



## COURT MARTIAL

**Citation:** *R v Harris*, 2011 CM 4008

**Date:** 20110331

**Docket:** 201112

Standing Court Martial

Lincoln and Welland Regiment  
St. Catharines, Ontario, Canada

**Between:**

**Her Majesty the Queen**

- and -

**Sergeant M.C. Harris, Offender**

**Before:** Lieutenant-Colonel J-G Perron, M.J.

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### REASONS FOR SENTENCING

(Orally)

[1] Sergeant Harris, having accepted and recorded your plea of guilty to charge No. 1, the court now finds you guilty of that charge. You have pled guilty to one charge laid under section 129 of the *National Defence Act*. You mailed from Kandahar to your residence in Welland, Ontario, one AK-74, two 30-round magazines and one RPG-7 firing tube. This act contravened Joint Task Force Afghanistan Theatre Standing Order (TSO) 108 and is thus prejudicial to good order and discipline. The court must now determine a just and appropriate sentence in this case.

[2] The Statement of Circumstances to which you formally admitted the facts as conclusive evidence of your guilt provides this court with the circumstances surrounding the commission of this offence. During a deployment to Afghanistan, you learned that it might be possible to send weapons from Afghanistan to Canada if they were acquired for a museum. You were excited by this prospect and you wanted to provide updated artefacts to your regimental museum.

[3] In September 2010 you arranged to purchase, through a local Afghan, one AK-74, two 30-round magazines and one RPG-7 firing tube. You also arranged for these weapons to be welded shut to make them inoperable. You paid \$750 US of your own money for the weapons and modifications.

[4] Contrary to the warnings posted at the Kandahar Airfield Postal Outlet, and without the required authorizations outlined in TSO 108, you mailed these weapons back to your residence in Welland, Ontario via Canada Post.

[5] On 17 September 2010, while conducting X-ray examinations of incoming mail from Afghanistan, Canadian Border Services Agency (CBSA) officials discovered and confiscated the weapons. CBSA contacted the military police in Trenton and an investigation was started into possible illegal importation of weapons. A weapons technician with the Canadian Forces inspected the weapons and noted that although attempts had been made to render the weapons inoperable, it would not have been difficult to return the weapons to an operable condition. The prosecution and your defence counsel have jointly proposed a sentence of a fine in the amount of \$1,000 to be paid by four monthly instalments of \$250.

[6] The Court Martial Appeal Court clearly stated that the fundamental purposes and goals of sentencing as found in the *Criminal Code of Canada* apply in the context of the military justice system and a military judge must consider these purposes and goals when determining a sentence.<sup>1</sup> The fundamental purpose of sentencing is to contribute to respect for the law and the protection of society, and society includes the Canadian Forces, by imposing just sanctions that have one or more of the following objectives:

- a. to denounce unlawful conduct;
- b. to deter the offender and other persons from committing similar offences;
- c. to separate offenders from society, where necessary;
- d. to assist in rehabilitating offenders;
- e. to provide reparations for harm done to victims or to the community; and
- f. to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

[7] The court must determine if protection of the public would best be served by deterrence, rehabilitation, denunciation or a combination of those factors. As indicated by the Court Martial Appeal Court, sentencing is a fundamentally subjective and individualized process where the trial judge has the advantage of having seen and heard all

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<sup>1</sup> *Tupper v R*, 2009 CMAC 5 at para 30.

of the witnesses, when there are witnesses, and it is one of the most difficult tasks confronting a trial judge.<sup>2</sup>

[8] The sentencing provisions of the *Criminal Code* at sections 718 to 718.2 also provide for an individualized sentencing process in which the court must take into account not only the circumstances of the offence, but also the specific circumstances of the offender.<sup>3</sup> A sentence must also be similar to other sentences imposed in similar circumstances.<sup>4</sup> The principle of proportionality is at the heart of any sentencing. The Supreme Court of Canada tells us at paragraph 42 of *Nasogaluak*<sup>5</sup> that proportionality means a sentence must not exceed what is just and appropriate in light of the moral blameworthiness of the offender and the gravity of the offence.

[9] The court must also impose a sentence that should be the minimum necessary sentence to maintain discipline. The ultimate aim of sentencing is the restoration of discipline in the offender and in military society. Discipline is that quality that every Canadian Forces member must have which allows him or her to put the interests of Canada and the interests of the Canadian Forces before personal interests. This is necessary because Canadian Forces' members must willingly and promptly obey lawful orders that may have very devastating personal consequences such as injury and death. Discipline is often described as a quality because, ultimately, although it is something which is developed and encouraged by the Canadian Forces through instruction, training and practice, it is an internal quality and it is one of the fundamental prerequisites to operational efficiency in any armed force.

[10] I will now set out the aggravating factors and the mitigating factors that I have considered in determining the appropriate sentence in this case. I consider the following to be aggravating. An act to the prejudice of good order and discipline is an objectively serious offence since its maximum sentence is dismissal with disgrace from Her Majesty's service. Subjectively, this is a serious offence. While I accept that you acquired these weapons for your regimental museum, you displayed a total lack of respect for clear and precise theatre standing orders.

