File Nos.: 37701 & 38308

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT MARTIAL APPEAL COURT OF CANADA)

Between:

MASTER CORPORAL C.J. STILLMAN, *ET AL.*

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

And between:

HER MAJESTY THE QUEEN

Appellant

- and -

CORPORAL R.P. BEAUDRY

Respondent

FACTUM
HER MAJESTY THE QUEEN

(Rule 42 of the *Rules of the Supreme Court of Canada*)

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[Style of cause continued.]

And between:

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

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

And between:

WARRANT OFFICER J.G.A. GAGNON

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

And between:

CORPORAL F.P. PFAHL

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

And between:

CORPORAL A.J.R. THIBAULT

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

[Style of cause continued on next page.]

[Style of cause continued.]

And between:

SECOND-LIEUTENANT N. SOUDRI

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

And between:

PETTY OFFICER 2ND CLASS R.K. BLACKMAN

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

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AGENT FOR THE INTERVENER

PART I – OVERVIEW AND STATEMENT OF FACTS

A. OVERVIEW

1. This Court is asked to decide whether an offence under paragraph 130(1)(a) of the *National Defence Act*[1] is "an offence under military law" as that phrase is used in s. 11(f) of the *Canadian Charter of Rights and Freedoms*.[2] In his dissent in *R. v. Beaudry*,[3] Bell C.J. stated, "the answer to this question will determine the future of the military justice system in Canada".[4] This is indeed so, as it is s. 130(1)(a) that transforms into service offences acts and omissions that take place in Canada and that are punishable under the *Criminal Code*[5] and other Acts of Parliament.[6] Without s. 130(1)(a), the Canadian Armed Forces is unable to prosecute undisciplined members who commit criminal and drug offences that occur in Canada and attract a maximum punishment of imprisonment for five years or more. This will seriously degrade the ability of the Canadian Armed Forces to maintain discipline, efficiency, and morale.

2. A version of s. 130(1)(a) has been part of the *NDA* since its enactment in 1950. Indeed, the provision pre-dates the *NDA*. Only two years before the advent of the *Charter*, the provision was considered by this Court in *MacKay v. The Queen*,[7] and was found to be validly enacted by Parliament. Thus, when the framers of the *Charter* included the term "offence under military law", they understood that "military law" included s. 130(1)(a). This Court subsequently reaffirmed the validity of s. 130(1)(a) in *R. v. Généreux*[8] and again in *Moriarity*. That s. 130(1)(a) engages the s. 11(f) exception was confirmed in *R. v. Reddick*[9] in a unanimous decision penned by Chief Justice Strayer, himself one of the drafters of the *Charter*. An examination of the purpose of s. 11(f) and of the military exception to that section placed in its

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[1] R.S.C. 1985, c. N-5 [*NDA*].
[2] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].
[3] 2018 CMAC 4 [*Beaudry*].
[4] *Ibid*. at para. 73.
[5] R.S.C. 1985, c. C-46 [*Criminal Code*].
[6] See especially *R. v. Moriarity*, 2015 SCC 55 at para. 8 [*Moriarity*].
[7] [1980] 2 S.C.R. 370 [*MacKay*].
[8] [1992] 1 S.C.R. 259 [*Généreux*].
[9] (1996), 112 C.C.C. (3d) 491 (C.M.A.C.) [*Reddick*].

proper linguistic, philosophic, and historical context demonstrates that an offence under s. 130(1)(a) is "an offence under military law" within the meaning of s. 11(f) of the *Charter*.

3. Although it is unnecessary for the resolution of the constitutional question before this Court, the Crown asks the Court to consider whether the majority in *Beaudry* breached the principle of *stare decisis*, given its disregard of previous CMAC decisions.

4. The Crown asks this Honourable Court to declare that an offence under s. 130(1)(a) of the *NDA* is an offence under military law within the meaning of s. 11(f) of the *Charter*.

B. STATEMENT OF FACTS

I. The CMAC unanimously upheld s. 130(1)(a) in *R. v. Royes*

5. In recent times, the CMAC first dealt with the central issue raised in this appeal in *R. v. Royes*.[10] In that case, a unanimous panel concluded that the acts or omissions referred to in s. 130(1)(a) are service offences and that service offences are offences under military law. As such, s. 130(1)(a) falls within the s. 11(f) exception to the right to a trial by jury. The CMAC further concluded that the effect of the SCC decision in *Moriarity* was to correct the CMAC's prior reasoning respecting s. 130(1)(a) and military nexus. The CMAC found that its prior jurisprudence regarding military nexus was no longer valid, and therefore that s. 130(1)(a), without resort to a military nexus test, does not violate s. 11(f) of the *Charter*. This Court denied Royes' application for leave to appeal.[11]

II. The CMAC unanimously followed *Royes* in *R. v. Déry*

6. The CMAC ruled on the same constitutional issue for a second time in the case of *R. v. Déry*.[12] In *Déry*, Bell C.J. agreed with the analysis undertaken by the CMAC in *Royes*. The majority, however, found that "it is only by the reading in of a military nexus test that paragraph 130(1)(a) of the *NDA* can pass constitutional muster".[13] Nevertheless, the Court unanimously

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[10] 2016 CMAC 1 [*Royes*].
[11] *Master Corporal D.D. Royes v. Her Majesty the Queen*, 2017 CanLII 4172 (S.C.C.).
[12] 2017 CMAC 2 [*Déry*].
[13] *Ibid*. at para. 85.

concluded that it was bound by *Royes*, a decision it found to be "a fully reasoned treatment of the issue by a unanimous bench".[14] The constitutional challenge was dismissed.

7. A number of the individuals involved in *Déry*, including Master Corporal Stillman, were granted leave to appeal to this Court.[15] The facts of the seven "*Stillman*" cases now before this Court are summarised as follows:

a. Master Corporal Stillman entered a residence on a military base and shot at two soldiers, hitting one of them in the leg. He was convicted of five offences punishable under s. 130(1)(a), those being discharging a firearm with intent contrary to s. 244 of the *Criminal Code*, discharging a firearm recklessly contrary to s. 244.2 of the *Criminal Code*, aggravated assault contrary to s. 268 of the *Criminal Code*, using a firearm in the commission of an offence contrary to s. 85(1) of the *Criminal Code*, and possession of a loaded restricted firearm contrary to s. 95 of the *Criminal Code*. He was sentenced to a period of imprisonment of six years and dismissal from Her Majesty's service;[16]

b. Ex-Petty Officer 2nd Class Wilks served as a medical technician and performed unauthorised and unnecessary breast examinations on female soldiers while conducting medical check-ups. The convictions under appeal (there were others) involve 25 offences punishable under s. 130(1)(a), those being 10 counts of sexual assault contrary to s. 271 of the *Criminal Code* and 15 counts of breach of trust by a public officer contrary to s. 122 of the *Criminal Code*. For these offences, he was sentenced to imprisonment for a period of 30 months and was made subject to a number of ancillary orders;[17]

c. Warrant Officer Gagnon was alleged to have sexually assaulted a female subordinate while they were alone in an armoury. He was charged with one

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[14] *Ibid*. at para. 96.
[15] *Master Corporal C.J. Stillman, et al. v. Her Majesty the Queen, et al.*, 2018 CanLII 11144 (S.C.C.).
[16] *R. v. Stillman*, 2013 CM 4028; *R. v. Stillman*, 2013 CM 4029.
[17] *R. v. Wilks*, 2013 CM 3032; *R. v. Wilks*, 2014 CM 3008.

