COURT MARTIAL

Citation: *R. v. Penner*, 2020 CM 5016

Date: 20201207
Docket: 202005

Standing Court Martial

3rd Canadian Division Support Base Edmonton
Edmonton, Alberta, Canada

Between:

Her Majesty the Queen

- and -

Master Corporal R. Penner, Offender

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

SENTENCE

(Orally)

Introduction

[1] Master Corporal Penner is charged with three counts under the *National Defence Act* (*NDA*). The three offences were committed in August 2019 in Edmonton, Alberta. The first charge relates to an offence of escaping from custody in that he, while being under a punishment of confinement to barracks, quit his barracks.

[2] The second charge relates to being drunk while on duty, while the third charge pertained to being drunk, having been warned for duty. The offender offered a guilty plea to these three offences. Having accepted and recorded the guilty plea, the Court must now determine whether the joint submission proposed by counsel, a reduction in rank to private with a fine in the amount of $1,500, should be accepted and imposed by this Court.

Summary of circumstances

[3] In accordance with paragraph 112.51(3) of the *Queen's Regulations and Orders for the Canadian Forces* (QR&O), the prosecutor shall inform the court martial of the circumstances of the charges to which a plea of guilty has been accepted. This is done through a summary of circumstances, which is read in court by the prosecutor, and which provided the following facts that were admitted as true by the offender. The Statement of Circumstances reads as follows:

"**STATEMENT OF CIRCUMSTANCES**

1. At all relevant times, Master Corporal Penner was a member of the Canadian Armed Forces, Regular Force. He was a member of 1st Battalion, Princess Patricia's Canadian Light Infantry. He was an Infantryman by trade.

2. On Thursday, 1 August 2019, Master Corporal Penner was tried by summary trial before a Delegated Officer. He was convicted on one charge under section 90 of the National Defence Act – Absence Without Leave. He was sentenced to ten days confinement to barracks and a fine of $250.00.

3. Master Corporal Penner was confined to Building 403, the main building of the 1st Battalion, Princess Patricia's Canadian Light Infantry. He was placed under the direct supervision of the Battalion Orderly Sergeant during non-working hours. He was to remain in the unit lines, sleeping in the 'Defaulter's Room' and attending the work and parade schedule set out in unit standing orders. Master Corporal Penner was familiar with these orders and routines, having himself been assigned as the Battalion Orderly Sergeant a number of times in months prior to his sentence.

4. On the morning of Sunday, 4 August 2019, the Battalion Orderly Sergeant shift handed over at 1000 hours. The off-going Sergeant noted that he had not seen Master Corporal Penner since 2230 hours the previous night. The two sergeants noted that Master Corporal Penner was not in the Defaulters Room, assuming he was smoking or conducting physical training. At 1015 hours, Master Corporal Penner contacted the new Battalion Orderly Sergeant, and asked if he may exercise behind the building. Permission was granted. Master Corporal Penner then stated that a friend would bring him lunch, and that he did not need an escort to the dining hall. The Battalion Orderly Sergeant agreed to this, but became suspicious. The Sergeant checked on Master Corporal Penner to subsequently find he was not in or around the building. Master Corporal Penner did not respond to phone calls. The Acting Quartermaster Sergeant Instructor, Master Warrant Officer Thompson, was advised.

5. A short time later, Master Corporal Penner contacted the Battalion Orderly Sergeant, but was evasive about his whereabouts. He stated that he did not deserve the treatment he was getting from the unit and hung up. Over the next hour, the Battalion Orderly Sergeant received calls from Master Corporal Penner and another soldier, each giving updates on Master Corporal Penner's whereabouts. His location changed several times, settling on Leduc, Alberta. Master Corporal Penner sounded agitated, intoxicated, and often incoherent. Master Corporal Penner admitted that he was drinking alcohol.

6. At approximately 1145 hours, Master Warrant Officer Thompson arrived at the unit. He spoke with Master Corporal Penner by phone. At approximately 1200 hours, Master Corporal Penner advised that he was at the Canadian Brew House in Leduc. This soon changed to a restaurant called Kosmos, also in Leduc. It was determined that Master Warrant Officer Thompson would pick up Master Corporal Penner at Kosmos Restaurant.

