COURT MARTIAL

Citation: *R. v. Anderson*, 2021 CM 4009

Date: 20211004
Docket: 202109

Standing Court Martial

Canadian Forces Base Cold Lake
Cold Lake, Alberta, Canada

Between:

Her Majesty the Queen

- and -

Master Corporal J. A. Anderson, Offender

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

REASONS FOR SENTENCE

(Orally)

Introduction

[1] This Standing Court Martial found Master Corporal Anderson guilty of two charges of stealing contrary to section 114 of the *National Defence Act* (*NDA*). I found that he had stolen lumber and a "DeWalt" headache rack, property of Her Majesty in right of Canada, which had been stored on a remote bombing range where Master Corporal Anderson performed his duties. I found Master Corporal Anderson not guilty of another charge for stealing gasoline. It is now my duty to impose an appropriate and fair sentence, on the basis of the evidence, precedents and arguments submitted by the parties who disagree as to the sentence to be imposed.

Position of the parties

Prosecution

[2] The prosecution submits that Master Corporal Anderson should be sentenced to a reduction in rank to the rank of private, combined with a fine of $500 as it is the

punishment most likely to contribute to the maintenance of discipline, efficiency and morale in the Canadian Armed Forces (CAF) in the circumstances of this case and of this offender.

Defence

[3] The defence submits that Master Corporal Anderson should benefit from an absolute discharge as it is, in the view of defence counsel, the outcome that is in the offender's best interest in his unique circumstances, as he has been released medically from the CAF just days ago and needs to find gainful employment despite being severely challenged by an operational stress injury.

Evidence

[4] The facts revealing the circumstances of the offence were heard in the course of the trial. In addition, the prosecution produced at the sentencing hearing the documents mandated at *Queen's Regulations and Orders for the Canadian Forces* (QR&O) paragraph 112.51(2). A joint statement of facts was read on the record and produced as exhibit. The prosecution called two witnesses: Lieutenant-Colonel Pilon, the commanding officer of the accused's unit at the time of the offences, and recalled Corporal Lugtu, a subordinate of Master Corporal Anderson who was present when the lumber was stolen.

[5] For its part, the defence called two witnesses: Master Warrant Officer Berg and Corporal Rose, as well as Master Corporal Anderson himself.

Facts

The circumstances of the offence

[6] The evidence heard at trial reveals the following facts which I accept as best reflecting the circumstances of the offences for the purpose of sentencing:

(a) in 2019, Master Corporal Anderson was assigned to lead a small section of the 1 Air Maintenance Squadron (1 AMS) composed of himself and two other permanent members, Corporal Lugtu and Aviator Eckhardt. The job of that section was essentially to maintain and support the operations of a part of the Cold Lake Air Weapons Range called Jimmy Lake Range or, as witnesses described it, JLR. That facility is essentially a bombing range where fighter jets fly to and drop ordnances and/or exercise firing their guns;

(b) for obvious reasons, JLR is not an area open to the public. In order to get there, the personnel from the section drive from their homes to Canadian Forces Base (CFB) Cold Lake in the morning, park their personal vehicle in a controlled area near the airfield and embark in one or both

Department of National Defence (DND) pickup trucks assigned to their section, parked nearby, to the eighty kilometre or so drive North to JLR. This involves using public roads up to an area named Primrose Lake Range and, after checking in with a guard at a gate, driving on a DND road a further twenty kilometre or so to JLR. At the end of a typical workday, personnel from the section would take the DND vehicles back down to CFB Cold Lake, through Primrose Lake, all the way back to the parking lot in the controlled area, arriving at approximately 1500 hours on a routine day. From there, members of the section would embark in their own vehicles parked nearby and proceed home;

