COURT MARTIAL

Citation: *R. v. Beemer*, 2019 CM 2029

Date: 20191003
Docket: 201907

Standing Court Martial

4th Canadian Division Support Base Petawawa
Petawawa, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Sergeant D.E. Beemer, Accused

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

NOTE: Personal data identifiers have been redacted in accordance with the Canadian Judicial Council's "*Use of Personal Information in Judgments and Recommended Protocol*".

REASONS FOR FINDING

(Orally)

The case

[1] Sergeant Beemer is charged with two offences. The first charge relates to an allegation contrary to paragraph 117(f) of the *National Defence Act* (*NDA*) for an act of a fraudulent nature not particularly specified in sections 73 to 128 of the *NDA*. The second charge is for an allegation contrary to section 129 of the *NDA* for neglect to the prejudice of good order and discipline. The particulars of the charges read as follows:

> "FIRST CHARGE — AN ACT OF A FRAUDULENT NATURE
> *NDA* Section 11(f) — NOT PARTICULARLY SPECIFIED IN

	SECTIONS 73 TO 128 OF THE NATIONAL DEFENCE ACT *Particulars*: In that he, between November 9th 2016 and January 17th 2018, in the province of Ontario, with intent to defraud, received Post Living Differential allowance, which he was not entitled to.
SECOND CHARGE *NDA* Section 129	NEGLECT TO THE PREJUDICE OF GOOD ORDER AND DISCIPLINE *Particulars*: In that he, between November 9th 2016 and January 17th 2018, in the province of Ontario, failed to report a change of residential address relevant to his Post Living Differential allowance, contrary to article 26.02 of the *Queen's Regulations and Orders.*"

[2] In reaching its decision, the Court reviewed and summarized the facts emerging from the evidence and made findings on the credibility of the witnesses. I instructed myself on the applicable law and applied the law to the facts, conducting my analysis before I came to a determination on each of the charges.

Evidence

[3] The following evidence was adduced at the court martial:

(a) In court testimony of two prosecution witnesses:

i. Petty Officer 1st Class A.L. Fields; and

ii. Mr R.R. Dissanayake;

(b) In court testimony of two defence witnesses:

i. Master Corporal J. John; and

ii. Ms R. Aucoin;

(c) Exhibit 1 - Convening order;

(d) Exhibit 2 - Charge sheet;

(e) Exhibit 3 – *Queen's Regulations and Orders for the Canadian Forces* (QR&O) article 26.02;

(f) Exhibit 4 – Compensation and Benefits Instructions (CBI) Chapter 205;

(g) Exhibit 5 - Email dated 17 January 2018;

(h) Exhibit 6 – Document entitled "Post Living Differential Request/Authorization", dated 2 July 2015;

(i) Exhibit 7 – Document entitled "General Pay Allowances", dated July 2015;

(j) Exhibit 8 – Document entitled "Update Member Continuous Allowance. Post Living Differential Allce, Beemer" dated June 2015";

(k) Exhibit 9 – Document entitled "CFB Borden R&QSS";

(l) Exhibit 10 – Document entitled "Guest History Report";

(m) Exhibit 11 – Document entitled "Update Pay Arrangement";

(n) Exhibit 12 – Document entitled "View Pay Ledger Activity";

(o) Exhibit 13 - Email dated 23 January 2018;

(p) Exhibit 14 - Email dated 25 September 2019;

(q) Exhibit 15 - Bundle of two documents entitled "Requisition for Removal/Storage of Furniture and Effects" and "Household Good and Effects report" with respect to a move from Angus, Ontario to Toronto, Ontario;

(r) Exhibit 16 - Bundle of two documents entitled "Household Goods and Effects Report" and "Requisition for Removal/Storage Furniture and Effects" with respect to a move from Toronto, Ontario to Petawawa, Ontario; and

(s) Pursuant to paragraph 15(2) of the *Military Rules of Evidence* (*MRE*), the Court also took judicial notice of:

i. QR&O article 26.01;

ii. CBI 205.45; and

iii. The Court took judicial notice of the facts and matters covered by section 15 of the *MRE*.

Facts

[4] The two charges before the Court arise from Sergeant Beemer's entitlement to collect post living differential (PLD) allowance while posted to 32 Service Battalion in Toronto, Ontario. While there, Sergeant Beemer applied for and was approved to collect PLD. However, it is alleged that when he moved from the address he originally declared to be his principal residence, he failed to report this change which led to his fraudulent collection of PLD for a period of more than a year when he was not entitled.

[5] Based on the unchallenged evidence before the Court, Sergeant Beemer was posted to the Toronto area sometime in 2014. For roughly the first year, he lived with his family in Angus, outside Toronto. As a result of a marital breakdown, Sergeant Beemer moved his Household Goods and Effects (HG&E) from his former residence in Angus, Ontario, to Toronto, Ontario, closer to his place of work. Exhibit 16 confirmed that a long-haul move took place from Angus to Toronto on 18 June 2015. Exhibit 15 reveals that Sergeant Beemer's HG&E were delivered on 19 June 2015 to the destination address of 2256 Lakeshore Blvd West, Etobicoke, Ontario which was in fact a storage facility, where the accused rented a storage unit, which I will refer hereafter to as the "storage unit".

[6] Mr Dissanayake testified that he is the owner of condo 706 located at XXXX in Toronto, Ontario, which the Court will refer to hereafter as "the condo". He testified that he worked with Sergeant Beemer at 32 Service Battalion and Sergeant Beemer knew that Mr Dissanayake owned a condo that was empty. Mr Dissanayake testified that he received a phone call from Sergeant Beemer asking if he could occupy the condo as he was sorting out his move from Angus to Toronto. Mr Dissanayake agreed to help Sergeant Beemer out.

[7] Mr Dissanayake testified that shortly afterwards, Sergeant Beemer approached him and asked to rent the condo for a longer term and requested that they establish a lease. Mr Dissanayake stated that he agreed to the proposal and entered into a lease with Sergeant Beemer in June 2015. The storage unit was located within minutes of the condo.

