DATE: 20000802

DOCKET: CMAC-431

CORAM: **STRAYER C.J.**
EWASCHUK J.A.
PELLETIER J.A.

B E T W E E N:

HER MAJESTY THE QUEEN

Appellant

— and —

MAJOR MICHEL LATOUCHE

Respondent

Heard at Ottawa, Ontario, on Thursday, April 27, 2000

Judgment delivered at Ottawa, Ontario, on Wednesday, August 2, 2000

REASONS FOR JUDGMENT BY: **EWASCHUK J.A.**

CONCURRED IN BY: **STRAYER C.J.**
PELLETIER J.A.

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Appellant

— and —

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Respondent

REASONS FOR JUDGMENT

EWASCHUK J.A.

[1] This appeal involves the unauthorized disclosure of military documents for a private purpose by an officer of the Canadian Armed Forces and the availability of the defence of lack of *mens rea* in general, and rhe defence of honest, but mistaken, belief in particular that the documents were disclosable without appropriate permission.

[2] Here, the Crown appeals the acquittal of Major Michel Latouche, the accused, on two charges of "conduct to the prejudice of good order and discipline" ("conduite préjudiciable au bon ordre et à la discipline"), contrary to section 129 of the *National Defence Act*, R.S.C. 1985, c. N-5

(NDA). The Crown alleges that the trial judge erred in law in applying the wrong test for the *mens rea* required by section 129 and its underlying conduct, prohibited by articles 19.36(2)(a) and 19.36(2)(b) of the *Queen's Regulations and Orders* (QR&O).

[3] The accused, Major Latouche, had been charged with the following:

> **First Charge Section 129 NDA**
>
> **An Act to the Prejudice of Good Order and Discipline**
>
> **Particulars**: In that he, on or about 12 February 1998, at or near the Central Region Cadet Headquarters, 8 Wing Trenton, Ontario, delivered copies of two Cadet Summer Camp Personnel Evaluation Reports and a letter to Cpl MacKenzie, Robert, contrary to QR&O 19.36(2).
>
> **Second Charge Section 129 NDA**
>
> **An Act to the Prejudice of Good Order and Discipline**
>
> **Particulars**: In that he, on or about 12 February 1998, at or near the Central Region Cadet Headquarters, 8 Wing Trenton, Ontario, used for a private purpose copies of two Cadet Summer Camp Personnel Evaluation Reports and a letter, contrary to QR&0 19.36(2).

[4] Section 129 of the *National Defence Act* provides, in part, as follows:

129.(1) Any act, conduct, disorder or neglect to the prejudice of good order and discipline is an offence and every person convicted thereof is liable to dismissal with disgrace from Her Majesty's service or to less punishment.	129.(1) Tout acte, comportement ou négligence préjudiciable au bon ordre et à la discipline constitue une infraction passible au maximum, sur déclaration de culpabilité, de destitution ignominieuse du service de Sa Majesté.
(2) An act or omission constituting □a contravention by any person of□	(2) Est préjudiciable au bon ordre et à la discipline tout acte ou omission□le fait de contrevenir à□
(b) any regulations, orders or instructions published for the general information and guidance of the Canadian Forces or any part thereof□	*b*) des règlements, ordres ou directives publiés pour la gouverne générale de tout ou partie des Forces canadiennes□
is an act, conduct, disorder or neglect to the prejudice of good order and discipline.	

In effect, the contravention of any published regulation is deemed to be an act to the prejudice of good order and discipline. It is here conceded that the regulations in question had been published.