(c) the JLR consists of a main administration building with a control/observation tower, a big barn-like shelter building described as the mobile support equipment (MSE) building and several shacks, sheds and sea containers used to store various items. These include a blue sea container containing lumber used to build targets, fences or whatever else might be needed for the operation or maintenance of the range. The MSE building is the responsibility of MSE operators belonging to another unit who work there from time to time as it contains mainly the vehicle and equipment they operate. However, the keys for the MSE building are accessible to the section staff under the responsibility of Master Corporal Anderson through a key press in the administrative building at JLR;

(d) the members of Master Corporal Anderson's section perform various tasks during the day such as vegetation control, wildlife control, road maintenance and support to operations. They have at their disposal at JLR vehicles such as all-terrain vehicles (ATVs) and snowmobiles to move around, as well as a wide range of tools, including power tools;

(e) as it pertains to charge two, I accepted the evidence of Corporal Lugtu to the effect that, in the fall of 2019, members of the section engaged in minor carpentry work to make shelves to store their equipment in the garage space located next to the administrative building at JLR. In doing so, they used the wood or lumber products stored in the blue sea container, including plywood, two-by-fours and four-by-fours. Corporal Lugtu testified that, as he and Aviator Eckhardt were making shelves, Master Corporal Anderson was for his part using the same wood or lumber products to make a bed frame, which he assembled in place and then disassembled to load it in the back of the DND pickup truck which was driven back to CFB Cold Lake that afternoon. He said he knew it was a bed frame from his observations and as a result of a discussion with Master Corporal Anderson at the time the bed frame was being made. The last time he saw the bed frame was at the parking lot in the controlled area at CFB Cold Lake. There are no beds at JLR;

(f) as it pertains to charge three, two former military members of the MSE staff, Mr Fudge and Lanteigne testified that they visited JLR regularly in 2019, spending most of their workday in the MSE building next to the administration building. A DeWalt headache rack had been lying on the floor of that building for quite some time, likely years. It is believed that the used rack had been, at one point, installed in the back of a DND pickup, but the item could not be formally traced as an accountable item on a supply customer account. Sometime in the spring of 2019, the rack was no longer on the floor of the MSE building. At a gathering of work colleagues in the spring or summer of 2019, Mr Fudge and Lanteigne noticed what very much looked like the DeWalt rack formally on the floor of the MSE Building installed in the back of Master Corporal Anderson's pickup truck, as evidenced by the "DeWalt" sign on it, a rare feature. They estimated that it had to be the same rack but did not confront Master Corporal Anderson about it as they were not absolutely certain;

(g) Ms Wills, Master Corporal Anderson's former spouse, testified that Master Corporal Anderson came home one day with a rack installed in the back of their pickup truck. He told her that he had brought the rack from work, that there was no listing for it and that it was "fair game" as it was next to a dumpster. After their separation in October 2019, Master Corporal Anderson brought the rack that had been installed in the back of his pickup truck to her apartment for safekeeping as he said he was under investigation. Ms Wills had reluctantly accepted to keep the rack after a few conversations, to protect the father of her children, as she stated in her testimony. She kept the rack for a number of months in a closet and at one point turned it over to the military police. When invited by military police to identify the rack obtained from Ms Wills' apartment as the one that had been on the floor of the MSE building at JLR, Sergeant (Retired) Lanteigne had no hesitation to do so. He did the same when that same rack was brought to the courtroom during the trial, especially on the basis that he recalled that the rack on the MSE building floor was missing a yellow tab at one end of its bottom arm, a particularity also found on the rack brought to the courtroom;

(h) the complaints which generated an investigation of the conduct of Master Corporal Anderson were related to gasoline which was perceived to have been missing. I found that perceptions were insufficient to justify finding him guilty of stealing. It is in the course of that gasoline investigation that the events related to stealing lumber were related by the same complainants. The headache rack investigation was the result of Ms Wills turning over the item which had not been declared as missing to the military police. The offences for which Master Corporal Anderson is being sentenced had no impact on the operations of his section or his unit; and

(i) the value of the items stolen is difficult to assess with certainty given the conversion of the lumber into a bed frame which does not allow a precise evaluation of the number and the value of the wood products used. Furthermore, the lumber used had been in storage for some time and it is therefore impossible to know exactly when the specific products were acquired hence their exact purchase value. I would estimate the value of the wood used to be about $130. As for the used headache rack, which had been in storage for years, its estimated value if purchased new in 2021 is between $324 and $480. Having seen the rack in the courtroom, it is far from looking new. For sentencing purposes I would evaluate the value of the property stolen to be a maximum of $300.

