



## COURT MARTIAL

**Citation:** *R. v. Anderson*, 2021 CM 4008

**Date:** 20211002

**Docket:** 202050

Standing Court Martial

Canadian Forces Base Cold Lake  
Cold Lake, Alberta, Canada

**Between:**

**Her Majesty the Queen**

- and -

**Master Corporal J. A. Anderson, Accused**

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

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### **REASONS FOR FINDING**

(Orally)

#### **Introduction**

[1] Master Corporal Anderson is facing three charges of stealing, contrary to section 114 of the *National Defence Act (NDA)*. It is alleged that between July 2019 and February 2020, he has stolen approximately 400 litres of gasoline (first charge), lumber (Charge 2) and a “DeWalt” headache rack, commonly seen in back of pickup trucks (Charge 3).

#### **The evidence**

[2] Seven witnesses were called by the prosecution. The defence elected to call no evidence. A number of documents were entered as exhibits through prosecution’s witnesses, notably gasoline fuel records (Exhibit 7) and pictures of a DeWalt headache rack (Exhibit 3). The defence made admissions as it relates to the continuity of possession of the DeWalt headache rack displayed in the courtroom, admitted to be the same as the rack on the pictures entered as Exhibit 3 and the rack that was obtained by

the military police from the apartment of Ms Wills, Master Corporal Anderson's ex-spouse. The Court also took judicial notice of the facts and matters at Military Rules of Evidence 15 and 16.

[3] It is worth noting that the prosecution's case was almost entirely circumstantial, in that no one testified having observed Master Corporal Anderson physically moving the items described in the charges. Further, none of these items were seized in his possession. No evidence was heard about the content of any statement that would have been made by Master Corporal Anderson to investigating authorities.

[4] Two of the prosecution's witnesses were working under the supervision of Master Corporal Anderson at the time of the alleged offences. Then-Aviator, now-Corporal Eckhardt and Corporal Lugtu testified about what they observed in relation to the first and second charges, pertaining to the alleged theft of gasoline and lumber. Sergeant Lepore also testified in relation to the theft of fuel to relate his limited involvement upon being made aware of complaints. The four other prosecution witnesses testified about the third charge, relating to the headache rack. Mr Fudge and Sergeant (Retired) Lanteigne testified about the whereabouts of that rack from the moment it was stored in a building where they regularly worked until it came to be in the possession of the military police. Sergeant Brochu testified about his research on official records for the rack and offered general explanations on the process of acquisition, attribution and disposition of moveable property within the Canadian Armed Forces (CAF) and the Department of National Defence (DND). Finally, Ms Wills testified about conversations she had with Master Corporal Anderson upon first seeing the rack on the back of their pickup truck and at the time he brought the rack to her for safekeeping.

[5] Before analyzing the law and facts as they relate to the three charges, I believe it would be useful to provide elements of context on the basis of uncontested evidence, to illustrate the situation the main actors in this trial found themselves in and hopefully facilitate the understanding of these reasons.

### **The context**

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

[7] For obvious reasons, JLR is not an area open to the public. In order to get there, the personnel from the section drive from their homes to Canadian Forces Base (CFB) Cold Lake in the morning, gathering at about 0700 hours. They would park their personal vehicle in a controlled explosive storage area on the ramp side of the airfield.

From there, they take one or the two DND pickup trucks assigned to their section, parked nearby, for the eighty kilometre or so drive north to JLR. This involves using public roads up to an area named Primrose Lake Range, where logistics installations including fuel pumps are located. After checking in with a guard at the gate there, they are allowed up an access-controlled DND road a further twenty kilometres or so to JLR. At the end of a typical workday, they would take the DND vehicles back down to CFB Cold Lake, through Primrose Lake Range once again, all the way back to the parking lot in the controlled Explosive Storage Area, arriving at approximately 1500 hours on a routine day. From there, members of the section would embark in their own vehicles parked nearby to proceed home.

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

[9] The members of Master Corporal Anderson's section perform various tasks during the day such as vegetation control, wildlife control, road maintenance, and support to operations. In order to move around the area to perform these tasks, they have at their disposal at JLR two all-terrain vehicles (ATVs) and two snowmobiles, as well as power tools such as chainsaws. These all run on gasoline. As there are no gasoline pumps at JLR, the gasoline is drawn from the DND pumps at Primrose Lake Range and placed inside jerry cans. Those are transported in the back of one of the DND pickup trucks used by the section, in a rack made by members of the section from lumber. Once at JLR, some jerry cans are stored in a POL shack, but there have always been jerry cans remaining in the rack in the cab of the DND pickup truck.

### **The law**

#### ***What needs to be proven***

[10] The elements of identity, as well as the place of the offences on the three charges, are not in contention. As it pertains to the time of the offences, I have been asked by the prosecution to make a special finding of guilty in relation to the third charge, to extend the start time of the offence period on the basis of the evidence heard at trial.

