Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20140120

Dockets: CMAC-560
CMAC-563

Citation: 2014 CMAC 1

Ottawa, Ontario, January 20, 2014

CORAM: BLANCHARD C.J.
WEILER J.A.
DAWSON J.A.

CMAC-560

BETWEEN:

SECOND LIEUTENANT MORIARITY

Appellant

and

HER MAJESTY THE QUEEN

Respondent

CMAC-563

AND BETWEEN:

PRIVATE M.B.A. HANNAH

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Ottawa, Ontario, on September 27, 2013.

Judgment delivered at Ottawa, on January 20, 2014.

REASONS FOR JUDGMENT BY: Blanchard C.J.

CONCURRED IN BY: Weiler J.A.
Dawson J.A.

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REASONS FOR JUDGMENT

THE CHIEF JUSTICE

I. Nature of the Appeals

[1] The Appellants appeal from the decisions of two Standing Courts Martial dismissing their *Charter* applications and convicting them of a variety of offences under paragraph 130(1)*(a)* of the *National Defence Act*, R.S.C., 1985, c. N-5 (*NDA* or the Act). The Appellants argue that by incorporating civil offences unrelated to military service in the *Code of Service Discipline* (CSD), paragraph 130(1)*(a)* employs unconstitutionally broad means to achieve its purpose: enforcing discipline, efficiency, and morale in the military. As a result, they are asking this Court to declare paragraph 130(1)*(a)* unconstitutional and of no force or effect pursuant to s. 52 of the *Constitution Act, 1982* and to dismiss all charges against them as their convictions are based on an unconstitutional law.

[2] In particular, the Appellants contend that paragraph 130(1)*(a)* violates their liberty rights under s. 7 of the *Canadian Charter of Rights and Freedoms (Charter)* in a manner that cannot be saved by s. 1; and that the provision also violates subsection 11*(f)* of the *Charter* and the right to not be arbitrarily tried by a military tribunal since non-military crimes may be tried by a service tribunal with no right to a jury.

II. Facts

[3] In both cases the facts are not in dispute. Second Lieutenant Moriarity, was a Cadet Instructor Cadre (CIC) officer on duty in Victoria and Vernon, British Columbia at the Cadet

Organization Administration and Training Service (COATS). While in a position of trust and authority with respect to cadets he interacted with, he engaged in inappropriate sexual relationships with two cadets. Sapper Hannah was a member of the Canadian Forces and a student at the Canadian Forces School of Military Engineering at Canadian Forces Base (CFB) Gagetown, New Brunswick. He purchased and delivered a controlled substance to another engineering candidate and the drugs were found in that student's quarters on the base.

[4] For our purposes, further elaboration of the facts is unnecessary since these are not relevant to the issues raised on these appeals. The judicial confession and admissions made by both accused were such that the convictions by the Courts Martial would stand in the absence of a successful *Charter* challenge. For our purposes, it is sufficient to set out the offences for which each accused was charged and convicted.

Second Lieutenant Moriarity

[5] Second Lieutenant Moriarity was charged with four offences punishable under s. 130 of the *NDA*; two relating to sexual exploitation contrary to s. 153 of the *Criminal Code*, a third for sexual assault contrary to s. 271 of the *Criminal Code*, and a fourth offence for invitation to sexual touching contrary to s. 152 of the *Criminal Code*.

Sapper Hannah

[6] Sapper Hannah was charged with two offences punishable under s. 130 of the *NDA*; one for trafficking of a substance included in Schedule IV contrary to subsection 5(1) of the *Controlled Drugs and Substances Act*, and one for unlawful selling of a substance containing a

drug included in Schedule F, contrary to s. C.01.041(1.1) of the *Food and Drug Regulations*, C.R.C., c. 870, contrary to s. 31 of the *Food and Drugs Act*.

III. Applicable Legislation

[7] The provision at issue in these cases is paragraph 130(1)*(a)* of the *NDA*. For completeness, I reproduce below s. 130 and other applicable provisions of the *NDA*, the *Constitution Act* and the *Charter*.

Offences Punishable by Ordinary Law	*Infractions de droit commun*
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;
(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,	*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.
is an offence under this Division and every person convicted thereof is liable to suffer punishment as provided in subsection (2).	Quiconque en est déclaré coupable encourt la peine prévue au paragraphe (2).
(2) Subject to subsection (3), where a service tribunal convicts a person under subsection (1), the service tribunal shall,	(2) Sous réserve du paragraphe (3), la peine infligée à quiconque est déclaré coupable aux termes du paragraphe (1) est :

(a) if the conviction was in respect of an offence

a) la peine minimale prescrite par la disposition législative correspondante, dans le cas d'une infraction :

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

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

(ii) committed outside Canada under section 235 of the *Criminal Code*,

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

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

(b) in any other case,

b) dans tout autre cas :

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

(i) soit la peine prévue pour l'infraction par la partie VII de la présente loi, le *Code criminel* ou toute autre loi pertinente,

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

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

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

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

(4) Nothing in this section is in

(4) Le présent article n'a pas

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.	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.
[Emphasis added]	[Je souligne]

Section 2 of the *NDA* defines a "service offence":

"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 d'ordre militaire » Infraction — à la présente loi, au Code criminel ou à une autre loi fédérale — passible de la discipline militaire.

Subsection 52(1) of the *Constitution Act, 1982* affirms the supremacy of the Constitution:

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.	**52.** (1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

Section 7 of the *Charter* establishes the constitutional right to life, liberty and security of the person:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.	**7.** Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

Subsection 11*(f)* of the *Charter* provides for the right to a jury trial except for an offence under military law tried by a military tribunal:

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;

IV. Decisions below

R. v. Second Lieutenant Moriarity

[8] The Standing Court Martial (Court Martial) found insufficient evidence to support the Appellant's claim that paragraph 130(1)*(a)* of the *NDA* violated s. 7 of the *Charter*. The Court Martial held that *Charter* challenges such as this one must take place on a case-by-case basis. The Appellant conceded that his own circumstances did not involve an overbroad application of paragraph 130(1)*(a)* of the *NDA*; the evidence adduced supported the fact that the Court Martial had jurisdiction to deal with the matter since it involved an officer on duty on a defence establishment having a relationship of authority with the complainant cadets. Notwithstanding

his concession, the Appellant relied on the doctrine of reasonable hypothesis to prove that the provision would violate the *Charter* in some situations and, as such, should be struck down.

[9] However, the Court Martial found it impossible to consider any reasonable hypotheses that would help in the matter given the wide variety of offences possibly involved. The Court Martial held that the Appellant failed to demonstrate that the application of the CSD unconstitutionally affected him. The facts did not support the Appellant's submission that paragraph 130(1)*(a)* of the *NDA* is contrary to s. 7 of the *Charter*. The Appellant's *Charter* challenge was dismissed.

[10] The Court Martial found Second Lieutenant Moriarity guilty of the four offences punishable under s. 130 of the *NDA*.