offence punishable under s. 130(1)(a), that being sexual assault contrary to s. 271 of the *Criminal Code*. He was acquitted at trial, but a majority of the CMAC subsequently granted the Crown's appeal, set aside the verdict of not guilty, and ordered a new trial.[18] His further appeal to this Court was unanimously dismissed from the Bench;[19]

d. Corporal Pfahl discussed the production of "magic mushrooms" with a subordinate, and then attempted to grow the mushrooms at a location just outside of a Canadian Forces Base. He was convicted of an offence punishable under s. 130(1)(a), that being attempting to produce psilocybin contrary to s. 7(1) of the *Controlled Drugs and Substances Act*.[20] He was sentenced to a severe reprimand and a fine in the amount of $2,000;[21]

e. Corporal Thibault stands accused of sexually assaulting a female member of the military police. He was charged with one offence punishable under s. 130(1)(a), that being sexual assault contrary to s. 271 of the *Criminal Code*. His case was not heard on the merits, as a plea in bar of trial was granted by a Standing Court Martial on the basis that it had no jurisdiction due to an insufficient nexus with military service (the plea in bar was granted prior to the decision of this Court in *Moriarity*).[22] The CMAC subsequently overturned the Court Martial decision and ordered a new trial,[23] which has been adjourned pending the outcome of this appeal;

f. Second-Lieutenant Soudri used forged documents in order to justify being absent from his military place of duty. He was convicted of an offence punishable under s. 130(1)(a), that being uttering nine forged documents contrary to s. 368 of the

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[18] *R. v. Gagnon*, 2018 CMAC 1.
[19] *R. v. Gagnon*, 2018 SCC 41.
[20] S.C. 1996, c. 19.
[21] *R. v. Pfahl*, 2014 CM 3024; *R. v. Pfahl*, 2014 CM 3025.
[22] *R. v. Thibault*, 2015 CM 1001.
[23] *Déry*, *supra* note 12 at para. 100.

Criminal Code. He was sentenced to a severe reprimand and a fine in the amount of $2,000;[24] and

g. Petty Officer 2nd Class Blackman submitted a number of false documents to the Canadian Armed Forces in order to obtain financial benefits to which he was not entitled. He was convicted of seven offences punishable under s. 130(1)(a), those being one count of fraud contrary to s. 380(1) of the *Criminal Code*, three counts of forgery contrary to s. 367 of the *Criminal Code*, and three counts of uttering a forged document contrary to s. 368(1) of the *Criminal Code*. He was sentenced to imprisonment for a term of 45 days.[25]

III. The majority in *Beaudry* rejected that Court's own decisions in *Royes* and *Déry*

8. Corporal Beaudry brought the question of whether s. 130(1)(a) violates s. 11(f) of the *Charter* to the CMAC for the third time in less than two years. In dissent, Bell C.J. concluded that the Court was bound by its decisions in *Royes* and *Déry* and that s. 130(1)(a) does not violate the right to a jury trial provided for in s. 11(f) of the *Charter*. As such, he would have dismissed the appeal. This time, however, the majority concluded that s. 130(1)(a) violates s. 11(f) of the *Charter*, that the violation cannot be saved by reading in a military nexus requirement, and that *Royes* was not binding, as the decision was manifestly wrong. As such, s. 130(1)(a) was declared to be of no force or effect in its application to any "civil offence" for which the maximum sentence is imprisonment of five years or more.

9. Corporal Beaudry is alleged to have sexually assaulted a female soldier on a military base. He was convicted of one offence punishable under s. 130(1)(a), that being sexual assault causing bodily harm contrary to s. 272 of the *Criminal Code*. He was sentenced to a term of imprisonment for 42 months and to dismissal from Her Majesty's service (the sentence would have been imprisonment for 48 months, but the Military Judge found that dismissal was

[24] *R. v. Soudri*, 2015 CM 3007; *R. v. Soudri*, 2015 CM 3008.
[25] *R. v. Blackman*, 2015 CM 3009.

equivalent to six months' imprisonment and reduced the term of imprisonment accordingly). He was also made subject to a number of ancillary orders.[26]

PART II – QUESTIONS IN ISSUE

10. The questions in issue are:

a. Is an offence under s. 130(1)(a) of the *NDA* "an offence under military law" within the meaning of s. 11(f) of the *Charter*?

b. If not, does s. 130(1)(a) of the *NDA* violate s. 11(f) of the *Charter*?

c. If s. 130(1)(a) violates s. 11(f) of the *Charter*, can it be saved by s. 1?

d. Was the principle of *stare decisis* breached by the majority's decision in *Beaudry*?

PART III – ARGUMENT

A. AN OFFENCE UNDER s. 130(1)(a) IS "AN OFFENCE UNDER MILITARY LAW" WITHIN THE MEANING OF s. 11(f) OF THE *CHARTER*

11. An examination of the purpose of s. 11(f), and the military exception, must take into consideration its proper linguistic, philosophic, and historical context. Such an examination demonstrates that "an offence under military law" means any offence that Parliament has validly enacted under the s. 91(7) power, that is rationally connected to the maintenance of discipline, efficiency, and morale in the Canadian Armed Forces, and that is not overbroad under s. 7 of the *Charter*.

I. The interpretation of a *Charter* right must accord with the purpose of the provision

12. Interpreting a *Charter* right requires a purposive approach. It must be generous rather than legalistic; however, it is important not to overshoot the actual purpose of the right, placing it in its proper linguistic, philosophic, and historical context.[27] Although *Charter* rights deserve a

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[26] *R. v. Beaudry*, 2016 CM 4009; *R. v. Beaudry*, 2016 CM 4010; *R. v. Beaudry*, 2016 CM 4011.
[27] *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295 at 344.

large and liberal interpretation, this principle does not work to expand those rights beyond their intended purpose. In *R. v. Peers*,[28] the Alberta C.A., quoting Professor Hogg, noted:

> Generosity is a helpful idea as long as it is subordinate to purpose … ascertain the purpose of the *Charter* right, and then interpret the right so as to include activity that comes within the purpose and exclude activity that does not.[29]

13. In *Peers*, the Court was asked to find that a punishment of imprisonment for five years less a day coupled with a five-million dollar fine was a more severe punishment than five years imprisonment, thereby triggering the right to a jury trial under s. 11(f) of the *Charter*. The Court indicated that the right *could* be interpreted as the Appellants proposed, but that this would not accord with the proper purposive interpretation. It was not sufficient that there was a possible interpretation that would expand the right if that interpretation did not reflect the purpose of the provision (in that case the threshold requirement to engage the right). Similarly, in this case, a narrow interpretation of the term "offence under military law" that does not accord with the purpose of the provision is not appropriate.

II. The purpose of s. 11(f) of the *Charter* is to entrench the traditional right to a jury in civilian criminal trials, while the exception recognises the existence of a parallel system of military law and tribunals for the purpose of enforcing discipline

14. In *Peers*, the Court identified the purpose of s. 11(f) of the *Charter*, which "was obviously to entrench the traditional right to a trial by jury for the most serious offences: *Rowbotham*, [1994] 2 S.C.R. 463 at 477."[30] As it relates to the exception to the right to trial by jury for offences under military law tried by military tribunals, the purpose was to exclude those offences for which there was no right to a jury trial at the advent of the *Charter*.

15. Section 11(f) recognises the existence and jurisdiction of military tribunals. As this Court noted in *Généreux*, the *Charter* right itself "does contemplate the existence of a system of

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[28] 2015 ABCA 407, aff'd 2017 SCC 13.
[29] *Ibid*. at para. 3 (quoting P.W. Hogg, *Constitutional Law of Canada*, 5th ed., looseleaf (Toronto: Carswell, 2007) at para. 36.8(c)).
[30] *Ibid*. at para. 6.

military tribunals with jurisdiction over cases governed by military law".[31] As The Right Honourable Jean Chretien, then Minister of Justice, explained during the debates on s. 11(f), "Jury trials in cases under military law before a military tribunal have never existed either under Canadian or American law".[32] There is no indication, nor would it make any sense, that the framers of the *Charter* intended to restrict Parliament's legislative authority to create offences under military law by adding an exception to the right to a jury trial for military offences. If such a restriction were the objective, this intent would have been reflected in both the debates and the language of s. 11(f) itself.

