COURT MARTIAL

Citation: *R. v. Berlasty*, 2019 CM 2032

Date: 20191116
Docket: 201871

Standing Court Martial

Major F.A. Tilson, VC Armouries
Windsor, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Corporal J.P.S. Berlasty, Offender

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

REASONS FOR SENTENCE

(Orally)

Introduction

[1] On 25 August 2019, the Court found Corporal Berlasty 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 — AN ACT OF A FRAUDULENT NATURE NOT PARTICULARLY SPECIFIED IN SECTIONS 73 TO 128 OF THE NATIONAL DEFENCE ACT
>
> *NDA* Paragraph 117(f)
>
> *Particulars*: In that he, between August 1st and October 31st 2014, in the province of Ontario, with intend to defraud, received Reserve Force injury compensation while being gainfully employed as a civilian during his period of incapacitation."

Circumstances surrounding the offences

[2] The facts surrounding the offence before the court were set out fully in my decision delivered orally on 25 August 2019. Accordingly, this decision provides only a brief summary of the facts for the purposes of sentencing.

[3] In coming to its finding, the Court accepted that in November 2013, while leaving his place of residence, Corporal Berlasty slipped on ice and rolled his ankle exacerbating a previous military injury on the same ankle. Since his ankle injury was found to be attributable to his military service, he was approved to collect Reserve Force Compensation (RFC) for two consecutive periods of incapacitation. RFC is available for members of the reserve force on Class A, B or C service who are incapable of performing their duties due to an injury, disease or illness attributable to their military service.

[4] Under the RFC program, prior to engaging in any paid work, Corporal Berlasty was required to seek appropriate approval. Firstly, approval was necessary to ensure he did not engage in work that would exacerbate his injury and jeopardize his ongoing rehabilitation. Secondly, when he was physically able to transition back to work, even part-time, the amount of money he was paid was to be considered under the RFC program where his payments would be adjusted accordingly.

[5] The Court found that Corporal Berlasty engaged in paid work doing manual labour on a construction site for which he specifically requested to be paid in cash. The evidence accepted at trial was that he worked from mid-August 2014 until the end of September 2014, and then again for approximately two weeks in October 2014 before he was fired.

[6] At some point in September 2014, a former colleague of Corporal Berlasty, then-Corporal Rovere, drove by a worksite where she just happened to recognize Corporal Berlasty. Knowing that he was injured and unable to work, she drove by the site a second time, took a photo and reported him to her superiors.

Evidence

[7] 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 evidence was adduced at the sentencing hearing in the court martial:

(a) letter from Doctor Maureen Rashwan, C. Psych, dated November 12, 2019;

(b) Veterans Affairs Canada Official Decision re: Jason Paul Samuel Berlasty, dated January 31, 2019; and

(c) the in-court testimony of Ms Harrington, testifying for the defence.

[8] Furthermore, the Court benefitted from counsel's submissions to support their respective positions on sentence where they highlighted facts and considerations relevant to Corporal Berlasty.

[9] Counsel's submissions and the evidence before the Court have enabled me to be sufficiently informed of Corporal Berlasty'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

[10] Corporal Berlasty is 32 years old. He enrolled in the Canadian Armed Forces (CAF) on 13 September 2008 and served as a military cook for a total of eight years, with five years in the regular force and a further three years as a cook in the reserve forces. He was released medically on 21 September 2016. Corporal Berlasty is in a long-term relationship with his spouse, Ms Harrington and together they are raising a daughter who is four years old. Corporal Berlasty is currently receiving a veteran's pension collecting $3,400 per month after taxes as is his spouse. The evidence before the court suggested that his veteran's pension is being paid for a mental health disorder determined to be, in whole, a consequence of his injury to his ankle.

[11] The precise amount of the fraud is not known. However, based on the evidence given in the main trial by Mr Loiselle, the Court accepted that Corporal Berlasty received as much as $2,500 during the period in which he was also receiving his full RFC entitlement.

Position of the parties

Prosecution

[12] The prosecution asks the Court to impose a sentence of not less than three months imprisonment. He argues that the abuse of trust sentencing principles apply and absent exceptional circumstances, a fit sentence requires a custodial sentence. He argued that the abuse of trust guidelines apply to all CAF members and that this is reinforced by the Department of National Defence (DND) and Canadian Forces Code of Values and Ethics and is consistent with the Court Martial Appeal Court's (CMAC) decision in *R. v. St. Jean,* (2000) CMAC-429. Further, he strongly asserted that there is an absence of mitigating factors in this case that would justify the imposition of a non-custodial sentence.

Defence

[13] Conversely, defence counsel recommends that a sentence of a reprimand and a fine in the amount of $2,500 is the most appropriate sentence based on parity with courts martial jurisprudence. She strenuously argued that the abuse of trust sentencing principles do not apply to the facts in this case and that the prosecution is attempting to broaden their scope. In addition, she argued that the prosecution's attempt to highlight the current case as an abuse of trust is inconsistent with the courts martial precedent.

Statutory framework

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

[14] 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 achieve this, it is imperative that members be provided the best opportunities for success in reforming their conduct and shortcomings.

[15] 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 paramount objectives of sentencing should be denunciation and deterrence. He argues that it does not matter 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.

[16] The prosecution referred the Court to paragraph 6 of *R. v. Arseneault*, 2013 CM 4007, where Perron M.J. agrees with the approach of the Chief Military Judge (C.M.J.) taken in *R. v. Master Corporal K.M. Roche*, 2008 CM 1001:

> Canadian jurisprudence on fraud clearly states that general deterrence and denunciation are the required sentencing objectives in the vast majority of fraud cases. The Chief Military Judge, Colonel Dutil, described this approach very well in paragraphs 15 and 16 of his sentence imposed during the court martial of *Master Corporal Roche*, and I quote him:
>
> > [15] Despite the decisions of the Court Martial Appeal Court in *St-Jean, Lévesque, Deg* and *Vanier*, it must be said that since the 2004 amendments to the *Criminal Code* related to the maximum sentence applicable to the offence of fraud where the subject-matter of the offence exceeds $5000 under paragraph 380(1)(a) of the *Criminal Code*, Canada's appellate courts have generally imposed prison sentences when the fraud is significant or when it is committed against an employer, whether it took place over a longer or shorter periods.
> >
> > The courts may impose a custodial sentence on any grounds they consider appropriate to achieve the paramount objectives of general deterrence and denunciation in this type of case, even if the offender has no judicial record,

> has registered a guilty plea and expressed remorse, has repaid the victims fully or in part, has little chance of re-offending and is known and respected in the community.
>
> [16] In considering what sentence would be appropriate, the Court must take into account the objective seriousness of the offence and the offender's degree of responsibility in light of the aggravating and mitigating factors related to the commission of the offence or the situation of the offender. In assessing the offender's responsibility in relation to the imposition of an adequate sentence in the case of fraud, the following factors, among others, should be examined: the nature and scope of the fraud and the victim's actual economic or financial losses; the degree of premeditation in the planning and implementation of the fraud; the offender's conduct after the commission of the offence, including the repayment of the victims; whether the offender cooperated with the authorities and pleaded guilty at the first opportunity; the judicial record; the personal gain realized from the fraud; the relationship of authority and trust with the victim; and the motive underlying the commission of the fraud. Some of these factors may be considered aggravating or mitigating circumstances, but this is not the case for those factors arising from the fundamental principle that the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender, as set out in section 718.1 of the *Criminal Code*.

[17] Defence counsel argued that based on paragraph 22(b) in *R. v. Downer*, 2016 CM 4006 and given that this matter has dragged on for five years since it was first reported, the objective of general deterrence is diminished. She argued that if it was such a serious offence, it would have been acted upon much sooner.

[18] Defence counsel presented evidence to support the member's positive progress in rehabilitation and argued that in light of delay in the case, the objective of rehabilitation must be a paramount sentencing objective to ensure that ongoing positive progress is not disrupted.

