Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20140430

Docket: CMAC-558

Citation: 2014 CMAC 6

CORAM: **COURNOYER J.A.**
BOIVIN, J.A.
DOYON J.A.

BETWEEN:

PRIVATE RÉJEAN LAROUCHE

Appellant

And

HER MAJESTY THE QUEEN

Respondent

Hearing held in Montréal, Quebec, on November 8, 2013 and January 24, 2014.

Judgment delivered at Ottawa, Ontario, on April 30, 2014.

REASONS FOR JUDGMENT BY: COURNOYER J.A.

CONCURRED IN BY: BOIVIN, J.A.
DOYON J.A.

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REASONS FOR JUDGMENT

COURNOYER J.A.

I. Introduction

[1] The appellant is appealing from a decision of a Standing Court Martial dated August 31, 2012,[1] convicting him of voyeurism (section 162(5) Cr. C.) and of possession of child pornography (section 163.1(4) Cr. C.).[2]

[2] He raises two grounds of appeal: the unconstitutionality of paragraph 130(1)(*a*) of the *National Defence Act* (NDA) and the trial judge's refusal to exclude evidence under section 24(2) of the *Canadian Charter of Rights and Freedoms* (Charter).[3]

[3] At the hearing held on November 8, 2013, the appellant was granted leave, in accordance with the rule in *R. v. Wigman*,[4] to raise the ground of appeal concerning the constitutionality of paragraph 130(1)(*a*) of the NDA, since our Court had to decide on this issue in *R. v. Moriarity/Hannah*,[5] which was heard on September 27, 2013. Had this provision been declared unconstitutional, the appellant's conviction would have had no legal basis.[6] In addition, in this case, there is no prejudice to the respondent, the Director of Military Prosecutions (DMP), who has not requested that evidence be presented under section 1 of the Charter. We adjourned the hearing of this issue to January 24, 2014.

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1 2012 CM 3009.
2 The appellant also faces criminal charges under sections 139, 151, 152, 212(4), 153(1)(*a*), 153(1)(*b*), 163.1(2)(*a*) and 163.1(4)(*a*) of the *Criminal Code* in the ordinary criminal courts (150-01-038423-126).
3 2012 CM 3008.
4 [1987] 1 S.C.R. 246.
5 2014 CMAC 1, paras. 25-26 (*Moriarity/Hannah*).
6 *R. v. Brown*, [1993] 2 S.C.R. 918, at p. 924.

[4] It must also be specified that, several days before the second day of the appeal hearing, this Court rendered its decision in *Moriarity/Hannah v. Canada*,[7] in which it found that paragraph 130(1)(*a*) of the NDA was overbroad, but confirmed its constitutionality on the ground of the application of the military nexus test.

[5] The parties received a copy of this decision as well as a direction of the Court requesting their comments on it, on the Supreme Court decision in *R. v. Ionson*,[8] on the application of *stare decisis* and on the use of reading in as a corrective measure.

[6] Under section 112.24 of the QR&O,[9] the constitutionality of paragraph 130(1)(*a*) of the NDA is an issue of jurisdiction, which I will discuss first.

II. Issues

[7] The following two topics will therefore be analyzed in turn:

(1) Constitutionality of paragraph 130(1)(*a*) of the NDA, and

(2) Exclusion of evidence under section 24(2) of the Charter.

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7 2014 CMAC 1.
8 [1989] 2 S.C.R. 1073 (*Ionson*).
9 *The Queen's Regulations and Orders for the Canadian Forces*.

III. Analysis

A. *First ground of appeal: constitutionality of paragraph 130(1)(a) of the NDA*

(1) *Moriarity/Hannah*

[8] I fully agree with the approach and conclusions of Chief Justice Blanchard in *Moriarity/Hannah* with regard to the overbreadth of paragraph 130(1)(*a*) of the NDA and to the violation of sections 7 and 11(*f*) of the Charter.[10]

[9] First, I specify that the appellant has, as stated by Chief Justice Blanchard, the legal standing required, within the meaning of *R. v. Big M Drug Mart*,[11] to raise the issue of constitutionality of section 130 of the NDA even though military nexus has been established in his case. In this regard, it must be recalled that the circumstances surrounding the offences are not important, as the Supreme Court rejected the American "constitutional as applied" approach in *R. v. DeSousa*[12] and *R. v. Smith*.[13] In fact, any accused may "defend a criminal charge by arguing that the law under which the charge is brought is constitutionally invalid".[14]

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10 See also *R. v. Vezina*, 2014 CMAC 3, paras. 11-15.
11 [1985] 1 S.C.R. 295.
12 [1992] 2 S.C.R. 944, at p. 955.
13 [1987] 1 S.C.R. 1045, at p. 1078.
14 *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295 at pp. 313-314.

[10] Paragraph 130(1)(*a*) of the NDA reads as follows:

Offences Punishable by Ordinary Law	*Infractions de droit commun*
Service trial of civil offences	Procès militaire pour infractions civiles
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,	*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;
…	[…]
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).

[11] Sections 7 and 11(*f*) of the Charter read as follows:

Life, liberty and security of person	*Vie, liberté et sécurité*
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.
…	[…]

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;
…	[…]

[12] Paragraph 130(1)(*a*) of the NDA confers jurisdiction on military tribunals with respect to both military offences covered by the NDA and criminal offences punishable by ordinary law. The issue is whether it is overbroad and whether it deprives persons who are subject to the NDA of the right to the benefit of a trial by jury in respect of offences not related to military justice within the meaning of section 11(*f*) of the Charter.

[13] In *Moriarity/Hannah*, Chief Justice Blanchard makes a remarkable summary of the jurisprudence of this Court and of the Supreme Court, the legislative history of the NDA, its purpose and its function as well as the purpose of the *Code of Service Discipline*, which he defines in the words of Chief Justice Lamer in *R. v. Généreux*:[15] "[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".

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15 [1992] 1 S.C.R. 259 at p. 293 (*Généreux*).

[14] Like him, I am of the view that the constitutionality of paragraph 130(1)(*a*) cannot be preserved unless it is interpreted as it was done by Chief Justice Mahoney in *MacDonald v. R.*[16] over thirty years ago:

> 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.

[15] For the reasons below, I find that subsection 130(1) of the NDA violates sections 7 and 11(*f*) of the Charter because it is overbroad, which is likely – without applying the military nexus test – to deprive Canadian military personnel of their constitutional right to the benefit of a trial by jury.

[16] Like Chief Justice Blanchard, I also reject the claim that the DMP's discretion precludes the attack on the overbreadth of section 130. His discretion, which must be exercised in an autonomous and independent manner that is free from any intervention from the chain of command,[17] cannot be relied on to preserve the constitutionality of section 130.[18]

[17] Section 130 does not comply with principles of fundamental justice because it goes too far by sweeping conduct into its ambit that bears no relation to its objective.[19]

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16 (1983), 6 C.C.C. (3d) 551, 4 C.M.A.R. 277 (*MacDonald*).

17 See the recent decision in *Canada v. Wehmeier*, 2014 CMAC 5, para. 31. I am not expressing any opinion regarding the scope of the instructions that may be given by the Judge Advocate General to the DMP under section 165.17 of the NDA. This issue goes beyond the scope of the appeal and raises separate statutory and constitutional interpretation issues. See *R. v. Trépanier (J.S.K.T.)* (2008), 232 C.C.C. (3d) 498, 2008 CMAC 3, para. 98.

18 *R. v. Smith (Edward Dewey)*, [1987] 1 S.C.R. 1045, at p. 1078.

19 *Canada (Attorney General) v. Bedford*, 2013 SCC 72, para. 117 (*Bedford*).

[18] *Catudal v. R.* provides such an example.[20] Mr. Catudal was charged with several counts of arson, but this Court found that one of them had no military nexus because it had been committed in a motel while he was en route to his new military assignment.[21]

[19] In applying the principles found in *Schachter v. Canada*[22] and *R. v. Ferguson*,[23] it is possible and constitutionally appropriate to read down this section to limit its scope and to read into it the military nexus test enunciated by Justice McIntyre in his concurring opinion in *MacKay v. The Queen*.[24]

[20] In my view, the question of whether paragraph 130(1)(*a*) of the NDA is constitutional is asked in a similar manner to that of section 163.1 of the *Criminal Code*, which was at issue in *R. v. Sharpe*[25] and whose overbreadth was being disputed. In this case, we are also "[c]onfronted with a law that is substantially constitutional and peripherally problematic".[26] In *Sharpe*, Chief Justice McLachlin found that "the appropriate remedy in this case is to read into the law an exclusion of the problematic applications of s. 163.1".[27] The same reasoning applies in this case with respect to section 130 of the NDA.

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20 (1985), 18 C.C.C. (3d) 189, 4 C.M.A.R. 338.

21 In *MacKay v. The Queen*, [1980] 2 S.C.R. 370, at p. 410, Justice McIntyre stated that a serviceman charged with negligence while he was driving his own vehicle on leave away from his base or any other military establishment should not be subject to the jurisdiction of military tribunals. This is certainly a reasonable hypothesis according to *R. v. Heywood*, [1994] 3 S.C.R. 761 and *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, para. 112.

22 [1992] 2 S.C.R. 679 (*Schachter*).

23 [2008] 1 S.C.R. 96, 2008 SCC 6 (*Ferguson*).

24 [1980] 2 S.C.R. 370 (*MacKay*).

25 [2001] 1 S.C.R. 45, 2001 SCC 2 (*Sharpe*).

26 [2001] 1 S.C.R. 45, 2001 SCC 2, para. 111.

27 *Ibid.*, para. 114.

[21] An offence set out in section 130 of the NDA may be tried under the *Code of Service Discipline* when it 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 Canadian Forces. Such an offence is an offence under military law within the meaning of section 11(*f*) of the Charter and must be tried before a Canadian military tribunal because it pertains directly to the discipline, efficiency and morale of the military.

[22] This is the interpretation that has been adopted by this Court over the last thirty years. No compelling reason has ever been provided for the Court to depart from this interpretation, which has stood the test of time.

[23] The military nexus test is part of the "pith and marrow" of Canadian military law. It is not appropriate today to perform a new constitutional surgery.

[24] I will now discuss the parties' submissions regarding the decision in *Moriarity/Hannah*, as they warrant some observations and additional clarifications.

(2) The position of the parties

(a) *The appellant*

[25] The appellant alleges that the decision in *Moriarity/Hannah* should not be followed on the ground of the numerous analysis errors made by this Court.

[26] First, the appellant argues that the Court confused the analysis required for section 7 of the Charter with that required for section 1.

[27] Second, in his opinion, the Court usurped the function of Parliament in confirming the constitutionality of paragraph 130(1)(*a*) by reading into that provision the military nexus test.

[28] Third, the tests in *MacKay* and *Généreux*, referred to by Chief Justice Blanchard in his decision, are inconsistent with each other.

[29] Fourth, there is no evidence of a sufficiently pressing and substantial objective to warrant the limitation of these rights and freedoms as well as regarding the means chosen by the Court.

(b) *The director of military prosecutions*

[30] The DMP's position is as follows:

[31] First, he argues that the opinion of Justice McIntyre in *MacKay* is not binding because it is not a decision of the Court, but rather a concurring opinion on the result.

[32] Relying on *Sellars v. The Queen*,[28] he urges this Court in adopting the obiter of Chief Justice Strayer in *Reddick v. The Queen*,[29] followed in *Lévesque v. The Queen*,[30] according to

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28 [1980] 1 S.C.R. 527 (*Sellars*).
29 (1996), 112 C.C.C. (3d) 491, [1996] C.M.A.J. No. 9 (*Reddick*).
30 [1999] C.M.A.J. No. 7.

which the military nexus exists but under the heading of the division of powers. This decision reversed the prior case law of this Court.

[33] In addition, in his opinion, the Supreme Court's decision in *Ionson* is not a binding precedent.

(3) Analysis

(a) *The appropriate remedy*

[34] The appellant voices a legitimate concern regarding the use of reading in. He considers that this Court must declare section 130 unconstitutional and that it is for Parliament to determine the nature of the statutory amendments, if any, to be made to the NDA. These claims must be carefully analyzed.

[35] First, it must be mentioned that, in 1983, our Court did not have the benefit of the detailed analysis conducted by Chief Justice Lamer in *Schachter* with respect to reading in as a corrective measure under section 52 of the *Constitution Act, 1982*, or of the more recent one made by Chief Justice McLachlin in *Ferguson*.

[36] However, it cannot be denied that both the reading in and reading down of section 130 adopted by this Court since *MacDonald* has added to this section a component that is missing from the actual wording of section 130: the case-by-case analysis described by Justice McIntyre in his concurring opinion in *MacKay*.