[11] In order to facilitate the analysis, the remaining elements of the offence of stealing are listed in two main components: the prohibited conduct (*actus reus*) and the

fault element (*mens rea*). I have added some basic explanations as required, referring to the charge sheet, section 114 of the *NDA*, and the notes from *Queen's Regulations & Orders for the Canadian Forces* (QR&O) article 103.46 on stealing.

- (a) The first component is the prohibited conduct (*actus reus*) constituting stealing, as alleged in the charges, requiring proof of the following three elements as provided at Note (A):
  - i. the items (gasoline, lumber and headache rack) are “anything capable of being stolen”. According to Note (B), this requires proof that some person other than the accused owns these items, in this case Her Majesty in right of Canada;
  - ii. these items were in fact stolen, which, as provided at paragraph 114(2)(a) of the *NDA*, fraudulently and without colour of right taken or converted, meaning the wrongful appropriation and application of the property of another to one's own use as provided at Note (E); and
  - iii. that they were stolen by the accused.
- (b) The second component is the required *mens rea* or wrongful intent for stealing, a specific intent offence, which requires the prosecution to demonstrate three things:
  - i. the person accused of stealing had one of the intents set out at paragraph 114(2)(a) of the *NDA*, including the intent to deprive, temporarily or absolutely, the owner of it or a person who has a special property or interest in it, of the thing or of that property or interest;
  - ii. the accused had a “fraudulent intent” at the time of taking or conversion, meaning that he acted deliberately and intentionally, under no mistake and with knowledge that the thing is another's property. It is worth noting that paragraph 114(2)(c) of the *NDA* provides that “the taking or conversion may be fraudulent, although effected without secrecy or attempt at concealment”; and
  - iii. the absence of any colour of right asserted by the accused. In accordance with Note (F), “colour of right” refers to an honest belief in a state of facts which, if it existed, would furnish a legal justification or excuse for the act.

***The applicable standard of proof***

[12] Now that I have mentioned what needs to be proven, it is important to mention the standard that the proof must meet before I can find the accused guilty of the offences.

[13] Indeed, underlying the analysis of charges by any court is the constitutional requirement for the prosecution to prove its case beyond a reasonable doubt. The accused enters penal proceedings presumed to be innocent. The burden of proof rests on the prosecution throughout the trial and never shifts to the accused. The standard of proof beyond a reasonable doubt is inextricably intertwined with a principle fundamental to all criminal trials: the presumption of innocence. This means that, before an accused can be convicted of an offence, the judge must be satisfied beyond a reasonable doubt of the existence of all of the essential elements of the offence.

[14] 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. It is not sufficient for me to believe the accused is probably guilty or likely guilty. In those circumstances the accused must be given the benefit of the doubt and acquitted because the prosecution has failed to satisfy me of the guilt of the accused beyond a reasonable doubt. On the other hand, I must keep in mind that it is virtually impossible to prove anything to an absolute certainty, and the prosecution is not required to do so.

[15] It is worth noting that reasonable doubt applies to issues of credibility. On any given point, the Court may believe a witness, disbelieve a witness, or not be able to decide. The Court need not fully believe or disbelieve one witness or a group of witnesses. If I have a reasonable doubt about Master Corporal Anderson's guilt arising from the credibility of the witnesses, then I must find him not guilty.

[16] I will discuss the charges in succession, outlining the specific position of the parties on each charge as required, given that the circumstances related to each of the charges are different and unrelated.

### **Analysis**

#### ***The first charge of stealing gasoline***

#### **Evidence**

[17] As it pertains to the first charge, the first requirement that the gasoline be capable of being stolen is not disputed. The gasoline in question came from the Primrose Lake Range pumps owned and operated by DND for the purpose of providing fuel for activities of DND vehicles and other assets. It was not owned by the accused, but rather by Her Majesty in right of Canada, as specified in the particulars of the charge.

[18] On the second and third elements of the *actus reus*, as to whether gasoline was in fact stolen by the accused, the evidence presented by the prosecution is entirely circumstantial. The prosecution elicited evidence from Corporals Eckhardt and Lugtu, who said they came to believe in the fall of 2019 that gasoline was missing in relation to their holding at JLR based on two observations: first, jerry cans used to transport gasoline had been missing; and second, there seemed to be a discrepancy between the quantity of gasoline they were drawing from DND pumps at Primrose Lake Range and the quantity they perceived to be consuming with their ATVs, snowmobiles and other equipment at JLR. They became concerned about potential illicit appropriation by Master Corporal Anderson at about the time they had seen a photo of Master Corporal Anderson posted on his Facebook page showing the presence of a jerry can similar to the ones they used at JLR on the back of what appeared to be his pickup truck. They both acknowledged, however, that jerry cans such as these may be obtained from commercial outlets.

