COURT MARTIAL

Citation: *R. v. Beemer*, 2019 CM 2031

Date: 20191107
Docket: 201907

Standing Court Martial

4th Canadian Division Support Base Petawawa
Petawawa, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Warrant Officer D.E. Beemer, Offender

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

REASONS FOR SENTENCE

(Orally)

Introduction

[1] On 3 October 2019, the Court found Warrant Officer Beemer guilty of one offence under paragraph 117(f) of the *National Defence Act* (*NDA*), for an act of a fraudulent nature not particularly specified in sections 73 to 128 of the *NDA*. The Court must now determine and pass sentence on the charge which reads as follows:

"FIRST CHARGE *NDA* Section 117(f)	AN ACT OF A FRAUDULENT NATURE NOT PARTICULARLY SPECIFIED IN SECTIONS 73 TO 128 OF THE NATIONAL DEFENCE ACT
	Particulars: In that he, between November 9th 2016 and January 17th 2018,

> in the province of Ontario, with intent to defraud, received Post Living Differential allowance, which he was not entitled to."

Circumstances surrounding the offences

[2] The circumstances surrounding the offence were set out fully in my decision delivered orally on 3 October 2019. Accordingly, this decision provides only a brief summary of the facts for the purposes of sentencing.

[3] In its finding, the Court found that while Warrant Officer Beemer was posted to 32 Service Battalion and living in the Toronto area, he applied for and was approved to collect post living differential (PLD) allowance. There is no question that when he applied for PLD, he was entitled to collect it; however, when he moved from the address which he had declared to be his principal residence, he failed to report the change which was his duty. As a result, his failure to report the change led to his fraudulent collection of PLD for over a year.

[4] A member whose principal residence is located in a PLD area remains entitled to collect PLD, at the rate established in the *Compensation and Benefits Instructions for the Canadian Forces* (CBI) for that PLD area while they, or their dependents occupy that residence. In the event of any change in the occupation of a principal residence, the member has a duty to report such a change. In his application for the PLD, Warrant Officer Beemer certified that he understood this duty. Warrant Officer Beemer collected PLD to which he was not entitled in the amount of $1,485 per month, for approximately fifteen months. His collection of the PLD was only ceased when the chief clerk for the 4th Canadian Support Group learned he had vacated his principal residence. In short, before his PLD was ceased, he collected approximately $22,275 to which he was not entitled.

Evidence

[5] In this case, the prosecutor provided the documents required under *Queen's Regulations and Orders for the Canadian Forces* (QR&O) article 112.51 that were supplied by the chain of command. In addition, the following additional evidence was adduced at the sentencing hearing in the court martial:

(a) Exhibit 21 - 5200-1 (Maint O), Commanding Officer's Assessment, Warrant Officer, D.E. Beemer, Veh Tech 00129-01, dated 25 September 2019;

(b) testimonies of the following defence witnesses, in order of appearance:

i. Major Sett, current deputy commanding officer of 32 Service Battalion and prior officer commanding Maintenance Company of 32 Service Battalion;

ii. Lieutenant-Colonel Devries, former commanding officer (CO) of 32 Service Battalion;

iii. Warrant Officer Farrell, human resources manager and chief clerk of the Royal Canadian Dragoons (RCD);

iv. Captain Dormeus, chaplain of the RCD;

v. Captain Normandin, current maintenance officer for the RCD;

vi. Master Corporal Rodriguez, former spouse of Warrant Officer Beemer; and

vii. Lieutenant-Colonel Marois, current CO of the RCD.

[6] Furthermore, the Court benefitted from counsel's submissions to support their respective positions on sentence where they highlighted the facts and considerations relevant to Warrant Officer Beemer.

[7] Counsel's submissions and the evidence before the Court have enabled me to be sufficiently informed of Warrant Officer Beemer's personal circumstances so I may adapt and impose a sentence specifically for him, taking into account the rehabilitation and progress he has made to date.

Circumstances of the offender

[8] Warrant Officer Beemer is 43 years old. He enrolled in the Canadian Armed Forces (CAF) on 8 June 1995 as a reservist, transferring shortly thereafter to serve in the regular forces. He has served his country for over 24 years, which includes a deployment in 2007 to 2008 to Kandahar, Afghanistan.

[9] Warrant Officer Beemer is currently paying child support for his daughter in the amount of $630 per month while sharing parenting duties with his former spouse, Master Corporal Rodriguez, who also resides in the Petawawa area. Every day after school, their ten-year-old daughter returns from school to the home of Warrant Officer Beemer and spends time in his care and custody. Master Corporal Rodriguez will be attending a three-week career course in Borden, expected to run from 18 November 2019 until 6 December 2019. Although they have developed the required parenting plans in the event of military exigencies, their first choice is to work together to do everything possible to ensure that their daughter is in the custody of one of them.

[10] In addition, Master Corporal Rodriguez's father, who resides in Chicago, Illinois, was recently diagnosed with a brain tumour with a prognosis of ten to thirteen months. In the coming year, she hopes to travel to Chicago as often as possible to visit with her father.

[11] Warrant Officer Beemer is in the process of repaying the amount of PLD he collected for which he was not entitled. The current balance left owing is approximately $5,367.72. He is repaying the balance at a rate of $488 per month, with full restitution expected to be completed by the end of November 2020.

[12] Since the allegations arose, Warrant Officer Beemer was promoted to his current rank and posted to the RCD in Petawawa, Ontario, where he originally filled the position of troop production warrant officer and more recently holds the position of maintenance control officer. He is assessed by his chain of command as having the potential to advance to the next rank level as a master warrant officer within the Corps of the Royal Canadian Electrical and Mechanical Engineering and to be an asset to any maintenance organization.

[13] On a personal level, his posting to Petawawa now places him in the same location as his ex-spouse and his daughter which has alleviated significant stress from his personal life.

Position of the parties

Prosecution

[14] The prosecution recommends the Court impose a sentence of a combination of reduction in rank to corporal and 30 days' detention or alternatively a term of three to six months' imprisonment. He argued that if the Court finds that less than three months is appropriate, the Court should combine it with a reduction in rank to corporal.

Defence

[15] The defence submits that a sentence of a severe reprimand and a $4,000 fine, with payments of $400 monthly, is the most appropriate sentence.

Purposes, objectives and principles of sentencing to be emphasized in this case

[16] The fundamental purposes of sentencing in a court martial are to promote the operational effectiveness of the CAF by contributing to the maintenance of discipline, efficiency and morale and to contribute to respect for the law and the maintenance of a just, peaceful and safe society. In order to accomplish this, it is imperative that members be provided the best opportunities for success in reforming their conduct and shortcomings.

[17] The fundamental purposes of sentencing are achieved by imposing sanctions that have one or more of the objectives set out within the *NDA* at subsection 203.1(2). The prosecution emphasized that given that this is a fraud case, the objectives of sentencing that are paramount for the Court to consider are denunciation and deterrence. Whether an accused is charged under paragraph 117(f) of the *NDA* or under section 130 of the *NDA*, contrary to section 380 of the *Criminal Code*, the case law consistently states that sentences imposed must emphasize both the principles of general deterrence and denunciation.

[18] The prosecution provided the Court with case law to support this position, being *R. v. Maillet*, 2013 CM 3034; *R. v. St. Jean*, (2000) CMAC-429; *R. v. Boire*, 2015 CM 4010; *R. v. Généreux*, [1992] 1 S.C.R. 259. He also relied upon the case of *R. v. Saucier*, 2019 ONSC 3611, inviting the Court to review paragraph 13 that sets out the principles of sentencing in fraud cases.

[19] Defence counsel did not oppose the sentencing principles recommended by the prosecution, nor did he take a different position. However, defence did present significant evidence to support the fact that the member is performing at a high level, suggesting the member's positive progress in rehabilitation must be considered. This Court is of the belief that the objective of rehabilitation is always an important consideration, but in light of the nature of the offence, this objective must remain in the background and not in the forefront. The Court agrees that the objectives of deterrence and denunciation, on the facts of this case, are paramount.

Gravity of offence

[20] Section 203.2 of the *NDA* stipulates the fundamental principle of sentencing is that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. 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. The sentence serves to clearly communicate to members specific consequences of engaging in similar conduct.

[21] In assessing the gravity of this offence, the prosecution referred the Court to the cases of *Maillet*, *R. v. Blackman*, 2015 CM 3009; and *St. Jean*, where the respective courts emphasized the seriousness of fraud offences.

[22] The nature of an offence under paragraph 117(f) of the *NDA* covers a broad spectrum of conduct ranging from minor to very serious. Despite the broad range of conduct captured by the paragraph, the maximum penalty to be imposed for all offences is the same, being imprisonment for less than two years or to less punishment.

