



SUPREME COURT OF CANADA

CITATION: R. v. Stillman, 2019 SCC 40

APPEAL HEARD: March 26, 2019
JUDGMENT RENDERED: July 26, 2019
DOCKETS: 37701, 38308

BETWEEN:

Master Corporal C.J. Stillman
Appellant

and

Her Majesty The Queen
Respondent

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

Canada (Minister of National Defence)

Respondent

AND BETWEEN:

Corporal A.J.R. Thibault
Appellant

and

Her Majesty The Queen
Respondent

AND BETWEEN:

Second Lieutenant Soudri
Appellant

and

Her Majesty The Queen
Respondent

AND BETWEEN:

K39 842 031 Petty Officer 2nd Class R.K. Blackman
Appellant

and

Her Majesty The Queen
Respondent

- and -

Advocates for the Rule of Law
Intervener

AND BETWEEN:

Her Majesty The Queen
Appellant

and

Corporal R.P. Beaudry
Respondent

- and -

Advocates for the Rule of Law

Intervener

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown and Rowe JJ.

JOINT REASONS FOR JUDGMENT: Moldaver and Brown JJ. (Wagner C.J. and Abella and Côté JJ. concurring)
(paras. 1 to 114)

JOINT DISSENTING REASONS: Karakatsanis and Rowe JJ.
(paras. 115 to 195)

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2019 SCC 40

File Nos.: 37701, 38308.

2019: March 26; 2019: July 26.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown and Rowe JJ.

ON APPEAL FROM THE COURT MARTIAL APPEAL COURT OF CANADA

Constitutional law — Charter of Rights — Right to trial by jury — Military exception — Armed forces — Military offences — Accused charged with offences under s. 130(1)(a) of National Defence Act, which transforms criminal and other federal offences into service offences triable by military justice system — Accused denied jury trial based on military exception to constitutional right to trial by jury for offences where maximum punishment is imprisonment for five years or more — Whether s. 130(1)(a) of National Defence Act is inconsistent with constitutional right to trial by jury in its application to serious civil offences — Whether service offence tried under s. 130(1)(a) engages military exception such that right to trial by jury may be denied — Canadian Charter of Rights and Freedoms, s. 11(f) — National Defence Act, R.S.C. 1985, c. N-5, s. 130(1)(a).

The accused persons, each a member of the Armed Forces at the relevant time, were charged with one or more service offences under s. 130(1)(a) of the *National Defence Act* (“NDA”). Before various standing courts martial, all but one of the accused persons unsuccessfully asserted their right to a trial by jury under s. 11(f) of the *Charter*; maintained that the military exception found in that provision was not engaged in their circumstances; and claimed that, since s. 130(1)(a) brought them

within the military justice system (which does not provide for a trial by jury), it is inconsistent with their s. 11(f) right. The appeals to the Court Martial Appeal Court resulted in two conflicting judgments: the accused persons' appeals in *R. v. Déry*, 2017 CMAC 2, 391 C.R.R. (2d) 156 (“*Stillman*”), were dismissed on the basis of horizontal *stare decisis*, and the appeal in *R. v. Beaudry*, 2018 CMAC 4, 430 D.L.R. (4th) 557, was allowed, resulting in a declaration that s. 130(1)(a) is inconsistent with s. 11(f) of the *Charter* and is of no force or effect in its application to any civil offence for which the maximum sentence is imprisonment for five years or more (“serious civil offence”).

Held (Karakatsanis and Rowe JJ. dissenting): The appeals in *Stillman* should be dismissed. The appeal in *Beaudry* should be allowed, the declaration that s. 130(1)(a) of the *NDA* is of no force or effect in its application to any serious civil offence should be set aside, and the conviction restored.

Per Wagner C.J. and Abella, **Moldaver**, Côté and **Brown JJ.**: Section 130(1)(a) of the *NDA* is not inconsistent with s. 11(f) of the *Charter*. The words “an offence under military law” in s. 11(f) refer to a service offence that is validly enacted pursuant to Parliament’s power over “Militia, Military and Naval Service, and Defence” under s. 91(7) of the *Constitution Act, 1867*. The Court’s jurisprudence establishes that Parliament has validly enacted s. 130(1)(a) of the *NDA* under this head of power. It also establishes that s. 130(1)(a) is not overbroad under s. 7 of the *Charter*. Where, therefore, a serious civil offence is tried as a service offence under

s. 130(1)(a), it qualifies as “an offence under military law”, thereby engaging the military exception in s. 11(f) of the *Charter*.

Generally speaking, the same core interpretive principles that apply to rights stated in the *Charter* also apply to exceptions stated in the *Charter*. They are to be read purposively, rather than in a technical or legalistic fashion. Just as courts must take care not to overshoot the purpose of a *Charter* right by giving it an unduly generous interpretation, so too must they be careful not to undershoot the purpose of a *Charter* exception by giving it an unduly narrow interpretation. Since a *Charter* exception can be understood only if the right it qualifies is understood, courts should consider the two together.

