Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20170519

Dockets: CMAC-566
CMAC-567
CMAC-571
CMAC-574
CMAC-577
CMAC-578
CMAC-579
CMAC-579
CMAC-581
CMAC-583
CMAC-584

Citation: 2017 CMAC 2

CORAM: CHIEF JUSTICE BELL
COURNOYER J.A.
GLEASON J.A.

CMAC-566

BETWEEN:

PRIVATE DÉRY, J.-C.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

CMAC-567

AND BETWEEN:

MASTER CORPORAL C.J. STILLMAN

Appellant

and

HER MAJESTY THE QUEEN

Respondent

CMAC-571

AND BETWEEN:

MAJOR B.M. WELLWOOD

Appellant

and

HER MAJESTY THE QUEEN

Respondent

CMAC-574

AND BETWEEN:

EX-PETTY OFFICER 2ND CLASS J.K. WILKS

Appellant

and

HER MAJESTY THE QUEEN

Respondent

CMAC-577

AND BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

WARRANT OFFICER J.G.A. GAGNON

Respondent

CMAC-578

AND BETWEEN:

LIEUTENANT (NAVY) G.M. KLEIN

Appellant

and

CANADA (MINISTER OF NATIONAL DEFENCE)

Respondent

CMAC-579

AND BETWEEN:

CORPORAL CHARLES NADEAU-DION

Appellant

and

HER MAJESTY THE QUEEN

Respondent

CMAC-580

AND BETWEEN:

CORPORAL F.P. PFAHL

Appellant

and

CANADA (MINISTER OF NATIONAL DEFENSE)

Respondent

CMAC-581

AND BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

CORPORAL A.J.R. THIBAULT

Respondent

CMAC-583

AND BETWEEN:

SECOND LIEUTENANT SOUDRI

Appellant

and

HER MAJESTY THE QUEEN

Respondent

CMAC-584

AND BETWEEN:

K39 842 031 PETTY OFFICER 2ND CLASS
R.K. BLACKMAN

Appellant

and

HER MAJESTY THE QUEEN

Respondent

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

Judgment delivered at Ottawa, Ontario, on May 19, 2017.

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

CONCURRING REASONS BY: BELL C.J.

Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20170519

Dockets: CMAC-566
CMAC-567
CMAC-571
CMAC-574
CMAC-577
CMAC-578
CMAC-579
CMAC-580
CMAC-581
CMAC-583
CMAC-584

Citation: 2017 CMAC 2

CORAM: CHIEF JUSTICE BELL
COURNOYER J.A.
GLEASON J.A.

CMAC-566

BETWEEN:

PRIVATE DÉRY, J.-C.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

CMAC-567

AND BETWEEN:

MASTER CORPORAL C.J. STILLMAN

Appellant

and

HER MAJESTY THE QUEEN

Respondent

CMAC-571

AND BETWEEN:

MAJOR B.M. WELLWOOD

Appellant

and

HER MAJESTY THE QUEEN

Respondent

CMAC-574

AND BETWEEN:

EX-PETTY OFFICER 2ND CLASS J.K. WILKS

Appellant

and

HER MAJESTY THE QUEEN

Respondent

CMAC-577

AND BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

WARRANT OFFICER J.G.A. GAGNON

Respondent

CMAC-578

AND BETWEEN:

LIEUTENANT (NAVY) G.M. KLEIN

Appellant

and

CANADA (MINISTER OF NATIONAL DEFENCE)

Respondent

CMAC-579

AND BETWEEN:

CORPORAL CHARLES NADEAU-DION

Appellant

and

HER MAJESTY THE QUEEN

Respondent

CMAC-580

AND BETWEEN:

CORPORAL F.P. PFAHL

Appellant

and

CANADA (MINISTER OF NATIONAL DEFENSE)

Respondent

CMAC-581

AND BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

CORPORAL A.J.R. THIBAULT

Respondent

CMAC-583

AND BETWEEN:

SECOND LIEUTENANT SOUDRI

Appellant

and

HER MAJESTY THE QUEEN

Respondent

CMAC-584

AND BETWEEN:

K39 842 031 PETTY OFFICER 2ND CLASS R.K. BLACKMAN

Appellant

and

HER MAJESTY THE QUEEN

Respondent

CONCURRING REASONS

CHIEF JUSTICE B. RICHARD BELL

I. Overview

[1] The question squarely before this Court is whether s. 130(1)*(a)* of the *National Defence Act*, R.S.C., 1985, c. N-5 [*NDA*] is constitutionally valid without the necessity of reading in a military nexus test (hereafter referred to as a "service connection" test). In *R. v. Larouche*, 2014 CMAC 6, this Court concluded that without a service connection test, s. 130(1)(*a*) of the *NDA* is overly broad and violates both sections 7 and 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*]. In *R. v. Moriarity*, 2015 SCC 55 [*Moriarity SCC*], the Supreme Court of Canada concluded that s. 130(1)(*a*) of the *NDA* is not overly broad and does not require a service connection test in order to comply with s. 7 of the *Charter*. *Moriarity SCC* specifically left unanswered the question about whether s. 130(1)(*a*) would, without a service connection test, violate s. 11(*f*) of the Charter. This Court answered that question in *R. v. Royes*, 2016 CMAC 1 [*Royes*] (leave to appeal to the SCC refused, 37054 (February 2, 2017)). This Court concluded in *Royes* that s. 130(1)(*a*) does not violate the *Charter*, even in the absence of a service connection test.

Section 11(*f*) of the *Charter* reads as follows:

Proceedings in criminal and penal matters	**Affaires criminelles et pénale**
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	**f)** sauf s'il s'agit d'une infraction relevant de la justice militaire, de bénéficier d'un procès avec jury lorsque la

punishment for the offence is imprisonment for five years or a more severe punishment;	peine maximale prévue pour l'infraction dont il est accusé est un emprisonnement de cinq ans ou une peine plus grave;

[2] The exception set out in s. 11(*f*), absent a service connection test, denies all persons subject to the Code of Service Discipline [CSD] (s. 60(1) of the *NDA*) a right to a jury trial for all *Criminal Code,* R.S.C., 1985, c. C-46 [*Criminal Code*] offences other than murder, manslaughter and those offences referred to in ss. 280-283 of the *Criminal Code* (s. 70 of the *NDA*). That is to say, the Director of Military Prosecutions [DMP] has discretion to prosecute before a court martial based upon the accused's status as a person subject to the CSD, as opposed to whether the alleged offence features a service connection. Subject to the exceptions set out in s. 70 of the *NDA*, a person's military status, as a person contemplated by the CSD, would be sufficient to clothe the military justice system with jurisdiction over the person and the offence.

[3] I wish to state unequivocally that I agree with my colleagues that this Court is bound by the *Royes* decision. As a result, I also agree with my colleagues' proposed disposition of the within appeal; namely, that without the requirement of a service connection test, s. 130(1)(*a*) of the *NDA* is constitutionally valid federal legislation and does not violate s. 11(*f*) of the *Charter*.

[4] While my reasons could conclude here, I feel compelled to make further observations given the extensive *obiter* offered by my colleagues, through which they, while still following *Royes*, demonstrate their disagreement with its (*Royes*) analysis and conclusion.

II. Observations and Analysis

A. *Parallel System of Military Justice*

[5] It is trite law that s. 91(7) of the *Constitution Act, 1867* (U.K.), 31 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 [Constitution] grants the federal Parliament the exclusive authority to legislate in relation to "Militia, Military and Naval Service, and Defence". As has been observed on a multitude of occasions by this Court and by the Supreme Court in *Moriarity SCC*, s. 11(*f*) contains an exception to the right to a jury trial "in the case of an offence under military law tried before a military tribunal". The military justice system is not an inferior or adjunct system of justice; rather, it is a parallel system of law (see *R. v. Moriarity*, 2014 CMAC 1, 455 N.R. 59 at para. 82 [*Moriarity CMAC*]; *R. v. Généreux*, [1992] 1 S.C.R. 259, [1992] S.C.J. no. 10 at para. 56) which operates within Canada and abroad for the purposes of the Canadian Armed Forces (ss. 130(1)(*a*) and (*b*) of the *NDA* refers to civil offences that take place in and outside Canada and which are tried under military law). It is essential that this parallel military justice system be seen as fair, just, Charter compliant, and operating effectively, both at home and abroad. I note in passing that the civilian justice system also provides for extraterritorial jurisdiction in several contexts. However, unlike the civilian justice system, the extra-territorial reach of the parallel military justice system is essential to its daily operations: persons subject to the CSD are regularly required to serve abroad and complete overseas assignments or training exercises in international or foreign territories.

[6] This parallel system of military justice is not a fossilized system of law. It is subject to the *Charter* and was subject to tremendous change and adaptation even before the *Charter*'s enactment. While the following list is not exhaustive, I consider it important to note several features of the parallel military justice system.

[7] Military judges are appointed based upon merit by the Governor in Council and are required to have at least ten years of standing at the bar of a province prior to their appointment (s. 165.21 of the *NDA*), just as civilian judges (s. 3 of the *Judges Act*, R.S.C., 1985, c. J-1 [*Judges Act*]). Military judges have security of tenure until retirement, just as civilian judges (s. 165.21(4) of the *NDA*). While it is the Canadian Judicial Council which is clothed with the jurisdiction to recommend the removal of a civilian judge (s. 65(2) of the *Judges Act*), it is the Military Judges Inquiry Committee, composed of justices of this Court, that is clothed with that power under the *NDA* (s. 165.21(3)). In the same manner that the civilian justice systems in Canada have implemented the position of an independent prosecutorial branch, often headed by a Director of Public Prosecutions, the military justice system has implemented a DMP (s. 165.1(1); see *R. v. Gagnon*, 2015 CMAC 2 at para. 19. The military justice system boasts an aggressive and independent Director of Defence Counsel Services (s. 249.18 of the *NDA*), which provides defence services to all persons subjected to the CSD requesting same. In addition, if a service member wishes to retain outside counsel, he has that opportunity (ss. 249.19 and 249.21 of the *NDA*). Appeals may be made by both the prosecution and the defence to this Court (which is fully civilianized), and then, by operation of ss. 245(1) and (2) there exist rights of appeal or leave to appeal to the Supreme Court of Canada, on grounds comparable to those available in the civilian system.

[8] I offer this brief summary of some of the important similarities between the two parallel systems for one reason: to demonstrate that the military justice system in Canada, which includes the possibility of appeals to this Court and the Supreme Court of Canada, is a dynamic and evolving system of justice, not unlike the parallel civilian system.