7. During this time the Military Police were contacted and a patrol was dispatched to travel with Master Warrant Officer Thompson. A courtesy call was made to the Leduc detachment of the Royal Canadian Mounted Police, advising that the Military Police would be in their area of operations.

8. At Kosmos Restaurant, Master Penner was intoxicated and disorderly, causing the staff to cut him off from alcohol. The staff soon asked him to leave, to which he respectfully refused. The staff contacted the RCMP. The RCMP Sergeant on duty attended Kosmos Restaurant. He found Master Corporal Penner highly intoxicated. Master Corporal Penner became defensive, and piled up chairs as a barrier between himself and the RCMP Sergeant. Further RCMP members were summoned. Master Corporal Penner refused to comply with direction from the RCMP Sergeant, acted aggressively toward the Sergeant, and threatened self-harm. He stated that he was a veteran, and that he had PTSD. At 1433 hours, Master Corporal Penner was subsequently arrested, placed in handcuffs, and removed from the restaurant. He was placed in the back of an RCMP cruiser to await the Military Police.

9. Upon the arrival of the Military Police, Master Corporal Penner was transferred to the custody of the Military Police. The RCMP declined to lay any charge in this matter, leaving it for military authorities.

10. Master Corporal Penner was taken to the guard house on base. He was highly intoxicated, at times bordering on unconsciousness. His behaviour was erratic. He was not compliant when being handled by the Military Police corporals and was verbally combative. Master Corporal

> Penner was retained in custody. During the intake process, he had a heated, verbal altercation with Master Warrant Officer Thompson.
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> 11. Master Corporal Penner was released by a custody review officer with conditions at 1050 hours on Tuesday, 6 August 2019. Master Corporal Penner had been in custody for 45 hours. Among the usual conditions, Master Corporal Penner's conditions included avoiding establishments that served alcohol and to report to the guard house at 1800 hours daily.
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> 12. At approximately 1745 hours on Sunday, 11 August 2019, a taxi containing Master Corporal Penner and a friend arrived at the guardhouse on base. Master Corporal Penner was extremely intoxicated by alcohol and was unconscious and unresponsive. They had been drinking at a pub in north Edmonton. The Military Police used a 'sternum rub' technique to awaken Master Corporal Penner. He was unable to be entrusted with any duty, including reporting as required by his conditions. He was arrested and retained in custody. He was released again with conditions at 0920 hours on Tuesday 13 August 2019. Master Corporal Penner had been in custody for 39 hours. On 18 September 2019, all conditions were removed by his unit."

Issue

[4] The Court shall now determine, with regards to the offender's situation and the circumstances of the case, whether the joint submission of a reduction in rank to private and a fine in the amount of $1,500 would cause an informed and reasonable public to lose confidence in the institution of the courts.

Position of the parties

Prosecution

[5] The prosecution contends that general deterrence and denunciation are the most important objectives for this sentence, and relying on the exhibits provided, he argues that there is an important need to send a strong message in the case of Master Corporal Penner, as the offender's actions attained a certain level of notoriety within the Battalion to which he was a member.

[6] In comparing the first charge to an offence pursuant to article 101 of the *NDA*, escape from custody, the prosecution contends that breaking out of barracks during a sentence imposed by a service tribunal is the most serious offence amongst the three charges Master Corporal Penner pled guilty to. The prosecution states that the offender's conduct constitutes a failure of discipline, an affront to the law, and a challenge to military authority.

[7] Aggravating the circumstances is the fact that the offender used deception when he broke out of barracks. He was also found at a fair distance from Canadian Forces Base Edmonton, in a highly intoxicated state, and was disorderly in a public space. The presence of military police, dispatched on site as a result of his erratic conduct, gave clear indications to those present in the restaurant that the offender was a member of the Canadian Armed Forces (CAF). Therefore, in those circumstances, his conduct, viewed by members of the public, brought discredit to Her Majesty's service.

[8] Additionally, the offender was unruly with the Royal Canadian Mountain Police (RCMP), bringing further harm to the reputation and image of the CAF. The behaviour forming the basis of the charges, combined with the content of his conduct sheet, show a pattern of disrespect to the notion of discipline.

