APPLICANT'S FACTUM

PART I – OVERVIEW OF THE POSITION AND FACTS

Overview

1. But for its recent decision in *R. v. Royes,* 2016 CMAC 1 [*Royes*] (leave to appeal to the SCC refused, 37054 (February 2, 2017), the majority would have concluded that, without a constitutional remedy, s. 130(1)(a) of the *National Defence Act* (the *NDA*) violates the right to a jury trial guaranteed under s. 11f) of the *Canadian Charter of Rights and Freedoms* (the *Charter*).

2. This matter raises a question of public importance because:

- The majority would have ruled that s. 130(1)(a) of the *NDA* violates the right to jury of Applicant Thibault and countless other like him;
- The majority would have ruled that military tribunals have excessive jurisdiction; and
- The problems in *Royes* identified by the majority undermine the legitimacy of juryless military jurisdiction to try countless serious criminal offences.

3. This Court's intervention is sought because collegiality should not be the reason for denying the constitutional right to jury of the Applicant Thibault and countless others.

Statement of Facts

4. All applicants have been charged or found guilty of offences under s. 130(1)(a) of the *NDA*. If leave is granted, the applicants will ask this Court to declare this provision invalid pursuant to subsection 52(1) of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11 on the basis that it violates s. 11(f) of the *Charter*.

5. For the purpose of this leave application, the applicants rely on the facts of the Applicant Thibault.

6. The Applicant Thibault was charged before a Standing Court Martial under s. 130(1)(a) of the *NDA* with having committed the offence of sexual assault:

> **First charge – Section 130 *N.D.A.***
>
> AN OFFENCE PUNISHABLE UNDER SECTION 130 OF THE *NATIONAL DEFENCE ACT*, THAT IS TO SAY, SEXUAL ASSAULT, CONTRARY TO SECTION 271 OF THE *CRIMINAL CODE*
>
> Particulars: In that he, on or about 20 August 2011, at Sainte-Catherine, Province of Quebec, sexually assaulted Corporal ABG.

7. Where an individual is tried by a military tribunal under s. 130(1)(a) of the *NDA*, a jury trial is not available.

8. Prosecutorial discretion to try the Applicant Thibault under s. 130(1)(a) of the *NDA* by military tribunal, rather than by an ordinary criminal court, was therefore determinative of the fact that he had no possibility to elect trial by jury even though his civilian peers, if tried for the same offence, would have such an option.

9. At Court Martial, the Applicant Thibault challenged the constitutionality of s. 130(1)(a) of the *NDA* under s. 11(f) of the *Charter* and raised a plea in bar of trial for lack of jurisdiction on the basis of insufficient military nexus.

10. The Applicant Thibault and the Plaintiff had become friends in a military workplace environment. Their relationship was personal, not professional. On August 19, 2011, the Applicant Thibault allegedly invited the Plaintiff to join him at his cousin's home in Sainte-Catherine (South Shore of Montréal), for purely social reasons, as he was helping his cousin move in that same day. The Applicant Thibault was visiting the area, as he lived in Québec City. The Plaintiff was living in Brossard at the time. The Plaintiff came to Applicant Thibault's cousin's new home and ended up sleeping over. The Plaintiff was unable to drive her car because she had been drinking alcohol. The alleged sexual assault occurred during the night.[1]

Court Martial Ruling

11. The Chief Military Judge allowed the plea in bar and terminated the proceedings. The military tribunal found that their meeting on August 19, 2011 was strictly personal, for social purposes. The meeting took place in the private residence of a third person who had no connection to military service, apart from being the cousin of the Applicant Thibault. He concluded that the alleged offence was not "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".[2]

12. The prosecution appealed the plea in bar and the Applicant Thibault cross-appealed the constitutionality of s. 130(1)(a) of the *NDA* under s. 11(f) of the *Charter*.