[37] This result may be perceived as the recognition of discretion that does not exist in the section and which, at least in appearance, is inconsistent with the Supreme Court's approach in *Schachter* and *Ferguson* and more recently in *Bedford*.

[38] Chief Justice McLachlin stated the relevant principles in *Ferguson*, which I summarize as follows:

- Section 52(1) of the Constitution provides for alternative remedies to striking down provisions that are inconsistent with it including severance, reading in and reading down;

- In considering alternatives to striking down, courts must carefully consider whether the alternative being considered represents a lesser intrusion on Parliament's legislative role than striking down: courts must thus be guided by respect for the role of Parliament, as well as respect for the purposes of the Charter in selecting a remedy;

- When a court opts for severance or reading in as an alternative to striking down a provision, it does so on the assumption that, had Parliament been aware of the provision's constitutional defect, it would likely have passed it with the alterations now being made by the court by means of severance or reading in;

- If it is not clear that Parliament would have passed the scheme with the modifications being considered by the court – or if it is probable that it would not have passed it – then for the court to make these modifications would represent an inappropriate intrusion into the legislative sphere; in such cases, the least intrusive remedy is to strike down the constitutionally defective legislation under section 52. It is then left up to Parliament to decide what legislative response, if any, is appropriate.

- The presence of section 52(1) with its mandatory wording suggests an intention of the framers of the Charter that unconstitutional laws are deprived of effect to the extent of their inconsistency, not left on the books subject to discretionary case-by-case remedies;

> - In cases where the requirements for severance or reading in are met, it may be possible to remedy the inconsistency judicially instead of striking down the impugned legislation as a whole; where this is not possible, the unconstitutional provision must be struck down.[31]

[39] In light of these principles, the issue is whether it may be found that Parliament would have passed section 130 in the form given to it by this Court's jurisprudence for over thirty years and by the Supreme Court in *Ionson*.

[40] To answer this question, we must first examine the historical background in which this Court's case law has developed.

[41] Second, I propose to conduct the analysis described by Chief Justice Lamer in *Schachter* in order to determine whether, as the appellant claims, this Court has confused the analysis required under section 7 with that required under section 1 in *Moriarity/Hannah* and whether it also erred in identifying the pressing and substantial objective set by section 130.

[42] Finally, the numerous legislative reforms made to the NDA since the adoption of the Charter must be described in order to determine whether, in light of these reforms, it may be concluded that Parliament would have passed section 130 in accordance with this Court's interpretation.

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[31] [2008] 1 S.C.R. 96, 2008 SCC 6, paras. 49-51, 65.

[43] This review will confirm that Justice McIntyre's opinion in *MacKay* contains all of the elements required by the test in *Schachter* and that this Court was correct in reading down section 130, which requires that the military nexus test be read into it.

(i) Historical background

[44] As noted by Chief Justice Blanchard, it was in 1980, in *MacKay*, that Justice McIntyre, supported by Justice Dickson (as he then was), made his observations regarding the military nexus test to confer on the military tribunals the jurisdiction to try offences under section 130.

[45] In his opinion, he refers to the United States law. He did not identify them specifically, but it is reasonable to think that he was referring to[32] the decisions of the Supreme Court of the United States in *O'Callahan v. Parker*[33] and *Relford v. Commandant*.[34]

[46] Since the adoption of the Charter and, particularly, section 11(*f*), it has been evident to any observer of Canadian military law that the United States law is, at least in part, a source of inspiration for section 11(*f*) of the Charter. In my view, the contemporaneity of Justice McIntyre's comments in *MacKay*, the state of the United States law on the issue of the "service connection test" at the time and the wording of section 11(*f*) show this clearly.

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[32] See the opinion of Justice Brooke of this Court in *R. v. Sullivan*, (1986), 4 C.M.A.R. 414, at pp. 419-423; leave to appeal refused [1986] 2 R.C.S. ix; Rubsun Ho, "A World That Has Walls: A Charter Analysis of Military Tribunals" (1996) 54 U.T. Fac. L. Rev. 149 at p. 152; Ronald D. Lunau, "Military Tribunals Under the Charter" (1992) 2 N.J.C.L. 197 at pp. 201-203.

[33] 395 U.S. 258 (1969) (*O'Callahan*).

[34] 397 U.S. 934 (1970) (*Relford*).

[47] In *O'Callahan*, the Supreme Court of the United States had to interpret the meaning of the expression "cases arising in the land or naval forces", which is found in the Sixth Amendment of the United States Constitution. This expression is reminiscent of that found in section 11(*f*) of the Charter "an offence under military law", or in French "une infraction relevant de la justice militaire".

[48] Justice Douglas wrote the following for the majority:

> The Fifth Amendment specifically exempts "cases arising *in the land or naval forces*, or in the Militia, when in actual service in time of War or public danger" from the requirement of prosecution by indictment and, inferentially, from the right to trial by jury. (Emphasis supplied.) See *Ex parte Quirin*, 317 U. S. 1, 317 U. S. 40. The result has been the establishment and development of a system of military justice with fundamental differences from the practices in the civilian courts.
>
> If the case does not arise "*in the land or naval forces*," then the accused gets *first*, the benefit of an indictment by a grand jury, and *second*, a trial by jury before a civilian court as guaranteed by the Sixth Amendment …[35].
>
> [Emphasis added.] [Italics in the original.]

[49] He found that the jurisdiction of military tribunals must be service-connected. He wrote as follows:

> In the present case, petitioner was properly absent from his military base when he committed the crimes with which he is charged. There was no connection -- not even the remotest one -- between his military duties and the crimes in question. The crimes were not committed on a military post or enclave; nor was the person whom he attacked performing any duties relating to the military. Moreover, Hawaii, the situs of the crime, is not an armed camp under military control, as are some of our far-flung outposts.

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35 395 U.S. 258 (1969), at pp. 261-262.

> Finally, we deal with peacetime offenses, not with authority stemming from the war power. Civil courts were open. The offenses were committed within our territorial limits, not in the occupied zone of a foreign country.
>
> The offenses did not involve any question of the flouting of military authority, the security of a military post or the integrity of military property.
>
> We have accordingly decided that, since petitioner's crimes were not service-connected, he could not be tried by court-martial, but rather was entitled to trial by the civilian courts.[36]
>
> [Emphasis added.] [Citations omitted.]

[50] This approach would be confirmed in 1970 in *Relford*, but overturned in 1987 in *Solorio v. U.S.*[37]

[51] On this side of the border, Justice McIntyre's opinion in *MacKay* has had a considerable impact on the development of Canadian military law, as noted by Colonel (retired) R. Arthur McDonald in his book *Canada's Military Lawyers* when he discusses *MacKay*:

> Despite this seemingly strong support by the majority, the decision that was to have a greater future impact was the concurring opinion of Justice (later Chief Justice) Dickson and Justice McIntyre.
>
> . . .
>
> The McIntyre formula with respect to the jurisdiction of military tribunals over offences was the one most frequently cited by the lower courts in the years to follow.[38]

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36 395 U.S. 258 (1969), at pp. 273-274.

37 483 U.S. 435 (1986).

38 Colonel (Retired) R. Arthur McDonald, *Canada's Military Lawyers* (Ottawa: Office of the Judge Advocate General, 2002) at p. 120. See also Andrew D. Heard, "Military Law and the Charter of Rights" (1987-88) 11 Dalhousie L.J. 514 at pp. 532-533; Rubsun Ho, "A World That Has Walls: A Charter Analysis of Military Tribunals" (1996) 54 U.T. Fac. L. Rev. 149 at pp. 152-153; Ronald D. Lunau, "Military Tribunals Under the Charter" (1992) 2 N.J.C.L. 197 at pp. 200-209.

[52] Thus, in light of Justice McIntyre's opinion in *MacKay* and shortly after the adoption of the Charter, professors Peter Hogg,[39] André Morel[40] and Walter Tarnopolsky[41] identified the problems with respect to the overbreadth of paragraph 130(1)(*a*).

[53] For example, Professor Hogg stated the opinion that paragraph 130(1)(*a*) must be read down:

> Probably, as McIntyre J. has suggested in the context of the equality clause of the *Canadian Bill of Rights*, that definition should be read down to encompass only service-related offences (*MacKay v. R.* [1980] 2 S.C.R. 370, 408).[42]

[54] He would keep that opinion in subsequent editions of his classic treatise on constitutional law.[43]

[55] I also note that, before stating his finding in *MacKay* with regard to the military nexus test, to which Chief Justice Blanchard refers in *Moriarity/Hannah*,[44] Justice McIntyre wrote the following:

> It must not however be forgotten that, since the principle of equality before the law is to be maintained, departures should be countenanced only where necessary for the attainment of desirable social objectives, and then only to the extent necessary in the circumstances to make possible the attainment of such objectives.

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39 Peter W. Hogg, *Canada Act 1982 Annotated* (Toronto: Carswell, 1982).

40 André Morel, "Les garanties en matière de procédure et de peines" in Gérald-A. Beaudoin and Walter S. Tarnopolsky, eds., *Charte canadienne des droits et libertés* (Montréal: Wilson & Lafleur, 1982) at p. 459; André Morel, "Certain Guarantees of Criminal Procedure" in Walter S. Tarnopolsky and Gérald-A. Beaudoin, eds., *The Canadian Charter of Rights and Freedoms – Commentary* (Toronto: Carswell, 1982) at p. 367.

41 Walter S. Tarnopolsky, "The New Canadian Charter of Rights and Freedoms as Compared and Contrasted With the American Bill of Rights" (1983) 5 Hum. Rts. Q. 5, 227, at p. 244, footnote 89.

42 Peter W. Hogg, *Canada Act 1982 Annotated* (Toronto: Carswell, 1982) at p. 42.

43 Peter W. Hogg, *Constitutional Law of Canada*. 2nd ed. (Toronto: Carswell, 1985) at p. 774, see footnote 193; Peter W. Hogg, *Constitutional Law of Canada*. 5th ed. Supp. (loose-leaf), vol. 2 (2013, update 1) at p. 51-30, see footnote 143.

44 2014 CMAC 1, see paras. 48-50, 63-64.

> The needs of the military must be met but the departure from the concept of equality before the law must not be greater than is necessary for those needs. 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. With this concept in mind, I turn to the situation presented in this case.[45]
>
> [Emphasis added.]

[56] It is easy to recognize here language that foreshadows the pressing and substantial objective test and the proportionality of the legislative means chosen that would be adopted in 1986 by the Supreme Court in *R. v. Oakes*,[46] which must be applied, according to *Schachter*,[47] when the tribunal determines whether it may read in a statutory provision.

[57] In my view, considering the observations of Justice McIntyre in *MacKay* based on the decisions of the Supreme Court of the United States, as well as the comments of professors Hogg, Morel and Tarnopolsky, the interpretation adopted by this Court of section 11(*f*) of the Charter and of the expression "an offence under military law" was completely natural and justified under the Charter rather than under the *Canadian Bill of Rights*. Let us recall that the Supreme Court also departed from *MacKay* in *Généreux* regarding the independence of military tribunals.[48]

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45 [1980] 2 S.C.R. 370 at p. 408.

46 [1986] 1 S.C.R. 103 (*Oakes*). With regard to section 1 and Justice McIntyre's opinion in *MacKay v. The Queen*, see Peter W. Hogg, *Constitutional Law of Canada*. 2nd ed. (Toronto: Carswell, 1985) at p. 794. With regard to the proportionality test, see Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (New York: Cambridge University Press, 2012) at pp. 175-210.

47 [1992] 2 S.C.R. 679, at pp. 702-703.

48 [1992] 1 S.C.R. 259, at p. 293.

[58] Since any departure from the benefit of a trial by jury must be strictly construed,[49] this Court's interpretation is consistent with the fact that this is an exception to the right to the benefit of a trial by jury, which is a right whose fundamental nature does not require a long demonstration.[50]

[59] In *MacKay*, Justice McIntyre stated that the service-discipline requirements do not justify depriving military personnel of their right to a jury trial under any circumstances:

> The all-embracing reach of the questioned provisions of the *National Defence Act* goes far beyond any reasonable or required limit. The serviceman charged with a criminal offence is deprived of the benefit of a preliminary hearing or the right to a jury trial.
>
> . . .
>
> 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.[51]

[60] One can only share the wisdom of those observations given the importance of the right to a jury trial.[52]

[61] In conclusion, the integration of the military nexus test into section 130 of the NDA by Chief Justice Mahoney in *MacDonald* was completely justified. That is what Justice Hugessen

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[49] *R. v. Turpin*, [1989] 1 S.C.R. 1296, at p. 1314; André Morel, "Les garanties en matière de procédure et de peines" in Gérald-A. Beaudoin and Walter S. Tarnopolsky, eds. *Charte canadienne des droits et libertés* (Montréal: Wilson & Lafleur, 1982) at p. 473; André Morel, "Certain Guarantees of Criminal Procedure" in Walter S. Tarnopolsky and Gérald-A. Beaudoin, eds., *The Canadian Charter of Rights and Freedoms - Commentary* (Toronto: Carswell, 1982) at p. 376.

