Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20180919

Docket: CMAC-588

Citation: 2018 CMAC 4

[ENGLISH TRANSLATION]

CORAM : BELL C.J.
GAGNÉ J.A.
OUELLETTE J.A.

BETWEEN :

CORPORAL R.P. BEAUDRY

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Ottawa, Ontario, on February 23, October 31, 2017 and January 30, 2018.

Judgment delivered at Ottawa, Ontario, on September 19, 2018.

REASONS FOR JUDGMENT BY: OUELLETTE J.A.

CONCURRED IN BY: GAGNÉ J.A.

DISSENTING REASONS BY : BELL C.J.

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REASONS FOR JUDGMENT

OUELLETTE, J.A.

I. Introduction

[1] A court martial sitting without a jury found Corporal Beaudry guilty of sexual assault causing bodily harm, an offence under paragraph 272(1)(*c*) of the *Criminal Code*, R.S.C., 1985, c. C-46 [*Criminal Code*].

[2] When the charges were brought against him, Corporal Beaudry was a member of the Regular Force component of the Canadian Armed Forces. Before his trial, he asked to be tried by a judge and jury, a request that was denied. According to paragraph 130(1)(*a*) of the *National Defence Act*, R.S.C., 1985, c. N-5 [NDA], the offences in the *Criminal Code* are service offences that can be tried in the military justice system.

[3] The appellant argues that paragraph 130(1)(*a*) violates subsection 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*], by depriving him of his right to a trial by jury for a civil offence.

II. Issues

[4] This appeal raises the following issues:

A. Is this Court bound by the decisions in Royes and Déry?

B. Does paragraph 130(1)(a) of the NDA violate subection 11(f) of the Charter?

C. If so, is this violation justified within the meaning of the section 1 of the Charter?

III. Jurisprudential context

[5] Following his conviction, Corporal Beaudry appealed the guilty verdict, pleading that paragraph 130(1)(*a*) of the NDA violates subsection 11(*f*) of the *Charter* by depriving him of his right to a trial by judge and jury. This provision considers a “service offence” that can be tried by the military justice system to be any offence committed by persons subject to the *Code of Service Discipline* of the Canadian Armed Forces (active members of the Forces and other persons

connected with the Forces) [*Code of Service Discipline*]. The act or omission must be an offence under Part VII of the NDA, the *Criminal Code*, or any other federal statute.

[6] Since the appellant filed his notice of appeal, this Court has ruled on the constitutionality of paragraph 130(1)(*a*) of the NDA in *R. v. Royes*, 2016 CMAC 1, [2016] C.M.A.J. No. 1 (leave to appeal to the Supreme Court of Canada dismissed, 37054 (February 2, 2017)), and *R. v. Déry*, 2017 CMAC 2, [2017] C.M.A.J. No. 2 (leave to appeal to the Supreme Court allowed, 37701 (March 8, 2018)). On April 11, the Supreme Court also allowed the appellants' motion in *Déry* to suspend the time limit for filing their memorandum until this Court has ruled on this appeal.

[7] In *Royes*, this Court unanimously dismissed the challenge of paragraph 130(1)(*a*) of the NDA and found that it was consistent with subsection 11(*f*) of the *Charter*. Faced with the same constitutional challenge the following year, the panel of three judges in *Déry* found they were bound by *Royes* by virtue of the principle of judicial comity and the doctrine of *res judicata* by earlier panels of the Court (the principle of horizontal *stare decisis*). However, in a strongly reasoned *obiter dictum*, the majority judges said they disagreed with the Court's reasoning in *Royes* and listed five reasons for which, if they did not feel bound by that decision, they would have departed from it and found that paragraph 130(1)(*a*) of the NDA must be interpreted by applying a military nexus test [military nexus] to be consistent with subsection 11(*f*) of the *Charter*. In so doing, they would have maintained the Court's previous line of jurisprudence, as expressed in *R. v. Larouche*, 2014 CMAC 6, [2016] C.M.A.J. No. 6, and *R. v. Moriarity*, 2014 CMAC 1, [2014] C.M.A.J. No. 1 [*Moriarity CMAC*].

IV. Appellant's position

[8] The appellant cites several of the reasons expressed by the majority in *Déry* and argues that they should lead to the conclusion that paragraph 130(1)(*a*) of the NDA violates subsection 11(*f*) of the *Charter*. However, he does not share the majority's finding that, when interpreted correctly, meaning as requiring the existence of a military nexus, this provision does not violate subsection 11(*f*) of the *Charter*. In *R. v. Moriarity*, 2015 SCC 55, [2015] 3 S.C.R. 485 [*Moriarity SCC*], the Supreme Court found that paragraph 130(1)(*a*) could apply in situations where the only military nexus is the status of the accused, while remaining rationally connected to the purpose of the challenged provision, that is, the maintenance of the discipline, efficiency and morale of troops. The appellant argues that requiring any other "military nexus" is not an appropriate remedy, pursuant to section 52 of the *Constitution Act, 1982*, and does not ensure that an offence incorporated into the NDA by paragraph 130(1)(*a*) is a "service offence" within the meaning of subsection 11(*f*) of the *Charter*.

[9] The appellant notes that neither the Supreme Court of Canada nor this Court has addressed the objective of subsection 11(*f*). He argues that the meaning of "under military law tried before a military tribunal" ("relevant de la justice militaire") must be defined before determining whether paragraph 130(1)(*a*) of the NDA violates the constitutional right in question. According to the appellant, a statutory definition that has no connection with the right to a trial by jury cannot restrict the scope of the constitutional right to a jury trial.

V. Crown's position

[10] The respondent considers the issues in this case to have already been resolved: In *Royes*, this Court concluded that paragraph 130(1)(*a*) of the NDA creates offences under military law and that this finding is consistent with the Supreme Court's decision in *Moriarity SCC*. Furthermore, the respondent argues that in considering itself bound by *Royes*, the panel of this Court in *Déry* acted so as to promote the stability and predictability of law.

VI. Statutory provisions

[11] Paragraph 130(1)(*a*) provides that:

130 (1) An act or omission	**130 (1)** Constitue une infraction à la présente section tout acte ou omission :
(a) that takes place in Canada and is punishable under Part VII, the *Criminal Code* or any other Act of Parliament, or	**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;

[12] The text of subsection 11(*f*) reads as follows:

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

VII. Analysis

A. *Is this Court bound by the decisions in Royes and Déry?*

[13] In *Royes*, this Court ruled that paragraph 130(1)(*a*) of the NDA did not violate subsection 11(*f*) of the *Charter*. However, the majority judges in *Déry* arrived at a different conclusion in the absence of a military nexus. They performed a detailed analysis of five relevant factors: 1) the Supreme Court specifically left open the subsection 11(*f*) issue in *Moriarity SCC*; 2) the analysis required under subsection 11(*f*) is different from that required under section 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 subsection 11(*f*) should be informed by the *Charter* and not by Parliament. Contrary to the findings of the Court in *Royes*, the majority judges in *Déry* arrived at the conclusion that, in the absence of a military nexus, paragraph 130(1)(*a*) of the NDA violates subsection 11(*f*) of the *Charter* and that the discretion granted to the prosecution to choose the forum that will try the offence cannot remedy that violation.

[14] However, the majority judges in *Déry* said they were bound by *Royes* in applying the principle of horizontal *stare decisis*. They based their finding primarily on *Young v. Bristol Aeroplane Co. Ltd.*, [1944] EWCA Civ 1, [1944] 2 All E.R. 293 and *R. v. Vezina*, 2014 CMAC 3, [2014] C.M.A.J No. 3.

[15] In *Vezina*, this Court found that it was bound by *Moriarity CMAC* because the appellant had not demonstrated that that decision contained a manifest error.

[16] In *Young*, Lord Greene M.R. presents three reasons for a Court to deviate from its own jurisprudence: 1) to resolve a conflict between decisions of the same court; 2) to correct non-compliance with a decision of the Supreme Court (the House of Lords); and 3) in the case that a previous decision was given *per incuriam* or contrary to a precedent or statutory provision binding the Court.