[9] In support of his submissions, the prosecution relied heavily on the exhibits he produced, particularly Exhibit 11, where emphasis is made on the need for discipline. Highlighting the principles related to discipline, which are applicable to aggravating factors such as the offender's rank and experience, the prosecution refers to the Court Martial Appeal Court decision in *R. v. Tupper*, 2009 CMAC 5. He affirms that the offender's addiction fueled his actions and plagued his life, but recognizes that the offender attended an addiction treatment program. In mitigation, he recognized and considered the guilty plea, the offender's acknowledgement of his addiction, and his continued efforts to seek help.

Defence

[10] The defence contends that the joint submission aims at denunciating the offender's conduct by deterring others from committing similar offences. Nevertheless, he argues that strong mitigating circumstances are present in this case, such as the offender's loss of income as a result of his release from the CAF following the commission of the offences. He also contends that the offender's service at the unit was strained.

[11] From his perspective, Master Corporal Penner presents a low chance of reoffending. His guilty plea represents an economy of the resources that are normally required for a contested trial.

[12] The defence also contends that the offender was in custody twice for a total of six calendar days, which is an aspect that should mitigate his sentence. In fact, this time in custody was considered when deciding on the joint submission. Also mitigating is the presence of delays in bringing this case to trial.

[13] He further contends that the situation of Master Corporal Penner, in particular the diagnosis of alcohol addiction and of mental health issues, no longer calls for a punishment of incarceration. Considering the offender's military employment limitations (MELs) at the material time, he qualifies as troubling the fact that a punishment involving the deprivation of the offender's liberty was imposed on him by

the presiding officer at the summary trial. The offender was, at the time, in a vulnerable situation caused by his substance addiction and mental health diagnoses, therefore, imposing a punishment of confinement to barracks was ill-advised. In fact, defence counsel contends that this punishment contributed to the commission of the offences.

[14] Lastly, the defence counsel explained that the offender has regular counselling sessions, shows progress in his treatments and is committed to his recovery, therefore rehabilitation should be at the forefront of the determination of his punishment.

Evidence

[15] In considering the joint submission, in addition to the documents listed at article 111.17 of the QR&O that the prosecution is required to provide during the sentencing procedure, in accordance with article 112.51 of the QR&O, the Court has examined two agreed statement of facts, with a chain of emails from August and September 2020, between the prosecutor and Lieutenant-Colonel Beare from the CAF Alberta and Northern Canada Transition Unit.

The analysis

[16] The *NDA* provides for the principles that shall be applied when deciding on a fair and fit sentence to impose. In promoting the operational effectiveness of the CAF, and in contributing to respect for the law and the maintenance of a just, peaceful and safe society, a sentence must be proportionate to the gravity of the offences and the degree of responsibility of the offender.

[17] The sentence must also take into consideration the character of the offender, the principle that the punishment must be commensurate with the gravity of the offence, and the parity principle, which means that the sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. A court must also consider the principle that an offender should not be deprived of liberty if less restrictive punishments may be appropriate in the circumstances.

[18] Finally, the sentence should be increased or reduced as the case may be, to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender. However, courts must always act with restraint in determining a sentence by imposing such punishment that constitutes the minimum necessary intervention to maintain discipline.

[19] In the offender's case, counsel contends that the proposed sentence meets the public interest test, and asks the Court to accept it. I must examine their joint submission in the context of the relevant facts particularized in this case, including the existence of aggravating and mitigating circumstances, as well as the objective gravity of the offences to which the offender pled guilty.

The offences

[20] The offence of breaking out of barracks, contrary to section 87 of the *NDA*, is an offence against the authority of the chain of command, and may be constitute an offence against the administration of law and military justice. It calls for a maximum punishment for less than two years. I accept the prosecution's argument that, in this case, the commission of the offence showed disregard for the authority of the presiding officer as the sanctioning authority for disciplinary violations.

[20] An offender found guilty of a drunkenness charge when on duty, or who has been warned for duty at the material time, is also liable to imprisonment for less than two years or to less punishment. I agree with Pelletier M.J.'s categorisation of the offence of drunkenness in *R. v. Sloan*, 2014 CM 4004, at paragraph 14:

> The offence of drunkenness is not aimed at sanctioning the consumption of alcohol or a drug. It is meant to address fitness for duty or behavior that is disorderly or discredits Her Majesty's service. It reflects the fact that no member of the military is exempted from the obligation to show respect to anyone, let alone refrain from violence despite any level of intoxication.

