



## COURT MARTIAL

**Citation:** *R. v. McKie*, 2022 CM 2017

**Date:** 20221221

**Docket:** 202217

Standing Court Martial

3rd Canadian Division Support Base Edmonton  
Edmonton, Alberta, Canada

**Between:**

**Warrant Officer B.A. McKie, Applicant**

- and -

**Her Majesty the Queen, Respondent**

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

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### **DECISION ON A MOTION BY DEFENCE THAT NO PRIMA FACIE CASE HAS BEEN MADE OUT**

(Orally)

#### **Introduction**

[1] Warrant Officer McKie was originally charged with four charges under section 130 of the *National Defence Act (NDA)*. At the commencement of proceedings, with leave of the Court, the prosecution withdrew the third charge. Two of the remaining charges relate to possession of property obtained by crime contrary to section 354 of the *Criminal Code* and the third charge alleges possession of a prohibited device, contrary to subsection 91(2) of the *Criminal Code*.

[2] The three charges read as follows:

**“FIRST  
CHARGE**  
Section 130

**AN OFFENCE PUNISHABLE  
UNDER SECTION 130 OF THE  
NATIONAL DEFENCE ACT,**

*National Defence  
Act*

**THAT IS TO SAY, POSSESSION  
OF PROPERTY OBTAINED BY  
CRIME, CONTRARY TO  
SECTION 354 OF THE  
CRIMINAL CODE**

*Particulars:* In that he, on or about 18 May 2021, at or near Edmonton, Alberta, did have in his possession a Browning Hi-Power 9 mm magazine of a value not exceeding five thousand dollars, obtained by the commission in Canada of an offence punishable by indictment.

**SECOND  
CHARGE**  
Section 130  
*National Defence  
Act*

**AN OFFENCE PUNISHABLE  
UNDER SECTION 130 OF THE  
NATIONAL DEFENCE ACT,  
THAT IS TO SAY, POSSESSION  
OF PROPERTY OBTAINED BY  
CRIME, CONTRARY TO  
SECTION 354 OF THE  
CRIMINAL CODE**

*Particulars:* In that he, on or about 18 May 2021, at or near Edmonton, Alberta, did have in his possession three blank firing attachments, of a value not exceeding five thousand dollars, obtained by the commission in Canada of an offence punishable by indictment.

**FOURTH  
CHARGE**  
Section 130  
*National Defence  
Act*

**AN OFFENCE PUNISHABLE  
UNDER SECTION 130 OF THE  
NATIONAL DEFENCE ACT,  
THAT IS TO SAY, POSSESSION  
OF A PROHIBITED DEVICE,  
CONTRARY TO SECTION 91(2)  
OF THE CRIMINAL CODE**

*Particulars:* In that he, on or about 18 May 2021, at or near Edmonton, Alberta, did possess prohibited

devices, to wit: six 30-round magazines.”

[3] On application, at the end of the Crown’s case, accused persons are entitled to a directed verdict of acquittal if the prosecution has not presented a *prima facie* case. Consequently, pursuant to the *Queen’s Regulations and Orders for the Canadian Forces* (QR&O) paragraph 112.05(13), defence presented a motion seeking a directed verdict on each of the three remaining charges. He argued that, with respect to the first and second charges, the prosecution did not introduce evidence of one of the essential elements of the offence; namely, that the items found in Warrant Officer McKie’s home were in fact stolen or were obtained by the commission in Canada of an offence punishable by indictment. Secondly, with respect to the fourth and remaining charge, he argued that by virtue of his full-time service in the Canadian Armed Forces (CAF), Warrant Officer McKie was an exempted person under section 117.07 of the *Criminal Code* and entitled to be in possession of the thirty-round magazines and, therefore, cannot be found guilty of being in possession of a prohibited device.

### **The applicable law**

[4] The applicable test to be applied in courts martial in assessing whether a *prima facie* case has been established in evidence is captured in Note(B) to QR&O article 112.05:

(B) A *prima facie* case is established if the evidence, whether believed or not, would be sufficient to prove each and every essential ingredient such that the accused person could reasonably be found guilty at this point in the trial if no further evidence were adduced. Neither the credibility of witnesses nor weight to be attached to evidence are considered in determining whether a *prima facie* case has been established. The doctrine of reasonable doubt does not apply in respect of a *prima facie* case determination.

[5] The above test is consistent with the test set out for directed verdicts by Fish J. of the Supreme Court of Canada (SCC) in *R. v. Fontaine*, 2004 SCC 27. At paragraph 53, Fish J. set out the test which was later enunciated in *R. v. Barros*, 2011 SCC 51, at paragraph 48 by Binnie J.:

[48] A directed verdict is not available if there is any admissible evidence, whether direct or circumstantial which, if believed by a properly charged jury acting reasonably, would justify a conviction: *R. v. Charemski*, [1998] 1 S.C.R. 679, at paras. 1-4; *R. v. Bigras*, 2004 CanLII 21267 (Ont. C.A.), at paras. 10-17. Whether or not the test is met on the facts is a question of law which does not command appellate deference to the trial judge.

[6] The test is the same whether the evidence is direct or circumstantial, but the nature of the judge’s task varies according to the type of evidence that the prosecution has advanced. Where the prosecution’s case is based entirely on direct evidence, the judge’s task is straightforward. In simple terms, direct evidence relates to “the precise fact which is the subject of the issue on trial” (see Sopinka, John, Sidney N. Lederman

and Alan W. Bryant. *The Law of Evidence in Canada*, 2nd ed. Toronto: Butterworths, 1999, at section 2.74).

[7] If the judge determines that the prosecution has presented any direct evidence as to every element of the offence charged, the judge's task is complete. However, with respect to the first and second charges, much of the evidence is circumstantial as there is no direct evidence that the items found in Warrant Officer McKie's possession were the result of a commission of a crime. When it comes to applying the above legal test to circumstantial evidence, the test is more complicated.

[8] With circumstantial evidence, as the SCC set out in *R. v. Arcuri*, 2001 SCC 54, [2001] 2 S.C.R. 828, there is "by definition, an inferential gap between the evidence and the matter to be established — that is, an inferential gap beyond the question of whether the evidence should be believed: see [Watt, David. *Watt's Manual of Criminal Evidence*. Scarborough, Ont.: Carswell, 1998], at § 9.01 (circumstantial evidence is 'any item of evidence, testimonial or real, other than the testimony of an eyewitness to a material fact. It is any fact from the existence of which the trier of fact may infer the existence of a fact in issue')." More fully, the trial judge's tasks are laid out by the SCC in *Arcuri*, 2001 SCC 54, at page 840:

23 The judge's task is somewhat more complicated where the Crown has not presented direct evidence as to every element of the offence. The question then becomes whether the remaining elements of the offence — that is, those elements as to which the Crown has not advanced direct evidence — may reasonably be inferred from the circumstantial evidence. Answering this question inevitably requires the judge to engage in a limited weighing of the evidence . . . The judge must therefore weigh the evidence, in the sense of assessing whether it is reasonably capable of supporting the inferences that the Crown asks the jury to draw. This weighing, however, is limited. The judge does not ask whether she herself would conclude that the accused is guilty. Nor does the judge draw factual inferences or assess credibility. The judge asks only whether the evidence, if believed, could reasonably support an inference of guilt.  
[Emphasis removed.]