[8] The purpose of PLD, as described at CBI 205.45(3) is to reduce the adverse financial impact on military members and their families when posted to a PLD area. A PLD area is a location in Canada within the boundaries of a place of duty where the cost of living exceeds that of the "standard city", being Ottawa/Gatineau. The PLD rates represent the monthly differential between the cost of living at the standard city and the cost of living at established PLD areas, grossed-up by the applicable marginal tax rate.

[9] The policy and administrative process for applying for and being approved for PLD are set out in CBI 205.45. CBI 205.45(19) establishes that members whose

principal residence is located in a PLD area, and who request the PLD allowance, must complete the PLD request form and submit it to their unit records support for approval and processing. In approving each request, Unit Records Support authorities will confirm that the conditions of the CBI instruction are satisfied and enter approved requests into the pay system.

[10] On 2 July 2015, as evidenced at Exhibit 6, Sergeant Beemer completed the required PLD request form and provided the lease he had with Mr Dassanayake for the condo, declaring it to be his principal address.

[11] Petty Officer 1st Class Fields testified that the purpose of the request form is to facilitate the pay clerks when sitting down with the members to brief them on their entitlement. On 2 July 2015, in making his PLD request, at Part D of Exhibit 6, the accused signed and certified the following:

> "I certify that the information given on this form is correct and complete. I understand that I must submit a new request for PLD if there is a change in my address or situation regarding joint ownership or lease of my principal residence."

[12] Petty Officer 1st Class Fields testified that the purpose of Part D of Exhibit 6 was to encourage a discussion with the applicant to ensure he or she understands that the zones in Toronto are very important as the CBIs make it clear that even if there is a slight change, it may affect a person's pay and allowances. In her testimony, Petty Officer 1st Class Fields explained that there are five different zones in the Toronto area and a slight change could lead to a significant increase or decrease in a member's entitlement to PLD.

[13] Unlike other cities, CBI 205.45 sets out five different PLD rates for locations in and around the Greater Toronto Area. They are as follows:

(a) Toronto Area 1 - $1,485;

(b) Toronto Area 2 - $506;

(c) Toronto Area 3 - $522;

(d) Toronto Area 4 - $819; and

(e) Toronto Area 5 - $1,167.

[14] Exhibit 7 revealed that the address for the condo entitled Sergeant Beemer to an allowance established for Toronto area Zone 1, being $1,485 per month, paid bimonthly which was notably the highest available PLD in both the Toronto area as well as the Canadian Armed Forces (CAF) at large. Sergeant Beemer's PLD was approved and became effective 19 June 2015.

[15] A member whose principal residence is located in that PLD area remains entitled to PLD at the rate established in the CBI for that PLD area, while they or their dependants occupy that residence. Mr Dissanayake testified that from June 2015 until November 2016, Sergeant Beemer regularly paid the rent on the condo through an automatic deposit into Mr Dissanayake's bank account. There is no dispute that during this time Sergeant Beemer occupied the condo and that he correctly received the PLD while he was residing at that address.

[16] Mr Dissanayake testified that shortly after Sergeant Beemer took occupancy of the condo in June 2015, he started receiving complaints regarding Sergeant Beemer's failure to comply with the condominium bylaws which eventually rose to the level that he requested Sergeant Beemer to leave, which Sergeant Beemer did on 9 November 2016.

[17] Exhibit 10 revealed that Sergeant Beemer checked into single quarters (SQ) at Canadian Forces Base (CFB) Borden the same day he vacated his condo, being 9 November 2016. He was charged a daily rate until he checked out on 16 February 2018.

[18] Petty Officer 1st Class Fields testified that in 2016 she assumed the position of chief clerk (CC) at the 4th Canadian Division Support Group in Toronto and was appointed as the Military Pay and Accounting Officer where she was responsible for the oversight of the administration of pay. Part of her responsibilities included the proactive prevention and detection of overpayments. This function required her to be active in reviewing the bi-monthly payroll as well as the payment of allowances, most notably she was responsible for reviewing PLD allowances to identify any anomalies.

[19] Petty Officer 1st Class Fields testified that in mid-December 2017, around the time of the junior ranks' Christmas dinner, she learned that Sergeant Beemer was living in SQ in Borden. On 15 January 2018, after the Christmas break, Petty Officer 1st Class Fields sent Sergeant Beemer an email inquiring whether the address they had on record was still current. She told the Court that she noted that Sergeant Beemer's file had not been updated as required, in the fall of 2017, under the annual readiness verification conducted yearly by Personnel Services. On 16 January 2018, in response, Sergeant Beemer wrote that he was currently between residences and applying for private married quarters in Borden. When asked to provide the location of his HG&E, he stated that it was at 2256 Lake Shore Blvd, Etobicoke, as he had moved out of the condo "last November."

[20] Petty Officer 1st Class Fields testified that based on this email exchange and an interaction she had with Sergeant Beemer in the hallway to the dirty work area at Denison Armoury, Sergeant Beemer led her to believe that he had just vacated the condo in November 2017.

[21] On 17 January 2018, Petty Officer 1st Class Fields advised Sergeant Beemer that he needed to provide her office with his new rental/lease agreement or mortgage showing his new address and start date. She explained that his PLD would be ceased and recovery action initiated as of November 2017. She testified that originally she thought the administrative action would be a recovery of the PLD for a few months that were paid out, based on the address of his condo, and that it would be replaced by the PLD Sergeant Beemer would have been entitled to at his new address.

[22] She later learned through multiple sources that Sergeant Beemer had actually vacated the condo in November 2016, over one year earlier than she originally believed.

Presumption of innocence and reasonable doubt

[23] Two rules flow from the presumption of innocence. One is that the prosecution bears the burden of proving guilt; the other is that guilt must be proven beyond a reasonable doubt. These two rules are linked to the presumption of innocence to ensure that no innocent person is convicted.

[24] The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the prosecution has, on the evidence put before the Court, satisfied me beyond a reasonable doubt that the accused is guilty on each of the charges.