R. v. Sapper Hannah

[11] The Court Martial conducted an overbreadth analysis. First, it interpreted the challenged provision in order to determine its scope and effect from its legislative history and jurisprudence. Although past jurisprudence from the Court Martial Appeal Court demonstrates that the jurisdiction of the military courts used to be confined to those offences that were connected in a meaningful way with military discipline, *R. v. Reddick*, (1996) 5 C.M.A.R. 485 (*Reddick*) held that a "military nexus" was not a precondition to the exercise of jurisdiction by a court martial

over an offence. The Court Martial felt bound by this decision. As such, it found that paragraph 130(1)*(a)* of the *NDA* applied to all offences under federal law, whether or not they related to discipline, efficiency or morale of the military.

[12] In determining the provision's purpose, the Court Martial adopted a passage in *R. v. Généreux*, [1992] 1 S.C.R. 259 (*Généreux*) where the Supreme Court of Canada held that the CSD has dual purposes; in addition to maintaining discipline and integrity in the military, it serves a public function by punishing conduct which threatens public order and welfare. The Court Martial concluded that the purpose of paragraph 130(1)*(a)* was to "provide a mechanism for the prosecution at court martial of those persons who are subject to the Code of Service Discipline for an offence under any federal law for which they are liable, ..."

[13] Since the purpose of paragraph 130(1)*(a)* was to create liability for military members to be prosecuted under military law for all federal offences, the provision was no broader than necessary to achieve its objective. The principles of fundamental justice were not offended and there was no *Charter* violation. Sapper Hannah's *Charter* challenge was dismissed.

[14] In consequence, the Court Martial found Sapper Hannah guilty of the two drug-related offences.

V. Issues

[15] The issues raised in this appeal are the following:

1. Does paragraph 130(1)*(a)* violate s. 7 of the *Charter* because it is overly broad?

2. Does paragraph 130(1)*(a)* violate other *Charter* rights?

VI. Analysis

Preliminary questions

[16] At the outset I will dispose of two preliminary questions. First, the Respondent challenges the nature of the Appellants' applications in both appeals, arguing that the issues raised are jurisdictional. Second, the Respondent argues that the Appellants have failed to demonstrate that their personal *Charter* rights are violated by paragraph 130(1)*(a)* and, without the showing of such deleterious effect, are unable to support their constitutional challenge.

[17] In both appeals, the Respondent argues that the Appellants' *Charter* challenges are really questions of jurisdiction. The Respondent contends that since s. 130 merely incorporates existing offences into the definition of "service offences", it does not create any new prohibition. It is therefore argued that the Appellants' overbreadth argument must be coextensive with the doctrine of *ultra vires*. The Respondent reasons that if s. 130 is overbroad on the ground it confers jurisdiction to try matters unrelated to military service, then it is not necessarily incidental to Parliament's subsection 91(7) military powers and, therefore, is *ultra vires*. The Respondent contends that the Supreme Court of Canada, in *MacKay v. The Queen*, [1980] 2 S.C.R. 370 (*MacKay*), has answered this question. The Court held that the provision was *intra vires* Parliament and as a consequence, the Appellants' challenge must fail.

[18] With respect, I disagree with the Respondent's characterization of the Appellants' argument. In my view, the Appellants are not arguing that including non-disciplinary offences in the military justice system is outside Parliament's military power. Rather, they are arguing that the inclusion of non-military offences in the definition of service offences overreaches the purpose of the CSD as enacted. Consequently, the challenge does not question the constitutionality of s. 130 vis-à-vis the division of powers, but the *NDA*'s disciplinary scheme.

[19] The Respondent's argument that the provision does not create new prohibitions is contrary to the plain meaning of s. 130. First, the offences under the *Criminal Code* or other Acts of Parliament that are incorporated in the CSD by the operation of paragraph 130(1)*(a)* would not otherwise be prohibited under military law. Second, paragraph 130(1)*(b)* extends the reach of the *Criminal Code* and other federal laws beyond the Canadian border thereby ensuring service personnel and others are liable for conduct which may otherwise be legal in another jurisdiction. For the above reasons, the Respondent's argument cannot be sustained.

[20] Further, subsection 130(2) exposes a person tried for offences under s. 130 to different penalties than are found in the *Criminal Code* or similar legislation. This issue is further dealt with at paragraph 51 below, where I deal with the differences resulting from the transformation of *Criminal Code* offences into service offences.

[21] Thus, contrary to the Respondent's submission, I conclude that the Appellants' challenge concerns overbreadth vis-à-vis the purpose of the CSD, not the division of powers. It was open to the Appellants to frame their application as they did.

[22] I will now turn to the second preliminary question raised by the Respondent in these appeals: are the Appellants required to prove that their own *Charter* rights are violated by paragraph 130(1)*(a)*?

[23] The Appellants contend that paragraph 130(1)*(a)* of the *NDA* is overbroad and therefore unconstitutional and of no force and effect. It follows, they submit, that they cannot be charged and convicted under the provision even if the circumstances of their alleged offences were contrary to the maintenance of discipline and integrity in the military. To support this, the Appellants rely on *R. v. Heywood*, [1994] 3 S.C.R. 761 (*Heywood*) and advance hypothetical fact scenarios to demonstrate that paragraph 130(1)*(a)* captures conduct having nothing to do with the provision's objectives.

[24] The Respondent argues that the Appellants' constitutional challenge cannot be analyzed without consideration of the factual circumstances of the cases and without any evidence of abusive effect. The onus is on the Appellants to demonstrate that the application of the law to their specific circumstances is unconstitutional. The facts in the present cases, according to the Respondent, clearly support military jurisdiction in that both sets of offences were committed in the context of the Appellants' roles as members of the Canadian Forces.

[25] While generally, deleterious effects must be established to prove a *Charter* violation, the Supreme Court held in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 (*Big M Drug Mart*) that there was an exception to this general principle. At pages 313-314, the Court wrote that "[a]ny accused, whether corporate or individual, may defend a criminal charge by arguing that the law

under which the charge is brought is constitutionally invalid." The Court thus held that a person should not be convicted under an unconstitutional law. Consequently, a defendant can raise any constitutional argument, whether or not the argument relates to his personal circumstances. Subsequently, the Supreme Court extended the *Big M Drug Mart* exception to instances where no criminal charges are laid but a person is brought before a Court by a government agency (*Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157). The Court found the exception was warranted in circumstances of involuntary presence before a court or tribunal and the possibility of coercive sanctions.

[26] This jurisprudence leads me to conclude the *Big M Drug Mart* exception applies in the instant cases. Both Appellants were charged with offences under the *NDA* before the military courts and, therefore, there existed a clear possibility of coercive sanctions. Consequently, the Appellants may raise their constitutional argument and rely on hypothetical fact scenarios to demonstrate how the impugned provision violates rights guaranteed by the *Charter*. In the result, the Appellants need not establish that their argument relates to their personal circumstances in order to challenge the constitutionality of paragraph 130(1)*(a)* of the *NDA*.

[27] I now turn to the first issue raised in these appeals.

1. Does paragraph 130(1)*(a)* violate s. 7 of the *Charter* because it is overly broad?

    a. Overbreadth as a principle of fundamental justice

[28] In *R. v. Khawaja*, [2012] 3 S.C.R. 555 (*Khawaja*), at paragraph 35, the Supreme Court held:

> It is a principle of fundamental justice that criminal laws not be overbroad. Pursuant to s. 7 of the *Charter*, laws that restrict the liberty of those to whom they apply must do so in accordance with principles of fundamental justice. Criminal laws that restrict liberty more than is necessary to accomplish their goal violate principles of fundamental justice. Such laws are overbroad.