[19] Dutil C.M.J.'s comments at paragraph 10 in *R. v. Master Corporal C. Poirier*, 2007 CM 1023 are instructive to the case at bar:

> However, I agree with the proposition that absent exceptional circumstances, the principles of denunciation and general deterrence trump considerations of an accused's first offender status and positive rehabilitation prospects. In cases of significant fraud such as this one, when committed by a person in a position of trust, such as a Resource Management Support (RMS) Clerk, vested with financial authority that abuses its position in order to commit the fraudulent acts, the sentence shall emphasize the need to protect the public by ensuring general deterrence, denunciation and punishment, and specific deterrence. Rehabilitation is considered to a lesser degree.

[20] Although the Court shares defence counsel's concerns arising from the delay in this matter, in light of the nature of the offence, the Court agrees with the position taken by the prosecution and articulated by Dutil C.M.J. in the paragraph above that the objectives of deterrence and denunciation are paramount.

[21] Nonetheless, the mere recognition by courts that the sentencing objectives of denunciation and deterrence are paramount, does not mean that courts do not consider the secondary objectives in its overall sentencing considerations. As an example, in both cases of *Roche, R. v. Master Corporal K.M. Roche*, 2008 CM 1001 and *R. v. Roche*, 2010 CM 4001, the courts considered the secondary objective in their respective decisions to suspend the period of imprisonment imposed.

Gravity of the offence

[22] The fundamental principle of sentencing set out at section 203.2 of the *NDA* stipulates 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. A sentence serves to clearly communicate to members specific consequences of engaging in similar conduct.

[23] In assessing the gravity of this offence, the prosecution submitted that a fraud offence is a serious crime that requires a serious response. Relying on the case of *R v Maillet*, 2013 CM 3034, he referred to paragraph 12 where d'Auteuil M.J. stated:

> [12] Given the size of the Canadian Forces as an organization, it relies in large part on the integrity and honesty of its members to ensure the sound management of the funds entrusted to it from the public purse when it comes to managing the individual allowances of its members. When a fraud within the meaning of the *Criminal Code* is committed, it is important to note, as many other Canadian courts have, including the Court Martial, that this is a serious crime that calls for a particularly severe approach because of the very nature of this crime and its impact. Members who have volunteered to serve our society, such as Forces members, cannot attempt in any way to obtain a strictly personal benefit to which they are clearly not entitled. In so doing, they betray the trust placed in them by all Canadians and those who lead them. This is what Justice Létourneau addressed in a more general manner in *R* v *St-Jean*, CMAC 429 at paragraph 22.

[24] Keeping in mind that a conviction of an offence contrary to paragraph 117(f) of the Act 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*. In relying upon the decision of Dutil C.M.J. in *R. v. Daigle*, 2017 CM 1003, the prosecution argued that the principles that flow from the *Criminal Code* offence of section 380 apply equally to paragraph 117(f) of the *NDA*. At paragraph 12, Dutil C.M.J. stated:

> Otherwise the objective gravity is the same whether an accused is charged under paragraph 117*(*f) of the *NDA* or under section 130 of the Act, contrary to section 380 of the *Criminal Code*. Both offences must emphasize the principles of general deterrence and denunciation.

[25] 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 this, the maximum

penalty to be imposed for all offences is the same, being imprisonment for less than two years or less punishment.

[26] The offence of fraud under section 380 of the *Criminal Code* separates offences by the monetary value of the subject matter involved. Based on the testimony of Mr Loiselle, which the court accepted, this offence would have been situated under paragraph 380(1)(b) of the *Criminal Code* since the value of the subject-matter of the offence did not exceed five thousand dollars.

[27] After asking counsel and conducting a review of case law, it appears that this is a first offence where a CAF member has been tried and convicted for fraudulently collecting RFC. Further, it was noted that there is no specific offence in the *Criminal Code* that deals with similar types of fraud against insurance or assistance granting agencies. It appears that infractions similar to the one before the court are dealt with under provincial legislative regimes or under section 380 of the *Criminal Code*.

[28] As mentioned to counsel during their oral submissions, in light of this being the first time a military court has considered what is otherwise insurance or worker's compensation fraud, it's important to be cognizant of how the civilian justice system treats this type of offence. In fact, this type of misconduct may engage the consideration of different aggravating factors that other paragraph 117(f) offences do not. For this reason, the court requested counsel to provide it with jurisprudence from civilian courts to explain how they have addressed similar cases of fraud against Workplace Safety & Insurance Board (WSIB) welfare and employment insurance, but the fruits of this effort were limited.

[29] Pursuant to jurisprudence provided to the Court, being the cases of *R. v. Lavigne*, 2011 ONSC 2938 and *R. v. Thomas*, 2002 BCPC 113, it is clear that civilian courts consider this type of fraud to be a breach of the public trust which is something this Court cannot ignore.

[30] The case of *Thomas*, was not overly helpful on its facts, but the prosecution did draw the Court's attention to a particular paragraph that not only recognizes the type of misconduct before the court, but it situates it as less serious than fraud involving an abuse of a position of trust. At paragraph 17, it reads:

> [17] Many large scale frauds involve a breach of trust, which aggravates the seriousness of the offences. The most serious breach of trust is where an employee or trustee abuses a relationship where the person has been trusted with responsibility for the funds that are stolen. The present case is not such a situation but some of the offences certainly involve the accused abusing or breaching the public trust. The frauds involving student loans, welfare, and employment insurance were all committed in situations where members of the public are trusted to be honest in putting forth claims for entitlement to public funds. The accused not only breached that trust, she did so repeatedly, on a massive scale, and her schemes involved an impressive amount of preparation and commitment.

[31] Given the lack of relevant courts martial precedents on this type of fraud, the Court took considerable time in reviewing and distinguishing the various types of fraud cases within military case law, in order to properly situate this specific type of conduct with respect to sentencing.

Parity

[32] An important sentencing principle set out at *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".

[33] In making his recommendation on sentence, the prosecution relied upon the following courts martial precedents, as well as the abuse of trust guidelines that relate specifically to abuses of employment trust. A brief summary of the relevant courts martial cases relied upon by the prosecution is provided as follows:

(a) *R v Arsenault*, 2013 CM 4007 - Warrant Officer Arsenault was found guilty of one charge laid under section 130 of the *NDA;* namely, having committed a fraud contrary to section 380(1) of the *Criminal Code*, and one charge laid under subsection 125(a) of the *NDA;* namely, having wilfully made a false statement in an official document. In total, the offender received approximately $34,034 of allowances for which he was not entitled. The court sentenced Warrant Officer Arsenault to a 30-day period of detention and a reduction in rank to sergeant.

(b) *R v Maillet*, 2013 CM 3034 - Master Corporal Maillet was found guilty of the first and fourth charges regarding an offence punishable under section 130 of the *NDA* for fraud contrary to subsection 380(1) of the *Criminal Code* and on the third and sixth counts for having wilfully made a false statement in a document signed by him and required for official purposes contrary to paragraph 125(a) of the *NDA*. The fraud scheme was elaborate and when all added in, amounted to approximately $87,000. The court sentenced Corporal Maillet to imprisonment for a term of 90 days.

(c) *R. v. Boire*, 2015 CM 4010 - Master Seaman Boire pleaded guilty to two charges on the charge sheet, for charges under section 130 of the *NDA* for fraud, contrary to section 380(1) of the *Criminal Code*, for having, on two occasions, claimed separation expense benefits without entitlement. 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 and sentenced Master Seaman Boire to imprisonment for a period of 60 days and a fine of $2,400 payable at the rate of $200 per month. The court then suspended the carrying into effect of the punishment of imprisonment.

(d) *R. v. Jackson*, 2015 CM 4012 - Master Corporal Jackson pleaded guilty to one charge on the charge sheet, under paragraph 117(f) of the *NDA* for having committed an act of a fraudulent nature; namely, the use of a DND credit card for personal purchases totaling approximately $20,000 between January 2011 and September 2014. Master Corporal Jackson held a position of trust and financial responsibility where he was entrusted by his superiors to use a credit card exclusively for work. The extent of his employer's reliance on his fidelity was such that his word, without questioning, was sufficient to engage and to bind the financial and economic interest of the CAF. The court sentenced Master Corporal Jackson to detention for a period of 60 days.