The circumstances of the offender

[7] Master Corporal Anderson is a thirty-six-year-old Air Weapons Systems Technician. He first enrolled in the army reserve in Nova Scotia in July 2003, serving with the Nova Scotia Highlanders until the spring of 2005. He re-enrolled in the army reserves two years later with the Royal Newfoundland Regiment until joining the regular force as an Air Weapons Systems Technician in February 2008. Following technical training in Borden, Ontario, he has been serving in Cold Lake since 2010.

[8] Master Corporal Anderson suffers from post-traumatic stress disorder (PTSD) since responding with his team to a CF-18 crash in 2016. He was exposed to the remains of the pilot, with whom he had been friends. Despite the best efforts of mental health specialists consulted over the years, the condition of Master Corporal Anderson remains unstable. Thankfully, he now benefits from help from a service dog, which is able to assist managing anxiety, as I have witnessed during his testimony in sentencing.

[9] Master Corporal Anderson was released medically from the CAF during the trial, on 1 October 2021. He has been separated from his wife since October 2019 and their divorce proceedings are ongoing. He has fifty percent shared custody of his three children aged seven, nine and thirteen. He now lives with his girlfriend and they have plans to expand their family. Master Corporal Anderson will be seeking employment in the coming weeks and would love to work with Parks Canada maintaining trails in Jasper National Park.

Analysis

The purpose and objectives of sentencing

[10] The purpose, objectives and principles applicable to sentencing by service tribunals are found at sections 203.1 to 203.4 of the *NDA*, reproduced at QR&O article 104.14. As provided at section 203.1 of the *NDA*:

203.1(1) The fundamental purposes of sentencing are

> **(a)** to promote the operational effectiveness of the Canadian Forces by contributing to the maintenance of discipline, efficiency and morale; and
>
> **(b)** to contribute to respect for the law and the maintenance of a just, peaceful and safe society.
>
> **(2)** The fundamental purposes shall be achieved by imposing just sanctions that have one or more of the following objectives:
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> **(a)** to promote a habit of obedience to lawful commands and orders;
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> **(b)** to maintain public trust in the Canadian Forces as a disciplined armed force;
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> **(c)** to denounce unlawful conduct;
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> **(d)** to deter offenders and other persons from committing offences;
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> **(e)** to assist in rehabilitating offenders;
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> **(f)** to assist in reintegrating offenders into military service;
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> **(g)** to separate offenders, if necessary, from other officers or non-commissioned members or from society generally;
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> **(h)** to provide reparations for harm done to victims or to the community; and
>
> **(i)** to promote a sense of responsibility in offenders, and an acknowledgment of the harm done to victims and to the community.

[11] As can be seen, the fundamental purposes of sentencing are twofold, recognizing the dual nature of the Code of Service Discipline which, as suggested by the Supreme Court of Canada, not only serves to regulate conduct that undermines discipline and integrity in the CAF, but also serves a public function by punishing specific conduct which threatens public order and welfare (*R. v. Généreux*, [1992] 1 S.C.R. 259 at page 281).

[12] Also, the objectives that a just sanction must try to achieve are mainly associated with the CAF, but also include considerations reaching outside the bounds of the military, for instance, the maintenance of public trust and acknowledgement of the harm done to victims who may belong to the larger civilian community.

Objectives to be applied in this case

[13] I agree with counsel that the circumstances of this case require that the focus be primarily placed on the objectives of denunciation and deterrence, both general and specific, in sentencing the offender.