[29] The Court in *Khawaja* confirmed the legal test for overbreadth articulated in *Heywood*. In *Heywood*, Justice Cory, writing for the majority, articulated the analysis envisaged in considering whether a legislative provision was overbroad. He wrote at paragraph 49:

> Overbreadth analysis looks at the means chosen by the state in relation to its purpose. In considering whether a legislative provision is overbroad, a court must ask the question: are those means necessary to achieve the State objective? If the State, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason. The effect of overbreadth is that in some applications the law is arbitrary or disproportionate.

[30] At paragraph 51 the learned judge indicated that a measure of deference was owed to the legislature in considering whether a legislative provision is overbroad:

> In analyzing a statutory provision to determine if it is overbroad, a measure of deference must be paid to the means selected by the legislature. While the courts have a constitutional duty to ensure that the legislation conforms with the *Charter*, legislators must have the power to make policy choices. A court should not interfere with legislation merely because a judge might have chosen a different means of accomplishing the objective if he or she had been the legislator.

[31] At paragraph 40 in *Khawaja*, the Supreme Court adopted the following approach in applying the test for overbreadth: first, examine the scope of the law; second, determine the

objective of the law; and third, ask whether the provisions of the law are broader than necessary to achieve the State objective and whether the impact of the law is grossly disproportionate to its objective. The Court clarified the distinction between overbreadth and disproportionality without deciding whether they are distinct constitutional doctrines. Chief Justice McLachlin writing for the majority stated:

> Overbreadth occurs when the means selected by the legislator are broader than necessary to achieve the state objective, and gross disproportionality occurs when state actions or legislative responses to a problem are "so extreme as to be disproportionate to any legitimate government interest."

[32] More recently, in *Canada (Attorney General) v. Bedford*, 2013 SCC 72 (*Bedford*), the Supreme Court reaffirmed that a law is overbroad when it goes too far and interferes with some conduct that bears no connection to its objective (*Bedford* at paragraph 101). The Supreme Court held that "the ultimate question remains whether the evidence establishes that the law violates basic norms because there is no connection between its effect and its purpose." The Supreme Court also cautioned that it is not easy to establish that there is no connection in whole or in part, between the effects and the purpose of impugned legislation (*Bedford* at paragraph 119).

[33] In considering whether paragraph 130(1)*(a)* of the *NDA* is overbroad, I will follow the above approach adopted by the Supreme Court.

b. The scope of paragraph 130(1)(a) of the NDA

[34] The Appellants contend that paragraph 130(1)*(a)* confers jurisdiction to courts martial over virtually all offences punishable under federal law, irrespective of the circumstances of their

commission. In essence, the provision purports to turn federal offences into military offences, even if those offences do not pose a challenge to military discipline.

[35] The Respondent's position is that the scope of paragraph 130(1)*(a)* is to incorporate offences that already exist in ordinary law into the CSD. It is argued that the provision allows for the trial of otherwise civil offences by service tribunals but only in relation to persons subject to the CSD. As such, the provision does not create any new offences.

[36] The Respondent contends that the Appellants inappropriately rely on the analysis adopted by the Supreme Court in *Heywood*. In that case, Justice Cory used hypothetical situations to demonstrate overbreadth through the existence of unnecessary prohibitions on one's freedom. The Respondent argues paragraph 130(1)*(a)* does not impose any prohibition, but merely incorporates offences that already exist elsewhere in law into the CSD. Consequently, *Heywood* does not apply.

[37] At paragraph 19 above, I have already rejected the argument that no new offences are created. For the same reasons I reject it here.

[38] The Respondent further contends that the scope of the provision is constrained by the discretion inherent in the enforcement of the CSD exercised by the Director of Military Prosecutions in laying charges or directing them to the civil authorities.

[39] I reject the Respondent's submissions that the scope of paragraph 130(1)*(a)* is constrained by the Director of Military Prosecutions' discretion to try matters under the CSD or leave them for civil courts. In my view, prosecutorial discretion does not save overbroad legislation. The Supreme Court rejected a similar argument in *R. v. Canadian Pacific*, [1995] 2 S.C.R. 1031, an overbreadth case. In that case, Chief Justice Lamer, at page 1057 of his minority reasons, agreeing with the majority that the legislation was not overbroad, comments that:

> Although the fact that police and provincial prosecutors rarely, if ever, lay charges against persons whose activities [that] interfere with purely hypothetical "uses" of the environment cannot, in my view, be invoked to sustain the legislation if it were found to be unconstitutionally overbroad […]

Further, in the two cases before the Court, no evidence was presented to suggest the Director of Military Prosecutions routinely declines to prosecute offences under paragraph 130(1)*(a)* where the substance of the offence is unrelated to military discipline. Nor was there any evidence filed as to the existence of a memorandum of understanding such as the one in place in Australia, for example, which would define and regulate respective prosecutorial powers of the civilian and military authorities. See: Hon. G. Létourneau, *Introduction to Military Justice: An overview of Military Penal Justice and its evolution in Canada* (Montréal: Wilson & Lafleur, 2012) at 59 and following.

[40] I will now consider the scope of paragraph 130(1)*(a)* of the Act.

[41] This Court has consistently interpreted the scope of paragraph 130(1)*(a)* to include, subject to s. 70 of the *NDA*, every act or omission punishable under any Act of Parliament, irrespective of its nature and the circumstances of its commission, see *R. v. T.(J.S.K.)*, 2008

C.M.A.J. No.3 (*Trépanier*) at paragraph 27. In *R. v. St. Jean*, [2000] C.M.A.J. No. 2 at paragraph 38, Justice Létourneau, writing for the Court, recognized that the scope of paragraph 130(1)*(a)* is not limited to matters that pertain directly to military discipline:

> The fact that these offences are made part of the Code of Service Discipline by section 130 of the Act and that the offender is a member of the military does not necessarily mean that these offences pose a challenge to "military discipline."

[42] In *Ellis v. R.*, [2010] C.M.A.J. No. 3 at paragraphs 20-22, the Court made the following observations about the provision's broad scope:

> [20] …The Act [*NDA*] contains a Code of Service Discipline, but its scope "is not limited to military or disciplinary offences *per se*, such as misconduct in presence of the enemy"…
>
> [21] Section 130 of the Act includes in that Code ordinary criminal law or civilian offences which, by the definition of "service offence" in section 2 and the combined effect of section 130, may become military offences triable by military courts. "Service offence", according to the definition, 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"…
>
> [22] The scope of the Code is also broad with respect to the jurisdiction *rationae loci* and *rationae personae*. The military court's jurisdiction extends to offences committed outside Canada by members of the regular, the special and the reserve force as well as civilians who accompany a unit or another element of the Canadian Forces that is on service or acting service in any place: ...

[43] Given the plain language of the provision and the consistent jurisprudence describing its breadth, I find that the scope of paragraph 130(1)*(a)* includes all offences under the *Criminal Code* and other Acts of Parliament. The only offences excluded from paragraph 130(1)*(a)* are murder, manslaughter and child abduction when committed in Canada (s. 70 of the *NDA*).

