COURT MARTIAL

Citation: *R. v. Berlasty*, 2019 CM 2020

Date: 20190825
Docket: 201871

Standing Court Martial

Major F.A. Tilson, VC Armouries
Windsor, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Corporal J.P.S. Berlasty, 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] Corporal Berlasty is charged with one offence under 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 particulars of the charge read as follows:

> "In that he, between August 1st and October 31st 2014, in the province of Ontario, with intent to defraud, received Reserve Force injury

> compensation while being gainfully employed as a civilian during his period of incapacitation."

[2] In reaching the Court's decision, I 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 an analysis before I came to a determination on the above charge.

Evidence

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

(a) In court, testimony of the prosecution witnesses:

i. Captain Othmer;

ii. Mr Loiselle;

iii. Lieutenant Rovere; and

iv. Mr Kitching.

(b) In court testimony of Corporal Berlasty testifying in his own defence as well as Ms Harrington testifying for the defence;

(c) Exhibit 1 - Convening order;

(d) Exhibit 2 - Charge sheet;

(e) Exhibit 3 - Admissions made by the defence pursuant to *Military Rule of Evidence* 37(b);

(f) Exhibit 4 - Investigating Officer's Report for Reserve Force Compensation Application XXXX Cpl JPS Berlasty;

(g) Exhibit 5 - Email dated 19 June 2014;

(h) Exhibit 6 - Form acknowledging the disability and compensation advance, dated 26 June 2014;

(i) Exhibit 7 - Medical Doctor's Statement;

(j) Exhibit 8 - CFHS Chit;

(k) Exhibit 9 - Member's Statement;

(l) Exhibit 10 - Email Subject: FW: Annex B 102 Berlasty Cpl 31 Svc Bn Windsor;

(m) Exhibit 11 - Email Subject: RES F INJURY COMPENSATION CPL BERLASTY;

(n) Exhibit 12 – DND – Revised Pay System for the Reserves Master Pay Record Report;

(o) Exhibit 13 – CD entitled "R. v. Berlasty (Retired) Initial Disclosure";

(p) Exhibit 14 – Photograph of a building; and

(q) The Court also took judicial notice of the facts and matters covered by section 15 of the Military Rules of Evidence (MRE).

[4] Pursuant to MRE 37(b), for the purpose of dispensing the prosecution from having to prove these facts beyond a reasonable doubt, the accused, Corporal Berlasty, made the following admissions:

a. the identity of the person having committed the alleged offence, as indicated in the particulars of the charge sheet dated November 9th, 2018;

b. the date of the alleged offence, as indicated in the particulars of the charge sheet dated November 9th, 2018; and

c. the place of the alleged offence, as indicated in the particulars of the charge sheet dated November 9th, 2018.

Background

[5] In July 2013, while serving as a cook on a temporary tasking in Calgary, Alberta, in support of the Canadian Armed Forces' (CAF) assistance to flood efforts, Corporal Berlasty injured his ankle. At the time, his injury was treated by a military medic and diagnosed as not serious. On 27 July 2013, upon completion of his tasking, Corporal Berlasty returned to his home unit in Windsor, Ontario.

[6] During the relevant time frame of the charge before the court, Captain Othmer was the Officer Commanding (OC) the Windsor Support Company where Corporal Berlasty served as a Class A reservist in Windsor, Ontario. Captain Othmer testified that he learned during his investigation that when Corporal Berlasty returned back from Calgary to the unit, he was fit and not subject to any Military Employment Limitations (MELs).

[7] In November 2013, Corporal Berlasty testified that while leaving his place of residence and making his way down a staircase to the street, he slipped on ice and rolled his ankle exacerbating his earlier ankle injury sustained while he was serving in Calgary in July 2013. Although there was no independent medical evidence before the Court on the exact nature of the injury, Corporal Berlasty testified that he immediately sought medical assistance through civilian authorities, had X-rays and an ultrasound that he said revealed a third degree sprain in his ankle.

[8] Captain Othmer testified he was not aware of Corporal Berlasty's original injury until he reinjured himself in November 2013. Captain Othmer explained that he was responsible for helping Corporal Berlasty seek assistance for his injury through the Reserve Force Compensation (RFC) program that had just been introduced as a benefit within the CAF. He explained that RFC is meant to assist members who have full-time jobs outside the CAF and are injured while on service compensating them for lost wages similar to that of Workplace Safety and Insurance Board's (WSIB) mechanisms.

[9] The RFC program is available for members of the reserve force serving on Class A, B or C service who are incapable of returning to full time work due to an injury, disease or illness that is attributable to their military service. Incapacitated members are entitled to RFC when the service injury or illness continues beyond the termination of the class of reserve service during which it occurred.

[10] Captain Othmer testified that prior to staffing the application for the accused, he had only staffed a handful of applications, which he estimated to be approximately ten. He explained that as the OC of the unit, he did everything he could to help Corporal Berlasty. When Corporal Berlasty advised the unit that he had reinjured his ankle, they sent him to the Medical Inspection Room (MIR) in London for evaluation and treatment while at the same time seeking the CF 98 form that recorded his earlier injury in Calgary as well as any other source documentation that would be helpful to link his injury to his military service.

[11] Captain Othmer described that the RFC approval process begins with the confirmation that the member has been incapacitated as a result of an injury that occurred during the member's military service. Claims for RFC are then processed in accordance with the relevant Compensation and Benefit Instructions (CBI). The actual request for RFC must be initiated by the member's parent unit who complete the requisite forms. When the forms have been completed, they are staffed through the chain of command to the Director Casualty Support Management (DCSM). The required forms must include the details of an investigation as well as the formal application for RFC.

[12] On 9 May 2014, Captain Othmer, submitted his Investigating Officer's Report to commence and substantiate Corporal Berlasty's RFC application. In his correspondence, he acknowledged the delay, clarifying that it had been caused by a number of issues, including the need to retrieve the member's original CF 98 form from Calgary, as well as the delay encountered in receiving the necessary medical

documentation from the MIR. For the purposes of the application, a medical officer (MO) must complete a statement which sets out the member's MELs and determines if the incapacitation arose from an injury, disease or illness attributable to military service. In addition, it sets out the medical treatment, the period of incapacitation and the prospects of the member being returned to work in a CAF Return to Work (RTW) program as well as the member's prognosis. It also sets out a reassessment date and projected end date of the disability. The Medical Doctor's Statement is referred to as Annex A to the member's application.

[13] In order to complete the application, the member must sign a Member's Statement which is referred to as Annex B to the application. With respect to the charge before the Court, on 7 August 2014 Corporal Berlasty signed the Annex B statement declaring that he was incapacitated as set out in the Medical Doctor's Statement. The statement required him to confirm three things, the pivotal one being that he was not gainfully employed as a civilian prior to / during the period of incapacitation set out at Annex A.

[14] Corporal Berlasty testified that he met with Captain Othmer when he signed the Annex B. He stated that Captain Othmer read out the conditions to him and filled in the boxes based on his answers. During that meeting, Corporal Berlasty testified that he signed the Annex B and answered questions. In signing his statement, the annotation also required that Corporal Berlasty confirm he had been informed of the Government Employees Compensation Act and that he understood that he may only receive compensation under one of the two programs available to him.

[15] When Captain Othmer was asked by counsel what would happen if a member answered "yes" to being gainfully employed either before or during the period of incapacitation, he explained that he would have to inquire further as to how it would affect the amount of the RFC. He further clarified that it would not necessarily mean that the member was ineligible for RFC, but the income earned would be factored into the RFC entitlement.

[16] For clarity, the evidence as a whole suggests there were two consecutive periods of incapacitation approved with two different sets of Annex As and Bs. Firstly, although not entered into evidence, the exhibits refer to the original Annex A signed by the MO on 24 April 2014, which reflected a period of incapacitation from 24 April to 31 July 2014. Secondly, when the member was reassessed on 31 July 2014, the MO approved a second period of incapacitation of 90 days extending from 1 August to 31 October 2014. All the evidence before the Court suggests that when the RFC extends beyond 90 days, a new Annex A must be completed and certified by the MO. There were no further annexes entered as evidence that extended Corporal Berlasty's benefits beyond 31 October 2014.

[17] Although all applications for RFC were to be staffed to DCSM, advances up to three months could be approved at the Division level, which in this case was the 4th Canadian Division Headquarters.

[18] On 19 June 2014, while Corporal Berlasty was awaiting the approval of his first payment of the RFC, in an email, the G1 from 4th Canadian Division Headquarters approved an advance RFC payment for 90 days, for the period of 24 April to 31 July 2014 where it annotated it would be reduced by the days he may have been employed on Class A service. Captain Othmer testified that he had tried to get the RFC backdated further, but it was not approved. The G1's email strongly emphasized, in bold, that the member is to be advised and needs to acknowledge in writing that he was briefed, that the advance will be recovered should the Minister deny the application for RFC. The same email also emphasized it was imperative that the G1 be notified if the member is placed on an approved CF RTW program or is capable of returning to duty, even on a limited basis.

[19] As required, on 31 July 2014, the medical doctor reassessed Corporal Berlasty's medical condition. The MO signed Annex A, which confirmed at paragraph 4 of Exhibit 7 that the member could not return to his civilian employment and was also medically unfit to return to unrestricted military duties. At paragraph 5, of Annex A, the member was recommended for participation in a CF RTW, but it was also annotated with a note saying "civilian environment". Captain Othmer testified that the CF RTW program is a military agreement made between the MO, the Integrated Personnel Services Centre or Joint Personnel Support Unit (JPSU), the member and the supervisor. Such an agreement would stipulate how many hours a member can work, what he or she can or cannot do and permits the member to ease back to work.

