



## COURT MARTIAL

**Citation:** *R. v. Anstey*, 2011 CM 3001

**Date:** 20110121

**Docket:** 201060

Standing Court Martial

Canadian Forces Base Edmonton  
Edmonton, Alberta, Canada

**Between:**

**Her Majesty the Queen**

- and -

**Major C.T. Anstey, Accused**

**Before:** Lieutenant-Colonel L.-V. d'Auteuil, M.J.

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### REASONS FOR FINDING

(Orally)

[1] Major Anstey is charged with one offence for having committed an act of a fraudulent nature, not particularly specified in sections 73 to 128 of the *National Defence Act*.

[2] Essentially it is alleged that, further to his posting to Canadian Forces Base (CFB) Edmonton in August 2008, Major Anstey claimed, between August 2008 and May 2009, in a fraudulent manner, separation expense, which represents temporary relocation benefits and separation allowance while he was on imposed restriction, for a total amount of \$23,199.47, knowing that he had no entitlement to that money.

### THE EVIDENCE

[3] The trial's hearing took place from 17 to 19 January 2011. Five witnesses were heard by the court during this trial, including the accused. The court heard, in the order

of their appearance: Mrs Cathy Wilson; Mrs Cheryl Redmond; Sergeant Jeffery Dumville; Sergeant Greg Isles, the lead investigator in the case; and Major Anstey.

[4] Both parties submitted to the court a total of 32 exhibits: one being a DVD with the recorded interview of Major Anstey by Sergeant Isles and 31 other documents.

[5] Also, the court took judicial notice of the facts in issues under Rule 15 of the Military Rules of Evidence.

## **THE FACTS**

[6] Major Anstey joined the Canadian Forces in 1988 and graduated from Royal Military College in 1993 with a Bachelor of Science and Space Science. He got trained and became a signal officer. He got his first posting in 1996 in Calgary and moved five times since then. He got married to his wife, Toshena, in 1997 and his son was born in 1999.

[7] In 2008, Major Anstey and his family were owning and living in a house at Hammonds Plains, Nova Scotia, which is near the city of Halifax. He was working at that time as the G6 Land Force Atlantic Area (LFAA) in Halifax. At the end of the month of February 2008, he received his initial posting message for Edmonton as the Chief of Staff for 73 Communication Group and the Commanding Officer of the Group Headquarters. He then listed his house for sale on 7 March 2008.

[8] In June 2008, it seems that the perspective to sell the house quickly was low because on 25 June, Major Anstey enquired to people he knew about the availability of quarters and the benefits he could get if he went to Edmonton alone for some time, which is to be on imposed restriction (IR). It was the first time in his career that he was contemplating such an option. Through an email, Exhibit 22, he obtained from the IR clerk at CFB Edmonton, Mrs Redmond, the CFB Edmonton Aide-Memoire about IR, Exhibit 21, and learned at the same time that no quarters were available on the base.

[9] On that same day, he informed his wife about the IR option, Exhibit 26. He suggested to proceed with their house hunting trip in the Edmonton area, which is the trip to search for accommodations for the family at the new posting location, to rent something that would fit, at the same time, the IR requirements and their requirements to live at that place. Then as soon as the house would be sold in Halifax, his wife and his son could move right away, door to door. His wife answered by email, confirming that the plan was a good one. Major Anstey made a request to his career manager to authorize him to be on IR and to issue an amended posting message consequently.

[10] The HHT took place from 10 to 19 July 2008 in Edmonton. A residential tenancy agreement was signed by Major Anstey on 15 July 2008 for the rental of premises in St. Albert, near Edmonton, Exhibit 6.

[11] On 21 July 2008, the amended posting message was issued by the career manager authorizing IR for Major Anstey, which would remain in effect up to 28 August 2009, Exhibit 27.

[12] Meanwhile, another concern was raised among the discussions between Major Anstey and his wife, Toshena, about their son. Despite the fact that the latter had some learning difficulties at school, and the parents' concern the school never really addressed the problem, it ended that the parents were unhappy with the educational system in the Province of Nova Scotia.

[13] They decided to register their son at his usual school in the Halifax area and also in St. Albert. They picked up this latter place because of the educational system. Then, if a move occurs during the school year, it will be easier to move him from one place to another. However, discussions evolved and they worried about the impact on him if he changes school during the school year. Major Anstey decided that he will ask to the IR clerk in Edmonton, on his arrival over there, if his son could stay with him. He did that because he heard from a friend that such thing had happened in the past.