III. The Historical Context: The inclusion of criminal offences as part of military law is deeply entrenched in Canada's history

(i) CRIMINAL OFFENCES WERE PART OF MILITARY LAW PRIOR TO THE *CHARTER*

16. The historical context considers the rights as they stood at the enactment of the *Charter*. As the Québec C.A. noted in *R. v. Genest*:

> Can it be really argued that the legislator, by adopting the constitutional *Charter*, was making reference to anything other than the institution of the jury as it then existed in Canada in 1982 and not as it could have existed between 1774, date of its arrival in Quebec, and 1925, date of the modification made by Parliament of Westminster with respect to the number of jurors.
>
> I cannot conceive of the Canadian legislator, in adopting the *Charter*, referring to the state of the common law as it no longer existed, either in England or in Canada.[33]

17. The majority in *Beaudry* erroneously concluded, through reference to the preamble of the *Mutiny Act, 1689* and a 1907 text on military law, that soldiers have enjoyed the right to trial by jury since 1689.[34] Their analysis ignores the development of military law, which continued right

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[31] *Généreux*, *supra* note 8 at 296.
[32] *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, 32nd Parl. 1st sess., No. 36 (12 January 1981) at 12.
[33] (1990), 61 C.C.C. (3d) 251 at 260 (Que. C.A.).
[34] *Beaudry*, *supra* note 3 at paras. 32-45.

up until the *Charter*. Similarly, the majority in *Déry* erred in concluding, "we would search in vain to ascertain the intent of the drafters in 1982" through a historical analysis of the right to a jury trial.[35] On the contrary, Bell C.J. had little difficulty in concluding, "Parliament understood clearly the concept of military law and the extent of its legislative competence. This is reflected in s. 11(f) of the *Charter*".[36] His conclusion was based on the existence of s. 130(1)(a) and the exception of some offences from military jurisdiction (under s. 70) since the enactment of the *NDA* in 1950, as well as its judicial treatment prior to the *Charter*.

18. In his 1976 thesis on the Rules of Evidence at Courts Martial, Lieutenant-Colonel Swainson describes the development of military law from its origins in the *Mutiny Act* through the *Army Act*, and eventually, in Canada, to the *NDA*:

> From 1689 to 1878, the successive *Mutiny Acts* expanded the geographical jurisdiction of the Act to all parts of the world where British forces were stationed. Additionally, more and more "military" offences were added as the years went by, with the result that by 1878 these successive changes had created a complete code of military discipline along with the disciplinary and judicial system required to enforce it.
>
> These very gradual changes resulted in the removal of the enforcement of discipline in the Army from the civil courts to military tribunals, although the civil courts always had primary jurisdiction if they wanted it, which they normally did not, and that is still the case today.[37]

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[35] *Déry*, *supra* note 12 at para. 47.
[36] *Ibid*. at para. 16.
[37] Arthur K. Swainson, "The Rules of Evidence at Courts Martial: A Study of the Military Rules of Evidence *Part I*" (1977), 25 Chitty's L.J. 274 at 275. It should be noted that as of 1985 the civil courts no longer had primary jurisdiction but retained a concurrent jurisdiction over persons subject to the Code of Service Discipline. See also, Martin L. Friedland, *Controlling Misconduct in the Military: a study prepared for the Commission of Inquiry into the Deployment of Canadian Forces to Somalia* (Ottawa, Minister of Public Works and Government Services Canada, 1997) at 76-78 [Friedland].

19. The *Mutiny Act* was replaced in 1879 by the *Army Discipline and Regulation Act*,[38] which was in turn superseded by the *Army Act, 1881*.[39] By at least 1904, Canada had given force and effect to the *Army Act, 1881* through the *Militia Act*,[40] to the extent that it was not inconsistent with the provisions of that Act.[41] Similarly, as it applied to the Royal Canadian Navy, the *Naval Service Act* of 1910[42] gave force and effect to the *Naval Discipline Act, 1886*[43] under the same conditions.[44]

20. Both the *Army Act, 1881* and the *Naval Discipline Act, 1886* gave jurisdiction to courts martial for offences punishable under ordinary law (i.e., *Criminal Code* offences and offences under other Acts of Parliament). The *Army Act, 1881* expressly indicated that a "person who, whilst he is subject to military law, shall commit any of the offences in this section mentioned [offences punishable by ordinary law] shall be deemed to be guilty of an offence against military law".[45]

21. At that time, both Acts restricted the jurisdiction of courts martial to try certain offences, such as murder, manslaughter, and rape, when committed in certain locations. The *Army Act, 1881* restricted jurisdiction for those offences when committed in the United Kingdom (and elsewhere, in certain circumstances). The *Naval Discipline Act, 1886* restricted jurisdiction over these offences when committed in Canada to certain locations associated with Naval service. The *Naval Discipline Act, 1886* was replaced by the *Naval Service Act, 1944*,[46] which maintained a substantially similar offence provision.

22. These Acts were consolidated into one *National Defence Act* in 1950.[47] The term "subject to military law" found in the previous Acts was replaced with the term "subject to the

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[38] (U.K.), 42 & 43 Vict., c. 33.
[39] (U.K.), 44 & 45 Vict., c. 58 [*Army Act, 1881*].
[40] R.S.C. 1906, c. 41, Proclaimed and published in (U.K.), 4 E. VII, c. 23.
[41] *Ibid*., s. 74.
[42] S.C. 1910, c. 43.
[43] (U.K.), 29 & 30 Vict., c. 109.
[44] *Supra* note 42 at s. 48.
[45] *Supra* note 39 at s. 41. [emphasis added]
[46] S.C. 1944-45, c. 23 at ss. 89-90.
[47] S.C. 1950, c. 43.

Code of Service Discipline". The military offence for offences punishable by ordinary law was maintained, along with restrictions to military jurisdiction for the offences of murder, manslaughter, and rape when committed in Canada.[48] Restrictions over the offences of treason and treason-felony found in the *Army Act, 1881* were omitted, as other treason offences were already included in the Code of Service Discipline.[49]

23. During the debates on the 1950 Act, the meaning of "military law" was explained by the Minister of National Defence, The Honourable Brooke Claxton:

> Parts IV to IX which constitute the code of service discipline, are what is properly called military law. Military law is the law which governs the members of the army and regulates the conduct of officers and soldiers as such, in peace and war, at home and abroad. Its object is to maintain discipline as well as deal with matters of administration in the army.[50]

24. The Minister also referred to the definition of "military law" found in the *Criminal Code* at the time:

> 2(21) 'Military law' includes the *Militia Act* and any orders, rules and regulations made thereunder, the King's Regulations and Orders for the Army, any Act of the United Kingdom or other law applying to His Majesty's troops in Canada and all other orders, rules and regulations of whatsoever nature or kind to which His Majesty's troops in Canada are subject.[51]

25. Even though the terminology used today in the *Criminal Code* definition of "military law" has changed, the essence is the same: "military law" includes all laws, regulations, or orders relating to the Canadian Forces.[52] All offences contained within the Code of Service Discipline are offences under military law.

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[48] *Ibid*., ss. 61, 119(1) (now ss. 70, 130(1)).
[49] See The *National Defence Act*: Explanatory Material, National Defence Headquarters (1 November 1950), s. 61.
[50] House of Commons, Special Committee on Bill No. 133 *An Act Respecting National Defence, Minutes of Proceedings and Evidence No.1* (23 May 1950) at 11-12 [emphasis added].
[51] *Ibid*. at 12.
[52] *Criminal Code*, *supra* note 5, s. 2.

