



## COURT MARTIAL

**Citation:** *R. v. Meeks*, 2022 CM 2016

**Date:** 20221212

**Docket:** 201960

Standing Court Martial

4th Canadian Division Support Base Petawawa  
Petawawa, Ontario, Canada

**Between:**

**His Majesty the King**

- and -

**Sergeant J.K. Meeks, Accused**

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

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### **DECISION ON FINDING**

(Orally)

#### **Introduction**

[1] Sergeant Meeks originally faced three charges. This Court granted a motion by defence counsel that no prima facie case had been made out on the third charge.

[2] He now faces two offences under section 130 of the *National Defence Act* (*NDA*); that is to say, aggravated assault contrary to section 268 of the *Criminal Code* and assault contrary to section 266 of the *Criminal Code*.

[3] Both charges arise from an early morning altercation on 18 June 2019 in Kaiserslautern, Germany where Sergeant Meeks was serving with his unit while participating in an international military exercise. The charges read as follows:

“FIRST CHARGE  
*NDA* Section 130

AN OFFENCE PUNISHABLE UNDER  
SECTION 130 OF THE NATIONAL

DEFENCE ACT, THAT IS TO SAY, AGGRAVATED ASSAULT, CONTRARY TO SECTION 268 OF THE *CRIMINAL CODE*

*Particulars:* In that he, on or about 18 June 2019, at or near Kaiserslautern, Germany, in committing an assault on Pte Meadows, did wound, maim, disfigure or endangered his life.

SECOND CHARGE  
NDA Section 130

AN OFFENCE PUNISHABLE UNDER SECTION 130 OF THE NATIONAL DEFENCE ACT, THAT IS TO SAY, ASSAULT, CONTRARY TO SECTION 266 OF THE *CRIMINAL CODE*

*Particulars:* In that he, on or about 18 June 2019, at or near Kaiserslautern, Germany, did commit an assault on Pte Berthe.”

[4] In reaching the Court’s decision, I reviewed and summarized the facts emerging from the evidence and made findings on the credibility of the witnesses. I instructed myself on the applicable law and applied the law to the facts, conducting my analysis before I came to a determination on each of the charges.

[5] Due to the passage of time since the alleged offences and understanding that most witnesses have either released from the Canadian Armed Forces (CAF) or have been promoted in the intervening time, most witnesses will be referred to by the rank they held at the time of the alleged offences. Two witnesses, being Corporal Gebeshuber and Master Corporal Melvin were both privates at the time of the alleged events. When referring to them providing testimony before the court, I will use their current rank, but in referencing the events that occurred in 2019 or as referred to in the testimony of the other witnesses, they will be referred to in the rank of private that they held at that time.

[6] The prosecution called seven eyewitnesses which included the complainants named in the charges, being Privates Meadows and Berthe. While Private Meadows testified, he had little memory of the critical events that make up the charge where he is the complainant. The accused testified but he also had no memory of the specific time period that captures the two charges before the Court.

**Uncontested facts**

[7] The members involved in the incidents before the Court were all members of Oscar Company, which was designated the parachute company of the 3rd Battalion of the Royal Canadian Regiment (3 RCR). In June of 2019, they were deployed to Ramstein, Germany where they were participating in a United States-led international exercise named Exercise SWIFT RESPONSE. On the night in question, Oscar Company was split into two where soldiers from 9 Platoon would conduct a parachute jump into Bulgaria with the exercise goal of seizing the airfield. There was a rear party who remained in Ramstein, Germany, who would be flown into the airfield in Bulgaria the next day and would take up a defensive position.

[8] After conducting their duties for the day, some members of the rear party went out for dinner. It was the only relaxed day of the exercise that they had. The members went to dinner in Kaiserslautern, Germany which was a town located far enough away that they had to take a train or a taxi from point to point.

[9] Sergeant Meeks went to dinner with a small group that included Captains Simmons and Korajilija and Private Meadows (Group A). There was a second group of members that took the train to the same town, Kaiserslautern, Germany. That second group included Privates Melvin, Prupus, Berthe and Gebeshuber. (Group B).

[10] Although the two groups socialized and travelled separately, they both ended up at the same restaurant for dinner. They ate and socialized in their separate groups. At one point, Sergeant Meeks bought the members of Group B a round of shots of a drink called "Jägermeister".

[11] Master Corporal Melvin described the members of Group B to be pretty happy, as they were in Germany eating schnitzel and having someone buy them drinks.

[12] While at the restaurant, they all consumed what they described as schnitzel and pints of beer and members of Group B described sharing a big "tube" or "showboat" of beer that was the equivalent of four or five pitchers (the size of the water pitcher in the courtroom).

[13] Witnesses within Group A, which included both Sergeant Meeks and Private Meadows testified that they ate at that restaurant from approximately 8 p.m. until 10 p.m. After dinner, most of Group A decided to go to a bar (referred to by the witnesses as the "nightclub") located down the street.

[14] Members from Group B decided to check out the nightlife in Germany and they proceeded to visit multiple bars. Master Corporal Melvin described it as "bar-hopping", having a drink in each bar. He estimated that they hit at least four different bars.

[15] At the end of the evening, or in the early morning hours of the next day, members of Groups A and B coincidentally ended up at the same nightclub. The

entrance to the nightclub was at street level and once inside, there was a stairway that led up to the nightclub itself.

[16] In the early morning hours of 18 June 2019, while at the nightclub, the two captains received messages indicating that they and everyone they were with had to return to the Ramstein Air Base immediately as there was a communications lockdown.

[17] Captain Korajilija testified that he told all the soldiers he saw that they had to return to base. He recalls telling both Sergeant Meeks and Private Meadows. After Captain Korajilija provided that direction, he stepped outside, googled a German taxi company to arrange taxis to bring the soldiers back to the base.

[18] Witnesses from Group B testified that they had only been at the nightclub for a short time, some estimating it was only about thirty minutes when they received notice to return to base. In fact, Master Corporal Melvin explained that he had just gotten a beer and likely had to guzzle it when they were told they had to leave.

[19] From the evidence, I concluded that all of the members directly involved in the incident had been drinking and the evidence suggested most were intoxicated, some more than others.

[20] Some of the soldiers did not take the order seriously as they were drunk, having a good time and lingered at the nightclub. This necessitated Captain Simmons and Sergeant Meeks to return together to formally order the stragglers outside. They had been told to leave the nightclub twice, but the second time it was not a request, but a formal order expected to be followed. Witnesses described Sergeant Meeks as becoming increasingly agitated as he attempted to corral the soldiers outdoors to meet the taxis.

[21] Slowly, all the soldiers amalgamated outside where they waited for taxis. It is what happens outside after this point where the consistency in the evidence diverges.

[22] Very few of the witnesses saw the unfolding of all the incidents that relate to the charges before the Court and I noted that depending on when the witnesses paid attention, they witnessed different aspects of the conflict. Consequently, the Court had to be attentive to this in determining what evidence it found most reliable.

[23] The evidence suggested that Sergeant Meeks does not recall the exact incidents before the Court. In the background of the ongoing trial, both counsel and the Court were alert to the potential defence of not criminally responsible (NCR) being raised. The accused has until the formal pronouncement of finding on the charges to raise the defence and neither the Court nor the prosecution can raise it prior to this stage. In light of this possibility, I permitted much wider questioning of all the witnesses in order to assist the parties in deciding whether or not they wish to raise the issue. However, I did

not consider this evidence in assessing whether the prosecution has proven each of the charges beyond a reasonable doubt.

**Summary of witness testimony with respect to the charges**

[24] Below is a summary of the witness testimony beginning with the accused and then prioritized in order based on its relevance to the charges before the Court and the reliability I have attached to it, which will be explained at length in the latter section.

***Sergeant Meeks***

[25] Sergeant Meeks joined the CAF in September 2005 from Kingston, Ontario. He completed his Soldier Qualification and infantry training in Meaford, Ontario. He was posted to the RCR in late 2006.

**First Tour to Afghanistan**

[26] His first deployment to the Panjwai District in Afghanistan was for eight and a half months. He described it as filled with gun fights, improvised explosive device (IED) contacts, exposures, suicide bombers and numerous deaths within the company. He explained that they were also shot at by a friendly tank during that deployment. He personally responded to a double amputation of one of his friends on 20 March 2009. He testified that, on that day, two Canadians and an interpreter were killed. He has a dream that repeats over and over again where he feels that if he performs first aid for longer, the outcome would be different, but in the end, the injured person always dies.

**Second Tour of Afghanistan**

[27] When he returned from Afghanistan, there was a call for volunteers for the upcoming rotation, so he volunteered to be redeployed with 1 RCR.

[28] He described his second tour to Afghanistan as a headquarters deployment where he was a close protection operator. His role was to support the Chief of Staff with evacuation and support plans. He described the second tour as being heavy on finding unexploded IEDs, etc. The types of explosions he experienced were such that they would have to detonate them in place in order to permit their travels.

[29] He was then redeployed to 1 RCR Battle Group, and it is after this he was posted to 3 RCR where he developed a specialty in mountain operations.

[30] Sergeant Meeks was later diagnosed with post-traumatic stress disorder (PTSD) as a result of his experiences in Afghanistan. He described how these experiences led to him developing a normalized practice of hyper vigilance in everything he does. He explained that, when you are in combat, you always look for signs of IEDs, bombs,

weapons, ammunition and medical supplies, etc., and that this practice has since dominated all aspects of his civilian life.

### **North Atlantic Treaty Organization – Operation (Op) REASSURANCE**

[31] He next deployed with the reconnaissance platoon and snipers on Op REASSURANCE. He served as the subject matter expert for fast roping which involved roping out of the helicopters, jumping into the Baltic Sea and then laddering back up into the helicopter. He described this deployment as one of the highlights of his career.

### ***Incidents before the Court***

[32] With respect to the incidents before the Court, Sergeant Meeks stated that his memory of the early morning in question is very clear up to a specific point. He admitted that he has experienced a slight change of memory since the incidents, but the only change is with respect to specific and exact details on precise words.

[33] Sergeant Meeks was the Platoon Warrant Officer of 7 Platoon and part of the rear party and the non-jumpers who were to join their fellow soldiers in Bulgaria the next day. Earlier that day, they conducted rehearsals on how they would flow into Bulgaria and join the rest of their company. Once they had completed their dry rehearsal and he had given out the stores needed, they were given the evening off, so they decided to go out for dinner.

[34] They departed the base around 1700 hours and had dinner at a restaurant. He consumed a meal of perogies and schnitzel. He noticed members of their platoon inside the restaurant bar, so he thought it was a good opportunity to buy them each a shot of Jägermeister to celebrate being in Germany and to thank them for their work.

[35] At the restaurant, he drank a flight of five individual German stouts and then had one or two pints out of the big tube as well as a shot of Jägermeister. From the restaurant, he went to a nightclub with Captains Simmons and Korajilija and they separated themselves from the remainder of the group. They sat on the other side of the bar discussing how best to prepare themselves for the upcoming exercise. He described their platoon as being few on numbers but having heavy weapons. He said they engaged in mostly shop talk.

[36] He bounced between the two captains for conversation that night and he believes at one point he bought a round for them. The night was relaxed and he was not planning to get very drunk given his role as the Platoon Warrant Officer for a live-fire exercise that was expected to unfold the next day.

[37] At the nightclub, he purchased about four Jack Daniels and Coke (singles) and he does not recall having/purchasing shots. He explained to the Court that, at that time,

he had a high tolerance of alcohol because, normally, he was an extremely heavy drinker. He explained that he could easily consume ten double Jack Daniels and Coke a night as well as between twelve and twenty-four beer. He explained that his pattern of drinking increased and got worse starting at the time of his return from his first deployment to Afghanistan. He has not consumed any alcohol since this incident and has successfully completed an alcohol rehabilitation program.

[38] He described how the two captains received the information regarding the communications lockdown. He believes that they both got a call, but he was not sure who got it first, recalling that they both looked at their respective phones at the same time. He said that he went to inform the soldiers at the other side of the nightclub that they all needed to return to the base. He told the Court that half the soldiers exited in a timely manner but the other half remained in the nightclub. He explained that both he and Captain Simmons then went over to explain to them the severity of the situation.

[39] He recalls Private Melvin trying to go back into the bar. He does not remember arguing with Private Melvin, but explained that he remembers being with Captain Simmons when he told Private Melvin to leave the nightclub.

[40] Having sustained a broken back on a parachute jump, Sergeant Meeks used himself as an example to highlight the seriousness of the situation to the soldiers. The bar had two stories and there was a flight of stairs down to the exit which then led to the outside and there was small gate. He recalls that the immediate area outside of the nightclub was dark with ambient light and the buildings were mostly modern buildings of two stories with a sidewalk. He testified that once they got down to the ground level that is where his memory starts to go fuzzy as he is not able to recall exact details. In terms of his own level of intoxication, he recalls feeling that he had a good “buzz on” and that was about it. After the communications lockdown was initiated, Sergeant Meeks heard something about Warrant Officer Oakley, who was his friend, and feared for his safety; however, the injured soldier was not Warrant Officer Oakley, but he was actually from Warrant Officer Oakley’s platoon. He told the Court that he has known Warrant Officer Oakley since 2012 and they were very close, having served together in the field. They had both just completed their warrant officers’ course together. He does not recall who told him this as his memory is very broken. He does remember some shouting but does not remember who was shouting.

[41] The next thing he remembers is the sun coming up and people in the city coming to work. He was not sure where he was but described the area as a busy intersection with structures over two stories. He was confused and disoriented, which he described as feeling different from being hung over. He got a hold of the company 2 IC who informed him that Warrant Officer Royce would come to pick him up. He had Warrant Officer Royce’s contact information and sent him a “geolocation” indicating where he was, and Warrant Officer Royce picked him up ten or fifteen minutes later.

[42] He described having a large bump on his head which he showed Warrant Officer Royce as they returned to the base. After parking their vehicle and walking to their accommodation, he noticed everyone that had been there the evening before huddled together. When he went inside, he remembers Warrant Officer Hatcher, the quartermaster asking to see his knuckles, which he thought was strange. Afterwards, he remembers having a conversation with Captain Simmons who explained to him what had taken place, leaving him in shock.

[43] He was informed that he would be sent home and that he had to see the Regimental Sergeant Major as soon as he got home. He was escorted back to Canadian Forces Base (CFB) Petawawa in Canada about a day or a day and a half later. He has attempted recollection or recalling his memory multiple times since the incident unfolded and there are maybe small things that he can recall, but the baseline of having no memory of the incidents before the court is always the same.

***Private Prupas***

[44] Private Prupas testified that:

- (a) he went to Kaiserslautern around 1700 or 1800 hours. with Privates Berthe, Gebeshuber, Melvin and Murdoch;
- (b) they started at the restaurant and then they went to a number of bars where they had drinks and eventually ended up at a nightclub;
- (c) they were told that there was a communications lockdown and that they had to go back to the base;
- (d) he believes that it was Sergeant Meeks who told him that they were to leave and return to base;
- (e) when Sergeant Meeks told him, Sergeant Meeks' demeanour was serious and there was a sense of urgency;
- (f) although they had been told to leave, they stayed because they were drunk and they were not taking the order to return to base seriously enough. They just did not get the sense of urgency;
- (g) next, Captain Simmons and Sergeant Meeks came back up into the nightclub and basically ordered them out;
- (h) although he cannot remember who gave them the order, he confirmed Sergeant Meeks was present;



- (i) after the second time they were told to leave, they went outside and they shuffled out to the front of the bar;
- (j) he described that the exit from the bar led outside onto the sidewalk then on to the street and there was a brick building on the other side;
- (k) they were “a gaggle” standing outside the nightclub;
- (l) Private Melvin went back up to the bar for a brief minute for his cell phone. After being cross-examined by defence counsel, he confirmed that it was actually cigarettes he had retrieved;
- (m) from what he recalls, when Private Melvin came back down from the bar, there was an altercation between Private Melvin and Sergeant Meeks;
- (n) Sergeant Meeks was upset with Private Melvin because Sergeant Meeks had told everyone to leave the bar, but Private Melvin went back in and then there was an argument about that;
- (o) he cannot recall what Sergeant Meeks said, but he described him as angry;
- (p) a shouting match ensued between Private Melvin and Sergeant Meeks which involved some pushing;
- (q) he does not recall exactly who engaged in the pushing, possibly both or maybe just one of them;
- (r) both he and Private Berthe tried to split up the argument but somehow Private Berthe got involved and became part of the altercation;
- (s) they tried to get Private Melvin and Sergeant Meeks away from each other; and
- (t) as they were trying to break up the argument, Sergeant Meeks grabbed Private Berthe by the shirt and held him against the wall.

***Private Prupas’s description of the assault on Private Meadows***

[45] Private Prupas provided evidence to the following effect:

- (a) it was after Private Berthe was held up against the wall that Private Meadows stepped in and tried to separate the two;

- (b) he was right there and could hear the interchange very well;
- (c) he said that Sergeant Meeks pushed Private Meadows away and they “squared up” on each other before Private Meadows fell to the ground. He remembers Private Meadows yelling something about his back;
- (d) he was not sure if Private Meadows got pushed or tripped to the ground, but he recalls seeing a shove by Sergeant Meeks;
- (e) Private Meadows got back up and looked like he was going to push Sergeant Meeks before getting thrown to the ground again by Sergeant Meeks;
- (f) while on the ground the second time, Private Meadows was yelling about his glasses being broken and then he got kicked by Sergeant Meeks while he was lying on the ground;
- (g) he described the kick as a regular kick and he only saw one kick;
- (h) when Sergeant Meeks kicked Private Meadows, Sergeant Meeks said something to the effect of “night night Nigger”
- (i) he thinks that Private Meadows got knocked out from the kick;
- (j) after the kick, Sergeant Meeks was pulled away and Private Meadows was tended to; and
- (k) he described Sergeant Meeks as being angry, inebriated and pissed off.

[46] Under cross-examination he confirmed:

- (a) that Private Melvin had returned for his cigarettes and not his cell phone;
- (b) it was after Private Melvin returned that he and Sergeant Meeks had their argument;
- (c) he remembers both Private Melvin and Sergeant Meeks being held back from fighting each other; and
- (d) after Private Meadows was first thrown to the ground, it was very possible he got up and chased Sergeant Meeks because Private Meadows was really pissed off when he was pushed to the ground.

*Private Berthe*

[47] Private Berthe testified as follows:

- (a) prior to the incident, Sergeant Meeks had been his chain of command so he interacted with him daily;
- (b) the evening before the incidents in question, he had gone out with his fellow soldiers, which included Privates Melvin, Gebeshuber and Prupas;
- (c) although it was not pre-planned, their group ended up at the same restaurant where Sergeant Meeks and his group were eating;
- (d) he spoke with Sergeant Meeks at the restaurant which was the first place they stopped to eat and Sergeant Meeks was “fine” at that time;
- (e) after frequenting a few places, they all ended up at the same nightclub as Sergeant Meeks and his group;
- (f) he cannot recall how much he personally drank that night;
- (g) he recalls the arguing and the fighting and noted that Sergeant Meeks and Private Melvin started fighting first;
- (h) he said voices were raised, but he could not hear what was actually being said, but that the tone was raised, vocal and affirmative;
- (i) he was approximately a couple of feet away;
- (j) in response to Sergeant Meeks and Private Melvin arguing, he got in between them so that they did not start fighting;
- (k) as a result of him separating them, they did not fight;
- (l) Private Melvin did not react to him getting in between them, but he said that Sergeant Meeks pushed him out of the way with his hands but told the Court he did not feel assaulted at all;
- (m) he stated that he felt like an obstacle and he did not feel like he was in danger;
- (n) he described how Sergeant Meeks put his hand on his shoulders and pushed him to the side as he tried to go towards Private Melvin;

- (o) he described that only light force was applied by Sergeant Meeks when he placed his hand on his shoulder;
- (p) after Sergeant Meeks moved him to the side, he explained that other people started showing up, which included Private Meadows. He explained that Private Meadows started getting “hyped up”, so he positioned himself in-between them;
- (q) Sergeant Meeks reacted in an aggressive manner;
- (r) he could accurately describe the outside as brick tiles, street lights, sidewalks, and Gothic architecture when they were on the street;
- (s) they decided it was best to leave the situation, so he, Private Melvin, Private Prupas and, he believes, Captain Simmons started to walk away to call a taxi but then they heard fighting and he next saw Private Meadows on the ground and Private Gebeshuber holding his head;
- (t) he observed Private Meadows to be breathing, but unconscious; and
- (u) the last two people who stayed behind with Private Meadows were Private Gebeshuber and Captain Simmons and the others returned to base.

