Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20170623

Dockets: CMAC-571

Citation: 2017 CMAC 4

[ENGLISH TRANSLATION]

CORAM: **BELL C.J.**
COURNOYER J.A.
GLEASON J.A.

CMAC-571

BETWEEN:

MAJOR B.M. WELLWOOD

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Ottawa, Ontario, on April 26, 2016.

Judgment delivered at Ottawa, Ontario, on June 23 2017.

REASONS FOR JUDGMENT BY: COURNOYER J.A.
GLEASON J.A.

DISSENTING REASONS BY: B. RICHARD BELL C.J.

Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20170623

Dockets: CMAC-571

Citation: 2017 CMAC 4

CORAM: **BELL C.J.**
COURNOYER J.A.
GLEASON J.A.

CMAC-571

BETWEEN:

MAJOR B.M. WELLWOOD

Appellant

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT

Table of contents

I - Overview 1

II – Facts ... 6
III - Issues ... 19
A - Introduction ... 20
B – Should the military police officer have obeyed the appellant's order? ... 23
C – Competing obligation of the chain of command to locate a member in distress ... 27
(1) The evidence ... 28
(2) Parties' positions ... 30
(3) Analysis ... 31
D – Issues arising from those raised by the parties ... 57

(1) The instruction regarding judicial notice of several statutes, regulations, orders and instructions ... 57
(2) The inclusion of the text of several legislative provisions in the instructions to the panel ... 60
(3) A *Baxter* instruction ... 62
(4) The instruction regarding the contradictory versions ... 64
(5) The failure to object to the instructions ... 64
IV - Epilogue ... 65
I. Background ... 1
II. Excerpts from the evidence, oral arguments and instructions to the Panel ... 3
III. Analysis ... 9
IV. Conclusion ... 12

COURNOYER J.A.

I - Overview

[1] On February 5, 2012, around 6:04 p.m., the spouse of a member who was participating in a military exercise called 911 emergency services. She informed the dispatcher that her spouse had expressed suicidal thoughts that involved the use of a firearm.

[2] This 911 call led to the intervention of the chain of command and the military police in order to locate the member.

[3] The military police officer responsible for finding him, Corporal Plourde, irrupted in the temporary camp set up for this exercise in a military 4x4 vehicle, lights flashing, without stopping at the gatehouse at the entrance to the camp. This gatehouse had been set up in order to ensure the safety and proper operation of the camp.

[4] This behaviour, similar to the previous behaviour of other military police officers during the exercise, did not please the appellant, who held the position of Officer Commanding Service Company and was responsible for logistics and support for the infantry battalion during the exercise.

[5] According to her testimony, she informed the police officer that the chain of command was looking for the member in question, but a one-way conversation quickly ensued. The police

officer invoked his authority to intervene and threatened to have the appellant charged with obstruction. At one point, she ordered him, rudely, to leave the area.

[6] The situation degenerated. The tone was acrimonious.

[7] The appellant stated that she did not want to obstruct the police officer's work and that she had tried to share the information she had, to inform him of the ongoing efforts to find the member and explain what company he was in, but he would not listen.

[8] According to the police officer's diverging account, the appellant informed him that the member was not on the premises and that the chain of command was handling the situation. She allegedly added that nobody was going to give him the information he was looking for, and she denied him access to the command post. The military police officer felt that only the military police could act in these circumstances.

[9] The police officer then tried to access the command post located in a tent, to obtain the information that would be useful for his intervention, information which, according to him, the appellant was hiding from him. The appellant tried to stop him. The military police officer shoved her, and she lost her balance. The police officer finally entered the tent and pushed the appellant aside.

[10] An officer present then confirmed to the military police officer, who seemed surprised, essentially the same information the appellant stated she had given the police officer, that is, regarding the chain of command's ongoing efforts to locate the member in distress.

[11] The member in distress was eventually located by members of his platoon.

[12] This is the background to a situation that degenerated, but that was essentially a regrettable dialogue of the deaf where each party, feeling self-important with authority, spoke without listening to the other.

[13] Major Wellwood was found guilty, by a panel of a General Court Martial ("the panel"), of two charges: first, of having obstructed a military police officer in the execution of his duty; and second, of conduct to the prejudice of good order and discipline for behaving with contempt towards him during these events.

[14] In the absence of the panel, the trial judge also acquitted the appellant on the second count, that is having obstructed a military police officer in the performance of his duties because the prosecution had not established a military standard that would apply in the circumstances.

[15] The main issue in this case is whether the instructions given to the panel of the General Court Martial included information essential to determining whether the appellant was guilty of the offence of obstructing the work of a police officer and of conduct to the prejudice of good order and discipline towards the military police officer.

[16] The appellant submits that the facts in this case involve the limits military law imposes on the powers of the military police when intervening to assist a member in suicidal distress rather than during an investigation into a service offence.

[17] According to the appellant, the charge the military judge gave to the panel was incomplete because the panel should have received the following instructions: (1) all members are subject to a duty to promote the welfare of their subordinates; (2) every officer in the Canadian Forces is a public officer within the meaning of section 129 of the *Criminal Code*; (3) the military police officer, who was not conducting an investigation into a service offence, had to obey the lawful commands and orders of Major Wellwood.

[18] In my opinion, the panel should have been informed specifically of the appellant's duty to find the member in distress because of her obligation to promote the welfare of her subordinates.

[19] This instruction is crucial to the assessment of two essential elements of the offence with which she was charged: (1) whether the military police officer was in the execution of his duty when he used force against the appellant to enter the command post tent; and (2) whether the appellant intended to obstruct the work of the military police officer.

[20] A complete charge to the panel would also likely have influenced the verdict on the count alleging that her behaviour towards the military police officer constituted conduct to the prejudice of good order and discipline.

[21] At trial, the appellant noted that the force the police officer used when carrying out his common law duty to find the member in distress exceeded what was reasonably necessary in the circumstances.

[22] The prosecution therefore had to establish, beyond a reasonable doubt, that the military police officer's intervention was reasonably necessary. This would have constituted a [translation] "justifiable use" of police power, as the police officer would then be considered to be acting in the execution of his duty. However, if the panel had a reasonable doubt as to whether the police officer's intervention was reasonably necessary, the appellant would be acquitted of the charge of obstructing a military police officer.

[23] For the following reasons, the panel had to consider the appellant's duty to find the member in distress when assessing whether the use of force by the military police officer was reasonably necessary in the circumstances. Similarly, the existence of this duty could have influenced the panel's decision regarding whether she had intended to obstruct the police officer in the execution of his duty.

[24] This duty is also crucial to the assessment of the charge regarding whether her behaviour towards the military police officer constituted conduct to the prejudice of good order and discipline, of which she was found guilty.

[25] I find that a new trial should be ordered.

II – Facts

[26] I have already presented the essence of the relevant facts, but the issues raised require more clarification, particularly with regard to the appellant's testimony and that of Major Sylvain (he was captain at the time of the events), the officer who managed to defuse the situation.

[27] Since the parties refer to the summary of the facts the military judge presented to the panel with regard to the first charge, I propose using it with a slight adaptation.

[28] On February 5, 2012, around 6:04 p.m., the spouse of a member called 911 emergency services to report receiving a call from her spouse, deployed on an exercise in the Beauce region, during which he confided that he had suicidal thoughts involving the use of a firearm.

[29] The emergency call led to several communications between the 911 emergency call centres of the Sureté du Québec, of the Military Police in Valcartier and the one on site in Beauce for the purposes of a military exercise.

[30] Corporal Plourde, a military police officer assigned to this exercise in an operational role as police officer responsible for law enforcement, was given the task of locating the individual in question, who belonged to the 2nd Battalion Royal 22e Régiment, and taking measures to ensure that he was not in danger.

[31] Corporal Plourde went to the area occupied by the service company of the 2nd Battalion, Royal 22e Régiment, which is under Major Wellwood's command. A reservist, Private Simard-Bolduc, accompanied him and drove the military police vehicle.

[32] Corporal Plourde was wearing the black military police uniform, a bullet-proof vest supplied with his uniform, his service weapon, and the other accessories of his military police uniform. Private Simard-Bolduc was wearing combat clothing and was not armed.

[33] Around 7:36 p.m., they went to the gatehouse for the 2nd Battalion service company camp. It was dark. Without formally identifying themselves and without announcing the reasons for their presence to the gate guard, the police officers turned on their flashing lights so they would be given access.

[34] The gate guard moved a barrier aside to give them access, but he promptly contacted the command post tent to inform them that members of the military police had just entered the area without providing reasons for their presence. He also made sure to describe the behaviour of the police officers.

[35] This type of behaviour by police officers was not new, and it irritated the appellant because of staff and equipment safety reasons in an area with little lighting at night, and where communications equipment are limited and fragile.

[36] She advised the members of her command post inside the tent that she would take care of the situation.

[37] At that moment, the military authorities, including the command post under Major Wellwood's responsibility, had already been informed of the situation regarding the member who had allegedly made suicidal statements. They were trying to find him to take care of him. The information sent was not clear, and it was difficult to clearly identify to which company he belonged.

[38] Major Wellwood exited her command post tent and went towards the military police vehicle to inquire about the situation and above all to ask the police officers why their vehicle did not stop at the gatehouse.

[39] It is not clear whether she passed by Corporal Plourde on her way to the vehicle. She knocked on the window of the vehicle a few times. She then went around the vehicle to speak to the driver, Private Simard-Bolduc, who was about to get out.

[40] Corporal Plourde joined them and interposed himself between them.

[41] Major Wellwood asked them why they had not stopped at the gatehouse. Corporal Plourde stated that they were there because of the 911 call.

[42] Corporal Plourde then invoked his power to act in accordance with the powers conferred by the *Act respecting the protection of persons whose mental state presents a danger to themselves or others*, CQLR, c. P-38.001.

[43] Major Wellwood replied that the chain of command, including the unit commanding officer, had already been informed of the situation and that the military authorities were handling it.

[44] Corporal Plourde alleged that Major Wellwood told him to calm down and that the situation was not under military police jurisdiction. Major Wellwood allegedly added that the member was not at her command post and insisted on learning why the police officers had not stopped at the gatehouse.

[45] Corporal Plourde replied to Major Wellwood that it was a police matter and not the responsibility of the chain of command, and that she should not confuse her rank with his police authority. At this time, the tone of both members was acrimonious.

[46] Corporal Plourde addressed Major Wellwood using the informal "you" in French. They continued their exchange until Major Wellwood, also using the informal "you", asked him in no uncertain terms to leave the premises.

[47] Corporal Plourde ignored Major Wellwood's explicit requests and headed towards the tent to enter it, even though Major Wellwood had formally forbidden him to do so. She passed him and turned to face him at the entrance to the tent.

[48] The acrimonious exchanges continued, and Corporal Plourde pushed Major Wellwood with his hands, at shoulder or chest level. She lost her balance at the entrance to the tent.

[49] Corporal Plourde testified that he wanted to enter the tent because he thought that Major Wellwood would order her subordinates not to provide him with the information needed to continue his investigation, which is what she did, according to Officer Plourde's testimony. However, the officers inside the command post, who testified at the trial, did not corroborate this aspect of Corporal Plourde's testimony.

[50] He therefore moved her to the left by grabbing her arm. The officers present, Pelletier, Turcotte and Sylvain, intervened to find out what was happening.

[51] Corporal Plourde was nervous; his face was red, and his hand was close to his weapon. Too close, according to Major Sylvain.

[52] Major Sylvain asked him what he was doing in the CP-8 tent and how he could help him. According to his testimony, Corporal Plourde replied that he was in a P-38 situation which superseded, if not negated, the chain of command and that this gave him full rights to act.

[53] Major Sylvain repeated the information that Major Wellwood had already given him, according to her testimony, to the effect that the chain of command was already aware of the situation and that efforts were being made to find the individual. According to Major Sylvain, this statement seemed to unsettle Corporal Plourde, who apparently did not believe that the chain of command was actually aware of the situation. Major Sylvain then informed him that the military authorities were still at the stage of verifying whether the person was at the battalion command post or at the sugar shack where more than a hundred members of the battalion were watching Super Bowl 2012 together.

[54] Major Sylvain left the tent with Corporal Plourde and accompanied him to his vehicle to exchange relevant information and contact details. At that time, the police officers left the area to go to the sugar shack.

[55] Major Sylvain then tried to send a summary to Corporal Plourde by cell phone, but was unsuccessful. Before he could go to the sugar shack, the police operation was cancelled. Corporal Plourde's superiors ordered him to return to Military Police Headquarters at Beauceville Armoury.

[56] Members of the unit of the member being sought found him alone in a vehicle near the sugar shack.

[57] The military judge did not summarize the appellant's testimony during his instructions regarding the charge of obstruction, and he stated that [translation] "it is not useful for the

purposes of this summary to repeat the statements allegedly made by either party in this case" (A.B. Vol. III, at page 498).

[58] At this time, I would note this aspect to which I will return later because of the obligation of the trial judge to relate the evidence to the law in his or her instructions to the jury: *R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523, at para. 57; *R. v. Saleh*, 2013 ONCA 742, 303 C.C.C. (3d) 43, at paras. 140-145. Indeed, the charge to the jury must set out the issues and the essential evidence bearing on them: *R. v. MacKay,* 2005 SCC 75, [2005] 3 S.C.R. 607.

[59] That said, the military judge partially summarized the appellant's testimony in his instructions with regard to the charge of conduct to the prejudice of good order and discipline. I reproduce it in its entirety:

> [translation]
>
> In assessing this evidence, I ask you to consider the first moments of the meeting between Major Wellwood and the military police officers when Major Wellwood asked them why they had not stopped at the gatehouse that had been installed by CP-8 or the service company.
>
> Also review Corporal Plourde's response provided after this statement by Major Wellwood. Once she was informed of the reasons for the police officers' presence, she informed them that the chain of command, including the unit commanding officer, was aware of the situation and was taking care of it. Major Wellwood allegedly told them the member was not on the premises, the CP-8 premises, and the search continued. It seems that the information obtained up to that moment, and I refer to your memory of the evidence, indicated that the member was a member of the command company, whereas clearly, CP-8 is used or was used by the service company.
>
> The evidence indicates that Corporal Plourde was not satisfied with the statements given by Major Wellwood at that time, and Corporal Plourde insisted on telling Major Wellwood that this was

none of the chain of command's concern. Major Wellwood allegedly repeated that the chain of command had taken action and that efforts were being made to find the individual and take care of him as needed. Major Wellwood then stated that the member was not on the CP-8 premises and that the search was continuing. It seems that at that time, Corporal Plourde did not appreciate the statements, neither the words nor the tone and attitude of Major Wellwood towards him in this case, and said that she should not confuse his authority as a military police officer with her rank as major. Then we see the situation deteriorated quickly.