[23] However, keeping in mind that a conviction of an offence contrary to paragraph 117(f) of the *NDA* requires proof of the same essential elements of the offence of fraud under section 380 of the *Criminal Code*, it is helpful to compare the gravity of the conduct before the Court to similar misconduct in the *Criminal Code*. The offence of fraud under section 380 of the *Criminal Code* separates offences by the monetary value of the subject matter involved, being under or over $5,000. The case at bar involved an act of a fraudulent nature of $22,275, which is well over $5,000.

[24] For cases where the value of the subject matter of the fraud offence is over $5,000, an offender is liable for a term of imprisonment up to fourteen years. The prosecution chose to pursue the charge under paragraph 117(f) of the *NDA* in lieu of section 380 of the *Criminal Code*, thereby limiting the Court to a sentence of a term for less than two years, however the value of the subject-matter of the fraud may still be assessed to have more gravity than cases of lesser amounts of fraud.

[25] The Court Martial Appeal Court (CMAC) addressed the gravity of the fraud offence in the *St. Jean* decision in its response to an appeal against the legality and the severity of the sentence imposed at a Standing Court Martial. The remarks of Létourneau J.A. at paragraph 22 of the decision in *St. Jean* apply equally to the offence charged under paragraph 117(f) of the *NDA*:

> In a large and complex public organization such as the Canadian Forces which possesses a very substantial budget, manages an enormous quantity of material and Crown assets and operates a multiplicity of diversified programs, the management must inevitably rely upon the assistance and integrity of its employees. No control system, however efficient it may be, can be a valid substitute for the integrity of the staff in which the management puts its faith and confidence. A breach of that faith by way of fraud is often very difficult to detect and costly to investigate. It undermines public respect for the institution and results in losses of public funds. Military offenders convicted of fraud, and other military personnel who might be tempted to imitate them, should know that they expose themselves to a sanction that will unequivocally denounce their behaviour and their abuse of the faith and confidence vested in them by their employer as well as the public and that will discourage them from embarking upon this kind of conduct.

[26] Most recently, in the Supreme Court of Canada (SCC) decision in *R. v. Stillman*, 2019 SCC 40, at paragraph 100, the SCC reinforced why serious offences committed by persons subjected to the Code of Service Discipline need to be sentenced within the military justice system to truly account for the seriousness of the offence in light of purposes of discipline, efficiency and morale. This statement reinforces the fact that in many cases, offences will need to be more seriously punished within the CAF, however, in other cases, there may need to be different sentencing alternatives considered. As Létourneau J.A. also stated in the case of *St. Jean*, referring to the words of Lamer C.J. in the *Généreux* case, sentencing in light of the purposes of discipline, efficiency and morale does not always require a more severe punishment than awarded in a civilian case. He stated:

> [38] In this regard, it is worth re-emphasizing that Lamer C.J. did not say that more severe punishment is required in every case. In addition, there has to be a breach of military discipline. The chief purpose of military discipline is the harnessing of the capacity of the individual to the needs of the group. I have no doubt that Lamer C.J., when he referred to breaches of military discipline, contemplated breaches of the imposed discipline which is necessary to build up a sense of cooperation and forgo one's self-interest. He would also have contemplated a breach of self-discipline in the context of a military operation or one which affects the efficiency, the operational readiness, the cohesiveness and, to some extent, the morale of the Armed Forces.

[27] In this case, the offender committed an offence, the gravity of which in the civilian context would have resulted in the loss of one's employment. The same offence committed in the context of military service is just as serious, however, if the member is deemed suitable for rehabilitation and continued military service, then this needs to be considered. It is an important aspect of sentencing that sets military tribunals apart from their civilian counterparts, requiring judges to weigh the needs of the group in sentencing considerations. In this case, the needs of the RCD and the maintenance unit to which the offender belongs must be considered.

[28] The prosecution argued that barring exceptional circumstances, the appropriate sentence in cases of fraud features a custodial sentence. He provided submissions on the test of "exceptional circumstances" imported from civilian case law which he suggests mirrors the jurisprudence in the military justice system. The case of *Murdoch v. R.*, 2015 NBCA 38 highlighted that it is an error for trial judges to "categorize the ordinary as exceptional" in permitting an offender to avoid a custodial sentence (*R. v. Zenari*, 2012 ABCA 279, [2012] A.J. No. 968 (QL), at para. 8, and *R. v. Douglas*, 2014 ABCA 113, [2014] A.J. No. 312 (QL), at paras. 14 and 16). Prosecution also referred the Court to paragraph 29 of *R. v. Burnett*, 2017 MBCA 122 where the Court found "exceptional circumstances only occur in the clearest of cases when there are 'multiple mitigating factors' of significance . . . or the offender's motive for committing the offence is highly unusual." [Citation omitted.]

[29] Although prosecution's submissions were extremely helpful, and the Court noted that the Chief Military Judge, in the case of *R. v. Master Corporal C. Poirier*, 2007 CM 1023, reiterated these same principles, the Court would be remiss not to point out that the analysis is not complete without a fulsome understanding of the more expansive sentencing considerations and discretion provided in the *NDA*. As well, there is a distinct difference between an individual who commits fraud when they are in a position of trust versus one who isn't.

[30] Referring back to the fundamental purpose of sentencing set out at section 203.1 of the *NDA*, it is important to remind ourselves that it is not just to contribute to the respect for the law and the maintenance of a just, peaceful and safe society. More importantly, sentencing in the military justice system must also accomplish the purpose of promoting the operational effectiveness of the CAF by

contributing to the maintenance of discipline, efficiency and morale. This fundamental purpose must be considered. For example, even in cases where a custodial sentence might be a fit sentence, the *NDA* permits military judges to suspend the carrying into effect of a sentence of imprisonment or detention if there are imperative reasons relating to military operations or the member's welfare.

[31] The *NDA* sets this out at section 215(1) as follows:

> 215(1) If an offender is sentenced to imprisonment or detention, the execution of the punishment may be suspended by the service tribunal that imposes the punishment or, if the offender's sentence is affirmed or substituted on appeal, by the Court Martial Appeal Court.

NDA section 216(2) continues:

> (2) A suspending authority may suspend a punishment of imprisonment or detention, whether or not the offender has already been committed to undergo that punishment, if there are imperative reasons relating to military operations or the offender's welfare.

[32] The goal of these provisions is to ensure that if an offender sentenced to imprisonment or detention has a particular skill required on an imminent deployment with his or her unit, then that person may still be able to fulfill the duties required by the operational mission should the requirements of the operation outweigh the societal and disciplinary interest in having a custodial sentence served at the time.

[33] The *NDA* does not contain particular criteria for the application of section 215, nor does it stipulate what types of reasons would be sufficient to qualify as "imperative" with respect to military operations or an offender's welfare. Further, it does not refer to any terminology of exceptional circumstances or a similar test.

[34] Based on court martial jurisprudence, if the gravity of an offence is serious enough to require a custodial sentence, in order to obtain a suspension of the custodial punishment, the offender must demonstrate, on the balance of probabilities, that the circumstances justify such a suspension. If the offender meets this burden, the Court must consider whether a suspension of the punishment of imprisonment or detention would undermine the public trust in the military justice system, in the circumstances of the offence and the offender including, but not limited to, the particular circumstances justifying a suspension. This two-step test is illustrated in decisions rendered in *R. v. Boire*, 2015 CM 4010 and *R. v. Caicedo*, 2015 CM 4020 in which Pelletier M.J. relied on a test first enunciated by d'Auteuil M.J. in *R. v. Paradis*, 2010 CM 3025, paragraphs 74 to 89.

[35] Notwithstanding the necessary consideration of the objectives of sentencing, a sentence must be proportionate to the gravity of the offence and the

degree of responsibility of the offender, the fact that *NDA* subsection 216(2) also includes a reference to military operations fortifies that, where applicable, military judges must craft a sentence that is not just individualized for the offender, but also considers the effects of a sentence on the discipline, efficiency and morale of the unit where the member serves.

[36] On the facts of this case, despite the pending allegations, the offender was promoted and transferred into an increased leadership position, where his guidance is considered pivotal to his unit. His chain of command both past and present were unanimous in supporting his continued service and described him in such favourable terms as an exceptional soldier and a highly capable, technically proficient leader.

[37] The Court notes that the offender's trade is a technical one, related to the maintenance of armoured tanks and military vehicles. He does not occupy a position in a financial trade, nor does he have any direct control of or access to financial resources. In fact, the maintenance officer, testified that he does not even have his own financial responsibilities.

[38] The CO of the RCD testified that the RCD are currently on the road to operational high readiness, with the expectation of an operational deployment in July 2020, which is less than eight months from now. Captain Normandin testified that their Maintenance Company has three established positions for warrant officers, but they are down to two, one of which is Warrant Officer Beemer. When asked what the effect would be if they lost Warrant Officer Beemer for an extended period, he stated that it would be a huge loss as Warrant Officer Beemer knows his job very well, is very helpful and more than able to pull his weight. He stated that he would not have time to train someone to replace him.