[48] Under cross-examination, he confirmed that:

- (a) Private Melvin had forgotten his cigarettes and was going back into the bar for them;
- (b) Sergeant Meeks was upset about Private Melvin going back into the bar;
- (c) he admitted his memory is not as strong today;
- (d) he drank mostly beer and had one shot. He does not recall what shot or liquor he had as he did not purchase it;
- (e) with respect to the beer he drank, he had a tall glass, from what he recalls, but he also recalls sharing beer from the huge tube which he indicated would be in addition to the tall glass; and
- (f) during the argument between Sergeant Meeks and Private Melvin, there were a lot of people, meaning fellow soldiers, around.

*Captain Simmons*

[49] Captain Simmons testified that:

- (a) the original group that he went out with on the evening of 17 June 2022 included Warrant Officer Hatcher, Sergeant Meeks, Warrant Officer Royce and Captain Korajilja;
- (b) they had dinner at a restaurant where they drank beer, but he cannot recall how many beer he drank, but does recall they had a beer tower for the table at one point;
- (c) he does not recall “seeing Sergeant Meeks drinking”, but he also “does not remember him not drinking”;
- (d) they ended up at a nightclub at the end of the evening where a group of junior ranks also ended up;
- (e) while in the nightclub, there was nothing that stood out beyond the normal;
- (f) while at the nightclub, he received a call from the company 2 IC, telling them to return to base and that there was a communications lockdown;
- (g) he immediately started to round up everyone, telling them that they had to return to the base;
- (h) he told Sergeant Meeks directly that there was a communications lockdown and they had to return to base;
- (i) he was trying to organize taxis to get the group home when an altercation started to brew outside the bar;
- (j) he recalled Sergeant Meeks explaining to the junior ranks what a communications lockdown was and the implications of that being enacted. Sergeant Meeks was impressing upon them the seriousness of the situation and that they could have a soldier on the parachute drop zone with a broken back;
- (k) he was not sure what transpired later, just knows that that situation turned into raised voices and then pushing and shoving;
- (l) with respect to raised voices, he said he observed Privates Meadows, Melvin and Berthe all yelling at Sergeant Meeks;

- (m) he did not hear Sergeant Meeks say anything specific at that time;
- (n) he described Sergeant Meeks' demeanour outside as agitated and aggressive and not the same demeanour he had when leaving the bar;
- (o) with respect to the pushing and shoving, he was not sure if Private Meadows pushed Sergeant Meeks but he saw Sergeant Meeks push Private Meadows and he illustrated it as a two-handed push out from his chest forward;
- (p) he described the push from Sergeant Meeks as hard enough that Private Meadows had to step back to maintain his balance;
- (q) he then saw Sergeant Meeks punch Private Meadows;
- (r) he described the punch by Sergeant Meeks as being with a closed fist, a single punch which hit Private Meadows on the left hand side of his face;
- (s) Private Meadows appeared to be knocked out when he fell to the ground and then Meeks soccer-kicked him in the face when Private Meadows was still on the ground;
- (t) he stated that Private Meadows did not respond to the soccer kick;
- (u) after Sergeant Meeks kicked him, both Captain Korajilja and he pulled Sergeant Meeks away, and as they were doing that, Sergeant Meeks appeared to drop his heel on Private Meadows head;
- (v) he said it was very difficult for him to say how hard Sergeant Meeks kicked Private Meadows;
- (w) he explained that as he and Captain Korajilja were pulling Sergeant Meeks back, the three of them fell over and then he convinced Sergeant Meeks to walk with him around the corner and he talked to him, trying to calm him down. While he was there with Sergeant Meeks, Captain Korajilja was trying to assess the condition of Private Meadows;
- (x) while around the corner, he described Sergeant Meeks as visibly angry, clenching his fists and not really looking at him. He further described:
  - i. he was in disbelief at that point and asked Sergeant Meeks, "Why did you do that?";

- ii. in trying to defuse the situation, he kept reminding Sergeant Meeks that he has a daughter and that what he just did would have consequences;
- iii. Sergeant Meeks responded to him with, "That's what I do";
- iv. he understood "That's what I do" in the context of Sergeant Meeks just coming off a fight where he knocked the other person out, and that is what he does;
- v. he did not recall any additional specific words that Sergeant Meeks said;
- vi. he described Sergeant Meeks as hearing him, but not listening and did not appear to understand what Captain Simmons was saying;
- vii. Sergeant Meeks was not looking at him, he was looking to his left and to his right and grunting with an adrenalin rush and not focussed on what he was telling him;
- viii. the police arrived shortly thereafter, which included the American military police as well as the German city police and they tried to figure out what happened;
- ix. he believes that it was the residents living in the surrounding buildings who called the police as they were out on their balconies trying to figure out what was going on;
- x. he rode in the ambulance with Private Meadows. Private Meadows had a neck brace on and his face was very swollen. In his assessment, Private Meadows was unconscious;
- xi. once they arrived at the hospital, they could not get a room so he waited with Private Meadows in the hallway and a doctor came out to talk to him and showed him the X-ray or imagery of Private Meadows' head;
- xii. the first doctor spoke good English and explained things to him, but after she left, Private Meadows was still not conscious and the relief doctor did not speak English so they did not get any further updates;

- xiii. his understanding of the X-ray was that Private Meadows had a fracture above his ear, a skull fracture and a fracture in the bone under the eye and nose and, because of the injury, there was air getting to his brain, so they were concerned about an infection and had given him antibiotics;
- xiv. he stayed at the hospital until late the following morning and afternoon when Captain Korajilja came to relieve him; and
- xv. Private Meadows regained consciousness after Captain Korajilja arrived, but while Captain Simmons was still there.

***Corporal Gebeshuber***

[50] Corporal Gebeshuber's testimony was as follows:

- (a) while leaving the bar, he heard raised voices on the street, but did not recognize the voices, other than that they were coming from their group, being Privates Meadows, Berthe, Melvin and Sergeant Meeks;
- (b) he originally ignored the raised voices as there was nothing happening and he was more worried about one of his friends possibly having died;
- (c) at first he saw some shoving and fighting between Private Berthe and Sergeant Meeks and it all happened so quickly;
- (d) he was not sure how Private Meadows got mixed in, but he thought maybe Private Melvin was trying to break it up and then Private Meadows was on the ground;
- (e) he went to the scene and tried to make sure that Private Meadows was okay, as Sergeant Meeks had already been separated from the group;
- (f) he could not describe how Private Meadows ended up on the ground;
- (g) he observed Private Meadows as being either unconscious or close to unconscious and that his face was scratched up and he was not very responsive;
- (h) Private Meadows was lying on the street against the curb so he put his hand under Private Meadows' head and, at that time, he noticed scratches on Private Meadows;



- (i) there was blood on Private Meadows' face, but he did not notice any blood on his own hands from holding the back of Private Meadows' head;
- (j) he checked and confirmed that Private Meadows was breathing;
- (k) he was not able to talk to Private Meadows nor could Private Meadows respond;
- (l) the police and paramedics arrived almost right away and he let the professionals deal with it at that point;
- (m) he was present when they loaded Private Meadows into the ambulance and Captain Simmons went with him to the hospital;
- (n) Private Meadows was lying on the side of the street closer to the bar and Sergeant Meeks was on the other side;
- (o) he did not notice anything out of the ordinary with Sergeant Meeks at that time; and
- (p) he described Private Melvin as pretty drunk, but said he was still able to walk and talk.

***Captain Korajlija***

[51] Captain Korajlija testified that:

- (a) they were all in the nightclub when they received a message from their company 2 IC telling them to return to the base and that there was an immediate communications lockdown;
- (b) he was sitting with Captain Simmons when he got the message and Captain Simmons was the first person he told;
- (c) he told all the soldiers he could find that they had to return to base immediately and he specifically remembers telling Sergeant Meeks;
- (d) while he was outside trying to arrange cabs to take the soldiers back to the base, there was a commotion and he went to investigate. He described the commotion as yelling and agitated voices. More specifically, he stated that everyone was yelling and he could not say who exactly;

- (e) he saw Sergeant Meeks hit Private Meadows in the face. He described it as a punch in the face with a closed fist that was strong enough to put Private Meadows on the ground. He stated that from what he remembers Private Meadows remained on the ground;
- (f) he stated that, shortly after the punch, both he and Captain Simmons jumped forward and grabbed Sergeant Meeks on either side and pulled him away from the scene;
- (g) from what he remembers, as he and Captain Simmons were pulling Sergeant Meeks away, Sergeant Meeks kicked Private Meadows in the face, but he cannot recall exactly where the kick landed. He stated it was the front or toe of Sergeant Meeks' shoe that hit Private Meadows in the face, but he was unable to describe how hard the kick was;
- (h) he described Private Meadows as appearing to be unconscious but he does not recall the condition of Private Meadows' face;
- (i) he did not recall Sergeant Meeks saying anything when he and Captain Simmons were pulling Sergeant Meeks away;
- (j) Captain Simmons then grabbed Sergeant Meeks and they walked about twenty to twenty-five metres from where Captain Korajlija was standing;
- (k) after Sergeant Meeks was removed from the scene, Private Meadows remained on the ground and the others were instructed to get into the taxi to return to the base; and
- (l) when asked to describe Sergeant Meeks' level of sobriety, he stated that he could not remember. While they were at dinner, he only recalled Sergeant Meeks drinking beer, but could not recall how big the beers were. While they were at the club, he did not see Sergeant Meeks drink anything and, if he did, drink, he did not see.

***Private Meadows***

[52] Private Meadows testified in examination-in-chief as follows:

- (a) that he went to dinner in town around 1700 hours with the group which included Sergeant Meeks and they walked around for a while and then stopped at a restaurant where they sat on the patio to eat and had a couple of beers;

- (b) he estimated that while at the restaurant, he drank approximately three or four beers. He described the size of those beers as normal but also stated that they had this “big showboating” big pitcher of beer;
- (c) he is not sure how many beers Sergeant Meeks consumed, but he would estimate about the same amount;
- (d) while at the restaurant, he described Sergeant Meeks as happy;
- (e) they then went to another bar which seemed like just a pub;
- (f) he did not drink at the pub, and he did not see Sergeant Meeks consume any beer either;
- (g) they then went to a final place which was a nightclub where he had a few beers and a shot. The beers were in bottles and the shot was a Jack Daniels which he purchased himself;
- (h) although there were many of his fellow soldiers at the nightclub, he was hanging out with Privates Prupas and Blackburn;
- (i) he saw Sergeant Meeks at the nightclub but he could not speak for his demeanour or how much he drank as he did not spend time with him;
- (j) he estimated that they were at that nightclub for about four or five hours;
- (k) Captain Korajilja advised them that something had happened during the jump in Bulgaria and that possibly someone died;
- (l) when he learned that they had to return to the base, he almost instantly went out onto the street to catch cabs to take them back to the base;
- (m) while he was on the street or on the curb trying to get a taxi , most of the soldiers were standing to the right about twenty-five feet away on the sidewalk;
- (n) he did not notice who all was there until something happened and he noticed a commotion to his right and saw Captain Korajilja and Captain Simmons on the back of Sergeant Meeks and described Sergeant Meeks as having a chokehold on Private Berthe;
- (o) he described Sergeant Meeks as angry at that time, but he could not hear what was being said;

- (p) he stated that he ran over to free Private Berthe, but once Private Berthe was freed, Private Meadows was then thrown to the ground by Sergeant Meeks;
- (q) he does not really know how this happened, he just remembers being thrown to the ground, perhaps by his shirt or his arm;
- (r) he got up and noticed that Sergeant Meeks and Private Melvin were advancing towards each other so he got in between the two of them;
- (s) he asked Sergeant Meeks what he was doing and he told Private Melvin to get back and that is the end of his memory;
- (t) he estimated that he was about an arm's length from each of them as he believed he had his arms out in their respective directions;
- (u) he described Sergeant Meeks as angry, violent and enraged;
- (v) he confirmed that he never heard Sergeant Meeks say anything;
- (w) but he also confirmed that Sergeant Meeks and Private Melvin appeared to understand each other perfectly;
- (x) he estimated it was less than five minutes from the time he freed Private Berthe to the end of his night;
- (y) he stated that Private Melvin was listening to him as he kept telling him to get back;
- (z) he spoke to Sergeant Meeks twice, asking him what he was doing once when he had Private Berthe in a headlock and then again when he was looking to fight Private Melvin; however, he could not tell if Sergeant Meeks understood as he was mostly looking at Private Melvin;
- (aa) when asked if Sergeant Meeks understood him, he indicated that Sergeant Meeks did not stop;
- (bb) the next thing he remembers is waking up in the hospital the next morning, at maybe 1100 hours.;
- (cc) he regularly worked with Sergeant Meeks and was able to identify him in Court;

- (dd) he is six feet tall and weighs about 155 or 160 pounds, but, in June 2019, he weighed about 150 or 155 pounds;
- (ee) when he woke up, he did not feel well, as the left side of his head suffered a triangular fracture;
- (ff) he described the pain as substantial and he could not see out of his left eye;
- (gg) he had a headache and loss of sensation along his cheek bone. It took three or four days for his eye to open. When his eye finally opened, he had double vision for approximately ten to twelve days;
- (hh) he still has numbness along where the fracture was, a symptom that has lasted just under three and a half years;
- (ii) when he would awake in the mornings, everything was blurry until later in the day;
- (jj) the German doctor told him that he had an air bubble between his skull and his brain and, at the time, he attributed his headaches to this;
- (kk) the Court was shown photos of him, entered as exhibits, which were taken by himself in the hospital after the fight;
- (ll) he said that they accurately represent what he looked like at the time;
- (mm) after he was discharged from the German hospital, he was transferred to the American medical facility at Ramstein Air Base where he spent time before he was medically evacuated back to Canada;
- (nn) he released from the CAF in August 2019 because his terms of service was complete;
- (oo) he had a positive interaction with Sergeant Meeks at dinner, but did not really see him for the rest of the night other than from across the room at the nightclub where Sergeant Meeks seemed fine; and
- (pp) he estimated that from the time they were told to go back to the base until the moment he lost his memory was approximately ten to fifteen minutes.

[53] Under cross-examination, Private Meadows testified that:

- (a) that he was intoxicated before the incident; and
- (b) he rejected the suggestion that he wanted to fight Sergeant Meeks after he was first knocked down and got back up.

***Master Corporal Melvin***

[54] Master Corporal Melvin identified Sergeant Meeks for the record and testified that:

- (a) prior to the incidents before the Court, as a private, Sergeant Meeks had been his section commander;
- (b) he had gone out with his fellow soldiers the evening before the incident, and although they did not go out with Sergeant Meeks, they did cross paths with him on two occasions:
  - i. Restaurant: They saw Sergeant Meeks at the restaurant. While at that restaurant, his group ate and drank beer. He described them sharing a big tube of beer and that the beer was going down “quite good”. While they were all at that restaurant, they were all pretty happy as they were in Germany eating schnitzel and Sergeant Meeks had bought them drinks. In cross-examination, he confirmed the drinks bought by Sergeant Meeks as Jägermeister shots. His group then left the restaurant and went bar-hopping, having a drink in each bar;
  - ii. Final Nightclub: They saw Sergeant Meeks again at the nightclub which he also described as a strip club;
- (c) it was at the final nightclub where Sergeant Meeks advised him that they were on a communications lockdown and had to get back to base and that someone had been injured from the jump;
- (d) he described the tone of Sergeant Meeks as assertive and a little frantic;
- (e) he understood immediately what Sergeant Meeks was saying when advising him of the communications lockdown;
- (f) he did not see who Sergeant Meeks spoke to afterwards, but described himself as trying to corral the people he had entered the bar with. He felt it was his duty to pass the information along;

- (g) he next saw Sergeant Meeks when Sergeant Meeks grabbed him by his shirt, pushed him against the wall near the door and said, "Time to get the fuck out";
- (h) the tone of Sergeant Meeks' voice became more frantic and angry, but he could still understand what he was saying;
- (i) in response, he told Sergeant Meeks to "Back the fuck up" as they were "all getting out of there" or words to that effect. He put his hands up and Sergeant Meeks backed off and went off to grab the remainder of the group;
- (j) he was still inside the bar at that time trying to gather the last member, who he believed was Private Berthe;
- (k) he then saw Sergeant Meeks again when he was standing by the door trying to ensure that members of his group were exiting the bar;
- (l) after he made sure that Private Berthe was coming, they exited the bar;
- (m) he later saw Sergeant Meeks pushing Private Berthe. He described that it occurred along a narrow alleyway and he saw Private Berthe fall to his buttocks;
- (n) when he saw Sergeant Meeks push Private Berthe to the ground with both hands in the chest, Master Corporal Melvin immediately reacted;
- (o) he stated that he was afraid that Sergeant Meeks might hit Private Berthe so Master Corporal Melvin pushed the sergeant off to the side and that is when he told Sergeant Meeks to pick on someone else;
- (p) in response, he said Sergeant Meeks wanted to fight and that he was not able to determine if Sergeant Meeks understood what he (Master Corporal Melvin) was saying to Sergeant Meeks;
- (q) he described what followed as a yelling match, but he cannot recall what Sergeant Meeks said while on the sidewalk while they were waiting for taxis to take them back to the base;
- (r) although he could not recall the words Sergeant Meeks used, he understood the "messaging", which was that Sergeant Meeks intended to get combative with him;
- (s) next, they were only able to exchange words because people were holding the two of them back;

- (t) then Private Meadows came up and told them that the taxis were about to arrive and to cool down and then Sergeant Meeks either pushed or struck Private Meadows as he then saw Private Meadows fall to the ground with Sergeant Meeks standing just above him;
- (u) when Private Meadows fell to the ground face first, he did not hear anything being said;
- (v) he then saw Sergeant Meeks about two and a half metres away being hauled back by fellow members;
- (w) after Private Meadows was on the ground, he witnessed Sergeant Meeks stomp on Private Meadows on and above his shoulders, including in the head area. He stated that Sergeant Meeks: used his right leg; stomped three times as though he was putting out a fire; was wearing a brown loafer; and he stomped on the side of Private Meadows head, who was on the ground;
- (x) after the stomps, his fellow soldiers pulled Sergeant Meeks further away onto the road and the taxis were arriving and they threw him into the back of a taxi;
- (y) he stated that Private Meadows did not react to the stomps;
- (z) after Sergeant Meeks stomped on Private Meadows, there were people holding Sergeant Meeks back and they re-established a firm grip on him and tried to pull him away;

[55] Under cross-examination, Master Corporal Melvin made the following admissions:

- (a) in response to Sergeant Meeks telling him that it was “time to get the fuck out”, he also pushed Sergeant Meeks;
- (b) he was pretty sure there were three foot stomps, but admitted that it could have been more or it could have been less;
- (c) he himself was quite intoxicated;
- (d) he was trying to fight with Sergeant Meeks;
- (e) he recalled that he had forgotten his cigarettes and was going back for them when Sergeant Meeks grabbed his shirt, which was the first sign of any animosity between them that night;



- (f) retrieving his cigarettes was en route to getting Private Berthe;
- (g) when he saw Sergeant Meeks going after Private Berthe, he wanted to fight Sergeant Meeks; and
- (h) Sergeant Meeks knew that he wanted to fight him.

### **Presumption of innocence**

[56] In light of the uniqueness of the facts before the Court, it is important to emphasize the presumption of innocence to which Sergeant Meeks is entitled. The presumption of innocence remains throughout the court martial until such time as the prosecution has, on the evidence put before the Court, satisfied the Court beyond a reasonable doubt that the accused is guilty of the charges before it.

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

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

[58] In essence, this means that even if I believe that Sergeant Meeks is probably guilty or likely guilty, that is not sufficient. If the prosecution fails to satisfy me of his guilt beyond a reasonable doubt, I must give him the benefit of the doubt and acquit him.

[59] On the other hand, it is virtually impossible to prove anything to an absolute certainty and the prosecution is not required to do so. Such a standard of proof is impossibly high. Therefore, in order to find Sergeant Meeks guilty of the charges before the Court, the onus is on the prosecution to prove something less than an absolute certainty, but more than probable guilt for the charges set out in the charge sheet (see *R. v. Starr*, 2000 SCC 40, [2000] 2 S.C.R. 144, paragraph 242).

### **Credibility of the witnesses**

[60] I noted that there was disparity in the testimony as to exactly what happened during the scuffle that led to the charges before the Court.

