COURT MARTIAL

Citation: *R. v. Darrigan*, 2019 CM 4010

Date: 20190516
Docket: 201855

Standing Court Martial

Halifax Courtroom Suite 505
Halifax, Nova Scotia, Canada

Between:

Her Majesty the Queen

- and -

Petty Officer 2nd Class S.J. Darrigan, Offender

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

REASONS FOR SENTENCE

(Orally)

Introduction

[1] Petty Officer 2nd Class Darrigan pleaded guilty to one charge under section 114 of the *National Defence Act* (*NDA*), to stealing from the Atlantic Galley on Canadian Forces Base (CFB) Halifax a meat slicer, a microwave and a countertop chafer, items of public property valued at $7,757.07 which were entrusted to him as kitchen supervisor. He also pleaded guilty to one charge under subsection 116(a) of the *NDA* to selling these items improperly the same day to a kitchen equipment reseller located nearby, for the sum of $750.

[2] Prosecution and defence disagree as to the sentence that should be imposed. Following the reading and introduction of a Statement of Circumstances as provided at *Queen's Regulations and Orders for the Canadian Forces* (QR&O) paragraph 112.51(3) the parties called evidence, produced documents and provided the court with

arguments on sentence. It is now up to me to impose an appropriate, fair and just sentence.

Position of the parties

Prosecution

[3] The prosecution submits that the Court should impose a sentence of imprisonment for a period of 90 days and make a restitution order for $750 to be paid to Advantage Food Equipment, as the reseller had to return the equipment to the Crown and has not recovered the sum it paid to Petty Officer 2nd Class Darrigan. It is submitted that given the gravity of the offence, the breach of trust is so severe as to require imprisonment as a minimum sentence that would maintain discipline. Commensurate with the sentence it proposes, the prosecution considers that Petty Officer 2nd Class Darrigan is unfit for further service with the Canadian Armed Forces (CAF).

Defence

[4] The defence submits that a sentence composed of the punishments of a severe reprimand and a fine in the amount of $8,000 would suffice to meet the objectives of sentencing in this case and be in the range of similar offences. Defence counsel added that in this case the objectives of sentencing can and should be met while recognizing the offender's well-engaged rehabilitation, along with other mitigating factors. The defence does not oppose the request for a restitution order.

Evidence

[5] The facts relevant to the determination of sentence were introduced through the Statement of Circumstances read by the prosecutor, documents consisting of annual personnel evaluation reports (PER) and a letter of appreciation for Petty Officer 2nd Class Darrigan's work in support of a special event for three weeks in June-July 2018 and through the testimony of six witnesses, two called by the prosecution and four by the defence, including Petty Officer 2nd Class Darrigan.

[6] The Statement of Circumstances includes the following facts:

(a) On or about 17 August 2016, as he was employed as a kitchen supervisor at the Atlantic Galley, which was being stood up to become the new dining facility on CFB Halifax, Petty Officer 2nd Class Darrigan took, fraudulently and without colour of right from his workplace a meat slicer, a microwave and a countertop chafer, property of the Canadian Armed Forces.

(b) These items, over which he was entrusted with custody and control, were new, had recently been delivered to the CAF and were collectively worth $7,757.07.

(c) On 17 August 2016, Petty Officer 2nd Class Darrigan, without authority, sold these items to Advantage Food Equipment, a kitchen equipment reseller, located in Dartmouth, Nova Scotia. He received $750 for these items. This amount was never recovered by Advantage Food Equipment.

(d) The three stolen items were seized during the investigation and have been returned to the Crown.

[7] The prosecution called two witnesses during the sentencing hearing. The first was Commodore Skjerpen, the Commander of Canadian Fleet Atlantic, who provided general comments on the importance of trust. In an organization such as the Fleet, where responsibilities are delegated at all levels and for the institution to work properly, trust needs to be granted as it would be very difficult to have a greater level of supervision of people entrusted with various responsibilities, including responsibilities for equipment. Commodore Skjerpen was made aware of the case of Petty Officer 2nd Class Darrigan and mentioned that his reaction was one of disappointment as to the offences that were committed. Even if he does not know the offender personally, he described generally the consequences of offences of breach of trust, mentioning that it would take time to have a person who committed such an offence be able to be placed once again in a position of trust. On cross-examination, Commodore Skjerpen agreed with the proposition that people can make mistakes and can learn from them to become better members of the CAF. He said that trust can be regained with time, supervision and further assessment.