B. *A Word about the Court Martial System*

[9] In their reasons, my colleagues refer to 'service tribunals' throughout. I recognize that s. 11(*f*) of the *Charter* refers to "military tribunals"; however, it is clear that the words "service tribunals" and "military tribunals" when used within the context of s. 11(f) of the *Charter*, both refer to a Court Martial, a Court provided for in the *NDA* clothed with the powers of a superior court of criminal jurisdiction (s. 179 of the *NDA*). Proceedings before a Court Martial are not summary proceedings in which the rights of the accused are not respected. In fact, for certain offences, an accused may choose to be tried by Standing Court Martial (military judge alone) or a General Court Martial (see s. 165.191(2) of the *NDA*). In a General Court Martial, the court is composed of a military judge and a panel of five members (s. 167(1) of the NDA). That panel serves a function similar to that of a jury in a civilian criminal trial: the panel is the trier of facts while the military judge makes rulings on legal questions (ss. 191 and 192(1) of the *NDA*). Similar to a civilian jury trial where a civilian judge instructs a jury, the military judge instructs the panel. The grounds of appeal available to an accused based upon instructions delivered to the panel of a court martial are no different than those available to parties in the parallel civilian system. Just as unanimity is required by a civilian jury, most decisions made by the panel are determined by a unanimous vote (s. 192(2) of the *NDA*).

[10] Like the civilian jury system, the military court martial system is in constant evolution. Criminal jury systems in Canada have evolved, even in recent years, from having no alternate jurors to having one or two, if so ordered by a presiding judge who considers it to be in the interest of justice (s. 631(2.1) of the *Criminal Code*; *Criminal Law Amendment Act*, 2001, S.C. 2002, c. 13, s. 54(2)). Furthermore, a presiding judge may order additional jurors to be sworn

such that a jury of 13 or 14 members can decide the fate of an accused (s. 631(2.2) of the *Criminal Code*). Finally, I would note that accused persons do not get to "pick" their jury. While accused persons have a role to play in jury selection, that role cannot be considered determinative given the limitations upon challenges and challenges for cause: see, s. 629(1) of the *Criminal Code*. In the court martial system, panels are selected randomly by the Court Martial Administrator. In some cases, the members of the panel are required to hold senior or equal rank to that of the accused: see s. 167 of the *NDA*.

C. *History of the Service Connection Test*

[11] My colleagues acknowledge in their *obiter* that the service connection test in Canada was borrowed from the United States of America. It is important to note the environment within which the test was developed in the United States. It was introduced in 1969, at a time when the Vietnam War was raging and conscription was still a feature of the American military culture. Conscription, otherwise known as forced enlistment, was seen by many as the antithesis of a vibrant liberal democratic society in which the struggle for civil rights was making serious advances. The higher standards of military discipline seemed incongruous with the lower standard of procedural fairness imposed upon conscripted individuals. I note that in Canada we have not had conscription since 1942, during the Second World War (*An Act to amend the National Resources Mobilization Act*, 1940, Chap. 29, was assented on August 1, 1942, authorizing conscription for overseas service if it was deemed necessary). Another important factor in the evolution of the service connection test is that it was developed when the American courts were only hearing judicial reviews from courts martial. There were no appeals, which now exist in both Canada and the United States.

[12] This brief background sets the stage for the introduction in American jurisprudence of the service connection test. In *O'Callahan v. Parker*, 395 U.S. 258 (1969) [*O'Callahan*], the accused questioned the jurisdiction of the court martial with respect to an offence that was not related to military service. The offence was allegedly committed when he was off-duty, while on leave. The United States Supreme Court [USSC] construed the court martial jurisdiction narrowly, in part, because the court martial was "not yet an independent instrument of justice but remain[ed] to a significant degree a specialized part of the overall mechanism by which military discipline is preserved" (at para. 265). In *O'Callahan*, the USSC concluded that in order for an offence to be tried under the military justice system, the offence must be connected to service (*O'Callahan* at para. 272). The service connection test was then born. It was refined and further developed, and became known as the *Relford Factors* from the case bearing its name, *Relford v. Commandant, U.S. Disciplinary Barracks*, 401 U.S. 355 (1971). Until 1987, it was that test which was consistently applied in the United States to determine court martial jurisdiction. However, in 1987, the USSC heard an appeal for the first time, as opposed to a judicial review, from a military court. In that case, the USSC restored military status as the basis for military jurisdiction and rejected the service-connection test. It bears noting that by 1987, conscription had ended in the United States, the Vietnam War was over, and appeals to the civilian USSC, as opposed to judicial reviews, were available under the military justice system. See also, Janet Walker, "A Farewell Salute to the Military Nexus Doctrine" (1993) 2 NJCL 366 at 367.

[13] As explained in *Moriarity CMAC*, *Larouche*, *Royes*, and by my colleagues in their *obiter* herein, the service connection test in Canada grew out of a minority opinion of the Supreme Court of Canada in *MacKay v. The Queen*, [1980] 2 S.C.R. 370. It was clearly eroded in

Moriarity SCC and, as determined by my colleagues and endorsed by me in these reasons, was dealt a final blow in *Royes*. Perhaps the service connection is outdated; perhaps it was never necessary in the Canadian environment. Regardless, the factors which motivated the adoption of the test in the United States, the Canadian progenitor, are far removed from the realities of the modern Canadian military justice system.

D. *Parliament's Legislative Authority in Relation to Military Law*

[14] As already noted, s. 91(7) of the *Constitution* grants exclusive legislative authority to Parliament with respect to the militia, military and naval service, and defence. I note here that the precursors to the present s. 70 of the *NDA*, which sets out exceptions from military law for certain offences committed in Canada, and s. 130(1)(*a*), were both enacted in 1950 (1950, c. 43. s. 61; 1950, c. 43, s. 119, respectively).

[15] In support of their *obiter* observation that s. 11(*f*) exception should be read subject to a service connection test, my colleagues point out that nothing prevents Parliament from redefining "military law" by amending the list of offences set out in s. 70 of the *NDA* (murder, manslaughter, and those offences listed in ss. 280-283 of the *Criminal Code*). My colleagues suggest the definition of "military law" should not be left to Parliament. On this issue, there exists a fu*nda*mental difference in approach between me and my colleagues. I ask, rather: who is better positioned that Parliament to define military law, subject of course, to the confines of the division of powers and the provisions of the *Charter*? Parliament, for example, makes choices on what is and is not criminal law on a routine basis. Those decisions sometimes find themselves the subject of court challenges, such as, for example, Parliament's enactment on m*anda*tory

minimum sentencing: see, *R. v. Lloyd*, 2016 SCC 13, where the m*anda*tory minimum sentence was determined to be contrary to s. 12 of the *Charter* and not justified under s. 1. Any modification of matters related to military law is subject to the same type of challenge. Without being speculative about what Parliament or the courts might or might not do, it is surely possible that the removal of murder in s. 70 might attract a constitutional challenge. What the outcome of such a challenge would be is entirely speculative. The courts should not, in my respectful view, interpret existing legislation or *Charter* rights by setting up proposed "straw person" amendments to legislation, apparently within Parliament's competence. Any such amendments need to be considered in the fullness of time and within the context of *Charter* evolution at the time.

[16] Given that the precursors to ss. 70 and 130(1)(*a*) of the *NDA* were in place and had been interpreted well before the advent of the *Charter* in 1982, I am of the view Parliament understood clearly the concept of military law and the extent of its legislative competence. This is reflected in s. 11*(f)* of the *Charter*.

III. Conclusion

[17] While I agree with my colleagues that this Court's decision in *Royes* is binding upon us and am therefore in agreement with their proposed disposition of this appeal, I agree with the analysis undertaken in the unanimous opinion in *Royes*. As a result, these reasons should be read in conjunction with those rendered in *Royes*.

"B. Richard Bell"
Chief Justice

REASONS FOR JUDGMENT

COURNOYER J.A. and GLEASON J.A.

[18] The Court has before it 11 appeals in which the individuals charged with or found guilty of service offences under paragraph 130(1)*(a)* of the *National Defence Act*, R.S.C. 1985, c. N-5 (the *NDA*) allege that this paragraph is unconstitutional and should be declared invalid pursuant to subsection 52(1) of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11 on the basis that it violates s. 11(f) of the *Canadian Charter of Rights and Freedoms* (the *Charter*). Section 11(f) of the *Charter* guarantees the right to a jury trial where the maximum punishment for the offence is at least five years imprisonment, except in the case of an offence under military law.

[19] In six of these appeals, namely those brought by Ex-Petty Officer 2nd Class Wilks, Lieutenant (Navy) Klein, Corporal Nadeau-Dion, Corporal Pfahl, Sub-Lieutenant Soudri and Petty Officer 2nd Class Blackman, this constitutional issue was raised by the appellants in their notices of appeal and was the sole issue they pursued by the time the appeals were heard. Major Wellwood likewise raised the alleged violation of s. 11(f) of the *Charter* in her notice of appeal but also raised other grounds of appeal. In the remaining four appeals, Private Déry, Master Corporal Stillman, Warrant Officer Gagnon and Corporal Thibault presented motions to raise the constitutional issue after the notices of appeal or cross-appeal were filed. These motions were granted orally during the hearing of the appeals, and the reasons for allowing the amendments to the grounds of appeal or cross-appeal are set out in Chief Justice Bell's Reasons in these matters, issued concurrently with these Reasons.

[20] Thus, in all 11 cases, we are called upon to determine whether paragraph 130(1)*(a)* of the *NDA* violates s. 11(f) of the *Charter*. Additional issues arise in the cases of Major Wellwood and Warrant Officer Gagnon.

[21] These Reasons relate solely to the constitutional challenge to paragraph 130(1)*(a)* of the *NDA*. For the reasons set out below, we are of the view that the constitutional challenge to paragraph 130(1)*(a)* of the *NDA* must be dismissed.

I. Background

[22] In all 11 cases before us, the constitutional argument advanced by the individuals charged with or convicted of service offences is identical; they assert that by reason of the decision of the Supreme Court of Canada in *R. v. Moriarity*, 2015 SCC 55, [2015] 3 S.C.R. 485 [*Moriarity*] the charges against them must be dismissed. To put their argument in context, a bit of background is useful.

[23] Paragraph 130(1)*(a)* of the *NDA* constitutes as a "service offence" (and therefore triable in the military justice system) any offence committed by those subject to the Canadian Armed Forces' Code of Service Discipline ("CSD") if the act or omission is an offence under Part VII of the *NDA*, the *Criminal Code*, R.S.C. 1985, c. C-46 or other federal law. Active members of the Canadian Armed Forces as well as several other categories of individuals connected with the military are subject to the CSD.

[24] Most service offences may be tried before a service tribunal under the *NDA*. Section 70 of the *NDA* excepts from those offences committed in Canada that may be tried by a service tribunal only murder, manslaughter or offences under sections 280 to 283 of the *Criminal Code*, which relate to the abduction of children. Thus, virtually all criminal offences – including the vast majority of those where the maximum penalty equals or exceeds five years imprisonment – may be heard by a service tribunal. Where an individual is tried by a service tribunal under the *NDA*, a jury trial is not available. Rather, depending on certain factors including the severity of the offence and the accused individual's election, the matter is either heard by a Court Martial or by way of a summary trial presided over by a commanding officer or superior commander.

[25] Consequently, for the vast majority of criminal offences committed in Canada, individuals subject to the *CSD* may be tried in the military justice system at the discretion of the prosecution, thereby losing the right to elect trial by jury for domestic offences even though their civilian peers, if tried for the same offence, would have such an option.