[61] Given that the events took place well over three years ago, it is not unusual that the evidence of the witnesses is inconsistent or even contradictory. Witnesses may have

different recollections of the events and the Court has to determine what evidence it finds credible and reliable.

[62] I noted that in Sergeant Meeks' testimony, he recalled arriving back at the Ramstein Air Base where he saw all the soldiers involved in the incidents early that morning, huddled together presumably discussing what had unfolded.

[63] Given the tight-knit nature of soldiers within a unit, a court martial must be particularly mindful and alert to unique evidentiary concerns. From the onset of the trial, I was alert to the risk of collusion in the testimony of the witnesses, whether intentional or unintentional.

[64] I am always attentive to the potential that the investigative authorities might have been blinded by tunnel vision in their investigation. Tunnel vision exists when authorities focus on only one suspect or cause and ignore or suppress evidence that is inconsistent with the suspect's guilt.

[65] In reviewing the evidence, I found it unlikely that any of the witnesses concocted evidence, but there were a few facts testified to that were unsupported by the whole of the evidence. The Court remained extremely vigilant and exercised heightened caution as to whether witnesses conflated what they saw with what they heard from their fellow soldiers.

[66] Consequently, I was particularly alert to the potential that the witnesses may have unconsciously coloured or tailored their individual description of the events based on what they heard from their fellow soldiers.

[67] With respect to the charges before the Court, the main prosecution witnesses included the complainants, Privates Berthe and Meadows as well as five additional witnesses who saw at least some part of the events unfold. It was noted that at the time of the events, they were all intoxicated. Their level of intoxication was an additional consideration in the Court's assessment of the reliability of some of the evidence and the Court needed to assess the evidence from all the witnesses in order to make a determination of what evidence as a whole should be believed.

[68] As mentioned earlier, few witnesses observed all the relevant events. As a result, I found that they testified to observing different parts of the scuffle depending on when they were personally paying attention or were actively engaged. Some witnesses were very clear in saying that they did not recall something, or they were not paying attention at various stages. Other witnesses were not as straightforward, and I found that there was a high probability that some witnesses recounted or described events that were either poorly recalled or were conflated with stories they heard. As an example, Master Corporal Melvin was adamant that after he saw Private Berthe thrown onto his buttocks, he reacted immediately and pushed Sergeant Meeks to ensure that he did not hit Private

Berthe any further. However, the whole of the evidence does not support this fact, but I did note that other witnesses described Private Meadows having been pushed and falling on the ground before getting back up. I also note that Private Meadows himself testified that he was pushed to the ground, got back up, and Private Melvin engaging Sergeant Meeks at that time. As they were all intoxicated, it became evident that some details of the assaults had been confused, causing the court to be extra diligent in determining what evidence was the most reliable.

[69] The demeanour of the witness while testifying is a factor which can be used in assessing credibility; that is, was the witness responsive to questions, straightforward in his or her answers or evasive, hesitant or argumentative?

[70] Generally, I found all the witnesses credible, and non-confrontational and they all did their very best to recount the events they witnessed. They were not argumentative and answered all the questions in a straightforward manner.

[71] Firstly, I noted that both Privates Berthe and Prupas have released from the CAF and are living far from the Petawawa area and their former peers. Private Berthe testified from where he is living and working in northern Quebec and Private Prupas testified from outside of the country. I found that they both testified very clearly and without hesitation with respect to the events they personally witnessed and they were both very clear in identifying when they did not observe something. They provided the court with important context and insight as to how the situation evolved and what unfolded. Based on their testimony, I also found that the two of them appeared to be best situated to observe the events that unfolded and since they are no longer serving with the units, their testimony appeared to be unbiased and very straightforward. Based on what they could recall, neither of them were hesitant to provide details. As I will explain in more detail, I found the incidents recounted in their versions of the events provided the Court with the most plausible description of what unfolded in the context of the whole of the evidence.

[72] Similarly, I found that Corporal Gebeshuber provided very credible evidence consistent with the evidence as a whole when he provided details with respect to those events he witnessed. He was honest and forthright as to when he started to pay attention and what he saw. As an example, he explained that he was not paying attention to what was unfolding with the initial arguing, etc., because he was more concerned with the fact that one of his fellow peers might have died. He did not try to speculate or attempt to fill in the gaps regarding what he did not see or could not recall. I noted that he testified that he first noticed the conflict between Private Berthe and Sergeant Meeks, which, based on when he started to pay attention to the scuffle, makes perfect sense.

[73] I found the testimony of both Captains Korajlija and Simmons to be both credible and reliable. Their respective testimonies provided important background as

well as confirmation as to how the scuffle ended and their role in it. They were both consistent and I found that they testified without bias or judgement of anyone involved.

[74] However, it does not follow that because there is a finding that a witness is credible, that his or her testimony is reliable. In fact, a witness may be completely sincere and speaking to the truth as the witness believes it to be; however, due to a number of reasons, including but not limited to the passage of time or memory, or a high level of intoxication, the actual accuracy of the witness's account may not be reliable. So, in effect, the testimony of a credible or an honest witness may nonetheless be unreliable (see *R. v. Clark*, 2012 CMAC 3 at paragraph 48 quoting *R. v. Morrissey*, [1995] O.J. No. 639, 97 CCC (3d) 193 (Ont CA), at page 205).

[75] In other words credibility is not an all or nothing proposition. A finding that a witness is credible does not require a trier of fact to accept all the witness's testimony without qualification. A court may accept or reject, some, none or all of the evidence of any witness who testifies in the proceedings.

[76] I had specific concerns regarding the reliability of the evidence of two witnesses which I explain below and will expand on throughout my analysis.

[77] In assessing the witnesses, I looked very closely as to whether the witness's testimony was consistent with itself and with the uncontradicted facts. Although I note that none of the charges are laid with respect to rank differences, and neither counsel made submissions on these facts, I found it necessary to rely upon my military experience to help me properly understand the dynamics of what unfolded.

[78] I found the reliability of Master Corporal Melvin's testimony to be the most problematic. I found much of his evidence to be inconsistent with itself and the evidence as a whole arising from the testimony of the other witnesses. It was clear that he was very intoxicated on the night in question and based on the consistency of the whole of the evidence, it was his decision to go back into the bar, in search of his cigarettes which appears to have been the catalyst to the conflict that later erupted. Given that much of the prosecution's case relied heavily on Master Corporal Melvin's evidence or specific facts that flowed from it, I was very diligent to examine the consistency of all his testimony whether it was relevant or not.

[79] I noted that under direct examination, Master Corporal Melvin did not even refer to his decision to retrieve his cigarettes as a trigger nor did he describe his involvement in the incident that led to the conflict. It was only after being cross-examined on this point that he somewhat admitted that his decision to return for his cigarettes was a point of contention. But even then, his description of the event changed and was inconsistent both with his evidence under direct examination as well as the evidence as a whole. I also found him to be particularly evasive in responding to questions that were important in validating critical facts of what transpired.

[80] The consistency of the evidence was that Sergeant Meeks became upset because the junior ranks were not clearing out as they had been first instructed to do. Under cross-examination, Sergeant Meeks admitted that the soldiers were not given an order the first time, but since they were not taking the direction to return to base seriously, they were given a clear order the second time. The evidence suggests he did this in the company of Captain Simmons. In fact, Sergeant Meeks specifically recalls being with Captain Simmons when they conveyed the order to Private Melvin to leave the nightclub.

[81] This is where I must rely upon my military experience to consider the rank difference in the context of the events that were unfolding. Sergeant Meeks, who was an experienced infantry non-commissioned officer (NCO) with three operational tours, where soldiers' lives were lost, understood the shift between enjoying the social evening out to transitioning immediately to the more operational response demanded by the situation given the accident on the airfield in Bulgaria. He had just completed his Intermediate Leadership Qualification (warrant officer qualification) and he was the Platoon Warrant Officer. The others involved were privates with no operational experience. I also noted that Master Corporal Melvin testified to being in Sergeant Meeks' section for at least six months prior to the incidents before the Court so it is highly likely that they had some prior history between the two of them whether it was too much familiarity or alternatively some hostility. Nonetheless, their rank differential is something that cannot be lost in the context of the facts and which needs to be highlighted in order to understand how the conflict elevated.

[82] The facts are unrefuted that Sergeant Meeks was trying to corral a group of very drunk privates, and who were not taking the urgency of the situation seriously enough. As Captain Simmons testified, while he was outside trying to coordinate taxis, he personally witnessed Sergeant Meeks talking to the junior ranks, stressing the importance of the situation before them, the meaning of the communications lockdown and the order to return to base. Sergeant Meeks explained to the junior ranks how someone from their unit was likely seriously injured with at least a broken back.

[83] The evidence confirms that Sergeant Meeks naturally assumed his role as the senior NCO on the ground and he was making every effort to enforce compliance with the order to return to base. In combat and on operations, orders given are expected to be followed. They are not discretionary and there is not to be any discussion. A failure to comply could lead to very serious consequences. It is for this reason, there are particular offences set out in the *NDA* to mitigate the consequences that flow from this type of situation. For example, there are service offences under the *NDA* for disobedience of a lawful command (section 83 of the *NDA*), insubordinate behaviour (section 85 of the *NDA*), striking or offering violence to a superior officer (section 84 of the *NDA*) which is complimented by the corresponding offence of abuse of subordinates (section 95 of the *NDA*). In this type of situation, rank matters.

[84] As Captain Simmons testified that when the troops were organizing themselves outside on the sidewalk, the situation seemed to be under control. So the court first asked itself, what changed?

[85] Captain Simmons described the evolving situation outdoors as follows:

“Q. Okay. So you’re outside the bar, what happens next? A. I was trying to organize taxis to get the group of us home when there was, sort of, an altercation started brewing outside the bar.

Q. Okay. You said an altercation brewing. What do you mean by that?  
A. Well, It didn’t start violent right away. I think I recall—or I do recall Sergeant Meeks trying to impress upon the junior rank soldiers what—like, what a comms lockdown was and the implications of that being enacted. And I don’t remember what exactly transpired, but it turned into raised voices and then pushing and shoving.

Q. Who had raised voices? A. Well, I don’t know if—you know, I can’t point out individual people. Certainly Private Meadows, Private Melvin, Private Berthe, I remember, were all sort of yelling at Sergeant Meeks and Sergeant Meeks was yelling back at them generally, but I can’t recall specifically who he was yelling at. But I do remember people yelling because we were making a lot of noise and people from the balconies of the buildings around the street were yelling at us to stop yelling.”

[86] As Privates Berthe and Prupas testified, it was Private Melvin’s decision to return to the bar to get his cigarettes that led to the altercation between Private Melvin and Sergeant Meeks. In the relevant timeline, I note that being outside on the sidewalk was the last thing that Sergeant Meeks remembers. He does not remember the arguing that ensued and the evidence suggests that it was after this point that the shouting and pushing began.

[87] Private Prupas testified as follows:

“Q. You said Melvin went back up to the bar. Can you describe that further, please? A. So I’m just remembering him coming back down, saying that he had to run back up because he left his cell phone in the bar. I just remember speaking to him as he was coming back down.

Q. Okay. So you are all outside on the sidewalk. What happened while you were out there? A. From what I remember there was a—when Melvin came back down, there was an altercation between him and Sergeant Meeks, maybe others. I don’t remember. But—and Sergeant Meeks.

Q. Okay. What do you mean by “altercation”? A. What I mean is Sergeant Meeks was upset with Melvin because he told—he ordered everybody to leave the bar, but Melvin went back up to get his phone. So there was an argument about that.

Q. What did Sergeant Meeks say? A. I can’t say word for word, but—I don’t remember exactly. Something like, this is—I don’t remember exactly.

Q. During this exchange, what was Sergeant Meeks’ demeanour?  
A. Angry.

Q. So what happened next? A. So I believe a shouting match ensued and maybe some pushing started as well.

Q. Okay. When you say shoving match, who was involved in that?  
A. Sergeant Meeks and Melvin.”

[88] Based on the rank difference, including the differences in their operational backgrounds and the sudden operational urgency of the situation that presented itself, it is understandable why Sergeant Meeks would have confronted Private Melvin. The Court also learned of Sergeant Meeks’ tendency towards hyper-vigilance in the performance of his duties. After returning from his second tour in Afghanistan, Sergeant Meeks admitted that his anger would be triggered when soldiers did not take seriously enough operational matters that affect their safety. Given the fact that a soldier’s life was at stake, it explains why Sergeant Meeks became very angry with Private Melvin.

[89] However, Master Corporal Melvin’s description of what unfolded was different and during his direct examination, he did not refer to any conflict with Sergeant Meeks regarding the cigarettes. Rather, he told the court that Sergeant Meeks got upset with him, grabbed his shirt, telling him it was “time to get the fuck out” an incident which no other witness observed. His testimony seemed to suggest that this was unprovoked as he was simply waiting for his peers to leave. Based on his cross-examination and the testimony of the other witnesses who were there, this was not the case. Under cross-examination, when asked whether someone had forgotten their cigarettes, he admitted that that was what the shirt grabbing incident related to. He testified as follows:

“Q. You don’t recall anyone indicating he had forgot their cigarettes and wanting to go back in? A. That was not in the bar—that was not when we left the bar. We were still very much inside the bar when that happened.

Q. Okay. And what . . . A. We were talking about the physical bar itself, where you receive your drinks.

Q. Okay. And so tell us about that cigarette incident? A. That is the incident that led to Sergeant Meeks grabbing my shirt, I am pretty sure.

Q. And that's really the first animosity that was developing between you and Sergeant Meeks on that evening, correct? A. The whole night. Yes, sir.

Q. Okay. And earlier in your testimony in chief, you told this court that he got mad at you, because you weren't leaving, but you were trying to corral some of the people you had come with. That was your evidence a little while ago, correct? A. Correct.

Q. But part of what you were going back for was to get your cigarettes as well, because you had forgotten them someplace? A. Correct.

Q. Okay. So why didn't you tell the court that when you said what it was that you were going in an argument with Sergeant Meeks about? Were you trying to hide that fact? A. Negative, no.

Q. Well, I put to you that it's not following the direction to leave right away is more acceptable if you were going in to get some drunk private that hadn't been leaving yet as opposed to if you were going backwards to get your cigarettes that you had forgotten? A. Well, on the way to the bar, or, sorry—on the way to my cigarettes was the way to the drunk private, so I saw my cigarettes and I therefore remembered that I didn't grab my cigarettes.”

[90] Further, I noted that in his testimony, he said that he exited the nightclub with Private Berthe:

“Q. And after you started corralling them, where did you move to? A. By the door to, like, ensure that they were leaving and exiting the bar.

Q. Okay. And then where was it that Sergeant Meeks—where you saw Sergeant Meeks that second time? A. Where I was, standing by the door, ensuring that my—the people that I showed up with were exiting the bar.

Q. Okay. And did you then—did you—what happened after that? What happened after that? You saw Meeks go to your right. What happened after that? A. I made sure that Private Berthe was coming along and then I grabbed him and we proceeded to exit the bar.

...



Q. Who was last out? A. That was myself and Berthe. Oh, out of my crew or out of everybody?

Q. Out of your group? A. It was myself and Berthe.”

[91] Interestingly, the evidence of Master Corporal Melvin himself was that he only responded to Sergeant Meeks’ challenge with words to the effect of “Back the fuck up” and said he just put his hands up and that Sergeant Meeks simply left. He described his reaction to Sergeant Meeks as follows:

“Q. And how did you react when he grabbed you and pushed up against the wall? A. I believe I told him to—I think—I believe I told him to like back the fuck up. I think we are all getting out of here at the same time. Something along those lines.

Q. Yeah. A. And I—yeah.

Q. So do you react physically when he did that to you? A. Beside put my arms out like this, negative.

Q. All right. So then the next question is, how did Sergeant Meeks react to your reaction? What happened after that? A. I believe he just backed up and went off to grab the remainder of the people, I believe.”

[92] However, under cross-examination, Master Corporal Melvin described this incident differently, but this time he admitted to actually pushing Sergeant Meeks in response:

“Q. Now, you indicated earlier that at one point you put both your hands up in response to Sergeant Meeks. Was that the grabbing of your t-shirt collar? A. Correct.

Q. Okay. And did both of those hands come in contact with Sergeant Meeks? A. I believe I did push him in the chest there, sir.

Q. Okay. And how far back would he have moved as a result of you pushing him? A. Maybe a step.

Q. Okay. And at that stage though, he goes back a step from you pushing him, and then if I understand your evidence correctly, he left to do something else. He didn’t engage with you further. Is that correct? A. Correct.

Q. So after pushing him, there's no more contact; he didn't tell you to fuck off on the way out the door when going away or anything like that. He just left? A. As I remember it, yeah.

Q. And then once you were outside, you had a pretty strong desire to fight with him. Is that correct? A. Negative, no."

[93] Although I find it possible this type of verbal exchange occurred at some point, I have considerable doubt that it unfolded as described. I find that when Private Melvin returned for his cigarettes, after being ordered to leave the nightclub, he was challenged directly by Sergeant Meeks for his decision to disobey the order to exit the nightclub.

[94] Next, in my assessment of the reliability of Master Corporal Melvin's version of events, I considered where this challenge took place? I note that, in his testimony, Master Corporal Melvin told the Court that this grabbing happened inside the nightclub by the wall nearest to the door and would have occurred before they actually left, as they were still very much inside the bar.

[95] The evidence of the other witnesses suggests they were all standing outside together in a gaggle waiting for taxis when Private Melvin went back inside to retrieve his cigarettes. In fact, Sergeant Meeks testified that he specifically recalls Private Melvin trying to go back into the nightclub, but he has no memory as to what happened after that point. So clearly, he was outside at some point before attempting to go back in.

[96] I wondered whether the conflict started inside the nightclub and then continued outside; however, in light of Master Corporal Melvin's admission that this shirt incident inside the nightclub was related to his return to retrieve his cigarettes, I then noted that he provided no explanation as to how this interaction inside the nightclub might have led to the conflict that the witnesses observed outside. The other witnesses clearly understood that the conflict outside between Sergeant Meeks and Private Melvin related to Private Melvin's decision to return for his cigarettes.

[97] Private Prupas explained that it was only after they were told to leave the second time that they eventually shuffled outside. He described how they were standing in a gaggle outside of the bar, when Private Melvin went back up to the bar to retrieve something. From what he recalls, it was when Private Melvin came back down from the nightclub that there was an altercation between him and Sergeant Meeks. He also told the court that he specifically remembers speaking with Private Melvin when he came back down. He said that a shouting match ensued between the two which involved some pushing. At that time, he said it was only Private Melvin and Sergeant Meeks involved.

[98] Private Berthe also testified that the fighting first began outside between Private Melvin and Sergeant Meeks as he explained to the court why he got involved and inserted himself between the two of them to calm them both down. However, Master

Corporal Melvin's testimony suggested that he only became engaged in the altercation to rescue Private Berthe from being beaten by the sergeant which simply does not make any sense and is completely inconsistent with the evidence of Privates Berthe and Prupas.

[99] If it is true that this incident unfolded inside the nightclub, then the evidence suggests that Sergeant Meeks would have been in the company of Captain Simmons as other witnesses told the court they were together in ordering the remaining soldiers to leave. Sergeant Meeks specifically remembers being with Captain Simmons when he told Private Melvin it was time to leave. Private Prupas also testified that Sergeant Meeks and Captain Simmons were together when they returned to order them all out. After they exited, Captain Simmons visually witnessed Sergeant Meeks standing outside talking to the privates and it was shortly thereafter that the talking escalated. If Sergeant Meeks had in fact been with Captain Simmons, I see no reason why Captain Simmons would not have told the court about the shirt incident inside the bar. I am fully aware that this finding by itself does not mean that there was not an incident that occurred inside the door to the nightclub. However, based on the whole of the evidence, and Master Corporal Melvin's testimony that the shirt incident was the same as the cigarette incident, I find that if this incident occurred, it unfolded outside.

[100] After assessing all the evidence, I find that the only plausible explanation is that this interaction occurred outside on the sidewalk and not in the nightclub itself as suggested by Master Corporal Melvin. Further, I find that Privates Prupas' and Berthe's description of events that the conflict first began between Private Melvin and Sergeant Meeks to be the most plausible.

