COURT MARTIAL

Citation: *R. v. Hastings*, 2024 CM 4006

Date: 20240423
Docket: 202314

Standing Court Martial

Asticou Centre
Gatineau, Quebec, Canada

Between:

His Majesty the King

- and -

Captain R. S. Hastings, Offender

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

REASONS FOR SENTENCE

(Orally)

Introduction

[1] At the outset of his trial before this Standing Court Martial, Captain (Capt) Hastings has pleaded guilty to the first charge under section 130 of the *National Defence Act* (*NDA*) for fraud against His Majesty of a value exceeding $5,000 contrary to section 380 of the *Criminal Code*.

[2] In exchange for his plea, the prosecution has withdrawn the second charge and has limited its submission on sentence to an agreed ceiling as part of what can be qualified as a partial resolution agreement between the parties.

The evidence

[3] The evidence at the sentencing hearing consists of mandatory documents provided by the prosecution relating to the career, history, and pay information of the

offender. Also, as provided in cases of guilty pleas, the prosecution produced a written Statement of Circumstances and read it on the record. Capt Hastings confirmed that the Statement of Circumstances was accurate. The documentary evidence included receipts showing that Capt Hastings has reimbursed the Crown a sum of $15,300 corresponding to the amount of the admitted fraud. Counsel for Capt Hastings produced four of his annual Personnel Evaluation Reports (PERs) covering the period from 1 April 2017 to 31 March 2021 and a document titled "Statement from Capt Hastings", documenting the offender's circumstances. Capt Hastings' treating psychiatrist, Dr Penner, produced a letter and testified. Finally, Capt Hastings himself testified.

[4] As the parties do not agree on the sentence that should be imposed, it is my duty to determine an appropriate and a fair sentence taking into consideration the purpose, objectives, and principles applicable to sentencing by courts martial, which are found at sections 203.1 to 203.4 of the *NDA*, in light of the facts in evidence pertaining to the circumstances of the offence and of the offender. Additionally, I must consider the arguments of counsel at the sentencing hearing and the jurisprudential precedence relevant to the offence and the offender.

Position of the parties

The prosecution

[5] The prosecution submits that Capt Hastings should be sentenced to imprisonment for a period of fourteen days, stressing that the Court should not suspend the execution of the punishment of imprisonment in the circumstances of this case. The prosecution considers that the circumstances call for the application of the principles of denunciation and deterrence in sentencing the offender. The proposed sentence is described as the minimum required to highlight the gravity of the offence and to signal that the conduct of the offender is such a departure from the acceptable conduct of Canadian Armed Forces (CAF) members that it requires separating the offender from society by a period of imprisonment, however short.

The defence

[6] The defence submits that Capt Hastings should be sentenced to a severe reprimand and a fine of no less than $3,600. It is, in the view of defence counsel, an outcome that is in-line with previous sentences imposed in fraud cases and respects the principles of restraint and rehabilitation, especially given the specific circumstances of Capt Hastings, notably his precarious mental health condition which could be aggravated by incarceration.

[7] Although the defence submits that the prosecution has not presented a case justifying imposing the "last resort" punishment of imprisonment on Capt Hastings, counsel alternatively submits that the evidence before the Court is sufficient to justify suspending any sentence of imprisonment which the Court may decide to impose.

The circumstances of the offence

[8] The Statement of Circumstances, complemented by the answers provided by counsel to questions from the Court, reveals the following facts relating to the offence:

(a) Capt Hastings joined the CAF in 2009 and has been on full-time service until the time of the sentencing hearing, although he is in the process of transitioning to civilian life and could be released from the CAF at any time.

(b) In early 2018, Capt Hastings was serving at Canadian Forces Base (CFB) Gagetown since the summer of 2012 and was officially in a common-law relationship, as reflected in his personal records.

(c) In reality, Capt Hastings had separated from his common-law spouse after having met Sergeant (Sgt) K.T on a military course and gotten involved romantically with her.

(d) In the summer of 2018, Capt Hastings was posted from CFB Gagetown to CFB Kingston, the location where Sgt K.T. was posted at the time.

(e) Capt Hastings had not previously, nor at the time of his posting to Kingston, informed his chain of command of his previous separation from his common-law spouse in Gagetown.

(f) Instead, he requested to be posted on Imposed Restrictions (IR) from his common-law spouse, allowing him to qualify for separation expense benefits during his posting to Kingston, essentially meaning that he was eligible for monthly payments from public funds to cover his rental expenses in the Kingston area.

(g) Upon arriving in Kingston, Capt Hastings did not obtain rental accommodations, but instead immediately moved in with Sgt K.T. at her residence in Kingston.

(h) From July 2018, Capt Hastings, without entitlement, claimed separation expense benefits every month for being posted on IR from Gagetown to Kingston.

(i) On his monthly separation expense claims, Capt Hastings stated that he resided at a specific address in Odessa, Ontario, from July 2018 to March 2019 and provided monthly rent receipts signed by a person named Chris Cains of KVS Development, a well-known property management company.

(j) Yet, Capt Hastings was not living in Odessa during that period: the address he provided corresponding to a single-family dwelling constructed by its owner who has lived there with his family ever since construction, well before 2018, and who has never rented his house or parts thereof to anyone.

