Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

**Date: 20140613**

**Docket: CMAC-561**

**Citation: 2014 CMAC 8**

**CORAM:** **COURNOYER J.A.**
**VINCENT J.A.**
**SCOTT J.A.**

**BETWEEN:**

**SERGEANT DAMIEN ARSENAULT**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

Hearing held in Québec, Quebec, on February 14, 2014.

Judgment delivered at Ottawa, Ontario, on June 13, 2014.

REASONS FOR JUDGMENT BY: COURNOYER J.A.

CONCURRED IN BY: VINCENT J.A.
SCOTT J.A.

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**REASONS FOR JUDGMENT**

**COURNOYER J.A.**

I. Introduction

[1] The appellant is appealing a decision dated April 23, 2013,[1] by the Standing Court Martial (Military Judge Jean-Guy Perron), which found him guilty of fraud on Her Majesty the Queen in Right of Canada between May 1, 2005, and February 21, 2007, and of, during that same period, wilfully making false statements in several allowance claims that he signed.

[2] Those charges concern the payment of a total of $30,725 to the appellant as Separation Expense (SE) following his transfer from the Valcartier Base to the Canadian Forces Base Gagetown as well as the payment of a total of $3,469 in Post Living Differential (PLD).

[3] The appellant is essentially criticized for making several false monthly statements concerning his marital status (he was separated) and regarding the fact that he had dependants. Those false statements resulted in him receiving allowances to which he was not entitled.

[4] For a better understanding of this appeal, I begin with reproducing the four charges brought against the appellant:

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1 2013 CM 4005.

**First Charge: Section 130 *NDA* (Alternate to 2nd and 3rd Charges)**

OFFENCE PUNISHABLE UNDER SECTION 130 OF THE *NATIONAL DEFENCE ACT*, NAMELY HAVING COMMITTED FRAUD CONTRARY TO SUBSECTION 380(1) OF THE *CRIMINAL CODE*

Particulars: In that, from May 1, 2005, to February 21, 2007, at the Canadian Forces Base Gagetown, Oromocto, province of New Brunswick, by deceit, falsehood or other fraudulent means, he defrauded Her Majesty in Right of Canada of a sum of money exceeding five thousand dollars ($5,000).

**Second Charge: Section 117(f) *NDA* (Alternate to 1st Charge)**

COMMITTED A FRAUDULENT ACT NOT PARTICULARLY SPECIFIED IN SECTIONS 73 TO 128 OF THE *NATIONAL DEFENCE ACT*

Particulars: In that, between May 1, 2005, and February 21, 2007, at Canadian Forces Base Gagetown, Oromocto, province of New Brunswick, he, with the intent to defraud, claimed allowances for shelter, meals and Separation Expense totalling thirty thousand seven hundred twenty-five dollars ($30,725), knowing that he was not entitled to them.

**Third Charge: Section 117(f) *NDA* (Alternate to 1st Charge)**

COMMITTED A FRAUDULENT ACT NOT PARTICULARLY SPECIFIED IN SECTIONS 73 TO 128 OF THE *NATIONAL DEFENCE ACT*

Particulars: In that between July 11, 2005, and January 31, 2007, at Canadian Forces Base Gagetown, Oromocto, province of New Brunswick, he, with the intent to defraud, failed to report that he no longer maintained a residence in the Quebec City area, thus obtaining allowances totalling three thousand four hundred sixty-nine dollars ($3,469) that he was not entitled to.

**Fourth Charge: Section 125(*a*) *NDA***

WILFULLY MAKING A FALSE STATEMENT IN AN OFFICIAL DOCUMENT SIGNED BY HIM

Particulars: In that, between May 1, 2005, and February 21, 2007, at Canadian Forces Base Gagetown, Oromocto, province of New Brunswick, he wilfully stated on the general allowance claims

> that he had a dependant and that there was no ongoing voluntary, legal or other separation, knowing that this was false.

[5] The appellant was found guilty of the count of fraud and the count of making a false statement. In accordance with the rule set out in *Kienapple*,[2] the military judge ordered a conditional stay of the second and third counts.[3]

[6] The appellant submitted two grounds of appeal: (1) paragraphs 117(*f*) and 130(1)(*a*) of the *National Defence Act* (NDA) are overbroad and are contrary to section 7 of the *Canadian Charter of Rights and Freedoms*; (2) the appellant was entitled to Separation Expense because he had dependants within the meaning of the applicable legislation and regulations.

[7] Subject to his constitutional arguments, the appellant acknowledges that he was properly convicted with respect to the third count[4] and is seeking, if applicable, a special finding of guilty[5] regarding the first count to include only the amount of $3,469 in connection with the PLD. Such a special finding is, in part, likely to impact the sentence that could be imposed.