The versions of Major Wellwood and Corporal Plourde are hard to reconcile from this moment on, and it will be up to you to make an assessment in accordance with all the evidence you consider to be credible and reliable.

However, it seems that Corporal Plourde quickly began using the informal "you" with Major Wellwood and this allegedly contributed, and at any rate it did not contribute, to the contrary, to calming the atmosphere between Major Wellwood and Corporal Plourde. According to Corporal Plourde, he tried to calm the situation, but this version of the events was contradicted by Major Wellwood.

It appears that the situation degenerated to the point that Corporal Plourde went to and entered the CP-8 tent despite Major Wellwood's instructions not to, and he used physical force to push her at the entrance to the tent to the point she lost her balance. Corporal Plourde testified that he allegedly told Major Wellwood to move aside and, addressing her with the informal "you", grabbed her forcibly by the arm because, in his opinion, she had ordered her subordinates in the tent not to give him any information whatsoever. Major Wellwood's version differs on certain points, in particular regarding what she allegedly said to her subordinates.

I ask you to review all the testimony presented, in particular that of Captain Pelletier and Captain Turcotte, and that of Major Sylvain with regard to the events that occurred in the CP-8 tent. During these events, Major Wellwood told Corporal Plourde many times to leave the premises using harsh language sprinkled with many epithets I will not repeat. One must not conclude that using inappropriate language, even if it is abusive, constitutes contempt in itself. The entire situation must be taken into consideration.

[Emphasis added] (A.B., Vol. III, at pages 519-520)

[60] Because of the importance of the appellant's testimony regarding the issues the panel had to resolve, it is necessary to reproduce certain excerpts.

[61] The appellant first explained that she had calmly asked Corporal Plourde why the military police officers had not stopped at the gatehouse. He replied that it was a police matter that did not concern the chain of command and, pointing at the appellant's rank on her uniform, told her not to confuse her rank with the authority of a police officer.

[62] According to the appellant, the exchange between them continued as follows:

> [translation]
>
> Q. Ok so how did the conversation or exchange continue? A. He repeated many times not to interfere in a police matter, not to prevent him from doing his work, to which I replied I would not do anything to hinder you from doing your work, I merely want to explain the camp rules to you. At that moment, he still had not asked any questions. He told me at one point it was a call for a suicidal case; I explained to him that is correct, I understand, I am aware of the situation, the chain of command has already been advised, and we are doing everything we can to try to find the individual. Again, often, in fact I would say every time, I could not even finish my sentence because he would interrupt me to say things such as the chain of command has nothing to do with this, you cannot, anyway, as if we could not contribute anything new, without asking clear questions and without letting me provide the information I was trying to give him. The clearest thing I got during this discussion was at one point when he said: what we want to know is, is he in Company A or is he in Company B. I said there is more than—he isn't in either Company A or in Company B, and I tried to explain to him that he's in the command company, but he didn't even give me time to tell him. He cut me off, he said, I can't remember exactly what he said, but he cut me off to say, once again, something like it is not the chain of command or it is the authority of the military police.
>
> [Emphasis added] (A.B., Vol. II, at pages 362-363)

[63] The confrontation continued as follows, according to the appellant:

> [translation]
>
> Q. So you said at some point, he was pointing at you. You tried to tell him what you knew, he interrupted you, so how did this continue, this— A. Well, when he—
>
> Q. —this non-discussion? A. —told me, when he told me—when he pointed at me with his finger, and he said I shouldn't confuse rank and authority, I saw that, clearly, there was—the direction the discussion was taking would not help the situation at all with regard to the safety of the camp, or with the situation with the suicidal individual. Therefore, I took a mental step back, I told him, listen, said, calm down, and I asked him to explain what he wanted, and again, he said the same type of replies as before. Then even talking to him, asking him to calm down, it seemed to frustrate him more because he raised his voice again and became even more aggressive. Eventually, I told him, listen, I gave you the information I have, then he was still aggressive. I told him, either you calm down or you leave. He told me . . .
>
> Q. Are those the exact words you used? A. Yes. Well, I think so. The first time, after that, my words changed a lot, but the first time it was, you calm down or you leave. Then, well, actually, it upseted him a lot, and he said, listen, I am a military police officer, I can do what I want, I can go where I want. I said ok. I replied, get the hell out, meaning I did not have anything more to add to the situation, I could clearly not help, and it seemed to be completely pointless to me, so I turned around to go into the command post tent.
>
> Q. At any time did you refuse to assist him? A. Outside the tent—
>
> Q. Outside? A. —I never refused, and I answered every question he asked me.
>
> Q. So you—you turned around, you returned to the tent, what was your intention at that moment, going back to the tent? A. I was sure that despite what I had told him, he would not go away, apparently, so my intention when heading to the tent was, one, to stop the altercation because if I stayed there I did not see how I could resolve the situation, so I removed myself from the situation, so it would not escalate. And at the same time, it gave me the chance, by going to the command post, to call someone else who could intervene, answer the military police officer in a way he might be more receptive to.

[Emphasis added] (A.B., Vol. II, at pages 363-364)

[64] The appellant added the following:

> [translation]
>
> Q. During this interaction, outside, we heard testimony from Corporal Plourde that he advised you that you were committing obstruction? A. Yes, I heard that.
>
> Q. What do you have to say about it? A. It's true that he told me a few times that I was committing obstruction; however, he never said in what way I was committing obstruction, and when he said it to me, I said to him, I am not preventing you from doing anything. So that's it, yes, he told me but never said how.
>
> Q. Did you understand, at that moment, during the initial interaction, did you understand what he was looking for in terms of information? A. Yes, I could deduct what he was looking for as information.
>
> Q. Did you give him the information he was seeking? A. I tried to provide all the information I had, but again, he was not hearing it because he interrupted me every time I tried to talk to him.
>
> Q. So, you turned around, you went towards the entrance to the tent, and what happened? A. From the police vehicle to the entrance of the tent, it must have been around 20 metres, probably; it's a pretty narrow area. There was the generator and the satellite on one side and then the tent on the other side, so it was a small trail. I saw in my—my peripheral vision while walking, that he was following me, so while walking, I turned slightly to tell him, don't follow me, or I probably said get the fuck out of here, said, you will not enter the command post.
>
> Q. And why did you say that to him? A. Well, because I truly did not want the altercation to continue, especially not in front of my subordinates who were inside the tent. I wanted to create some distance between the two of us and give someone the opportunity to go get him the same information I was trying to give him and calm the situation down so he could continue with the work he had to do.
>
> [Emphasis added] (A.B., Vol. II, at pages 364-365)

[65] The appellant then testified very clearly that she never tried to prevent her subordinates from cooperating with Corporal Plourde. She even stated that she wanted them to, in order to help the military police officer in his investigation:

> [translation]
>
> Q. At any time, did you try to prevent your subordinates from cooperating with Corporal Plourde? A. Never. It was actually my goal, it was for them to help him and end this exchange.
>
> (A.B., Vol. II, at page 367)

[66] As we can see, the appellant's version could raise a reasonable doubt with regard to her intention to obstruct the military police officer's work.

[67] It seems essential to me to reproduce here certain excerpts from Major Sylvain's testimony; he was a witness for the prosecution, and was able to finally defuse the situation.

[68] According to Major Sylvain, the police officer stated that the nature of his intervention superseded, if not negated, the chain of command, and that he had an authority that gave him full rights to act:

> [translation]
>
> Q. Once Major Wellwood headed towards the phone, the other person entered, if you could continue. What happened, exactly? A. There was clearly a high level of aggression from both sides. Words were exchanged, I cannot say them exactly, but there was obviously a fight going on between the two. To sum up, Major Wellwood said she was going to call the commanding officer of the 2nd Battalion about the situation, that we didn't understand; and then the military police officer said he had the power to arrest her if needed and that she better get out of his way, that type of comment. This exchange lasted several seconds, maybe less than a minute, but it still took quite a while. Then from my perspective, the conversation did not seem to be going anywhere, and it was

> more of a fight than a conversation. I finally intervened orally between the two people, I asked the military police officer, well, what he was doing there and how we could help him at the CP-8. He replied—he replied that he was in a P-38 authority situation, which is an expression I did not know—so I did not know at the time what that meant, and that the situation and that this authority rendered superseded or negated any chain of command, and therefore he had full authority over the place and that it gave him full rights. At that time, I believe I surprised him a little, I said: well, it must be about the situation with the guy who is potentially suicidal, we are aware of it and we are currently searching. I think it surprised him because it threw him off balance. My understanding was that he did not believe we were aware of the situation.
>
> [Emphasis added] (A.B., Vol. II, at pages 283-284)

[69] The military police officer's claim to have limitless authority to intervene and his surprise when informed that the chain of command was handling the situation corroborate the appellant's testimony in many ways.

[70] According to Major Sylvain, the military police officer seemed more preoccupied with justifying his authority than obtaining information that would help locate the member in distress:

> [translation]
>
> Q. Ok. Now, turning to your perception of the military police officer's attitude, from what I understand, it took you some time before you figured out what he wanted. Is this correct? A. Correct. It took, I cannot give you an exact time, but it took a long time before we got to the subject of the nature of his intervention. There was a lot of communicating to justify his authority and a lot of emphasis on the fact that the chain of command no longer had any significance, much more than asking us for information or attempting to locate the member.
>
> Q. Ok. So when he was talking to you, you mentioned P-38, you also mentioned that at that time you did not know what P-38 was? Is this correct? A. Yes, at that time, I did have a good 15 years in the Forces with solid training, was deployed as adjutant and this is not an expression that I had—that I knew or it was not a protocol I

> was aware of at that time, I will make no secret of the fact that I did my research—
>
> Q. Since then. A. —since then, and now I am a little more comfortable with what it means.
>
> Q. So for you, essentially, what this police officer was expressing was not requests but justifications for his attitude. Is this a proper summary of what you said? A. As I understood it, <u>the military police officer was more interested in justifying his authority than solving the problem situation.</u>
>
> Q. Ok. You characterized his attitude as aggressive; in fact the attitude of both was actually aggressive. At one point there were aggressive exchanges; the military police officer was also excited? A. <u>That's right, excited. He was showing signs I found worrisome, redness in the face, rapid breathing, on the tips of his toes, hands too close, for my level of comfort, to his weapon, and just a very aggressive posture in the CP</u>.
>
> [Emphasis added] (A.B., Vol. II, at pages 288-289)

<u>III - Issues</u>

[71] The appellant raises three grounds of appeal against the instructions the military judge gave the panel: (1) he neglected to inform the panel of the appellant's duty to promote the welfare of her subordinates; (2) he did not instruct the panel that all officers of the Canadian Forces must be considered as public officers within the meaning of section 129 of the *Criminal Code*; (3) he did not inform the panel that all officers and non-commissioned members have a duty to obey the lawful commands and orders of a superior, except police officers for the purpose of an investigation into a service offence.

A - Introduction

[72] In my opinion, the appellant is correct in stating that the instructions to the panel were insufficient. In fact, the instructions were not carefully tailored to focus on the key evidence and the essential issues, considering the particular context of this case.

[73] It is true that the parties' positions complicated the issues unnecessarily. However, by following them strictly and thoroughly, the military judge's charge was needlessly complex.

[74] Indeed, it contains elements that were not necessary but were likely to distract the panel from the true issues in that trial, namely, the appellant's intent and whether the police officer's intervention was justified because it was reasonably necessary in the circumstances. I am of the opinion that a great number of the instructions in that charge could have and should have been left out.

[75] More specifically, the charge to the panel included a fundamental omission, informing the panel, in the instructions regarding the offence of obstruction, of the appellant's competing obligation to locate the member in distress.

[76] This critical omission is exacerbated by the following elements: (1) the charge to the panel contains unnecessary citations of many legislative and regulatory provisions without including an appropriate warning about their use; (2) it does not adequately define the appropriate role of the appellant as representative of the chain of command in assisting a member in suicidal distress, in that the judge did not instruct the panel on the relevance of this duty when

assessing the appellant's intent and whether the force used by the police officer was reasonably necessary; (3) finally, the connection of the evidence to the law was insufficient, as the trial judge did not summarize certain critical elements in the opposing version presented by the appellant.

[77] I must note that my intention is not to unfairly or unjustly criticize the experienced military judge who presided over the trial. He did not have the benefit of the principles laid down by the Supreme Court in *R. v. Rodgerson,* 2015 SCC 38, [2015] 2 S.C.R. 760.

[78] In that case, the Supreme Court renewed its invitation to trial judges to simplify their jury charges, but it also noted the obligation of the parties to assist the trial judge in crafting a jury charge that provides clear and comprehensible instructions on the positions they are defending: *Rodgerson*, at paras. 44-49. On this point, of particular interest are the observations of Professor Lisa Dufraimont, *R. v. Rodgerson*, Commentary, (2015), 21 C.R. (7th) 1, pp. 2-3, as well as the analysis of S. Casey Hill, David M. Tanovich and Louis P. Strezos, *McWilliams' Canadian Criminal Evidence*, 5th ed., Toronto, Thomson Reuters, 2016, Year in Review: 2015 - Archived, para. 2015:20.40, pp. 2015-14 to 2015-19.

[79] The military judge was faced with parties who defended, during the trial and before this court, rigid and inflexible positions regarding the legitimacy of the intervention of the chain of command or the military police in circumstances such as the one in this case. Their positions did nothing but obscure the true issues of the matter without making the military judge's task any easier.