[17] This restrictive approach, set out by England in 1945, was further developed in Canada, namely by the Ontario Court of Appeal in *David Polowin Real Estate Ltd. v. Dominion of Canada General Insurance Co.* (2005), 76 O.R. (3d) 161, 199 O.A.C. 266 (leave to appeal dismissed, 31095 (January 26, 2006)), where the Court made the following remark:

> 118 Lord Denning once wrote, "The doctrine of precedent does not compel your Lordships to follow the wrong path until you fall over the edge of the cliff", to which Justice Brandeis might have replied: "It is usually more important that a rule of law be settled, than that it be settled right": see *Ostime v. Australian Mutual Provident* ***Society***, [1960] A.C. 459 at 489 and *Di Santo v. Pennsylvania*, 273 U.S. 34 at 270 (1927) respectively. These words, by two great jurists, capture the essence of the debate about *stare decisis*.
>
> [Citation omitted.]

[18] The Ontario Court of Appeal expressed the view that a provincial court of appeal acts as a last-resort tribunal in the vast majority of cases and, consequently, it is insufficient to always leave it to the Supreme Court to correct the errors.

[19] This notion was recently reiterated in *R. v. Gashikanyi*, 2017 ABCA 194, 53 Alta. L.R. (6th) 11. The majority judges of the Alberta Court of Appeal gave a consistent summary, at paragraphs 6 to 14, of the principles underlying the doctrine of horizontal *stare decisis*. They

noted that the doctrine will not be applied too strictly when the case raises an issue relating to a citizen's freedom.

[20] In *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, the Supreme Court notes, at paragraph 44, that the Court's practice is against departing from its precedents unless there are compelling reasons to do so. However, it notes that it may do so when constitutional issues, and especially *Charter* rights and freedoms, are concerned. It adds that the Court should be particularly careful before reversing a precedent where the effect is to diminish *Charter* protection. It logically follows that an intermediate court of appeal may, in appropriate cases, depart from previous decisions when it must make a more generous interpretation of the scope of a right guaranteed by the *Charter* (see also the Court's decision in *Canada (Attorney General) v. Bedford*, 2013 SCC 72).

[21] According to that jurisprudence, it would be inappropriate to make a rigid application of the principles of *res judicata* and judicial comity when the issue is likely to affect a citizen's rights and freedoms guaranteed by the *Charter*. To reiterate the principle set out by the Supreme Court, the interests concerned may constitute "compelling reasons" for deviating from a precedent.

[22] The majority judges in *Déry* did not qualify the five reasons cited as manifest errors to then conclude that the Court's decision in *Royes* was unfounded. However, I am of the view that, together, these reasons at the very least meet the criterion of a manifest error. Therefore, it is

impossible to reconcile the conclusions reached in the two cases on the constitutionality of paragraph 130(1)(*a*) of the NDA, at least when applied to the offence at issue in this appeal.

[23] Based on the Supreme Court decision in *Canada v. Craig*, 2012 SCC 43, [2012] 3 S.C.R. 489, the majority judges felt they were obligated to express why they found that *Royes* presents certain issues. However, in *Craig*, they were not charged with criticizing a decision of the same intermediate court of appeal while considering themselves bound by it, but rather with criticizing a precedent of the Supreme Court of Canada rather than overruling it. The following is an excerpt from the reasons of Justice Rothstein on which the majority judges in *Déry* based their findings:

> [21] But regardless of the explanation, what the [Federal Court of Appeal] in this case ought to have done was to have written reasons as to why *Moldowan* [Supreme Court of Canada precedent] was problematic, in the way that the reasons in *Gunn* [Federal Court of Appeal decision] did, rather than purporting to overrule it.

[24] With respect, I do not find that this excerpt justifies an intermediate court of appeal exposing the errors committed by a previous panel if the objective is not to overrule it. In *Craig*, the fact that the Federal Court of Appeal criticized the Supreme Court decision in *Moldowan* (which had already received a number of criticisms from the legal community) did not have the effect of creating any uncertainty about the state of the law since the Supreme Court decision, and not the Federal Court of Appeal's decision, was imposed on the litigants. In *Déry*, the fact that the Court criticized the decision in *Royes* in such a well-reasoned *obiter* without overruling it, in my humble opinion, creates uncertainty about the state of the law. This is all the more true when this uncertainty concerns a *Charter* right. The fact that this *obiter* can create uncertainty is

a factor that enables this panel not to feel bound by its previous decisions on the constitutional question in this case.

[25] Lastly, given that the Court is presently divided on the constitutionality of paragraph 130(1)(*a*) of the NDA, and that the Supreme Court granted leave to appeal to the members in *Déry* and stayed its case pending a decision in this case, I am of the view that we should rule on the merits of the question, irrespective of *Royes* and *Déry*.

B. *Does paragraph 130(1)(*a*) of the NDA violate subsection 11(f) of the Charter?*

(1) The majority decision in *Déry*

[26] I am in substantial agreement with the reasons of the majority set out in paragraphs 18 to 84 of *Déry*. In particular, I agree with the analysis and reasoning discussed in the following paragraphs: 18, 23–25, 27–31, 33–46, 48–77 and 79–84.

[27] In paragraphs 58 and 79, the majority held that the first step was to articulate the purpose of subsection 11(*f*) in order to determine the interests that this provision is meant to protect. However, the narrow exception of subsection 11(*f*), that is "under military law" / "relevant de la justice militaire", has not been defined. In my view, we must define "military law" / "justice militaire" first and then proceed to the question as to whether paragraph 130(1)(*a*) of the NDA violates the right to a trial by jury guaranteed by the *Charter*.

[28] I concur with the majority that Parliament cannot define the right guaranteed in subsection 11(*f*) of the *Charter* by adopting or amending the NDA. As stated by the majority:

> [76] […] 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. […]

[29] Similarly, I agree with the observation made in *Royes* and *Déry* that Parliament can amend and even repeal the NDA to remove the restrictions on military jurisdiction for certain offences, such as murder, as provided in section 70. Nonetheless, such an amendment to the NDA would have no bearing on whether the *Charter* has been violated in this case.

[30] However, and with respect, I cannot agree that including the concept of a military nexus in paragraph 130(1)(*a*) of the NDA is sufficient to immunize it against a constitutional violation (see paragraphs 85–86 of *Déry*). Below, I will explain why, in my view, this proposal must be rejected.

(2) The purpose of subsection 11(*f*) of the *Charter*

[31] In *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at page 344, 1985 CanLII 69 (SCC), the Supreme Court outlined the approach to be taken in determining the purpose of a constitutional right. First, the following three factors must be considered:

> (a) the historical origins of the concepts enshrined;
>
> (b) the character and larger objects of the *Charter* itself; and
>
> (c) the language chosen to articulate the right.

a) *The historical origins of the concepts enshrined*

[32] As of 1689 (*Mutiny Act*, 1689, 1 William 3 and Mary 2 (UK)), all members have had the right to a trial by jury. The sole exception to this right would apply when it was imperative to

consider the requirements of military discipline and the efficiency of the armed forces. The relevant passage from the *Mutiny Act* reads as follows:

> ...and whereas no man may be forejudged of life or limb, or subjected to any kind of punishment by martial law, or in any other manner than by the judgment of his piers and according to the known and established laws of this realm; yet nevertheless, it being requisite for retaining such forces as are or shall be raised during this exigence of affairs in their duty an exact discipline be observed, and that soldiers who shall mutiny or stir up sedition or shall desert their Majesties' service be brought to a more exemplary and speedy punishment than the usual forms of law will allow.

[33] Even though the *Mutiny Act* does not provide any definition of "military law" or "justice militaire", it certainly implies that the summary proceedings of the military justice system would apply to acts related to sedition, desertion and mutiny.

[34] In the 1886 book *A Catechism on Military Law as Applicable to the Militia of Canada* (Montréal, John Lovell & Son, 1886), the author, Major J. Pennington MacPherson, asks the following questions at the beginning of the first chapter:

> Q1: What is Military law?
>
> A1: Military law, as distinguished from Civil law, is the law relating to and administered by the Military Courts and concerns itself with the trial and punishment of offences committed by officers, soldiers and other persons (e.g. sutlers and camp followers), who are, from circumstances, subjected, for the time being, to the same law as soldiers.
>
> Q2: What necessity is there for Military law apart from Civil law?
>
> A2: To enable the Military authorities to deal with offences which it would be inexpedient to leave to Civil authorities. Many acts and omissions, which are mere breaches of contract in Civil life – e.g. desertion or disobedience to orders – must, if committed by soldiers, even in time of peace, be made crimes, with penalties

> attached to them; while, on active service, any act or omission which impairs the efficiency of a man in his character of a soldier must be punished with severity.