[39] The CO of the RCD further testified that Warrant Officer Beemer holds a critical position within the troop, responsible for the maintenance of the largest A-type fighting vehicle fleet in the CAF. He is responsible for the integration of vehicles, which requires him to balance vehicles that are breaking down with the integration of new vehicles and their ongoing inspection requirements. He admitted that losing Warrant Officer Beemer at this time would be felt within the unit. He explained that the unit would eventually recover but it would initially be very challenging. Under cross-examination, he stated that they might not be able to backfill his position at all.

[40] Applying my military knowledge and experience, it is a well-known fact that the road to high readiness is both physically and mentally demanding, engaging members on intensive training and long exercises. It also requires extensive testing to ensure its members and equipment are operationally fit to fight in the coming months. It is no Club Med and there are few breaks during this time. In terms of operational readiness for an armoured unit, there would be an

undeniable impact that would flow if Warrant Officer Beemer was absent during this time.

[41] The successful work-up of the RCD on the road to high readiness is undoubtedly dependent on functioning fighting vehicles. It is a time when the A-type vehicles need to be intensely tested, drivers and operators need to be trained and evaluated in their operation of the vehicles and if the vehicles are not maintained then this cannot be accomplished. Further, the maintenance unit needs to bond and work together.

[42] When the CO of the RCD was questioned on how the fraud conviction would affect Warrant Officer Beemer's employability within his unit, he stated that he would have to do an administrative review to assess his employability and determine if he needed to impose restrictions. However, he was clear in stating that Warrant Officer Beemer has spent the last year regaining lost trust. When Captain Normandin was asked the same question, he stated that he is happy to keep him in his platoon. He confirmed that Warrant Officer Beemer does not have any financial responsibilities at this time. Under cross-examination, he stated that if Warrant Officer Beemer was to be given financial responsibilities in the future that he would support him. Despite his conviction for an offence under paragraph 117(f), he does not view Warrant Officer Beemer as a thief. He stated that Warrant Officer Beemer is remorseful and moving forward, he trusts him because, as he said, "Who hasn't made mistakes in their life?"

[43] The CO of the RCD testified that Warrant Officer Beemer is very dedicated to his troops. Based on his own interactions with Warrant Officer Beemer and the direct accounts he has received from his supervisors, he described Warrant Officer Beemer as very capable, technically knowledgeable and competent, but even more impressive, very passionate about his job.

[44] In addition, Captain Dormeus, the chaplain of the RCD testified that from his observations, Warrant Officer Beemer really loves his job and takes care of his subordinates. He testified that in speaking to members from the headquarters to which Warrant Officer Beemer belongs, he consistently receives very positive feedback regarding morale and the community support provided within the unit, which he attributed to Warrant Officer Beemer's leadership. He explained that Warrant Officer Beemer not only likes what he does, but he is also good at it. He testified that Warrant Officer Beemer has accepted the consequences that will flow from his poor judgement and wants to continue serving.

Parity

[45] *NDA* paragraph 203.3(b) stipulates that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. Despite relatively straightforward facts, the recommendations on sentence by counsel are disparate.

[46] In making his recommendation on sentence, the prosecution relied upon the following courts martial precedents which the Court reviewed. A brief summary of the relevant cases is provided as follows:

(a) *R. v. Arsenault*, 2013 CM 4007. This member was convicted by court martial of two charges: one charge laid under section 130 of the *NDA*; namely, having committed a fraud contrary to subsection 380(1) of the *Criminal Code*, and one charge laid under paragraph 125(a) of the *NDA*; namely, having wilfully made a false statement in an official document. Those relate to the payment of a total of $30,725 for separation expense (SE) following his posting from the Canadian Forces Base (CFB) Valcartier to CFB Gagetown as well as the payment of a total of $3,469 in post living differential. The offender made several false statements monthly concerning his marital status and regarding the fact that he had dependants. He had been separated from his common-law spouse prior to his posting and he specifically asked for a posting and fraudulently added in his ex-spouse and his children as dependants, which triggered significant financial benefits. In addition, by proceeding on an imposed restriction, he was paid PLD for falsely having his primary residence in Quebec City. The Court found that although he betrayed the trust that the CAF entrusts in all its members to comply with orders and directives, Warrant Officer Arsenault's conduct did not abuse a special position of trust. In that case, he was sentenced to a 30-day period of detention and a reduction in rank to sergeant.

(b) *R. v. Maillet*, 2013 CM 3034. This was actually a guilty plea on the four counts: two offences punishable under section 130 of the *NDA*; namely, having committed fraud contrary to subsection 380(1) of the *Criminal Code* between 11 November 2005 and 12 February 2007, at CFB Trenton, and between 12 February 2007 and 31 May 2010, at Valcartier Garrison, concerning a PLD claim for a total of $19,777.80 for both *cases*, as well as two other offences under paragraph 125(a) of the *NDA*, namely, having wilfully made a false statement in a document signed by him and required for official purposes concerning the same two periods and at the same two places previously mentioned. The offender claimed separation expense benefits for a common-law spouse in October 2004, but separated from his spouse in November 2005 and did not notify military authorities as was his duty to do. He continued to claim separation expense. The processing of separation expense benefits require a member to submit a claim every month. It is combined with a section 125, which in each opportunity, when you submit that claim, you have an opportunity to think, reflect, and

consider the circumstances.. The fraud amounted to $67,000 and went on for more than four years, and, adding in the other offences, fraud in the amount of approximately $87,000. The degree of premeditation was considered high and conduct was repeated monthly by submitting a form each and every month. He was sentenced to imprisonment of 90 days.

(c) *R. v. Blackman*, 2015 CM 3009. He was found guilty of seven charges: one charge of fraud contrary to subsection 380(1) of the *Criminal Code*, three charges for forgery contrary to section 367 of the *Criminal Code* and three charges for uttering a forged document contrary to subsection 368(1) of the *Criminal Code*. Between October 2009 and April 2010, he submitted six family care assistance claims for a total amount $l2,460 for which the court martial found him guilty of fraud. He claimed having paid someone to care for his daughter while he was away for training, while, in reality, he did not. In addition, he forged and submitted a family care assistance declaration in support of monthly claims for which he was found guilty of forgery and uttering a forged document. The statement made by the caregiver in each document was forged. The degree of premeditation was very high. He also claimed the allowance on a monthly basis over a period of six months. Petty Officer Blackman was sentenced to imprisonment for a term of 45 days.

(d) *R. v. Boire*, 2015 CM 4010. Plea of guilty in respect of the two charges under section 130 of the *NDA* for fraud, contrary to subsection 380(1) of the *Criminal Code*, for having, on two occasions, claimed separation expense benefits without entitlement. The events relating to the first charge occurred throughout the course of offender's posting to CFB Petawawa in September 2009, when posted on imposed restrictions on the understanding he had a dependant. He applied for separation expense benefits every month of his posting to CFB Petawawa, obtaining 20 monthly benefits of $2,500, certifying and declaring that he had a dependant, when it was not true. The total amount of allowances received to which he was not entitled was $43,262.01. The events relating to the second charge occurred during a subsequent posting to CFB Borden, where he submitted claims for separation expense benefits certifying and declaring he had a dependant, knowing that this was not true. The support personnel at CFB Borden conducted an administrative investigation on his eligibility to receive separation expense benefits which led to the cessation of payments. The total paid by the Crown and received by Master Seaman Boire in relation to separation expense benefits related to his posting to Borden was $5,250. In total with the two

claims, he obtained approximately $48,512.01 to which he was not entitled. The military judge rejected a joint submission of 60 days' imprisonment which counsel suggested should be suspended. Master Seaman Boire was sentenced to imprisonment for a period of sixty days and a fine of $2,400 payable at the rate of $200 per month, but the Court suspended the carrying into effect of the punishment of imprisonment.

(e) *R. v. Martinook*, 2011 CM 2001. Guilty plea to one charge for the offence of fraud contrary to subsection 380(1) of the *Criminal Code* and section 130 of the *NDA*. Over a ten-month period, while the offender was posted to the Essex and Kent Scottish Regiment in Windsor, Ontario, as the chief clerk for the unit, the offender wrote and signed a series of fifteen cheques drawn in his favour on the unit non-public funds account. Cheques varied from $400 to a high of $2,650, and the total amount of the fraud was $17,945. When irregularities were noted in the non-public funds account, the offender was asked to assist in resolving them and he then failed to provide necessary information, lying to his CO that he had done so. He failed to brief his successor on the management of the non-public funds account. At the time of sentencing, none of the money had been repaid. He was sentenced to imprisonment for a period of 21 days and to reduction in rank to corporal.

