained that he arrived at his recommendation on sentence using the punishment imposed in the *Kenderesi* case, which bears the most similarities, by adding $1,000 to the sentence imposed on *Kenderesi* as his recommended punishment to impose on WO Topp.

[21] He identified the following eight aggravating factors in the case at bar: the senior rank of the offender; his level of experience in the CAF, which means that he understands that he must obey orders and show the example; his actions were premeditated; they were also done with intention; he wore the wrong uniform because he had no authority to wear the PPCLI uniform; his actions undermined the CAF as a result of being seen by thousands; he reasonably knew that videos he posted on the Internet would remain available indefinitely; and finally, he invited the public and other CAF members to follow his example, which is akin to a mutinous act. The prosecution also considered as mitigating, the guilty plea, the absence of a conduct sheet, and that WO Topp served on multiple deployments. He contended that there is no mitigation in relation to any exercise of his freedom of speech. Further, the offender's organization and participation in the seven-month-long march is not relevant for the determination of the sentence to impose. In conclusion, the prosecution claimed that an absolute discharge would not serve to deter the conduct. Directing an absolute discharge would be contrary to the public interest. Indeed, WO Topp admitted in both recorded statements that he was ready to face the consequences for his conduct; an absolute discharge is not a consequence.

[22] Defence counsel submitted that WO Topp is a unique individual in a unique time. He contended that an absolute discharge would be appropriate in this case; however, should the Court not support this approach, he recommended the imposition of the lowest possible fine. He relied on cases that support his recommendation for an absolute discharge: *R. v. Fallofield* [1973], 13 C.C.C. (2d) 450; and *R. v. D'Amico*, 2020 CM 2004. He also relied on the case of *R. v. Reid*, 2022 CM 2004, where an absolute discharge was sought but denied for an unrelated offence. Defence counsel further contended that the CAF struggled with the vaccine mandate which was forced on members and that other less drastic measures, such as releasing members medically, would have been a more appropriate approach. He recognized that although WO Topp did receive national attention, mitigating circumstances should not be ignored. In particular, when he made the recorded statements, the offender was composed and conducted himself in a professional manner. The offender also possesses vast and remarkable military skill sets. The defence argued that WO Topp has a diminished culpability because he was dealing with mental health issues at the time; his deployments took a toll on him, and he was also demoralized for not being able to support his own community as a serving CAF member during the 2021 flood in Hope, BC. The offender chose to do the walk as a way to self-medicate. Counsel for the defence submitted that someone from the offender's chain of command should have reached out to see if he was doing well.

[23] Defence counsel argued that there is a political angle to this case. He contended that the CAF deliberately gave instructions not to lay charges contrary to section 126 of the *NDA*, and instead pursued charges contrary to section 129 against the offender because the latter was being seen as momentarily influential. Indeed, defence claimed that the requirement to show a vaccinated status and the measures that were taken if the member failed to do so were lifted because of the offender's recorded statements and his seven-month-long march. He further contended that WO Topp took down the video

from the TikTok platform but could not do so for the YouTube video because he had no control over its broadcast distribution. He also argued that the recorded statements were made during a momentary lapse of judgment. WO Topp also suffered financial consequences during a seventeen-month period where he did not receive any pay. Despite the lifted mandate, he was not allowed to return to serve with his unit. The guilty plea prevented a trial by general court martial which would likely have turned into "a circus". In these circumstances, therefore, an absolute discharge would be a proper measure to impose, particularly as the 5(f)-release item constitutes a black mark on his file.

Sentencing principles of the military justice system

[24] When determining a fair and fit sentence, the Court must be guided by the sentencing principles contained in the *NDA*. As provided at section 203.1 of the *NDA*, "The fundamental purpose of sentencing is to maintain the discipline, efficiency and morale of the Canadian Forces." [My emphasis.]

[25] The fundamental purpose of sentencing shall be achieved by imposing just sanctions that have one or more of the objectives listed at subsection 203.1(2), such as deterrence, denunciation, promoting a habit of obedience to lawful commands and orders, maintaining public trust in the CAF as a disciplined armed force, or assisting in rehabilitating offenders. The objectives of the sentence are dictated by the particularity of the case and of the offender. This principle of proportionality was codified at section 203.2 of the *NDA*. This section provides for the fundamental principle of sentencing:

> A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[26] The *NDA* further provides that sentences must be imposed in accordance with the following other principles, to name a few found at section 203.3:

> (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, . . .
>
> (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
>
> (c) an offender should not be deprived of liberty by imprisonment or detention if less restrictive punishments may be appropriate in the circumstances; . . .
>
> (d) a sentence should be the least severe sentence required to maintain the discipline, efficiency and morale of the Canadian Forces; and
>
> (e) any indirect consequences of the finding of guilty or the sentence should be taken into consideration.