[50] *R. v. Trépanier (J.S.K.T.)* (2008), 232 C.C.C. (3d) 498, 2008 CACM 3, paras 75-80; *R. v. Sherratt*, [1991] 1 S.C.R. 509; *R. v. Davey*, [2012] 3 S.C.R. 828, para. 30; *R. v Turpin*, [1989] 1 S.C.R. 1296.

[51] [1980] 2 S.C.R. 370, at p. 409.

[52] *R. v. Sherratt*, [1991] 1 S.C.R. 509 at pp. 523-524.

reiterated in *R. v. Brown*[53] by referring to, namely, the Supreme Court's decision in *Ionson*, as did Chief Justice Blanchard in *Moriarity/Hannah*.

[62] That being said, the more specific question raised by the appellant in this appeal is still at issue, that of the appropriate remedy in the circumstances. Must this Court declare section 130 unconstitutional or can it resort to reading in?

(ii) The analytical framework of *Schachter*

[63] Even though its application is, in my opinion, implied in the case law of this Court, I now propose to proceed formally with Chief Justice Lamer's *Schachter* analysis.

[64] That exercise is necessary in determining whether, as the appellant claims, this Court is usurping Parliament's function by reading in section 130 to incorporate the military nexus test.

[65] In my view, that will establish that this Court did not confuse the criteria in sections 1 and 7 of the Charter, that it did not identify the pressing and substantial concerns of section 130 in the absence of evidence and that it is not usurping, in the very specific case at hand, Parliament's legislative function.

[66] The interpretation of section 130 of the NDA is a matter that can be described as unique in the Canadian case law. In fact, in order to avoid the overbreadth of that section, this Court integrated the military nexus test into section 130 through reading in starting in 1983. In that

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53 (1995), 35 C.R. (4th) 318 (C.M.A.C.), at p. 327 (*Brown*).

very specific context, this Court therefore applied reading down and reading in techniques, but that is only, in my opinion, one "manner in which the extent of the inconsistency"[54] between section 130 and the Charter can be defined.

1. Reading in

[67] According to Chief Justice Lamer, "[r]eading in should . . . be recognized as a legitimate remedy akin to severance and should be available under s. 52 in cases where it is an appropriate technique to fulfil the purposes of the *Charter* and at the same time minimize the interference of the court with the parts of legislation that do not themselves violate the *Charter*".[55]

[68] The first step in the *Schachter* analysis is to "define the extent of the inconsistency which must be struck down"[56] which requires examining "the manner in which the law violates the *Charter* and the manner in which it fails to be justified under s. 1".[57]

[69] That requires applying the two-part *Oakes* test to section 130: sufficiently pressing and substantial concerns and the proportionality of the measures chosen.

[70] Having found that there is an overbreadth of section 130 of the NDA in its analysis under section 7 of the Charter, this Court must determine whether reading in is an acceptable remedy under section 52 of the *Constitution Act, 1982*. Because the analysis applies the *Oakes* test, I find that there is no possible confusion between the analysis required under sections 1 and 7 of the

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54 *Schachter v. Canada*, [1992] 2 S.C.R. 679, at p. 698.
55 *Ibid*., at p. 702.
56 *Ibid*.
57 *Ibid*.

Charter since the issue of reading in only arises if the Court has already found that section 130 of the NDA breaches sections 7 and 11(*f*) of the Charter.

2. Pressing and substantial concerns

[71] There is no doubt that the discipline requirements in the Canadian Forces relate to pressing and substantial concerns. Here, the appellant sees, incorrectly, a reversal of the burden of proof under section 1. The purpose of a system of military courts and the need for the Canadian Forces readiness were recognized by Justice McIntyre in *MacKay*[58] and Chief Justice Lamer in *Généreux*.[59]

[72] Chief Justice Blanchard noted the fact that the Supreme Court has recognized that the military justice system responds to sufficiently pressing and substantial concerns.

[73] A separate and different finding is not required for section 130 because Chief Justice Lamer adopted, in *Généreux*, the observations that Justice Cattanach made in *MacKay v. Rippon*,[60] namely those concerning the commission of ordinary law offences by a member of the military.[61]

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58 [1980] 2 S.C.R. 370, at pp. 407-411.
59 [1992] 1 S.C.R. 259, at p. 293.
60 [1978] 1 F.C. 233, at pp. 235-236.
61 [1992] 1 S.C.R. 259, at p. 294.

[74] In my view, specific evidence was unnecessary because there were "certain elements of the s. 1 analysis [that were] obvious or self-evident".[62]

3. Proportionality of the measures chosen

[75] It is important to determine whether section 130 of the NDA is rationally connected to the legislative objective and whether it is designed to impair the constitutional right at issue as little as possible.

[76] I have no hesitation in finding, like Chief Justice Blanchard, that section 130 is rationally connected to the objective of the discipline in the Canadian Forces.[63]

[77] However, the problem lies with the minimal impairment test because of the overbreadth of paragraph 130(1)(*a*).

[78] Chief Justice Lamer raised the issue in *Schachter* as follows:

> Where the second and/or third elements of the proportionality test are not met, there is more flexibility in defining the extent of the inconsistency. For instance, if the legislative provision fails because it is not carefully tailored to be a minimal intrusion, or because it has effects disproportionate to its purpose, the inconsistency could be defined as being the provisions left out of the legislation which would carefully tailor it, or would avoid a disproportionate effect. According to the logic outlined above, such an inconsistency could be declared inoperative with the result that the statute was extended by way of reading in.[64]

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62 *R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 138; *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519, 2002 SCC 68, para. 18; *R. v. Bryan*, [2007] 1 S.C.R. 527, paras. 100-103 (Justice Fish).

63 2014 CMAC 1, para. 44.

64 [1992] 2 S.C.R. 679, at pp. 704-705.

[79] The challenge is identifying the appropriate remedy. Chief Justice Lamer described the substance of that challenge as follows:

> While reading in is the logical counterpart of severance, and serves the same purposes, there is one important distinction between the two practices which must be kept in mind. In the case of severance, the inconsistent part of the statutory provision can be defined with some precision on the basis of the requirements of the Constitution. This will not always be so in the case of reading in. In some cases, the question of how the statute ought to be extended in order to comply with the Constitution cannot be answered with a sufficient degree of precision on the basis of constitutional analysis. In such a case, it is the legislature's role to fill in the gaps, not the court's.[65]

[80] Caution is advised to prevent interference with the legislative function. That is the appellant's main objection.

[81] He believes that if section 130 is declared unconstitutional, Parliament could either decide to do nothing or to adopt an amended section that would involve a military nexus requirement, with or without a list of criteria restricting the decision to be rendered, or it could even choose to identify the crimes that could be the subject of prosecution under section 130. Finally, he states that the case-by-case approach is not an appropriate remedy under section 52 of the *Constitution Act, 1982*, according to *Ferguson* and *Canada (Attorney General) v. PHS Community Services Society*.[66]

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65 [1992] 2 S.C.R. 679, at p. 705.

66 [2011] 3 S.C.R. 134, 2011 SCC 44 (*PHS*).

[82] It is true that this Court's interpretation of section 130 limited its scope, but that was done through reading in, which adds a requirement that was absent from the text in section 130, that is, the military nexus test.

[83] As previously mentioned, however, that interpretation has withstood the test of time. It demonstrates that it was possible to answer "the question of how the statute ought to be [restricted] in order to comply with the Constitution . . . with a sufficient degree of precision on the basis of constitutional analysis".[67] Thus, in order to avoid the overbreadth of section 130, the military nexus test had to be integrated into it.

[84] I readily admit that if the constitutionality of the section had first been challenged in 1992, that is, shortly after the Supreme Court's decision in *Schachter*, it would indeed have been possible for this Court to purely and simply set aside section 130 and let Parliament identify the amendments to be made.

[85] In fact, one might have argued at the time that the use of the military nexus test imports into section 130 "an element that the legislature specifically chose to exclude from the provision – the discretion of the trial judge", like Justice McLachlin (as she was then) noted in *R. v. Seaboyer*.[68]

[86] However, in the unique context of section 130, that claim must be rejected for the reasons raised by Chief Justice McLachlin in *Ferguson* regarding the rule of law and the values that

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67 [1992] 2 S.C.R. 679, at p. 705.

underpin it: certainty, accessibility, intelligibility, clarity and predictability.[69] In my view, the application of the military nexus test by this Court respects the rule of law and the values that underpin it.

[87] Therefore, no compelling reason to depart from the case law of this Court was argued.[70] This case law takes into consideration the Supreme Court's decision in *Ionson* and integrates the essential requirements of *Schachter*, as demonstrated by Chief Justice Blanchard's analysis.

[88] Regarding *Ionson*, the DMP maintains that the Supreme Court did not formally uphold Justice McIntyre's approach concerning the nexus. That very limited interpretation must be rejected.

[89] In that case, the main issue was the military tribunal's jurisdiction in light of the military nexus test.[71] According to the DMP, the Supreme Court only upheld the result of the decision by the majority of this Court,[72] that is, Mr. Ionson's conviction, nothing more. With respect, I cannot interpret Chief Justice Dickson's decision, who concurred with Justice McIntyre's opinion in *MacKay*, in such a limited manner.[73]

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68 [1991] 2 S.C.R. 577, at p. 628. Chief Justice McLachlin refers to it in *R v. Ferguson*, [2008] 1 S.C.R. 96, 2008 SCC 6, para. 45.

69 [2008] 1 S.C.R. 96, 2008 SCC 6, para. 69.

70 *R. v. Bernard*, [1988] 2 S.C.R. 833. See also *Canada. v. Craig*, [2012] 2 S.C.R. 489, 2012 SCC 43.

71 Justice Heald's dissent was regarding this issue.

72 *Ionson v. R.*, (1987), 120 N.R. 82, 4 C.M.A.R. 433.

73 J. Walker, "Military Justice: From Oxymoron to Aspiration" (1994) 32 Osgoode Hall L.J. 1. The author, who criticizes Justice McIntyre's analysis in *MacKay v. The Queen*, wrote the following at pages 13-14: "Following this decision, the elusive "military nexus" doctrine developed". In footnote 44, she refers to the Supreme Court's decision in *Ionson*. See *R. v. Brown* (1995), 35 C.R. (4th) 318 (C.M.A.C.), at p. 327.

[90] Without overstating the scope of *Ionson*, I do not believe that the opposite error should be committed, that is, that the decision should be considered unimportant. The Supreme Court upheld this Court's decision that analyzed the military nexus test and applied it to the circumstances of the case. It is a precedent that this Court must respect.

(iii) Many legislative amendments since the adoption of the Charter

[91] There have been many legislative amendments to the NDA since 1985.[74] Few aspects of it have remained unchanged.

[92] The most significant amendments follow the adoption of the Charter,[75] the Supreme Court's decision in *Généreux* and a major change to military justice following the events in Somalia, Bill C-25 came into force on September 1, 1999.[76]

[93] In 2002, former Judge Advocate General Jerry S.T. Pitzul described them as follows:

> What followed was a relatively intense process of review, both internal and judicial, during which the Canadian Forces was called upon to reconcile its military justice provisions and processes with the constitutional protections embodied in the *Charter*. That process, which is still ongoing, resulted in an unprecedented series of amendments to the *Code of Service Discipline* and subordinate regulations and orders as well as what has been appropriately characterized as the "rapid convergence between military and civilian criminal justice processes."

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74 See Jerry S.T. Pitzul and John C. Maguire, "A Perspective on Canada's Code of Service Discipline" in *Evolving Military Justice*, E. R. Fidell and D.H. Sullivan (Annapolis: Naval Institute Press, 2002) at pp. 239 to 245.

75 Amendments to the *National Defence Act*, Schedule 1 of *An Act to amend certain Acts having regard to the Canadian Charter of Rights and Freedoms*, R.S.C. 1985, 1st Supp., c. 31; Andrew D. Heard, "Military Law and the *Charter of Rights*" (1987-88) 11 Dalhousie L.J. 514 at pp. 532-533.

76 S.C. 1998, c. 35.

> Some of the more significant changes implemented between 1982 and 1992 include:
>
> > establishing a process under which an accused who had been found guilty at court-martial and sentenced to a term of incarceration could apply for judicial interim release;
> >
> > developing a *Charter*-compliant scheme for dealing with mentally disordered accused;
> >
> > creating a truly comprehensive civilian appellate review process in respect of both courts-martial findings and sentences accessible by both the Crown and the accused; and
> >
> > enhancing the independence of courts-martial by (1) separating the functions of convening courts-martial and appointing judges and panel members; (2) adopting a random methodology for selecting courts-martial panel members; and (3) implementing reforms to ensure the security of tenure, financial security, and institutional independence of military judges, including appointing judges for fixed terms, adopting the civilian "cause-based" removal standard and discontinuing the use of career evaluations as a measure of judicial performance.[77]
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> [Emphasis added.] [References omitted.]