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1 Court Martial Appeal Court of Canada Decision at paras 4, 7, **Applicants' Brief (hereinafter "AB"), p 50 and 52.**

2 *Ibid* at paras 10, 11, **AB, p 53-54.**

Court Martial Appeal Court Judgment

13. The Appeal Court was faced with two issues: 1) whether the Court was bound by the rule of collegiality to follow its recent decision in *Royes* which decided that s. 130(1)(a) of the *NDA* did not violate s. 11(f) of the *Charter*; and 2) whether s. 130(1)(a) of the *NDA* violates s. 11(f) of the *Charter*.

14. On the first issue, the Appeal Court unanimously declared itself bound by the principle of collegiality to follow its recent decision in *Royes* which decided that s. 130(1)(a) did not violate s. 11(f). In *Royes*, the Court concluded that the mere status of the accused as a member of the military is sufficient to deny a Canadian citizen his or her constitutional right to a jury trial with respect to a criminal offence committed in Canada ("*Royes* Status Test").[3]

15. Despite its conclusion that it was bound by *Royes*, the Appeal Court nevertheless decided to address whether s. 130(1)(a) of the *NDA* violates s. 11(f) of the *Charter*. The majority disagreed with the analysis and conclusion in *Royes*.

The minority opinion

16. In a minority opinion, Chief Justice Bell agreed with the *Royes* Status Test.[4] According to the majority, his approach was "inconsistent with the broad and purposive way in which the guarantee of the right to a jury trial should be interpreted".[5] At bottom, his analysis did not identify the purpose of the military exception to the right to jury.

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3 Court Martial Appeal Court of Canada Decision at paras 1, 2, 63, **AB, p 49, 50, 72-73.**
4 *Ibid* at paras 2, 17, **AB, p 50 and 57.**
5 *Ibid* at para 64, **AB, p 73.**

The majority opinion

17. Justices Cournoyer and Gleason for the majority profoundly disagreed with the *Royes* Status Test.

18. The majority would have concluded that s. 130(1)(a) "does not pass constitutional muster" because s. 130(1)(a) does not incorporate a military nexus test. After observing that the Royes Status Test is novel, the majority stated:

> In our view and in the consistent view of this Court prior to *Royes*, it is only by the reading in of a military nexus test that paragraph 130(1)*(a)* of the *NDA* can pass constitutional muster. We therefore respectfully disagree with the conclusion in *Royes*.[6]

19. To put its opinion in context, the majority considered the following legislative facts:

- Section 130(1)(a) provides jurisdiction to military tribunals to try virtually all criminal offences – including the vast majority of those where the maximum penalty equals or exceeds five years imprisonment.[7] (N.B.: Murder, manslaughter and child abduction committed in Canada are the only offences excluded from the scope of s. 130(1)(a).[8])

- Where an individual is tried by a military tribunal under s. 130(1)(a) of the *NDA*, a jury trial is not available.[9]

- For the vast majority of criminal offences committed in Canada, individuals subject to the Code of Service Discipline (the "CSD") may be tried in the military justice system at the discretion of the prosecution, thereby losing the right to elect trial by jury for domestic offences even though their civilian peers, if tried for the same offence, would have such an option.[10] [Emphasis added]

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6 *Ibid* at para 85, **AB, p 80.**
7 *Ibid* at para 24, **AB, p 60.**
8 *NDA*, s. 70.
9 Court Martial Appeal Court of Canada Decision at para 24, **AB, p 60.**
10 *Ibid* at para 25, **AB, p 60.**

20. The majority conducted an in-depth analysis to explain why the *Royes* Status Test is "problematic"[11]:

- The Supreme Court specifically left open the s. 11(f) issue in *Moriarity*;
- The analysis required under s. 11(f) is different from that required under s. 7 of the *Charter*;
- The *Charter* rights should be given a generous and purposive interpretation;
- The emerging international consensus to restrict the scope of military jurisdiction in criminal proceedings; and
- The interpretation of s. 11(f) should be informed by the *Charter* and not by Parliament.