[14] Indeed, as the offences in this case involve a breach of trust in the course of employment, deterrence and denunciation have to be the paramount sentencing

objectives to be met. Although he was discussing specifically a fraud case, I believe the views expressed by Létourneau J.A. at paragraph 22 of the Court Martial Appeal Court (CMAC) decision in *R. v. St-Jean*, (2000) CMAC-429 are applicable in a case involving stealing from Her Majesty as this one:

> 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.

[15] That being said, the objective of rehabilitation is also especially important in this case. The offender finds himself at a critical juncture in his life, being forced out of the military by an injury suffered as a result of duty and having to find gainful employment at a still relatively young age while having to overcome a severe health condition. I have to apply the outmost care to avoid imposing a sentence which would have the effect of creating an excessive additional barrier to an offender who appears willing to invest the efforts to achieve happiness while starting a new family and making a positive contribution to society following the imposition of the sentence.

[16] Having established the objectives to be pursued, it is important to discuss the principles to be considered in arriving at a just and appropriate sentence.

Main principle of sentencing: proportionality

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

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

[18] The principle of proportionality thus obliges a judge imposing sentence to balance the gravity of the offence with the degree of responsibility of the offender. Respect for the principle of proportionality requires that the determination of a sentence by a judge, including a military judge, be a highly individualized process.

Other principles

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

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

A number of aggravating circumstances are listed in this section, including that "the offender, in committing the offence, abused their rank or other position of trust or authority", which in my opinion applies in the circumstances here given that the offender had the means to access, convert and transport the items stolen by virtue of the responsibilities entrusted to him as senior member at JLR.

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

That is known as the principle of parity.

> **(c)** an offender should not be deprived of liberty by imprisonment or detention if less restrictive punishments may be appropriate in the circumstances;
>
> **(c.1)** all available punishments, other than imprisonment and detention, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders;
>
> **(d)** a sentence should be the least severe sentence required to maintain discipline, efficiency and morale of the Canadian Forces; and

Those paragraphs embody the principle of restraint, especially for Aboriginal offenders; and, finally,

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

[20] I will now go over these factors in light of the circumstances of this case.

Aggravating and mitigating factors

[21] As provided in the enumeration of principles of sentencing, a sentence should be increased or reduced to account for any relevant aggravating or mitigating

circumstances relating either to the offence or the offender. That being said, one aggravating or mitigating factor, in isolation, cannot operate to increase or decrease the sentence to a level that would take it outside of the range of what would be an adequate sentence. In taking these factors into consideration, the Court must keep in mind the objective gravity of the offences. The offender was found guilty of two charges of stealing, which attract under section 114 of the *NDA* a maximum punishment of imprisonment for seven years. It is an objectively serious offence.

[22] The circumstances of the offence and the offender in this case reveal in my view three aggravating factors as follows:

(a) **the breach of trust involved.** This aggravating factor will be present anytime someone steals from an employer, as recognized in *R. v. Darrigan,* 2020 CMAC 1, the most recent CMAC case dealing with stealing, at paragraph 49. This factor is present here even more acutely given the rank and specific functions entrusted to Master Corporal Anderson as senior member at a remote location such as JLR, where he benefitted from access to material resources necessary to ensure that the work gets done on location, thereby ensuring mission success;

(b) **the breach of leadership involved, most notably illustrated by the poor example set to subordinates present for the lumber theft.** As explained by Lieutenant-Colonel Pilon, good leadership by supervisors of small teams holding the rank of Master Corporal is very important at remote locations where the junior personnel's interaction with the unit leadership is in large part limited to what they learn and observe from their immediate supervisors. As senior technicians, they are entrusted to develop less experienced members, showing what "right" looks like, something that Master Corporal Anderson has failed to do in relation to the theft of lumber; and

(c) **the post-offence conduct of Master Corporal Anderson in asking his ex-spouse to hide the headache rack in her home.** This strategy shows an ill-intentioned scheme of conduct, which required efforts to remove the rack from his truck and find a home for it away from him in an attempt to cover up the theft of the headache rack at Charge 3. It could well have been successful if the circumstances had been different and Ms Wills would not have entered into interaction with the military police.

