



## COURT MARTIAL

**Citation:** *R. v. Downer*, 2016 CM 4005

**Date:** 20160408

**Docket:** 201513

Standing Court Martial

8 Wing Trenton  
Belleville, Ontario, Canada

**Between:**

**Her Majesty the Queen**

- and -

**Master Corporal M.A. Downer, Accused**

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

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### REASONS FOR FINDING

(Orally)

#### INTRODUCTION

[1] In this trial, Master Corporal Downer is facing five charges under the Code of Service Discipline in relation to statements he is alleged to have made on 16 August 2013, in the course of his efforts to finalize a claim for Leave Travel Assistance (LTA) raised in April 2013 in anticipation of travel on leave to Newfoundland and Labrador (NL) for which he had obtained an advance of \$600 from public funds.

[2] The first and second charges both allege that on 16 August 2013, the accused committed a fraudulent act. The first charge is laid under section 130 of the *National Defence Act (NDA)* for fraud, contrary to section 380(1) of the *Criminal Code*, in making false statements by claiming a benefit for which he had no entitlement. The second charge alleges an act of a fraudulent nature under section 117(f) of the *NDA* where the same false statement is alleged to have been made by the accused, this time to obtain payment of a benefit knowing that he had no entitlement.

[3] The third charge is also laid under section 117(f) of the *NDA*, alleging that the failure of the accused to return the advance of \$600 he had received, knowing he was not entitled to payment, constitutes an act of a fraudulent nature. The prosecution has made a point of mentioning, upon opening its submissions, that no evidence was introduced to show any obligation on the part of the accused to return the advance he had received. I agree. Consequently, the third charge will be the object of a finding of not guilty and I will not deal with it any further in these reasons.

[4] The fourth and fifth charges under section 125(a) of the *NDA*, both allege that on 16 August 2013, the accused made two statements in a statutory declaration that he knew were false.

### **THE FACTS**

#### **Evidence received**

[5] The prosecution called nine witnesses, most of whom introduced documents as exhibits in these proceedings. The defence elected not to call any evidence. In addition to testimony and exhibits, the court took judicial notice of the matters contained in section 15 of the *Military Rules of Evidence (MRE)* and, under section 16 of the *MRE*, took judicial notice of Chapter 209 of the *Compensation and Benefits Instructions (CBI)* and of the Canadian Forces Leave Policy Manual. Finally, the defence formally admitted the element of identification of the accused in relation to all charges.

#### **Chronological narrative of the facts**

[6] On 2 April 2013, while posted in Ottawa, Master Corporal Downer requests leave for 12 days between 29 June and 10 July 2013. In the "Address While on Leave" portion of the leave pass, mention is made that he will be in "Lance Au Loup, NL, A0K 3L0", and "Touring NL" along with a licence plate number of the vehicle expected to be used. The "Remarks" portion mentions that he is to be "Standing Best Man for a wedding". Leave is authorized the next day as evidenced by the Canadian Forces Leave Request Authorization Form (known as and referred to as a "leave pass") produced as Exhibit 4 by Master Warrant Officer Bolduc. She was Master Corporal Downer's immediate superior at that time and recommended the approval of the leave.

[7] On 19 April 2013, Corporal Downer receives a \$600 advance on a LTA claim raised on the basis of the leave pass at Exhibit 4. The claim was raised at the direction of Sergeant Dion upon receipt of the leave pass. Sergeant Dion testified as to the procedure for the issuance of advances in Ottawa and produced the Advance of Public Funds form as Exhibit 5, showing that the advance was annotated on the claim/pay record on the same date. Sergeant Dion testified that the advance is calculated on the basis of 80% of the estimated value of the claim once completed, that value being determined by the kilometric distance to be travelled applying a formula found at CBI 209.50(7) in the case of travel by road, as it is here.

[8] Master Corporal Downer was to be posted from Ottawa to Trenton in July 2013. He was granted a request for an early reporting date to his new unit, sometime before 29 June 2013. Master Warrant Officer Bolduc testified that she verified with Master Corporal Downer's gaining unit and ensured that the leave which had been authorized at Exhibit 4 could effectively be taken.