[20] On 31 July 2014, the MO projected the end date of Corporal Berlasty's disability to be between three and six months. In the Comments box, it stated, "Member worked as general labourer pre injury - unable to return to this employ as still unable to stand for prolonged periods of time do [sic] to service related [sic] injury". Annex A was signed by the MO on 31 July 2014. For a longer-term prognosis, the member was to be reassessed two months later at the end of September 2014. There was no evidence to suggest that a medical follow-up occurred as required.

[21] At paragraph 2 of the MO's Statement, Annex A refers directly to the Canadian Forces Health Services (CFHS) Chit, dated 31 July 2014, entered as Exhibit 8. The MELs state firstly that with respect to medical employment limitations, the member could return to duty with limitation beginning Thursday, 31 July 2014. Under geographical limitations, it stated that the member required periodic medical follow-up more frequently than every six months and regular access to medical services such as physiotherapy and laboratory facilities. With respect to his occupational limitations, it provided the following limitations:

> "PT limited in type, duration, intensity or frequency
>
> Unfit forced/ruck marching

> Unable to do high impact activities (running, jumping, stop and go sports)
>
> May work: 4 hours per day 5 day(s) per week
>
> Unfit operational environment
>
> Unfit work in any military environment
>
> Unable to perform drill and parades for at least 30 minutes
>
> Unable to safely handle and effectively operate a personal weapon
>
> No prolonged standing greater than 15 min
>
> no access to live ammunition or explosives”

[22] As Captain Othmer testified, since the MO determined that Corporal Berlasty was unfit to work in any military environment, he could not be returned to duty with respect to the other conditions set out in the MELs. Further, the member was recommended to undergo physical training as directed by a healthcare professional and to take physiotherapy.

[23] Lieutenant Rovere, formerly Corporal Rovere, a military cook, worked regularly with Corporal Berlasty at the Windsor Garrison. Corporal Berlasty testified they also worked together full-time for a year in Petawawa, when they were completing their Level 4 qualifications. They knew each other as colleagues. Lieutenant Rovere told the Court that when she noticed that the accused was not showing up for work, she specifically inquired as to his whereabouts and was advised that he was injured. She later learned he was receiving RFC.

[24] At some point in late September 2014, after the fall semester of school had started, then Corporal Rovere drove by a worksite where she recognized Corporal Berlasty. Knowing that he was supposed to be injured and unable to work, she drove by the site a second time and took a photo, which is Exhibit 14. The photo shows Corporal Berlasty on a worksite with two other individuals. Lieutenant Rovere described seeing a group of men together with one of them pointing to a specific area on the building. Under cross-examination, Lieutenant Rovere admitted that she did not see any tools in Corporal Berlasty’s hands.

[25] Both Mr Kitching and Mr Loiselle testified that Corporal Berlasty worked with them. Mr Loiselle testified Corporal Berlasty asked to be and was paid in cash.

[26] Corporal Berlasty provided a diametrically opposed version denying ever having worked for Mr Loiselle or his company.

[27] On 31 July 2015, Mr Loiselle was charged and later pleaded guilty to the offence of assault arising from an altercation he had with Corporal Berlasty. In their respective testimonies, both Mr Loiselle and Corporal Berlasty acknowledged that Corporal Berlasty was not charged for his part in the altercation.

[28] Based on the video entered in as evidence, Mr Loiselle met with the military police investigator in August 2015 and provided a statement.

<u>The charge</u>

The elements of the offence

[29] Paragraph 117(f) of the *NDA* 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 SCR 5 at page 15).

[30] It was submitted by counsel that the elements of the offence of paragraph 117(f) of the *NDA* mirror those set out under a charge of fraud under subsection 380(1) of the *Criminal Code* as determined by Pelletier M.J. in *R. v. Downer*, 2016 CM 4005.

[31] In outlining the essential elements of a fraud offence, the Court Martial Appeal Court case of *R. v. Arsenault*, 2014 CMAC 8, described at paragraph 29:

> [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).

Position of the prosecution

[32] It is the prosecution's position that this case is about an abuse of trust. At first, Corporal Berlasty was legitimately receiving RFC, and it was just enough. The prosecution argued that in August 2014, after Corporal Berlasty reunited with Ms Harrington, and learned that his family would increase from one to three, what was enough for him was no longer sufficient. It is the prosecution's position that Corporal

Berlasty had time on his hands and learned of a job opportunity close by that could provide additional revenue, in cash, for his family. In accepting work for cash only, he could avoid the risk of a Record of Employment and at the same time avoid losing his RFC entitlement.

[33] It is the prosecution's position that Corporal Berlasty was well aware that he could not be gainfully employed and collect full RFC, but he did and when he failed to report it, he broke the trust of the people who tried to help him in his time of need.

[34] The prosecution argues that the evidence reveals, beyond a reasonable doubt, three pivotal facts relevant to the prohibited act:

(a) Corporal Berlasty was gainfully employed by Mr Loiselle during the period of relevance;

(b) Corporal Berlasty was receiving RFC; and

(c) Corporal Berlasty failed to inform his chain of command of the change in his employment situation.

[35] Further, the prosecution argues that the evidence reveals, beyond a reasonable doubt, the following *mens rea* elements having been met:

(a) Corporal Berlasty had subjective knowledge of the prohibited act, as he knew, if he was gainfully employed as a civilian while receiving RFC, he would no longer be entitled to receive the full RFC amount; and

(b) Corporal Berlasty knew that if he was gainfully employed as a civilian and he failed to inform his chain of command of this fact he would continue to receive full RFC that he was not entitled to, putting the economic interests of Her Majesty at risk.

Position of the defence

[36] The position of the defence is that Corporal Berlasty should be found not guilty because there is sufficient reasonable doubt based on the evidence before the Court arising from three sources:

(a) lack of credibility and reliability of Mr Loiselle, the prosecution's main witness, which speaks to the *actus reus* of the offence;

(b) reasonable doubt with respect to two essential elements of the offence, being deceit used to cause a deprivation and the intent to defraud; and

(c) even if the court does not accept Corporal Berlasty's evidence that he was not working, defence argues there is sufficient reasonable doubt

with respect to the dates and the timeline of the charge, particularly rooted in Mr Loiselle’s evidence.

Presumption of innocence and the standard of proof beyond a reasonable doubt

[37] Before providing an assessment of the charges before the Court, it is appropriate for the Court to deal with the presumption of innocence and the standard of proof beyond a reasonable doubt.

[38] It is important to remember that the accused, Corporal Berlasty, enters these proceedings presumed to be innocent. The burden of proof with respect to the charge remains on the prosecution. That presumption of innocence remains throughout the case until such time as the prosecution has, on the evidence put before the Court, satisfied the Court beyond a reasonable doubt that the accused is guilty of the charge before it.

[39] It is important to note that a trial judge must not “apply a stricter standard of scrutiny to the evidence of the accused than [it does] to [the] evidence of [the] complainant.” (see *R. v. H.C.*, 2009 ONCA 56, paragraph 62). The prosecution’s case is not made out simply because the testimony of one witness might be preferred to the testimony of Corporal Berlasty. In fact, it is possible to not believe some of what Corporal Berlasty has testified to, but still be left in doubt as to whether the prosecution has established each of the elements of the offence beyond a reasonable doubt.

[40] 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, yet its meaning bears repeating. In *R. v. Lifchus*, [1997] 3 S.C.R. 320:

> 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.

[41] In essence, this means that even if I believe that Corporal Berlasty is probably guilty or likely guilty, that is not sufficient. In those circumstances, I must give the benefit of the doubt to him and acquit because the prosecution has failed to satisfy me of his guilt beyond a reasonable doubt.

[42] 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.

[43] Therefore, in order to find Corporal Berlasty guilty of the charge 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] 2 S.C.R. 144, paragraph 242).

Assessing conflicting versions

[44] With respect to the prohibited act that underpins the charge before the Court, Corporal Berlasty and the prosecution's main witness, Mr Loiselle, gave diametrically opposed versions as to whether Corporal Berlasty worked for Mr Loiselle and, if he did, whether Corporal Berlasty was paid for the work.

[45] In assessing a case with competing versions of what happened, where credibility is a central issue and the accused has testified, the Supreme Court of Canada (SCC) provided guidance in applying the reasonable doubt concept. It recommends that a trial judge consider the evidence of the accused in three steps, commonly referred to as the *W.(D.)* test to assist the court in identifying reasonable doubt in the context of conflicting testimonies. The three steps are:

> (a) first, if you believe the evidence of the accused, obviously you must acquit.
>
> (b) Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
>
> (c) Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[46] Further, in *Regina v. C.W.H.*, 1991 3956 (BC CA), Wood JA suggested an addition to the second part of the three-part test set out in R. v. W.(D.), [1991] 1 SCR 742. At paragraph 50 of *R. v. C.W.H.*, supra, his Lordship said:

> If, after a careful consideration of all of the evidence, you are unable to decide whom to believe, you must acquit.

[47] A court martial is not an inquiry to determine what happened. We may never know. It serves only to determine whether the prosecution has proven the elements of the offence before the court, beyond a reasonable doubt. The *W.(D.)* framework aims to prevent a conviction where reasonable doubt exists.

[48] Of course, the above tests taken alone are oversimplifications of the analysis that a trial judge must undertake. And quite often the judge has to apply the W.(D.) test in various stages, the critical elements or vital points of the decision making process such as the "elements of the offence" or the "elements of a defence".