[80] The parties were supposed to assist the military judge in crafting a concise summary including instructions that clarify and simplify the issues in dispute.

[81] However, I will point out again, the military judge was confronted with legal issues that had been unnecessarily complicated by the black-and-white positions of the parties.

[82] Clearly, it is easier to simplify things now with the benefit of hindsight.

[83] I find that the charge to the panel did not provide it with sufficient guidance on how it should use and assess all the evidence, including the appellant's version. The panel was supposed to consider the competing duties of the chain of command and the military police with regard to assisting a member who had expressed suicidal thoughts, in order to decide whether it had been proven, beyond a reasonable doubt, that the military police officer was acting in the execution of his duty and whether the evidence presented by the prosecution established, beyond a reasonable doubt, the appellant's criminal intent.

[84] I will first address the appellant's third ground of appeal, namely, the issue of the military police officer's duty to obey her during the incident.

[85] This issue was a useless distraction in relation to the true issues. It is true that the facts presented to the panel highlight the confrontation between a military police officer who erroneously believed that his power to intervene had no limits and an officer who seemed to think that the situation should be managed solely by the chain of command.

[86] For this reason, I would hope, as did the military judge in his sentencing judgment, that this case will generate a willingness to better define the respective roles of the chain of command and the military police in similar circumstances and to establish clearer guidelines for future interventions of this type.

[87] I will now answer the strict question of law the appellant raised, which alleges that the military police officer should have obeyed her.

B – Should the military police officer have obeyed the appellant's order?

[88] During final arguments, counsel for the appellant asked the panel to find that the military police officer should have obeyed the order given by the appellant (A.B., Vol. III, at pages 419, 420 and 424).

[89] In his instructions, the military judge specifically referred to the appellant's position when he summarized the parties' positions.

[90] First, he stated that, according to the prosecution, the appellant's order to leave the premises (the order) and her preventing access to the tent constituted obstruction of the work of a military police officer (A.B., Vol. III, at page 524). He then went on to summarize the position of the defence, which was that the police officer should have obeyed this order (A.B., Vol. III, at pages 525-526).

[91] On this issue, the appellant's position does not hold water.

[92] The principle of the independence of the police when faced with an executive power is well entrenched in Canadian law and is not at all in doubt.

[93] In *R. v. Campbell*, [1999] 1 S.C.R. 565, Justice Binnie addressed the issue of the relationship between the police and the executive branch of the government in the context of determining the immunity that applied to RCMP officers who had overstepped the legal limits of their mandate while engaging in drug trafficking as part of a "reverse sting" operation involving the sale of illegal drugs by police to the leaders of a drug trafficking organization.

[94] He made the following observations regarding the principle of the independence of the police:

> 27 The Crown's attempt to identify the RCMP with the Crown for immunity purposes misconceives the relationship between the police and the executive government when the police are engaged in law enforcement. <u>A police officer investigating a crime is not acting as a government functionary or as an agent of anybody. He or she occupies a public office initially defined by the common law and subsequently set out in various statutes</u>. In the case of the RCMP, one of the relevant statutes is now the *Royal Canadian Mounted Police Act*, R.S.C., 1985, c. R-10.
>
> . . .
>
> 29 It is therefore possible that in one or other of its roles the RCMP could be acting in an agency relationship with the Crown. In this appeal, however, we are concerned only with the status of an RCMP officer in the course of a criminal investigation, and in that regard <u>the police are independent of the control of the executive government. The importance of this principle, which itself underpins the rule of law</u>, was recognized by this Court in relation to municipal forces as long ago as *McCleave v. City of Moncton* (1902), 32 S.C.R. 106. This was a civil case, having to do with potential municipal liability for police negligence, but in the course of his judgment Strong C.J. cited with approval the following proposition, at pp. 108-9:

> Police officers can in no respect be regarded as agents or officers of the city. Their duties are of a public nature. Their appointment is devolved on cities and towns by the legislature as a convenient mode of exercising a function of government, but this does not render them liable for their unlawful or negligent acts. The detection and arrest of officers, the preservation of the public peace, the enforcement of the laws, and other similar powers and duties with which police officers and constables are entrusted are derived from the law, and not from the city or town under which they hold their appointment.

[95] When military police officers perform activities related to law enforcement, the principle of police independence in *Campbell* applies to the military police in its relationship with the chain of command with regard to these activities, except as authorized under the *National Defence Act* (NDA): Kent Roach, *Police Independence and the Military Police* (2011), 49 Osgoode Hall L.J. 117, at pp. 132 and 139-140.

[96] The independence of the military police is explicitly enshrined in section 250.19 of the NDA, under which a military police officer who conducts or supervises a military police investigation and who believes on reasonable grounds that any officer or non-commissioned member or any senior official of the Department has improperly interfered with the investigation may make a complaint against that person.

[97] The NDA clarifies the nature of the relationship between the chain of command of the Canadian Forces and the chain of command of the military police.

[98] The Canadian Forces Provost Marshal is responsible for investigations conducted by any unit or other element under his or her command (subsection 18.4(a) of the NDA). These duties are carried out under the general supervision of the Vice Chief of the Defence Staff (subsection 18.5(1) of the NDA), who may issue general instructions or guidelines in writing in respect of the Provost Marshal's responsibilities. The Provost Marshal shall ensure that these instructions and guidelines are available to the public (subsection 18.5(2) of the NDA).

[99] The Vice Chief of the Defence Staff, too, may issue instructions or general guidelines in writing in respect of a particular investigation (subsection 18.5(3) of the NDA). The Provost Marshal shall ensure that these are made available to the public (subsection 18.5(4) of the NDA).

[100] The independence of the military police with respect to the chain of command in the course of law enforcement activities is indisputable. Moreover, contrary to another of the appellant's arguments, law enforcement activities also include the duty and powers of police officers under the common law and not restricted to investigations regarding service offences.

[101] Police officers act lawfully only if they are exercising an authority conferred by statute or that is derived from their duties under common law. Police officers responding to a 911 emergency call will be acting in the exercise of their authority, since their intervention derives as a matter of common law from their duties: *Dedman v. The Queen,* [1985] 2 S.C.R. 2, at p. 28; *R. v. Godoy*, [1999] 1 S.C.R. 311, at paras. 15-16; *R. v. Clayton*, 2007 SCC 32, [2007] 2 S.C.R. 725, at paras. 21 and 25.

[102] In my opinion, this issue must not be confused with the issue of whether the military police officer was carrying out his duties when he entered the command post tent and whether the appellant's behaviour justified the conclusion that she voluntarily obstructed the military police officer's investigation on February 5, 2012.

[103] For this reason, I feel that the appellant's third ground must be dismissed, because the principle of police independence as stated in *Campbell* applies to the military police. Corporal Plourde was not required, in the specific circumstances of the case, to obey the appellant's order not to enter the command post tent.

[104] In the context of this case, this conclusion is sufficient. It would be unwise and inappropriate to extrapolate regarding hypothetical situations that are not raised by the appeal.

[105] This does not, however, dispose of the question as to whether the military police officer could use force to enter the command post tent, as this behaviour was reasonably necessary under the circumstances.

C – Competing obligation of the chain of command to locate a member in distress

[106] The main issue in this case is to determine whether the competing obligation of the chain of command, in this case that of the appellant and her subordinates, to locate the member in distress should have been the subject of a specific instruction to the panel.

[107] I would first note the position of the respondent in her memorandum, which states that this obligation is addressed in an instruction by the judge in his instructions regarding the third charge. I conclude that the respondent admits that such an instruction was necessary.

[108] However, I find that because of issues that were to be resolved by the panel, the trial judge should have communicated this information at the appropriate time, namely, in the instructions regarding the first charge. Moreover, the link to the relevant evidence should also have been made at that time.

[109] What impact could neglecting to address this obligation have had on the instructions given?

[110] First, we will consider the evidence presented that describes the role of the chain of command with regard to members in suicidal distress.

(1) The evidence

[111] During her testimony, the appellant addressed the issue of the role of the chain of command with regard to members in distress as follows:

> [translation]
>
> Q. With regard to protocol in your unit, for calls or individuals in need of assistance or in distress, do you have an approach protocol? In general, how do you approach these cases? A. Well, each time it happens it's a little different, but we do have guidelines, if you will, that allow us to direct the actions that are taken. Sometimes, it—it—well, normally we are informed by the inferior or subordinate chain of command, so we are told that someone made suicidal statements. In almost every case, the chain of command is informed. It is an essential need in terms of

> information for the commanding officer. Then a list is made in terms of the unit and when it happens, well, everyone is informed, but the important thing is that the person is met with as soon as possible by either the padre or the Valcartier Health Centre, depending on where it happens, when it happens, and so on. In a case where it happens during down time or the Valcartier Health Centre is not open, well then—it is the civilian hospital we will refer the person to, and normally the person is escorted by a member, normally someone pretty close to him or her, a co-worker, so that it does not become a situation of authority necessarily, but instead it is a peer that is offering assistance to seek out the truly professional help that is needed.
>
> Q. So I imagine this type of incident is not uncommon? A. No. It happens fairly, unfortunately, fairly frequently. I couldn't—I wouldn't be able to tell you the number of times in a week or in a year it happens, but it's something that almost every member of the chain of command has experienced and has had to deal with.
>
> Q. So, you are aware of this type of problem? A. Absolutely. Every year there are training sessions on suicide awareness, and a number, a certain number or certain ratio of people in the chain of command and in the unit in general have to take specific training on suicide prevention and intervention. So, yes, it is something that is pretty well known.
>
> (A.B., Vol. II, at pages 370-371)

[112] Major Sylvain also addressed this issue during his testimony. He stated that these difficult situations are handled by the chain of command and that the military police are almost never involved:

> [translation]
>
> Q. Now, in terms of the chain of command's intervention with the person in need, you said that you spent many years—you have spent many years in the Forces, you will agree with me that this type of intervention, unfortunately, for the chain of command, is frequent? A. That's right, it happens regularly, but it's frequent, it's not out of the ordinary at all. The chain of command manages this type of incident very well. In addition, maybe personally, I had just returned from a deployment in Afghanistan where I was adjutant in the battle group, I was the human resources manager of 1,500 people in combat, people who made potentially suicidal

> comments, it was common. We always managed it through the chain of command with the appropriate tools, and it went very, very well. It's not something that's exciting or worrisome for the chain of command, it is handled professionally, the interventions are done appropriately, and things are resolved very, very well.
>
> Q. If I understand you correctly, in the vast majority of cases, the military police are not even involved in these situations? A. That's right. In my experience as adjutant and after in the service, the military police are almost never involved in this type of incident.
>
> [Emphasis added] (A.B., Vol. II, at pages 289-290)

(2) Parties' positions

(i) The appellant

[113] The appellant submits that the military judge should have instructed the panel about its duty to promote the welfare of her subordinate.

(ii) The respondent

[114] The respondent raises three grounds in support of her position that the military judge did not need to specifically instruct the panel on the appellant's duty.

[115] First, the fact a duty is being carried out is not a defence to the offence of obstructing a police officer. Second, the appellant did not mention this aspect during the trial, and at any rate, it was the deputy commanding officer who had handled the situation. Third, the military judge read out paragraph 4.02(1)(c) of the *Queen's Regulations and Orders* (QR&O) during his instructions with regard to the charge of conduct to the prejudice of good order and discipline.

(3) Analysis

[116] There are many reasons that would explain why it was necessary for the instructions to the panel to include a discussion about the competing obligation of the chain of command to locate a member in distress.

[117] First, the appellant's and Major Sylvain's testimony described the intervention role of the chain of command when a member experiences suicidal thoughts.

[118] Second, the military police officer, during the events and in his testimony at the trial, defended the unique and exclusive role of the military police to locate a suicidal member and the existence of unlimited power to carry out this role.

[119] Third, all officers and non-commissioned members have a duty to promote the welfare, efficiency and good discipline of all subordinates (subparagraph 4.02(1)(c) and subparagraph 5.01(c) of the QR&O).

[120] Fourth, the civil obligation of the Canadian Forces to ensure the health and safety of its members includes the duty of the chain of command to locate a member in suicidal distress: see paragraph 3(a) and sections 10 and 36 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50; *R. v. Campbell*, [1999] 1 S.C.R. 565, at para. 36; art. 2087 *C.C.Q.*; *Durette v. Grenier*, 2012 QCCA 1207.

[121] In my opinion, the objections presented by the respondent are unfounded.

[122] Clearly, the performance of the chain of command's obligation to locate a member in distress does not justify committing the criminal offence of obstructing a military police officer. This duty must be carried out without impeding the work of a military police officer, if this police officer is acting in the execution of his or her duty.

[123] Moreover, contrary to the position presented by the respondent, the personal involvement of the appellant is not required to conclude that the military judge should have explained to the panel that it was her responsibility to ensure the welfare of the member in distress. The fact the appellant was supervising the efforts to locate the member in distress must be taken into consideration. This is sufficient.

[124] Additionally, the fact the military judge addressed the appellant's obligation in his instructions regarding the charge of conduct to the prejudice of good order and discipline seems clearly insufficient to me, because due to the complexity and density of the instructions as given to the panel, I am far from satisfied that the panel was clear about the relevance of this duty when assessing the appellant's guilt *with regard to the charge of obstruction*.

[125] In my opinion, if the military judge had addressed this competing obligation in his instructions with regard to the charge of obstruction, the instructions would have been different, which would have affected the way the panel would have analyzed the two essential elements of the offence with which the appellant was charged: (1) whether the police officer was performing his duties; and (2) whether the appellant voluntarily obstructed the work of police officer Plourde.

[126] I will restate that the prosecution had to prove beyond a reasonable doubt that Corporal Plourde was in the course of performing his duties. Although the appellant admitted that he was intervening in the performance of his common law duty in response to a 911 call, she submitted that the force used was not reasonably necessary, and in doing so, he was no longer acting in the execution of his duty.