[101] Having come to the conclusion that if this incident occurred, it happened outside on the sidewalk, I cannot accept Master Corporal Melvin's evidence that Sergeant Meeks grabbed him by the shirt and pushed him the way he described. I am troubled by the fact that there were no witnesses to this alleged grabbing when they were all outside together in a gaggle. Further, given the inconsistency in the way Master Corporal Melvin described this incident while admitting to pushing Sergeant Meeks who he says just walked away, defies all logic, keeping in mind that Master Corporal Melvin admitted in court that he also responded to Sergeant Meeks in a manner that I would describe as insubordinate using the words, "back the fuck up" followed by a push. The other witnesses testified that Sergeant Meeks was enraged and the evidence suggests to me that he certainly would not just walk away after being pushed by a private who was being insubordinate and had disobeyed a direct order.

[102] In his direct testimony, Master Corporal Melvin told the Court that after exiting with his back towards the bar and walking towards the road, he witnessed Private Berthe approximately 3.7 metres, or 12 feet, away being thrown onto his buttocks by Sergeant Meeks. However, I also noted that Master Corporal Melvin told the court that "I made sure that Private Berthe was coming along and then I grabbed him and we proceeded to exit the bar." He confirmed that he and Private Berthe were the last

soldiers out of the nightclub. So, I wondered, how was it that he was walking out with Private Berthe and then Private Berthe was somehow immediately assaulted by Sergeant Meeks and thrown on the ground? He told the court:

“Q. Okay. Did you see any other interactions with Sergeant Meeks and members of your group after you exited the bar? A. Correct. That is what I seen—that was when I witnessed Sergeant Meeks pushing on Berthe, Private Berthe.

Q. Okay. And what do you mean when you say pushing on Sergeant—on Private Berthe? A. It was a narrow, like, fenced in area, like, alleyway, I guess you would call it, and he was pushing Berthe, where I did see Private Berthe sort of, like, fall to his butt and that is when I had enough of that, and I believe I pushed Sergeant Meeks and told him that he should pick on somebody that is worth picking on or something along those lines.

Q. All right. And I apologize for getting too technical, but when you say that you saw Sergeant Meeks pushing Private Berthe, can you describe exactly—did you see any—was there any contact that you witnessed between Sergeant Meeks and Private Berthe? A. Yes. I seen Private Berthe on the ground, what appeared to be on his butt trying to get up, and the Sergeant, like, over top of him, not really allowing him to get up. I could not see if he was throwing punches or what, but . . . .

Q. Did you have an opportunity to witness what had happened before that may have caused Private Berthe to end up on the ground? A. Yes. I saw him push Private Berthe to the ground.”

[103] I found his responses to the questions posed to him by counsel as to why Private Berthe was pushed to be particularly evasive. More specifically he appeared either unable or unwilling to describe exactly what instigated the alleged push on Private Berthe by Sergeant Meeks. Despite being asked a few times what led to the push, he simply described the push itself, which I also noted was inconsistent with that described by Private Berthe himself.

[104] Master Corporal Melvin then told the court that he immediately reacted to defend Private Berthe by pushing Sergeant Meeks. In describing how he got involved in the altercation, Master Corporal Melvin told the court the following:

“Q. So as a result of that seeing the push then, how long was it in-between when you saw that push that you had words with Sergeant Meeks? A. Immediately after.

Q. All right. And where was it? Where were you positioned when you were talking to Sergeant Meeks then? A. My back towards the bar; I was still heading my—making my way out to the road and . . . "

[105] However, no other witness saw Private Berthe being thrown onto his buttocks and Private Berthe himself was clear in his testimony that the fight started first between Private Melvin and Sergeant Meeks. Private Berthe's testimony was as follows:

"Q. All right. So you said "last". How about at first? Who did you remember first arguing that you saw? A. Meeks and Melvin.

Q. All right. And what is it that you heard or saw that gave you the impression they were arguing? A. Can you repeat the question?

Q. Sure. What is it that you heard or saw that gave you the impression that they were arguing? A. Voices were raised.

Q. All right. And whose voices did you hear that were raised? A. Both Melvin and Meeks."

[106] After originally denying that he had a desire to fight Sergeant Meeks, Master Corporal Melvin later confirmed under cross-examination that he did want to fight Sergeant Meeks. He stated:

"Q. And at the time that this was happening you were being held back and physically trying to get out of the hold so you could go and fight with Sergeant Meeks, correct? A. Correct.

....

Q. After you physically leave the bar and you're outside, were your emotions such that you could describe them as "seeing red"? Is that how mad you were? A. After I saw him—what appears to be the sergeant beating up on Private Berthe, yes, I did want to fight the sergeant.

Q. Okay. And the only thing that was stopping you from fighting the sergeant was your peers were holding you back? A. Correct.

Q. And from how close you were to Sergeant Meres (phonetic), it would be—I'd suggest to you, he knew you wanted to fight him, correct? A. Correct."

[107] I note that Private Meadows testified that Sergeant Meeks had Private Berthe in a headlock, which also does not make any sense given the evidence of the other witnesses. Private Meadows testified that he "saw Captain Korajlija and Captain

Simmons on the back of Sergeant Meeks and I saw Private Berthe in a chokehold.” He described getting involved to free Private Berthe from the headlock, but no other evidence suggests that a headlock was used by anyone at any time.

[108] I note that the physical mechanics of a headlock cannot be confused with being pushed onto one’s buttocks so the testimony of Private Meadows cannot even be reconciled with that of Private Melvin unless Private Berthe had been repeatedly manhandled by Sergeant Meeks. Further, although the testimony of Private Meadows suggested that the two captains were on the back of Sergeant Meeks, they both testified they did not get directly engaged until Private Meadows had been hit. However, I note that these events allegedly occurred within minutes of Private Meadows being hit and losing his memory.

[109] The evidence before the court confirmed that Private Berthe was very quick to respond when he saw things unfolding in a bad way and he courageously and intentionally inserted himself into the conflict, in an effort to defuse the situation. His testimony gave me confidence that he was not one to be pushed around, so I have no doubt that if Private Berthe had been manhandled as described by Master Corporal Melvin and Private Meadows, that Private Berthe would have said so. He did not and, in fact, he went so far as to say that he did not feel assaulted at all.

[110] Many factors influence the Court’s assessment of the credibility of the testimony of a witness. For example, a court will assess a witness’s opportunity to observe events, as well as a witness’s reasons to remember. Was there something specific that helped the witness remember the details of the event that he or she described? Were the events noteworthy, unusual and striking or relatively unimportant and, therefore, understandably more difficult to recollect?

[111] In light of the testimony from the two captains and Private Berthe himself who I find would have the best reasons to remember having been personally involved, I do not find this evidence of Private Meadows on this point to be reliable.

[112] Another factor in determining credibility is the apparent capacity of the witness to remember. I was attentive to the fact that witnesses testified that Private Melvin was very intoxicated at the time of the incidents. Master Corporal Melvin also confirmed this in his testimony. I find that he was most likely too intoxicated to remember all the details of what unfolded and likely conflated what he witnessed with what he heard from others in order to fill in the gaps in his memory. Further, in light of the testimony of other witnesses that it was his decision to return for his cigarettes after he was ordered out of the nightclub that led to the conflict, I had to be particularly sensitive to the fact that Master Corporal Melvin had a personal interest in colouring his description of the events in a way that was most favourable to him. In fact, there is evidence to suggest that Private Melvin was in fact the aggressor for the actual physical conflict. Consequently, I found very little of his evidence to be reliable.

[113] I had similar evidentiary concerns with respect to Master Corporal Melvin's description of the aggravated assault charge before the Court. As an example, he told the court that:

“Q. Okay. All right. And what happened after that between you and Sergeant Meeks? A. At this point we were pretty much only able to exchange words because we had people that were holding us back.

Q. All right. And what did you see happened next? A. This is Cole Meadows came up to me and said, like, hey, like, the cars are about to—the ride is about to be here, just cool down, and then the Sergeant struck Meadows.”

[114] The facts provided in his version of the assault on Private Meadows are not supported by any other evidence and, in fact, they are inconsistent with the whole of the evidence. I note that some persons saw more than others because they were walking away, calling taxis or just not paying attention, but I note that Private Meadows' testimony is very consistent with Private Prupas' description of his interaction with Sergeant Meeks. Most importantly, their individual testimonies confirmed that the interaction began with pushing and shoving before the punch.

[115] Master Corporal Melvin testified that Private Meadows fell face-first onto the pavement, a fact that was not specifically observed by anyone else. Similarly, he described and demonstrated to the Court three alleged stomps given to Private Meadows by Sergeant Meeks which were entirely different than the descriptions provided by the two captains who were actively engaged in removing Sergeant Meeks from the scene. The evidence of the other witnesses was to the effect that there was one, maybe two kicks. I find that the testimony of the two captains was more reliable on this point given that they were holding Sergeant Meeks at the time and, at one point, the three of them fell over as they attempted to remove Sergeant Meeks from the situation.

### **Assessing conflicting versions**

[116] In assessing a case with competing versions of what happened, where credibility is a central issue and the accused has testified, the Supreme Court of Canada (SCC) has provided guidance to trial judges in *R. v. W.(D.)*, [1991] 1 SCR 742, commonly referred to as the *W.(D.)* test.

[117] Although the accused did testify, he has no memory of the specific events that unfolded with respect to the two charges remaining before the Court. Nevertheless, his testimony on what unfolded that evening provided the Court with helpful context with respect to the circumstances that led to the charges before the Court.

[118] In their submissions, the prosecution took the position that given Sergeant Meeks' lack of memory of the time period covering the critical incidents of the offences before the Court, his testimony does not provide the Court with sufficient evidence upon which to rely in assessing his credibility. He argued that the Court must view this case as a *W.(D.)* scenario akin to an accused offering no evidence.

[119] I agree that it is not appropriate to apply the *W.(D.)* test to Sergeant Meeks' version of the events, as he does not have a version because he cannot recall what happened given his memory lapse. However, since the *W.(D.)* test was first enunciated by the SCC, the test has also been found to apply not just to the testimony of an accused, but it also applies to Crown witnesses or in other evidence where a conflicting exculpatory account emerges (see *R. v. B.D.*, 2011 ONCA 51, Blair J.A. at paragraph 114). This is important given the fact that Sergeant Meeks has no memory. Although there were no other defence witnesses, the prosecution's witnesses such as Privates Berthe and Prupas offered evidence that directly favours the accused on some of the elements of the charges.

[120] A court martial is not an inquiry to determine what happened. We may never know. It serves only to determine whether the prosecution has proven the elements of the offence beyond a reasonable doubt. The *W.(D.)* framework aims to prevent a conviction where reasonable doubt exists.

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

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

[122] Further, in *Regina v. C.W.H.*, 7 WAC 205, [1991] BCWLD 2371, 68 CCC (3d) 146, 3 BCAC 205, 14 WCB (2d) 89, [1991] BCJ No 2753 (QL), Wood J.A. suggested an addition to the second part of the three-part test set out in *W.(D.)*. At paragraph 24 of *C.W.H.*, his Lordship said, "If, after a careful consideration of all of the evidence, you are unable to decide whom to believe, you must acquit."



[123] Of course, the above tests taken alone are oversimplifications of the analysis that a trial judge must undertake. With respect to the facts of this particular case, it is important that as the trial judge, I apply the rule to any exculpatory evidence regardless of the source. This means it applies to anything that indicates that an accused could be innocent or gives an accused favour in terms of the facts.

[124] What this means is that if there is evidence on vital issues of evidence in favour of Sergeant Meeks, then it could raise a reasonable doubt on what the prosecution is required to prove beyond a reasonable doubt to secure a conviction (see Paciocco, David M. “Doubt about Doubt: Coping with *R. v. W.(D.)* and Credibility Assessment” (2017), 22 *Can. Crim. L. Rev.* 31).

### **Legal framework**

[125] There are two different charges remaining before the Court. The first charge is that of aggravated assault contrary to section 268 of the *Criminal Code* and the second charge is that of common assault contrary to section 266 of the *Criminal Code*. The two charges relate to separate complainants.

[126] It is well accepted that there must be a common assault before there can be an aggravated assault (see *R. v. Melaragni*, [1992] O.J. No. 4718, 75 C.C.C. (3d) 546 at 549). Consequently, I will begin by laying out the law starting from the offence of assault.

### ***Assault – charge 2***

[127] The *Criminal Code* defines assault at section 265:

#### **Assault**

**265 (1)** A person commits an assault when

- (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
- (b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or
- (c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.

#### **Application**

(2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.

**Consent**

(3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of

- (a) the application of force to the complainant or to a person other than the complainant;
- (b) threats or fear of the application of force to the complainant or to a person other than the complainant;
- (c) fraud; or
- (d) the exercise of authority.

**Accused's belief as to consent**

(4) Where an accused alleges that he believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, to consider the presence or absence of reasonable grounds for that belief.

**Assault**

**266** Every one who commits an assault is guilty of

- (a) an indictable offence and is liable to imprisonment for a term not exceeding five years; or
- (b) an offence punishable on summary conviction.

[128] The elements of identity and the date and location of the two offences before the Court were not contested. Specifically, in order to prove the basic offence of assault, the prosecution must prove each of the following essential elements of the offence beyond a reasonable doubt:

- (a) that Sergeant Meeks applied force to the complainant;
- (b) that Sergeant Meeks intentionally applied the force;
- (c) that the complainant did not consent to the force that Sergeant Meeks applied; and
- (d) that Sergeant Meeks knew that the complainant did not consent to the force that Sergeant Meeks applied.

[129] In deciding whether a complainant consented to the physical contact, a trial judge must consider the complainant's state of mind. It is important to consider all the

circumstances surrounding Sergeant Meeks' physical contact with each of the complainants and decide whether the respective complainants consented to the contact. In doing so, I must take into account any words or gestures, whether by Sergeant Meeks or the respective complainant, and any other indication of the complainants' state of mind at the time.

[130] Further, just because the complainant submitted or did not resist does not mean that the complainant consented to what Sergeant Meeks did. Consent requires the complainant's voluntary agreement, without the influence of force, threats, fear, fraud or abuse of authority to let the physical contact occur.

### ***Aggravated Assault – First Charge***

[131] In order to prove an aggravated assault, as set out in the first charge, the prosecution must first prove that there was a common assault as laid out above, and then prove that in addition to the common assault, one of the consequences of aggravated assault was present (see *R. v. Cuerrier*, [1998] 2 S.C.R. 371).

[132] Section 268 of the *Criminal Code* sets out what constitutes an aggravated assault and the punishment for such an assault. Subsection 268 (1) includes the following applicable wording in describing the acts captured:

Every one commits an aggravated assault who wounds, maims, disfigures or endangers the life of the complainant.

[133] The plain meaning of the language used in subsection 268 (1) of the *Criminal Code* is that an aggravated assault is committed if there is an assault that either wounds, or maims, or disfigures, or endangers life.

[134] The definition provided therein establishes three categories of assault applicable to the facts of this court martial, being assault, assault causing bodily harm (at section 267 of the *Criminal Code*) and aggravated assault as set out at section 268 of the *Criminal Code*. The maximum penalty for simple assault is five years' imprisonment; for assault causing bodily harm the maximum punishment is ten years; and for aggravated assault the maximum punishment is fourteen years.

[135] In light of the particulars of the first charge, it is also helpful to review the other relevant statutory offence of assault causing bodily harm.

#### **Assault with a weapon or causing bodily harm**

**267** Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years or is guilty of an offence punishable on summary conviction who, in committing an assault,

- (a) carries, uses or threatens to use a weapon or an imitation thereof,

- (b) causes bodily harm to the complainant, or
- (c) chokes, suffocates or strangles the complainant.

**Aggravated assault**

**268 (1)** Every one commits an aggravated assault who wounds, maims, disfigures or endangers the life of the complainant.

**Punishment**

(2) Every one who commits an aggravated assault is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

**Excision**

(3) For greater certainty, in this section, “wounds” or “maims” includes to excise, infibulate or mutilate, in whole or in part, the labia majora, labia minora or clitoris of a person, except where

- (a) a surgical procedure is performed, by a person duly qualified by provincial law to practise medicine, for the benefit of the physical health of the person or for the purpose of that person having normal reproductive functions or normal sexual appearance or function; or
- (b) the person is at least eighteen years of age and there is no resulting bodily harm.

**Consent**

(4) For the purposes of this section and section 265, no consent to the excision, infibulation or mutilation, in whole or in part, of the labia majora, labia minora or clitoris of a person is valid, except in the cases described in paragraphs (3)(a) and (b)

[136] As discussed briefly, once an assault has been established, the offence of aggravated assault is defined by reference to the consequences of the assault, not the manner in which the assault was carried out. In response to an earlier application by the prosecution, I granted the prosecution’s request to amend the particulars of the first charge that originally only included the consequence of “wounds.” Upon granting their application, they added the additional consequences of “maims, disfigures or endangered the life of the complainant”, terms which capture the full range of consequences for an offence of aggravated assault.

[137] Even if the above avenues of consequences are not proven beyond a reasonable doubt, the Court must then consider whether the prosecution has proven the included offence of assault causing bodily harm.

[138] Further, in the event that the Court finds Sergeant Meeks committed the act constituting an aggravated assault, I must address whether or not Sergeant Meeks had the intention to commit the offence.

### **Mental element**

[139] The enduring definition of the *mens rea* or "intention" element that is required for aggravated assault in Canada flows from the decision of the SCC in *R. v. Godin*, [1994] 2 S.C.R. 484, in which Cory J. stated:

The *mens rea* required...is objective foresight of bodily harm. It is not necessary that there be an intent to wound or maim or disfigure. The section pertains to an assault that has the consequences of wounding, maiming or disfiguring.  
[Emphasis added.]

[140] The prosecution does not have to prove that a particular form or manifestation of bodily harm was reasonably foreseeable in order to secure a conviction. It may be general in nature (see paragraph 10 of *R. v. Dewey*, 1999 ABCA 5).

[141] It bears emphasizing that what must be objectively foreseeable is only "bodily harm", not wounding, maiming, disfigurement or endangerment of life. "Bodily harm" is one of the terms where there is a statutory definition set out in section 2 of the *Criminal Code*. In short, "bodily harm" is a relatively low standard defined as "any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature."

### **Legal analysis**

[142] Having instructed myself on the presumption of innocence, reasonable doubt, the onus on the prosecution to prove their case, the required standard of proof and the essential elements of the offences, I now turn to address the legal principles.

### ***Second Charge***

[143] Given that the second charge deals with the first alleged interaction in the timeline, and is a basic assault, I will address this charge first.

[144] It is important to keep in mind that the onus is on the prosecution to prove beyond a reasonable doubt that Private Berthe did not consent to the accused's application of force.

[145] Private Prupas testified that both he and Private Berthe tried to split up the argument between Private Melvin and Sergeant Meeks, but Private Prupas admitted that somehow Private Berthe got involved and became part of the altercation, describing how Sergeant Meeks grabbed Private Berthe by the shirt and held him against the wall.

[146] In assessing whether a complainant consented to the physical contact, a trial judge must consider the complainant's state of mind. In closely reviewing Private Berthe's testimony, I find that he intentionally placed himself between Private Melvin and Sergeant Meeks. He was clear in his testimony that he knew what he was doing and although his memory was not as precise on some details of that evening, he could accurately recall for the Court what unfolded during that moment in a clear and straightforward way. His testimony on this point was as follows:

“Q. And how did Sergeant Meeks react to you getting in-between them?  
A. I'd say it was probably just like an obstacle. I didn't feel like I was in any danger.

Q. Well, what—I'm sorry. Why would you say that? What did Sergeant Meeks do then in response to you getting in-between? A. Pretty much, just like pushed me out of the way.

Q. All right. And how did he push you out of the way? A. With his hands.

Q. All right. A. In a non—I didn't feel like I was aggress—I didn't feel assaulted or anything.

Q. Okay. Fair enough. I'm just trying to get a description of what happened. I wasn't there. So you said he used his hands. And how did he use his hands? A. He put his hand on my shoulders—

Q. Yeah. A. —and pushed me to the side, where he continued trying to go for Melvin, I think.”

[147] His description of the events are not just plausible, but I found that they also make the most sense of all the descriptions of what occurred.

[148] In this type of situation, persons who intentionally insert themselves within a scuffle, willingly expose themselves to the nature of the ongoing pushing and shoving, notwithstanding their motivation for entering the fray. By directly intervening, they consent to a potential push or shove, action of a similar nature to what was unfolding. Based on the state of mind communicated from Private Berthe in his testimony, I find that he did indeed consent to the nature of the touching by Sergeant Meeks. I looked next to the amount of force that was used.

[149] In describing the nature of force that Sergeant Meeks used on Private Berthe, Private Berthe described it as follows:

“Q. But after he put your hand on your shoulder, what did he do? Just put his hand on your shoulder, or did he apply any force? A. There was some light force applied.”

