COURT MARTIAL

Citation: *R. v. McKie*, 2023 CM 2011

Date: 20230511
Docket: 202217

Standing Court Martial

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

Between:

His Majesty the King

- and -

Warrant Officer B.A. McKie (retired), Accused

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

REASONS FOR FINDING

(Orally)

Introduction

[1] Warrant Officer (WO) McKie was originally charged with four charges under section 130 of the *National Defence Act* (*NDA*). At the commencement of proceedings, with the 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 remaining three charges read as follows:

"**FIRST CHARGE** Section 130 of the *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 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 of the
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 of the
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] In reaching my decision, I reviewed and summarized the facts emerging from the evidence and made findings on the credibility of the witnesses. I instructed myself on the applicable law and applied the law to the facts, conducting my analysis before I came to a determination on each of the charges.

Evidence Before the Court

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

[5] During the trial, WO McKie confirmed that three blank firing attachments (BFA), six C7 magazines and one 9-millimetre (mm) magazine were found in his rental residence during the search conducted on 18 May 2021. WO McKie also conceded the continuity of the evidence.

[6] The prosecution called four witnesses and the defence called two witnesses including WO McKie who testified in his own defence.

Theory of the Prosecution

[7] It is the prosecution's position that the items listed in the three charges belong to the Canadian Armed Forces (CAF). He argued that WO McKie unlawfully brought the BFAs and the 9-mm magazine to his home and in doing so, he unlawfully converted them to his own use. In addition, he argued that the six C7 magazines are prohibited devices.

Theory of the Defence

[8] The defence argued that at some point during his military career, WO McKie came into possession of the items detailed in the three charges and either did not realize that he had them in his possession or simply forgot about them.

[9] WO McKie does not refute the fact that the items belong to the CAF and not to him but argued that he would have signed for them on loan at one point during his career. He argued that he did not steal these items and has no personal use for them.

Summary of Evidence

[10] In this case, WO McKie testified, and from his testimony the following facts are of note to the issues to be resolved at this court martial:

(a) WO McKie and his ex-wife Sarah had a matrimonial breakdown;

(b) as a result of the marital breakdown, he vacated the matrimonial home and moved to a rented residence;

(c) in March 2020, he returned to the matrimonial home with his son and daughter to retrieve some of their personal belongings which he moved in his truck;

(d) after they had loaded all the stuff into the trailer (Exhibit 4 photos) and brought them to the rental house, he returned with his son to pick up some stuff from the freezer, and while he was loading stuff from the freezer, his ex-wife decided to film him. While she was filming him, he pushed her phone out of his face, and it fell and she jumped on top of him, and she tried to drag him out of the house, telling him that he was not allowed to take anything more;

(e) his son called the Royal Canadian Mounted Police (RCMP) reporting that his mother had just attacked his father and the RCMP attended the matrimonial residence;

(f) as a result of the verbal confrontation, on the 21st of March 2020, he was ordered by the RCMP not to return to the matrimonial house;

(g) there were no further interactions with the police after that date in March 2020;

(h) however, his relationship with his ex-wife had completely broken down and was very volatile. She unilaterally decided what items he was allowed to take, because her lawyer had told her if there was an item in dispute, he was not allowed to remove it from the house;

(i) the types of personal belongings they removed in March 2020 were dressers, beds and then there were a few items they moved from the garage;

(j) WO McKie explained that prior to vacating the matrimonial residence, when he heard that his ex-wife was going to try and have his guns confiscated by the RCMP, he had them removed from the matrimonial residence, probably two weeks before, and moved them to a friend's residence;

(k) when he left the matrimonial home, his gun lockers were both locked in what he described as his gun room, which had a locked door on it to restrict access. He provided the following additional details regarding this gun room that he had in the matrimonial home:

i. he was the only one who had access to the gun room at that time because he had the only set of keys and was the only one that had a firearm license;

ii. he described two grey metal lockers that he used as his gun lockers. They both had locks, shelves, and he had made a rack to hold the guns, where they could stand up and be secured inside the locker;

iii. the lockers were bolted to the wall and then locked with the items inside of it; and

iv. in terms of size, he described them as approximately three feet wide and about five feet tall;

(l) between March of 2020 and February 2021, he requested permission from his ex-wife to return to the matrimonial home to retrieve other items, but he was always told that he could not have items because they were in dispute;

(m) the next time he was permitted to return to the matrimonial home to retrieve any belongings was on or about 7 February 2021, after his ex-wife contacted him on or about the 5th of February 2021 advising him that he could return to retrieve some of his stuff;

(n) on that occasion, he returned to the matrimonial home and was given the gun lockers and multiple boxes that she had packed and placed in the living room in the basement. He noted the following:

i. both the gun-room door and gun cabinets had been broken into and were damaged;

ii. he believes that it was his ex-wife, as she was the only person with access to the house and there was nobody of adult age that was living in the house that would have any need to go into that room. Additionally, in packing the boxes, she removed everything from those lockers and put them in boxes for him to pick up;

iii. he picked up two out of three-gun lockers, and left one for his ex-wife who decided she wanted one;

iv. he picked up a brown toolbox, and approximately six or seven boxes measuring about two feet by two feet that were located in the main living room in the basement and not in the gun room;

v. they loaded the boxes into his personal pickup truck, drove them over to his rental residence, and put them in the gun lockers in the basement; and

vi. when he picked the boxes up from the matrimonial home, they were all closed, and he did not want to be there any longer than he needed to be, due to the volatility of their personal situation. So, they literally just picked up what she had told them they could have, and carried it out of the house;

(o) when he returned to his rental residence, he put the gun cabinets against the wall and put the boxes into the gun cabinets. It was after nine o'clock on a Sunday night by the time they finished. He closed the lockers, locked them and got ready for work the next day (Monday);