[19] At the end of November 2019, Corporals Eckhardt and Lugtu shared their concerns with a colleague, who consulted Sergeant Lepore at their home unit, 1 AMS. Having been informed that proof was needed, they provided copies of the log registering gasoline draws from the DND pumps at Primrose Lake which Corporal Lugtu had obtained. The information contained in the log strengthened their opinion that the quantity of fuel drawn did not correspond to the quantities used by their section at JLR. It also convinced Sergeant Lepore. He accused Master Corporal Anderson of stealing fuel in a closed door meeting in December 2019, yet did not take any other action other than informing the two complainants that it would stop. In February 2020 however, as a snowmobile needed to be fueled, there was no gasoline available at JLR, a situation which prompted Aviator Eckhardt and Corporal Lugtu to complain once again, this time resulting in an investigation.

[20] In addition to that evidence, Corporal Lugtu testified that he had seen Master Corporal Anderson throwing an apparently empty jerry can in the back of one of their section's DND pickup trucks as they were about to leave from CFB Cold Lake to JLR one morning. He said that he had also seen on another occasion a jerry can marked "JLR" in the back of Master Corporal Anderson's own truck.

### **Position of the parties**

[21] The prosecution is asking me to infer on the basis of this evidence, first that gasoline was stolen, and second, that Master Corporal Anderson is the person responsible for the theft as he had been seen with jerry cans in his possession.

[22] The defence submits that the circumstantial evidence heard is not reasonably capable of supporting the inferences proposed by the prosecution, given the subjectivity and frailty of the perceptions of fuel consumption by the witnesses, which was evident in the course of the hearing and, subsequently, in arguments. It has been submitted that there should be ample doubt preventing me from finding the accused guilty beyond a reasonable doubt in these circumstances. Alternatively, defence counsel submitted that

should I find, “miraculously”, that the gasoline was stolen, I could not possibly find that Master Corporal Anderson was the author of the theft.

### **Analysis**

[23] I must state at the outset that there will be no miracles. I cannot possibly infer on the basis of the evidence I heard that, first, gasoline was stolen and, second, that Master Corporal Anderson is the person responsible for the theft. The bottom line is that I have what I consider to be a reasonable doubt as to whether any gasoline went missing from the quantities drawn by Master Corporal Anderson and members of his section at the DND pumps in Primrose Lake Range. If no gasoline is missing, then there can be no theft. I will now explain why I concluded this way.

[24] The prosecution relies on what it considers to be a “shortage” between the volume of gasoline drawn from DND pumps and the usage made by members of the section at JLR. Yet, as evidenced by the testimony of Sergeant Brochu on material management within the CAF and DND, shortages or overages are differential between an allocation and what is actually in hand. It is objectively measurable. What the evidence more accurately reveals in this case is a perceived discrepancy on the basis of the highly subjective opinion formed by three witnesses, strengthened by witnesses’ views of data contained in a log which potentially suffers from significant reliability issues.

[25] One of these three witnesses is Sergeant Lepore, who formed the opinion that there was missing fuel from JLR and accused Master Corporal Anderson of being responsible. The sole source behind that opinion appears to be the copy of the gasoline fuel log brought to him, which is presumably the copy made by Corporal Lugtu, corresponding to a portion of the full log entered at Exhibit 7, although the witness could not be positive about that. Yet, the foundation for Sergeant Lepore’s opinion on the quantity of gasoline that should have been expended is not sufficiently informed to be reliable. Sergeant Lepore has shown little awareness of what exactly was going on at JLR, a place which he visited only a few times every year. He obviously had inaccurate knowledge of the number of ATVs and snowmobiles on the site, did not show any grip as to the activities performed by the section, nor the level of training operations that had been going on during the period in question. In light of this, I don’t know how I can give any weight to his testimony as it pertains to the fact that gasoline was missing.

[26] For their part, both Corporals Eckhardt and Lugtu expressed the opinion that there was gasoline missing and provided the basis for that opinion, resting on two pillars: their perception of gasoline consumption compared to their perception of how much gasoline they had put in jerry cans, as well as what they saw as the confirmation of these perceptions in the copy of the gasoline log from the DND pumps at Primrose Lake Range.

[27] Yet, both sources of information are inherently unreliable, as was evident in their testimony.

[28] Indeed, their perception of fuel consumption was essentially based on a feeling that something was wrong. They provided no objective data during their testimony such as logs showing mileage/hours of ATV and snowmobile usage or fuel consumption information for these vehicles. They were unable to state the exact capacity of the fuel tanks of the vehicles and provided vague estimation for other equipment such as chainsaws. All that they were able to say is that they believed having filled the ATVs and snowmobiles on a number of occasions between September 2019 and February 2020, which, for Corporal Eckhardt, meant “once or twice”, and for Corporal Lugtu, meant “once a month, twice if we are very busy”, as he said they were during that time. Unsurprisingly, their estimate of total quantity of gasoline used in that period varied greatly, from a categorical “less than 40 litres” for Corporal Eckhardt to “just under 300 litres plus 30, maybe 40 litres for other equipment such as chainsaws” for Corporal Lugtu.

