

**Court Martial Appeal Court
of Canada**



**Cour d'appel de la cour martiale
du Canada**

Date: 20170519

**Dockets: CMAC-566
CMAC-567
CMAC-577
CMAC-581**

Citation: 2017 CMAC 1

**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-577

AND BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

WARRANT OFFICER J.G.A. GAGNON

Respondent

CMAC-581

AND BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

CORPORAL A.J.R. THIBAUT

Respondent

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

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

REASONS FOR JUDGMENT BY:

CHIEF JUSTICE B. RICHARD BELL

CONCURRED IN BY:

COURNOYER J.A.
GLEASON J.A.

**Court Martial Appeal Court
of Canada**



**Cour d'appel de la cour martiale
du Canada**

Date: 20170519

**Dockets: CMAC-566
CMAC-567
CMAC-577
CMAC-581**

Citation: 2017 CMAC 1

**CORAM: CHIEF JUSTICE BELL
GLEASON J.A.
COURNOYER 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-577

AND BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

WARRANT OFFICER J.G.A. GAGNON

Respondent

CMAC-581

AND BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

CORPORAL A.J.R. THIBAUT

Respondent

REASONS FOR JUDGMENT

CHIEF JUSTICE B. RICHARD BELL

I. Background

A. *Private Déry*

[1] Private Déry was charged with a service offence punishable under s. 130 of the *National Defence Act*, RSC 1985, c N-5 [Act] of having committed a sexual assault contrary to s. 271 of the *Criminal Code*, RSC 1985, c C-46 [Criminal Code]. He was found guilty by a Standing Court Martial. The incident occurred at Canadian Forces Base Wainwright, Alberta, in the tent where the victim was sleeping. Private Déry appeals from the decision on the basis that paragraph 130(1)(a) of the Act violates 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] and should be declared invalid pursuant to subsection 52(1) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [Constitution Act, 1982].

B. *Master Corporal Stillman*

[2] Master Corporal Stillman was charged with service offences punishable under s. 130 of the Act and was found guilty by a Standing Court Martial of five charges. Those charges are set out in Annex A attached hereto. Master Corporal Stillman shot the victim in the thigh with a .45-calibre semi-automatic pistol on Canadian Forces Base Shilo. As he walked away from the scene and was being pursued, he turned and fired another shot, which narrowly missed the second victim. Master Corporal Stillman appealed the decision on the basis that paragraph

130(1)(a) of the *Act* violates sections 7 and 11 of the *Charter* and should be declared invalid pursuant to subsection 52(1) of the *Constitution Act, 1982*.

C. *Warrant Officer Gagnon*

[3] Warrant Officer Gagnon was charged with a service offence under s. 130 of the *Act* of having committed sexual assault contrary to s. 271 of the *Criminal Code*. He was acquitted by a Standing Court Martial. The Crown appealed on the basis that the military judge erred in providing instructions on the defence of mistaken belief in consent.

D. *Corporal Thibault*

[4] Finally, Corporal Thibault was charged with a service offence under s. 130 of the *Act* of having committed sexual assault contrary to s. 271 of the *Criminal Code*. The military judge terminated the proceedings when he concluded the offence was not sufficiently connected in its nature and in the circumstances of the offence, such that the standard of discipline and efficiency of the Canadian Forces would be affected. The Crown appealed on the basis that the military judge erred in its analysis of the military nexus requirement.

II. Nature of the Appeals and Issues

[5] On September 30, 2014, Warrant Officer Gagnon filed a Notice of Cross-Appeal. On February 25, 2015, Corporal Thibault did the same. Both contended that paragraph 130(1)(a) of the *Act* is unconstitutional and should be declared invalid pursuant to subsection 52(1) of the *Constitution Act, 1982*, on the basis that it violates s. 7 of the *Charter*.

[6] On March 11, 2015, Corporal Thibault and Warrant Officer Gagnon filed and served a Notice of Constitutional Question challenging the constitutional validity of the Minister of National Defence's [the Minister] right to appeal a criminal matter under s. 230.1 of the *Act*. This Court in *R v Gagnon*, 2015 CMAC 2 declared s. 230.1 of the *Act* unconstitutional. The Minister appealed this Court's decision to the Supreme Court of Canada. Until determination of that appeal, this Court ordered the matter involving Corporal Thibault and Warrant Officer Gagnon to be adjourned. On July 22, 2016, the Supreme Court delivered its judgment in which it overturned this Court and concluded s. 230.1 to be constitutionally valid.

[7] On November 19, 2015, the Supreme Court issued a decision in *R v Moriarity*, 2015 SCC 55, *R v Moriarity*, 2015 SCC 55, [2015] 3 SCR 485 [*Moriarity*] in which it concluded that s. 130(1)(a) does not violate s. 7 of the *Charter*. As a result of *Moriarity*, Warrant Officer Gagnon and Corporal Thibault, on December 22, 2015, filed amended Notices of Cross-Appeal in which they contend paragraph 130(1)(a) of the *Act* violates s. 11(f) of the *Charter*.

[8] On December 4, 2015, the appellants, Private Déry and Master Corporal Stillman, served and filed a Notice of Motion to present further written submissions in light of *Moriarity*, pursuant to Rules 24 and 28(1)(f) of the *Court Martial Appeal Court Rules*, SOR86/-959 [*CMAC Rules*], on the issue of whether s. 130(1)(a) violates s. 11(f) of the *Charter*.