[11] You have a conduct sheet. The prosecutor and your defence counsel have argued that this offence is quite different from the two offences found in your conduct sheet, being one offence of having disobeyed a lawful command and one offence of absence without leave. The first offence occurred in 2002 at the Lake Street Armouries and the second offence occurred in 2009 when you were deployed in Afghanistan and were serving with the Kandahar Provincial Reconstruction Team. You were a sergeant at the time of these offences. The nature of the offences found on your conduct sheet and your demeanour during this short trial make me wonder if this offence is truly an error in judgement as stated by counsel or simply another example of your lack of respect for orders and lawful commands. Since I do not possess all the information need-

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<sup>2</sup> *Ibid*, at para 13.

<sup>3</sup> *R v Angelillo*, 2006 SCC 55 at para 22.

<sup>4</sup> *R v L.M.*, 2008 SCC 31 at para 17.

<sup>5</sup> *R v Nasogaluak*, 2010 SCC 6 at para 41.

ed to arrive at a clear conclusion on this specific issue, I will let those who know you reach the appropriate conclusion.

[12] The prosecution chose to charge you under section 129 of the *National Defence Act* and did not lay any weapons offence under the *Criminal Code*. I must sentence you for the offence committed and not for the offences that could have been charged. You and other members of the Canadian Forces must realize that any offence that involves weapons must not be taken lightly and is usually dealt with severely by Canadian courts.

[13] The offence, like the absence without leave offence on your conduct sheet, occurred in a theatre of operations. You were well-aware of a theatre standing order and you chose to disobey this order. While I will include it as an aggravating factor, I gave it less weight than I would have in a case where the offence was committed purely for personal gain.

[14] You were 38 years old at the time of the offence and you were a sergeant. You were old enough to know better and to understand the nature and consequences of your actions. You disobeyed an order. As a non-commissioned officer, it is your duty to promote the welfare, efficiency and good discipline of all who are subordinate to you.<sup>6</sup> You may only accomplish this duty by being an example to your subordinates.

[15] As to the mitigating circumstances, I note the following. You have pled guilty; therefore, a plea of guilty is usually considered as a mitigating factor. This approach is generally not seen as a contradiction of the right to silence and of the right to have the Crown prove beyond a reasonable doubt the charge laid against the accused, but is seen as a means for the courts to impose a more lenient sentence because the plea of guilty usually means that witnesses do not have to testify and that it greatly reduces the costs associated with a judicial proceeding. It is also usually interpreted to mean that the accused wants to take responsibility for his or her unlawful actions and the harm done as a consequence of these actions. It would appear that you meant to do well and that you wanted to provide your regimental museum with some artefacts from the Afghan theatre of operations. You did not commit this offence for personal gain. These prohibited weapons were initially confiscated by the Canadian Border Services Agency upon their arrival in Canada. They are presently in the possession of the military police and will be returned to the CBSA.

[16] I have reviewed Exhibits 8, 9 and 10 presented by your counsel. These letters written by Captain Cincio, Warrant Officer Ward, and Captain Knox describe you in a very positive manner. Captain Cincio has known you since the 1990s. He states you have excelled in your leadership roles and he describes you as a hard-working and diligent soldier and patriot. Warrant Officer Ward has known you since training you as a young private in 1992. He is of the view that your professionalism and integrity has only ever come second to your dedication to the good of your unit. Captain Knox was the second in command of the CIMIC Company during your last tour in Afghanistan.

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<sup>6</sup> Art 5.01 of *QR&O*.

He states that the success of the CIMIC projects in your area of responsibility were in large part due to your ability to make decisions that supported the mission. He also commented on your ability to interact closely with the local Afghans and gain their trust. All in all, these letters paint a positive picture of a good soldier.

[17] Sergeant Harris, stand up. The Court Martial Appeal Court has stated clearly that a sentencing judge should not depart from a joint submission unless the proposed sentence would bring the administration of justice into disrepute or unless the sentence is otherwise not in the public interest. I agree with counsel that the principles of general deterrence and of denunciation are important in this case.

[18] After reviewing the totality of the evidence, the jurisprudence, and the representations made by the prosecutor and your defence counsel, I have come to the conclusion that the proposed sentence is the minimum necessary sentence in the present case in that it would not bring the administration of justice into disrepute and that the proposed sentence is in the public interest. Therefore, I agree with the joint submission of the prosecutor and of your defence counsel.

**FOR THESE REASONS, THE COURT**

[19] **SENTENCES** you to a fine in the amount of \$1,000. The fine shall be paid in four monthly instalments of \$250 commencing on the 15th day of April, 2011.

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**Counsel:**

Captain R.D. Kerr, Canadian Military Prosecution Services  
Counsel for Her Majesty the Queen

Captain D.M. Hodson, Directorate Defence Counsel Services  
Counsel for Sergeant M.C. Harris