[27] As part of the indirect consequences that should be taken into consideration, the registration of a criminal record could influence the punishment to impose. In fact,

section 249.27 of the *NDA* provides that a person convicted of an offence contrary to section 129 has not been convicted of a criminal offence if the offender is sentenced to one or more of the following punishments: a severe reprimand, a reprimand, a fine not exceeding basic pay for one month, or a minor punishment. In these circumstances, the offence does not constitute an offence for the purposes of the *Criminal Records Act*. In certain cases, therefore, the punishment may not be proportionate if that the punishment would result in a criminal record.

Parity

[28] Turning now to the parity principle, the Court examined precedents for similar offences to determine whether the sentence is similar to sentences imposed on similar offenders. With respect, I find that the only similar case that guides the Court when applying the parity principle is the case of *Kenderesi*. In that case, in December 2020, OCdt Kenderesi travelled to a protest about an hour away, in downtown Toronto. Protesters were gathered to express their opposition to government action and restrictions designed to contain the COVID-19 pandemic. Two video recordings of OCdt Kenderesi's participation in the protest were posted to the Internet, which prompted an investigation. In one of the videos posted on social media, a man introduced OCdt Kenderesi to the crowd as "an incredible serviceman to our country." OCdt Kenderesi is wearing a Canadian disruptive pattern (CADPAT) uniform with a beret, webbing, a helmet slung on the webbing, and a sheathed knife attached to the yoke on his left side. OCdt Kenderesi thanked the crowd for coming out to "tell the Government of Canada that freedom and tyranny doesn't rule Canadians." He expressed his doubts about the safety of the COVID-19 vaccines being distributed and asked any members of the military to refuse the order in distribution of the vaccine. The evidence showed that OCdt Kenderesi grew up in Hungary and witnessed from an early age violent repression by governmental authorities. As a result, he was fearful of perceived authoritarian government actions. Further, as a result of the lockdown measures instituted in relation to the COVID-19 outbreak, his family's financial situation was precarious. A sentence composed of a severe reprimand and a fine in the amount of $4,200 was imposed. Considering this case, I find that the punishment recommended by the prosecution, a severe reprimand and a fine in the amount of $5,200, would be a sentence similar to a sentence imposed for similar offences.

[29] Finally, although I found the other cases submitted by counsel had limited value, the *Fallofield* case did assist in the narrow context of the defence's recommendation that I direct an absolute discharge.

Conditions to direct an absolute discharge

[30] After a review of the applicable precedent, and considering the defence's recommendation, I have examined the conditions set out at subsection 203.8(1) of the *NDA* that must be met for directing an absolute discharge. This subsection provides that:

> If an accused person pleads guilty to or is found guilty of an offence, other than an offence for which a minimum punishment is prescribed by law or an offence punishable by imprisonment for 14 years or for life, the court martial before which the accused appears may, if it considers it to be in the accused person's best interests and not contrary to the public interest, instead of convicting the accused person, direct that they be discharged absolutely.

When an absolute discharge is directed, the offender is deemed not to have been convicted of the offence.

[31] In order to assist in interpreting the two conditions, first, being that an absolute discharge is in the accused person's best interests and, second, that it is not contrary to the public interest, in *Fallofield*, a seminal case in this regard, the British Columbia Court of Appeal wrote:

> Generally, the first condition would presuppose that the accused is a person of good character, without previous conviction, that it is not necessary to enter a conviction against him in order to deter him from future offences or to rehabilitate him, and that the entry of a conviction against him may have significant adverse repercussions.

[32] The second condition precedent requires the Court to ensure that the granting of an absolute discharge is not contrary to the public interest. "Not contrary to the public interest" is a concept which includes a consideration of the need for the deterrence of others.

Analysis

[33] At the outset of my analysis, I feel important to clarify what this case is not about. It is not about any personal views on vaccine mandate and policy, nor is it about WO Topp's march across Canada. It is also not about politics or other organization's views on the matter. It is rather about the commission of two *NDA* offences for making statements that were opposed to the Government of Canada's policy contrary to article 19.14 of the QR&O.