[150] Further, I find that the facts underlying the second charge are not such that the law would vitiate consent under the *Jobidon* principle (see *R. v. Jobidon*, [1991] 2 S.C.R. 714, 66 C.C.C. (3d) 454). The *Jobidon* principle requires serious bodily harm to be both intended and caused in order for consent to be vitiated. With respect to the second charge, there was no bodily harm caused nor is there sufficient evidence to convince me beyond a reasonable doubt that serious bodily harm was intended by Sergeant Meeks in pushing or moving Private Berthe out of the way.

[151] After an analysis of the facts and a review of the case law, I do not find that the force applied by Sergeant Meeks exceeded that to which Private Berthe consented to by intervening in the scuffle. Lightly pushing Private Berthe off to the side does not demonstrate an intention to cause serious bodily harm to Private Berthe nor did it result in serious bodily harm, so I do not find that his consent was vitiated.

[152] In applying the *W.(D.)* analysis, I believe the exculpatory account provided in the evidence of the Private Berthe, so obviously, I must acquit Sergeant Meeks on the second charge.

### **First Charge – Aggravated Assault**

[153] As set out within the legal framework above, the offence of aggravated assault is the most serious form of assault and is the first charge before the Court.

### ***Position of the prosecution***

[154] The prosecution argued that there is no dispute regarding the injuries sustained by Private (now Mr Cole Meadows). Further, they argued that there is sufficient evidence that:

- (a) Sergeant Meeks either pushed Private Meadows or moved him out of the way, either action which amounts to an application of force;
- (b) Sergeant Meeks punched Private Meadows in the face and Private Meadows fell to the ground; and
- (c) Sergeant Meeks then kicked Private Meadows in the face, while he was down, which is an application of force that Private Meadows did not consent to.

[155] The prosecution argued that Private Meadows' reaction to being pushed the first time was an angry one, as he yelled something to the effect that it aggravated his back injury which is evidence that he did not consent to the pushing and fighting.

[156] The only consent that was provided by Private Meadows was his willingness to defuse a confrontation between Sergeant Meeks and another.

[157] Witnesses state that after the punch, Private Meadows was unconscious and therefore was in no position to consent to any further force and any consent that might be deemed to exist would be vitiated by law.

***Position of the defence***

[158] With respect to the first charge, during the trial proper, the defence strategy for Sergeant Meeks did not raise self-defence as a defence. Defence's final submissions focussed on the consequences of the injuries suffered by Private Meadows. Defence counsel invited the Court to find that the severity of the injuries suffered by Private Meadows did not fall into the category of aggravated assault under section 268 of the *Criminal Code*, but rather the Court should find that they fall within the category of assault causing bodily harm under section 267 of the *Criminal Code*.

***Did an assault take place?***

[159] In assessing the offence of aggravated assault, I must first assure myself that an actual assault took place.

[160] Consistent with the evidence of Privates Berthe and Prupas, I found that the argument first began between Sergeant Meeks and Private Melvin.

[161] As discussed above, we know that Private Berthe was pushed to the side by Sergeant Meeks just before Private Meadows became involved. Private Berthe described what he saw next as follows:

“Q. All right. After Sergeant Meeks moved you to the side, what happened? A. What happened next? I think it was at this point other people started showing up and Meadows was one of them.

Q. Yeah. A. And Meadows started getting hyped up between Meeks as well, so I got in-between them.

Q. Okay. And how did Sergeant Meeks react to that? A. He's still the same, aggressive, I guess.

....



Q. Okay. What happened next? A. L-t Simmons it's probably best to like leave the situation.

Q. Okay. A. Because there were more people involved or something, so it was me, Melvin I think, and Prupas and Simmons walking away.

Q. Okay? A. And we were calling the taxi.

Q. All right. And then what happened? A. I think Gebeshuber was—I don't know if it was Gebeshuber, but we heard them starting fighting so we returned and when we returned I saw Meadows on the ground.

Q. Okay. Did you see . . . A. And . . .

Q. I didn't mean to interrupt, sorry. A. No. What's the question?

Q. I was going to ask when you said you saw Melvin—you saw Meadows on the ground? A. Yes.

Q. Did you see how he got to the ground? A. No.”

[162] Private Meadows testified that he got involved when he saw Private Berthe in a chokehold and Captains Korajlija and Simmons on the back of Sergeant Meeks, facts which no other witness testified to observing. He testified that he went over to free Private Berthe, which he said he did. As already discussed above, I did not find Private Meadows' evidence on how he became engaged with Sergeant Meeks to be reliable.

[163] Private Meadows further testified that Sergeant Meeks threw him to the ground, but that he got back up. He explained that he noticed Sergeant Meeks and Private Melvin advancing towards each other so he got in between them again and that was the last thing he remembers.

[164] Other witnesses described very differently how Private Meadows became involved, but their description of what occurred between Private Meadows and Sergeant Meeks was relatively consistent. As an example, Private Prupas testified that after Private Berthe was held up against the wall by Sergeant Meeks, Private Meadows stepped in and tried to intervene.

[165] Private Prupas described what happened as follows:

“Q. And what happened next? A. After that, Cole Meadows stepped in and tried to separate those two.

Q. And what happened next? A. Then there was a bit of a—I don't remember exactly, but I do remember Cole getting pushed away and then . . .

Q. Go ahead? A. Cole getting pushed away, Cole Meadows getting pushed away by Sergeant Meeks, and then Cole and Sergeant Meeks were squaring up on each other. They had words and then, yeah, and then I think Cole got pushed to the ground and I just remember him yelling something about his back, I guess a bad back.

Q. Okay. We'll pause there for a moment and come back. You said—you remember Cole getting pushed away. I just want to clarify who pushed him. A. Sergeant Meeks.

Q. Okay. So this is the first time Sergeant Meeks pushed him. Can you describe the push? A. I can't. I don't remember it that well.

Q. Okay. You said Cole Meadows got pushed to the ground. Can you describe that push? A. So I don't—I have to say, I don't remember exactly if he got pushed to the ground or if he got pushed and then he tripped and went to the ground, but I just remember a shove of some sort.

Q. And who did that? A. Sergeant Meeks.

Q. And what happened next? A. So Meadows was yelling about his back, had some words for Sergeant Meeks, and he got back up and then I think he was going to try to push Sergeant Meeks and fight Sergeant Meeks and then I think he got thrown to the ground again.

Q. Who threw him to the ground? A. Sergeant Meeks.

Q. What happened next? A. Cole was yelling on the ground about how his glasses broke, I think it was, and then he got kicked.

Q. Okay. Who kicked him? A. Sergeant Meeks.

Q. I want to unpack this little bit, please. How did Sergeant Meeks—or describe how Sergeant Meeks kicked him. A. Just a regular kick. I'm not sure how to describe the kick.

.....

Q. How many times did he kick? A. Just once.

Q. What did Cole Meadows do? A. While on the ground?

Q. When he was kicked, what happened? A. I think he got knocked out. I can't say I remember clearly though.

Q. Okay. So we have the kick. What happened next? A. So he got kicked and then he got pulled away and I think everybody tried to intervene at that point, if I remember right. And Cole was looked after, but the rest I don't remember.

Q. I think you said he got kicked. Who do you mean by that? A. What do I mean by Cole getting kicked?

Q. I just want to be clear on the "he"? A. Sorry. I didn't hear that last part.

Q. Sorry. You said he got kicked and then he got pulled away. So which "he"? A. Sergeant Meeks.

Q. Okay. Sorry. I just want to clarify with the connection. Sergeant Meeks got pulled away? A. . . ."

[166] Other witnesses testified to only observing Sergeant Meeks punch Private Meadows with a closed fist directly to the face which knocked Private Meadows out; however, I also noted that these same witnesses admitted to not paying attention to the earlier pushing and shoving.

[167] Captain Simmons testified that he is not sure if Private Meadows pushed Sergeant Meeks, but he saw Sergeant Meeks push Private Meadows and he illustrated it as a two-handed push out from his chest forward, describing it as hard enough that Private Meadows had to step back to maintain his balance. He then witnessed Sergeant Meeks punch Private Meadows with a closed fist, delivering a single punch which hit Private Meadows on the left hand side of his face and appeared to knock him out. He testified that when he fell to the ground, Sergeant Meeks soccer-kicked him into the face. He testified that Private Meadows did not respond to the soccer-kick, and he and Captain Korajilja pulled Sergeant Meeks away, and as they were doing that, he "kind of dropped his heel" on Private Meadows' head.

[168] If I summarize the evidence provided by the witnesses that favours Sergeant Meeks, I find that it is clear that Private Melvin wanted to fight Sergeant Meeks and was being held back by his peers. We also know from Captain Simmons that there were several soldiers yelling at Sergeant Meeks and after Private Berthe inserted himself to calm them down, he was moved out of the way. It appears that his removal was immediately followed by Private Meadows entering the fray, who was described as "all hyped up". The evidence suggests that Sergeant Meeks pushed or Private Meadows fell and the evidence suggests that is when Private Melvin broke free from those restraining

him. So, it appears that Sergeant Meeks was facing three privates, all drunk, yelling and pushing and who would have appeared to him as intent on fighting him. The evidence suggests that Private Meadows did fall to the ground, but he told the court that he got back up and Private Prupas stated that Private Meadows was going to try to push Sergeant Meeks, while at the same time, Private Meadows stated that Private Melvin was advancing on Sergeant Meeks. Sergeant Meeks then punched Private Meadows once in the face which caused Private Meadows to fall to the ground.

[169] I find, based on the most reliable evidence before the court, that Private Meadows' decision to intervene voluntarily exposed himself to similar conduct that was ongoing, which included some pushing and shoving. Given the way the conflict was arising and the circumstances of Private Melvin trying to fight with him, there is an argument in Sergeant Meeks' favour that the punch delivered by him was done in self-defence.

[170] It is helpful to draw a comparison with case law. In *R. v. Paice*, 2005 SCC 22, [2005] 1 S.C.R. 339, the accused and deceased consented to a fist fight, although the deceased was the initial aggressor. After the deceased pushed the accused once or twice, the accused struck the deceased hard in the jaw with his elbow. The deceased fell and hit the pavement. He did not cushion his fall, but rather appeared to be knocked out by the first blow. He died as a result of these head injuries. In that case, the majority held that pursuant to the *Jobidon* principle, the law requires serious bodily harm to be both intended and caused in order for consent to be vitiated.

[171] However, on the facts of the case at bar, the assault on Private Meadows did not end within the scope of the pushing and shoving. Private Prupas testified that while Private Meadows was on the ground the second time, he was yelling that his glasses were broken when Sergeant Meeks kicked him.

[172] As mentioned above, pursuant to the *Jobidon* principle, the law requires serious bodily harm to be both intended and caused in order for consent to be vitiated. Private Prupas only saw one kick but told the Court that, when Sergeant Meeks kicked Private Meadows, he also heard Sergeant Meeks say something to the effect of, "night night nigger." I note that the captains testified to observing two kicks, but it was not completely clear in their testimony whether the second kick landed on Private Meadows. It is important to note that Private Meadows is Caucasian and as a result, the use of the term is interpreted as communicating an intention to inflict serious bodily harm in some capacity.

[173] I find the kick, that was delivered after Private Meadows was on the ground, and the accompanying derogatory comment were sufficient to communicate an intention to inflict serious bodily harm and the injuries sustained by Private Meadows are classified as such. If there was any doubt, after the two captains pulled Sergeant Meeks away,

Sergeant Meeks' attempt to kick Private Meadows a second time whether or not he connected with Private Meadows reinforced his intent to inflict serious bodily harm.

***Ultimate issue on charge #1 – aggravated assault***

[174] After confirming that there was indeed an assault and based on the final submissions of counsel, the question left to be resolved is whether the multiple fractures, black eye and abrasions suffered by Private Meadows, which were caused by the assault by the accused constitute aggravated assault or whether they fall within the included offence of assault causing bodily harm.

[175] It is imperative that the injuries sustained by Private Meadows be assessed with respect to the offence for which Sergeant Meeks is charged. For example, given that the offence of aggravated assault is primarily distinguished from less serious assaults by virtue of its consequences, it is important to ensure that those consequences are more severe than bodily harm.

[176] The case law reinforces that the distinguishing element between the three ranges of assault is the gravity of the consequences that flow from the assault. Consequently, it is important to review the medical evidence to determine whether medical intervention was necessary to reduce, correct and heal the injuries suffered.

[177] Consequently, based on the evidence before the Court, I reviewed Private Meadows' injuries in the context of the common law.

***Nature of Private Meadows' injuries***

[178] Doctor Timothy Peppin who is a medical doctor currently working as a base surgeon for CFB Petawawa was qualified before the Court as a medical expert in order to explain the nature and severity of the injuries that Private Meadows suffered. He based his opinion on a review of Private Meadows' medical records.

[179] Doctor Peppin explained Private Meadows' injuries as follows:

“Q. And can you tell us what those injuries were, please? A. Yeah. For sure. So I'll probably speak in plain language, I'll point to my own face which may be helpful for people. So he had a non-displaced fracture of the temporal bone, which is part of the skull, kind of on the side of the head. “Displaced” just means, you know, something has shifted relative to another piece. So essentially it was broken but not badly with respect to the other piece. There was mention that there were lacerations and abrasions, so there were breaks to the skin. That's relevant because of the risk of infection and can give you some indication of the amount of energy that was imparted. So there were breaks for the skin; there was a break to

the temporal bone. The break migrated into the side and upper portion of the eye socket itself or the orbit itself. The zygomatic arch, which people think of as their cheekbone, that was broken, and the anterior aspect or the front bone that covers up the maxillary sinus underneath the cheekbone was also broken. You know, so you had a fairly extensive ring-like break around most of the cheek. I'm trying to think. He also had—he had a small, what's called an epidermal hematoma, so that just means you had some bleeding in a particular region. So there is two classic regions where people will bleed, one is between the skull and these linings of the skull. That tends to be a much higher pressure, a kind of more concerning pattern of bleeding. He didn't have that. He had a bleed kind of from the surface of the brain itself that did not separate the meninges or the lining of the brain. So there is enough injury to kind of tear blood vessels and cause the surface of the brain itself to bleed. He had some bleeding inside of the conjunctiva, or the lining of the left eye, and I believe he also had, you know, some pain but not a dislocation to his left—what's called the “TMJ” or temporal mandibular joint, the jaw, the jaw joint. He had some, you know, depressed level of consciousness that was not necessarily believed to be attributable to alcohol, although I believe alcohol was on board, and I think that that was the extent of the injuries that were sustained.”

[180] Doctor Peppin testified Private Meadows' injuries could have occurred from a single event or blow but it would have had to be “one impressive punch”. Doctor Peppin also hypothesized that the likely cause for these injuries was blunt force trauma, by way of a punch or kick.

[181] Based on other testimony before the Court, the following additional descriptions of Private Meadows' injuries were provided and were relatively uncontested:

- a. he was tended to by paramedics almost immediately after the assault while he was lying on the sidewalk. The paramedics noted that:
  - i. the left eye was severely swollen, with an abrasion above the eye; and
  - ii. Private Meadows reacted to being addressed and complained of pain around left temple;
- b. he was taken by ambulance to a German hospital where:
  - i. he was sent for consults with neurology, an ear, nose and throat (ENT) specialist, and ophthalmology which ruled out any requirement for surgical intervention; and

- ii. a brain scan was conducted at the hospital that revealed multiple fractures, recommending that the patient be observed;
- c. Private Meadows was medically evacuated back to Canada on 22 June 2019, four days after the incident;
- d. Private Meadows described the aftermath, including injuries, as follows:
  - i. he could not see out of his left eye;
  - ii. he suffered from headache and loss of sensation;
  - iii. when his eye finally opened again, he suffered from double vision;
  - iv. it took three or four days for his eye to open;
  - v. his double vision lasted about 10 to 12 days;
  - vi. upon waking up in the morning, everything was blurry until later on in the day;
  - vii. he still cannot feel anything along where the fracture was, a symptom that he describes as lasting three and a half years;
  - viii. the German doctor told him that he had an air bubble between his skull and his brain that Private Meadows attributed to his headaches;
  - ix. he was able to leave his bed after they completed a second CAT scan the afternoon of the first day in the hospital;
  - x. he believes he was in the hospital for two days and then spent four or five days at the American medical facility in Germany before flying back to Canada. He was flown to Ottawa and from there he travelled to CFB Petawawa.

***Proof of the consequences of an assault is an essential element of aggravated assault***

[182] As mentioned above in the legal framework, the requirements of an aggravated assault include proof of the assault itself plus at least one of the listed consequences arising from that assault: wounds, maims, disfigures or endangers the life. The following is my review of the listed consequences for which Sergeant Meeks is charged, where I applied the pertinent legal test.

***What is a wound?***

[183] The first consequence that must be assessed is, namely, whether the injuries suffered by Private Meadows amounted to a “wound” in law.

[184] In their submissions, the prosecution argued that Private Meadows’ injuries were wounds. They argued that further to the testimony of Corporal Gebeshuber, when he went to check on Private Meadows, he noted that Private Meadows had blood on his face. Other evidence before the Court suggests that Private Meadows had multiple lacerations and bruises to his face. In his testimony, Doctor Peppin confirmed that these specific injuries were recorded within his medical records.

[185] Further, the testimony before the Court suggests that Private Meadows had bleeding in his brain and inside his eye at the back of the eyeball. The photos of Private Meadows that were taken immediately after the incident reveal the black eye and associated swelling.

[186] The word “wound” is not defined in the *Criminal Code* and consequently, the Court must rely upon the common law in order to define the term.

[187] Although I found no relevant jurisprudence from the Court Martial Appeal Court, nor did counsel provide me with any, I noted that in courts martial jurisprudence, notably in the case *R. v. Stillman*, 2013 CM 4028, Perron M.J. provides the following definition of “wound” that guided him in his analysis:

[40] Did the force that Master Corporal Stillman applied to Bombardier Trimm wound Bombardier Trimm? To "wound" means to injure someone in a way that breaks, cuts, pierces or tears the skin or some part of the person's body. It must be more than something trifling, fleeting or minor, such as a scratch.

[41] The prosecutor must prove beyond a reasonable doubt that Master Corporal Stillman's conduct contributed significantly to the wounding of Bombardier Trimm. The prosecutor does not have to prove beyond a reasonable doubt that Master Corporal Stillman meant to wound Bombardier Trimm when he made physical contact with Bombardier Trimm. However, the prosecutor must prove that any reasonable person, in the circumstances, would realize that the physical contact Master Corporal Stillman made would likely put Bombardier Trimm at risk of suffering some kind of bodily harm, not necessarily the precise kind of harm that Bombardier Trimm suffered here. "Bodily harm" is any kind of hurt or injury that interferes with another person's health or comfort. It has to involve something that is more than just brief or fleeting, or minor in nature.

[42] The round that Master Corporal Stillman fired at Bombardier Trimm hit him in the left thigh, just above his knee, and exited from his left calf. The bullet caused both an entry and an exit wound to Bombardier Trimm's leg and significant bleeding. Bombardier Trimm was later taken by ambulance to the Brandon Regional Health Centre for emergency medical treatment. The evidence proves beyond a reasonable doubt that the force applied to Bombardier Trimm by Master Corporal Stillman did wound Bombardier Trimm.



[43] The court finds the prosecutor has proven this offence beyond a reasonable doubt.  
[Emphasis added.]

[188] However, that court martial case of *Stillman* was decided before the more recent jurisprudence on the same issue. In short, there appears to be several competing definitions of the term “wound” in Canada. The two most recent Court of Appeal decisions come out of Ontario and British Columbia and there is a trend of jurisprudence from Nova Scotia that also provides helpful guidance. This court is not bound by the definitions within these other jurisdictions, but they provide very meaningful assistance to which this Court can examine in the context of *Stillman* and within the military justice system.

[189] In *R. v. Pootlass*, 2019 BCCA 96, Bennett J.A. extensively canvassed the common law meaning of “wound” and writing for the Court, the British Columbia Court of Appeal (BCCA) reviewed the legal requirements of the offence setting out very practical advice in defining the types of injuries that fall within the margins of the offence under “wound”.

[190] The evidence at the trial level in *Pootlass* suggested that Mr Pootlass punched the victim repeatedly in the head for thirty to forty seconds, leaving the victim with two bleeding cuts to his head that required more than a dozen stitches and staples. At the time of the trial, the victim’s enduring injuries were a light scar and a mild loss of feeling on his forehead where the scar was located.