[47] In comparison with the facts before the Court, the above courts martial had more aggravating factors and include repeated offences of varying complexity and design. Two of the courts martial related to members who abused their roles in their positions of chief clerk. Additionally, in the above cases, the actions of the offenders were premeditated, suggesting a higher degree of responsibility of the offenders.

[48] In making his recommendation on sentence, defence counsel relied upon the following courts martial precedents. A brief summary is provided as follows:

(a) *R. v. Sergeant McLean*, 2008 CM 4005. A guilty plea to one charge laid under paragraph 117(f) of the *NDA*. Offender requested to travel to Gagetown on posting with his wife and four children and finalized a claim for this posting certifying that the expenses claimed had been incurred, knowing full well he had not travelled with his estranged wife and four children. An audit of this claim determined that he had defrauded the DND in the amount of $2,832.50. The member was sentenced to a reprimand and a fine in the amount of $1,500 to be paid in monthly instalments of $150.

(b) *R. v. Martin*, 2014 CM 3001. A guilty plea to one charge under *paragraph* 117(f) of the *NDA*. While posted at Colorado Springs,

United States of America in 2009, Commander Martin submitted information claiming Foreign Service premium (FSP) for three dependents at a rate for which he had no entitlement, depriving Her Majesty in right of Canada of the sum of $14,938. The two children of his second wife, with whom he had just married were supposed to come live with them. The children were registered at a school in Colorado Springs, but his second wife never obtained custody from her ex-husband so the children never moved and offender did not correct the situation. He also got a higher FSP rate because of his personal situation and never informed the proper authority about the change. The situation was eventually discovered and payments ceased in November 2012. The Court accepted a joint submission, with a sentence of severe reprimand and a fine in the amount of $10,000.

(c) *R. v. Mosher*, 2019 CM 4014. A guilty plea for one charge, contrary to paragraph 117(f) of the *NDA*. From August 2015 to January 2016, while Lieutenant-Colonel Mosher was the Chief of Staff - Operations of Canadian Forces *Information* Operations Group, located at National Defence Headquarters in Ottawa and in possession of an Individual Designated Travel Credit (IDTC) card, he used his IDTC card for numerous unauthorized transactions. When confronted, he acknowledged the misuse, asked for the card not to be cancelled, promising that he would cease improper use of the card. Less than a week later, he deposited a cheque for $4,819 to pay off the balance on the IDTC card, knowing that he did not have sufficient funds to cover the cheque. The fraudulent deposit temporarily reset his account balance, allowing him to continue using the card. He wrote a total of eight fraudulent cheques and continued to use the IDTC card for unauthorized expenses until the Bank of Montreal became aware of the activity and cancelled the card. The outstanding balance on the account was then $24,513.53. Lieutenant-Colonel Mosher repaid the Crown the amount owed on the IDTC through garnishment from his pay. The Court accepted a joint submission of a fine in the amount of $10,000, payable in ten monthly instalments of $1,000. There was no imposition of a severe reprimand.

[49] The *NDA* has established a structured and military centric approach to sentencing with well-defined objectives and principles and provides military judges with discretion, but as the SCC stated in *R. v. Nasogaluak*, 2010 SCC 6, discretion in sentencing has limits:

> [44] The wide discretion granted to sentencing judges has limits. It is fettered in part by the case law that has set down, in some circumstances, general ranges of sentences for particular offences, to encourage greater consistency between sentencing decisions in accordance with the principle of parity enshrined in the

> *Code*. But it must be remembered that, while courts should pay heed to these ranges, they are guidelines rather than hard and fast rules. A judge can order a sentence outside that range as long as it is in accordance with the principles and objectives of sentencing. Thus, a sentence falling outside the regular range of appropriate sentences is not necessarily unfit. Regard must be had to all the circumstances of the offence and the offender, and to the needs of the community in which the offence occurred.

[50] This principle of sentencing was reinforced by Gleeson J.A., writing for the CMAC in *R. v. Hoekstra*, 2017 CMAC 5, at paragraph 25:

> [25] Prior sentences and sentencing ranges are not binding on sentencing judges. This reflects the individualized nature of the sentencing process. However, where a sentencing judge determines that an appropriate sentence is one that is markedly more lenient or harsh than the sentences awarded in similar circumstances the judge has a duty to address the reasons for the disparity.

[51] In order to have a better understanding of the range of sentences referred to by counsel, including those cases relied upon by the CMAC in their reasons, I conducted a comparative analysis of not just the cases relied upon above, but of all the cases that both counsel referred to at various parts of their submission. I selected twenty-one fraud-like charges both under section 380 of the Criminal Code as well as NDA paragraph 117(f), in courts martial (see Annex A).

[52] Of the twenty-one courts martial reviewed, the Court found that a custodial sentence was only awarded in ten of the twenty-one cases and in two of those cases, the execution of the custodial sentence was suspended.

[53] Further, the Court noted that none of the offenders who were before a court martial for a single charge of paragraph 117(f) of the NDA were sentenced to a custodial sentence. The cases where a custodial sentence was awarded involved multiple fraud-like offences, or involved a combination of stealing or making a false statement contrary to section 125 of the NDA, knowing it was not true, in a positive act to defraud.

[54] Notwithstanding the observations made from the comparative review, the Court proceeded on an independent assessment for sentencing.

Accounting for relevant aggravating or mitigating circumstances

[55] In the military justice system, under section 203.3 of the *NDA*, in imposing a sentence, the Court shall also take into consideration a number of principles relevant to the case. Firstly, under paragraph 203.3(a) of the *NDA*, in imposing a sentence, the Court shall increase or reduce its sentence to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender. Aggravating circumstances include, but are not restricted to, evidence establishing any of the statutory factors set out in subparagraph 203.3(a)(i) of the *NDA*.

Did the Offender abuse his rank or other position of trust or authority?

[56] As discussed above, the prosecution argued that based on the gravity of the offence of fraud, courts have almost always found that a custodial sentence is the most appropriate sentence. To support his position, he referred the Court to the cases of *Arsenault, R. v. Master Corporal K.M. Roche*, 2008 CM 1001, *Maillet*, *Boire* and *Murdoch*.

[57] The prosecution also drew the Court's attention to civilian case law on the same point. At paragraph 13 of *Saucier*, the prosecution pointed out that large scale fraud by persons in positions of trust will almost inevitably attract a significant custodial sentence. In *Saucier*, the offender was found guilty of ten counts of fraud over $5,000, four counts of uttering forged documents and one count of forgery. The offender was a financial adviser who defrauded ten of his clients over a three-year period. The offender received funds from his clients, and, without their knowledge or consent, retained personal control over those funds rather than place them as he was directed to do.

[58] A review of the above case law supporting the position that, absent exceptional circumstances, cases of fraud will almost always attract a custodial sentence, the Court found that this position was predicated on the underlying factor that in committing the fraud the offender breached a position of trust. The Court notes that Dutil C.M.J. also relied upon this proposition in his sentencing decision in *Poirier* where there was a clear violation of a position of trust.

[59] Subparagraph 203.3(a)(i) of the *NDA* stipulates that it is an aggravating factor in sentencing for the offender to have been in a position of trust. It reads as follows:

> 203.3 A service tribunal that imposes a sentence shall also take into consideration the following principles:
>
> (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and aggravating circumstances include, but are not restricted to, evidence establishing that
>
> (i) the offender, in committing the offence, abused their rank or other position of trust or authority,

[60] This *NDA* provision mirrors that provision that is set out in subparagraph 718.2(a)(iii) of the *Criminal Code*.

> 718.2 A court that imposes a sentence shall also take into consideration the following principles:
>
> (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to

> the offence or the offender, and, without limiting the generality of the foregoing,
>
> . . .
>
> (iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim.

[61] The statutory factor set out at subparagraph 202.3(a)(i) of the *NDA* is an important one that military judges must consider in sentencing. However, it is also important that courts martial not conflate the conduct of all offenders in cases of fraud to be the same as those offenders who committed the offence while abusing their rank or other position of trust or authority. It is an error for courts to do so.

[62] The prosecution also referred the Court to the abuse of trust sentencing guidelines referred to and relied upon by Drapeau C.J. in *Murdoch*. At paragraph 24, Drapeau C.J. reinforces the need for a custodial sentence in deterring and denunciating offences arising from the abuse of trust:

> [24] In most cases of trust theft or trust fraud by an employee, the need for denunciation and deterrence arising from the abuse of trust overwhelms the typically numerous mitigating circumstances and leads inexorably to the conclusion that a jail term is the only "just" sanction that will achieve the fundamental purpose of sentencing. As is well known, that purpose is to "contribute […] to respect for the law and the maintenance of a just, peaceful and safe society": s. 718. Few would quibble with the proposition that the threat of jail is a particularly effective deterrent with "law-abiding persons, with good employment records and family": *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, at para. 129.