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

(a) the fact that Master Corporal Anderson does not have a conduct sheet nor a criminal record and is therefore presumed to be a first-time offender;

(b) the satisfactory conduct of Master Corporal Anderson since the offence, with the exception of his attempt at hiding the rack, including his dedication in volunteering to assist in first aid training and during range exercises, as testified by Master Warrant Officer Berg;

(c) the mental health condition of Master Corporal Anderson since 2016, suffered in the line of duty and for which he has sought and obtained help. Although there is no evidence that it contributed to or directly caused the offences, it was a cause of his separation in October 2019 which, with three children aged eleven, seven and five at the time, would have caused significant stress around the time of the offence, especially in relation to the lumber theft. It is also a factor relevant to his unique circumstances in that he finds himself today having to transition to civilian life while having to overcome a significant mental injury;

(d) the otherwise good character displayed by and contribution made by Master Corporal Anderson to the CAF over the years as evidenced by witnesses called by the defence in mitigation, which show that Master Corporal Anderson has the potential to make a positive contribution to Canadian society in the future; and

(e) the administrative action taken by military authorities following the complaints, to remove Master Corporal Anderson from his position and employ him in a non-supervisory capacity prior to this trial. These actions certainly had an impact on Master Corporal Anderson and were seen by others in his unit, thereby having a deterrent effect even before this Court had to address that objective of sentencing.

[24] I wish to state that in limiting the list of aggravating and mitigating factors as I have done, I am not ignoring other factors suggested to me by counsel, but I am simply considering these to be neutral. As mentioned in the hearing, the fact that these were not crimes of impulse is an absence of a mitigating factor, not aggravating. The fact that the offences required some planning, albeit minimal, is simply a circumstance of the offences, just like the small value of the property stolen, which I recognize is low. However, even if stealing large sums over a long period of time can be aggravating and stealing a trivial object such as a pen once may be mitigating, the items stolen in this case are in neither category and in my view this factor is neutral, especially given the other circumstances at play. I also recognize that Master Corporal Anderson must pay child support, but absent any further information on his precise financial situation following his release, notably from sources such as pension relating to his mental injury suffered on duty and as to superannuation payments which may be due to him, I am not in a position to find that Master Corporal Anderson is in a dire financial situation. I do acknowledge, as mentioned earlier, that he is at a critical juncture of transitioning to civilian life. This can be taken into account in arriving at a proper sentence without being labeled as a mitigating factor.

Parity and sentencing range

[25] The next principle to be taken into account is the principle of parity. The parties have brought a number of cases to my attention in attempting to demonstrate an appropriate range of sentences imposed in the past for similar offences, and to show that their respective submissions would fit within that range.

[26] The prosecution offered two precedents showing that the punishment of reduction in rank is within the range of previously imposed offences of stealing. In the case of *R v Labadie*, 2012 CM 1021, the reduction imposed upon Sergeant Labadie to the rank of corporal was the result of a joint submission after a guilty plea on two charges of stealing while entrusted and attempted theft, involving $1,397.34 of fuel drawn in twenty-two transactions over approximately two months. The case of *R. v. Sorbie*, 2015 CM 3010 involved a guilty plea on two charges of stealing while entrusted of canteen funds, for an amount of around $1,000, even if $11,000 in total was missing. Master Corporal Sorbie had a substance addiction and was no longer serving at the time he was sentenced. The prosecution was requesting a sentence of imprisonment and the defence a fine. The military judge imposed a reduction in rank to the rank of private, a severe reprimand, and a fine in the amount of $1,000.

[27] Although, strictly speaking, these two cases show that a reduction in rank has been imposed in the past for offences under section114 of the *NDA*, they are cases of stealing while entrusted, which carries a maximum punishment of fourteen years imprisonment, double the objective gravity than the seven years for simple stealing as we have here. These cases show a more troubling behaviour than what Master Corporal Anderson has been found guilty of. The demonstration has not been made that reduction in rank has been imposed in the past in a case bearing resemblance with the specific circumstances of this case.