[8] The second witness called by prosecution was Commander Perks. He is the commanding officer of Base Administration at CFB Halifax. Hospitality Services is one of five branches that are part of his organization and it includes messes and galleys in which Petty Officer 2nd Class Darrigan worked at the time of the offence. Commander Perks described what he was told of the situation in 2016 at CFB Halifax where the Tribute tower building had just been finished and there was a transfer of the galley operations from its former location in “A” Block to the new facility. Commander Perks does not know Petty Officer Darrigan personally but was apprised of the charges involving him once he arrived in his position in August 2017. He said that he relies on people in a position of trust to perform ethically, especially in locations where there are attractive items such as in kitchens. He said he believes in giving people second chances, but that, with a person such as a petty officer 2nd class with all the training on accountability and ethics, the situation is different. He will not trust such a person who has committed an offence of theft while entrusted to continue serving in any rank or capacity requiring trust.

[9] For its part, the defence called four witnesses in the course of the sentencing hearing. The first one was Commander Brown, who is the commanding officer of Her

Majesty Canadian Ship (HMCS) *Fredericton*, the unit to which the offender was posted in May 2018. At that time, Commander Brown had not yet taken command but was briefed about the situation of the offender as part of his turnover, in July 2018. He said he trusted the judgement of the previous commanding officer as to the employment of Petty Officer 2nd Class Darrigan in his unit and agreed to continue this employment. He identified two distinct accomplishments he observed the offender make under his command. The first is Petty Officer 2nd Class Darrigan's qualification as duty coxswain and the second is his work in facilitating the ship's Christmas party. Commander Brown explained these contributions and mentioned that Petty Officer 2nd Class Darrigan was responsible for obtaining and paying suppliers for door prizes at the Christmas party. He commented on the impressive work ethic of Petty Officer 2nd Class Darrigan in the galley and with other tasks as well as the impressive leadership qualities he witnessed the offender displaying. Having been informed of the offender's guilty plea, he said that he will still trust the offender to be duty coxswain and handle the galley staff efficiently. The admission of guilt will not prevent him from giving him the same responsibilities as before in the same rank of petty officer 2nd class.

[10] The second witness to be called by defence was Chief Petty Officer 1st Class Dejong who is the coxswain on HMCS *Fredericton*. He too was posted in July 2018, at the time when the offender had been employed on the ship for a few months. He said that the decision was made with the executive officer and commanding officer to continue employing Petty Officer 2nd Class Darrigan under the supervision of the senior cook, Petty Officer 1st Class Campbell. Throughout their time together, Petty Officer 2nd Class Darrigan fully gained his trust as a competent duty coxswain serving as his representative during a 24-hour period when the ship is alongside and he is then the second in command to the officer of the day. He also described the contribution of Petty Officer 2nd Class Darrigan to the Christmas party, commenting on his outstanding work ethic. Informed of the guilty plea, Chief Petty Officer 1st Class Dejong said that even if the breach of trust is established it would still not be sufficient to make him not trust the offender. He said that Petty Officer 2nd Class Darrigan is suitable for duties at the rank he currently holds.

[11] Chief Petty Officer 1st Class Dejong acknowledged in cross-examination that a person awaiting court martial could be inclined to have a good performance. However, he said that the interaction that he had with Petty Officer Darrigan convinced him that the efforts made and the performance shown by the offender were genuine. He gave the offender the benefit of the presumption of innocence throughout his time on HMCS *Fredericton*.

[12] The third witness called by defence was Petty Officer 1st Class Campbell, the immediate supervisor of Petty Officer 2nd Class Darrigan on HMCS *Fredericton*. She said that she had worked with Petty Officer 2nd Class Darrigan previously in 2009-2010 on HMCS *Kingston*, when they were both reservists, him a leading seaman and her as a petty officer 2nd class. She said she accepted an offer to employ Petty Officer 2nd Class Darrigan as second in command despite him having been charged with offences of stealing. At that time, HMCS *Fredericton* was on refit and the galleys

needed to be restocked following new appliances being fitted onboard. HMCS *Fredericton* was the first ship on the fleet to receive this equipment. She said she was very pleased with Petty Officer 2nd Class Darrigan's performance on HMCS *Fredericton*. Throughout the time together, he showed great initiative and experience and was able to contribute significantly to the task of identifying the equipment that needed to be acquired, where it needed to be stored, what menus needed to be prepared and also the personnel that would join the ship gradually in the transition from the dry dock to the dockyard and higher operational status. She said she trusted Petty Officer 2nd Class Darrigan with money in circumstances such as the charity BBQ every Thursday when the ship was in refit and with regards to the organization of the Christmas party. Knowing that Petty Officer 2nd Class Darrigan admitted to the breach of trust in stealing equipment, she said that she will still trust him and employ him as a petty officer 2nd class. She added that within a year or two he should be able to be promoted and employed as senior cook onboard.