Aggravating factors

[21] Having considered the objective gravity of the offence, the Court also considered the following aggravating circumstances:

(a) The confinement to barracks was imposed as a punishment following a summary trial, which implies that the offender's conduct exhibited a disregard for the authority of the military justice system and of his chain of command;

(b) During the commission of the offences, the offender used deception to trick his chain of command, making it more difficult to find him. This had the effect of requiring that the military authority had to deploy additional resources to locate him;

(c) The offender was on duty at the time that he committed the offences of drunkenness;

(d) His unruly conduct caused disturbances at a local restaurant, where RCMP were contacted and had to intervene;

(e) The high level of intoxication of the offender, which caused the restaurant staff to stop serving him alcohol, and which was most likely the source of his rowdy conduct that included piling up chairs as a barrier between himself and the RCMP sergeant. His behaviour led to additional RCMP members being summoned on scene;

(f) The rank of the offender. As a master corporal, the offender was given responsibility which placed him in a position of authority amongst junior ranks, where expectations regarding professionalism, dedication and exemplary conduct are higher; and

(g) The previous convictions contained in the conduct sheet for similar offences that took place before the commission of the offences leading to the charges for which the offender has now pled guilty, were taken into consideration. The convictions post-August 2019 were not considered. As stated by the Court Martial Appeal Court in the case of *R. v. Castillo*, 2003 CMAC 6, convictions that occurred after the commission of the offence before the Court should not be considered for sentencing purposes.

[22] I do not accept that the mere presence of the military police at the local restaurant would amount to proof beyond a reasonable doubt that the offender was a CAF member in the eyes of the public, thus discrediting the institution. On its own, it merely constitutes circumstantial evidence to this effect. The prosecution was required to prove this factor beyond a reasonable doubt but failed to do so. Therefore, the Court did not consider this aspect.

Mitigating factors

[23] The Court was mindful of the circumstances present in this case that mitigates the sentence, including the offender's guilty plea and his positive conduct while serving at the CAF Alberta and Northern Canada Transition Unit. The offender was described by Lieutenant-Colonel Beare as being respectful, hardworking and genuinely happy for the opportunity to help. Lieutenant-Colonel Beare views the offender's time within this unit as overwhelmingly positive. Finally, the time served in pre-trial custody, which I will further address later in my decision, constitutes mitigating circumstances.

The offender's situation

[24] As for the offender's situation, he enrolled in the reserve force on 15 April 2008 and subsequently transferred to the regular force on 5 December 2012. He has a number of previous convictions that are strong indicators of the existence of addiction issues. During his service, he deployed in support of Operation REASSURANCE and is a recipient of the Special Service Medal – North Atlantic Treaty Organization.

[25] The offender has a long history of alcohol dependence that caused administrative measures affecting his military career, in particular:

(a) Following his early return from Operation REASSURANCE in 2018, he was placed on counselling and probation for misuse of alcohol;

(b) On 16 July 2019, he was placed on counselling and probation a second time for an incident that included reporting to work while highly intoxicated;

(c) On 28 August 2019, the commanding officer of 1st Battalion Princess Patricia's Canadian Light Infantry (1 PPCLI) made a recommendation that he be released from the CAF under QR&O 15.01(2)(a), unsatisfactory conduct, as a result of the incidents that led to this court martial;

(d) The offender was eventually released from the CAF on 14 August 2020 under QR&O 15.01(5)(f), unsuitable for further service. He was also deemed medically disabled;

(e) Because the working environment and relationships were strained between the offender, his peers, and his chain of command for most of the year 2019, a posting out of the unit was arranged for the 2019 active posting season; however, the imposition of the measure of counselling and probation in July 2019 required that the posting be cancelled;

(f) On 24 September 2019, the offender was required to report to the Transition Centre until the outbreak of the COVID-19 pandemic;

(g) He moved to Manitoba in March 2020 and in early June 2020, Master Corporal Penner contacted 1 PPCLI in distress. Arrangements were made to return him to Edmonton, where he was once more under the direct supervision of 1 PPCLI;

(h) He attended residential treatment programs for alcohol addiction in early 2018, and a second time in early 2019. Around the time of the commission of the offences, it was assessed that a third residential treatment program would not be supported by the medical system;