(p) all the boxes fit into the locker cabinets, and he did not open them when he got back to his rental residence;

(q) he just took it for granted that the contents within them all came out of the cabinets;

(r) under cross-examination, despite knowing that his ex-wife had packed the boxes and there was animosity between them, he explained why he did not open the boxes: "If I had got time, I may have gone into it sooner, but I was working at a civilian job doing on the job training downtown, so I did not have time to go through them and get it amongst everything else in my life it was not a priority.";

(s) on 18 May 2021, the military police (MP) executed a search warrant for his rented residence;

(t) with respect to his military career, at the time the MPs executed the search warrant:

i. he was pending medical release, with a three-year retention and had been posted to 1 Service Battalion (1 Svc Bn) for approximately a year and a half when Master Warrant Officer (MWO) Lefebvre was his supervisor; and

ii. he was not field deployable, as he could not do the required physical activities, so he was limited to garrison work;

iii. he retired from the CAF in 2022 after having served with 1 Svc Bn for approximate two years;

(u) during the MP's conduct of the search, they found three BFAs, one 9-mm magazine and six C7 magazines which are the subject of the charges;

(v) he emphatically denied stealing any of the items that are listed in the three charges before the Court;

(w) with respect to his possession of the three BFAs that he had been issued, he explained that:

i. the BFA was part of their field kit that once signed for by the member, was kept in their personal fragmentation vest, webbing, or other gear;

ii. additional items contained in his field kit included a wash basin, laundry bag, bayonet, BFA, camp cot, and the sling for the weapon;

iii. as long as he kept the BFA secured in his personal kit there was no limitation on where he held it;

iv. once the BFA was issued to them, it was kept in their personal, bugout lockers or some guys held their bugout gear at their personal residence. So, when they got called while they were at home, they could grab their gear and go;

v. on the day that the MPs executed their search warrant, all of his personal kit was at his rented residence;

vi. he speculated that his BFA was with his field kit in the laundry room;

vii. when asked why he was in possession of three BFAs, he explained that he cannot say for sure how, but he speculated as follows. “Honestly, the only thing I can think of is the odd time when we deployed to the field you keep your BFA in your bugout locker at work. Because you do not use it in garrison, and I may have grabbed my gear at some point in my career and forgot my BFA, and I went and asked the CQM “Hey I forgot my BFA”, and the CQM is like “You are not supposed to forget that”. Yeah, and it’s like, yeah and he goes “Have another one, bring it back to me at the end of the exercise”;

viii. he served in the CAF for twenty-seven years and likely would have had a BFA issued to him for at least twenty-five of those years;

ix. the BFAs have been the same model over those twenty-five years;

x. he is not aware of any other use for BFAs other than on the C7;

xi. the first time he learned that he had three BFAs was when they were placed on his kitchen table during the investigation;

xii. the last time he saw his BFA was when he checked his personal kit about six months to a year earlier; and

xiii. under cross-examination, he confirmed that he likely had the BFAs for several years and that there is no use for the BFA outside of the military.

(x) With respect to his possession of the 9-mm magazine, he admitted the following facts:

i. the last time he would have had a 9-mm magazine would have been when he did a range day with Lord Strathcona's Horse (LdSH) when he was posted there;

ii. he last worked with LdSH between 2015 and 2019;

iii. he did not know he had a 9-mm magazine in his possession until the execution of the warrant, when it was brought to his attention. He stated. "I do not know where it came from, I do not recall in the time prior to me leaving the marital home on the 20th of March when I went through my gun stuff and removed some of my guns due to the volatile situation, I did not see any of that. I did not see a 9-mm magazine or anything like that";

iv. he does not recall having accessed the lockers from the time he moved the boxes into the lockers at his rental residence until the execution of the search warrant;

v. if he had found the 9-mm magazine in his locker or in his kit at home, he likely would have brought it in to work and dropped it in one of the amnesty boxes, or given it to his CQM (company quartermaster);

vi. he is ninety-five percent certain that when he left the residence in March of 2020, he did not have a 9-mm-magazine in his possession, and he did not see it when he picked up the boxes in February 2021;

vii. he had no use for the 9-mm magazine; and

viii. under cross-examination, he confirmed the following:

> "Q. Your position is that you did not know that the 9-mm magazine made it from your work to your home? A. I am maintaining the position that I was not aware that there was a 9-mm magazine in any of my military or my gun stuff."

(y) With respect to his possession of the C7 Magazines, he admitted the following facts:

i. during the execution of their search warrant, the MPs found six C7 magazines that he believes were found in one of the gun lockers within his rental residence;

ii. he first realized that he had the six C7 magazines when the MPs brought them upstairs and put them on the kitchen table;

iii. he did not see the magazines when he picked up the boxes;

iv. he told the court that prior to leaving the matrimonial home, "He did not recall seeing them, but with the three lockers that were there, I was not in every locker, every day, every week, every month";

v. while he was posted to 1 Svc Bn, he did not at anytime sign for any C7 magazines.

vi. when asked how he might have come into possession of them, he explained: "I'm going to guess, and this is just a guess on my part, that they came back with my military kit when I returned from Afghanistan in 2006."

vii. he explained the difference between the numbers of magazines issued in Afghanistan as compared to the limitations issued while in garrison with his response to the following question:

> "Q. And we heard from one of the witnesses that we normal load, combat load or something in Garrison for C7 magazines is five. In your case they found six. Why would that be? A. In Garrison yes, it is five that is issued when you sign for your rifle. When we were in Afghanistan, both in 2010 when I was there and in 2006, we had 10 to 15 magazines on us at any given time while we were out on deployments."

viii. he had deployed to Afghanistan in 2006 and 2010, although he seemed to speculate that they likely came back with his kit when he returned from Afghanistan in 2006;

ix. under cross-examination, he explained why he had not discovered the magazines in the last eleven years:

"Q. That's eleven years later? A. Correct.