[35] The author therefore justifies the existence of, and need for, "military law" or "justice militaire" in cases where it would not be expedient to apply the ordinary law before the ordinary courts. According to him, certain infractions or omissions are mere breaches of contract for civilians yet constitute actual offences for soldiers. Offences such as desertion, breach of duty and wartime offences will be dealt with more seriously.

[36] In addition, a careful reading of the book *Manual of Military Law* (London, Harrison & Sons, 1907) suggests that the structure and content of the NDA is based on the principles contained therein. The first paragraph of the second chapter, entitled "History of Military Law," provides the following definition of "military law":

> Military Law, as distinguished from Civil law, is the law relating to and administered by military courts, and concerns itself with the trial and punishment of offences committed by officers, soldiers, and other persons (e.g. sutlers and camp followers) who are from circumstances subjected, for the time being, to the same law as soldiers. This definition is to a great extent arbitrary, the term "Military law" being frequently used in a wider sense, to include not only the disciplinary, but also the administrative law of the army, as, for instance, the law of enlistment and billeting. In this chapter, however, the term is used only in the restrictive sense above mentioned.

[37] The second paragraph of this book's second chapter identifies the purpose of military law:

> The object of Military law is to maintain discipline among the troops and other persons forming part of or following an army. To effect this object, acts and omissions which are mere breaches of contract in civil life – e.g., desertion or disobedience to orders –

> must, if committed by soldiers, even in time of peace, be made offences, with penalties attached to them; while, on active service, any act or omission which impairs the efficiency of a man in his character of a soldier must be punished with severity.

[38] In the third paragraph of the second chapter, the author adds the following:

> "In the early periods of our history, military law existed only in the time of actual war... Military law, in time of peace, did not come into existence until the passing of the first Mutiny Act in 1689."

[39] He goes on to explain the structure of the *Army Act*, which gave rise to the NDA, and the content of its various parts. He lists various offences under military law, the applicable penalties and the offences punishable by ordinary law. Paragraph 3 of the third chapter reads as follows:

> "For the most part, the military offences are laid down by the Army Act in the same, or nearly the same language as that of the former Mutiny Acts and Articles of War."

[40] Chapter 7 of the book is devoted to offences punishable by ordinary law. The author explains the following in the first paragraph:

> A soldier, however is, not only a soldier but a citizen also and as such is subject to the civil as well as the Military law. An act which constitutes an offence committed by a civilian is nonetheless an offence if committed by a soldier and a soldier not less than a civilian can be tried and punished for such an offence by the civil courts.

[41] It is apparent from this quotation that the key distinction resides in the nature of the offence and not the mere fact that the offence has been committed by a soldier. The author explains the following in the second paragraph:

> In order to give military courts complete jurisdiction over soldiers, those courts are authorized to try and punish soldiers for civil offences, namely offences which have been committed in England are punishable by the law in England.

[42] However, he describes the jurisdiction of the courts martial as follows:

> They are not allowed to try the most serious offences – treason, murder, manslaughter, treason-felony or rape – if those offences can with reasonable convenience, be tried by a civil court.

[43] This limit on the power of the military courts is also noted in paragraph 3 of chapter 7:

> But though this wide power of trial is given, it is not as a rule expedient to exercise the power universally.

[44] The author goes on to state the principle that the accused's ability to exercise the right to a trial by jury should increase with the severity of the offence (paragraph 3 of chapter 7):

> The heinousness of an offence is also an element of consideration. A trifling offence, such as would, if tried before a civil court be properly punishable by a small fine, may well be punished by the military court immediately, especially if the case is one in which stoppages may be ordered to make good damage occasioned by the offence. On the other hand, a more serious offence, especially one which would ordinarily be tried by a jury, had better be relegated to the civil court. (Emphasis added)

[45] Accordingly, it seems that, in as early as 1689, a member was entitled to a trial by judge and jury, except in cases of mutiny, sedition or desertion.

[46] In *MacKay v. The Queen*, [1980] 2 S.C.R. 370, 1980 CanLII 217 (SCC), McIntyre and Dickson JJ., concurring in the majority result, noted the existence of the principle that the soldier's rights should be affected as little as possible and, more specifically, the right to request a trial by judge and jury (page 408). They described the principle in the following terms:

> The principle which should be maintained is that the rights of the serviceman at civil law should be affected as little as possible considering the requirements of military discipline and the efficiency of the service.

[47] They also determined that the all-embracing reach of the questioned provisions of the NDA, as they existed in 1980, went far beyond any reasonable or required limit.

b) *The character and larger objects of the Charter*

[48] The *Charter* is intended to promote freedom, justice and social equality, principles that are vital to our free and democratic society. These objectives find expression in all the rights and freedoms set out in the *Charter*, including its subsection 11(*f*). Given the nature of the very specific and special obligations of the armed forces, the military is subject to military discipline to ensure the efficiency of the armed forces. However, this is not justification for military status to result in an unjustified abridgement of a right enjoyed by any other Canadian citizen.

[49] It follows that any limit on a right must be related to the maintenance of discipline, morale and efficiency of the armed forces. In the absence of such a connection, there is no reason why a member would not enjoy the same rights as any other Canadian citizen. Indeed, it would be ironic for those who have the ultimate responsibility of protecting freedom, justice and social equality, at the risk of their lives, to not enjoy these same rights.

c) *The wording of subsection 11*(f) *of the Charter*

[50] What is meant by the phrase “except in the case of an offence under military law tried before a military tribunal” / “sauf s’il s’agit d’une infraction relevant de la justice militaire”?

[51] Unlike the French version of subsection 11(*f*), the exception in the English version has two aspects: the offence falls under military law (“offences under military law”) and the trial is

before a military tribunal (“tried before a military tribunal”). This means that the exception in subsection 11(*f*) is not based solely on a military tribunal’s jurisdiction over the offence or the accused.

[52] While the French and English versions of the text appear to differ significantly at first glance, I consider them to be reconcilable. The term “justice militaire” (“military law”) must be interpreted to encompass both the rules of substantive law (military law) and the tribunals set up to administer them (the military tribunals).

[53] Once the two versions are reconciled, it appears that the drafters of the *Charter* were referring to military offences and not the mere fact that the accused person is a member or an individual subject to the *Code of Service Discipline*. Nothing in the wording of this provision indicates an intention to deprive any member accused of a civil offence (“offence punishable by ordinary law”) of the right to a trial by jury. The language suggests rather that this right will only be limited in the case of an offence that is essentially military in nature.

[54] A number of offences under military law, listed in sections 72 to 129 of the NDA, are punishable by life imprisonment, such as misconduct of any person in presence of the enemy (s. 74), offences the accused has committed as a prisoner of war (s. 76), spying for the enemy (s. 78) and mutiny (s. 79). The offences that fall under military justice or, rather, military law, are very specific. The NDA devotes an entire division to identifying offences under military law: sections 72 to 129, Division 2, Part III, entitled “Code of Service Discipline.” This is, in fact, a

codification of provisions of earlier acts dating back to 1689**.** These are the offences that fall under military law within the meaning of subsection 11 *(f)* of the *Charter*.

[55] Parliament does not have the authority to limit the right guaranteed in subsection 11(*f*) by expanding the definition of an "offence under military law". Therefore, paragraph 130(1)(*a*) of the NDA entitled "Service trial of civil offences" cannot convert a "civil offence" into an offence under military law within the meaning of subsection 11(*f*) of the *Charter*.

(3) Legislative context

[56] In *Moriarity SCC,* the Supreme Court of Canada identified the legitimate objective of the military justice system, which is to maintain discipline, efficiency and morale in the military. That objective is logically related to how criminal behaviour by military personnel is treated, even outside the military context. This legitimate objective of paragraph 130(1)(*a*) is not inconsistent with the proposed interpretation of subsection 11(*f*).

[57] Parliament chose to give service tribunals concurrent jurisdiction over civil offences.

[58] When the *Charter* was adopted in 1982, Parliament acknowledged that the jurisdiction of service tribunals is limited. Section 60 of the NDA, as it read at that time, did not give service tribunals jurisdiction over the most serious civil offences. A member charged with murder, rape or manslaughter, in 1982, would not have been tried before a service tribunal with the concomitant right to a trial by judge and jury.