[127] Indeed, as we know, a police officer cannot be considered to be performing his duties if he or she does not respect the legal framework surrounding those duties: *Dedman v. The Queen*, [1985] 2 S.C.R. 2, at pages 28-29; *R. v. Mann,* [2004] 3 S.C.R. 59, 2004 SCC 52, at para. 35; *R. v. DeLong*, (1989), 47 C.C.C. (3d) 402 (C.A. Ont.), at pages 410-411; *R. v. Stevens* (1976), 33 C.C.C. (2d) 429 (C.A. N.S.), at pages 434-5.

[128] To counter the argument presented by the appellant, the prosecution therefore had to prove beyond a reasonable doubt that the force Corporal Plourde used was reasonably necessary.

[129] Accordingly, if the panel had been informed of the appellant's competing duty to locate the member in distress, it could have considered that because of this obligation and the fact that, according to the appellant's testimony, the military police had been informed of the actions taken to locate the member, the force used by Corporal Plourde exceeded what is reasonable and necessary in the exercise of his common law powers.

[130] Neglecting to address this obligation constitutes an error of law.

[131] To explain how neglecting to address this obligation may have influenced the verdict, I propose a review of the relevant issues in the following order: (1) the essential elements of the offence of obstructing the work of a police officer performing his duties; (2) the general principles that apply to the judge's duties when giving the jury instructions; (3) the obligation of the chain of command and the appellant to locate the member in distress and the consequences of neglecting to address this in the instructions to the panel.

(i) Obstructing a police officer (s. 129 of the Criminal Code)

[132] I now turn to the interpretation of section 129 of the *Criminal Code*.

[133] Section 129 of the *Criminal Code* reads as follows:

Offences relating to public or peace officer	**Infractions relatives aux agents de la paix**
129 Every one who	**129** Quiconque, selon le cas :
a) resists or wilfully obstructs a public officer or peace officer in the execution of his duty or any person lawfully acting in aid of such an officer,	(a) volontairement entrave un fonctionnaire public ou un agent de la paix dans l'exécution de ses fonctions ou toute personne prêtant légalement main-forte à un tel fonctionnaire ou agent, ou lui résiste en pareil cas;
…	[…]

[134] The authorities recognize the challenges posed by the interpretation of the offence set out in section 129 *Cr. C.*

[135] The analysis of the challenges in interpreting section 129 strikes me as being essential, as on the one hand, it brings to light the grey areas surrounding the application of this provision, and on the other hand, it reveals how much care must be taken in defining the essential elements of section 129, particularly when they need to be explained to a jury.

[136] Even though the law "presumes the collective wisdom and intelligence of the jurors[,] . . . the law makes no assumption as to their knowledge of the legal principles they are bound to apply" (*R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523, at para. 139 (Justice Fish, dissenting)), as they are new to the exercise: *R. v. Biniaris*, [2000] 1 S.C.R. 381, at para. 39.

[137] In *R. v. Gunn* (1997), 113 C.C.C. (3d) 174, leave to appeal refused [1997] 2 S.C.R. x, a decision cited by the prosecution in its memorandum, the Alberta Court of Appeal described the difficulties in interpreting this provision in the following terms:

> 18 There is not, and likely cannot be, a precise legal definition of "obstructs" as the word is used in s. 129(a). That reality is both a strength and a weakness of the section. Furthermore, any interpretation of "obstructs" must respect the fact that there is in this country, a right to question a police officer. The cases demonstrate that courts have had difficulties measuring the interaction between individuals and peace officers and drawing the line between innocent and culpable conduct.

[138] In his article entitled, "Obstructing a Peace Officer: Finding Fault in the Supreme Court of Canada", (2000) 27 *Man. L.J.* 273, at p. 291, author Larry Wilson makes the following observation regarding the *mens rea* of section 129: "[s]uffice it to suggest that at this point in time, lacking a definitive statement from the Supreme Court of Canada, the fault element for the offence of resisting, wilful obstruction and failing to assist remains a mystery".

[139] In the fifth edition of their work *Criminal Law*, authors Manning and Sankoff note that charges brought under section 129 *Cr. C.* require that the rights of citizens be carefully reconciled with the powers of the police in the execution of their duties:

> **¶16.54** . . . Still, although sections 129 and 270 apply to a wide range of public employees, charges under this section are most often brought in relation to conduct concerning the police, as they are the officers most likely to be involved in direct clashes with members of the public. <u>The difficulty in resolving these charges is to reconcile the right of citizens to resist interference with their liberty and property, and the duty of the police to preserve peace and enforce the law</u>. Although all people have the right to be left alone generally, certain powers are conferred upon the police in connection with the execution of the duties imposed upon them that authorize exceptions to this right. However, where such interference extends beyond the legitimate ambit of police authority, whether because there is a purported exercise of a non-existent power or because there is an exercise of powers for an improper purpose or to an extent not authorized by statute, then the citizen is entitled to resist, by force if necessary. In these circumstances, there is no liability for assault unless excessive force is used, and similarly the person cannot be prosecuted under section 129(a) for resistance or obstruction. Technically, such a result is reached by holding that a police officer's unauthorized action puts them outside the execution of their duty. As Laskin C.J.C. noted in *Biron*, an acquittal is justified by the overriding "social and legal, and political, principle upon which our criminal law is based, namely, the right of an individual to be left alone, to be free of private or public restraint, save as the law provides otherwise".
>
> [Emphasis added.]

Morris Manning and Peter Sankoff, *Manning, Mewett & Sankoff, Criminal Law*, 5th ed. (Markham, Ontario: LexisNexis, 2015), pp. 758 and 759.

[140] In this case, the military judge instructed the panel that the appellant was under no legal obligation to assist Corporal Plourde (A.B., Vol. III, at pages 501-502).

[141] Moreover, in *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59, Justice Iacobbuci wrote the following regarding the lack of correlation between police powers and police duties in the context of the power to detain:

> 35 Police powers and police duties are not necessarily correlative. While the police have a common law duty to investigate crime, they are not empowered to undertake any and all action in the exercise of that duty. Individual liberty interests are fundamental to the Canadian constitutional order. Consequently, any intrusion upon them must not be taken lightly and, as a result, police officers do not have *carte blanche* to detain. The power to detain cannot be exercised on the basis of a hunch, nor can it become a *de facto* arrest.
>
> [Emphasis added.]

[142] I will return to this point when I review the instructions given by the military judge.

[143] In considering the interpretation of section 129, it should first be noted that the use of the word "wilfully" indicates that the fault must be subjective: *R. v. A.D.H.*, 2013 SCC 28, [2013] 2 S.C.R. 269, at para. 49.

[144] In *R. v. Docherty*, [1989] 2 S.C.R 941, Wilson J. notes that the use of the word "wilfully" in section 666 *Cr. C.*, as it then read, denotes the requirement of a high level of *mens rea*, stressing intention in relation to the achievement of a purpose:

> Section 666(1) is clearly framed so as to require guilty knowledge in order to constitute a breach. The section prohibits an accused from wilfully failing or refusing to comply with a probation order. The word "wilfully" is perhaps the archetypal word to denote a *mens rea* requirement. It stresses intention in relation to the achievement of a purpose. It can be contrasted with lesser forms of guilty knowledge such as "negligently" or even "recklessly". In short, the use of the word "wilfully" denotes a legislative concern for a relatively high level of *mens rea* requiring those subject to the

> probation order to have formed the intent to breach its terms and to have had that purpose in mind while doing so.
>
> [Emphasis added; emphasis of Justice Wilson on the words "wilfully" and "refusing" in the original.]

[145] Moreover, in *R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190, the Supreme Court was called on to define the *mens rea* required for the offence of obstructing justice under section 139 of the *Code*, which requires the prosecution to prove beyond a reasonable doubt that the accused intended to act in a way tending to obstruct, pervert or defeat the course of justice. On this point, Justice Charron wrote the following:

> 52 Second, it must be determined whether the offence of obstructing justice, the parameters of which are well established, has been committed. To sum up, the *actus reus* of the offence will be established only if the act tended to defeat or obstruct the course of justice (*R. v. May* (1984), 13 C.C.C. (3d) 257 (Ont. C.A.), *per* Martin J.; see also *R. v. Hearn* (1989), 48 C.C.C. (3d) 376 (Nfld. C.A.), *per* Goodridge C.J.N., aff'd [1989] 2 S.C.R. 1180). With respect to *mens rea*, it is not in dispute that this is a specific intent offence (*R. v. Charbonneau* (1992), 13 C.R. (4th) 191 (Que. C.A.)). The prosecution must prove beyond a reasonable doubt that the accused did in fact intend to act in a way tending to obstruct, pervert or defeat the course of justice. A simple error of judgment will not be enough. An accused who acted in good faith, but whose conduct cannot be characterized as a legitimate exercise of the discretion, has not committed the criminal offence of obstructing justice.

[146] While Justice Charron's comments dealt with section 139 rather than section 129, the essential elements of the two offences are sufficiently similar to persuade me to adopt the interpretation of Chief Justice Richards of the Court of Appeal for Saskatchewan in *R. v. Alsager*, 2016 SKCA 91, in which he wrote:

> 52 Nonetheless, in order to give effect to the language of s. 129(a), and Parliament's apparent intention in enacting it, it is not necessary to restrict the scope of the provision to situations where an offender has a conscious purpose to obstruct a peace officer. As

> pointed out by Martin J.A. in *Buzzanga* at paras 40-46, if a person who foresees that a consequence is certain or substantially certain to result from an act, the person can be taken to have intended the consequence even if the act is done to achieve some different purpose: see also Morris Manning, Q.C., and Peter Sankoff, *Manning, Mewett & Sankoff: Criminal Law*, 4th ed (Markham: LexisNexis Canada Inc, 2009) at 164.
>
> 53 All of this leads me to conclude that the *mens rea* aspect of s. 129(a) requires the Crown to prove beyond a reasonable doubt that (a) the accused knew the individual obstructed was a peace officer or other person listed in s. 129(a), (b) the accused knew the individual obstructed was in the execution of his or her duty, and (c) the accused either had an intention to obstruct the peace officer or foresaw with certainty or substantial certainty that doing the act in question would obstruct the peace office.

[147] In this case, the prosecution had to prove the following essential elements beyond a reasonable doubt: (1) the appellant obstructed Corporal Plourde; (2) she knew that Corporal Plourde was a police officer; (3) he was in the execution of his duty; (4) she knew that he was in the execution of his duty; and (5) she intended to obstruct Corporal Plourde in the execution of his duty or foresaw with certainty or substantial certainty that her act would obstruct him: see David Watt, *Watt's Manual of Criminal Jury Instructions*, 2nd ed. (Toronto: Carswell, 2015) at p. 564.

[148] In my view, *Beaudry* provides clarification with respect to two critical points: a simple error of judgment will not be enough for a conviction, and the good faith of the accused must be evaluated.

[149] The appellant cannot be convicted of obstructing justice if she acted in good faith and her conduct constituted a simple error in judgment rather than an intention to obstruct the military police officer.

(ii) Jury instructions: general principles

[150] In a criminal trial by jury, such as this one held before a panel of the General Court Martial, the trial judge is required to determine and to state the law, and to regulate and order the proceedings in accordance with the law: *R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523, at para. 27.

[151] The final charge to the jury must at minimum cover the following eight elements, namely, (1) instruction on the relevant legal issues, including the charges faced by the accused; (2) an explanation of the theories of each side; (3) a review of the salient facts which support the theories and case of each side; (4) a review of the evidence relating to the law; (5) a direction informing the jury they are the masters of the facts and it is for them to make the factual determinations; (6) instruction about the burden of proof and presumption of innocence; (7) the possible verdicts open to the jury; and (8) the requirements of unanimity for reaching a verdict: *R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523, at para. 29.

[152] The connection between the evidence presented and the issues to be decided is a crucial element of the judge's charge to the jury.

[153] The trial judge is not required to provide an exhaustive review of the evidence. In some cases, this may serve to confuse the jury as to the central issue. Brevity in the jury charge is desired. The extent to which the evidence is reviewed will depend on each particular case. The test is one of fairness. The accused is entitled to a fair trial and to make full answer and defence. So long as the evidence is put to the jury in a manner that will allow it to fully appreciate the

issues and the defence presented, the charge will be adequate. The duty of the trial judge is to explain the critical evidence and the law and relate them to the essential issues in plain, understandable language: *R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523, at paras. 54-57.

[154] *R. v. Saleh*, 2013 ONCA 742, 303 C.C.C. (3d) 431 (Ont. C.A.), includes a full and useful summary of the trial judge's obligations with respect to relating the evidence adduced at trial to an issue (see also *R. v. Huard*, 2013 ONCA 650, 302 C.C.C. (3d) 469 (Ont. C.A.), at paras. 53-58, leave to appeal refused [2014] 1 S.C.R. ix).