Q. So among, in the 11 years never once did you stumble on the C7 magazines in your house? A. I may have, but there was also multiple friends that lived within the shacks that also stored stuff at my residence, and I may have missed them buried in a locker";

x. he confirmed that as a senior non-commissioned officers (NCO), he understood magazines are to be properly stored in a vault; and

xi. he has no personal use for the C7 Magazines.

Cordell McKie

[11] Cordell McKie, who is WO McKie's son, testified and confirmed for the Court that Exhibit 4 shows photos of him and his father moving their stuff from his mother's house in March of 2020. He confirmed that they picked up items from the garage, loaded them into a trailer and took them to his father's house. He told the Court that they returned a second time, approximately a year later, to retrieve their firearms stuff that was in the main living room. He explained that it had all been packed in boxes by his mother and confirmed that the boxes were closed.

[12] He explained that they loaded the closed or sealed boxes into their truck and took them back to his father's house. Once they returned to his father's house, they put the boxes into the basement and did not open them.

[13] In the decision *R. v. McKie*, 2022 CM 2017, I summarized most of the evidence from the four prosecution witnesses which remains relevant to this decision on finding. For conciseness, below is a shortened summary of the testimonial evidence that relates to the few issues that remain to be determined at finding.

Master Corporal (MCpl) Bennett

[14] MCpl Bennett, the lead investigator on WO McKie's file told the Court the following:

(a) during the search at WO McKie's rented residence, they found and seized the following items:

i. six C7 magazines;

ii. one Browning magazine;

iii. three BFAs, and

iv. a cadex foregrip (not the subject of charges);

(b) he described the Browning magazine as resembling the magazines that the military uses with the Browning pistol;

(c) he identified that they seized the exhibits which were sealed and marked as having been collected as follows:

i. he was unsure of exactly where the BFAs were found in WO McKie's house, but he stated that the lead evidence collector would have that information;

ii. he identified the 9-mm Browning magazine. The evidence bag indicated 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. MCpl Bennett believed that the gun locker was locked because the lead evidence collector asked WO McKie to open it, which he did. However, MCpl Bennett also confirmed for the Court that he was not personally present when WO 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 one, first gun locker on left going into the room";

(d) under cross-examination, he told the Court the following:

i. Ms McKie told him that while WO McKie was moving items out of the matrimonial home, she observed items that she felt belonged to the military;

ii. Ms McKie provided him photographs of items that WO McKie had in his possession that she believed belonged to the CAF;

iii. the first time Ms McKie told him about the C7 magazines was on 13 February 2021;

iv. the first time he learned that WO McKie had BFAs at his rental residence was when he executed the search warrant;

v. the first time he learned that WO McKie had a 9-mm magazine was when he executed the search warrant;

vi. 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

vii. he has no evidence to confirm whether these items are missing from the CAF inventory.

MWO Cowan

[15] MWO 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 WO;

(b) in June 2022, his Regimental Sergeant-Major asked him to inspect the seized items before the Court;

(c) he told the Court that he inspected the following items and explained to the Court their background:

i. the BFAs. They are used on C7, C8 and C9 rifles but are not compatible with hunting rifles or pistols. He could not say how much the BFAs would be worth;

ii. the Browning Hi-Power 9-mm magazine. The Browning is the current issue pistol within the CAF and holds thirteen rounds. It is a 9-mm 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 he 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;

(d) when asked to review the affidavit of Kathleen Malley from the Canadian Firearms Registry which listed the personal firearm held by

WO McKie, he noted that the personal firearm held by WO McKie was a SIG Sauer Mosquito, .22-calibre; and

(e) when asked if the 9-mm magazine was compatible with WO McKie's SIG Sauer Mosquito, the witness indicated that they are different calibre weapons with a .22-calibre being much smaller.

Sergeant (Sgt) Munro

[16] Sgt Munro, a material management technician currently working in the Garrison Support Platoon in the major equipment section in Edmonton, Alberta testified as follows:

(a) items are accounted for on the system of record called Defence Resource Management Information System. Every account has a storage location (SLOC), and many units have multiple SLOCs;

(b) each company quartermaster 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;

(c) 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 CQM. 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;

(d) other items such as bayonets and slings are kept under lock and key;

(e) 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;

(f) he explained that 9-mm are not issued unless the member is headed to a 9-mm range and five C7 magazines are issued when going to a range or on exercise, otherwise the above magazines are held within the CQM lines until they are needed;

(g) 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 Bn 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 a member's kit be readily available because they do not have time to go back home to get it;

(h) 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;

(i) the CQM will be awaiting the return of all weapons and magazines issued on that day;

(j) he saw no reason why anyone would have six magazines (rather than the standard issue of five magazines);

(k) there is no reason why a member of 1 Svc Bn would bring either a C7 or 9-mm magazine home;

(l) 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;

(m) additionally, under cross-examination, Sgt Munro confirmed:

i. the Bn standing order is that the kit, including BFAs, be available as the member is not permitted to travel home to get it;

ii. the issuance of weapons and magazines are closely accounted for;

iii. all personnel posted to 1 Svc Bn have weapons assigned to them and when these weapons are required, they are issued that same weapon. At the end of the day, members return their weapons to the point where they were issued (i.e., the weapons vault). In issuing the weapons, etc., in the morning, Sgt 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;

iv. if a soldier returns to the supply section with one less magazine than they had been issued, they must 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;

v. if he discovered that there was a missing magazine, he would immediately file an MP report and advise the chain of command (CoC). This would apply to all the weapons components such as the bolt, etc., as they are required for the proper functioning of the weapon; and

vi. 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.