[13] Finally, Petty Officer 2nd Class Darrigan testified. He described his career so far, including his transition from the Naval Reserve to the Regular Force in 2014 and provided details about his duties with HMCS *Fredericton*, including the secondary duties for the Thursday BBQs, the Christmas party and the functions of duty coxswain. He mentioned that he was selected as duty coxswain for the harbour readiness trials in which the ship was successful. He said he left HMCS *Fredericton* on 4 January 2019 to go on parental leave after taking a few watches as duty coxswain during the Christmas holidays. In relation to the events of 2016, he mentioned that the items were there, he took them and he did not know what he was doing. He said it is uncharacteristic of him and that he is very sorry for what he has done. He said he embarrassed himself, embarrassed his colleagues and superiors and this is not something he is proud of. He said that if there is an opportunity for him to continue with the CAF, he will be a better member as a result of his mistake.

Analysis

Purpose, objectives and principles of sentencing

[14] The purpose, objectives and principles applicable to sentencing by service tribunals have finally come into force on 1 September 2018. They are found at sections 203.1 to 203.4 of the *NDA*, reproduced at QR&O article 104.14. As provided at section 203.1 of the *NDA*:

> **203.1 (1)** The fundamental purposes of sentencing are
>
> > **(a)** to promote the operational effectiveness of the Canadian Forces by contributing to the maintenance of discipline, efficiency and morale; and
> >
> > **(b)** to contribute to respect for the law and the maintenance of a just, peaceful and safe society.
>
> **(2)** The fundamental purposes shall be achieved by imposing just sanctions that have one or more of the following objectives:

> **(a)** to promote a habit of obedience to lawful commands and orders;
>
> **(b)** to maintain public trust in the Canadian Forces as a disciplined armed force;
>
> **(c)** to denounce unlawful conduct;
>
> **(d)** to deter offenders and other persons from committing offences;
>
> **(e)** to assist in rehabilitating offenders;
>
> **(f)** to assist in reintegrating offenders into military service;
>
> **(g)** to separate offenders, if necessary, from other officers or non-commissioned members or from society generally;
>
> **(h)** to provide reparations for harm done to victims or to the community; and
>
> **(i)** to promote a sense of responsibility in offenders, and an acknowledgment of the harm done to victims and to the community.

[15] The fundamental purposes of sentencing are twofold, recognizing the dual nature of the Code of Service Discipline, which, as suggested by the Supreme Court of Canada, not only serves to regulate conduct that undermines discipline and integrity in the CAF but also serves a public function by punishing specific conduct which threatens public order and welfare. (*R. v. Généreux*, [1992] 1 S.C.R. 259 at page 281). The objectives that a just sanction must try to achieve may include considerations reaching outside the bounds of the military, for instance the maintenance of public trust and acknowledgment of the harm done to victims which may belong to the larger civilian community.

[16] I agree with counsel that the circumstances of this case require that the focus be primarily placed on the objectives of denunciation and deterrence in sentencing the offender. Indeed, as the offences in this case involve a breach of trust in the course of employment, deterrence and denunciation have to be the paramount sentencing objectives to be met. As stated by Létourneau J.A. at paragraph 22 of the Court Martial Appeal Court (CMAC) decision in *R. v. St. Jean*, (2000) CMAC-429:

> 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.

[17] That being said, the objective of rehabilitation is also important, especially in cases such as this one where there is evidence of satisfactory post-offence conduct for a rather lengthy period of time, suggesting a significant potential for reintegration of the offender into military service and indeed society following the imposition of the sentence. Finally, given that counsel agree on the need for a restitution order, I infer that

reparation is relevant but will be fully addressed by the restitution of the sum of $750 to be paid to Advantage Food Equipment.

[18] Having established the objectives to be pursued, it is important to discuss the principles to be considered in arriving at a just and appropriate sentence in this case. The most important of these principles is proportionality. Section 203.2 of the *NDA* provides that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. In conferring a privileged position in the recently enacted sentencing scheme Parliament acknowledges the jurisprudence of the Supreme Court which has elevated the principle of proportionality in sentencing as a fundamental principle in cases such as *R. v. Ipeelee*, 2012 SCC 13. At paragraph 37 of this case, Lebel J. explains the importance of proportionality in these words:

> Proportionality is the *sine qua non* of a just sanction. First, the principle ensures that a sentence reflects the gravity of the offence. This is closely tied to the objective of denunciation. It promotes justice for victims and ensures public confidence in the justice system. . . . Second, the principle of proportionality ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender. In this sense, the principle serves a limiting or restraining function and ensures justice for the offender. In the Canadian criminal justice system, a just sanction is one that reflects both perspectives on proportionality and does not elevate one at the expense of the other.

[19] Then, the principle of proportionality obliges a judge imposing sentence to balance the gravity of the offence with the degree of responsibility of the offender, a concept that has been traditionally associated with the character of the offender, as expressly provided for in the former provision found at QR&O article 112.48 before 1 September 2018. What is important to keep in mind is that respect for the principle of proportionality requires that the determination of a sentence by a judge, including a military judge, be a highly individualized process.