[26] The relevant provisions from the *NDA* that establish the foregoing are reproduced and appended to these Reasons.

[27] Prior to the decision in *Moriarity*, the jurisprudence of this Court was to the effect that paragraph 130(1)*(a)* of the *NDA* would violate both s. 7 and ss. 11(f) of the *Charter* unless a charge laid under the *NDA* as a service offence arose out of a situation that was tied to military service with a sufficient nexus to justify a hearing before a military tribunal. This Court therefore read down paragraph 130(1)*(a)* of the *NDA* to impose a military nexus requirement as, absent

such a nexus, this Court found that proceeding under the *NDA* would violate both the constitutional guarantee to a jury trial and the rights guaranteed under section 7 of the *Charter*.

[28] In *Moriarity*, the Supreme Court of Canada overturned part of this jurisprudence and determined that paragraph 130(1)*(a)* and ss. 117(f) of the *NDA* do not violate s. 7 of the *Charter*. In that case, the Supreme Court found no need for a military nexus requirement to be read into paragraph 130(1)*(a)* of the *NDA* as there was no *Charter* violation to remedy. However, the issue of whether paragraph 130(1)*(a)* of the *NDA* also violates s. 11(f) of the *Charter* was not before the Supreme Court in *Moriarity*. Indeed, in writing for the Court, Justice Cromwell noted at paragraph 16 that the *Charter* challenge in that case was based solely on an alleged violation of s. 7 of the *Charter*.

[29] The accused individuals in these appeals argue that in *Moriarity* the Supreme Court held that one cannot read a military nexus requirement into paragraph 130(1)*(a)* of the *NDA* for any purpose. They further say that in *Moriarity* the Supreme Court did not disturb the case law of this Court to the effect that without such a read-in paragraph 130(1)*(a)* of the *NDA* violates s. 11(f) of the *Charter*. They thus argue that it must necessarily follow that the impugned provisions in the *NDA* are unconstitutional and that the charges against them must accordingly be dismissed as the case law of this Court regarding the violation of s. 11(f) of the *Charter* stands and the remedy of a reading down through the insertion of a military nexus requirement into paragraph 130(1)*(a)* of the *NDA* is no longer available.

[30] The same argument was recently considered by this Court in *R. v. Royes*, 2016 CMAC 1, 486 N.R. 257 [*Royes*]. There, this Court held that the decision in *Moriarity* "effectively dictates that paragraph 130(1)(a) of the NDA does not violate s. 11(f) of the Charter for overbreadth" (at para. 40). In consequence, this Court dismissed the challenge to paragraph 130(1)*(a)* of the *NDA* and found that it was no longer necessary to read a military nexus requirement into paragraph 130(1)*(a)* of the *NDA* to ensure its constitutional validity. In other words, this Court found that the paragraph was valid and that all charges contemplated under paragraph 130(1)*(a)* of the *NDA* may be heard by a service tribunal even if they arise out of a situation where there is no nexus to the military. Leave to appeal was denied by the Supreme Court on February 2, 2017. The parties in this matter were invited to provide written submissions on the impact of *Royes* on the constitutional question at issue. The Court received submissions from the accused individuals on September 9, 2016 and from counsel for the Crown on September 23, 2016.

II. The Impact of *Royes*

[31] With respect, we would not have reached the same conclusion as the panel in *Royes* regarding the impact of the decision in *Moriarity* on the constitutional validity of paragraph 130(1)*(a)* of the *NDA* under s. 11(f) of the *Charter*.

[32] We believe, as suggested by Rothstein J. in *Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489, at para. 21 that we are required to explain why we are of the view that *Royes* is problematic.

[33] We arrive at our conclusion considering the following factors: 1) the Supreme Court specifically left open the s. 11(f) issue in *Moriarity*; 2) the analysis required under s. 11(f) is different from that required under s. 7 of the *Charter*; 3) *Charter* rights should be given a generous and purposive interpretation; 4) the emerging international consensus to restrict the scope of military jurisdiction in criminal proceedings; and 5) the interpretation of s. 11(f) should be informed by the *Charter* and not by Parliament.

[34] Although leave to appeal from *Royes* has been denied, we note that Binnie J. remarked in *Des Champs v. Conseil des écoles séparées catholiques de langue française de Prescott Russell*, [1999] 3 S.C.R. 281 at para, 31, 177 D.L.R. (4th) 23, "of course refusal of leave is not to be taken to indicate any view by members of [the Supreme] Court of the merits of the decision". Similarly, in *The Queen v. Côté*, [1978] 1 S.C.R. 8 at 16, 73 D.L.R. (3d) 752, de Grandpré J. stated that the refusal to grant leave "does not amount to a confirmation of the views of the Court of Appeal thereon".

A. *The s. 11(f) issue was specifically left open in Moriarity*

[35] In *Moriarity* at paragraph 30, Cromwell J. wrote:

> The overbreadth analysis does not evaluate the appropriateness of the objective. Rather, it assumes a legislative objective that is appropriate and lawful. I underline this point here because the 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 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.

[36] In our view, the intention of the Supreme Court cannot be in doubt due to two clear statements made by Justice Cromwell: 1) the scope of the exemption of military law from the right to a jury trial guaranteed by s. 11(f) of the *Charter* was not before the Court in *Moriarity*; and 2) nothing in the Court's reasons should be taken to address the scope of s. 11(f).

B. *The interpretation to be given to s. 11(f) is different from that to be given to s. 7 of the Charter*

[37] The *Royes* panel expressed the opinion that to restrict the holding of *Moriarity* to s. 7 would result in considering section 7 and section 11(f) in completely separate silos (at para. 21). In its view, such reasoning would lead to an absurd result: holding the same legal conclusions simultaneously correct and incorrect, depending on the *Charter* provisions considered (at para. 23).

[38] With respect, we disagree. The overbreadth analysis to be undertaken under s. 7 of the *Charter* is fundamentally different from interpreting the scope of the exemption of military law from the right to a jury trial guaranteed by s. 11(f) of the *Charter*. The overbreadth inquiry asks whether a law that restricts rights in a way that generally supports the object of the law goes too far by denying the rights of some individuals in a way that bears no relation to the object of the law: *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, at para. 85. This analysis is entirely unconcerned with the interpretation of the breadth of the constitutional guarantee to a jury trial and the scope of the exemption of military law from the right to a jury

trial. They are as analytically distinct as s. 7 and s. 1 are: *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 128.

[39] We believe that our view is supported by the decision of the Alberta Court of Appeal in *R. v Peers*, 2015 ABCA 407, 330 C.C.C. (3d) 175, upheld substantially for the reasons of the majority by the Supreme Court (2017 SCC 13). The Court of Appeal held at paragraph 7 that "[s]ection 11(f) […] must be interpreted in its own context, according to its specific purpose" and that "s. 7 is neither a floor nor a ceiling on [s. 11(f)] rights". As noted by Hamish Stewart in *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (Toronto: Irwin Law, 2012) at 6, s. 7 provides "no constitutional entitlement to trial by jury beyond what is contained in section 11(f)".

[40] Thus, the scope of the exemption of military law from the right to a jury trial falls squarely to be decided under s. 11(f) and not under s. 7. There is therefore nothing incongruous in reaching a different result under ss. 11(f) and 7 of the *Charter* as the protections provided under each are distinct and the scope of protection may therefore well be different.

C. *The generous and purposive interpretation of s. 11(f)*

[41] It must first be acknowledged that our Court read the military nexus test into paragraph 130(1)*(a)* of the *NDA* in *R. v. MacDonald* (1983), 150 D.L.R. (3d) 620, 6 C.C.C. (3d) 551 [MacDonald] without much analysis and that at certain points our case law may have conflated interpretations under ss. 7 and 11(f) of the *Charter* even though the two analyses are conceptually distinct.

[42] Our decision in *R. v. Larouche*, 2014 CMAC 6 at paras. 44-61, 460 N.R. 248 [*Larouche*] explains how the conclusion that it was necessary to read in a military nexus into s. 130 of the *NDA* was reached and the historical context underpinning the approach.

[43] In a nutshell, the opinion expressed about the need for a military nexus test under the *Canadian Bill of Rights*, S.C. 1960, c. 44 by McIntyre J. in *MacKay v. The Queen*, [1980] 2 S.C.R. 370 at 410, 114 D.L.R. (3d) 393 [*MacKay*] after a specific reference to American law, came to be adopted by respected scholars in this country and our Court for the purpose of defining the scope of the exemption of military law to the right to a trial by a jury under the *Charter*.

[44] But taking a step back, if we undertake a more detailed and principled analysis, the result is the same.

[45] In our view, the approach to adopt when interpreting "under military law" was summarized in *R. v. MacDougall*, [1998] 3 S.C.R. 45, 165 D.L.R. (4th) 193, where the Supreme Court rejected a restrictive interpretation of the word "tried" under s. 11(b) of the *Charter*. McLachlin J. (as she then was) wrote at paragragh 24:

> […] *Charter* rights should be given a generous and purposive interpretation: see *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344, Re *B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at pp. 499-500, and *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 157. When interpreting *Charter* rights, courts "should avoid narrow, legalistic interpretations that might be appropriate to a detailed statute": P. W. Hogg, *Constitutional Law of Canada* (4th ed. 1997), at p. 820. There is no reason to suppose that the framers of the *Charter* intended in s. 11(b) to depart from a generous interpretation of "tried" which includes sentencing.

[46] While it is true that even if constitutional documents like the *Charter* should be interpreted in a large and liberal manner, the adoption of an interpretation divorced from the written text is not justified as explained by Cromwell J. in *Caron v. Alberta*, 2015 SCC 56, [2015] 3 S.C.R. 511, at paras. 36-38:

> These important principles, however, do not undermine the primacy of the written text of the Constitution: *Reference re Secession of Quebec*, at para. 53. The Constitution, the Court has emphasized, "should not be regarded as an empty vessel to be filled with whatever meaning we might wish from time to time": *Reference re Public Service Employee Relations Act* (Alta.), [1987] 1 S.C.R. 313, at p. 394; see also *British Columbia (Attorney General) v. Canada (Attorney General),* [1994] 2 S.C.R. 41 ("*Vancouver Island Railway (Re)*"); P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), at p. 15-50.
>
> As Iacobucci J. observed in *Vancouver Island Railway (Re)*: "Although constitutional terms must be capable of growth, constitutional interpretation must nonetheless begin with the language of the constitutional law or provision in question" (p. 88). More recently, this Court in *R. v. Blais*, 2003 SCC 44, [2003] 2 S.C.R. 236, cautioned that courts are "not free to invent new obligations foreign to the original purpose of the provision"; rather, "[t]he analysis must be anchored in the historical context of the provision" (para. 40).
>
> Thus, we must assess the appellants' arguments by looking at the ordinary meaning of the language used in each document, the historical context, and the philosophy or objectives lying behind the words and guarantees. We cannot simply resort to the historical evidence of the desires and demands of those negotiating the entry of the territories, and presume that those demands were fully granted. It is obvious that they were not. The Court must generously interpret constitutional linguistic rights, not create them.