(k) Further, the company KVS Development, who Capt Hastings stated he was paying rent to, did not have any property in Odessa, Ontario and has not nor has ever employed a person named Chris Cains.

(l) Sgt K.T. raised the issue of improper separation expense payments with her spouse Capt Hastings, which prompted him to formally request to authorities at his unit that he be no longer held to be posted on IR beyond March 2019.

(m) Sometime later, the relationship between Capt Hastings and Sgt K.T. broke down and a military police investigation for fraud was initiated with Sgt K.T. identified as complainant.

(n) Capt Hastings received $1,700 every month for separation expense benefits from July 2018 to March 2019, a duration of nine months, hence receiving a sum of $15,300 which he reimbursed the Crown for on 5 December 2023.

The circumstances of the offender

[9] The documents pertaining to the career of Capt Hastings show that he joined the CAF in Moncton, New Brunswick in August 2009, when he was twenty-six years of age and had completed significant university-level studies. At the time, he had a spouse and an almost one-year-old child. Following successful completion of basic military and infantry training and the birth of his second son in 2010, Capt Hastings was posted in the summer of 2011 to the 1st Battalion Princess Patricia Canadian Light Infantry in Edmonton. He remained at that location until the summer of 2012, when he was posted at his request to the infantry school in Gagetown, New Brunswick to be closer to his sons who had moved back to Atlantic Canada with their mother following a separation earlier in the year.

[10] In Gagetown, Capt Hastings occupied various positions at the infantry school, the 5th Canadian Division Training Centre and at the 2nd Battalion Royal Canadian Regiment (2 RCR) where he was posted in the summer of 2017. After serving with 2 RCR, Capt Hastings was posted to Kingston in July 2018, first at the Royal Military College during which time he completed the training required to serve on the staff as an instructor at a Conduct After Capture Training Centre, a unit of the Canadian Defence Academy. In March 2022, Capt Hastings was assigned to the Transition Centre in Kingston following changes in his medical category. He was transferred to the

Transition Centre in Ottawa on the eve of the sentencing hearing in February 2024 and, as mentioned, he is expected to obtain his release from the CAF shortly.

[11] Capt Hastings is now forty years old. He testified at his sentencing hearing essentially to introduce into evidence some documents and address the Court to express his regrets for his illegal fraudulent actions. The Court received as an exhibit the annual PERs of Capt Hastings from 1 April 2017 to 31 March 2021. These documents show that with the exception of an incident of conduct deficiency in early 2019, Capt Hastings was assessed as having mastered the tasks required at his rank level and as having outstanding potential for an immediate promotion to the rank of major, all the way to his final PER when he had ranked 19 out of 222 officers at his rank level in the Military Personnel Generation Group.

[12] During his testimony Capt Hastings also introduced a five-page document titled, "Statement of Capt Hastings", the content of which he adopted. Counsel did not want to the document to be read on the record, understandably, as my subsequent reading of it reveals content that is troubling in many ways. It tells the disturbing story of someone who expresses anger at the CAF and the people within it who he interacted with in the last fifteen years, starting with the recruiter who allegedly lied to him so he would join the infantry, an occupation which was not his first choice.

[13] In the document, Capt Hastings discusses his struggle with his sexual orientation which caused him to try to show he was leading a hetero normal life with female spouses including Sgt K.T., who he married in December 2018. He discusses an atmosphere and culture of toxic masculinity which he states he had to contend with in the infantry. This included rumours regarding his homosexuality, which in his view, contributed to discrimination towards him, notably the feeling of not being accepted and supported. He states that he saw worse performers than him being preferred to deploy on tours overseas, something he was deprived of despite his positive performance reviews. In the document, Capt Hastings explains the difficult financial situation Sgt K.T. found herself in when he met her, having been posted to Kingston without being able to sell her house at a previous location due to a depressed market. He felt this situation, and subsequent unfavourable CAF policy changes, placed her in an unfair position without any fault of her own. As a result, he stated that his fraudulent action in claiming IR without entitlement appeared to him at the time as justified, being a victimless crime that will provide him with additional resources to support a woman he cared for.

[14] Yet, Capt Hastings does not deny that his actions were wrong. He states he realizes that he is guilty of fraud and has acted in a way that is, "untrustworthy and compromised his integrity". However, he adds that, "prior to that he tolerated harassment and discrimination for years at the hands of others that were trustworthy and had integrity". He hopes that providing the context for his actions and his career will allow the Court to relate to him and see him as more than a criminal. He states that he has made retribution and "will accept whatever additional punishment above and beyond what he has already endured to make this right." He states that he has been

diagnosed with Attention-Deficit / Hyperactivity Disorder (ADHD) in 2023, adding that an earlier diagnostic would have been incredibly useful. He stated that he is, "working very hard to become a better person, a more aware person, a healthier person."

[15] Dr Penner, Capt Hastings' treating psychiatrist, also testified for the defence. She stated that she has been treating him on behalf of the CAF Health Services since November 2021 and had approximately fifteen to twenty sessions with him once every six weeks or so. She stated that her relationship with Capt Hastings will end once he is released from the CAF but opined that incarceration of Capt Hastings would be likely to adversely affect his mental health. The prosecution objected to this opinion being admitted but the Court accepted to hear the evidence to expedite the sentencing hearing, considering the opinion of this witness the same way as any other ordinary, i.e., non-expert, witness.

