Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20160603

Docket: CMAC-568

Citation: 2016 CMAC 1

CORAM: **DAWSON J.A.**
TRUDEL J.A.
RENNIE J.A.

BETWEEN:

MASTER CORPORAL D.D. ROYES

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Ottawa, Ontario, on January 22, 2016.

Judgment delivered at Ottawa, Ontario, on June 3, 2016.

REASONS FOR JUDGMENT BY: TRUDEL J.A.

CONCURRED IN BY: DAWSON J.A.
RENNIE J.A.

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REASONS FOR JUDGMENT

TRUDEL J.A.

I. Overview and Issues

[1] The appellant is seeking a declaration stating that paragraph 130(1)(*a*) of the *National Defence Act*, R.S.C. 1985, c. N-5 (NDA), which incorporates by reference nearly all offences under the *Criminal Code*, R.S.C. 1985, c. C-46 (Criminal Code), as offences under the NDA,

violates the right to the benefit of trial by jury guaranteed under section 11(*f*) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c. 11 (Charter).

[2] Thus, the appellant argues that paragraph 130(1)(*a*) and its regulatory counterpart found at section 103.61 of the *Queen's Regulations and Orders* (QR&Os) should be declared to be invalid pursuant to subsection 52(1) of the *Constitution Act, 1982*. The text of section 103.61 of the QR&Os is appended to these reasons (see Appendix I).

[3] This issue arises after the appellant was tried and convicted of sexual assault by a Standing Court Martial (2013 CM 4033). He was sentenced to a term of imprisonment of 36 months (2013 CM 4034). He appealed to our Court the legality of the guilty verdict as well as the Military Judge's decision to dismiss his motion for an order striking down paragraph 130(1)(*a*) of the NDA on the basis that it violates section 7 of the Charter (2013 CM 4032).

[4] In reasons indexed as 2014 CMAC 10, our Court dismissed all grounds of appeal with respect to the legality of the guilty verdict, leaving open the constitutional question. This way of proceeding was rendered necessary because the appellant had failed to serve a Notice of Constitutional Question pursuant to Rule 11.1 of the *Court Martial Appeal Court Rules*, S.O.R./86-959. As a result, the appeal was adjourned on this issue to 23 January 2015 to allow the appellant to comply with the Rules.

[5] On 28 October 2014, a first Notice of Constitutional Question was served, seeking a declaration that section 130 of the NDA offends section 7 of the Charter because it is overbroad.

[6] One rapidly notes that this constitutional issue is different from that which is presently in front of the Court. Indeed, on 22 December 2015, the appellant filed a new Notice of Constitutional Question wherein he abandoned his argument under section 7, focusing instead on section 11(*f*), which reads:

11. Any person charged with an offence has the right	11. Tout inculpé a le droit :
…	[…]
(*f*) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;	*f*) sauf s'il s'agit d'une infraction relevant de la justice militaire, de bénéficier d'un procès avec jury lorsque la peine maximale prévue pour l'infraction dont il est accusé est un emprisonnement de cinq ans ou une peine plus grave;

[7] This change of heart is subsequent to the Supreme Court of Canada's decision in *R. v. Moriarity*, 2015 SCC 55, [2015] 3 S.C.R. 485 [*Moriarity SCC*], issued on 19 November 2015.

[8] In *Moriarity SCC*, the Supreme Court of Canada held that paragraph 130(1)(*a*) of the NDA does not violate section 7 of the Charter.

[9] This finding obviously answered the question as posited in the first Notice of Constitutional Question. Hence the second Notice which is at the center of this continued hearing.

[10] At the outset of the hearing, the respondent sought summary dismissal of the appeal arguing that the appellant was impermissibly raising a new issue. Having heard the parties on the respondent's motion, our Court exercised its discretion to hear the matter on its merits despite the constitutional question being new to the debate. These reasons address the new constitutional question filed by the appellant with respect to section 11(*f*) of the Charter.