[28] For its part, the defence has not presented any precedent where an absolute discharge had been imposed as a punishment by a court martial for a charge of stealing. The only precedent shown from the military side is the case of *R. v. D'Amico*, 2020 CM 2004 which involved a military policeman at the rank of private who had been found guilty under section 129 of the *NDA* for falling asleep in a DND vehicle while he was responsible for controlling the entry into a rifle range.

[29] Defence counsel, after acknowledging that her suggestion for an absolute discharge was outside the range, backed up from that suggestion when discussing three civilian cases where discharges were imposed. I do accept these precedents as being useful given that an absolute discharge is a relatively new possibility for courts martial. The cases of *R. v. Atleo,* 2014 BCPC 0015, *R. v. Thakur,* 2020 ONSC 8198 and *R. v. Smith*, 2021 ONCJ 234 are about police officers committing forgery (or ex-police officer participating in a theft, in the case of Mr Thakur) in minor circumstances where the impact of a conviction would be significant for their future as police officers. Defence would ask for absolute discharge and the Crown would argue for conditional sentence, including probation or conditional discharge in the case of *Thakur*. Although

the respective judges did impose discharges in the end, the circumstances of these cases were quite different than the case of Master Corporal Anderson based on the lesser severity of his offences and the more significant impact of a conviction on those offenders' employment.

[30] In relation to the principle of parity, I find that the vast majority of sentences for stealing involved a reprimand or severe reprimand, combined with a fine. I do acknowledge, however, that the sentences proposed by the parties have been imposed before in cases which bear enough similarity to be considered within the range, although at the extreme upper and lower edges of it.

[31] In any event, even if the sentences proposed were outside the range, it would not constitute an absolute limit on my discretion as sentencing judge given that, as explained earlier, proportionality is the cardinal principle that must guide judges in imposing a fit sentence. There will always be situations that call for a sentence outside a particular range: although ensuring parity in sentencing is in itself a desirable objective, the fact that each crime is committed in unique circumstances by an offender with a unique profile cannot be disregarded. The specific circumstances of Master Corporal Anderson are what defence counsel has relied on in submissions to convince me to grant an absolute discharge, emphasizing the principle of restraint, in light of the mitigating factors identified.

The principle of restraint

[32] The principle of restraint obliges me to sentence the offender with the least severe sentence required to maintain discipline, efficiency and morale, and, in this case, I must consider all available punishments, paying particular attention to the circumstances of Master Corporal Anderson.

[33] I have no hesitation to conclude that the principle of restraint can be applied in the circumstances of this case to exclude the possibility of imposing the punishment of reduction in rank. Even if that punishment would have minimal practical impact on Master Corporal Anderson, who is now a civilian, it remains that it, in my view, constitutes a significant scar on one's career record and satisfaction about the accomplishment one has made in the course of their military career. If I were to reduce him in rank, Master Corporal Anderson would have difficulties appreciating the accomplishments he made in the CAF to be promoted to corporal and then appointed to master corporal, when in reality he would be known as a retired private or aviator. I believe that for an offender in the position of Master Corporal Anderson, trying to find employment as a former military member while attempting to cope with a significant mental injury, such an official designation would be counterproductive and not justified by the gravity of the offences he has committed.

Choosing a fit sentence

[34] In choosing a fit sentence, I believe it is appropriate to consider first whether the suggestion of the defence to grant the offender an absolute discharge would be sufficient to maintain discipline. I must ask myself whether the objectives of denunciation and deterrence, both general and specific, that I have identified as important in this case can still be met if I was to give priority to the objective of rehabilitation as requested by the defence. In arriving at that conclusion, I must consider the circumstances of the offence and of Master Corporal Anderson, including the aggravating and mitigating factors identified previously.