[16] In any event, that opinion is of no value to the issues raised in this case. Indeed, the mental conditions diagnosed years after the offence have no relationship with its circumstances. There is no precise evidence as to how exactly the short period of imprisonment of 14 days requested by the prosecution will affect the mental health of the offender beyond the need to follow up, which in any event occurs only every six weeks. The Court recognizes that incarceration is an experience that is inherently unpleasant and mentally challenging: that is the point of that punishment of last resort. It is likely to negatively affect the mental health of those subjected to it, but no evidence was presented on the exact nature of this likely impact, including its long-term effect on the offender, especially in the context where mental health resources are available at incarceration facilities, as admitted by Dr Penner.

Analysis

Purpose and objectives of sentencing

[17] The purpose, objectives, and principles applicable to sentencing by courts martial are found at sections 203.1 to 203.3 of the *NDA*, reproduced at *Queen's Regulations and Orders for the Canadian Forces* article 104.14. As provided at section 203.1 of the *NDA*, to achieve the fundamental purpose of maintaining discipline, efficiency and morale of the Canadian Forces, the imposition of just punishments must stand to reach a number of objectives including the maintenance of public trust, the denunciation of unlawful conduct, the deterrence of offenders and other persons from committing offences, the rehabilitation and reintegration of offenders into military service and the separation of offenders, if necessary, from other officers or non-commissioned members or from society generally. In my opinion, the circumstances of this case require that the focus be primarily placed on the objectives of denunciation and deterrence, especially general deterrence in sentencing the offender.

[18] Indeed, the Court is dealing here with an instance of fraud in relation to an important benefit offered to CAF members who are posted away and, for whatever reason, including employment of a spouse at the originating location, need to proceed to

their posting location without their spouse and often their family. As stated in the well-known case of Warrant Officer (WO) Arsenault (*R. v. Arsenault*, 2013 CM 4007) at paragraph 6, a case involving fraud in relation to separation expense just like we have here, denunciation and deterrence are the required sentencing objectives in the vast majority of fraud cases. It is so, regardless of whether a fraud involves money that the offender was entrusted to manage or whether it involves benefits claimed by the offender without or in excess of actual entitlement. As stated by Sukstorf M.J. in *R. v. Berlasty*, 2019 CM 2032 at paragraph 84, courts have similarly emphasized that there is an overwhelming need to send a strong message of general deterrence in a similar manner for both these types of fraud.

[19] I do recognize that the situation of Capt Hastings, based on the evidence presented to me at the sentencing hearing, must be taken into account to ensure his rehabilitation. Suffice to state for now that the offender has no conduct sheet, has reimbursed the sums he defrauded and is dealing with physical and mental health challenges as he is about to transition to civilian life with many years ahead of him to contribute to society, given his education and potential. These circumstances reveal that I cannot lose sight of the objective of rehabilitation in sentencing the offender.

[20] Yet, as concluded previously in fraud cases such as *R. v. Poirier*, 2007 CM 1023 paragraph 10 and *Berlasty* at paragraphs 19 to 21, even if evidence reveals that the rehabilitation of the offender is an objective to be considered, the principles of denunciation and general deterrence must be paramount in cases of fraud and the objective of rehabilitation is secondary.

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

The main principle of sentencing: proportionality

[22] The most important of these principles is proportionality. Section 203.2 of the *NDA* provides that the 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 a sentencing scheme of the *NDA*, Parliament acknowledges the jurisprudence of the Supreme Court of Canada which has elevated the principle of proportionality in sentencing as a fundamental principle of justice in cases such as *R. v. Ipeelee*, 2012 SCC 13. At paragraph 37, 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.

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

The gravity of the offence

[24] It is useful to place the offence in perspective and discuss its objective and subjective gravity to provide the context for the discussion that will follow on the other principles of sentencing before courts martial in accordance with the *NDA*. The objective gravity of any offence is established by the offence provision which provides for a maximum and sometimes a minimum punishment which can be imposed following a declaration of guilt.

[25] In this case where the value of the fraud is $15,300, the maximum punishment provided for the offence at paragraph 380(1)(a) of the *Criminal Code* is a term of imprisonment not exceeding fourteen years. There is no minimum punishment applicable. Given the maximum punishment of fourteen years' imprisonment, it is obvious that the objective gravity of the offence in this case is significant. The gravity of the offence has been recognized in the jurisprudence of courts martial and the Court Martial Appeal Court (CMAC) in cases of fraud such as this one.

[26] Indeed, a fraud offence is a serious crime that requires a serious sentencing response both in courts martial and in civilian courts of criminal jurisdiction. In the case of *R. v. Maillet*, 2013 CM 3034, my colleague d'Auteuil M.J. stated as follows at paragraph 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.

[27] The reference to the words of Létourneau J.A. at paragraph 22 of *St-Jean* offers an interesting insight in the discussion on the gravity of the offence of fraud and what it means for a military judge's task of determining an appropriate sentence, especially given that these words have been extensively referred to and quoted by prosecutors in the more than twenty-four years since *St-Jean* was released on 8 February 2000.