[9] The weighing of the evidence for a directed verdict is a very limited exercise. "The judge does not ask him- or herself whether he or she is personally satisfied by the evidence. Rather, the judge asks whether a jury, acting reasonably, could be satisfied by the evidence." (see *R. v. Charemski*, [1998] 1 S.C.R. 679 at paragraph 23; emphasis removed.)

[10] A good starting point for any discussion of inference drawing is the definition offered by Watt J. in David Watt, *Manual of Criminal Evidence*, (Toronto: Thomson Reuters Canada, 2022), *Inferences and Presumptions*, *Inferences* at §12.01 at page 108:

An *inference* is a deduction of fact which may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the proceedings. It is a conclusion that *may*, not *must*, be drawn in the circumstances.

[11] The first step in inference drawing is ensuring that the primary facts, which are said to provide the basis for the inference, are established by the evidence. If the primary facts are not established, then any inferences drawn from them will result in impermissible speculation. The proposed inference must be reasonably and logically drawn from the established primary facts.

[12] Further, if the judge determines that there are two competing inferences that can reasonably be drawn and it is not speculation, it is a legal error to favour the inference of the accused over that of the prosecution as to do so usurps the function of the trier of fact (see *Arcuri*, at pages 839 to 842 and *Charemski* at paragraphs 27 to 31 and *R. v. Masterson*, 2008 ONCA 481 at paragraphs 6 to 14). As Major J. put it in *R. v. Sazant*, 2004 SCC 77, [2004] 3 S.C.R. 635, [2004] S.C.J. No. 74 (QL), at paragraph 18, “where more than one inference can be drawn from the evidence, only the inferences that favour the Crown are to be considered.” Thus, if a reasonable inference in favour of the prosecution is available to be drawn, then, regardless of its strength, a judge considering an application for a directed verdict, is required to draw it.

### **Evidence before the Court**

[13] By consent, the prosecution entered a firearm licence affidavit sworn by Kathleen Malley confirming that Warrant Officer McKie had a registered firearm which is described as a 22-calibre SIG Sauer, Mosquito semi-automatic handgun.

[14] During the trial, the applicant confirmed that the three blank firing attachments (BFAs), the C7 magazines and the 9-millimetre magazine were found in his rental residence during the search. The applicant also conceded the continuity of the evidence.

[15] In addition, the prosecution called four witnesses. The relevant testimonial evidence is summarized below:

### ***Master Corporal Bennett***

[16] During the main trial, Master Corporal Bennett told the Court the following:

- (a) he was the lead investigator on Warrant Officer McKie’s file. It was his responsibility to ensure that the investigation progressed and steps were taken to gather evidence and further the investigation;
- (b) on the day that they were exercising the warrant, they left the guardhouse in several vehicles, which included a marked patrol car, a utility transport van and a third vehicle;
- (c) in executing the search warrant, they initially searched the house to make sure no one was hiding;
- (d) Warrant Officer McKie informed him that he had dogs which he locked up in his son’s room;

- (e) Warrant Officer McKie's son, daughter and son's girlfriend, who were approximately fifteen or sixteen years of age were present in the home during the execution of the search warrant. There were no others present in the home who were old enough to serve in the CAF;
- (f) Warrant Officer McKie and his children remained in the living room on the couch for the duration of the search;
- (g) aside from himself, there were two MPs who searched: one military police (MP) filed and photographed evidence that was collected; while a fourth MP transported seized items to the evidence collection point where Master Corporal Bennett was personally situated to oversee what was seized;
- (h) Master Corporal Bennett's role during the execution of the search was to ensure that everything went smoothly and if someone needed help or needed to be replaced he would help, but he otherwise stayed at the evidence collection point;
- (i) during the search, they found and seized the following:
  - i. six C7 magazines,
  - ii. one Browning magazine,
  - iii. three BFAs, and
  - iv. a Cadex foregrip;
- (j) he described the Browning magazine as resembling the magazines that the military uses with the Browning pistol;
- (k) once the items were seized, they were brought to the evidence collection point and after the search was completed, they bagged the items and placed them in the marked cruiser, eventually transporting them back to the MP detachment in Edmonton. Once at the MP detachment, the seized items were logged into the file, sealed into evidence bags with a tag that identified and described them. The seized items were subsequently placed in temporary evidence storage and locked up for the evidence custodian to move them from temporary evidence to the actual evidence storage room;
- (l) to his knowledge, the only person who has access to the evidence room is the Evidence Custodian. Access to any of the items is logged;

- (m) he identified that they seized the exhibits which he said were sealed and marked as having been collected as follows:
  - i. he was unsure of exactly where the BFAs were found in Warrant Officer McKie's house, but he stated that the lead evidence collector would have that information,
  - ii. he identified the 9-millimetre Browning magazine. The evidence bag indicates that it was seized from a gun locker located on the left-hand side upon entering the basement of the residence by their lead evidence collector, Corporal Comeau. Master Corporal Bennett believed that the gun locker was locked because the lead evidence collector asked Warrant Officer McKie to open it, which he did. However, Master Corporal Bennett also confirmed for the Court that he was not personally present when Warrant Officer McKie was asked to open the locker, and
  - iii. the lead evidence collector wrote on the evidence bag that six C7 magazines were seized "in basement, room 1, first gun locker on left going into the room";
- (n) he recalls the garage being locked as they requested that Warrant Officer McKie open it;
- (o) under cross-examination, he told the Court the following:
  - i. he first contacted Ms McKie on 4 February 2021,
  - ii. he does not recall if she had contact with the MPs prior to this date,
  - iii. she told him that while Warrant Officer McKie was moving items out of the matrimonial home, she observed items that she felt belonged to the military,
  - iv. Ms McKie provided him photographs of items that Warrant Officer McKie had in his possession that she believed belonged to the CAF,
  - v. he viewed Ms McKie as a citizen and a complainant,
  - vi. on 8 March 2021, he exchanged emails with Ms McKie regarding a search warrant expected to be executed at the matrimonial home,

- vii. he responded to her on 9 March 2021, in an email advising her that there were new procedures that needed to be followed regarding the issuance of a search warrant,
- viii. he knew that he needed a search warrant to search the matrimonial home,
- ix. on 3 April 2021 he advised Ms McKie that they wanted to come to the matrimonial home at a time that would not inconvenience her, but invited her to drop the items off at their detachment if she wanted to expedite the investigation. He described this as providing her available options,
- x. he confirmed that he had advised Ms McKie to take photos of markings or etchings so he could identify if any of the items belonged to the military,
- xi. he met with Ms McKie on 10 April 2021 where she brought all the items that Warrant Officer McKie left at her residence to the MP detachment,
- xii. the first time Ms McKie told him about the C7 magazines was on 13 February 2021. He explained that he also asked her if she had found any empty casings,
- xiii. the first time he realized that Warrant Officer McKie had a BFA at his rental residence was when he executed the search warrant,
- xiv. the first time he realized that Warrant Officer McKie had a 9-millimetre magazine was when he executed the search warrant,
- xv. he does not believe that BFAs are available in the civilian community as they are used primarily by the military. He is not sure how anyone else could come into possession of them, and
- xvi. he has no evidence to confirm whether these items are missing from the CAF inventory.