[47] Contrary to the suggestion made by the Crown, we will search in vain to ascertain the intent of the drafters in 1982 with respect to s. 11(f) by conducting a review of what was in place in England or in Canada at any historical vantage point.

[48] In effect, there is no constitutional protection to the right to a trial by jury in England: Sally Lloyd-Bostock and Cheryl Thomas, "The Continuing Decline of the English Jury" in Neil Vidman, *World Jury Systems* (Oxford: Oxford University Press, 2000) at 57; Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (London: Stationery Office, 2001) at 137-138; Michael Code, "Law Reform Initiatives Relating to the Mega Trial Phenomenon" (2007), 53 C.L.Q. 421 at 441 (footnote 20).

[49] That being established, there are in our view, three historical certainties about s. 11(f).

[50] The first is that s. 11(f) created a new constitutional guarantee protecting the right to a trial by jury.

[51] The second is that the Supreme Court decision in *Mackay* was rendered on July 18, 1980. In *Mackay*, two judges referred to the approach of American courts with respect to the military nexus test: *MacKay* at 410.

[52] The third is that the right to a jury trial was added to the version of the *Charter* tabled before the Special Parliamentary Committee on the Constitution on January 12, 1981: Robin Elliot, "Interpreting the Charter - Use of the Earlier Versions as an Aid", (1982) U.B.C. L Rev (Charter Edition 11) at 15, 34; Gilles Létourneau, *Introduction to Military Justice: an Overview of Military Penal Justice System and its Evolution in Canada* (Montréal: Wilson & Lafleur, 2012) at 18-19.

[53] Our research has only uncovered three countries whose constitutions protect the right to a trial by jury and contain some defined military exception, namely, the United States and Canada, as is well known, and also Ireland: John D. Jackson, Katie Quinn and Tom O'Malley, "The Jury System in Contemporary Ireland: In the Shadow of a Troubled Past", in Neil Vidmar, *World Jury Systems* (Oxford: Oxford University Press, 2000) at 288.

[54] From the surrounding historical context, there is reason to believe that the sole possible influence on the drafters of our *Charter of Rights and Freedoms* came from the U.S. where, at the time of the adoption of s. 11(f), American law provided for a military nexus test: *O'Callahan v. Parker*, 395 U.S. 258 (1969) and *Relford v. Commandant*, 397 U.S. 934 (1970).

[55] As noted by our Court in *Moriarity*, this is no longer the case: *Solorio v. United States*, 483 U.S. 435 (1987).

[56] But even without more potent evidence with respect to the intent of the drafters of our Constitution, and regardless of whether or not we may come to a definitive conclusion that they intended to follow the American approach applied at the time, we believe that the same conclusion should be reached on the basis of a purposive and generous interpretation of s. 11(f).

[57] In *Hunter et al. v. Southam Inc.*, [1984] 2 S.C.R. 145, 11 D.L.R. (4th) 641 [*Hunter*], the Supreme Court was confronted with a similar situation with respect to the meaning of "unreasonable" under s. 8 of the *Charter*. In Hunter at 154-156, Chief Justice Dickson explained

how to resolve the open-ended nature of s. 8 by recourse to a purposive approach even without any particular hint from the historical, political and philosophic context:

> As is clear from the arguments of the parties as well as from the judgment of Prowse J.A., the crux of this case is the meaning to be given to the term "unreasonable" in the s. 8 guarantee of freedom from unreasonable search or seizure. The guarantee is vague and open. The American courts have had the advantage of a number of specific prerequisites articulated in the Fourth Amendment to the United States Constitution, as well as a history of colonial opposition to certain Crown investigatory practices from which to draw out the nature of the interests protected by that Amendment and the kinds of conduct it proscribes. There is none of this in s. 8. There is no specificity in the section beyond the bare guarantee of freedom from "unreasonable" search and seizure; nor is there any particular historical, political or philosophic context capable of providing an obvious gloss on the meaning of the guarantee.
>
> It is clear that the meaning of "unreasonable" cannot be determined by recourse to a dictionary, nor for that matter, by reference to the rules of statutory construction. The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a *Bill* or a *Charter of Rights*, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind. Professor Paul Freund expressed this idea aptly when he admonished the American courts "not to read the provisions of the Constitution like a last will and testament lest it become one".
>
> The need for a broad perspective in approaching constitutional documents is a familiar theme in Canadian constitutional jurisprudence. It is contained in Viscount Sankey's classic formulation in *Edwards v. Attorney-General for Canada*, [1930] A.C. 124, at p. 136, cited and applied in countless Canadian cases:
>
> > *The British North America Act* planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant

> a Constitution to Canada… Their Lordships do not conceive it to be the duty of this Board—it is certainly not their desire—to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation.

More recently, in *Minister of Home Affairs v. Fisher*, [1980] A.C. 319, dealing with the Bermudian Constitution, Lord Wilberforce reiterated at p. 328 that a constitution is a document "sui generis, calling for principles of interpretation of its own, suitable to its character", and that as such, a constitution incorporating a Bill of Rights calls for:

> … a generous interpretation avoiding what has been called "the austerity of tabulated legalism," suitable to give individuals the full measure of the fundamental rights and freedoms referred to.

Such a broad, purposive analysis, which interprets specific provisions of a constitutional document in the light of its larger objects is also consonant with the classical principles of American constitutional construction enunciated by Chief Justice Marshall in *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). It is, as well, the approach I intend to take in the present case.

[58] Thus, the first step is to define the purpose underlying s. 11(f) and delineate the nature of the interests it is meant to protect: *Hunter* at 157.

[59] The right to a jury trial "is an important right which individuals have historically enjoyed in the common law world" and "[t]he jury has often been praised as a bulwark of individual liberty": *R. v. Turpin*, [1989] 1 S.C.R. 1296 at 1309 [*Turpin*]. In *R. v. Sherratt*, [1991] 1 S.C.R. 509 at 523-524, Justice L'Heureux-Dubé provided the following description:

> The jury, through its collective decision making, is an excellent fact finder; due to its representative character, it acts as the conscience of the community; the jury can act as the final bulwark against oppressive laws or their enforcement; it provides a means whereby the public increases its knowledge of the criminal justice

> system and it increases, through the involvement of the public, societal trust in the system as a whole.

[60] Obviously, s. 11(f) is meant to protect the right to a jury trial. Any exception to this right should be narrowly construed: André Morel, "Certain Guarantees of Criminal Procedure" in Walter S. Tarnopolsky and Gérald-A. Beaudoin, eds., *The Canadian Charter of Rights and Freedoms – Commentary* (Toronto: Carswell, 1982) at 376.

[61] Such an approach is supported by Turpin, one of the few decisions involving the interpretation of s. 11(f). In *Turpin*, the Supreme Court concluded that s. 11(f) gives an accused the right to the benefit of a jury trial but does not force a jury trial on an accused if he or she has the option of a jury trial and elects to waive that right. In so deciding, the Court adopted a generous interpretation of the word "benefit" because this approach was "in tune with the purpose of s. 11(f)" and one that provided the accused "with the full measure of the protection which it appears the accused was intended to receive under s. 11(f)" (*Turpin* at 1313).

[62] As Wilson J. noted, when faced with two possible interpretations, s. 11(f) like other *Charter* rights, should be interpreted "in a broad and generous manner designed to ensure that those protected receive the full benefit of the protection" (*Turpin* at 1314). In our view, there is no reason to adopt a different approach in interpreting the expression "under military law".

[63] Consistent with the approach in *Turpin*, we believe the correct interpretation of "under military law" which provides the full measure of s. 11(f) is to read into paragraph 130(1)*(a)* of the *NDA* the military nexus requirement adopted by our Court. This approach has been

consistently applied from *MacDonald to R. v. Moriarity*, 2014 CMAC 1, 455 N.R. 59 (Moriarity (CMAC)) and *Larouche*. Until the decision in *Royes*, the mere status of the accused as a member of the military was considered insufficient to deny a Canadian citizen his or her constitutional right to a jury trial with respect to a criminal offence committed in Canada.

[64] The interpretation of "under military law" adopted by the *Royes* panel results in a much more restrictive protection of the constitutional right to a trial by a jury and narrows its scope. We believe this is inconsistent with the required broad and purposive way in which the guarantee of the right to a jury trial should be interpreted. No compelling case has been presented to justify this violation under s. 1: *Moriarity* (CMAC) at paras. 104-105; *Larouche* at paras. 19-20, 67-83, 131-132.

D. The emerging international consensus to restrict the scope of military jurisdiction

[65] An additional factor supporting our interpretation of s. 11(f) is the emerging international trend restricting the jurisdiction of military tribunals.

[66] No international human rights instrument contains a specific provision addressing the jurisdiction of military tribunals. But military courts are considered to be subjected to s. 14 of the *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171 (Entry into force on March 23, 1976; accession by Canada on May 19, 1976.) This Covenant provides in s. 14 that everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law: *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, UN GA A/68/285 (7 August 2013) at paras. 16-19; Michael Gibson, "International

Human Rights Law and the Administration of Justice Through Military Tribunals: preserving utility while precluding impunity" (2008), 4(1) J Int'l L and Int'l Rel 1 at 18; Christopher Waters, "Democratic Oversight Through Courts and Tribunals", in Alison Duxbury and Matthew Groves, *Military Justice in the Modern Age* (Cambridge: Cambridge University Press, 2016) at 54.

[67] In 2006, the *Draft Principles Governing the Administration of Justice Through Military Tribunals* were presented in a report by the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, Emmanuel Decaux: UN ECOSOCOR, 66th Sess, Supp No. 11(d), UN Doc E/CN.4/2006/58 (2006) (*Decaux Principles)*. Their purpose was to establish a minimum system of universally applicable rules to regulate military justice (at para. 10). In particular, if adopted, Principle No. 8 would restrict the jurisdiction of military courts to offences of a strictly military nature.

[68] In 2013, the Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaul recommended that the *Decaux Principles* be promptly considered and adopted by the Human Rights Council and endorsed by the General Assembly: UN GA, *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, UN GA A/68/285 (7 August 2013) at paras. 98-99 (Nature of offences under the jurisdiction of military tribunals) [Knaul]. They have not yet been adopted.

[69] To be sure, the *Decaux Principles* are not unanimously embraced: see for example the criticism of Michael Gibson in "International Human Rights Law and the Administration of

Justice Through Military Tribunals: Preserving Utility While Precluding Impunity" (2008), 4(1) J Int'l L and Int'l Rel 1 and Rain Liivoja, "Trying Civilian Contractors in Military Courts: A Necessary Evil", in Alison Duxbury and Matthew Groves, *Military Justice in the Modern Age* (Cambridge: Cambridge University Press, 2016) at 86-87.

[70] Yet, importantly, Special Rapporteur Knaul noted the current international approach towards military tribunals: "Over time, there has been an increasing tendency to curb the jurisdiction of military tribunals" (*Knaul* at para. 20).