21. The majority observed that "until the decision in *Royes*, the mere status of the accused as a member of the military was considered insufficient to deny a Canadian citizen his or her constitutional right to a jury trial with respect to a criminal offence committed in Canada".[12]

22. The majority noted that "the interpretation of "under military law" adopted by the *Royes* panel results in a much more restrictive protection of the constitutional right to a trial by a jury and narrows its scope".[13]

23. The majority concluded that the *Royes* Status Test "is inconsistent with the required broad and purposive way in which the guarantee of the right to a jury trial should be interpreted".[14]

24. But for *Royes*, the majority would have declared that the right to jury of the Applicant Thibault has been violated and that no military tribunal has jurisdiction to try him. However,

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11 *Ibid* at paras 31-33, **AB, p 62-63.**
12 *Ibid* at para 63, **AB, p 72-73.**
13 *Ibid* at para 64, **AB, p 73.**
14 *Ibid*.

because the majority considered itself bound to follow and apply *Royes,* a new military trial was nonetheless ordered in his case.[15]

25. If the majority is right, the Applicant Thibault will definitely lose his constitutional right to jury.

26. All individuals subject to the CSD will likewise lose their right to jury whenever the State – at its discretion – chooses to try them before a military tribunal.

27. This Court has never had the opportunity to define the scope of the military exception to the right to jury guaranteed under s. 11(f) of the *Charter*.[16]

PARTIE II – QUESTIONS IN ISSUE

28. This matter raises the following two issues :

a. Does s. 130(1)(a) of the *NDA* violate the right to a jury trial guaranteed under s. 11(f) of the *Charter*?

b. If so, is this violation justified under s. 1 of the *Charter*?

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15 *Ibid* at paras 98, 100, **AB, p 85-86.**

16 *R c Moriarity*, [2015] SCC 55 at para 30. Marc-André Séguin, « *Quelle portée pour le droit militaire?* » dans Le Journal du Barreau, vol 48, Décembre 2016 / Janvier 2017, n°1, p 24, **AB, p 140-141.**

PARTIE III – STATEMENT OF ARGUMENT

29. This matter raises a question of public importance because:

- The majority would have ruled that s. 130(1)(a) of the *NDA* violates the right to jury of Applicant Thibault and countless other like him;
- The majority would have ruled that military tribunals have excessive jurisdiction; and
- The problems in *Royes* identified by the majority undermine the legitimacy of juryless military jurisdiction to try countless serious criminal offences

A. BUT FOR *ROYES*, THE MAJORITY WOULD HAVE RULED THAT S. 130(1)(A) OF THE *NDA* VIOLATES THE RIGHT TO JURY.

30. But for *Royes*, the majority would have ruled that s. 130(1)(a) of the *NDA*, as it now stands, violates s. 11(f) of the *Charter*. The majority would have protected the right to jury of the Applicant Thibault and countless others like him.

1. The majority would have ruled that s. 130(1)(a) of the *NDA* violates the right to jury of the Applicant Thibault.

31. This is a question of public importance because, had it not considered itself bound by *Royes* due to the rule of collegiality, the majority would have ruled that s. 130(1)(a) of the *NDA* violates the right to jury of the Applicant Thibault.

32. In its reasons, the majority concluded that, without reading in a military nexus test, s. 130(1)(a) of the *NDA* violates s. 11(f) of the *Charter*. The majority would have formally rejected the *Royes* Status Test in favor of the nexus test. The majority observed that "until the decision in *Royes*, the mere status of the accused as a member of the military was

considered insufficient to deny a Canadian citizen his or her constitutional right to a jury trial with respect to a criminal offence committed in Canada."[17]

33. In the case of the Applicant Thibault, the alleged offence under s. 130(1)(a) does not meet the military nexus test.[18] Accordingly, the majority would have concluded that s. 130(1)(a) violated his right to jury.[19]

34. The Applicant Thibault asks this Court to grant leave to protect his constitutional right to a jury trial, a right that has been "praised as a bulwark of individual liberty".[20]

2. The majority would have ruled that s. 130(1)(a) of the *NDA* would violate the right to jury of countless others.

35. This case raises a systemic issue.

36. For the same reasons as above, the majority would have protected the right to jury of all persons subject to the CSD charged with offences under s. 130(1)(a) of the *NDA* that do not meet the nexus test.

37. This Court's intervention is sought to protect the constitutional right to a jury trial of all persons subject to the CSD.