[29] The evidence and arguments by counsel revealed that the Primrose Lake Range gasoline log offered very little in terms of objective confirmation of the exact quantities of fuel drawn for JLR. Indeed, the quality of the information recorded is wholly dependent on the accuracy and uniformity of the information entered by individuals operating the pumps, apparently without any independent verification using measured amount of fuel delivered from the pumps in a given period. The understanding of Corporal Lugtu about the meaning of entries listing a Canadian Forces registration (CFR) number varied from the testimony of his colleague. Entries believed to represent the filling of jerry cans were ultimately explained by the need to fill a gasoline pickup loaned to the JLR section. Some entries were incomplete, leaving blank lines in the log. As a result, estimations of quantity of fuel drawn varied considerably, as evidenced in suggestions of counsel to witnesses, 300 litres suggested to Corporal Eckhardt vice 559.2 litres by another prosecutor to Corporal Lugtu.

[30] During arguments on a *non prima facie* motion by the defence, the prosecution was unable to provide the Court with a precise figure of fuel drawn for JLR. In final arguments, this deficiency was corrected, the prosecutor submitting that 474.2 litres had been drawn from the Primrose Lake Range gasoline pump for use at JLR and estimated a usage of 360 litres based on the maximum that can be inferred from Corporal Lugtu’s testimony. As a consequence, I was asked to conclude and make a special finding to the effect that it was no longer 400 litres that had been stolen, but rather a rounded up figure of 115 litres, a significant change.

[31] In reply, the defence showed an equally coherent path to offer an interpretation of the content of the gasoline log revealing an estimated quantity of fuel drawn of 220 litres and an estimated quantity of fuel spent of 320 litres just on the basis of the testimony of both prosecution witnesses on the number of hours required to qualify as ATV drivers. On both accounts, the defence concludes there is no missing fuel.

[32] As the fuel quantity is not a core element which requires to be proven, I am not required to be the arbiter of the mathematical confrontation between parties. These



conflicting estimations based on reasonable interpretation of the evidence demonstrate, however, the frailties of the estimations on which the prosecution rests its argument that gasoline was missing and had been stolen. These frailties are largely sufficient to fuel a reasonable doubt in my mind as to whether any gasoline was missing, hence stolen.

[33] I will add in closing that I do not accept the argument of the prosecution to the effect that the observation on two occasions of one jerry can in the possession of Master Corporal Anderson reveals that forty litres of gasoline would have been stolen. There is no evidence that these jerry cans were full of gasoline when observed; in fact, one of the jerry cans was most likely empty as it had been thrown in the back of a pickup truck. As Master Corporal Anderson is not charged with being in improper possession of jerry cans belonging to Her Majesty the Queen, the fact that he had been observed with jerry cans in his possession on DND property is of no assistance to the prosecution if it has not demonstrated, to the required standard, that gasoline had in fact been stolen.

### **Conclusion**

[34] I conclude, therefore, that Master Corporal Anderson must be found not guilty of the first charge.

### ***The second charge for stealing lumber***

#### **Evidence**

[35] As it pertains to the second charge, the first requirement that the lumber be capable of being stolen is not disputed. The lumber in question was stored at JLR, property owned and operated by DND as a bombing range. The lumber was not owned by the accused, but rather by Her Majesty in right of Canada, as specified in the particulars of the charge.

[36] On the second and third elements of the *actus reus*, as to whether lumber was in fact stolen by the accused, the evidence of the prosecution simply consists of the testimony of both Corporals Eckhardt and Lugtu to the effect that in the fall of 2019, they engaged in minor carpentry work to make shelves to store their equipment in the garage space located next to the administrative building where they worked at JLR. In doing so, they used the wood or lumber products stored in the blue sea container at JLR, including plywood, two by fours and four by fours. Corporal Lugtu testified that as he and Corporal Eckhardt were making shelves, Master Corporal Anderson was for his part using the same wood or lumber products to make a bed frame, which he assembled in place and then disassembled to load it in the back of the DND pickup truck, which was driven back to CFB Cold Lake that afternoon. He testified knowing it was a bed frame from a discussion that he had with Master Corporal Anderson at the time the bed frame was being made. Corporal Lugtu concluded from this conversation that the bed frame was not for the JLR. The last time he saw the bed frame was at the parking lot in the controlled Explosives Storage Area (ESA) at CFB Cold Lake, in the

back of the DND pickup truck. Both Corporals Eckhardt and Lugtu testified that there are no beds at JLR.

[37] Corporal Eckhardt also testified that Master Corporal Anderson was making a bed frame at JLR, which was transported back to CFB Cold Lake but his recollection was different in some details. He testified that he did not know that it was a bed frame that was being made by Master Corporal Anderson as they were building shelving at JLR, having learned that detail in the course of a subsequent conversation on Master Corporal Anderson having moved in with a colleague. He recalled having loaded the pieces of what Master Corporal Anderson had been making in the DND pickup trucks at JLR and unloaded the same material with Corporal Lugtu once they had arrived at CFB Cold Lake. The last he saw of the lumber was on the ground of the parking lot in the controlled ESA, as he was leaving to go home. He added that when he came to the same location the next morning, the material was gone.