[34] Although the cases submitted by the prosecution are of some assistance, the Court must apply them with due regard to the facts in this case. All of the cases cited by the prosecution, relate to more elaborate fraudulent schemes where the subject matter of the fraud exceeded $5000. Furthermore, not only does *Jackson* relate to a significant case of fraud greater than $5000, he abused a position of trust.

[35] In making her recommendation on sentence, the defence relied upon the following courts martial precedents. A brief summary of the case law is provided as follows:

(a) *R. v. Mosher*, 2019 CM 4014 - Lieutenant-Colonel Mosher pleaded guilty to one charge contrary to paragraph 117(f) of the *NDA*. From August 2015 to January 2016, while the Chief of Staff - Operations of Canadian Forces Information Operations Group, 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, requested the card not be cancelled, promising he would comply. Less than a week later, he deposited a cheque for $4,819 to pay the balance on the IDTC card, knowing he did not have sufficient funds to cover the cheque. The fraudulent deposit temporarily reset the 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 cancelled the card when the outstanding balance was $24,513.53. He repaid the Crown the amount owed through garnishment from his pay. The court accepted a joint submission and sentenced him to a fine in the amount of $10,000, payable in 10 monthly instalments of $1,000.

(b) *R. v. Daigle*, 2017 CM 1003 - Corporal Daigle pleaded guilty to one charge under paragraph 117(f) of the *NDA* for altering a credit card statement in support of a claim for compassionate leave travel assistance (LTA). The fraudulent amount claimed was $1,570. Offender had a conduct sheet with three offences related to dishonesty, two offences contrary to section 129 of the *NDA* and one offence under section 125.

Chief Military Judge Dutil found the three-year delay in bringing the case to trial did not mitigate the sentence. The court sentenced offender to a reprimand and a fine in the amount of $1,400 paid through consecutive instalments of $200 per month

(c) *R. v. Downer*, 2016 CM 4006 - Master Corporal Downer was found guilty of three charges in relation to false statements made in attempting to finalize a claim for LTA for which he had obtained an advance of $600. He was found guilty of one charge under paragraph 117(f) of the *NDA* and two charges under paragraph 125(a) of the *NDA*. The court sentenced offender to a severe reprimand and a fine of $1,500, payable in 10 monthly installments of $150.

(d) *R v Martin*, 2014 CM 3001 - Commander Martin pleaded guilty to one charge under paragraph 117(f) of the *NDA*. While posted to Colorado Springs, the United States of America, in 2009, he claimed Foreign Service Premium to the sum of $14,938 for three dependents for which he had no entitlement. The court accepted a joint submission imposing a sentence of a severe reprimand and a fine in the amount of $10,000 payable in monthly instalments of $100 each.

(e) *R v Hull*, 2014 CM 1001 - Able Seaman Hull pleaded guilty to an offence under paragraph 117(f) of the *NDA* for a travel claim which included $2,104.11 of expenses for which he was not entitled. The court sentenced the offender to a reprimand and a fine in the amount of $2,000 payable in 10 monthly equal instalments of $200.

(f) *R. v. Wight*, 2014 CM 1021 - Corporal Wight pleaded guilty to an offence contrary to paragraph 117(f) of the *NDA* for fraudulently obtaining medication in the amount of ($ 913.32) for his then, common law spouse. The court sentenced the offender to a reprimand and a fine in the amount of $900 payable in consecutive monthly instalments of $100.

(g) *R. v. Ringuette*, 2012 CM 1019 - Leading Seaman Ringuette pleaded guilty to a charge contrary to paragraph 117(f) of the *NDA* to the sum of $6,450; and admitted being absent without leave under section 90 of the *NDA*. The court accepted the joint submission and sentenced offender to a severe reprimand and a fine in the amount of $3,500.

(h) *R. v. Sergeant K.J. McLean*, 2008 CM 4005 - Sergeant McLean pleaded guilty to one charge contrary to paragraph 117(f) of the *NDA*. On posting, offender requested reimbursement for costs ($2,832.50) associated with the travel of his wife and four children on despite them not moving with him. The court sentenced Sergeant McLean to a reprimand and a fine in the amount of $1,500. The fine was paid in monthly installments of $150.

(i) *R. v. Corporal B.A.F. Lewis*, 2008 CM 4004 - Corporal Lewis pleaded guilty to two charges; one under paragraph 125(a) of the *NDA* and one charge under paragraph 117(f) of the *NDA* for claiming false allowances; Separation Expense, and Rations and Quarters. The court sentenced him to a severe reprimand and a fine in the amount of $2500. The fine was paid in the amount of $50 per month for the first four months and then $100 per month for the next 23 months.

(j) *R. v. Major M. Paradis*, 2006 CM 75 - Major Paradis pleaded guilty to one charge under paragraph 125(a) of the *NDA* and another under paragraph 117(f) of the *NDA*. The court accepted the joint submission and sentenced Major Paradis to a reduction to the rank of captain and a fine of $1,000 payable in equal consecutive instalments over 12 months.

(k) *R. v. Captain J.C.B. Gagnon*, 2005 CM 34– Captain Gagnon pleaded guilty to one charge laid under paragraph 117(f) of the *NDA* and to two charges under section 129 of *NDA* for conduct to the prejudice of good order and discipline. The court sentenced Captain Gagnon to a severe reprimand accompanied by a fine of $1200 payable through consecutive instalments of $100 per month.

(l) *R. v. Warrant Officer (Retired) A.A. MacLellan*, 2004 CM 48 - Warrant Officer (Retired) MacLellan pleaded guilty to a charge under paragraph 117(f) of *NDA*. The alleged misconduct involved 71 purchases on a credit card used to purchase gas for his personal use. There was no restitution made. The court accepted a joint submission and sentenced Warrant Officer (Retired) MacLellan to a severe reprimand and an $8,000 fine.

(m) *R. v. Levesque*, (1999) CMAC-428 - Lance Corporal Levesque pleaded guilty to three charges under section 130 of the *NDA*, conspiracy to commit an offence, namely fraud, contrary to paragraph 465(1)(c) of the *Criminal Code* and paragraph 117(f) of the *NDA*. The CMAC upheld the sentence of a severe reprimand and a fine of $4,000.

[36] In order to have a better overview of the range of sentences referred to by counsel, I added the above cases to the table that was annexed in *R. v. Beemer*, 2019 CM 2031 and referred to in court. The table now has approximately 29 courts martial including fraud-like charges from both section 380 of the *Criminal Code* as well as paragraph 117(f) of the *NDA*.

[37] The Court noted that in the majority of the above cases referred to by the defence, the offender entered guilty pleas and there was evidence of significant remorse. These mitigating factors are absent in the present case (see Annex A).

[38] Notwithstanding the observations flowing from the comparative review on parity, the Court proceeded with an independent assessment on sentencing, keeping in mind that this is the first time that a fraudulent activity with respect to RFC has come before a court martial.

Accounting for relevant aggravating or mitigating circumstances

[39] In imposing a sentence, under the statutory regime of the *NDA*, military judges must increase a sentence where the aggravating factor of an abuse of rank or other position of trust is present. Subparagraph 203.3(a)(i) of the *NDA* 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

[40] Subparagraph 203.3(a)(i) of the *NDA* mirrors that 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

[41] It is imperative that a court martial not conflate the sentencing of an offender who abused their rank or position of trust or authority in committing the offence with an offender whose conduct was a general betrayal of trust. This distinction is important.

[42] The general consensus of military case law set out at Annex A is that when committing the offence, if an offender abused their rank or other position of trust or authority in committing the offence, then absent exceptional circumstances, their conduct will generally attract a custodial sentence. Whereas, an offender who has betrayed the trust placed in him as a member of the CAF, depending on the facts, a custodial sentence may or may not be required to meet the objectives of sentencing.

[43] A determination as to whether an offender abused a "position of trust or authority' in committing an offence requires an examination of the facts and the

relationship between the players. Courts must be particularly prudent not to broaden the scope of what constitutes a position of trust or abuse of one's rank. It is not sufficient to say that since every military member is in an employer/employee relationship with the CAF, if he or she commits the offence of fraud, that this automatically means that the aggravating factor set out at subparagraph 203.3(a)(i) of the *NDA* is triggered.