The right to a trial by jury serves two main purposes. At the individual level, it protects the accused by giving him or her the benefit of a trial by his or her peers. Since the right is held by the accused, this individual dimension is of utmost importance. At the societal level, it provides a vehicle for public education about the criminal justice system and lends the weight of community standards to trial verdicts. Notwithstanding the significance of these twin purposes, the right to a jury trial is not absolute. Rather, s. 11(f) of the *Charter* carves out an internal exception to this right that applies to “an offence under military law tried before a military tribunal” (in French, “*une infraction relevant de la justice militaire*”).

The inclusion of this military exception in s. 11(f) shows that the *Charter* contemplates a parallel system of military justice designed to foster discipline,

efficiency, and morale in the military. Canada's military justice system has always been separate from the civilian justice system, and is designed to meet the unique needs of the military. It has evolved from a command-centric disciplinary model that provided weak procedural safeguards, to a parallel system of justice that largely mirrors the civilian justice system. The foundation of Canada's military justice system is the Code of Service Discipline ("CSD"), which is contained in Part III of the *NDA*, and includes s. 130(1)(a). It defines the standard of conduct to which military personnel are subject and provides for a set of military tribunals to discipline breaches of that standard. Section 130(1)(a) of the *NDA* transforms most ordinary civil offences that take place in Canada into service offences, thereby giving service tribunals concurrent jurisdiction over such offences when committed by a person who is subject to the CSD. This provision has appeared in the *NDA* since its enactment, and similar provisions have long existed in the United Kingdom.

While Canada's military justice system has never provided for a trial by jury, it has long provided for a trial before a General Court Martial, which consists of a judge and a military panel. The role of a military panel is unique; panel members bring military experience and integrity to the military judicial process, and provide the input of the military community responsible for discipline and efficiency. In some respects, a military panel is analogous to a jury, and over the years this has become increasingly so. Like a jury, the panel is the trier of fact, while the judge makes rulings on legal questions. Furthermore, panels are required to reach their verdicts unanimously, and it is the judge who is tasked with imposing a sentence in the event

of a guilty verdict. However, a military panel is not a jury, and important differences distinguish one from the other. There are sound reasons why the military justice system has opted for a unique military panel model, rather than a jury model. For example, the concept of “members tried by members” fosters morale within the military. Further, Canada’s military justice system operates extraterritorially, and service tribunals may have to be convened on short notice in a different part of the world. Where a trial is to be held outside Canada, it would be highly impractical, if not impossible, to convene a jury of Canadian civilians and transport them to the place of trial.

The purpose of the military exception in s. 11(f) of the *Charter* is to recognize and affirm the existence of a separate military justice system tailored to the unique needs of the military, and to preserve the historical reality that jury trials in cases governed by military law have never existed in Canada. In the specific instance of s. 11(f), the military exception restricts the right to a trial by jury by referring, at least implicitly, to a particular head of power under the *Constitution Act, 1867*, namely, Parliament’s power over the “Militia, Military and Naval Service, and Defence” under s. 91(7) of the *Constitution Act, 1867*. The text “an offence under military law” in s. 11(f) of the *Charter* refers to an offence that is validly enacted pursuant to this head of power. Therefore, there must be coherence among the division of powers analysis, the overbreadth analysis, and the meaning of “an offence under military law” in s. 11(f). The Court’s jurisprudence establishes that Parliament has validly enacted s. 130(1)(a) of the *NDA* under the authority granted to it by

s. 91(7) of the *Constitution Act, 1867*. It also establishes that s. 130(1)(a) is not overbroad under s. 7 of the *Charter*. It follows, therefore, that a serious civil offence tried as a service offence under s. 130(1)(a) qualifies as “an offence under military law” for the purposes of s. 11(f) of the *Charter*. Accordingly, it is not inconsistent with s. 11(f) of the *Charter*, as it does not deprive a person who is lawfully entitled to a jury of that right.

A serious civil offence tried as a service offence under s. 130(1)(a) qualifies as “an offence under military law” for the purposes of s. 11(f) of the *Charter* whether or not there is a heightened “military nexus” going beyond the accused’s military status. There are compelling reasons why the “military nexus” doctrine should not be resurrected. Firstly, the Court in *R. v. Moriarity*, 2015 SCC 55, [2015] 3 S.C.R. 485, identified the “military nexus” required to ground a rational connection to discipline, efficiency, and morale in the military — the accused’s military status. Secondly, a number of the offences listed in ss. 73 to 129 of the *NDA*, which the parties do not contest are “offence[s] under military law”, can be committed in the absence of a heightened “military nexus” (e.g., “stealing” under s. 114). If no heightened “military nexus” is required to preserve the status of these offences as “offence[s] under military law”, then it would be inconsistent to impose such a requirement in relation to offences under s. 130(1)(a). Thirdly, the imposition of a heightened “military nexus” requirement would risk causing military courts to engage in an unwieldy and unhelpful threshold inquiry that distracts from the merits. Fourthly, the fundamental purposes of sentencing in the military justice system differ