[25] That presumption of innocence remains throughout the court martial until such time as the prosecution has, on the evidence put before the Court, satisfied it beyond a reasonable doubt that the accused is guilty of the charges before it.

[26] So, what does the expression "beyond a reasonable doubt" mean? The term "beyond a reasonable doubt" is anchored in our history and traditions of justice. It is so entrenched in our criminal law that some think it needs no explanation, but its meaning bears repeating (see *R. v. Lifchus*, [1997] 3 S.C.R. 320 at paragraph 39):

> A reasonable doubt is not an imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.

[27] In essence, this means that even if the court believes that Sergeant Beemer is probably guilty or likely guilty, that would not be sufficient. If the prosecution fails to satisfy the court of his guilt beyond a reasonable doubt, the court must give him the benefit of the doubt and acquit him.

[28] On the other hand, it is virtually impossible to prove anything to an absolute certainty and the prosecution is not required to do so. Such a standard of proof is impossibly high. Therefore, in order to find Sergeant Beemer guilty of the charges before the Court, the onus is on the prosecution to prove something less than an absolute certainty, but something more than probable guilt for the charges set out in the charge sheet. (see *R. v. Starr*, 2000 SCC 40, paragraph 242).

First charge

[29] The first charge before the Court alleges a violation of paragraph 117(f) of the *NDA*. Paragraph 117(f) deals with any act of a fraudulent nature. The wording of this section is purposefully broad and encompasses virtually all acts of a fraudulent nature contemplated within the *Criminal Code*. The offence entails two essential elements; namely, dishonesty and deprivation (see *R. v. Olan et al.*, [1978] 2 S.C.R. 1175, per Dickson J., at page 1182; and *R. v. Théroux*, [1993] 2 S.C.R. 5, per McLachlin J., at page 15.

[30] In outlining the essential elements of a fraud offence, the Court Martial Appeal Court (CMAC) case of *R. v. Arsenault*, 2014 CMAC 8, at paragraph 29 relied upon an analysis done by McLachlin J., as she then was, who, in the case of *Théroux*, summarized the essential elements of a section 380 fraud offence in the *Criminal Code* where she noted that:

> [T]he *actus reus* of the offence of fraud will be established by proof of:
>
> 1. the prohibited act, be it an act of deceit, a falsehood or some other fraudulent means; and
>
> 2. deprivation caused by the prohibited act, which may consist in actual loss or the placing of the victim's pecuniary interests at risk.
>
> Correspondingly, the *mens rea* of fraud is established by proof of:
>
> 1. subjective knowledge of the prohibited act; and
>
> 2. subjective knowledge that the prohibited act could have as a consequence the deprivation of another (which deprivation may consist in knowledge that the victim's pecuniary interests are put at risk).

Second charge

[31] The second charge before the Court alleges a violation of section 129 of the *NDA* for neglect to the prejudice of good order and discipline. Aside from proof of identity, time and place, the following elements left to be proven beyond a reasonable doubt for the charge are:

(a) the conduct alleged in the charge;

(b) that the neglect is prejudicial to the good order and discipline; and

(c) that the accused had the wrongful intent.

[32] Having instructed myself on the presumption of innocence, reasonable doubt, the onus on the prosecution to prove their case, the required standard of proof and the

essential elements of the offences, the court now turns to address the legal principles and the charges.

[33] As I explained earlier, the onus is on the prosecution to prove the particulars as alleged. In conducting my analysis, the court proceeded first in assessing the evidence and credibility of all the witnesses and determining whether the particulars of the charges had been made out.

Credibility of the witnesses

[34] The first witness for the prosecution was Petty Officer 1st Class Fields who was the CC and Military Pay and Accounting Officer responsible for the oversight of pay and allowances in the 4th Canadian Division Support Group during most of the time of the alleged offences. I found Petty Officer 1st Class Fields to be a consummate and well-informed professional who testified without malice, in a very straightforward manner. She was extremely well informed and precise in responding to questions and when she was not personally familiar with a document, she readily admitted it. She did not purport to possess knowledge that she did not have. She also readily admitted when her memory might be compromised due to the fact that she was posted out of her former position as CC and Military Pay and Accounting Officer and she is now working in Kingston.

[35] When challenged by the defence, she was calm and considerate. She responded thoughtfully to tough questions and was never argumentative. Most importantly, her evidence informed the documentary exhibits, most of which were entered on consent and her testimony was consistent with the evidence as a whole. I found her both reliable and credible.

[36] The prosecution's second witness was Mr Dissanayake, who was a former serving member and professional colleague of Sergeant Beemer. Importantly, based on the facts before the Court, he was Sergeant Beemer's landlord for the time period when Sergeant Beemer occupied said condo. Mr Dissanayake's evidence confirmed uncontested facts that were necessary to support the prosecution's case, such as the fact that a lease was signed, the date it started, as well as the date Sergeant Beemer vacated said condo. His evidence was consistent with the evidence as a whole as well as the documentary evidence accepted by the Court. I found him to be both reliable and credible on the facts to which he testified.

[37] Similarly, there was no issue with the credibility of the defence witnesses, being Master Corporal John and Ms Aucoin. The witnesses did nothing more than put before the Court the documents necessary to support the defence's position of the case.

First charge

Issues

[38] The critical issues for this court martial to decide are:

Actus reus

(a) Is the Court convinced beyond a reasonable doubt that the particularized conduct or *actus reus* has been proven as described?

i. Was there a change in his principal residence?

ii. Did the accused have a duty to report the change of address?

iii. Did the accused report the change in the address of his principal residence as required?

iv. Was there deprivation caused by not reporting the change?

Mens rea

(a) Did the accused have subjective knowledge of the prohibited act and did he know that he was required to report his change of address?

(b) Did the accused know that if he had a change to his principal address and he did not inform the authorities that he would continue to receive the PLD to which he was not entitled?

Position of the prosecution

[39] The prosecution submitted that on 9 November 2016, the accused moved out of his condo, which had been declared his principal residence for the purpose of the PLD allowance that he was collecting.