[94] Bill C-25 came into force on September 1, 1999.[78] The summary of the Bill reads as follows:

> This enactment reforms and modernizes the *National Defence Act* and, in particular, the Code of Service Discipline. Key components of the enactment include:

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77 Jerry S.T. Pitzul and John C. Maguire, "A Perspective on Canada's Code of Service Discipline" (2002) 52 A.F.L. Rev. 1 at p. 8; Jerry S.T. Pitzul and John C. Maguire, "A Perspective on Canada's Code of Service Discipline" in *Evolving Military Justice*, E.R. Fidell and D.H. Sullivan (Annapolis, Naval Institute Press, 2002) at p. 239.

78 S.C. 1998, c. 35.

> clarification of the roles and responsibilities of the principal actors in the military justice system, including the Minister of National Defence and the Judge Advocate General, and the establishment of clear standards of institutional separation between the investigative, prosecutorial, defence and judicial functions;
>
> establishment of a Director of Military Prosecutions who prefers all charges to be tried by court martial and has conduct of all prosecutions at court martial;
>
> establishment of a Canadian Forces Grievance Board to make findings and provide recommendations to the Chief of the Defence Staff on grievances by members of the Canadian Forces;
>
> establishment of a Military Police Complaints Commission to investigate complaints as to military police conduct and interference with military police investigations;
>
> abolition of the death penalty and substitution of the punishment of life imprisonment; and
>
> increased reporting through the release of annual reports by the Canadian Forces Grievance Board, the Military Police Complaints Commission and the Judge Advocate General.

[95] Subsequently, the Right Honourable Antonio Lamer conducted the first independent review of the operation of Bill C-25.[79] Several of his recommendations gave rise to proposed legislative amendments, which were not passed because Bills C-7 (2006), C-45 (2008) and C-41 (2010) died on the order paper.[80]

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79 The Right Honourable Antonio Lamer, *The First Independent Review by the Right Honourable Antonio Lamer P.C., C.C., C.D., of the provisions and operation of Bill C-25, An Act to Amend the National Defence Act and to make consequential amendments to other Acts as required under s. 96 of Statutes of Canada (1998), c. 35*, submitted to the Minister of National Defence on September 3, 2003.

80 See the excellent summary of the recent amendments and recommendations in the Canadian military justice system: Erin Shaw and Dominique Valiquet, *Legislative Summary of Bill C-15: An Act to Amend the National Defence Act and to make consequential amendments to other Acts*, Publication No 41-1-C15-E (Ottawa:

[96] In May 2011, the Honourable Patrick J. LeSage, retired Chief Justice of the Ontario Superior Court, was in charge of conducting the second independent review of Bill C-25 and of Bill C-60, which was passed in 2008. He submitted his report to the Minister of National Defence in December 2011.[81]

[97] Some changes were also made after this Court's decisions in *R. v. Trépanier (J.S.K.T.)*[82] regarding the constitutionality of section 165.14 and subsection 165.19(1) (choice of the type of courts martial) and in *R. v. Leblanc*[83] (appointment of military judges and the length of their term).

[98] Finally, Bill C-15, the *Strengthening Military Justice in the Defence of Canada Act*,[84] which incorporates several elements from bills that died on the order paper, was assented to on June 19, 2013.[85]

[99] Thus, despite the many decisions of this Court regarding the military nexus test, an amendment was never proposed or presented with respect to section 130 of the NDA.

Library of Parliament, Parliamentary Information and Research Service, April 24, 2012, Revised on May 2, 2013) at pp. 2-8.

81 The Honourable Patrick J. Lesage, *Report of the Second Independent Review Authority to The Honourable Peter G. MacKay Minister of National Defence*, submitted to the Minister of National Defence in December 2011.

82 (2008), 232 C.C.C. (3d) 498, 2008 CMAC 3. See *An Act to amend the National Defence Act (court martial) and to make a consequential amendment to another Act*, S.C. 2008, c. 29, which received Royal Assent on June 18, 2008.

83 (2011), 281 C.C.C. (3d) 451, 2011 CMAC 2, para. 55. See *An Act to amend the National Defence Act (military judges)*, S.C. 2011, c. 22, which received Royal Assent on November 29, 2011.

84 S.C. 2013, c. 24.

85 Came into force on June 19, 2013, exception for sections 17, 97 and 104, which came into force on October 18, 2013 (Order in council), (2013), 147 Can. Gaz. II, 2337, and sections 2(1) and (5), sections 4 to 9, 12 to 16, 18, 20 to 40, 46 to 67, 69 to 96, 98 to 103, 105, 107, 108, 129 and 131 *see* subsection 135(1), not into force, and 19 to 68 *see* subsection 135(2), not into force.

[100] That historic overview and legislative effervescence leads me to find that Parliament passed up many opportunities to amend section 130, which was the subject of consistent interpretation by this Court.[86]

[101] For these reasons, I believe that it is reasonable to presume and find that Parliament knew that section 130 was constitutionally flawed and that it was aware of the interpretation adopted by this Court and upheld by the Supreme Court in *Ionson*.

[102] This is, I repeat, a unique situation.

[103] It can thus be confirmed and determined that, in the last thirty years, Parliament would have adopted section 130 in the modified form that was given by this Court through reading in.[87]

[104] The reading in of paragraph 130(1)(*a*), like section 163.1 Cr. C. at issue in *Sharpe*, makes it possible to eliminate the problematic applications of that section.

[105] I will now address a few alternative arguments submitted by the parties.

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86 *ATCO Gas & Pipelines Ltd.* v. *Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140, 2006 SCC 4, para. 59; P.-A. Côté, S. Beaulac and M. Devinat, *The Interpretation of Legislation in Canada*, 4th ed. (Toronto: Carswell, 2011) at p. 576; Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham, Ont.: LexisNexis, 2008) at p. 205.

87 *R. v. Ferguson*, [2008] 1 S.C.R. 96, 2008 SCC 6, para. 51.

(b) *Must Reddick be followed?*

[106] *Reddick* was rendered less than two years after *Brown*. In that case, Chief Justice Strayer stated that "the nexus doctrine is superfluous and potentially misleading in a distribution of powers context".[88] He added that the approach "distract[s] from the real issue which is one of the division of powers".[89] Those comments were interpreted by some as signifying either the elimination of the military nexus test in Canadian military law or that the test was no longer as relevant.[90]

[107] If I understand the DMP's claim correctly, he would like this Court to replace the military nexus test under section 130 of the NDA with a similar or equivalent test, but in the context of a division of powers analysis.

[108] Such an approach is undesirable because it is preferable to maintain the necessary distinctions between a division of powers analysis and an analysis under the Charter.

[109] Furthermore, it seems to me that that approach is inconsistent with Chief Justice McLachlin's comments in *PHS*, where she wrote the following:

> More broadly, the principle that one part of the Constitution cannot be abrogated or diminished by another part of the Constitution is of no assistance in dealing with division of powers issues on the one hand, and *Charter* issues on the other. There is no conflict between saying a federal law is validly adopted under s. 91 of the

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88 (1996), 112 C.C.C. (3d) 491, at p. 487.

89 *Ibid*.

90 *Halsbury's Laws of Canada: Mental Health, Military, Mines and Minerals*, 1st ed. (Markham, Ont.: LexisNexis, 2011, at p. 397; David McNairn, "A military Justice Primer, Part II" (2000), 43 Criminal Law Quarterly 375, at p. 382.

> *Constitution Act, 1867*, and asserting that the same law, in purpose or effect, deprives individuals of rights guaranteed by the *Charter*. The *Charter* applies to all valid federal and provincial laws. Indeed, if the *CDSA* were *ultra vires* the federal government, there would be no law to which the *Charter* could apply. Laws must conform to the constitutional division of powers and to the *Charter*.[91]

[110] In this case, there is no doubt that Parliament has the constitutional jurisdiction to adopt section 130.[92] However, the issue is instead whether that section, in purpose or effect, deprives Canadian military personnel of their Charter rights.

[111] The DMP raises the *Sellars*[93] principle of the Supreme Court and directs us to apply it and to follow *Reddick*, which, in his opinion, apparently reversed the prior case law of this Court.

[112] *Sellars* was the subject of remarks by the Supreme Court in *R. v. Henry*.[94]

[113] Justice Binnie noted that Justice Chouinard's opinion in *Sellars* was interpreted as "suggest[ing] that other courts are bound by this Court's considered ruling on a point of law, even a point not strictly necessary to the conclusion".[95] He stated that that is not the case:

> [57] The issue in each case, to return to the Halsbury question, is what did the case decide? Beyond the *ratio decidendi* which, as the Earl of Halsbury L.C. pointed out, is generally rooted in the facts, the legal point decided by this Court may be as narrow as the jury instruction at issue in *Sellars* or as broad as the *Oakes* test. All *obiter* do not have, and are not intended to have, the same weight. The weight decreases as one moves from the dispositive

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91 [2011] 3 S.C.R. 134, 2011 SCC 44, para. 82.

92 *MacKay v. The Queen*, [1980] 2 S.C.R. 370; David McNairn, "*Introduction au système de justice militaire*" (2002), 7 Can. Crim. L. Rev. 299, at p. 301.

93 [1980] 1 S.C.R. 527.

94 [2005] 3 S.C.R. 609, 2005 SCC 76.

95 *Ibid*., para. 54.

> *ratio decidendi* to a wider circle of analysis which is obviously intended for guidance and which should be accepted as authoritative. Beyond that, there will be commentary, examples or exposition that are intended to be helpful and may be found to be persuasive, but are certainly not "binding" in the sense the *Sellars* principle in its most exaggerated form would have it. The objective of the exercise is to promote certainty in the law, not to stifle its growth and creativity. The notion that each phrase in a judgment of this Court should be treated as if enacted in a statute is not supported by the cases and is inconsistent with the basic fundamental principle that the common law develops by experience.[96]
>
> [Emphasis added.]

[114] Those principles apply to *Reddick*.

[115] First, I share Chief Justice Blanchard's analysis, which states that the issue in *Reddick* is the division of powers.

[116] Second, *Reddick's* usefulness is considerably lessened since the overbreadth of section 130 is not at issue in that decision.

[117] Third, and significantly, *Reddick* does not review the Supreme Court's decision in *Ionson*.

[118] Further, the DMP relies on *R. v. Heyden*[97] of the Alberta Court of Appeal to persuade us that the rules of horizontal collegiality require that we follow *Reddick*.

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96 [2005] 3 S.C.R. 609, 2005 SCC 76, para. 54.

97 (1997), 200 A.R. 279, [1997] A.J. No. 712.

[119] This submission cannot be accepted.

[120] Indeed, *Reddick* could not overrule the previous case law of this Court—*Brown* having been determined less than two years earlier—because, according to a well-established practice in Canadian appellate courts,[98] only a decision of a five members panel of this Court could have had this effect within the context of an appeal specifically raising the reassessment of previous case law of this Court with respect to military nexus under sections 7 and 11(*f*) of the Charter.[99]

[121] For the reasons noted above, I consider that, according to the rules of collegiality in a Court of Appeal, we are bound by the complete and persuasive analysis of Chief Justice Blanchard in *Moriarity/Hannah*, which is in accordance with the consistent approach of this Court with respect to the military nexus test.

(c) *The wording of the military nexus test*

[122] The appellant submits that this Court, in its recent decision, adopted military nexus tests that are incompatible with each other. In his opinion, the test set out by Justice McIntyre in *MacKay* cannot be reconciled with Chief Justice Lamer's observations in *Généreux*.

[123] First, it must be explained that the interpretation of section 11(*f*) and the issue of the military nexus were not at issue in *Généreux*, but that is not the most fundamental observation.

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98 *Murphy v. Welsh* (1991), 81 D.L.R. (4th) 475, at p. 480 (Ont. C.A.); *Thomson v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 205 N.S.R. (2d) 55, 2002 NSCA 58, paras. 7-9 (N.S.C.A.); *R. v. Arcand* (2010), 264 C.C.C. (3d) 134 (Alta. C.A.), paras. 185-207. This approach complies with the recent decision of the Supreme Court in *Canada v. Craig*, [2012] 2 S.C.R. 489, 2012 SCC 43, paras. 25-27.

[124] In my view, when "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",[100] it "pertain[s] directly to the discipline, efficiency and morale of the military".[101]

[125] The appellant is wrong to see a substantially different test between the wording of Justice McIntyre in *MacKay* and that of Chief Justice Lamer in *Généreux*. Chief Justice Blanchard refers in his judgment to these two wordings, which are far from incompatible. Indeed, they are complementary in the sense that they state the same essential requirement using a slightly different terminology.