from those in the civilian criminal justice system. Were serious civil offences committed by persons subject to the CSD to be streamed into the civilian justice system, sentencing decisions in those cases might not truly account for the seriousness of such offences, seen in light of the purposes of discipline, efficiency, and morale. Fifthly, while military prosecutors may engage in an inquiry that resembles a “military nexus” test when assessing whether to exercise jurisdiction in a particular case, the existence of jurisdiction must be separated from the exercise of jurisdiction. Finally, these concerns are reinforced by practical considerations. Imposing a heightened “military nexus” requirement would go against the objective of responding swiftly to misconduct within the military and thereby enhancing discipline, efficiency, and morale in the military.

Per Karakatsanis and Rowe JJ. (dissenting): Based on the nature and purpose, language, and history of the jury trial right and its exception, s. 130(1)(a) of the *NDA* does not comply with s. 11(f) of the *Charter* to the extent that it denies service members the right to a jury trial for serious offences that do not have a military connection. Thus, s. 130(1)(a) falls within the scope of the military exception to the *Charter* right to a jury trial only to the extent that there is a direct connection between the circumstances of the offence and the military. Because striking down the legislative provision would go further than the *Charter* breach requires and prevent the trial of all offences by military courts designated in s. 130(1)(a), a military connection requirement should be read into s. 130(1)(a) to respect s. 11(f) of the *Charter*.

The meaning of a *Charter* right is to be understood by analyzing the purpose of the guarantee and the interests it is meant to protect. The purpose of the right is ascertained by reference to the character and larger objectives of the *Charter*, the language of the right, the historical origins of the concepts enshrined, and where applicable, the meaning and purpose of the other specific rights with which it is associated within the text of the *Charter*. The interpretation should be generous and aimed at fulfilling the guarantee and securing for individuals the full benefit of the *Charter* protection without overshooting the purpose of the right. Exceptions should not be construed more widely than is necessary to fulfil the values which support them. In order to determine whether an exception is undermining the broad purpose of the right beyond the intended scope of the exception, it is essential to consider the rationales underlying the right and the exception together. Section 11(f) is an illustration of a fundamental right to life, liberty and security of the person guaranteed in s. 7. But s. 11(f) also offers a specific protection that s. 7 does not. Legislation found constitutional with respect to s. 7 is not necessarily constitutional under s. 11, or vice versa. Thus, the finding in *Moriarity* that s. 130(1)(a) of the *NDA* did not violate s. 7 for overbreadth does not answer the question of whether the provision violates s. 11(f). The purpose of s. 11(f) is to guarantee the right to a jury trial, which protects both an individual and societal interest in trials by jury. Effect must be given to both aspects of the right. A trial before a military panel does not mirror the civilian justice system when the broader society cannot participate.

Over the past four decades, the development of a military connection test in Canada has limited military court jurisdiction to offences that are military in nature or take place in military circumstances. Military court jurisdiction has historically been subject to important limits. Initially, the types of offences that could be tried by military courts were limited to offences that were specific to the military, such as desertion, mutiny and sedition. It was generally appropriate for offences to be heard by military courts rather than civilian courts where quick and efficient justice was necessary to uphold discipline, such as when offences were committed during wartime or abroad. As the jurisdiction of military courts expanded to include civilian offences, civilian courts maintained primary jurisdiction where offences were triable in either court. Courts developed the military connection test to determine when it was appropriate to depart from the primacy of civilian court jurisdiction. That test asked whether a service member committed an offence connected to the military, having regard to the nature of the offence, the circumstances of its commission and whether the offence would tend to affect military discipline and efficiency.

The Court in *Moriarty* did not foreclose the possibility of the military connection test, and it continues to be applied in practice by military prosecutors. Determining whether there is a military connection may involve careful consideration and difficult judgment calls, but it is a necessary exercise in light of the constitutional rights at stake. Courts are better placed to make such determinations rather than leaving them to the discretion of the prosecutor. The constitutionality of a legislative provision cannot depend on the assumption that discretion will be properly exercised.

Requiring a military connection test is unlikely to result in further backlogs in civilian courts. Even if there was evidence to suggest that the military justice system suffers from fewer delays than the civilian system, the possibility of delay is not a proper basis to deny an accused their right to a jury trial.

It is the role of the courts to interpret the words expressing the military exception in s. 11(f) of the *Charter* to define the range of offences that Parliament can exclude from the right to a trial by jury. Legislative competence and overbreadth are not the only limits on Parliament's power. It is not up to Parliament to be the arbiter of constitutional rights by defining what the scope of the military exception means. Based on a purposive interpretation, the term "offence under military law" refers to an offence that is connected to the military in its nature or committed in circumstances sufficiently connected to the military that would directly affect discipline, efficiency and morale.