[11] I am of the view that this appeal cannot succeed. I arrive at this conclusion in light of three issues, as framed by the appellant at the hearing of this appeal:

A. First, what did the Supreme Court decide in Moriarity SCC and what is the effect of that decision?

B. Second, in light of Moriarity SCC, does the settled jurisprudence of this Court require a finding that paragraph 130(1)(a) of the NDA violates section 11(f) of the Charter?

C. Finally, is an offense under paragraph 130(1)(a) of the NDA a service offense as defined in section 2 of the NDA, and are service offenses under military law within the meaning of section 11(f) of the Charter?

[12] Because of my proposed conclusion, I need not address the appellant's arguments on section 1 of the Charter or on remedy.

A. *First, what did the Supreme Court decide in Moriarity SCC and what is the effect of that decision?*

(1) This Court's Decisions

[13] Prior to the Supreme Court of Canada's decision, this Court had recently pronounced itself on the constitutionality of paragraph 130(1)(*a*) of the NDA both in *R. v. Moriarity*, 2014 CMAC 1, 455 N.R. 59 [*Moriarity CMAC*], and in *R. v. Larouche*, 2014 CMAC 6, 460 N.R. 248 [*Larouche*]. I find it helpful to briefly review these decisions in order to place the Supreme Court of Canada's decision in context.

[14] In *Moriarity CMAC*, this Court held that, correctly interpreted, paragraph 130(1)(*a*) does not violate section 7 and section 11(*f*) of the Charter. Blanchard C.J. reviewed the relevant jurisprudence of this Court and the Supreme Court of Canada, and determined that despite the broad language of the provision, it must be read in the context of a military nexus requirement, and only includes those offences "whose commission is directly connected to discipline, efficiency, and morale in the military" which "may be prosecuted as service offenses under the [Code of Service Discipline]" (at paragraph 66).

[15] Blanchard C.J. further concluded, at paragraph 100, that the purpose of paragraph 130(1)(*a*) of the NDA is in accordance with the purpose of a separate system of military tribunals, as stated by Lamer C.J. in *R. v. Généreux*, [1992] 1 S.C.R. 259 at page 293, 88 D.L.R. (4th) 110: "to allow the Armed Forces to deal with matters that pertain directly to the discipline,

efficiency and morale of the military". Thus, "paragraph 130(1)(*a*) can be no broader than the purpose or object of the [Code of Service Discipline]".

[16] On the basis of this interpretation of the scope and the purpose of paragraph 130(1)(*a*), Blanchard C.J. concluded that it was not overbroad, as the military nexus requirement, which is "essential to ensuring the constitutionality" of the provision (at paragraph 102), ensures that it is not broader than necessary to accomplish its purpose (at paragraph 105). The same overbreadth analysis applied to his conclusion that neither section 7 nor section 11(*f*) of the Charter was violated (at paragraphs 105 and 108).

[17] This Court rendered its decision in *Larouche* after it decided *Moriarity CMAC*, but also before the Supreme Court of Canada pronounced itself in *Moriarity SCC*. Our Court arrived at the same practical result, but reframed the analysis in *Moriarity CMAC*. Cournoyer J.A. stated that the provision is overbroad and violates section 7 and section 11(*f*) of the Charter. He ordered a remedial reading in of the military nexus requirement, to bring the provision within the limits set by section 7 and section 11(*f*) of the Charter (*Larouche*, at paragraphs 15 and 133).

[18] In both *Moriarity CMAC* and *Larouche*, this Court drew its conclusions with respect to section 7 and section 11(*f*) of the Charter on the basis of the same overbreadth analysis.

(2) The Scope of the Supreme Court of Canada's Decision in *Moriarity SCC*

[19] The appellant argues that the Supreme Court of Canada's decision only addresses the constitutionality of paragraph 130(1)(*a*) of the NDA under section 7. Therefore, this Court's

conclusion remains valid that, absent the remedy of military nexus, paragraph 130(1)(*a*) violates section 11(*f*) and is unconstitutional. In other words, *Moriarity CMAC* and *Larouche* remain good law as they concern section 11(*f*) of the Charter.