(d) *Impact on summary trials*

[126] The appellant also claims that the application of the military nexus test in the context of summary trials[102] may result in an inconsistent and divergent application of this test because the commanding officers who preside over summary trials are not independent courts under section 11(*d*) of the *Charter* and they do not have legal training.

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99 As Chief Justice Blanchard pointed out in *Moriarity/Hannah*, para. 61, this Court had stressed in *R. v. Nystrom*, [2005] C.M.A.J. No. 8, 2005 CMAC 7 and *R. v. Trépanier (J.S.K.T.)* (2008), 232 C.C.C. (3d) 498, 2008 CMAC 3 that *Reddick* did not have the scope that some seemed to give it.

100 *MacKay v. The Queen*, [1980] 2 S.C.R. 370, at p. 410, reiterated in *R. v. Généreux*, [1992] 1 S.C.R. 259, at p. 291.

101 *R. v. Généreux*, [1992] 1 S.C.R. 259, at p. 293.

102 See the description of summary trials in *Halsbury's Laws of Canada: Mental Health, Military, Mines and Minerals*, 1st ed. (Markham, Ont.: LexisNexis, 2011) at pp. 424-429.

[127] The appellant's argument extends beyond the ambit of this appeal, because it is based on grounds that concern the constitutionality of summary trials under the NDA.[103] It is not appropriate to address the issue of the constitutionality of summary trials in this appeal.

[128] Further, it must be pointed out that the accused has the choice to be judged by a court martial, except for five specific offences.[104]

[129] Moreover, the commanding officers that preside over summary trials are "trained in the administration of the Code of Service Discipline in accordance with a curriculum established by the Judge Advocate General" and "certified ... as qualified to perform their duties in the administration of the Code".[105]

[130] In my view, although they are not judges and although we must approach this aspect with great caution, we must conclude that, subject to constitutional issues that do not arise in this case, the commanding officers who preside over summary trials benefit from the presumption of integrity.[106] For this reason, it must be presumed that the military nexus test will be applied in accordance with the teachings of this Court's case law and not the contrary.

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103 See for example: Patrick Cormier, *La Justice militaire canadienne : le procès sommaire est-il conforme à l'article 11(d) de la Charte canadienne des droits et libertés?* (2000) 45 McGill L.J. 209.

104 S. 162.1 of the NDA; art. 108.17 of the QR&O.

105 Art. 101.09(1) of the QR&O. See David McNairn, "A Military Justice Primer, Part I" (2000) 43 Criminal Law Quarterly 243, at p. 262, see footnote 81.

106 *R. v. Teskey*, [2007] 2 S.C.R. 267, 2007 SCC 25; *Cojocaru v. British Columbia Women's Hospital and Health Centre*, [2013] 2 S.C.R. 357, 2013 SCC 30, paras. 14-22.

(e) *Conclusion*

[131] In closing, I note that in 2010-2011, 96% of the disciplinary proceedings held under the NDA were summary trials.[107] Approximately 48% of charges laid involved section 129 of the NDA, for acts, conduct or neglect to the prejudice of good order and discipline, while approximately 1.5% of charges were laid under section 130.[108]

[132] It would be an exaggeration in the circumstances to claim that the survival or sustainability of service discipline is jeopardized in Canada because of the interpretation adopted by this Court. A line must simply be drawn, in accordance with the Constitution's requirements, "... separating the service-related or military offence from the offence which has no necessary connection with the service".[109] Nothing more, nothing less.

[133] For all these reasons, paragraph 130(1)(*a*) of the NDA must be subject to a reading in that requires the application of Justice McIntyre's military nexus test in *MacKay*.

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107 Office of the Judge Advocate General, *Annual Report of the Judge Advocate General to the Minister of National Defence on the Administration of Military Justice in the Canadian Forces* from 2010-2011, Annex: Statistics on military justice, at p. 23.

108 According to the *Annual Reports of the Judge Advocate General to the Minister of National Defence on the Administration of Military Justice in the Canadian Forces*, this percentage was 0.76% in 2007-2008 (Annual Report from 2008-2009), 0.91% in 2008-2009 (Annual Report from 2009-2010), 1.6% in 2009-2010 (Annual Report from 2010-2011), and 1.48% in 2010-2011 (Annual Report from 2010-2011).

109 *MacKay v. The Queen*, [1980] 2 S.C.R. 370, at p. 410 (Justice McIntyre).

[134] Paragraph 130(1)(*a*) of the NDA must now be read as follows:

130. (1) An act or omission which 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 of the Canadian Forces	130. (1) Constitue une infraction à la présente section tout acte ou omission, qui est à ce point relié à la vie militaire, par sa nature et par les circonstances de sa perpétration, qu'il est susceptible d'influer sur le niveau général de discipline et d'efficacité des Forces canadiennes:
(*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;
…	[…]
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).

[135] At the appeal hearing, the appellant agreed that this criterion was met in the circumstances of this case. A more thorough analysis is not required in this context.[110]

[110] See the military judge's comments during the sentencing: *R. v. Larouche*, 2012 CM 3023, paras. 23, 41, 48-49.

B. *The second ground of appeal: Exclusion of the evidence under section 24(2) of the Charter*

(1) Introduction

[136] The appellant challenges the decision of the military judge who refused to exclude the evidence gathered following the execution of two search warrants although he had found that these warrants should not have been issued.

[137] The first warrant was issued on January 20, 2010, and executed on January 21, 2010, at the appellant's home. This warrant was for obtaining computers, cell phones, digital cameras, all the storage devices and nude prints of the complainants.

[138] Originally, the investigator had sought to obtain a search warrant for the offence of voyeurism under section 162 Cr. C. and the offence of conduct to the prejudice of good order and discipline under section 129 of the NDA. However, the authorizing judge was not familiar with the NDA and asked the investigator to demonstrate to him that a search warrant could be issued for this offence.

[139] After receiving a legal opinion, the investigator, concerned with the possible destruction of evidence, instead chose to request a warrant only for the offence of voyeurism. A copy of this first information was not placed in the trial record or submitted to us.

[140] The military judge described the search as follows:

> [19] The search of Private Larouche's home began early in the morning, around 6 o'clock, and took about 10 hours. Corporal Gauvin used certain computer programs that allowed him to skim through the electronic and memory items described in the warrant to identify the relevant ones to be analyzed and seize them for a real analysis later in a laboratory, since this was very time consuming. Two factors made the seizure more complex: first, the number of items that he had to comb through, about 1,800; and the fact that, during this survey, he noticed that some of these items contained a large number of files that might constitute child pornography that he seized in plain view. At the end of the search, they met with Private Larouche again at his home, and the evidence seized was identified for him.

[141] A second warrant was issued on February 5, 2010, and was for possession of child pornography, which was [TRANSLATION] "accidentally" found during the execution of the first warrant, according to the description used by the investigator in his information.

[142] The evidence gathered helped establish that the appellant was guilty of both counts. In the case of the offence of voyeurism, it was a video recording that proved that the appellant had filmed a complainant without her knowledge.[111]

[143] In the case of the offence of possession of child pornography, the appellant admitted, after his motion for exclusion of the evidence under section 24(2) was rejected, that the 1054 electronic files which were seized and filed as evidence by the prosecution were child pornography. He also acknowledged during sentencing that the electronic files of child pornography are photographs or videos of two young girls under the age of 18 years.

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111 *R. v. Larouche*, 2012 CM 3009, paras. 83-93.

(a) *Standard of intervention*

[144] The standard of intervention of a Court of Appeal in this matter is strict and demanding. Justice Cromwell described it in *R. v. Côté*:[112]

> [44] The standard of review of a trial judge's s. 24(2) determination of what would bring the administration of justice into disrepute having regard to all of the circumstances is not controversial. It was set out by this Court in *Grant* and recently affirmed in *R. v. Beaulieu*, 2010 SCC 7, [2010] 1 S.C.R. 248. Where a trial judge has considered the proper factors and has not made any unreasonable finding, his or her determination is owed considerable deference on appellate review (*Grant*, at para. 86, and *Beaulieu*, at para. 5).

[145] Justice Fish makes the following precisions in *R. v. Cole*:[113]

> [82] The standard of review is deferential: "Where a trial judge has considered the proper factors and has not made any unreasonable finding, his or her determination is owed considerable deference on appellate review" (*R. v. Côté*, 2011 SCC 46, [2011] 3 S.C.R. 215, at para. 44). But <u>where the relevant factors have been overlooked or disregarded, a fresh *Grant* analysis is both necessary and appropriate</u>.
>
> [Emphasis added.]

(b) *Validity of the search warrants*

[146] It is useful to reproduce the main elements of the military judge's analysis that led him to conclude that the two search warrants should not have been issued. He writes:

> [41] Regarding the affidavit in support of the information that allowed Corporal Gauvin to obtain a search warrant on 20 January 2010, I must admit that, on its face, and more

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112 [2011] 3 S.C.R. 215, 2011 SCC 46.

113 [2012] 3 S.C.R. 34, 2012 SCC 53.

specifically with regard to paragraphs 3 and 4, it does not appear to contain credible and reliable evidence allowing the judge to conclude that Private Larouche had acted without the knowledge of his alleged victims and hence reasonable and probable grounds to believe that an offence of voyeurism had been committed.

…

[43] Corporal Gauvin, the Military Police investigator in this case, gave clear, direct and consistent testimony. In my view, he answered properly and sincerely on the basis of his personal knowledge and experience.

[44] Corporal Gauvin stated twice when he was examined by counsel for the applicant and once when cross-examined by the respondent that he was faced with a situation where the two victims had consented to have Corporal Larouche take videos or photos of them on condition that all of those videos or photos be subsequently destroyed and that, when the applicant failed to do so, he was in a situation in which he was committing the offence of voyeurism.

[45] Clearly, the affidavit prepared by Corporal Gauvin in support of the information reflects this state of affairs. According to him, the facts did not present a situation where the victims were photographed or filmed without their knowledge, but rather one in which Private Larouche had kept, without the victims' knowledge, materials that should normally have been destroyed. As he explained, the victims decided to complain to the Military Police because Private Larouche had kept the materials and had probably shown them to others, without their knowledge, and they feared that they would have no control whatsoever over how widely all these materials would be disseminated.

[46] This observation thus leads me to conclude that the applicant has not shown on a balance of probabilities that Corporal Gauvin's affidavit was incomplete because it contained inaccuracies and omissions. On the contrary, in my view, the affidavit is accurate and reflects Corporal Gauvin's understanding of the facts as described in his testimony before the Court and as he tried to summarize them in the document.

[47] However, I find that the judge could not have issued the warrant on the basis of Corporal Gauvin's information because the supporting affidavit he filed does not disclose in any way, be it directly or by inference, reasonable and probable grounds to believe that Private Larouche took photos or videos of the two

> victims surreptitiously, that is, without their knowledge, and that he thus committed the offence of voyeurism. Consequently, I must intervene and declare that the search warrant that Judge Bédard issued in this case on 20 January 2010 is invalid.
>
> [48] The applicant also argued that the second search warrant, issued in February 2010, was invalid because it had been unlawfully obtained. On this point, I must agree with him and declare that this search warrant, too, is invalid.
>
> [49] Since the search warrant dated 20 January 2010 should not have been granted, and since the February warrant was issued on the basis of grounds that were unlawfully obtained, all this means that both of the ensuing searches infringed section 8 of the *Charter*, on the grounds that they were, by their combined effect, unreasonable.
>
> [50] Regarding the execution of the search made pursuant to the warrant dated 20 January 2010, I do not agree with the argument of counsel for the applicant concerning the need to specify in the warrant the data sought on the computers. As the evidence submitted to the Court showed, Corporal Gauvin tried to minimize the impact on Corporal Larouche throughout the search. He used software to skim over the 1,800 items subject to the search so that he could avoid conducting lengthy analyses at Private Larouche's home and take away with him only those items, 18 in number, requiring analysis, thereby leaving Private Larouche in possession of all the items that could have been seized but were not because they were not at all relevant.
>
> [51] I therefore conclude that Private Larouche has proved, on a balance of probabilities, that the items of evidence listed in the table in Exhibit R1-VD1-17 were obtained in conditions that violated his right to be secure against unreasonable seizure, as provided under section 8 of the *Charter*.

[147] The search warrants were therefore declared invalid, as the police officer had no reasonable grounds on which it could be established that the offence of voyeurism had been committed. This is not a case in which there were insufficient grounds, but one in which there was a complete lack of grounds establishing the commission of a criminal offence.