[9] As it turns out, that authorized leave planned for 29 June to 10 July 2013 was cancelled prior to departure from Ottawa. Sergeant Parsons testified that she had to perform verifications due to discrepancies in leave data and was informed by staff at Master Corporal Downer's former unit that the leave authorized at Exhibit 4 had been cancelled at the request of the member. The leave statement produced by Sergeant Nadon at Exhibit 9 shows the cancellation of that leave period.

[10] Following posting and report for duty in Trenton, Master Corporal Downer was granted special leave (relocation) for five days which, combined with a weekend, appeared as a total period of seven days of leave from 17 to 23 July 2013 on Exhibit 8, a leave pass produced by Sergeant Nadon along with the leave statement produced as Exhibit 9 confirming that leave was actually taken. This period almost matches the period of 19 to 24 July 2013 during which Master Corporal Downer allegedly travelled to L'Anse au Loup, NL according to a statement he would have made to Sergeant Parsons on 16 August 2013. The prosecution's position is that Master Corporal Downer did not travel to NL at that time. Master Corporal Tapp, the lead investigator in this case, produced as Exhibit 11 bank records she obtained through a production order showing MasterCard transactions linked to one of Master Corporal Downer's accounts and the fact that these transactions were made during the period of alleged travel to NL, transactions which were made in Trenton and other locations in the immediate area of Master Corporal Downer's residence in Carrying Place, Ontario (ON), which is the location identified as "Address While on Leave" in the leave pass at Exhibit 8. Master Corporal Tapp also produced, as Exhibits 13 and 14, records of cell phone usage obtained through a production order from Telus for an account under the accused's name for the same phone number listed in Master Corporal Downer's leave passes, at Exhibits 4 and 8, as where he can be reached while on leave. The phone records show calls originating and received from Trenton, ON during the period of 17 to 23 July 2013 and no calls originating from anywhere in NL or in places between Trenton and NL.

[11] Mrs Sheila Downer, Master Corporal Downer's mother, also testified for the prosecution, stating she did not see Master Corporal Downer in NL in the summer of 2013, either in L'Anse au Loup or at Gander Bay, NL where she has her summer cottage. She stated that she is not aware that her husband saw Master Corporal Downer either, acknowledging, however, that Master Corporal Downer may have travelled to NL without coming to see her, as he had done before. Mrs Downer provided her phone number in Gander Bay and the phone number of her husband in L'Anse au Loup, both of which appear on Exhibit 14 as having been reached from Trenton, ON on 19 and 21 July respectively. She also stated that L'Anse au Loup is located on the southern coast of Labrador and that it takes two days of road travel from Trenton, including travel by

sea on two ferries to reach that destination. As for travel to NL, Captain Kelly had previously testified about the usual route taken to travel to NL, including details of the ferry to be boarded at North Sydney, Nova Scotia to travel approximately six hours to Port aux Basques, NL and then the requirement to head north and take another ferry to the reach the coast of Labrador.

[12] Sergeant Boutilier testified that on or about 13 August 2013, while working at 8 Wing Orderly Room, she had received a periodic report from the cashier to the effect that an advance of \$600 previously provided to Master Corporal Downer was still outstanding. As a consequence of that information, she sent an email to Master Corporal Downer to request that he finalize his LTA claim to avoid recovery from his pay. She produced a printout of that email as Exhibit 3.

[13] In August 2013, Sergeant Parsons is the Chief Clerk at 2 Military Police Squadron where Master Corporal Downer is posted. She testified that on 16 August 2013, Master Corporal Downer came to see her to obtain assistance to finalize his LTA claim. She undertook the usual verifications and realized that Master Corporal Downer did not have with him either a leave pass stamped by an official at the location of travel or receipts indicating he had travelled to NL. During the discussion, Master Corporal Downer said that he did attend L'Anse au Loup, NL, but subsequently lost all documentation related to the trip when a friend cleaned up his truck after he had gotten back home. Given that information, she proposed to Master Corporal Downer to make a statutory declaration outlining these facts in the hope that it would be accepted as sufficient proof to obtain finalization of his claim. She set out to complete a statutory declaration form she had ready on her computer, on the basis of what Master Corporal Downer was dictating to her. She said she kept the Word document of that statutory declaration form on her computer and, although she uses templates, stated in cross-examination that the document was not modified by her until it was provided to authorities in the course of the investigation. She produced this document as Exhibit 6.