[20] The appellant relies heavily on paragraph 30 of the Supreme Court of Canada's reasons in *Moriarity SCC*, where Cromwell J. wrote:

> [T]he question of the scope of Parliament's authority to legislate in relation to "Militia, Military and Naval Service, and Defence" under s. 91(7) of the *Constitution Act, 1867* and the scope of the exemption of military law from the right to a jury trial guaranteed by s. 11(*f*) of the *Charter* are not before us in these appeals. We are concerned here with articulating the purpose of two challenged provisions in order to assess the rationality of some of their effects. We are not asked to determine the scope of federal legislative power in relation to the military justice or to consider other types of *Charter* challenges. We take the legislative objective at face value and as valid and nothing in my reasons should be taken as addressing any of those other matters.

[21] The appellant submits this paragraph means that the Supreme Court of Canada's conclusions in *Moriarity SCC* are strictly limited to section 7 and do not apply to an analysis under section 11(*f*). Effectively, the appellant asks this Court to consider section 7 and section 11(*f*) in completely separate silos. I disagree with this approach.

[22] In my view, in paragraph 30, Cromwell J. simply specified that he was not addressing the constitutional limits of military justice, including the scope of section 11(*f*) of the Charter in a general sense, nor other Charter challenges that might arise in the future, and that his reasons should not be read as conclusive of those questions.

[23] I cannot, as the appellant invites me to do, read into that paragraph a statement that, although this Court applied an identical analysis to section 7 and section 11(*f*), and although the Supreme Court of Canada rejected this Court's approach to that analysis, somehow this Court's approach in *Moriarity CMAC* and *Larouche* remains valid in respect of section 11(*f*). With respect, this line of reasoning leads to an absurd result: holding the same legal conclusions simultaneously correct and incorrect, depending on which provision of the Charter is being considered.

[24] The appellant also points to paragraph 55 of *Moriarity SCC*, suggesting that it reflects a continued acceptance of the military nexus requirement insofar as the Supreme Court of Canada relied upon *Ionson v. The Queen* (1987), 4. C.M.A.R. 433, aff'd [1989] 2 S.C.R. 1973.

[25] Paragraph 55 reads:

> [55] A "military nexus" case from the 1980s supports this broader understanding of the connection between criminal offences committed by members of the armed forces and military discipline. In *Ionson v. The Queen* (1987), 4 C.M.A.R. 433, aff'd [1989] 2 S.C.R. 1073, the accused, a member of the regular armed forces, was a steward posted to HMCS *Fundy* in Esquimalt, British Columbia. While off duty and off his ship and the base, he was found by civilian police to be in possession of cocaine. At the time, he was driving a civilian vehicle (his own), was dressed in civilian clothes and there was no connection with other military members. He was convicted of possession of a narcotic by a Standing Court Martial. He raised a plea in bar of trial that there was not a sufficient military nexus to give jurisdiction to the Standing Court Martial. The President denied his plea in bar of trial, finding that there was a very real military nexus. That conclusion was affirmed by the CMAC (at p. 438), quoting with approval these words: "[The military authorities'] concern and interest in seeing that no member of the forces uses or distributes drugs and in ultimately eliminating their use, may be more pressing than that of civilian authorities" (*MacEachern v. The Queen* (1985), 4 C.M.A.R. 447,

> at p. 453). This Court affirmed that result. *Ionson* is consistent with a broad understanding of when at least a rational connection will exist between criminal offences committed by a member of the armed forces and military discipline, efficiency and morale.

[26] The appellant is not assisted by this paragraph. Cromwell J. states at the outset that the case was a "military nexus" case but relies on it entirely to support his "broad understanding of when at least a rational connection will exist between criminal offences committed by a member of the armed forces and military discipline, efficiency, and morale" (*Moriarity SCC* at paragraph 55). Clearly, he relies on military nexus in *Ionson* as analogous to rational connection; after the military nexus doctrine was explicitly rejected earlier in the decision (at paragraphs 35-40). This single reference to a military nexus case cannot be read to revive it.