[35] In doing so, I have considered the criteria for granting an absolute discharge from the case of *D'Amico*, where my colleague Sukstorf M.J. reviews the legislation governing the absolute discharge at section 230.8 of the *NDA* and its close relationship with section 730 of the *Criminal Code* at paragraphs 32 to 35 of her decision. In conformity with *D'Amico*, I agree that the test set out by the British Columbia Court of Appeal in *R. v. Fallofield* (1973), 13 C.C.C. (2d) 450 should be used to guide military judges considering whether the imposition of an absolute discharge is appropriate. The test sets out a number of factors that should be considered and is quoted at paragraph 38 of *D'Amico*.

[36] Essentially, after having considered whether a discharge is available for the offence or offences to which an offender was found guilty, which is the case here, a military judge must consider if two conditions precedent are found. The first is that the Court must consider that it is in the best interests of the accused that he should be discharged absolutely. If it is not in the best interests of the accused, that is the end of the matter. If it is decided that it is in the best interests of the accused, then that brings the next consideration into operation, namely whether the Court considers that a grant of an absolute discharge is not contrary to the public interest.

[37] Both counsel submit that the first condition precedent is present here and I agree. Indeed, an absolute discharge would mean that Master Corporal Anderson would not have a record and it would certainly assist him in finding civilian employment at this stage of his life.

[38] It is in relation to the second condition precedent that opinions diverge. The prosecution is of the view that the grant of an absolute discharge would be contrary to the public interest and refer me to the case of *R. v. MacFarlane*, 1976 AltaSCAD 6 at paragraphs 15 to 20, providing a list of relevant factors which must be considered by trial judges in the exercise of their discretion to grant an absolute or conditional discharge. They are as follows:

> [15] Firstly, there is the nature of the offence. While it is to be borne in mind that the Section may be used in respect of any offence other than one for which a minimum punishment is prescribed by law or the offence is punishable by imprisonment for 14 years or for life, or by death, one must nevertheless be concerned with the seriousness of the offence, and it would seem appropriate that the more serious the offence, the less frequent would be the use of a Discharge in sentencing. It would, for instance, be a most exceptional case where a crime involving violence would be dealt with by an order of Discharge.

> [16] Secondly, one has to consider the prevalence of the particular offence as it may exist in the community from time to time.
>
> [17] Thirdly, one must consider whether an Accused stood to make some personal gain at the expense of others, as distinct from some activity which might be in the nature of a prank or in respect of which his motives were other than self-interest.
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> [18] Fourthly, where the offence is relating to property, as here, the value of the property destroyed or stolen must be relevant. The theft of a ball-point pen would not ordinarily be regarded as seriously as the theft of a colour television set.
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> [19] Fifthly, we think that it is relevant to consider whether the crime was committed as a matter of impulse, and in the face of unexpected opportunity, or whether it was calculated.
>
> [20] Sixthly, we think it relevant to consider whether the circumstance that an Accused has committed the offence is something which should be a matter of record so that members of the public may have the opportunity of being aware of the fact that that Accused had committed the offence in question. Theft from an employer would, in most cases, involving as it does a breach of trust, not warrant a Discharge, as it may be thought that prospective employers should have the means of knowing something about the character of the prospective employee. Even here there may be exceptional circumstances, such as a falling-out, or a civil dispute about money which did not amount to colour of right, but which might result in the offence being in the nature of a technical one.

[39] Applying these factors to the circumstances of this case, I do consider that stealing from an employer is a serious offence, as identified in the aggravating factors listed previously. I believe the CMAC has recognized this in cases such as *Darrigan* and *St-Jean*, especially in the passage at paragraph 22 cited previously, which highlights the importance of the objectives of deterrence and denunciation in such cases. As for the second factor, I have no evidence which would allow me to conclude that stealing is prevalent in Cold Lake or anywhere else in the CAF. As for the third factor, Master Corporal Anderson stood to gain from the offences in this case. The example of the application of the fourth factor has not aged well but essentially here the value of the items stolen is not significant, but it is not trivial either. As for calculation, the offences here were not impulsive as previously explained. With regard to the final factor, I note the mention to the effect that theft from an employer as we have here would, in most cases, not warrant a discharge as it involves a breach of trust.