[49] What this means is that if there is evidence on vital issues where the accused is believed, then it could raise a reasonable doubt on what the prosecution is required to prove beyond a reasonable doubt to secure a conviction. (see *Doubt about Doubt: Coping with R. v. W.(D.) and Credibility Assessment*, 22 Can.Crim.L. Rev.31 at page 5)

[50] In *R. v. Haroun* [1997] 1 S.C.R. 593, Sopinka J. writing in dissent, observed that the *W.(D.)* framework applies not just to the testimony of an accused, but it also applies to defence witnesses other than an accused, such as Ms Harrington. In addition, it applies to any of the prosecution evidence that favours the accused on vital issues. In short, the rule applies to any exculpatory evidence regardless of the source, which means it applies to anything that indicates that an accused could be innocent or gives an accused favour in terms of the facts.

[51] Generally, the outcome of a trial where there are diametrically opposed positions, will depend on the reliability and credibility of the evidence given by the witnesses. The appropriate approach to assessing the standard of proof is to weigh all the evidence and not assess individual items of evidence separately.

[52] 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 offence, I now turn to address the legal principles and the charge.

Credibility of witnesses

Accused's evidence

[53] The accused testified that in July 2013, while serving in Calgary (assisting the civilian authorities with respect to the flood in the inner city), he tripped over a slip line and sprained his ankle, an injury which he says was assessed at the time to be a second degree strain.

[54] He told the Court that he reinjured this same ankle in November 2013 when he slipped on ice while walking down steps. He explained that after reinjuring his ankle, he felt abandoned, had no outlet, no information and was in a bad place. He said he was suicidal and did not want to wake up the next day as his whole life and routine had been taken from him. He further testified that he waited for "them" to send him to the MIR and that he went a year and a half without wages losing everything and ended up sleeping on his mother-in-law's couch. He said his whole life was ruined.

[55] Corporal Berlasty acknowledged that on 7 August 2014, he signed the Annex B declaration that he was not gainfully employed as a civilian prior to and during the period of incapacitation set out at Annex A. which was the Medical Doctor's Statement. Annex A stipulated that the period of incapacitation was 1 August 2014 to 31 October 2014.

[56] Corporal Berlasty explained that prior to signing Annex B, he met with Captain Othmer who read to him the questions on Annex B and that Captain Othmer checked off his responses to the questions. Corporal Berlasty then acknowledged that after going through Annex B with Captain Othmer, he personally signed the declaration. Under cross-examination, he admitted that when he filled out the Annex B, with the dates

relevant to the charges before this court, it was actually his second time completing the declaration.

[57] Corporal Berlasty testified that his MELs indicated that he had worked as a manual labourer, and he was “unable to return to this employ”. When asked by his counsel whether he worked during the time frame set out in the particulars, he said he could not because he could not find a job that fit within his MELs.

[58] Corporal Berlasty testified that his understanding of his MELs was that he could not work with the CAF because the MELs said he was unfit for any work in a military environment, but he said he could work four hours a day in a civilian environment and understood that he could get a civilian job as long as he stayed within his MELs. When asked why he was under that impression, he testified that he learned from the JPSU, just prior to his release in 2016 (two years later) that he could make more money, almost $1,000 more under the RTW program, because the RFC would only take back 50 cents per dollar that he made.

[59] He testified that once the RFC kicked in, he was okay financially, but not psychologically. He said in August 2014, he had his own apartment and his partner, Ms Harrington would be there every day helping him out. He said that it was during that time that they found out she was six weeks pregnant. He explained that he was depressed, suicidal and desperate for money.

[60] He explained that “Jeff,” Mr Kitching was the only person in whom he confided the depth of his psychological state. He explained that Mr Jeff Kitching who had been a childhood friend, since he was about nine years old, worked at a job site close to his apartment. He stated that when he went to the store to buy milk, he would often drop by the work site where Mr Kitching worked as it was situated close to the store. He told the Court that he visited the worksite on several occasions, approximately five times, where he would chat with “Jeff” and share cigarettes.

[61] Corporal Berlasty testified that Mr Loiselle asked him a few times to do work, but he told Mr Loiselle he was not there to work for him. He was adamant that he did not receive any money from Mr Loiselle except for the sale of an old camera.

[62] Corporal Berlasty told the Court that he first learned of a complaint regarding his RFC when he did not receive the pay he was expecting, which he believed to have been in November 2014, just prior to Christmas. Based on his pay sheet, it would be mid-November 2014. He told the court that he called Captain Othmer who advised him that his RFC had been suspended. Corporal Berlasty testified that he told Captain Othmer he needed that money and it was “bullshit”. He stated that at that time, he was not provided any details about the allegation he faced. He further testified that after the RFC ceased, he almost went down the same road as before with no money and he could not even buy milk.

[63] The accused also testified that from August until October 2014, he was constantly with Ms Harrington and that she knew exactly where he was every minute.

W.(D.) assessment of the accused's evidence

[64] Defence argued that Corporal Berlasty was both credible and reliable and should be believed. She argued that he was forthcoming about his mental health situation and the conditions he was facing. She admitted that there was some emotion displayed in his testimony, but given the history of the case and how long the matter has dragged on, he has significant emotional personal investment in the outcome of this court martial.

[65] The Court closely reviewed the accused's evidence in order to make an assessment of its credibility and reliability with particular focus on those areas where he provided evidence inconsistent with guilt or that might raise doubt on an essential element of the offence.

Did he work?

[66] The crux of the charge before the Court is whether or not Corporal Berlasty engaged in paid work for Mr Loiselle between August and October 2014? Throughout his testimony, Corporal Berlasty was adamant that, despite Mr Loiselle asking him several times, he never worked for Mr Loiselle. Corporal Berlasty testified that he physically could not work and did not pursue the job because his MELs did not permit it.

[67] The Court heard from Corporal Berlasty that he visited the job site about five times and, while there, he assisted his friend with light tasks in exchange for emotional and psychological compensation. He testified that his apartment was close to the site and he would often visit Mr Kitching throughout the day, spending several hours at a time smoking cigarettes and socializing. He testified that on a few occasions Mr Kitching drove him to his appointments. This fact was confirmed by both Mr Kitching and Mr Loiselle. In fact, Mr Loiselle testified that on a few occasions, he lent Mr Kitching his vehicle to drive Corporal Berlasty to his appointments.

[68] Ms Harrington, who was also a defence witness, and a class A reservist during the pivotal times, told the court she returned to Windsor mid-August 2014. She stated that, at the time, RFC was the sole source of income for both Corporal Berlasty and herself. She said that during the time period in question, she was not working except for the odd Wednesday parade night. She testified that she was at home during the days and since she was aware of the accused's poor mental health issues, she kept a close eye on him, always maintaining contact with him to ensure that he was not in a position to be a danger to himself. She stated they took walks, read parenting books, watched movies and prepared for the arrival of their child.

[69] Although she was never present at the job site, she testified that Corporal Berlasty was only away from her for a few hours at a time. She testified that Corporal

Berlasty told her he would visit Mr Kitching at a worksite to have a cigarette and a beer. Corporal Berlasty testified at one point, that he eventually did small tasks to help Mr Kitching when he was there for a few hours at a time. Ms Harrignton stated that to the best of her knowledge, Corporal Berlasty was not provided any money in exchange for his help, but rather received psychological compensation, somewhat like therapy. She also confirmed that Corporal Berlasty would often go to several different worksites.

[70] The Court noted that Ms Harrington testified that during the pivotal times, she was living with Corporal Berlasty, while in his testimony, Corporal Berlasty said they were not living together, but spent most of their days and evenings together.

[71] Under cross-examination, Corporal Berlasty was challenged on his assertion that he spent all his time with Ms Harrington given that there was a court Order that specifically prohibited him from contacting Ms Harrington. In response, Corporal Berlasty readily acknowledged the existence of the Court Order but admitted that despite understanding the consequences of breaching it, he chose to defy it. He also testified that the Court Order was eventually lifted.

[72] When Ms Harrington was questioned on how they could go for walks with the court order in place, she stated that was why they stayed indoors at his place most of the day and walked at night when it was less risky.

Understanding of RFC entitlements for his period of incapacitation

[73] The whole of the evidence suggested that on 7 August 2014, with respect to the period of incapacitation extending from 1 August to 31 October 2014, Corporal Berlasty was going through the RFC process for the second time. At that point, he would have been briefed by Captain Othmer twice. Corporal Berlasty confirmed that during the meetings with Captain Othmer, he was able to ask questions and seek clarification.

[74] Defence argued that Captain Othmer provided testimony that in 2014, they were breaking ground with this new application process for RFC and explained how he injected his own protocols in distributing the advances in 30-day increments. Defence suggested that given the lack of understanding of the procedure, when Corporal Berlasty signed Annex B in August 2014, there was confusion and Corporal Berlasty was under the impression that the annotations on the Annex meant to him that he could engage in civilian part-time work.

[75] However the whole of the evidence suggests that members on RFC have a duty to advise their unit when they feel able or intend to return to work. Captain Othmer testified that the MO must approve the RTW, as the chain of command does not want to be seen as pressuring members to return to full-time work before they are physically ready. He stated that this discussion normally happens when an Annex B is completed. Captain Othmer did testify that in his interview with Corporal Berlasty that he felt Corporal Berlasty was anxious to get back to work and that he advised him to follow up

with his rehabilitation and they would start easing him back into Class A service as a first step.

[76] In his testimony, Corporal Berlasty minimized his understanding of the RFC application process and the dates of incapacitation set out in his declaration. He said all he understood was what his unit was willing to divulge. Under cross examination, Corporal Berlasty became increasingly agitated stating words to the effect, “I don’t know this process, the only ones who knew were the men who broke ground on it.”