[34] In the context of the determination of a fair and fit sentence, I must therefore only consider evidence put before me that is relevant to this determination. I must be guided by the sentencing principles, as I have explained earlier, and the law generally, as required.

[35] First, I agree with the prosecution that the objective gravity of the offences is serious; a maximum punishment of dismissal from His Majesty's service is a clear indication that the offence under section 129 is a serious offence. Further, I concur with my brother judge in *Kenderesi* at paragraph 31, that this conduct is incompatible with the obligation of obedience and of support to lawful authority at the core of the duty of all members of the military community:

> It also has the potential to damage the military institution in the eye of the public, notably the expectation, always fulfilled, that the CAF will perform lawful duties imposed in support of civilian authorities. The offence here constitutes a clear and significant breach

> of the obligation imposed on all members of the CAF not to conduct themselves in a manner prejudicial to good order and discipline.

[36] In addition to the nature and objective gravity of the offences, I now turn to the aggravating factors specific to this case that were taken into consideration:

(a) the offender's rank. The QR&O prescribes that all NCMs shall become acquainted with, observe and enforce: the *NDA*, the *Security of Information Act*, the QR&O, and all other regulations, rules, orders and instructions that pertain to the performance of the member's duties; and promote the welfare, efficiency and good discipline of all who are subordinate to the member. In this regard, there are higher expectations for warrant officers and NCMs because at their rank level, in addition to knowing, observing and enforcing all regulations, rules and instructions pertaining to their duties, they are expected to show a proper sense of their rank, status and responsibilities. In their responsibilities both up and down the chain of command, warrant officers and NCMs must strive to develop a rapport that is based on honesty, trust, respect and open-mindedness. The offender not only failed to observe the QR&O by making public statements against governmental efforts to counter the spread of COVID-19, he also failed to act as a leader setting the example in matters of discipline toward junior NCMs, and toward inexperienced officers; a function that includes offering advice, helping solve problems, and providing feedback and information;

(b) the offender's experience in the CAF. He was a reserve force member with considerable experience in both components, as mentioned earlier. Expectations toward a CAF member with a considerably lengthy career will always be higher. Conversely, I do agree with defence counsel that his twenty-five plus years of service in the CAF can serve to mitigate his sentence because it is an indication of dedication toward the service;

(c) the offender was in uniform, which I find particularly serious and aggravating because he purposely used his military status as a platform to influence the public against governmentally imposed health restrictions. WO Topp knew or ought to have known the demonstration he chose to attend at the Sumas border crossing was about protesting government actions in relation to the unique situation brought about by the COVID-19 pandemic. I find he demonstrated a lack of judgement by deciding to participate in the video while in uniform. Indeed, his appearance at the protest in uniform made him an ideal candidate to be used by the organizers as a symbolic voice;

(d) the offender allowed and even participated in the recording and broadcast of his statements and had no control over the broadcasting or production of the second video. I did find saddening to watch WO Topp's participation in the second video as a serviceman who has

dedicated most of his life to the military, reckless to sacrifice his career. Nevertheless, while the evidence of the offender that he was not looking for fame or notoriety may be true, the sole purpose of recording his statements and making them available on the Internet was to draw attention to himself on a much broader scale. Notoriety was a natural or logical consequence of his choice to allow his statements to be recorded and broadcasted; and

(e) the offender's statements risked undermining the execution of orders in the context of the involvement of the CAF in assistance to civilian authorities in the fight against COVID-19 at the time of the offences. In that sense, WO Topp's failure in discipline has a direct link to the ability of the CAF to perform operations, including operations in support of the efforts of authority to control a deadly virus. I find this is manifestly aggravating. His conduct may have influenced other CAF members, and members of the public, to refuse to comply with governmental rules imposed to protect the public.

[37] As for military or unit impact statements, these statements are generally useful for a sentencing judge. They assist in understanding the effect the conduct had on the offender's brothers and sisters in arms, on the unit, and the CAF as a whole. That said, in this case, while the offender's conduct may have detrimentally influenced recruiting as stated by the unit CO, the evidence I was provided did not clearly establish a causal link between the impugned conduct and the issue of recruiting. Further, the harm caused to the unit and its members is an essential element to prove an offence of conduct to the prejudice of good order and discipline. WO Topp has admitted all the essential elements of both charges; therefore, he has admitted that his conduct had a negative impact on unit cohesion, morale, retention because it harmed the soldiers' trust in their chain of command. This is what prejudice entails. Accordingly, having accepted his guilty plea, I am of the view that I cannot punish him more severely based on this evidence of prejudice, because without this evidence, there would be no offence. In sum, given the nature of the offences and the particulars of the charges in this case, the aspect of prejudice is a circumstance that is included in the offences, rather than an aggravating factor in sentencing.

