Court File No. 37701

SUPREME COURT OF CANADA

(ON APPEAL FROM A JUDGMENT OF THE COURT MARTIAL
APPEAL COURT OF CANADA)

Nos. **CMAC–567**
CMAC–574
CMAC-577
CMAC-578
CMAC-579
CMAC-580
CMAC-581
CMAC-583
CMAC-584

CMAC-567

BETWEEN:

MASTER CORPORAL C.J. STILLMAN

APPLICANT
(Appellant)

and

HER MAJESTY THE QUEEN

RESPONDENT
(Respondent)

(Style of cause continues next pages)

APPLICANTS' REPLY ON LEAVE TO APPEAL
Pursuant to Rule 28

CMAC-574

BETWEEN:

EX-PETTY OFFICER 2ND CLASS J.K. WILKS

APPLICANT
(Appellant)

-and-

HER MAJESTY THE QUEEN

RESPONDENT
(Respondent)

CMAC-577

BETWEEN:

WARRANT OFFICER J.G.A. GAGNON

APPLICANT
(Appellant)

-and-

HER MAJESTY THE QUEEN

RESPONDENT
(Respondent)

CMAC-578

BETWEEN:

LIEUTENANT (NAVY) G.M. KLEIN

APPLICANT
(Appellant)

-and-

CANADA (MINISTER OF NATIONAL DEFENCE)

RESPONDENT
(Respondent)

CMAC-579

BETWEEN:

CORPORAL CHARLES NADEAU-DION

APPLICANT
(Appellant)

-and-

HER MAJESTY THE QUEEN

RESPONDENT
(Respondent)

CMAC-580

BETWEEN:

CORPORAL F.P. PFAHL

APPLICANT
(Appellant)

-and-

CANADA (MINISTER OF NATIONAL DEFENCE)

RESPONDENT
(Respondent)

CMAC-581

BETWEEN:

CORPORAL A.J.R. THIBAULT

APPLICANT
(Appellant)

-and-

HER MAJESTY THE QUEEN

RESPONDENT
(Respondent)

CMAC-583

BETWEEN:

SECOND LIEUTENANT SOUDRI

APPLICANT
(Appellant)

-and-

HER MAJESTY THE QUEEN

RESPONDENT
(Respondent)

CMAC-584

BETWEEN:

K39 842 031 PETTY OFFICER 2ND CLASS R. K. BLACKMAN

APPLICANT
(Appellant)

-and-

HER MAJESTY THE QUEEN

RESPONDENT
(Respondent)

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APPLICANTS' REPLY

1. The prosecution is incapable of explaining how a systemic constitutional violation identified by a majority of an Appeal Court in Canada is not a question of public importance that justifies the intervention of this Court.

2. A majority opinion of a Canadian Appeal Court has found that a provision that provides military jurisdiction over all criminal and federal offences is constitutionally defective – contrary to the right to trial by jury guaranteed under s. 11(f) of the *Charter*.

3. The prosecution's response trivializes the constitutional right to trial by jury. It carefully avoids any reference to it. It refuses to even acknowledge that, if the majority below is correct, Applicant Thibault's right to trial by jury has been violated.[1]

4. The constitutional right to trial by jury is no trivial matter. It requires twelve of the accused's peers to be unanimously convinced of his or her guilt beyond a reasonable doubt. Applicant Thibault firmly believes he will be acquitted by a jury, but that is not the point: as a Canadian citizen, he has a right to trial by jury – win, lose or draw.[2] His liberty is at stake. He cannot accept that he is being denied trial by jury *solely* because is a member of the Canadian Armed Forces. To deny this precious right, selectively, to those whose duty it is to protect the country can only be viewed as perverse.

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[1] According to the majority, the right to jury is violated whenever the s. 130(1)(a) offence has no military nexus. The Chief Military Judge found no nexus in the case of the Applicant Thibault: *R. v. Thibault*, 2015 CM 1001 at paras 10, 11 [Application for Leave to Appeal at 27, 28]

[2] *R v Spence* [2005] 3 SCR 458 at para 22 ("Over the years, people accused of serious crimes have generally chosen trial by jury in the expectation of a fair result.")

5. In their response, the prosecution would have this Court believe that:

i. The majority opinion of the Appeal Court is unimportant because it is "*obiter* comments";

ii. All is well in the Appeal Court, the majority and *Royes* are not so far apart, and any points of divergence are of no moment;

iii. *Moriarity* has already addressed the constitutional problems raised by the majority below in relation to s. 11(f) of the *Charter*.

6. Each of these propositions is without merit.

***No ordinary* Obiter**

7. The prosecution's claim that the opinion of the majority at the Appeal Court can be disregarded as mere *obiter* is wishful thinking.[3]

8. The majority below hardly dashed off a casual observation *en passant*. Rather, they offered a fully developed analysis of the constitutional question on which the Applicants seek leave.

9. Nor can the majority opinion be dismissed as trivial. The majority squarely found that the provision that provides military jurisdiction over all criminal and federal offences, is constitutionally defective – contrary to the right to trial by jury guaranteed under s. 11(f) of the *Charter*. As a result, the authority and legitimacy of the military justice system to try certain serious criminal offences committed in Canada *without a jury* is now called into question.