[77] When asked what he understood regarding the dates when he signed Annex B, he provided vague and internally inconsistent responses. He further argued that the only thing he received in the entire process was the CF Medical Chit. He became angry and insisted that he did not receive a copy of Annex A until his lawyer received it in the disclosure process.

[78] When asked what he understood when he first filled out Annex B in April 2014, he testified that he understood that the RFC was compensation for the forthcoming 90 days. However, when asked to explain his understanding when he signed the second application on 7 August 2014, at first, he suggested it was applicable for the previous three months, meaning it applied retroactively.

[79] When asked if he had discussed his employability and limitations with the doctor, he asserted he never discussed the paperwork with the doctor as it was his unit’s responsibility. When challenged by the prosecution to describe how the doctor knew he was a general labourer, he admitted that he told the MO and reluctantly admitted there had been discussion on what he could do in the coming months. One could logically infer that in order for the doctor to medically assess what Corporal Berlasty could or could not do, Corporal Berlasty would have had to provide some feedback, describing his mobility limitations, pain or other pertinent information for the MO to render a prognosis for the next three months.

[80] After continually being challenged on cross-examination, he eventually confirmed that he knew the doctor was assessing him to determine whether he could be gainfully employed for the next three months. This fact is also confirmed by independent evidence found on CFHS Chit, Exhibit 8, where his MELs state his Return to Duty with limitation beginning Thursday, 31 July 2014 for the duration of 90 days ending 31 October 2014.

[81] However, under re-examination from his own counsel, he confirmed that he believed the dates on Annex A, Exhibit 9, were the dates he was answering the questions to. But, later, his counsel specifically asked him if he meant the “7 August date”, being the date of signing, and he said, “Oh, yeah.”

[82] In summary, Corporal Berlasty was insistent and argumentative that he knew nothing about the Annexes, but his testimony on this assertion is inconsistent with evidence he provided on other matters.

RTW Program

[83] The Court noted multiple contradictions in Corporal Berlasty's admissions under both the direct and cross-examination. He testified that he understood that he was unable to work. However, in response to a number of questions posed, he also asserted several times that he could work four hours a day, five days a week in a civilian environment provided that it complied with his MELs. Although there was a box ticked off on Annex A to suggest he would be suitable for a RTW program, there was no evidence before the Court that during the time period in question, he had asked for or had been placed on a formal RTW program.

[84] As explained earlier, in responding to questions by the prosecution on Annex A, Corporal Berlasty was indignant and angry repeatedly denying that he received a copy of Annex A and originally denied ever engaging in any discussions with his doctor on Annex A. He repeatedly stated he had no idea what was in Annex A. If that was in fact the case, he certainly could not have known about the annotated RTW box. The fact is, there is absolutely no reference to RTW nor is there a notation of any sort on the CFHS Chit that Corporal Berlasty insisted was the only document he received. The only document that makes any reference to RTW in a civilian environment is on Annex A and Corporal Berlasty testified he had no knowledge of its contents until his lawyer received disclosure many years later.

[85] When Corporal Berlasty was asked if he understood that if he worked, he would not receive RFC, he did not answer the question once, but rather he continually asserted that according to a meeting he had with JPSU, when he was preparing for his medical release, he learned it was possible to earn more income on a RTW than on the RFC. There was no evidence before the Court to validate this assertion.

[86] When Captain Othmer was asked what would have happened if the member indicated that he had worked or wanted to return to work in some capacity, he stated that they would have to determine how RFC was affected. In his view, depending on the situation, RFC could be either stopped or reduced. He explained that the CBI's explain that RFC is to be reduced based on income earned and they have been amended at various times. However, he did note that it was possible that a member on a RTW could still receive at least some RFC.

[87] It is also noted at Exhibit 5 in the authorization for the member's first pay advance from 4 Division, Captain Sett to Captain Othmer and Captain Vandevenne, on 19 June 2014 that "As requested at ref A and IAW ref B & C, an advance RFC payment is approved for the period of 24 Apr - 31 Jul 14 (less the days he may have been employed on Cl A) for XXXX, J.P.S. Cpl Berlasty, 31 Svc Bn." This suggests that the RFC is reduced by the amount of money that a member earned within the same time period that RFC is provided.

[88] This policy is further supported by the formal approval message, Exhibit 11 received from DCSM providing ministerial authority for the RFC. At paragraph 3 of the message, it states “ENSURE AMT AUTH IS ABATED BY ANY ADVANCE OF COMPENSATION OR CLASS A SERVICE DURING PERIOD AT PARA 1.”

[89] CBI 210.72(12) states:

> (**Return to Work Program**) Compensation during a period of injury, disease or illness for any officer or non-commissioned member to whom this instruction applies, shall be reduced by the amount of the income earned from participation in the CF Return to Work program (ADM (HR-MIL) Instruction 05/03) as part of a medical treatment plan as prescribed by a competent medical authority.

[90] The RTW program operates consistent with Queen’s Regulations and Orders for the Canadian Forces (QR&O) 208.45, which states:

> **DEDUCTIONS FOR RECOVERY OF ADDITIONAL PAYMENT RECEIVED IN PERFORMANCE OF DUTIES**
>
> An officer or non-commissioned member who while in receipt of pay and allowances, has accepted from anyone in addition thereto, contrary to any regulation, order or instruction, a salary, bonus, gratuity or other payment in respect of the performance of his duties is liable to a deduction from his pay and allowances equal to the amount of any such payment.

[91] There was no evidence on record to explain how the RFC would be abated in the event of part-time civilian employment. However, based on the fact the RFC deducts salary paid for Class A service during the same time period and the RTW policy must comply with QR&O 208.45, it is highly likely that his RFC would have been reduced by the amount of income he earned.

[92] Under cross-examination, Captain Othmer testified that units must follow the doctor’s recommendations on MELs. He also explained that the MELs relate only to military employment, and do not apply to civilian work. He explained the MO’s reference to working four hours per day, five days per week presented a conflict for the unit to manage. He explained that units have a responsibility not to pressure a member to return back to work, contrary to doctor’s recommendations as it could aggravate the injury.

[93] The court noted that the doctor’s comments also state that Corporal Berlasty could not return to his civilian work as a labourer, which is essentially the work that he is alleged to have accepted from Mr Loiselle.

Time period without pay and unit assistance

[94] The accused testified that he went a year and a half without pay and that the unit did not help him. The Court noted that based on the evidence, upon his return from

Calgary, Corporal Berlasty continued to serve with his unit, engaging in Class A service until 9 May 2014.

[95] The evidence before the court suggests that almost immediately upon learning of Corporal Berlasty's aggravation of his earlier injury, the unit sent Corporal Berlasty to the MIR in London for evaluation and treatment, while at the same time seeking information with respect to his earlier injury sustained in Calgary the summer before.

[96] The evidence shows that Captain Othmer did everything he could to have the RFC backdated to November, 2013. Despite his request to have it backdated, approval was only granted from 24 April 2014, the effective date set out in the Annex A signed off by the MO. Furthermore, based on the totality of the evidence, it is clear that from April 2014 until the end October 2014, for an uninterrupted period of six months, Corporal Berlasty received RFC.

[97] Captain Othmer testified that although Corporal Berlasty began receiving RFC payments effective 24 April 2014, he did not receive actual payment until June 2014, seven months after his re-injury in November, 2013. This delay is too long for a seriously injured member without an income. However, this timeline is inconsistent with Corporal Berlasty's assertion made in court.

[98] When Captain Othmer learned that Corporal Berlasty may have been working, he testified that his first concern was whether Corporal Berlasty understood that the RFC would be subject to clawbacks and that it would hurt him.

[99] Corporal Berlasty testified that when he did not receive his RFC for the month of November 2014, he called Captain Othmer and learned that his RFC had been suspended. It is not clear on the evidence whether RFC was ceased as a result of the complaint or rather because the approved period of incapacitation had lapsed. It may have been affected by both. In any event, Corporal Berlasty knew he needed to be reassessed by the MO before his RFC benefits could be extended beyond 31 October 2014.

Summary on the credibility of the accused

[100] The Court found that the above assertions advanced by Corporal Berlasty were simply implausible.

[101] Firstly, his assertion that he was not working is inconsistent with the evidence as a whole and is internally inconsistent with his own evidence. He testified that he completed light tasks for free, while he visited the worksites. Yet, he also testified that he was not physically able to these tasks and was limited by MELs, one being that he could not physically stand for longer than 15 minutes at a time. However, from his own testimony and that of Ms Harrington, the court heard that he would walk to a worksite which was at least a 10 to 15 minute walk from his apartment to "hang out" for several hours, smoking and socializing, then he would walk back home and then go for a walk

in the evening with Ms Harrington. He testified to engaging in these activities while denying at the same time, he could not physically do so.

[102] It is also implausible that he refused cash for performing the same light duty tasks that he testified that he was doing for free, when around the same time, he told Captain Othmer that he was depressed, in dire financial distress and desperate. Further, his position that he strictly obeyed his MELs runs contrary to the consistency of his general conduct displayed with respect to compliance of other orders. His own conduct and evidence suggests that he has little respect for authority, including court orders. The Court noted that he repeatedly referred to his former OC, Captain Othmer as "Sir Othmer" and openly stated in court that he defied an imposed court order.

[103] Secondly, with respect to his personal knowledge of the RFC entitlements and the expectations they placed upon him, he continually minimized what he understood of the program and provided misleading responses to questions. His strategic attempt to convey that he had no knowledge, led to multiple internal inconsistencies in his own evidence that caused the Court grave concern.