[28] The facts in the case of *St-Jean* bear some similarities with this case. Indeed, then-Sergeant St-Jean had pleaded guilty to the first charge under section 130 of the *NDA* for fraud contrary to subsection 380(1) of the *Criminal Code* and admitted that for a period of six months, he submitted false monthly claims to obtain reimbursement of tuition for authorized computer courses that he had never attended nor paid for. In doing so, St-Jean defrauded the Crown of the sum of $30,835.05 paid to him. In exchange for his plea, no evidence was presented on two other charges. The entire paragraph 22 of the CMAC decision is worth quoting because it is pleaded so often:

> 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. 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.]

[29] What Létourneau J.A. is communicating, essentially, is that in cases of fraud, the principle of deterrence must be emphasized because a large organization such as the CAF is inherently vulnerable to fraud and must rely on the integrity of its members given that it would be impracticable and too costly to implement control mechanisms covering every possible opportunity for abuse. This does not mean, however, that imposing imprisonment is the only means by which the principle of deterrence can be met. Each case must be assessed on its circumstances, notably the circumstances of the offender. Indeed, the outcome in *St-Jean* was an intervention by the CMAC to set aside the sentence of four months' imprisonment imposed at the court martial and replace it by a reduction in rank to the rank of corporal, a severe reprimand and a fine of $8,000.

[30] I conclude that although fraud is an offence of significant gravity, it does not follow that it must necessarily be punished by a sentence of imprisonment. This is what I had concluded in the stealing while entrusted case of *R. v. Darrigan*, 2019 CM 4010. My sentencing decision was appealed by the prosecution on the severity or lack thereof of the sentence. The CMAC refused to intervene and confirmed that the case of *St-Jean* did not stand for the proposition that fraud and fraud-like breach of trust cases require proof of exceptional circumstances to qualify for a non-custodial sentence. See *R. v. Darrigan*, 2020 CMAC 1 at paragraphs 55, 57, and 58.

[31] As it pertains to the subjective gravity of the offence in this case, relevant factors include the amount of the fraud, its sophistication, the repetition of the fraud and conduct over time, and the status of the offender within the organization. Here, the amount of the fraud is $15,300. Its implementation required creation of false receipts which nevertheless included credible information such as the name of an existing property management company and of an employee, an address which existed and the submission of nine of these receipts over nine months, although more than one receipt may have been submitted at any one time.

The degree of responsibility of the offender

[32] Capt Hastings appears to be taking responsibility for his behaviour, although in his written statement he seems to link his anger towards the CAF as an organization with his offence. It is concerning to me that while Capt Hastings writes that he admits behaving in a way that is untrustworthy, he feels the need to add in the same sentence that before offending, he tolerated harassment and discrimination for years at the hands of others that were "trustworthy". This seems to me like an ironic way to imply that while he accepts responsibility, others have behaved just as badly or worse without being made to account for their own behaviour. However, the actions Capt Hastings states he was victimized by are unrelated to his actions in committing the offence. Capt Hastings is unfortunately not the only member of the CAF that has suffered harassment and discrimination, yet many others in the same position did not commit fraud.

[33] I also note that although I accept Capt Hastings' statement to the effect that he feels he was discriminated against, his career assignments over the years show that he has been entrusted with meaningful and even significant position of responsibilities within the CAF. He was repeatedly employed as an instructor to lead junior personnel and has occupied important positions in infantry battalions in Edmonton and Gagetown. He was by no means sidelined within the organization. Further, the four PERs provided by counsel on his behalf at the sentencing hearing show that he benefitted from support of superiors from 2017 to 2021, being assessed as worthy of an immediate promotion recommendation in each of these four evaluations, despite a conduct deficiency in February 2019.

[34] Comments and scores on the 2020-2021 evaluation reveal that Capt Hastings was positioned for an effective promotion in the summer of 2021 or shortly thereafter. It is a fact that Capt Hastings has not been deployed in his career. However, he would not be the first high performer who encountered reluctance from superiors at the prospect of loosing the services of a key officer on deployments with other units for the standard six months deployment, in addition to months of associated training and leave. Although I understand how Capt Hastings may feel about the lack of any deployed service in his career, it remains that there is no such thing as a right to deployment associated with service in the CAF.

[35] Having considered the evidence, I have come to the conclusion that any perception of mistreatment and discrimination by Capt Hastings in no way excuses his behaviour in committing the offence. The degree of responsibility of the offender is significant and tempered only by the fact that the evidence reveals that he did stop the payments of separation expense on his own volition. Although there may have been other reasons related to the deployment of his then wife, Sgt K.T., that required him to come clean in March 2019, it would be inappropriate for me to speculate and deprive Capt Hastings of what appears to be evidence of him realizing that what he had done was wrong. I also infer from the evidence and the chronology of this file that Capt Hastings admitted the offence and announced his intention to plead guilty early, which he ultimately did after reimbursing the sums defrauded.

Other principles

[36] 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 at the paragraphs of section 203.3 of the *NDA*. These include:

(a) the requirement that a sentence "be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender";

(b) the principle of parity, requiring the sentence imposed to "be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances";

(c) the principle of restraint to the effect that, "a sentence should be the least severe . . . required to maintain the discipline, efficiency and morale", and that all available punishments other than imprisonment and detention that are reasonable in the circumstances and consistent with the harm done should be considered for all offenders; and

(d) the requirement to take into account the, "indirect consequences of the finding of guilty or the sentence".