[59] In 1989, Parliament replaced section 60 with section 70, thus modifying the limitations on certain offences and granting service tribunals concurrent jurisdiction over cases of rape. At the same time, Parliament added another limitation concerning the offences under sections 280 to 283 of the *Criminal Code*, regarding child abduction. There are no explanations for these amendments in the notes on the deliberations of the House of Commons.

[60] Parliament does not have the authority to amend the NDA to limit or repeal rights guaranteed by the *Charter*. Furthermore, it is not necessary to deprive the member of the right to a trial by jury in such a case to ensure military discipline, efficiency and morale.

[61] The NDA provides the possibility of applying the *Code of Service Discipline*, whether the member is tried before a service or civil tribunal. Subsection 130(4) reads as follows:

130(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.	**130(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.

[62] Subsection 129(1) provides that:

129 (1) Any act, conduct, disorder or neglect to the prejudice of good order and discipline is an offence and	**129 (1)** Tout acte, comportement ou négligence préjudiciable au bon ordre et à la discipline constitue une

every person convicted thereof is liable to dismissal with disgrace from Her Majesty's service or to less punishment.	infraction passible au maximum, sur déclaration de culpabilité, de destitution ignominieuse du service de Sa Majesté.

[63] There is a logic between sections 129 (Prejudicing Good Order or Discipline) and 130 (Offences Punishable by Ordinary Law) with regard to sentncing. Subsection 139(1) sets out a scale of sentences in order of decreasing severity: (a) imprisonment for life; (b) imprisonment for two years or more; (c) dismissal with disgrace from Her Majesty's service; (d) imprisonment for less than two years; (e) dismissal from Her Majesty's service; (f) detention; (g) reduction in rank; (h) forfeiture of seniority; (i) severe reprimand; (j) reprimand; (k) fine; and (l) minor punishments.

[64] The sentence for an offence under paragraph 130(1)(*a*) of the NDA is the same as that provided for in the *Criminal Code*. The maximum sentence is dismissal with disgrace from Her Majesty's service (130(2)(*b*)(ii)). The sentences of dismissal with disgrace and lesser are available whether the offence is punishable by imprisonment of less than five years (section 130) or more than five years (subsection 129(1)). The sentencing and enforcement of the *Code of Service Discipline* are therefore the same, regardless of whether a member's trial is before a civil or service tribunal.

[65] The appellant observed that military authorities continue to have some control over a member being tried by a civil judge and jury: 1) an officer attends the soldier's trial to inform the military authorities who will decide what administrative measures to impose; 2) a trial by civil

judge and jury does not exempt the soldier from the application of the range of administrative orders and directives governing the soldier's conduct and discipline; and 3) the soldier tried by judge and jury is still subject to the *Code of Service Discipline*.

[66] In short, a member's trial may be held before a civil tribunal with the member still remaining subject to the *Code of Service Discipline*. This calls into serious question the need to apply the criterion of a military nexus in order to make paragraph 130(1)(*a*) of the NDA consistent with subsection 11(*f*) of the *Charter*.

(4) Conclusion

[67] Historically, members were entitled to a trial by jury for civil offences. Paragraph 130(1)(*a*) of the NDA has the effect of depriving any member of the right to a trial by judge and jury, even in the case of a civil offence. By amending the NDA, Parliament acted to limit the right to a jury guaranteed by subsection 11(*f*) of the *Charter*.

C. *Is this violation justified within the meaning of the section 1 of the Charter?*

[68] The objective of paragraph 130(1)(*a*) is to ensure the maintenance of the discipline, efficiency and morale of troops within the Canadian Armed Forces. The foregoing indicates that whether a trial is held before a service tribunal or a civil tribunal composed of a judge and jury has no effect on the application of the *Code of Service Discipline* and therefore on the discipline, efficiency and general morale of the Canadian Forces. In other words, the provisions of the NDA provide the necessary means of ensuring the discipline, efficiency and morale of troops,

regardless of whether the convicted person's trial is before a service tribunal or a civil tribunal with a jury.

[69] For the above reasons, I find that the violation is not justifiable under section 1 of the *Charter*.

[70] I would add that no provision of the *Charter* limits the rights provided therein in times of war. In applying the measures set out in the *Emergencies Act*, R.S.C., 1985, c. 22 (4th Supp.), the Governor in Council remains subject to the *Charter* and the *Canadian Bill of Rights*, S.C. 1960, c. 44, and must consider the *International Covenant on Civil and Political Rights*, December 19, 1966, 999 UNTS 171 (entered into force: March 23, 1976, accession by Canada May 19, 1976), namely with regard to the fundamental rights that cannot be violated even in national crisis situations.

VIII. Decision

[71] Subsection 11(*f*) of the *Charter* provides that any person charged with an offence has the right to a trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment, except in the case of an offence under military law. Civil offences are not offences under military law. Paragraph 130(1)(*a*) of the NDA is unconstitutional because it deprives a member of the right to a trial by judge and jury for a civil offence for which the maximum sentence is five years or more.

[72] Paragraph 130(1)(*a*) of the NDA is declared of no force or effect in its application to any civil offence for which the maximum sentence is five years or more, in accordance with subsection 52(1) of the *Constitution Act, 1982*.

"Vital Ouellette"

J.A.

"I agree
Jocelyne Gagné J.A. "

BELL C.J. (Dissenting Reasons)

I. Overview

[73] The principal issue in this appeal can be set out in a sterile and legalistic fashion, namely: does paragraph 130(1)(*a*) of the *National Defence Act*, R.S.C. 1985, c. N-5 [*NDA*] violate the *Charter* right to a jury trial by denying those who are subject to the *Code of Service Discipline* the right to such a trial where charges involve civil offences allegedly committed in Canada? In my view, the answer to this question will determine the future of the military justice system in Canada. I would therefore frame the overarching question as follows: what was Parliament's intention when it carved out the military exception in subsection 11(*f*) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act* (U.K.), 1982, c. 11 [*Charter*]?

[74] For the reasons set out below, I would conclude that paragraph 130(1)(*a*) of the *NDA* does not violate the right to a jury trial provided for in subsection 11(*f*) of the *Charter*. In my opinion, by enacting subsection 11(*f*) of the *Charter*, Parliament intended to preclude individuals subject to the *Code of Service Discipline* who are alleged to have committed service offences under paragraph 130(1)(*a*) of the *NDA* from having the right to a trial by jury. As a result, I would dismiss this appeal.

[75] As I stated in *R. v. Déry*, 2017 CMAC 2, [2017] C.M.A.J. No. 2 [*Déry*], nothing in these reasons is intended to detract from the unanimous decision of this Court in *R. v. Royes*, 2016 CMAC 1, [2016] C.M.A.J. No. 1 [*Royes*]. These reasons are intended to build upon, and be read in conjunction with, *Royes* and my opinion in *Déry*.

II. A few remarks about the Canadian military justice system

[76] Through legislative enactments, the application of the *Charter*, and careful guidance from its Supreme Court, Canada has become a leader among nations in the development of military justice. As evidenced in several key cases (e.g., *MacKay v. The Queen*, [1980] 2 S.C.R. 370, 114 D.L.R. (3d) 393 [*MacKay*]; *R. v. Généreux*, [1992] 1 S.C.R. 259, 88 D.L.R. (4th) 110; *R. v. Moriarity*, 2015 SCC 55, [2015] 3 S.C.R. 485 [*Moriarity*]; *R. v. Cawthorne*, 2016 SCC 32, [2016] 1 S.C.R. 983 [*Cawthorne*]; *Royes*; *Déry*), the Canadian judicial and legislative branches have engaged in constructive dialogue that has led to the development of a system of military justice respectful of its pre-1867 origins, section 91 of the *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.), and its obligations under the *Charter*, including subsection 11(*f*).

[77] Subject to limited exceptions found in section 70 of the *NDA*, our military tribunals (hereafter referred to as "courts martial") enjoy concurrent jurisdiction with the civilian justice system in relation to those offences under paragraph 130(1)(*a*) of the *NDA*. This concurrent jurisdiction does not, of course, apply to offences allegedly committed abroad (paragraph 130(1)(*b*) of the *NDA*). In my view, Parliament intended for prosecutorial services (see *Cawthorne*), writ large, to have a choice as to which system of justice – civilian or military – would be employed to prosecute individuals subject to the *Code of Service Discipline* for violations allegedly committed in Canada. I consider this choice both prudent and constitutionally valid given the application of the *Charter* to accused persons in both systems, the varying circumstances in which alleged infractions might arise, the need for varying degrees of flexibility and, among other issues, varying degrees of timeliness in provincial/territorial civilian justice systems. In addition, I would note that the Supreme Court of Canada resolved any

jurisdictional confusion between the two systems in *Moriarity* by abolishing the nexus test, thereby respecting the original intention of the architects of the military justice system as to its jurisdiction.