[27] At the hearing of this appeal, the appellants contended that overbreadth as a principle of fundamental justice for the purposes of section 7 of the Charter is distinct from overbreadth outside that context, and that a provision which has been found not to be overbroad under section 7 may nonetheless be overbroad in other contexts — in this case, for the purposes of section 11(*f*).

[28] First and foremost, this position is belied by the fact, once again, that in this Court's decisions on which the appellant relies for the analysis of paragraph 130(1)(*a*) of the NDA under section 11(*f*) of the Charter (*Moriarity CMAC*; *Larouche*; *R. v. Vezina*, 2014 CMAC 3, 461 N.R. 286), the very same overbreadth analysis was adopted for both section 7 and section 11(*f*).

[29] Notwithstanding the Supreme Court of Canada's lack of a specific affirmative statement that paragraph 130(1)(*a*) of the NDA does not violate section 11(*f*), it is not, in my view, open to the appellant to sidestep the Supreme Court of Canada's decision on the basis of this Court's earlier statements. It is not open to this Court, either, having been overturned in that analysis by the Supreme Court of Canada, to reject its guidance when faced with substantially the same question in relation to a different section of the Charter.

[30] Further, the appellant is not assisted by his reliance on the Supreme Court of Canada's reasons in *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45 [*Sharpe*]. The appellant argues that *Sharpe* demonstrates a distinct meaning to overbreadth when considered outside the context of section 7 of the Charter. I disagree.

[31] In *Sharpe*, the Supreme Court of Canada addressed a challenge to Canada's laws criminalizing the possession of child pornography on the basis that they offended the right to freedom of expression protected by paragraph 2(*b*) and the right to liberty under section 7 of the Charter, without being reasonable limits demonstrably justified in a free and democratic society within the meaning of section 1.

[32] In *Sharpe*, the Crown conceded that criminalizing possession of child pornography limited the right of free expression. Thus, the Chief Justice only considered whether that limitation was reasonable and demonstrably justified in a free and democratic society. It was not necessary for the Court to deal with the section 7 argument. The Chief Justice stated that: "[s]ince [the section 7] argument wholly replicates the overbreadth concerns that are the central

obstacle to the justification of the section 2(*b*) breach, it is not necessary to consider it separately" (at paragraph 18).

[33] It is worth noting that the Court explicitly proceeded on the basis that the overbreadth analysis was identical under section 1 as it would be in respect of section 7. Although the legal approach has been refined over the years, there is no reason to conclude that *Sharpe* represents a distinct approach to overbreadth when considering the Charter in a context other than under section 7. Although no single statement defining the approach to overbreadth can be readily isolated from *Sharpe*, it seems clear to me that the approach to overbreadth is essentially the same as what was later stated and applied in *Moriarity SCC*.

[34] I realize that in *Sharpe*, the analysis focused on the effects of the law rather than its purpose like in *Moriarity SCC*. Yet, the central question was the same: properly construed, does the law have effects that are not rationally connected to its purpose?

[35] In my respectful view, *Sharpe* illustrates that, in addition to being a principle of fundamental justice for the purpose of section 7, overbreadth can be useful when considering whether a limit is demonstrably justified for the purpose of section 1. In the absence of, or in addition to, having an effect on a person's right to life, liberty, and security of the person, it may be relevant under the Charter to consider whether a law is overbroad in its effect on other guaranteed rights.

[36] The appellant provided no additional authority for the suggestion that the content of the overbreadth analysis is to be different, or that there might be different results to the question of overbreadth whether section 7 is at issue or not. In so stating, I have taken into consideration the recent decision of the Supreme Court of Canada in *R. v. Safarzadeh-Markhali*, 2016 SCC 14, [2016] S.C.J. No. 14, sent to the members of the panel by counsel for the appellant while this matter was under advisement.

[37] I am also reminded that sections 8 through 14 of the Charter have been held to describe breaches of the principles of fundamental justice within the meaning of section 7 (see *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at page 502, 24 D.L.R. (4th) 536). In that vein, I find it difficult to hold on one hand that a law is in accordance with the principles of fundamental justice under section 7 of the Charter, but on the other that it violates section 11(*f*) on an overbreadth analysis that has been specifically rejected by the Supreme Court of Canada.