[104] For example, Corporal Berlasty became angry, almost yelling, at the prosecution when he suggested that he knew what was in the doctor's statement at the relevant time of the charge. He was adamant that he only learned of the contents of the doctor's statement when his lawyer received disclosure many years later. However, upon review of the various Annexes, the information regarding RTW option was not provided in the CFHS Chit which was the only document he says he received.

[105] Thirdly, upon a review of the totality of the evidence, Corporal Berlasty appears to have conflated evidence of what he understood in August 2014, with facts that he allegedly learned two years after the fact when he was releasing, without recognizing the apparent inconsistencies of the two positions. In effect, he retrospectively rationalized that he was somehow authorized to work, while at the same time adamantly denying that at no time during the relevant period he worked.

[106] Further, the accused was continually evasive in responding to queries on whether he understood he could not work and also claim RFC at the same time. He consistently responded by saying that he could have made more money on the RTW. However, no evidence of this assertion was provided.

[107] The court is not persuaded by the defence position that Corporal Berlasty actually believed he could work four hours per day in a civilian environment. The court notes that even if he believed he could work 4 hours per day, in a civilian environment, this wasn't without limitation as the Doctor also stated he could not work as a labourer, which is exactly what the alleged job involved.

[108] In addition, even if he did believe he was entitled to work, he had an obligation to report his intention to his chain of command where an appropriate formal program would have been set up and established. QR&O 208.45, which applies to RTW

programs and has been in effect since 1970 recognizes that any money received by a member, through salary, bonus, gratuity or other payment, while the CAF member is in receipt of pay and allowances, is entitled to be deducted from the member's pay.

[109] Fourthly, he offered an exaggerated estimation of the period he went without pay, as well as the lack of support he received from his chain of command. Although this evidence was not pivotal to vital issues before the Court, it reveals that he is not immune to his own frailties and reflects the potential that his own evidence has become tainted and coloured over time.

[110] In conclusion, the Court found Corporal Berlasty's testimony on the above described matters inconsistent with the evidence as a whole as well as inconsistent with his own evidence. I do not find the accused credible on these matters and as a result none of his evidence on these matters is reliable.

[111] In applying the SCC's *W.(D.)* test, if the Court is left in doubt by the evidence of the accused, I must then ask myself whether, on the basis of the evidence which I do accept, am I convinced beyond a reasonable doubt by that evidence of the guilt of the accused?

[112] Most recently, in *R v. Ryon*, 2019 ABCA 36, the Alberta Court of Appeal fine-tuned the W.(D.) analysis and the following paraphrased clarification is relevant to the facts before this Court:

> Even if the [Court] completely rejects the accused's evidence [or other exculpatory evidence, the Court] must carefully assess the evidence [it does] believe and decide whether that evidence persuades [the Court] beyond a reasonable doubt that the accused is guilty.

[113] Importantly, what this means is that notwithstanding the fact that I found a lack of credibility and reliability on the part of Corporal Berlasty's evidence, it does not equate to proof of his guilt beyond a reasonable doubt on the offence charged (see *R. v. J.H.S.*, [2008] 2 S.C.R. 152, 2008 SCC 30 at paragraph 1). This is important because members cannot be convicted simply because their evidence is rejected as that unfairly reverses the burden of proof requiring them to prove that they are innocent.

[114] At this point, I must assess the strength of the prosecution's case by first assessing the credibility and reliability of its witnesses.

Credibility of prosecution witnesses

Captain Othmer

[115] Captain Othmer testified in a straightforward manner. It was clear that he was someone who cared for his subordinates and their difficult circumstances. He testified that he met with Corporal Berlasty at least twice, staffed his applications for RFC with a sense of urgency and gave Corporal Berlasty ample opportunity to ask questions. He

testified that he read out the requirements that needed to be met for a member to qualify for RFC, explained the process and then had Corporal Berlasty sign the documents. Once Corporal Berlasty signed the relevant Annex B Member's Statement, the Court noted that Captain Othmer processed his application as a priority the same day. Captain Othmer came across as a highly diligent officer who wanted to ensure that Corporal Berlasty received everything he was entitled to. I found his evidence to be both credible and reliable.

Mr Loiselle

[116] The prosecution asserted that Mr Loiselle's testimony was candid, caring and sincere which was supported by independent sources thereby reinforcing his credibility. The prosecution also argued that Mr Loiselle's responses were plausible and consistent with who he is as a person and the person we saw in court. What he said fits with his personality.

[117] Conversely, defence argued that there is sufficient evidence to doubt Mr Loiselle's credibility and reliability and that his evidence raises sufficient reasonable doubt on two elements of the offence:

(a) date of the alleged offence or timeline in question; and

(b) the fact that Corporal Berlasty was paid or that there had been a deprivation.

[118] In closing submissions, defence argued that:

(a) Mr Loiselle demonstrated very poor memory, and based on the evidence and the details of what he could recount, his testimony was not reliable and should not be believed;

(b) Mr Loiselle was being untruthful in his testimony and was neither credible nor reliable; and

(c) If Mr Loiselle was being truthful, then he was potentially committing collusion with Mr Kitching because he admitted to consulting Mr Kitching to confirm the dates of the alleged offence. She argued that where there is a prospect of collusion, the dates might not be reliable.

[119] Although, the Court noted that pursuant to MRE 37(b), at the beginning of the court martial, defence made an admission that dispensed the prosecution from having to prove beyond a reasonable doubt the date set out in the particulars, in fairness to the accused, and in light of the evidence that unfolded during the trial, the Court examined the issue.

Mr Loiselle's testimony in general

[120] Defence argued that Mr Loiselle did not testify in a straightforward, calm and honest manner. She submitted that his testimony was evasive, hesitant and argumentative and he denied that his eye injury led to memory difficulties, even when confronted with his video statement where he claimed it had. She argued that Mr Loiselle admitted that his timeline was jumbled. Defence also argued that Mr Loiselle's interview with investigators was conducted in August 2015 and it was clear that he was someone who did not have a good relationship with the accused and his motive was not pure. Defence further argued that given the fact that Mr Loiselle was charged with assaulting Corporal Berlasty and admitted to dragging out his guilty plea suggests that he has a brazen willingness to take risks and contravene the law.

[121] When asked to describe what incited the assault referred to by defence, that occurred in July, 2015, Mr Loiselle explained that Corporal Berlasty was "pissed" and warned Mr Loiselle not to give a statement to the military police. Mr Loiselle told the Court that Corporal Berlasty confronted him with words to the effect, "Shut your mouth, old man or I'll ruin your life," and then he said Corporal Berlasty told him, he was going to "cave my head in and ruin my life and my company." Mr Loiselle amplified his testimony to say that initially, he was unsure whether he would give a statement to the military police because he knew he could also get into "hot water" himself, but that their altercation helped to clarify that decision for him.

[122] Defence further argued that Mr Loiselle was not impartial as he alleged that threats were made against him, but also acknowledged that Corporal Berlasty was never charged for these alleged threats. She argued that Mr Loiselle admitted that the assault charge in July 2015 jeopardized his hunting licence and the continuation of his hobby and therefore Mr Loiselle had an axe to grind with Corporal Berlasty.

[123] Upon review of the evidence, the Court found Mr Loiselle was disappointed in the situation that unfolded with Corporal Berlasty; however, that alone should not be used in isolation to undermine his credibility. In fact, he is not the sole person with first-hand evidence on the relevant facts before the Court and although outside events unfolded that tarnished their relationship, the Court will not automatically assume that he is not credible, but it proceeded with caution in assessing Mr Loiselle's testimony.

[124] Respectfully, after reviewing all the evidence and re-listening to his testimony, I disagree with defence counsel's arguments challenging the general credibility of Mr Loiselle's testimony. While a court is not required to accept all the testimony of any witness except to the extent that it has impressed the court as credible, a court will accept evidence as trustworthy unless there is a reason to disbelieve it.

[125] Based on the arguments of counsel and the facts of this case, there is a particularly useful explanation from an older case to guide a trial judge in assessing credibility when some of the witnesses might not leave a favourable impression. In *Faryna v. Chorny*, [1952] 2 D.L.R. 354, at page 357, the British Columbia Court of Appeal states:

> A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial Judge, and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth.
>
> . . .
>
> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

In other words, trial judges have to be cautious, but they also have to look at the evidence provided in its context.

[126] The court found that on the vital aspects of the charge before the court, there was independent evidence that provided support to Mr Loiselle's assertions. For example, Mr Loiselle testified that he offered work to Corporal Berlasty for which Corporal Berlasty was paid. Although there may have been some discrepancy in the evidence in describing what tasks Corporal Berlasty may have performed and the exact amount paid, the reality is that both Mr Kitching and Mr Loiselle testified that Corporal Berlasty worked with them and that he received direction and pay from Mr Loiselle.

[127] The Court noted that Mr Loiselle was candid in explaining that he met Corporal Berlasty when he came to visit Mr Kitching at the worksite, which is consistent with the accused's testimony. However, the fact that he offered him a job, described the tasks and the hourly wage paid, based on his description of his experience working with Corporal Berlasty and the anecdotes Mr Loiselle shared with the court, suggests that Mr Loiselle had certain reasons to remember some relevant details that Mr Kitching might not.