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[3] Prosecution's Letter in Response at para 2.

Doctrinal stability is not a valid reason to exempt a lower Court decision from Charter scrutiny, especially when a right as fundamental as the right to trial by jury is at stake

10. The prosecution insists that "nothing has changed", that the law is now "clear and stable", and that there "is no reason to upset this stability."[4] This is unresponsive to the Application.

11. First, *Royes* never once considered the object of s. 11(f) of the *Charter*.

12. The prosecution minimizes the important contribution of the majority which, unlike the panel in *Royes*, conducted a purposive interpretation of s. 11(f) and found s. 130(1)(a) to be constitutionally defective.

13. The prosecution would have this Court believe that the majority only slightly disagreed with *Royes*.[5] Nothing could be further from the truth.

14. As mentioned in the Application, the majority identified several alarming constitutional problems in *Royes* that undermine the legitimacy of juryless military jurisdiction to try countless serious offences.[6] The cogency of the majority's reasons materially undermine *Royes*.[7]

15. The majority's disagreement with *Royes* is profound. For example, the majority could not have disagreed more with the *Royes* panel that *Moriarity* "dictates that paragraph 130(1)(a) of the NDA does not violate s. 11(f)".[8] The majority explains that the Court's error in *Royes* is not only manifest, it was one that was *impossible* to commit :

> [36] Nous sommes d'avis qu'il est impossible de mettre en doute l'intention de la Cour suprême, et ce, en raison de deux déclarations faites par le juge Cromwell : 1) dans l'affaire *Moriarity*, la Cour n'était pas saisie de la question de la portée de l'exemption d'application

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[4] *Ibid* at para 1.
[5] Contrary to the prosecution's assertions, the majority never applied the manifest error standard. Rather, it applied the distinct standard of *per incuriam*: Court Martial Appeal Court of Canada Decision at para 96.
[6] Court Martial Appeal Court of Canada Decision at paras 33, 36, 38, 40, 63, 70, 74, 75, 80.
[7] Application for Leave to Appeal at 117-119.
[8] Ibid at para 30.

> du droit à un procès avec jury garanti à l'alinéa 11*f)* de la *Charte*, et 2) rien dans les motifs de la Cour ne donne à penser que ceux-ci traitent de la portée de l'alinéa 11*f)*.

16. In these circumstances, it was incumbent on the prosecution to respond to the majority in order to salvage *Royes*.

17. The prosecution's omission to defend *Royes* on the merits speaks volumes. The same may be said with respect to the prosecution's complete failure to take issue with the detailed and persuasive submission of the American military justice expert who has moved for intervention.

18. Finally, the prosecution's undeveloped stability claim is unpersuasive. Nothing in its two-page letter response to the Application for Leave even attempts to show that anyone, anywhere, has relied on *Royes* in undertaking any particular course of action. Did the Canadian Armed Forces modify their operations or invest even a penny on the basis of that judgement during the short time between that decision and the judgement that is the subject of the Application for Leave? Did any member of the forces adjust his or her conduct in reliance on *Royes*? These questions answer themselves, and show that the stability argument is utterly hollow.

***This Court never addressed the constitutional problems raised by the majority in relation to s. 11(f) of the* Charter**

19. The prosecution would have this Court believe that its decision in *Moriarity* has already addressed the constitutional problems identified by the majority under s. 11(f). Again, nothing could be further from the truth.

20. This Court simply never determined the scope of the s. 11(f) military exception either in *Moriarity* or in any other case. In this context, the prosecution's assertion that "*Royes* is entirely consistent with this Court's conclusions in *Moriarity*"[9] is unhelpful and confusing. If all the

[9] Prosecution's Letter in Response at para 3.

prosecution is saying is that the government prevailed in both *Moriarity* and *Royes*, that adds nothing to the conversation.

21. The question presented in the Application for Leave is at least as important as the one in *Moriarity*, where of course this Court granted leave. In *Moriarity*, the Court was called to identify the purpose of a statute to determine whether it was overbroad. In this case, the Court would be asked to interpret the Constitution: what is the purpose of the military exception to the right to trial by jury guaranteed under s. 11(f) of the *Charter*?

22. Having determined the purpose of s. 130(1)(a) in *Moriarity*, it remains for the Court to decide the purpose of the military exception to s. 11(f) of the *Charter*.

23. Given the profound disagreement in the Appeal Court on the constitutional validity of s. 130(1)(a) which provides military jurisdiction over *all* serious criminal and federal offences, this Court's intervention is required to restore the legitimacy and authority of military tribunals and afford the right to trial by jury the salience it merits in the *Charter* scheme and Canadian constitutional history.

24. Applicant Thibault joined the Canadian Armed Forces voluntarily. He did not believe that by doing so he would be losing one of the central protections afforded by the Nation's legal traditions and governing document. To deny him the right to trial by jury *because* he has chosen to aid in Canada's defence is – however the matter is ultimately resolved – surely strange enough to warrant the Court's time and attention.

Gatineau, October 2nd, 2017

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