Circumstances of the offender

[20] Having previously discussed the circumstances of the offence, it is proper at this point to discuss the circumstances of the offender in my analysis of the principle of proportionality. Petty Officer 2nd Class Darrigan is a 33-year-old cook who has joined the Naval Reserve in June 2004 at HMCS *Scotian* in Halifax. After initial training as a maritime engineer, he changed occupation to become a cook and trained in that occupation starting in 2007. In parallel, he attended culinary school at the Nova Scotia Community College in Halifax. He served on numerous full-time assignments as a member of the Naval Reserve, mainly as cook on Maritime Coastal Defence vessels on the east coast, with increased rank and responsibilities. After achieving the rank of petty officer 2nd class and serving as Chief Cook on HMCS *Goose Bay*, he transferred to the Regular Force in October 2014, initially serving as master seaman until a promotion to his current rank in June 2015. He has since served in senior positions as cook at sea on frigates and ashore in CFB Halifax. Once charges were laid in May 2018, he joined HMCS *Fredericton* until January 2019, when he went on parental leave until a few weeks ago. His future with the CAF will in all likelihood be reviewed following the

conclusion of these proceedings. Petty Officer 2nd Class Darrigan has a spouse and a daughter who will turn one this month, on 26 May.

[21] The documentary evidence of Petty Officer 2nd Class Darigan's annual performance evaluations reveal a member whose performance consistently exceeds standards and has an above average to outstanding potential for promotion, including to the next rank of petty officer 1st class, as stated in his 2017-2018 PER. The evidence of the three witnesses called by the defence, namely his commanding officer, coxswain and immediate supervisor onboard HMCS *Fredericton* from May 2018 to January 2019, reveals a unanimous picture of a highly motivated and reliable cook who has contributed significantly to the successful transition of HMCS *Fredericton* from an extensive midlife refit under the control of a contractor to gradual reintegration as an operational unit in Canadian Fleet Atlantic. This contribution involved the reorganization of the galley spaces which had been re-equipped with appliances not yet found on other ships, the maintenance of unit morale through organization of BBQs, the unit Christmas party and dinner, and a significant contribution as duty coxswain during harbour readiness trials conducted by sea training staff which HMCS *Fredericton* successfully completed on the road to full readiness as a fighting unit. Importantly, these witnesses have trusted Petty Officer 2nd Class Darrigan with money in the course of his duties, knowing that he was charged with an offence of dishonesty. They said they would have no hesitation to do it again.

[22] In light of the evidence heard, the Court concludes that Petty Officer 2nd Class Darrigan is a significant asset to the Royal Canadian Navy (RCN) and the CAF, in an occupation that is typically understaffed and overworked, as described by Commander Perks in his testimony. This is a relevant consideration to the choice of punishments appropriate or desirable in sanctioning the conduct of the offender.

Principles relevant to this case

[23] Having reviewed the circumstances directly relevant to the principle of proportionality, I now need to discuss other principles relevant to the determination of the sentence, which are listed as the paragraphs of section 203.3 of the *NDA* as follows:

> **(a)** a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender. . .

Here, a number of aggravating circumstances are listed in this section, including one applicable in this case, namely that "the offender, in committing the offence, abused their rank or other position of trust or authority,"

> **(b)** a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

That is known as the principle of parity;

> **(c)** an offender should not be deprived of liberty by imprisonment or detention if less restrictive sanctions may be appropriate in the circumstances;

> **(d)** a sentence should be the least severe sentence required to maintain discipline, efficiency and morale; and

Those two paragraphs embody the principle of restraint;

> **(e)** any indirect consequences of the finding of guilty or the sentence should be taken into consideration.

As it used to be provided at QR&O article 112.48 in the former scheme.

Aggravating and mitigating factors

[24] As provided in the enumeration of principles of sentencing, a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating either to the offence or the offender. That being said, one aggravating or mitigating factor, in isolation, cannot operate to increase or decrease the sentence to a level that would take it outside of the range of what would be an adequate sentence. In taking these factors into consideration, the Court must keep in mind the objective gravity of the offences. The offender pleaded guilty to stealing when entrusted with the custody of the things stolen, an offence under section 114 of the *NDA* which attracts a maximum punishment of 14 years' imprisonment. It is an objectively very serious offence. The offender also pleaded guilty to improperly selling public property under section 116(a) of the *NDA*, a less severe offence attracting a maximum sentence of imprisonment for less than two years.