[78] I also note that paragraph 130(1)(*a*) of the *NDA*, or some version thereof, has existed since at least 1952, well before the *Charter*'*s* enactment in 1982 (see paragraph 119(1)(*a*) of the *National Defence Act*, R.S.C. 1952, c. 184 [*NDA 1952*], as well as paragraph 120(1)(*a*) of the *National Defence Act*, R.S.C. 1970, c. N-4 [*NDA 1970*]). For this reason, I consider the military exception in subsection 11(*f*) of the *Charter* to be an endorsement of the law in force at the time of its enactment and an expression of Parliament's confidence in the military justice system, including its ability to hold fair service trials for civil offences under paragraph 130(1)(*a*) of the *NDA*. While it is trite law that laws in force at the time of the *Charter*'s enactment may be successfully challenged, the circumstances are much different where, as here, the law or system under attack finds protection in the *Charter* itself.

III. The appeal in question

[79] This is an appeal of the verdict delivered orally on July 14, 2016 by a Standing Court Martial [SCM]. In that verdict, the SCM found the appellant guilty of sexual assault causing bodily harm under paragraph 130(1)(*a*) of the NDA and section 272 of the *Criminal Code*, R.S.C., 1985, c. C-46 [*Criminal Code*]. The facts and the SCM's conviction are not in dispute. The appellant claims that paragraph 130(1)(*a*) of the NDA is inconsistent with subsection 11(*f*) of the *Charter*, and is therefore unconstitutional.

IV. Facts and statutory scheme

[80] The appellant is a member of the Regular Force component of the Canadian Armed Forces and is subject to the *Code of Service Discipline* under paragraph 60(1)(*a*) of the NDA. The SCM found him guilty of sexual assault causing bodily harm under paragraph 130(1)(*a*) of the NDA and section 272 of the *Criminal Code*.

[81] The provisions relevant to this appeal are reproduced in Appendix A.

V. Issues

[82] In this case, I consider there to be only one question to be answered to determine whether paragraph 130(1)(*a*) of the NDA violates subsection 11(*f*) of the *Charter*:

> Is an offence under paragraph 130(1)(a) of the NDA an "offence under military law tried before a military tribunal"("infraction relevant de la justice militaire") within the intended meaning of subsection 11(f) of the Charter?

[83] In addition to that question, it is important to consider whether this Court is bound by the decisions in *Royes* and *Déry* because of the principle of judicial comity. This question is undoubtedly moot given the decision of the Supreme Court of Canada allowing the application for leave to appeal in *Déry*, docket number 37701, on March 8, 2018. Nevertheless, I consider it important to address it, as well as to determine whether the differences between the French and English versions of subsection 11(*f*) of the *Charter* are meaningful.

VI. Analysis

A. *Is the Court bound by the principle of judicial comity?*

[84] The appellant claims that the Court erred in *Déry* by failing to apply the standard of manifest error used in *R. v. Vezina*, 2014 CMAC 3, [2014] C.M.A.J. No. 3 [*Vezina*] to decide whether it was bound by the principle of judicial comity (also called the principle of horizontal *stare decisis*).

[85] The *Vezina* decision was rendered by a unanimous bench and has not been reversed on this point. The standard of manifest error is therefore the correct standard for determining whether the Court is bound by the principle of judicial comity.

[86] The standard of manifest error is not defined in *Vezina*. However, the Federal Court of Appeal [FCA] stated in *Miller v. Canada (Attorney General)*, 2002 FCA 370, [2002] F.C.J. No. 1375 [*Miller*] that a decision is "manifestly wrong, in the sense that the Court overlooked a relevant statutory provision, or a case that ought to have been followed" (paragraph 10). According to *Miller*, a "manifest error" is the error of making a decision *per incuriam*, or in disregard of binding legal or statutory authority. The appellant does not explain how the standard of manifest error in *Vezina* differs from that in *Miller*. Therefore, I am of the opinion that the standard of manifest error in *Vezina* is the same standard established by the Court of Appeal in *Miller*.

[87] In *Déry*, the Court had to determine whether it was bound by the decision in *Royes*. In its analysis, the Court considered the various approaches courts have adopted to decide whether they could disregard the principle of judicial comity. The Court identified three circumstances that could justify the reversal of a prior decision of the same court. Citing the applicable case law, including *Vezina*, the Court noted that one of these circumstances is when a prior decision

was given *per incuriam*, or in disregard of binding statutory authority. That is what *Miller* identifies as the standard of manifest error. The Court then noted that it was impossible to say that the decision in *Royes* had been made *per incuriam*. In *Royes*, the Court examined the effect of *Moriarity* on the constitutionality of paragraph 130(1)(*a*) of the NDA in relation to subsection 11(*f*) of the *Charter*. The Court found that neither it nor the Supreme Court of Canada had ever rendered a conflicting decision with respect to the interpretation of *Moriarity*. Thus, the Court affirmed in *Déry* that 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. Consequently, the Court concluded that it was bound by the decision in *Royes*.

[88] I therefore find that the panel in *Déry* applied the correct standard to determine whether it was bound by the principle of judicial comity. In fact, it went beyond that standard and presented an analysis based fully on the legislation and case law. I agree with the statement in *Déry* on this topic. There was no manifest error in *Royes*, just as there was no manifest error in *Déry*. The Court is bound by those two decisions, which leads to a conclusion that this appeal should be dismissed.

[89] In case I am wrong about this, I will continue my analysis.

B. *Are the differences between the French and English versions of subsection 11(f) of the Charter meaningful?*

[90] To facilitate my analysis, I will cite subsection 11(*f*) of the *Charter* below and highlight the part of the provision that pertains to this appeal:

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

[91] In chapter 12 of the book *Charte canadienne des droits et libertés*, Montréal, Wilson & Lafleur, 1982, by Gérald-A. Beaudoin and Walter S. Tarnopolsky, dirs., the author André Morel analyzes the significance of the difference between the French and English versions of subsection 11(*f*) of the *Charter*. He explains that the French wording ("sauf s'il s'agit d'une infraction relevant de la justice militaire, de bénéficier d'un procès avec jury. . .") is more general than the English wording ("except in the case of an offence under military law tried before a military tribunal. . .") and encompasses any offence that falls under the jurisdiction of a service tribunal, whereas the English version is also qualified by the type of law that defines the offence. This difference gives rise to an argument that the ordinary law offences under paragraph 130(1)(*a*) were not intended to be included in the exception in subsection 11(*f*), being only offences "tried before a military tribunal" and not "offence[s] under military law". For the reasons that follow, I find that this argument is based on an erroneous interpretation of subsection 11(*f*) of the *Charter*.

[92] The book *Sullivan on the Construction of Statutes* by Ruth Sullivan (6th edition, Markham, Ontario, LexisNexis, 2014) [*Sullivan*] provides a succinct summary of the principles of interpretation and the case law to be reviewed when analyzing bilingual statutes. According to that book, the two versions of a provision have equal weight (see *Canadian Pacific Railway Co. v. Robinson*, [1891] 19 S.C.R. 292, [1891] S.C.J. No. 26) and equal authority (see *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c. 11, sections 18, 56-57). One does not take precedence over the other. Therefore, the courts must read and analyze both versions of the legislation (see *New Brunswick v. Estabrooks Pontiac Buick Ltd.*, [1982] N.B.J. No. 397, 44 N.B.R. (2d) 201 (NB CA)). If there is a difference, discrepancy or ambiguity between the two versions, a Court must interpret both texts by comparing them to determine a common meaning. Once a common meaning has been determined, the Court must apply the principles of statutory interpretation to determine whether that meaning is consistent with legislative intent (see *R. v. Daoust*, [2004] 1 S.C.R. 217, [2004] S.C.J. No. 7, paragraph 30 [*Daoust*]).

[93] With regard to the common meaning, I agree that the wording of the two texts seems different *a priori*. However, when the versions are studied in light of the principles of bilingual statutory interpretation, I find there is no real difference between the two.