[155] Watt J.A. wrote the following:

> 140 It is beyond controversy that among the obligations imposed upon a trial judge in instructing a jury in a criminal case, except in cases where it would be needless to do so, is the duty to review the substantial parts of the evidence and to give the jury the position of the defence, so that the jury may appreciate the value and effect of the evidence, and how the law is to be applied to the facts as the jury finds them to be: *Azoulay v. R.*, [1952] 2 S.C.R. 495 (S.C.C.), at pp. 497-498.
>
> 141 Frequently, a judge satisfies this obligation to review substantial parts of the evidence and to relate that evidence to the issues the jury must decide by reviewing the evidence contemporaneously with legal instructions about what the Crown must prove to establish each essential element of the offence and any defence, justification, or excuse that may be applicable to that element: *R. v. MacKinnon* (1999), 132 C.C.C. (3d) 545 (Ont. C.A.), at para. 29; *R. v. Cudjoe*, 2009 ONCA 543, 68 C.R. (6th) 86 (Ont. C.A.), at paras. 172-173. When this approach is followed, the jury understands, to put it in the vernacular, "what goes with what". In other words, the instructions couple what must be proven (an essential element of an offence) with what is relevant to prove (or raise a reasonable doubt about) it (the evidence): *Cudjoe*, at para. 175.
>
> 142 The obligation to review the substantial parts of the evidence and relate it to the issues that ripen for decision by the jury imposes no duty upon the trial judge to review all the

> evidence: *Azoulay*, at p. 498; *R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523 (S.C.C.), at paras. 55-56. The role of the trial judge is to decant and simplify, not to regurgitate and complicate: *R. v. Jacquard*, [1997] 1 S.C.R. 314 (S.C.C.), at para. 13; *Daley*, at para. 56. A trial judge is vested with a considerable discretion in determining the extent to which the evidence adduced at trial is reviewed for the jury in final instructions: *R. v. Royz*, 2009 SCC 13, [2009] 1 S.C.R. 423 (S.C.C.), at para. 3. In the end, the test is one of fairness. Provided the critical features of the evidence are put to the jury in a way that will permit the jury to truly appreciate the issues and the defence presented, a trial judge will have met the standard required: Daley, at para. 57.
>
> 143 A charge to the jury in a criminal case does not take place in isolation. It occurs in the context of the trial as a whole. Appellate review of a trial judge's charge encompasses the addresses of counsel, as the addresses may fill some gaps in the charge: *Daley*, at para. 58; *Royz*, at para. 3. That said, the addresses of counsel are not and cannot be a proxy for the trial judge's obligations under *Azoulay* and its progeny.
>
> 144 Jury instructions are tested against their ability to fulfill the purposes for which they are given, not by reference to whether any particular approach or formula has been used. Provided the jury is left with a sufficient understanding of the evidence as it relates to the relevant issues and the positions of the parties on those issues, the charge passes muster: *Jacquard*, at para. 14.
>
> 145 Serial reviews of the evidence adduced at trial are not likely to be of assistance to jurors: *R. v. MacKay*, 2005 SCC 75, [2005] 3 S.C.R. 607 (S.C.C.), at para. 2; R. v. Charles, 2011 ONCA 228, 270 C.C.C. (3d) 308 (Ont. C.A.), at para. 19.
>
> [Emphasis added.]

[156] Normally, the judge must relate the relevant evidence to the essential element to which it applies.

[157] In *R. v. Cudjoe*, 2009 ONCA 543, 68 C.R. (6th) 86, Justice Watt describes as follows the requirement to link the review of the relevant evidence to the issue or essential element in question:

> 173 The more difficult task for trial judges in connection with evidentiary references is the *relation* of those references to the issues in the case. Review and relate. Relating the evidence to the issues requires the trial judge to apprise the jurors of the essential features of the evidence that they may apply in resolving the issues that are theirs to decide and that will lead them, ultimately, to their verdict.
>
> . . .
>
> 175 The Ontario Specimen Jury Instructions (Criminal), and other model and pattern instructions that have duplicated their methodology, adopt a systematic approach to jury instructions. A crucial constituent of this scheme, reflected in item iv, above, involves linking the critical features of the evidence to the issue or essential element to which the evidence relates. Said somewhat differently, what must be proven (the essential element) is mated with what is offered to prove it (the evidence).
>
> 176 To determine whether an essential element of an offence has been proven beyond a reasonable doubt requires a jury to make findings of fact. These findings of fact are made on the basis of evidence adduced at trial: testimony, exhibits and admissions, together with inferences drawn from that evidence. For each finding of fact some, but usually not all of the evidence adduced at trial will be relevant. The trial judge's task is to review the essentials of that evidence and to relate it to the issue to which it is relevant. A legal instruction combined with a contemporaneous review of the evidence on the issue seems more likely to assist the jurors in their decision-making than an instruction that segregates what must be proven from what is used to prove it.
>
> 177 The practice of combining legal instruction and focused evidentiary review into an integrated whole, the method for which the Ontario Specimen Jury Instructions (Criminal) provides, ensures what a separate review of the evidence does not achieve in most cases: an issue specific relation of the evidence. Further, such a procedure is more apt to reduce the volume of evidence references, confining them to the essentials, eliminating the peripheral and concentrating more on quality than quantity.
>
> [Emphasis added.]

[158] However, even though the review of the relevant evidence must usually be provided when the judge is addressing an essential element of the offence, the failure to do so at that

precise moment will not necessarily be fatal if the jurors can nevertheless properly appreciate the relevance of the evidence in relation to the issue: *R. v. Cudjoe* 2009 ONCA 543; 68 C.R. (6th) 86 (Ont. C.A.), at para. 169.

[159] Finally, the charge to the jury sometimes needs to include certain warnings because of the appreciation of the evidence by the trial judge and his or her accumulated judicial experience. In *R. v. Biniaris,* [2000] 1 S.C.R. 381, at para. 39, Justice Arbour made the following remarks on this subject:

> 39 . . . Judicial appreciation of the evidence is governed by rules that dictate the required content of the charge to the jury. These rules are sometimes expressed in terms of warnings, mandatory or discretionary sets of instructions by which a trial judge will convey the product of accumulated judicial experience to the jury, who, by definition, is new to the exercise. For instance, a judge may need to warn the jury about the frailties of eye-witness identification evidence. Similarly, years of judicial experience has revealed the possible need for special caution in evaluating the evidence of certain witnesses, such as accomplices, who may, to the uninitiated, seem particularly knowledgeable and therefore credible. Finally, judicial warnings may be required when the jury has heard about the criminal record of the accused, or about similar fact evidence. But these rules of caution cannot be exhaustive, they cannot capture every situation, and cannot be formulated in every case as a requirement of the charge.
>
> [Emphasis added.]

[160] In this case, certain specific warnings were required regarding the distinction between the moral obligation to assist the police and the legal obligation to do so, the police officer's error of law, and an instruction regarding the evaluation of the appellant's conduct and that of the police officer.

(iii) The chain of command's obligation to locate the member in distress and the instructions regarding the execution of the police officer's duty

[161] I note that the appellant admitted that Corporal Plourde, a military police officer, was initially acting in the execution of his duty when he intervened following a 911 call (A.B., Vol. III, at page 418). This admission rendered several elements of the military judge's instructions superfluous (A.B., Vol. III, from page 508, line 17, to page 511, line 33). The military judge should have instructed the panel to consider that the police officer was in the execution of his duty in the course of an intervention following the call, but that the question it needed to answer was whether his conduct was reasonable and necessary in the circumstances.

[162] As the military judge correctly noted from the outset, the issue is the scope of the execution of the duty to locate the member in distress, an issue that must be decided on the basis of the circumstances of each case.

[163] Before reading the relevant sections of the *Code*, he told the panel the following:

> [translation]
>
> But it is wrong for a peace officer, whether civil or military, to use force without legal authorization to do so. In so doing, he risks not only overstepping his duties, but also losing what protection he has as a person charged with enforcing the law. Therefore, a peace officer may use reasonably necessary force when required or authorized to do anything in the administration or enforcement of the law, but the *Criminal Code* states that he is criminally responsible for any excess force employed. Many sections of the *Criminal Code* deal with the responsibilities and authorities of peace officers, as well as the scope of the legal protection granted to them or the justification of their acts. Earlier I mentioned sections 25 and 27, and told you I would talk more about them later; now the time has come. For the purposes of this case, it will be useful to briefly go over certain provisions of the *Code*, namely sections 25 and 27, which read in part as follows: . . .

[164] It is clear that, although he stated that the use of force must not exceed that which is [translation] "reasonably necessary", the military judge did not instruct the panel using the test described in *R. v. Waterfield*, [1963] 3 All E.R. 659 (C.C.A.), a test adopted and applied by the Supreme Court in several decisions: *Dedman v. The Queen*, [1985] 2 S.C.R. 2; *R. v. Godoy*, [1999] 1 S.C.R. 311, at para. 18; *R. v. Asante-Mensah*, 2003 SCC 38, [2003] 2 S.C.R. 3, at paras. 75-76; *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59, paras. 24-26; *R. v. Clayton*, 2007 SCC 32, [2007] 2 S.C.R. 725, paras. 25-31; *R. v. MacDonald*, 2014 SCC 3, [2014] 1 S.C.R. 37, paras. 33-39). Instead, he chose to read sections 25 and 27 of the *Criminal Code* to the panel.

[165] After reading these two sections, he instructed the panel as follows:

> [translation]
>
> These provisions indicate that a peace officer may only use as much force as is reasonably necessary in the course of an investigation if the strict conditions of section 25 or section 27 are met. Therefore, you must examine all the evidence you consider credible and reliable to determine whether Corporal Plourde's conduct constituted a justifiable use of his powers in the circumstances. Remember that the burden of proof in this regard lies with the prosecution. Do not forget that we are still dealing with the third issue. Therefore, in answering the third issue, you must determine whether, in the circumstances of this case, Corporal Plourde was acting in the execution of his duty or whether he had overstepped it.
>
> You may wish to ask yourselves the following questions, which is not an exhaustive list , as you may have additional questions, for example:
>
> Was it reasonable for Corporal Plourde to fail to identify himself properly and to clearly explain, upon his arrival at the CP-8 gatehouse, the reasons for his investigation during Exercise "Rafale Blanche"?
>
> Was it reasonable for Corporal Plourde in the circumstances to claim that the case was a matter for the police only, and not for the chain of command?

Another question: Once he had been informed by Major Wellwood and her subordinates that the individual was not at CP-8 and that the chain of command, including the commanding officer, was aware of the situation and that measures were being taken to locate him and handle the situation in accordance with the unit's existing procedures, was it necessary for Corporal Plourde to persist in his conduct?

Would it have been appropriate for him to ask his own chain of command what he should do in light of this information?

Did he have reasonable grounds to disbelieve Major Wellwood and her subordinates regarding the measures taken by the unit to handle the situation?

Another question: Once he had been made aware of the situation by Major Wellwood, did Corporal Plourde have good reason to believe that the mental state of the person concerned presented a grave and immediate danger to himself or to others?

You may also ask yourself whether, even if he was legitimately executing his investigative duties on a defence establishment or on premises deemed to be a defence establishment, to what extent he was justified in ignoring the questions put to him by Major Wellwood, who, as officer commanding the service company of the 2nd Battalion, was the superior officer responsible for CP-8?

Finally, was it necessary and justifiable in the circumstances to use force against Major Wellwood, pushing her to gain access to the CP-8 tent? As I have said, this list of questions is not exhaustive.

Consider the evidence as a whole to determine whether Corporal Plourde was acting in the execution of his duty or whether his conduct constituted, in light of all the circumstances, an abusive or unjustified use of his authority. There needs to be a legal basis for the duty executed by the peace officer for there to be obstruction. Corporal Plourde's reasonable but erroneous belief regarding his authority under Quebec's *Act respecting the protection of persons whose mental state presents a danger to themselves or to others* is not sufficient. If all of the evidence demonstrates that Corporal Plourde overstepped his duties, he cannot, he cannot, he cannot be considered to have been in the execution of his duty.

Therefore, if you are not convinced beyond a reasonable doubt that

Corporal Plourde, a peace officer, was in the execution of his duty

> when he was obstructed, you must find Major Wellwood not guilty of wilfully obstructing a police officer in the execution of his duty. That will put an end to your deliberations on the third issue.

(iv) The applicability of sections 25 and 27 of the Criminal Code

[166] First, I am of the view that sections 25 and 27 of the *Criminal Code* are not applicable in this case, as these sections establish a relative immunity on which police officers may rely when they are themselves facing criminal charges (which would have been the case had Corporal Plourde been charged with assaulting the appellant). They do not constitute the source of Corporal Plourde's authority.

[167] In my opinion, the issue of whether the police officer's use of force exceeded that which was "reasonably necessary" in the circumstances should be resolved by the panel by applying the *Waterfield* test, which is summarized by Justice LeBel in *MacDonald*. I will return to this point after discussing the inapplicability of section 25.

[168] In *R. v. Asante-Mensah* (2001), 157 C.C.C. (3d) 481, Justice Macpherson and Justice Sharpe of the Court of Appeal for Ontario made the following comments regarding the fact that section 25 of the *Criminal Code*, like section 146 of the *Provincial Offences Act* at issue in that case, does not authorize police officers to use necessary force, but rather shields them from civil or criminal prosecution:

> [51] We were not referred to any authority on s. 146 itself. However, s. 146 is cast in terms similar to s. 25 of the Criminal Code. It has been consistently held that <u>s. 25 of the Criminal Code does not confer powers upon police officers or others, but rather</u>

> shields them from civil or criminal prosecution if they act on reasonable and probable grounds in the exercise of their authority and use reasonable force for that purpose. The argument that s. 25 is a power-conferring provision was rejected by Dickson J. in *Eccles v. Bourque*, supra at p. 131:
>
> > Section 25 does not have such amplitude. The section merely affords justification to a person for doing what he is required or authorized by law to do in the administration or enforcement of the law, if he acts on reasonable and probable grounds, and for using necessary force for that purpose. The question which must be answered in this case, then, is whether the respondents were required or authorized by law to commit a trespass; and not, as their counsel contends, whether they were required or authorized to make an arrest. If they were authorized by law to commit a trespass, the authority for it must be found in the common law for there is nothing in the Criminal Code.
>
> See also the judgment of this court in *R. v. Brennan* (1989), 52 C.C.C. (3d) 366 at pp. 372-74.

[169] In the appeal before the Supreme Court, Justice Binnie confirmed the Court of Appeal for Ontario's analysis that the sole purpose of section 25 is to grant police officers immunity:

> 62 I agree with the Court of Appeal that such a "negative inference" is not warranted. Sections 146 and 147 of the *Provincial Offences Act* do not in and of themselves grant authority to the police or to anyone else to use force in making an arrest. Their sole function, as with the parallel provision in s. 25 *Cr. C.*, is to confer a limited immunity: *Eccles*, *supra*. An occupier making an arrest under the *TPA* without meeting the conditions of s. 146 simply proceeds without the benefit of s. 146 protection, and must look to the common law for a "shield".