[5] The underlying conduct, alleged to constitute the two offences contrary to section 129 of the *National Defence Act,* contravenes articles 19.36(2)(a) and 19.36(2)(b) of the QR&O. Article 19.36(2) provides as follows:

19.36(2) Subject to article 19.375 (*Communication to News Agencies*), no officer or non-commissioned member shall without permission obtained under article 19.37 (*Permission to Communicate Information*):	19.36(2) Sous réserve de l'article 19.375 (*Communication à des agences de nouvelles*), aucun officier ou militaire du rang ne doit, s'il n'en a d'abord obtenu la permission aux termes de l'article 19.37 (*Permission de communiquer des renseignements*);
(*a*) publish in any form whatever or communicate directly or indirectly or otherwise disclose to an unauthorized person official information or the contents of an unpublished or classified official document or the contents thereof; [or]	*a*) publier sous quelque forme que ce soit, communiquer directement ou indirectement ou autrement divulguer à une personne non autorisée des renseignements officiels ou le contenu d'un document officiel inédit ou classifié; [ou]
(*b*) use that information for a private purpose .	*b*) utiliser ce renseignement ou ce document à ses fins particulières .

[6] Article 19.37(1) states as follows:

19.37(1) Permission for the purposes of article 19.36 (*Disclosure of Information or Opinion*) may be granted by the Chief of the Defence Staff or such other authority as he may designate.	19.37(1) La permission aux fins de l'article 19.36 (*Divulgation de renseignement ou d'opinion*) peut être accordée par le chef d'état-major de la défense ou toute autre autorité qu'il peut désigner à cette fin.

It is conceded by the parties that permission pursuant to article 19.37 was never granted in this case.

<u>At Trial</u>

[7] The evidence at trial revealed that the accused asked Lieutenant-Colonel McCulloch to provide him with various copies of Canadian Forces documents relating to Lieutenant Pejsa. These military documents were performance evaluations of Lieutenant Pejsa. Lieutenant-Colonel McCulloch foolishly provided the documents to the accused.

[8] The accused knew that his friend and business associate, Corporal MacKenzie, intended to use the documents in a private civil suit between MacKenzie and Lieutenant Pejsa. After reading the documents, the accused gave them to Corporal MacKenzie, who showed the documents to Lieutenant Pejsa. Instead of being intimidated by the contents of the documents, Lieutenant Pejsa contacted the military police, who charged both Lieutenant-Colonel McCulloch and Major Latouche with similar offences.

[9] Lieutenant-Colonel McCulloch pleaded guilty to the charges, whereas Major Latouche pleaded not guilty and, as stated, was later acquitted of the charges.

[10] At trial, the accused, Major Latouche, raised the defence of honest mistake of fact as to the nature of the documents. While the accused conceded that he knew the general nature of the military documents, inasmuch as he had read them, the accused testified that he honestly believed that the documents were non-classified documents, which could be legitimately released or disclosed to other persons and used for a private purpose. It must be noted that the documents were unstamped, unlike many military documents, which are stamped either “secret” or “confidential”. However, two of the three documents were marked “personal.” The accused, Major Latouche, grounded his defence on the basis of his honest belief that the documents were

"releasable." By "releasable" in this context, Major Latouche must have meant "legally releasable" in the sense that disclosure of the documents in question would not contravene any legislation or regulations. The regulation in question, article 19.36 of the QR&O, does not employ the term "releasable", but the term "official". The documents were either official in nature and therefore non-releasable without appropriate permission, or were non-official in nature and therefore *per se* releasable. In other words, Major Latouche's defence of mistake must have been based on an honest belief that the documents were releasable because they were not official.

[11] The trial judge ignored the accused's defence and simply found that the documents were official. It may well be that the judge concluded that Major Latouche must have known that military documents relating to performance evaluation are by definition official and, therefore, the accused's testimony as to his claimed belief was untrue. However, the judge did not directly address that issue and, instead, addressed the issue of the general *mens rea* requisite for the two offences. Neither counsel addressed the issue of *mens rea,* apart from the defence of honest mistake of fact, nor were counsel invited to address that issue. In the end, the judge acquitted the accused of both charges on the basis of a lack of *mens rea* unrelated to the defence of honest mistake of fact.