[44] However, while paragraph 130(1)*(a)* uses broad language, the object or purpose of the CSD is also ambitious. As will be discussed below, its object is about ensuring the discipline, efficiency and morale of the military. This is clearly a legitimate concern of government and a broad subject matter, which does not lend itself to precise codification. It is also an object, if not attained, that could lead to very serious consequences for Canada. In my view, Parliament is justified in choosing equally ambitious means for achieving these objectives and using broad and general terms in legislation. Here, Parliament elected to include essentially all offences under the *Criminal Code* and other federal offences as service offences. A strict requirement of drafting precision might well undermine the ability of Parliament to provide for a comprehensive and flexible regime. It would be difficult if not impossible to anticipate which offence included under paragraph 130(1)*(a)* would, if committed by a person subject to the CSD, affect military discipline, efficiency and morale. That would depend on the circumstances of each case and those circumstances would require the existence of a clear military connection or nexus.

[45] In turn, the broad scope of paragraph 130(1)*(a)* must be read in the context of a military nexus requirement; otherwise, the military courts would have no authority under the *NDA* over public offences which lacked any clear military connection.

[46] The Supreme Court adopted a similar contextual approach in interpreting certain provisions of the *Ontario Environmental Protection Act*, in *Ontario v. Canadian Pacific Ltd.* [1995] 2 S.C.R. 1031. In that case, the provision at issue also employed broad language but it

was construed not to be overbroad (see in particular paragraphs 41, 42, 43, 44, 48, 49, 69, 83, 84 and 85).

[47] At this point, to understand how the scope of paragraph 130(1)*(a)* is constrained, it is necessary to review the requirements of a military nexus.

Military Nexus

[48] The requirement of a military nexus for a prosecution before a service tribunal is not new. Prior to the enactment of the *Charter* in 1982, the Supreme Court limited the jurisdiction of service tribunals to "service connected" offences. In *MacKay*, above, Justice McIntyre in concurring reasons at page 411 of the decision, wrote:

> I would therefore hold that the provisions of the National Defence Act, in so far as they confer jurisdiction upon courts martial to try servicemen in Canada for offences which are offences under the penal statutes of Canada for which civilians might also be tried, and where the commission and nature of such offences has no necessary connection with the service, in the sense that their commission does not tend to affect the standards of efficiency and discipline of the service, are inoperative as being contrary to the Canadian Bill of Rights in that they create inequality before the law for the serviceman involved.

[49] The learned Justice provided the following rationale for the nexus requirement for service connected offences at page 409 of his reasons:

> …The serviceman charged with a criminal offence is deprived of the benefit of a preliminary hearing or the right to a jury trial. He is subject to a military code which differs in some particulars from the civil law, to differing rules of evidence, and to a different and more limited appellate procedure. His right to rely upon the special pleas of "*autrefois convict*" or "*autrefois acquit*" is altered for, while if convicted of an offence in a civil court he may not be tried again for the same offence in a military court, his conviction in a

> military court does not bar a second prosecution in a civil court. His right to apply for bail is virtually eliminated. While such differences may be acceptable on the basis of military need in some cases, they cannot be permitted universal effect in respect of the criminal law of Canada as far as it relates to members of the armed services serving in Canada.

[50] In this concurring judgment, endorsed by Justice Dickson, Justice McIntyre saw a need to restrict the application of s. 120 (now s. 130) to discipline-related offences. He explained that any departure from the concept of equality before the law must not be greater than is necessary to meet the needs of the military relating to service discipline. He stated at page 408 of his reasons that "[t]he principle which should be maintained is that the right of the servicemen at civil law should be affected as little as possible considering the requirements of military discipline and the efficiency of the service."

[51] In 1985, s. 66 of the *NDA* was amended to provide for pleas of "*autrefois*" to prevent re-trials before civilian criminal courts. Notwithstanding this legislative change, differences between the two systems of justice remain. Recently, this Court commented on the transformation of *Criminal Code* offences into military offences by making them service offences through sections 2 and 130 of the *NDA*. In *Trépanier* at paragraph 33, the Court stated that for a person accused before a military tribunal, "[a] number of derogations and loss of rights and benefits ensues." The most notable of which is the loss of the constitutional right to a jury trial.

[52] The Supreme Court in *Généreux*, at page 293, reasserted the requirement of a military nexus. It did so by stating the purpose of a separate system of military tribunals, namely to

"allow the Armed Forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military."

[53] Justice Hugessen of this Court in *R. v. Brown* (1995), 5 C.M.A.R. 280 (*Brown*) acknowledged the settled state of the law when he wrote at page 287 of his reasons "that the exception to the guarantee of the right to a jury trial in paragraph 11*(f)* is triggered by the existence of a military nexus with the crime charged." The learned judge stated that after the coming into force of the *Charter*, the nexus requirement was adopted and elaborated for the purposes of paragraph 11(*f*) of the *Charter* by this Court. In *MacDonald v. the Queen* (1983), 4 C.M.A.R. 277 (*MacDonald*), Chief Justice Mahoney, writing for the Court, at page 283 of his reasons, said:

> An offence that has a real military nexus and falls within the letter of subsection 120(1) [now subsection 130(1)] of the *National Defence Act* is an offence under military law as that term is used in paragraph 11(*f*) of the *Charter of Rights*.

[54] It is therefore clear that the military nexus test is a necessary component of subsection 130(1) of the *NDA*.

[55] Until the decision of *Reddick* in 1996, above, this Court consistently made use of the military nexus doctrine to determine whether the military courts had jurisdiction to try an offence brought under s. 130 (see for example: *R. v. MacEachern* (1985), 4 C.M.A.R. 447; *R. v. Ryan* (1987), 4 C.M.A.R. 563; *R. v. Ionson* (1987), 4 C.M.A.R. 433 affirmed [1989] 2 S.C.R. 1073 (S.C.C.)). As the Court Martial noted in *Hannah*, the decision in *Reddick* has raised in the minds

of some whether a military nexus continued to be required for offences to be tried before the military tribunals.

[56] It is useful to briefly review the facts in *Reddick*. The accused was charged with eight offences under the *NDA*. Several of these offences would also have been punishable under the *Criminal Code* in a civilian court. The accused was released from the Canadian Forces by the time the Standing Court Martial was assembled on September 26, 1995. The accused objected to the jurisdiction of the Standing Court Martial on the grounds that he was then a civilian. There was no dispute that the accused was subject to the CSD at the time of the offences. The president of the Standing Court Martial upheld the accused's Plea in Bar of Trial on the grounds that Parliament's power over the "militia, military, and naval service, and defence", granted by head 91(7) of the Canadian *Constitution Act, 1867*, could not justify the assignment of jurisdiction by subsection 60(2) to the Standing Court Martial in respect of a civilian. The question before the Court was whether subsection 60(2) of the *NDA* could constitutionally extend to the trial of a civilian in the circumstances of the accused.

[57] The issue in *Reddick* was about Parliament's power to deem a civilian to be a person subject to the CSD. This issue was unrelated to the question of military nexus or to the jurisdiction of the military tribunal to try service offences. The issue was properly framed by the Court as a division of powers issue: whether Parliament had the power to enact the impugned provision? The Court ruled, in my view correctly, that "the nexus doctrine is superfluous and potentially misleading in a distribution of powers context."

[58] Chief Justice Strayer writing for the Court went on to observe in *obiter* that "the nexus doctrine no longer has the relevance or force which influenced many of the earlier decisions of this Court." It is this judgment that grounded the decision of the Court Martial in *Hannah* that it could not apply a military nexus to the case at hand. In my view, such a reading takes the decision in *Reddick* out of context.