[44] In the case of *Arsenault*, in referring to the CMAC in *St. Jean*, Perron M.J. specifically distinguishes between the characterization of an abuse of trust which exists under subparagraph 718.2(a)(ii) of the *Criminal* Code and is now reflected at subparagraph 203.3(a)(i) of the *NDA* with a general betrayal of trust which is also a factor to be considered in sentencing:

> The court does not believe that the offences constitute an abuse of trust under paragraph 718.2(*a*)(iii) of the *Criminal Code*. Warrant Officer Arsenault did not abuse a special position of trust when he committed this fraud although he betrayed the trust that the Canadian Forces place in each of us as regards complying with laws and directives. Moreover, the fraud committed by Warrant Officer Arsenault is by its very nature an abuse of trust that is taken into consideration in sentencing. The CMAC summarized this concept very well in paragraph [22] of *Private St. Jean and Her Majesty the Queen* 2000 CMAC 429 as follows:
>
> > After a review of the sentence imposed, the principles applicable and the jurisprudence of this Court, I cannot say that the sentencing President erred or acted unreasonably when he asserted the need to emphasize deterrence. 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.

[45] In *Arsenault*, the facts and circumstances were very serious, with multiple aggravating factors including the fact that the subject matter of the fraud was over $5,000. As a senior non-commissioned officer, Warrant Officer Arsenault specifically sought out a posting and contrived a plan that would permit him to receive multiple allowances and he submitted falsified claims up to $34,043. Notwithstanding the fact that Perron M.J. found that Warrant Officer Arsenault had not breached a position of trust, based on the facts and circumstances of that case, the offender was still awarded a 30 day custodial sentence and a reduction in rank to that of sergeant.

[46] In the court martial of *Poirier*, based on its facts, Dutil C.M.J. referred specifically to the axiom that in committing an offence, the offender abused her position of trust and that absent exceptional circumstances, a custodial sentence should be

awarded. She was the chief clerk of the unit. The fraud rose to a level of $35,000 and she was sentenced to 30 days' imprisonment.

[47] Based on the facts of this case, it is clear that Corporal Berlasty did not abuse his rank, position or authority in the commission of the offence. However, without having specifically abused his rank, a position of trust or a position of authority for his self-benefit, his conduct can still betray the trust that the CAF has placed in him.

Betrayal of Public Trust

[48] As discussed earlier, offences involving fraud against the RFC are similar in scope to those offences committed against insurance schemes, welfare, or WSIB that civilian courts have found to be a breach of public trust. The establishment of the RFC has had a profound effect in the CAF as it ensures members of the reserve force are now adequately covered for injuries sustained while undertaking military service. As most reservists work full-time in a civilian capacity, the consequence of being injured while on military service could have devastating effects for their civilian jobs. The immediate consequence of the RFC was to bring to an end to the seemingly unfair treatment that reservists suffered when injured in comparison with their regular force counterparts. It had the beneficial effect of making it possible for reserve force members who were injured while on military service to have a stable income while they were rehabilitating. The RFC is a vital element for the financial security of reserve force members and their families. Accordingly, dishonest deprivation of the RFC constitutes a threat to the integrity of its very purpose and allegations of its abuse must be viewed seriously.

[49] The nature of the RFC program is such that once approved for the period of incapacitation, the RFC is automatically deposited into the member's pay account twice a month until the member either reports a change or the period of incapacitation ends.

[50] Although in 2014, the RFC program was still in its infancy, the underlying expectation of honesty by the members dependent upon the program was clear. Not only was it imperative that recipients of RFC not engage in work that would unnecessarily aggravate and prolong their injuries, any income earned either serving on Class A or in a civilian job needed to be considered within the RFC process.

[51] The reality is that if Corporal Berlasty had obtained approval to return to work, it is unlikely that the small amount of income he earned would have disentitled him to RFC benefits, but it likely would have reduced the amount he was paid. More importantly, by not seeking the requisite approval, he engaged in work that might have frustrated his ongoing physical recovery and that is a very important consideration that must not be lost.

Additional aggravating factors

[52] In addition to the breach of the public trust discussed above, the Court highlights the following additional aggravating factors for the record:

(a) Nature and scope of the fraud. Based on the evidence at trial, the nature and scope of the fraud was not highly sophisticated. He failed to inform his chain of command of the fact that he was offered paid work and that he chose to take it. He knew he was under an obligation not to work and could have re-injured his ankle, reversing the recovery that he had made to that date. The amount of the fraud was not insubstantial, but there was no evidence to suggest that the money earned was used to fund a lavish lifestyle or support an alcohol or drug addiction. In fact, the evidence was such that the offender was doing everything possible to avoid being evicted from his residence.

(b) Premeditation. Over a period of two and a half months Corporal Berlasty worked for Mr Loiselle, he knew what he was doing and he assumed the risk anyway.

(c) He derived a personal financial gain, in that he was paid cash for the work he did, while the RFC was deposited into his account each month.

(d) Caught. As opposed to involuntarily stopping, he was caught by his co-worker, then-Corporal Rovere who formally reported him to the chain of command. (see *R. v. Mathur*, 2017 ONCA 403, paragraph 14).

Mitigating factors

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

(a) Age and potential. Corporal Berlasty is 32 years old and considered relatively youthful. He has sufficient time ahead to be able to make a meaningful contribution to his community and provide an example to his family.

(b) 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.

(c) Ongoing rehabilitation. According to a letter from Doctor Rashwan, Corporal Berlasty has just recently taken an active role in his own therapeutic treatment. The Court noted that he has made attempts before, but perhaps he was not ready to assume responsibility now. Doctor Rashwan writes that he has been receptive to therapeutic suggestions and is open to the cognitive-behavioural strategies presented.

(d) Service. While he was actively serving in the CAF, Corporal Berlasty contributed meaningfully in his role as a cook.

(e) Delay. The amount of time required to bring a matter to court martial is something this court has historically considered in mitigation, where appropriate. The allegation underlying this offence, was raised to the unit's attention in 2014. Then-Corporal Rovere reported the incident immediately and Captain Othmer was advised shortly thereafter. The allegation has been hanging over Corporal Berlasty's head for five years

[54] Defence counsel also argued in mitigation that the charge before the Court was an isolated incident that unfolded when the offender was going through a very difficult time. She explained that at the time of the offence, the offender had just learned he was going to be a father and at the same time, he was struggling financially, and afraid he was going to lose his home. She argued that he exercised very poor judgment and chose a path that was not a good one. She explained that it was a crime of need and not of greed. She argued that we are dealing with one point in time where he committed the offence before the Court.

[55] This Court is particularly compassionate to Corporal Berlasty's personal circumstances including the facts that led to the charge before the Court. However, it cannot accept as a mitigating factor that this was an isolated incident. The reason is that the court found that his post offence conduct suggests otherwise. In committing the offence, Corporal Berlasty demonstrated a lack of respect and flagrant disregard for his duties under the RFC Program. The court accepted the evidence given at trial that a year after the offence, when Corporal Berlasty learned that Mr Loiselle had been asked to provide a statement to the military police, Corporal Berlasty demonstrated extreme anger threatening Mr Loiselle which led to an altercation between the two. Similarly, there was evidence of prolonged disrespect and anger demonstrated towards Captain Othmer who also tried to help him. The court noted that the same lack of respect and anger were present as late as August 2019 during this court martial. Hence, Corporal Berlasty continues to struggle and he has yet to mitigate the underlying reasons why. Although this court does not accept that this is an isolated incident, for the same reasons it rejects it, it accepts defence's submission of the importance of Corporal Berlasty's rehabilitation.

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

[56] 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.

[57] Defence counsel argued that if Corporal Berlasty is imprisoned it will place significant strain on his family, where a child who is too young to understand will be deprived of her father. However, the court notes that the disruption of family life as described by defence is considered an ordinary consequence of imprisonment that is not provided special consideration under sentencing.

[58] Defence argued that the offender has been trying to pull himself out of this hole that he got himself into and is finally making progress and a sentence of incarceration will only kick him when he is down. She argued that he would be deprived of his necessary support system. She argued that he is a man who suffers from depression and is currently unemployable. She stated that he is finally getting back on his feet. He is young and a sentence of imprisonment would hinder the progress he has made and the sentencing objective of rehabilitation.