[63] Without weighing into the relevancy of the abuse of trust sentencing guidelines to courts martial, the fundamental question that the Court reviewed was whether or not the offender in the case at bar was actually in a position of trust. Defence argued strongly that he was not.

[64] In the case at bar, the offender fraudulently obtained a personal benefit through dishonesty. However, one can be dishonest without having specifically abused their rank, a position of trust or a position of authority for self-benefit as stipulated in the guidelines. Courts martial have always harshly treated offenders who abused their rank, or other position of trust or authority to gain an advantage to the detriment of another, including the Crown.

[65] The Court notes that in the case before it, the offender was not in a position similar to any of the cases referred to within the abuse of trust guidelines and case law discussed in the case of *Murdoch*. He was not an agent, cashier, bookkeeper, bank manager, bank employee, trust adviser, comptroller stealing from his employer, an accounting manager or a lawyer stealing from his clients. He was simply a CAF member receiving an

allowance that he was entitled to collect and he failed to report a change in his circumstances that he was under a duty to do so.

[66] In the application of the guidelines, it is important that courts delineate between cases where an abuse of trust existed with those where it was absent. At paragraph 37 of *Murdoch*, Drapeau C.J. wrote that:

> [37] Moreover, the abuse-of-trust sentencing guideline is not concerned with cases of employee theft *simpliciter*. For the guideline to be in play, the employee must have abused a position of trust (in relation to the employer) in committing the offence. That elementary, but important point is made by Richard J.A., writing for the Court, in *Veno v. R.*, 2012 NBCA 15, 384 N.B.R. (2d) 126, at paras. 13-16:
>
> > There is ample authority for the proposition that theft by one who is entrusted with money in the course of his or her employment constitutes an abuse of a position of trust. In fact, most of the theft cases where s. 718.2(*a*)(iii) has been applied feature such circumstances. This was the situation in *Steeves and Connors* and its companion case, *R. v. Chaulk*, 2005 NBCA 86, 287 N.B.R. (2d) 375, and is the situation in most of the reported cases (see for example: *R. v. McKinnon*, 2005 ABCA 8, [2005] A.J. No. 12 (QL) (embezzlement by a bookkeeper); *R. v. Holmes*, 1999 ABCA 228, [1999] A.J. No. 862 (QL) (bank manager stealing from accounts); *R. c. Dubreuil*, [1992] J.Q. No. 1081 (C.A.) (QL) (bank employee embezzling funds); *R. v. Reid*, 2004 YKCA 4, [2004] Y.J. No. 3 (QL) (cashier stealing from employer); *R. v. Pierce*, [1997] O.J. No. 715 (C.A.) (comptroller stealing from employer); *R. v. Dobis*, [2002] O.J. No. 646 (C.A.) (fraud by accounting manager); *R. v. Clarke*, [2004] O.J. No. 3438 (C.A.) (bank telephone agent stealing from accounts); and *R. v. Bowes (J.M.)* (1994), 155 N.B.R. (2d) 321, [1994] N.B.J. No. 472 (C.A.) (QL) (lawyer stealing trust funds)). However, the present case is different. Mr. Veno did not steal money that was entrusted to him in the course of his employment. He used information he gained through his employment and, just as importantly, through his friendship with his employer in order to identify the object of his crime and the means by which he could commit it.
> >
> > I note that, as an aggravating factor pursuant to s. 718.2(*a*)(iii), "abuse of a position of trust" is not limited to theft-type cases. There are other offences, such as sexual assault, where s. 718.2(*a*)(iii) has been applied. A credible argument can certainly be made that Mr. Veno breached the trust his employer and friend placed in him when he hired him, giving him an opportunity to learn where the money was kept and how to get access to the house. However, when it comes to theft-type cases, such an argument has been rejected by this Court in *Adler*. - 14 -
> >
> > In *Adler*, a homemaker hired by an elderly couple through the services of the Red Cross "inveigled herself into their confidences" and gained access to the couple's bank debit card and personal identification number, after which she "proceeded to deplete the account of the couple's life savings of $27,890.00" and then forged "three cheques for a total of $1,650" (para. 2). Upon pleading guilty to her crimes, Ms. Adler was sentenced to serve a conditional sentence of eight months.

> On appeal, this Court varied the sentence to eight months incarceration. In doing so, the Court said as follows:
>
> > In this case there was no aggravating factor of trust. The Crown argued that there was a breach of trust but argues it in a non legal sense of abuse of confidence rather than a recognized legal sense of vesting their finances in Ms. Adler's hands for their benefit. The accused was engaged to look after the physical comfort needs of this elderly couple as a homemaker and not in any fiduciary capacity. She is simply a thief. If she had been in a position of trust or authority and breached such position, an aggravating factor, we would consider a sentence of eight months in the circumstances of this case neither fit nor proportionate to the gravity of the offence and the degree of her responsibility as set forth in s. 718.1. The appeal in relation to sentence is allowed. [para. 11]
> >
> > I find *Adler* indistinguishable from the present case and, in my view, the Provincial Court judge was bound to apply it. The judge simply said it was distinguishable because Mr. Veno worked for the victim and learned of the existence of the funds through his employment. However, Ms. Adler worked for the elderly couple she defrauded, and it was in the course of this employment that she learned of the existence of their bank account and how to gain access to it. There are simply no significant distinguishing features. *Adler* set the law on the application of s. 718.2(*a*)(iii) to theft-type cases in this Province, and the failure to apply it constitutes an error of law. [paras. 13-16]]

[67] Further, Drapeau C.J. states that the abuse of trust sentencing guideline does not apply to summary conviction offences. Although the military justice system does not draw a distinction between indictable and summary conviction offences, the prosecution did pursue the charge under the *NDA*, paragraph 117(f), rather than under section 130 of the *NDA* and section 380 of the *Criminal Code* for fraud.

[68] Based on the underlying facts of the charge, I have no trouble concluding that the offender did not abuse his rank or other position of trust or authority. In summary, in the case at bar, the offender's level of moral culpability is lower than the offenders who abused their position or a position of trust and bears little resemblance to the case law that would trigger adherence to the abuse of trust sentencing guidelines.

[69] In assessing what type of sentence is most fit for the circumstances and the offender, it is therefore important for the Court to start its analysis from the point that there is no rule of law stating that a term of imprisonment should be automatically imposed, nor shall a court martial rule it out. Each case rests on its particular facts. Referring to the CMAC case of *R. v. Lévesque*, CMAC-428, Létourneau J.A., writing for the CMAC in *St. Jean* stated the following at paragraph 22:

> Deterrence in such cases does not necessarily entail imprisonment, but it does not *per se* rule out that possibility even for a first offender. There is no hard and fast rule in this Court that a fraud committed by a member of the Armed Forces against his employer requires a mandatory jail term or cannot automatically deserve imprisonment [footnote omitted]. Every case depends on its facts and circumstances.

[70] The prosecution brought the Court's attention to the reasons of Pelletier M.J. in *Boire*, where he wrote that the CMAC *St. Jean* decision was rendered when there was a significant trend in appeal court jurisprudence treating economic crimes with minimum resort to incarceration, including imprisonment. Military Judge Pelletier further noted that since that time, section 380 of the *Criminal Code* was amended in 2004 to increase the maximum punishment for the offence of fraud over $5,000 from ten to fourteen years. I note that Dutil C.M.J. made a similar observation in the case of *R v. Roche* and again in *Poirier*. In their view, the principle of general deterrence, which must be emphasized in fraud cases, was more important now than it was at the time of *St. Jean*.

[71] Upon a close review of the case law, the Court notes that these comments were made in relation to courts martial that were significantly more serious than the facts of the case at bar. In those cases, the offenders were charged with multiple offences, including fraud, contrary to section 380 of the *Criminal Code*. The Court noted in *Poirier* that Dutil C.M.J. also made this statement and referred to the axiom that absent exceptional circumstances, a custodial sentence should be awarded, but that was in the context of the facts of that case which involved five charges of approximately $35,000 by the chief clerk of the unit who committed the breaches by abusing her position as chief clerk.

[72] In *Boire*, the offender developed a sophisticated fraudulent scheme with the sole purpose of obtaining benefits to which he was not entitled and he executed this not just once, but during two different postings, by submitting fraudulent claims each month to the total amount of approximately $50,000.

[73] Hence my review of the jurisprudence, including the submissions I received from counsel, the CMAC decision in *St. Jean* remains good law. The most recent sentence awarded at court martial for a similar offence in June 2019, is the case of *R.* v. *Mosher*, 2019 CM 4014. Despite him having the aggravating factor of a conviction for a fraudulent act of personation twenty years ago, he was not given a custodial sentence. The *Mosher* case was just decided in June of 2019.