[37] I will go over those principles, considering the circumstances of this case.

Aggravating and mitigating factors

[38] The law provides that a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating either to the offence or the offender. Yet, one aggravating and mitigating factor in isolation cannot operate to increase or decrease a sentence to a level that will take it outside of the range that will be an adequate sentence.

[39] In assessing the presence of aggravating circumstances, I have taken into account the list of aggravating circumstances specifically found at paragraph 203.3(a) of the *NDA* as well as the general principles inferred in, and the specific factors listed at section 380.1 of the *Criminal Code*. Indeed, those apply to sentencing for an offence under section 130 of the *NDA* alleging fraud under section 380 of the *Criminal Code*.

[40] In my opinion, the circumstances of the offence and of the offender in this case reveal three aggravating factors.

[41] The first is the complexity of the fraud which required the creation of false receipts with credible information such as the name of an existing property management company and an existing address, receipts submitted to obtain payment for nine months between July 2018 and March 2019. This adds a degree of sophistication to the fraudulent behaviour associated to the posting of Capt Hastings in this case, which is not limited to a failure to notify the appropriate military authorities of the end of the common-law status at the previous location and or the expression of a request to be posted on IR at the new location, often the sole fraudulent act and or omission in separation expense fraud cases within the CAF.

[42] The second, and to an extent related aggravating factor, is the magnitude of the fraud. Not so much its duration of nine months in corresponding amount of nine times the monthly alleged rent of $1,700 for $15,300, but mainly the fact that contrary to most other separation expense claims fraud, Capt Hastings was not only fraudulently obtaining reimbursement for rent which he was effectively paying at the posting location, he was obtaining reimbursement for rent which he had not paid. Indeed, he was then staying at his girlfriend, later wife, Sgt K.T.'s residence free of charge. Therefore, not only was he fraudulently living for free in Kingston like others such as then-WO Arsenault in Gagetown, but he was also obtaining sums to use as he wished, here to share with Sgt K.T. in order to provide as he writes, "assistance in day-to-day purchases." Yet, provision of mutual assistance to one spouse is not an extraordinary burden justifying resorting to fraud.

[43] The third aggravating factor is the fact that in abusing a benefit offered to CAF members in the unfortunate situation of having to be posted away from spouses and family, Capt Hastings was breaching the trust that the public confers on all CAF members to only obtain the benefits they are truly entitled to in good faith without wilful inaccuracies or abuse of any kind. A fraud related to benefits risk fragilizing programs by making them inappropriately more expensive for the Crown. This is not a victimless crime. With respect, the expression "betrayal of the public trust" expresses more accurately the gravamen of the fraud committed in this case than the expression "stealing from his employer" suggested by the prosecution. Betraying the public trust is not the same thing as an abuse of a position of trust in the commission of the offence which is an aggravating factor listed at paragraph 203.3(a)(i) of the *NDA*, the distinction having been explained by Sukstorf M.J. at paragraphs 41 to 47 and 76 to 78 of *Berlasty* in a manner I substantially agree with.

[44] I realize in coming to this conclusion I am not accepting as aggravating some factors mentioned by the prosecution or I have named them differently or grouped several in one circumstance. Specifically, I want to stress that I cannot find the rank of the offender to be aggravating in the circumstances here for two reasons. First, the admissibility to separation expense or to go on posting on IR is not tied to rank. Second, there is no evidence supporting the submission by the prosecution to the effect that Capt Hastings' fraud was more easily successful because he benefitted from extraordinary trust on the part of the personnel administrating benefits at his unit by virtue of his rank or by virtue of occupying a position of special trust in the organization.

[45] On the other hand, the Court considered the following as mitigating factors arising either from the circumstances of the offence or the offender:

(a) First, is the guilty plea of Capt Hastings which avoided the expense and energy of running a trial and demonstrates that he is taking responsibility for his actions in public, in the presence of members of the military community;

(b) Second, the fact that Capt Hastings recognized not being entitled to the sums defrauded; first, by asking that his posting no longer be considered to be on IR in March 2019, meaning that he was no longer entitled to separation expense payments, and second by his reimbursement of the sums fraudulently obtained in December 2023;

(c) Third, the expression of regret by Capt Hastings when testifying before me;

(d) Fourth, the fact that Capt Hastings does not have a conduct sheet or criminal record, hence must be treated as a first-time offender; and

(e) Finally, the significant contribution made by Capt Hastings throughout his career despite the difficult condition he experienced by virtue of his struggle in dealing with his sexual identity and the perceived mistreatment he suffered.

The principle of parity and sentencing range

[46] The next principle to be considered is the principle of parity. The sentencing options available to a court martial are found at section 139 of the *NDA*, although detention is not an option for officers such as Capt Hastings.

[47] In this case, the submissions of counsel, especially the prosecution, are grounded in the fact that prosecution has limited his submission to imprisonment for a period of fourteen days in consideration for the guilty plea of the offender. However, this is a contested sentencing hearing. In *R. v. Nahanee*, 2022 SCC 37, the Supreme Court of Canada held that the principles applicable to joint submissions do not apply to

contested sentencing hearing, where the most an accused can reasonably expect is that the sentence is likely to fall within the ranges proposed by counsel from both sides and that it will not likely exceed the Crown's upper range. The majority also ruled that judges must notify the parties if they intend to impose a harsher sentence than the one sought by the prosecution and give the parties an opportunity to make further submissions.