[12] The trial judge imported a "specific intent" to the offences charged and held that the accused, in order to be found guilty of them, would need to have "intended to cause prejudice to good order and discipline by his actions in this case." The judge found that the accused "intended

no wrong and no harm", and that he could not infer that the accused "foresaw or intended any breach of regulations or any harm or prejudice to good order and discipline by his actions."

Analysis

What is *Mens Rea* in General?

[13] The trial judge imposed a need for the Crown to prove beyond a reasonable doubt that the accused specifically intended to contravene the law. On this appeal, defence counsel concedes that the imposition of a specific intent requirement constituted fundamental error. Section 129 of the *National Defence Act* does not require the Crown to prove that an accused had any intent whatsoever to contravene the law, or that an accused had any intent to do conduct to the prejudice of good order and discipline. In the latter case, an offence contrary to section 129 of the *National Defence Act* is a deemed offence. Section 129 merely requires the contravention of a published regulation, order or instruction, and then statutorily deems such contravention to constitute an act to the prejudice of good order and discipline.

[14] However, because section 129 is a deemed offence, it is still necessary to examine the underlying QR&O offences in order to determine what *mens rea* is required for a finding of guilt pursuant to section 129. In this case, article 19.36(2) of the QR&0 provides that:

19.36(2) Subject to article 19.375 (*Communication to News Agencies*), no officer or non-commissioned member shall without permission obtained under article 19.37 (*Permission to Communicate Information*):	19.36(2) Sous réserve de l'article 19.375 (*Communication à des agences de nouvelles*), aucun officier ou militaire du rang ne doit, s'il n'en a d'abord obtenu la permission aux termes de l'article 19.37 (*Permission de communiquer des renseignements*);
(a) publish in any form whatever or communicate directly or indirectly or otherwise disclose to an unauthorized person official information or the contents of an unpublished or	*a*) publier sous quelque forme que ce soit, communiquer directement ou indirectement ou autrement divulguer à une personne non autorisée des renseignements officiels ou le

classified official document or the contents thereof; [or]	contenu d'un document officiel inédit ou classifié; [ou]
(b) use that information for a private purpose .	*b*) utiliser ce renseignment ou ce document à ses fins particulières .

[15] It is accepted that the accused, Major Latouche, did not obtain the requisite permission to publish or use the documents, pursuant to article 19.37 of the QR&O.

[16] Article 19.36(2)(a) prohibits the disclosure of an official document to an unauthorised person. Thus, the Crown must prove that the accused wilfully published or disclosed an official document to a person he knew was unauthorised to receive it. I will later return to the issue of whether or not the accused must either have known or wilfully blinded himself as to the specific nature of the document.

[17] Article 19.36(2)(b) prohibits the use of an official document for a private purpose. It is accepted that the word "purpose", like the word "intent", imports the need for the Crown to prove the "specific intent" beyond a reasonable doubt. In this case, the required *mens rea* is that the accused must have possessed the mental element of wilfully using the official document for a private purpose. The accused conceded in evidence that his purpose in disclosing the document to his friend was a private one.

[18] In this case, the trial judge was correct that there was a specific intent required, at least in respect of article 19.36(2)(b). However, he misconstrued the applicable *mens rea* requirement. The trial judge erred in holding that the accused must have "intended to cause prejudice to good order and discipline by his actions in this case." He further erred in requiring the Crown to prove

that the accused intended to do wrong or harm. He also erred in requiring the Crown to prove that the accused foresaw or intended a breach of regulations or any harm or prejudice to good order and discipline by his actions.

[19] It is, therefore, necessary to briefly review the general nature of the concept of the mental element required of a criminal offence, commonly known as *mens rea*. To begin with, a criminal offence is composed of an *actus reus* (prohibited conduct) and a *mens rea* (mental fault). In other words, a criminal offence consists of a prohibited act, committed in specified factual circumstances, combined with a blameworthy mental state, both of which are prescribed either by statute or common law. It is important to note that it is the statutory definition of the criminal offence that determines the essential physical and mental elements of the offence.