[71] While the *Decaux Principles* are more restrictive than the military nexus test adopted by our Court, we believe that such an emerging international consensus is relevant to the interpretation of s. 11(f) even if it is not binding: *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 245, at para. 71.

[72] In *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283, at para. 92, the Supreme Court took note of a trend against the death penalty. Justice Arbour explained the relevance of such a trend:

> The existence of an international trend against the death penalty is useful in testing our values against those of comparable jurisdictions. This trend against the death penalty supports some relevant conclusions. First, criminal justice, according to international standards, is moving in the direction of abolition of the death penalty. Second, the trend is more pronounced among democratic states with systems of criminal justice comparable to our own. The United States (or those parts of it that have retained the death penalty) is the exception, although of course it is an important exception. Third, the trend to abolition in the democracies, particularly the Western democracies, mirrors and

> perhaps corroborates the principles of fundamental justice that led to the rejection of the death penalty in Canada.

[73] In his recent book *Military Justice*, American professor Eugene R. Fidell described the international impetus supporting the requirement of a military nexus test:

> Prevailing human rights doctrine properly disfavors the use of courts-martial for the trial of offences that have no relation to military service. A soldier who robs a bank, murders a taxicab driver in the civilian community, or views child pornography on a home computer should be tried in the courts of the civilian community. Permitting the military to handle these cases unwisely increases the gulf between the armed forces and the larger society. There should be more and better bridges between the two, not weaker ones. The wide-open US approach is in serious tension with prevailing international sta*nda*rds.
>
> Eugene R. Fidell, *Military Justice – A Very Short Introduction* (Oxford: Oxford University Press, 2016) at 47.

[74] Author Christina Cerna, a former Principal human rights specialist at the Inter-American Commission on Human Rights, shares this perspective. She writes "[t]he trend in international human rights law is to narrow the scope of military jurisdiction whereby it applies only to military officials who have committed military crimes and offences in the line of duty": Christina M. Cerna, "The Inter-American System and Military Justice" in Alison Duxbury and Matthew Groves, *Military Justice in the Modern Age* (Cambridge: Cambridge University Press, 2016) at 345.

[75] We believe that this emerging international consensus supports our interpretation of s. 11(f).

E. The definition of s. 11(f) should be informed by the Charter and not by Parliament

[76] Finally, we believe that the extent of the constitutional guarantee to a jury trial and the scope of the military law exception to such guarantee ought not be defined by Parliament in the *NDA*. Section 11(f) of the *Charter* is not cast in such terms as to leave open to the legislature the authority to define the scope of the right guaranteed by the section. In this regard, it stands in contrast to the provisions in the Quebec *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12 discussed in *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429 [Gosselin] which contain "limiting language sharply curtailing the scope of the right" and thus provided the legislature the authority to limit and define the rights in question (*Gosselin* at paras. 87-94).

[77] In the absence of wording in section 11(f) of the *Charter* that would leave it to Parliament to define the scope of what is meant by military law, we believe that the words "under military law" in the section cannot be equated with "under the National Defence Act": see André Morel, "Certain Guarantees of Criminal Procedure" in Walter S. Tarnopolsky and Gérald-A. Beaudoin, *The Canadian Charter of Rights and Freedoms – Commentary* (Toronto: Carswell, 1982) at 374-377.

[78] It should be pointed out that under *Royes*, nothing prevents Parliament from amending s. 70 of the *NDA* – as it did in 1998 with respect to sexual assaults offences – and abolishing the right to a trial by jury on a charge of murder committed in Canada, even if the offence was committed while on leave and away from a military base with no connection to military service, based simply on the military status of the serviceperson. Moreover, under *Royes*, cases that

previously would have proceeded before the civilian courts in the presence of a jury – such as trials for sexual assault by a member of the military of a civilian in a non-military setting – may now be tried before a service tribunal without a jury at the discretion of the prosecution.

[79] In short, in the absence of specific limiting language contained in s. 11(f) of the *Charter*, we are of the view that Parliament ought not be the arbiter of constitutional rights by defining what "under military law" means. In our view, the definition of "under military law" should rather be informed by the *Charter* and *Charter* values, as opposed to the *Charter* right being constrained by Parliament's chosen definition of military law, which may change from time to time.

[80] Given the importance of the right to a trial by jury and the fact that such a right is constitutionally guaranteed, we find it inappropriate to adopt an interpretation where Parliament would be the ultimate arbiter of the scope of the military law exemption and thus of the breadth of the right to a jury trial under s. 11(f) of the Charter.

[81] We hasten to add that prosecutorial discretion cannot save s. 130 of the *NDA* from its constitutional insufficiency: *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773, paras. 85-98 [*Nur*]. The recent decision of the Supreme Court in *R. v. Cawthorne*, 2016 SCC 32, [2016] 1 S.C.R. 983 does not overrule *Nur*.

[82] In *Nur*, Chief Justice McLachlin declined to accept the submission that the constitutionality of s. 95 of the *Criminal Code* could be salvaged by relying on the discretion of

the prosecution. She stated that "[t]o accept this argument would result in replacing a public hearing on the constitutionality of s. 95 before an independent and impartial court with the discretionary decision of a Crown prosecutor, who is in an adversarial role to the accused": *Nur*, at para. 86.

[83] She also explained why an unconstitutional law cannot be saved on a case-by-case basis by prosecutors:

> The argument of the Attorneys General of Canada and Ontario, however, goes further. They seek to insulate otherwise unconstitutional laws through the exercise of prosecutorial discretion as to when and to whom the laws apply. But unconstitutional laws are null and void under s. 52 of the *Constitution Act, 1982*. The Attorneys General's argument is essentially the converse of a constitutional exemption. As I observed on behalf of a unanimous Court in *Ferguson*, "[t]he divergence between the law on the books and the law as applied — and the uncertainty and unpredictability that result — exacts a price paid in the coin of injustice": para. 72. It deprives citizens of the right to know what the law is in advance and to govern their conduct accordingly, and it encourages the uneven and unequal application of the law. To paraphrase *Ferguson*, bad law, fixed up on a case-by-case basis by prosecutors, does not accord with the role and responsibility of Parliament to enact constitutional laws for the people of Canada: paras. 72-73.
>
> [Emphasis added]

[84] As is evident from the foregoing, the American doctrine of "constitutional as applied" has been rejected in Canada: see also *R. v. DeSousa*, [1992] 2 S.C.R. 944, at 955; *R. v. Ferguson*, [2008] 1 S.C.R. 96, 2008 SCC 6, para. 72. Finally, we observe that the power of the Attorney General under s. 568 of the *Criminal Code* to require a jury trial poses a qualitatively different question from the one raised by a statutory provision denying the right to a jury trial (see: *R. v. Hanneson* (1987), 31 C.C.C. (3d) 560, 27 C.R.R. 278 (Ont. H.C.J.); *R. v. J.S.R.*, 2012 ONCA

568, 291 C.C.C. (3d) 394, leave to appeal denied in [2012] S.C.C.A. No. 456, 447 N.R. 389). Thus, prosecutorial discretion is not and cannot be a cure for the unconstitutionality of 130(1)*(a)* of the *NDA*.

[85] In our view and in the consistent view of this Court prior to *Royes*, it is only by the reading in of a military nexus test that paragraph 130(1)*(a)* of the *NDA* can pass constitutional muster. We therefore respectfully disagree with the conclusion in *Royes*.

[86] That said, we cannot accept the argument advanced by the accused individuals in these appeals. We disagree with the submission of the accused individuals that *Moriarity* must lead to the conclusion that paragraph 130(1)*(a)* of the *NDA* is unconstitutional through violating s. 11(f) of the *Charter* but the remedy of reading the section down through the insertion of the requirement of a military nexus is no longer available. For the reasons noted in *Larouche* and the case law of this Court issued prior to *Royes*, we believe that this technique is available and appropriate to remedy the violation of s. 11(f) of the *Charter*.

III. Stare Decisis

[87] Despite our disagreement with the reasoning in *Royes*, we believe we are nonetheless bound to follow it due to the principle of comity or horizontal stare decisis. Under this principle, subject to certain rather narrow exceptions – none of which pertains here – our Court, which lacks the ability to sit in panels of more than three judges, should follow decisions made by earlier panels of the Court on the same point of law.

[88] A useful starting point for the discussion of comity is the approach taken by the Court of Appeal of England and Wales, an intermediate appellate court whose decisions are appealable to the United Kingdom Supreme Court (formerly the House of Lords). In *Velasquez, Ltd. v. Inland Revenue Commissioners*, [1914] 3 K.B. 458 at 461, Lord Cozens-Hardy M.R. noted that:

> […] there is one rule by which, of course, we are bound to abide — that when there has been a decision of this court upon a question of principle it is not right for this court, whatever its own views may be, to depart from that decision. There would otherwise be no finality in the law. If it is contended that the decision is wrong, then the proper course is to go to the ultimate tribunal, the House of Lords, who have power to settle the law and hold that the decision which is binding upon us is not good law.

[89] In *Young v. Bristol Aeroplane Co. Ltd.*, [1944] EWCA Civ 1, [1944] 2 All E.R. 293, Lord Greene M.R., while echoing this principle, identified three circumstances that would justify overturning a prior decision: to resolve conflicting decisions of the same court; to correct inconsistency with a decision of the House of Lords; or where the prior decision was given *per incuriam* or in disregard of binding legal or statutory authority. In the specific matter before the Court, Lord Greene M.R. expressed discontent with the reasoning underlying the binding precedent, but nevertheless felt bound to apply it. On appeal to the House of Lords in *Young v. Bristol Aeroplane Co. Ltd.*, [1945] UKHL 2, [1946] A.C. 163, Viscount Simmons agreed with Lord Greene M.R. on all accounts; the precedent had been wrongly decided, but only the House of Lords had authority to correct the mistake.

[90] These three narrow exceptions to the binding nature of a prior decision of an intermediate appellate court have been recognized by Canadian courts as setting out the circumstances where such a court, when sitting in the typical formation of a three-person panel, may decline to follow

a prior decision on a point of law. For example, the Federal Court of Appeal in *Miller v. Canada (Attorney General),* 2002 FCA 370 at paras. 8-10, 220 D.L.R. (4th) 149 [*Miller*] acknowledged that these exceptions are available to a three-person appellate panel of the Court, but noted they were not lightly exploited given the Court's responsibility to ensure consistency in the law. At least four provincial appellate courts have adopted a comparable approach for three-person panels: *British Columbia v. Worthington (Canada) Inc.*, [1989] 1 W.W.R. 1, 29 B.C.L.R. (2d) 145 (BCCA) [*Worthington*]; *Nathanson, Schachter & Thompson v. Inmet Mining Corp.*, 2009 BCCA 385, 96 B.C.L.R. (4th) 342; R. v. Lee, 2012 ABCA 17, 58 Alta. L.R. (5th) 30; *R. v. Grumbo* (1998), 159 D.L.R. (4th) 577, 168 Sask. R. 78 (SKCA); and *Thomson v. Nova Scotia (Workers' Compensation Board)*, 2003 NSCA 14, 223 D.L.R. (4th) 193 [*Thomson*].