***Master Warrant Officer Cowan***

[17] Master Warrant Officer Cowan testified as follows:

- (a) he is a weapons technician by trade, but is currently classified as a Land Engineering Equipment Technologist, a classification that a weapons technician becomes when they reach the rank of warrant officer;



- (b) he is currently the senior technical instructor for the western area for all electrical mechanical and engineering trades;
- (c) currently, his job is to ensure that the on-the-job-trainees get the proper training;
- (d) he is currently the senior weapons technician for the brigade;
- (e) he is called upon to inspect weapons involving suicides or accidents on the range;
- (f) Weapons Technician Developmental Period 3 provided him these unique qualifications;
- (g) in June 2022, his regimental sergeant-major asked him to inspect the seized items before the Court;
- (h) he told the Court that he inspected:
  - i. the BFAs that are used on C7, C8 and C9 rifles which he told the Court are not compatible with hunting rifles or pistols. He could not say how much the BFAs would be worth,
  - ii. the Browning Hi-Power magazine 9-millimetre. He explained that the Browning is the current issue pistol within the CAF and holds thirteen rounds. It is a 9-calibre pistol, and
  - iii. six C7 magazines which hold thirty rounds each. The magazines themselves are compatible with C7, C8 and civilian rifles. Although they are compatible with civilian weapons, after inspecting them, he found that the magazines had not been altered to comply with Canadian law. He explained that under Canadian law, magazines of that type can only hold five rounds when used with civilian rifles, and explained that if the magazines held more rounds than that, they would be prohibited devices. He estimated that they would be worth approximately \$30 each;
- (i) when asked to review the affidavit of Kathleen Malley from the Canadian Firearms Registry which listed the personal firearm held by Warrant Officer McKie, he noted that the personal firearm held by Warrant Officer McKie was a SIG Sauer Mosquito, 22-calibre; and
- (j) when asked if the 9-millimetre magazine was compatible with Warrant Officer McKie's SIG Sauer Mosquito, the witness indicated that they are different calibre weapons with a 22-calibre being much smaller.

***Sergeant Munro***

[18] Sergeant Munro testified as follows:

- (a) he is a material management technician currently working in the Garrison Support Platoon in the Major Equipment Section in Edmonton, Alberta;
- (b) his section processes the life cycling of all major equipment, including wheeled and tracked assets. As an example, he would pick up a vehicle from the dealership and he would also sell that same vehicle at the end of its life. Additionally, he is familiar with the process for life cycling items other than vehicles, including weapon systems and weapons components. This is knowledge he gained through his earliest training;
- (c) items are accounted for on the system of record called Defence Resource Management Information System (DRMIS). Every account has a storage location (SLOC) and many units have multiple SLOCs;
- (d) within repair and disposal (R&D) there will be a scrap metal and a vault SLOC, depending on where the item will be stored;
- (e) during the lifecycle of an item, it could be stored in one SLOC and then it could be transferred to another;
- (f) these accounts are virtual in the DRMIS, but each unit has their own SLOC. Additionally, 1 Service Battalion (1 Svc Bn) also manages customers' SLOC accounts;
- (g) each company quartermaster (CQM) has its own SLOC, and each company has its own quartermaster, which will house an individual's weapons and field military equipment as well as any equipment specific to that company. In 1 Svc Bn, if a member is issued items, the items are tracked on the CQM SLOC;
- (h) field military equipment comprises those items or weapons specific to the CQM and they will have all the components that accompany the weapon that is issued, such as site, magazines, bolt, bayonet, "frog", weapons sling, and weapons cleaning kit and is assigned a rack where the weapon is located. When initially issued all these items, the member will sign for them, but they will be stored at the CQMS. When required for training or exercises, the weapon will be signed for by the member on a temporary loan card and all the associated field military equipment, including the bolt and the magazine will accompany it;

- (i) other items such as bayonets and slings are kept under lock and key;
- (j) upon receiving a posting to 1 Svc Bn, members receive an initial issue of one BFA. There is only one issued and it is expected that the member will show up with this item when required;
- (k) he explained that 9-millimetre magazines are not issued unless the member is headed to a 9-millimetre range and five C7 magazines are issued when you are going to a range or on exercise, otherwise the above magazines are held within the CQM lines until they are needed;
- (l) if they are issued a BFA, they are expected to be kept in their kit locker. All fighting order kit needs to be accessible and is expected to be held within battalion lines. He keeps his BFA in his truck so he has it no matter where he is. Under cross-examination he clarified that the standing order requires that the kit be readily available because members do not have time to go back home to get it;
- (m) for a range day, a member signs for the weapons and magazines that morning. While on the range, this equipment is stored on their person such as in their tactical vest or their combat pants;
- (n) the CQM will be awaiting the return of all weapons and magazines issued on that day;
- (o) he saw no reason why anyone would have six magazines (rather than the standard issue of five magazines);
- (p) there is no reason why a member of 1 Svc Bn would bring either a C7 or 9-millimetre magazine home;
- (q) other than being issued the magazines from the CQM, 1 Svc Bn members have no other way to acquire these items. While personnel from supply, and maintenance section or R&D may have a requirement to be in possession of these items, the average member has no such requirement;
- (r) the management of the C7 magazines is as follows:
  - i. if a C7 magazine or other component is identified as broken then it goes to the maintenance section and a work order is raised,
  - ii. the maintenance section accepts the item, at the receipts and issues (R&I) section, and a technician will book an appointment, accept and verify the items and take signatures of the exchange,

- iii. R&I will forward the item or components to the appropriate shop to be repaired,
  - iv. once they are repaired, the items are returned to the supply section,
  - v. if it is determined that the items are beyond economic repair, (BER) or beyond local repair (BLR) then the items are disposed of in accordance with the predetermined disposal actions for that specific item,
  - vi. if maintenance determines that the items need to be disposed of, then they will continue with the disposal actions, and
  - vii. the same work order process is followed for C9 magazines which is considered to be a repairable item;
- (s) within the SLOC, the C7 is registered on charge, but the components that accompany it (bolts, firing pins, magazines, cleaning kit) are not registered because they are part of a subassembly. However, it is understood that a C7 has five magazines, a firing pin, etc., and a number of components;
  - (t) if one of the parts of the subassembly, such as a magazine, needs to be repaired, then the supply section breaks down the list of components and will bring on charge the magazine so the maintenance section can create a work order and the magazine can be tracked. Once the items are formally transferred to the maintenance section and they have brought the items onto their charge, then the supply section can issue a replacement item to the customer;
  - (u) this is important because when a first-line unit has broken magazines, they need immediate replacements. So once the maintenance section has these items registered on its charge, then this opens up entitlements for the supply to re-issue any necessary replacements;
  - (v) the term “write off” means removing an item from a system of record. The material management technicians’ job is to verify all the items on their charge and they have to count them each time. If an article is BLR, it is forwarded for local disposal;
  - (w) disposal is specific to each item. It varies from item to item if there is a formal demilitarization, if there is a formal destruction, or if the item can be placed in the garbage;