[48] I did not notify the parties at the sentencing hearing that I was considering a harsher sentence than the fourteen days of imprisonment the prosecution requests, as I did not, and still do not believe that the sentence proposed by the prosecution appears too lenient, having regard to the seriousness of the offence and or the degree of responsibility of the offender. Consequently, I considered the fourteen days of imprisonment proposed by the prosecution as a ceiling in assessing the applicable jurisprudential precedents. As a reminder, the primary position of the defence is that the sentence of a severe reprimand and a fine of no less than $3,600 would be appropriate.

[49] The focus of counsel's submissions in relation to previous case law was two-fold. First, both parties submitted that their respective submissions are within the range of possible sentences previously imposed on similar offenders in similar circumstances, and therefore, that the Court does not need to go outside that range of acceptable sentence. Second, the defence argues that the submission of the prosecution for imprisonment is situated at the most severe end of the range and that custodial sentences are rarely imposed for fraud of a similar amount and level of complexity, notably following a guilty plea and reimbursement.

[50] I agree with both propositions.

[51] Counsel brought my attention to several precedents, notably the sentencing decisions of *Berlasty* and *R. v. Beemer*, 2019 CM 2031, both decided within ten days of each other in November 2019 by Sukstorf M.J. Annexed to the *Berlasty* decision is a table of twenty-nine fraud-related cases decided by courts martial between 1999 and 2019, including for stealing of sums of money while entrusted with the money stolen. At the sentencing hearing, counsel brought to my attention two other precedents since 2019. I have identified eleven such precedents which include ten cases of fraud-like activities and one case of theft while circumstances were that the position in the service occupied by the offender allowed him privileged access to the thing stolen. In *Berlasty*, Sukstorf M.J. concludes as follows as it pertains to the twenty-nine cases she examined and I quote, paragraphs 69 and 70:

> [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*.

[52] I accept my colleague's very factual observations with three precisions. First, I note that the fact that a custodial sentence is ultimately suspended is not important at this stage of determining an appropriate sentence, given that the issue of suspension arises only after determining that a punishment of detention or imprisonment is appropriate. Second, it is to be noted that in the case of *R. v. Jackson*, 2015 CM 4012, referred to by my colleague, the sentence of detention for sixty days was the result of a joint submission of counsel. The offender had used a Department of National Defence credit card issued to him inappropriately resulting in unauthorized personal fuel purchases worth approximately $20,000. Third, I need to mention that in relation to an observation appearing at the bottom of the table at Annex A to the effect that, "facts arising from a breach of trust or stealing while entrusted will attract custodial sentence absent exceptional circumstances" is, in my view, no longer accurate considering the CMAC decision in *Darrigan*, released after *Berlasty* on 10 March 2020, where our court of appeal unequivocally distances itself at paragraph 50 from the proposition that absent exceptional circumstances, theft from an employer mandates a term of imprisonment. As mentioned earlier in my remarks concerning the gravity of the offence, each case must be assessed on its merit.

[53] Turning now to the eleven post-2019 cases I have examined, I note that a custodial sentence was imposed in two cases. First in *R. v. Tarso*, 2022 CM 5013, when a joint submission was approved following a guilty plea to sentence an offender who had left the CAF with thirty days' imprisonment, along with dismissal and reduction in rank from Master Warrant Officer to sergeant. The two offences related to fraudulent acts committed over a few years when the offender was a detachment commander entrusted with payment cards and authorities which allowed her to affect the purchase of goods and services for herself, family and friends totalling over $38,000. The second case is *R. v. Laflamme*, 2023 CM 3014, where the offender, who had been forced out of the CAF over a year before sentencing, had decided to plead guilty to one count of fraud following an unfavourable evidentiary ruling at trial. He admitted lying when stating that his address was in Montreal, a location allowing him to receive a monthly benefit worth $45,450 after seven and a half years. He had not reimbursed any of the defrauded sum and was ultimately sentenced to forty-five days' imprisonment.

[54] The defence brought to my attention two cases of fraud in relation to benefits where offenders were officers at higher ranks than Capt Hastings who admitted their guilt to benefit-related frauds, resulting in non-custodial sentences. In the case of *R. v. Martin*, 2014 CM 3001, the offender, holding the rank of Commander, had claimed foreign service premium for three dependent children when he was entitled to claim for one and at a rate for which he had no entitlement, depriving the Crown of a sum of $14,938. At the time of pleading guilty, Commander Martin was in the process of reimbursing. The Court accepted the joint submission of counsel for a sentence composed of a severe reprimand and a fine in the amount of $10,000. In the case of *R. v. Martimbeault*, 2022 CM 5007, the offender, a Major, pleaded guilty to one count under section 117(f) of the *NDA* for having fraudulently claimed French tuition for his children while commanding a detachment in London, England, a benefit he was entitled

to but for which he had not paid the tuition, courses having been provided free of charge by a friend who was placed in the difficult position of having to fabricate receipts to cover the fraud. The offender had reimbursed and had released from the CAF at the time of trial. Once again, the Court accepted the joint submission of counsel for a reduction in rank to captain, a punishment which had no practical impact on the offender in the circumstances.