[170] In his article entitled "Police Use of Force: Assessing Necessity and Proportionality", author Kevin Cyr relies on *Asante-Mensah* and *Eccles v. Bourque*, [1975] 2 S.C.R. 739, to conclude that police officers' authority to use necessary force is derived from the common law ancillary powers:

> The principle of legality that the police "may act only to the extent that they are empowered to do so by law" is a fundamental premise of a liberal democracy. In the present inquiry, this leads to the question, by what legal mechanism are the police empowered to use force in the execution of their duties? The commonly understood answer to this question, by the police and even experienced legal counsel, is that section 25 of the Criminal Code provides this authority:
>
> > (1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law
> >
> > . . .
> >
> > b) as a peace officer or public officer,
> >
> > . . .
> >
> > is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.
>
> However, section 25 does not provide lawful authority to use force. Rather, it serves as a shield from criminal or civil liability, creating the "peace officer defence" if the use of force was properly justified. Instead, the authority for the police to use force is derived from the ancillary powers doctrine which requires an assessment of whether the police conduct falls within the general scope of any duty imposed on the police, and whether the conduct involved an unjustifiable use of powers associated with that duty.
>
> [Emphasis added.]

See also David Vachon-Roseberry, "L'emploi légitime de la force policière en vertu de l'article 25 du Code criminel canadien", (2016) 75 R. du B. 117, at p. 122.

[171] Moreover, even if we assume for the purposes of this discussion that the military judge did not err in relying on section 25 of the *Code*, the fact that the allowable degree of force is constrained by the principles of proportionality, necessity and reasonableness was not mentioned

anywhere in the military judge's instructions: *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, at paras. 32-35.

[172] The applicability of the test developed in *Waterfield* and adopted in *Godoy* was not disputed by the parties at trial or before this Court. The trial judge's instructions regarding the appellant's competing obligations needed to be given within this analytical framework.

(v) The Waterfield test

[173] The military judge's instructions did not provide the panel with the structured analytical framework required by the *Waterfield* test.

[174] I will summarize this analysis with the help of the summary provided by Justice LeBel in *R. v. MacDonald*, 2014 SCC 3, [2014] 1 S.C.R. 37. In that case, the Supreme Court was considering the framework for scrutinizing safety searches, but the principles are applicable to this case: *Figueiras v. Toronto (City) Police Services Board*, 2015 ONCA 208, 383 D.L.R. (4th) 512 (Ont. C.A.), at paras. 41-51 and 83-87.

[175] Justice LeBel wrote the following:

> [35] At the first stage of the *Waterfield* test, the court must ask whether the action falls within the general scope of a police duty imposed by statute or recognized at common law. For safety searches, the requirement at this first stage of the analysis is easily satisfied. In the case at bar, the police action falls within the general scope of the common law police duty to protect life and safety that I mentioned above. This duty is well established (*Mann*, at para. 38; *R. v. Clayton*, 2007 SCC 32, [2007] 2 S.C.R. 725, at paras. 20-21; *Dedman*).

[36] At the second stage, if the answer at the first is affirmative, as it is in this case, the court must inquire into whether the action constitutes a justifiable exercise of powers associated with the duty. As this Court held in *Dedman*,

> [t]he interference with liberty must be <u>necessary</u> for the carrying out of the particular police duty and it must be <u>reasonable</u>, having regard to the nature if the liberty interfered with and the importance of the public purpose served by interference. [Emphasis added; p. 35.]

Thus, for the infringement to be justified, the police action must be *reasonably necessary* for the carrying out of the particular duty in light of all the circumstances (*Mann*, at par. 39; *Clayton*, at paras. 21 and 29).

[37] To determine whether a safety search is reasonably necessary, and therefore justifiable, a number of factors must be weighed to balance the police duty against the liberty interest in question. These factors include:

> 1. the importance of the performance of the duty to the public good (*Mann*, at para. 39);
>
> 2. the necessity of the interference with individual liberty for the performance of the duty (*Dedman*, at p. 35; *Clayton*, at paras. 21, 26 and 31);
>
> 3. the extent of the interference with individual liberty (*Dedman*, at p. 35).

If these three factors, weighed together, lead to the conclusion that the police action was reasonably necessary, then the action in question will not constitute an "unjustifiable use" of police powers (*Dedman*, at p. 36). If the requirements of both stages of the *Waterfield* test are satisfied, the court will then be able to conclude that the search in question was authorized by law.

[38] A can be seen, the *Dedman-Mann* line of cases does not stand for the proposition that all acts related to an offender's duties are authorized by law. Quite the opposite, only such acts as are reasonably necessary for the performance of an officer's duties can be considered, in the appropriate circumstances, to be so authorized. The English Court of Appeal was clear on this point in *Waterfield*, in a passage quoted by this Court in *Dedman*:

> Thus, while it is no doubt right to say in general terms that police constables have a duty to prevent crime and a duty, when crime is committed, to bring the offender to justice, it is also clear from the decided cases that when the execution of these general duties involves interference with the person or property of a private person, the powers of constables are not unlimited. [Emphasis added; p. 33.]

Likewise, Dickson J., in a powerful dissent in the *Wiretap Reference*, [1984] 2 S.C.R. 697, stressed the critical importance of a narrow reading of the *Waterfield* test:

> The fact that police officers could be described as acting within the general scope of their duties to investigate crime cannot empower them to violate the law whenever such conduct could be justified by the public interest in law enforcement. Any such principle would be nothing short of a fiat for illegality on the part of the police whenever the benefit of police action appeared to outweigh the infringement of an individual's rights. [pp. 718-719]

Such restraints on safety searches are particularly important in the context of a search in a private home, as in the case at bar, which concerns a serious invasion of Mr. MacDonald's privacy in his home. Moreover, safety searches can often give the police access to a considerable amount of very sensitive personal information.

[176] In this case, the panel had to determine whether Corporal Plourde's conduct was *reasonably necessary* to carry out of his duty to locate the military member in distress, in light of all the circumstances and the three factors from the *Waterfield* test: (1) the importance of the performance of the duty to the public good; (2) the necessity of the use of force for the performance of the duty; and (3) the extent of the interference with individual liberty.

[177] The military judge, according to Justice LeBel's suggestion in *MacDonald*, also needed to explain to the panel that police powers are not unlimited, contrary to Corporal

Plourde's belief. Conduct is not justified solely on the basis that its advantages seem to outweigh the disadvantages: *R. v. MacDonald*, 2014 SCC 3, [2014] 1 S.C.R. 37, at para. 38; *Wiretap Reference*, [1984] 2 S.C.R. 697, at pp. 718-719). The *Waterfield* test provides a rigorous framework for the necessary analysis.

[178] In addition, when a 911 call is involved, it is rare for there to be a reasonable alternative to ensure that a person receives the necessary assistance in a timely manner, as police officers must go to the scene to ascertain the person's health and safety: *R. v. Godoy*, [1999] 1 S.C.R. 311, at paras. 18 and 22. In the present case, the appellant's obligation to act and the fact that the chain of command was handling the situation (the military police officer admitted that he had been informed of this by the appellant) constituted an important factor in determining whether the officer's use of force was reasonable.

[179] As we can see more clearly, the panel could not properly assess whether the force used by the military police officer was reasonably necessary without knowing whether the appellant had a competing obligation to locate the military member in distress.

[180] In this regard, one of the questions suggested by the military judge highlights the issue:

> [translation]
>
> Was it reasonable for Corporal Plourde in the circumstances to claim that the case was a matter for the police only, and not for the chain of command?

[181] First, the wording of the question itself reveals why the instruction regarding the appellant's obligation with respect to the third charge was insufficient. In fact, because of this reformulation, the panel was not informed, at this stage, that the appellant was subject to a competing obligation to locate the military member in distress, a relevant element of the evaluation that the panel needed to make.

[182] Second, in the absence of specific instructions on this point, the panel was not in a position to determine whether the police officer's belief was reasonable.

[183] Third, the instruction given left it to the panel to evaluate a question of law, which is a task for the trial judge.

[184] Fourth, Corporal Plourde's mistaken belief as to the law was both misleading and fatal. A police officer's reasonable mistake of law as to the scope of his or her authority cannot justify or provide a basis for the exercise of such authority: *Hudson v. Brantford Police Services Board* (2001), 158 C.C.C. (3d) 390 (Ont. C.A.), at para. 24; *Tymkin v. Winnipeg (City) Police Service* (2014), 306 C.C.C. (3d) 24 (Man. C.A.), leave to appeal refused [2014] 2 S.C.R. x, at paras. 122-123; *Figueiras v. Toronto (City) Police Services Board*, 2015 ONCA 208, 383 D.L.R. (4th) 512 (Ont. C.A.), at paras. 148-149; *R. c. Lévesque Mandanici,* 2014 QCCA 1517, at paras. 83-86.

[185] Fifth, the question presents the panel with a different way of evaluating the appellant's obligation, from the perspective of the police officer's reasonable belief that the matter was not

one for the chain of the command (or the appellant), even though, with respect to the other charge, the panel was required, according to the trial judge's instructions, to consider the appellant's obligation pursuant to subparagraph 4.02(1)(c) of the QR&O to ensure the welfare of her subordinates. However, there is no justification for this approach.

[186] The trial judge was therefore required to inform the panel that the appellant had a legal obligation to locate the military member in distress and that the police officer's belief was erroneous. Moreover, the military judge was required to specify that the panel could not take into account the police officer's erroneous belief in determining whether his intervention was reasonable and necessary.

[187] The prosecution had the burden of proving beyond a reasonable doubt that Corporal Plourde's intervention was reasonably necessary in order for the panel to find that the latter was in the execution of his duty. If the panel had a reasonable doubt as to whether Corporal Plourde's use of force was reasonably necessary, it was required to acquit the appellant.

[188] For these reasons, although there is clearly some overlap between some of the questions formulated by the military judge in his instructions and the factors to be taken into consideration when applying the *Waterfield* test, I am of the view that the demonstration above establishes that the military judge's instructions did not provide the panel with the elements required, in the circumstances, to evaluate, on the one hand, whether Corporal Plourde was in the execution of his duty and, on the other hand, whether the appellant intended to obstruct him.

[189] The above analysis, on the whole, persuades me that this could also have influenced the conviction with respect to the charge of prejudicing good order and discipline.

D – Issues arising from those raised by the parties

[190] I will now turn to the other issues arising from those raised by the parties, while bearing in mind the limits imposed by *R. v. Mian*, 2014 SCC 54, [2014] 2 S.C.R. 689, with respect to new issues raised by a court of appeal.

[191] However, like Justice Moldaver in *Rodgerson*, I am making these observations here for the sole purpose of facilitating the task of the military judge who will hear the appellant's new trial. I am of the view that "a few modest alterations would have saved this jury charge from legal error" and that "a great many of the instructions that were included should have been removed": *R. v. Rodgerson*, 2015 SCC 38, [2015] 2 S.C.R. 760, at para. 54. These suggestions involve non-controversial legal principles that, at any rate, would not have justified a new trial on their own.

(1) The instruction regarding judicial notice of several statutes, regulations, orders and instructions

[192] In his instructions, the military judge instructed the panel to consider as proven before it the *Criminal Code*, the NDA and the QR&O, as well as the orders and instructions given by or on behalf of the Chief of Defence Staff under the QR&O article 1.23 regime (A.B., Vol. III, at page 493).

[193] Such a general instruction should never be provided, as it is for the trial judge to determine and state the law and *only* the applicable law: *R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523, at paras. 27-28. In paragraph 21 of his dissenting opinion, Chief Justice Bell proposed a distinction that is not recognized in Canadian law but would be recognized only in military law. However, the trial judge is the master of the law: *R. v. Daley,* 2007 SCC 53, [2007] 3 S.C.R. 523, at para. 28. To this end, as the military judge did in this case (A.B., Vol. III, at page 483), the trial judge must instruct the members of the panel that they must follow his or her instructions with regard to the law and must not to use their own ideas about what the law is or should be: see Final Instructions 8.2 by the Canadian Judicial Council; David Watt, *Watt's Manual of Criminal Jury Instructions*, 2nd ed., Toronto: Carswell, 2015, Preliminary Instructions 15, page 42; and Final Instructions 2-A, at pages 231-232. The panel members' personal knowledge of military duties should not be relied on. The instructions from the trial judge are the only means to ensure that a consistent explanation of the applicable rules of law is provided to the panel.

[194] Chief Justice Bell justifies his distinction by relying on subparagraphs 4.02(1)(a) and 5.01(a) of the QR&O, which provide that all officers and non-commissioned members must become acquainted with, observe and enforce the *National Defence Act*, the *Security of Information Act*, the QR&O and all other regulations, rules, orders and instructions that pertain to the performance of their duties. Yet, section 19 of the *Criminal Code* establishes the same obligation for all Canadian citizens. This section's purpose and the legislative intent underlying it seek to encourage citizens to be responsible in conducting their affairs by becoming aware of Canadian laws and their legal obligations: Morris Manning and Peter Sankoff, *Manning, Mewett*

& Sankoff, Criminal Law, 5th ed., Markham, Ontario: LexisNexis, 2015, page 441, § 9.31; *R. v. Forster*, [1992] 1 S.C.R. 339, at 346; *Lévis (City) v. Tétreault; Lévis (City) v. 2629-4470 Québec Inc.*, [2006] 1 S.C.R. 420, 2006 SCC 12, at paras. 22 and 29. Since the obligations of citizens and panel members to understand the law are not different, the distinction Chief Justice Bell proposed cannot be justified.

[195] The instruction, as given, considerably extends the panel's presumptive knowledge of the state of the law.

[196] When such an instruction regarding judicial notice of the law is given to the panel, it becomes more difficult to determine which laws it is applying, especially in the absence of an instruction from the judge enjoining the panel to limit itself to the principles of law that have been explained to it: see *R. v. Olsen* (1999), 131 C.C.C. (3d) 355, at para. 46; *R. v. Keegstra*, [1996] 1 S.C.R. 458, at p. 459, affirming the dissenting judge (1994), 92 C.C.C. (3d) 505 (Alta. C.A.), at p. 562; see model instruction CRIMJI 4.99A in Ferguson, Gerry A. and Michael R. Dambrot, *CRIMJI: Canadian Criminal Jury Instructions*, 4th ed. (Vancouver: Continuing Legal Education Society of British Columbia), updated 2016.

[197] In my view, an instruction regarding judicial notice of the law should never be given to a panel. Only the relevant legal rules should be part of the judge's charge.