- (x) with respect to the specific items referenced in the charges before the Court, the Court heard the following:
  - i. BFAs do not require any formal destruction nor formal demilitarization, therefore they can be placed in scrap metal. The three BFAs seized were still in good condition,
  - ii. the 9-millimetre and C7 magazines are to be destroyed beyond their intended purpose via crushing or shredding,
  - iii. the 9-millimetre magazine had not been destroyed beyond its intended purpose as would be required on disposal, and
  - iv. the six C7 magazines, configured to hold thirty rounds were not destroyed beyond their intended purpose;
- (y) although members of 1 Svc Bn might be able to take for their personal use some items listed for disposal action, this policy is just for certain commodities, and there are policies for such things as scrap wood. No member is permitted to take the BFAs, C7 magazines or 9-millimetre magazines;
- (z) additionally, under cross-examination, Sergeant Munro confirmed:
  - i. the battalion standing order is that the kit, including BFAs, be available and at no time will the member be permitted to travel home to get it,
  - ii. 1 Svc Bn, Garrison Support Platoon employs the largest group of logisticians, however there are often personnel gaps, but these gaps would not affect weapons security,
  - iii. the issuance of weapons and magazines are closely accounted for,
  - iv. all personnel posted to 1 Svc Bn have weapons assigned to them and when these weapons are required, they are issued that same weapon when they go to the range or on exercise. At the end of the day on the range, members return their weapons to the point where they were issued (i.e., the weapons vault). In issuing the weapons, etc., in the morning, Sergeant Munro himself maintains a list of weapons on a serialized sheet. At the end of the day, he verifies that every weapon and magazine distributed has been returned,
  - v. if a soldier returns to the supply section with one less magazine than they had been issued, they have to stay there until it is found

and they go back to the range to search for it. Everything stops until it is found, as magazines are treated like weapons,

- vi. the witness held 237 sets of five magazines for each soldier and the magazines were stored in his vault,
- vii. if he discovered that there was a missing magazine, he would immediately file an MP report and advise the chain of command. This would apply to all the weapons components such as the bolt, etc., as they are required for the proper functioning of the weapon,
- viii. magazines are not controlled technical assets, but their loss does require the filling out of an MP report and a document dealing with miscellaneous lost stores,
- ix. the form would be forwarded to the commanding officer for a determination as to what is to happen so that they can properly write off the item and to ensure due diligence. The accompanying paperwork is then uploaded into the DRIMIS. Records are maintained for five years, but anything related to weapons is kept for seven years,
- x. magazines that are to be repaired or disposed of are returned to the R&I section, and
- xi. if the maintenance section loses the magazine, they have to create a lost item report themselves.

***Master Warrant Officer Lefebvre***

[19] Master Warrant Officer Lefebvre testified that:

- (a) he is a vehicle technician by trade and currently works at the 3rd Canadian Division Headquarters as the Equipment Technical Sergeant Major;
- (b) he first met Warrant Officer McKie when they worked at the Lord Strathcona's Horse (Royal Canadians);
- (c) he was Warrant Officer McKie's supervisor when he worked in Garrison Maintenance Section for the three to four months prior to Warrant Officer McKie releasing from the CAF;
- (d) their relationship was mostly professional and they did not see each other often as Warrant Officer McKie was going through the release process;

- (e) as part of Garrison Maintenance section, Warrant Officer McKie oversaw production and administration, sitting behind a desk, responsible for personnel administration, mostly for the civilians who worked on the shop floor maintaining and repairing vehicles of a civilian nature such as firetrucks, busses, ambulances and snowplough. He was responsible for making sure parts were ordered and work orders were being looked after. He would not have had a toolbox issued to him;
- (f) nobody would have been issued C7 magazines unless they were also issued a weapon to go with it when they would be going to the range, or on exercise or if they were cleaning weapons;
- (g) with respect to 9-millimetre magazines, they would only be issued for training events or weapons cleaning;
- (h) an individual should only be issued one BFA as that is the initial issue by the CQM as they are given to members when they clear into the unit and when they clear out they have to turn that item back in;
- (i) in order to ensure that members properly account for items issued to them, the CQM staff would perform a weekly inventory where the witness would receive an email and they would check to see if they were missing any equipment;
- (j) depending on what was missing the action taken would be different. If it was a weapon or serialized kit they would immediately search for it and the witness would not dismiss any of his soldiers until the item was found;
- (k) depending on what the missing item was, they would fill out a lost kit report. If it was a serialized piece of equipment, such as a piece of a weapon, they would go to the next higher chain of command and involve the MPs;
- (l) although magazines are not serialized, they are considered a component of a weapon;
- (m) if a magazine was reported lost, there is no set procedure, but he would not release the soldiers until everyone searched through their kit to make sure that it was not tucked away somewhere and, additionally, they would also go through the log to see who signed for it;
- (n) if they could not find the item, then he would call the MPs;

- (o) members issued C7 or 9-millimetre magazines were not permitted to bring them home;
- (p) during his time supervising Warrant Officer McKie, he never authorized Warrant Officer McKie to bring such equipment home;
- (q) senior non-commissioned officers (NCOs) should ensure that weapons, parts of weapons and serialized items should all be accounted for whether they are conducting a training event or just taking them out of stores to clean them to make sure everything is serviceable. The witness indicated that this equipment should always be accounted for. When they are doing a training event in the field, maybe once every forty-eight hours he would have all the senior NCOs perform a 100 per cent stocktaking to verify all serialized kit within their platoon, ensuring that weapons and parts of weapons and magazines are accounted for; and
- (r) during the period of time that Warrant Officer McKie worked for him, there were no reported losses of magazines or BFAs.

### **Legal Framework**

#### ***Charges 1 and 2 - section 354 of the Criminal Code***

[20] Section 354 reads as follows:

##### **Possession of property obtained by crime**

**354 (1)** Every one commits an offence who has in his possession any property or thing or any proceeds of any property or thing knowing that all or part of the property or thing or of the proceeds was obtained by or derived directly or indirectly from

- (a) the commission in Canada of an offence punishable by indictment; or
- (b) an act or omission anywhere that, if it had occurred in Canada, would have constituted an offence punishable by indictment.

[21] “Property” is defined at section 2 of the *Criminal Code*. From a practical perspective, it captures anything of value that a person, corporation or government may own, including but not limited to, things, money, vehicles, goods, securities, personal effects and rights or interests in any of them.

[22] A person may have property in their possession in several different ways. Proof of any one of them is enough to establish this essential element. The term “possession” is defined in subsection 4 (3) of the *Criminal Code*. It reads as follows:

##### **Possession**

- (3) For the purposes of this Act,



- (a) a person has anything in possession when he has it in his personal possession or knowingly
  - (i) has it in the actual possession or custody of another person, or
  - (ii) has it in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or of another person; and
- (b) where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them.