[38] In sum, I conclude that the effect of the Supreme Court of Canada's decision in *Moriarity SCC* was not only to affirm that paragraph 130(1)(*a*) of the NDA does not violate section 7 of the Charter, but to correct this Court's approach to the question of overbreadth and determine that, properly interpreted, paragraph 130(1)(*a*) does not contain a military nexus requirement, and that even without this requirement the provision is not overbroad.

[39] In my view, by rejecting the necessity of a military nexus in order to give jurisdiction to military tribunals over members of the Canadian Forces and civilians accompanying them, the

Supreme Court of Canada has removed the sole prerequisite to the application of the exception contained in section 11(*f*), *i.e.* the exception to the constitutional right to a trial by jury.

[40] Therefore, I conclude that notwithstanding the absence of a specific order to this effect, *Moriarity SCC* effectively dictates that paragraph 130(1)(*a*) of the NDA does not violate section 11(*f*) of the Charter for overbreadth. This Court's conclusions that it does (*Larouche*), or that it would in the absence of a military nexus requirement (*Moriarity CMAC*), can no longer be relied upon for those propositions.

[41] I turn now to the appellant's other arguments.

B. *This Court's settled jurisprudence*

[42] The appellant further submits that rejecting his appeal on the sole basis of *Moriarity SCC* would entail inappropriately overturning thirty years of settled jurisprudence of this Court. In light of the Supreme Court of Canada's decision in *Moriarity SCC* and my conclusions on its ambit, this argument must also fail.

[43] This issue largely overlaps with the appellant's first argument, addressed above. I find it helpful nonetheless to discuss it as a separate argument in order to fully answer the appellant's claim.

[44] The appellant repeated that this Court has consistently asserted the necessity of military nexus in the system of military justice, and that this line of authority must be followed. The history of the military nexus doctrine is aptly set out in *Moriarity CMAC* at paragraphs 48 to 61.

[45] To the extent that the conclusion that I propose is inconsistent with past decisions of this Court emphasizing the need for military nexus to abide by section 11(*f*) of the Charter, it is because of the more recent guidance of the Supreme Court of Canada.

[46] I add that in arguing for this Court's broad endorsement of military nexus as fundamental to the military justice system, the appellant effectively overlooks this Court's decision in *R. v. Reddick*, 112 C.C.C. (3d) 491, [1996] C.M.A.J. No. 9 [*Reddick*], a division of powers case. For this Court, Strayer C.J. wrote:

> I believe that the concern about "nexus" in the *Bill of Rights* or Charter context is now misplaced because of the decision of the Supreme Court of Canada in *Généreux*. That decision has confirmed the basic legitimacy of a separate system of military justice. It has recognized that such a system is generally subject to the requirements of the Charter, albeit that those requirements may mandate somewhat different results in the military context. Thus military justice is not treated as a serious exception to the system of fundamental justice generally guaranteed to Canadians by the Charter (at page 504).

[47] Strayer C.J. also addressed the question of military nexus in relation to section 11(*f*) of the Charter directly:

> As to the application of the exemption for military tribunals from the Charter requirements of trial by jury, this really involves statutory interpretation or division of powers issues as to whether the offence in question is truly "an offence under military law" in the words of paragraph 11(*f*) of the Charter. Is the offence in question in its essence a "military offence" validly prescribed by

> Parliament under head 91(7) of the *Constitution Act, 1867*? If so, then the exception in the Charter applies (*ibidem* at page 505).

[48] Notwithstanding this Court's subsequent restrictive reading of Strayer C.J.'s comments on nexus, limiting them to the division of powers context (*Moriarity CMAC*, at paragraph 60), *Reddick* undermines the appellant's suggestion that his appeal is directly in line with decades of this Court's jurisprudence, from which *Moriarity SCC* can be somehow distinguished.

[49] The military nexus doctrine had already been effectively removed from the constitutional analysis by the *Reddick* decision, and has now been fully rejected by the Supreme Court. As suggested by Strayer C.J., the task remains to enforce the standards of the Charter in a military context following the generally applicable analytical principles (*Reddick*, at page 505).