[128] I found Mr Loiselle's testimony to be balanced. He readily admitted facts that were unflattering or to his prejudice such as the fact that he paid Corporal Berlasty cash under the table. Despite the risk of this admission exposing him to personal legal scrutiny, he was forthright. He was also humble and honest when describing what led to the assault charge and, if anything, he seemed embarrassed about how he reacted that day. He was brutally honest in accepting responsibility for the assault, while acknowledging that both he and his counsel pursued what was effectively a joint submission where he pleaded guilty and received a sentence that permitted him to maintain his hunting licence. He openly admitted that he had been drinking that evening, which was why he was not driving and also explained that the older he gets, the shorter his temper. He was very honest with what he had done. These are all signs and sources that speak to his credibility.

Mr Loiselle's memory and reliability

[129] Defence argued that the greatest concern in Mr Loiselle's testimony was the reliability of his memory and his difficulty recalling specific evidence. She stated that he could not accurately recall the year he was interviewed despite reviewing the video evidence just prior to trial and his estimate of when it was held was off by a year. She further argued that, in the video, Mr Loiselle expressed that he had difficulty with his memory and she said the dates he gave were not reliable. She further argued that timing is significant and even marginal error could have a significant impact.

[130] Defence submitted that the memory of Mr Loiselle was not only dulled by time, but that Mr Loiselle also admitted that due to his various medical conditions and a career interacting with chemicals, his memory was jumbled.

[131] The video clip of the interview highlights that although Mr Loiselle admits various reasons why he doesn't remember certain facts, such as having had major eye surgery and four laser treatments, he was clear that these impediments were not sufficient to affect his memories of his interactions with Corporal Berlasty, as they were recent and he has good reason to remember them.

[132] On the undisputed facts before the court, Mr Loiselle owned and operated his own trade company. Through Mr Kitching, he was introduced to Corporal Berlasty, an injured member of the CAF, who Mr Loiselle understood was in desperate need and he wanted to help him. Mr Loiselle testified that he had to fire Corporal Berlasty twice despite Corporal Berlasty being a good friend of his long time co-worker, Mr Kitching. These are good reasons for Mr Loiselle to remember the detail. He clearly remembers having to fire him, not just once, but twice, which he testified he had to do because the situation was causing him problems at home with his wife, because he would return home so upset.

[133] Defence argued that Mr Loiselle's evidence was not consistent with other witnesses. For example, she suggested that Mr Loiselle was adamant that Corporal Berlasty was on the site for eight to nine-hour days, but Corporal Berlasty, Mr Kitching, as well as Ms Harrington all testified that Corporal Berlasty was on the worksite for only a few hours at a time. Defence submitted that Mr Kitching was being as honest as he could be with what he could recall.

[134] With respect to the duration of the work, she also stated Mr Loiselle testified that Corporal Berlasty worked for him over several weeks, but defence argued that given the other witnesses' testimony, he was only on the site a handful of times. Given Mr Loiselle's lack of memory, Defence urged the Court to rely on the accused's evidence and not that of Mr Loiselle.

[135] With respect to heavy work, Mr Loiselle stated that Corporal Berlasty was doing heavy work, described by Mr Loiselle as "horse work", but Mr Kitching testified that Corporal Berlasty only assisted with light duties, handing tools, cleaning supplies and

things of that nature. However, the Court noted that within the various descriptors that Mr Loiselle used, he also described cleaning up and setting up scaffolds.

[136] Regarding the salary paid, Mr Loiselle testified that he provided Corporal Berlasty with $1,500 then later said $2,000 to $2,500. Defence counsel argued that his evidence was inconsistent with itself. Further, she argued that Mr Loiselle had no proof that he paid Corporal Berlasty, and the Court has nothing but the word of a man who dislikes Corporal Berlasty.

[137] Upon review of the evidence, the court agrees with the prosecution that Mr Loiselle was extremely candid and honest and admitted the frailties that he was experiencing with his memory and provided several reasons for it. In addition, the court noted that when he said he did not recall, he meant it and when challenged he did not dispute or argue. There was a consistency in the fact that he could identify when his memory was in fact affected. Most particularly, the events he could describe were particularly memorable and he often explained why a certain memory was vivid as he did when he reviewed the photo at Exhibit 14. In reviewing the photo, he identified the building as a worksite his company worked on and identified the men in the photo. He described himself as wearing the blue shirt that he wore when he buried his dog. He also identified "Jeff" also referred to as Mr Kitching, as well as the accused. He described the people living in the house where they worked as "artsy", and described how the rare brick on the house was difficult to get. He also added the fact that the people who lived in the house were building a studio or facility in the basement.

[138] In short, although there are inconsistencies in Mr Loiselle's testimony and Mr Kitching's in describing tasks, the duration of work days and the amount of money paid, these quantitative discrepancies are not pivotal to the determination of the vital issues relevant to the charge before the court. Similarly, the other discrepancies noted by defence are also peripheral. The consistency of the evidence is that Mr Loiselle and Mr Kitching both agreed that Corporal Berlasty worked for them and was paid. Further, since Mr Loiselle was the actual owner of the company and directing Corporal Berlasty's work, he was in a better position to describe Corporal Berlasty's tasks and what he was paid.

[139] There is also external independent support to these facts from then-Corporal Rovere – who testified that she drove by, recognized Corporal Berlasty on the worksite, stopped and took the photograph that is in evidence.

Collusion

[140] Defence argued that the Court must address the issue of potential collusion because Mr Loiselle admitted that he consulted with Mr Kitching to confirm the timeline, a fact which Mr Kitching denied in his testimony. Defence argued that given Mr Kitching's denial of this fact, she suggests that Mr Loiselle was either being untruthful or alternatively, then the prospect of collusion is a live issue and needs to be considered.

[141] In particular, the defence argued that the Court should be alert to the possibility, either conscious or unconscious, of collusion and collaboration and apply the test set out in the case of *R. v. G., W*., [1999] 137 C.C.C. (3d) 53, which adopted the words of Sopinka J. in the Supreme Court of Canada decision of *R. v. Burke* (1996), 105 C.C.C. (3d) 205 at page 222:

> [T]he trier of fact is obliged to consider the reliability of the evidence having regard to all the circumstances, including the opportunities for collusion or collaboration to concoct the evidence and the possibility that these opportunities were used for such a purpose. [Emphasis of Sopinka J. and the word "all".]

[142] In light of this assertion by the defence and in weighing the evidence, the Court had a duty to consider the possibility of collusion regarding the timeline or dates. In short, there is no absolute bar that prohibits the admission of evidence when the Court learns of collaboration or possible collusion between witnesses (*R. v. Illes*, 2013 BCCA 169); however, the Court did exercise increased caution in measuring the individual testimony of these two witnesses. Based on the evidence, the Court found that the collaboration that Mr Loiselle admitted to in confirming his timeline was not of the effect that either of them were concocting evidence.

[143] The Court appreciated that Mr Loiselle openly admitted his health complications and circumstances that limited his specific recollection of details such as dates. He stated that prior to meeting with the investigator, which was one year after the alleged incident before the Court, he believed he discussed the timeline with Mr Kitching. He was open and transparent. Mr Kitching testified that he did not recall this. However, the Court noted that if such a consultation did take place, it would have been four years ago. Since Mr Kitching was never asked to provide a statement in the investigation and was never intended to be a witness in this court martial, he would have no reason to specifically remember a discussion that would have taken place four or five years earlier. If the discussion occurred, the court accepts that there was nothing malicious or untoward. Mr Loiselle also testified that he was intimidated and nervous prior to meeting with the investigator and knowing that his memory was a bit fuzzy, he understandably wanted to ensure he provided accurate information. This makes sense.

[144] Based on the evidence, due to health reasons, at some point after the incident before the court, Mr Loiselle gave up his company, and it appears that he may have transferred at least the client base to Mr Kitching. Their roles are reversed and Mr Loiselle now works for Mr Kitching when required. Hence there was a clear opportunity for the two to have had discussions regarding the charges. As such, the Court advanced to the second aspect of the required analysis, which is to assess the likelihood of collusion.

[145] Upon a review of the entirety of the evidence, the court found that the nature of the testimonies do not reveal evidence of collusion. In listening to their individual testimony, the Court was satisfied that there was no concocting of evidence and the Court found that their individual testimony was appropriately limited to what they

personally observed or experienced. In fact, the Court noted that they individually remembered different things based on the personal importance of the event or the memory to them. As I stated earlier, it is not unusual that evidence presented before the Court is contradictory. Witnesses have different recollections of events and different reasons to remember some details and not others. The Court has to determine what evidence it finds credible and reliable.

[146] Next, the Court considered Mr Loiselle's testimony with respect to the dates when Corporal Berlasty worked, as compared to the evidence that was unrefuted or accepted by the Court. For the reasons that follow, the Court concluded that there was no collusion. Importantly, the dates given by Mr Loiselle are independently confirmed in other evidence provided by witnesses where no collusion is alleged.

Timeline

[147] The timeline set out in the charge extends from 1 August to 31 October 2014. Defence argued that if the Court accepts that the accused worked, it would have been after October, when he was physically capable and his RFC had ceased. Defence further argued that if Corporal Berlasty worked, it could not be the time frame in the charge sheet because she stated that the facts suggest that at the relevant time, Corporal Berlasty was at risk of losing his apartment and in financial distress. She submitted that based on these facts, the alleged offence would not have occurred until after the RFC was cut off which would be after the end of October.

[148] However, this assertion is not supported by the facts accepted by the Court. The Court noted that on 7 August 2014, immediately after Corporal Berlasty met with Captain Othmer, Captain Othmer sent an email (Exhibit 10) with the scanned copy of Corporal Berlasty's application seeking approval for an advance of the RFC funds. In his email, he specifically states that at that time, the member still does not have a fixed address and is in financial distress.