[191] The trial judge held at paragraph 10 of his decision that “a wound contemplates a tissue injury that results in permanent damage or long-standing dysfunction, including injuries that result in serious internal or external bleeding or other serious internal tissue damage”. Consequently, the trial judge found that the victim’s injuries did not fall within that definition and Mr Pootlass was convicted of the lesser included offence of assault causing bodily harm. On appeal, the issue was the “correct definition of ‘wound’ and whether a wound requires permanent damage or long-lasting dysfunction”.

[192] In *Pootlass*, the BCCA observed that a wound is “a break in the continuity of the whole skin, meaning a break in the skin that goes . . . as deep as the dermis” (or goes beyond the epidermis). Although bleeding was not required, it was admitted that if there is bleeding, it provides “valuable . . . evidence that a break in the skin went at least as far as the dermis” (see paragraphs 46, 64 and 65, and 84).

[193] Pursuant to paragraph 113 of the BCCA decision in *Pootlass*, Bennett J.A. wrote:

[113] To briefly conclude, a wound, as the word is used in s. 268(1) of the *Code*, is a break in the continuity of the whole skin that constitutes serious bodily harm. Serious bodily harm is any hurt or injury that interferes in a substantial way with the integrity,

health or well-being of the complainant. This is a finding of fact, upon the application of the proper legal test.

[194] In *Pootlass*, at paragraph 84, Bennett J.A. described the type of wound expected to meet the legal requirements:

[84] As I will explain, it is clear that Parliament's organization of assaults into three categories signaled an intent to alter the definition of "wound" from its common law roots. The more challenging question is just how much it changed the definition. In my view, a wound is a break in the skin that goes beyond the epidermis and that rises to the standard of "serious bodily harm".

[195] Given that aggravated assault by wounding is intended to be more serious than assault causing bodily harm, a "wounding" must be a more serious injury than an injury which merely causes "bodily harm"(see *Pootlass* at paragraph 105). The injury must interfere with the health or comfort of the person in a significant way. It must be more than trifling or transient (see section 2 of the *Criminal Code*).

[196] At paragraph 90 of *Pootlass*, Bennett J.A. further clarifies the level of seriousness for a wound to qualify under the offence of aggravated assault rather than under assault causing bodily harm which I find is also instructive and portable to the other analyses of "maiming" or "disfigurement" this Court must also assess:

[90] Considering the historical use of the term "aggravated assault", it would appear that the third tier means more aggravated than the second tier. In other words, the third-tier assault requires something more than the second-tier assault.

[197] The Ontario Court of Appeal (ONCA) in *R. v. Brown*, 2021 ONCA 678, 158 OR (3d) 275 and *R. v. Wong* (2006), [2006] OJ No 2209, 209 CCC (3d) 520 defined "wound" in a remarkably similar manner to the test applied by Perron M.J. in the case of *Stillman*:

To "wound" means to injure someone in a way that breaks, cuts, pierces or tears the skin or some part of the person's body. It must be more than something trifling, fleeting or minor, such as a scratch.

[198] It is important to be aware that although the ONCA's decision in *Brown* was rendered after *Pootlass*, the decision only comments on the accepted definition of "wound" that existed in Ontario when the trial judge rendered his decision. The Court noted that the state of the law in Ontario followed the accepted definition of wound for the purpose of aggravated assault as reflected in Watt, David. *Watt's Manual of Criminal Jury Instructions*, 2nd ed. Toronto: Carswell, 2015.

[199] In rendering its decision, the ONCA found that the trial judge appreciated, applied and accepted the Ontario definition that existed at the time, reaching a conclusion that was available on the evidence. In reviewing what law is now applied in Ontario Superior Court of Justice, I note that in a more recent case of *R. v. William*

*Kirby*, 2021 ONSC 2273, where the accused stabbed the victim at least twice, the trial judge relied upon the definition of “wound” as set out in *Pootlass* to find that the injuries arising from the stabbings that needed to be sutured fell within the definition of “wound.”

[200] Similarly, in the case of *R. v. MacKinnon*, 2021 ONSC 4763, the trial judge referenced *Pootlass* in assessing whether a stab wound was a “wound.” In short, there is now a clear trend of trial judges at the Superior Court of Justice – Ontario applying the *Pootlass* standard as to what constitutes a wound.

[201] Importantly, the substance of the decision is that *Pootlass* dispensed with the requirement for a wound to be permanent favouring an approach that requires a substantial interference and lasts long enough to be substantial.

[202] Until *Pootlass*, the duration of the injury as a determining factor in defining a wound was not universally followed in other jurisdictions. As an example, courts in Alberta had imposed the requirement that a wound needed to result in permanent or long-lasting damage (see *R. v. Hilderman*, 2005 ABQB 106 at paragraph 15; *R v SEL*, 2012 ABQB 190 at paragraphs 96–97; *R. v. MacNeil*, 2012 NSPC 106 at paragraphs 19–20; *R. v. Reid*, 2013 ABPC 228 at paragraphs 22 to 26). However, after *Pootlass*, the Court of Appeal of Alberta in *R. v. Richards*, 2020 ABCA 63, 389 CCC (3d) 189 adopted the definition of wound set out in *Pootlass* that dispensed with the requirement that the injury result in permanent or long-standing damage. Consequently, I am of the belief that, based on the consistency in the common law, a wound does not need to leave permanent effects. However, this does not mean that this factor is irrelevant, as the analyses conducted within the earlier cases still remain informative.

[203] One of the cases provided to the Court was that of *R. v. Papalia*, 2012 BCSC 245, which I note predates *Pootlass*. In *Papalia*, the victim was struck in the head by a steering wheel locking device while he was on the ground as a result of a road rage altercation with the accused. The victim sustained injuries to his head and face. The injuries included a gash to the face and a broken nose. The victim was hospitalized for two weeks followed by five months of rehabilitation therapy.

[204] At paragraph 132 of *Papalia*, the Court found that the facial injury of a punctate gash to the victim’s face fell short of establishing that the victim would be left with a permanent mark. Consequently, the case law has been replete with guidance regarding the duration of the effects of an injury. However, it is also important to note that in *Papalia*, the victim did not require stitches or other surgical intervention which also seems to be a consistent trend in cases that qualify what constitutes a “wound”.

[205] In Alberta, in the case of *Hilderman*, Martin J. recognized the difficult, almost elusive, task of defining a *wound* which he described as follows:

To a large extent each case will depend on its own facts. However, I would describe a wound as a cut or breaking of the skin which bleeds, which is more than transient or trifling, and which will leave a scar if not surgically altered.  
[Emphasis added.]

[206] The above comments by Martin J. are not inconsistent with the interpretation in *Pootlass* provided that the caution and threshold set out by Bennett J.A. at paragraph 98 in *Pootlass* are adhered to. It is important to note that, in *Pootlass*, the BCCA reversed the trial judge's decision because it found that the twelve stitches administered to close the cuts in the victim's head interfered in a substantial way with the integrity of the victim. Hence, it is not whether or not the wound leaves a permanent scar that is the sole determining factor in defining a wound.

[207] To be clear, Bennett J.A. emphasized that the consequences of the injury by "wound" should involve serious bodily harm consisting of any hurt or injury that interferes in a substantial way with the integrity, health or well-being of the complainant.

[208] I find that the decision in *Pootlass* provides trial judges with a more practical understanding of, and greater discretion in determining, where the threshold in meeting the definition of "wound" should be situated. In rejecting the requirement that the injury needed to persist over time, Bennett J.A. concluded:

[98] An insignificant injury that leaves a small but permanent scar should rarely qualify as aggravated assault. Conversely, a significant interference with the complainant's well-being may not be permanent or long lasting, but it should be open to the trier of fact to determine that it was the consequence of an aggravated assault. A definition of "wound" that requires that the injury be permanent or long-lasting—with no further definition—should not be adopted.  
[Emphasis added.]

[209] In *Hilderman*, the dimensions of the injury were six centimetres by five millimetres. Although the Court noted that the depth might be misleading, it appeared that all of the skin and tissue to the bone were separated and a significant number of stitches were required to close the cut, which bled profusely. Accordingly, the Court found that the injury qualified as a wound.

[210] Another example of injuries that qualified as wounds under aggravated assault is that of *R. v. Martin*, 2012 BCSC 2086. In *Martin*, the accused attacked the victim after the victim texted the accused's girlfriend. The accused struck the victim thirty to forty times in a 15-minute period of time, causing the victim to suffer three lacerations that required stitches. The wounds were three centimetres, seven centimetres and ten centimetres in length. The Court found that the injuries constituted a wound and were an aggravated assault.

[211] Pragmatically, although the new, more nuanced test abandons strict reliance on the duration of the injury, the fact is still highly relevant in a trial judge's assessment. The important factor flowing from *Pootlass* is that courts are not to be restricted by the sole requirement that an injury be permanent or long lasting.

[212] The prosecution argued that the cuts or abrasions above the eye on the face of Private Meadows, as well as the black eye and the bleeding behind it, are sufficient to establish a "wound" for the purpose of proving an aggravated assault. The abrasions to Private Meadows' face and the photos entered in as exhibits suggest that the blows thrown by Sergeant Meeks did result in bodily harm to Private Meadows. A determination as to whether the injuries sustained by Private Meadows establish an aggravated assault by "wounding" is a finding of fact that requires a proper analysis.

[213] Although Corporal Gebeshuber was not able to recall all the specifics of how Private Meadows ended up on the ground, or what led up to it, he provided assistance to him after he fell to the ground. He testified as follows:

Q. —how did Private Meadows end up on the ground? A. I don't know.

Q. Okay. And then when you saw him on the ground, what did you do?  
A. I went over to Meadows to make sure he was still okay, not dead obviously.

Q. Right. And what did you notice about his condition? A. Well, he was—if he wasn't either unconscious, he was very close to being unconscious. Like mumbling. He face was scratched up, stuff like that. That's pretty much all I can gather from what I saw of the situation: his face was scratched up; he was very close to being unconscious or unconscious, but he was not very responsive.

Q. Okay. When you said his face was scratched up, can you describe—you remember how were you positioned over him? A. I remember he was lying on the street, like, right up against a curb, sort of, and I went to him, I think I might have put my hand behind his head to make sure he was okay or whatever, and I noticed there was, on his face, scratches, stuff like that. I think, sort of around his, like, eye socket.

Q. Okay. And scratches. When you—did you—you said you put hands on? A. Yeah. I put my hand around the back of his head.

Q. Right. A. Because just maybe—I don't if at the time I was trying to feel if there was blood on him or whatever, but I think it was more just concern from my friend, because I knew for quite a long time, so . . .

Q. Right. Was there any blood? A. There was blood on his face, but there was no blood that I could tell on the back of his head. I didn't check my hand after, but I would have noticed and felt if there was wet or stuff like that, and I didn't notice any blood on my hand when I got back that night.

Q. Did you have any first aid training in particular? A. Oh, I just have basic military first aid so very minimal, but like I said, it was almost—the paramedics and the police arrived so quickly after that moment, it's like I pretty much was there to—the only thing I had to do was make sure he's still breathing, he was still breathing; and then the paramedics arrived and I stood away, so, because I'm going to let the professionals handle it at that point.

[214] Although Corporal Gebeshuber did testify to seeing blood on Private Meadows' face, there is no indication that the blood came from anything other than abrasions or minor lacerations on his face. Private Berthe described the condition of Private Meadows' as follows:

Q. Okay. When you saw him on the ground, what did you do? A. I saw Gebeshuber was holding his head, so I went to go do the ABCs, airway, breathing, circulation, and we put him in the recovery position.

Q. Okay. What did you notice about Meadows' condition at that time? A. He was unconscious.

Q. All right. What else did you notice about him? A. He was unconscious.

Q. All right. You said you checked ABCs. How was his airway? A. He was breathing.

Q. You check the "B". What's the "B" for? A. Breathing.

Q. How can you describe his breathing? A. Laboured.

Q. All right. And what's the "C" for? A. Circulation.

Q. Was he bleeding? A. No. He wasn't bleeding.

Q. All right. Did you check for—what do you do to check for circulation? A. (Inaudible) the colour in terms of the circulation.

Q. All right. And did you do that? A. I believe so. I don't recall.

Q. Okay. But after doing your ABCs, you didn't have any concerns about ABCs? A. Say again?

Q. Well, you said you checked his "A", his "B" and his "C", right? A. Yes. But I don't recall if I did check the circulation.

Q. Okay. Well, at the end of ABCs, what had you figured out? A. Because he was breathing but he was unconscious, I've seen people like that before.

Q. All right. And so what did you do after that? A. We left.

Q. Okay A. It was Gebeshuber, and Simmons who stayed behind.

[215] I find that, based on the evidence of the witnesses who responded directly to Private Meadows after the assault, there was no significant bleeding, other than abrasions and minor cuts. With respect to abrasions and minor cuts, at paragraph 15 in *Hilderman*, Martin J. took the view that it was illogical to call abrasions or minor cuts which bleed a wound. In formulating a definition that he put forward at the time, he wrote:

This definition would exclude most bruises which will disappear once the blood is reabsorbed by the body and simple abrasions that bleed and then heal over. These are examples of injuries which are usually classified as transient or trifling and as such would not qualify as bodily harm, and therefore, in my opinion, should also not qualify as a wound.

[216] It was uncontested that Private Meadows received almost immediate medical assistance from the German paramedics who brought him directly to the hospital where he was seen in Emergency. Despite having some blood and abrasions on his face, Private Meadows did not have a cut that was assessed by the hospital emergency department as needing stitches nor did he have any cuts that required care. In short, I have been provided with no evidence to support the position that the abrasions and facial bruises involved serious bodily harm consisting of any hurt or injury that interfered in a substantial way with the integrity, health or well-being of Private Meadows.

[217] The photos of the injuries taken by Private Meadows himself immediately after the assault, while he was in the hospital, reveal the significant facial bruising he endured. He also took photos in the following days. The photos provide evidence that there were no sutures or stitches required to close any cuts. Although they provide evidence of bodily harm, evidence of a specific cut, which meets the definition of a wound as set out in *Pootlass*, in the bleeding skin is noticeably absent.

### **Soft tissue injury and bleeding from black eye**

[218] In their submissions, the prosecution took the position that since Private Meadows was bleeding from his brain and inside his eye at the back of the eyeball, these injuries qualify as wounds. In short, their position is predicated on the underlying premise that internal bleeding results from damage to internal body tissue.

[219] I must assess whether this is such a case where the soft tissue injuries sustained by Private Meadows fall within the definition of “wound” based on the common law.

[220] After examining case law from multiple jurisdictions, I find that there are some jurisdictions that have accepted that a modern definition of “wounding” includes tissue injury that results in permanent damage or dysfunction. Indeed, that was recognized by the Court of Appeal of Alberta in *R. v. Littlelent*, 1985 ABCA 22, which concluded that a blow that broke an eardrum amounted to a wound.

[221] Further, in *Richards* at paragraph 27, the Court of Appeal of Alberta subsequently adopted the definition of “wound” that was laid out by the BCCA in *Pootlass*, despite being simultaneously silent on whether it no longer considers permanent tissue injury to be included within the definition of a “wound”.

[222] In *R. v. Kogon*, [2008] O.J. No. 3921, the injuries suffered by the victim involved frontal and right temporal cerebral contusions, permanent hearing loss, and ongoing problems with vertigo. The Ontario Superior Court of Justice found these injuries satisfied the definition of “wound” as it is used in subsection 268 (1) of the *Criminal Code* (see *Kogon*, paragraph 5).

[223] In *R. v. Michael Vincent*, 2011 ONSC 139 in a decision that also predates *Pootlass*, Pierce J. of the Ontario Superior Court of Justice adopted a broader interpretation of the definition of the word “wound” to include not only a cut in the skin that bleeds, but also includes any internal bleeding that results from trauma or damage to body tissue. The facts of that case involved a confrontation between the accused and the complainant at a club. The complainant gave the accused a shove indoors and the accused walked away. When the accused went outdoors, the complainant struck the accused first. The accused struck the complainant in the head causing a head injury and bleeding in the brain.

[224] In *Michael Vincent*, although the accused was eventually found not guilty based on self-defence, the relevant part of the decision was the Court’s analysis on whether a hit to the head and bleeding on the brain could rise to the level of a “wound” for the purpose of section 268 of the *Criminal Code*.

[225] At paragraph 13 of the decision, Pierce J. quotes with approval the comments of a New Zealand Court in *R v Waters* [1979] 1 NZLR 375, 378 (CA), to the effect that internal bleeding is not excluded from the definition of the term “wound”:



A breaking of the skin would be commonly regarded as a characteristic of a wound. The breaking of the skin will be normally evidenced by a flow of blood and, in its occurrence at the site of a blow or impact, the wound will more often than not be external. But there are those cases where the bleeding which evidences the separation of tissues may be internal. Harman's case and Waltham's case are illustrations of this. We do not understand the dictionary meaning of the term to exclude them.

[226] At paragraph 15 of the *Michael Vincent* decision, Pierce J. explained that the serious nature of aggravated assault would be minimized if the interpretation of the word “wound” was limited to external bleeding:

[15] In my view, the seriousness of an aggravated assault by wounding should not be minimized by an artificially narrow definition of wounding, limited to external bleeding. Lord Lyndhurst's definition originated at a time when medical knowledge was less sophisticated than it is at present. The law develops incrementally, in accordance with changes in knowledge and social values. An unduly narrow definition of wounding may impose greater criminal responsibility for minor external bleeding but ignore substantial internal damage to tissues caused by an assault.

[227] In reading *Pootlass*, I find that the guidance encourages judicial discretion where bleeding does not flow from the wound thereby leaving open the possibility of soft tissue injuries and internal bleeding qualifying under “wound”.

[228] At the trial level of the Provincial Court of British Columbia, Mr Pootlass was originally found not guilty of aggravated assault and convicted of the lesser included offence of assault causing bodily harm instead. The trial judge found the victim's injuries did not amount to a “wound” in the context of section 268 of the *Criminal Code* based on a definition that relies upon tissue injury that results in serious internal bleeding:

[A] wound contemplates a tissue injury that results in permanent damage or long-standing dysfunction, including injuries that result in serious internal or external bleeding or other serious internal tissue damage.

[229] Under appeal, in rejecting the position taken by the trial judge that a wound needed to result in permanent damage or long-standing dysfunction, Bennett J.A. did not reject that internal bleeding fits within the definition. In fact, in *Pootlass*, she specifically references the position adopted in the New Zealand decision in *Waters* in confirming that the evidence of external bleeding is valuable, but not required:

[64] Other decisions, which conform more closely to the origins and history of the term, instead say that bleeding is valuable (and in some cases decisive) evidence that a break in the skin went at least as far as the dermis: *R. v. Waters*, [1979] 1 N.Z.L.R. 375 at 378 (C.A.); *Devine v. R.* (1982), Tas. R. 155 at 168–69 (S.C.).

[65] In my view, the latter is the correct statement of the law. Prior to the incorporation of the word “wound” into Canadian law, it had a widely understood meaning that did not include bleeding.

[230] With the nuance that *Pootlass* introduces to the law in defining a “wound”, I find that given the patchwork interpretation of “wound” across multiple jurisdictions in the context of section 268 of the *Criminal Code*, there is not a clear test that guides trial judges in assessing what tissue breakage or internal bleeding falls within the definition of “wound”.

[231] In pre-*Pootlass* jurisprudence, in the case of *SEL*, the Court relied upon a test that was very straightforward in assessing injuries where external bleeding is not evident.

[232] In *SEL*, the victim, SL recovered well from trauma suffered and showed no residual effects attributable to her injuries. In deciding whether internal injuries could fit within the definition of “wound”, the Court stated:

96 Crown does not argue vigorously that Mr. SEL's alleged misconduct could be said to have wounded SL. Conventionally, the term "wound" has been used to indicate skin was broken and bleeding ensued, though our Court of Appeal has also concluded a blow that broke an eardrum wounded a complainant: *R. v. Littlelent* (1985), 59 A.R. 100, 17 C.C.C. (3d) 520 (Alta. C.A.). In *R. v. Hilderman* (2004), 2005 ABQB 106 (Alta. Q.B.) at para. 15, (2004), 369 A.R. 24 (Alta. Q.B.), Martin J. (as he then was) suggests "wounding" involves a permanent consequence.