[8] For the following reasons, I am of the opinion that the constitutional challenge to paragraph 130(1)(*a*) must be rejected because of the decisions of this Court in *R. v. Moriarity/Hannah*[6] and *R. v. Larouche*,[7] and that the constitutional challenge to paragraph 117(*f*) is moot because of my findings with respect to the second ground of appeal.

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2 [1975] 1 S.C.R. 729.
3 *R. v. Provo*, [1989] 2 S.C.R. 3; *R. c. Fortin*, EYB 1996-71426, [1996] J.Q. No 148 (C.A.Q.).
4 Reproduced at para. 9 of the Decision.
5 See section 138 of the NDA and articles 112.40 and 112.42 of the Queen's Regulations and Orders (QR&O).
6 2014 CMAC 1.

[9] Regarding the second ground of appeal, the appellant made false statements which resulted in his receipt of SE and PLD to which he was not entitled. The appellant's children did not normally reside with him and were not his dependants according to the requirements for claiming those allowances. He was not absent from his home. He is therefore guilty of fraud and of making false statements. This appeal must be dismissed.

[10] The two grounds of appeal will be analyzed in turn:

(1) The constitutionality of paragraph 130(1)(*a*) of the NDA and paragraph 117(*f*) of the NDA, and

(2) The fraud and the appellant's entitlement to Separation Expense

## II. The first ground of appeal: The constitutionality of paragraph 130(1)(*a*) and paragraph 117(*f*) of the NDA

[11] In *R. v. Moriarity/Hannah*[8] and *R. v. Larouche*,[9] this Court found that subsection 130(1) of the NDA breaches section 7 and paragraph 11(*f*) of the Charter because it is overbroad.

[12] However, it is possible and constitutionally appropriate to adopt a reading down of that section to limit its scope and to include therein for this purpose, through reading in, the military nexus test formulated by Justice McIntyre in his concurring opinion in *MacKay v. The Queen*.[10]

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7 2014 CMAC 6.
8 2014 CMAC 1.
9 2014 CMAC 6.
10 [1980] 2 S.C.R. 370.

[13] An offence under section 130 of the NDA may be tried under the *Code of Service Discipline* when it is so connected with the service in its nature, and in the circumstances of its commission, that it would tend to affect the general standard of discipline and efficiency of the service. Such an offence is under military law pursuant to paragraph 11(*f*) of the Charter and it falls within the jurisdiction of Canadian military tribunals because it pertains directly to discipline, efficiency and morale of the military.

[14] During the hearing of this appeal, the appellant agreed that that test was met in the circumstances of this case. It is therefore not necessary to conduct a more thorough analysis in this context. That ground of appeal must be dismissed.

III. Second ground of appeal: The appellant's entitlement to SE and the fraud charge

A. *The facts*

[15] The appellant claimed a total of $30,725 in Separation Expense (SE) from July 2005 to January 2007.

[16] According to the documents signed by the appellant, he stated and certified that he had one dependant within the meaning of QR&O 209.30(3),[11] that there was no ongoing voluntary, legal or other separation from his spouse, and that the separation was a result of his compulsory transfer.

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[11] In effect at the time. That part of the QR&O was moved to the *Compensation and Benefits Instructions* (CBI).

[17] The military judge described the context of the relationship between the appellant and his spouse, Manon Loisel, as follows:

> [TRANSLATION]
>
> [12] The evidence clearly indicates that Warrant Officer Arsenault and Ms. Loisel began cohabiting in January 1996 and moved to 1477 Haut Relief Street in Val-Bélair in July 1996. Their son Michaël was born in September 1998 and their daughter Jade in April 2001. They separated in September 2004. They lived together at 1477 Haut Relief Street from September 2004 to January 2005. Warrant Officer Arsenault moved into an apartment on Équinoxe Street in Val-Bélair in January 2005. They entered into a temporary separation agreement on February 4, 2005, with the assistance of a mediator. Ms. Loisel purchased 1477 Haut Relief Street, the family home, in May 2005. Ms. Loisel returned the appliances and furniture to Warrant Officer Arsenault in the summer of 2005. Accordingly, all of Warrant Officer Arsenault's personal effects had been removed from 1477 Haut Relief Street at the time of his posting to the 12 Régiment blindé du Canada at Gagetown in July 2005. Warrant Officer Arsenault was posted to the 12 Régiment blindé du Canada in August 2009.

[18] The military judge found that the appellant and Ms. Loisel separated in September 2004, that they lived together from September 2004 to January 2005, and that the appellant lived in an apartment from February to July 2005. In July 2005, he began living in Oromocto, New Brunswick.