MWO Lefebvre

[17] MWO Lefebvre testified that:

(a) he is a vehicle technician by trade and currently works at the 3rd Canadian Division Headquarters as the equipment technical Sgt Major;

(b) he first met WO McKie when they worked at the LdSH;

(c) he was WO McKie's supervisor when he worked in Garrison maintenance section for the three to four months prior to WO McKie releasing from the CAF;

(d) their relationship was mostly professional, and they did not see each other often as WO McKie was going through the release process;

(e) as part of Garrison maintenance section, WO 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 snowplows. 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-mm 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 members 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 (CoC) 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-mm magazines were not permitted to bring them home;

(p) during his time supervising WO McKie, he never authorized WO McKie to bring such equipment home;

(q) senior 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 that WO 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

[18] 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.

[19] "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.

[20] 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.

[21] 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).

[22] 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

[23] 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.

[24] 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.]

[25] 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.

[26] 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 remanufactured 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.

[27] 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.

[28] 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*.

[29] 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;

[30] 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]

[31] 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.

Presumption of innocence and reasonable doubt

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

[33] WO McKie entered these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the prosecution has on the evidence put before the Court, satisfied me beyond a reasonable doubt that he is guilty on one, two or all the charges.

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

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

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

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

[37] A court martial is not an inquiry to determine what happened. We may never know. It serves only to determine whether the prosecution has proven the elements of the offences beyond a reasonable doubt.

Credibility of the witnesses

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

[39] In assessing the evidence, a Court may accept or reject some, none, or all the evidence of any witness who testifies in the proceedings.

[40] Many factors influence the Court's assessment of the credibility of the testimony of a witness. For example, a Court will assess a witness's opportunity to observe events, as well as their reasons to remember. Was there something specific that helped the witness remember the details of the event that he or she described? Were the events noteworthy, unusual, and striking, or relatively unimportant and, therefore, understandably more difficult to recollect? There are other factors that come into play as well. For example, does a witness have an interest in the outcome of the trial; that is, a reason to favour the prosecution or the defence, or is the witness impartial?

[41] In assessing a case where credibility is a central issue and the accused has testified, the Supreme Court of Canada (SCC) has provided guidance to trial judges in *R. v. W.(D.)*, [1991] 1 S.C.R 742 commonly referred to as the *W.(D.)* test. It aims to prevent a conviction where reasonable doubt exists.

[42] Since the *W.(D.)* test was first enunciated by the SCC, the test has been found to apply not just to the testimony of an accused, but it also applies to any defence witnesses (see *R. v. Haroun*, [1997] 1 S.C.R. 593, Sopinka J., writing in dissent) as well

as in any circumstance where a conflicting exculpatory account emerges through the Crown witnesses or is found in any other evidence (see *R. v. B.D.*, 2011 ONCA 51, Blair J.A., at paragraph 114).

[43] To assist judges in identifying reasonable doubt in the context of conflicting testimonies, the SCC recommends that a trial judge consider the exculpatory evidence of the accused in three steps. The three steps are:

> (a) first, if I believe the testimony of WO McKie obviously, I must acquit;
>
> (b) second, if I do not believe the testimony of WO McKie but I am left in reasonable doubt by it, I must acquit; and
>
> (c) third, even if I am not left in doubt by the exculpatory account advanced by the defence, I must ask myself whether, based on the evidence which I do accept, I am convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[44] Of course, the above tests on their own are oversimplifications of the analysis that a trial judge must undertake. And quite often the judge must apply the *W.(D.)* test at various stages, with respect to the critical elements or vital points of the decision making process such as the elements of the offence or the "elements of a defence".

[45] I found all the prosecution's witnesses to be both credible and reliable. They did not have a personal stake in this court martial and testified very professionally based on their respective expertise or background. They carefully explained those technical matters that were required to understand the nature of the charges before the Court.

[46] I also found WO McKie to be both credible and reliable. He was forthright in responding to questions and did not embellish or attempt to escape accountability for his actions. In substance, he admitted that the items were recovered from his rental residence and provided his rationale for why they were there. For the most part, he did not offer any fanciful explanations for how these items might have found their way into his home nor did he try to project any ridiculous theories that were inconsistent with the facts. Although I did not accept all his evidence, in general, I found his explanations to be both reasonable and believable for how the items ended up in his residence and his testimony at large helped the Court to narrow the issues with respect to the first two charges which I will review first.

Analysis

First and Second Charges

[47] There was no dispute over the elements of identity, date and location set out in the first two charges. Further, in his testimony, the accused did not contest that the items seized came from his rented residence, nor did he contest the continuity of the evidence.

WO McKie also confirmed that some of the items had been secured in his gun locker which was secured by a key. MCpl Bennett confirmed that when he was asked if WO McKie could unlock the gun locker, he did so, revealing that he had constructive control over the items. He also admitted that he maintained tight control over his gun cabinets and generally had exclusive control over them. He did, however, admit to placing boxes into the cabinets that were given to him by his ex-wife and he assumed she packed.

[48] However, WO McKie also testified that he did not know that he had these items, and in his testimony, he speculated as to how he likely came into possession of them. He also admitted that they belonged to the CAF. Aside from the evidence that they were found in his possession, there is no evidence before the Court that he ever used these items or benefited from them by having them at his personal residence.

[49] I noted that even if WO McKie had control over these items, he cannot be said to have "possession" of them if he legitimately did not know they were there. Consequently, as I proceeded through the analysis, I was attentive to this fact.

[50] Based on the facts and the arguments of counsel, the contested elements of the first two charges require the Court to examine the following questions:

(a) was the property obtained by crime; and

(b) if the above question is answered in the affirmative, did WO McKie know that the property had been obtained by crime?

Was the property obtained by crime?