26. Between 1950 and 1982, offences under what is now s. 130(1)(a) were routinely tried by court martial, including offences for which an accused would have had a right to a jury trial if the offence had been tried in civil criminal court. In the *MacKay* decision, just two years before the advent of the *Charter*, this Court upheld the jurisdiction of the military over s. 130 offences.[53] Even the minority concurring judges in *MacKay* recognised, albeit with the inclusion of a service connection requirement, that offences such as theft, trafficking and possession of narcotics, among others, could be categorised as military offences.[54]

27. By the advent of the *Charter*, the incorporation of offences found in other Acts of Parliament into military law was well established. This was the state of military law as it stood in 1982. This is what was meant by The Right Honourable Jean Chrétien, in the debates regarding s. 11(f) of the *Charter*, when he said that there had never been jury trials in Canadian military law.[55]

(ii) CRIMINAL OFFENCES REMAINED PART OF MILITARY LAW AFTER THE ADVENT OF THE *CHARTER*

28. Parliament proactively amended the *NDA* in 1985 in order to bring it in line with *Charter* rights.[56] Many of these amendments were based on recommendations from the military's *Charter* Working Group, which was established to examine what changes would be required in the *NDA* and in regulations because of the *Charter*. Then Minister of Justice, The Honourable John Crosbie, explained that "it was preferable to change questionable legislation rather than leave it to individual litigants to assert their rights in court" and that the amendments were made "so it does not have to be challenged in court".[57] Neither the *Charter* Working Group, nor Parliament, saw any need to modify ss. 70 or 130(1)(a).

29. In 1997, the Minister of National Defence established the Special Advisory Group (SAG) on Military Justice and Military Police Investigation Services, chaired by former Chief Justice of

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[53] *MacKay*, *supra* note 7 at 397.
[54] *Ibid*. at 409-10.
[55] *Supra* note 32.
[56] See Friedland, *supra* note 37 at 78-82.
[57] *Ibid*. at 80.

Canada, The Right Honourable Brian Dickson. The SAG had a broad mandate and examined a number of topics, including the types of service offences and the impact of the *Charter* on courts martial. In the end, the SAG made 35 recommendations. None of the discussion in the SAG's report suggested that s. 130(1)(a) was in violation of s. 11(f) of the *Charter*.[58]

30. The SAG concluded that there was a clear need to retain a separate and distinct military justice system, workable in peace or conflict, in Canada or abroad.[59] It did, however, recommend comprehensive amendments to the *NDA*. In response, on 4 December 1997, the Minister of National Defence introduced Bill C-25[60] in the House of Commons. During the debates, the Minister addressed the importance of military law:

> …discipline and cohesion are very important because not only can what some of our soldiers do threaten their own lives, it can threaten the lives of other people who are part of the team they are working with. It is important to be able to deal with these matters for that reason very swiftly. In some cases they may be abroad at the time. They may be involved in war or peacekeeping in other parts of the world and so it is necessary to have a portable system that can operate in a very swift fashion in terms of the military justice system.[61]

31. When the new law came into force in 1998, one important amendment removed the offence of sexual assault from the list of offences not triable by service tribunals if committed in Canada (s. 70 of the *NDA*). The amendment was made because "This lack of jurisdiction to try sexual assault cases committed in Canada results in an inability to deal promptly with offences that undermine morale and unit cohesion, lessen mutual trust and respect, and ultimately impair military efficiency".[62]

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[58] *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services* (Ottawa, 1997) [Dickson].
[59] *Ibid*. at 12-13.
[60] Bill C-25, *An Act to amend the National Defence Act and to make consequential amendments to other Acts*, 1 Sess., 36th Parl., 1998 (assented to 10 December 1998), S.C. 1998, c. 35.
[61] Chris Madsen, *Military Law and Operations*, looseleaf (Toronto: Thomson Reuters, 2017), c. 1 at 39 (citing *House of Commons Debates*, No. 77 (19 March 1998) at 5153 (Hon. Art Eggleton)) [Madsen].
[62] Amendments to the *National Defence Act*, Background and Amendment Highlights, December 1997, at 11.

32. Twelve years after the advent of the *Charter*, this Court once again affirmed the validity of the military justice system in *Généreux*. Writing for the majority, Lamer C.J. stated, "Section 11(f) reveals, in my opinion, that the *Charter* does contemplate the existence of a system of military tribunals with jurisdiction over cases governed by military law".[63] Here, the "case governed by military law" that he was addressing involved three counts of possession of narcotics for the purpose of trafficking contrary to s. 4 of the *Narcotic Control Act*[64] punishable under the predecessor to s. 130(1)(a). Although that case did not involve a s. 11(f) challenge, it is clear that Chief Justice Lamer considered s. 130(1)(a) offences to be "offences under military law".

33. Following the enactment of Bill C-25, two independent reviews of its provisions and operation have taken place. The first independent review was submitted in 2003 by the Right Honourable Antonio Lamer. He stated, "I am pleased to report that as a result of the changes made by Bill C-25, Canada has developed a very sound and fair military justice framework in which Canadians can have trust and confidence".[65] The former Chief Justice of Canada made 88 recommendations aimed at improving the military justice system and the grievance process. None of his recommendations suggested that an offence punishable under s. 130(1)(a) was not "an offence under military law". He did, however, turn his mind to the subject of trial by jury:

> Section 11(f) of the *Charter* specifically states that those subject to trial by courts martial are denied the right to a trial by jury and although the *NDA* could well grant that right if Parliament so chose, there are important military requirements that justify it not doing so.[66]

34. He also made two recommendations concerning military panels. At the time, it was up to the Director of Military Prosecutions to determine whether a court martial was held before a military judge sitting alone, or a military judge sitting with a panel. Moreover, panels reached

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[63] *Généreux, supra* note 8 at 296.
[64] R.S.C. 1985, c. N-1.
[65] Canada, 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 section 96 of Statutes of Canada 1998, c. 35 (3 September 2003) at (1).
[66] *Ibid*. at 39.

their verdicts by a majority vote of their members. Former Chief Justice Lamer recommended that panels arrive at their verdicts by unanimous vote and that the accused person be given the right, in most cases, to elect trial by military judge alone or military judge and panel.[67] (Both recommendations have since been enacted.)

35. The second independent review of Bill C-25 was submitted in 2011 by The Honourable Patrick J. LeSage.[68] Clearly, Lesage C.J. was aware of s. 130(1)(a).[69] Once again, however, none of his 55 recommendations suggested that an offence punishable under s. 130(1)(a) was not "an offence under military law".