(2) The inclusion of the text of several legislative provisions in the instructions to the panel

[198] In his instructions regarding the first charge, the military judge read to the panel several excerpts from sections 130 and 156 of the NDA, the definition of a peace officer in section 2 of the *Criminal Code*, sections 25, 27 and 129 of the *Criminal Code*, article 22.02 of the QR&O and section 8 of the *Act respecting the protection of persons whose mental state presents a danger to themselves or to others*.

[199] While trial judges are not formally prohibited from giving jurors copies of certain legislative provisions or reproducing them in the written instructions to the jury, I am of the view that the practice is undesirable. Several of these provisions simply serve no purpose and are a source of potential confusion.

[200] The example of section 8 of the *Act respecting the protection of persons whose mental state presents a danger to themselves or to others* will suffice as an illustration. There was no justification for reading it, as it was the police officer's common law powers that had to be considered by the panel.

[201] Moreover, reading it led the trial judge to instruct the panel that the police officer's belief was erroneous but *insufficient* to justify the use of force. It would have been more accurate, as I explained above, to tell the panel that the police officer's error could not justify his intervention.

[202] In *Helping Jurors Understand* (Scarborough, Ontario: Carswell, 2007), Justice Watt suggests the use of plain language that eliminates, insofar as possible, legal terminology that is unduly complex, for the purposes of the charge to the jury:

> Final instructions should not be or amount to a crash course in substantive and adjectival law so that jurors can engage in discussions worthy of law school seminars or in the same decision-making process as an appellate judge. But there is more to the education of jurors in final instructions than trimming unnecessary content.
>
> At their best, final instructions should be a simple, rugged communication from the trial judge to a jury of twelve ordinary people that tells *them*, in language *they* understand, what *they* need to know to decide the case *they* are trying. Nothing more. Nothing less. Common words in their common sense. Educated jurors make educated decisions.
>
> The complexity of the law that a trial judge must convey to jurors in final instructions must shoulder some of the blame for the obstacles jurors encounter in understanding these directives. But the complexity of the law need not take the full weight of responsibility. Equally, if not more complicit in this deficit in comprehension is the language in which the instructions are composed.
>
> The language of final instructions, like the language of any instructions, should be plain English or plain French, according to the language of trial.
>
> To compose final instructions in plain language requires an understanding of what the term "plain language" means. Plain language is *not* confined to writing short sentences, or restricted to choosing short simple words. Plain language is about readers and listeners, not just writing and speaking. Plain language is about organization of the subject-matter, not just about the words, phrases, clauses and sentences in it. Plain language is a process that produces a document, such as final instructions to a jury, which works for its users. (pp. 160 and 161)
>
> . . .
>
> Final instructions to the jury in a criminal case, like any instruction about legal principles, should be expressed in plain language. Informed decision-making requires an informed decision-maker.

> And decision-makers are more likely to be informed by familiar plain language, not foreign legalese. (p. 175)
>
> . . .
>
> Jury deliberations are not law school examinations. Jurors are not law students. And jury instructions are not law school lectures. (p. 177)

[203] The law to be applied by the jury must be explained to it in plain and understandable terms (*R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523, at para. 32), and reading out multiple legislative provisions does little to help achieve this objective. The role of the trial judge is to "decant and simplify": *R. v. Rodgerson*, 2015 SCC 38, [2015] 2 S.C.R. 760, at para. 50.

[204] As Justice Moldaver noted in *Rodgerson,* the charge to the jury must be tailored to the case, avoiding any irrelevant instruction:

> [52] Courts have repeatedly emphasized that the jury charge must "be tailored to the facts of the specific case" (*R. v. McNeil* (2006), 84 O.R. (3d) 125 (C.A.), at para. 21). While "[t]he model instructions are intended to provide a starting point for trial judges", modification will frequently be required to provide the jury "with the applicable legal principles in a format that facilitates the application of those principles to the specific circumstances of the case" (*ibid.*). Trial judges must "separate the wheat from the chaff" when determining which defences may be applicable, and must engage in a "careful and considered culling . . . to avoid unnecessary, inappropriate and irrelevant legal instruction of a kind that might well divert the jury's attention" from the primary disputed issues in the case (*Pintar*, at p. 494).

(3) A *Baxter* instruction

[205] I am also of the view that the brief altercation between the appellant and the military police officer, which was both impulsive and intense, required that a *Baxter* instruction be given

to the panel. This instruction originated from a decision of the Court of Appeal for Ontario in *R. v. Baxter* (1975), 27 C.C.C. (2d) 96 (Ont. C.A.), p. 111, a case involving the defence of self-defence.

[206] In my opinion, this type of instruction may be necessary in "quick response" situations in which an accused is not expected to "weigh to a nicety" the exact measure of a defensive action or to stop and reflect upon the precise risk of consequences from such action: see the summary provided in Justice Binnie's dissenting opinion in *R. v. Szczerbaniwicz*, 2010 SCC 15, [2010] 1 S.C.R. 455, at para. 35; *R. v. D.S.*, 2017 ONCA 239, at paras. 112-139; *R. v. Hope*, 2016 ONCA 623, at para. 93.

[207] That was the case here, given that the panel had to decide, in evaluating the appellant's intention, whether she acted in good faith or committed an error in judgment that did not reflect, at least according to her above-cited testimony, an intention to obstruct the police officer.

[208] Indeed, while the facts and the question of law differ from those in *Baxter*, it seems to me that an instruction of this type would have contributed to a measured and contextual evaluation of the facts by the panel. Of course, I acknowledge that the absence of such an instruction is rarely fatal in and of itself: *R. v. Sinclair,* 2017 ONCA 38, at paras. 112-119; *R. v. Hope*, 2016 ONCA 623, at para. 93.

[209] A similar instruction regarding the evaluation of the force used by the military police officer may also be appropriate: *R. v. Cornell*, 2010 SCC 31, [2010] 2 S.C.R. 142, at para. 24; *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, at para. 35.

(4) The instruction regarding the contradictory versions

[210] The trial judge provided the panel with an instruction regarding the rule in *R. v. W.(D.)*, [1991] 1 S.C.R. 742.

[211] However, the instruction received by the panel regarding the charge of wilfully obstructing a military police officer was worded in general terms, without relating it to the version of the appellant, who stated that she attempted to share all of the information she had but Corporal Plourde would not listen to her, that she did not intend to obstruct him and that she wanted her subordinates to provide him with the information they had.

[212] While this is not fatal by itself, it would have been preferable for the relationship between the evidence presented and the *W.D.* instruction also to have been established in the context of the review of the essential elements of the offence of wilful obstruction.

(5) The failure to object to the instructions

[213] The prosecution argues that the failure of counsel to make an objection is taken into consideration on appeal, even though it is not determinative. However, an error might still be considered serious despite the absence of an objection at trial: *R. v. Van*, [2009] 1 S.C.R. 716, at para. 43.

[214] Counsel's failure to object at trial to a portion of the instructions that would later be raised on appeal certainly does not constitute a determining factor. It is the judge, and not counsel, who is ultimately responsible for the adequacy of the charge: *R. v. Jaw*, 2009 SCC 42, [2009] 3 S.C.R. 26, at para. 44.

[215] In light of my reasons, I think it is clear that the failure to instruct the panel about the appellant's competing obligation goes to the heart of the issues and that counsel's failure to object must not be considered fatal.

[216] A failure to object, especially when it is not for tactical advantage, does not preclude a court of appeal from intervening to correct an error. There is good reason why this is so. Any advocate, no matter how skilled or experienced, may on occasion overlook a material point during the course of a trial: *R. v. Jones*, 2011 ONCA 584, 277 C.C.C. (3d) 143(Ont. C.A.), at para. 42.

[217] Finally, I do not consider it is necessary to examine the second ground raised by the appellant, namely, the trial judge's obligation to instruct the panel that the appellant should be considered a public officer in the execution of her duty within the meaning of section 129 of the *Criminal Code*, as no submissions were made on this point during the hearing.

IV - Epilogue

[218] Since drafting my reasons, I have read the dissenting opinion of Chief Justice Bell. First, I would like to note that, as required and in accordance with Rule 7 of our rules of practice

and procedure, in her memorandum, the appellant correctly identified the new grounds of appeal presented to our Court. On this point, she clearly noted that the panel should have been specifically informed of her duty to locate the member in distress because of her obligation to promote the welfare of her subordinates.

[219] Moreover, on the subject of *R. v. Waterfield*, I note that, as we know, *Godoy* is an application of the criteria from that decision in the context of a 911 emergency call, which was also the situation in the present case. In its memorandum on appeal, the prosecution specifically refers to *Godoy* and the passages from that decision that discuss the *Waterfield* criteria: Respondent's Memorandum, para. 15. It is not a new ground of appeal. It is necessarily incorporated into the discussion about the essential elements of the offence of obstructing a peace officer.

[220] For these reasons, I would order a new trial with respect to these two offences.

"Guy Cournoyer"
J.A.

"Mary J.L. Gleason"
J.A

B. RICHARD BELL C.J. (dissenting reasons)

I. Background

[221] On February 19, 2014, a general court martial found Major B.M. Wellwood (hereafter "the Major") guilty of the following offences:

> [TRANSLATION]
>
> . . . [O]n or about February 5, 2012, at Saint-Pierre-de-Broughton, province of Quebec, she wilfully obstructed . . . Corporal K. Plourde, a peace officer acting in the execution of his duty.
>
> . . . [[O]n or about February 5, 2012, at Saint-Pierre-de-Broughton, province of Quebec, she behaved with contempt, through her words and actions, towards . . . Corporal K. Plourde, a military police officer, in the presence of subordinates, contrary to subparagraph 4.02(c) of the *Queen's Regulations and Orders for the Canadian Armed Forces*.

[222] In her notice of appeal, the Major raises a single ground of appeal. She states:

> [TRANSLATION]
>
> This appeal challenges the constitutionality of paragraph 130(1)(a) of the NDA. At trial, I submitted that paragraph 130(1)(a) of the NDA is contrary to section 7 and paragraph 11(f) of the Charter because of its overly broad scope. The central issue in this appeal is therefore to identify the purpose of paragraph 130(1)(a) of the NDA.
>
> Any other ground that I could raise and that this Court may wish to hear.

[223] Without amending her notice of appeal, the Major filed a memorandum containing a second ground of appeal. She argues that [TRANSLATION] "the judge [did not] instruct the panel on military law limiting the powers of military police officers". It should be noted that, in her memorandum, the Major devotes just four of the fifty-five paragraphs to the issue of the instructions given to the Panel. I have reproduced these four paragraphs below:

[TRANSLATION]

50. As will be shown, the military judge erred in law in his instructions to the panel. To avoid a new trial, the respondent [TRANSLATION] "will have to establish that there is no reasonable possibility that the verdict rendered was influenced by the error in law". In this case, the appellant submits that, if properly instructed, a panel could not reasonably have found Maj Wellwood guilty. Accordingly, she asks that she be acquitted.

51. The military judge erred in law in his final instructions with regard to whether the military police officer was acting in the execution of his duty when his work was obstructed. He failed to instruct the panel on the following law:

> Every member has a duty to promote the welfare of his or her subordinates;
>
> Every officer in the Canadian Forces is a public officer within the meaning of section 129 of the *Criminal Code*;
>
> Every officer and non-commissioned member has a legal duty to obey the lawful commands and orders of a superior, except military police officers *for the purposes of investigating a service offence*.

52. Had the panel received such instructions, it would not necessarily have arrived at the same verdict on the charge of obstructing a peace officer. Moreover, a properly instructed panel could not reasonably have found Maj Wellwood guilty, given that:

> The Major was discharging her legal duty to promote the welfare of her subordinate;
>
> As a public officer within the meaning of section 129 of the *Criminal Code*, the Major had the authority to direct the investigation into the welfare of her subordinate, so it was the military police officer who obstructed her in the execution of her duty, not the other way around.
>
> The military police officer was legally obliged to obey the Major's orders, given that he was not investigating a service offence.

53. For the same reasons, the panel would not necessarily have arrived at the same verdict on the charge of conduct to the

> prejudice of good order and discipline. It could not reasonably have found that the Major had behaved with contempt if it had been instructed that, in the circumstances, the military police officer had a legal duty to obey her and to refrain from—on pain of imprisonment for life—"[offering] violence against a superior officer".
>
> 54. Given that "no one can be convicted of an offence under an unconstitutional law", the appellant asks this Court to dismiss the charge brought under paragraph 130(1)(a).

[224] Although the Major did not amend her notice of appeal, the respondent did have the chance to respond, in both a memorandum and oral arguments, to the arguments in the Major's memorandum. However, I note that the respondent did not have an opportunity to respond to several arguments raised by my colleagues in their reasons. I will address these arguments later in my analysis.

[225] In a decision dated May 19, 2017 (2017 CMAC 2), this Court ruled on the ground of appeal relating to paragraph 11(f) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the Charter). Accordingly, the only issue remaining to be decided is whether the military judge erred in his instructions to the Panel regarding the grounds of appeal and, if so, whether this error warrants reversing the decision of the general court martial.

II. Excerpts from the evidence, oral arguments and instructions to the Panel

[226] A trial by general court marital is largely conducted as a trial by judge and jury. A court of appeal does not have the benefit of the reasons for the Panel's decision and cannot know what evidence the Panel accepted or rejected. Moreover, it is impossible for a court of appeal to know how much weight was given to each item of evidence. For these reasons, I will provide a

brief summary of the uncontested facts, followed by references to the relevant excerpts from the evidence, oral arguments and instructions.

[227] The appellant is a major in the Canadian Armed Forces. Corporal Plourde was, at the time, a military police officer and a peace officer for the purposes of the *Criminal Code,* R.S.C. 1985, c. C-46. The Major does not dispute that at the relevant times, Corporal Plourde was acting in his capacity as a peace officer. The Major was, at the time, responsible for a platoon that was taking part in a military exercise in the Beauce region of Quebec. She was in command of Command Post Eight [CP-8].