[20] *Mens rea*, which literally literally means "guilty mind", refers to the blameworthy state of mind required for the commission of the particular crime charged, as prescribed by the definitional elements of the crime. Thus, *mens rea* is defined by the essential elements of the crime. There is no such thing as a fixed *mens rea*. Instead, *mens rea* varies from crime to crime. *Mens rea* generally requires not only an intention, whether general or specific, to commit a prohibited act, but also knowledge of or wilful blindness to the relevant factual circumstances that may or may not involve a prohibited result or consequence of the accused's conduct. In any situation, much depends on the definitional essential elements of the alleged offence. Alternatively, the *mens rea* of the offence may require either the wilful commission of a prohibited act or knowledge of a prohibited state of affairs combined with knowledge of or wilful blindness as to relevant factual circumstances.

[21] *Mens rea* may also be subjective or objective in nature. The accused's requisite mental fault may consist of negligence, knowledge, wilfulness, recklessness, wilful blindness, intent, or purpose, depending again on the definition of the crime charged.

[22] It is also necessary to review briefly what *mens rea* is not. *Mens rea* does not require that the accused have a morally blameworthy, reprehensible, unethical or evil state of mind. Moral blameworthiness must be distinguished from mental blameworthiness. Moral blameworthiness or turpitude generally relates to the accused's motivation for committing a crime. An accused's motive is not an essential element of that crime: an accused may be convicted of a crime even though he has a good motive or no motive for committing it.

[23] Thus, the "good purpose" of the accused, Major Latouche, in providing the official documents so as to assist his friend and business associate in private litigation, does not constitute a lack of *mens rea* or a defence to the charges he faced.

[24] Similarly, *mens rea* does not require that the accused must intend to contravene the law. Indeed, an accused need not even know that his conduct constitutes a crime inasmuch as "[i]gnorance of the law by a person committing an offence is not an excuse for committing that offence" ("[i]gnorance de la loi chez une personne qui comment une infraction n'excuse pas la perpétration de l'infraction") section 19 of the *Criminal Code,* R.S.C. 1985, c. C-46. Furthermore, section 150 of the *National Defence Act* provides that:

150. The fact that a person is ignorant of the provisions of this Act, or of any regulations or of any order or	150. Le fait d'ignorer les dispositions de la présente loi, de ses règlements ou des ordonnances ou directives dûment

instruction duly notified under this Act, is no excuse for any offence committed by the person.	notifiées sous son régime ne constitue pas une excuse pour la perpétration d'une infraction.

[25] Likewise, *mens rea* does not require that an accused must intend to contravene a law if he knows the general state of the law regulating his conduct. Even where an accused knows the law and honestly believes that his conduct does not contravene that law, he may, nonetheless, be guilty of a crime. An honest mistake of law is not a defence to the crime charged, even though an honest mistake of fact may be.

[26] In this case, the accused, Major Latouche, conceded that he knew that it was an offence to disclose official information; however, he also maintained that he had honestly believed that the information was non-official even though it was contained in a military document.

[27] In the end, *mens rea* is the mental fault required by the definitional essential elements of the crime charged, regardless of the accused's intent, or lack thereof, to contravene the law, and regardless of his knowledge of the law, his moral blameworthiness, or his motivation for his conduct.

What is the Requisite *Mens Rea* for the Offences Charged?

[28] The trial judge undoubtedly erred in holding that the *mens rea* of the offence of "An Act to the Prejudice of Good Order and Discipline" required the Crown to prove beyond a reasonable

doubt that "Major Latouche intended to cause prejudice to good order and discipline by his actions in this case."

[29] It is necessary to refer again to section 129(2)(b) of the *National Defence Act,* which provides that:

129 (2) An act or omission constituting a contravention by any person of . . .	129 (2) Est préjudiciable au bon ordre et à la discipline tout acte ou omission . . . le fait de contrevenir à . . .
(b) any regulations, orders or instructions published for the general information and guidance of the Canadian Forces or any part thereof . . .	*b*) des règlements, ordres ou directives publiés pour la gouverne générale de tout ou partie des Forces canadiennes . . .
is an act, conduct, disorder or neglect to the prejudice of good order and discipline.	