[51] The prosecution alleged that the only way that the property ended up in WO McKie's possession is through theft, as set out in section 114 of the *NDA*. He offered the following arguments to support this position:

(a) the elements of identity, date, location, etc., have been proven;

(b) *actus reus* requires two underlying elements:

i. that he possessed the items; and

ii. secondly, that he obtained them by crime;

(c) the prosecution is not required to prove that 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), at paragraph 5);

(d) he was in possession of items that he did not own;

(e) the evidence suggests that the items belonged to the CAF;

(f) as stated in *R. v. Thompson*, 30 N.S.R. (2d) 361 at paragraph 14, the particulars of the offence do not need to be particularized;

(g) a person who comes into possession lawfully of the items will subsequently have stolen it when the person converts the property to his or her own use and continuing possession of it (see *R. v. Hayes*, 20 C.C.C. (3d) 385(Ont. C.A.);

(h) the accused admitted that he did not own the items and he had a duty to return them to the unit, amnesty box, but in any event, they were not supposed to be in his house;

(i) items were obtained because of theft (stealing) under section 114 of the *NDA* and asks the Court to rely upon the following primary facts to draw that inference:

i. the testimony of Sgt Munro and MWO Cowan confirmed that the 9-mm magazine was the same as those owned by the CAF and was not consistent with a magazine of his private weapon;

ii. BFAs are not consistent with the use of civilian weapons and the accused admitted that there is no civilian use;

iii. the testimonial evidence supports that the BFAs, 9-mm and C7 magazines were not authorized to be brought home;

iv. MWO Lefebvre told the Court that he never authorized the accused to bring any magazines home;

v. only one BFA was ever issued;

vi. BFAs must be accessible at all times, whether in use or not, so he likely had them in his possession for two years;

vii. the fact that WO McKie had no use for these items, does not excuse his actions, and as a senior NCO, he should have returned them;

(j) *mens rea.* The prosecution argued that the accused either knew that he had these items in his possession or alternatively, he was willfully blind. He asked the Court to take judicial notice of the fact that all CAF members are told that it is an offence to lawfully keep weapons or ammunition in their possession;

(k) he argued that the defence is asking the Court to believe he was reckless with respect to what he brought home and encouraged the Court to reject that argument; and

(l) he asked the Court to reject the evidence that Ms McKie had placed all the items into boxes which were then placed into the locker as MCpl Bennett did not say anything about the items being found in a box.

[52] It is the prosecution's position that the ownership of the three BFAs and the 9-mm Browning magazine lies with the CAF and Government of Canada. In his testimony, WO McKie did not dispute this but clarified that at some point over his twenty-seven-year military career, he had been issued or loaned these items and somehow, he ended up with the three BFAs and one 9-mm Browning magazine, and he did not realize that he had them. Further, he argued that he has no use for these items. During his cross-examination, he demonstrated a good understanding for the nature of control over the items, accepting that the 9-mm Browning magazine is a controlled item in the CAF while the BFAs are not, but are accounted for via a loan card.

[53] In interpreting section 354 of the *Criminal Code*, the SCC in *R. v. Daoust* 2004 SCC 6, held at paragraph 52 that the "provision is aimed specifically at persons who receive or accept property despite knowing it to be of illicit origin".

[54] Counsel for WO McKie argued that there was no theft of these items ever reported. WO McKie was not charged with theft, and there are no judicial precedents that involve persons being charged with an offence contrary to section 354 of the *Criminal Code* without having been charged with an underlying indictable offence of some type.

[55] Conversely, the prosecution argued that by retaining the property in his possession, and not returning the property, WO McKie committed the indictable offence of theft by converting the property to his own use.

[56] Contrary to the defence's submissions, there is indeed legal precedent to support an accused being charged for possession of property obtained by an indictable offence without having been charged with an underlying offence. In fact, aside from precedents from the SCC, there are a series of Court of Appeal decisions, from the British Columbia Court of Appeal (BCCA), the Alberta Court of Appeal (ABCA), and the Ontario Court of Appeal (ONCA) that are very helpful in understanding what is required in "converting the property to one's own use." These decisions will be discussed in the forthcoming analysis.

[57] The theory of the prosecution's case is that although WO McKie might have had legal possession of these items that belonged to the CAF, when he took these items to his residence, at that point, he fraudulently converted them to his own use, and he committed the offence of theft.

[58] In assessing the two converging arguments of the prosecution and WO McKie, the fundamental issue I must resolve is whether WO McKie's continued possession of the items at his personal residence constituted the offence of being in possession of the property knowing it had been obtained by the commission of an indictable offence? More simply, Did WO McKie automatically convert the items to his own use by his continued possession of the property?

Did WO McKie automatically convert the items to his own use by his continued possession of the property?

[59] To have legally converted the property, an accused person must do more than simply have possession. In *R. v. Stewart*, [1988] 1 SCR 963, Lamer J. makes clear, that conversion requires that the lawful owner of the property, in this case, the CAF, to be deprived of the use and possession of the property in question. Based on the prosecution's position, this step is considered met as the items were no longer available in the CAF inventory. However, conversion requires that the accused intended that the CAF be deprived of such deprivation by converting it to his own use or benefit.

[60] It is important to conceptualize how property can be fraudulently converted when the property is not used for the individual's use or benefit. As an example, if the 9-mm Browning magazine made it into his home, in his webbing and was simply left in WO McKie's weapon's lockup and not used and the accused never benefited in any way by retaining the item, has he converted the item, in the legal sense?

[61] As recognized in the earlier *McKie* decision on a motion for a directed verdict, the law provides for the assumption that the possession of the BFA and the 9-mm magazine could have been innocent in the beginning, but at some point, when the accused chose to keep these items without colour of right and he uses or benefits from them, his possession of these items becomes unjustified (see *R. v. Maroney*, [1975] 2 S.C.R. 306 and *R. v. Hayes*, 20 C.C.C. (3d) 385(Ont. C.A.))