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17 Court Martial Appeal Court of Canada Decision at para 63, **AB, p 72-73.**
18 *Ibid* at para 100, **AB, p 85-86.**
19 *Ibid* at paras 85, 98, **AB, p 80 and 85.**
20 *R v Turpin,* [1989] 1 SCR 1296 at p 1309.

B. BUT FOR *ROYES*, THE MAJORITY WOULD HAVE RULED THAT MILITARY TRIBUNALS HAVE EXCESSIVE JURISDICTION.

38. The majority would have ruled that military tribunals have no jurisdiction to try the Applicant Thibault and countless others.[21]

1. The majority would have ruled that military tribunals have no jurisdiction to try the Applicant Thibault.

39. The majority concluded that in order for military tribunals to have jurisdiction to try an offence under s. 130(1)(a), this offence must meet the military nexus test.[22]

40. In the case of the Applicant Thibault, the alleged offence under s. 130(1)(a) does not meet the military nexus test.[23] Accordingly, the majority would have ruled that the military justice system has no jurisdiction to try him. However, because of collegiality, the Applicant Thibault is nonetheless ordered a new military trial.[24]

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21 The scope of military jurisdiction over criminal offences is a question that has attracted increased public interest in recent years. See for example: Marc-André Séguin, « Quelle portée pour le droit militaire? » dans Le Journal du Barreau, vol 48, Janvier 2017, n°10, **AB, p 140-141**; Joelle Bergeron, « Faute de lien militaire, la Cour martiale refuse d'entendre une affaire d'agression sexuelle », dans Le Reflet, 4 mars 2015, **AB, p 122**; Noémie Mercier et Alex Castonguay, « La justice militaire dans la mire de la Cour suprême », *L'Actualité* (7 mai 2015) en ligne : https://lactualite.com/actualites/quebec-canada/2015/05/07/la-fin-de-la-justice-militaire/, **AB, p 135-139**; Marie Deschamps, "External Review into the Sexual Misconduct and Sexual Harassment in the Canadian Armed Forces" (27 May 2015) at pp 72-74 online http://www.forces.gc.ca/en/caf-community-support-services/external-review-sexual-mh-2015/conclusion.page, **AB, p 123-126.**

22 Court Martial Appeal Court of Canada Decision at para 85, **AB, p 80.**

23 *Ibid* at paras 85, 98, **AB, p 80 and 85.**

24 *Ibid* at para 100, **AB, p 85-86.**

41. The Applicant Thibault asks this Court to grant leave to ensure that he will be tried by a tribunal that has jurisdiction.

2. The majority would have ruled that military tribunals have no jurisdiction to try countless others.

42. The majority concluded that whenever an offence under s. 130(1)(a) does not meet the nexus test, a military tribunal should have no jurisdiction.[25]

43. Without this Court's intervention, military tribunal will exercise jurisdiction over serious criminal offences committed in Canada that do not meet the nexus test. Military tribunals will therefore exercise jurisdiction in situations where the majority is of the opinion that no jurisdiction exists.

C. THE PROBLEMS IN *ROYES* UNDERMINE THE LEGITIMACY OF JURYLESS MILITARY JURISDICTION TO TRY COUNTLESS SERIOUS CRIMINAL OFFENCES.

44. The problems in *Royes* identified by the majority undermine the juryless military jurisdiction to try virtually all serious criminal offences committed in Canada. But for collegiality, the majority would have overruled *Royes*.

1. The majority identifies several problems in *Royes*.

45. The majority explains why it would not have reached the same conclusion as the panel in *Royes* which found that s. 130(1)(a) did not violate s. 11(f) of the *Charter*.