36. The military justice system continues to evolve. On 7 October 2011, the *Strengthening Military Justice in the Defence of Canada Act*[70] was introduced in the House of Commons. When that Act came into force, it included a number of improvements to the *NDA*. One such improvement was that, for the first time, Parliament explicitly established the purposes and principles of sentencing by service tribunals.[71] One of the fundamental purposes of sentencing is "to promote the operational effectiveness of the Canadian Forces by contributing to the maintenance of discipline, efficiency and morale".[72] To that end, the objectives of sentencing include: to promote the habit of obedience to lawful commands and orders;[73] to maintain public trust in the Canadian Forces as a disciplined armed force;[74] and to assist in reintegrating offenders into military service.[75] As The Honourable Michael Gibson wrote, these objectives

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[67] *Ibid*. at 37-40.
[68] Canada, The Honourable Patrick J. LeSage, C.M., O.Ont., Q.C., Report of the Second Independent Review Authority to The Honourable Peter G. MacKay, Minister of National Defence (December 2011).
[69] *Ibid*. at 13.
[70] Bill C-15, *An Act to amend the National Defence Act and to make consequential amendments to other Acts*, 1st Sess., 41st Parl., 2001 (assented to 19 June 2013), S.C. 2013, c. 24.
[71] *NDA, supra* note 1, ss. 203.1-203.4.
[72] *Ibid*., s. 203.1(1)(a).
[73] *Ibid*., s. 203.1(2)(a).
[74] *Ibid*., s. 203.1(2)(b).
[75] *Ibid*., s. 203.1(2)(f).

illustrate "that military law has a more positive purpose than the general criminal law in seeking to mould and modify behaviour to the specific requirements of military service".[76]

37. In conclusion, by the advent of the *Charter*, the incorporation of offences found in other Acts of Parliament into military law had been well established. As this Court noted in *Généreux*, "The existence of a parallel system of military law and tribunals, for the purpose of enforcing discipline in the military, is deeply entrenched in our history".[77]

IV. The Philosophic Context: Paragraph 130(1)(a) is an "offence under military law" because a soldier who breaks a law, any law, is an undisciplined soldier

38. The philosophic context lends itself to three considerations which inform the interpretation of the s. 11(f) exception to the right to the benefit of trial by jury:

a. First, the vital role that military justice plays in the maintenance of discipline, efficiency, and morale demonstrates why the military exception was included in s. 11(f);

b. Second, there is no natural military law by which military offences can be distinguished from ordinary criminal offences. Offences under military law are those offences which Parliament has chosen to include for the purpose of maintaining discipline, efficiency, and morale of the Canadian Armed Forces, and are akin to criminal law offences; and

c. Third, the meaning of the phrase "an offence under military law" can be ascertained through s. 91(7) of the *Constitution Act, 1867*[78] and examined in light of other *Charter* rights. In deciding on the boundaries of Parliament's legislative competence over military law, there must be a harmony between the division of powers analysis, the overbreadth analysis, and the meaning of the phrase "an

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[76] Michael Gibson, "Canada's Military Justice System" (2012) 12:2 Canadian Military Journal 61 at 63.
[77] *Généreux*, *supra* note 8 at 295.
[78] (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

offence under military law" under s. 11(f). They are, in essence, three sides of the same triangle.

(i) THE MILITARY JUSTICE SYSTEM PLAYS A VITAL ROLE IN THE MAINTENANCE OF DISCIPLINE, EFFICIENCY, AND MORALE

39. First, the vital role that military justice plays in the maintenance of discipline, efficiency, and morale demonstrates why the military exception was included in s. 11(f). The Canadian Armed Forces is unlike any other institution in Canada.[79] It is the only organisation that subjects its members to unlimited liability: "all members accept and understand that they are subject to being lawfully ordered into harm's way under conditions that could lead to the loss of their lives".[80] Moreover, unlike police officers, for example, members of the military are trained, and are often authorised, to use lethal force not only defensively but also offensively.

40. Additionally, a single military operation can involve thousands of people fighting concurrently at sea, on land, and in the air. They must work harmoniously in order to achieve the intent of their commander while minimising friendly casualties and avoiding harm to non-combatants. Indeed, the Canadian Armed Forces is equipped with a fearsome array of lethal weapon systems and its members are trained to employ those weapon systems in combat operations. There is thus an obvious need that those members conduct themselves in a highly disciplined fashion.

41. It has been said that armies without discipline are nothing but "contemptible, armed mobs, more dangerous to their own country than to the enemy".[81] Canadians have the right to expect that those who bear arms on behalf of Canada will do so in a lawful manner and that they will demonstrate appropriate restraint, even in the most horrendous of conditions. Discipline is therefore essential.

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[79] See e.g. Madsen, *supra* note 61, c. 2 at 4.3-4.4.
[80] Canadian Defence Academy, *Duty with Honour: The Profession of Arms in Canada* (Kingston: Canadian Forces Leadership Institute, 2009) at 27 [*Duty with Honour*].
[81] Maurice de Saxe: *Mes Reveries*, 1732.

42. Canadian military doctrine states that, "First and foremost, duty entails service to Canada and compliance with the law".[82] The habit of obeying the law cannot begin when troops deploy overseas. Rather, that habit of obedience must be instilled in soldiers, sailors, and aviators from the moment that they begin their military training and it must be reinforced throughout their military careers. It is for this reason that the "objective of maintaining 'discipline, efficiency and morale' is rationally connected to dealing with criminal actions committed by members of the military even when not occurring in military circumstances".[83] In other words, a soldier who breaks a law, any law, is an undisciplined soldier.[84] The military must have sufficient means of addressing such breaches of discipline. It is for this reason that Parliament included s. 130(1)(a) as an offence under military law.

43. The very composition of a court martial panel furthers the aim of maintaining discipline, efficiency, and morale. As former Chief Justice Dickson stated, "The officers serving as courts martial panel members bring military experience and integrity to the military judicial process. They also provide the input of the military community responsible for discipline and military efficiency".[85] Janet Walker points out how panel composition positively affects morale. She writes:

> *Esprit de corps* depends on the confidence that one's conduct, alleged to have violated the Code of Service Discipline (even in the commission of an offence also found in the *Criminal Code*) will be assessed by those whose familiarity with the challenges and circumstances of military life is the product of personal experience and whose sensitivity to the requirements of the Code is derived from an ongoing commitment to uphold it.[86]

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[82] *Duty with Honour, supra* note 80 at 32.
[83] *Moriarity, supra* note 6 at para. 51.
[84] See also Michael Gibson, "International Human Rights Law and the Administration of Justice through Military Tribunals: Preserving Utility while Precluding Impunity" (2008) 4 Journal of International Law and International Relations 1 at 37.
[85] See e.g. Dickson, *supra* note 58 at 55.
[86] Janet Walker, "A Farewell Salute to the Military Nexus Doctrine", (1993) 2 N.J.C.L. 366 at 372.

In other words, morale is increased because members of the military can rest assured that their conduct will be judged by members of their military community.

44. In *Beaudry*, the majority of the CMAC erroneously dismissed the vital role that service tribunals play in the military justice system: "whether a trial is held before a service tribunal or a civil tribunal composed of a judge and jury has no effect on the application of the Code of Service Discipline and therefore on the discipline, efficiency and general morale of the Canadian Forces".[87] That broad assertion is belied by the jurisprudence of this Court.

45. In *Généreux*, Lamer C.J. stated, "Recourse to the ordinary criminal courts would, as a general rule, be inadequate to serve the particular disciplinary needs of the military. There is thus a need for separate tribunals to enforce special disciplinary standards in the military". He then cited with approval the comments of Cattanach J. in *MacKay v. Rippon*: "Without a code of service discipline the armed forces could not discharge the function for which they were created".[88] Lamer C.J. concluded saying, "Such a disciplinary code would be less effective if the military did not have its own courts to enforce the code's terms".[89] These comments provide a very clear indication as to why the military exception was included in s. 11(f).

(ii) THERE IS NO NATURAL MILITARY LAW

46. Second, there are no natural military law principles that distinguish an offence as a military offence rather than a criminal offence. The majority in *Beaudry* concluded that there is something fundamentally different between military offences and other Federal offences, without offering any concrete reasons why this would be so. The decision suggests that there is some set of principles from which military offences emerge and can be distinguished as fundamentally military in nature. However, this is simply not the case. Military offences are not defined by a military nexus, nor by their severity, nor by their incorporation (or lack thereof) by reference to other Acts of Parliament.

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[87] *Beaudry*, *supra* note 3 at para. 68.
[88] *Généreux*, *supra* note 8 at 293-94.
[89] *Ibid*. at 294.