(2) Military judge's analysis under section 24(2)

(a) *Seriousness of Charter-infringing state conduct*

[148] The military judge referred to the criteria in *R. v. Grant*[114] and assessed the Charter-infringing state conduct as follows:

> [56] First, let us be clear. There is an undeniable link between the evidence obtained and the violation of the accused's right to be secure against unreasonable seizure. Indeed, if the investigator had not obtained the first search warrant, he would not have had access to the photos and videos depicting the complainants, nor would he have had access to all or part of the files alleged to be child pornography.
>
> [57] That being said, how should the conduct of the Military Police officer be characterized in these circumstances? In my view, all of the evidence clearly indicates that Corporal Gauvin never tried to deceive anyone in the process of trying to obtain the search warrant. Determined and perseverant, he presented the case to a judge to obtain a search warrant on the basis of his understanding of the essential elements of the offence of voyeurism. He was concerned that the complainants had given conditional consent to the taking of photos and video and that, in the end, the applicant used the photos and videos without the knowledge or consent, even though they should not normally still exist. He initially tried to obtain a search warrant covering both aspects, voyeurism and misconduct, but after he was turned down the first time because of the judge's lack of familiarity with the offence of conduct to the prejudice of good order and discipline, he adapted and resubmitted a case based on the facts he had collected during his investigation.
>
> [58] Regarding the search, as I have already stated, it was carried out in a manner that minimized the impact on the applicant. There is no evidence that the investigator or his team behaved improperly in the circumstances.
>
> [59] Accordingly, no one can fault the police officer for persevering in his investigation. On the contrary, often, this is the attitude everyone in our society expects. He took the applicant's

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114 [2009] 2 S.C.R. 353, 2009 SCC 32 (*Grant*).

> rights into consideration by trying to obtain judicial permission before laying siege to the applicant's private domain.
>
> [60] I therefore conclude that the police officer's conduct was entirely proper in the circumstances and that there was no reprehensible conduct on the part of state authorities in respect of the applicant's *Charter* rights.

(b) *Impact of the breach on the accused's Charter-protected rights*

[149] The military judge characterized the impact of the breach in this way:

> [61] Now, what is the impact of the breach of the accused's *Charter* rights? In my opinion, it is very significant. As the Supreme Court clearly stated in *Morelli*, it is difficult to imagine anything more serious in terms of an invasion of privacy than a search, at 6 o'clock in the morning, of one's home and all of one's computers, electronic devices and data storage equipment by a police officer, particularly when one is arrested or held at somewhere far from home during this search. This shows how very important it is that police authorities obtain judicial authorization before invading the private domain of any individual.

(c) *Society's interest in the adjudication of the case on the merits*

[150] The military judge expressed his views with regard to the third element of the analysis required by *Grant* stating:

> [62] Finally, what is society's interest in the adjudication of the case on the merits? First off, let us assume that the evidence at issue in this motion is totally reliable. The ownership of the items seized at the applicant's home does not appear to be in question. They were all seized in his home, and the subsequent analysis appears to have been done in accordance with a reliable process. Consequently, the reliability of the evidence is high.
>
> [63] This evidence is clearly essential for the prosecution, particularly for the charges of voyeurism and child pornography. The prosecution stated that, without this evidence, it would be impossible to prosecute the case, with the exception of the first

count, namely, conduct to the prejudice of good order and discipline.

[64] It is important to note that the offences with which Private Larouche is charged are serious. Society's condemnation of these offences is strong, particularly with regard to possession of child pornography. It is also important to bear in mind that this evidence consists of a very large number of files that were seized in connection with this offence, over 1,000, which in itself is also an indicator of the seriousness of this offence.

[65] This is a context that involves the physical and psychological integrity of numerous alleged victims. Indeed, it involves several people in the applicant's social circle or workplace, who are also Forces members. Furthermore, the offences are objectively serious and allegedly unfolded over a long period of time at multiple locations.

[66] In light of the preceding, the public's perception of the military justice system, and the Court Martial in particular, could be severely undermined or eroded in the long term if the evidence at issue in this motion were excluded. If this evidence were excluded, the public could in the long term come to believe that the Court Martial is unable to properly exercise its truth-seeking function when dealing with serious criminal cases. In fact, in the long term, the public could come to believe that the Court Martial is unable to properly assess and deal with criminal offences, which are first of all service offences under the *National Defence Act*, not only because of their seriousness, but also because of its capacity to properly assess the seriousness of the context in which the offences were allegedly committed.

[67] In the present case, I am of the opinion that a reasonable person, fully apprised of the relevant circumstances of this case and of the underlying *Charter* values, would conclude that the admission of the evidence presented would not bring the administration of justice into disrepute.

[68] The two warrants in this case were not obtained through unacceptable police conduct or practices, but by a judicial authorization that was granted on the basis of a sincere belief of a police officer that use without the knowledge of the victims, who posed or were filmed totally nude or while performing a sex act with the applicant, in itself constituted an offence of voyeurism. In the present case, the actual demonstration of the grounds incorrectly considered on a particular aspect of the offence of voyeurism, probable and reasonable, by both the police officer and

> the judicial authority, resulted in an invasion of the applicant's privacy. However, excluding the evidence in the circumstances of this case would, in my opinion, undermine public confidence.
>
> [69] Therefore, I am entirely satisfied that the exclusion of the evidence identified in the table in Exhibit R1-VD1-17 would bring the administration of justice into disrepute.

(3) Analysis

(a) *Introduction*

[151] The DMP acknowledges that the military judge made an error with regard to the first part of the *Grant* analysis, the seriousness of the Charter-infringing state conduct, when he asserted that "there was no reprehensible conduct on the part of state authorities in respect of the applicant's Charter rights."[115] Indeed, this conclusion is incompatible with the total lack of reasonable grounds establishing that a criminal offence had been committed.

[152] The DMP concedes that this error requires the Court to proceed with a new section 24(2) analysis.[116]

[153] I will now proceed with this new analysis.

[154] Due to its importance for the analysis of this means, I will first reproduce the text of subsections (1) and (2) of section 162 of the *Criminal Code*:

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115 2012 CM 3008, para. 60.

116 *R. v. Cole*, [2012] 3 S.C.R. 34, 2012 SCC 53, para. 82; *R. v. Vu*, [2013] 3 S.C.R. 657, 2013 SCC 60, para. 67.

Voyeurism

162. (1) Every one commits an offence who, surreptitiously, observes — including by mechanical or electronic means — or makes a visual recording of a person who is in circumstances that give rise to a reasonable expectation of privacy, if

(*a*) the person is in a place in which a person can reasonably be expected to be nude, to expose his or her genital organs or anal region or her breasts, or to be engaged in explicit sexual activity;

(*b*) the person is nude, is exposing his or her genital organs or anal region or her breasts, or is engaged in explicit sexual activity, and the observation or recording is done for the purpose of observing or recording a person in such a state or engaged in such an activity; or

(*c*) the observation or recording is done for a sexual purpose.

Voyeurisme

162. (1) Commet une infraction quiconque, subrepticement, observe, notamment par des moyens mécaniques ou électroniques, une personne — ou produit un enregistrement visuel d'une personne — se trouvant dans des circonstances pour lesquelles il existe une attente raisonnable de protection en matière de vie privée, dans l'un des cas suivants :

a) la personne est dans un lieu où il est raisonnable de s'attendre à ce qu'une personne soit nue, expose ses seins, ses organes génitaux ou sa région anale ou se livre à une activité sexuelle explicite;

b) la personne est nue, expose ses seins, ses organes génitaux ou sa région anale ou se livre à une activité sexuelle explicite, et l'observation ou l'enregistrement est fait dans le dessein d'ainsi observer ou enregistrer une personne;

c) l'observation ou l'enregistrement est fait dans un but sexuel.

Definition of "visual recording"	*Définition de « enregistrement visuel »*
(2) In this section, "visual recording" includes a photographic, film or video recording made by any means.	(2) Au présent article, « enregistrement visuel » s'entend d'un enregistrement photographique, filmé, vidéo ou autre, réalisé par tout moyen.
[Emphasis added.]	[Je souligne]

(b) *Seriousness of Charter-infringing conduct*

[155] The relevant principles to be used when determining the criterion of the seriousness of the Charter-infringing conduct are set out in *Grant*[117] and *R. v. Harrison*.[118]

[156] In *Grant*, the Supreme Court (joint reasons by Chief Justice McLachlin and Justice Charron), writes:

> [75] Extenuating circumstances, such as the need to prevent the disappearance of evidence, may attenuate the seriousness of police conduct that results in a *Charter* breach: *R. v. Silveira*, [1995] 2 S.C.R. 297, *per* Cory J. "Good faith" on the part of the police will also reduce the need for the court to disassociate itself from the police conduct. However, ignorance of *Charter* standards must not be rewarded or encouraged and negligence or wilful blindness cannot be equated with good faith: *R. v. Genest*, [1989] 1 S.C.R. 59, at p. 87, *per* Dickson C.J.; *R. v. Kokesch*, [1990] 3 S.C.R. 3, at pp. 32-33, *per* Sopinka J.; *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631, at para. 59. Wilful or flagrant disregard of the *Charter* by those very persons who are charged with upholding the right in question may require that the court dissociate itself from such conduct. It follows that deliberate police conduct in violation of established *Charter* standards tends to support exclusion of the evidence. It should also be kept in mind that for every *Charter*

117 [2009] 2 S.C.R. 353, 2009 SCC 32.
118 [2009] 2 S.C.R. 494, 2009 SCC 34 (*Harrison*).

> breach that comes before the courts, many others may go unidentified and unredressed because they did not turn up relevant evidence leading to a criminal charge. In recognition of the need for courts to distance themselves from this behaviour, therefore, evidence that the *Charter*-infringing conduct was part of a pattern of abuse tends to support exclusion.

[157] In *Harrison*, Chief Justice McLachlin noted as follows:

> [22] At this stage the court considers the nature of the police conduct that infringed the *Charter* and led to the discovery of the evidence. Did it involve misconduct from which the court should be concerned to dissociate itself? This will be the case where the departure from *Charter* standards was major in degree, or where the police knew (or should have known) that their conduct was not *Charter*-compliant. On the other hand, where the breach was of a merely technical nature or the result of an understandable mistake, dissociation is much less of a concern.
>
> [23] The trial judge found that the police officer's conduct in this case was "brazen", "flagrant" and "very serious". The metaphor of a spectrum used in *R. v. Kitaitchik* (2002), 166 C.C.C. (3d) 14 (Ont. C.A.), *per* Doherty J.A., may assist in characterizing police conduct for purposes of this s. 24(2) factor:
>
> > Police conduct can run the gamut from blameless conduct, through negligent conduct, to conduct demonstrating a blatant disregard for *Charter* rights... . What is important is the proper placement of the police conduct along that fault line, not the legal label attached to the conduct. [Citation omitted; para. 41.]
>
> [24] Here, it is clear that the trial judge considered the *Charter* breaches to be at the serious end of the spectrum. On the facts found by him, this conclusion was a reasonable one. The officer's determination to turn up incriminating evidence blinded him to constitutional requirements of reasonable grounds. While the violations may not have been "deliberate", in the sense of setting out to breach the *Charter*, they were reckless and showed an insufficient regard for *Charter* rights. Exacerbating the situation, the departure from *Charter* standards was major in degree, since reasonable grounds for the initial stop were entirely non-existent.

[158] The military judge accepted that the police officer honestly believed that the keeping by the appellant of the complainants' photographs, taken with the complainants' consent, constituted the criminal offence of voyeurism.

[159] However, the offence of voyeurism is committed where the accused *surreptitiously* observes a person who is in circumstances that give rise to a reasonable expectation of privacy and not where he or she keeps without permission photographs taken with the knowledge and with the consent of that person.

[160] Authors Manning and Sankoff describe this essential element of the offence as follows in their work *Manning, Mewett and Sankoff: Criminal Law*:

> The key element of the offence is the 'surreptitious' observation or recording of another person in circumstances where that other person has a reasonable expectation of privacy. Observation includes the use of electronic or mechanical means. The offence thus covers the classic case of the 'peeping Tom' who looks through the blinds, and also the modern high-tech version, where web-cams or other recording devices are used. An absence of consent at the time of the observation or recording is not an element of the offence, but it is difficult to imagine that an act would ever be 'surreptitious' where the person being observed was aware that he or she was being watched or recorded, and consented to it.[119]
>
> [Emphasis added.]

[161] I agree with that interpretation.

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[119] Morris Manning and Peter Sankoff, *Manning, Mewett & Sankof: Criminal Law*, 4th ed. (Markam, Ont. 2009) at p. 932. See for example, *R. v. Keough* (2011), 267 C.C.C. (3d) 193 (C.B.R. Alta.).

[162] While the military judge accepted the police officer's sincerity as to the requirements of section 162 of the *Criminal Code*, there is no evidence on file that provides true insight into how the police officer drew that conclusion, for which there is no basis in the text itself of the offence of voyeurism.