[40] He argued that the evidence suggests that a member is required to occupy the principal residence, which would include eating and sleeping in the dwelling.

[41] He argued that when Petty Officer 1st Class Fields checked with base accommodations in Borden, she learned that the accused first began staying in the SQ in Borden on the same day that he vacated the condo on 9 November 2016.

[42] He argued that the pay ledger activity at Exhibit 12 reveals that the accused was regularly paid the PLD allowance twice per month for approximately fourteen months before Petty Officer 1st Class Fields inquired whether his address was still current.

[43] The prosecution argued that when Sergeant Beemer applied for PLD, he certified that he understood he had an obligation to submit a new request in the event of any changes. He submitted that it was a continuous obligation that persisted as long as the accused was receiving PLD. He argued that this was Sergeant Beemer’s obligation

and his alone and it existed outside of what the unit knew or did not know. For fourteen months, twice a month, he collected the PLD and would have been aware of his duty to report that his address had changed and yet he failed to report the change.

Position of the defence

[44] Firstly, defence argued that the wording of the charge requires an act or a positive fraudulent act. He argued that a review of courts martial case law suggests that the particulars of the charges rely upon the use of action verbs such as "submitted", "fabricated", "falsely claiming", "signed a false claim". He further argued that the charge is a nullity and as a result no conviction can ensue.

[45] Alternatively, he argued that although there is uncontested evidence before the Court that the accused had access to the SQ in Borden, it is not evidence that he was in fact living there as his primary residence for PLD purposes. He argued that throughout the pivotal times, the accused's HG&E were stored at 2256 Lake Shore Boulevard West, being the storage facility. He argues that the accused's HG&E were moved into that location in June 2015 and moved out of the exact same location in August 2018, as supported by Exhibit 16, when the accused was posted to Petawawa.

[46] He further argued that the accused's estranged spouse and his daughter were both living in the Borden area and that due to the expense of staying in hotels, which ranged from $100 to $200 per night, it was far cheaper for the accused to have permanent access to a SQ on an ongoing basis so he could have ready access to his daughter. He submitted that the evidence suggested that it cost roughly $11 per night for the accused to stay in SQ, which when paid over a month is the most economical way for him to access his daughter, even if he stayed only infrequently.

[47] Finally, he argued that the verification process of entitlement should not be confused with the member's entitlement itself. He submitted that based on the CBI, as long as the accused occupied a dwelling at the place of duty, which he argued was in the geographical area, there was no requirement to own the dwelling or to even pay rent, for that matter. He submitted that the definition does not contemplate homelessness or a non-fixed address and has no temporal requirements. In other words, based on the plain reading of the CBI, defence argues, the accused could be staying at the home of family or friends, couch surfing, staying at a homeless shelter, etc. He argued that the only requirement for PLD is to have the HG&E in the place of duty.

Analysis of the first charge

[48] For the first time, in his closing submissions, defence argued that the charge is a nullity and no conviction can ensue. It is his position that the wording of the charge requires a positive fraudulent act, which he says does not exist in this case.

[49] In response, the prosecution argued that challenges to the jurisdiction of the Court are to be raised as a plea in bar of trial pursuant to article 112.24 of the QR&O. In

the Court's view, questions such as this should be raised as a plea in bar of trial before court martial formally begins and a plea is entered. I specifically asked both counsel if there were any issues to be raised as pleas in bar of trial, to which they both confirmed they did not. Once the court martial begins, there is a presumption that the Court has the necessary jurisdiction to hear the charges.

[50] The Court acknowledges that there could be evidence that comes to light during the court martial which raises doubt on whether the particulars as alleged have been proven. Based on the facts of this case, and the fact that the defence did raise this issue in the context of the particulars in the first charge, the Court will address the question.

[51] Although defence presented a summary of case law on courts martial where offences contrary to paragraph 117(f) were addressed, as he correctly noted, only three of the courts martial were contested. Further, it was noted that the CMAC guidance on this issue is scant.

[52] However, the CMAC case of *Arsenault* at paragraph 29, in outlining the essential elements of a section 117(f) *NDA* fraud offence, relied upon the analysis of McLachlin J., as she then was, in the case of *Théroux* where she summarized the essential elements of fraud under the *Criminal Code*. Further, Pelletier M.J. stated in the case of *R. v. Downer*, 2016 CM 4005 that the elements of the offence of paragraph 117(f) mirror those set out under a charge of fraud under subsection 380(1) of the *Criminal Code*.

[53] Consequently, based on this guidance from the CMAC, and the recent case of my brother judge, Pelletier M.J., it is important that this Court inform its own analysis on this question by examining the case law under subsection 380(1) of the *Criminal Code*.

[54] Subsection 380(1) of the *Criminal Code* captures a broad range of behaviour. Essentially, anyone who commits a prohibited act of deceit, falsehood or other fraudulent means, with intent to defraud and that act results in deprivation or loss is guilty of the offence of fraud. As explained above, both the CMAC and other courts martial have relied upon the evolving case law under section 380 of the *Criminal Code* in assessing allegations contrary to paragraph 117(f) of the *NDA*. Both the CMAC and my brother judge, Pelletier M.J. accepted that "an act of a fraudulent nature" includes acts of deceit, falsehood or other fraudulent means.

[55] Based on the facts of this case, the relevant comparator is that of "other fraudulent means" and the question that is being raised by defence is whether or not this term "other fraudulent means" includes acts of omission.

[56] It is true that, in Canada, early decisions with respect to fraud recognized non-disclosure as being fraudulent only when the omission was accompanied by other conduct which amounted, in law, to some form of positive action, such as deceit. In fact, prior to the Supreme Court of Canada (SCC) decision in *Olan*, referred to earlier,

which was decided in 1978, "other fraudulent means" under subsection 380(1) of the *Criminal Code* applied only to cases in which some positive conduct beyond mere silence could be found.

[57] The defence's position that the phrase in paragraph 117(f) requires an act of a positive conduct is not far-fetched. In fact, in the *Criminal Code*, the reference to "other fraudulent means" was not originally understood to include cases in which fraud was committed by omission such as when an individual breaches a duty to report or failure to disclosure, which explains why this belief exists.