[23] To “obtain” something is to acquire or get it, directly or indirectly, from some place or person, or by some means. For property to be obtained by crime means that it has been acquired, in part at least, directly or indirectly, by the commission of a criminal offence. The words “obtained by” apply only where the indictable offence was committed in respect of the thing obtained. (See *R. v. Geauvreau* (1979), 51 C.C.C. (2d) 75 (Ont. C.A., affd [1982] 1 S.C.R. 485).

[24] The prosecution argued that the relevant crime is that of section 114 of the *NDA* which reads as follows:

#### **Stealing**

**114 (1)** Every person who steals is guilty of an offence and on conviction, if by reason of the person’s rank, appointment or employment or as a result of any lawful command the person, at the time of the commission of the offence, was entrusted with the custody, control or distribution of the thing stolen, is liable to imprisonment for a term not exceeding fourteen years or to less punishment and, in any other case, is liable to imprisonment for a term not exceeding seven years or to less punishment.

#### **Definition**

- (2) For the purposes of this section,
  - (a) stealing is the act of fraudulently and without colour of right taking, or fraudulently and without colour of right converting to the use of any person, any thing capable of being stolen, with intent
    - (i) 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) to pledge it or deposit it as security,
    - (iii) to part with it under a condition with respect to its return that the person who parts with it may be unable to perform, or
    - (iv) to deal with it in such a manner that it cannot be restored in the condition in which it was at the time when it was taken and converted;

- (b) stealing is committed when the offender moves the thing or causes it to move or to be moved, or begins to cause it to become movable, with intent to steal it;
- (c) the taking or conversion may be fraudulent, although effected without secrecy or attempt at concealment; and
- (d) it is immaterial whether the thing converted was taken for the purpose of conversion, or whether it was, at the time of the conversion, in the lawful possession of the person who converts it.

**When movable inanimate things capable of being stolen**

- (3) Every inanimate thing that is the property of any person and that either is or may be made movable is capable of being stolen as soon as it becomes movable, although it is made movable in order that it may be stolen.

***Fourth charge – subsection 91(2) of the Criminal Code***

[25] The fourth charge alleges an offence contrary to subsection 91(2) of the *Criminal Code* which reads as follows:

- (2) Subject to subsection (4), every person commits an offence who possesses a prohibited weapon, a restricted weapon, a prohibited device, other than a replica firearm, or any prohibited ammunition without being the holder of a licence under which the person may possess it.

...

**Exceptions**

- (4) Subsections (1) and (2) do not apply to
  - (a) a person who possesses a prohibited firearm, a restricted firearm, a non-restricted firearm, a prohibited weapon, a restricted weapon, a prohibited device or any prohibited ammunition while the person is under the direct and immediate supervision of a person who may lawfully possess it, for the purpose of using it in a manner in which the supervising person may lawfully use it; or
  - (b) a person who comes into possession of a prohibited firearm, a restricted firearm, a non-restricted firearm, a prohibited weapon, a restricted weapon, a prohibited device or any prohibited ammunition by the operation of law and who, within a reasonable period after acquiring possession of it,
    - (i) lawfully disposes of it, or
    - (ii) obtains a licence under which the person may possess it and, in the case of a prohibited firearm or a restricted firearm, a registration certificate for it.

[26] With respect to the facts of this case, section 84 sets out the relevant definitions to assist in this analysis:

## Definitions

**84 (1)** In this Part,

...

*cartridge magazine* means a device or container from which ammunition may be fed into the firing chamber of a firearm; (*chargeur*)

*prohibited device* means

- (a) any component or part of a weapon, or any accessory for use with a weapon, that is prescribed to be a prohibited device,
- (b) a handgun barrel that is equal to or less than 105 mm in length, but does not include any such handgun barrel that is prescribed, where the handgun barrel is for use in international sporting competitions governed by the rules of the International Shooting Union,
- (c) a device or contrivance designed or intended to muffle or stop the sound or report of a firearm,
- (d) a cartridge magazine that is prescribed to be a prohibited device, or
- (e) a replica firearm; (*dispositif prohibé*)

[Emphasis added.]

[27] The law establishes that any magazine that exceeds the maximum permitted capacity as described in the Regulations Prescribing Certain Firearms and Other Weapons, Components and Parts of Weapons, Accessories, Cartridge Magazines, Ammunition and Projectiles as Prohibited or Restricted, SOR/98-462 is a prohibited device.

[28] The description of the magazines considered to be prohibited devices is set out in the Schedule to the *Regulations Prescribing Certain Firearms and Other Weapons, Components and Parts of Weapons, Accessories, Cartridge Magazines, Ammunition and Projectiles as Prohibited or Restricted (SOR/98-462)* as follows:

### Former Cartridge Magazine Control Regulations

**3 (1)** Any cartridge magazine

- (a) that is capable of containing more than five cartridges of the type for which the magazine was originally designed and that is designed or manufactured for use in
  - (i) a semi-automatic handgun that is not commonly available in Canada,
  - (ii) a semi-automatic firearm other than a semi-automatic handgun,

...

- (b) that is capable of containing more than 10 cartridges of the type for which the magazine was originally designed and that is designed or

manufactured for use in a semi-automatic handgun that is commonly available in Canada.

...

(4) A cartridge magazine described in subsection (1) that has been altered or re-manufactured so that it is not capable of containing more than five or ten cartridges, as the case may be, of the type for which it was originally designed is not a prohibited device as prescribed by that subsection if the modification to the magazine cannot be easily removed and the magazine cannot be easily further altered so that it is so capable of containing more than five or ten cartridges, as the case may be.

[29] Section 117.13 of the *Criminal Code* allows for the admission into evidence of a certificate of an analyst who has examined the prohibited device. It reads as follows:

**Certificate of analyst**

**117.13 (1)** A certificate purporting to be signed by an analyst stating that the analyst has analyzed any weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, or any part or component of such a thing, and stating the results of the analysis is evidence in any proceedings in relation to any of those things under this Act or under section 19 of the *Export and Import Permits Act* in relation to subsection 15(2) of that Act without proof of the signature or official character of the person appearing to have signed the certificate.

**Attendance of analyst**

(2) The party against whom a certificate of an analyst is produced may, with leave of the court, require the attendance of the analyst for the purposes of cross-examination.

**Notice of intention to produce certificate**

(3) No certificate of an analyst may be admitted in evidence unless the party intending to produce it has, before the trial, given to the party against whom it is intended to be produced reasonable notice of that intention together with a copy of the certificate.

[30] The applicant argued that as a full-time-serving member of the CAF, he was a public officer and as such he is an exempted person and therefore cannot be found guilty of violating subsection 91(2) of the *Criminal Code*.