[14] The initial Major Anstey's date to report to his new position in Edmonton was on 14 July 2008; however, considering that his house was not sold, he obtained to move this date to 15 August 2008. It is then on 15 August 2008 that Major Anstey reported himself to his new job in Edmonton. On arrival, he asked to the IR clerk if his son could stay with him.

[15] Because this situation previously occurred with another member of the Canadian Forces, Mrs Redmond had already checked about this situation with the Directorate of Compensation Benefits Administration (DCBA) in Ottawa, which is the organisation responsible for the monitoring and application of administering policies and programmes in the areas of expense reimbursement for travel and relocation. She confirmed that DCBA has authorized Canadian Forces' members on IR to stay with their kids.

[16] Then Major Anstey and his wife decided that their son would stay with him. Major Anstey filled an application for temporary relocation (TR) benefits and separation allowance (SA), which once approved allowed him to submit claims for monthly reimbursements of rental premises and utilities and to get SA on a monthly basis.

[17] In addition to that, Major Anstey had noticed in the CFB Edmonton Aide-Memoire, Exhibit 21, that if a member's spouse resides with the member at the new location for greater than 30 consecutive days then IR benefits will be discontinued. Then, considering that his wife is a travel agent and that she has to absent herself from the place where she resides often, it was decided that she will come with her son in St. Albert and that she will stay there to take care of her son and work, while she makes sure that she will not stay at the rented premises for more than 30 consecutive days. She could stay close to her son and her husband while allegedly respecting the parameters of the CFB Edmonton Aide-Memoire for getting IR benefits. This is what they did.

[18] Their son started school in St. Albert, and after a couple of weeks school authorities thought that he had learning disabilities. He was assessed and they found out that he has high IQ dyslexia, which means that he's approaching genius level for mathematics and science, but is completely off of the scale for reading and writing. He was then put on a special programme in order to help him to deal with this problem.

[19] Major Anstey submitted his first claim for separation expense in September 2008; he did so, on a monthly basis, up to May 2009.

[20] In November 2008, while being at their house in Hammonds Plains, Major Anstey's wife rented, for a very low price, their house to their neighbours. Essentially, the latter occupied the residence because they needed another place to live and it also provided somebody to take care of the house that still was on the market while they were away.

[21] Also Major Anstey's wife inherited some money from her mom, who passed away in March 2008, and she bought a house in Kingston in February 2009 as a future project for retirement, considering that CFB Kingston is the home station for signal officers.

[22] Further to some information she received around mid-June 2009, Mrs Redmond called the MP detachment to provide information concerning a possible fraud about separation expense claimed by Major Anstey. The file was referred to the National Investigation Service Detachment for the Western Region and an investigation was initiated, having Sergeant Isles as the lead investigator.

[23] On 13 August 2009, Major Anstey was interviewed by Sergeant Isles concerning the matter before this court. The interview was recorded, Exhibit 25.

[24] Further to this interview, Major Anstey met the IR clerk and mentioned that he will cease to claim IR benefits up to the time the situation is clarified.

[25] Major Anstey's residence in Hammonds Plains, Nova Scotia was sold at the end of August 2009.

[26] As today, all the money he got as separation expense in Edmonton was taken back by the Canadian Forces on his pay, and it represented an amount of about \$24,000.

### **THE APPLICABLE LAW AND THE ESSENTIAL ELEMENTS OF THE CHARGE**

[27] Subsection 117(f) of the *National Defence Act* reads, in part, as follows:

117. Every person who

...

(f) commits any act of a fraudulent nature not particularly specified in sections 73 to 128,

is guilty of an offence and on conviction is liable to imprisonment for less than two years or to less punishment.

[28] Then the prosecution had to prove the following essential elements beyond a reasonable doubt: the prosecution had to prove the identity of the accused and the date and place as alleged in the charge sheet. The prosecution also had to prove the following additional elements: that the accused used deceit, falsehood or other fraudulent means to cause a deprivation, he deprived somebody of something of value and that he intended to defraud.

[29] Concerning the essential element which requires that the accused used deceit, falsehood or other fraudulent means that caused a deprivation, it is essential to say that in order to prove this element the prosecution counsel must satisfy the court beyond a reasonable doubt that it was by using deceit, falsehood or other fraudulent means that Major Anstey deprived the Canadian Forces. All three means do not have to be proven; any one is enough. Deceit is an untrue statement made by a person who knows that it is untrue or has reason to believe that it is untrue, but makes it, despite that risk, to induce another person to act on it, as if it were true to that other person's detriment. Falsehood is a deliberate lie. "Other fraudulent means" is a term that covers more ground than either deceit or falsehood. It includes any other means, which are not deceit or falsehood, properly regarded as dishonest according to the standards of reasonable people.