In effect, the contravention of any published regulation is deemed to be an act prejudicial to good order and discipline.

[30] The trial judge was, therefore, required to examine the two underlying offences particularized in the charges in order to determine what the essential elements of the underlying offences were, and what *mens rea* was required for those underlying offences. It is the commission of the underlying offences which determines whether or not the accused's act caused prejudice to the good order and discipline of the Canadian military forces. The accused, Major Latouche, admitted that he had committed the offences with the requisite state of mind to wilfully disclose the contents of the

documents, and to wilfully use them for a private purpose. However, the accused also raised the

defence of honest mistake of fact in respect of the specific nature of the disclosed information. The trial judge found that the information was objectively official, but failed to consider the accused's subjective defence and whether or not it was available on the evidence.

[31] On appeal, the Crown submitted that the two offences charged against the accused are "conduct crimes" as opposed to "result crimes." In this case, that characterisation is irrelevant. A conduct crime, by definition, does not require an accused's conduct to produce a prohibited result or consequence. For example, where the accused possesses an unregistered firearm, the accused commits a conduct crime inasmuch as the Crown does not have to prove that the accused's possession of the firearm resulted in harm to anyone. However, where the accused, with intent to kill someone, shoots a person with a firearm, the Crown must prove that the person died in order to prove the "result crime" of murder. Furthermore, a "result crime" may require the accused to have a specific intent or purpose to achieve the prohibited result, or it may simply require, on an objective basis, that the accused's conduct caused the prohibited result. It is unnecessary in this case to consider what effect, if any, s.7 of the *Canadian Charter of Rights and Freedoms* may have on s. 129 of the *National Defence Act*, inasmuch as neither party raised the matter: see *R. v. DeSousa*, [1992] 2 S.C.R. 944.

[32] In this case, the offence of "conduct to the prejudice of good order and discipline" would, normally, be characterised as a "result crime" inasmuch as the accused's underlying conduct must be prejudicial to good order and discipline. However, s.129 of the *National Defence Act* deems the accused's underlying conduct to be prejudicial to good order and discipline, so long as the accused's underlying act or omission contravenes a regulation, order or instruction. Thus, the

question of whether the offence charged is a "conduct" or a "result crime" is immaterial, so long as the accused's conduct, as particularised in the charges, contravened the underlying offences, which are statutorily deemed to have caused (i.e. resulted in) the prejudice of good order and discipline.

[33] The trial judge, therefore, erred in law by misconstruing the *mens rea* requisite for the offences charged. Furthermore, the judge's error resulted in the accused's acquittals. The appeal, therefore, must be allowed and the acquittals quashed. It remains to be determined whether a conviction must be entered or a new trial ordered. That determination necessarily involves the proper characterisation of "official information" as a question of fact or a question of law, or a combination thereof.

Is Knowledge of the Official Character of the Documents a Question of Fact, Law, or Mixed Law and Fact?

[34] The parties accept that the character of the documents pertaining to Lieutenant Pejsa is an essential element of the prohibited conduct, and that the Crown must prove, as a matter of objective fact, that these documents were official in nature. The parties also accept that the documents were official in nature. What is not agreed upon by the parties is whether the Crown must prove, as an essential element of mental fault, that the accused subjectively knew that the documents were official in nature. The Crown submits that the nature of the documents is a question of law, such that the accused's mistake is immaterial and a conviction must be entered. The accused submits that his mistake is a question of fact, such that his acquittals must be maintained or, in the least, a new trial must be ordered to determine whether his testimony and

the other evidence leave a trier of fact in a state of reasonable doubt on the matter. Conversely put, the accused submits that the Crown must prove beyond a reasonable doubt that the accused knew or wilfully blinded himself as to the official character of the military documents.