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[25] *Ibid* at paras 85, **AB, p 80.**

46. At paragraph 33 of its decision, the majority considers the following factors in concluding that *Royes* is "problematic"[26]:

- **The Supreme Court specifically left open the s. 11(f) issue in *Moriarity*.**[27]

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

- **The analysis required under s. 11(f) is different from that required under s. 7 of the *Charter*.**[28]

> [38] … This analysis is entirely unconcerned with the interpretation of the breadth of the constitutional guarantee to a jury trial and the scope of the exemption of military law from the right to a jury trial.
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> …
>
> [40] Thus, the scope of the exemption of military law from the right to a jury trial falls squarely to be decided under s. 11(f) and not under s. 7. There is therefore nothing incongruous in reaching a different result under ss. 11(f) and 7 of the *Charter* as the protections provided under each are distinct and the scope of protection may therefore well be different. [Emphasis added]

- ***Charter* rights should be given a generous and purposive interpretation.**[29]

> [63] … Until the decision in *Royes*, the mere status of the accused as a member of the military was considered insufficient to deny a Canadian

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26 *Ibid* at para 32, **AB, p 62.**

27 *Ibid* at paras 35, 36, **AB, p 63-64.** Chief Justice Bell also recognizes that "*Moriarity SCC* specifically left unanswered the question about whether s. 130(1)(a) would, without a service connection test, violate s. 11(f) of the Charter" at para 1. See also Pascal Lévesque, « Moriarity : Military Justice Now Based on Status, not Nexus : Wider Issues Remain », (2016) 24 C.R. (7th) 377, **AB, p 127-134.**

28 *Ibid* at paras 37-40, **AB, p 64-65.**

29 *Ibid* 41-64, **AB, p 65-73.**

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

- **The emerging international consensus to restrict the scope of military jurisdiction in criminal proceedings.**[30]

> [70] Yet, importantly, Special Rapporteur Knaul noted the current international approach towards military tribunals: "Over time, there has been an increasing tendency to curb the jurisdiction of military tribunals" (*Knaul* at para. 20).
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> [74] Author Christina Cerna, a former Principal human rights specialist at the Inter-American Commission on Human Rights, shares this perspective. She writes "[t]he trend in international human rights law is to narrow the scope of military jurisdiction whereby it applies only to military officials who have committed military crimes and offences in the line of duty": Christina M. Cerna, "The Inter-American System and Military Justice" in Alison Duxbury and Matthew Groves, *Military Justice in the Modern Age* (Cambridge: Cambridge University Press, 2016) at 345.
>
> [75] We believe that this emerging international consensus supports our interpretation of s. 11(f). [Emphasis added]

- **The interpretation of s. 11(f) should be informed by the *Charter* and not by Parliament.**[31]

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

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30 *Ibid* at paras 65-75, **AB, p 73-76.**
31 *Ibid* at paras 76-86, **AB, p 77-80.**

47. The majority's disagreement with *Royes* is profound.

2. Has collegiality trumped the *Charter*?

48. The above problems in *Royes* identified by the majority undermines the legitimacy of juryless military jurisdiction to try countless serious criminal offences. This Court's intervention is sought because the strength of the majority's in-depth analysis has undermined the legitimacy of military jurisdiction to try serious criminal offences committed in Canada in numerous circumstances.

49. This situation is quite unusual. The majority opinion did not prevail.

50. If the majority is right that s. 130(1)(a) of the *NDA* violates s. 11f) of the *Charter*, then collegiality has effectively trumped the *Charter*.

51. Yet, as this Court recognized in *Bedford*, "the common law principle of *stare decisis* is subordinate to the Constitution and cannot require a court to uphold a law which is unconstitutional".[32]

52. Without this Court's intervention, collegiality may effectively trump the *Charter*.

53. Given the majority's profound disagreement on this constitutional and jurisdictional issue, collegiality is insufficient to maintain public confidence in the authority of the military justice system to try serious criminal offences committed in Canada.

54. This Court's intervention is sought because collegiality should not be the reason for denying the constitutional right to jury of the Applicant Thibault and countless others.

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32 *Canada (Attorney General) v Bedford*, [2013] 3 SCR 1101 at para 43.

55. The nine Applicants respectfully submit that this majority opinion on a question of law of such importance calls for the attention of this Court.

PARTIE IV – SUBMISSIONS CONCERNING COSTS

56. The Applicants do not seek costs.

PARTIE V – ORDER SOUGHT

57. It is respectfully submitted that leave ought to be granted on the issues as set out above.

58. ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Gatineau, August 18, 2017

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PART VI –TABLE OF AUTHORITIES