[59] In *Reddick*, the learned Chief Justice went on to write:

> It [the doctrine] can be put aside as distracting from the real issue which is one of the division of powers. In addressing that issue a Court Martial must start by considering whether the Code of Service Discipline gives it jurisdiction in the circumstances alleged in the charges. If so, it can presume that the Code, as part of the National Defence Act, is constitutionally valid unless the accused can demonstrate otherwise.
>
> In this case, the circumstances of the offences were within the terms of the Code of Service Discipline, and there was nothing to demonstrate that subsection 60(2) could not constitutionally apply to the accused even though he was a civilian at the time of trial. The prosecution of these offences is equally important to the maintenance of discipline and morale even if the accused has left the Armed Forces.

[60] In my opinion, the Court in *Reddick* was not abolishing the military nexus requirement. The case concerned a division of powers issue and the judgment should be read in that context. The above-cited constitutional validity reference by Chief Justice Strayer related to the constitutional jurisdiction of Parliament to enact the impugned provision and not to the *Charter* rights of the accused.

[61] This Court since *Reddick* has discussed the status of the military nexus doctrine in *Nystrom v. R.*, [2005] C.M.A.J. No. 8 and *Trépanier*, above. In the latter case, at paragraphs 25 and 26 of its judgment the Court wrote:

> Third, at one time the jurisdiction of the courts martial was clearly conditional on the existence of a military nexus. In other words, the offence had to be "so connected with the service in its nature, and in the circumstances of its commission, that it would tend to affect the general standard of discipline and efficiency of the service": see for example *MacKay v. The Queen*, [1980] 2 S.C.R. 370, at page 410; *Ionson v. R.* (1987), 4 C.M.A.R. 433; and *Ryan v. The Queen* (1987), 4 C.M.A.R. 563. Indeed, in *R. v. Brown* (1995), 5 C.M.A.R. 280, at page 287, the Court Martial Appeal Court unanimously reasserted as a matter now "well settled that the exception to the guarantee of the right to a jury trial in paragraph 11*f*) is triggered by the existence of a military nexus with the crime charged".
>
> In the following year, however, our Court ruled in *R. v. Reddick* (1996), 5 C.M.A.R. 485, at pages 498-506, that the notion of military nexus has no place when the debated issue is one of division of constitutional powers. In that context, the Court found that the concept was misleading and distracted from the issue. Finally, in *R. v. Nystrom*, supra, our Court narrowed the scope of the ruling in the *Reddick* case and left for another time the determination of the need for a military nexus which, according to the *Brown* case, appears to be a prerequisite under paragraph 11*f)* of the Charter. We hasten to add that the existence of a military nexus is not in dispute in the present instance.

[62] It is appropriate and useful at this time to clarify the state of the law on the doctrine of military nexus. Simply put, a military nexus is required to ensure that only those offences relating to the purposes behind a separate military justice system can be prosecuted under paragraph 130(1)*(a)* of the *NDA*. In my view Justice Hugessen correctly asserted "that the exception to the guarantee of the right to a jury trial in paragraph 11*(f)* is triggered by the existence of a military nexus with the crime charged."

[63] In defining "military nexus" I adopt the words of Justice McIntyre written in *MacKay* at page 410. The learned judge succinctly expressed a useful approach which I find difficult to improve upon:

> The question then arises: how is a line to be drawn separating the service-related or military offence from the offence which has no necessary connection with the service? In my view, an offence which would be an offence at civil law, when committed by a civilian, is as well an offence falling within the jurisdiction of the courts martial and within the purview of military law when committed by a serviceman if such offence is so connected with the service in its nature, and in the circumstances of its commission, that it would tend to affect the general standard of discipline and efficiency of the service. I do not consider it wise or possible to catalogue the offences which could fall into this category or try to describe them in their precise nature and detail. The question of jurisdiction to deal with such offences would have to be determined on a case-by-case basis. A serviceman charged in a service court who wished to challenge the jurisdiction of the military court on this basis could do so on a preliminary motion. It seems, by way of illustration, that a case of criminal negligence, causing death resulting from the operation of a military vehicle by a serviceman in the course of his duty, would come within the jurisdiction of the court martial, while the same accident, occurring while the serviceman was driving his own vehicle on leave and away from his military base or any other military establishment, would clearly not. It may be observed that, on an admittedly different constitutional basis, this approach has been taken in American courts where a possible conflict of jurisdiction had arisen between the military tribunals and the civil courts.
>
> [Emphasis added]

[64] I acknowledge that the U.S. Supreme Court in *Solorio v. U.S.* (1987), 483 U.S, 435, abandoned the military nexus test doctrine. The American jurisprudence in this area is founded on constitutional provisions that are different than our own and where the status of the accused is the key jurisdictional concern - not the nature of the offence. In Canada we are bound by the pronouncements of Justice McIntyre in *MacKay* which have been adopted by this Court in *MacDonald* for the purposes of paragraph 11(*f*) of the *Charter* and have been consistently

applied over the past thirty years. The military nexus test has become an integral part of the substantive fabric of Canadian military law.

[65] Further, I agree with Justice McIntyre that it is not possible to enumerate all of the circumstances in which there would be a nexus to the military, so that the exercise is best determined on a case-by-case basis. This Court has in the past provided guidance in a number of its judgments on how the nexus doctrine is to be applied to the circumstances of a particular case. By way of examples, I reference: *Catudal v. R.* (1985), 4 C.M.A.R. 338; *R. v. MacEachern* (1986), 24 C.C.C. (3d) 439; *Ryan v. R.* (1987), 4 C.M.A.R. 563, *R v. Ionson* (1987), 4 C.M.A.R. 433 affirmed [1989] 2 S.C.R. 1073 (S.C.C.), and *R. v. Brown* (1995), 5 C.M.A.R. 280.

Conclusion on the scope of paragraph 130(1)(a) of the NDA

[66] Despite its broad language, the scope of paragraph 130(1)*(a)* is necessarily circumscribed by the existence of a military nexus. While the provision is broad enough to include virtually all federal offences, only those whose commission is directly connected to discipline, efficiency and morale in the military may be prosecuted as service offences under the CSD. This requirement becomes even clearer when one examines the purpose of that provision and the *NDA* as a whole.

c. The purpose of paragraph 130(1)(a) of the NDA

[67] The *NDA* contains no overarching purpose provision. The placement of paragraph 130(1)*(a)* in Part III (Code of Service Discipline), Division II of the legislation under the heading "Offences Punishable by Ordinary Law" does little to help determine its purpose.

[68] The complex and multi-dimensional character of statutory interpretation is understood in the modern approach to the interpretation of statutes. Elmer Driedger described the approach as follows in the first edition of *The Construction of Statutes* (Toronto: Butterworths, 1974) at page 67:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[69] This approach has been cited by Canadian courts and declared to be the preferred approach to be followed by the Supreme Court of Canada in *Re Rizzo & Rizzo Shoes Ltd*, [1998] 1 S.C.R. 27, at paragraph 21.

[70] Further, s. 12 of the *Interpretation Act*, R.S.C., 1985, c. I-21 provides that "every enactment is deemed remedial, and shall be given such fair, large and liberal construction as best ensures the attainment of its objects."