(i) The offender was diagnosed with major depressive disorder, post-traumatic stress disorder and alcohol dependency by the Canadian Forces Health Services prior to the commission of the offences. He was imposed MELs in early 2019. They included the requirement for regular specialist follow-ups, regular access to direct medical services, a prohibition on driving Department of National Defence vehicles, and a prohibition on handling personal weapons. The MELs further specified that the offender had a chronic medical condition that was at high risk of being exacerbated if he was required to perform duties that included frequent movement, relocation, isolation and temporary duty away from his home unit. The offender attended regular follow-up with health care services and has demonstrated progress in his treatments; and

(j) He is currently focused on his physical and psychological recovery, including maintaining his sobriety. Since 16 November 2020, he has been enrolled in the LIFT online program, which provides recovery education for addictions and complex trauma.

Parity

[26] In the context of the parity principle for an offence of escaping from custody, the Court has considered the range of punishments provided in the following similar cases: *R. v. Private R.J. Tupper,* 2007 CM 1028, where the accused was found guilty of six offences, which included breaking out of barracks, and was sentenced to dismissal with a detention of ninety days; *R v Estridge,* 2013 CM 3003, where a dismissal from Her Majesty's service was imposed following a guilty plea on offences committed in similar circumstances; and *R. v. Corporal Dove,* 2006 CM 44, where a punishment of a fine in the amount of two hundred dollars was imposed following a guilty plea for an offence of breaking out of barracks. In *R. v. Rideout*, 2010 CM 3006, the member pled guilty to several charges, one of which was for resisting arrest when he struggled with two escorts who were assigned to bring him into custody. The member was young, and a first offender at the time of the offences, but in his short time in the CAF he had already experienced disciplinary issues. He was sentenced to dismissal.

Credit for time served in pre-trial custody

[27] Although this issue is now moot, there is one last aspect of this case that the Court needs to address. Initially counsel recommended the punishments of a reduction in rank to private, a fine in the amount of $1,500, and that the Court impose a punishment of detention of six days, with an order that the six days spent in pre-trial custody be credited for time served. This order would have the practical effect of nullifying the proposed punishment of detention. In other words, the offender would not be required to spend time in custody for the six-day period as a result of the order crediting his time in pre-trial custody.

[28] During the prosecution's submissions, referring to subsection 719(3) of the *Criminal Code,* the Court asked counsel whether courts martial have statutory authority to impose an order crediting the time served with the accompanying punishment of incarceration. Prosecution responded affirmatively, contending that section 179 of the *NDA* provides the same broad powers as are vested in a superior court of criminal jurisdiction, which include the authority to impose a crediting order for time served in pre-trial custody.

[29] In this regard, the Court considered *R. v. Wust*, 2000 SCC 18, which provides clarity on the application of the *Criminal Code* provision granting the power for trial judges of criminal jurisdictions to take into account time spent in custody when the effect of reducing the sentence would bring the sentence below the mandatory minimum sentence. Being informed of the applicable leading case, the Court is of the view that it has discretion to take into account pre-trial custody in reducing the sentence; however, I

do not believe that the powers provided to courts martial pursuant to section 179 of the *NDA* include the authority to issue a specific order crediting the time served. As courts martial are statutory courts, such authority would require this to be statutorily provided in the *NDA*, which it is not.

[30] This approach is confirmed in other court martial cases where trial judges have accepted to reduce the sentence in recognizing the time served in pre-trial custody, without imposing an order crediting time. In particular, in *R. v. ex-Chief Petty Officer 2nd Class G.A. Tobin*, 2005 CM 1, Carter C.M.J., when presented with a similar request, wrote at paragraph 17 that:

> [T]here is no sentence of time served, per se. There is consideration, and it is not binding, that pre-trial custody can, and often is offset against any sentence of imprisonment that may be imposed. And this is often done at the rate of two days post-trial custody credit for every day of pre-trial. That is not always the case, and it will depend on the circumstances.