[94] In fact, I think that those who insist there is a difference between the French and English versions of subsection 11(*f*) of the *Charter* are confusing the concepts of “military justice” (“justice militaire”) and “military law” (“droit militaire”). These two concepts are not interchangeable. “Military justice” refers to a justice system based on military law and the jurisdiction of service tribunals, whereas “military law” is a narrower concept that does not

include the tribunal's jurisdiction. For that reason, I find that "relevant de la justice militaire" likely characterizes the nature of the tribunal and the type of law, which is the same meaning as the English version. The two versions can be interpreted as having a common meaning, which is that the only people deprived of a jury trial are those charged with a "service offence" before a service tribunal.

[95] The reason offences covered by the military exception in subsection 11(*f*) of the Charter must be qualified by both the type of law and the nature of the tribunal is simple; some "offence[s] under military law" / "infractions de droit militaire", such as a murder committed in Canada by a person subject to the *Code of Service Discipline*, are under the jurisdiction of civil tribunals (see section 70 of the NDA). Under such circumstances, the accused is entitled to a jury trial, because it is an "offence under military law" that is not "tried before a military tribunal".

[96] Subsection 11(*f*) imposes two very distinct requirements in its characterization of offences included in the military exception to the right to a jury trial. The objective of these requirements is not to guarantee the right to a trial by jury in the case of ordinary law offences under paragraph 130(1)(*a*), but rather to guarantee the right to a trial by jury in the case of service offences that are tried by civil tribunals. These two requirements are present in both the French and the English versions. The two versions can be reconciled by recognizing that the common meaning is that expressed in the English version. It is not appropriate to interpret the English version of subsection 11(*f*) of the *Charter* as proof of a legislative intent to exclude the ordinary law offences under paragraph 130(1)(*a*) from the exclusion set out in subsection 11(*f*) of the *Charter*.

C. *Is an offence under paragraph 130(1)(a) of the NDA an "offence under military law tried before a military tribunal" ("infraction relevant de la justice militaire") within the intended meaning of subsection 11(f) of the Charter?*

[97] Having identified a common meaning between the two versions of subsection 11(*f*) of the *Charter*, I will now proceed to the second step of the exercise of interpreting bilingual statutes established in *Daoust*, which is to determine whether that meaning is consistent with Parliament's intent.

[98] Under subsection 2(1) of the NDA, "service offence" ("infraction d'ordre militaire") includes all offences in the NDA, the *Criminal Code* or any other federal statute that is "committed by a person while subject to the *Code of Service Discipline*" ("passible de la discipline militaire"). Under paragraph 130(1)(*a*) and subsection 2(1), the offences punishable under the *Criminal Code* or any other federal statute are offences that can be tried by a service tribunal when committed by a person subject to the *Code of Service Discipline*. Therefore, the offences under paragraph 130(1)(*a*) are "offence[s] under military law tried before a military tribunal" ("infractions relevant de la justice militaire") when they are committed by a person subject to the *Code of Service Discipline* and tried by a service tribunal. Once again, I note that it has been this way since long before the promulgation of the *Charter* in 1982.

[99] That interpretation was confirmed by the Supreme Court in *Moriarity* at paragraph 8: "There is no explicit limitation in the text of s. 130(1)(*a*) to the effect that the offence must have been committed in a military context; it transforms the underlying offence into a service offence 'irrespective of its nature and the circumstances of its commission'". Accordingly, it is not possible to say that only disciplinary offences are offences under military law; the ordinary law

offences under paragraph 130(1)(*a*) are also offences under the NDA and may be tried by a service tribunal. They are therefore necessarily offences under military law.

[100] Since at least 1886 (just under 100 years before the promulgation of the *Charter*), "military law" ("droit militaire") has been defined as being "the law relating to and administered by Military Courts, and concerns itself with the trial and punishment of offences committed by officers, soldiers, and other persons . . .", and includes "[a]ll other laws applicable to Her Majesty's troops in Canada" (see Major P. Macpherson, *A Catechism on Military Law as Applicable to the Militia of Canada*, Montréal, John Lovell & Son, 1886). Moreover, the *Manual of Military Law*, London, Harrison and Sons, 1907, states that "[i]n order to give military courts complete jurisdiction over soldiers, those courts are authorised to try and punish soldiers for civil offences, namely, offences which, if committed in England, are punishable by the law of England". Therefore, to ensure the efficiency of trials and thus discipline, service tribunals have long held the authority to try offences of ordinary law committed by members.

[101] For some time now, the jurisdiction to try ordinary law offences in the military justice system has been exercised in Canada without a jury trial (see, for example, sections 140, 145, 146 and 149 of the *NDA 1952*, and sections 145, 150, 151, 154 and 155 of the *NDA 1970* to see the previous composition of courts martial in Canada). I do not share the opinion of the majority that, historically, members were entitled to a trial by jury.

[102] In light of the above, I am of the opinion that Parliament intended to include the offences under paragraph 130(1)(*a*) of the NDA as "offence[s] under military law tried before a military

tribunal" ("infraction[s] relevant de la justice militaire") when drafting subsection 11(*f*) of the *Charter*. Parliament was presumably aware of the legal consequences of the military exception set out in subsection 11(*f*) of the *Charter*, and there is every indication that it intended to exclude persons subject to the *Code of Service Discipline* from the right to a trial by jury when it conceived that exception. For that reason, I am of the view that the common meaning of the two versions of subsection 11(*f*) of the *Charter* is consistent with Parliament's intent.

[103] Parliament's intent may also be determined by the legislative context. In this case, Parliament established a military justice system that includes independent bureaus of prosecution and defence, independent military judges appointed by the Governor in Council until they retire or are dismissed for cause with the support of the House of Commons and the Senate, an independent commission that sets the salaries of military judges, an independent Court Martial Administrator, and appeals to this Court and then to the Supreme Court of Canada. One would wonder why Parliament would establish such a complex system if the goal of the *Charter* was to exclude the vast majority of offences in the *Code of Service Discipline* from the jurisdiction of the military justice system.

VII. Remedy in the case of a violation of the *Charter*

[104] In light of the recognized importance of maintaining military discipline and the nature of the offences under paragraph 130(1)(*a*), I cannot agree with the majority decision to declare the provision of no force or effect without temporarily suspending the effect of that declaration in order to enable Parliament to take the necessary measures to respond to the declaration of unconstitutionality as it sees fit.

VIII. Conclusion

[105] To conclude, I consider this Court to be bound by the decisions in *Royes* and *Déry*. If I am wrong, I nevertheless find that an offence under paragraph 130(1)(*a*) of the NDA is an "offence under military law tried before a military tribunal" ("infraction relevant de la justice militaire") within the meaning of subsection 11(*f*) of the *Charter*. Therefore, the offence is included in the exception to the right to a jury trial. Consequently, paragraph 130(1)(*a*) of the NDA does not violate subsection 11(*f*) of the *Charter*, and there are no grounds for a declaration of invalidity. The appeal should be dismissed.

"B. Richard Bell »
Chief Justice

ANNEXE A

National Defence Act, R.S.C. 1952, c. 184	Loi sur la défense nationale, L.R.C. 1952, ch. 184
Offences Punishable by Ordinary Law	**Infractions punissables par la loi ordinaire**
119 (1) An act or omission	**119 (1)** Une action ou omission
(a) that takes place in Canada and is punishable under Part XII of this Act, the Criminal Code or any other Act of the Parliament of Canada; or	a) qui se produit au Canada et est punissable selon la Partie XII de la présente loi, le Code criminel ou toute autre loi du Parlement du Canada; ou
(b) that takes place out of Canada and would, if it had taken place in Canada, be punishable under Part XII of this Act, the Criminal Code or any other Act of the Parliament of Canada,	b) qui se produit en dehors du Canada et qui, si elle était faite au Canada, serait punissable suivant la Partie XII de la présente loi, le Code criminel ou toute autre loi du Parlement du Canada;
is an offence under this Part and every person convicted thereof is liable to suffer punishment as provided in subsection (2).	est une infraction tombant sous le coup de la présente Partie, et toute personne qui en est déclarée coupable encourt la peine prévue au paragraphe (2).
[…]	[…]
General Courts Martial	**Cours martiales générales**
[…]	[…]
140 (1) A General Court Martial shall consist of not less than five officers and not more than such maximum number of officers as may be prescribed in regulations.	**140 (1)** Une cour martiale générale se compose d'au moins cinq officiers, et d'au plus le nombre maximum d'officiers que les règlements peuvent fixer.