[14] Once the document at Exhibit 6 was completed and Master Corporal Downer was satisfied with it, Master Corporal Downer and Sergeant Parsons both headed for the office of Captain Kelly, as the declaration had to be solemnly made before a commissioned officer as stated on the form itself. Captain Kelly testified that he remembers meeting Master Corporal Downer, a fellow Newfoundlander, in his office for the purpose of a statutory declaration in the company of Sergeant Parsons. He remembers the statutory declaration form that was brought to him and, once shown Exhibit 6, he stated that, to his knowledge, it was the same document that was brought to him. He remembers chatting with Master Corporal Downer in his office and remembers asking him if he had travelled to NL, receiving a positive response. Consequently, he received the solemn declaration by signing the form, stating he had no reason to doubt Master Corporal Downer's word. He said Master Corporal Downer also signed the form, in the presence of Sergeant Parsons.

[15] Sergeant Parsons testified that following the signature of the statutory declaration in Captain Kelly's office, which she attended, she forwarded the

documentation to the 8 Wing Orderly Room and received a call from Sergeant Boutilier, informing her that the Payment Accounting Officer and Comptrollers were of the view that the statutory declaration was insufficient to provide the required justification to finalize the claim, as it was too vague in scope. As a consequence, it appears documents were returned to Master Corporal Downer.

[16] Master Corporal Sinclair testified that on 25 September 2013, she did inform Master Corporal Downer that he needed to finalize his LTA claim or the advance would be recovered from his pay. She produced a printout of her email to Master Corporal Downer as Exhibit 7. As it turns out, it appears the claim was never finalized and the advance of \$600 was recovered.

### **ISSUES TO BE RESOLVED**

[17] Before going over the applicable law and its application to the facts of this case, it is worthwhile to pause and consider what this case is about. As confirmed during final submissions, the prosecution's case on the four charges still in issue essentially rests on the same alleged act attributed to the accused; namely, to have stated on 16 August 2013 that he had travelled to L'Anse au Loup, NL on 19 July 2013, knowing that it was false. That statement constitutes the deceit at the heart of charges 1 and 2 and the substance of charge 4 and even charge 5 considering that the statement of the loss of the stamped leave pass and gas receipts is based on travel to L'Anse au Loup.

[18] Essentially then, to succeed, the prosecution must prove beyond a reasonable doubt two things: first, that the statement was made by the accused; and second, that the accused made that statement knowing it was false. If it fails, then the accused must be found not guilty of all charges. Otherwise, the analysis will continue on each essential element of the four charges still in issue.

[19] I will go over the law applicable to the assessment of the first two issues and then perform the analysis. If necessary, I will then turn to the law pertaining to the elements of the offences and analyse whether the facts demonstrate that these elements have been proven beyond a reasonable doubt.

### **THE ASSESSMENT OF THE EVIDENCE**

#### **Presumption of innocence and proof beyond a reasonable doubt**

[20] As part of the explanation on the applicable law in this case, it is important to discuss first, the presumption of innocence, then, the standard of proof beyond a reasonable doubt, two notions fundamental to findings for Code of Service Discipline and criminal trials.

[21] In this country, a person facing criminal or penal charges is presumed to be innocent until the prosecution has proven his or her guilt beyond a reasonable doubt. This burden rests with the prosecution throughout the trial and never shifts. There is no

burden on an accused to prove that he or she is innocent. An accused does not have to prove anything.

[22] What does the expression "beyond a reasonable doubt" mean? A reasonable doubt is not an imaginary or frivolous doubt. It is not based on sympathy for or prejudice against anyone involved in the proceedings. Rather, it is based on reason and common sense. It is a doubt that arises logically from the evidence or from an absence of evidence.

[23] It is virtually impossible to prove anything to an absolute certainty, and the prosecution is not required to do so. Such a standard would be impossibly high. However, the standard of proof beyond a reasonable doubt falls much closer to absolute certainty than to probable guilt. The court must not find Master Corporal Downer guilty unless it is sure he is guilty. Even if I believe that he is probably guilty or likely guilty, that is not sufficient. In those circumstances, I must give the benefit of the doubt to Master Corporal Downer and find him not guilty because the prosecution has failed to satisfy me of his guilt beyond a reasonable doubt.