[71] In conducting a purposive analysis in the absence of any legislative statements of purpose, the courts have turned to non-legislative statements of purpose, including statements by the Minister introducing the legislation (*Re Application under s. 83.28 of the Criminal Code*, [2004] 2 S.C.R. 248, at paragraphs 37-38). The Courts have also relied on descriptions of purpose offered by legal scholars and descriptions of purpose in previous case law. Ruth Sullivan, in her authoritative text *Sullivan on the Construction of Statutes*, 5ed, (Toronto: Nexis, 2008, at pages 269-281), teaches that at times purpose may be inferred from the text alone, from the legislative scheme or from the external context.

[72] I propose to first review the position of the parties on the purpose of paragraph 130(1)*(a)*. I will then consider the direct evidence adduced, including academic commentary and ministerial statements, as well as indirect evidence, which will involve inferences to be drawn, based on reading the legislation in context. I will also consider judicial findings relating to the purpose of the legislation. The interpretative exercise will be conducted using a textual, contextual and purposive analysis to determine a purpose that is harmonious with the Act as a whole (*Canada Trustco Mortgage Co. v. Canada*, [2005] 2 S.C.R. 601, at paragraph 10).

Position of the Parties

[73] The Appellants submit that the purpose of paragraph 130(1)*(a)* is to confer jurisdiction to military tribunals to deal with acts or omissions punishable under any Act of Parliament that pertain directly to the discipline, efficiency and morale of the military. The Appellants contend that this purpose is consistent with the original purpose of the CSD. They point to statements of the Minister of National Defence made at the time the legislation was introduced in Parliament, when the Minister stated that its purpose was "to maintain discipline as well as to deal with matters of administration in the army."

[74] The Appellants argue that the purpose of paragraph 130(1)*(a)* can be no broader than the purpose of either the military justice system or the CSD that is the maintaining of military discipline, due to the principle against shifting purposes. They contend the CSD's purpose could not have changed since its enactment and, therefore, the provision must still be restricted by it.

[75] The Appellants further rely on Chief Justice Lamer's discussion of the "Purpose of a System of Military Tribunals" at page 293 of his reasons in *Généreux* in support of their position that the purpose of the military justice system is restricted to maintaining discipline, efficiency and morale in the military.

[76] The Respondent argues that the objective of Parliament in passing paragraph 130(1)*(a)* was to confer upon military tribunals jurisdiction over acts or omissions punishable under any Act of Parliament, regardless of military discipline. The Respondent argues for a broader purpose of the military justice system and the CSD.

[77] In support of this position, the Respondent relies on *Généreux* and points to a passage at page 281 of the decision where Chief Justice Lamer wrote that the CSD and paragraph 130(1)*(a)* specifically serve a public function beyond military discipline, equivalent to the purposes served by ordinary criminal courts. I reproduce the cited passage below:

> Although the Code of Service Discipline is primarily concerned with maintaining discipline and integrity in the Canadian Armed Forces, it does not serve merely to regulate conduct that undermines such discipline and integrity. The Code serves a public function as well by punishing specific conduct which threatens public order and welfare. Many of the offences with which an accused may be charged under the Code of Service Discipline, which is comprised of Parts IV to IX of the *National Defence Act*, relate to matters which are of a public nature. For example, any act or omission that is punishable under the *Criminal Code* or any other Act of Parliament is also an offence under the Code of Service Discipline.

[78] The Respondent contends that given the plain language of the provision, there is no need to resort to *Hansard*. Rather, Parliament's clearly written intent and recent improvements in judicial and prosecutorial independence point to a more encompassing purpose. I reject this

position. Even plain language must be read in context and that is why I propose to follow the approach adopted by the Supreme Court discussed above.

Purposive analysis of paragraph 130(1)(a) of the NDA

[79] As stated above, the *NDA*, which includes the CSD in Part III, contains no preamble or overarching purpose provision. The clear words of paragraph 130(1)*(a)* make no reference to military discipline. The words of the provision read in isolation do not limit its broad scope to matters relating to military discipline or constrain its application to any particular purpose. It is on this basis that the Respondent points to a broader reading of its purpose.

[80] In interpreting paragraph 130(1)*(a)* of the *NDA*, I will adopt the modern approach to statutory interpretation cited above. In determining the purpose of the provision, I will consider a number of factors, including judicial pronouncements on its object, the legislative history of the *NDA* and parliamentary debates relating to the purpose of the provision.

Jurisprudence

[81] The Supreme Court of Canada considered the purpose of s. 120 (now s. 130) of the *NDA* in *MacKay*, above. The majority held that given the special characteristics of military service and the choice to become a member of the Canadian Forces, those subject to the CSD were not unfairly subjected to different treatment under the law. Justice Ritchie, writing for the majority, quoted with approval the judgment of Justice Cattanach of the Federal Court ruling on a question pertaining to the jurisdiction of the military courts:

> …for there to be an efficient defence it is axiomatic that there must be discipline in the forces and that that discipline must be

> enforceable within the service. The legislative purpose is abundantly clear.
>
> (*MacKay* at page 397)
>
> Without a code of service discipline the armed forces could not discharge the function for which they were created.
>
> …
>
> Many offences which are punishable under civil law take on a much more serious connotation as a service offence and as such warrant more severe punishment.
>
> (*MacKay* at page 399)

[82] In *Généreux*, the Supreme Court addressed the purpose of a separate system of military justice. The principal question raised in that case is whether a General Court Martial is an independent and impartial tribunal for the purposes of subsection 11*(d)* of the *Charter*. A second constitutional question was also before the Court, namely whether s. 130 of the *NDA* restricts the right to equality protected by s. 15 of the *Charter*. Central to the Court's analysis in addressing these two questions is "the extent to which, and the reasons why, the *Charter* permits a parallel system of justice, such as that found under the *National Defence Act*, to exist alongside the ordinary criminal courts." The Court indicated that the reasons for the existence of such a parallel system of courts provide guidance as to the system's proper limits (*Généreux* at page 288).

[83] *Généreux* is the Supreme Court's most recent pronouncement on the purpose of a separate military justice system. In his reasons for decision, Chief Justice Lamer stated the following at page 293:

> The purpose of a separate system of military tribunals is to allow the Armed Forces to deal with matters that pertain directly to the

> discipline, efficiency and morale of the military. The safety and well-being of Canadians depends considerably on the willingness and readiness of a force of men and women to defend against threats to the nation's security. To maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct. As a result, the military has its own Code of Service Discipline to allow it to meet its particular disciplinary needs. In addition, special service tribunals, rather than the ordinary courts, have been given jurisdiction to punish breaches of the Code of Service Discipline. Recourse to the ordinary criminal courts would, as a general rule, be inadequate to serve the particular disciplinary needs of the military. There is thus a need for separate tribunals to enforce special disciplinary standards in the military.
>
> [Emphasis added]

[84] Chief Justice Lamer's statement provides an explicitly discipline-focused purpose for the military justice system, outlining the importance of preserving discipline, efficiency and morale in the military. The learned Chief Justice goes on to say at page 295 of his reasons for decision that "[t]he existence of a parallel system of military law and tribunals, for the purpose of enforcing discipline in the military, is deeply entrenched in our history and is supported by the compelling principles discussed above."