[9] The appellants, Private Déry and Master Corporal Stillman, and the cross-appellants, Warrant Officer Gagnon and Corporal Thibault, contend that s. 130(1)(a) of the *Act* violates s. 11(f) of the *Charter*, in that the exception to a jury trial is no longer remedied by the military

nexus requirement. They contend that this Court has consistently viewed this remedy as relating to the nature of the offence rather than the status of the accused, and that this Court has not changed its rulings in *R v Larouche*, 2014 CMAC 6 and in *R v Moriarity*, 2014 CMAC 1. They raise the s. 11(f) issue following the Supreme Court's decision in *Moriarity* and its refusal to address the scope of the exception to the right to a jury trial as guaranteed under s. 11(f) of the *Charter*. The Appellants contend that this Court may exercise its discretion to grant their motions based upon Rule 29 of the *CMAC Rules*.

[10] The Crown opposes the motions to amend the Notices of Cross-Appeal in the matters involving Warrant Officer Gagnon and Corporal Thibault. At the hearing held on April 26, 2016, this Court exercised its discretion and granted, pursuant to subsection 28(1)(f) of the *CMAC Rules*, the motions to amend the Notices of Cross-Appeal and the motions to permit further written submissions in the matters involving Private Déry and Master Corporal Stillman. The Court indicated reasons would follow; these are the reasons.

III. Analysis

[11] First, I would note the constitutional question related to s. 11(f) of the *Charter* submitted by Warrant Officer Gagnon and Corporal Thibault constitutes a new ground of appeal, as they did not originally plead a violation of that section. These motions to amend are subsequent to the decision in *Moriarity* which holds that paragraph 130(1)(a) of the *Act* does not violate s. 7 of the *Charter*. The decision in *Moriarity* altered the jurisprudence established by this Court with respect to the application of a so-called 'military nexus' test to the application of s. 7 of the *Charter*. In *R v Royes*, 2016 CMAC 1, this Court found that, as a result of the Supreme Court's

conclusion in *Moriarity*, interpreting s. 130 of the *Act* without a military nexus requirement does not violate s. 11(f) of the *Charter*. The different interpretive approach by the Supreme Court from that previously taken by this Court motivated the appellants Private Déry and Master Corporal Stillman, and the cross-appellants, Warrant Officer Gagnon and Corporal Thibault, to request the opportunity to make further submissions and amend their Notices of Appeal in the circumstances.

[12] Second, on the motion to amend, this Court also considered the fact that the issue of the application of s. 11(f) of the *Charter* was properly before it in several other appeals. In addition, the parties informed the Court they did not intend to lead evidence on the issue. In all of the circumstances, we concluded that despite the bifurcation of the appeal and the lack of an evidentiary foundation, we would permit the amendments (see *R v Wigman*, [1987] 1 SCR 246, [1987] SCJ no 13) and the further submissions. Parties to an appeal are entitled to raise new questions of law, subject to the opposing party being given reasonable notice and a reasonable opportunity to respond. This was accomplished in the present case when the parties to the respective moving parties filed and served their Notices of Motion at least four months prior to

Court Martial Appeal Court
of Canada



Cour d'appel de la cour martiale
du Canada

[13] the scheduled hearing date. I consider such notice to be adequate in the circumstances.

IV. Conclusion

[14] I would allow the motions to amend the Notices of Cross-Appeal in the appeals involving Warrant Officer Gagnon (CMAC-577) and Corporal Thibault (CMAC-581). I would also grant Private Déry (CMAC-566) and Master Corporal Stillman (CMAC-567) permission to file further submissions.

“B. Richard Bell”
Chief Justice

“I agree.
Guy Cournoyer J.A.”

“I agree.
Mary J.L. Gleason J.A.”

ANNEX A

Master Corporal Stillman was charged with service offences punishable under s. 130 of the *Act* and was found guilty by a Standing Court Martial of the following five charges:

Charge 1 (alternate to charge 2): S. 130 NDA, discharging a firearm with intent (s. 244 CCC).

Charge 4 (alternate to charge 3): S. 130 NDA, discharging a firearm recklessly (s. 244.2 CCC).

Charge 5: S. 130 NDA, aggravated assault (s. 268 CCC).

Charge 6: S. 130 NDA, using a firearm in the commission of an offence (s. 85(1) CCC).

Charge 9: S. 130 NDA, possession of a loaded restricted firearm (s. 95 CCC).

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-577

STYLE OF CAUSE: HER MAJESTY THE QUEEN v.
WARRANT OFFICER J.G.A.
GAGNON

AND DOCKET: CMAC-581

STYLE OF CAUSE: HER MAJESTY THE QUEEN v.
CORPORAL A.J.R. THIBAUT

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: APRIL 26, 2016

REASONS FOR JUDGMENT BY: CHIEF JUSTICE BELL

CONCURRED IN BY: COURNOYER J.A.
GLEASON J.A.

DATED: MAY 5, 2017

APPEARANCES:

Capitaine de Corvette Mark Létourneau
Lieutenant-Colonel Jean-Bruno Cloutier

FOR THE APPELLANTS
PRIVATE DÉRY, J.-C.
WARRANT OFFICER J.G.A.
GAGNON
CORPORAL A.J.R. THIBAUT

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