97 I agree with Justice Martin's approach that "wounding" involves permanent damage. It does seem that the requirement that skin be broken and bleeding ensue is artificial. Indeed, that has already been recognized by the Alberta Court of Appeal in *R. v. Littlelent*, an eardrum is obviously not skin. An appropriate modern definition of "wounding" is tissue injury that results in permanent damage or dysfunction, see for example *R. v. Vincent*, 2011 ONSC 139 (Ont. S.C.J.) at paras. 7-17. Had SL suffered ongoing injury, such as sustained loss of vision or impairment to her brain, I could see those as analogues to the kind of injury recognized in *R. v. Littlelent*. Here, however, that kind of lasting effect did not occur, so SL could not have been 'wounded' by Mr. SEL's alleged misconduct.

[233] Returning to the case at bar, I need to decide whether Private Meadows was subjected to an assault that inflicted serious bodily harm or was he “wounded”? The defence argues that the injuries amount only to serious bodily harm.

[234] I have struggled with this issue because I believe that Private Meadows’ internal injuries do need to be assessed as tissue breakage that resulted in internal bleeding. However, as the examples above indicate, unlike an external cut, it is hard to discern what level of tissue breakage and internal bleeding amounts to bodily harm and what amounts to “wounding”.

[235] As Derrick J., as she then was, stated in the case of *R. v. MacNeil*, 2012 NSPC 106 after struggling with this same issue:

[20] For the law to be coherent, there must be something that distinguishes wounding from serious bodily harm where the nature of the injuries alone do not make the distinction clear. In such cases, the distinguishing characteristic has to be the permanence or long-lasting effect of the injuries. In this respect I find the *S.E.L.* decision to be the most helpful to my analysis. The trial evidence indicated that Mr. Clarke’s injuries healed after about 2 – 4 months. He is taking no medications and receiving no ongoing treatment. There are no physical changes to his face other than the scar by his eye. He testified that although he is once again playing competitive hockey, he is not playing it at the same level as before. But I do not know if that is related to his injuries directly or to his level of conditioning after a hiatus from playing, or some other reason.  
[Emphasis added.]

[236] In rendering her decision, Derrick J., in finding that the victim’s injuries did not fall within the definition of “wound”, relied upon the *SEL* decision to assist her analysis. She was most persuaded by whether the injuries sustained left a permanent or long-lasting effect.

[237] In light of the decision in *Pootlass*, the first question that surfaces is whether the distinguishing characteristic of permanent or long-lasting effects relied upon in *MacNeil* and *SEL* remains an acceptable approach in assessing internal injuries where the distinction is not clear. In reviewing the common law in Nova Scotia, it is clear that this distinguishing characteristic still has relevance.

[238] Nonetheless, upon my review of the case law, I find that *Pootlass* is the more prevailing approach to assessing the evidence. *Pootlass* makes it clear that permanency and long-lasting effects of an injury are not to be the sole determining factors in assessing any injury.

[239] *Pootlass* provides trial judges with specific guidance which I find particularly helpful in situating where the bright line lies in cases where the facts are not very clear:

[109] It is a definition that can potentially encompass relatively transient harm as long as it is sufficiently serious to be a substantial interference, as well as relatively trifling harm that lasts long enough to be substantial. In short, it is an appropriate elevation of the bodily harm standard.

[240] In short, I have to ask myself whether the transient harm that Private Meadows suffered was sufficiently serious to amount to a substantial interference. This type of situation is captured in cases where there was surgery required, or the victim experiences a significant cut that requires staples or stitches that affects the integrity of the victim.

[241] Further, I must ask myself whether the harm or injuries he suffered lasted long enough to be substantial. As I mentioned previously, the length of time that the harm lasts and whether it is permanent still remain relevant considerations, they simply must not be the sole determining factors. To be considered substantial, the hurt or injury

needs to interfere in a substantial way with the integrity, health or well-being of the complainant which I will assess next.

***Did Private Meadows, as the complainant, suffer hurt or injury that interferes in a substantial way with his integrity, health or well-being?***

[242] The case law provides guidance on the type of injury that interferes in a substantial way with “the integrity of a complainant.” Specifically, in *Pootlass*, the BCCA found that the bleeding experienced by the victim was decisive evidence of a break in the continuity of his whole skin and found that “[a] cut that requires five stitches or staples is a substantial interference with someone’s physical integrity.”

[243] In pragmatic terms, in determining whether an injury is serious bodily harm or a “wound” pursuant to section 268 of the *Criminal Code*, a court can consider whether there was medical intervention required such as stitches, sutures, surgical procedures or other steps required to rehabilitate the victim and minimize any long-lasting effects of the injury. Given advanced medical care and procedures available, it is understandable why the BCCA found that there is no requirement for permanency or long-lasting effects to flow from the injury. Every case will turn on its own facts.

[244] Health and well-being is a state of complete physical, mental and social well-being and is not merely an absence of disease or infirmity.

[245] This was not a case involving extensive bleeding throughout the brain or in other internal areas. There is no medical evidence before the Court to inform it on the effect of the injuries beyond the first few weeks. The medical evidence ends on the date of Private Meadows’ release from the CAF. Despite immediate referrals for consults to Neurology, ENT and ophthalmology, undergoing multiple CT scans, Private Meadows’ injuries did not require stitches nor neurosurgical or other surgical intervention.

[246] I note that Private Meadows’ hospital stay was relatively short and his medical records confirm that four days after the assault he was flown back to Canada where he received outpatient medical care from the medical clinic at CFB Petawawa. He was released from the CAF very shortly thereafter, as he had planned and desired to do. It was clear from the evidence that prior to travelling to Germany to support this exercise, Private Meadows’ release from the CAF was administratively in process, as he had elected not to re-engage upon the completion of his original terms of service.

[247] The black eye, swelling and internal bleeding behind Private Meadows’ eye and around his brain cannot be minimized, but the evidence suggests that they resolved themselves within two weeks without requiring any further intervention. In order for his injuries to fall within the definition of a “wound,” they would have had to interfere in a substantial way with the integrity, health or well-being of Private Meadows.

[248] I compared Private Meadows' injuries to those sustained in the case of *MacNeil*, where the Court found that the injuries in that case did not meet the definition of a "wound." In *MacNeil*, the victim suffered the following:

- (a) very small amounts of blood that had not pooled, were detected in several parts of his brain;
- (b) there were areas of patchy, small bleeds throughout the brain and some blood in the ventricles;
- (c) a CT scan indicated that Mr Clarke did not have any bleeding in his brain from a major artery;
- (d) his brain showed signs of having been shaken, rattled, or bruised;
- (e) a neurosurgery consult was arranged but it was determined that no neurosurgical intervention was required;
- (f) he had fractured bones in his face. His right cheek bone and his eye bone had breaks in them. They did not require treatment and were left to heal on their own; and
- (g) he had a cut by the corner of his right eye and bruising around that eye. He was in hospital for three days. He now has a small but obvious scar by his right eye that corresponds to the injury shown in the photographs taken by police.

[249] I find that the injuries sustained by the victim in the *MacNeil* case closely resemble the injuries sustained by Private Meadows. In *MacNeil*, the victim's injuries were not characterized as "minor" even though he recovered successfully and without surgery or stitches. However, it is important to note that the injuries of the victim in *MacNeil* were not classified as wounding and Mr MacNeil was convicted of the lesser included offence of assault causing bodily harm. However, I note that Derrick J. did consider the permanency of the injuries in coming to her decision and consequently I was careful to ensure that my assessment was not focussed solely on this as a distinguishing factor.

[250] In a post-*Pootlass* case, in the Supreme Court of Nova Scotia, the case of *R. v. Barron*, 2021 NSSC 14, 169 W.C.B. (2d) 573, the complainant found the accused in the passenger seat of his vehicle. The accused demanded that he turn over the car keys. The accused then pushed the complainant to the ground, punched him in the face several times with his fists, pinned him down with his forearm on his neck, and began choking him. The complainant suffered bruises, lacerations, a fractured nose, loss of two teeth, and he required dental surgery involving bone grafting and implants. In coming to his decision, the trial judge did consider whether the victim's injuries were permanent or

lasting in coming to the conclusion that he was not satisfied that the Crown has proved beyond a reasonable doubt that the injuries sustained constituted wounding and found the accused not guilty of aggravated assault but guilty of assault causing bodily harm.

[251] In *R. v. Farrar*, 2019 NSSC 46, as a result of the assault by the accused, the complainant suffered a very serious, pancreatic rupture that required two surgeries and the implanting of tubes in her body to stop the flow of pancreatic fluids and to depressurize her pancreatic system. One doctor stated that her injuries were not life threatening. Her injuries were serious and were long-lasting. She had large unsightly scars from the surgeries. The Court found that the internal injuries amounted to “wound” for the purposes of section 268 of the *Criminal Code*.

[252] Further, when I compare the injuries sustained by Private Meadows to those suffered by the victim in the *Michael Vincent* case, where the injuries were found to fall within that of a “wound”, I find that there is great disparity in the level of seriousness that flows from the consequences of the assault. In *Michael Vincent*, the facts, injuries and assessment were as follows:

- (a) 9 June 2009, the victim was attended to by ambulance personnel and was observed to have fresh bleeding from his mouth. He complained of tenderness in the right upper quadrant of his abdomen. He showed signs of agitation and confusion. His right eye was slow to react (see paragraph 3 of *Michael Vincent*);
- (b) transferred to the hospital for treatment and attended by a staff neurosurgeon. A CT scan of victim's skull indicated a depressed fracture of the right temporal squama which is the thinnest portion of the temporal bone. Doctor testified the bone there is only a few millimetres thick. The squama is located low in the temporal region parallel with the eye but above the zygoma or cheek bone (see paragraph 4 of *Michael Vincent*);
- (c) the fracture fragments in the skull severed the meningeal artery. The meningeal artery runs along the surface of the dura, which is the lining that covers the brain. The severing of the artery led to bleeding in the epidural space between the skull and the dura. Eventually a blood clot developed. The blood clot was of sufficient size to exert pressure on the brain. The blood clot was removed during surgery, relieving critical pressure on the brain. A second blood clot was discovered during surgery and removed. Bone fragments were also removed. Additional bleeding of the dura was discovered and treated. A doctor testified that the fracture caused the bleeding (see paragraph 5 of *Michael Vincent*); and
- (d) the victim remained in the acute care hospital until mid-July, 2009 (six weeks) when he was transferred to another hospital for rehabilitative

care. Initially, he was unresponsive and unable to communicate. He was sustained by a ventilator and feeding tube. In time, he was weaned off the ventilator and gradually breathed on his own. He received physiotherapy to maintain range of motion in his limbs, but he is completely paralyzed. With the aid of speech and occupational therapists, and a computerized device, he is now able communicate in a limited way by moving his eyes (see paragraph 6 of *Michael Vincent*).

[253] In deciding that the injuries sustained by the victim did fall within the definition of “wound”, the Court wrote the following:

17 In the case at bar, a fracture of a bone in the skull severed the meningeal artery, causing bleeding between the skull and the dura. The damage was evident to Dr. Marchuk when he opened the skull during surgery. The pressure on the brain exerted by bleeding and resulting hematomas caused serious injury to Mr. Syposz's brain. I find that the severing of the artery and the damage to the internal tissues constitutes wounding as defined in the *Criminal Code*.

[254] Aside from Private Meadows’ personal assertion that he still experiences residual numbness along the site of his facial fracture, there is absolutely no evidence before the Court that describes the effect of his injuries on his integrity, health or well-being. In fact, the Court was provided with no insight into what Private Meadows is currently doing in terms of employment nor was it provided with any follow-up medical evidence regarding the prolongation of his injuries since his release from the CAF, nor was it provided with any evidence as to how the injuries impacted his transition from the CAF, nor how they impact his current lifestyle and quality of life.

[255] As previously explained, in order for these particular injuries to be classified as serious bodily harm, they would have had to interfere in a substantial way with the integrity, health or well-being of Private Meadows. In my view, based on the evidence before the court, there is insufficient evidence before me that permits me to draw this inference.

[256] I find that the injuries to Private Meadows are very serious, but I am left with reasonable doubt about whether they constitute a “wound” as contemplated by subsection 268(1) of the *Criminal Code* and it is a doubt that must be resolved in Sergeant Meeks’ favour.

[257] Further, I would add that the fractures that Private Meadows sustained cannot be characterized as a wound, which involves a breakage of the skin or tissues. I therefore proceed next to consider the injuries of Private Meadows in the context of “maiming”.

***Was Private Meadows maimed?***

[258] With respect to the maiming of Private Meadows, the prosecution argued that there is uncontested evidence before the Court that:

- (a) Private Meadows experienced a long term loss of sensation in his cheek, loss of the use of his eye and his vision was blurry for several days which resulted in a loss of the use or function of his eyesight for those days. Relying upon paragraph 41 of the ONCA decision of *R. v. McPhee*, 2018 ONCA 1016, the prosecution argued that the Court of Appeal agreed with the position adopted in *R. v. Schultz*, [1962] A.J. No. 37, 133 C.C.C. 174 (A.D.), leave to appeal to S.C.C. refused “to the extent that it recognizes that the loss of the use or function of some part of the victim's body need not necessarily prove to be permanent in order for ‘maiming’ to be made out”; and
- (b) Unconscious - with respect to the first part of the definition of maiming, the prosecution argued that the punch that knocked Private Meadows out is maiming as Private Meadows was unable to fight back. It is the prosecution’s position that the mere act of Sergeant Meeks knocking Private Meadows out meets the definition of maiming.

[259] In response, the defence argued there is a difference between broken bones in the skull and a broken skull as they are medically very different. He argued that the injuries experienced by Private Meadows do not qualify as maiming under the offence of aggravated assault.

[260] The term "maim" is not defined in the *Criminal Code* so similar to the term “wound”, the interpretation of this word must flow from the common law. To “maim” means to inflict an injury that deprives a person of the use of any limb or member of the body or renders him or her lame or defective in bodily vigour. It need not be permanent.

[261] However, based on the case law there was at one time, two possible definitions of the word "maim."

[262] The first definition of "maim" required "bodily harm to the victim to such an extent that it renders the victim less able to fight back or to defend himself or herself".

[263] The second definition required the loss of "the use of some part of the body or bodily function".

[264] At paragraph 36 of *McPhee*, the ONCA evolved the definitions that previously existed after *Shultz*, when it stated “whether or not a victim has been maimed should not turn on whether the bodily harm inflicted upon the victim rendered the victim less able to fight back or to defend himself or herself.”

[265] At paragraph 41 of *McPhee*, the Court of Appeal further clarified that the case law and the decision in *Shultz* suggests that “the loss of the use or function of some part



of the victim's body need not necessarily prove to be permanent in order for 'maiming' to be made out." This leaves the second definition, which appears to be the one most followed in recent jurisprudence.

[266] Importantly, the current trend in the case law across multiple jurisdictions is that there is no requirement for the injuries to be of a permanent nature (see *R. c. Martinez Abarca*, 2020 QCCA 1196, *Dubourg c. R.*, 2018 QCCA 1999, at paragraph 46; *McPhee*, at paragraph 41; *Pootlass*, at paragraphs 109, 113 and 116; and *Richards*, at paragraph 27).

[267] The injuries arising from fist fights where bodily harm follows lie along a continuum. If a wound requires an injury that amounts to at least serious bodily harm then a "maim" would not include a minor injury that fits within its definition. In terms of the types of injuries that could flow from this type of hit to the face, Doctor Peppin testified as follows:

"Q. All right. So left temporal skull fracture. What—how much force does it take to fracture that left temporal skull, if you know? A. I mean, I will—I can't give you a certain quantity in Newton metres, but less than you would think. You know, the temporal bone is quite thin. It is susceptible to injury. The probably the most susceptible region outside of the undersurface of the skull, which is very difficult to access, but it's quite a thin and brittle region. But outside of that, your temporal bone is fairly susceptible to fracture.

Q. Okay. And how about the wall of the orbital—the left lateral wall of the orbital fracture. How much force would it take to break that bone? A. Yeah. I mean, really, the issue is that you have multiple sites that have all fractured simultaneously, right? So if you were to take a hammer, for example, and you hit somebody on their temporal bone, well, yeah, it's going to fracture very, very easily. But if you were to take a hammer of the same weight that has a significantly larger surface area, it's unlikely that you're going to fracture that temporal bone. You know, so to fracture, you know, one, two, three, four sites simultaneously and injure the brain such that it essentially, you know, bleeds on its surface, that's a fairly substantial amount of force."

[268] Based on the summary of the injuries provided by Doctor Peppin, I find that Private Meadows' injuries cannot be characterized as "minor", even though he recovered successfully and without surgery or stitches. He had some bruising of his brain and suffered multiple broken facial bones and fractures to his skull, but the fundamental question is whether his injuries fit within the definition of "maim" in a manner consistent with the jurisprudence. Consequently, I conducted a fulsome review of the prosecution's arguments regarding the fractures experienced by Private Meadows

and the fact that he lost consciousness. I compared the fractures to similar injuries that amounted to maiming within the case law.

[269] In *R. v. Bennett*, [2006] A.J. No. 540 (Alta. Prov. Ct.) the Court found that a bouncer who threw one punch causing the victim to fall to the ground and become unconscious was guilty of assault causing bodily harm. There was only one punch thrown. The result of that one punch was that the victim hit his head on the concrete and ended up in the hospital.

[270] Examples of those injuries that courts have accepted under maiming include the following:

- (a) *R. v. Shultz*, [1962] A.J. No. 37, 133 C.C.C. 174 (A.D.). The breaking of a leg was considered a serious enough injury to amount to “maiming”;
- (b) *R. v. MacDonald*, 2010 NSSC 281, an assault was characterized as aggravated assault because it left the victim with a jaw broken in two places, requiring surgery and the use of plates and screws. The victim could not chew for a month and half and was left with permanent nerve damage (see *MacDonald*, paragraph 13); and
- (c) *R. v. McPhee*, 2018 ONCA 1016 was an assault where the accused punched the complainant in the face, leading to a broken orbital bone that required surgery. The complainant lost his eyesight which required surgery. It was eventually restored after surgery, but he still had eye twitches, felt numbness and pain on top of his gums.

[271] Examples of the types of injuries that courts did not accept under the definition of maiming include the following:

- (a) *R. v. Papalia*, 2012 BCSC 245. The accused was found guilty of the included offence of assault causing bodily harm. The Court was not satisfied that the victim’s broken nose could be regarded as “maiming or disfiguring”. The broken nose healed without surgical intervention and there was also no evidence of any residual disfigurement. To “maim” means to inflict an injury that deprives a person of the use of a limb or renders the victim less able to defend themselves. The Court held that a broken nose cannot be regarded as maiming by this definition; and
- (b) *R. v. MacNeil*, 2012 NSPC 106, This case had striking similarities with the injuries in the case at bar and the Crown conceded that the injuries did not fall within the definition of “maiming”.

[272] Doctor Peppin provided the following evidence that is helpful to assessing whether the injuries amounted to maiming:

"Q. If I could stop you there just for a second, because as opposed to plausible, I guess what I am wondering is in this particular case, from your review of the notes, are there anything that you are aware of that is a continuing impact? A. Yeah. So I think some of the things that I would point to, people typically—sorry, are we talking specifically from my review of the medical records or we talking about residual effects from this generic pattern of injury?

Q. Specifically from your review of the medical records in this case. A. Got you. Okay. I believe he continued to have some residual numbness in his face, probably caused by fracture of some of the nerves that exit the skull in that area. I believe he continued to have some post-concussive symptoms and some pain for, you know, weeks and months after the incident in question; most fortunate enough not to have any serious neurologic injury. You know, didn't have any paralysis or loss of arms or legs, you know, continued to have—he did have some blurry vision and double vision, which I believe resolved and didn't have any lasting trauma to the eye or lasting changes to visual acuity. So really, by the time of the release medical, which is the, you know, the latest check-in that I had, I believe most of it was still around; some persistent pain and persistent numbness and tingling sensation to the face."

[273] In short, the evidence provided by Doctor Peppin regarding the potential of Private Meadows' injuries qualifying as maiming, he could not provide much other than what was included in Private Meadows medical records where the last inputs were six weeks after the assault. He was clear that there had been no paralysis, loss of arms, or legs, no lasting trauma to the eye or lasting changes to visual acuity.