[85] I take Chief Justice Lamer's observations to constitute a clear finding on the purpose of the military justice system, namely that, at page 293, "[t]he purpose of a separate system of military tribunals is to allow the Armed Forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military."

[86] I disagree with the Respondent's argument that the Chief Justice intended a broader purpose for the military justice system. The Respondent points to the following passage in

Généreux in support of the contention that the CSD serves a public function as well by punishing specific conduct which threatens public order and welfare:

> Although the Code of Service Discipline is primarily concerned with maintaining discipline and integrity in the Canadian Armed Forces, it does not serve merely to regulate conduct that undermines such discipline and integrity. The Code serves a public function as well by punishing specific conduct which threatens public order and welfare…Service tribunals thus serve the purpose of the ordinary criminal courts, that is, punishing wrongful conduct, in circumstances where the offence is committed by a member of the military or other person subject to the Code of Service Discipline.
>
> (*Généreux* at page 281)

[87] The statement by the Chief Justice at page 281 of his reasons was made in the context of deciding whether subsection 11*(d)* of the *Charter* is applicable to the proceedings of a General Court Martial. The Court held that such proceedings could fall within the scope of s. 11 for both reasons set out in *R. v. Wigglesworth*, [1987] 2 S.C.R. 541. The first reason involves considering whether the proceedings are concerned with offences of a public nature, that is, breaches of rules that are "intended to promote public order and welfare within a public sphere of activity". The second is an acknowledgment that service tribunals also serve the purpose of the ordinary criminal courts when dealing with offences under the CSD and punishing wrongful conduct, which threatens public order and welfare. The learned Chief Justice was not saying that the military justice system should be seen as a full alternative to criminal justice. In my view, Chief Justice Lamer's later pronouncement on the subject of the purpose of the military justice system at page 293 of his reasons, discussed above, expressly and comprehensively deals with the issue. This view finds support in the parliamentary debates to which I now turn.

Hansard

[88] The purpose driving the enactment of paragraph 130(1)*(a)* cannot be divorced from the object underlying the enactment of the *NDA*, the cornerstone for the creation of a separate system of military justice. In introducing the *NDA* to Parliament in 1950, the Minister of National Defence of the day stated that the purpose of the Code was "to maintain discipline as well as to deal with matters of administration in the army." Speaking in Special Committee of Parliament, Minister Claxton went on to distinguish military law from "ordinary civil law." He stated that a soldier on becoming subject to military law does not cease to be subject to the ordinary criminal and civil law. The Minister was unequivocal in stating "the civil law is always supreme to the military law." (see *House of Commons Special Committee on Bill No. 133, An Act respecting National Defence*, Minutes of Proceedings and Evidence No. 1 (23 May, 1950) at pages 11-12 (Hon. Brooke Claxton)).

[89] In subsequent debates before the House of Commons, the Minister again recognized the supremacy of the civil law. He underscored the rationale for a separate system of military justice by providing examples of circumstances where the civil courts could or did not act. He illustrated the need for service offences and military tribunals in Canada to be able to deal with offences that relate directly to military discipline, with reference to an act of an assault between two soldiers in a military camp. He also pointed to circumstances overseas where no civil court is available. (see *House of Commons Debates*, 21st Parl., 2nd Sess., Vol. IV (7 June, 1950) at page 3320 (Hon. Brooke Claxton)).

[90] The above-noted debates support the contention that the object of the *NDA* was primarily aimed at maintaining discipline in the Canadian Forces, the underlying rationale for the existence of a separate military justice system. The Minister's statements in Parliament also provide insight into the intended subsidiary positioning of the military justice system relative to the civilian system of justice. This distinction between the two systems of justice underscores the need for a military nexus for military offences without which, the military justice system would be without authority under the *NDA*.

The legislative scheme

[91] While the *NDA* contains no overarching purposive clause, it comprehensively provides for the composition, management and operations of the Canadian Forces. An overview of its Table of Provisions reveals its broad scope.

[92] Part I provides for the establishment of the Department of National Defence and sets out the duties and responsibilities of the Minister, Deputy Minister and Judge Advocate General. This part includes a provision for the making of regulations, under which authority the *Queen's Regulations and Orders for the Canadian Forces* (QR&Os) have been enacted.

[93] Part II provides for the Constitution of the Canadian Forces, the appointment of the Chief of Defence Staff and the Powers of the Chain of Command. This part of the Act also includes provisions dealing with promotion, labour matters, payroll, grievances and Boards of Inquiry, all relating to the military.

[94] Part III sets out the CSD and includes provisions identifying persons to whom the CSD applies, defining service offences and conduct to the Prejudice of Good Order and Discipline. This part also includes provisions dealing with punishments, arrest and pre-trial custody, commencing a proceeding, summary trials, trial by Court Martial, the appointment of the Director of Military Prosecutions, the Court Martial Administrator, Military judges and the Chief Military Judge. Division 8 of Part III incorporates provisions applicable to imprisonment and Division 9 deals with appeals including the powers on appeal of the Court Martial Appeal Court of Canada (CMAC) as well as provisions concerning release pending appeal.

[95] Part IV concerns complaints about or by Military Police, including provisions establishing the Military Police Complaints commission, its officers and process.

[96] Parts V and VI deal with summary trials and trials by courts martial respectively, while Part VII provides for offences relating to matters that may be tried in a civil court.

[97] The above brief overview of the *NDA* provides a sense of the comprehensive nature of the Act. It touches on essentially every aspect of national defence and the Canadian military and includes provisions relating to military discipline and operational efficiency, which constitutes the very foundation of the modern Canadian military justice system.

[98] The narrower purpose of paragraph 130(1)*(a)* advocated by the Appellants, that is to confer jurisdiction on military tribunals to deal with public offences that pertain directly to the discipline, efficiency and morale of the military, finds support in the *NDA*'s legislative context.

In particular, s. 12 provides for regulation-making authority expressly for "the organization, training, discipline, efficiency, administration and good government of the Canadian forces and generally for carrying the purposes and provisions of this Act into effect." Section 12 serves to underscore the importance of discipline and efficiency in the making of regulations under the Act. Given the importance of the QR&Os in the management and operations of the military, s. 12 lends support to an underlying purpose of the Act with a similar object.

[99] In terms of included offences and geographic effect, the CSD has a very broad scope. However, it very carefully limits those who are subject to it. Only those offenders caught under subsection 60(1) are subject to the CSD. The persons identified under subsection 60(1) of the CSD are intimately connected to military service. The provision includes officers and non-commissioned members of the regular forces and Special Forces; members of the reserve in particular circumstances related to military service; and persons not otherwise subject to the CSD who accompany any unit or other elements of the Canadian Forces on service mission. Narrowing the application of the CSD to this class of persons connected to the military and military operations speaks to the underlying importance of the military connection to the CSD. The underlying theme throughout the *NDA* is about the organization and management of the Canadian Forces to ensure a state of preparedness to defend Canada both at home and abroad in times of peace and war. It is reasonable to infer from such a statutory scheme that the need for military discipline, efficiency and the concern for morale in the military would be paramount considerations.