47. If it so desired, Parliament could reproduce, word for word, the text of the *Criminal Code* (and any number of other statutes) as provisions of the Code of Service Discipline. Instead, through s. 130(1)(a), Parliament made the decision to incorporate by reference the *Criminal Code* and all other Acts of Parliament into the Code of Service Discipline. This has the obvious advantage of reducing the length of the *NDA*. Perhaps more importantly, Paul Salembier points out that incorporation by reference also has the advantages of reinforcing the relationship between the two pieces of legislation and ensuring harmony between the laws of the jurisdictions in question.[90] As such, the offence of sexual assault, for example, has the same meaning under military law as it does under civilian law and is governed by the same jurisprudence. There is thus harmony between military law and civilian law.

48. In *Moriarity*, this Court noted that there are a number of military offences that do not require the offence to have been committed in military circumstances. These offences rely solely on the military status of the accused.[91] Some of these offences also have direct counterparts in criminal law that are indistinguishable from the military offence, such as stealing (s. 114 of the *NDA*) and theft (s. 322 of the *Criminal Code*), or an act of a fraudulent nature (s. 117(f) of the *NDA*) and fraud (s. 380 of the *Criminal Code*). As this Court noted, "Criminal or fraudulent conduct, even when committed in circumstances that are not directly related to military duties, may have an impact on the standard of discipline, efficiency and morale."[92] In other words, there is nothing illogical about concluding that an offence is both a criminal offence and a military offence.[93]

49. Neither is seriousness of the offence a distinguishing factor. As even the majority in *Beaudry* recognised, there are a significant number of offences listed at ss. 72-129 of the *NDA* which carry maximum punishments of five years imprisonment or more, including a number of offences that carry a maximum punishment of imprisonment for life. Military offences are

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[90] Paul Salembier, *Legal and Legislative Drafting*, 2d ed. (Toronto: LexisNexis Canada, 2018) at 405-6.
[91] See e.g. *Moriarity*, *supra* note 6 at paras. 38-39.
[92] *Ibid*. at para. 52.
[93] See e.g., *Trumbley v. Fleming*, 55 O.R. (2d) 570 at 585-87 (Ont. C.A.), aff'd [1987] 2 S.C.R. 577 and referred to with approval in *R. v. Wigglesworth*, [1987] 2 S.C.R. 541 at 554-55.

serious offences, akin to criminal offences, and are not simply internal disciplinary or regulatory matters. This Court identified the similarity between military law and criminal law in *Généreux*:

> Service tribunals thus serve the purpose of the ordinary criminal courts, that is, punishing wrongful conduct, in circumstances where the offence is committed by a member of the military or other person subject to the Code of Service Discipline.[94]

50. In other words, breaches of military law, even though they are disciplinary in nature, are akin to public wrongs or transgressions against society. Military law is therefore in the nature of criminal law: military justice operates in parallel with criminal justice.

51. Offences tried through s. 130(1)(a) are no less military offences than are other offences in the Code of Service Discipline. Their nature is the same, only the method of enactment differs. Arguing that Parliament does not have the authority to create offences by referring to other Acts is the same as arguing that Parliament has no authority to enact any military offence for which a corresponding provision already exists in another Act. The deeply entrenched historical roots of offences, such as stealing pursuant to s. 114 of the *NDA*, demonstrate the invalidity of this proposition.

(iii) THE THREE SIDES OF THE TRIANGLE: AS S. 130(1)(A) IS NEITHER *ULTRA VIRES* NOR OVERBROAD, IT MUST BE AN "OFFENCE UNDER MILITARY LAW"

52. Third, there must be a harmony between the division of powers analysis, the overbreadth analysis, and the meaning of "an offence under military law" in s. 11(f). They are, in essence, three sides of the same triangle. That is to say, if s. 130(1)(a) includes offences that are not "offences under military law", then the provision would necessarily be overbroad, or *ultra vires* of Parliament, or both. It is, however, neither overbroad nor *ultra vires*. The overbreadth issue was recently settled in *Moriarity*, while the division of powers question was settled squarely by this Court in *MacKay*. Writing for a majority of the Court, Ritchie J. stated that s. 120(1)(a) [now s. 130(1)(a)] "derives its force from s. 91(7) and therefore there is no possible application

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[94] *Généreux*, *supra* note 8 at 281-82.

for provincial powers under [s. 92(14)]".[95] Since s. 130(1)(a) is neither overbroad nor *ultra vires* of Parliament, an offence under that provision is necessarily "an offence under military law".

53. While division of powers arguments are not determinative of *Charter* rights, the meaning of the phrase "an offence under military law" can be ascertained through an examination of s. 91(7) of the *Constitution Act, 1867*, which confers upon the Parliament of Canada exclusive legislative authority over all matters related to "Militia, Military and Naval Service, and Defence". This provision has long been held to give Parliament the power to legislate in areas that would otherwise be within the jurisdiction of the provinces under s. 92(14). For example, this Court has held that s. 91(7) gives Parliament the jurisdiction to pass legislation exempting visiting foreign troops from the criminal jurisdiction of the Canadian courts.[96] Indeed, in *MacKay*, it was the judgment of a majority of this court that matters prosecuted under [now] s. 130(1)(a) "properly fall into the category of service offences" and that service offences "have always been considered part of military law".[97] Writing for a unanimous CMAC in *Reddick*, Strayer C.J. had this to say:

> As to the application of the exemption for military tribunals from the *Charter* requirements of trial by jury, this really involves statutory interpretation or division of powers issues as to whether the offence in question is truly "an offence under military law" in the words of paragraph 11(f) of the *Charter*. Is the offence in question in its essence a "military offence" validly prescribed by Parliament under head 91(7) of the *Constitution Act, 1867*? If so, then the exception in the *Charter* applies. Here the application of the *Charter* depends on non-*Charter* standards, just as it does for example under section 6 which guarantees certain rights to "citizens": citizenship itself is surely determined by the *Citizenship Act*, … not the *Charter*.[98]

54. The *Charter* continues to apply to military law, and s. 11(f) is no different. In determining the scope of the military law exception in s. 11(f), the right should be examined in light of other *Charter* rights. In *Moriarity*, this Court recently examined s. 130(1)(a) through the lens of s. 7 of the *Charter*. Writing for a unanimous Court, Cromwell J. concluded "that the

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[95] *MacKay*, *supra* note 7 at 397.
[96] *Reference re Exemption of U.S. Forces from Canadian Criminal Law*, [1943] S.C.R. 483.
[97] *MacKay*, *supra* note 7 at 397.
[98] *Reddick*, *supra* note 9 at 505. See also *Royes*, *supra* note 10 at paras. 46-50.

purpose of [s. 130(1)(a)] is the same as that of the overall system of military justice: to maintain the discipline, efficiency and morale of the military".[99] Justice Cromwell went on to say, "The objective of maintaining 'discipline, efficiency and morale' is rationally connected to dealing with criminal actions committed by members of the military even when not occurring in military circumstances".[100] As such, s. 130(1)(a) did not infringe s. 7 of the *Charter* as being overbroad.

55. Granted, at paragraph 30 of *Moriarity*, Cromwell J. pointed out that the exemption of military law from the right to a jury trial was not before the Court. To the extent that this Court indicated that it was not addressing s. 11(f) of the *Charter* in its reasons, that statement was simply a recognition that no violation of s. 11(f) was being argued before the Court in that case.[101] This does not mean that the decision must be ignored in the section 11(f) context. To the extent that *Moriarity* addresses the underlying concerns expressed by the CMAC in its previous rulings on section 11(f) of the *Charter*, it has a direct impact on those decisions that cannot, as some would suggest, be ignored.