[25] The circumstances of the offences and the offender in this case reveal the following aggravating factors:

(a) The breach of trust that the offence constitutes. As admitted by both counsel, this is a significant factor as Petty Officer 2nd Class Darrigan was employed as kitchen supervisor at the time of the offences, a position which should have made him aware of his responsibility for the safekeeping of the equipment entrusted to him and which likely provided him with more flexibility to commit the theft as he was not directly supervised. Both prosecution witnesses discussed the importance of trust in a military organization. In a very balanced testimony, Commodore Skjerpen provided a high-level perspective on the need for trust as the Navy could hardly afford close supervision of everyone in the organization without a significant loss in operational efficiency. These words were in line with those of Létourneau J.A. in paragraph 22 of *St. Jean*:

> > 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.

(b) The fact that Petty Officer 2nd Class Darrigan was, at the time of the offence, a 30-year-old cook in a supervisory rank and function with over 12 years' experience in the CAF and commensurate training and awareness of the ethical requirements of his functions. It is obvious to the Court that the offender should have known better than to act as he did, a behaviour which he did not try to justify in any way. The Court is left to conclude that Petty Officer 2nd Class Darrigan acted out of greed, for his own financial benefit in a manner that is entirely incompatible with the expectations of his superiors, peers and subordinates, as well as the public. It can be inferred that such action by a leader in the Atlantic Galley had a negative impact on the morale and efficiency of subordinates, even if no evidence was introduced to demonstrate any specific impact. Yet, all witnesses agreed as to the shocking nature of the actions and their disappointment in knowing of the offender's actions. There is unanimity as to the unacceptable nature of the actions of the offender and the breach of trust it constitutes, but most witnesses stated that trust can nevertheless be regained. The exception is Commander Perks, who stated his opinion to the effect that at the level Petty Officer 2nd Class Darrigan was serving, trust could not be regained following an offence such as the one committed in this case.

[26] The Court also considered the following as mitigating factors arising either from the circumstances of the offences or the offender:

(a) The guilty plea of the offender on the two charges remaining on the charge sheet. This avoided the need to conduct what is, in most cases of that nature, a lengthy trial.

(b) The fact that Petty Officer 2nd Class Darrigan is a first-time offender who has otherwise conducted himself in an entirely satisfactory manner, as evidenced by his steady progression in rank and responsibilities since joining the CAF and especially since having been trained as a cook. It would appear that the conduct of the offender on 17 August 2016 was out of character for him.

(c) The post-offence conduct of Petty Officer 2nd Class Darrigan revealing his potential to make a positive contribution to both the CAF and Canadian society in the future. The offender has close to fifteen years of honourable service with the Navy and key representatives of the chain of command he was under during his most recent period of productive service testified in public to express unequivocally their confidence that

the offender not only will generally be able to make a valuable contribution to the CAF in the future but specifically that they would take him back on their ship and would consider entrusting him with greater responsibilities as chief cook. Regardless of the length of any future career in the CAF, Petty Officer 2nd Class Darrigan is still young and has the potential to continue making a positive contribution to Canadian society for many years in the future.

(d) Finally, I have considered very closely the testimony of Petty Officer 2nd Class Darrigan, the regret he expressed, how sorry he is for what he has done and his wishes to continue a career in the Navy. In my opinion, these words are consistent with the guilty plea offered, which constitute an acceptance of responsibility and they are also consistent with the performance offered by Petty Officer 2nd Class Darrigan with HMCS *Fredericton* as heard in the evidence. I believe these regrets are sincere.

Other circumstances

[27] The Court also takes into consideration a number of other circumstances that I find relevant but which I consider to be neither aggravating nor mitigating in the strict sense of the term, in that they do not, on their own, justify an increase or decrease in the sentence to be imposed. One of these circumstances is the value of the things stolen, estimated at $7,757.07 based on acquisition cost. This sum is not in my view low enough to be mitigating or high enough to be aggravating. It is what it is. The same goes for the efforts and planning required to move the three rather heavy items out of the galley and transport them to Dartmouth to be sold the same day. It is in the nature of the offence under section 114 of the *NDA* that the thing stolen be moved. There was no evidence of extensive planning, organization or involvement of others that could in my view justify increasing the sentence on that basis alone. The same goes with the "one time" and unsophisticated nature of the offences, in the sense that there is no continuous scheme of deceit in this case as opposed to other cases of breach of trust involving fraudulent schemes over long periods of time. This is a relevant fact, especially in comparing this case to others, but it does not in itself justify decreasing the sentence to address an offence of stealing.

Parity and sentencing range

[28] The next principle to be taken into account is the principle of parity. A great number of cases were submitted to my attention from civilian trial and appeal courts, from courts martial and from the CMAC. I do not feel the need to review them all in detail. However, I wish to make the following comments on the basis of the submissions of counsel.