[24] The important point for me as the court in this case is that the requirement of proof beyond a reasonable doubt applies to each and every essential element of the offence. It does not apply to individual items of evidence. I must decide, looking at the evidence as a whole, whether the prosecution has proved Master Corporal Downer's guilt beyond a reasonable doubt.

[25] Reasonable doubt also applies to the issue of credibility. On any given point, the court may believe a witness, disbelieve a witness, or not be able to decide. I need not fully believe or disbelieve one witness or a group of witnesses. If I have a reasonable doubt about Master Corporal Downer's guilt arising from the credibility of the witnesses or the reliability of their evidence, then I must find him not guilty.

#### *Assessment of the testimony of witnesses*

[26] The court may accept or reject, some, none or all of the evidence of any witness who testified in these proceedings. Neither credibility nor reliability is an all-or-nothing proposition. A witness can be deemed reliable on some aspects and unreliable on others. It is a given, however, that to sustain a conviction, testimony must be reliable and capable of sustaining the burden of proof on a specific issue or as a whole. The court must assess the evidence of each witness, in light of the totality of the evidence adduced in the proceedings, unaided by any presumption, except perhaps the presumption of innocence.

[27] I find that all witnesses heard by the court were credible. Some were very nervous and challenged by the task of testifying but I find that no witness exaggerated the facts. They all admitted when their memory would not allow reaching firm conclusions and none have shown any animosity towards the accused. This is not surprising as seven of the nine witnesses heard were called to produce documents they

had gained knowledge of in the course of their duties, which often involved minimal or no interaction with the accused. There were some discrepancies in the knowledge of acronyms and use of them in a consistent way, especially as it pertains to the LTA meaning "Leave Travel Assistance" as per the CBI, but referred to by one witness as HLTA and erroneously described in the charge sheet as "Leave Travel Allowance." Similar hesitations were shown with the meaning of CBI, an acronym one witness had problems spelling out. Yet, these discrepancies are minor and inconsequential to the real issues. I find that the mother of the accused testified in a very dignified manner despite the difficulty of the task imposed on her by the prosecution. She was credible on both direct and cross-examination. The lead investigator testified in a straightforward fashion, explaining the investigative steps she had taken while readily agreeing to suggestions on areas of investigations she did not pursue. She testified in a dispassionate way and without hesitation. I find she was credible.

***Type of Evidence heard in this case***

[28] The evidence heard in this case is both direct and circumstantial and I may believe or rely upon either one as much or as little as the other in deciding this case. In making my decision, both kinds of evidence count. The law treats both equally. In each case, my duty is to use my common sense and experience to decide what conclusions I will reach, based upon the evidence as a whole, both direct and circumstantial. Yet, in order to find Master Corporal Downer guilty on the basis of circumstantial evidence, I must be satisfied beyond a reasonable doubt that his guilt is the only rational inference that can be drawn from the whole of the evidence.

**ANALYSIS OF THE EVIDENCE RELEVANT TO ALL CHARGES**

***First issue: Did the accused state that he travelled to L'Anse au Loup?***

[29] I find the evidence of both Sergeant Parsons and Captain Kelly convincing to the effect that Master Corporal Downer did state on 16 August 2013 that he had travelled to L'Anse au Loup, NL on 19 July 2013 in the context of steps he was taking to finalize a claim for LTA. I also find that this statement, along with others, was reduced to writing by Sergeant Parsons in a statutory declaration which was examined and subsequently executed and signed in Captain Kelly's office. Although Exhibit 6 was admitted as secondary evidence of the original of the statutory declaration which was returned to Master Corporal Downer and not obtained, this does not make evidence of the utterance of the statements and their exact formulation circumstantial evidence. This evidence is direct: Sergeant Parsons heard these statements being made, she did reduce them in writing in a statutory declaration made at the time the statements were made, and she saw the execution of the statutory declaration by Master Corporal Downer and Captain Kelly. Her testimony to the effect that the statutory declaration was created as a Word document and kept on a computer drive she had access to and did access when requested by the investigators is credible and makes entire sense to me. Despite a vigorous cross-examination, she was unshaken in her assertions that the document was not altered in any way, even if she uses these kinds of files as templates for subsequent

statutory declarations. Indeed, it makes sense, on the basis of common experience, that a word document originating from another document be saved while keeping the source document intact. Although I could have doubts about the reliability of the assertion by Captain Kelly that Exhibit 6, which he was shown on the stand, contains the exact same words as the document he saw in his office on 16 August 2013, the evidence of Sergeant Parsons convinces me that it is the case. I find the evidence of Sergeant Parsons credible and reliable.