56. In *Royes*, the CMAC disagreed with the approach of considering ss. 7 and 11(f) "in completely separate silos".[102] Indeed, Professor Hogg had this to say:

> The defendants in *Moriarity* did not argue that they had been deprived of their right to trial by jury under s. 11(f); they only argued that there was a breach of s. 7. However, the Court's decision will obviously govern the phrase "offence under military law" in s. 11(f).[103]

57. In conclusion, from a philosophic context, the framers of the *Charter* recognised that the military exception to s. 11(f) is essential to the maintenance of the discipline, efficiency, and morale of the Canadian Armed Forces. However, the framers left for Parliament the question of what constitutes "an offence under military law". Parliament has recognised that soldiers who break laws, including criminal laws, are undisciplined soldiers. That is why s. 130(1)(a) was

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[99] *Moriarity*, *supra* note 6 at para. 48.
[100] *Ibid*. at para. 51.
[101] *Ibid*. at paras. 3, 57-58.
[102] *Royes*, *supra* note 10 at paras. 20-23.
[103] P.W. Hogg, *Constitutional Law of Canada*, looseleaf (Toronto: Thomson Reuters Canada, 2016) at 51-32.

included in the Code of Service Discipline. This Court has found that the provision is neither *ultra vires* nor overbroad. It is an offence under military law.

V. The Linguistic Context: The plain and ordinary meaning of the phrase "an offence under military law" suggests that the exception applies to s. 130(1)(a)

58. The plain and ordinary meaning of "an offence under military law" suggests that the military exception in s. 11(f) applies to those offences included in laws enacted in relation to the military. So long as the offence is within the legislative authority of Parliament under its s. 91(7) power, and not overbroad under s. 7 of the *Charter*, the offences that Parliament has chosen to include within the Code of Service Discipline are "offences under military law".

59. In *Royes*, the CMAC noted that neither the *Charter* nor the *NDA* define the term "military law". The *Criminal Code* defines it as "all laws, regulations or orders relating to the Canadian Forces".[104] This definition accords with a plain and ordinary meaning of the term military law, one that recognises that military law is the law enacted by Parliament under the s. 91(7) power.

60. The *NDA* is a law relating to the Canadian Forces. Section 2 of the *NDA* defines a "service offence" as "an offence under this Act, the *Criminal Code* or any other Act of Parliament, committed by a person while subject to the Code of Service Discipline". Parts IV to IX of the *NDA* create a Code of Service Discipline, which includes service offences and the system of tribunals to hear those offences. Paragraph 130(1)(a) is a service offence listed within the Code of Service Discipline.

61. There is simply nothing in the language of s. 11(f) to suggest that "an offence under military law" was intended to restrict the jurisdiction historically granted to the military through s. 130(1)(a). Had this been the intent, one would expect language such as "except for those offences which are exclusively under military jurisdiction" or "except for those offences which apply only to those persons subject to military law".

62. Similarly, there is nothing in the language of s. 11(f) that would subject "offences under military law" to a military nexus test. On the contrary, the term "an offence under military law"

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[104] *Royes*, *supra* note 10 at para. 54 (quoting *Criminal Code*, *supra* note 5, s. 2 "military law").

must be interpreted harmoniously with Parliament's constitutional authority to legislate under the s. 91(7) power.

63. The plain and ordinary meaning of the phrase "an offence under military law" suggests that the military exception in s. 11(f) applies to all offences validly enacted in relation to the Canadian Armed Forces. The unanimous Court in *Royes* correctly concluded as such, and Bell C.J. has correctly supported this view in his dissenting opinions in both *Déry* and *Beaudry*.

VI. Conclusion

64. An examination of the purpose of s. 11(f), and its exception, in its linguistic, philosophic, and historical context, demonstrates that "an offence under military law" means any offence validly prescribed by Parliament under the s. 91(7) power which is rationally connected to the maintenance of discipline, efficiency and morale in the Canadian Armed Forces, and is not overbroad under s. 7 of the *Charter*. In this analysis, the military nexus doctrine is superfluous. As such, an offence under s. 130(1)(a) of the *NDA*, without resort to a military nexus test, is "an offence under military law" within the meaning of s. 11(f) of the *Charter*.

B. EVEN IF s. 130(1)(a) IS NOT "AN OFFENCE UNDER MILITARY LAW", THE OFFENCE PROVISION DOES NOT VIOLATE s. 11(f) OF THE *CHARTER*

65. Even if the majority in *Beaudry* was right to conclude that s. 130(1)(a) is not an offence under military law within the meaning of the exception in s. 11(f) of the *Charter*, it does not follow that s. 130(1)(a) violates s. 11(f). The right to a jury trial is a procedural right. There is nothing within s. 130(1)(a) that denies someone the right to a jury trial, even if the system of military tribunals as it currently exists does not provide for a mechanism for trial by jury.

66. If s. 130(1)(a) offences, or some sub-category of them, are not offences under military law, then a right to a jury trial for those offences carrying a maximum punishment of five years or more imprisonment exists. Unless and until a mechanism is included into the *NDA* to provide for a right to trial by jury, a court martial for such offences would violate s. 11(f) of the *Charter*, but not the offence provision itself. There would be no need to declare s. 130(1)(a) of no force or effect.

C. THE CROWN DOES NOT RELY ON s. 1 OF THE *CHARTER*

67. If this Court reaches this stage of the analysis, then the Crown would concede that, to the extent s. 130(1)(a) breached s. 11(f), it could not be saved by s. 1 of the *Charter*.

D. THE PRINCIPLE OF *STARE DECISIS* WAS BREACHED BY THE MAJORITY'S DECISION IN *BEAUDRY*

68. Although it is unnecessary for the resolution of the constitutional question now before the Court, given the *Beaudry* majority's disregard for the conclusions of its own Court's rulings in *Royes* and *Déry*, the Crown asks this Court to consider whether the principle of *stare decisis* was breached by the majority's decision in *Beaudry*.

69. Courts of appeal are generally bound to follow their own previous precedents as a matter of *stare decisis*.[105] This general principle is of fundamental importance to the proper functioning of a common law system.[106] It promotes certainty and stability in the law.[107] If courts of appeal were free to reconsider any of their previous decisions at any time, there would be significant demand on the courts to confirm their decisions in each and every case. This would increase the burden on the court and affect the ability of lower courts to rely on those decisions, all to the ultimate detriment of the administration of justice.[108]

70. However, a court of appeal must also retain the authority to revisit its earlier decisions.[109] Stability in the law cannot require a court to perpetuate injustice through rigid adherence to the principle of *stare decisis*.[110] Different courts achieve the balance between correctness and certainty in different ways. Some courts have created formalised rules of practice for the

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[105] See e.g. *R. v. Arcand*, 2010 ABCA 363 at paras. 186, 382 [*Arcand*].
[106] *Miller v. Canada (A.G.)*, 2002 FCA 370 at para. 8 [*Miller*].
[107] See e.g. *R. v. Lee*, 2012 ABCA 17 at para. 74.
[108] *Arcand*, *supra* note 105 at paras. 185, 380-81. See also *David Polowin Real Estate Ltd. v. Dominion of Canada General Insurance Co.* (2005), 76 O.R. (3d) 161 at para. 120 (C.A.) [*David Polowin*]; *Thomson v. Nova Scotia (Worker's Compensation Appeal Tribunal)*, 2002 NSCA 58 at para. 7 [*Thomson*].
[109] *Thomson*, *ibid*. at para. 8.
[110] *David Polowin*, *supra* note 108 at paras. 121-22.

reconsideration of previous decisions, while others have not adopted a particular practice.[111] Some courts apply a strict threshold before considering whether to overrule a previous judgement, while others apply a wide range of criteria in making such a determination.[112]