[19] From February 2005 to July 2005, the appellant's children were with him every other week. According to the military judge, that was a temporary agreement that amounts to visitation rights and not shared custody.

B. *The trial judgment*

[20] The appellant challenges his conviction with respect to the payment of SE. The military judge came to the following conclusion with respect to his entitlement to that allowance according to the parameters of paragraph (2) of *Compensation and Benefits Instructions* (CBI) 209.975:

> [TRANSLATION]
>
> [33] Chapter 209 of the CBI that applied at the time of the offence governed transportation and travelling expenses. CBI 209.997 states that a member is entitled to separation expense, SE, as compensation for additional expenses as a result of the separation from the member's dependants if the member has a dependant as defined in paragraph (3) of CBI 209.80, who is normally resident with the member at the member's place of duty (see paragraph 2 of CBI 209.997 at tab 1 of Exhibit 3).
>
> [34] A dependent is defined as follows at paragraph 3 of CBI 209.80:
>
> > "dependent" means, in respect of an officer or non commissioned member:
> >
> > (a) the member's spouse or common law partner, who is normally resident with the member at the member's place of duty or who, if living separately, is doing so for military reasons;
> >
> > (b) a relative by blood, marriage or common law partnership or adoption legally or in fact who is normally resident with the member and for whom the member may claim a personal exemption under the *Income Tax Act*;
>
> There is also (c), (d), (e) and (f), but it is primarily paragraphs (a) and (b) that interest us in this case. Defence counsel submits to the court that, despite the fact that the prosecution's theory is based on sub paragraph (a) of this definition, it is the definition in sub paragraph (b) that applies in our case. He argues that section 118 of the *Income Tax Act*, specifically sub paragraph 118(1)(*b*)(ii) applies in our case.

[35] The definition of dependent contains some elements that must all be present. These three elements are the parental relationship, cohabitation and the possibility of claiming a personal exemption under the *Income Tax Act*. Let us examine this definition more closely and step by step.

[36] The evidence clearly shows that Warrant Officer Arsenault's two children are relatives by blood. We will now move to the second step, namely, whether they were normally resident with him. The court has already found that Warrant Officer Arsenault had shared custody for the period February to July 2005. Although the children were normally resident with Warrant Officer Arsenault for certain weeks during this time period, the evidence shows that this was only a temporary situation to allow the children to see their father as much as possible before his posting to Gagetown. The children were normally resident with Ms. Loisel beginning in August 2005. There was no intention to have shared custody as of August 2005.

[37] Could Warrant Officer Arsenault claim a personal exemption under the *Income Tax Act* for his children? Section 118 of the *Income Tax Act* in effect at the time of the offences reads in part as follows:

> 118.(1) For the purpose of computing the tax payable under this Part by an individual for a taxation year, there may be deducted an amount determined by the formula
>
> A x B
>
> where
> A is the appropriate percentage for the year, and
> B is the total of,

And (*b*) that is of particular interest to us:

> (b) in the case of an individual who does not claim a deduction for the year because of paragraph (*a*) and who, at any time in the year,
>
> (ii) whether alone or jointly with one or more other persons, maintains a self contained domestic establishment (in which the individual lives) and actually supports in that establishment a person who, at that time, is

> (A) except in the case of a child of the individual, resident in Canada,
>
> (B) wholly dependent for support on the individual, or the individual and the other person or persons, as the case may be,
>
> (C) related to the individual and
>
> (D) except in the case of a parent or grandparent of the individual, either under 18 years of age or so dependent by reason of mental or physical infirmity,
>
> an amount equal to the total of
>
> (iii) $7,131, and
>
> (iv) the amount determined by the formula
>
> $6,055 - (D - $606)
>
> where
>
> D is the greater of $606 and the dependent person's income for the year.

[38] A self contained domestic establishment is defined in section 248 of the *Act* as:

> ... a dwelling house, apartment or other similar place of residence in which place a person as a general rule sleeps and eats.

Warrant Officer Arsenault lived at 1477 Haut Relief in January 2005 although he was actually separated from Ms. Loisel at that time, in an apartment in Val-Bélair from February to July 2005 and then in an apartment in Oromocto from August 2005 to February 2007. He lived alone in an apartment commencing in February 2005 and did not pay any costs associated with the residence at 1477 Haut Relief as of that date. Accordingly, Warrant Officer Arsenault alone maintained a self contained domestic establishment in which he lived from February 2005 to February 2007. With Ms. Loisel, he maintained a self contained domestic establishment in which he lived in January 2005.