[74] Based on the Court's assessment, the three cases presented by the defence are most similar to the facts before this Court. In the Court's view, the *Martin* case is more serious than the case before me, in that he was never entitled to collect the allowances to begin with, and although he might have thought he would be eligible, he began collecting the allowances when he first arrived in the

United States, and, at that point, he knew his stepchildren were not with him. He collected the allowances from the first instance and continued for forty months.

[75] The Court notes that the facts in both *Mosher* and *Martin*, involved senior officers, and were the result of joint submissions. However, the case law is clear that in recommending a joint submission, counsel must jointly propose a sentence that is not contrary to the public interest and does not bring the administration of justice into disrepute. The prosecution would have been in contact with the chain of command and were aware of the needs of the military and its surrounding community. In their roles as prosecutors, they were responsible for representing those interests and courts martial rely heavily on their professionalism, honesty and judgement.

[76] It is important to keep in mind that the prosecution and defence are provided significant latitude in the recommendation of joint submissions and the Court appreciates that there are many factors, including a *quid pro quo* balancing that underlies the recommendations. Nevertheless, joint submissions are not without consequences in the larger picture as every time a joint submission is accepted, it must still meet the objectives of sentencing.

[77] The facts of both those cases involve officers who were guilty of much more serious misconduct. The case of *McLean*, is also similar to the facts before the Court. In *McLean*, the offender submitted a fraudulent claim for benefits when he knew at the time he was not entitled. The differentiating factor in that case was that he defrauded the government of significantly less money being, $2,832.50.

[78] In the case at bar, it is an important fact that the offender was legitimately collecting the PLD allowance for a significant period of time before his circumstances changed. If he had not been forced to vacate the condo where he was living, he would have continued to be entitled to receive the allowance. Both *Martin* and *Mosher* were guilty of taking active steps that were deliberate and fraudulent from first instance and the case of *Mosher* involved an elaborate design and premeditation to defraud. In the case at bar, the nature of the PLD program is such that once approved, the allowance is continuous, so the member would continue to receive the allowance until the member reports a change. In this case, his offence was an act of omission in failing to report his change, when he had a duty to do so. Similarly, this fact also sets his case apart from the cases relied upon by the prosecution in terms of parity, being *Martinook, Arsenault, Maillet, Blackman*, and *Boire*. In each of those cases, the member's actions were premeditated, and specifically designed to provide them with benefits, to which they were not entitled from first instance. Compounding these factors, in each case, the offender's collection of the benefits required them to submit monthly claims, which triggered an opportunity for them to pause and think about what they were doing, when they submitted a claim each month.

Additional aggravating factors

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

(a) Rank and experience. At the time of the offence, the offender was a sergeant with twenty-one years of experience, serving within the regular force. He was expected to follow and uphold the law and CAF policies.

(b) Scope of the fraud. The allowance continued without interruption for over a year to a total amount of $22,275.

(c) Personal gain. The offender derived personal gain from the receipt of the allowance to which he was not entitled.

(d) Involuntary end. Rather than voluntarily stopping the allowance, the fact that he was living in Borden was brought to the attention of the chief clerk who inquired further. He was originally evasive in responding to the queries and then angrily confronted her at one stage.

Mitigating factors

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

(a) First time offender. Although there are a few entries on the member's conduct sheet, they are unrelated to the conduct before the Court and he was considered by the Court to be a first offender.

(b) Ongoing restitution to repay the PLD he received to which he was not entitled. Based on the evidence of Sergeant Farrell, the chief clerk of the RCD, the offender has been repaying the overpayment and at the time of sentencing, he had approximately $5,000 left outstanding.

(c) Prior service and good work performance. Warrant Officer Beemer has served his country well for over twenty-four years and contributed meaningfully on a tour in Afghanistan. Major Sett, Warrant Officer Beemer's former Officer Commanding of the Maintenance Company in 32 Service Battalion, testified that while serving with them, Warrant Officer Beemer's performance was outstanding and that he had nothing but excellent words to describe him in his role as the operations and training warrant officer. Similarly, Lieutenant-Colonel Devries, Warrant Officer Beemer's

former CO, also testified that Warrant Officer Beemer was an excellent soldier and still is. He explained that during the time Warrant Officer Beemer served with 32 Service Battalion, he was assessed as a "mastered/outstanding" in terms of performance, but he also referred to him as a "Jekyll and Hyde". He explained that in the field, Warrant Officer Beemer was the one he relied upon, but off duty he was doing things that violated rules in others' homes, such as smoking in the quarters and in the condominium, where policies prohibited it.

(d) Age and Potential. Major Sett confirmed that Warrant Officer Beemer had excellent potential to continue to serve and progress within the CAF. Despite the conviction, Major Sett expected that the offender would continue to be an outstanding soldier. He stated that he would likely put in measures to monitor any financial matters, but he would have no objections having him serve in his unit again.

(e) Remorse of the Accused. When Warrant Officer Beemer was given the opportunity to address the Court, he apologized to everyone, including his chain of command for putting them through these proceedings. He expressed gratitude for his supportive chain of command who he stated were supportive of him from "flash to bang". He explained that he had a hard time over the last few years, but was responsible for the poor lapse of judgement on his part. He explained that since he was his daughter's age, being ten years old, he knew what he wanted to do. He explained that at the age of twelve, he joined cadets, then he joined the reserves and then transferred to the regular force. He stated that he currently has forty hardworking technicians working for him, weapons systems and, until recently, communications in his area of responsibilities. He stated that his focus is on looking after his technicians, his job and his daughter. In short, Warrant Officer Beemer's address confirmed his passion for his work as a technician and his desire to continue serving in the CAF. He demonstrated no sense of bitterness, entitlement or arrogance that might be expected when someone is facing this stage of the sentencing process.

Any indirect consequences of the finding of guilt or the sentence should be taken into consideration

[81] Pursuant to paragraph 203.3(e) of the *NDA*, defence counsel made extensive submissions on the indirect consequences of the finding and the sentence of the charges before the Court.

[82] Defence counsel argued that it is no secret that Warrant Officer Beemer, due to his lack of qualifications is currently acting-lacking as a warrant officer, so a reduction in rank would see him reduced to that of a corporal. He argued that Warrant Officer Beemer has already had his promotion deferred due to the facts of this case and it has had a financial impact on him.

[83] Defence further argued that sentences of detention or imprisonment would further hinder the progress he has made and the sentencing objective of rehabilitation. He argued that the offender is not currently displaying any shortcomings and this should be given proper consideration. He argued that there is no problem that needs to be solved in order to provide him with specific deterrence and asked the Court to craft a sentence that sends a message that a custodial sentence can be counterproductive.

[84] Further, defence pleaded with the Court to consider the hardship a custodial sentence would have on others, such as Master Corporal Rodrigues and their daughter. Master Corporal Rodrigues testified that she will be away to attend a three-week career course in Borden from mid-November 2019 until early December 2019 and that Warrant Officer Beemer is her primary backup for child care during her absence.

[85] Further, it was the evidence of Captain Normandin, the maintenance officer for the RCD, that he relies heavily on Warrant Officer Beemer's experience and losing him at this time would be difficult as they are already short one warrant officer. The CO of the RCD, Lieutenant-Colonel Marois, also testified that the loss of Warrant Officer Beemer would have a significant effect on his unit as they are short of members with his experience and skill set and losing him would be a hardship to the unit, placing a significant load on others.

Is a custodial sentence required? (see NDA paragraph 203.3 (c) and (c.1))

Moderation

[86] Under the principles of sentencing set out in section 203.3 of the *NDA*, an offender should not be deprived of liberty by imprisonment or detention if less restrictive sanctions may be appropriate in the circumstances. Further, it states that a sentence should be the least severe sentence required to maintain discipline, efficiency and morale.

[87] This Court actively weighed and analyzed at length the relevant factors to ensure proportionality. Proportionality is determined both on an individual basis and by comparison with sentences imposed for similar offences committed in similar circumstances. This is imperative to ensure confidence in the court martial system, particularly in light of the variance between extreme harsh and lenient sentences proposed by counsel.