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

Moderation

[59] Under the principles of sentencing set out in section in 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.

[60] The prosecution argued that based on the gravity of the offence of fraud, courts have always found that a custodial sentence is the most appropriate sentence. To support his position, he referred the Court to the cases of *Arsenault, Maillet, Boire* and *Murdoch v. R.*, 2015 NBCA 38.

[61] The prosecution argued that barring "exceptional circumstances", the appropriate sentence in cases of fraud committed against an employer requires a custodial sentence. He provided submissions on the test of "exceptional circumstances" set out in civilian case law which he suggests mirrors the jurisprudence in the military justice system.

[62] Further, he argued that the case of *Murdoch* highlights that it is an error for trial judges to "categorize the ordinary as exceptional" in permitting an offender to avoid a custodial sentence (see paragraph 47, *Murdoch*, quoting *R. v. Zenari*, 2012 ABCA 279, at paragraph 8 and *R. v. Douglas*, 2014 ABCA 113). Prosecution also referred the court to paragraph 29 of *R. v. Burnett*, 2017 MBCA 122 where the court found:

> . . . exceptional circumstances occur only 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.]

[63] The prosecution relied heavily upon the reasoning in *R. v. Saucier*, 2019 ONSC 3611. In supporting his position, the prosecution invited the Court to review the case law on fraud that Lacelle J. sets out in the *Saucier* case at paragraph 13, which reads as follows:

> [13] In addition to these principles set out in the *Criminal Code*, I consider the principles and direction from the case law related to sentencing for fraud offences of this kind. They include the following:

a. Fraud over $5,000 is a serious offence: *R. v. Bogart*, (2002), 2002, 167 C.C.C. (3d) 390 (Ont. C.A.), leave to appeal refused (2003), [2002] S.C.C.A. No. 398 (S.C.C.). The maximum sentence is 14 years imprisonment.

b. Large-scale frauds by persons in positions of trust will almost inevitably attract a significant custodial sentence: *Bogart* at para. 36; *R. v. Williams*, [2007] O.J. No. 1604.

c. In imposing a sentence where the offender has used his or her position to commit a breach of trust, the primary considerations are the protection of the public, general deterrence and the repudiation of the conduct of which the offender was found guilty. The secondary considerations are specific deterrence, rehabilitation and any mitigating circumstances such as a plea of guilty or co-operation with the authorities: *R. v. Castro*, 2010 ONCA 718 at para. 30. See also *Bogart* at paras. 29-34.

d. General deterrence remains a paramount consideration even for first time offenders of otherwise good character: *Williams* at para. 25.

e. As was noted in *Bogart* in citing *R. v. Gray* (1995), 1995, 76 O.A.C. 387 (Ont. C.A.) at 398-99:

> there are few crimes where the aspect of deterrence is more significant. It is not a crime of impulse and is of a type that is normally committed by a person who is knowledgeable and should be aware of the consequences. That awareness comes from sentences given to others.

f. The term "large-scale fraud" has been used in respect of cases involving an attempt to obtain funds in the range of $343, 000 where only $35, 000 was actually obtained (*R. v. Mathur*, 2017 ONCA 403), and in cases where the amount defrauded was as low as $194, 000 (see *Williams*; see also *Castro* at para. 16, and *R. v. Dobis*, [2002] O.J. No. 646 (C.A.));

g. Regardless, the characterization of the fraud is not determinative of whether certain sentencing principles apply or have primacy. As noted in *Mathur* by Trotter J.A. at para. 14, "irrespective of the adjective used to describe the level of the appellant's offending", it was the presence of the many aggravating factors in the case which compelled an emphasis on the sentencing principles of general deterrence and denunciation.

[64] In *Saucier*, the offender, a financial adviser, defrauded many of his clients and as such the statutory aggravating factor associated with an abuse of trust underpinned the judicial reasoning. As such, paragraph 13 sets out the summary of the law that pertains to "large-scale fraud" committed by an offender occupying a position of trust which the trial judge specifically notes at paragraph 15:

> The offences involved a breach of trust (see s. 718.2 of the *Code*). The breach of trust is particularly troubling given what the offender knew about his clients' circumstances during the time he committed the offences, such as the Lacombe's loss of their son. Many of the victims also trusted the accused, at least in part, because of his association with London Life. In all cases, the offender violated the considerable trust that was placed in him because of his professional status as a financial advisor

[65] This Court's interpretation of paragraph 13 of *Saucier* is that large-scale fraud, well over $5000, committed by persons in a position of trust or authority will almost always attract a penitentiary sentence. However, the facts of this case are in no way similar. The facts before this court do not involve a "large-scale fraud" as defined at subparagraph 13(f) of *Saucier* and secondly, the amount of the fraud is significantly less.

[66] Upon a review of the above case law, the Court found that this default position set out in *Murdoch* is predicated on the underlying factor that in committing the fraud the offender abused a position of trust or authority. It is not to say that a case that does not have this underlying factor will not result in a custodial sentence, but as described earlier, this underlying distinction here is important and this court has already found that in committing the offence, Corporal Berlasty did not abuse a position of trust.

[67] However, notwithstanding this, the prosecution argued that the abuse of trust sentencing guidelines apply to all members no matter what position they occupy in the CAF. He argued that it should not be confused with the statutory aggravating factor set out in the *NDA* and that the guidelines exist separately.

[68] If the proposition of the prosecution had merit, and the abuse of trust doctrine was triggered every time a CAF member committed fraud, then the court martial jurisprudence would overwhelmingly reflect custodial sentences. Upon a review of the case law set out in Annex A, the jurisprudence overwhelmingly weighs against this proposition.

[69] Of the 29 courts martial reviewed in Annex A, the Court found that a custodial sentence was only awarded in 11 of the 29 cases and in 3 of those cases, the execution of the custodial sentence was suspended.

[70] Further, the Court noted that in cases where offenders faced only a single charge under paragraph 117(f) of the *NDA*, there was only one case being *Jackson*, where the offender received a custodial sentence. The cases where a custodial sentence was awarded involved multiple fraud-like offences or involved a combination of stealing or making false statements contrary to section 125 of the *NDA*.

[71] Court martial jurisprudence does distinguish between cases where a member steals or commits fraud while entrusted with the protection of funds or material, in comparison with other types of fraud, but the application of abuse of trust sentencing guidelines have not automatically been applied to every type of fraud case tried at courts martial as argued by the prosecution.

[72] At paragraph 1 of *Murdoch*, the New Brunswick Court of Appeal succinctly summarized the type of conduct captured by the abuse of trust guidelines as follows:

> It is widely accepted that the public interest is best served by emphasizing denunciation and deterrence in imposing sentence for thefts or frauds committed by employees who

> thereby abuse a position of trust in relation to their employers. That view has prompted this Court, and other appellate courts, to hold that, barring "exceptional circumstances", a fit sentence for most categories of trust thefts or trust frauds by employees is one that features a jail term: *R. v. Steeves and Connors*, 2005 NBCA 85, 288 N.B.R. (2d) 1, at para. 10 ("*Steeves* (2005)") and *R. v. Chaulk*, 2005 NBCA 86, 287 N.B.R. (2d) 375. For ease of reference, we will refer to that general approach as the abuse-of-trust sentencing guideline.
> [My emphasis.]

[73] Upon a review of the facts in *Murdoch*, the Court notes that at paragraph 2, the court of appeal starts its decision by categorizing the offender's conduct as 12 separate occurrences of embezzlement of a relatively modest sum of money, the property of her employer. By the categorization of the offence as repetitive occurrences of embezzlement, the abuse of trust guideline automatically kicks in. The Concise Oxford English Dictionary defines "embezzle" as follows:

> embezzle: steal or misappropriate (money placed in one's trust or under one's control).