[30] Consequently, I find that Master Corporal Downer did state that he had travelled to L'Anse au Loup, NL on 19 July 2013 from Carrying Place, ON and returned on 24 July 2013.

***Second issue: Did the accused travel to L'Anse au Loup as he stated?***

[31] On this issue, both the prosecution and defence agree that the testimony heard and the exhibits received constitute circumstantial evidence. Indeed, no one testified to the effect that Master Corporal Downer was seen in a specific place between 19 and 24 July 2013. Such evidence may not have been easy to obtain given that he was on approved leave at the time and, therefore, presumably away from military establishments and duties. What I do find significant is evidence at Exhibit 11 that MasterCard transactions linked to one of Master Corporal Downer's accounts were made during that period in Trenton and other locations in the immediate area of Master Corporal Downer's residence in Carrying Place, ON, the location identified as "Address While on Leave" in the leave pass at Exhibit 8. I also consider the records of cell phone usage at Exhibit 14 associated to the phone number listed in Master Corporal Downer's leave passes at Exhibits 4 and 8 indicating where he can be reached while on leave. It shows calls originating and received from Trenton, ON during the period of 17 to 23 July 2013 and as stated earlier no calls originating from anywhere in NL or in places between Trenton and NL. I also find significant the testimony of Mrs Downer to the effect that she did not see her son in NL in the summer of 2013.

[32] The defence submits that the circumstantial evidence I just described does not prove anything as it is possible that Master Corporal Downer visited other persons including his father in NL, used another cell phone during his trip while leaving his cell phone and the MasterCard to a person in Trenton for use while he was away. That submission, like many things, is possible. The evidence does not show that Master Corporal Downer made purchases and phone calls during the period in question, or that he, indeed, did not travel to NL. Yet, circumstantial evidence is not radioactive. I may reach conclusions advanced by any party based upon the evidence as a whole, both direct and circumstantial. I am aware that in order to find Master Corporal Downer guilty on the basis of circumstantial evidence, I must be satisfied beyond a reasonable doubt that his guilt is the only rational inference that can be drawn from the whole of the evidence. I find that the inference the prosecution is asking me to draw from the circumstantial evidence presented is rational. It is rational to conclude from the bank and phone records in the alleged period of travel that Master Corporal Downer had not travelled to NL. Is it the only rational inference that can be made? In light of the



evidence before me, I find that it is. Even if the defence has raised hypotheses as to what may explain the phone and bank records as well as the fact that Master Corporal Downer did not meet his mother in NL, I have not been provided with any evidence through the cross examination of prosecution witnesses or otherwise that would be sufficient to support another inference than the one suggested by the prosecution. The hypotheses suggested by defence do not constitute, absent supporting evidence, other rational inferences that would allow me to displace the rational inference suggested by the prosecution to be drawn from the whole of the evidence in this case.

[33] Consequently, I find that Master Corporal Downer has not travelled to L'Anse au Loup, NL on 19 July 2013 from Carrying Place, ON as he stated he did. Consequently, I need to continue the analysis as the specific charges must now be dealt with.

### **THE LAW AND ANALYSIS OF THE CHARGES**

#### **The first charge**

[34] The first charge is laid under section 130 of the *NDA* for fraud contrary to section 380(1) of the *Criminal Code*. The particulars of the charge read as follows:

"In that he, on or about 16 August 2013, at or near 8 Wing Trenton, Ontario, did by deceit, falsehood or other fraudulent means attempt to defraud Her Majesty in Right of Canada of the sum of approximately \$600.00 by claiming Leave Travel Allowance for which he had no entitlement."

#### **Elements of the offence to be proven**

[35] The defence admitted identity of the accused at the outset of trial. During final submissions, the prosecution made clear that the act grounding charges one and two was Master Corporal Downer's statement to the effect that he had travelled to L'Anse au Loup, NL on 19 July 2013 from Carrying Place, ON and returned on 24 July 2013, knowing that this was false. I have already found that this statement was made on 16 August 2013 at 8 Wing Trenton, therefore, the elements of time and place are proven for both of these charges. That being said, the prosecution remains bound by the charges as particularized, as defence was entitled to rely on this particularization. This does not preclude making special findings should the requirements of section 138 of the *NDA* be met.