[31] The definition of a public officer is set out subsection 117.07(2) of the *Criminal Code*. It reads:

**Definition of *public officer***

(2) In this section, ***public officer*** means

(a) a peace officer;

(b) a member of the Canadian Forces or of the armed forces of a state other than Canada who is attached or seconded to any of the Canadian Forces;

[32] The law with respect to exempted persons applicable to the fourth charge reads as follows:

Exempted Persons

**Public officers**

**117.07 (1)** Notwithstanding any other provision of this Act, but subject to section 117.1, no public officer is guilty of an offence under this Act or the *Firearms Act* by reason only that the public officer

- (a) possesses a firearm, a prohibited weapon, a restricted weapon, a prohibited device, any prohibited ammunition or an explosive substance in the course of or for the purpose of the public officer's duties or employment;
- (b) manufactures or transfers, or offers to manufacture or transfer, a firearm, a prohibited weapon, a restricted weapon, a prohibited device, any ammunition or any prohibited ammunition in the course of the public officer's duties or employment;
- (c) exports or imports a firearm, a prohibited weapon, a restricted weapon, a prohibited device or any prohibited ammunition in the course of the public officer's duties or employment;
- (d) exports or imports a component or part designed exclusively for use in the manufacture of or assembly into an automatic firearm in the course of the public officer's duties or employment;
- (e) in the course of the public officer's duties or employment, alters a firearm so that it is capable of, or manufactures or assembles any firearm with intent to produce a firearm that is capable of, discharging projectiles in rapid succession during one pressure of the trigger;
- (f) fails to report the loss, theft or finding of any firearm, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance that occurs in the course of the public officer's duties or employment or the destruction of any such thing in the course of the public officer's duties or employment; or
- (g) alters a serial number on a firearm in the course of the public officer's duties or employment.

[Emphasis added]

[33] Section 117.11 of the *Criminal Code* addresses the onus on those persons who do not fit within the exemption set out at section 117.07.

**Onus on the accused**

**117.11** Where, in any proceedings for an offence under any of sections 89, 90, 91, 93, 97, 101, 104 and 105, any question arises as to whether a person is the holder of an authorization, a licence or a registration certificate, the onus is on the accused to prove that the person is the holder of the authorization, licence or registration certificate.

**First and Second Charges**

[34] Firstly, the fact that there was some evidence of the elements of identity, time and place, these elements were not contested in submissions. Master Corporal Bennett identified Warrant Officer McKie as the person whose residence was searched and where the items were retrieved and he also confirmed the date and location when the items were seized pursuant to a search warrant.

[35] In his application, counsel for the applicant argued that charges 1 and 2 under section 354 of the *Criminal Code* both allege that the items of property (BFAs and 9-millimetre magazine) found in the possession of Warrant Officer McKie were obtained by crime, but he argued that there is no evidence of a crime.

[36] He explained that there is no case law that supports someone having been found guilty, as a result of a theft that was not proven. He submits that the prosecution has failed to present any evidence on the following elements:

- (a) that the accused had possession of the property. He argued that there is no evidence that the accused was in possession of the property. The only possession evidence is that the items were found in his rented house;
- (b) that the accused knew or should have known that the property was obtained by the commission of the offence of theft in Canada (see *R. v Harms* 2020 BCCA 242 at paragraph 30) which discusses the knowledge component requirement. He strenuously argued that there is no evidence whatsoever that the accused knew that the property was obtained by theft;
- (c) that there is no estimated date of an actual theft and there is no evidence that an alleged theft of the items was ever investigated. Defence counsel argued that the prosecution did not pursue this as something that the Court needs to be informed of. The evidence before the Court is that none of these items are missing from any CAF, government or other inventory. Master Warrant Officer Lefebvre told the Court that these items did not go missing under his scope of control;
- (d) further, defence counsel argued that there is no evidence that:
  - i. the property was owned by someone,
  - ii. the lawful owner did not give or lend the goods to Warrant Officer McKie,
  - iii. the lawful owner did not give Warrant Officer McKie permission to take the item,

- iv. the lawful owner did not give or offer the items to Warrant Officer McKie in good faith,
- v. indicates the value of the property, and
- vi. to establish the blameworthy state of mind of Warrant Officer McKie.

[37] The applicant argued that the prosecution is asking that the Court draw an inference that those items set out in the charges belonged to the Crown; and that the Court also needs to draw an inference that the items were stolen; and then another inference that Warrant Officer McKie had actual knowledge of that inferred theft. He argued that this requires the Court to draw triple inferences which he argued is not acceptable.

[38] Conversely, the prosecution asked this Court to dismiss the application. He argued that there is sufficient evidence on the charges before the Court that, if believed, would render the applicant guilty on each count.

[39] The prosecution alleged that the only way that the property ended up in Warrant Officer McKie's possession is through theft, as set out in section 114 of the *NDA*, and submits that:

- (a) Warrant Officer McKie was in possession of items that he did not own;
- (b) the applicant was advised that it was the prosecution's position that the items were obtained by theft, however, he also argued that these specific particulars of the offence do not need to be set out in the charge itself;
- (c) the prosecution is not required to prove that the items belonged to anyone in particular, but only that they did not belong to the accused (see *R v McDowell*, [1970] 3 O.R. 480, [1970] 5 C.C.C. 374, 1970 CarswellOnt 59 (ONCA), at paragraph 5); and
- (d) a person who comes into possession lawfully of the items will be deemed to have subsequently stolen them when the person converts the property to his or her own use and has continuing possession of it (see *R. v. Hayes*, [1985] 20 CCC (3d) 385).

[40] At this stage, I only have to determine if there is any evidence of the following:

- (a) that Warrant Officer McKie was in possession of the property;
- (b) that the property was obtained by crime; and

- (c) that Warrant Officer McKie knew that the property had been obtained by crime.

***Was Warrant Officer McKie in possession of the property?***

[41] Based on the facts of this case, the relevant type of possession is that of constructive possession which covers situations where a person does not actually have the property on his or her person. The prosecution must prove three things in order to prove constructive possession:

- (a) the property was in the actual possession of his residence;
- (b) that Warrant Officer McKie knew the property was at his residence; and
- (c) he exercised control over the property while it was in his residence.

[42] A person who knowingly has something in the actual possession or custody of somebody else, or in some place for the use or benefit of themselves or somebody else, has that thing in their possession, provided they have some control over that thing.

[43] To determine whether Warrant Officer McKie exercised control over the property, the trier of fact must look to the facts and the surrounding circumstances.

[44] “Knowingly” means that Warrant Officer McKie is aware of the possession or custody of the thing by another, or in another place, and does not act through ignorance, mistake or accident. To decide whether Warrant Officer McKie acted knowingly, the Court may consider evidence of Warrant Officer McKie’s words, acts or omissions, along with all the other evidence.

[45] As previously mentioned, in his submissions, Warrant Officer McKie did not contest that the items were seized from his rented residence, nor did he contest the continuity of the evidence. There was evidence that the items were discovered during the execution of the search warrant at Warrant Officer McKie’s rented residence.

[46] The evidence bag seized from Warrant Officer McKie’s residence during the search indicates that the 9-millimetre magazine was seized from a gun locker located on the left-hand side, upon entering the basement of the residence by their lead evidence collector, Corporal Comeau. There is also evidence that the gun locker was locked and that Warrant Officer McKie was asked by the lead evidence collector to open it, which he did.