[88] After comparing the facts of the case at bar to the cases discussed above, I was particularly persuaded by the decision of Létourneau J.A. in the case of *St. Jean*. In *St Jean*, after a survey of the relevant case law at that time, for similar offences, (being *R. v. Vanier*, CMAC-422, *R. v. LeGaarden*, CMAC-423, *R. v. Lévesque*, CMAC-428 and *R. v. Deg*, CMAC-427), Létourneau J.A. concluded at paragraph 31, that the imposition of a sentence of imprisonment for a non-commissioned member, while less restrictive sanctions were considered suitable for officers would make the proposed custodial sentence in that case unreasonable. He wrote:

> [31] Indeed, after a review of all these cases, I am at a loss to see how the sentence of imprisonment in the present instance can be said not to be unreasonable. The only matter which distinguishes this case from those previously discussed and might appear to be more incriminating is the amount of money fraudulently obtained by the appellant, i.e., $30,835.05. However, this factor alone, in my view, does not justify the imposition of a harsher treatment to a non-commissioned member when it was found that deterrence of officers, including one of senior rank and another guilty of the more serious charge of stealing while entrusted with the control of the stolen money, could be achieved by less restrictive sanctions. To maintain the sentence in the circumstances of the present instance would amount to creating two classes of offenders in the military justice system with differential treatment for each class: imprisonment for non-commissioned members and a less restrictive sanction for officers.

[89] It is clear that this observation by the CMAC in the case of *St. Jean* remains valid today. In the more recent cases of *Martin* and *Mosher*, the mere fact that the prosecution jointly proposed a non-custodial sentence in both cases suggests that the prosecution believed that the deterrence and denunciation for this type of offence can be achieved by less restrictive sanctions. To suggest otherwise now in the instant case may be unreasonable. Further, based on the evidence provided by the offender's military chain of command, and the fact that the unit is on the road to high readiness, the Court is persuaded to impose a sentence that permits the offender to contribute usefully to his unit, the Army and the CAF at large, rather than the unit losing one of its warrant officers at a pivotal time, detracting the unit from its mission while he serves time in a penal institution. The Court is also aware that if he was sentenced to less than fourteen days, his unit would actually have to maintain and run the detention facility here in Petawawa.

[90] Consequently, in crafting a sentence that is proportionate to the gravity of the offence and the degree of responsibility of the offender, for the reasons I have already described above, I am of the view that a custodial sentence in this case is not required.

[91] Although this Court accepts the prosecution's submission that but for the predicament it faced when the *R. v. Stillman*, 2019 SCC 40 case was before the SCC, the prosecution would have pursued charges through section 130 of the *NDA* contrary to section 380 of the *Criminal Code*. Based on the circumstances of the charge before the Court, its facts, and the parity in case law, my assessment on

whether a custodial sentence is required remains unaffected. The Court must now consider non-custodial sentencing options.

Assessment of sentencing options

[92] The punishments available to a court martial are set out in subsection 139(1) of the *NDA* which is found within Division 2, Service Offences and Punishments. In addition to the custodial sentences requested, the prosecution also recommended that the Court impose a reduction in rank to corporal. In contrast, defence recommended that the Court impose a sentence of a severe reprimand and a fine in the amount of $4,000.

[93] As explained earlier, the Court must also be mindful of the second order effect of a sentence on military operations, recognizing the fundamental purpose that such a sentence should not detract from the operational effectiveness of the CAF by contributing to the maintenance of discipline, efficiency and morale. The Court must be mindful of the effect of a sentencing decision on military discipline as that underpins the rationale for a separate system of justice.

[94] Reduction in rank is a purely military sentence that reflects the loss of trust in the offending member to act in a leadership position at his current rank. In the CMAC decision of *R. v. Fitzpatrick*, [1995[CMAC-381, Goodfellow J.A. described at paragraph 31 the nature of such a sentence:

> The sentence of reduction in rank is a serious sentence. It carries with it career implications, considerable financial loss, plus social and professional standing loss within the services. It is a truism that rank has its privileges, and to reduce one to the lowest rank is a giant step backwards which undoubtedly serves not only as a deterrent to the individual but also a very visible and pronounced deterrent to others. There are occasions when a sentence in the military context justifiably departs from the uniform range in civic street and certainly the reduction in rank is a purely military sentence.

[95] The overwhelming evidence before the Court suggests that as an acting lacking warrant officer, the offender has not lost the trust from his superiors to lead troops. He currently leads a team of forty technicians responsible for maintaining the regiment's armoured fighting vehicles, its weapon systems and its communication equipment as well as reconnaissance vehicles.

[96] As the prosecution pointed out, the offender betrayed the trust of the CAF in failing in his duty to accurately report the change in his personal situation. However, there is no evidence that he used his rank, function, position, or authority to facilitate the commission of the offence. Notwithstanding the current charge before the Court, the testimony from both his former and current chain of command were consistent in their praise for his technical expertise and leadership.

[97] More importantly, despite the allegations before the Court, his chain of command promoted him to the rank of warrant officer. The evidence was such

that he has regained the trust and respect of his superiors, peers and his subordinates. In light of these facts, the Court is of the view that a reduction in rank is not a reasonable sentence either.

[98] When the court works its way through the mitigating and aggravating factors, it is clear that there is a need to send a strong message of deterrence and denunciation. Referring back to the prosecution's submission that the facts themselves would have constituted an offence under section 380 of the *Criminal Code* for fraud, this fact is something I must consider. The Court is aware that until 2013, there was no delineation on the offences that would lead to a criminal conviction under the *Criminal Records Act*. That changed when section 249.27 was added to the *NDA*. Under that new provision, a conviction under paragraph 117(f) eludes a criminal conviction unless the sentence is higher in the scale of punishments than a severe reprimand or greater than a fine exceeding basic pay for one month.

[99] Upon a review of the available sentences set out at section 139 of the *NDA*, I note that forfeiture of seniority is situated higher in the scale of punishments than a severe reprimand, but lower than reduction in rank. As most military members are aware, promotion to the next rank depends on merit, but also partly on achieving a minimum time in rank, which is often referred to as entering the promotion zone. Although forfeiture of seniority in rank does not carry the same visible stigma as a reduction in rank, its impact on pay and promotion prospects can be significant and its mere imposition is not without its own set of consequences.

[100] More importantly, based on the facts of this case, this sentence is individualized to the offender while promoting the operational effectiveness of the CAF by contributing to the maintenance, efficiency and morale of the unit.

[101] *Queen's Regulations and Orders for the Canadian Forces* (QR&O) 104.11, Forfeiture of seniority, reads as follows:

> Section 144 of the *National Defence Act* provides:
>
> "144. Where a court martial imposes a punishment of forfeiture of seniority on an officer or non-commissioned member, the court martial shall in passing sentence specify the period for which seniority is to be forfeited."

[102] Most importantly, any person found guilty of an offence under paragraph 117(f) of the *NDA* and sentenced to a punishment of forfeiture of seniority will have a criminal record. This is an important factor that by itself acts as a significant deterrent to members wishing to engage in this type of conduct in the future.

Final comments

[103] Warrant Officer Beemer, I have carefully weighed your conduct against the testimony from your chain of command and the positive reports of your performance and commitment to service in the CAF. Both your address to the Court and the evidence suggests that you accept responsibility for your conduct.

[104] As you stated in your comments, your chain of command has been supportive from "flash to bang" and despite the allegation, although there were some setbacks, they still promoted you. They have shown confidence in you. Now, you must close this chapter and move on to the next stage of your career. You are well positioned with the opportunity to return the confidence displayed by your chain of command as you positively mentor junior members.

[105] I hope that you have hoisted in this ordeal as an important lesson. Anyone of us can find ourselves close to that fine line that is very tempting to cross. It is important that all members be surrounded by positive role models and we need consistent messaging encouraging our members to make the right choices. Integrity is an everyday commitment to resist temptation. We are all human, we make mistakes, but it is what we do when we are called out on them that reflects our true character. I wish you the best of luck as you move forward.

FOR THESE REASONS, THE COURT:

[106] **SENTENCES** Warrant Officer Beemer to a forfeiture of seniority of a period of one year in his current acting/lacking rank of warrant officer, and a fine in the amount of $4,000. Because Warrant Officer Beemer is currently making restitution of the defrauded amount, which is expected to be completed in November 2020, the fine is to be paid in monthly instalments of $200 per month, commencing on 1 December 2019, and once full restitution has been obtained, the monthly instalments of $200 shall increase to the amount of $600 until the fine is paid in full.