[36] Consequently, the elements that are left to be proven beyond a reasonable doubt by the prosecution in relation to the first charge are as follows, mirroring the essential elements of the fraud offence outlined by the CMAC in *R. v. Arsenault*, 2014 CMAC 8:

- (a) The prohibited act, be it an act of deceit, falsehood or other fraudulent means. On this charge the prohibited act was particularized as

"attempting to defraud by claiming Leave Travel Allowance for which he had no entitlement";

- (b) The deprivation caused by the prohibited act, particularized in the charge as a sum of approximately \$600; and
- (c) The *mens rea*, established by proof of both the subjective knowledge of the prohibited act and subjective knowledge that the prohibited act could have as a consequence the deprivation of Her Majesty.

[37] As far as the prohibited act is concerned, I have no difficulty finding that Master Corporal Downer's false statement to the effect that he had travelled to L'Anse au Loup, NL on 19 July 2013 from Carrying Place, ON constitutes an act of deceit, falsehood or other fraudulent means. I also find that the context of this act meets the charge as particularized. Being present at the desk of Sergeant Parsons after having been invited three days earlier to finalize his LTA claim, I find that he was "attempting to defraud by claiming Leave Travel Allowance for which he had no entitlement", even if the claim itself had been initiated earlier.

[38] On the second element, there is a clear link between the prohibited act and deprivation. Master Corporal Downer's false statement to the effect that he had travelled to L'Anse au Loup was provided to finalize the very LTA claim on which an advance of \$600 had been given to him, as attested at Exhibit 5 and explained by the testimony of Sergeant Dion. It is clear from Exhibit 3 that the finalization of that claim was required to avoid the recovery of the \$600 that had been advanced. That sum was owed to Her Majesty at that time and it was placed in jeopardy by the prohibited act which was aimed at transferring the property of that sum to Master Corporal Downer.

[39] As for the *mens rea*, this element requires the prosecution to prove beyond reasonable doubt the subjective knowledge of the prohibited act as particularized and subjective knowledge that the prohibited act could have as a consequence the deprivation of Her Majesty. I do believe that Master Corporal Downer must have meant to say that he travelled to L'Anse au Loup, NL and that he knew this was untrue. Having been invited to finalize his claim to avoid the recovery of the sum of \$600, he must have known that his prohibited act would have as a consequence the deprivation of Her Majesty.

[40] That being said, I am concerned about the *mens rea* element in relation to the charge as particularized as "claiming Leave Travel Allowance for which he had no entitlement". Indeed, no evidence was presented as to the specific claim in question, nor from anyone present when the claim was raised. There is no proof of any statement on the claim itself in relation to entitlement which would have been somehow acknowledged by Master Corporal Downer. There is no proof as to how exactly the approved leave pass at Exhibit 4 got specifically associated with LTA to generate the claim and the advance obtained. Indeed, there is no mention of "claim" or "LTA" on Exhibit 4, the leave pass. It seems to me that I am missing explanations on the

expression of an intention on the part of the Master Corporal Downer to claim LTA on the basis of that document, especially given that he could have chosen to claim LTA for another trip or for obtaining assistance to bring his mother to Trenton, a trip she made later in the year. Not knowing the circumstances in which Master Corporal Downer did claim LTA in the first place, I am left with a doubt as to his intentions in relation to claiming that benefit at the time the claim was raised, which is much earlier than the prohibited act alleged. In short, even if it is clear to me that Master Corporal Downer was attempting to avoid the recovery of the advance of \$600 from his pay by finalizing his LTA claim on 16 August 2013, I have a doubt as to whether Master Corporal Downer intended to be claiming, and I stress the word "claiming", LTA on that date.

[41] I believe this doubt arises logically from the absence of evidence on the claim for LTA. Even if I believe that Master Corporal Downer is likely guilty, that is not sufficient. In those circumstances, I must give the benefit of the doubt to Master Corporal Downer and find him not guilty of this charge because the prosecution has failed to satisfy me of his guilt beyond a reasonable doubt on the *mens rea* of the charge, and specifically the issue of subjective knowledge of the prohibited act; namely, particularized as "claiming Leave Travel Allowance for which he had no entitlement" Consequently, Master Corporal Downer will be found not guilty of this charge.