[74] The term embezzlement requires that the money was placed in one's trust or under one's control. In describing the circumstances where the application of the abuse of trust guideline must be followed, Drapeau C.J. clarifies the application of the doctrine to cases where an offender has abused a position of employment-related trust by stealing or defrauding their employers. In his general observations in the case of *Murdoch*, Drapeau C.J. wrote:

> [23] The jurisprudence emanating from this Court, and other courts in this jurisdiction and elsewhere, espouses the view that, absent "exceptional circumstances", the public interest requires a jail term be imposed, in most cases, for employees who abuse a position of employment-related trust by stealing from or defrauding their employers: *R. v. McNamara (J.)* (1992), 126 N.B.R. (2d) 298, [1992] N.B.J. No. 451 (C.A.) (QL), at para. 4; *Steeves* (2005), at para. 1; *Chaulk*, at para. 3; *R. v Pierce*, [1997] O.J. No. 715 (C.A.) (QL); *R. v. Fulcher*, 2007 ABCA 381, [2007] A.J. No. 1323 (QL); and *R. v. Hogan*, 2012 PESC 11, [2012] P.E.I.J. No. 7 (QL), per Mitchell J., as he then was.
>
> [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.
> [My emphasis.]

[75] Further, contrary to the position argued by the prosecution, it is also important to clarify that the common law abuse of trust sentencing guideline does not exist in a separate silo outside the provisions in the *NDA* or the *Criminal Code*. In fact, upon a review of all the case law, it is clear that the abuse-of-trust sentencing guideline fits

comfortably within the sentencing scheme elaborated in Part XXIII of the *Criminal Code* as well as within the *NDA* (see *Murdoch* at paragraph 27).

[76] Under the *NDA*, the consideration of whether the offender was in a "position of trust" is the first aggravating factor that military judges must consider. However, Corporal Berlasty 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.

[77] Although the abuse of trust doctrine existed prior to the amendments to the *NDA* and the *Criminal Code*, in *Murdoch*, Drapeau CJ in referencing the 2005 decision in *R. v. Steeves and Connors*, 2005 NBCA 85, acknowledges and describes how the doctrine of the abuse-of-trust guideline fits within the new statutory sentencing provisions of the *Criminal Code* at paragraph 25.

> We note, as well, that s. 718.2(a)(iii) calls for an increase in sentence to account for evidence that the offender, in committing the offence, abused a position of trust in relation to the victim. That provision was considered in *R. v. Matchett* (H.J.) (1997), 188 N.B.R. (2d) 321 (C.A.), where we indicated, at para. 13, that an offence committed by abusing a position of trust "would ordinarily command a sentence to be served in jail and not elsewhere."
> [My emphasis.]

[78] In order to further emphasize that the abuse of trust guideline does not have a separate existence outside of the statutory aggravating factor set out at s. 203.3(a)(i) of the *NDA*, it is important to note that the addition of this aggravating factor into the *NDA* codified the common law associated with the abuse of trust guideline. This is apparent when compared to commentary on the identical statutory aggravating factor in the *Criminal Code*. At paragraph 37 of *Murdoch*, Drapeau C.J. emphasizes the important points made by Richard J.A. in *Veno v. R.*, 2012 NBCA 15, in applying the statutory provision related to abuse of a position of trust. Although the New Brunswick Court of Appeal in *Veno* upheld the imposition of a custodial sentence awarded by the trial judge, it recognized and specifically commented on the trial judge's error in law in applying the statutory factor on the abuse of a position of trust set out at subparagraph 718.2(a)(iii) of the *Criminal Code*:

> [11] As stated above, I find merit to Mr. Veno's first ground of appeal. For the reasons set out below, I conclude the sentencing judge committed an error in law by applying s. 718.2(*a*)(iii) of the *Criminal Code*.
>
> [12] Section 718.2(a)(iii) deems the abuse of a position of trust in the commission of an offence to be an aggravating factor. This provision is simply the codification of a long-standing principle pursuant to which courts already considered the abuse of such a position as an aggravating factor (see Steeves and Connors, at para. 12).
>
> [13] 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 sealing 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.

[14] 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.

[15] 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]

[16] 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.
[My emphasis.]

[79] Referring to the CMAC case of *Lévesque*, Letourneau, 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. Every case depends on its facts and circumstances.
> [Footnote omitted.]

[80] In summary, I will reiterate again as I did in the case of *Beemer*, that absent proof of the statutory factor at subparagraph 203.3(a)(i) of the *NDA* that the offender abused their rank, position or authority, there is no common law rule stating that a term of imprisonment must be imposed, nor shall a court martial rule it out. Each case will rest on its particular facts. The court must craft a sentence that is proportionate to the gravity of the offence and the degree of responsibility of the offender.

Assessment of sentencing options

[81] 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. The prosecution seeks a minimum three-month term of imprisonment while defence counsel requests a reprimand and a $2,500 fine.

[82] This Court concluded that Corporal Berlasty did not abuse his rank, position or authority in the commission of the offence. However, as explained above, this does not necessarily mean the offender will avoid jail. In fact, in the case of *Veno*, relied upon in *Murdoch*, a jail sentence was imposed even though the employee had not abused a position of trust in stealing from his employer. Similarly, in the court martial case of *Arsenault*, a case where there was no breach of a position of trust, the court likewise felt that the imposition of a jail sentence was appropriate.

[83] Based on the court's review of all the decisions presented by counsel, and notwithstanding this Court's rejection of the prosecution's proposition that the abuse of trust guidelines apply to this case, as discussed earlier, the court did find that this is an case that rises to the level of a breach of the public trust. As the commentary in the case of *Thomas* reflected, breaches of public trust are extremely serious, but not as serious as those cases that would fall within the abuse-of-trust-guidelines.

[84] Although the case before me is the first of its kind within the military justice system, there was no evidence presented that suggested that the need for general deterrence in discouraging RFC fraud was higher in the military justice system than it is for other types of fraud. Although breach of the public trust may not be considered on the same level as an offender who commits fraud or steals while entrusted by reason of his or her employment with financial resources and responsibilities, courts have similarly emphasized that there is an overwhelming need to send a strong message of general deterrence.

[85] However, due to Corporal Berlasty's release from the CAF and his status as a civilian, this Court finds itself in a difficult position with few tools available to craft an individualized sentence that also sends a strong message of general deterrence and denunciation. Defence counsel is correct in her submission that the delay in this case has deprived the Court of tools it would otherwise have had available if the matter had been pursued quickly and the member was still serving.

[86] The Court is also mindful of the fact that these incidents occurred five years ago, and Corporal Berlasty was medically released from the CAF in 2016 and has moved on with his life. The Court is also attentive to the fact that if Corporal Berlasty had been tried for the offence of fraud, under section 380 the *Criminal Code* in the downtown Windsor criminal court, he would receive a criminal record.

[87] Until 2013, under the *NDA*, 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 section 249.27, a conviction under paragraph 117(f) of the *NDA* eludes a criminal conviction unless the penalty is such that it is a severe reprimand or less, a fine not exceeding basic pay for one month or a minor punishment. The necessary message to be communicated to the CAF at large is that any offender who engages in this type of similar breach of the public trust and is convicted will receive a criminal record for an offence of dishonesty.

[88] This case did not involve a high level of sophistication or deliberate design. The offender was offered an opportunity to make additional money at a time when he was in desperate financial need and he took advantage of it. This is the hallmark of many cases of welfare, EI and similar WSIB fraud. The amount of money defrauded is uncertain, but based on the evidence, it is believed to be no more than $2,500.

[89] The case law set out in Annex A, provides the court with some comparators to conduct an analysis. After a full review of all the cases set out in Annex A, the court notes that in the present case, the amount of money defrauded and the circumstances of the fraud was not as serious as that in *R. v. Master Corporal Roche,* 2008 CM 1001 where the court imposed a sentence of 14 days (suspended) for the first offence. Although *Roche* had the aggravating factor that she was in a position of trust, her case also included a longer list of mitigating factors which are absent in this case. As such, this Court is of the view that a custodial sentence of 10 days is appropriate for Corporal Berlasty. In order to achieve the necessary deterrence, it must be clear that there is a real chance of penal consequences that will flow for engaging in this type of fraud.

[90] In light of Corporal Berlasty now being a civilian, if the prosecution had of pursued the charges downtown in a civilian court, then the court is mindful that the offence would have fallen under paragraph 380(1)(b) of the *Criminal Code* for fraud under $5,000. What this means is that a civilian court would have had to consider whether or not the imposition of a conditional sentence was appropriate in Corporal Berlasty's circumstances. A conditional sentence is a sentence of incarceration which is

permitted to be served in the community under strict conditions, which typically consists of house arrest.