Conclusion on the purpose of paragraph 130(1)(a) of the NDA

[100] On the basis of prior judicial pronouncements by the Supreme Court of Canada on the object of the *NDA*, the legislative history of the *NDA*, including statements of the Minister of National Defence who introduced the *NDA*, and the overall scheme of the Act, I find the purpose of the military justice system and object of the CSD to be as articulated by Chief Justice Lamer in *Généreux*: "[t]he purpose of a separate system of military tribunals is to allow the Armed Forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military." It follows that the purpose of paragraph 130(1)*(a)* can be no broader than the purpose or object of the CSD.

d. Does paragraph 130(1)(a) of the NDA employ broader means than necessary to achieve its purpose?

[101] In my view, paragraph 130(1)*(a)*, when interpreted in isolation, given its broad scope, captures a wide range of offences that could fall outside its underlying purpose which is to allow the military justice system to deal with matters that pertain directly to discipline, efficiency and morale of the military. Given this interpretation, the provision would fail to meet s. 7 scrutiny. Arguably, including such offences would go beyond what is needed to accomplish the governmental objective. However, for the reasons discussed above, paragraph 130(1)*(a)* of the *NDA* is not overbroad.

[102] The requirement of a military nexus is essential to ensuring the constitutionality of paragraph 130(1)*(a)*. In my interpretation the nexus requirement is consistent with the scheme of the *NDA* and its legislative and jurisprudential history. In support of this interpretation, I point to a passage of the majority decision in *MacKay*, at page 400, where Justice Ritchie wrote:

> When the *National Defence Act* is considered as a whole it will be seen that it encompasses the rules of discipline necessary to the maintenance of morale and efficiency among troops in training and at the same time envisages conditions under which service offences may be committed outside of Canada by service personnel stationed abroad. The Act also reflects the rules governing members of the armed services in the discharge of the duties required of them when acting in Aid of the Civil Power [...] In my view these are some of the factors which make it apparent that a separate code of discipline administered within the services is an essential ingredient of service life.

[103] The nexus requirement provides a limit on the application of paragraph 130(1)*(a)*, for offences committed within Canada and abroad, preventing its deployment in situations where the objective of the *NDA* is not implicated. Suffice it to say that in the context of the scheme and object of the *NDA*, its legislative history, discussed above, and the jurisprudence concerning the military nexus, the interpretation I have afforded paragraph 130(1)*(a)* is warranted.

[104] For greater clarity, such an interpretation does not create an impermissible constitutional exemption (*Schachter v. Canada*, [1992] 2 S.C.R. 679, at pages 698-715; *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *R. v. Ferguson*, [2008] 1 S.C.R. 96, 2008 SCC 6, at paragraphs 49-51). Rather, when so interpreted, the requirement of a military nexus ensures that paragraph 130(1)*(a)* accords with the purpose of the *NDA*. Further, this interpretation is consistent with the deference owed to Parliament. At paragraph 51 in *Heywood*, Justice Cory speaks to this deference in considering whether a legislative provision is overbroad:

> In analyzing a statutory provision to determine if it is overbroad, a measure of deference must be paid to the means selected by the legislature. While the courts have a constitutional duty to ensure that legislation conforms with the Charter, legislatures must have the power to make policy choices. A court should not interfere with legislation merely because a judge might have chosen a different

> means of accomplishing the objective if he or she had been the legislator.

[105] In conclusion, properly interpreted, paragraph 130(1)*(a)* of the *NDA* is not overbroad. Its scope, though broad, is restricted by the requirement of a military nexus which, in turn, ensures the provision is no broader than necessary to achieve the purpose of the *NDA*: to allow the Armed Forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military. In the result, the provision does not violate s. 7 of the *Charter*.

[106] I now turn to the second issue on this appeal.

2. Does paragraph 130(1)*(a)* violate other *Charter* rights?

[107] The Appellants' further arguments are premised on a finding of overbreadth. They are summarized as follows in their written submissions:

> The Constitution has delineated the power of Parliament to create offences under military law and the jurisdiction of military tribunals. The overbreadth of the service offence under s. 130(1)*(a)* extends subject-matter jurisdiction of military tribunals to matters beyond those required to deal with the discipline, efficiency and moral [sic] of the military. The effects of s. 130's overbreadth violate two constitutional rights: (1) the right to a jury trial; and (2) the right not to be arbitrarily subjected to trial by a military tribunal.
>
> (Hannah Appellant's Memorandum of Fact and Law at paragraph 30; Moriarity Appellant's Memorandum of Fact and Law at paragraph 31)

[108] Having determined that paragraph 130(1)*(a)* is not overbroad, the Appellants' right to a jury trial and right not to be arbitrarily subjected to trial by a military tribunal are not violated.

[109] Having endorsed in these reasons the view expressed by Justice Hugessen in *Brown* "that the exception to the guarantee of the right to a jury trial in paragraph 11*(f)* is triggered by the existence of a military nexus with the crime charged", there could only be a violation of a person's right to a jury trial if the person was tried under paragraph 130(1)*(a)* in the absence of a military nexus. In my view, such a result could only arise if paragraph 130(1)*(a)* is overbroad.

[110] Similarly, the right not to be arbitrarily subjected to trial by a military tribunal, is not infringed unless paragraph 130(1)*(a)* is overbroad. "Arbitrariness asks whether there is a direct connection between the purpose of the law and the impugned effect on the individual, in the sense that the effect on the individual bears some relations to the law's purpose." (*Bedford* at paragraph 111). As put forth in *Chaoulli v. Quebec*, [2005] 1 S.C.R. 791 at paragraph 131, "[t]he question in every case is whether the measure is arbitrary in the sense of bearing no real relation to the goal and hence being manifestly unfair." As noted earlier at paragraph 29 of these reasons, arbitrariness is one of the effects of overbreadth observed by Justice Cory in *Heywood*. Thus, any arbitrary effect of s. 130 would be incorporated in the overbreadth analysis. If s. 130 were arbitrary or resulted in arbitrary effects, it would be found overbroad.

VII. Conclusion

[111] For the above reasons, I find that paragraph 130(1)*(a)* is not unconstitutionally overbroad since its scope is limited by the requirement of a military nexus and, as a result, the Appellants' s. 7 *Charter* rights have not been violated. In so concluding I do not wish to be understood as saying that military prosecutions before service tribunals will necessarily follow in every case

the military nexus requirement is satisfied. In certain instances, there may be overriding public interest considerations which either require or justify a prosecution before a civilian tribunal.

[112] I also find that the Appellants' rights to a jury trial have not been violated and that the Appellants were not subject to arbitrary treatment under the law by reason of being tried before military tribunals.

[113] Since the Appellants do not raise the absence of a military nexus for any of the offences for which they were charged or otherwise challenge their convictions for the various offences under paragraph 130(1)*(a)* of the *NDA*, I would dismiss the appeals.

"Edmond P. Blanchard"
Chief Justice

"I agree.
Karen M. Weiler J.A."

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

COURT MARTIAL APPEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	CMAC-560
STYLE OF CAUSE:	SECOND LIEUTENANT MORIAARITY v. HER MAJESTY THE QUEEN
AND DOCKET:	CMAC-563
STYLE OF CAUSE:	PRIVATE M.B.A. HANNAH v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	SEPTEMBER 27, 2013
REASONS FOR JUDGMENT BY:	BLANCHARD C.J.
CONCURRED IN BY:	WEILER J.A. DAWSON J.A.
DATED:	JANUARY 20, 2014

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