[39] Michaël and Jade were not dependants of Warrant Officer Arsenault as of August 2005. They were completely dependent on Ms. Loisel from that period of time. Warrant Officer Arsenault had

> regular access, namely, every other week on weekends but during holiday periods as agreed upon between Ms. Loisel and Warrant Officer Arsenault. The evidence establishes that he rented a suite on the Valcartier base for his weekend visits and that he kept his children at his apartment in Oromocto for only one month in the summer of 2006. He never lived at 1477 Haut Relief after he left in January 2005. Thus, Warrant Officer Arsenault's apartment in Oromocto did not actually support his children during the period August 2005 to February 2007. The court finds that, based on the evidence presented and accepted by the court, Warrant Officer Arsenault could not claim a personal exemption for Michaël and Jade under the *Income Tax Act*.
>
> [40] Paragraph (2) of CBI 209.997 states that the dependant must be normally resident with the member at the member's place of duty. The court finds that the evidence presented to the court clearly indicates that Michaël and Jade were normally resident with Warrant Officer Arsenault during the period February to August 2005 on a purely temporary basis for specific reasons and that this situation does not meet the objectives or the criteria in paragraph (2) of CBI 209.997. The term "Separation Expense" clearly describes the purpose of this allowance: to compensate the member for the member's absence from his or her home. The member must of necessity have a home from which he or she is absent in order to receive this allowance. This is clearly not the case for Warrant Officer Arsenault.
>
> [Emphasis added.]

[21] I will now briefly examine the positions of the parties and evaluate their well-foundedness.

C. *Positions of the parties*

(1) The appellant

[22] According to the appellant, the appeal concerns the entitlement of a CF member, a father to two young children, to an allowance as compensation for additional expenses incurred as a result of the separation from his children because of his compulsory transfer.

[23] He admits that he lied to the military authorities about his marital status, but he claims that he was entitled to SE because he had dependants. According to him, the *actus reus* of the fraud has not been established. He lied to receive PLD and SE to enable him to pay the necessary expenses to be with his children regularly. Those additional expenses resulted from the fact that he was separated from his children.

[24] He states that he was entitled to SE as compensation for additional expenses incurred as a result of the separation from his dependants. He adds that he did not make any false statement by declaring that he had dependants.

[25] However, the appellant acknowledges the well-foundedness of his conviction with respect to the third charge subject to his argument regarding the overbreadth of paragraph 117(*f*) of the NDA.

(2) The respondent

[26] According to the respondent, a member of the Canadian Forces may request to be transferred unaccompanied. The member may be entitled to an allowance as compensation for the absence from the home, which is in the place of duty that the member is leaving. To be

eligible, the member must have a home from which he or she is absent, as well as a dependant who is resident there.

[27] The appellant requested a transfer and implied that his family situation remained unchanged and that he still lived with his spouse and children. He was thus reimbursed for his rent, cable, telephone and living expenses even though he no longer had a home in Quebec.

D. *Analysis*

[28] It is useful to simplify the assessment of this case by describing the essential elements of the fraud offence according to *Théroux*[12] and *Zlatic*.[13]

(1) The essential elements of the fraud

[29] Justice McLachlin (as she was then) summarized the essential elements of the fraud offence in *Théroux* as follows:

> These doctrinal observations suggest that the *actus reus* of the offence of fraud will be established by proof of:
>
> 1. the prohibited act, be it an act of deceit, a falsehood or some other fraudulent means; and
>
> 2. deprivation caused by the prohibited act, which may consist in actual loss or the placing of the victim's pecuniary interests at risk.
>
> Correspondingly, the *mens rea* of fraud is established by proof of:
>
> 1. subjective knowledge of the prohibited act; and

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12 [1993] 2 S.C.R. 5.

13 [1993] 2 S.C.R. 29.

> 2. subjective knowledge that the prohibited act could have as a consequence the deprivation of another (which deprivation may consist in knowledge that the victim's pecuniary interests are put at risk).
>
> Where the conduct and knowledge required by these definitions are established, the accused is guilty whether he actually intended the prohibited consequence or was reckless as to whether it would occur.[14]

(2) Application to the facts in this case

(a) *The dishonest act*

[30] In *Théroux*, it is specified that "[i]n instances of fraud by deceit or falsehood, . . . all that need be determined is whether the accused, as a matter of fact, represented that a situation was of a certain character, when, in reality, it was not".[15]

[31] That is the case here. There is no doubt about the dishonest act because the appellant lied, and admitted that he lied, regarding his marital and family situation.

(b) *Deprivation*

[32] With respect to deprivation, Justice McLachlin made the following clarifications regarding the scope of *Olan* in respect of the risk of prejudice or imperil to economic interests:

> . . . *Olan* made it clear that economic loss was not essential to the offence; the imperilling of an economic interest is sufficient even though no actual loss has been suffered. By adopting an expansive interpretation of the offence, the Court established fraud as an

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14 [1993] 2 S.C.R. 5, at p. 20; *Cormier c. R.*, 2013 QCCA 2068, paras. 65-68.