[38] In addition, I find that the prosecution has attached disproportionate significance to WO Topp wearing the wrong uniform, a conduct captured in charges 3 and 4, charges that he asked the Court to withdraw. I am of the view that once the charges were laid, then withdrawn, the prosecution renounced the use of the alleged conduct in any way in the present proceeding, including as an aggravating factor. I would have come to a different conclusion had the prosecution asked to include the alleged conduct of charges 3 and 4 as part of WO Topp's guilty plea on the first two charges, or had the prosecution not laid charges 3 and 4. Finally, on the point of his conduct closely resembling a mutiny, I did not see or hear anything mutinous in the offender's statements.

[39] In addition to the aggravating factors I accepted, I have considered the following mitigating factors:

(a) the offender's guilty plea, which avoided the expense and resources of a contested trial and demonstrated that he is taking full responsibility for his actions in this public trial, held on a military establishment in the presence of members of the military community. Ultimately, WO Topp acknowledged the harm caused by his conduct;

(b) the offender is a first-time offender, supporting the argument that the conduct attributed to him is out of character; and

(c) the offender is well engaged in rehabilitating himself, as evidenced by his current employment with the RCMP, showing that he deserves a sentence that will not compromise his reintegration into civil society.

[40] I recognize and appreciate that WO Topp made efforts to mitigate any detrimental effects of his conduct when he made his statements by remaining calm, respectful, and displaying a professional deportment, specifically stating that he discouraged violence. I also recognize that the offender tried to dissociate himself from the CAF by saying in his statements that this was his conduct alone; however, WO Topp did introduce himself, in uniform, as a CAF member with a long military career. This is somewhat contradictory as one cannot claim to separate themselves from an organization while at the same time introducing themselves as part of it and wearing its accoutrements. I, therefore, cannot accept the argument that the offender attempted to dissociate himself from the CAF.

[41] WO Topp also said that his unit did not reach out to him and that no one approached him to explain that what he was doing was wrong. I cannot accept that the offender believed what he did was right, because he knew it was wrong. He recognized and admitted that he knew his conduct was wrong in both videos. He was also expected to know the regulations and the obligations that come with them.

[42] I agree with counsel for the defence that the offender's chain of command should have reached out to him to ensure his well-being. This absence of communication from his unit was very unfortunate and may regrettably be a common problem in the CAF. However, WO Topp cannot blame his chain of command for taking administrative measures against him for his stance on the vaccine, and for his conduct, which in any event, he accepted responsibility for during his statements and when pleading guilty. WO Topp could have reached out to his superiors, sought help or guidance, and let them know of his intent. I find as a result, that these claims do not serve to mitigate the offender's sentence. Neither is his firm belief in the vaccine mandate.

[43] Nevertheless, I recognized that the statements he made and the march constituted a therapeutic approach that WO Topp adopted to ease his anguish. It was a

form of therapy. Consequently, I accept his evidence that he was dealing with mental health issues at the time and that the statements made, and the march he organized, helped him cope with his distress. I also accept that the offender always conducted himself professionally during his march, which speaks to his character.

[44] I must now turn to defence counsel's suggestion that an absolute discharge is appropriate in this case. First, I find that the offences to which WO Topp pled guilty do not preclude that an absolute discharge be directed. Next, the Court must determine whether it is in his best interest that he be discharged absolutely. The second condition precedent is that directing an absolute discharge not be contrary to the public interest.

[45] Considering whether it is in the offender's best interest that he be discharged absolutely, I am of the view that on 12 February 2022, when the offender recorded, or had his statements recorded, and made them available to the public at large, he had a lapse of judgement, letting his emotions run high at a time when he was dealing with pressure, anguish, stress and suicidal ideation. Indeed, both videos were taken on the same day, at or near Abbotsford. Although WO Topp's march across Canada may have been premeditated, planned and well organized, I am not convinced that the recording of his statements, which is the conduct that forms the basis of the two charges, was premeditated. They rather seemed to have been made impulsively. On the second video, WO Topp seemed assertive, but emotional. In addition to the impulsivity of his conduct on 12 February 2022, I have already accepted that there is ample evidence showing that WO Topp's conduct was out of character: he has no conduct sheet; his career progressed successfully, reaching the rank of warrant officer and he received recognition and military decorations for his service and deployments. He had glowing character letters, speaking to his usual respectful behaviour, dedication, courage, and determination. Therefore, in these circumstances, I do believe that WO Topp meets the condition for directing an absolute discharge because it would be in his best interest. I must now decide if the public interest condition is met.