140 (2) The president of a General Court Martial shall be an officer of or above the naval rank of captain or of or above the rank of colonel or group captain and shall be appointed by the authority convening the General Court Martial or by an officer empowered by that authority to appoint the president.

140 (2) Le président d'une cour martiale générale doit être un officier détenant le grade de capitaine dans la marine ou un grade plus élevé, ou le grade de colonel ou capitaine de groupe ou un grade plus élevé, et il est nommé par l'autorité qui convoque la cour martiale générale ou par un officier qui à cette autorité permet de nommer le président.

140 (3) Where the accused person is of or above the rank of commodore, brigadier or air commodore, the president of a General Court Martial shall be an officer of or above the rank of the accused person, and the other members of the court martial shall be of or above the naval rank of captain or of or above the rank of colonel or group captain.

140 (3) Lorsque l'accusé détient le grade de commodore, brigadier ou commodore de l'air, le président de la cour martiale générale doit être un officier d'un grade égal ou supérieur à celui de l'accusé, et les autres membres de la cour martiale doivent avoir le grade de capitaine dans la marine ou un grade plus élevé, ou le grade de colonel ou capitaine de groupe ou un grade plus élevé.

140 (4) Where the accused person is of the naval rank of captain or of the rank of colonel or group captain, all of the members of a General Court Martial, other than the president, shall be of or above the rank of commander, lieutenant-colonel or wing commander.

140 (4) Lorsque l'accusé a le grade de capitaine dans la marine ou un grade plus élevé, ou le grade de colonel ou capitaine de groupe ou un grade plus élevé, tous les membres d'une cour martiale générale, autres que le président, doivent avoir le grade de commandant, lieutenant-colonel ou commandant d'escadre ou un grade plus élevé.

140 (5) Where the accused person is a commander, lieutenant-colonel or wing commander, at least two of the

140 (5) Lorsque l'accusé a le grade de commandant, lieutenant-colonel ou commandant d'escadre, au

members of a General Court Martial, exclusive of the president, shall be of or above the rank of the accused person.

moins deux des membres de la cour martiale générale, à l'exclusion du président, doivent avoir un grade égal ou supérieur à celui de l'accusé.

[…]

[…]

Disciplinary Courts Martial

Cours martiales disciplinaires

[…]

[…]

145 A Disciplinary Court Martial shall consist of not less than three officers and not more than such maximum number of officers as may be prescribed in regulations.

145 Une cour martiale disciplinaire se compose d'au moins trois officiers et d'au plus tel nombre maximum d'officiers que peuvent fixer les règlements.

146 (1) The president of a Disciplinary Court Martial shall be appointed by the authority convening the Disciplinary Court Martial or by an officer empowered by that authority to appoint the president.

146 (1) Le président d'une cour martiale disciplinaire doit être nommé par l'autorité qui convoque la cour martiale disciplinaire ou par un officier à qui cette autorité permet de nommer le président.

146 (2) The president of a Disciplinary Court Martial shall be an officer of or above the rank of lieutenant-commander, major or squadron leader or of or above such higher rank as may be prescribed in regulations.

146 (2) Le président d'une cour martiale disciplinaire doit être un officier détenant le grade de lieutenant-commandant, major ou chef d'escadron ou un grade plus élevé, ou détenant tel grade supérieur que peuvent prescrire les règlements ou un grade plus élevé.

[…]

[…]

Standing Courts Martial

Cours martiales permanentes

149 (1) The Governor in Council may in an emergency establish Standing Courts

149 (1) Le gouverneur en conseil peut, lors d'une situation d'urgence, créer des

Martial and each such court martial shall consist of one officer, to be called the president, who is or has been a barrister or advocate of more than three years standing and who shall be appointed by or under the authority of the Minister.

cours martiales permanentes, et chacune de ces cours martiales se compose d'un officier, appelé le président, qui est ou a été un avocat inscrit pendant plus de trois ans et qui doit être nommé par ou sur l'autorité du Ministre.

149 (2) Subject to any limitations prescribed in regulations, a Standing Court Martial may try any person who under Part IV is liable to be charged, dealt with and tried upon a charge of having committed a service offence, but a Standing Court Martial shall not pass a sentence including any punishment higher in the scale of punishments than imprisonment for less than two years.

149 (2) Sous réserve de toute restriction prescrite dans les règlements, une cour martiale permanente peut juger toute personne qui, sous le régime de la Partie IV, est susceptible d'être accusée, poursuivie et jugée sur l'inculpation d'avoir commis une infraction militaire, mais une cour martiale permanente ne doit pas prononcer de sentence renfermant une peine supérieure, dans l'échelle des punitions, à l'emprisonnement pour une période de moins de deux ans.

[…]

[…]

National Defence Act, R.S.C. 1970, c. N-4

***Loi sur la défense nationale,* L.R.C. 1970, ch. N-4**

Offences Punishable by Ordinary Law

Infractions punissables par la loi ordinaire

120 (1) An act or omission

120 (1) Une action ou omission

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

a) qui se produit au Canada et est punissable selon la Partie XII de la présente loi, le Code criminel ou toute autre loi du Parlement du Canada; ou

(b) that takes place out of

b) qui se produit en dehors

Canada and would, if it had taken place in Canada, be punishable under Part XII of this Act, the Criminal Code or any other Act of the Parliament of Canada,

du Canada et qui, si elle était faite au Canada, serait punissable suivant la Partie XII de la présente loi, le Code criminel ou toute autre loi du Parlement du Canada;

is an offence under this Part and every person convicted thereof is liable to suffer punishment as provided in subsection (2).

est une infraction tombant sous le coup de la présente Partie, et toute personne qui en est déclarée coupable encourt la peine prévue au paragraphe (2).

[…]

[…]

General Courts Martial

Cours martials générales

[…]

[…]

145 (1) A General Court Martial shall consist of not less than five officers and not more than such maximum number of officers as may be prescribed in regulations.

145 (1) Une cour martiale générale se compose d'au moins cinq officiers, et d'au plus le nombre maximum d'officiers que les règlements peuvent fixer.

145 (2) The president of a General Court Martial shall be an officer of or above the rank of colonel and shall be appointed by the authority convening the General Court Martial or by an officer empowered by that authority to appoint the president.

145 (2) Le président d'une cour martiale générale doit être un officier détenant le grade de colonel ou un grade plus élevé, et il est nommé par l'autorité qui convoque la cour martiale générale ou par un officier qui à cette autorité permet de nommer le président.

145 (3) Where the accused person is of or above the rank of brigadier-general, the president of a General Court Martial shall be an officer of or above the rank of the accused person, and the other members of the court martial

145 (3) Lorsque l'accusé détient le grade de brigadier-général ou un grade plus élevé, le président de la cour martiale générale doit être un officier d'un grade égal ou supérieur à celui de l'accusé, et les autres membres de la

shall be of or above the rank of colonel.

cour martiale doivent avoir le grade de colonel ou un grade plus élevé.

145 (4) Where the accused person is of the rank of colonel, all of the members of a General Court Martial, other than the president, shall be of or above the rank of lieutenant-colonel.

145 (4) Lorsque l'accusé a le grade de colonel, tous les membres d'une cour martiale générale, autres que le président, doivent avoir le grade de commandant, lieutenant-colonel ou un grade plus élevé.

145 (5) Where the accused person is a lieutenant-colonel, at least two of the members of a General Court Martial, exclusive of the president, shall be of or above the rank of the accused person.

145 (5) Lorsque l'accusé est un lieutenant-colonel, au moins deux des membres de la cour martiale générale, à l'exclusion du président, doivent avoir un grade égal ou supérieur à celui de l'accusé.

[…]

[…]

Disciplinary Courts Martial

Cours martiales disciplinaires

[…]

[…]

150 A Disciplinary Court Martial shall consist of not less than three officers and not more than such maximum number of officers as may be prescribed in regulations.

150 Une cour martiale disciplinaire se compose d'au moins trois officiers et d'au plus tel nombre maximum d'officiers que peuvent fixer les règlements.

151 (1) The president of a Disciplinary Court Martial shall be appointed by the authority convening the Disciplinary Court Martial or by an officer empowered by that authority to appoint the president.