### **The second charge**

[42] The second charge is laid under section 117(f) of the *NDA* for an act of a fraudulent nature not particularly specified in sections 73 to 128 of the *NDA*. The particulars of the charge read as follows:

"In that he, on or about 16 August 2013, at or near 8 Wing Trenton, Ontario, having received a \$600 advance of public funds, with intent to defraud, attempted to obtain payment of Leave Travel Allowance knowing that he was not entitled to."

### **Elements of the offence to be proven**

[43] Both parties submitted that the elements of a charge under section 117(f) are essentially the same as those under a charge of fraud under section 380(1) of the *Criminal Code*. I agree. The elements already proven and those left to be proven are, therefore, the same as previously discussed in relation to the first charge. However, the particulars of the charge are different: the prohibited act is now described as "attempted to obtain payment of Leave Travel Allowance knowing that he was not entitled to".

[44] I find that this particularization of the prohibited act is much better aligned with what has actually occurred on 16 August 2013. Indeed, regardless of the specific circumstances under which the claiming of the benefit materialized sometime in April 2013, it is clear from the evidence that by 16 August 2013, the issue was payment, or at least an absence of recovery of the advance, as evidenced at Exhibit 3. Indeed, I

conclude it is that email from Sergeant Boutilier which brought Master Corporal Downer to seek the assistance of Sergeant Parsons on 16 August 2013.

[45] As for the first element as particularized, the prohibited act is, and I have no difficulty finding that it is, the false statement to the effect that Master Corporal Downer had travelled to L'Anse au Loup, NL on 19 July 2013 from Carrying Place, ON. This constitutes an act of deceit, falsehood or other fraudulent means and it was aimed at obtaining payment of LTA.

[46] On the second element, there is a clear link between the prohibited act and deprivation as explained previously. The finalization of that claim was required to avoid the recovery of the \$600 that had been advanced. That sum owed to Her Majesty was placed in jeopardy by the prohibited act.

[47] As for the *mens rea*, this element requires the prosecution to prove beyond a reasonable doubt the subjective knowledge of the prohibited act as particularized, and the subjective knowledge that the prohibited act could have as a consequence the deprivation of Her Majesty. I do believe that Master Corporal Downer must have meant to say that he travelled to L'Anse au Loup, NL and that he knew this was untrue. Having been invited to finalize his claim to avoid recovery of the sum of \$600, he must have known that his prohibited act would have as a consequence the deprivation of Her Majesty.

[48] The concerns I have expressed in relation to the first charge as it pertained to the *mens rea* of the charge as particularized are not present in relation to this second charge which particulars are no longer concerned with claiming without entitlement but rather obtaining a payment. It has been established, to the satisfaction of the court, by the testimony of Sergeant Parsons and the statements made to her and reduced in writing at Exhibit 6 that Master Corporal Downer knew that, in order to obtain payment of the LTA, he had to state that he travelled to L'Anse au Loup and state that he had lost the documentation pertaining to that trip. Without those statements, he had no entitlement and I am convinced he knew that. I am, therefore, convinced beyond a reasonable doubt that he made those statements voluntarily, that he knew he had not so travelled and, therefore, that the statements were false and that he knew that making those statements would put the financial interests of Her Majesty at risk.

[49] Consequently, Master Corporal Downer will be found guilty of charge number two. As alluded to earlier, it was noted that the particulars of that charge mention "Leave Travel Allowance" while in fact the benefit that is unquestionably the object of the charge is indeed "Leave Travel Assistance" as labelled at CBI Article 209.50. A special finding will be made in accordance with section 138 of the *NDA* as the difference in the facts has not, in my opinion, prejudiced the defence.

#### **The fourth and fifth charges**

[50] The fourth and fifth charges are laid under section 125(a) of the *NDA* for having wilfully made a false statement in a document signed by him that was required for official purposes. The document in question is the statutory declaration form, the content of which having been obtained from the computer of Sergeant Parsons and produced as Exhibit 6.