[30] About the essential element of deprivation of somebody of something by the accused, it must be said that any property, money, valuable security or service is "something of value" for the purposes of this question. Property includes real property, land and personal property, goods and things, including the right to recover or receive money or goods or things. Money has its usual meaning and includes currency and coins. Deprivation includes, but does not require that the Canadian Forces suffers actual economic loss. It is enough that the Canadian Forces were induced to act to their detriment by the accused's conduct. The Canadian Forces' economic or financial interests must be at risk, but they do not have to lose any money or anything of value as a result of the accused's conduct.

[31] Finally, about the intent to defraud, it relates to Major Anstey's state of mind at the time he deprived the Canadian Forces of the money by deceit, falsehood or other fraudulent means. To prove this essential element, prosecution counsel must satisfy the court beyond a reasonable doubt that Major Anstey meant to say and/or do those things that amount to deceit, falsehood or other fraudulent means, and knew that saying and/or doing them could put at risk the economic or financial interests of the Canadian Forces. It does not matter whether the accused thought that what he was saying and/or doing was not dishonest or thought that neither the Canadian Forces nor anyone else would suffer harm in the end as a result. To determine the accused's state of mind, what he knew or what he meant to do, the court should consider what he did or did not do, how

he did or did not do it; and what he said or did not say. The court must look at Major Anstey's words and conduct before, at the time, and after he used deceit, falsehood or other fraudulent means to deprive the Canadian Forces of money. All these things and the circumstances in which they happened may shed light on the accused's state of mind at the time. They may help to decide what he meant or did not mean to do. It is also reasonable to conclude that a sane and sober person means to do what he actually does. It is a conclusion that may be drawn from what Major Anstey did.

[32] Before this court provides its legal analysis, it's appropriate to deal with the presumption of innocence and the standard of proof beyond a reasonable doubt; a standard that is inextricably intertwined with the principle fundamental to all criminal trials. And these principles, of course, are well known to counsel, but other people in this courtroom may well be less familiar with them.

[33] It is fair to say that the presumption of innocence is perhaps the most fundamental principle in our criminal law, and the principle of proof beyond a reasonable doubt is an essential part of the presumption of innocence. In matters dealt with under the Code of Service Discipline, as in cases dealt with under the criminal law, every person charged with a criminal offence is presumed to be innocent until the prosecution proves his guilt beyond a reasonable doubt. An accused person does not have to prove that he is innocent. It is up to the prosecution to prove its case on each element of the offence beyond a reasonable doubt.

[34] The standard of proof beyond a reasonable doubt does not apply to the individual items of evidence or to separate pieces of evidence that make up the prosecution's case, but to the total body of evidence upon which the prosecution relies to prove guilt. The burden or onus of proving the guilt of an accused person beyond a reasonable doubt rests upon the prosecution and it never shifts to the accused person.

[35] A court must find an accused person not guilty if it has a reasonable doubt about his guilt or after having considered all of the evidence. The term "beyond a reasonable doubt" has been used for a very long time. It is part of our history and traditions of justice. In *Lifchus*<sup>1</sup>, the Supreme Court of Canada proposed a model charge on reasonable doubt. The principles laid out in this decision have been applied in a number of Supreme Court and appellate court subsequent decisions. In substance, a reasonable doubt is not a far-fetched or frivolous doubt. It is not a doubt based on sympathy or prejudice; it is a doubt based on reason and common sense. It is a doubt that arises at the end of the case based not only on what the evidence tells the court, but also on what that evidence does not tell. The fact that a person has been charged is no way indicative of his or her guilt and I will add that the only charges that is faced by an accused person are those that appear on the charge sheet before a court.

[36] In *Starr*<sup>2</sup>, the Supreme Court held that:

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<sup>1</sup> *R. v. Lifchus*, [1997] 3 S.C.R. 320

<sup>2</sup> *R. v. Starr*, [2000] 2 S.C.R. 144, at para. 242

... an effective way to define the reasonable doubt standard for a jury is to explain that it falls much closer to absolute certainty than to proof on a balance of probabilities.