### **Position of the parties**

[38] The prosecution argues that the evidence demonstrates unequivocally that Master Corporal Anderson converted lumber stored at JLR range into a bed frame, which was transported back to CFB Cold Lake, and asks me to infer that it was subsequently brought by Master Corporal Anderson outside of the base for his personal use.

[39] In reply, the defence argues that I cannot rely on the testimony of the prosecution's witnesses given their lack of credibility, which should leave me with a reasonable doubt as to whether the events unfolded as they described.

### **Analysis**

[40] What the defence argues, in relation to the second charge, is a general lack of credibility of both witnesses and not a lack of credibility relating to specific aspects of their testimony on that charge. Indeed, the testimony of Corporal Lugtu on the second charge was not specifically challenged in cross-examination, while Corporal Eckhardt's testimony was challenged only on one specific point, to the effect that he had previously used the word "guess" to describe his conclusion to the effect that the bedframe would have been used in the colleague's place where Master Corporal Anderson would have moved. Given that Corporal Eckhardt never testified having observed the bed frame in its intended location, this was only a clarification. At the end of the trial, the evidence about Master Corporal Anderson having made the bed frame from lumber taken from DND stocks at JLR and taken in a DND truck to CFB Cold Lake remained uncontradicted.

[41] That being said, I did acknowledge earlier in these reasons that a reasonable doubt about Master Corporal Anderson's guilt may arise from the credibility of the witnesses. Even if credibility is not an all or nothing proposition, there can be situations

when a witness displays such a disregard for the truth, for instance in uttering a deliberate falsehood, that it will taint his or her entire testimony.

[42] As noted by Watt J.A. writing for the Court Martial Appeal Court in *R. v. Clark*, 2012 CMAC 3, at paragraph 48:

Testimony can raise veracity and accuracy concerns. Veracity concerns relate to a witness' sincerity, his or her willingness to speak the truth as the witness believes it to be. In a word, credibility. Accuracy concerns have to do with the actual accuracy of the witness' account. This is reliability. The testimony of a credible, in other words, an honest witness may nonetheless be unreliable.  
[Citation omitted.]

[43] I do not have concerns with the credibility of Corporal Lugtu, who testified in a straight forward manner, admitted when his memory would not allow him to provide details, and was particularly frank and honest when the reliability of his testimony was challenged during cross-examination. Corporal Lugtu defended his point of view effectively when it was suggested that he used fuel to light fires in the range and when it was suggested that a witness could testify having used fuel from their section. He readily admitted his error about the time period when an ATV was being repaired and about benefitting from a replacement snowmobile. I find that his missteps were linked to specific reliability issues and I have heard nothing that could allow me to conclude that his testimony is generally unreliable.

[44] I am significantly more concerned with the reliability of the testimony of Corporal Eckhardt. He experienced considerable difficulties remembering many details during his examination-in-chief, details that in my view should have been remembered. This weakness was particularly obvious when he related the incident in January 2020 when gasoline could unexpectedly not be found to allow a task to be performed. Corporal Eckhardt could not remember what the gasoline was for and what Master Corporal Anderson's involvement might have been or whether he was even present. Such a lack of memory related to the event which triggered the formal complaint targeting Master Corporal Anderson following weeks of suspicion was puzzling. Then, the cross-examination revealed significant contradictions with previous statements, which led me to conclude that Corporal Eckhardt had exaggerated damaging evidence against Master Corporal Anderson in his examination-in-chief. In relation to his testimony and previous statement to the effect that he had filled jerry cans with gasoline shortly before the January day when there was no gasoline to be found, he had to admit, when confronted by the content of the gasoline log, that he had not been filling jerry cans of gasoline at that time. Finally, the cross-examination revealed that Corporal Eckhardt had significant reasons to be upset with Master Corporal Anderson over administrative steps relating to his accelerated promotion, an incident that he unconvincingly tried to minimize.

[45] For these reasons, I do have credibility concerns about Corporal Eckhardt. If his testimony was the only one allowing me to convict Master Corporal Anderson on the second charge, I could well have a reasonable doubt and acquit. However, the bed

frame narrative has also been related by Corporal Lugtu, a witness that I find to be credible. I do not accept the suggestion made by defence to the effect that Corporals Eckhardt and Lugtu may have colluded to invent the bed frame story, a suggestion that was incidentally not put to them in cross-examination. This argument calls for speculation, as it is not supported by evidence. As it pertains to the final destination of the bed frame, I note that the “guess” shared by Corporal Eckhardt as to Master Corporal Anderson moving in with a colleague is corroborated by the unchallenged evidence of Ms Wills, who testified that Master Corporal Anderson moved out of the matrimonial home they shared in October 2019. It is therefore plausible that a bed frame would have become useful for Master Corporal Anderson at that point in time. In any event, the prosecution does not have to prove the final destination of the bed frame. All that is required is an inference that lumber was taken off DND property.