[55] The *Martin* and *Martimbeault* cases reinforce the observations anyone can make in examining the bulk of fraud-related cases, in that they are two more cases where non-custodial sentence end up being imposed. However, given that they are both the product of joint submission, they are not determinative to my task of determining whether a custodial sentence will be appropriate in this case. They stand for the proposition that reduction in rank and severe reprimand, combined with fines, are sentences that will not bring the administration of justice into disrepute or be contrary to public interest, the applicable test for judges assessing joint submissions of counsel on sentencing.

[56] The bottom line is, as stated, that the submissions by both parties are within the range of sentence previously imposed on similar offenders for similar offences. Yet, the prosecution's submission for imprisonment is in an area of the range less frequented than the submission of defence for a severe reprimand and a fine.

[57] What matters most importantly for the determination of an appropriate sentence, however, is the next principle to be considered. The principle of restraint.

The principle of restraint

[58] The principle of restraint obliges me to sentence the offender with the least severe sentence required to maintain discipline, efficiency and morale. It applies to all available punishments in consideration of all applicable circumstances. In addition, paragraphs (c) and (c.1) of section 203.3 of the *NDA* apply specifically to the custodial punishments of detention and imprisonment providing respectively that an offender should not be deprived of liberty if less restrictive punishments may be appropriate in the circumstances and that, "all available punishments, other than imprisonment or detention, that are reasonable in the circumstances and consistent with the harm done to victims or the community should be considered for all offenders".

[59] That is the context where I need to discuss the submission of the prosecution to impose a sentence composed of imprisonment for fourteen days.

[60] The main feature of the prosecution's submission is that imprisonment is needed to send a message necessary to achieve the objectives of denunciation and deterrence, particularly general deterrence. Yet, the prosecution's submission, even for a low number of days such as fourteen, is very much in the upper range of what could be imposed given the circumstances of the offence and of the offender in this case, based on the precedents discussed. The presence of the aggravating factors that I have mentioned is acknowledged. However, there are mitigating factors as well which cannot

be ignored, including the guilty plea, the fact that the offender has acted to stop the payments made to him and the fact that he has reimbursed in full prior to sentencing.

[61] I acknowledge that a sentence which includes imprisonment will have an impact which would help in achieving the objectives of denunciation and deterrence. However, other punishments can have that impact too. Based on the relevant precedents, I find that the principle of restraint limits my ability to impose imprisonment on the circumstances of this case. Indeed, instances where custodial punishments have been handed out in cases of benefit frauds (as opposed to theft or fraud while entrusted) reveal circumstances such as duration, amount of the fraud and sophistication that are of greater gravity than what I have here. For instance, in the cases of *R. v. Boire*, 2015 CM 4010, *Arseneault*, *Maillet*, and more recently *Laflamme*, precedents resulting from contested sentencing hearings, the fraud led to greater losses for the Crown and longer periods of fraudulent activity, as well as partial or no reimbursement. In the case of *R. v. Blackman*, 2015 CM 3009, the offender was found guilty of seven charges involving forged documents, including one charge of fraud not of significant sophistication. However, the Court found that it was limited in its sentencing options in the circumstances of the offender and sentenced Petty Officer 2nd Class Blackman to forty-five days of imprisonment.

[62] I conclude that imposing the imprisonment, even for a short period, will be excessive in the circumstances of the offence and the offender in this case.

[63] Punishment lower in the scale of section 139 of the *NDA* which are available to the Court include dismissal, reduction in rank, and forfeiture of seniority. Counsel have not addressed, let alone suggested, any of these options in their submissions which I take as meaning that they do not consider these sentencing options to be appropriate. Dismissal is, in my view, clearly unadvisable, although it is technically lower in the scale than punishment of imprisonment for less than two years, the sentence formerly proposed by the prosecution, it will effectively or in practice be more severe than fourteen days of imprisonment, especially that it could cause a separation of Capt Hastings from the service ahead of plans that must have been made for his orderly transition towards civilian life. As it pertains to forfeiture of seniority, on the other hand, its impact will be difficult to assess and likely minor and inefficient.

[64] The punishment of reduction in rank is at first sight is attractive as it pertains to its impact in meeting the principles of denunciation and deterrence. It is not barred by the principle of restraint, although it may be undesirable in the circumstances of the offender as I will discuss shortly. It appears to me that the proper application of the principle of restraint calls for a choice between the reduction in rank or a severe reprimand combined with a fine to sentence the offender in this case. I am therefore, arriving at the final step of the analysis; namely, the choice of a fit sentence.

A fit sentence

[65] As mentioned, the reduction in rank generally appears as an attractive punishment given the value of rank within the CAF, thereby promoting the objectives of denunciation and deterrence which I find to be paramount in this case. However, the punishment also needs to be adapted to the circumstances of the offender and avoid endangering rehabilitation, also an objective I cannot lose sight of, albeit to a lower degree. I believe that the impact of a reduction in rank is likely to be limited in the circumstance of the offender before me in this case. Indeed, Capt Hastings had been for some time, and likely still is, in the process of transferring from military to civilian life and therefore, rank will mean little to him soon. He has appeared before me out of uniform, citing mental health reasons. He may well not get to wear the rank he could be reduced to. Although reduction in rank is an entirely legal punishment, in fact, it will have little more than a symbolic impact on the offender. This will not be unnoticed by other CAF members interested in this case, hence reducing its effect as it pertains to achieving the principles of denunciation and deterrence.