[29] First, on the range of sentences applicable. The prosecution submits that theft from an employer requires a sentence of imprisonment, mainly on the basis of *R. v. McEachern*, [1978] O.J. No. 987, a 1978 case from the Ontario Court of Appeal and on

the basis of a more recent court martial case of *R. v. Sorbie*, 2015 CM 3010. That is a very surprising submission to me if only because in the case of Master Corporal Sorbie, the offender pleaded guilty to stealing approximately $1,000 from the canteen and was not sentenced to imprisonment as requested in that trial by the prosecutor but rather to a reduction in rank to private, a severe reprimand and a fine in the amount of $1,000. Nowhere in *Sorbie* does the military judge state that a person guilty of stealing while entrusted must be sentenced to imprisonment. The most that is stated is the doubly qualified statement to the effect that, "Usually, the denunciation and the deterrence of this type of infraction generally requires incarceration." Given the result of that case, I conclude that there are exceptions, an outcome not precluded by *McEachern*.

[30] Indeed, there are many court martial cases where theft from Her Majesty resulted in sentences not involving imprisonment or detention, the other form of incarceration available in courts martial. At the lower end of the scale, Corporal Stevenson (*R. v. Stevenson*, 2005 CM 13) was sentenced to a reprimand and a $1,000 fine after having pleaded guilty to stealing a number of objects of a value with an accomplice, Corporal Keller, who was sentenced to a reprimand and a $1,400 fine. More recently, in 2017, Master Bombardier Gaffey (*R. v. Gaffey*, 2017 CM 2009) pleaded guilty to three charges including one of stealing tools and other equipment of a value of $7,644.40, quite close to this case, and was sentenced to a reduction in rank to private and a severe reprimand, at a point in his career where he was awaiting release by virtue of poor mental health which impacted his capacity to fulfil his duties. Notably, he was his unit's storeman. The sentence in that case was the result of a joint submission of counsel for the prosecution and defence.

[31] Regarding joint submissions, I must state my disagreement with the prosecution's submission to the effect that joint submissions are useless to assist in determining an appropriate sentence. Even if the analysis pertaining to a joint submission does not usually address the issue of whether the sentence is appropriate, focusing instead on whether the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest, it remains that the sentence ultimately imposed is relevant to assess the range of sentence imposed in similar cases. Indeed, as recognized by the Supreme Court of Canada in *R. v. Anthony-Cook*, 2016 SCC 43, prosecution and defence counsel are well placed to arrive at joint submissions that are fair and consistent with the public interest. These resolutions are entirely relevant to assess a range of acceptable sentences for a given offence or set of offences.

[32] I do agree that the upper range of sentences available does include incarceration, as evidenced by the case of *R. v. Tardif*, 2014 CM 1022, where imprisonment was imposed for a period of 90 days as a result of a joint submission. The offender had pleaded guilty to two charges of fraud and one of stealing while entrusted. The illicit activities spanned over several years. The value of the fraud and theft was approximately $48,000. The circumstances of the *Tardif* case were significantly more severe than the circumstances of Petty Officer 2nd Class Darrigan and yet the position of the prosecution on the minimum sentence required to maintain discipline is exactly

the same. This is surprising especially considering that the sentence in both *Tardif*, at the upper end of the spectrum and *Gaffey* at the lower end, were proposed by prosecutors in this region.

[33] The prosecution quoted cases of the CMAC such as *St. Jean* and the more recent case of *R. v. Hoekstra*, 2017 CMAC 5. The *St. Jean* case is indeed interesting in its analysis of factors to be taken into consideration for sentencing in fraud cases, as evidenced by the extracts quoted earlier. However, in his reasons Létourneau J.A. reviews cases from the CMAC where non-custodial sentences were either confirmed on appeal or where custodial sentences imposed at courts martial were overturned and replaced by non-custodial sentences on appeal. He uses this analysis to conclude that the sentence imposed on *St. Jean* at trial was unreasonable. Consequently, the CMAC substituted a sentence of reduction in rank to corporal, a severe reprimand and a fine in the amount of $8,000. This is hardly an endorsement to the effect that imprisonment is mandatory in such cases. As it pertains to *Hoekstra*, the CMAC varied the sentence of imprisonment from 60 days to increase it to14 months but the severity of the offences committed bears no relationship with this case, especially given that the crux of the offences for sentencing purposes appeared to be the quantity of marijuana seized and the dangerous nature of the military equipment the offender stored at his house after having taking it away from military control.

[34] The prosecution made a point of stressing that imposing a sentence that would not include imprisonment would have the effect of sparing the accused from a sentence that would have been imposed on a civilian in his position, an outcome that has been described as unacceptable. The prosecutor pointed out that subparagraph 742.1(f)(vii) of the *Criminal Code* makes conditional sentences unavailable for offences of theft over $5,000. The prosecution submits that the offences here were committed in civilian circumstances, hence a failure to impose a sentence commensurate to what would have been imposed for a civilian supervisor in a similar position as Petty Officer 2nd Class Darrigan would erode public trust in the military justice system.