[58] The SCC in *Théroux* specified that:

> In instances of fraud by deceit or falsehood … all that need be determined is whether the accused, as a matter of fact, represented that a situation was of a certain character, when, in reality, it was not.

[59] As such, non-disclosure of important facts upon which an entitlement is based may constitute dishonesty for the purposes of subsection 117(f) of the *NDA*. Whether in fact it does in a particular case will depend on whether a reasonable person considers it to be dishonest in the circumstances.

[60] In short, the law has evolved over the last thirty to forty years such that Canadian courts have recognized that a duty of disclosure and reporting can arise by virtue of the operation of legislation and regulations amongst other duties. As a result, a search of case law reveals many cases where persons breach reporting requirements imposed by social assistance, workers' compensation, and unemployment insurance statutes and regulations. In these cases, breaches by omissions have been held to fall within "other fraudulent means" in the *Criminal Code*.

[61] In more recent case law (see *R. v. Quinn*, 2007 BCPC 0321) even where a clear duty to report or disclose a material fact exists outside of statute and regulations and an individual is advanced funds which that individual would not otherwise have received had the material fact been known, then this failure to report the material fact has changed or no longer exists has been held to fall within the definition of "other fraudulent means."

[62] This begs the question as to what types of facts must be reported or disclosed once a duty to report exists. Obviously, the failure to disclose certain facts where a duty might exist does not automatically give rise to fraudulent conduct as the offence also requires some deprivation or loss to flow from the prohibited act. For example, if the accused was not receiving PLD or benefits based on the location of his principal residence, then the fact that he moved and did not report the change in his address might breach some other order or duty, but his failure to report the change would not be considered fraudulent unless that failure resulted in some identifiable deprivation or loss.

[63] However, where a member is receiving a financial entitlement, allowance or compensation based on a specific fact, then the implications of breaching a duty to report changes to that fact are different. In the case before the Court, the accused was legitimately receiving a PLD allowance, the receipt of which was predicated on the specific address of his principal residence. When he moved and his principal address changed, given that this was a material fact upon which his PLD allowance was determined, any change to his address, triggered his duty to report. Given that financial consequences flowed from the accused's failure to report, permitting him to collect the PLD, an allowance he was no longer entitled to receive, deprivation and loss ensues.

[64] It is important to keep in mind that not all failures to report material facts will amount to an act of a fraudulent nature, and available defences of negligence or inadvertence exist. There is also a reasonable period of time that a member would be given to report effective changes. Nonetheless, the case law is clear that an act of omission where there is a duty to report can amount to an act of a fraudulent nature.

Particulars and the *actus reus*

[65] The particulars of the first charge allege that between 9 November 2016 and 17 January 2018, in the province of Ontario, with intent to defraud, Sergeant Beemer received PLD allowance, to which he was not entitled.

[66] Upon review of the particulars of the first charge, there was ample evidence in the exhibits, and in the evidence of witnesses that the dates, location and identity were proven beyond a reasonable doubt.

[67] Next, the Court must assess whether the accused, with intent to defraud, received a PLD allowance, which he was not entitled to.

[68] The evidence is clear and uncontested that on 9 November 2016, Sergeant Beemer vacated the condo. The evidence is also uncontested that on the same date, Sergeant Beemer checked into SQ at CFB Borden.

[69] Prosecution submitted that effective 9 November 2016, there was a change of address that needed to be reported. He further argued that Sergeant Beemer failed to report the change of address and as a result, he continued to receive bimonthly PLD allowance to which he was not entitled.

[70] Defence's position is that it was not incumbent upon the accused to make a new application for the PLD because his situation with respect to the PLD did not change. He argued that Petty Officer 1st Class Fields automatically presumed that Sergeant Beemer was living in the SQ in Borden, but he stated that was never proven in evidence. He submitted that the way the CBI is worded, it only exempts SQ from the PLD if the SQ was situated at the member's place of duty, which the SQ in Borden is not.

[71] Further, defence counsel argued that pursuant to the CBI, the only real condition for the accused to qualify for PLD was that his HG&E be located in the place of duty. He argued that it was sufficient for the accused to couch surf or stay with friends provided his HG&E were located within the approved zone.

[72] The Court noted that although the accused presented an excellent business case for residing in the CFB Borden SQ on a full-time basis because it facilitated easy access to his daughter, it also noted that despite living in his Toronto condo for over a year, there is no evidence to suggest that he stayed at the SQ full time to facilitate access during that year. In fact, his occupancy in SQ did not begin until the exact day he vacated the condo. Nonetheless, the court will not go into an in-depth analysis as to whether I believe the accused did or did not reside in the SQ in Borden, or whether the strict wording of one of the CBI provisions alone means that a member residing in a SQ outside the member's place of duty qualifies for PLD. For the reasons that will follow, even if the Court accepted that the accused was only temporarily residing at the SQ, that fact is a corollary one.

[73] The fundamental issue for the Court to assess is the member's duty to report the fact he had vacated his condo on the date he did. Based on the policy and Exhibits 6 and 7, when he vacated the condo, he was not otherwise entitled to continue to collect PLD without submitting a new request and having it approved.

[74] On the facts before the Court, the accused applied for and collected the PLD allowance based specifically on the location of his condo. The administrative process is supported by nationally controlled formal request forms and each PLD request is specific to one principal residence only. There is no room on the form for a member to make amendments. CBI 205.45 must be read in its entirety to understand the full program. You cannot cherry-pick one provision without the context of the larger policy. The policy provides strict guidelines, but aims to protect members on many levels. For example, those members who may have purchased or leased a home relying on the approved PLD allowance will be somewhat protected as long as the member continues to occupy the approved residence and is otherwise eligible.

[75] The CBI stipulates that when regular force members are approved to receive PLD because their principal residences are situated in a PLD area, the members remain entitled to the approved PLD at the rate established in the CBI for that PLD area while they or their dependants occupy that specific residence. As such, it can be easily inferred that when the member no longer occupies the specific approved address, then the PLD entitlement for the principal residence automatically ceases and a new PLD request is required based on the address of the new residence.