Where an accused is charged with an offence that falls under s. 130(1)(a) of the *NDA* and the accused challenges the military court's jurisdiction on the basis that it would deny their right to a jury trial guaranteed in s. 11(f), the court should ask whether there is a military connection. Has a service member committed an offence in circumstances that are so connected to the military that it would have a direct effect on military discipline, efficiency and morale? To determine whether there is a sufficiently direct connection, a court should consider whether the offence was committed while the accused was on duty, on military property or using military

property. If so, a court may infer that the circumstances of the offence have a direct impact on military efficiency, discipline and morale. The prosecution may point to other circumstances of the offence to show such an impact.

Section 130(1)(a) of the *NDA* cannot be saved by s. 1 of the *Charter*. The provision is not carefully tailored to its objectives, as it impairs the right to a jury trial more than is reasonably necessary. The objective of maintaining discipline, efficiency and morale in the Armed Forces is sufficiently pressing and substantial, but it is not obvious that it requires trying ordinary offences in military courts. A minimally impairing alternative would have been to try penal offences by military panel only where the circumstances in which it was committed are directly connected to the military. The appropriate remedy is to read a military connection requirement into s. 130(1)(a), as it immediately reconciles the legislation in question with the requirements of the *Charter*.

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By Moldaver and Brown JJ.

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C.C.C. (3d) 498; *R. v. Turpin*, [1989] 1 S.C.R. 1296; *R. v. Sherratt*, [1991] 1 S.C.R. 509; *R. v. Kokopenace*, 2015 SCC 28, [2015] 2 S.C.R. 398; *R. v. Mac*, 2002 SCC 24, [2002] 1 S.C.R. 856; *R. v. Lunn* (1993), 5 C.M.A.R. 157; *R. v. Brown* (1995), 5 C.M.A.R. 280; *R. v. Nystrom*, 2005 CMAC 7; *O'Callahan v. Parker* (1969), 395 U.S. 258; *Solorio v. United States* (1987), 483 U.S. 435; *R. v. MacDonald* (1983), 4 C.M.A.R. 277; *Ionson v. The Queen* (1987), 4 C.M.A.R. 433; *Ryan v. The Queen* (1987), 4 C.M.A.R. 563; *R. v. Moriarity*, 2014 CMAC 1, 455 N.R. 59; *R. v. Larouche*, 2014 CMAC 6, 460 N.R. 248; *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134; *R. v. CIP Inc.*, [1992] 1 S.C.R. 843; *MacKay v. Rippon*, [1978] 1 F.C. 233; *R. v. Ryan*, 2018 CM 2033; *R. v. Reddick* (1996), 112 C.C.C. (3d) 491.

By Karakatsanis and Rowe JJ. (dissenting)

MacKay v. The Queen, [1980] 2 S.C.R. 370; *R. v. Généreux*, [1992] 1 S.C.R. 259; *R. v. Moriarity*, 2015 SCC 55, [2015] 3 S.C.R. 485; *R. v. Turpin*, [1989] 1 S.C.R. 1296; *R. v. Lee*, [1989] 2 S.C.R. 1384; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161; *R. v. Kalanj*, [1989] 1 S.C.R. 1594; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *R. v. Lyons*, [1987] 2 S.C.R. 309; *R. v. CIP Inc.*, [1992] 1 S.C.R. 843; *R. v. Smith (Edward Dewey)*, [1987] 1 S.C.R. 1045; *R. v. Sherratt*, [1991] 1 S.C.R. 509; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257; *Canada (Attorney General) v. PHS Community Services Society*,

2011 SCC 44, [2011] 3 S.C.R. 134; *Amax Potash Ltd. v. Government of Saskatchewan*, [1977] 2 S.C.R. 576; *Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21, [2014] 1 S.C.R. 433; *R. v. Larouche*, 2014 CMAC 6, 460 N.R. 23; *Grant v. Gould* (1792), 2 H. Bl. 69, 126 E.R. 434; *R. v. Macdonald*, 4 C.M.A.R. 277; *R. v. MacEachern* (1985), 4 C.M.A.R. 447; *Ryan v. The Queen* (1987), 4 C.M.A.R. 563; *Ionson v. The Queen* (1987), 4 C.M.A.R. 433, aff'd [1989] 2 S.C.R. 1073; *R. v. Brown* (1995), 5 C.M.A.R. 280; *O'Callahan v. Parker* (1969), 395 U.S. 258; *Relford v. Commandant* (1971), 401 U.S. 355; *R. v. Catudal* (1985), 4 C.M.A.R. 338; *Solorio v. United States* (1987), 483 U.S. 435; *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773; *R. v. Hannah*, 2013 CM 2011; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Re Colonel Aird*, [2004] HCA 44, 209 A.L.R. 311; *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *Schachter v. Canada*, [1992] 2 S.C.R. 67.