[62] However, a determination of WO McKie's liability here requires an assessment of whether he converted the items to his own use in the context of the SCC's decision in *Maroney.*

[63] In interpreting *Maroney*, a judgment of the BCCA in the case of *R. v. Costello*, 1 C.C.C. (3d) 403 is very instructive. In that case, the accused was charged with unlawfully using a credit card, knowing that it had been obtained by the commission in Canada of an offence, contrary to what was at that time, paragraph 301.1(1)(*c*) of the *Criminal Code*. The accused had found a credit card and later used the credit card to pay for a round of drinks at a bar. When the accused tendered the credit card to pay for a second round of drinks, the waitress checked the card with American Express and discovered that the card had been reported lost and the accused was subsequently arrested. In delivering the judgment of the BCCA, Macfarlane J.A., wrote at page 406:

> With respect, I think that *Maroney* has settled the meaning of the word "obtained", and it is not open to us to substitute another meaning. Here the credit card was at first innocently

> obtained, as were the goods in *Maroney*. When the appellant formed the intention to covert the credit card to his own use the second stage of obtaining was concluded. He had committed theft. Thereafter, he was in possession of a stolen credit card, with the requisite guilty knowledge, and the offence with which he was charged was completed when he used the card. It would be no defence for him to say that he was the thief, for a thief may be guilty of either theft or possession: see *R. v. Schultz* (1971), 3 C.C.C. (2d) 491 at p. 492, 16 C.R.N.S. 115, [1971] 4 W.W.R. 637 (B.C.C.A.).

[64] Essentially, *Maroney* recognizes that an accused person does not have to be charged with an underlying offence for section 354 to find application, however, in cases where the property has been innocently obtained, like the case at bar, the SCC suggests that a two-stage test must be met. In *Maroney*, when the appellant formed the intention to convert the credit card to his own use and benefit, the second and final stage of "obtaining" was concluded. Most notably, the second stage requires an active step by the accused, that must be closely analysed in the case at bar.

[65] In *Hayes*, Martin J.A., writing for the Court, also addressed facts where innocent possession of property becomes fraudulently converted. In *Hayes*, the accused was charged, among other things, with being in possession of another's identification documents knowing that property had been obtained by the commission in Canada of an offence punishable by indictment. The identification documents were the property of Jill Sharlene Laws who was a Queens University student who had either lost her wallet or had it stolen when she was at a laundromat. When Ms Hayes was apprehended for shoplifting, she identified herself to police as Sharlene Laws, producing a false birth certificate in that name. Ms Laws did not know Ms Hayes and certainly did not consent to Ms Hayes' possession of her identification papers. Ms Hayes had found Ms Laws identification after the snow had melted. The respondent also stated that she had used Ms Laws' identification at a Loblaws store in Kingston on the 10th of June.

[66] The Provincial Court judge convicted Ms Hayes on the basis that the documents had been "obtained" by the commission of an indictable offence. The summary conviction appeal court judge, allowed M. Hayes' appeal and entered an acquittal on the charge, holding that Ms Hayes had obtained the identification documents lawfully when she found them, and her subsequent use of the documents did not constitute the obtaining by the commission of an indictable offence.

[67] At the ONCA, there was agreement that Ms Hayes had fraudulently converted Ms. Laws' documents to her own use when she used them on the 10th of June 1983. The ultimate question that the court of appeal had to determine was "whether, although the respondent came into the possession of Ms Laws' documents lawfully, her continued possession of them <u>after</u> she unlawfully converted them to her own use constituted the offence of being in possession of the documents knowing they had been obtained by the commission of an indictable offence."
[Emphasis added.]

[68] In short, in *Hayes*, the court of appeal held that "A person who has come into the possession of the property of another lawfully, who <u>subsequently steals that property by converting it to his own use and who continues in possession of the stolen</u> property may

be convicted of the offence under s. 312(1)(a) of having in his possession property knowing that the property was obtained by the commission of an indictable offence" (see headnote of *Hayes*).
[Emphasis added.]

[69] Similarly, in *R. v. Zurowski*, 1983 ABCA 89, at paragraph 7, in another credit card case, the court found that "while Zurowski's initial possession of the Roberts' card may have been lawful - at least not proven otherwise - his fraudulent conversion of it to his own use constituted an unlawful obtaining as the character of his possession had then become criminal. The threshold was crossed when he formed the fraudulent intention to use the card."

[70] In other words, there must be proof that the person who acquired the property, intentionally and wrongfully took steps to convert the property for their own use and benefit, without the owner's permission. In *Hayes*, the court of appeal went further, in relying upon the first use of the identification on 10 June to be the threshold marker of fraudulently converting the card and found that the possession that followed beyond that point, as meeting the offence of possession of property knowing that it was obtained by the commission of an indictable offence.

[71] Like the facts in the above cases, there is no evidence to suggest that WO McKie acquired the three BFAs and 9-mm Browning magazine improperly. The case law suggests that the continued possession without conversion to one's use or benefit can remain innocent. However, it is also possible that based on the facts that WO McKie could have converted the items to his own use and benefit. A great deal turns on whether he made a conscious "choice" to keep these items in his residence for his personal use or benefit.

[72] Examined more closely, the evidence suggests that WO McKie came into possession of the items when they were loaned or issued to him as a serving member of the CAF. It is his position that he does not recall how he ended up with these items found in his possession, but he acknowledges that they would have been "issued" or loaned to him at some point during his military career and they do not belong to him.

[73] In assessing this sort of situation, it is important to understand the terms and conditions that underlay the loan of items in the CAF. It is not uncommon that when CAF members are completing their careers, or being posted out of a unit that they discover items they did not realize they had or alternatively they find out that the items they were issued on loan are no longer registered on loan to them.