[31] In the *Tobin* case, the presiding judge was not inclined to accept the joint submission, as she expressed concerns with the nature of the proposed punishment and the absence of authority, particularly when imposing the order crediting the pre-trial custody had the effect of nullifying the punishment, as in the case at bar. The Court then asked counsel to provide additional submissions regarding sentence. Chief Petty Officer 2nd Class Tobin was sentenced to a severe reprimand and a fine in the amount of $3,000. See also cases where the time in pre-trial custody was considered in order to reduce the punishment: *R. v. Corporal S.W. Arnsten*, 2004 CM 20; *R. v. Private B.L.R. Billingsley*, 2009 CM 2016; *R. v. Thiele*, 2016 CM 4016; *R. v. McKenna*, 2013 CM 490; *R. v. Mason*, 2003 CM 480; and *R. v. ex-Private J.M. Vautier*, 2005 CM 3.

[32] Similarly, in *R. v. O'Toole*, 2012 CMAC 5, where the applicant was seeking an order pursuant to section 159.9 of the *NDA* for his release from custody, the Court Martial Appeal Court established that pre-trial detention conditions may be considered by the military judge on sentencing. The Court also stated that in cases where the conditions of detention are particularly onerous, a reviewing court may consider enhanced credit for the time spent in pre-trial custody. See also the court martial decision subsequently rendered in this matter, *R. v. O'Toole, 2012* CM 1018, where the presiding judge confirmed that the weight to be given to time spent in pretrial custody is left to the discretion of the sentencing judge; and *R. v. O'Toole*, 2012 CM 1010.

[33] More recently, in *R. v. Conway*, 2017 CM 4006, Pelletier M.J. accepted a joint submission that included incarceration for a period of one day to be suspended, taking into consideration thirty-nine days spent in pre-trial custody. His rationale was that the proposed sentence was within the range he considered reasonable, and the test for suspending the sentence was met, since there was evidence that further custody would risk the deterioration of Sergeant Conway's mental health.

[34] Consequently, except for one isolated decision rendered in 2013, *R v Grenier*, 2013 CM 4014, and relied upon by the prosecution, where the presiding judge exercised

the authority of the *Criminal Code* provisions to justify the imposition of such order in the context of an offender experiencing harsh conditions, such as solitary confinement, as part of his pre-trial custody, the Court is not aware of a court martial that imposed a punishment of detention, then issued a separate order to credit the time served. Rather, courts martial have exercised their discretion in reducing the punishment as a result of pre-trial custody. At a minimum, time served before sentence can be considered as a form of mitigating circumstances in most cases.

[35] I accept in the case at bar the fact that the offender was detained in pre-trial custody for a total period of six calendar days is a mitigating factor, even as his punishment of confinement to barracks was continuing during this period. But for this mitigating factor, the joint submission would have been deemed too lenient to be accepted without further queries from the Court, as required by the principles established by the Supreme Court of Canada.

[36] The Court does not accept the prosecution's view that general and specific deterrence, as well as denunciation, are the most important objectives in this case. It is apparent that the prosecution gave little weight to the need for the offender's rehabilitation, despite the offender's addiction and positive steps toward his recovery.

Conclusion

[37] The Court is cognisant of the difficulties, challenges and frustrations that the offender's conduct had on his peers and his chain of command. The expected focus on operational requirements somewhat shifted to address the offender's situation. The Court cannot, however, ignore the cause of the offender's conduct, as he clearly suffers from both addiction and mental health issues. Although his condition does not excuse his conduct, it nevertheless provides factual basis to support sentencing objectives deemed important such as rehabilitation, as illustrated in *R v Crosman*, 2013 CM 1010.

[38] The offender has taken important and serious steps to address his addiction, which took great courage. He is pursuing efforts to improve. The Court also noted from the evidence that Lieutenant-Colonel Beare believes the offender was genuinely remorseful; I believe it, too. The Court also recognize the guilty plea as significant. Hopefully the offender will pursue his efforts toward rehabilitation and, in doing so, will become an asset to Canadian society. Consequently, the Court concludes that rehabilitation is in fact an important aspect of this offender's punishment, and that this objective can be achieved with the joint submission.

FOR THESE REASONS, THE COURT:

[39] **FINDS** the offender guilty of one charge of breaking out of barracks and two charges of drunkenness; and

[40] **SENTENCES** the offender to a reduction in rank to private, combined with a fine in the amount of $1,500, payable forthwith.

Counsel:

The Director of Military Prosecutions as represented by Major G.J. Moorehead and Captain P.J.R. Watkinson

Major A. Gélinas-Proulx, Defence Counsel Services, Counsel for Master Corporal R. Penner