[47] I find that there is some evidence whereby the trier of fact may infer that Warrant Officer McKie did have the BFAs and the 9-millimetre magazine in his possession.

***Was the property obtained by crime?***



[48] The main proposition raised by the defence is that there is no proof that the three BFAs or the 9-millimetre magazine were in fact stolen goods.

[49] In order to satisfy this element, the prosecution must establish that the ownership of the items lies in some person other than Warrant Officer McKie and that fact may be proven by circumstantial evidence.

[50] At this stage of the analysis, the prosecution must provide some evidence that could satisfy a trier of fact that Warrant Officer McKie acquired or got the property, directly or indirectly, from the commission of a criminal offence. It does not matter whether Warrant Officer McKie was the person who committed the original crime, nor does it matter whether Warrant Officer McKie got property indirectly from someone else.

[51] The theft of ownership may be proven by direct or by circumstantial evidence. The circumstances of the accused's possession may lead compellingly to the conclusion that the goods are stolen goods and the owner is someone other than the accused.

[52] To satisfy this element, it is sufficient for the prosecution to prove ownership to be in a person or persons, or an organization other than the accused (see *McDowell*, and *R. v. Bagshaw*, 4 CCC (2d) 303). It is the prosecution's position that the ownership of the BFAs and the 9-millimetre magazine lies in the CAF and Government of Canada.

[53] Notwithstanding the applicant's argument comparing the facts in the case at bar to the police finding a carton of eggs in his fridge that had not been reported missing, neither the issue nor the law are that simple. However, this fact scenario is helpful to explain the necessary distinction between impermissible speculation and the drawing of legally acceptable inferences. In dealing with the discovery of eggs in one's refrigerator, one is dealing with commonly available commodities such as eggs, which enjoy wide distribution across a very broad consumer base and flow from a broad supply chain of producers and vendors.

[54] Referring to the legal framework that trial judges are to follow, there must be primary facts established before any inferences may be drawn. The proposed inference must be reasonably and logically drawn from the facts, and in the case of the carton of eggs there are so many possibilities that an analysis would necessarily lead to impermissible speculation which cannot be the foundation for an inference.

[55] The first step in inference drawing is verifying that the primary facts said to provide the basis for the inference are established by the evidence. Consequently, the Court took the time to outline all the relevant facts that relate to the inference that the the BFA belonged to the CAF or the Government of Canada:

- (a) the BFAs are used on C7, C8 and C9 rifles but they are not compatible with hunting rifles or pistols;

- (b) members who are posted to 1 Svc Bn, receive an initial issue of only one BFA as it is expected that the member will show up with this item when required. This item must also be returned when the member is posted out of the unit; and
- (c) based on the lifecycle management of the items, when the above items need repair, they are sent to the maintenance section. When they are deemed to be BLR, they are then disposed of. Because BFAs do not require any formal destruction, nor formal demilitarization, throwing them into scrap metal would be acceptable. Sergeant Munro testified that in his assessment, the BFAs seized during the search look to be in good condition.

[56] Secondly, the Court took the time to outline all the relevant facts that relate to the inference that the 9-millimetre magazine belonged to the CAF or the Government of Canada:

- (a) the Browning Hi-Power 9-millimetre pistol is the current CAF-issued 9-calibre pistol and it holds thirteen rounds. The 9-millimetre magazine is not compatible with Warrant Officer McKie's 22-calibre SIG Sauer, Mosquito semi-automatic handgun as they are different calibre weapons;
- (b) nobody would be issued 9-millimetre magazines unless they were issued a weapon to go with it for the purpose of going to the range, participating on an exercise or tasked to clean it;
- (c) with respect to the issuing and control of magazines, members must sign for their magazines on the morning of a range day and they return them afterwards. Sergeant Munro testified that he would personally wait for the return of all the items issued before he would close his vault. The members would store their magazines in their tactical vest or some would put them in their combat pants while on the range or exercise;
- (d) although magazines are not serialized, they are considered a component of a weapon and consequently closely managed;
- (e) there is no reason why a member of 1 Svc Bn would bring a 9-millimetre magazine home and the witnesses testified that they were not aware of any other way to obtain these items;
- (f) Master Warrant Officer Lefebvre confirmed that he did not authorize Warrant Officer McKie to bring these items home;
- (g) Warrant Officer McKie worked in the maintenance section of 1 Svc Bn;

- (h) RFAs and magazines that need to be repaired or disposed of are sent to the maintenance section to coordinate the repair or disposal of these items; and
- (i) the appropriate disposal for the 9-millimetre magazine would require that it be destroyed beyond its intended purpose so that it can no longer fulfill its function.

[57] Recalling the test to be applied at this stage, I must only ask whether there is some evidence, if believed, that could support an inference of guilt. I must not ask myself whether I am personally satisfied by the evidence or whether I believe it.

[58] The case has to be decided on the facts proved in evidence and the conclusions alternative to the guilt of the accused must be rational conclusions based on inferences drawn from proven facts. At this stage of the proceedings, there was no evidence before the Court to suggest that Warrant Officer McKie bought or received the 9-millimetre magazine and BFAs from a source other than the CAF.

[59] Further, even if there are two competing inferences that can reasonably be drawn and they are not based on speculation, it is a legal error at this stage, to favour the inference of the accused over that of the prosecution as to do so usurps the function of the trier of fact.

[60] I find that there is some evidence that the items set out in the first and second charges, being the three BFAs and a Browning Hi-Power 9-millimetre magazine were the property of the Canadian Government.

***Did Warrant Officer McKie know that the property had been obtained by crime?***

[61] This question has to do with Warrant Officer McKie's state of mind, in particular, his knowledge of the origins of the property when he had it in his possession. The applicant argued that not only were these items not obtained by crime, there is also no evidence that Warrant Officer McKie knew that these items were obtained by crime.

[62] There are two ways in which the prosecution may prove Warrant Officer McKie's knowledge of the origins of the property.

[63] One way for the prosecution to prove Warrant Officer McKie's knowledge is to prove that he actually knew or was aware that the property had been acquired by or had come from, directly or indirectly, a crime. Warrant Officer McKie does not have to know what the law determines the crime to be but must know the relevant circumstances that make the prior conduct a crime.

[64] The second way to prove this essential element of knowledge is to prove that Warrant Officer McKie was aware of the need to make an inquiry about the origins of the property, but deliberately failed to do so because he did not want to know the truth

about it. Wilful blindness arises where a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth. He would prefer to remain ignorant (see *R. v. Sansregret* [1985] 1 S.C.R. at 584). However, a finding of indifference is not enough. It requires actual suspicion combined with a conscious decision not to make inquiries which could confirm that suspicion.

[65] The actual test for wilful blindness as set out in *R. v. Romain, 1987 CarswellOnt 2736, 1 W.C.B. (2d) 361* was approved by Gibbs J.A. in *R. v. Gould, 78 CR (3d) 151* and reads as follows:

How does one determine whether or not the accused deliberately refrained from making inquiries or if he merely neglected to do so? In my view, it is open to the court, in proper circumstances, to infer or conclude from the facts that were known to the accused and from the manner in which he conducted himself having knowledge of those facts, that he deliberately refrained from making inquiries.  
[Emphasis omitted from original.]