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APPEALS from a judgment of the Court Martial Appeal Court of Canada (Bell C.J. and Cournoyer and Gleason JJ.A.), 2017 CMAC 2, 391 C.R.R. (2d) 156, [2017] C.M.A.J. No. 2 (QL), 2017 CarswellNat 2522 (WL Can.), affirming a decision of Perron M.J., 2013 CM 4028, 2013 CarswellNat 11404 (WL Can.), decisions of D'Auteuil M.J., 2013 CM 3032, 2013 CarswellNat 6527 (WL Can.); 2014 CM 3024, 2014 CarswellNat 8526 (WL Can.); 2015 CM 3007, 2015 CarswellNat 5821 (WL Can.); and 2015 CM 3009, 2015 CarswellNat 4878 (WL Can.), and a decision of Dutil M.J., rendered on August 22, 2014, and setting aside a decision of Dutil M.J.,

2015 CM 1001, 2015 CarswellNat 146 (WL Can.). Appeals dismissed, Karakatsanis and Rowe JJ. dissenting.

APPEAL from a judgment of the Court Martial Appeal Court of Canada (Bell C.J. and Gagné and Ouellette JJ.A.), 2018 CMAC 4, 430 D.L.R. (4th) 557, [2018] C.M.A.J. No. 4 (QL), 2018 CarswellNat 5345 (WL Can.), setting aside a decision of Pelletier M.J., 2016 CM 4010, 2016 CarswellNat 3501 (WL Can.). Appeal allowed, Karakatsanis and Rowe JJ. dissenting in part.

Jean-Bruno Cloutier and *Mark Létourneau*, for the appellants (37701) and the respondent (38308).

Bruce W. MacGregor, Q.C., Dylan Kerr and *Anthony M. Tamburro*, for the respondents (37701) and the appellant (38308).

Adam Goldenberg, Peter Grbac and *Asher Honickman*, for the intervener Advocates for the Rule of Law (37701 and 38308).

The judgment of Wagner C.J. and Abella, Moldaver, Côté and Brown JJ. was delivered by

MOLDAVER AND BROWN JJ. —

I. Overview

[1] Section 11(f) of the *Canadian Charter of Rights and Freedoms* guarantees every person charged with an offence carrying a punishment of at least five years' imprisonment the right to the benefit of a jury trial, "except in the case of an offence under military law tried before a military tribunal" (in French, "*sauf s'il s'agit d'une infraction relevant de la justice militaire*"). In these appeals, we must determine the scope of this "military exception". More particularly, we must decide whether an offence under s. 130(1)(a) of the *National Defence Act*, R.S.C. 1985, c. N-5 ("*NDA*") falls within its scope.

[2] Since the earliest days of organized military forces in post-Confederation Canada, a separate system of military justice has operated parallel to the civilian justice system. Tailored to the unique needs of the Armed Forces, this system's processes "assure the maintenance of discipline, efficiency and morale of the military" (*R. v. Moriarity*, 2015 SCC 55, [2015] 3 S.C.R. 485, at para. 46). Its foundation is the Code of Service Discipline ("CSD"), contained in Part III of the *NDA*. The CSD, which is "an essential ingredient of service life" (*MacKay v. The Queen*, [1980] 2 S.C.R. 370, at p. 400), establishes the core features of the military justice system, including the categories of persons subject to the CSD, the "service offences" (as defined in s. 2 *NDA*) which contravene the CSD, the jurisdiction of military courts (or "service tribunals", as defined in s. 2 *NDA*) to try these offences, and the processes for challenging their decisions.

[3] Section 130(1)(a) creates, by way of incorporation, service offences that add to those already contained in the CSD. It establishes, as a service offence, any “act or omission that takes place in Canada and is punishable under . . . the *Criminal Code* or any other Act of Parliament”. This transforms criminal and other federal offences (i.e., ordinary civil offences) that take place in Canada into service offences, thereby giving service tribunals jurisdiction (concurrent with civilian courts)¹ over such offences when committed by a person who is subject to the CSD.

[4] This Court has considered s. 130(1)(a) on several prior occasions. Nearly four decades ago in *MacKay*, the Court confirmed that the enactment of a provision transforming ordinary civil offences into service offences is a valid exercise of Parliament’s power over “Militia, Military and Naval Service, and Defence” under s. 91(7) of the *Constitution Act, 1867* (see p. 397). That conclusion is not challenged here. Twelve years later in *R. v. Généreux*, [1992] 1 S.C.R. 259, the Court affirmed “[t]he existence of a parallel system of military law and tribunals, for the purpose of enforcing discipline in the military” (p. 295). This observation was made in the context of a challenge to the court martial system under s. 11(d) of the *Charter* — which guarantees the right to be tried by an independent and impartial tribunal — brought by a member of the Armed Forces charged under what is now s. 130(1)(a), among others. Most recently in *Moriarity*, this Court held that s. 130(1)(a) is not overbroad under s. 7 of the *Charter* (para. 56), even absent a “direct link” between the circumstances of the alleged offence and military duties (see paras. 35-36). This

¹ Ordinary civil offences may generally be tried in either the military justice system or the civilian justice system. The factors considered by prosecutors in streaming cases into one system or the other are outlined at paras. 102-3 of these reasons.

conclusion stemmed from the recognition that “[c]riminal 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” in the military (para. 52).