[40] Having considered these factors and the objectives that the sentence I impose must meet, I have to conclude that despite Master Corporal Anderson's current situation, for which I have the utmost sympathy, I simply cannot grant an absolute discharge. Doing so would in my view overemphasize a desire to see the offender leave court without a record without sufficient consideration for my duty to impose the minimum sentence required to maintain discipline.

[41] The behaviour of Master Corporal Anderson is serious. I believe members of the CAF would have difficulty understanding how an offender who has been found guilty of two charges of stealing in the circumstances of this case could benefit from the most

lenient outcome possible, even in his personal circumstances. The members of the military and civilian community in the CAF and DND must know that stealing from the Crown is a serious matter that is condemned and carries consequences. An absolute discharge is simply not an outcome that is consistent with these expectations, despite the mitigating factors at play in this case. I find that it is therefore inappropriate in the circumstances of this case.

[42] In my efforts to find the appropriate sentence, I must move beyond an absolute discharge in the scale of punishments available at section 139 of the *NDA* and ask myself whether the punishment would be adequate as a minimum punishment to maintain discipline. By virtue of their nature, minor punishments are not adequate for an offender who is no longer a member of the CAF. The next punishment up is a fine. This is an eminently adequate punishment for cases of theft as it has been imposed on numerous occasions in the past.

[43] I have to ask myself if a fine alone would be sufficient to meet the objectives of sentencing at play in the circumstances of this case. I do not believe so, especially if the amount of the fine must be kept as low as the number suggested by the prosecution and adopted as alternative punishment by the defence. More is required to meet the objectives of sentencing and that brings me up the scale to the punishments of reprimand and severe reprimand. Both have been imposed interchangeably in sentences for stealing and, in fact, many members of the military and observers of the military justice system are hard-pressed to explain the difference between the two, as evidenced by recent comments by Justice Fish in his report, *Report of the Third Independent Review Authority to the Minister of National Defence*, 30 April 2021, paragraphs 302 to 306. In that context, I find that a reprimand would be adequate for two reasons. First, it is the minimum sentence necessary to sufficiently express the disapprobation of the Court for the conduct of Master Corporal Anderson. Second, a reprimand is somewhat of a known quantity in the civilian world, being an available sanction in professional misconduct cases, such as those involving police and the judiciary, and therefore would in my view be able to reflect adequately the sanction imposed to Master Corporal Anderson vis-à-vis a prospective employer.

Conclusion and disposition

[44] Combined with a reprimand, I believe a fine of three hundred dollars would be sufficient to meet the interest of discipline in this case, corresponding to the very approximate value of the items stolen. As recognized by the Supreme Court of Canada, the imposition of a sentence by a judge is not an entirely precise process. Guided by the principle of proportionality, I have done my very best to exercise judgement and arrive at a sentence that constitutes the absolute minimum to meet the requirement of discipline in this case, while impeding as little as possible the rehabilitation of Master Corporal Anderson. I am confident I have been able to strike the appropriate balance.

[45] Master Corporal Anderson, I hope the process in the last week has offered an opportunity to reflect on what you have done wrong and convinced you to do better in

the future. As you transition to a new life, I hope you can also reflect positively on the service you have given to our country. Good luck.

FOR THESE REASONS, THE COURT:

[46] **SENTENCES** Master Corporal Anderson to a reprimand and a fine of $300 payable no later than this Friday, 8 October 2021 by cheque to the order of the Receiver General for Canada, handed to any appropriate person in authority at CFB Cold Lake.

Counsel:

The Director of Military Prosecutions as represented by Major G.J. Moorehead and Major A.M. Orme

Major F.D. Ferguson and Lieutenant-Commander F. Gonsalves, Defence Counsel Services, Counsel for Master Corporal J.A. Anderson