[149] In explaining how he came to hire Corporal Berlasty, Mr Loiselle testified that when he met Corporal Berlasty, he learned that Corporal Berlasty was getting an apartment close to the worksite, where he would be working for the landlord in that apartment building. The fact that Corporal Berlasty was allegedly working for a landlord, possibly in exchange for rent was not challenged nor explored by either counsel. In any event, the Court highlights Mr Loiselle's observation because based on the other evidence, it provides support to the timeline set out in the charge sheet.

[150] The whole of the evidence suggests that on 7 August 2014, Corporal Berlasty had no fixed address, and if the court accepts Mr Loiselle's testimony, Corporal Berlasty most likely obtained his apartment very shortly thereafter. The court noted that Ms Harrington testified that she returned from her course in mid-August 2014 when she reunited with Corporal Berlasty, and both she and Corporal Berlasty testified that upon her return they spent all their time together in Corporal Berlasty's apartment watching movies, going for walks, reading up on parenting as they prepared for the arrival of

their first child. There was no evidence to suggest that Corporal Berlasty was homeless at that time.

[151] Further, Mr Loiselle testified and it was not refuted, that due to the nature of their work, they only worked in the warmer months. He explained that they do work a little into the fall but only until it starts raining and is not safe. He specifically stated that they generally work into the month of October. We also know from Corporal Berlasty's testimony that he slipped on ice in the month of November, so it is not unreasonable to infer that working in November, in the Windsor area, would be unsafe and this lends additional support to the dates set out in Mr Loiselle's testimony.

[152] Mr Loiselle testified that he fired Corporal Berlasty because of Corporal Berlasty's use of inappropriate language that could be heard through open windows in the summertime. Mr Loiselle told the court Corporal Berlasty kept making derogatory comments towards women, which was a concern to Mr Loiselle because in the building where they were working, there were two young girls living in an apartment with their mother and women walking by who could hear the comments. Although not impossible that residents have their windows open in late November and December in Windsor, the probability is low.

[153] The Court noted that Corporal Berlasty's last payment of RFC was the end of October 2014. In his testimony, Corporal Berlasty testified that he was not aware that his RFC was cut off until he failed to receive his payment, mid-November, 2014 so this would mean that his RFC would have been cut off prior to this.

[154] The Court was also influenced by the evidence of Lieutenant Rovere that the photo of the worksite was taken in September shortly after the start of school. In reviewing the photo closely, it is noticeable that the trees have dark green leaves and there is no evidence of fallen or colouring leaves or other noticeable signs associated with autumn. Although it is arguable that the photo is not conclusive of the fact that the accused was working on a specific date, based on the way the individuals are focussed and as the prosecution pointed out, the accused was wearing what appears to be work boots, it is at least some evidence that supports that he was on the site, appearing to be working during the time period set out in the particulars.

[155] In summary, the court engaged in a very exhaustive analysis to assess the credibility of Mr Loiselle. Although the Court did exercise caution given his admission that he has experienced memory lapses, based on the amount of independent evidence corroborating his testimony on critical issues, the court found Mr Loiselle to be both credible and reliable.

Lieutenant Rovere

[156] Lieutenant Rovere testified that she knew and worked with Corporal Berlasty over several years. The prosecution introduced into evidence a photo taken by then-Corporal Rovere that captured Corporal Berlasty wearing construction boots interacting

with Mr Kitching and Mr Loiselle on a worksite. Corporal Berlasty appeared to be doing more than “hanging out”. While knowing that Corporal Berlasty was injured and collecting RFC, she drove by again and took a photo which is Exhibit 14. The Court found her both credible and reliable.

Mr Jeffrey Kitching

[157] Mr Kitching was unexpectedly thrown into court to give evidence against the accused, an old friend. He came forward and answered questions honestly. His evidence was hesitant, but he answered the questions and he never argued. And if he did not know something, he said so. His evidence was consistent with Mr Loiselle’s evidence and is supported by the photo at Exhibit 14. When Mr Kitching was shown the photo, he recognized the job site and Mr Loiselle, but openly admitted that he did not recognize the third person.

[158] Despite the fact that he was testifying against an employee and a former long-time friend, whom he had a falling-out with, his testimony came across as unbiased and impartial. He had the distinct disadvantage of not having been interviewed nor provided notice that he would have to testify. As such, the Court accepts that his memory on certain issues would not be as strong and reliable as other witnesses. The Court found him both credible and reliable with respect to the evidence he could testify to.

Ms Harrington

[159] Ms Harrington was placed in a very difficult position as a witness. She was only able to testify to limited details relevant to the pivotal issues that the Court needed to decide. She was cautious in her responses and non-confrontational in every way. The Court recognizes that she has somewhat of a vested interest in ensuring the best outcome possible for her partner. I reviewed her evidence in the context of the evidence as a whole and some of her evidence I found to be credible, while other statements caused the Court to be cautious in weighing them. Although she stated she stayed in continual contact with Corporal Berlasty, a fact that is distinctly possible, whether he worked or not, she also admitted that she was not on the job site and consequently has no first-hand knowledge about whether Corporal Berlasty worked at any time. The Court noted that her testimony had some internal inconsistencies with respect to what they did together during the time period in question. She also openly admitted that she ignored the No Contact Order.

<u>Analysis</u>

Issues to be decided

[160] ***Actus reus*** –In proving the prohibited act, the prosecution had to prove the following:

(a) Did Corporal Berlasty work for Mr Loiselle?

(b) Was he paid for this work?

(c) Did Corporal Berlasty fail to inform his chain of command that he was gainfully employed as a civilian, so that they could take appropriate action with respect to his RFC entitlement?

Did he work for Mr Loiselle?

[161] The prosecution argued that the evidence as a whole clearly reveals that Corporal Berlasty worked for Mr Loiselle and even if the Court finds that Corporal Berlasty worked for just one day during the relevant period that alone is sufficient to meet the test.

[162] The relevant evidence to this issue is summarized as follows:

(a) Mr Loiselle testified that he met Corporal Berlasty through his employee Mr Jeff Kitching, who was Corporal Berlasty's friend. He testified that he offered to hire Corporal Berlasty despite the fact he was inexperienced in the brick-laying business because he wanted to help a member of the CAF who he believed was in a tough spot.

(b) Mr Loiselle testified that Corporal Berlasty's job entailed work as a general labourer, grinding, cleaning up, and setting up scaffolds.

(c) Mr Loiselle told the Court that Corporal Berlasty worked for him during two different periods. He told the court that Corporal Berlasty worked for him from mid-August through September 2014 and then again for two weeks in October 2014. Mr Loiselle testified that after the first period, he had a "falling-out" with Corporal Berlasty because Corporal Berlasty was using demeaning and "derogative" language that could be heard by women and children who lived close to their worksite. He specifically stated that he personally loves a good joke, but the language Corporal Berlasty used back and forth on the scaffold when windows were open concerned him. He explained that as the owner of the company, it was his "ass that was on the line."

(d) Mr Loiselle explained that a few weeks later Corporal Berlasty "had the balls to come back and apologize", and that he was so impressed, he gave Corporal Berlasty a second chance and rehired him. He stated that after two weeks, Corporal Berlasty's old habits resurfaced and he was forced to fire him a second time. Mr Loiselle described Corporal Berlasty as a good worker who had the ability to go up and down the scaffolds with better agility than himself.

(e) Mr Loiselle's evidence that Corporal Berlasty worked is supported by the evidence of Mr Kitching who testified that Corporal Berlasty worked for them sporadically doing what he described as general clean-up. He explained that Corporal Berlasty was employed to assist him and to help him because they needed help cleaning up the worksite.

(f) Conversely, Corporal Berlasty testified that he had an apartment around the corner from the job site which he visited about five times to see his friend Mr Kitching. He testified that he was asked by Mr Loiselle to work, but he refused because he was not physically able and his MELs did not permit it.

(g) Corporal Berlasty told the Court that he only dropped by the site to "shoot the shit" with Mr Kitching and have a smoke while Mr Kitching worked and if Mr Kitching needed anything he would hand it to him. He firmly testified that he did not work and was not paid.

(h) Corporal Berlasty also testified that he could not have worked as he spent all his time with Ms Harrington reading books about parenting.

(i) Ms Harrington stated that she and Corporal Berlasty reunited when she returned from course in mid-August 2014 and from that point on, they were constantly together. She explained that she would have known if Corporal Berlasty was working as she kept close tabs on him. She testified that Corporal Berlasty told her he only visited with Mr Kitching on the work site.

[163] After having completed an assessment of the credibility of all the witnesses and weighing all the above evidence, the Court concluded that Corporal Berlasty did in fact work for Mr Loiselle.

Was he paid for his work?

[164] In responding to the above question, the court needed to assess whether Corporal Berlasty was paid for the work he performed. The relevant evidence is:

(a) Mr Loiselle unequivocally told the Court that he paid Corporal Berlasty an hourly wage in cash, under the table, at a rate between $14 to $16 per hour. He specifically stated that in terms of hours, some days and weeks were longer than others.

(b) Mr Loiselle estimated that he paid Corporal Berlasty approximately $1,500 to $2,500. He testified that his business often got paid cash for jobs and this was sometimes the norm.

(c) Mr Kitching testified that although Corporal Berlasty definitely worked with them, he had no idea what the payment arrangements were between Corporal Berlasty and Mr Loiselle.

(d) In contrast, Corporal Berlasty testified that he never worked for Mr Loiselle and therefore never got paid.

(e) Ms Harrington testified that the sole source of income for their family was Corporal Berlasty's RFC.