[91] Similarly, this Court has previously noted that it was bound by its prior legal determinations except where they could be said to have been made *per incuriam* or were manifestly wrong: *R. v. Vezina*, 2014 CMAC 3 at paras. 12-15, 461 N.R. 286; see also *Larouche* at para. 121.

[92] The Supreme Court of Canada, as the final court of appeal, has recognized a broader ability to depart from its prior decisions, but has adopted a cautious approach to so doing. In an oft-cited passage in *R. v. Bernard*, [1988] 2 S.C.R. 833, 90 N.R. 321 [*Bernard*] Chief Justice Dickson (dissenting in the result) noted on page 849 that "certainty in the law remains an important consideration" and that there must therefore be "compelling circumstances to justify departure from a prior decision". In determining whether to overturn a prior decision, the Supreme Court has stated that it must balance the need for certainty against correctness, but

should not lightly depart from prior decisions, particularly if they are long-standing and represent the views of a majority of the Court: *Nur* at para. 59; *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3, at paras. 56-57; *Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489, at para. 27.

[93] Some intermediate appellate courts have adopted a somewhat similar expanded approach to departing from a binding precedent in situations where the court sits in a panel of five as opposed to three judges. For example, in *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215 at paras. 61-65, 402 D.L.R. (4th) 497, the Federal Court of Appeal recently sat as a panel of five and decided that it was entitled to revisit and overturn a long-established precedent because the jurisprudence of other courts on the issue and circumstances had changed so significantly as to fundamentally shift the parameters of the debate and require a revisiting of the prior authority.

[94] Somewhat similarly, the appeal courts of Ontario, Manitoba, Nova Scotia and British Columbia have endorsed a multi-factor approach to determining when five-person panels may depart from a precedent. In *David Polowin Real Estate Ltd. v. Dominion of Canada General Insurance Co.* (2005), 76 O.R. (3d) 161 at paras. 131-143, 255 D.L.R. (4th) 633 (Ont. C.A.) [*Polowin*], for example, the Ontario Court of Appeal identified a non-exhaustive list of factors that can motivate a five-person panel to reconsider a previous decision of the Court beyond the three traditional narrow grounds. These factors include the fact that other appellate courts have not followed the impugned precedent, that it had been the subject of academic criticism, had not been applied by implicated parties and the unlikelihood of a further appeal being heard. The

Manitoba Court of Appeal applied *Polowin* in *R. v. Neves*, 2005 MBCA 112 at paras. 91-108, [2006] 4 W.W.R. 464. The Nova Scotia Court of Appeal in Thomson at para. 34 offered a more limited list of factors focused primarily on the extent to which an overruling would represent a departure from or simply a return to established law. The British Columbia Court of Appeal in Worthington recognized the multi-factor approach without identifying a specific list of factors for consideration.

[95] Given that this Court lacks the ability to sit in panels of five, we believe this Court should follow the narrow approach and should only decline to follow a prior holding on a point of law if there is a contradictory decision from the Court on the point, the decision is contrary to binding authority of the Supreme Court of Canada or was made *per incuriam*.

[96] None of the foregoing may be said of the decision in *Royes*. In it, this Court decided the impact of *Moriarity* on the constitutionality of paragraph 130(1)*(a)* of the *NDA* under s. 11(f) of the Charter – the identical issue we are called upon to decide. There is no other conflicting case from this Court or the Supreme Court of Canada that interprets *Moriarity*. Moreover, the decision in *Royes* cannot be said to have been made *per incuriam* but, rather, was a fully reasoned treatment of the issue by a unanimous bench.

[97] The accused individuals argue that despite this we should decline to follow *Royes* because the principle of comity should be relaxed when a court is faced with a constitutional issue or when the liberty of an individual is at stake. We disagree that this is so. The principles of comity apply equally in constitutional cases; indeed, Miller involved a constitutional challenge

under the Charter. And, while it is true that the liberty of the individual is a factor that has sometimes been considered by courts adopting a broader approach to declining to follow a binding precedent, this factor is not enough on its own so as to justify a court's departing from a precedent with which it disagrees. Were this so, there would be no binding pronouncements made in criminal cases. Thus, neither of the reasons advanced by the accused individuals for departing from *Royes* holds weight.

[98] Moreover, in ten of the cases before us, the liberty of the individuals would not be impacted even if we were to depart from *Royes*. In all cases, except that of Corporal Thibault, there was in fact a military nexus and the individuals charged do not challenge this fact. Thus, even if it were still necessary to read the requirement for such a nexus into paragraph 130(1)*(a)* of the *NDA*, the result in only one of these 11 appeals might be impacted.

IV. Disposition

[99] It follows that we would dismiss the constitutional challenge and accordingly the appeals in the cases of Ex-Petty Officer 2nd Class Wilks, Lieutenant (Navy) Klein, Corporal Nadeau-Dion, Corporal Pfahl, Sub-Lieutenant Soudri, Petty Officer 2nd Class Blackman, Private Déry and Master Corporal Stillman, where this is the sole issue advanced by the appellants. The remaining issues in Major Wellwood's case will be decided in a separate decision to issue shortly.

[100] In Corporal Thibault's case, the prosecution is appealing the plea in bar of trial granted pursuant to article 112.24 of the *QR&O* because the Standing Court Martial came to the

conclusion that it had no jurisdiction on the basis of an insufficient nexus with military service: 2015 CM 1001. As we have determined that we are bound to follow and apply *Royes*, the plea in bar of trial should be overturned and a new trial ordered.

[101] In Warrant Officer Gagnon's case, the prosecution's appeal raises the additional issue of whether or not the trial judge committed a reversible error in leaving the defense of mistaken belief in consent to the panel. By agreement, the parties concurred that this issue would be examined only after we decided the constitutional issue. Warrant Officer Gagnon's case should therefore be set for a hearing before this Court for argument on this remaining issue.

"Guy Cournoyer"
J.A.

"Mary J.L. Gleason"
J.A.

ANNEXE

The relevant provisions of the National Defence Act, RSC, 1985, c N-5 are:

PART III	**PARTIE III**
Code of Service Discipline	**Code de discipline militaire**
DIVISION 1	**SECTION 1**
Disciplinary Jurisdiction of the Canadian Forces	**Compétence des forces canadiennes en matière disciplinaire**
[…]	[…]
Persons subject to Code of Service Discipline	**Personnes assujetties au code de discipline militaire**
60 (1) The following persons are subject to the Code of Service Discipline:	60 (1) Sont seuls justiciables du code de discipline militaire :
(*a*) an officer or non-commissioned member of the regular force;	*a*) les officiers ou militaires du rang de la force régulière;
(*b*) an officer or non-commissioned member of the special force;	*b*) les officiers ou militaires du rang de la force spéciale;
(*c*) an officer or non-commissioned member of the reserve force when the officer or non-commissioned member is	*c*) les officiers ou militaires du rang de la force de réserve se trouvant dans l'une ou l'autre des situations suivantes :
(i) undergoing drill or training, whether in uniform or not,	(i) en période d'exercice ou d'instruction, qu'ils soient en uniforme ou non,
(ii) in uniform,	(ii) en uniforme,
(iii) on duty,	(iii) de service,
[…]	[…]
(v) called out under Part VI in aid of the civil power,	(v) appelés, dans le cadre de la partie VI, pour prêter main-forte au pouvoir civil,
(vi) called out on service,	(vi) appelés en service,

(vii) placed on active service,

(viii) in or on any vessel, vehicle or aircraft of the Canadian Forces or in or on any defence establishment or work for defence,

(ix) serving with any unit or other element of the regular force or the special force, or

(x) present, whether in uniform or not, at any drill or training of a unit or other element of the Canadian Forces;

(*d*) subject to such exceptions, adaptations and modifications as the Governor in Council may by regulations prescribe, a person who, pursuant to law or pursuant to an agreement between Canada and the state in whose armed forces the person is serving, is attached or seconded as an officer or non-commissioned member to the Canadian Forces;

(*e*) a person, not otherwise subject to the Code of Service Discipline, who is serving in the position of an officer or non-commissioned member of any force raised and maintained outside Canada by Her Majesty in right of Canada and commanded by an officer of the Canadian Forces;

(*f*) a person, not otherwise subject to the Code of Service Discipline, who accompanies any unit or other element of the Canadian Forces that is on service or active service in any place;

(*g*) subject to such exceptions, adaptations and modifications as

(vii) en service actif,

(viii) à bord d'un navire, véhicule ou aéronef des Forces canadiennes ou dans — ou sur — tout établissement de défense ou ouvrage pour la défense,

(ix) en service dans une unité ou un autre élément de la force régulière ou de la force spéciale,

(x) présents, en uniforme ou non, à l'exercice ou l'instruction d'une unité ou d'un autre élément des Forces canadiennes;

d) sous réserve des exceptions, adaptations et modifications que le gouverneur en conseil peut prévoir par règlement, les personnes qui, d'après la loi ou un accord entre le Canada et l'État dans les forces armées duquel elles servent, sont affectées comme officiers ou militaires du rang aux Forces canadiennes ou détachées auprès de celles-ci;

e) les personnes qui, normalement non assujetties au code de discipline militaire, servent comme officiers ou militaires du rang dans toute force levée et entretenue à l'étranger par Sa Majesté du chef du Canada et commandée par un officier des Forces canadiennes;

f) les personnes qui, normalement non assujetties au code de discipline militaire, accompagnent quelque unité ou autre élément des Forces canadiennes en service, actif ou non, dans un lieu quelconque;

g) sous réserve des exceptions, adaptations et modifications que le

the Governor in Council may by regulations prescribe, a person attending an institution established under section 47;

gouverneur en conseil peut prévoir par règlement, les personnes fréquentant un établissement créé aux termes de l'article 47;

(*h*) an alleged spy for the enemy;

h) les présumés espions pour le compte de l'ennemi;

(*i*) a person, not otherwise subject to the Code of Service Discipline, who, in respect of any service offence committed or alleged to have been committed by the person, is in civil custody or in service custody; and

i) les personnes qui, normalement non assujetties au code de discipline militaire, sont sous garde civile ou militaire pour quelque infraction d'ordre militaire qu'elles ont — ou auraient — commise;

(*j*) a person, not otherwise subject to the Code of Service Discipline, while serving with the Canadian Forces under an engagement with the Minister whereby the person agreed to be subject to that Code.

j) les personnes qui, normalement non assujetties au code de discipline militaire, servent auprès des Forces canadiennes aux termes d'un engagement passé avec le ministre par lequel elles consentent à relever de ce code.

Continuing liability

(2) Every person subject to the Code of Service Discipline under subsection (1) at the time of the alleged commission by the person of a service offence continues to be liable to be charged, dealt with and tried in respect of that offence under the Code of Service Discipline notwithstanding that the person may have, since the commission of that offence, ceased to be a person described in subsection (1).