[76] This is important for many reasons, but most notably because the geographical zones and the PLD allowances are constantly being reviewed and updated. A member might have been protected and grandfathered in receiving a fixed PLD for a residence in a certain location, but the updated tables may no longer provide for an allowance in that area. The member who is grandfathered under the policy is entitled to continue

receiving the approved allowance only as long as he or his dependants occupy that residence. If he or she moves, even next door, the entitlement ceases and he or she must apply under the new regime.

[77] Administratively, as described by Petty Officer 1st Class Fields, Exhibits 6 and 7 are linked together. In Exhibit 6, the accused requested a PLD and specifies his principal residence. Upon reviewing that request, staff verify the address and the applicable PLD rate based on where the home is located. As Petty Officer 1st Class Fields explained, some members have been surprised to learn that homes on one side of a street are entitled to a different rate than homes on the other side. When the member's entitlement is verified, then a General Pay Allowance form is raised, as at Exhibit 7, certifying that the member has met the eligibility requirements set out in the CBI and is entitled to the PLD for the rate specified and then the allowance is added into the member's pay record.

[78] In Sergeant Beemer's case, based on the address of the condo, the CC at the time, Master Warrant Officer Pearson confirmed that the accused was entitled to receive zone 1 PLD, being $1,485 per month, payable bimonthly on a continuous basis until there was a material change to that address. Consequently, when Sergeant Beemer vacated that condo, Exhibit 7 was no longer valid. It was linked specifically to Exhibit 6 where the accused certified his principal residence as being at the condo. When Sergeant Beemer's address changed, the underlying condition precedent of the PLD allowance did as well. It is for this reason that Petty Officer 1st Class Fields said that it was imperative that all members provide an updated address so they could minimize disruption to a accused's financial circumstances.

[79] In signing section D of Exhibit 6, the accused certified that he understood that he must submit a new request for PLD if there is a change in his address or situation regarding joint ownership or lease of his principal residence. When he applied for the PLD, this triggered a heightened duty on him to report any changes to his address as it was a material fact in the determination of his PLD allowance. Petty Officer 1st Class Fields explained why the reporting of any change is important and how even a small change could have disastrous financial consequences on a member in the Toronto area because there were five different PLD zones which all provide for different PLD amounts ranging from $506 to $1,484 per month. Petty Officer 1st Class Fields testified that the policy also requires members collecting PLD to report when there is a joint residential occupation of any type, either with another service member as a roommate or as a service couple, as that would also trigger a change to the amount of PLD to be paid out. Section D of the certification even goes so far as to make clear that situations such as joint ownership or changes to the lease are to be reported.

[80] Consequently, the defence position that it was not incumbent upon the accused to make a new request for PLD because his situation with respect to PLD did not change is not supportable. It was clear that he was no longer occupying the condo, and pursuant to the CBI, his entitlement no longer existed.

[81] The evidence suggests that Sergeant Beemer continuously paid for his condo prior to 9 November 2016. There is no suggestion in the evidence that he improperly received the PLD from June 2015 until November 2016. The fact that he may have been couch surfing, staying with friends, etc., after that time is not an acceptable excuse absolving him from his duty to at least report that he vacated the condo. He went fourteen months without reporting that he had vacated the condo, which was a duty he undertook and committed to when he applied for and was approved for a PLD.

Did Sergeant Beemer fail to report the change of address?

[82] For the purpose of the facts before this Court, in order to continue receiving a PLD after 9 November 2016, the onus shifted to Sergeant Beemer to make a new request for PLD based on an updated address for his principal residence. Without doing this, he was not entitled to collect PLD. Sergeant Beemer's principal residence needed to be declared and it needed to be a dwelling occupied by him, in Zone 1 of the Toronto area if he was to be entitled to continue collecting the PLD at the same rate. This requirement to make a request exists even if he was residing in a dwelling where he was allegedly couch surfing. The request form anticipates that members may have roommates and there is room on the form to name several.

[83] The documentary evidence shows no record of Sergeant Beemer reporting his change of address, however, there was some testimonial evidence that both the CC and the Commanding Officer (CO) of 32 Service Battalion were clearly aware that he had vacated the condo.

[84] The prosecution submitted that although the CO facilitated and may have been aware that the accused moved out of the condo on 9 November 2016, we have no way of knowing what the CO knew about the accused's PLD. For example, there was no evidence to suggest that the CO knew that the accused was receiving PLD for the condo or how the move would affect Sergeant Beemer's future entitlements. In fact, the CO was entitled to rely upon the fact that the accused was a very experienced senior non-commissioned officer (NCO) and that he knew that he needed to administratively report anything that affected his pay. The evidence before the Court also supported the fact that his PLD was not administered by the unit, which was a reserve unit, but rather it was administered by the 4th Canadian Division Support Group Toronto orderly room.

[85] Based on the fact that Sergeant Beemer was an experienced NCO, who had already made a request for PLD, he had to be aware of his obligation to report his change of address to the CC in the same office that administered his original request. His obligation to submit a new request existed outside of his duty to inform his chain of command. Any senior NCO with close to thirty years of experience would understand this. He figured out how and where to go to make his original application, so he clearly knew where he needed to go to update this information.

[86] On the evidence, Sergeant Beemer clearly breached his duty to report as specifically set out in section D of Exhibit 6 which he certified as understanding. The

court notes that when Sergeant Beemer applied for a PLD, it was at least one year after he had been posted to the Toronto area. The initial application for PLD did not occur in a blur of paperwork on the first day of his posting. In fact, he served in Toronto for a year before he applied for PLD so he would have become familiar with his entitlement to PLD and Mr Dissanayake confirmed for the court that it was something that they specifically discussed when Sergeant Beemer requested a lease. The accused knew exactly what he was doing, when he moved his HG&E to Toronto in June of 2015.