[165] Based on the court's assessment of the above evidence, the court finds that prosecution has proven beyond a reasonable doubt, not only that Corporal Berlasty worked, but that he also got paid.

Did he fail to inform his chain of command so they could take the appropriate action with respect to the RFC?

[166] With respect to the prohibited act, there was unrefuted evidence before the court that Corporal Berlasty was aware that he had an obligation to inform his chain of command when he was in a position to be gainfully employed.

[167] There was no evidence on record that Corporal Berlasty informed his chain of command that he was working for pay. The only evidence upon which the court may rely comes from the testimonies of Captain Othmer and Lieutenant Rovere. Their evidence suggests that the chain of command only discovered Corporal Berlasty was working after then-Corporal Rovere witnessed him working, took a photo and reported the fact to her chain of command.

Summary on *actus reus*

[168] In assessing whether a reasonable person would consider the lack of reporting to be dishonest, the reaction of then-Corporal Rovere when she spotted Corporal Berlasty working speaks volumes. At the time, she was of the same rank, experience, trade and status as Corporal Berlasty. Together they worked within the same unit, and she clearly represents a reasonable person in this circumstance. She knew immediately that if Corporal Berlasty was still on RFC, what he was doing was wrong. That was the reason she stopped and took the photo.

[169] Given the accused's experience in the CAF and his understanding of the RFC, combined with the fact that he was on his second period of incapacitation collecting RFC, it is reasonable to assume that he understood the expectations and his responsibilities that he should not be accepting both RFC and paid employment at the same time. Hence, the court concludes that the act of accepting cash payments for work while receiving the RFC after having been trusted to report gainful employment would in the eyes of a reasonable person, be considered to be a dishonest act.

[170] The finding of dishonesty, leading to the deprivation of RFC, being government funds, constitutes the *actus reus* of the offence.

Analysis of *mens rea*

[171] As set out earlier, the mental element that needs to be proven beyond a reasonable doubt is:

(a) Corporal Berlasty's subjective knowledge of the prohibited act; and

(b) his subjective knowledge that the prohibited act would lead to the deprivation of her Majesty.

Did Corporal Berlasty have subjective knowledge of the prohibited act?

[172] In examining whether Corporal Berlasty had subjective knowledge of the prohibited act, the court examined the following two questions:

(a) Did Corporal Berlasty know that if he was to be gainfully employed as a civilian, he was no longer entitled to receive RFC or that his RFC would be reduced or affected in some capacity?

(b) Did Corporal Berlasty have subjective knowledge that the prohibited act would lead to the deprivation to Her Majesty?

[173] In its assessment of Corporal Berlasty's subjective knowledge, the court considered the following evidence:

(a) Captain Othmer testified that he personally met with Corporal Berlasty on two occasions to have him sign his applications. He stated that on both occasions, before Corporal Berlasty left his office, he ensured that Corporal Berlasty understood the program, its expectations and had made the required declarations before him.

(b) Conversely Corporal Berlasty testified that he spoke with someone at the JPSU (2 years later) who told him he could have returned to work, and in doing so, could have made an extra $1,000. Similarly, Corporal Berlasty also testified that when he signed the declaration, he understood that it applied only for the date, being 7 August 2014 the date he signed it and it applied retroactively.

(c) Other relevant evidence on this issue came from Mr Loiselle who testified that when he hired Corporal Berlasty, Corporal Berlasty asked to be paid in cash and told him to "keep his fucking mouth shut and not tell anybody". Mr Loiselle thought Corporal Berlasty was a "pretty decent guy" as far as he knew, so he agreed.

(d) Mr Loiselle described an incident that occurred between himself and Corporal Berlasty in July 2015, when Corporal Berlasty confronted him and warned him not to provide a statement to the Military Police. However, in their respective testimonies, both Mr Loiselle and Corporal Berlasty acknowledged that Corporal Berlasty was never charged for his part in this incident and no additional clarifying facts were offered.

[174] Recalling that the Court determined that Corporal Berlasty lacked reliability on the his evidence set out in the above paragraph and based on the weight of evidence I do accept, I find that the prosecution has proven beyond a reasonable doubt that Corporal Berlasty had subjective knowledge of the prohibited act.

Did he know that if he was employed and he failed to inform his chain of command he would continue to receive RFC that he was not entitled to, thereby putting Her Majesty at risk?

[175] The evidence relevant to this issue was as follows:

(a) Captain Othmer testified that on 7 August 2014, he received approval from the Director Military Careers Administration for Corporal Berlasty's RFC entitlement (see Exhibit 11). Captain Othmer testified that he immediately informed Corporal Berlasty of the approval to ensure that he was aware that his RFC entitlement would be paid for the forthcoming 3 months and the funds would not have to be clawed back; and

(b) Captain Othmer testified that the RFC money was deposited into Corporal Berlasty's pay account and Corporal Berlasty's pay records clearly reflect that the money was deposited into his personal bank account on 15 August, 31 August, 15 September, 30 September, 15 October and 31 October 2014.

Defence's position on intent

[176] Defence argued that even if the Court finds that Corporal Berlasty worked, there is reasonable doubt on the essential element that he intended to defraud.

[177] Whether a member intended to defraud is not the test. In a case where the conduct and knowledge are both established, the accused is guilty whether he actually intended the prohibited consequence or was reckless as to whether it would occur. In *Théroux, McLachlin*, J. stated at paragraphs 23 and 24:

> [T]he better view is that the accused's belief that the conduct is not wrong or that no one will in the end be hurt affords no defence to a charge of fraud.
>
> . . .

> Many frauds are perpetrated by people who think there is nothing wrong in what they are doing or who sincerely believe that their act of placing other people's property at risk will not ultimately result in actual loss to those persons. If the offence of fraud is to catch those who actually practise fraud, its *mens rea* cannot be cast so narrowly as this.

[178] Relying on the case of *R. v. Anstey*, 2011 CM 3001, defence argued that proof of the essential element of fraud requires an untrue statement by a person who knew it was untrue at the time. Further, she argued that the accused had to say or do something that in itself amounted to deceit.

[179] Although the facts in the case of Anstey may have demanded proof of an untrue statement, 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.

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

[181] In *R. c. E.(J.)*, (1997) 117 C.C.C. (3d) 275, leave to appeal to SCC refused [*R. c. Émond* (1997), 117 C.C.C. (3d) vi (S.C.C.)]), at page 284, the Court confirmed that a falsehood can include a lack of proper disclosure, a mere omission where, through silence, an individual hides fundamental and essential information. The silence or omission must be such that it would mislead a reasonable person.

[182] In this case, the Court found that Corporal Berlasty knew he had a duty to report any gainful employment and he intentionally decided not to report this fact, and that omission permitted the erroneous representation of a situation that was of a certain character, being that he was not gainfully employed, when in reality that was not the case. The fact that he retained gainful employment, even in the smallest capacity, was a factor that needed to be considered within the RFC program. He clearly had a duty to report. As a result of not reporting, he was paid funds for which he was not entitled.

[183] Given that Corporal Berlasty had experience with the process and was informed on 7 August 2014 that ministerial approval was granted for him to continue receiving RFC for the next three months, on the whole of the evidence, it is reasonable to infer that he knew that if he did not report he was working and getting paid, then he would continue receiving RFC without interruption.

[184] In this case, the element of deprivation is established by proof of payments deposited into his bank account to which he had no full entitlement and which deprived Her Majesty of public funds assigned to the RFC fund. Corporal Berlasty knowingly accepted these payments and used the money for his personal benefit.

[185] The evidence suggests that Corporal Berlasty understood his responsibilities under the program, and if he did not he was wilfully blind. In light of Captain Othmer's testimony combined with the evidence that Corporal Berlasty specifically asked to be paid in cash and told Mr Loiselle "to keep [his] mouth shut" further supports that he knew he could not accept paid work. In doing so, without reporting it to his chain of command, he fraudulently accepted the RFC.

[186] 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 charge before the court.

Summary

[187] The establishment of the RFC program has had a profound impact on the CAF by ensuring reserve force members are adequately covered for injuries sustained while undergoing military service. As most reservists work full-time in a civilian capacity, the consequences of them being injured while on military service could have devastating effects on their civilian jobs and their personal lives. The implementation of the RFC brought an end to the seemingly unfair treatment that reservists suffered when injured, in comparison with their regular force counterparts. It has the salutary effect of providing reserve force members, injured while on military service, with a stable income while they are rehabilitating. Hence, RFC is a vital element in the financial security of reserve force members and their families. Accordingly, dishonest deprivation of the RFC constitutes a threat to the integrity of its purpose and allegations of its abuse must be viewed seriously.

[188] The successful implementation of the whole RFC process to support injured members of the reserve force is based on the trust it places in the members who need it. Accordingly, there are reciprocal obligations that must be fulfilled particularly, in light of the fact that a reserve force member's obligations straddle between military service and a civilian career. At the time he applied for RFC, Corporal Berlasty was a relatively experienced member of the CAF and was aware that the program was intended to supplement his salary up to an amount determined based on his rank and experience. Any income made either serving on Class A or in a civilian job needed to be considered within the RFC entitlement. By not reporting the money earned, Corporal Berlasty breached the trust that was placed in him.

Conclusion on the charge

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

FOR THESE REASONS, THE COURT:

[190] **FINDS** Corporal Berlasty guilty of the charge, contrary to paragraph 117(f) of the *NDA*.

Counsel:

The Director of Military Prosecutions as represented by Major L. Langlois and Captain S. Scott

Captain D. Mansour, Defence Counsel Services, Counsel for Corporal J.P.S. Berlasty