[66] At this stage, the prosecution must have provided some evidence that Warrant Officer McKie's knowledge of the unlawful origins of the property in either of these ways.

[67] The evidence suggests that Warrant Officer McKie was a senior NCO who by virtue of his rank would have had to serve for a significant period of time within the CAF. One of the basic conditions of service is the requirement to conduct weapons training. The evidence was uncontested by all witnesses that it was impermissible to bring BFAs or magazines home.

[68] The law provides for the assumption that the possession of the BFAs and the 9-millimetre magazine could have been innocent in the beginning, but at some point, if Warrant Officer McKie chose to keep these items without colour of right, his possession of these items became unjustified. In particular, even if he came into the possession of these items innocently, by continuing the possession of these items that he had to know belonged to the CAF and were not to leave the base or the weapons vault, he exposed himself to liability (see *R. v. Maroney*, [1975] 2 S.C.R. 306 and *R. v. Hayes*, 20 CCC (3d) 385).

[69] In other words, it is possible to find that possession of items which is at first innocent, may subsequently become unlawful. Regardless of the manner in which he received these items, at the moment when he decided to keep them, being a senior NCO who had to be aware that these items were not supposed to be removed from the base or taken home, then his possession of these items became precarious. I find that based on these facts, there is some evidence to support an inference that Warrant Officer McKie ought to have known that these items belonged to the CAF.

#### **Fourth charge**

***Did the accused possess the device?***

[70] Master Corporal Bennett testified that during the execution of the search warrant of the applicant's rental home, the lead evidence collector wrote on the evidence bag that all six of the C7 magazines had been seized from a gun locker located on the left-hand side upon entering the basement of the residence.

[71] Master Corporal Bennett also confirmed that during the search, the evidence collectors had asked Warrant Officer McKie to unlock the gun locker, which he did.

[72] The evidence suggests that there were no other adults within the home.

[73] I find that there is some evidence whereby the trier of fact may infer that Warrant Officer McKie did have the six C7 magazines in his possession.

***Are the C7 magazines prohibited devices?***

[74] The legal framework that sets out whether an item falls within the parameters of a prohibited device was outlined above. Based on the application of the law, any C7-style magazines to be used with civilian rifles must have no more than five rounds. Master Warrant Officer Cowan, who was the senior weapons technician for the brigade conducted a physical examination of the magazines seized at Warrant Officer McKie's rental residence and confirmed that the magazines held thirty rounds.

[75] Under Canadian law, a magazine of that type, holding more than five rounds, is a prohibited device. In Canada, this type of magazine is used exclusively by the CAF. There is also evidence that only five C7-magazines are issued when one is going to a range or on exercise and that there is no reason why members would have had six magazines issued.

[76] In his submissions, the applicant did not make significant arguments that the C7 magazines are not prohibited devices, but rather he relied primarily upon his status as a public officer and the exemption that is set out at section 117.07 of the *Criminal Code*.

***Does the exemption set out at section 117.07 apply?***

[77] The wording of section 117.07 of the *Criminal Code* establishes that a member of the CAF who has in their possession a prohibited device in the course of or for the purpose of the public officer's duties or employment is not guilty of an offence.

[78] It is the applicant's position that the exemption applies to him as a regular force member of the CAF and the burden is on the prosecution to prove that Warrant Officer McKie is not exempted and the prosecution has not met this burden.

[79] With respect to this argument, the prosecution says that paragraph 117.07(1)(a) of the *Criminal Code* allows a public officer in the course of his duties or employment

to use prohibited devices and that if they are not in the course of their duties, then the onus set out at 117.11 of the *Criminal Code* applies.

[80] Referring to the wording set out at paragraph 117.07(1)(a) of the *Criminal Code*, I note that the exemption applies by reason only that Warrant Officer McKie had possession of the magazines “in the course of or for the purpose of the public officer’s duties or employment.”

[81] The evidence suggests that the C7 magazines were found in the applicant’s personal residence, which is presumptively outside of his place of employment. Warrant Officer McKie was not in the midst of his duties nor participating in the course of them. There is evidence that he was enroute to his place of employment in his personal vehicle while the magazines were in the rented home when he was stopped by the military police. The evidence is that the magazines were stored and were not being used in any official capacity. In fact, the evidence is that until Warrant Officer McKie returned to the residence, he was not even in close proximity to the magazines. The consistency of the evidence suggests that not only should a member not have these prohibited devices when they are not in the field nor on a CAF range, they should never be taken home. Consequently, there is no evidence that they were in his possession for the purpose of his employment.

[82] I find that the prosecution has led some evidence whereby a trier of fact could draw the inference that on the facts of the case at bar, the exemption does not apply to Warrant Officer McKie.

[83] Alternatively, Warrant Officer McKie could rebut this by providing some evidence to support his position that he was required or authorized to keep these magazines in his home for the purpose of his duties or employment.

[84] In a situation where the exemption does not apply, the onus rests with the applicant to prove that he holds an authorization, licence or registration certificate similar to those demands required of a private citizen. However, at this stage there is no such evidence before the Court. Consequently, I do not find the position of the applicant that, as a public officer, he was entitled to hold the magazines in his personal residence, to be supported by any authority.

***Was Warrant Officer McKie aware that the C7 magazines were prohibited devices?***

[85] In assessing whether or not Warrant Officer McKie had the necessary *mens rea* to possess these magazines and he knew their characteristics, the trier of fact can rely upon the following evidence:

- (a) Warrant Officer McKie was an experienced senior NCO who would have had to conduct weapons training throughout his military career;

- (b) he would have understood the requirement for accountability of such highly controlled magazines. The evidence of Master Warrant Officer Lefebvre confirmed that senior NCOs were held responsible for and were regularly tasked with accounting for weapons, weapons parts and serialized items;
- (c) the witnesses before the Court testified that it was basic and common knowledge for members serving within the CAF that such magazines were closely controlled items and were not to be taken home; and
- (d) Warrant Officer McKie opened secured storage areas to facilitate the execution of the warrant.

[86] Based on the above facts arising from the evidence, it is possible for the trier of fact to conclude that Warrant Officer McKie had to have known that the C-7 magazines were tightly controlled and needed to be secured as he had in fact done. Consequently, even if he did come into possession of the magazines very innocently, based on his knowledge and experience, he had a duty to make inquiries as to why he had received them and, further, there is some evidence that he ought to have known that the items should not be retained in his personal residence.

[87] I can conclude that there is some evidence, if believed, where a properly instructed panel could draw an inference that Warrant Officer McKie had control of the C7 magazines and had knowledge of their prohibited status and characteristics.

**FOR THESE REASONS, THE COURT:**

[88] **DISMISSES** the application.

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**Counsel:**

Major E. Carrier, Defence Counsel Services, Counsel for the Applicant, Warrant Officer B.A. McKie

The Director of Military Prosecutions as represented by Major B.J. Richard, Counsel for the Respondent