[91] Regrettably, the option of a conditional sentence is not available for Corporal Berlasty as it is not a sentence offered under the military justice system. As such, in the circumstances of this case, it is appropriate that this Court assess whether the custodial sentence should be suspended.

[92] In his submissions, the prosecution argued that since there are no exceptional circumstances in this case, the Court should not consider suspension. He argued that Corporal Berlasty's sympathetic and compassionate circumstances do not meet the test of exceptional circumstances set out in *Burnett*. However, based on reasons already provided above, as well as the judicial reasoning provided in *Murdoch* and *Matchett*, the Court has already concluded that the abuse of trust guidelines are not triggered and as such the Court is not required to satisfy a test of exceptional circumstances set out in *Burnett* in considering whether suspension is appropriate.

[93] Further, based on the facts of this case, not only is there no common law impediment to a court martial considering the suspension of an execution of a sentence of imprisonment, the *NDA* permits military judges to suspend the carrying into effect of a sentence of imprisonment or detention where it is imperative for the member's welfare or operational reasons. Subsection 215(1) of the *NDA* reads 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.

[94] Further, subsection 216(2) of the *NDA* states:

> (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.

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

[96] Based on court martial jurisprudence, 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 offences 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. At paragraphs 22 and 23 of *Boire*:

> [22] It is clear from this provision that the issue of suspension of a sentence of incarceration does not arise unless and until the sentencing judge has determined that the offender is to be sentenced to imprisonment or detention, after having applied the proper sentencing principles appropriate in the circumstances of the offence and the offender.
>
> [23] How should military judges determine whether a sentence should be suspended? In the absence of legislated criteria for suspension, military judges sentencing offenders at courts martial have developed over time, as illustrated in cases such as *R. v. Paradis*, 2010 CM 3025 paragraphs 74 to 89 and *R. v. Masserey*, 2012 CM 3004 paragraphs 21 to 32, two requirements which must be met:
>
> (a) The offender must demonstrate, on the balance of probabilities, that his or her particular circumstances justify a suspension of the punishment of imprisonment or detention;
>
> (b) If the offender has met 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 offences and the offender including, but not limited to, the particular circumstances justifying a suspension.

[97] In advocating for the Court to consider suspending the execution of the period of imprisonment, defence counsel argued that there is clear evidence before the Court that the offender is suffering from a major depressive disorder linked to the injury that forms the basis of the charge before the Court.

[98] Defence counsel argued that we cannot dismiss the mental health concerns of the offender. She explained that the testimony of Ms Harrington and a review of the Veteran Affairs Official Decision, Exhibit 20, approving the offender for a disability pension based on his persistent depressive disorder should carry some weight. In the Veteran Affairs Official Decision, the commentary suggests that the offender's ankle injury and subsequent incidents that followed, set the foundation for the depressive disorder.

[99] Defence Counsel further argued that the offender is now in a situation where he has met a doctor whom he seems to connect with and has a positive view moving forward. Although he has only met with the Doctor twice, she argues that it is a positive step that should be taken into account. Corporal Berlasty trusts his Doctor and opens up to her and has spent some time developing a relationship with her for treatment. The Court commends Corporal Berlasty in making this positive step forward; however, I am left wondering whether the change is more contrived, real or is it a little too late?

[100] Referring to the court martial in *Downer*, defence argued that although psychological injuries do not absolve someone of the offence, they do carry weight at the time of sentencing. Defence counsel argued that the offender's daughter is his life

and motivation and to cut him off from his support system will be extremely detrimental to his ongoing rehabilitation.

[101] In considering whether or not to suspend the execution of a punishment of imprisonment, the Court must weigh a number of factors. As explained earlier, this Court is concerned with the unexplainable delay that unfolded in this case which has left the Court with limited sentencing options to ensure that the message of general deterrence is clearly communicated. As this is the first fraud involving the RFC, it is imperative that a strong message of general deterrence be clear and unequivocal.

[102] A review of section 380 of the *Criminal Code* fraud charges relied upon, there were three cases where the military judge suspended the punishment of a custodial sentence. One of the cases was that of *Boire*, where the member committed a much more extensive and elaborate series of fraudulent transactions, but the suspension was the result of a joint submission due to the member's very extenuating circumstances. In both *Roche* cases involving fraud by the same offender who breached her position of trust twice, the court considered what would be considered non-exceptional circumstances to suspend the imposition of a custodial sentence.

[103] In *R. v. Roche*, 2008 CM 1001, on facts that involved an abuse of trust, defrauded the non-public funds accounting office of CFB Kingston of an amount of $8,700, Dutil C.M.J. imposed a sentence of 14 days' imprisonment and a fine of $2,000. In suspending the execution of imprisonment he concluded at paragraph 22:

> **Considering** the long time elapsed since the offence was committed and Master Corporal's extraordinary efforts over the past two years;
>
> **Considering** the responsibility of the various parties with respect to the failure to provide her with legal counsel in a timely manner and the effect of this omission on the administration of justice;
>
> **Considering** that Master Corporal Roche and all of the evidence have eloquently demonstrated her efforts to rehabilitate herself and the critical role she has been playing in the treatment of community members suffering from addictions;
>
> **The Court** finds that it is not in the interest of justice that she serve the 14-day prison sentence imposed by the Court because she will be much more useful to society outside of a penal institution, continuing her therapy and providing support to others suffering from similar problems. Accordingly, the Court, as the suspending authority, suspends the carrying into effect of the period of imprisonment.

[104] Later, in *R. v. Roche*, 2010 CM 4001, while abusing her position of chief clerk, the offender stole $885 of cash that she had been entrusted to secure. Despite the fact that it was her second court martial for a similar offence where she was found to have violated a position of trust, in light of her release from the CAF and non-exceptional family responsibilities, the court still suspended the custodial sentence.

[105] The Court would be remiss not to point out that under the *NDA*, by suspending the execution of the sentence, the offender is placed under conditions that extend a

period of one year before his sentence is considered wholly remitted. This means that from now until November 2020, should Corporal Berlasty breach any of the conditions, then the suspension may be lifted and he must serve the period of imprisonment.

[106] Although the Court was only provided with evidence of faint hope that Corporal Berlasty has turned the corner and is now focussed on rehabilitation and improving himself, the imposition of a suspended sentence provides the Court some leverage to hold him accountable in his ongoing rehabilitation. In short, it will not be the court, but rather it will be him and his personal conduct over the next year which will determine whether or not he goes to jail.

[107] A sentence that strongly encourages Corporal Berlasty to continue on his path of rehabilitation will not only encourage him, but it permits him to make a contribution to society at the same time. Both he, his family and society will benefit more if he furthers his rehabilitation than it will if he is sent to jail for 10 days.

[108] After a review of the case law, and the unique factors presented in the case at bar, this Court is of the view that suspension of the punishment of imprisonment would not undermine the public trust in the military justice system. It has been five years and the offender desperately needs to move on with his life.

[109] In addition, after reviewing the case law, given that Corporal Berlasty has not made any attempt at restitution and this was a case of fraud where he benefited financially, the Court finds that the imposition of a fine in the amount of $4,000 is fair and appropriate.

Explanation of the suspension order and consequences of breaching its conditions

[110] Before I pass sentence, I need to ensure that Corporal Berlasty understands the proposed order and the consequences that will flow if he fails to comply with the order or the conditions imposed. Subsection 215(2) of the *NDA* sets out the conditions that the court must impose in suspending the sentence which in addition to other reasonable conditions that the court wishes to impose, it includes keeping the peace and being of good behaviour, to attending a hearing when ordered to do so and to notify the Provost Marshal of any change in address.