[5] The accused persons now before this Court, all of whom were members of the Armed Forces at the relevant time, were each charged with one or more service offences under s. 130(1)(a). The underlying offences include sexual assault contrary to s. 271 of the *Criminal Code*, R.S.C. 1985, c. C-46, forgery contrary to s. 367 of the *Criminal Code*, and other serious civil offences carrying a maximum punishment of at least five years’ imprisonment. Before various standing courts martial, the accused persons asserted their right to a trial by jury under s. 11(f) of the *Charter*; maintained that the military exception was not engaged in their circumstances; and claimed that, since s. 130(1)(a) brought them within the military justice system (which does not provide for a trial by jury), it is inconsistent with their s. 11(f) right. All but one of those challenges failed, and appeals ensued. While the accused persons’ appeals in *R. v. Déry*, 2017 CMAC 2, 391 C.R.R. (2d) 156 (“*Stillman*”)², were dismissed, the appeal in *R. v. Beaudry*, 2018 CMAC 4, 430 D.L.R. (4th) 557, was allowed, resulting in a declaration that s. 130(1)(a) is inconsistent with s. 11(f) of the *Charter* and is of no force or effect in its application to any civil offence for which the maximum sentence is five years or more (hereinafter, “serious civil offence”).

² As Private Déry is no longer involved in the litigation, we will refer to this decision as *Stillman*.

[6] Before this Court, the accused persons submit that the only “offence[s] under military law” captured by the military exception in s. 11(f) are those listed in ss. 73-129 of the *NDA*, which include spying for the enemy (s. 78), mutiny with violence (s. 79), insubordination (s. 85), and other “purely” military offences. In other words, they say that only “special standards of military discipline”, to which ordinary citizens are not subject, constitute “military law”.

[7] The Crown, in contrast, submits that any service offence that is validly enacted pursuant to Parliament’s authority under s. 91(7) of the *Constitution Act, 1867*, qualifies as “an offence under military law” for the purposes of s. 11(f). It maintains that a service offence under s. 130(1)(a) is no less “an offence under military law” than spying for the enemy, mutiny, insubordination, or any other service offence set out in the CSD.

[8] Finally, and while neither the accused persons nor the Crown urges this Court to impose a “military nexus” requirement, that was the approach endorsed in *obiter* by the majority in *Stillman*, and as such it represents a third alternative to be considered.

[9] For reasons that follow, we conclude that s. 130(1)(a) of the *NDA* is not inconsistent with s. 11(f) of the *Charter*. In our view, the words “an offence under military law” in s. 11(f) refer to a service offence that is validly enacted pursuant to Parliament’s power over “Militia, Military and Naval Service, and Defence” under s. 91(7) of the *Constitution Act, 1867*. As this Court’s jurisprudence confirms, s.

130(1)(a) is rooted in this head of power. Where, therefore, a serious civil offence is tried as a service offence under s. 130(1)(a), it qualifies as “an offence under military law”, thereby engaging the military exception in s. 11(f).

[10] Accordingly, we would dismiss the appeals in *Stillman* and allow the appeal in *Beaudry*. The declaration in *Beaudry* that s. 130(1)(a) is of no force or effect in its application to any civil offence for which the maximum sentence is imprisonment of five years or more is set aside, and the conviction is restored.

II. Charter and Statutory Provision

[11] The two provisions at the heart of these appeals are s. 11(f) of the *Charter* and s. 130(1)(a) of the *NDA*:

Canadian Charter of Rights and Freedoms

11. Any person charged with an offence has the right

...

(f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

National Defence Act

PART III

Code of Service Discipline

...

Offences Punishable by Ordinary Law

Service trial of civil offences

130 (1) An act or omission

(a) that takes place in Canada and is punishable under Part VII, the Criminal Code or any other Act of Parliament, or

...

is an offence under this Division and every person convicted thereof is liable to suffer punishment as provided in subsection (2).

III. Decisions Below

A. *Standing Courts Martial*

[12] The decisions of the various standing courts martial have already been recounted above. In brief, all but one of the accused persons' s. 11(f) challenges failed, leading to appeals to the Court Martial Appeal Court ("CMAC").