[37] On the other hand, it should be remembered that it is nearly impossible to prove anything with absolute certainty. The prosecution is not required to do so. Absolute certainty is a standard of proof that does not exist in law. The prosecution only has the burden of proving the guilt of an accused person, in this case, Major Anstey, beyond a reasonable doubt. To put it in perspective, if the court is convinced or would have been convinced that the accused is probably or likely guilty, then the accused would have been acquitted since proof of probable or likely guilt is not proof of guilt beyond a reasonable doubt.

[38] What is evidence? Evidence may include testimony under oath or solemn affirmation before the court by witnesses about what they observed or what they did; it could be documents, photographs, maps or other items introduced by witnesses; the testimony of expert witnesses; formal admissions of facts by either the prosecution or the defence; and matters of which the court takes judicial notice.

[39] It is not unusual that some evidence presented before the court may be contradictory. Often witnesses may have different recollections of events. The court has to determine what evidence it finds credible.

[40] Credibility is not synonymous with telling the truth and a lack of credibility is not synonymous with lying. Many factors influence the court's assessment of the credibility of the testimony of a witness. For example, a court will assess a witness' opportunity to observe; a witness' reasons to remember, like, were the events noteworthy, unusual, and striking, or relatively unimportant and, therefore, understandably more difficult to recollect? Does a witness have any interest in the outcome of the trial; that is, a reason to favour the prosecution or the defence or is the witness impartial? This last factor applies in a somewhat different way to the accused. Even though it is reasonable to assume that the accused is interested in securing his or her acquittal, the presumption of innocence does not permit a conclusion that an accused will lie where that accused chooses to testify.

[41] Another factor in determining credibility is the apparent capacity of the witness to remember. The demeanour of the witness while testifying is a factor which can be used in assessing credibility; that is, was the witness responsive to questions, straightforward in his or her answers or evasive, hesitant or argumentative? Finally, was the witness' testimony consistent with itself and with the uncontradicted facts?

[42] Minor discrepancies, which can and do innocently occur, do not necessarily mean that the testimony should be disregarded. However, a deliberate falsehood is an entirely different matter. It is always serious and it may well tint a witness' entire testimony.

[43] The court is not required to accept the testimony of any witness except to the extent that it has impressed the court as credible. However, a court will accept evidence as trustworthy unless there is a reason, rather, to disbelieve it.

[44] As the rule of reasonable doubt applies to the issue of credibility, the court is required to definitely decide in this case, first, on the credibility of the accused and to believe or disbelieve him. It is true that this case raises some credibility issues and it is one of those cases where the approach on the assessment of credibility expressed by the Supreme Court of Canada in *R. v. W.(D.)*, must be applied, because the accused, Major Anstey, testified. As established in that decision at page 758, the test goes as follows:

First, if you believe the evidence of the accused, obviously you must acquit.

Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[45] This test was enunciated mainly to avoid for the trier of facts to proceed by establishing which evidence it believes, the one adduced by the accused or the one presented by the prosecution. However, it is also clear that the Supreme Court of Canada reiterated many times that this formulation does not need to be followed word by word as some sort of incantation<sup>3</sup>.

[46] As underlined by Justice Abella, writing for the majority in *C.L.Y.*<sup>4</sup>, I want to confirm that I am aware of the test in *W. (D.)* of the decisions of the Supreme Court of Canada delivered in *C.L.Y.* and *J.H.S.*<sup>5</sup> on the application of that test while assessing credibility. The pitfall that this court must avoid is to be in a situation, appearing or in reality, as it chose between two versions in its analysis.

[47] Having instructed myself as to the presumption of innocence, the reasonable doubt, the onus, and the required standard of proof, I will now address the legal principles.

## **ANALYSIS**

[48] Both parties agreed that the identity of the accused, the date and the place of the offence are not in dispute. Accordingly, the court concludes that these essential elements of the offence are proved by the prosecution beyond a reasonable doubt.

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<sup>3</sup> *R. v. S. (W. D.)*, [1994] 3 S.C.R. 521, at p. 533

<sup>4</sup> *R. v. C.L.Y.*, 2008 SCC 2, at para. 10

<sup>5</sup> *R. v. J.H.S.* 2008 SCC 30



[49] I am turning now to the test enunciated by the Supreme Court in *W. (D.)*. I will first proceed with the analysis of the evidence introduced by the accused. It requires finding on the reliability and credibility of his testimony in light of the three last and disputed essential elements of the charge to be proven by the prosecution beyond a reasonable doubt, reflected by the *actus reus* and the *mens rea*.

[50] Major Anstey testified in a straightforward, calm, and honest manner. His testimony was consistent and logical. He answered clearly to all the questions he was asked by both counsel and also the court, and when some of those questions appeared unclear to him, he did not hesitate to ask counsel to clarify or repeat them.