[51] The essential elements of both charges 4 and 5 are as follows:

- (a) identity, date and place;
- (b) the statement in the document was false;
- (c) the accused signed the document;
- (d) document was required for official purposes; and
- (e) the blameworthy state of mind of the accused as characterized in the particulars.

[52] I have already discussed the first three elements at length earlier in my analysis of the first and second issues and will not discuss these elements in detail again. Identity being admitted, I have found beyond a reasonable doubt, that on 16 August 2013 at 8 Wing Trenton, Master Corporal Downer signed before Captain Kelly the statutory declaration form, prepared by Sergeant Parsons at his request and produced as Exhibit 6. It contained a number of statements including the statement particularized in charge 4 to the effect that he had travelled from Carrying Place, ON to L'Anse au Loup, NL back in July 2013 and the statement particularized in charge 5 as "I did get my leave pass stamped in Lanse au Loup, by a local post office, which has been misplaced as well as all gas receipts that was paid by cash." I have also found that these statements were false for the reasons explained before. To be clear as it pertains to the statement relating to charge 5, I find that this cannot be true from the moment I found that the travel to L'Anse au Loup did not occur.

[53] As for the element that the document be required for official purposes, I find that the statutory declaration in this case is indeed one such document. It is clear from the testimony of Sergeant Parsons, reinforced by the testimonies of both Captain Kelly and Sergeant Boutilier that the statutory declaration was required to be submitted by Master Corporal Downer because he desired to obtain the LTA benefit promulgated in CBI 209.50 and, from the moment he had no receipt or stamp on a leave pass, the benefit was obtainable only after completion of that document. I am convinced beyond a reasonable doubt that the statutory declaration in this case fits within the class of documents contemplated by section 125 of the *NDA*, the document was required for official purposes.

[54] As for the final element related to the blameworthy state of mind of the accused as particularized in the charge by the words "knowing this to be false", I find that it has

been met in this case by the fact that the evidence as a whole, especially the evidence of Sergeant Parsons as to the circumstances leading to the signature of the statutory declaration, as explained earlier, reveals that Master Corporal Downer knew that the statutory declaration contained a false statement and that it was required for an official purpose; **and** engaged in the signing of it to achieve that official purpose. Indeed, Master Corporal Downer knew that in order to obtain payment of the LTA benefit, he had to sign a statutory declaration stating that he travelled to L'Anse au Loup and stating that he had lost the documentation pertaining to that trip. I am convinced beyond a reasonable doubt that he knew he had not so travelled and, therefore, that the statements were false and signed the statutory declaration anyway, specifically to obtain payment of the LTA benefit.

[55] Consequently, the prosecution has convinced me of the guilt of Master Corporal Downer on both charges 4 and 5.

[56] As discussed during final submissions, I have considered the rule against multiple convictions in relation to charges 4 and 5 and whether the accused can be found guilty of both. I have concluded that he can. Indeed, the offence at section 125(a) is concerned with statements. Many statements can be found in one document, as is the case here. The two statements found respectively in charges 4 and 5 address different requirements for eligibility to LTA: the requirement to travel, at CBI 209.50(3)(c) and the requirement to provide proof of travel, at CBI 209.50(3)(d). Furthermore, the statements relate to facts that were separated in time; the travel from 19 to 24 July 2013 and the cleaning of the truck which occurred sometime later.

[57] I have also considered whether the rule against multiple convictions could apply to guilty findings under charge 2 and charges 4 and 5. It does not. Charges 4 and 5 include an additional element not found in charges 1 and 2 and, according to the Supreme Court of Canada decision in *R. v. Prince*, [1986] 2 S.C.R. 480, a guilty finding can be sustained under each charge.

#### **FOR THESE REASONS, THE COURT:**

[58] **FINDS** the accused not guilty of charge 1.

[59] **MAKES A SPECIAL FINDING** of guilty on charge 2, as the evidence reveals that the particulars should refer to "Leave Travel Assistance", not "Leave Travel Allowance", as stated in the charge sheet.

[60] **FINDS** the accused not guilty of charge 3.

[61] **FINDS** the accused guilty of charges 4 and 5.

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#### **Counsel:**

The Director of Military Prosecutions as represented by Major J.S.P. Doucet and Major A.J. Van der Linde

Major D. Hodson and Lieutenant(N) T.N. Ticky, Defence Counsel Services,  
Counsel for Master Corporal Downer