[50] Strayer C.J.'s comments in *Reddick* on section 11(*f*) of the Charter in particular, read in light of *Moriarity SCC*, point to how it can be determined whether the deprivation of the right to trial by jury falls within the exception written into the constitutional text. If the accused is charged under a validly enacted offence and the offence is, properly interpreted, an offence under military law, then it does not violate section 11(*f*) to deny the accused a trial by jury.

[51] This brings me to the appellant's final argument.

C. *Does paragraph 130(1)(a) fall within the exception to the right to trial by jury?*

[52] At the hearing of this appeal, the appellant submitted that, notwithstanding the Supreme Court of Canada's conclusions on overbreadth, paragraph 130(1)(*a*) of the NDA does not refer to

offences under military law within the meaning of section 11(*f*) of the Charter, and therefore violates the right to trial by jury.

[53] It is clear to me that the acts or omissions referred to in paragraph 130(1)(*a*) are "Service Offences" as defined in section 2 of the NDA: "an offence under this Act, the Criminal Code or any other Act of Parliament, committed by a person while subject to the Code of Service Discipline".

[54] "Military law" is not defined in the Charter or the NDA, but is defined in the Criminal Code: "military law includes all laws, regulations or orders relating to the Canadian Forces".

[55] The only basis by which the appellant contended that a service offence would not constitute an offence under military law within the meaning of section 11(*f*) of the Charter was premised on the continued application of the military nexus doctrine.

[56] Indeed, this Court has previously held that "[a]n offence that has a real military *nexus* and falls within the letter of s. 120(1) [now 130(1)] of the *National Defence Act*] is an offence under military law as that term is used in s. 11(*f*) of the Charter of Rights" (*R. v. MacDonald*, [1983] 150 D.L.R. (3d) 620 at page 625, 6 C.C.C. (3d) 551).

[57] The appellant would have this Court continue to endorse this approach in the face of the Supreme Court of Canada's rejection of the military nexus doctrine. I am unable to do so.

[58] The Supreme Court unequivocally rejected this interpretation of paragraph 130(1)(*a*) of the NDA:

> An intent to limit the application of these provisions to situations in which there is a "direct link" between the circumstances of the offence and the military is nowhere apparent in the legislation.
>
> …
>
> We must therefore conclude that Parliament turned its mind to the circumstances in which it is appropriate to subject members of the armed forces to the military justice system. In the case of regular and special forces, it concluded that it was appropriate to do so in all circumstances, with the exception of the small group of offences which are excluded.
>
> (*Moriarity SCC*, at paragraphs 36-37)

[59] In light of the Supreme Court of Canada's comments in *Moriarity SCC*, my previous conclusion on its impact, and the text of the NDA and the Criminal Code, I conclude that service offences are offences under military law. I therefore propose to dismiss this final argument.

II. Proposed conclusion

[60] For these reasons, I conclude that the Supreme Court of Canada's decision in *Moriarity SCC* dictates finding that paragraph 130(1)(*a*) of the NDA, interpreted without a military nexus requirement, does not violate section 11(*f*) of the Charter.

[61] As a result I would answer the constitutional question in the negative: Paragraph 130(1)(*a*) of the NDA, and its regulatory counterpart found at section 103.61 of the QR&Os are not invalid pursuant to section 52(1) of the *Constitution Act, 1982*.

[62] Consequently, I propose to dismiss the appeal with the result that the sentence imposed by the Standing Court Martial on December 14, 2013 stands.

"Johanne Trudel"

J.A.

"I agree.
Eleanor R. Dawson J.A."

"I agree.
Donald J. Rennie J.A."