### **Conclusion**

[46] I have no difficulties on the basis of the credibility of witnesses or otherwise to conclude from the evidence that I have heard that lumber, property of Her Majesty, was wrongful appropriated by Master Corporal Anderson to make a bed frame at JLR, which was subsequently moved to CFB Cold Lake, prior to being taken elsewhere by Master Corporal Anderson to be applied to his own personal use.

[47] As for the *mens rea* or wrongful intent for stealing, I have no difficulty to find beyond a reasonable doubt that Master Corporal Anderson had the required intent to deprive Her Majesty of the lumber fraudulently and without color of right.

[48] Consequently, Master Corporal Anderson must be found guilty of the second charge.

### ***The third charge for stealing the headache rack***

#### **The evidence**

[49] The evidence heard pertaining to the third charge of stealing a DeWalt headache rack consists in the testimony of two former military members of the MSE staff, Mr Fudge and Sergeant (Retired) Lanteigne, whose duties in 2019 involved frequent visits in JLR where they mostly spent their workday in the MSE building next to the administration building. Their evidence is to the effect that a DeWalt headache rack had been lying on the floor of that building for quite some time, likely years. It is believed that the used rack had been, at one point, installed in the back of a DND pickup as what was described as a CFR number appeared on the top of the rack, in faded letters. The evidence was inconclusive on specifics of what vehicle the rack may have been attached to. The rack could not be formally retraced in documents or computer files as an item formally attributed to a supply customer account, hence traceable as an accountable item.

[50] Sergeant (Retired) Lanteigne testified that sometime in the spring of 2019, the rack was no longer on the floor of the MSE shop. The testimony of Mr Fudge is to the effect that at a gathering of work colleagues in the spring or summer of 2019, he noticed what very much looked like the DeWalt rack formally on the floor of the MSE building installed in the back of Master Corporal Anderson's pickup truck, as evidenced by the "DeWalt" sign on it. Sergeant (Retired) Lanteigne, present at the time, noted the same thing when his attention was brought to the rack by Mr Fudge. They both testified that DeWalt racks were rare; it is the only one they had ever seen, and estimated that it had to be the same rack.

[51] Ms Wills, Master Corporal Anderson's former spouse, testified that Master Corporal Anderson came home one day with a rack installed in the back of their pickup truck. He told her that he had brought the rack from work, that there was no listing for it and that it was "fair game" as it was next to a dumpster. Later, after their separation, Master Corporal Anderson brought the rack that had been installed in the back of his pickup truck to her apartment for safekeeping, as he said he was under investigation. She had reluctantly accepted to keep the rack after a number of conversations, to protect the father of her children, as she stated in her testimony. She kept the rack for a number of months in a closet and at one point turned it over to the military police. When invited by the military police to identify the rack obtained from Ms Wills' apartment as the one that had been on the floor of the MSE building at JLR, Sergeant (Retired) Lanteigne had no hesitation to do so. He did the same when that same rack was brought to the courtroom during the trial, especially on the basis that he recalled that the rack on the MSE building floor was missing a yellow tab at one end of its bottom arm, a particularity also found on the rack brought to the courtroom and photographed at Exhibit 3.

### **Position of the parties**

[52] The prosecution submits that it has presented all of the evidence required to obtain a conviction on this charge.

[53] The defence argues that the prosecution had failed in its burden of proving that the rack was property of DND and that it was stolen. Indeed, it was submitted that DeWalt headache racks are sold commercially and that no such rack could be traced on DND inventory or associated with a DND vehicle. Alternatively, it was also argued that the evidence of the conversation that Master Corporal Anderson had with Ms Wills reveals that he believed he could take the rack, which was destined to the garbage anyways, as revealed by Sergeant (Retired) Lanteigne during cross-examination. This "abandonment" argument has impacts on both the *actus reus* and the *mens rea*.

### **Analysis**

The *prima facie* property of the rack

[54] As it pertains to the ownership of the rack, I find that despite the lack of evidence going to the administrative attribution of responsibility for the rack as a traceable item on DND's inventory, it remains that this is an item of moveable property, stored at the time of the alleged offence in a DND building, on a bombing range and hence accessible by a very limited number of CAF members and DND employees. It was unquestionably in the possession of DND, hence Her Majesty, when it was taken. The incapacity to trace the item to an account is not determinative, especially in light of the testimony of Sergeant Brochu, to the effect that an item of that nature had been previously listed as consumable hence not necessarily individually listed on an account.

#### The abandonment argument and its impact on property

[55] The defence argues that evidence to the effect that the rack was being destined to the garbage allows an inference of abandonment, which the prosecution had to disprove. With respect, I cannot agree as it would amount to recognizing a presumption of abandonment for DND property not actively used. We must remember that it is the nature of the CAF to prepare for emergencies, from support to civil agencies to active hostilities. It is the nature of emergencies to arrive unannounced. To be prepared to react to those, DND and the CAF must store significant quantities of material that may, if all goes well, never be used. Respectfully, it does not make sense to presume these items to have been abandoned through lack of use.