B. *R. v. Déry, 2017 CMAC 2 (Bell C.J. Concurring, Cournoyer and Gleason J.J.A.)*

[13] In *Stillman*, the CMAC held that it was bound by horizontal *stare decisis* to follow its previous decision in *R. v. Royes*, 2016 CMAC 1, 338 C.C.C. (3d) 183, where the court concluded that s. 130(1)(a) is not inconsistent with s. 11(f) of the *Charter*. In *Royes*, the court reasoned that the acts and omissions referred to in s. 130(1)(a) are service offences and that service offences are offences under military law such that the military exception in s. 11(f) is engaged. In reaching this conclusion,

the court relied heavily on this Court’s decision in *Moriarity*, stating that although *Moriarity* did not expressly consider s. 11(f), it nonetheless “dictates finding that paragraph 130(1)(a) of the *NDA*, interpreted without a military nexus requirement, does not violate section 11(f) of the *Charter*” (para. 60).

[14] In *obiter dicta*, however, the majority in *Stillman* added that, in its view, *Royes* was wrongly decided. It observed that the scope of the military exception in s. 11(f) of the *Charter* was not before the Court in *Moriarity*, and that ss. 7 and 11(f) entail mutually distinct analyses. Further, citing the need to give *Charter* rights a generous and purposive interpretation, the majority reasoned that reading in a “military nexus” requirement into s. 130(1)(a) would provide the fullest measure of protection afforded by s. 11(f). It also cited an “emerging international trend [towards] restricting the jurisdiction of military tribunals” (para. 65). Finally, it stressed that the meaning of “an offence under military law” should be informed by the *Charter* and *Charter* values, rather than by Parliament’s chosen definition of “military law”, which may change from time to time. In sum, the majority took the view that it is only by reading in a “military nexus” requirement that s. 130(1)(a) can pass constitutional muster under s. 11(f).

[15] In his concurring reasons, Bell C.J. agreed with the majority that the court was bound by *Royes*, but disagreed with the majority’s view that *Royes* was incorrectly decided.

C. *R. v. Beaudry*, 2018 CMAC 4 (Bell C.J. Dissenting, Gagné and Ouellette J.J.A.)

[16] In *Beaudry*, the majority held that it was not bound by *Royes* and *Stillman*, stating that horizontal *stare decisis* “will not be applied too strictly” where a citizen’s freedom is concerned (para. 19). The majority was fortified in this view by the irreconcilability of *Royes* and the *obiter* discussion in *Stillman*, the resulting uncertainty in the law, and the fact that this Court had already granted leave in *Stillman*.

[17] Having determined that it was not bound by *Royes* and *Stillman*, the majority considered the scope of the military exception in s. 11(f) of the *Charter* afresh, concluding that the only offences that qualify as “offence[s] under military law” for the purposes of s. 11(f) are those listed in ss. 73-129 of the *NDA*. Accordingly, the majority held that s. 130(1)(a) is inconsistent with s. 11(f) because it deprives service members of the right to a trial by jury for serious civil offences. It further held that this inconsistency could not be justified under s. 1 of the *Charter*, and declared s. 130(1)(a) to be of no force or effect in its application to any serious civil offence.

[18] In dissent, Bell C.J. maintained that the court was bound by *Royes* and *Stillman*, such that s. 130(1)(a) is not inconsistent with s. 11(f) of the *Charter*.

IV. Issue

[19] The issue on appeal is whether s. 130(1)(a) of the *NDA* is inconsistent with s. 11(f) of the *Charter*. This turns on whether a serious civil offence tried as a

service offence under s. 130(1)(a) qualifies as “an offence under military law”, thereby engaging the military exception in s. 11(f).

V. Analysis

[20] To resolve the issue raised on these appeals, we will first examine the right to a trial by jury under s. 11(f) of the *Charter*, then turn to consider the military exception. As we will explain, the inclusion of a military exception shows that s. 11(f) contemplates a parallel system of military justice designed to foster discipline, efficiency, and morale in the military. To understand this parallel system and why it is the subject of a discrete exception in s. 11(f), we trace its evolution over time from a command-centric model of discipline to a full partner in administering justice alongside the civilian justice system. This in turn bears on the meaning of the words “an offence under military law” in s. 11(f) which, as we will also explain, captures any service offence validly enacted pursuant to Parliament’s power under s. 91(7) of the *Constitution Act, 1867*.

A. *Section 11(f) of the Charter*

(1) Principles of Constitutional Interpretation

[21] A *Charter* right must be understood “in the light of the interests it was meant to protect” (*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344; see also *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 157), accounting for “the

character and the larger objects of the *Charter* itself”, “the language chosen to articulate the specific right or freedom”, “the historical origins of the concepts enshrined” and, where applicable, “the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*” (*Big M*, at p. 344). It follows that *Charter* rights are to be interpreted “generous[ly]”, aiming to “fulfi[l] the purpose of the guarantee and securing for individuals the full benefit of the *Charter*’s protection” (*ibid.*). At the same time, it is important not to overshoot the actual purpose of the right or freedom in question (*ibid.*). As Professor Hogg observes:

In the case of most rights . . . the widest possible reading of the right, which is the most generous interpretation, will “overshoot” the purpose of the right, by including behaviour that is outside the purpose and unworthy of constitutional protection. The effect of a purposive approach is normally going to be to narrow the scope of the right. Generosity is a helpful idea as long as it is subordinate to purpose. [Footnote omitted.]