[46] The second condition precedent requires the Court to ensure that the granting of an absolute discharge is not contrary to the public interest. "Not contrary to the public interest" is a concept which includes a consideration of the need for the deterrence of others. Earlier, the Court found that there were consequences of his conduct, specifically that there was reputational harm done to the CAF as a result of the broad reach of the recordings of both statements. The impact of the offender's conduct was national. The evidence before me, therefore, does not support that I direct an absolute discharge in this case. Considering the offences to which WO Topp pled guilty and in light of the circumstances surrounding this case, the fundamental purpose of sentencing shall be achieved by imposing a sanction that has the objectives of general deterrence and denunciation as the main objectives. I must impose a punishment that would send a strong message for others to be deterred from following in WO Topp's path. Having regard to the principles of sentencing deserving greatest emphasis being denunciation and general deterrence, it would not be in the interest of the public in the circumstances that I direct an absolute discharge. WO Topp must bear the consequences of his actions.

[47] In summary, while the offender's personal situation could make him eligible for an absolute discharge, I simply cannot order this measure in this case because the offences committed were serious and had a far-reaching effect. It was not disputed that his videos garnered over 100,000 views on public media websites. It does not matter that he had both support and backlash from the statements he posted. What matters is that, as a member of the CAF in uniform, he was seen by thousands taking a stance against one of the Government of Canada's national policies.

Sentence to impose

[48] Reviewing the record and the evidence before me, and considering the applicable sentencing principles, I find that a sentence composed of a severe reprimand with a substantial fine would serve to denounce the conduct while not compromising the offender's rehabilitation. But for the evidence provided in mitigation, including the pressure he was facing and his anguish which led to suicidal thoughts at the time he decided to record and distribute his comments online opposing a governmental health policy, combined with his guilty plea, I would have imposed a more severe sentence.

[49] Since WO Topp pled guilty and his personal situation shows that he is progressing in reintegrating civil society successfully, the punishment should not compromise his rehabilitation. Thus, the sentence recommended by the prosecution, a severe reprimand combined with a hefty fine, would serve the main objectives for the offender's sentence, particularly as it will not be liable to registration of a criminal record. I find this recommendation fair, except for the amount of the fine recommended. Indeed, counsel for the prosecution added $1,000 over the amount of the fine imposed in the *Kenderesi* case. While I appreciate that counsel for the prosecution compared and considered the context of both cases in order to ensure that his recommendation on sentence was fair, determining an appropriate amount for a fine to impose cannot be reduced to a simple mathematical equation. The *Kenderesi* case has many distinguishable features, including the rank of the offender, that the offender in that case did not know his image was used in a video later accessible online and that he and his family suffered financially as a result of the restrictions imposed by the government. Conversely, his public statements were more incendiary, referring to governmental actions to contain the virus as "tyranny" and asking any members of the military to refuse the order in distribution of this vaccine. More importantly, the punishment imposed in that case was the result of a joint submission accepted by the Court. When presented with a joint submission, sentencing judges have less discretion and are bound to apply the very high threshold of the public interest test before considering departing from the jointly recommended sentence. While I am obliged to consider the *Kenderesi* case as part of the parity principle, I must be mindful of the context in which the punishment was imposed on OCdt Kenderesi.

[50] Although I have not accepted some of the prosecution's submissions as they pertain to the factors influencing the punishment because he either overemphasized or considered aggravating circumstances that should be given little to no weight, and that he did not seem to have considered the mental health issues WO Topp was dealing with

at the time, I believe that he was, nevertheless, not too far off the sentence that I have determined to be a fair and fit sentence that I will impose in the circumstances of this case.