[56] The suggestion that a given item has been abandoned because it has not been in use for a long time also runs counter to the evidence of Sergeant Brochu, who explained the process for the disposal of DND property, which must be formally transferred outside of the department and the government in a controlled fashion. The process does not involve allowing CAF members or DND personnel to simply bring an item home when they deem it to be of no use to DND. It is not open to anyone to assume that if the item has been laying unused for a long time it is because it must have been disposed of. To the contrary, if the disposal process has been performed, the property will be gone. If it is still there, it is because it is and it remains DND property. The prosecution does not have anything to disprove as it pertains to disposal or abandonment in the circumstances of this case.

[57] Consequently, in relation to the first element of *actus reus* for stealing, the headache rack was property that could be stolen, as it belonged to Her Majesty in right of Canada. It had gone missing since some time in the spring of 2019, when Sergeant (Retired) Lanteigne noted that it was no longer on the floor of the MSE building.

#### Was the headache rack taken by Master Corporal Anderson?

[58] The next issue to consider is whether the rack was taken by Master Corporal Anderson, an element that I assume remains contested by the defence who challenges the sufficiency of the evidence to demonstrate that the rack seen on the back of Master

Corporal Anderson's pickup truck was the same as the rack that disappeared from the floor of the MSE building in JLR.

[59] The evidence going to that element comes from the observations made by Mr Fudge and Sergeant (Retired) Lanteigne of the rack installed on the back of Master Corporal Anderson's truck. They were able to observe the rack for a long time in a workplace they regularly attended and were therefore entirely able to identify the rack on the back of Master Corporal Anderson's truck as the same rack. I find their testimony on that issue to be credible, including the doubts and hesitations that they expressed as it pertains to their decision not to confront Master Corporal Anderson at the time given the possibility that it may not be the same rack.

[60] These observations were not the only evidence going to this element. It has been admitted that the rack, which found its way into the courtroom and on the pictures at Exhibit 3, was given to the military police by Ms Wills, who had obtained it from Master Corporal Anderson. It has been convincingly identified as the same rack which was on the floor of the MSE building at JLR. In light of this evidence, I am convinced beyond a reasonable doubt that Master Corporal Anderson is the person who has taken the rack.

The "fair game" *mens rea* argument

[61] Turning now to the fault element, the *mens rea*. The defence submits that Master Corporal Anderson did not have the required fraudulent intent to take the rack as he honestly believed that the headache rack had been abandoned, a state of fact which justified his actions in taking the rack, even if his belief was mistaken. When asked what evidence supported this position, the defence pointed to the testimony of Ms Wills, who stated that, when Master Corporal Anderson first came home with the rack installed on what was then their truck, he told her that he had obtained the rack from work, that it was not listed on any account, and that it was next to a dumpster hence "fair game" as far as he was concerned.

[62] The position of the defence calls for an assessment of the nature of the statement made by Master Corporal Anderson to Ms Wills and of whether it can be admitted for the truth of its content as proposed.

[63] First off, it is important to note that the statement was not given to a person in authority, hence it is not a confession which could be admitted in its entirety with both inculpatory and exculpatory parts, at the initiative of the prosecution. This is simply an out-of-court statement which introduction is requested to prove the truth of its content, hence hearsay. As such it is subject to the full exclusionary rule barring its reception in evidence because of an absence of a contemporaneous opportunity for cross-examination. Indeed, cross-examination best exposes defects in perception and memory, as well as ambiguity in communication and want of sincerity. Hearsay statements such as this one are presumably inadmissible.

[64] There are common law exceptions, but none apply here. Indeed, the common law exceptions are underlined by two basic principles: necessity and unavailability. The principle of necessity implies that since the benefit of the evidence will be lost in its entirety unless it is admitted in its untested form, a greater or lesser necessity exists for receiving the evidence. The unavailability of the declarant is the commonest reason that underlies necessity. Necessity may also arise from the inability to get evidence of similar value from the declarant or other sources. Here the declarant is Master Corporal Anderson. He is available, but chose to exercise his right not to testify. None of the common law exceptions apply to allow entering evidence from him through a third party, including the exception of declaration against penal interest, which is stringently limited and not available to declarants who are unwilling to testify in the proceedings.

[65] Hearsay evidence that does not overcome the presumption of inadmissibility because the evidence does not fall within any traditional exception may nonetheless gain entry under the principled approach by satisfying the requirements of necessity and reliability. Under the principled approach, it is for the trial judge to determine whether the requirements of necessity and reliability have been satisfied. Necessity implies that the reception of evidence untested by cross-examination is necessary, since otherwise the benefit of the evidence to the determination of the litigation will be lost entirely. The reliability requirement is aimed at identifying those cases where concerns arising from the inability to test the evidence are sufficiently overcome to justify reception of the evidence as an exception to the general exclusionary rule. In general, the reliability requirement may be met where the proponent shows that there is no concern about the truth of the statement because of the circumstances in which the statement was made; or no real concern arising from presentation of the statement as hearsay because the circumstances permit testing of its truth and accuracy by means other than contemporaneous cross-examination.