[87] In this case, the element of deprivation is established by proof of payments of the PLD allowance deposited into Sergeant Beemer's bank account to which he had no entitlement and which deprived Her Majesty of public funds. Sergeant Beemer knowingly accepted these payments and used the money for his personal benefit.

Summary of *actus reus*

[88] The uncontested evidence before the Court was that Sergeant Beemer vacated his principal residence on 9 November 2016 and failed to report his change of address. The evidence at Exhibit 12 was also uncontested and supports the fact that he continued to receive the monthly PLD allowance for a principal residence which he did not occupy.

[89] Given the accused's experience in the CAF and his understanding of the PLD in the Toronto area, the court finds he understood that when he vacated his condo, that he was required to update his address. The act of accepting a PLD allowance for a principal residence while he was not occupying said residence would, in the eyes of a reasonable person, be considered to be a dishonest act. That finding of dishonesty, leading to the deprivation of government funds, and together with the prohibited act, constitute the *actus reus* of the offence.

Mens rea

Analysis of mens rea

Did Sergeant Beemer have subjective knowledge that he had to report his change of address?

[90] The evidence relevant to assessing whether the accused had subjective knowledge that he should be reporting his change of address are:

(a) Exhibit 6, the original PLD request, which makes it clear that if there was a change of address, ownership, lease arrangements etc., the accused had to report it and make a new request. On 2 July 2015, he signed this form acknowledging that he understood this requirement; and

(b) Petty Officer 1st Class Fields made it clear that although she was not the CC at the time Sergeant Beemer made his application, the staff were well

trained and briefed all members on their responsibilities and their need to submit a new request if the member moved or their address changed.

[91] On the weight of evidence, I find that the prosecution has proven beyond a reasonable doubt that Sergeant Beemer had subjective knowledge of the prohibited act.

Did Sergeant Beemer know that if he had a change to his principal address and he did not inform the authorities that he would continue to receive the PLD to which he was not entitled?

[92] The Court considered the following evidence:

(a) Exhibit 7 makes it clear that once approved, the allowance was continuous such that the member would continue to receive it until the member reports a change;

(b) Exhibit 8 indicates that the end date on the entitlement of the PLD Allowance was set to 9999 to ensure that there was no interruption of the allowance;

(c) Exhibit 5 indicates that when Petty Officer 1st Class Fields inquired about his change of address, the accused did not provide a direct answer other than to confirm that his HG&E was in storage;

(d) Petty Officer 1st Class Fields also noted upon her review of Exhibit 9 that the accused was not paying for his SQ out of his CCPS (pay account) which is the norm. She explained that there is a mechanism in the pay account that does not permit a pay office to deduct for SQ while the member is receiving PLD because the system does not permit both at the same time. The Court found the direct pay approach by Sergeant Beemer a bit odd as Petty Officer 1st Class Fields also noted that based on the accused's pay records, he had a lot of pay allotments, which shows that he tended to manage most of his expenses by paying them directly off his pay, as he did when paying his rent to Mr Dissanayake;

(e) As a senior NCO, making an application for a PLD, the accused would have read and understood CBI 205.45 that indicated that the PLD in the Toronto area was contingent on the member occupying a principal residence located in one of the zones, with varying PLD rates ranging from $506 to $1,485; and

(f) Further, while being pressed by defence counsel, Petty Officer 1st Class Fields explained that shortly after the email exchange she had with Sergeant Beemer in early 2018, he approached her aggressively in the hallway to the dirty work area and asked her what she was doing. She

> said that his chest was up against her and it was so tense that another warrant officer came out of his office to inquire if everything was okay.

[93] Defence counsel suggested that the accused understood that he was entitled to collect PLD because his HG&E was located in a storage unit in Zone 1. However, as prosecution suggested, if all that was required to collect a PLD was to have your HG&E in a storage facility at the place of duty, then arguably that is what the accused would have put on his request when he first applied and he would not have asked Mr Dissanayake for a lease.

[94] Similarly, if Sergeant Beemer legitimately believed that was all that was required, after he moved out of the condo he would have dropped by the orderly room and updated his address to the storage unit, but he did not do that either. Further, if a storage locker in the zone was all that was required, he would have had no reason to confront Petty Officer 1st Class Fields in such an aggressive manner.

[95] In the instant case, in weighing all the above evidence, the Court found that Sergeant Beemer intentionally decided not to report the fact that he had vacated the condo, and that omission permitted the erroneous representation of a situation that was of a certain character, being that he was still occupying the condo in a Zone 1 PLD area, when, in reality, he was not. The fact that he moved from the residence upon which his allowance was based was a material fact. As a result of not reporting the change, he was paid funds for which he was not entitled.

[96] Based on the whole of the evidence that the Court accepts, it finds that the prosecution has proven beyond a reasonable doubt the *mens rea* of the offence before the Court.

Conclusion on the first charge

[97] I find that the prosecution has proven beyond a reasonable doubt the first charge before the Court.

<u>Second Charge</u>

Analysis of the facts

[98] With respect to the second charge, the first step is to determine if the particularized conduct occurred; namely in that the accused, between 9 November 2016 and 17 January 2018, in the province of Ontario, failed to report a change of residential address relevant to his PLD allowance, contrary to article 26.02 of the QR&O.

[99] Based on the evidence and reasons provided supporting the identity, date and location of the alleged offence set out in the first charge, the Court finds that the prosecution has proven these elements beyond a reasonable doubt.

[100] QR&O article 26.02 states that members are required to:

> notify their commanding officer in writing of changes in their family status and of the occurrence of other domestic events that might affect the member's pension, annuity, pay, allowances, benefits or expenses and the commanding officer shall report to National Defence Headquarters any circumstances that might bring the member's eligibility into doubt.