[111] As explained earlier, the suspension remains in force for a period of a year before it is considered wholly remitted. Here are the conditions of the order:

(a) Failure to comply with conditions. If Corporal Berlasty fails to comply with the order, he may be found guilty of an offence under section 101.1 of the *NDA* and on conviction, could be liable to imprisonment for less than two years or to less punishment;

(b) Hearing into breach of conditions. Pursuant to subsection 215.2(1) of the *NDA*, on application by the Director of Military Prosecutions, the

Court may conduct a hearing to determine if Corporal Berlasty breached a condition imposed by the court. If this should occur, he will be provided full opportunity to make representations;

(c) If the Court determines that he has breached a condition, the Court may:

i. revoke the suspension of a punishment and commit him to serve the sentence of imprisonment; or

ii. vary any conditions imposed and add or substitute other conditions as the Court sees fit.

(d) Notice of application. At any time, Corporal Berlasty may make an application to the Chief Military Judge, to request a condition of the order be varied or to substitute a condition;

(e) Representation of offender. Corporal Berlasty is entitled to free legal counsel by the Director of Defence Counsel Services with respect to an application made to vary a condition of the order or to substitute another condition. He can talk to his counsel about any concerns he may have with this suspension order, either now or in the future.

Conclusion

[112] In summary, the punishment of 10 days' imprisonment is the minimum required to send a strong message of general deterrence that this type of conduct will not be tolerated in the CAF.

[113] The suspension of the sentence of imprisonment reflects the Court's consideration of the significant delay that has extended this matter over the last five years and the fact that the offender has already obtained his medical release from the CAF, and is receiving a pension from Veterans Affairs for ongoing mental health problems that he appears now to be managing.

[114] In terms of parity, it also recognizes the fact that this is the first fraud case of its type to be tried within the military justice system thereby providing every benefit of the doubt in the sentence to the offender.

[115] Further, the sentence is consistent with the principle of moderation and addresses the indirect consequences that would flow from the sentence.

[116] Corporal Berlasty, you now need to assume responsibility for your past conduct. You are a young man with a great deal to offer society. Based on the evidence before the court, you also have a great deal to look forward to. You should also have an opportunity through Veterans Affairs Canada to pursue training. Even if you never get back to work, you need to keep your mind occupied and accept every opportunity to

give back to the community. In addition, it is imperative that you invest in anger management courses. Please listen to the people around you and the specialists trying to help you. I invite you to self-reflect and to try and appreciate and respect the small gestures extended to you by others, so you are not crippled by your anger moving forward. I am giving you an extraordinary opportunity, but I also feel that the suspended sentence will hold you accountable in your rehabilitation and I sincerely hope I do not see you before me again.

FOR THESE REASONS, THE COURT:

[117] **SENTENCES** Corporal Berlasty to imprisonment for a period of 10 days and a fine of $4,000, payable at $200 per month starting on 15 December 2019.

[118] **SUSPENDS** the carrying into effect of the punishment of imprisonment.

Counsel:

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

Captain D. Mansour, Defence Counsel Services, Counsel for Corporal J.P.S. Berlasty

Annex A
To *R. v. Berlasty*, 2019 CM 2032

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	Offender pleaded 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*	Found guilty –		Military police in position of trust	Fine of $2000 and	

	G.R. Benard, 1999 CM 51	stealing while entrusted with care and custody of that material and making false certification		Stealing while entrusted	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) CMAC-429	Guilty plea: - 3x s. 380(1) Fraud of *CCC*; - 1 x para 117(f) of *NDA* - 1 x s. 368(1) of the *CCC*	Fraud of $30,835.05 by submitting 62 separate general allowance claims falsely claiming money for tuition and courses which he did not take. Sergeant and evidence of blackmail		CMAC imposed reduction in rank to corporal, severe reprimand and a fine of $8,000.	CMAC overturned TJ sentence of imprisonment.
9	*R.* v. *Warrant Officer (Retired) A.A. MacLellan*, 2004 CM 48.	Guilty Plea to one charge contrary to paragraph 117(f) of the *NDA*	Defrauded the Government of $4,425.98 over a 12-month period by a scheme involving the use of government credit cards to buy gasoline for his own purposes. There were 71 purchases made in amounts ranging from $16 to $91.	- In Position to audit the statements; - Court took position, no restitution had been made. -joint submission	Severe reprimand and a fine in the amount of $8,000.	
10	*R.* v. *Captain J.C.B. Gagnon*, 2005 CM 34	Guilty plea - 9 original charges – pleaded guilty to 3 charges. - 1x paragraph 117 (f) of the *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.	

11	*R. v. Major M. Paradis*, 2006 CM 75	Pleaded guilty to 2 charges; para 125(a) and para 117(f) of *NDA*.	-joint submission -No real facts set out in written decision. -2nd CO of CIL in 18 months in Quebec found to have breached the trust of position.	CIL Officer – Major Abused position of CO	Reduction in rank to captain and a fine of $1000.	
12	*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.
13	*R. v. Sergeant K.J. McLean*, 2008 CM 4005	Guilty Plea 1x 117(f) of *NDA*	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.	
14	*R. v. Master Corporal K.M. Roche*, 2008 CM 1001	Guilty Plea s. 380 *CCC* - Fraud	RMS Clerk - Over 3 months – defrauded NPF Funds at CFB Kingston of $8700 via writing 7 cheques to herself.	Abused position. MCpl – RMS clerk and Deputy CO of the NPF Acctg – had been asked to assist in investigation. –Hid NSF cheques		Suspended sentence of 14 days' 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."
15	*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 carrying into effect the imprisonment.
16	*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. Total fraud - $17, 945 Cheques ranged from a low of $400 to a high of $2,650.	CC- in reserve Unit - abused his position None of the money was repaid.		21 days' imprisonment and reduction in rank from sergeant to corporal.
17	*R.* v. *Corporal B.A.F. Lewis*, 2008 CM 4004	Pleaded guilty to two charges; paragraph 125(a) of the *NDA* and paragraph 117(f) of the *NDA.* Claiming false allowances; Separation		Joint Submission	Severe Reprimand and fine in the amount of $2500.	

		Expense, Rations and Quarters to the amount of $2,553.53.				
18	*R.* v. *Ringuette*, 2012 CM 1019	Offender admitted guilt to two offences: paragraph 117(f) of the *NDA* for fraud in the the sum of $6,450; and, absent without leave under s. 90 of the *NDA*.		Joint Submission	Severe reprimand and a fine in the amount of $3,500.	
19	*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.
20	*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).

21	*R.* v. *Hull,* 2014 CM 1001	Found Guilty for one offence under paragraph 117(f) of the *NDA* for claim which included $2,104.11 of expenses for which he was not entitled.	Claimed entitlements for moving his then wife and children from Newfoundland to Esquimalt, but only moved his fiancée.		Reprimand and fine in the amount of $2000 payable in 10 monthly equal instalments of $200.	
22	*R. v. Wight,* 2014 CM 1021	Pleaded guilty to an offence under paragraph 117(f) of the *NDA.* On 10 occasions member attended civilian medical clinics claiming difficulty sleeping in order to obtain prescription sleep medication for his common law partner. Member knew cost ($913.32) of medication was billed to DND.			Reprimand and fine in amount of $900 payable in monthly instalments of $100.	
23	*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.	

24	*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.
25	*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.
26	*R.* v. *Jackson*, 2015 CM 4012	Guilty Plea to one charge, under paragraph 117(f) of the *NDA*, for using a DND credit card for personal purchases to the total amount of $20,000	Member in position of trust;			Detention for 60 Days.
27	*R.* v. *Downer*, 2016 CM 4006	Found Guilty of three charges; one charge under paragraph 117(f) of the *NDA* and two charges under paragraph 125(a) of the *NDA*.	False statements made in attempt to finalize a claim for Leave Travel Assistance (LTA) for which he obtained an advance of $600 from public funds. He had not proceeded on leave for which claim was based.		Severe Reprimand and a fine of $1,500 payable in 10 monthly installments of $150.	
28	*R.* v. *Daigle*, 2017 CM 1003	Guilty Plea to one charge under paragraph 117(f) of *NDA* for altering a credit card statement – The difference in amount claimed	Member had previous convictions for 3 offences for dishonesty. Court applied the step up principle.		Reprimand and fine in the amount of $1,400 to be paid in consecutive installments of $200 per month.	

		and warranted was $1,570.00 which was never paid.				
29	*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).
- 11 courts martial out of 29 – 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 (see *Jackson*)).