[74] A strict interpretation of "converting to one's use or benefit" would mean that in cases where members have in their possession items that were originally issued to them by the CAF, but for whatever reason, the items are no longer registered as being on loan to them, that they are now in possession of stolen goods? This sets off alarm bells. Consequently, understanding this nuance is important to providing an operative understanding of how the law should be applied in a case such as this.

[75] The evidence suggests that BFAs were loaned to WO McKie as a member of the CAF, and he was still a serving member when they were discovered during the execution of a search warrant. BFAs are devices and safety features used by the CAF for the cycling and firing of blank rounds from the C7 weapon. The evidence is also unrefuted that there is no civilian use for a BFA and WO McKie's explanation for how he likely came into possession of the extra two BFAs over the course of his long military career is entirely plausible. In fact, I find it is very likely that members might find themselves in a situation where they do not have their BFA on them when it is required and another BFA is subsequently issued. WO McKie testified that he was not aware that he had three BFAs at all until the MPs put the items on his table.

[76] The prosecution took a contrary view to this position advanced by WO McKie suggesting that he had to have known they were in his cabinet, drawing the Court's attention to the fact that the MPs were able to find these items so quickly during their search. However, in reviewing the evidence, I noted that MCpl Bennett confirmed that it was WO McKie's ex-wife who reported to the MPs that WO McKie had military equipment in his possession. The unrefuted evidence of WO McKie and his son Cordell was that his ex-wife also packed up the contents of the gun lockers, placing the contents into boxes. Despite having refused to allow WO McKie to pick up any belongings for almost one year, she contacted him on 5 February 2021 to advise him that he could pick up stuff which she had packed for him. Shortly, after he picked up the boxes from the matrimonial home, she provided the underlying information that was used by the MPs for a search warrant. The evidence also suggests that she likely had to rummage through, and sort his military gear at the matrimonial home, including those items within his gun lockers when she packed the boxes. Given that it was Ms McKie's information that led to the issuance of the search warrant, which was executed on 18 May 2021, this very likely accounted for how quickly the MPs were able to locate the items and complete their search.

[77] With respect to his possession of the 9-mm Browning magazine that was found in his locker, WO McKie told the Court that he did not know that he had a 9-mm magazine in his possession until the execution of the warrant, when it was brought to his attention. He stated:

> "I do not know where it came from, I do not recall in the time prior to me leaving the marital home on the 20th of March when I went through my gun stuff and removed some of my guns due to the volatile situation, I did not see any of that. I did not see a 9-mil magazine or anything like that."

[78] Although he was clear that he was not sure where he got the 9-mm magazine, he told the Court that the last time he used the 9-mm Browning pistol was on a range day when he was serving with LdSH from 2015 to 2019.

[79] The evidence is that WO McKie was still a serving member of the CAF when the items were retrieved from his rental residence. The BFAs did not need to be secured in a weapon's vault or lockup. Sgt Munro told the Court that he kept his in his truck so

that he always had it handy when required. The evidence suggested that although they would not be permitted to return home to retrieve their BFAs, there was no evidence to suggest that the BFAs could not be stored at their homes. The evidence was also clear that the BFAs were to be stored in a place where members could access them quickly when required. The evidence also suggests that there is no civilian use for BFAs so it begs the question as to what "use", or "benefit", WO McKie would gain from keeping these items. There was also no evidence that he was a collector of military memorabilia.

[80] The evidence also confirms that the one 9-mm Browning magazine belonging to the CAF was not compatible with his personally registered SIG Sauer Mosquito. There is no evidence that WO McKie used or intended to use or benefited in any way from his possession of the 9-mm magazine in any manner. There is also no evidence to suggest that he knew that he had this magazine. Aside from WO McKie's assertion that he was not aware that he had possession of this magazine, the Court has no other direct evidence to contradict this. WO McKie also explained that he had no idea that he had it in his possession in the gun locker in his matrimonial home and explained that other members who lived in the barracks often stored miscellaneous items in his gun locker, so he simply never noticed it. Since there were at least several boxes of items that were likely removed, this is not unreasonable.

[81] To be guilty of fraudulent conversion, WO McKie must have intentionally and wrongfully converted the property of the CAF for his own benefit and use, without the authority to do so. In this case, since WO McKie acquired the property legally, he kept it in his possession as a serving military member, and there is no evidence that he used the BFAs or the 9-mm magazine while they were at his residence. If he had, then I find that by law, he would have converted them to his own use. Further, there is also no evidence before the Court he intended to sell the items so he could benefit financially. If he had knowledge that he had these items and retired from the CAF without returning them, then this would be an additional factor to be considered in determining whether a conversion had occurred. However, at the time the items were seized, he was still a serving CAF member.

[82] The fact that he retained the 9-mm magazine in his personal residence was likely a violation of an internal order, but I find that there is no evidence that it constitutes an indictable offence of theft in the context of section 354 of the *Criminal Code*.

Did WO McKie know that the property had been obtained by crime?

[83] WO McKie further argued that not only were these items not obtained by crime, but there is no evidence before the Court that WO McKie knew he had three BFAs or a 9-mm Browning magazine in his possession or that these items were obtained by crime.

[84] In *R. v. Vinokurov*, 2001 ABCA 113 the ABCA considered the *mens rea* element of paragraph 354(1)(a) of the *Criminal Code*. It held that the "The onus is on the Crown to prove that the accused knew that the property was stolen."

[85] In *R. v. L'Heureux*, [1985] 2 SCR 159, the SCC held at paragraph 8 that "One of the components of the offence stated in s. 312 of the *Criminal Code* [now 354] is knowledge by the person having possession of the thing that it was obtained by the commission of an indictable offence."

[86] The prosecution argued that the reasonable CAF member would have to know, as it is something that members are trained to respect from basic training. One of the basic conditions of service is the requirement to conduct weapons training. The evidence was uncontested by all the witnesses who testified that it was impermissible to bring magazines hom.