Counsel:

The Director of Military Prosecutions as represented by Major L. Langlois

Major A. Bolik, Defence Counsel Services, Counsel for Warrant Officer D.E. Beemer

Annex A
To *R. v. Beemer*, 2019 CM 2031

CHRONOLOGICAL REVIEW OF SENTENCES IN CASES OF VARIOUS LEVELS OF FRAUD

#	Court Martial	Number of Charges	Distinguishing Facts	Breach of Position of Trust	Non-Custodial Sentence	Custodial Sentence
1	*R. v. Vanier*, (1999) CMAC-422	6 charges of fraud; 1 x improper receipt of benefit,	Officer	Officer in Position of Trust	Reduction in rank to lieutenant-colonel and fine of $10,000.	
2	*R. v. Legaarden*, (1999) CMAC-423	Multiple charges including falsification of documents (taxi chits).	Officer $2,400 involved		CMAC substituted a fine of $10,000 and severe reprimand.	CMAC quashed sentence of 6 months' imprisonment.
3	*R. v. Lévesque*, (1999) CMAC-428	Found guilty: -3 x para 117(f) *NDA* -Conspiracy	NCM Fraudulent claim of $35,615.42		TJ sentence – Fine of $4000 and severe reprimand. CMAC upheld sentence of fine of $4000 and severe reprimand.	
4	*R. v. Deg*, (1999) CMAC-427	Pleaded guilty s. 114, 125(a) and 129 of *NDA* – Stealing while entrusted with standing advance, 23 charges of false entries and neglect. Forged signature of his superior on false claims.	Officer Finance and Pay Officer; amount small $619.	Position of trust	CMAC quashed sentence of 4 months imprisonment and substituted severe reprimand and fine of $5000.	CMAC quashed sentence of 4 months' imprisonment.
5	*R. v. Sergeant G.R. Benard*, 1999 CM 51	Found guilty – stealing while entrusted with care and custody of that material and making false certification		Military police in position of trust Stealing while entrusted	Fine of $2000 and reduction in rank from sergeant to corporal.	
6	*R. v. Sergeant K.G. Larocque*, 1997 CM 35	Found guilty of 1 x fraud and 1x stealing while entrusted with money stolen	$27,394.75 fraud and theft of $621.43; Gambling addiction	Stealing while entrusted		Judge of view that imprisonment mandatory – *it was stealing while entrusted*. Imprisonment of 4 months.
7	*R. v.,Blaquière*, (1999) CMAC-421		Submitting false claims up to $13,500 while working as a pay cashier.	Position of trust; Stealing while entrusted.		Sentence of 7 months' imprisonment upheld by CMAC.
8	*R. v. St. Jean*, (2000)	Guilty plea:	Fraud of $30,835.05 by		CMAC imposed reduction in rank	CMAC overturned TJ sentence of

	CMAC-429	- 3x s. 380(1) Fraud of *CCC*; - 1 x para 117(f) of *NDA* - 1 x s. 368(1) of the *CCC*	submitting 62 separate general allowance claims falsely claiming money for tuition and courses which he did not take. Sergeant and evidence of blackmail		to corporal, severe reprimand and a fine of $8,000.	imprisonment.
9	*R. v. Captain J.C.B. Gagnon*, 2005 CM 34	Guilty plea - 9 original charges – pleaded guilty to 3 charges. - 1x s. 117 (f) *NDA*, - 2 x s. 129 *NDA*.	Multiple offences including harassment of cadet and drinking while on duty. Authorized pay to a person not entitled (and who was his spouse). $610	CIC CO – Captain - abuse of trust	Severe reprimand and fine $1200.	
10	*R. v. Major M. Paradis*, 2006 CM 75	Pleaded guilty to 2 charges – para 125(a) and para 117(f).	No real facts set out in written decision. 2nd CO of CIL in 18 months in Quebec to have found to have breached the trust of her position.	CIL Officer – Major Abused position of CO	Reduction in rank to captain and a fine of $1000.	
11	*R v. Master Corporal C. Poirier*, 2007 CM 1023	Pleaded guilty to 5 charges, 2 x. S. 380 *CCC*, and 3 x para 117(f) *NDA*. There were originally 25 charges, which also included offences contrary to s. 125 of the *NDA*.	Combined fraud - $31,109.15 + $2,838.60. Planned and deliberate	Chief Clerk – abused position RMS Clerk for 28 Svc BN and DCC for the Unit OR.		30 days' imprisonment. In decision, C.M.J. writes that he agrees with the proposition that "absent exceptional circumstances", a custodial sentence should be provided.
12	*R. v. Sergeant K.J. McLean*, 2008 CM 4005	Guilty Plea 1x 117(f)	Fraudulent claim on posting for alleged travel with ex-spouse and 4 children Amount of $2,832.50		Reprimand and fine of $1,500 to be paid in monthly instalments of $150.	
13(a)	*R. v. Master*	Guilty Plea	RMS Clerk - Over 3	Abused position.		Suspended sentence of 14 days'

	Corporal K.M. Roche, 2008 CM 1001	s. 380 *CCC* - Fraud	months – defrauded NPF Funds at CFB Kingston of $8700 via writing 7 cheques to herself.	MCpl – RMS clerk and Deputy CO of the NPF Acctg – had been asked to assist in investigation. – Hid NSF cheques		imprisonment and a fine of $2000. C.M.J. writes at para 21 in response to Defence's request for a non-custodial sentence: "recent legislation and case law do not support such an approach in cases of fraud ***committed against an employer by an employee <u>abusing a position of trust</u> directly related to the management or supervision of the money or material fraudulently taken***. A custodial sentence is required to promote denunciation and deterrence."
13(b)	*R. v. Roche*, 2010 CM 4001	Guilty Plea – Joint Submission. Charge 1: S. 114 *NDA*, stealing, when entrusted by reason of her employment, with the custody, control or distribution of the thing stolen.	Second Court Martial for member in less than 2 years. RMS Clerk with accommodations section at CFB Kingston. After members had left for the day, she took an envelope containing $885 without authorization and left for the weekend. On the Monday, when asked whether she knew where the money was she lied, telling him that she had deposited it in the base cashbox. Later she admitted having stolen the money and gradually returned it.	Breach of trust - stealing while entrusted. BUT – 2nd court martial for similar violation of a position of trust. She pleaded guilty in Jan 08 after defrauding the NPF office of CFB Kingston of $8700. (See *R. v. Roche* 2008) Court in this case concerned she has not learned from her first experience with justice		Sentenced to 60 days' imprisonment and a fine a $5000 payable in 20 monthly instalments of $250. Once again, the court suspended the sentence of imprisonment.
14	*R. v. Martinook*, 2011 CM 2001	Guilty Plea s. 380(1) of the *CCC*	15 cheques drawn in his favour over 10 months – as CC in reserve unit.	CC- in reserve Unit - abused his position		21 days' imprisonment and reduction in rank from sergeant to corporal.

			Total fraud - $17, 945 Cheques ranged from a low of $400 to a high of $2,650.	None of the money was repaid.		
15	*R v Maillet*, 2013 CM 3034	Guilty Plea on 4 Counts, -2 x 380(1) of *CCC* and -2 x Para 125(a) of the *NDA*	PLD fraud up to $19,777.80 Multiple fraud activities. Scam which included SE and PLD			Imprisonment for 90 days.
16	*R v Arsenault*, 2013 CM 4007	Found guilty after trial - 1 x 380(1) of the *CCC* - 1 x s. 125(a) *NDA* for making a false statement in an official document. Deliberate and calculated from asking for a posting on IR. Required continual monthly submissions of deceit.	Fraudulently obtaining SE and PLD – falsified $34,043. SE would have required monthly applications.			30 days' detention and reduction in rank to sergeant (Sentence upheld on appeal).
17	*R v Martin*, 2014 CM 3001	Guilty Plea 1 x 117(f) NDA Collected FSP to which he was not entitled for 40 months. Similar to case at bar.	Officer	Claimed foreign service premium for 3 dependents for which he had no entitlement. $14,938.	Severe reprimand and $10,000 fine, payable at $100 per month until full restitution was reimbursed and then increased to $800 per month.	
18	*R. v. Blackman*, 2015 CM 3009	Found guilty of 7 charges: 1 x 380(1) *CCC* Fraud + 3 x Forgery (367 of *CCC*) + 3 x 368(1) of *CCC*.	Member was also serving in admin position and as a CC. Level of planning - very high			Imprisonment for a term of 45 days.
19	*R. v. Boire*, 2015 CM 4010	Guilty Plea 2 charges contrary to section 380(1) of the *CCC*	2 x occasions of continual breach (approx. $50,000) Sophisticated scheme and planning to defraud.			Imprisonment for 60 days and a fine of $2,400. Court suspended carrying into effect of

						the imprisonment.
20	*R. v. Mosher*, 2019 CM 4014	Guilty Plea to 1 charge contrary to s. 117(f) *NDA*. Deliberate, calculated writing a series of 8 cheques.	Officer $24,513.53		Fine in amount of $10,000.	

- Note: there are two courts martial of *MCpl Roche* (2008 and 2010).
- 10 courts martial out of 20 – Custodial Sentences were awarded – of which 3 were suspended (*Boire* and 2 x *Roche*)
- Facts arising from a breach of trust or stealing while entrusted will attract custodial sentence (absent exceptional circumstances);
- Courts martial limited to 1 x s. 117 *NDA* offence – all sentences were a combination of reprimands and fines (unless circumstances arose from a breach of trust).