[163] The most relevant passage from the investigator's testimony to understand how he came to the conclusion that it was an offence of voyeurism is the following:

[TRANSLATION]

> Q. When you say "repeat the same thing twice" I do not quite understand what you are referring to? A. I [did not] want there to be[120] any ambiguity in my information in saying yes she consented in one way but she did not in another. It was clear following my interviews with [the two complainants] that yes they both consented—well, if I may, I will focus on [the first complainant] in this case, [the first complainant] consented to the photos on the condition that the photos be deleted. Therefore, no photo should have been put in circulation or observed by [the first complainant] at the residence of Mr. Larouche. That is why I did not, to avoid confusion in my information, I only took into account what appears to be only my part of the interview as at that point it was complementary to the first statement from [the first complainant].
>
> Q. Yes, the fact that the photos were in circulation, I can understand, but we agree that it was an information in which you stated that you had reasonable grounds to believe that the offence of voyeurism had been committed. Correct? A. Yes, Your Honour. Since—
>
> Q. Yes. Please proceed. A. —Since, yes, there was consent but there was some dispute about the agreement. The two women had been persuaded to have the photos taken provided that the photos be deleted immediately after Mr. Larouche led them to believe that the photos would be destroyed. It was found that this was not the case because photos of [the second complainant] were circulating,

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120 In the transcript, the witness' response is [TRANSLATION]: "I did want there to be ambiguity". It is obvious from his response and from the context of his testimony that he meant to say [TRANSLATION]: "I did not want there to be any ambiguity".

> and then, following the interviews, information in the statement from [the first complainant] revealed that she, too, had—that photos of her were observed at Mr. Larouche's home. Therefore, Mr. Larouche, if I may, lied to the two individuals by making them believe that the photos had been destroyed. Therefore, the two individuals were expecting that there be no more photos, but without their consent, he kept or obtained a copy of said photos, which means it fits the description of voyeurism, Your Honour.
>
> Q. So, to you, the fact that he kept photos when the women said that they clearly wanted him to delete them, that to you constitutes voyeurism. Is that what you are saying today? A. What I mean by this is that the photos were taken without—the photos should have been destroyed. The fact that he lied, that he hid the fact that he kept the photos, yes, at the time the photos were taken—that means that the photos were taken without the consent of the individuals since they were kept by Mr. Larouche.
>
> [Emphasis added.]

[164] In my view, the investigator made an error in law which the military judge found sincere but unreasonable.

[165] For that reason, with great respect for the military judge, I find that he failed to complete the analysis that was required in the circumstances as to the seriousness of the Charter-infringing state conduct. His finding concerning the sincerity of the investigator's belief was only the first step; he also had to determine whether it was reasonable in the circumstances.

[166] The interpretation of the word "surreptitiously", which can be defined as [TRANSLATION] "secretly, without someone's knowledge", "clandestinely", "covertly", was unlikely to pose a major issue of interpretation during the investigation. Indeed, according to the military judge's findings which are binding upon us, the police officer *knew* that the photos had been taken by the

appellant *with the consent* of the complainants. Only the keeping of the photos was not authorized by them.

[167] The investigator's error can only be unreasonable, as he "ought to have known" that the appellant did not commit any criminal offence based on the facts in his possession.

[168] Let me explain.

[169] The courts do not expect police officers to anticipate or predict the evolution of the case law, because, as Justice Sopinka made clear in *R. v. Kokesch*, police officers do not have "a burden of instant interpretation of court decisions".[121] Furthermore, police officers are not expected to engage in "judicial reflection on conflicting precedents", even though they are expected "to know what the law is".[122]

[170] However, Justice Sopinka made the following comments with respect to the same matter:

> Either the police knew they were trespassing, or they ought to have known. Whichever is the case, they cannot be said to have proceeded in "good faith", as that term is understood in s. 24(2) jurisprudence. I find support for this conclusion in *R. v. Genest*, [1989] 1 S.C.R. 59, in which Dickson C.J., speaking for the Court, held that the Crown could not argue that the police officers' failure to recognize obvious defects in a search warrant was inadvertent. Even in the absence of evidence of bad faith the seriousness of the *Charter* violation in that case was enhanced, because "the defects in the search warrant were serious and the police officers should have noticed them" (emphasis added, p. 87); and later: "Well-established common law limitations on the powers of the police to search were ignored" (p. 91). . . .

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121 [1990] 3 S.C.R. 3, at p. 33.

122 *R. v. Grant*, [2009] 2 S.C.R. 353, 2009 SCC 32, para. 133.

> …The police are entitled, indeed they have a duty, to assume that the search powers granted to them by Parliament are constitutionally valid, and to act accordingly. The police cannot be expected to predict the outcome of *Charter* challenges to their statutory search powers, and the success of a challenge to such a power does not vitiate the good faith of police officers who conducted a search pursuant to the power. Where, however, police powers are already constrained by statute or judicial decisions, it is not open to a police officer to test the limits by ignoring the constraint and claiming later to have been "in the execution of my duties". This excuse has been obsolete since, at least, the decision of this Court in *Colet* (see Ritchie J., at p. 9).[123]
>
> [Emphasis added.] [Justice Sopinka emphasized the passage in *Genest*.]

[171] In the passage from *Grant*,[124] which I reproduced in paragraph 156 of this judgment, the Supreme Court refers to both Justice Sopinka's observations and the following comments by Justice Arbour in *R. v. Buhay*:[125]

> 59 It should first be noted that the officer's subjective belief that the appellant's rights were not affected does not make the violation less serious, unless his belief was reasonable (see, e.g., *Mercer*, *supra*, at p. 191). As Sopinka, Lederman and Bryant note, *supra*, at p. 450, "good faith cannot be claimed if a *Charter* violation is committed on the basis of a police officer's unreasonable error or ignorance as to the scope of his or her authority". Given that the locker had been rented for private use and was locked, and given the broad interpretation this Court has given to the right of privacy, I do not think the officer's perception that the right to privacy had been "given up" was altogether reasonable.[126]
>
> [Emphasis added.]

[172] Therefore, how must police conduct be assessed in this case?

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123 *R. v. Kokesch*, [1990] 3 S.C.R. 3, at pp. 32-34.
124 [2009] 2 S.C.R. 353, 2009 SCC 32, para. 75.
125 [2003] 1 S.C.R. 631, 2003 SCC 30 (*Buhay*).
126 See also *R. v. Mann*, [2004] 3 S.C.R. 59, 2004 SCC 52, para. 55.

[173] Even though, like the military judge stated, the offence was added to the *Criminal Code* in 2005, it is difficult to understand how the police officer was able to commit an error on an issue as simple as the requirement that the observation be surreptitious. The surreptitious nature is obviously linked to observing complainants and not to keeping photographs taken at that time.

[174] Even assuming that the police officer was sincere, I believe that it was an error that should have been evident for him and for the judge who authorized the warrant. It is not a complex or controversial issue that would make it possible to find that the police officer acted in good faith and without deliberate disregard for or ignorance of Charter rights or that would attenuate the seriousness of the breach.[127]

[175] The sincerity of the police officer's deliberate disregard in no way attenuates the seriousness of the breach and I have no difficulty finding that the police officer's error was unreasonable, as was that of the judge who issued the warrant. In accordance with the analysis in *R. v. Mann*,[128] *Buhay* and *Grant*, I cannot make a finding of good faith with respect to the police officer because this is not an "entirely reasonable misunderstanding of the law".[129]

[176] I realize, however, that judicial authorization was granted and that that must be considered in evaluating the seriousness of the breach. Justice Rosenberg of the Ontario Court of Appeal stated the following in that regard in *R. v. Rocha*:[130]

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127 *R. v. Aucoin*, [2012] 3 S.C.R. 408, 2012 SCC 66, para. 50; *R. v. Cole*, [2012] 3 S.C.R. 34, 2012 SCC 53, para. 86.

128 [2004] 3 S.C.R. 59, 2004 SCC 52.

129 *R. v. Duarte*, [1990] 1 S.C.R. 30, at p. 60.

130 (2012), 292 C.C.C. (3d) 325, para. 28.

> 28 Applying for and obtaining a search warrant from an independent judicial officer is the antithesis of wilful disregard of *Charter* rights. The search warrant process is an important means of preventing unjustified searches before they happen. Unless, the applicant for exclusion of evidence can show that the warrant was obtained through use of false or deliberately misleading information, or the drafting of the ITO in some way subverted the warrant process, the obtaining of the warrant generally, as I explain below, tells in favour of admitting the evidence. In this case, the police submitted the fruits of their investigation to a justice of the peace who granted the warrants. I have held that the warrant was properly granted in relation to the restaurant. The warrant should not have been granted in relation to the house, but it must be remembered that an independent judicial officer did authorize the search.

[177] Furthermore, in his book entitled *Canadian Search Warrant Manual 2005: A Guide to Legal and Practical Issues Associated with Judicial Pre-Authorization of Investigative Techniques*, author Scott Hutchison analyzed the purpose of the judicial pre-authorization system. That analysis seems relevant to the issue before us:

> As already noted, *Hunter v. Southam Inc.* set down the "bedrock" principles related to search and seizure. At the core of those principles is the concept of judicial pre-authorization as the key protection against unjustified state intrusions before they happen. Meaningful judicial pre-authorization requires a neutral third party capable of acting as a true intermediary between the interests of the state and the individual.
>
> The Australian High Court has captured this important role in its judgment in *Parker v. Churchill*. The process is "not some quaint ritual of the law, requiring a perfunctory scanning of the right formal phrases, perceived but not considered, and followed by an inevitable signature." The judicial officer must "stand between the police and the citizen to give real attention to the question whether the information proffered by the police does justify the intrusion they desire to make into the privacy of the citizen and the inviolate security of his personal and business affairs."
>
> Most of the substantive and constitutional rules related to Informations to Obtain and warrant drafting arise from the function of the independent judicial officer. At the core of these

> requirements is the insistence that the justice be placed in a position to independently determine how persuasive the evidence already gathered is. This requires the search warrant applicant to set out his or her sources of information and evidence. In those cases where the source cannot be named (tipsters and confidential informers), the Information to Obtain must put the judicial officer in a position to make an assessment of the source before any weight can be attached to that evidence.[131]
>
> [Emphasis added.]

[178] In my opinion, judicial authorization should have never been granted because it did not disclose the commission of any criminal offence. The judicial pre-authorization system did not play its constitutional role here. The breach concerns a substantive constitutional requirement.[132]

[179] I will conclude by saying that even though I am not inclined towards reviewing the military judge's finding that the investigator's information faithfully reflected his understanding of the situation, I cannot help but state that, even if the investigator did not want to deceive the authorizing judge, the wording chosen was not as clear as it could have been.

[180] Indeed, he did not clearly state that the complainants agreed to having their photos taken and that it was done to their knowledge. He was required to state the facts in a clear and unequivocal manner.[133] The fact that he did not could only confuse the authorizing judge. The authorizing judge must "know all the facts necessary for him to make an informed decision and to exercise genuine supervision".[134]

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131 Scott C. Hutchison, *Canadian Search Warrant Manual 2005: A Guide to Legal and Practical Issues Associated with Judicial Pre-Authorization of Investigative Techniques*, 2nd ed. (Toronto: Carswell, 2004) at p. 23.

132 *R. v. Dombrowski* (1985), 18 C.C.C. (3d) 164, at p. 16 (C.A. Sask.).

133 *R. v. Morelli*, [2010] 1 S.C.R. 253, 2010 SCC 8, paras. 43-44; *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3, 2002 SCC 75, para. 27.

134 *Restaurant Le Clémenceau Inc. v. Drouin*, [1987] 1 S.C.R. 706, at p. 709.

[181] This case is therefore different from the many situations where the Supreme Court determined that the seriousness of the constitutional breach was attenuated when the police officer had a reasonable belief on the basis of the apparent constitutionality of a statute, the facial validity of a judicial authorization, a distinguished or qualified jurisprudential precedent or the evolution of police powers.[135]

[182] I must also discuss the possibility of legally discovering the evidence, an issue that, according to Justice Cromwell's analysis in *Côté*, is relevant with respect to the first two components of the *Grant* analysis.[136]

[183] The DMP submits that the investigator had reasonable grounds to believe that the Canadian Forces' policy on harassment in DAOD 5012–0 (Harassment Prevention and Resolution)[137] had been violated by the appellant: the fact of having shown nude photos of one of the complainants to work colleagues at the medical clinic, while asserting that the photos had been willingly sent to him by a spurned lover, is a potential violation of this policy and could constitute an offence of "Conduct to the Prejudice of Good Order and Discipline" under section 129 of the NDA.

[184] I should first note that we do not have the original information before us, in which the investigator alleged that an offence under 129 of the NDA had occurred.