Maintien du statut de justiciable

(2) Quiconque était justiciable du code de discipline militaire au moment où il aurait commis une infraction d'ordre militaire peut être accusé, poursuivi et jugé pour cette infraction sous le régime du code de discipline militaire, même s'il a cessé, depuis que l'infraction a été commise, d'appartenir à l'une des catégories énumérées au paragraphe (1).

Retention of status and rank

(3) Every person who, since allegedly committing a service offence, has ceased to be a person described in subsection (1), shall for the purposes of the Code of

Rétention du statut et grade

(3) Quiconque a cessé, depuis la présumée perpétration d'une infraction d'ordre militaire, d'appartenir à l'une des catégories énumérées au paragraphe (1) est réputé, pour l'application du

Service Discipline be deemed, for the period during which under that Code he is liable to be charged, dealt with and tried, to have the same status and rank that he held immediately before so ceasing to be a person described in subsection (1).

code de discipline militaire, avoir le statut et le grade qu'il détenait immédiatement avant de ne plus en relever, et ce tant qu'il peut, aux termes de ce code, être accusé, poursuivi et jugé.

[…]

[…]

Place of Commission of Offence

Lieu de la perpétration de l'infraction

Service offence, wherever committed, is triable

Effet

67 Subject to section 70, every person alleged to have committed a service offence may be charged, dealt with and tried under the Code of Service Discipline, whether the alleged offence was committed in Canada or outside Canada.

67 Sous réserve de l'article 70, quiconque est présumé avoir commis une infraction d'ordre militaire peut être accusé, poursuivi et jugé sous le régime du code de discipline militaire, indépendamment du lieu de perpétration, au Canada ou à l'étranger.

Place of Trial

Lieu du procès

No territorial limitation

Absence de restriction territoriale

68 Every person alleged to have committed a service offence may be charged, dealt with and tried under the Code of Service Discipline, either in Canada or outside Canada.

68 Quiconque est présumé avoir commis une infraction d'ordre militaire peut être accusé, poursuivi et jugé sous le régime du code de discipline militaire, tant au Canada qu'à l'étranger.

Period of Liability

Période d'assujettissement

When person is liable

Prescription

69 (1) A person who is subject to the Code of Service Discipline at the time of the alleged commission of a service offence may be charged, dealt with and tried at any time under the Code.

69 (1) Toute personne qui était justiciable du code de discipline militaire au moment où elle aurait commis une infraction d'ordre militaire peut être accusée, poursuivie et jugée pour cette infraction sous le régime de ce code.

Sections 130 and 132

(2) Despite subsection (1), if the service offence is punishable under section 130 or 132 and the act or omission that constitutes the service offence would have been subject to a limitation period had it been dealt with other than under the Code, then that limitation period applies.

Articles 130 et 132

(2) Toutefois, dans le cas où le fait reproché est punissable par le droit commun en application des articles 130 ou 132, la prescription prévue par le droit commun pour cette infraction s'applique.

Limitations with respect to Certain Offences

Offences not triable by service tribunal

70 A service tribunal shall not try any person charged with any of the following offences committed in Canada:

(*a*) murder;

(*b*) manslaughter; or

(*c*) an offence under any of sections 280 to 283 of the Criminal Code.

[…]

Restrictions relatives à certaines infractions

Limitation de la compétence des tribunaux militaires

70 Les tribunaux militaires n'ont pas compétence pour juger l'une des infractions suivantes commises au Canada :

a) meurtre;

b) homicide involontaire coupable;

c) infractions visées aux articles 280 à 283 du Code criminel.

[…]

Offences Punishable by Ordinary Law

Service trial of civil offences

130 (1) An act or omission

(*a*) that takes place in Canada and is punishable under Part VII, the Criminal Code or any other Act of Parliament, or

(*b*) that takes place outside Canada and would, if it had taken place in Canada, be punishable under Part

Infractions de droit commun

Procès militaire pour infractions civiles

130 (1) Constitue une infraction à la présente section tout acte ou omission :

a) 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) survenu à l'étranger mais qui serait punissable, au Canada, sous le régime de la partie VII de la présente loi, du

VII, the Criminal Code or any other Act of Parliament,

Code criminel ou de toute autre loi fédérale.

is an offence under this Division 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).

Punishment

Peine

(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

a) 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

(i) 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, impose a punishment in accordance with the enactment prescribing the minimum punishment of the offence; or

(ii) commise à l'étranger et prévue à l'article 235 du Code criminel;

(*b*) in any other case,

b) dans tout autre cas :

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

(i) 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.

(ii) soit, comme peine maximale, la destitution ignominieuse du service de Sa Majesté.

Code of Service Discipline applies

Application du code de discipline militaire

(3) All provisions of the Code of

(3) Toutes les dispositions du code de

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).

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).

Saving provision

(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 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.

Disposition restrictive

(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 des infractions prévues aux articles 73 à 129.

[…]

[…]

DIVISION 4

Commencement of Proceedings

Interpretation

Definition of commanding officer

160 In this Division, commanding officer, in respect of an accused person, means the commanding officer of the accused person and includes an officer who is empowered by regulations made by the Governor in Council to act as the commanding officer of the accused person.

SECTION 4

Début des poursuites

Définition

Définition de commandant

160 Pour l'application de la présente section, commandant, en ce qui concerne une personne accusée d'une infraction d'ordre militaire, s'entend de son commandant ou de l'officier que les règlements du gouverneur en conseil habilitent à agir à ce titre.

[…]

[…]

Laying of charge

161 Proceedings against a person

Accusation portée

161 La poursuite contre une personne à

who is alleged to have committed a service offence are commenced by the laying of a charge in accordance with regulations made by the Governor in Council.

qui il est reproché d'avoir commis une infraction d'ordre militaire est entamée par une accusation portée conformément aux règlements du gouverneur en conseil.

Referral to commanding officer

161.1 After a charge is laid, it shall be referred to an officer who is a commanding officer in respect of the accused person.

Déféré

161.1 Après qu'elle a été portée, l'accusation est déférée au commandant de l'accusé.

[…]

[…]

Duty to act expeditiously

162 Charges laid under the Code of Service Discipline shall be dealt with as expeditiously as the circumstances permit.

Obligation d'agir avec célérité

162 Une accusation portée aux termes du code de discipline militaire est traitée avec toute la célérité que les circonstances permettent.

Right to Trial by Court Martial

Droit à un procès devant une cour martiale

Election

162.1 Except in the circumstances prescribed in regulations made by the Governor in Council, an accused person who is triable by summary trial has the right to elect to be tried by court martial.

Choix

162.1 Sauf dans les cas prévus par règlement du gouverneur en conseil, un accusé qui peut être jugé sommairement peut choisir d'être jugé devant une cour martiale.

[…]

[…]

DIVISION 5

SECTION 5

Summary Trials

Procès sommaires

Interpretation

Définitions

Definitions

Définitions

162.3 The definitions in this section apply in this Division.

162.3 Les définitions qui suivent s'appliquent à la présente section.

commanding officer, in respect of

commandant En ce qui concerne une

an accused person, means an officer who is a commanding officer within the meaning of section 160. (commandant)

personne accusée d'une infraction d'ordre militaire, s'entend de son commandant au sens de l'article 160. (commanding officer)

superior commander means an officer of or above the rank of brigadier-general, or any other officer appointed by the Chief of the Defence Staff as a superior commander. (commandant supérieur)

commandant supérieur Tout officier détenant au moins le grade de brigadier-général ou nommé à ce titre par le chef d'état-major de la défense. (superior commander)

Summary Trials by Commanding Officers

Procès sommaire devant commandant

Jurisdiction

Compétence

163 (1) A commanding officer may try an accused person by summary trial if all of the following conditions are satisfied:

163 (1) Un commandant peut juger sommairement l'accusé si les conditions suivantes sont réunies :

(*a*) the accused person is either an officer cadet or a non-commissioned member below the rank of warrant officer;

a) il s'agit d'un élève-officier ou d'un militaire du rang d'un grade inférieur à celui d'adjudant;

(*b*) having regard to the gravity of the offence, the commanding officer considers that his or her powers of punishment are adequate;

b) il estime que ses pouvoirs de punition sont suffisants, eu égard à la gravité de l'infraction;

(*c*) if the accused person has the right to elect to be tried by court martial, the accused person has not elected to be so tried;

c) l'accusé n'a pas choisi d'être jugé devant une cour martiale, dans les cas où ce choix est prévu;

(*d*) the offence is not one that, according to regulations made by the Governor in Council, the commanding officer is precluded from trying; and

d) l'infraction ne fait pas partie de celles que les règlements du gouverneur en conseil excluent de sa compétence;

(*e*) the commanding officer does not have reasonable grounds to believe that the accused person is unfit to stand trial or was suffering

e) il n'a aucun motif raisonnable de croire que l'accusé est inapte à subir son procès ou était atteint de troubles mentaux au moment de la perpétration

from a mental disorder at the time of the commission of the alleged offence.

de l'infraction reprochée.

Limitation period

(1.1) A commanding officer may not try an accused person by summary trial unless the summary trial commences within one year after the day on which the service offence is alleged to have been committed.

Prescription

(1.1) Le commandant ne peut juger sommairement l'accusé à moins que le procès sommaire ne commence dans l'année qui suit la perpétration de l'infraction reprochée.

Prohibition on presiding

(2) Unless it is not practical, having regard to all the circumstances, for any other commanding officer to conduct the summary trial, a commanding officer may not preside at the summary trial of a person charged with an offence if

Restriction

(2) Le commandant ne peut, dans les cas suivants, juger sommairement l'accusé, à moins que, dans les circonstances, aucun autre commandant ne soit en mesure de le faire :

(*a*) the commanding officer carried out or directly supervised the investigation of the offence;

a) il a mené ou supervisé directement l'enquête relative à l'accusation;

(*b*) the summary trial relates to an offence in respect of which a warrant was issued under section 273.3 by the commanding officer; or

b) il a délivré en application de l'article 273.3 un mandat relativement à l'infraction en cause;

(*c*) the commanding officer laid the charge or caused it to be laid.

c) il a porté — directement ou indirectement — les accusations.

Sentences

(3) Subject to the conditions set out in Division 2 relating to punishments, a commanding officer at a summary trial may pass a sentence in which any one or more of the following punishments may be included:

Sentences

(3) Sous réserve des conditions énoncées à la section 2 en matière de peines, le commandant présidant un procès sommaire peut prononcer une sentence comportant une ou plusieurs des peines suivantes, énumérées dans l'ordre décroissant de gravité :

(*a*) detention for a period not

a) détention pour une période maximale

exceeding thirty days;

(*b*) reduction in rank by one rank;

(*c*) severe reprimand,

(*d*) reprimand,

(*e*) a fine not exceeding basic pay for one month, and

(*f*) minor punishments.

[…]

de trente jours;

b) rétrogradation d'un grade;

c) blâme;

d) réprimande;

e) amende n'excédant pas un mois de solde de base;

f) peines mineures.