[35] As a general rule, a mistake of fact, which includes ignorance of fact, exists when an accused is mistaken in his belief that certain facts exist when they do not, or that certain facts do not exist when they do. Ignorance of fact exists when an accused has no knowledge of a matter and no actual belief or suspicion as to the true state of the matter. By contrast, a mistake of law exists when the mistake relates not to the actual facts but rather to their legal effect: see *R. v. Jones*, [1991] 3 S.C.R. 110. Mistake of law also includes ignorance of the law, which exists when the accused is ignorant as to the existence, meaning, scope or interpretation of the law: *R. v. Molis,* [1980] 2 S.C.R. 356. In *Molis,* the accused was ignorant of the fact that a regulation had been published in the Canada Gazette, rendering the chemical substance in question a restricted drug. There is no significant legal difference between mistake of law and ignorance of the law: *R. v. Jorgenson,* [1995] 4 S.C.R. 55, *per* Lamer C.J.

[36] In this case, the evidence shows that the accused actually read the documents so that he knew they were military documents relating to performance evaluations of Lieutenant Pejsa. The accused's position is that, although he knew the general nature of the documents, he did not know that they were official in nature, such that their contents could not be disclosed to third parties or used for a private purpose.

[37] The accused relies on *R. v. Beaver*, [1957] S.C.R. 531 for the proposition that the Crown must establish, in respect of the accused's *mens rea,* that the accused knew that the documents were official. In that case, the trial judge refused to put to the jury the accused's defence that he honestly, but mistakenly, believed that the substance he was selling to the undercover police officer was sugar of milk, and not heroin, as it turned out to be. The Supreme Court of Canada held that the defence of honest mistake of fact was available in the circumstances of that case. It must be kept in mind that the *honesty* of the accused's belief, evaluated in light of the surrounding circumstances, is what is determinative. The *reasonableness* of the belief, however, is a factor to be weighed in the assessment of its honesty: see *R. v. Pappajohn,* [1980] 2 S.C.R. 120. In this case, it would be permissible for a trier of fact to reject as untrue the accused's claimed belief that the documents were non-official in light of the attending circumstances, particularly the patent unreasonableness of the accused's testimony on the matter.

[38] *R. v. Beaver*, *supra* is distinguishable from this case inasmuch as the accused, Major Latouche, actually examined the documents and knew they were military documents relating to performance evaluations of Lieutenant Pejsa. Here, the accused officer admitted that he looked at the documents in question, recognised them as National Defence documents pertaining to personnel "evaluations" and "a cadet organization document of some sort", and that he understood that performance evaluations were used for decisions as to future promotions, which is an "official purpose": see the Appeal Record, pp. 92, 109-10 and 120. It is arguable that it would be disingenuous for an officer to claim to have regarded the documents as other than "official".

[39] It is also arguable that the acquittals were unreasonable. I would point out parenthetically that the Crown is foreclosed from appealing an acquittal on the ground of unreasonableness at the first level of appeal. This is so even though the ground of appeal as to the unreasonableness of an acquittal constitutes a pure question of law and even though the Crown may later appeal to the Supreme Court of Canada where an appellate court allows an initial appeal against conviction on the ground that the conviction was unreasonable: see *R. v. Biniaris* (2000), 184 D.L.R. (4th) 193, 2000 SCC 15.

[40] In light of the rule that a mistake of fact is available even though it is unreasonable unless the claim is rejected as untrue, the question remains whether the accused's claimed mistake as to the legal classification of the documents was a mistake of fact or a mistake of law. Whether the characterization of the military documents as official or not is a question of fact or law is not easy to determine. The matter is not subject to statutory or regulatory definition, or to prior judicial determination.

[41] It may be argued that the specific nature of the documents is analogous to that of the nature of obscene matter. Where an accused is charged with possession of obscene matter for the purpose of distribution, the Crown must prove that the accused knew the general nature of the materials, but whether or not the materials are obscene is a question of law: see *R. v. Jorgenson, supra, per* Lamer C.J., and *R. v. Metro News Ltd.* (1986), 56 O.R. (2d) 321 (C.A.), application for leave to appeal to S.C.C. refused (1957), 57 O.R. (2d) 638*n*.