15 [1993] 2 S.C.R. 5, at p. 17.

> offence of general scope capable of encompassing a wide range of dishonest commercial dealings.[16]

[33] In this case, the deprivation caused by the appellant's falsehood is established if the prosecution proves beyond a reasonable doubt that the appellant was not entitled to SE and PLD and that he was nevertheless paid those allowances.

(i) Post Living Differential (PLD)

[34] The military judge asked the question in the following manner:

> [TRANSLATION]
>
> [15] Did Warrant Officer Arsenault defraud or deprive a person of rights or property? A deprivation is shown if the prosecution proves a detriment, prejudice or risk of prejudice to the economic interests of the victim. It is not essential that there be an actual economic loss as to the outcome of the fraud (see *R v Olan et al.*, [1978] 2 S.C.R. 1175, at page 1182).
>
> [16] Warrant Officer Arsenault asked to be and was posted to Gagetown on Imposed Restriction, see Exhibits 5 and 6. Warrant Officer Arsenault received the Quebec City Post Living Differential, PLD, as of the date of his posting to Gagetown. He continued to receive this allowance while he was at Gagetown on Imposed Restriction (see Warrant Officer Bergeron's testimony and Exhibits 25, 26 and 27). After arriving at Gagetown, he completed the general allowance claims to receive Separation Expense, SE (see Exhibit 7).
>
> [17] Warrant Officer Arsenault received the PLD and the Separation Expense benefit while he was posted at Gagetown. In January 2007, he stated that he was no longer living in Quebec City with Ms. Loisel (see Exhibit 11). He stopped receiving the Separation Expense benefit but continued to receive the Quebec City PLD because of an administrative error beyond his control that was not his fault (see Master Corporal Bussières' testimony).

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16 *Ibid.*, at p. 16.

[18] Was the accused's deceit, falsehood or other fraudulent means the cause of the fraud and deprivation? Chapter 205 of the Compensation and Benefit Instructions, CBI, that applied at the time of the offence stipulated that the PLD is an allowance paid to members of the Regular Force who rent or own a residence in an eligible location (see paragraph 2 of CBI 205.45). Members of the Regular Force whose principal residence is located within a PLD area are entitled to the PLD rate for that location (see paragraph 4 of CBI 205.45 at tab 10 of Exhibit 3).

[19] Warrant Officer Arsenault sold his interest in the family home located at 1477 Haut Relief Street to Ms. Loisel in May 2005 and rented an apartment in Val-Bélair until his posting to Gagetown. He began living at 50-2 Howe Crescent, Oromocto, New Brunswick in July 2005. He did not own or rent a residence in the Quebec City area at the time of the offences.

[20] The term principal residence is defined in paragraph (3) of CBI 205.45 as follows:

> "principal residence" means a dwelling in Canada, other than a summer cottage, other seasonal accommodation or a single quarter that is occupied by the member or their dependants, and is situated at

And in our case,

> (ii) the member's former place of duty, if the member is not authorized to move their household goods and effects at public expense to their place of duty,

This definition states that a principal residence can be a dwelling occupied by the member's dependants. Did Warrant Officer Arsenault have dependants at the time of the offence? First, was Ms. Loisel a dependant of Warrant Officer Arsenault?

[21] Warrant Officer Arsenault and Ms. Loisel separated in September 2004 (see Ms. Loisel's testimony and Exhibits 13, 14 and 19). They lived under the same roof from September 2004 to January 2005 and then he stayed in an apartment in Val-Bélair from February to July 2005. Although they used the services of a mediator, they did not complete the mediation process and did not finalize a mediation agreement. The evidence clearly shows that they had been separated since September 2004 and had lived separate and apart since February 2005.

[35] The military judge then examined the definition of dependent child in CBI 205.015, which applies to PLD. According to that definition, a dependent child is a child who is "in law or in fact in the custody and control of the member".

[36] The military judge made the following finding on that issue:

> [TRANSLATION]
>
> [24] Ms. Loisel testified that there was no legal separation agreement or court order with respect to their separation. Any agreement between Warrant Officer Arsenault and Ms. Loisel had been entered into out of court. She testified that the children aged six and three in February 2005 lived one week with Warrant Officer Arsenault and one week with her during the period February to July 2005 because she wanted them to spend as much time as possible with him before his posting to Gagetown. After the posting, it was impossible to continue this lifestyle. Ms. Loisel and Warrant Officer Arsenault had agreed that he would visit the children every two weeks. He rented a suite at the Exacta Centre at the Valcartier Garrison and spent the weekend with Michaël and Jade from Friday evening to Sunday at dinner. He never lived with the children at 1477 Haut Relief during his visits. Warrant Officer Arsenault and Ms. Loisel shared custody of the children equally during the vacation period and Christmas holidays. Warrant Officer Arsenault kept the children with him in New Brunswick for a month in 2006 and during school breaks.
>
> [25] On her cross examination, Ms. Loisel answered yes when defence counsel asked her if custody was shared prior to Warrant Officer Arsenault's departure for New Brunswick. She also stated that it was impossible to have shared custody when he was in New Brunswick.
>
> [26] Defence counsel stated during his argument that the only reliable evidence on this point was Ms. Loisel's testimony on her cross examination. The court agrees with him that Ms. Loisel was a reliable, credible witness. Defence counsel also submitted that Warrant Officer Arsenault had dependent children because he had shared custody of the children when he left for Gagetown.
>
> [27] Did Warrant Officer Arsenault have dependent children from February to July 2005? There was no order or judgment or

> even a formal separation agreement, the terms of which awarded Warrant Officer Arsenault the custody of Michaël and Jade. Were Michaël and Jade actually in the custody of Warrant Officer Arsenault? Warrant Officer Arsenault and Ms. Loisel had agreed that the children would live with each parent equally between February and Warrant Officer Arsenault's departure for Gagetown. This agreement was intended to ensure that the children spent as much time as possible with their father before he left Quebec City for three or four years, then they had agreed that the children would actually be in Warrant Officer Arsenault's custody and control during this period of time pursuant to the shared custody schedule they had entered into.
>
> [28] Moreover, the court finds that this agreement was only temporary and applied only to that period of time for obvious reasons. Ms. Loisel had repurchased the family home and intended to live there with Michaël and Jade following Warrant Officer Arsenault's posting in July 2005. There was no shared custody agreement during his posting to Gagetown.
>
> [29] Ms. Loisel and Warrant Officer Arsenault agreed that Warrant Officer Arsenault would return to Valcartier every other weekend so that he would not be separated from his children for more than two weeks. This out of court agreement was not an agreement about the custody of the children but about visitation rights to his children to ensure that the father/child link would be maintained. They also agreed to share vacation periods equally but again that was not about custody but about more extended visits.
>
> [30] Although he paid support, nothing in the evidence indicates to a reasonable person that he actually had custody of his children. Accordingly, the court finds that the evidence establishes beyond a reasonable doubt that Warrant Officer Arsenault did not have dependent children as defined in paragraph (1) of CBI 205.015 while he was posted to Gagetown.

[37] The appellant does not challenge his conviction by the military judge regarding the PLD.

(ii) Separation Expense (SE)

[38] The appellant's entitlement to SE requires correctly defining the following concepts, which can be found in CBI 209.997: "dependant" and "who is normally resident" with the member.

[39] The directive reads as follows:

> 209.997 – SEPARATION EXPENSE
>
> 209.997(2) (Entitlements to separation expense) An officer or non-commissioned member is entitled to separation expense as compensation for additional expenses as a result of the separation from the member's dependants at the monthly rate that is determined under this instruction if
>
> > (a) . . .
> >
> > (b) the member has a dependant as defined in paragraph (3) of CBI 209.80, who is normally resident with the member at the member's place of duty; . . .
>
> [Emphasis added.]

[40] CBI 209.997(2) must be interpreted by applying the modern approach to statutory interpretation. That method involves the following: "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament".[17] Those provisions must be interpreted in light of their purpose.[18] Any interpretation that leads to conflict with another provision of CBI 209.997, another CBI or that runs contrary to the purpose, must be avoided.[19]

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17 *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, para. 26; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at p. 41; *R. v. A.D.H.*, [2013] 2 S.C.R. 269, 2013 SCC 28, para. 19.

18 *Wood v. Schaeffer*, [2013] 3 S.C.R. 1053, 2013 SCC 71, para. 33.

19 *Ibid*.

[41] The purpose of CBI 209.997(2) is easily identifiable; it concerns compensation to a member for additional expenses as a result of the separation from his or her dependants who are normally resident with the member at the member's place of duty at the time of the member's posting to a new place of duty.

[42] The military judge made the correct interpretation that entitlement to SE requires, in accordance with its purpose, proof of the posted member's absence from his or her home. He stated the following:

> [TRANSLATION]
>
> The term "Separation Expense" clearly describes the purpose of this allowance: to compensate the member for the member's absence from his or her home. The member must of necessity have a home from which he or she is absent in order to receive this allowance. This is clearly not the case for Warrant Officer Arsenault.

[43] The definition of a dependant that applies to SE in this case requires proof that the child is normally resident with the member and that the member is able to claim a personal exemption for that child under paragraph 118(1)(*b*) of the *Income Tax Act* (ITA).