[228] Around 4:09 p.m., on February 5, 2012, Corporal Plourde received a call from his relief sergeant asking him to remain on standby because of a 911 call concerning a person with suicidal intentions. The spouse of a member had apparently called 911 emergency services in Valcartier after speaking with her spouse, a member who was participating in a military exercise and who had [TRANSLATION] "threatened to kill himself with a firearm that very evening" (Transcript, Vol. 1, p.171, line 43).Corporal Plourde learned that the member in question was probably with Company A or Company B. He therefore proceeded to a location halfway between the two to await further details. He arrived at his standby location around 6:30 p.m.

[229] While waiting for further information, the Corporal checked the computer system to confirm whether the suicidal individual had a criminal record. He did not. The Corporal then used the same system to check whether this individual owned a firearm. He owned two. The Corporal also began taking steps to try to confirm whether the suicidal individual was in

possession of those weapons. While he was standing by, he made two calls to find out which company the suicidal individual was in. The hierarchy was unable to provide him with this information. However, around 7:20 p.m., more than an hour after the first call, the Corporal was informed that the soldier in question belonged to 22 Brigade Group, and he was ordered to proceed to CP-8 [TRANSLATION] "as quickly as possible" to respond to the call (Transcript, Vol. 1, p. 178, line 28). Heading towards CP-8, the Corporal and his driver, Officer Simard-Bolduc, a military police officer who is a reservist, not a peace officer, approached the gatehouse providing access to the command post. Instead of stopping at the gatehouse, the driver turned on his flashing lights, and the gate guard let them through. The gate guard called CP-8 to report the fact that the police officers had entered without stopping at the gatehouse. When notified of this, the Major decided to intercept Corporal Plourde and his driver because this was not the first time that police officers (other than Corporal Plourde and Officer Simard-Bolduc) had failed to stop at the gatehouse during military exercises. She asked the Corporal for an explanation.

[230] Corporal Plourde testified that he explained that he was looking for a suicidal member. He also testified that the Major explained to him that the chain of command was handling the situation, ordered him to leave the premises after he had explained that this was a police matter, prohibited him from speaking with anyone else in the command tent and blocked his access to the command tent. The relevant excerpts from Corporal Plourde's testimony are found at pages 179 to 238 of the transcript.

[231] Officer Simard-Bolduc was the only witness to the discussions that took place between the Corporal and the Major outside the tent. In his testimony, he describes the events and the

language used in the same terms as the Corporal did (Transcript, Vol. II, from p. 309, line 25, to p. 310, line 20).

[232] Major Wellwood, on the other hand, testified that she tried to provide the requested information but the Corporal was not listening to her and interrupted her (Transcript, Vol. II, p. 380, lines 2 and 3). The Major also confirmed the testimony of Corporal Plourde and Officer Simard-Bolduc that she had told the Corporal to [TRANSLATION] “get the hell out of my CP, leave the camp”. As for the Corporal’s testimony to the effect that the Major blocked the entrance to the tent, she admitted to this but explained that she wanted to go look for other officers who could assist the Corporal (Transcript, Vol. II, from p. 383, line 40, to p. 384, line 10). From my perspective, the most relevant excerpts from the Major’s testimony relating to the issues in dispute are at pages 356 to 385.

[233] Three other people testified during the trial: Captain Pelletier, Captain Turcotte and Major Sylvain. Unfortunately, none of these three individuals saw or heard the exchanges between the Corporal and the Major outside the command tent. All the relevant exchanges occurred outside the tent, including the moment the Major blocked the entrance to the tent with her body.

[234] I would now like to address the judge’s final instructions to the Panel. First, it should be noted that the judge had long discussions with Crown counsel and counsel for the Major regarding the instructions. Both counsel made recommendations regarding the instructions, and

the judge accepted these recommendations. Both counsel expressed their agreement with the content of the final instructions that the judge would give to the Panel.

[235] The judge's instructions, including the Panel's questions, begin at page 481 of the transcript and end at page 535. I do not intend to reproduce every aspect of these instructions. Nonetheless, it should be noted that the judge went to great pains to be fair to the parties. He advised the Panel not to accept his version of the facts, but to make its own decision in an impartial manner. He explained, repeating this several times, that the burden of proof always remains on the prosecution and is [TRANSLATION] "never reversed". He explained that the Panel could accept a witness' testimony in whole or in part, or even reject it entirely. He instructed the Panel at length regarding the necessity for them to decide whether Corporal Plourde was acting in the execution of his duty and, if so, whether he overstepped his duty in the circumstances. He also gave an instruction in accordance with the criteria in *R. v. W.(D)*, [1991] 1 S.C.R. 742, (1991) 63 C.C.C. (3d) 397. When the judge gave his summary of the relevant facts, he noted at the outset that the military authorities were aware of the situation. He said:

> [TRANSLATION]
>
> . . .
>
> At that point, the military authorities at 2nd Battalion, Royal 22e Régiment, including CP-8's command, had already been informed of the situation regarding the member who had allegedly made suicidal remarks. They tried to locate the individual to take care of him. It is important to understand that the information that had been passed on to them was unclear. There was every indication that the individual did not belong to the service company, but to the command company, although all this remained to be confirmed. (from p. 495, line 43, to p. 496, line 5)
>
> . . .

Major Wellwood therefore exited the tent of CP-8 and went towards the military police vehicle to inquire about the situation and above all to ask the police officers why their vehicle did not stop at the gatehouse. Whether or not she passed by Corporal Plourde on her way to the vehicle, she knocked on the window of the vehicle a few times and then went around the vehicle to speak to the driver, Private Simard-Bolduc, who was about to get out. Seeing what was happening, Corporal Plourde came back to join them and interposed himself between them. Major Wellwood asked them why they had not stopped at the gatehouse. Corporal Plourde stated that they were there because of the 911 call from the member's spouse following the telephone call that she herself allegedly received from her spouse, who had admitted to her having suicidal thoughts involving the potential use of a firearm. Corporal Plourde therefore invoked his legal authority to act, particularly his powers under provincial legislation. Major Wellwood replied that the chain of command, including the unit's commanding officer, was already aware of the situation and that the military authorities were handling it. Corporal Plourde submits that Major Wellwood told him to calm down and that the situation did not fall under military police jurisdiction. Major Wellwood also allegedly told Corporal Plourde that the member was not in CP-8 and insisted on finding out why the police officers had not stopped at the gatehouse. Corporal Plourde allegedly replied to Major Wellwood that it was a police matter and not the responsibility of the chain of command, and that she should not confuse her rank with his police authority. At this point, both sides were taking an authoritarian tone. Corporal Plourde's tone became more hostile, and he then started addressing Major Wellwood using the informal "you". The acrimonious exchanges continued between the two until Major Wellwood asked him in no uncertain terms to leave the premises, with her too adopting the informal "you". Corporal Plourde then decided to ignore the explicit requests of Major Wellwood, headed directly towards the CP-8 tent and tried to enter it even though he had been formally forbidden to do so by Major Wellwood, who passed him and turned to face him at the entrance to the tent. The acrimonious exchanges continued between them, and Corporal Plourde pushed Major Wellwood with his hands at shoulder or chest level, causing her to lose balance at the entrance to the tent. (from p. 496, line 7, to p. 497, line 6)

. . .

You will be able to review the video recording with regard to the circumstances of this intrusion and the remarks made by the various individuals involved, particularly Major Wellwood and

> Corporal Plourde. Carefully review their testimony on this point, including the tone used, the actions taken and the information that was passed on from one to the other, as well as the reactions of the various participants, to determine what the military police officer was trying to do during the incident. I also invite you to review the portion of the evidence dealing with, among other things, the different actors in this; the various witnesses regarding the chain of command's awareness or knowledge of the call from the spouse of the battalion member regarding suicidal statements that had allegedly been made shortly before; the steps that had already been taken by the chain of command, in other words, by the battalion authorities, to handle the situation, including the information that had been passed on by Major Wellwood, and later by Captain Sylvain, to Corporal Plourde on this subject; and Corporal Plourde's reaction. Review all that.
>
> If you are not satisfied beyond a reasonable doubt that there was obstruction of a peace officer, you must find Major Wellwood not guilty of obstructing the work of a peace officer in the exercise of his duty. This would bring your deliberations to an end. (from p. 502, line 43, to p. 503, line 27)

III. Analysis

[236] An accused has a right to a fair trial. However, this should not be conflated with the right to a perfect trial (*R. v. Bjelland*, 2009 SCC 38, [2009] 2 S.C.R. 651 at para. 22, citing *R. v. Harrer*, [1995] 3 S.C.R. 562, [1995] S.C.J. No. 81 at para. 45). The same rule applies to instructions to the jury (*R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823 at para. 30; *R. v. Korski (CT)*, 2009 MBCA 37, [2009] 7 W.W.R. 18 at paras. 102-103; *R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523, at para. 81; *R. v. Jacquard*, [1997] 1 S.C.R. 314, [1997] S.C.J. No. 21) or, as in this case, to the Panel.

[237] As was already mentioned, the judge had a long discussion with Crown counsel and counsel for the defence regarding the instructions. Counsel had the opportunity to make recommendations. The judge accepted those recommendations. Moreover, at the end of his

instructions, the judge offered counsel a chance to suggest changes to the instructions. The case law tells us that, while not dispositive, counsel for the parties' failure to object to the instructions may be taken into consideration when one of the parties' attacks them (*R. v. Bouchard*, 2013 ONCA 791, [2013] O.J. No. 5987 at paras. 37-40; *R. v. Huard*, 2013 ONCA 650 at para. 74, 311 O.A.C. 181). Finally, regarding the case law providing the framework for my observations, I cite *R. v. Mian*, 2014 SCC 54, [2014] 2 S.C.R. 689: a court of appeal must limit its review to the issues raised by the parties, and in circumstances where new issues are raised by the Court, it must give the parties an opportunity to fully respond.

[238] In her notice of appeal, the appellant does not rely on the duty of the judge to instruct the Panel on the following issues: the limits to the usefulness of reading the statutes, *Waterfield*, the police officer's abuse of power, his mistaken beliefs (if any), the instructions concerning "judicial notice", the *Baxter*-type instructions, or a ground of appeal based on conflicting versions of the facts. Even if we accept the appellant's written submissions as constituting an amendment to the notice of appeal, the fact remains that the only grounds of appeal pleaded (apart from paragraph 11(f) of the Charter) are the following: (1) the police officer had to obey the orders of a superior officer; (2) the police officer obstructed the Major in her work; and (3) the military judge should have instructed the Panel on the Major's obligation to promote the welfare of her subordinate. In their analysis, my colleagues deal with the issue of the power of a military police officer in relation to superior officers in Part B (pages 23 to 27) of their reasons. I agree with that analysis. In the circumstances of this case, the peace officer did not have a duty to obey the orders. It is also difficult to accept the claim made by the Major that Corporal Plourde

obstructed the Major in her work. In my opinion, such an argument has no merit, and the military judge had no duty to instruct the Panel as such.

[239] As for the third ground of appeal, the Major's duty to promote the welfare of her subordinate, it is important to bear in mind that the Panel is a panel of officers as prescribed by paragraph 167(3) of the *National Defense Act*, R.S.C. (1985), c. N-5 [NDA]. The military judge is giving instructions to officers of the Canadian Armed Forces. These officers are well aware of the duties they owe. As highlighted by the Supreme Court of Canada in *R v. Daley* and *R v. Jacquard*, in order to determine whether a jury has received adequate instructions, an appellate court must take into consideration the distinct roles of the various actors at trial. In this regard, one should not dissociate the instructions to the Panel from the general context of the trial. In this case, we cannot ignore the fact that the Panel is composed of officers from the Canadian Armed Forces who have the obligation to know, obey, and enforce the NDA, the *Security of Information Act,* R.S.C. (1985), c. O-5, the QR&O, and all other rules, orders, and directives related to the exercise of their functions (QR&O, ss. 4,02(1)a), 5.01a) and 19.01). I agree with my colleagues that, when dealing with a jury composed of civilians as contemplated by the *Criminal Code*, an instruction regarding judicial notice should not be given and a reference to the relevant legal rules should be part of a judge's instructions. There is nevertheless an important distinction to be made when dealing with a jury composed of officers of the Canadian Armed Forces (Panel) who are obligated under the QR&O to know the rules applicable to officers and non-commissioned members.

[240] In addition, I reject the claim that the military judge did not inform the panel of Major Wellwood's duty to promote the welfare of her subordinates. The judge cites the QR&O and many of the sections cited make reference to an officer's responsibilities in that regard.

[241] Despite my conclusion that the military judge gave instructions regarding an officer's responsibilities, I consider it important to make an observation on the usefulness of instructing the Panel on the Major's competing obligation to locate the member in distress. An instruction regarding this obligation could cause the Panel to confuse the officer's guilt of obstructing a peace officer with her duty to assist. The issue here is of course the first and not the second.

IV. Conclusion

[242] In light of the preceding, I am of the opinion that, in the circumstances, the military judge provided adequate instructions regarding the two enumerated offences. I would therefore dismiss the appeal with regard to the two findings of guilt.

"B. Richard Bell"

Chief Justice

COURT MARTIAL APPEAL COURT OF CANADA

SOLICITORS OF RECORD

DOCKET:	CMAC-571
STYLE OF CAUSE:	MAJOR B.M. WELLWOOD and HER MAJESTY THE QUEEN
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	APRIL 26, 2016
ADDITIONAL SUBMISSIONS FILED BY THE PARTIES:	SEPTEMBER 9 AND 23, 2016
REASONS FOR JUDGMENT:	COURNOYER J.A.
CONCURRED IN BY:	GLEASON J.A.
DISSENTING REASONS BY:	BELL C.J.
DATED:	JUNE 23, 2017

APPEARANCES:

Lieutenant-Commander Mark Létourneau Lieutenant-Colonel Jean-Bruno Cloutier	FOR THE APPELLANT MAJOR B.M. WELLWOOD
Major Dylan Kerr Major Gabriel Roy	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Defence Counsel Services Gatineau (Québec)	FOR THE APPELLANT
Canadian Military Prosecution Service Ottawa, Ontario	FOR THE RESPONDENT