71. All courts of appeal start from the basic premise that the previous decisions of that court ought to be followed unless there are exceptional and compelling circumstances that require them to revisit their earlier decision. In *R. v. Hayden*, a majority of the Alberta C.A. explained the dangers associated with continually reconsidering the correctness of past decisions:

> The Alberta Court of Appeal (when at full strength) has 18 Justices of Appeal. It is not typical that all 18 will agree on all questions of law or fact. The chance that two will disagree with the other 16 is considerable. If there can be repeated motions to reconsider the correctness of the same recent precedent of the Alberta Court of Appeal, then sooner or later two Justices of Appeal who disagree with that precedent will chance sit upon one of the panels which hears one of the motions for leave to reconsider. So if repeated motions to reconsider the correctness of the same precedent are permitted, it would be almost negligent for any counsel faced with a precedent tending against him not to seek leave to reconsider it. Such a motion is cheap. If the litigant has Legal Aid, it is free.
>
> There is an extremely weighty reason not to entertain repeated motions to reconsider the same previous precedent. The public and the Bar need certainty to run their affairs. To upset previous precedents (with leave) undermines certainty. To allow repeated motions for the Court to reconsider the same precedent would completely eliminate predictability. To upset a precedent makes a victim of the lawyers and public who have in the meantime settled disputes relying on it. That is also true of those charged with offences and those who work as police and prosecutors.[113]

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[111] For example, the Alberta Court of Appeal has a formalised process incorporated into their practice directives, while Ontario does not appear to have a specific procedure (although they frequently hear reconsideration cases with a five-member panel).

[112] The Federal Court of Appeal appears to have the strictest threshold for reconsideration while Ontario has adopted a balancing of broad factors.

[113] 1997 ABCA 259 at paras. 13-14.

72. The CMAC does not have a formal rule of practice for the reconsideration of its previous decisions, nor does it have a process for sitting as a five-member panel.[114] In two cases prior to the *Royes-Déry-Beaudry* trilogy, the CMAC held that it was bound to follow a prior recent decision. In *R. v. Larouche*, the CMAC indicated that "according to the rules of collegiality in a Court of Appeal" it was bound by the former decision of the Court.[115] In *R. v. Vezina*, the CMAC held that it was bound by a previous decision absent "manifest error".[116] The Court did not indicate the source for its determination of this threshold.

73. The Federal Court of Appeal (FCA) applies the threshold of manifest error in deciding whether to overrule a previous decision.[117] A decision must be manifestly wrong in the sense that the Court overlooked a relevant statutory provision, or a binding precedent.[118] The FCA will also reconsider a previous ruling in accordance with the *Bernard* principles.[119] In *R. v. Bernard*, Dickson C.J.C. considered four non-exhaustive factors that could warrant overruling a previous decision of the SCC.[120] Those factors were: the effect of the advent of the *Charter*; the attenuation of the legal principles by subsequent case law; uncertainty in the law; and, the establishment of a rule more favourable to the accused.

74. The FCA is, of course, bound by the decisions of the SCC and as such, the Court recognises that it is bound to refuse to follow its own previous decisions, which although not expressly overruled, cannot in its opinion stand with a decision of the SCC.[121] However, where a previous decision of the FCA has interpreted the effect of such SCC decisions, the Court is then

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[114] Section 235(2) of the *NDA* states that every appeal shall be heard by three judges of the Court Martial Appeal Court sitting together.
[115] *R. v. Larouche*, 2014 CMAC 6 at para. 121.
[116] *R. v. Vezina*, 2014 CMAC 3 at paras. 12-15.
[117] *Miller*, *supra* note 106 at para. 10. This threshold was applied most recently in *Containerwest Manufacturing Ltd. v. Canada (President of Border Services Agency)*, 2016 FCA 110 at para. 12.
[118] *Miller*, *ibid*.
[119] *Ibid*. at para. 18.
[120] *R. v. Bernard*, [1988] 2 S.C.R. 833 at 849-61 (Dickson C.J.C. writing in dissent, however his analysis was subsequently adopted by the Court in *R. v. Chaulk*, [1990] 3 S.C.R. 1303 at 1352-53).
[121] *eBay Canada Ltd. v. M.N.R.*, 2008 FCA 348 at paras. 58-59 [*eBay*].

bound by that interpretation in accordance with the same principles which apply to its other previous decisions.[122]

75. *Stare decisis* applies equally to decisions interpreting constitutional principles. Clearly, lower courts are bound by higher court rulings regarding constitutional law. Stability and certainty are equally important principles in constitutional law. As the FCA stated in *eBay*:

> [A] determination by this Court of the legal effect of a Supreme Court decision is as subject to the general principle set out in *Miller* as a decision by this Court on any other question of law. It is clear that that general principle does not depend on the importance of the particular legal rule at issue, because it was applied in *Miller* to a prior decision of the Court on a question of constitutional law and the Constitution is the supreme law of the land.[123]

76. In *Miller*, the FCA applied the principle of *stare decisis* to a previous decision on a *Charter* right:

> Counsel suggested that because *Sollbach* was a *Charter* decision, it may more readily be overruled than a non-*Charter* decision. However, counsel have not demonstrated, to our satisfaction, that there is any special reason for treating *Charter* decisions differently from others. We do not say that, if intervening *Charter* decisions attenuated the decision alleged to be incorrect or if, over a period of time or due to an event, Canadian values changed from those prevailing at the time of the original *Charter* decision, there might not be grounds for overruling that decision. However, those considerations do not apply here.
>
> We conclude that, even if *Sollbach* was wrongly decided, and we do not say that it was, we have not been persuaded that there are compelling reasons to justify our departing from it.[124]

77. In *Déry*, the CMAC applied the principle of *stare decisis* to the Court's previous decision in *Royes*. Although the majority expressed their disagreement with the reasons in *Royes*, the panel was unanimous that the *Royes* decision was a "fully reasoned treatment of the issue by a unanimous bench".[125]

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[122] *Ibid*. See also, *Arcand*, *supra* note 105 at paras. 191, 386.
[123] *Supra* note 121.
[124] *Miller*, *supra* note 106 at paras. 22-23.
[125] *Déry*, *supra* note 12 at para. 96.

78. The majority reasons in *Beaudry*, on the other hand, completely disregard the principle. The majority express no reason why the unanimous Court in *Déry* was manifestly wrong when it concluded that *Royes* was binding. The majority simply disagreed with those reasons, just as they disagreed with the majority reasons in *Déry* regarding military nexus.

PART IV – SUBMISSIONS AS TO COSTS

79. The Crown does not seek costs in these cases.

PART V – ORDER SOUGHT

80. The Crown asks this Honourable Court to declare that an offence under paragraph 130(1)(a) of the *NDA* is "an offence under military law" within the meaning of s. 11(f) of the *Charter* and, as such, that paragraph 130(1)(a) of the *NDA* does not violate s. 11(f).

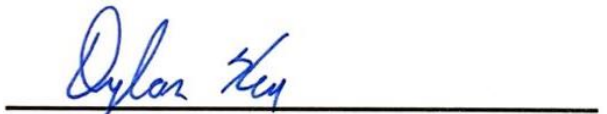
81. The Crown further requests that this Court dismiss the appeal in *R. v. Stillman et al.*, grant the appeal in *R. v. Beaudry*, and confirm his conviction at trial.

PART VI – SUBMISSIONS ON CASE SENSITIVITY

82. The military judges in the cases of *R. v. Thibault*, *R. v. Wilks*, and *R. v. Beaudry* ordered publication bans on information tending to identify the victims in those cases. No information that would be subject to the publication bans has been included in the submissions of the Crown. These publication bans should not impact this Court's reasons on the issues under appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Ottawa, Ontario, this 8th day of February 2019.



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