[51] Major Anstey described clearly his personal situation at the time of the alleged offence. He told the court what has brought some changes in his approach to the fact that he was initially supposed to come alone on IR in Edmonton in August 2008. As many other families in the Canadian Forces, his wife and him were very concerned by the impact of the move on their son and his education. He said that he understood that usually, as he certified in his application for TR and IR, Exhibit 5, Canadian Forces' members on IR are separated from their families. However, the reading of CFB Edmonton Aide-Memoire seemed to allow some room on having dependants with him while on IR, especially about the member's spouse. Having confirmed with the IR clerk that his son could stay with him, and having concluded that his wife could reside with him for less than 30 consecutive days in accordance with what was said in the CFB Edmonton Aide-Memoire, he clearly got the impression that being separated from his dependants on IR was not a necessary condition to get separation expense at CFB Edmonton.

[52] Through his testimony, he described his wife as a proactive person and that she was taking care of many things in the family, which explained why he was relying on her to make sure that she was not residing in St. Albert for more than 30 consecutive days while he was on IR. He also brought additional details in his testimony to the one he provided in his interview to the police in August 2008. At that time, he was not sure if his wife resided more than 30 consecutive days and said that he could check. In court, he said that he checked with his wife and that he stated that she never resided more than 30 consecutive days while on IR.

[53] Major Anstey's testimony left the court with a clear impression that he never held information on purpose in order to fit the separation expense's criteria. He provided the necessary information he was asked by authorities to claim what he was allowed to, nothing else. The court understood from his testimony that because his family has not officially moved, waiting for the house in Hammonds Plains to be sold, many administrative things that are usually modified when you move were left as they were, waiting for the move to be done. Then, he never denied and always confirmed that it looked like he was on IR alone, while the reality was that his son and his wife were around in Edmonton. On the other end, the CFB Edmonton Aide-Memoire, on which he relied on as the IR clerk did, did not request him to let her know when his wife and his son were with him. This situation represents exactly what has been described by the

police and the accused as the grey area of the applicable policy. Were Major Anstey and his wife thinking that separation expense was provided to him beyond what it is usually allowed in the Canadian Forces? Probably. Was Major Anstey and his wife allowed to think that he was entitled to separation expense in the circumstances they went through? Totally.

[54] Nothing in the evidence adduced by the prosecution contradicts Major Anstey's testimony. To the contrary, he amplified and provided additional and logical details, which provided the court with a better understanding of the events.

[55] Then, it is court's conclusion that the evidence provided by the accused, including his testimony, is credible and reliable.

[56] The applicable regulation, which is article 209.997 of the Compensation and Benefits Instructions for the Canadian Forces, provides that Canadian Forces' members are entitled to separation expense as compensation for additional expenses as a result of the separation from their dependants, such as their kids and their wife, if they are posted, if their dependants normally reside at their place of duty, and if their dependants have not been moved at the new place of duty at public expense.

[57] By allowing a member's spouse, which is a dependant, to reside on a temporary basis through the CFB Edmonton Aide-Memoire for TR and IR, and by permitting a child, which is also a dependant, to reside with the member at his new place of duty, pursuant to a DCBA decision, the Canadian Forces allowed any Canadian Forces' member on IR in Edmonton during the year 2008 and 2009 to think legitimately that he could get separation expense in such situation without being inevitably separated from his or her dependants.

[58] The essence of Major Anstey's testimony is that his family and him acted in accordance with the CFB Edmonton Aide-Memoire and that he never used deceit, falsehood or other fraudulent means that caused a deprivation to the Canadian Forces. His testimony has raised a reasonable doubt on this essential element.

[59] Considering this conclusion, the court does not need to proceed with the analysis of the essential element related to the deprivation. However, the court considers that Major Anstey's testimony has raised a reasonable doubt about the *mens rea*, which is the intention to defraud.

[60] In the circumstances, Major Anstey must be given the benefit of the reasonable doubt.

[61] Consequently, having regard to the evidence as a whole, it is the court's conclusion that the prosecution has not proved beyond a reasonable doubt all the essential elements of the offence of having committed an act of fraudulent nature not particularly specified in sections 73 to 128 of the *National Defence Act*.

**FOR THESE REASONS, THE COURT:**

[62] **FINDS** you not guilty of the offence punishable under section 117(f) of the *National Defence Act* for having committed an act of fraudulent nature not particularly specified in sections 73 to 128 of the *National Defence Act*.

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**Counsel:**

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