[101] The prosecution submits that based on the following evidence, Sergeant Beemer failed to notify the CO in writing:

(a) The testimony of Mr Dissanayake. Mr. Dissanayake confirmed that based on his interactions with the CO and the CO's assistance in encouraging the accused to vacate the condo, the CO was aware that Sergeant Beemer moved from the condo in November 2016. However, Mr. Dissanayake did not confirm whether the CO was aware of the accused's entitlement to PLD or what the accused needed to do to report the follow up change. The prosecution argued that a CO cannot discharge his or her functions alone. In practice, the administrative follow up needed is delegated and handled by those members with the responsibility to resolve the issues. As an example, when Petty Officer 1st Class Fields was notified of the change, she acted immediately to inquire further and resolve the issue; and

(b) The prosecution argued that the Exhibit 6 was the proper mechanism to report changes, by submitting a new PLD form. Although there is no evidence that the accused submitted a new PLD form, there is also no evidence that he submitted any form in writing to the CO either.

[102] In response, defence argued that with respect to the second charge, the accused is not being charged with failing to report on the duty set out in Exhibit 6, but rather he is charged with not reporting in writing to his CO under QR&O article 26.02. He further argued that if the Court finds that it was the same duty to report, then there is a *Kienapple* (see *Kienapple v. R.* [1975] 1 S.C.R. 729) or *res judicata* argument that exists.

[103] Defence argued that there was a clear bifurcation of administrative responsibilities between the unit and 4 Canadian Division Support Group Toronto and without some coordination of sorts, we have no idea what was provided to 32 Service Battalion itself. He argued that there was no evidence provided by the unit that Sergeant Beemer did not advise them in writing of the change to his primary residence.

[104] In his submissions, the prosecution invited the Court to conclude that if it finds that Sergeant Beemer did not fulfil his duty to report under the first charge that it would follow that he would not have met the duty under the second charge. In the prosecution's assessment of the first charge, the Court found that the accused did fail to

report a change of his residential address relevant to his PLD allowance, however, the Court is sensitive to the nuance highlighted by defence.

[105] In the Court's assessment, the first charge was focused on the accused's duty that was specifically triggered under the PLD allowance policy. The accused had a specific duty, while in receipt of PLD to report any change of address directly to the 4 Canadian Division Support Group orderly room where the PLD for all members supported by them was managed and administered. Whereas QR&O article 26.02 sets out a broader duty to report all changes that a member has that will have an effect on a member's pension, annuity, pay, allowances, benefits or expenses to the CO of 32 Service Battalion. It is the Court's view that the duty to report the change of address on the PLD to the requisite authority, being 4 Canadian Division Support Group orderly room, is in fact a duty separate and distinct from the duty Sergeant Beemer had in reporting the same change to the CO as set out in QR&O article 26.02.

[106] As the prosecution argued, the duty owed to report changes to a CO is an important one. In the Court's view, based on the issue of a change of address, the duty to report to a CO serves as a safety net to ensure that members are proactive in all personnel matters. It is not expected that the CO himself or herself will personally address the issue, but their staff will ensure that any requisite administrative follow-up action is taken. This QR&O article serves to ensure that the best interests of CAF members are always being considered by his or her chain of command.

[107] For the above reasons, this Court is of the belief that a *res judicata* argument does not exist as there are two different duties to report the change that existed in Sergeant Beemer's case.

[108] However, although the Court found that two duties existed independently, it is important not to conflate the fact that neither of the two different reporting obligations were met, simply because one was not.

[109] In most cases, this nuance of reporting to the CO or the orderly room administering a PLD would be of little significance; however, as Petty Officer 1st Class Fields explained in her testimony, and defence counsel mentioned in his submissions, the Denison Armoury houses a number of different organizations and units with serving reservists and regular force members and there are multiple orderly rooms that perform different functions. An orderly room supporting a reserve unit such as 32 Service Battalion would concentrate its administrative efforts on very different issues than that of the orderly room of the 4 Canadian Division Support Group that primarily supports regular force members and Class B and C reservists and provided oversight over the PLD allowances that most reservists would not qualify for.

[110] We know from the testimony of Mr Dissanayake that the CO was aware of Sergeant Beemer's move prior to 9 November 2016. From Petty Officer 1st Class Field's testimony, we also know that the CC of 32 Service Battalion knew that Sergeant Beemer was no longer living at the condo. However, there was insufficient evidence to

confirm how the CO and the CC each learned of this fact. There was also evidence that there had been a change in the CC of 32 Service Battalion at some point.

[111] Petty Officer 1st Class Fields testified that she had a conversation with the CC to the effect that if he knew and was aware that the accused had moved, why did he not do something? She told the Court that the CC for 32 Service Battalion had just started in the position and her conversation with him was primarily to ensure that he understood his responsibility to notify her office immediately when he becomes aware that the principle address of one of the battalion members has changed.

[112] There was clear testimony and documentary evidence before the Court that Sergeant Beemer did not report his change in address to the 4th Canadian Division Support Group orderly room as required. However, the same level of evidence was not presented to provide the Court with confidence that the accused did not report the change in writing to the CO of 32 Service Battalion. Although the Court is of the belief that Sergeant Beemer probably did not report the change in writing to the CO of 32 Service Battalion that is not sufficient.

[113] Further, based on the evidence provided by Petty Officer 1st Class Fields, I have some doubt believing that even if Sergeant Beemer did report the change in writing to his unit, that his unit took the requisite action to report it to the orderly room and the CC for the 4th Canadian Division Support Group. This court is not convinced that the new CC of the reserve unit originally understood the consequences of not updating this information with the CC of another orderly room. As such, the Court cannot infer that because the 4th Canadian Division Support Group orderly room did not receive notification of the change directly from the 32 Service Battalion, that Sergeant Beemer had not informed them.

Conclusion on the second charge

[114] I am left with reasonable doubt as to whether the accused failed to report his change in address in writing to his CO and, consequently, there is no requirement for the Court to conduct further analysis.

FOR THESE REASONS, THE COURT:

[115] **FINDS** Sergeant Beemer guilty of the first charge, contrary to paragraph 117(f) of the *NDA.*

[116] **FINDS** Sergeant Beemer not guilty of the second charge, contrary to section 129 of the *NDA* as listed on the charge sheet.

Counsel:

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

Major A Bolik, Defence Counsel Services, Counsel for Sergeant Beemer