Indirect consequences

[51] I have considered that, should I impose punishments more severe than those listed at subsection 249.27(1) of the *NDA*, whether they are combined with each other or not (see subsection 139(2) of the *NDA* and *R. v. Squires*, 2013 CM 2016 at paragraphs 24 to 26), the two offences to which WO Topp pled guilty would be deemed to be offences for the purposes of the *Criminal Records Act*. I agree with defence counsel that the offender has already paid a hefty price for his conduct when he was released from the CAF after over twenty-five years of service, particularly when he dearly wanted to pursue his military career in the reserves. As a result, a proportionate sentence must necessarily, in the circumstances, be within the punishments that would require or be eligible for the registration of a criminal record. Thus, I was mindful that any fine imposed must not exceed one month of basic pay.

[52] The difficulty is that WO Topp was a reserve force member who was not always serving on Class B Reserve Force service and has been released since June 2023. Unsurprisingly, the prosecution did not provide the pay and allowances records listed at article 111.17 of the QR&O. When asked to provide the document, he had to seek this information from the unit who I was informed, in turn, had to conduct research because the document was no longer available. What I received did not assist the Court because the document does not provide information regarding WO Topp's basic monthly pay prior to his release; it also does not inform whether he served on Class B for a full month. In the circumstances, reviewing section 249.27 of the *NDA*, I find that it does not provide for the situation of a CAF member who has been released, nor for the situation of a reserve force member. I agree with the military judge in the cases of *R. v. Scott*, 2018 CM 2034 and *R. v. Richard*, 2019 CM 2006 that section 249.27 is ambiguous and risks creating an unfair situation.

[53] In any event, this issue does not need to be resolved today because the prosecution's position is that his recommended punishment is not intended to create eligibility for a criminal conviction. He confirmed that he reviewed the applicable table of pay for a warrant officer to ensure that the recommended fine would be well within the basic monthly pay. I agree. Reviewing the monthly rates (in dollars) after March 2023 contained in both recently amended Tables "A" to Compensation and Benefits Instructions (CBI) 204.30 for a Regular Force or Class C Warrant Officer and to CBI 204.53 for a Reserve Force Warrant Officer on a class other than Class C, I am satisfied that the prosecution's recommended sentence is below the punishment that would otherwise have the effect of requiring registration as a criminal record. I make this point clear in order to ensure that no criminal record will result from the punishment I have decided to impose in the circumstances. I would come to the same conclusion had I factored instead WO Topp's monthly income with the RCMP, which reflects his current situation more accurately. Since I find that the amount of the fine the prosecution

recommended slightly too severe, the punishment I am imposing will include a lower fine. Consequently, a severe reprimand, combined with a fine in the amount of $4,000, would be the least severe sentence required to maintain the discipline, efficiency and morale of the CAF.

III. Conclusion

[54] Having reviewed the documentary evidence introduced as exhibits and considered counsel's submissions, I find that WO Topp's case does not meet the conditions for the Court to direct an absolute discharge. I accept the prosecution's position that the need for general deterrence and denunciation should be the focus of this punishment, while not compromising the offender's rehabilitation. These objectives are met with the imposition of a severe reprimand combined with a fine in the amount of $4,000. This punishment sends a strong message to deter those who might think of following the same or similar conduct. It is the least severe sentence required to maintain the discipline, efficiency and morale of the CAF.

[55] Although WO Topp may still hold the same belief he had when he made his statements opposing the Government of Canada's COVID vaccine policy, he has admitted that making and broadcasting those statements as a member of the CAF in uniform was wrong. Like the offender said in the videos, he accepts responsibility for his actions and now faces the consequences. WO Topp is a man of principle who usually understands the importance of obeying orders with honour. I believe that the offender's conduct in February 2022 was driven by despair and that he is now, as he put it himself, in "a good place". In time, when the dust has settled, and although WO Topp may be fast approaching the CAF mandatory retirement age, perhaps it will be possible for him to re-enrol in the CAF. Indeed, he still has a lot to offer the military and he will have been punished as a result of his conduct.

[56] In sum, in consideration of all the aggravating and mitigating factors and the sentencing principles, the Court finds that a severe reprimand combined with a fine in the amount of $4,000 is a fair and fit sentence in the circumstances.

FOR THESE REASONS, THE COURT:

[57] **FINDS** WO Topp guilty of the first and second charges.

[58] **SENTENCES** the offender to a severe reprimand and a fine in the amount of $4,000 to be paid in two instalments, the first payment payable on 1 December 2023 and the second payable on 15 January 2024.

Counsel:

The Director of Military Prosecutions as represented by Major B. Richard

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