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135 P. Béliveau and M. Vauclair, *Traité général de preuve et de procédure pénales*, 20th ed. (Montréal: Yvon Blais, 2013) para. 687, at pp. 296-297; S. Penney, V. Rondirelli and J. Stribopoulos, *Criminal Procedure in Canada* (LexisNexis, 2011) § 10.110-10.114.

136 *R. v. Côté*, [2011] 3 S.C.R. 215, 2011 SCC 46, paras. 64-74.

137 "Defence Administrative Orders and Directives."

[185] Furthermore, the information provides no clue that the investigator was referring to DAOD 5012–0. Certainly, "authorizing justices may draw reasonable inferences from the evidence in the ITO; the informant need not underline the obvious"[138], but it is far from clear that the investigator was referring to the offence which is being suggested to us today *ex post facto* by the DMP.

[186] In my view, the DMP is inviting us to "engage in speculation" and this is proscribed by *Côté*.[139]

[187] To the extent that I cannot "[determine] with any confidence whether evidence would have been discovered in the absence of the *Charter* breach, discoverability will have no impact on the s. 24(2) inquiry."[140]

[188] This case reveals the blatant ignorance on the part of the police officer and authorizing judge[141] of the essential elements, which I would characterize as basic and simple to determine, of the offence of voyeurism.

[189] For this reason, I am of the view that "ignorance of *Charter* standards must not be rewarded or encouraged and negligence or wilful blindness cannot be equated with good faith.[142] In this case there is a "flagrant disregard of the *Charter* by those very persons who are charged

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138 *R. v. Vu*, [2013] 3 S.C.R. 657, 2013 SCC 60, para. 16 (*Vu*).
139 *R. v. Côté*, [2011] 3 S.C.R. 215, 2011 SCC 46, para. 70.
140 *Ibid*.
141 See *R. v. Pastro* (1988), 42 C.C.C. (3d) 485 (SK CA), at pp. 522-523 (Sherstobitoff J.A.).
142 *R. v. Grant*, [2009] 2 S.C.R. 353, 2009 SCC 32, para. 75.

with upholding the right in question"[143] which requires "that the court dissociate itself from such conduct."[144]

[190] The seriousness of the breach favours excluding the evidence.

(c) *Impact on the Charter-protected interests*

[191] In *Grant*, the analysis of the impact of the breach is described as follows:

> [76] This inquiry focusses on the seriousness of the impact of the *Charter* breach on the *Charter*-protected interests of the accused. It calls for an evaluation of the extent to which the breach actually undermined the interests protected by the right infringed. The impact of a *Charter* breach may range from fleeting and technical to profoundly intrusive. The more serious the impact on the accused's protected interests, the greater the risk that admission of the evidence may signal to the public that *Charter* rights, however high-sounding, are of little actual avail to the citizen, breeding public cynicism and bringing the administration of justice into disrepute.
>
> [77] To determine the seriousness of the infringement from this perspective, we look to the interests engaged by the infringed right and examine the degree to which the violation impacted on those interests. For example, the interests engaged in the case of a statement to the authorities obtained in breach of the *Charter* include the s. 7 right to silence, or to choose whether or not to speak to authorities (*Hebert*) — all stemming from the principle against self-incrimination: *R. v. White*, [1999] 2 S.C.R. 417, at para. 44. The more serious the incursion on these interests, the greater the risk that admission of the evidence would bring the administration of justice into disrepute.
>
> [78] Similarly, an unreasonable search contrary to s. 8 of the *Charter* may impact on the protected interests of privacy, and more broadly, human dignity. An unreasonable search that intrudes on an area in which the individual reasonably enjoys a high

143 *Ibid.*
144 *Ibid.*

> expectation of privacy, or that demeans his or her dignity, is more serious than one that does not.
>
> [Emphasis added.]

[192] In light of *Morelli*, *Cole* and *Vu*, and more particularly in terms of respect for privacy, the military judge rightly found that the breach in this case was significant and very serious. The appellant's home and personal computer were searched for several hours in the absence of reasonable grounds to believe that a criminal offence had been committed. Moreover, I find that "the impact of the search on the accused's *Charter*-protected interests is greater because the search could not have occurred legally."[145]

[193] This criterion also favours excluding the evidence.

(d) *Society's interest in the adjudication of the case on the merits*

[194] In his analysis, the military judge noted five factors under the following section: the reliability of the evidence, the importance of the evidence for the prosecution, the seriousness of the offences, the circumstances under which they were committed – work context, identity of the persons in question and timeframe – and lastly, the public perception of the military justice system's ability to handle serious criminal cases.

[195] I concur with the military judge that the evidence is reliable and that it is important, even indispensable, for the prosecution.

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145 *R. v. Côté*, [2011] 3 S.C.R. 215, 2011 SCC 46, para. 73; see also para 53.

[196] The offences are extremely serious. The circumstances under which they were committed clearly show this.

[197] However, the seriousness of the offence is a factor that may favour the exclusion of evidence in certain circumstances, as the Supreme Court noted in *Grant*:

> [84] It has been suggested that the judge should also, under this line of inquiry, consider the seriousness of the offence at issue. Indeed, Deschamps J. views this factor as very important, arguing that the more serious the offence, the greater society's interest in its prosecution (para. 226). In our view, while the seriousness of the alleged offence may be a valid consideration, it has the potential to cut both ways. Failure to effectively prosecute a serious charge due to excluded evidence may have an immediate impact on how people view the justice system. Yet, as discussed, it is the long-term repute of the justice system that is s. 24(2)'s focus. As pointed out in *Burlingham*, the goals furthered by s. 24(2) "operate independently of the type of crime for which the individual stands accused" (para. 51). And as Lamer J. observed in *Collins*, "[t]he *Charter* is designed to protect the accused from the majority, so the enforcement of the *Charter* must not be left to that majority" (p. 282). The short-term public clamour for a conviction in a particular case must not deafen the s. 24(2) judge to the longer-term repute of the administration of justice. Moreover, while the public has a heightened interest in seeing a determination on the merits where the offence charged is serious, it also has a vital interest in having a justice system that is above reproach, particularly where the penal stakes for the accused are high.
>
> [Emphasis added.]

[198] With all due respect for the military judge, he failed to consider that the seriousness of the offence cuts both ways in a section 24(2) analysis. Indeed, the exemplary character of the justice system is of particular importance in this case, as it is the integrity of the system of prior judicial authorization that is in issue.

[199] It should be kept in mind that the more serious the impact of the violation of the accused's rights, "the greater the risk that admission of the evidence may signal to the public that *Charter* rights, however high-sounding, are of little actual avail to the citizen, breeding public cynicism and bringing the administration of justice into disrepute."[146]

[200] I would reiterate that due to the lack of reasonable grounds that a criminal offence had been committed, no search warrant should have been issued.[147]

[201] In addition, the military judge found that "the public could in the long term come to believe that the Court Martial is unable to properly exercise its truth-seeking function when dealing with serious criminal cases" and that "the Court Martial is unable to properly assess and deal with criminal offences".[148]

[202] This factor, related to public confidence with regard to military courts' judging ordinary criminal offences where the military nexus test is met, has no place in an analysis under section 24(2) of the Charter.

[203] The specific and distinct nature of military courts as well as their vigilance with respect to criminal offences must not be subject to an independent assessment, as it is "the long-term sense of maintaining the integrity of, and public confidence in, the justice system"[149] in general that is at issue, and not that of the military justice system in particular in cases that involve

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146 *R. v. Grant*, [2009] 2 S.C.R. 353, 2009 SCC 32, para. 76.
147 *R. v. Côté*, [2011] 3 S.C.R. 215, 2011 SCC 46, para. 73.
148 *R. v. Larouche*, 2012 CM 3008, para. 66.
149 *R. v. Grant*, [2009] 2 S.C.R. 353, 2009 SCC 32, para. 68

criminal offences. This is particularly true in this case, as the integrity of the system of prior judicial authorization is at stake.

[204] In so formulating this concern with respect to maintaining confidence in the military justice system in the long term, the military judge appears to have assigned more importance to it as opposed to maintaining confidence in the administration of justice in general. To the extent that the reasons relied on "are presumed to reflect the reasoning that led him to his decision",[150] that is what I have concluded from his statement.

[205] It must be clear that Canadian military tribunals should not balance differently the protection of section 8 and the analysis of section 24(2) of the Charter.

[206] Society's interest in the adjudication of this case on its merits is undeniable, but the military judge did not engage in an overall analysis of the seriousness of the offence factor and placed undue emphasis on protecting the military justice system compared to the administration of justice in general, which affects the final balancing exercise.

(e) *The balancing exercise*

[207] Before proceeding to the final balancing of the various factors under section 24(2), I believe it will be helpful to recall its purpose as identified in *Grant*:

> [67] The words of s. 24(2) capture its purpose: to maintain the good repute of the administration of justice. The term "administration of justice" is often used to indicate the processes by which those who break the law are investigated, charged and

150 *R. v. Teskey*, [2007] 2 S.C.R. 267, 2007 SCC 25, para. 19.

> tried. More broadly, however, the term embraces maintaining the rule of law and upholding Charter rights in the justice system as a whole.
>
> [68] The phrase "bring the administration of justice into disrepute" must be understood in the long-term sense of maintaining the integrity of, and public confidence in, the justice system. Exclusion of evidence resulting in an acquittal may provoke immediate criticism. But s. 24(2) does not focus on immediate reaction to the individual case. Rather, it looks to whether the overall repute of the justice system, viewed in the long term, will be adversely affected by admission of the evidence. The inquiry is objective. It asks whether a reasonable person, informed of all relevant circumstances and the values underlying the Charter, would conclude that the admission of the evidence would bring the administration of justice into disrepute.
>
> [69] Section 24(2)'s focus is not only long-term, but prospective. The fact of the *Charter* breach means damage has already been done to the administration of justice. Section 24(2) starts from that proposition and seeks to ensure that evidence obtained through that breach does not do further damage to the repute of the justice system.
>
> [70] Finally, s. 24(2)'s focus is societal. Section 24(2) is not aimed at punishing the police or providing compensation to the accused, but rather at systemic concerns. The s. 24(2) focus is on the broad impact of admission of the evidence on the long-term repute of the justice system.

[208] In *Harrison*, Chief Justice McLachlin described the balancing exercise that must be conducted:

> [36] The balancing exercise mandated by s. 24(2) is a qualitative one, not capable of mathematical precision. It is not simply a question of whether the majority of the relevant factors favour exclusion in a particular case. The evidence on each line of inquiry must be weighed in the balance, to determine whether, having regard to all the circumstances, admission of the evidence would bring the administration of justice into disrepute. Dissociation of the justice system from police misconduct does not always trump the truth-seeking interests of the criminal justice system. Nor is the

> converse true. In all cases, it is the long-term repute of the administration of justice that must be assessed.[151]

[209] The required analysis must not be "a simple contest between the degree of the police misconduct and the seriousness of the offence".[152]

[210] The violation was quite serious because of the unreasonable error of the investigator and the authorizing judge. There were no reasonable grounds to believe that a criminal offence had been committed. A judicial authorization was granted even though the information did not clearly state that the complainants knew they had been photographed and had consented to this. The authorization resulted in the execution of a search warrant at the appellant's residence and a search of his computer for more than about ten hours. The integrity of the prior judicial authorization system is at the heart of this case.

[211] In my view, the military judge "placed undue emphasis on [one] line of inquiry while neglecting the importance of the other inquiries, particularly the need to dissociate the justice system from flagrant breaches of *Charter* rights."[153]

[212] The importance for this Court to dissociate itself from Charter breaches must trump the search for truth if we really wish to protect the long-term reputation of the administration of justice and the prior judicial authorization system.[154]

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151 [2009] 2 S.C.R. 494, 2009 SCC 34, para. 36.

152 *R. v. Harrison*, [2009] 2 S.C.R. 494, 2009 SCC 34, para. 37.

153 *Ibid*.

154 *R. v. Boudreau-Fontaine*, 2010 QCCA 1108, para. 71; *R. v. Rocha* (2012), 292 C.C.C. (3d) 325, paras. 41-43 (Ont. C.A.).

[213] For these reasons, I propose to allow the appeal, set aside the convictions in respect of the two charges that the appellant was convicted of and enter an acquittal in respect of those charges.

"Guy Cournoyer"
J.A.

"I concur.
Richard Boivin, J.A."

"I concur.
François Doyon, J.A."

COURT MARTIAL APPEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	CMAC-558
STYLE OF CAUSE:	PRIVATE RÉJEAN LAROUCHE v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	NOVEMBER 8, 2013, JANUARY 24, 2014
REASONS FOR JUDGMENT BY:	COURNOYER J.A.
CONCURRED IN BY:	BOIVIN J.A. DOYON J.A.
DATED:	APRIL 30, 2014

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