[35] I completely disagree with this submission for a number of reasons. First, this case deals mainly with a theft committed on a military establishment, in relation to public goods serving a military purpose, involving an offender entrusted with the control of these goods by virtue of military orders given to him as a full-time member of the Regular Force on active service, as he still is. I do not see how these circumstances are civilian. Further, Petty Officer 2nd Class Darrigan has not been charged with theft over $5,000 under the *Criminal Code*. He was charged with a military offence under section 114 of the *NDA* which does not recognize the $5,000 threshold *per se* as a factor leading to an increased punishment. If the circumstances were civilian and parity with civilians was deemed to be required, such a charge of theft under the *Criminal Code* could have been laid under section 130 of the *NDA*. At the time the charges were laid and preferred in this case, the *Beaudry* decision of the CMAC had not been rendered to prevent conviction on such a charge. The charges in this case are different than those considered by civilian courts such as the Ontario Appeal Court in *McEachern* and

civilian precedents are therefore of limited use compared with jurisprudence from courts martial and the CMAC.

[36] In relation to the principle of parity, therefore, I conclude that the range of sentences imposed in the past on similar offenders for similar offences varies from a reprimand and a fine, to imprisonment for ninety days. The submissions of counsel are in that range. Consequently, I do not intend to analyse any precedent further or impose a sentence more lenient or harsh than what is found within the range.

Choosing a sentence within the range

[37] In choosing a sentence within the range, in reference to the scale of punishment found at section 139 of the *NDA*, I am of the view that all punishments, including any punishment lesser than imprisonment, are available to me. This includes reduction in rank, despite the submission of defence counsel with which I respectfully disagree. Indeed, even if the evidence reveals that Petty Officer 2nd Class Darrigan could be employed in his current rank in the future and would be grossly underemployed at a rank at which he could be reduced, this would not necessarily make a sentence of reduction in rank unavailable or even inadequate. A reduction in rank is a punishment. It is not linked to the efficient employment of the offender in the service prior to or following sentencing. In most cases a member of the CAF who was promoted for reasons commensurate with qualifications, experience and leadership potential will necessarily be underemployed when reduced in rank as a result of a sentence by a service tribunal. However, rank, like trust, can be regained. The chain of command is free to promote an offender back to his or her former rank when they are satisfied that the operational requirements of efficiency, discipline and morale have been met. Sometimes, the loss of trust as a result of a suspected misconduct may result in administrative actions including transfer to a position of lesser authority which would suggest that a reduction in rank would be fitting to the position the offender then occupies. That was the case in the CMAC decision in *Reid v. R.*, 2010 CMAC 4. Yet the words of Bennett J.A. at paragraph 39 of that decision should not be interpreted to mean that such a decrease in responsibilities is a necessary prerequisite to the availability of a punishment of reduction in rank.

[38] That being said, the availability of a given punishment does not mean that it should be imposed. In this case, I must inform my decision on the basis of what I perceive to be an adequate sentence in light of the evidence I have heard and the purposes, objectives and principles of sentencing I have discussed and those important principles I still have to consider. Most importantly, I must consider the principle of restraint, obliging me to sentence the offender with the least severe sentence required to maintain discipline, efficiency and morale, and the obligation not to deprive the offender of liberty by imprisonment or detention if less restrictive sanctions may be appropriate in the circumstances.

[39] I have found in my analysis of the circumstances of the offender that in my view Petty Officer 2nd Class Darrigan is a significant asset to the RCN and the CAF. I

therefore respectfully disagree with the prosecution on this point. My views are also contrary to the opinion expressed by Commander Perks to the effect that any petty officer 2nd class committing the kind of breach of trust Petty Officer 2nd Class Darrigan admitted to should be retained in the CAF. Yet, this disagreement does not put me in contradiction with the chain of command as hinted by the prosecution. Indeed, as a judge, I may well decide to disagree with the chain of command on any issue but as it turns out in this case, my conclusion accords with the testimony of Commodore Skjerpen, who stated that trust can be regained and, of course, with the testimony of Commander Brown, Chief Petty Officer 1st Class Dejong and Petty Officer 1st Class Campbell who have convinced me of the value of the offender. As the latter three witnesses are the only ones who know the offender and have worked with him, it is difficult for me to imagine dismissing their testimony while respecting the need to impose a proportionate sentence which truly takes into account the circumstances of the offender.

[40] Given this conclusion and the fact that imprisonment is a punishment that should be in most cases imposed to a person that is unfit for further military service, as indicated in the NOTE (A) to QR&O article 104.04, it is not a punishment that I deem adequate in the circumstances of the offender in this case.