[87] However, it is a general rule of statutory construction that when the term "knowingly" is used in a criminal statute, the reasonable person standard will not satisfy the *mens rea* requirement (see *Vinokurov* at paragraph 7). In other words, the test requires more than asserting that as a senior NCO, WO McKie "ought to have known."

[88] The necessary knowledge for a possession offence can be established through either the proof of subjective knowledge of WO McKie or through the concept of wilful blindness. WO McKie testified that he did not know that he had these items in his possession. Although that might seem outlandish from the perspective of the prosecution, a review of the quantum of military equipment in the photos included at Exhibit 4 suggests that it is very possible that these items could have conceivably been missed. He had an awful lot of military kit stored at home. The evidence of MCpl Bennett suggested that the BFAs were not in the gun lockers and WO McKie speculated that they were likely with his other military gear in his laundry room.

[89] Wilful blindness requires more than a failure to inquire, but it goes so far to suggest a level of "deliberate ignorance".

[90] Charron J. explained the doctrine of wilful blindness at paragraph 21 of *R. v. Briscoe*, 2010 SCC 13:

> The doctrine of wilful blindness imputes knowledge to an accused whose suspicion is aroused to the point where he or she sees the need for further inquiries, but *deliberately chooses* not to make those inquiries.

[91] With respect to the first two charges, given the size and nature of the BFAs and the lone 9-mm Browning magazine, I am not satisfied beyond a reasonable doubt that WO McKie was even aware that he had these items in his home. Further to my comments made in the above analysis, the prosecution has not convinced me beyond a reasonable doubt of WO McKie's guilt on the first two charges.

Fourth Charge

Did the accused possess the device?

[92] To satisfy the element of possession of the magazines, the prosecution must prove beyond a reasonable doubt that WO McKie had control of the C7 magazines and that he had knowledge that they were prohibited devices or was reckless with respect to their characteristics.

[93] In assessing whether WO McKie had possession of the prohibited devices, I accepted the following facts:

(a) the C7 magazines which are prohibited devices were located and retrieved during the search warrant executed by the MPs on 18 May 2021 and the evidence bags were marked as having been found in a gun locker;

(b) WO McKie was asked to open gun lockers where the evidence suggests the C7 magazines were found; and

(c) there were no other adults who were at the residence and his children, of approximate ages of fifteen and sixteen years of age were not serving members of the CAF.

[94] During his testimony, WO McKie did not contest that he was in possession of these items. Unlike his testimony on the BFAs and the 9-mm magazine where he told the Court he had no idea where he got them and he did not know that he had them in his possession, WO McKie appeared more confident in speculating that the C7 magazines returned home with him from his 2006 tour in Afghanistan.

[95] Although he testified that he did not know that he had these magazines in his gun locker until they were shown to him, I do not accept that. The items were found in his locked gun locker. Unlike the other items that might be possible to miss, there were six C7 magazines, which are large enough that they just cannot be missed. **CANFORGEN 078/96 CANFORGEN /96 241430Z OCT 9** sets out the CAF policy and direction to CAF members with respect to the handling of prohibited devices.

[96] Further, if the magazines had returned with him from Afghanistan, which he expressed was the most plausible explanation, and based on his described diligence in storing these items, at some point he would have had to remove them from his kit that returned from Afghanistan and secured them into his gun locker.

[97] At that point, he would have known that he was not to have these items in his possession and at his residence. Based on his testimony, I conclude that he knew these C7 Magazines were both controlled and prohibited items and needed to be stored in a vault. It was incumbent upon him to return the C7 magazines immediately to the base.

Are the C7 magazines prohibited Devices?

[98] The legal framework that sets out whether an item falls within the parameters of a prohibited device was outlined above. The seized C7 magazines are compatible with C7, C8 and civilian rifles, but MWO Cowan, who was the senior weapons technician for the brigade and who conducted a physical examination of the magazines seized at WO McKie's rental residence confirmed that the magazines retrieved from WO McKie's home held thirty rounds each.

[99] MWO Cowan explained for the Court that although the seized C7 magazines may be used on civilian weapons, magazines holding more than five rounds are prohibited in Canada. He explained that the possession of a large capacity magazine that has been permanently altered so that it cannot hold more than the number of cartridges allowed by law is legal in Canada and is not considered a prohibited device.

[100] In final submissions, WO McKie did not make any arguments that the C7 magazines are not prohibited devices.

Does the exemption set out at section 117.07 apply?

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

[102] In earlier submissions, it was WO McKie's position that the section 117.07 exemption applied to him as a regular force member of the CAF and that the burden is fully on the prosecution to prove that WO McKie was not in possession of the prohibited devices for the purposes of his public officers' duties or employment. He argued that the prosecution has not met this burden.

[103] In response to this argument, the prosecution argued that paragraph 117.07(1)(a) allows a public officer in the course of his duties or employment to use prohibited devices and that if the items are not being actively used in the course of their duties, then the onus set out at section 117.11 applies.

[104] In any event, the evidence put forward by the prosecution suggests that the C7 magazines were found secured in WO McKie's personal residence, which is presumptively outside of his place of employment. The evidence suggests that the magazines were static, not being used in any official capacity and were individually stored in a gun locker. 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 range, they should never be taken home. I find that the prosecution has led sufficient evidence to satisfy me that the exemption does not apply to WO McKie.

[105] Based on all the evidence at trial, I can conclude that the prosecution has proven all the elements of the fourth charge beyond a reasonable doubt.

FOR THESE REASONS, THE COURT:

[106] **FINDS** WO McKie not guilty of the first and second charge and guilty of the fourth charge on the charge sheet.

Counsel:

The Director of Military Prosecutions as represented by Major B.J. Richard

Major E. Carrier, Defence Counsel Services, Counsel for WO B.A. McKie