[…]

Summary Trial by Superior Commanders

Jurisdiction

164 (1) A superior commander may try an accused person by summary trial if all of the following conditions are satisfied:

(*a*) the accused person is an officer below the rank of lieutenant-colonel or a non-commissioned member above the rank of sergeant;

(*b*) having regard to the gravity of the offence, the superior commander considers that his or her powers of punishment are adequate;

(*c*) if the accused person has the right to elect to be tried by court martial, the accused person has not elected to be so tried;

(*d*) the offence is not one that, according to regulations made by the Governor in Council, the superior commander is precluded from trying; and

Procès sommaire devant des commandants supérieurs

Compétence

164 (1) Le commandant supérieur peut juger sommairement l'accusé si les conditions suivantes sont réunies :

a) il s'agit d'un officier d'un grade inférieur à celui de lieutenant-colonel ou d'un militaire du rang d'un grade supérieur à celui de sergent;

b) il estime que ses pouvoirs de punition sont suffisants, eu égard à la gravité de l'infraction;

c) l'accusé n'a pas choisi d'être jugé devant une cour martiale, dans les cas où ce choix est prévu;

d) l'infraction ne fait pas partie de celles que les règlements du gouverneur en conseil excluent de sa compétence;

(*e*) the superior commander does not have reasonable grounds to believe that the accused person is unfit to stand trial or was suffering from a mental disorder at the time of the commission of the alleged offence.

e) il n'a aucun motif raisonnable de croire que l'accusé est inapte à subir son procès ou était atteint de troubles mentaux au moment de la perpétration de l'infraction reprochée.

Limitation period

(1.1) A superior commander may not try an accused person by summary trial unless the summary trial commences within one year after the day on which the service offence is alleged to have been committed.

Prescription

(1.1) Le commandant supérieur ne peut juger sommairement l'accusé à moins que le procès sommaire ne commence dans l'année qui suit la perpétration de l'infraction reprochée.

Prohibition on presiding

(2) Unless it is not practical, having regard to all the circumstances, for any other superior commander to conduct the summary trial, a superior commander may not preside at the summary trial of a person charged with an offence if

Restriction

(2) Le commandant supérieur ne peut, dans les cas suivants, juger sommairement l'accusé, à moins que, dans les circonstances, aucun autre commandant supérieur ne soit en mesure de le faire :

(*a*) the superior commander carried out or directly supervised the investigation of the offence;

a) il a mené ou supervisé directement l'enquête relative à l'accusation;

(*b*) the summary trial relates to an offence in respect of which a warrant was issued under section 273.3 by the superior commander as a commanding officer; or

b) il a délivré en application de l'article 273.3 un mandat relativement à l'infraction en cause;

(*c*) the superior commander laid the charge or caused it to be laid.

c) il a porté — directement ou indirectement — les accusations.

Exception

(3) A superior commander may try an accused person who is of the rank of lieutenant-colonel by summary trial in any circumstances that are prescribed by the Governor

Exception

(3) Le commandant supérieur peut juger sommairement un accusé détenant le grade de lieutenant-colonel dans les cas prévus par règlement du gouverneur

in Council in regulations.

Sentences

(4) Subject to the conditions set out in Division 2 relating to punishments, a superior commander at a summary trial may pass a sentence in which any one or more of the following punishments may be included:

(*a*) severe reprimand;

(*b*) reprimand; and

(*c*) fine.

[…]

DIVISION 6

Trial by Court Martial

[…]

General Courts Martial

Jurisdiction

166 A General Court Martial may try any person who is liable to be charged, dealt with and tried on a charge of having committed a service offence.

Punishment limitation

166.1 A General Court Martial that tries a person other than an officer or a non-commissioned member may only pass a sentence that includes a punishment of imprisonment or a fine.

Composition

167 (1) A General Court Martial is composed of a military judge and a

en conseil.

Sentences

(4) Sous réserve des conditions énoncées à la section 2 en matière de peines, le commandant supérieur présidant un procès sommaire peut prononcer une sentence comportant une ou plusieurs des peines suivantes :

a) blâme;

b) réprimande;

c) amende.

[…]

SECTION 6

Procès devant une cour martiale

[…]

Cour martiale générale

Compétence

166 La cour martiale générale a compétence en matière d'infractions d'ordre militaire imputées aux personnes justiciables du code de discipline militaire.

Restriction quant à la peine

166.1 La cour martiale générale ne peut infliger à la personne qui n'est pas officier ou militaire du rang qu'une peine d'emprisonnement ou une amende.

Composition

167 (1) La cour martiale générale se compose d'un juge militaire et d'un

panel of five members.

[…]

Standing Courts Martial

Jurisdiction

173 A Standing Court Martial may try any person who is liable to be charged, dealt with and tried on a charge of having committed a service offence.

Composition

174 Every military judge is authorized to preside at a Standing Court Martial, and a military judge who does so constitutes the Standing Court Martial.

Punishment limitation

175 A Standing Court Martial that tries a person other than an officer or a non-commissioned member may only pass a sentence that includes a punishment of imprisonment or a fine.

[…]

Powers

Courts martial

179 (1) A court martial has the same powers, rights and privileges — including the power to punish for contempt — as are vested in a superior court of criminal jurisdiction with respect to

comité de cinq membres.

[…]

Cour martiale permanente

Compétence

173 La cour martiale permanente a compétence en matière d'infractions d'ordre militaire imputées à toute personne justiciable du code de discipline militaire.

Composition

174 La cour martiale permanente est constituée par un seul juge militaire.

Restriction quant à la peine

175 La cour martiale permanente ne peut infliger à la personne qui n'est pas officier ou militaire du rang qu'une peine d'emprisonnement ou une amende.

[…]

Pouvoirs

Cour martiale

179 (1) La cour martiale a, pour la comparution, la prestation de serment et l'interrogatoire des témoins, ainsi que pour la production et l'examen des pièces, l'exécution de ses ordonnances et toutes autres questions relevant de sa compétence, les mêmes attributions qu'une cour supérieure de juridiction criminelle, notamment le pouvoir de punir l'outrage au tribunal.

(*a*) the attendance, swearing and examination of witnesses;

(*b*) the production and inspection of documents;

(*c*) the enforcement of its orders; and

(*d*) all other matters necessary or proper for the due exercise of its jurisdiction.

Military judges

(2) Subsection (1) applies to a military judge performing a judicial duty under this Act other than presiding at a court martial.

[…]

Decisions of General Court Martial

Questions of law

191 The military judge presiding at a General Court Martial determines all questions of law or mixed law and fact arising before or after the commencement of the trial.

[…]

Decision of panel

192 (1) The members of the panel determine the court martial's finding and its decision in respect of any other matter or question arising after the commencement of the trial that is not a question of law or mixed law and fact.

Decision

Juge militaire

(2) Chaque juge militaire a ces mêmes attributions pour l'exercice des fonctions judiciaires que lui confie la présente loi, sauf lorsqu'il préside une cour martiale.

[…]

Décisions de la cour martiale générale

Questions de droit

191 Le juge militaire qui préside la cour martiale générale statue sur les questions de droit ou sur les questions mixtes de droit et de fait survenant avant ou après l'ouverture du procès.

[…]

Décision du comité

192 (1) Le comité décide du verdict et statue sur toute autre matière ou question, autre qu'une question de droit ou une question mixte de droit et de fait, survenant après l'ouverture du procès.

Décision

(2) A decision of the panel in respect of a finding of guilty or not guilty, of unfitness to stand trial or of not responsible on account of mental disorder is determined by the unanimous vote of its members. A decision in respect of any other matter is determined by a majority vote.

(2) Les décisions du comité relatives à un verdict de culpabilité, de non-culpabilité, d'inaptitude à subir un procès ou de non-responsabilité pour cause de troubles mentaux se prennent à l'unanimité; les autres décisions se prennent à la majorité des membres.

[…]

[…]

Sentence

193 The military judge presiding at a General Court Martial determines the sentence.

Sentence

193 Le juge militaire qui préside la cour martiale générale fixe la sentence.

COURT MARTIAL APPEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	CMAC-566
STYLE OF CAUSE:	PRIVATE DÉRY, J.-C. v. HER MAJESTY THE QUEEN
AND DOCKET:	CMAC-567
STYLE OF CAUSE:	MASTER CORPORAL C.J. STILLMAN v. HER MAJESTY THE QUEEN
AND DOCKET:	CMAC-571
STYLE OF CAUSE:	MAJOR B.M. WELLWOOD v. HER MAJESTY THE QUEEN
AND DOCKET:	CMAC-574
STYLE OF CAUSE:	EX-PETTY OFFICER 2ND CLASS J.K. WILKS v. HER MAJESTY THE QUEEN
AND DOCKET:	CMAC-578
STYLE OF CAUSE:	LIEUTENANT (NAVY) G.M. KLEIN v. CANADA (MINISTER OF NATIONAL DEFENCE)
AND DOCKET:	CMAC-577
STYLE OF CAUSE:	HER MAJESTY THE QUEEN v. WARRANT OFFICER J.G.A. GAGNON
AND DOCKET:	CMAC-579
STYLE OF CAUSE:	CORPORAL CHARLES NADEAU-DION v. HER MAJESTY THE QUEEN

AND DOCKET:	CMAC-580
STYLE OF CAUSE:	CORPORAL F.P. PFAHL v. CANADA (MINISTER OF NATIONAL DEFENSE)
AND DOCKET:	CMAC-581
STYLE OF CAUSE:	HER MAJESTY THE QUEEN v. CORPORAL A.J.R. THIBAULT
AND DOCKET:	CMAC-583
STYLE OF CAUSE:	SECOND LIEUTENANT SOUDRI v. HER MAJESTY THE QUEEN
AND DOCKET:	CMAC-584
STYLE OF CAUSE:	K39 842 031 PETTY OFFICER 2ND CLASS R.K. BLACKMAN v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	APRIL 26, 2016
REASONS FOR JUDGMENT BY:	COURNOYER J.A. GLEASON J.A.
CONCURRING REASONS BY:	CHIEF JUSTICE BELL
DATED:	MAY 19, 2017

APPEARANCES:

Capitaine de Corvette Mark Létourneau et Lieutenant-Colonel Jean-Bruno Cloutier	FOR THE APPELLANTS SOLDAT DÉRY, J.-C. MAJOR B.M. WELLWOOD EX-PETTY OFFICER 2ND CLASS J.K. WILKS HER MAJESTY THE QUEEN LIEUTENANT (NAVY) G.M. KLEIN CAPORAL CHARLES NADEAU-DION CORPORAL F.P. PFAHL HER MAJESTY THE QUEEN SOUS-LIEUTENANT SOUDRI K39 842 031 PETTY OFFICER 2ND CLASS R.K. BLACKMAN
Major Dylan Kerr Major Gabriel Roy	FOR THE RESPONDENTS
Capitaine de Corvette Mark Létourneau	FOR THE APPELLANT MASTER CORPORAL C.J.STILLMAN
Lieutenant Colonel David Anthonyshyn	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Defence Counsel Services Gatineau, Quebec	FOR THE APPELLANTS
Canadian Military Prosecution Service Ottawa, Ontario	FOR THE RESPONDENTS