ANNEXE I

Queen's Regulations and Orders (QR&Os)	**Ordonnance et règlements royaux applicables aux forces canadiennes (ORFC)**
…	[…]
103.61 - OFFENCES AGAINST OTHER CANADIAN LAW	**103.61** - INFRACTIONS À D'AUTRES LOIS DU CANADA
(1) Section 130 of the National Defence Act provides:	(1) L'article 130 de la Loi sur la défense nationale prescrit :
"130. (1) An act or omission	«130. (1) Constitue une infraction à la présente partie tout acte ou omission :
a. that takes place in Canada and is punishable under Part VII, the Criminal Code or any other Act of Parliament, or	1. survenu au Canada et punissable sous le régime de la partie VII de la présente loi, du Code criminel ou de toute autre loi fédérale;
b. that takes place outside Canada and would, if it had taken place in Canada, be punishable under Part VII, the Criminal Code or any other Act of Parliament,	2. survenu à l'étranger mais qui serait punissable, au Canada, sous le régime de la partie VII de la présente loi, du Code criminel ou de toute autre loi fédérale.
is an offence under this Part and every person convicted thereof is liable to suffer punishment as provided in subsection (2).	Quiconque en est déclaré coupable encourt la peine prévue au paragraphe (2).
(2) Subject to subsection (3), where a service tribunal convicts a person under subsection (1), the service tribunal shall,	(2) Sous réserve du paragraphe (3), la peine infligée à quiconque est déclaré coupable aux termes du paragraphe (1) est:
a. if the conviction was in respect of an offence	1. la peine minimale prescrite par la disposition législative correspondante, dans le cas

d'une infraction:

i. committed in Canada under Part VII, the Criminal Code or any other Act of Parliament and for which a minimum punishment is prescribed, or

a. commise au Canada en violation de la partie VII de la présente loi, du Code criminel ou de toute autre loi fédérale et pour laquelle une peine minimale est prescrite,

ii. committed outside Canada under section 235 of the Criminal Code,

b. commise à l'étranger et prévue à l'article 235 du Code criminel,

impose a punishment in accordance with the enactment prescribing the minimum punishment for the offence; or

b.in any other case,

2.dans tout autre cas :

i. impose the punishment prescribed for the offence by Part VII, the Criminal Code or that other Act, or

a. soit la peine prévue pour l'infraction par la partie VII de la présente loi, le Code criminel ou toute autre loi pertinente,

ii. impose dismissal with disgrace from Her Majesty's service or less punishment.

b. soit comme peine maximale, la destitution ignominieuse du service de Sa Majesté.

(3) All provisions of the Code of Service Discipline in respect of a punishment of imprisonment for life, for two years or more or for less than two years, and a fine, apply in respect of punishments imposed under paragraph (2)(a) or subparagraph (2)(b)(i).

(3) Toutes les dispositions du code de discipline militaire visant l'emprisonnement à perpétuité, l'emprisonnement de deux ans ou plus, l'emprisonnement de moins de deux ans et l'amende s'appliquent à l'égard des peines infligées aux termes de l'alinéa (2)a) ou du sous-alinéa (2)b)(i).

(4) Nothing in this section is in derogation of the authority conferred by other sections of the Code of Service Discipline to charge, deal with and try a person alleged to have

(4) Le présent article n'a pas pour effet de porter atteinte aux pouvoirs conférés par d'autres articles du code de discipline militaire en matière de poursuite et de jugement

committed any offence set out in sections 73 to 129 and to impose the punishment for that offence described in the section prescribing that offence." (1 September 1999)

des infractions prévues aux articles 73 à 129.» (1er septembre 1999)

2) The statement of the offence in a charge under section 130 should be in the following form:

(2) L'énoncé de l'infraction dans le cas d'une accusation relevant de l'article 130 devrait être rédigé selon la formule suivante :

An offence punishable under section 130 of the National Defence Act, that is to say, (state the offence) contrary to (state the provision under which the offence is prescribed).

Une infraction punissable selon l'article 130 de la Loi sur la défense nationale, soit (indiquez l'infraction) contrairement à (indiquez la disposition qui établit l'infraction).

COURT MARTIAL APPEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	CMAC-568
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CONCURRED IN BY:	DAWSON J.A. RENNIE J.A.
DATED:	JUNE 3, 2016

APPEARANCES:

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Major Dylan Kerr Lieutenant-Colonel Anne Litowski	FOR THE RESPONDENT

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