[41] Turning to consideration of the sentence of detention, the NOTE (A) to QR&O article 104.09 provides that in contrast with imprisonment, detention seeks to rehabilitate service detainees, by re-instilling in them the habit of obedience. It can be imposed for a maximum period of 90 days. It is foreseen that once a sentence of detention has been served, the member will normally be returned to his or her unit without any lasting effect on his or her career.

[42] Given the restriction in liberty that it involves, the sentence of detention has the advantage of having a significant impact as it pertains to the objectives of denunciation and deterrence that I must emphasize in this case, given the importance of the breach of trust committed. Knowing that a sentence depriving an offender of liberty is a measure of last resort, the difficult issue I need to tackle is whether imposing detention is necessary in all of the circumstances of this case, including those of the offender, to maintain discipline, efficiency and morale.

[43] This is a difficult decision. As a former seagoing officer, I do believe in discipline and understand the reluctance of those who would hesitate to place confidence in a person guilty of stealing while entrusted. Yet, the mitigating factors in this case are significant and the evidence I heard is compelling as to the circumstances of the offender and his value to the CAF. I have considered imposing a short sentence of 10 days of detention. However, I am not convinced that such a punishment is necessary to achieve the objectives of deterrence and denunciation vis-à-vis a reasonable and reasonably informed observer aware of all of the circumstances of this case as well as the law and precedents. I believe the objectives of sentencing can still be met in this case by the imposition of a less restrictive sanction.

[44] I now turn to the next sentence down the list of available punishments, namely reduction in rank. Defence counsel has urged me not to impose this punishment and has made significant efforts to illicit evidence to the effect that it would not be appropriate given that defence witnesses were of the view that the offender belonged in the rank of petty officer 2nd class and could not be gainfully employed at a lower rank. As stated earlier, I do not agree that these considerations bar the imposition of a reduction in rank. However, I appreciate the honesty of defence counsel in stating that should I consider the sentence he proposes, namely a severe reprimand and a substantial fine in the amount of $8,000 coupled with a restitution order to be insufficient, I should instead impose a short period of detention and a much lower fine. What the defence invites me to do is essentially to consider the sentence primarily proposed and decide and justify why it would be insufficient to meet the objectives of sentencing. That is a viable approach which respects the principle that a sentence should be the least severe required to maintain discipline. By his submission and the evidence he presented, defence counsel has convinced me to adopt this approach. The severe reprimand and significant fine that he proposes are significant punishments. I am not convinced that I need to impose a reduction in rank to maintain discipline in this case.

[45] I am aware that I am imposing a sentence that may be seen as lenient in light of the significant breach of trust involved in this case. I am making this decision with my eyes wide open, confident that the sentence I am choosing to impose is within the range of sentences imposed for similar cases in the past and also confident that the exceptional circumstances of the offender in this case warrant such leniency. I am also aware that this sentence and conviction do have the consequences of a criminal record and the conviction will be considered, most likely as a negative factor, in a potential upcoming administrative review of Petty Officer 2nd Class Darrigan’s career. That said, it is my hope that whoever conducts this review will take into consideration the conclusion of this court as to the value of Petty Officer 2nd Class Darrigan as a member of the CAF and as a much-needed senior cook in the Navy.

Conclusion and disposition

[46] Petty Officer 2nd Class Darrigan, I have been convinced that you now deeply regret your actions of August 2016 and you are determined to do better. A number of people have taken a risk on you by allowing your gainful employment despite the cloud hanging over your head after you were charged, commencing with Petty Officer 1st Class Campbell. The risk she took worked to your benefit. She did come to this court to vouch for you once again in the course of the sentencing hearing and so did your former commanding officer and coxswain. I have decided to honour their endorsement by choosing not to deprive you of your liberty despite the gravity of what you have done. I trust you will not disappoint those who vouched for you and that you would strive to become a better person who will not reoffend. It is now up to you to regain the trust of your peers and superiors, and to be worthy of the confidence placed in you to succeed and contribute further to the CAF, the Navy, your family and Canadian society in any capacity.

FOR THESE REASONS, THE COURT:

[47] **FINDS** you guilty of the charges of stealing when entrusted and of selling improperly public property under section 114 and subsection 116(a) respectively of the *NDA*.

[48] **SENTENCES** you to a severe reprimand and a fine in the amount of $8,000, payable no later than 1 June 2019. In the event you are released from the CAF for any reason before the fine is paid in full, any outstanding unpaid balance will be due the day prior to your release.

[49] **ORDERS**, under the authority granted to me by section 203.9 of the *NDA*, that you pay Advantage Food Equipment the sum of $750 forthwith, as restitution for the money that company paid to you on or about 17 August 2016.

Counsel:

The Director of Military Prosecutions as represented by Major M.L.P.P. Germain

Major B.L.J. Tremblay, Defence Counsel Services, Counsel for Petty Officer 2nd Class S.J. Darrigan