[66] I find that these requirements are not met in this case. The necessity requirement cannot in my view arise on the basis of the choice made by the accused not to testify, thereby not exposing himself to cross-examination. Also, I very much doubt the reliability of the statement that the defence wishes to enter for its truth here. Indeed, the evidence reveals that part of the statement may be inaccurate as it would appear that the rack was on the floor of a building regularly used by personnel and not near a dumpster, which would be kept outside. Also in relation to reliability, I find that it is very likely that instead of being concerned with veracity in making his statement, Master Corporal Anderson was motivated to tell his then spouse what he perceived she wanted to hear when he came home with their pickup truck equipped with a new accessory, namely that it was free and that its possession was legitimate.

[67] Consequently, I find that the statement of Master Corporal Anderson to Ms Wills is not admissible to prove the truth of its content, hence cannot establish his state of mind when he took the headache rack from the floor of the MSE building at JLR. Even if I was wrong on that, I would not have been convinced that the belief that Master Corporal Anderson may have had in relation to the rack was honestly held. It is in my view unreasonable for a member of the CAF to believe that an object on DND



property in circumstances such as in this case is “fair game” to take home, regardless of the opinion that others such as Sergeant (Retired) Lanteigne may have held. I recognize that the test is a subjective one – it is the belief of Master Corporal Anderson that counts - but the circumstances of the actions of Master Corporal Anderson in taking the rack, combined with his subsequent actions in relation to the rack, convince me that he did not have the faultless belief that he claims to have had.

#### The *mens rea* elements

[68] This brings me to the post-offence conduct of Master Corporal Anderson. The evidence of Ms Wills as to the conversations she had with Master Corporal Anderson, who asked her to keep the rack at her apartment, and indeed his actions in bringing the rack to her, constitutes circumstantial evidence indicative of a fraudulent intent by Master Corporal Anderson. In my view this fraudulent intent goes back to the time he took the property. This evidence is convincing as Master Corporal Anderson stated he was under investigation and that, consequently, he needed to part with the rack. These words turned out to be true, but their impact lies in the association made between the investigation and the need to avoid having the rack in his possession. They were understood that way by Ms Wills, who testified that she agreed to keep the rack to protect the father of her children. They are indicative of a consciousness on the part of Master Corporal Anderson that the rack was not acquired legitimately. I believe this knowledge was present at the time he took the rack, even if he had no hesitation sporting the rack on his pickup truck before being informed of an investigation on his actions. Only then did the risks associated with that possession did occur to him.

[69] I consequently find that Master Corporal Anderson had the intent to deprive permanently Her Majesty of the rack at the time that he took it and that this intent was fraudulent at that time, having acted deliberately and intentionally, under no mistake and with knowledge that the rack was another’s property.

[70] As it pertains to the colour of right *mens rea* element, it is important to note that the prosecution will have met its burden of proving absence of colour of right whenever there is nothing in the evidence suggesting that the accused had an honest belief as to his proprietary or possessory right. Colour of right is a defence and, as for each defence, the accused bears the burden of showing that there is an “air of reality” to it before it can operate to negate guilt.

[71] The colour of right defence is not at play here. The accused has failed, despite the best efforts of counsel, to point to some admissible evidence that the issue is a live one at trial. There is simply insufficient evidence suggesting that the accused had an honest belief as to his proprietary or possessory right in relation to the rack. I have no difficulty finding, beyond a reasonable doubt, that he took the rack without colour of right.

#### Conclusion

[72] I am convinced beyond a reasonable doubt that all elements of *mens rea* have been proven, in addition to the elements of the prohibited act, as described previously. Consequently, Master Corporal Anderson must be found guilty of the third charge.

### **Special finding**

[73] I have been asked to make a special finding under the authority of section 138 of the *NDA* to ensure that the entire period of the charge matches the evidence heard from both Mr Fudge and Sergeant (Retired) Lanteigne, to the effect that the headache rack went missing from the MSE building in the spring of 2019. I do agree that the testimony of these witnesses is more convincing than the testimony of Ms Wills, to the effect that Master Corporal Anderson would have first come to their house with the rack on their pickup truck in late 2019, especially that her evidence shows that they were separated since October 2019. I do find that this difference from the statement of particulars is not essential to establish the commission of the offence charged. I also find that it did not prejudice Master Corporal Anderson in his defence, as indeed, the request was not opposed. Consequently, the special finding will be made as requested.

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

[74] **FINDS** Master Corporal Anderson not guilty of the first charge of stealing under section 114 of the *NDA*.

[75] **FINDS** Master Corporal Anderson guilty of the second charge of stealing under section 114 of the *NDA*.

[76] **FINDS** Master Corporal Anderson guilty of the third charge of stealing under section 114 of the *NDA*.

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### **Counsel:**

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

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