[44] Regarding the personal exemption set out in paragraph 118(1)(*b*) of the ITA, author Michel Tétrault described the scope of that credit in light of the Tax Court of Canada's decision in *R. v. Krashinsky*.[20] The author stated the following:

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[20] [2010] T.C.J. No, 52, 2010 TCC 78.

> [TRANSLATION]
>
> It is a non-refundable tax credit that is affected by the income of the dependant. Regarding exclusive custody, only the parent who has custody of the minor child may generally claim it. The child must be "wholly dependent". It is not sufficient to have custody under a judgment; the child must actually be in the parent's custody.
>
> A taxpayer can only claim this credit once a year even if the taxpayer has more than one child who is "wholly dependent". Also, the credit cannot be divided, but each separated parent who has custody of at least one child can claim it for a different child (subject to other applicable conditions). If the parties do not agree on what to with the credit, it is lost.
>
> The credit, like many other federal credits, cannot be claimed by a former spouse who must pay child support for that child. However, the debtor ordered to pay a lump sum for support could receive the credit. Also, under subsection 118(5) of the *Income Tax Act*, that credit cannot be claimed when the person is claiming a spousal credit (or could do so if it were not for the spouse's income).
>
> [Emphasis added.] [Author's emphasis removed.] [Footnotes omitted.][21]

[45] The appellant was not entitled to a personal exemption under the ITA because his children were not *wholly* dependent on him according to the findings of the military judge.[22]

(iii) Conclusion regarding proof of deprivation

[46] The military judge evaluated the evidence. He determined that the appellant's children are not normally resident with him and that his children were not dependants. It could not be

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[21] Michel Tétrault, *Le droit de la famille – L'obligation alimentaire*, vol. 2 (Cowansville: Éditions Yvon Blais, 2011) p. 958.

[22] See also Marie-Pierre Allard, Marie Jacques, Gilles Larin et al., *Collection fiscale du Québec – Guide de l'impôt fédéral*, vol. 2, (Farnham , QC: Publications CCH, 1994) loose-leaf, updated in 2013, ¶ 8 619, p. 4 177-5 to 4 177-9 ; *Charlebois v. Canada*, [2004] T.C.J. No. 598, 2004 TCC 785.

found that he was, in the circumstances, absent from his home according to the requirements of CBI 209.997(2).

[47] His findings do not show any palpable and overriding error. As clearly stated by Justice Fish in *R. v. Clark*, "[a]ppellate courts may not interfere with the findings of fact made and the factual inferences drawn by the trial judge, unless they are clearly wrong, unsupported by the evidence or otherwise unreasonable. The imputed error must, moreover, be plainly identified. And it must be shown to have affected the result. 'Palpable and overriding error' is a resonant and compendious expression of this well-established norm".[23]

[48] The prosecution established beyond a reasonable doubt that the appellant was not entitled to SE. The prosecution established in the same manner that he was also not entitled to PLD, which the appellant did not challenge in his memorandum.

[49] In this case, the element of deprivation is established by proof of payments to the appellant to which he had no entitlement.

(c) *The mens rea*

[50] Regarding the *mens rea*, the military judge stated the following:

> [TRANSLATION]
>
> [51] Did Warrant Officer Arsenault have the intent to commit fraud? The Supreme Court of Canada defined the *mens rea* of

[23] *R. v. Clark*, [2005] 1 S.C.R. 6, 2005 SCC 2, para. 9; *Reid v. R.*, 2010 CMAC 4, para. 21; *Rose v. R.*, 2005 CMAC 4, para. 14.

> fraud as being "the subjective awareness that one was undertaking a prohibited act (the deceit, falsehood or other dishonest act) which could cause deprivation in the sense of depriving another of property or putting that property at risk." The fact that Warrant Officer Arsenault may have hoped that there would be no deprivation or may have believed that he was doing nothing wrong is not a defence. The court must consider whether Warrant Officer Arsenault intentionally committed the prohibited acts, namely, deceit and falsehood, knowing or desiring the consequences proscribed by the offence, that is, deprivation, including the risk of deprivation (see *R v Théroux*, [1993] 2 5).
>
> [52] Warrant Officer Arsenault had been informed of the requisite conditions for obtaining the benefits of an imposed restriction posting. He had had numerous occasions to inform his chain of command of his family situation prior to his posting and when he arrived at Gagetown. He did not tell the provincial authorities that he no longer lived at 1477 Haut Relief until January 2007 and this only after Ms. Loisel forced him to do so. He informed the military authorities but not the provincial. Warrant Officer Bergeron testified that Warrant Officer Arsenault had told him that the PLD allowed him to see his children. Warrant Officer Arsenault admitted during his interview with the military police that the Imposed Restriction benefits enabled him to travel to see his children. The evidence clearly demonstrates that Warrant Officer Arsenault, through deceit and falsehood, wanted to receive money from the SE and PLD.