151 (1) Le président d'une cour martiale disciplinaire doit être nommé par l'autorité qui convoque la cour martiale disciplinaire ou par un officier à qui cette autorité permet de nommer le président.

151 (2) The president of a Disciplinary Court Martial shall be an officer of or above the rank of major or of or

151 (2) Le président d'une cour martiale disciplinaire doit être un officier détenant le grade de major ou un grade

above such higher rank as may be prescribed in regulations.

plus élevé, ou détenant tel grade supérieur que peuvent prescrire les règlements ou un grade plus élevé.

[…]

[…]

Standing Courts Martial

Cours martiales permanentes

154 (1) The Governor in Council may establish Standing Courts Martial and each such court martial shall consist of one officer, to be called the president, who is or has been a barrister or advocate of more than three years standing and who shall be appointed by or under the authority of the Minister.

154 (1) Le gouverneur en conseil peut créer des cours martiales permanentes, et chacune de ces cours martiales se compose d'un officier, appelé le président, qui est ou a été un avocat inscrit pendant plus de trois ans et qui doit être nommé par ou sur l'autorité du Ministre.

154 (2) Subject to any limitations prescribed in regulations, a Standing Court Martial may try any person who under Part IV is liable to be charged, dealt with and tried upon a charge of having committed a service offence, but a Standing Court Martial shall not pass a sentence including any punishment higher in the scale of punishments than imprisonment for less than two years.

154 (2) Sous réserve de toute restriction prescrite dans les règlements, une cour martiale permanente peut juger toute personne qui, sous le régime de la Partie IV, est susceptible d'être accusée, poursuivie et jugée sur l'inculpation d'avoir commis une infraction militaire, mais une cour martiale permanente ne doit pas prononcer de sentence renfermant une peine supérieure, dans l'échelle des punitions, à l'emprisonnement pour une période de moins de deux ans.

Special General Courts Martial

Cours martiales générales spéciales

155 Notwithstanding anything in this Act, where a person other than an officer or man is to be tried by a court martial,

155 Nonobstant les dispositions de la présente loi, lorsqu'une personne autre qu'un officier ou homme doit

he may be tried by a Special General Court Martial consisting of a person, designated by the Minister, who is or has been a judge of a superior court in Canada, or is a barrister or advocate of at least ten years standing and, subject to such modifications and additions as the Governor in Council may prescribe, the provisions of this Act and the regulations relating to trials of accused persons by General Courts Martial and to their conviction, sentence and punishment are applicable to trials by a Special General Court Martial established under this section, and to the conviction, sentence and punishment of persons so tried.

être jugée par une cour martiale, elle peut être jugée par une cour martiale générale spéciale composée d'une personne, désignée par le Ministre, qui est ou a été juge d'une cour supérieure au Canada, ou est un avocat inscrit pendant au moins dix ans au barreau, et, sous réserve des modifications et additions que le gouverneur en conseil peut prescrire, les dispositions de la présente loi et des règlements relatifs aux procès d'accusés, devant des cours martiales générales, et à leur déclaration de culpabilité, sentence et peine s'appliquent aux procès devant une cour martiale générale spéciale établie sous l'autorité du présent article, ainsi qu'à la déclaration de culpabilité, à la sentence et à la peine des personnes ainsi jugées.

[…]

[…]

National Defence Act, R.S.C. 1985, c. N-5

***Loi sur la défense nationale*, L.R.C. 1985, ch. N-5**

Definitions

Définitions

2 (1) In this Act,

2 (1) Les définitions qui suivent s'appliquent à la présente loi.

[…]

[…]

service offence means an offence under this Act, the Criminal Code or any other Act of Parliament, committed by a person while subject to the Code of Service Discipline; (infraction

infraction d'ordre militaire Infraction — à la présente loi, au Code criminel ou à une autre loi fédérale — passible de la discipline militaire. (service offence)

d’ordre militaire)

[…]

[…]

Persons subject to Code of Service Discipline

60 (1) The following persons are subject to the Code of Service Discipline:

(a) an officer or non-commissioned member of the regular force;

[…]

Personnes assujetties au code de discipline militaire

60 (1) Sont seuls justiciables du code de discipline militaire :

a) les officiers ou militaires du rang de la force régulière;

[…]

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.

[…]

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.

[…]

No interference with civil jurisdiction

71 Subject to section 66, nothing in the Code of Service Discipline affects the jurisdiction of any civil court to try a person for any offence triable by that court.

Intégralité de la compétence

71 Sous réserve de l’article 66, le code de discipline militaire n’a pas pour effet d’empêcher un tribunal civil de juger toute infraction pour laquelle il a compétence.

[…]

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

is an offence under this Division and every person convicted thereof is liable to suffer punishment as provided in subsection (2).

[…]

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

Proceedings in criminal and penal matters

11. Any person charged with an offence has the right

[…]

Infractions de droit commun

Procès militaire pour infractions civiles

130 (1) Constitue une infration 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 Code criminel ou de toute autre loi fédérale.

Quiconque en est déclaré coupable encourt la peine prévue au paragraphe (2).

[…]

Charte canadienne des droits et libertés, partie I de la Loi constitutionnelle de 1982, Annexe B de la Loi de 1982 sur le Canada (R.-U.), 1982, ch. 11

Affaires criminelles et pénales

11. Tout inculpé a le droit :

[…]

(f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

[…]

[…]

f) sauf s'il s'agit d'une infraction relevant de la justice militaire, de bénéficier d'un procès avec jury lorsque la peine maximale prévue pour l'infraction dont il est accusé est un emprisonnement de cinq ans ou une peine plus grave;

[…]

Criminal Code, R.S.C., 1985, c. C-46

Sexual assault with a weapon, threats to a third party or causing bodily harm

272 (1) Every person commits an offence who, in committing a sexual assault,

(a) carries, uses or threatens to use a weapon or an imitation of a weapon;

(b) threatens to cause bodily harm to a person other than the complainant;

(c) causes bodily harm to the complainant; or

(d) is a party to the offence with any other person

Punishment

272 (2) Every person who

Code criminel, L.R.C. 1985, c. C-46

Agression sexuelle armée, menaces à une tierce personne ou infliction de lésions corporelles

272 (1) Commet une infraction quiconque, en commettant une agression sexuelle, selon le cas :

a) porte, utilise ou menace d'utiliser une arme ou une imitation d'arme;

b) menace d'infliger des lésions corporelles à une autre personne que le plaignant;

c) inflige des lésions corporelles au plaignant;

d) participe à l'infraction avec une autre personne.

Peine

272 (2) Quiconque commet

commits an offence under subsection (1) is guilty of an indictable offence and liable

(a) if a restricted firearm or prohibited firearm is used in the commission of the offence or if any firearm is used in the commission of the offence and the offence is committed for the benefit of, at the direction of, or in association with, a criminal organization, to imprisonment for a term not exceeding 14 years and to a minimum punishment of imprisonment for a term of

(i) in the case of a first offence, five years, and

(ii) in the case of a second or subsequent offence, seven years;

(a.1) in any other case where a firearm is used in the commission of the offence, to imprisonment for a term not exceeding 14 years and to a minimum punishment of imprisonment for a term of four years; and

(a.2) if the complainant is under the age of 16 years, to imprisonment for life and to a minimum punishment of imprisonment for a term of five years; and

l'infraction prévue au paragraphe (1) est coupable d'un acte criminel passible :

a) s'il y a usage d'une arme à feu à autorisation restreinte ou d'une arme à feu prohibée lors de la perpétration de l'infraction, ou s'il y a usage d'une arme à feu lors de la perpétration de l'infraction et que celle-ci est perpétrée au profit ou sous la direction d'une organisation criminelle ou en association avec elle, d'un emprisonnement maximal de quatorze ans, la peine minimale étant :

(i) de cinq ans, dans le cas d'une première infraction,

(ii) de sept ans, en cas de récidive;

a.1) dans les autres cas où il y a usage d'une arme à feu lors de la perpétration de l'infraction, d'un emprisonnement maximal de quatorze ans, la peine minimale étant de quatre ans;

a.2) dans les cas où le plaignant est âgé de moins de seize ans, de l'emprisonnement à perpétuité, la peine minimale étant de cinq ans;

(b) in any other case, to imprisonment for a term not exceeding fourteen years.	b) dans les autres cas, d’un emprisonnement maximal de quatorze ans.

COURT MARTIAL APPEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES :

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