[42] However, it seems to me that the nature of obscene matter and the nature of official documents are distinguishable. The characterisation of something as obscene requires a value judgment made in relation to community standards of tolerance. On the other hand, whether a document is official or not is more factual in nature and is generally determinable by an examination of the document in light of the applicable legal standards.

[43] It appears that the specific nature of official documents is most likely a question of mixed fact and law allowing an accused to raise the defence of mistake of fact: see *R. v. Prue; R. v. Baril*, [1979] 2 S.C.R. 547. In that case, the Supreme Court of Canada held that the accused, charged with the criminal offence of driving while his license was suspended, was entitled to raise the defence of honest mistake of fact. The accused was permitted to argue that he had honestly and mistakenly believed that he was not under suspension, even though the suspension arose automatically as a matter of provincial statute.

[44] The determination of whether the documents are official in nature thus involves both factual and legal components. The relevant factual elements of this analysis include the contents of the documents, the purpose for which they were made, the persons who have access to them, and the persons who are responsible for their manufacture. The relevant legal elements of this analysis include the interpretation, scope and nature of “official” in article 19.36(2) of the QR&O, which prohibits disclosure of official information. These elements are “mixed” because the legal elements must be applied to the factual elements. The determination is, thus, one of mixed law and fact**.** Inasmuch as there is no statutory or regulatory definition of “official”, the determination of the matter must be made by examining the contents of the documents, which is

a factual matter, and by application of relevant criteria, which generally involves a mixture of fact and law. As a matter of fairness, an accused should be entitled to raise a defence that he honestly, but mistakenly, believed the document to be non-official. Whether the accused's testimony is rejected as untrue, when assessed in light of all the evidence, is a matter for the trier of fact to resolve.

[45] The problem in this case is that the accused did examine the documents and was aware of their factual elements, such as their contents, the purpose for which they were made, and who made them. However, inasmuch as the appropriate test is one of mixed law and fact rather than fact alone, his personal examination of the documents is not determinative of the matter. As already stated, whether the documents are objectively official in nature requires an examination of the unstamped documents in light of the legal elements, such as the interpretation, scope and nature of "official" in article 19.36(2) of the QR&O. Whether the accused was subjectively mistaken as to the official character of the documents is a matter of mixed law and fact. Here, the accused was not mistaken as to the existence, content, scope or interpretation of the applicable law (i.e. the applicable legal criteria) but, according to his testimony, was honestly mistaken as to whether the specific documents in question were official or non-official in nature. The predominant element of the claimed mistake was more factual than legal in nature. Therefore, the accused should have been entitled to raise the defence of honest but mistaken belief about the official nature of the documents.

[46] In the end, I have decided that the Crown must prove beyond a reasonable doubt as part of the accused's *mens rea* that he knew that the documents were official or, at least, that he

willfully blinded himself as to the true nature of the documents. Therefore, the defence of mistake of fact is relevant to the determination of whether the accused had the requisite mental fault for the offences charged.

Result

[47] In the result, the appeal will be allowed, the acquittals will be quashed and a new trial will be ordered on both charges.

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"E. G. Ewaschuk"
J.A.

I agree
"B. L. Strayer" C.J.

I agree
"J.D. Denis Pelletier" J.A.

COURT MARTIAL APPEAL COURT OF CANADA

SOLICITORS OF RECORD

DOCKET:	CMAC-431
STYLE OF CAUSE:	JHER MAJESTY THE QUEEN **v.** MAJOR MICHEL LATOUCHE
PLACE OF HEARING:	OTTAWA, ONTARIO, CANADA
DATE OF HEARING:	APRIL 27, 2000
REASONS FOR JUDGMENT OF THE COURT BY:	THE HON. MR. JUSTICE EWASCHUK, J.A.
DATED:	AUGUST 2, 2000

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