[51] Regarding the military judge's findings, it may be helpful to add the following observations by Justice McLachlin, again from *Théroux*:

> The second collateral point is the oft-made observation that the Crown need not, in every case, show precisely what thought was in the accused's mind at the time of the criminal act. In certain cases, subjective awareness of the consequences can be inferred from the act itself, barring some explanation casting doubt on such inference. The fact that such an inference is made does not detract from the subjectivity of the test.[24]
>
> [Emphasis added.]

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[24] [1993] 2 S.C.R. 5, at p. 18.

[52] In my opinion, that inference was inevitable in the circumstances of this case because of the repetitive nature of the appellant's false statements. It was not "mere negligent misrepresentation",[25] but a series of false statements repeated each month.

[53] It was completely reasonable under the circumstances to infer that the appellant knew that signing the allowance claims would result in payment of allowances to which he claimed entitlement. The statements in his claims enabled him to obtain the certificate required in accordance with section 34 of the *Financial Administration Act*.[26]

[54] Once again, I believe that Justice McLachlin's comments support the military judge's finding because it was open to the military judge to infer that the appellant knew that payment would be approved:

> The inclusion of risk of deprivation in the concept of deprivation in *Olan* requires specific comment. The accused must have subjective awareness, at the very least, that his or her conduct will put the property or economic expectations of others at risk. As noted above, this does not mean that the Crown must provide the trier of fact with a mental snapshot proving exactly what was in the accused's mind at the moment the dishonest act was committed. In certain cases, the inference of subjective knowledge of the risk may be drawn from the facts as the accused believed them to be. The accused may introduce evidence negating that inference, such as evidence that his deceit was part of an innocent prank, or evidence of circumstances which led him to believe that no one would act on his lie or deceitful or dishonest act. But in cases like the present one, where the accused tells a lie knowing others will act on it and thereby puts their property at risk, the inference of subjective knowledge that the property of another would be put at risk is clear.[27]
>
> [Emphasis added.]

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25 [1993] 2 S.C.R. 5, at p. 26.
26 R.S.C., 1985, c. F-11.
27 *R. v. Théroux*, [1993] 2 S.C.R. 5 at pp. 20-21.

[55] It goes without saying that the appellant did not submit his allowance claims in order not to be paid.

[56] Thus, in the absence of evidence to the contrary, it must be found that he submitted those claims knowing that he would obtain the necessary certificates to obtain payment thereof. To find otherwise would be unreasonable.

[57] I add that a document that was not finalized and that was not signed by the appellant, but that summarizes the mediation agreement between the appellant and Ms. Loisel, nevertheless supports the finding that the appellant wanted to file his and Ms. Loisel's tax return as if they were not separated, which did not reflect reality.

[58] Finally, in a note from January 2007, the appellant asked Ms. Loisel not to report him. In my opinion, that only reinforces the military judge's finding regarding the *mens rea* of the fraud.

[59] In conclusion, I would like to specify that the good intentions of the appellant are unimportant because "[t]he personal feeling of the accused about the morality or honesty of the act or its consequences is no more relevant to the analysis than is the accused's awareness that the particular acts undertaken constitute a criminal offence".[28] Furthermore, "the accused's belief that the conduct is not wrong or that no one will in the end be hurt affords no defence to a charge of fraud".[29]

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28 *R. v. Théroux*, [1993] 2 S.C.R. 5, at p. 19.

29 *Ibid.*, at p. 23.

(3) Conclusion

[60] All of the essential elements of the fraud have been established. If the appellant had disclosed the real status of his marital and family situation, he would not have been paid the Separation Expense.

[61] For these reasons, I would dismiss the appeal.

"Guy Cournoyer"

J.A.

"I concur.
André Vincent, J.A."

"I concur.
André F.J. Scott, J.A."

**COURT MARTIAL APPEAL COURT OF CANADA**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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| **DOCKET:** | CMAC-561 |
| **STYLE OF CAUSE:** | SERGEANT DAMIEN ARSENAULT v. HER MAJESTY THE QUEEN |
| **PLACE OF HEARING:** | QUÉBEC, QUEBEC |
| **DATE OF HEARING:** | FEBRUARY 14, 2014 |
| **REASONS FOR JUDGMENT BY:** | COURNOYER J.A. |
| **CONCURRED IN BY:** | VINCENT J.A.<br>SCOTT J.A. |
| **DATED:** | JUNE 13, 2014 |

**APPEARANCES:**

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