### *Consciousness*

[274] With respect to Private Meadows' level of consciousness, the evidence of the witnesses is as follows:

- (a) Captain Korajlija said Sergeant Meeks' punch was strong enough to put Private Meadows on the ground. He testified that from what he observed of Private Meadows lying on the ground, he appeared to be unconscious;
- (b) Corporal Gebeshuber testified that he did not see how Private Meadows ended up on the ground, but when he responded to him, Private Meadows was either unconscious or close to it;

- (c) Private Berthe testified that he did not see how Private Meadows ended up on the ground but with Corporal Gebeshuber, they put Private Meadows in the recovery position and that he was unconscious at that time;
- (d) Private Prupas testified that in his recollection, it was after the kick that Private Meadows got knocked out;
- (e) Captain Simmons accompanied Private Meadows to the hospital in the ambulance. He described Private Meadows' condition in the ambulance as unconscious. He stated that when he received an update from the doctor around 4 a.m., Private Meadows was still unconscious. He stayed with Private Meadows until the following day, which was late morning or early afternoon when Captain Korajlija arrived to relieve him. He described Private Meadows regaining consciousness after Captain Korajlija arrived and before he left the hospital; and
- (f) Private Meadows told the Court that the next thing he remembers is waking up in the hospital the next morning which he estimated to be around 11 a.m.

[275] In short, some witnesses were adamant that Private Meadows fell unconscious immediately after the punch (Melvin, Simmons), while another witness (Prupas) suggested that it was likely after the kick.

[276] Upon a review of the whole of the evidence, I also found that:

- (a) although the police and witnesses told the paramedics that Private Meadows had been briefly unconscious, their records suggests that he was responsive when addressed by the paramedics and seemed to have varying vigilance slipping in and out of consciousness;
- (b) during the paramedics discussions, Private Meadows confirmed consuming alcohol but no drugs; and
- (c) upon Private Meadows' admission to the emergency department, he was reported to be alert, responsive, oriented to person, but not to place and time. The report described some initial unconsciousness, retrograde amnesia and nausea.

[277] The evidence suggests that Private Meadows was unconscious at one point, likely while he was lying on the sidewalk, but it is unclear at what point he became unconscious and for how long it lasted. There is also the uncontested evidence that Private Meadows was extremely intoxicated and given the confirmation by trained

medical personnel that he was in fact conscious, it is possible that he was passed out sleeping, rather than unconscious as a result of the punch. The evidence suggests that he would have been admitted into the hospital around 0330 hours.

[278] Although Captains Korajlija and Simmons both observed the punch and subsequent kicks by Sergeant Meeks, they testified that they responded immediately by grabbing Sergeant Meeks on either side and removing him from the conflict. I can therefore infer that in the first few minutes, they were not paying close attention to the condition of Private Meadows as they were distracted. However, the Court noted that they provided meaningful testimony on the condition of Private Meadows afterwards as they both attended at the hospital.

[279] From all the witnesses, the three who appear to have been in the best position to assess whether Private Meadows was unconscious, either after the punch or after the kick, were Privates Gebeshuber, Prupas and Berthe.

[280] However, to the best of his recollection, Private Prupas provided testimony to describe what transpired between Sergeant Meeks and Private Meadows before Private Meadows finally fell to the ground. I found his testimony to be both credible and reliable. He testified that Private Meadows became unconscious after the kick. There was also evidence that just prior to the kick that Private Meadows complained that Sergeant Meeks had broken Private Meadows' glasses. Private Prupas specifically recalls the sergeant making an accompanying comment that suggested that the kick was intended to put him out, when he said, "Night night nigger."

[281] The prosecution did not provide the Court with any case law upon which they relied to assert that the mere fact that Private Meadows was rendered unconscious at one point meant that the element of maiming was met. Although I am aware that courts have accepted fact situations where the victim was so severely injured and in a coma and hospitalized for extended periods of time, this Court would have benefited from case law more similar to the facts of this case.

[282] Although it is not exactly clear when Private Meadows became unconscious, the evidence suggests that if he did become unconscious, it was not enduring as he was able to be roused by the medical authorities.

[283] I am not aware of any legal authority that asserts that the element of maiming is automatically met where the victim has fallen unconscious even very briefly. As Doctor Peppin testified, consciousness is not a light switch as there is a spectrum. He explained this is why doctors use a spectrum scale which means that a patient could be fully conscious and then not. Doctor Peppin further testified that Private Meadows had a Glasgow Coma Scale rating of thirteen out of fifteen which would indicate that he had lost a few points.

[284] Based upon the foregoing analysis and the legal authorities, I must conclude that the evidence before the Court does not establish the consequence of maiming.

**Disfigure**

[285] To disfigure means to impair or injure a person's beauty or appearance to a significant extent and in more than a temporary manner and involves something beyond the passing characteristics of bruising or abrasion.

[286] In short, broken bones may be considered under disfigurement if the result of the break impairs or injures a person's beauty or appearance.

[287] In *Papalia*, the Court found that there was no disfigurement when the victim's broken nose recovered without having had to undergo surgery:

[131] Section 268(1) of the *Code* narrowly defines aggravated assault by reference to proof of specific consequences to the victim. Turning to the specific consequences that render an assault aggravated, I am not satisfied that Mr. Truong's broken nose can be regarded as "maiming or disfiguring". Mr. Truong's broken nose healed without surgical intervention and there is no evidence of any residual disfigurement. To "maim" means to inflict an injury that deprives a person of the use of a limb or renders the victim less able to defend themselves. A broken nose cannot be regarded as maiming by this definition. The nasal fractures cannot be characterized as a wound, which involves a breakage of the skin in a way that causes more than minor bodily harm. Minor bodily harm was held to be insufficient to constitute "wounding, maiming or disfiguring" in *R v. Innes and Brotchie* (1972), 7 C.C.C. (2d) 544 (B.C.C.A.). In *R v. Burger*, 2000 BCSC 655, the victim, the accused's wife, suffered from a bloody nose after the assault. Boyle J. noted that "wounding" required the breaking of skin. He was of the opinion that breaking the nasal mucosa was not enough to constitute aggravated assault.

[288] In applying the Court's position taken in *Papalia*, the Court of Quebec, in the decision of *R. c. Mouchet*, 2019 QCCQ 1531 distinguished the facts of that case for the consequence of disfigurement because the victim had to undergo an operation to repair both the broken nose and the wall of the orbit of the left eye which collapsed following the blows suffered. Essentially, the victim in *Mouchet* needed surgical reconstruction of the orbital cavity. The Court found that this fell within the definition of disfigurement.

[289] In *Hilderman*, Martin J. provided practical guidance to trial judges in addressing the nature of the injuries within the proper consequence envisaged by section 268 of the *Criminal Code*. He clarified that while wounding requires a breaking of the skin, disfigurement does not.

[290] More specifically, Martin J. explained that in Canada the term "disfigure" has been used to refer to more than temporary damage to appearance. A black eye, for example, which detracts from the victim's appearance, but disappears in a short time and does not leave a lasting mark, does not disfigure the victim:

[18] In Canada, the word has been used to denote “something more than a temporary marring of a person’s appearance, such as a black eye.” *R. v. Innes and Brotchie* (1972), 7 C.C.C. (2d) 544 (B.C.C.A.) at 550, per Robertson, J.A. dissenting in part, is referred to. Thus, a blow which permanently dislocates the nose may be disfiguring in that it amounts to more than a temporary marring of the face, but it may not be a wounding. Likewise, if someone is kicked or hit in the knee, the resulting injury may be such as to prevent the person from walking normally again and therefore fall within the definition of “disfigure” but not a “wound.”  
[Emphasis added.]

[291] In summary, for an injury to rise to the level of disfigurement in law requires an injury that impairs the beauty, symmetry, or appearance of a person. It means something that affects a person permanently or for an appreciable period, and be more than a temporary marring of a person’s appearance, like a black eye or bruising, that in time will heal. It will include injuries that leave a permanent and visible scarring.

[292] There was no evidence before the Court other than the black eye and the assertion by the prosecution that the injuries left Private Meadows disfigured. Consequently, I find that the nature of the injuries sustained by Private Meadows do not qualify as disfigurement in law.

### **Endangerment to life**

[293] The prosecution argued that during the assault by Sergeant Meeks, Private Meadows’ life was put at risk. He further argued that there does not need to be harm for an assault to endanger life.

[294] In response, the defence argued that the offence of aggravated assault is defined by the consequences flowing from the assault and not potential risks that flowed from the type of assault itself, and that at no time was Private Meadows’ life endangered.

[295] With respect to the risks of the injuries, Doctor Peppin testified as follows:

“Q. All right. The underlying hematoma in the skull fracture and was that—can you tell us about that and what the danger of that is? Is there any risk associated with that injury? A. Yeah. Absolutely. You know, one, it’s usually a marker, you know, trauma or energy that’s been imparted to the brain and the brain certainly does not like that and it has fairly robust mechanisms to try to prevent itself from being battered around. So the fact that there was sufficient amount of energy to cause the brain, particularly in a young person, who have very, you know, plastic, pliable blood vessels, to cause those to rupture and bleed is a sign of, you know, significant energy that was imparted to the brain. You can certainly have pressure effects is the most common thing that you’d be concerned about. You know, if he started to have uncontrolled bleeding in the brain, the brain can become squeezed, it can have difficulty clearing waste and

providing oxygen to its tissues. Again, that's more common when you have, kind of, high pressure bleeding, the other type that I was describing, it's less common with an epidermal bleed, you know. But certainly it is a sign that the brain tissue itself has been damaged. It doesn't tend to lead to, kind of, runaway escalation in a kind of positive feedback loop that the other type of bleeding will, but again, not a good thing for the brain.

Q. All right. I'll try to find in the records—Doctor, my understanding was there was some—a small amount of air in the vault at the fracture site?

A. Yeah. That's fair actually, and that's something I probably should've mentioned. That's a source of concern because, you know, the air that you breathe, in particular, the, you know, the lining of your mucous passages, you know, they are all heavily laden with bacteria and you can actually develop fairly serious infections from that. So it's a sign that the skin lining is broken; that there has been, you know, a sufficient pressure shift to cause this kind of dirty air to go places that it shouldn't, right; inside of a kind of pristine environment of the inside of your body and your immune system is now kind of on the clock to repair that damage and prevent a serious infection from cropping up. So depending on where the fractures are, and depending on how much air gets in, depending on the bacterial load that you get, you can easily have, you know, an infection that will move backwards to infect the brain or the spinal cord or the lining of the brain itself, you know. So you can have a meningitis; you can have an encephalitis, the encephalon is just a fancy word for the outer part of the brain; the meninges are the linings that I was talking about before. "Itis" just means "inflammation", usually because of infection. So you can have an infection of the brain, and infection of the linings or infection of your entire spinal cord, none of which is good. So the fact that air is visible tells you a couple of important things, you know: one, there was a break to the bones; and so, there was a break to the skin lining and now the outside has access to the inside in a way that it shouldn't, and access to some very sensitive hardware, right? Your brain and nervous system."

[296] During his testimony, Doctor Peppin was asked to opine on whether, in his opinion, based on his experience as a medical officer and a base surgeon, that one's life is endangered when one is kicked in the head while on the ground or through the execution of an impressive punch, to which he replied as follows:

"Q. And being hit by that substantial amount of force, in your opinion, would that endanger someone's life? A. It absolutely could. I mean, people die from this kind of mechanism very, very routinely. And sometimes it's a great tragedy. You know, you will have young person, they are out at a bar with their friends, they get into an altercation, one punch is thrown and suddenly the person is dead. It sounds outlandish.



You are just like, what do you mean? How can the human body be that fragile? But your head and your neck have just a tremendous amount of fragile and important hardware in them and especially with the uncontrolled application of force, somebody who is not prepared for it or doesn't see it coming, it's very, very easy to have very, very serious injuries happen. So, you know, it doesn't even have to be about your nervous system, you know? You look at the exposed throat, right? You can have a tracheal fracture and it ruptures somebody's airway or cause of enough swelling or bleeding that they can't breathe and they suffocate to death, right? Tracheal fractures from incidents like this, somebody being punched, or kicked or, you know, attacked with a knife, that kind of thing, they can very commonly lose their airway. You can rotate the head. The spinal cord really does not like sudden rotation. That's why boxers on not . . .

Q. And so I was asking about the—whether or not the force applied in this case, based on your review of the medical file, would endanger life? A. I got you. Yeah. It absolutely could. So going back to rotation that I was talked about, you could very easily, you know, break the very brittle bones that are found in your cervical spine. That can easily lead to paralysis if it's high enough, right? Higher up tends to—it powers your diaphragm, right, your breathing muscle. And if you fracture it high enough, people will simply stop breathing. They no longer have the ability to breathe and they will suffocate to death unless someone breathes for them. So paralysis is absolutely a possibility; death is absolutely a possibility. You can have something called Central Cord Syndrome, which is caused by, you know flexing the spinal cord in a way that it's not used to. People lose the ability to control their arms. They can still use her legs. Very horrible disease. You can rupture blood vessels that are found in the back of your spinal column and essentially you'll stop providing necessary blood supply to your brain and spinal column. There's all kinds of bad things that can happen. You know, all the way from, you know, you can rupture the globe of your eye, you could have fragments of bone from the various fractures around the eye that cuts the eye or lacerates it as it moves. Like I said, you can have a very very serious infection that's caused by causing breaks somewhere that's in such close proximity to closely guarded nervous tissue. So those are some of the things that can happen, several of which have plausible mechanisms of leading to death.

. . .

Q. Okay. Doctor, I'm going to put a hypothetical to you. Someone who is six foot tall gets—loses consciousness and falls flat on their face. Is—would the force of the fall be something that might endanger their life?

And I say “might endanger life”; would endanger their life? A. A six-foot fall—or a six-foot tall person falling and being witnessed to land unbroken, flat on their face on a hard surface.

Q. Sure. Let’s go with that hypothetical then, yes. A. And the question is would that endanger their life.

Q. Yes? A. I would say it is possible.

Q. Okay? A. If you are to go down and thunder your head on some concrete, you could have some fairly serious injuries. You would be unlikely to have the rotational force required to fracture your spine; you could certainly have, you know, a fairly serious, you know, laceration and fracture together with, you know, the infection risk and bleeding risk that I had mentioned. But if it’s being suggested that the pattern of injury that was identified was caused by falling on the floor, I don’t think that that is plausible.

Q. Okay. So I said possible. Your answer started with it’s possible and anything is possible, but if I understood your answer, it’s that that’s not probable then. Just the force of the fall from a six-foot would probably not endanger someone’s life. Is that what I heard? All of that (inaudible)? A. I think that would be very unusual cause of death, yeah.

Q. All right. That’s fair. A. A fall from—if I fall from standing height in a young person, it would be unusual.

Q. Right. I just didn’t want to leave the possible there, because anything is possible. It was more . . . A. Anything is possible.

Q. Right, but unusual event, okay. How about another hypothetical then, doctor? Your hypothetical patient then is lying on the ground, unconscious and gets kicked in the head with enough force to cause the injuries that you observed in the medical records in this case, with the broken—the four breaks around the, you know, going from, sort of, the eyebrow around the left eye and down to the cheekbone. In your opinion then, would getting kicked with enough force to cause those injuries endanger someone’s life? A. Yeah. Absolutely.”

[297] Later on, during redirect from the prosecution, the doctor indicated:

“Q. Right. Okay. And then the final thing arising, counsel was asking you about whether those injuries were consistent with the punch, and you said that would have to be an impressive punch. So my question to you is if someone was the recipient of that impressive punch, would that impressive

punch endanger their lives? A. Absolutely. People die from being punched all the time.”

[298] As a matter of statutory law, and logic, there is support for the possibility of assaulting a person in a manner that endangers life without actually injuring or even touching that person, so it follows that it is possible to commit aggravated assault without inflicting bodily harm (see *R. v. Phillips*, [2009] OJ No 400 (QL), at paragraph 65). In other words, it is possible but only as long as the endangerment to life automatically flows as the consequence of the particular action. The peril to one’s life must be real. In *Phillips*, the accused drove his car onto a sidewalk to get to the victim and then turned his car around and drove at him again. Based on those facts, Molloy J. held that the use of a motor vehicle to endanger life or cause bodily harm can give rise to a conviction for assault with a weapon and/or aggravated assault.

[299] In *R. v. Melaragni* (1992), 75 C.C.C. (3d) 546 at page 550, Moldaver J., as he then was, provided examples of when bodily harm was not a necessary prerequisite of endangerment to life. He gave the following examples of assaults which endanger life without causing actual bodily harm:

For example, if D. and V are standing on a 20th-floor balcony and D. pushes V, causing V to go over the railing, but V. miraculously holds on and is rescued before falling, can it be doubted that D.'s common assault endangered the life of V.? In this example, D. has assaulted V. and the assault has endangered V's life even though V suffered no bodily injury. The same could be said if D. pushed V. into a busy intersection in the face of oncoming vehicular traffic. Assuming that an alert motorist was able to avoid striking V, can it be doubted that V's life was endangered?

[300] The Manitoba Court of Appeal distinguished the above comments by then Moldaver J. in the case of *R. v. De Freitas* 132 CCC (3d) 333 when it concluded that:

In my opinion, the assaults in those examples qualify as aggravated assaults because. Most assaults with a weapon have such potential at their inception, but do not qualify as an aggravated assault because the potential is unrealized when the assault ends. [Emphasis added.]

[301] The evidence must establish beyond any reasonable doubt that Private Meadows’ life was, in fact, endangered from the assault. The prosecution argued that the act of kicking Private Meadows to the head was sufficient by itself to prove the essential element of endangering life beyond a reasonable doubt because pursuant to the medical evidence before the Court it is medically possible to die from such a blow. With the greatest of respect, I must reject this argument for the following reasons.

[302] I find that the consistency of the case law suggests that no matter how the offence of assault is carried out, it becomes one of aggravated assault only if the victim’s life is actually endangered. To “endanger the life” of another person is to put him or her in a situation or condition that could cause that person to die. The mere

possibility that their life could be at risk is not sufficient. It must be realized as Moldaver J. concluded in *Melaragni* and as clarified and distinguished in *De Freitas*.

[303] Most of the hypotheticals and questions posed to Doctor Peppin focussed on the risks based on the type of assault itself and injuries sustained in this case. This nuance is an important one. Under cross-examination, I noted that the defence counsel asked Doctor Peppin more specifically about the realization of the risks and the exchange went as follows:

“Q. And my friend brought you through a lot of the risks that are associated with the conduct that led to this individual’s condition. Was there any materialization of any of those risks in this case? A. If I understand you correctly, you’re asking kind of whether any of those very sinister possibilities came to pass?

Q. Yes? He’s obviously not dead, but . . . A. No. Exactly, yeah.

Q. Yeah. So none of them came to pass? A. No, I think that’s fair to say.”

[304] Although a blow to the head with a closed fist or the receipt of multiple kicks to the head amount to an undoubtedly serious assault, it does not lead to the unavoidable conclusion that the life of Private Meadows was endangered at any point. As the above case of *De Freitas*, confirms at paragraph 11, the "endangerment of life" element is intended to refer to a consequence of the assault rather than a risk which arose from the nature of the assault. The expert medical opinion of Doctor Peppin was that Private Meadows’ injuries were not life-threatening.

[305] Although Sergeant Meeks’ punch and kicks to Private Meadows had the potential of endangering Private Meadow’s life, the evidence from the witnesses, including the medical doctor, Doctor Peppin, suggests that the injuries were serious, but there is no evidence that Private Meadows’ life was threatened at any time as a consequence of the assault.

[306] In short, the evidence presented in this case does not satisfy me beyond a reasonable doubt that Sergeant Meeks can be found guilty of aggravated assault on the basis of the assault endangering Private Meadows’ life.

### **Conclusion**

[307] The consequences of wounding, maiming, disfiguring and endangering the life of are elements of the offence of aggravated assault with which Sergeant Meeks is charged.

[308] The onus was on the prosecution to prove all the elements of the offence beyond a reasonable doubt, which in this case requires the prosecution to prove one of the consequences set out. When I look at the injuries sustained by Private Meadows, and I apply the relevant tests, and compare them to the respective common law, I find I am left with a doubt about whether Private Meadows' injuries constitute "wounding, maiming, disfiguring and endangering the life of" as contemplated by subsection 268(1) of the *Criminal Code*. It is a doubt that must be resolved in Sergeant Meeks' favour.

[309] I, therefore, find that the prosecution has not proven the required elements of the *actus reus* of aggravated assault, but I find it has proven the required elements of the included offence of assault causing bodily harm.

**FOR THESE REASONS, THE COURT:**

[310] **FINDS** Sergeant Meeks not guilty of the second charge and awaits submissions on the first charge prior to coming to a formal finding on that charge.

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**Counsel:**

The Director of Military Prosecutions as represented by Major G.D. Moffat and Major G.J. Moorehead.

Lieutenant-Colonel D. Berntsen, Defence Counsel Services, Counsel for Sergeant J.K. Meeks