[66] Of course, a reduction in rank has a financial impact as the offender is reduced to a rank carrying less pay. However, it is unknown how long the offender will serve for in the CAF. In effect, imposing a reduction in rank will be, in the circumstances of the offender here, akin to imposing a fine of an unknown amount, potentially nothing if the offender has been released at the time of sentencing, little to a lot depending on how long he still has to serve. This uncertainty likely explains why this punishment has not been suggested by either counsel.

[67] Imposing a fine will, however, in the circumstances bring certainty to the sentence to be imposed in this case. Accompanying a fine with a more severe punishment of a severe reprimand will provide the required symbolism assisting in meeting the objective of denunciation and deterrence. I note that a severe reprimand or a reprimand combined with a fine has historically been the most often imposed sentence by courts martial in fraud like cases in the last twenty-five years or so. Based on the table annexed to *Berlasty* in 2019, this combination of punishment was favoured in fourteen of the twenty-nine cases. More recently, from 2019 to so far in 2024, it was imposed in eight of the eleven cases I identified as relevant to the circumstances of this case. Many of these eleven cases were joint submissions, so this combination is certainly within the toolbox of counsel including the prosecutors who represent the public interest.

[68] To enhance the message of denunciation and deterrence, especially general, that is expressed by a severe reprimand, it must be accompanied by a substantial fine, given the need for the sentence to have a direct impact on the offender. As the offender is an officer, hence in receipt of greater pay than non-commissioned members, the fine must be of a substantial amount, in order to show subordinates and non-commissioned members that crime does not pay, and no one is above the law. Defence counsel recommends a fine of, “no less than $3,600.” I certainly do not blame counsel for suggesting a fine that is as low as possible for the offender, but it remains that the sum proposed as a minimum is very low, especially when one considers that Capt Hastings draws a monthly basic pay of $10,135 as a captain at incentive ten in February 2024.

Even if Capt Hastings is released from the CAF at or shortly after sentencing, with his education and experience, he has significant potential to obtain civilian employment. He recognizes this in his statement mentioning that his civilian and military qualifications will allow him to be an asset for an employer.

[69] Consequently, I believe that a fine in the amount of $7,000 is the minimum required in the circumstances of this case to meet the objectives of sentencing given that the offender has the means to pay and that this is known by virtue of his rank. Combined with a severe reprimand, it is the least severe sentence required to maintain discipline, efficiency and morale.

[70] In arriving at this conclusion, I have taken into consideration that as a result of his plea of guilty which I have accepted, Capt Hastings will have been convicted of a criminal offence, leading to a criminal record, for the purpose of the *Criminal Records Act*. This is how it should be in the circumstances.

[71] As stated at paragraph 145(2) of the *NDA*, the terms of payment of a fine are in the discretion of the court martial that imposes the fine. I believe that to maximize the effect of the fine and considering the capacity of paying of Capt Hastings, it will be desirable that the fine be paid in a period of ten months starting with $250 before 1 May 2024 and followed by nine payments of $750 per month from 1 June 2024 to 1 February 2025.

Conclusion and disposition

[72] I have concluded that a sentence composed of the punishments of severe reprimand a fine in the amount of $7,000 is required to meet the interests of discipline in this case. 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 crafting a sentence that constitutes the absolute minimum to meet the required sentencing objectives of denunciation and deterrence while impeding as little as possible the rehabilitation of Capt Hastings. I am confident I have been able to strike the appropriate balance.

[73] Capt Hastings, your statement is to the effect that you want to move past this chapter in your life, forgive those who have hurt you and forgive yourself. Your service since 2009 has proven challenging to you in a way that many others did not have to experience. However, I invite you to consider the punishment I am imposing today as unrelated to the mistreatment you have experienced in the past. I am sanctioning your offence, and this sanction is not a continuation of what you have endured. You are on the road to rehabilitation but keep in mind that it is a road which is often windy and that speed of travel can be inconsistent. I have spared you the stress of imprisonment as indeed the transition that is coming up in your life is extremely important. Now that you are done with the justice system in this court, you need to reflect about what happened and remain determined to not let it happen again. As a citizen, you have enormous

potential to make a positive contribution to civilian society as you have made for the CAF since 2009. It is up to you now.

FOR THESE REASONS, THE COURT:

[74] **FINDS** Capt Hastings guilty of the service offence under section 130 of the *National Defence Act* for fraud against His Majesty of a value exceeding $5,000, contrary to section 380 of the *Criminal Code*.

[75] **SENTENCES** Capt Hastings to a severe reprimand and fine in the amount of $7,000 payable in monthly instalments as follows: first payment of $250 before the 1st of May 2024, then subsequent payment of $750 per month for the nine months following, specifically from 1 June 2024 to 1 February 2025. Should Capt Hastings be released from the CAF before the fine has been paid in full, any remaining unpaid sum will be payable within thirty days of the effective date of release.

Counsel:

The Director of Military Prosecutions as represented by Major A. Dhillon

Major É. Carrier, Defence Counsel Services, Counsel for Captain R. S. Hastings