(*Constitutional Law of Canada* (5th ed. Supp.), at p. 36-30)

[22] Generally speaking, the same core interpretive principles that apply to *rights* stated in the *Charter* also apply to *exceptions* stated in the *Charter*. They are to be read purposively, rather than in a technical or legalistic fashion. And, just as courts must take care not to “overshoot” the purpose of a *Charter right* by giving it an unduly generous interpretation, so too must they be careful not to “undershoot” the purpose of a *Charter exception* by giving it an unduly narrow interpretation. But since a *Charter* exception can be understood only if the right it qualifies is understood, the court should consider the two together.

[23] Bearing these principles in mind, we turn first to consider the right to a trial by jury under s. 11(f) of the *Charter* before moving to the military exception.

(2) The Right to a Trial by Jury

[24] Jury trials in English courts can be traced back more than 900 years to the time of William the Conqueror (see *R. v. Bryant* (1984), 48 O.R. (2d) 732 (C.A.), at p. 742, citing W. S. Holdsworth, *A History of English Law* (5th ed. 1931), vol. 1, at pp. 312-50). The jury “protected accused persons in times past when the monarch could exert undue influence on proceedings being conducted in his own courts” (*R. v. Lee*, [1989] 2 S.C.R. 1384, at p. 1401) and provided “a mean[s] of counterbalancing the broad powers of the King and later the State” (*R. v. Trépanier*, 2008 CMAC 3, 232 C.C.C. (3d) 498, at para. 75).

[25] The modern-day understanding of the nature and importance of the right to a trial by jury was explained in *R. v. Turpin*, [1989] 1 S.C.R. 1296, where Wilson J. wrote:

The right of the accused to receive a trial before a judge and jury of his or her peers is an important right which individuals have historically enjoyed in the common law world. The jury has often been praised as a bulwark of individual liberty. Sir William Blackstone, for example, called the jury “the glory of the English law” and “the most transcendent privilege which any subject can enjoy”: Blackstone, *Commentaries on the Laws of England* (8th ed. 1778), vol. 3, at p. 379.

The jury serves collective or social interests in addition to protecting the individual. The jury advances social purposes primarily by acting as a vehicle of public education and lending the weight of community

standards to trial verdicts. Sir James Stephen underlined the collective interests served by trial by jury when he stated:

. . . trial by jury interests large numbers of people in the administration of justice and makes them responsible for it. It is difficult to over-estimate the importance of this. It gives a degree of power and of popularity to the administration of justice which could hardly be derived from any other source.

(J. Stephen, *A History of the Criminal Law of England* (1883), vol. I, at p. 573.)

In both its study paper (*The Jury in Criminal Trials* (1980), at pp. 5-17) and in its report to Parliament (*The Jury* (1982), at p. 5) the Law Reform Commission of Canada recognized that the jury functions both as a protection for the accused and as a public institution which benefits society in its educative and legitimizing roles.

(pp. 1309-10)

[26] Not long after *Turpin* was decided, L'Heureux-Dubé J. described the role and significance of the jury as an institution in *R. v. Sherratt*, [1991] 1 S.C.R. 509:

The jury, through its collective decision making, is an excellent fact finder; due to its representative character, it acts as the conscience of the community; the jury can act as the final bulwark against oppressive laws or their enforcement; it provides a means whereby the public increases its knowledge of the criminal justice system and it increases, through the involvement of the public, societal trust in the system as a whole.

(pp. 523-24)

[27] More recently, the majority in *R. v. Kokopenace*, 2015 SCC 28, [2015] 2 S.C.R. 398, emphasized that “[t]he right to be tried by a jury of one’s peers is one of the cornerstones of our criminal justice system” (para. 1). This is illustrated by the

fact that under s. 471 of the *Criminal Code*, every person charged with an indictable offence shall be tried by a judge and jury unless otherwise stipulated by law.

[28] This brief review reveals that the right to a jury serves two main purposes. First, at the individual level, it protects the accused by giving him or her the benefit of a trial by his or her peers. Since the right is held by the accused, this individual dimension is of utmost importance. Secondly, at the societal level, it provides a vehicle for public education about the criminal justice system and lends the weight of community standards to trial verdicts.

[29] Notwithstanding the significance of these twin purposes, the right to a trial by jury is not absolute. Rather, s. 11(f) carves out an internal exception to this right, which distinguishes it from most other *Charter* rights.

(3) The Military Exception

[30] Section 11(f) carves out an exception to the right to a trial by jury that applies to “an offence under military law tried before a military tribunal” (in French, “*une infraction relevant de la justice militaire*”). This exception “contemplate[s] the existence of a system of military tribunals with jurisdiction over cases governed by military law” (*Généreux*, at p. 296).

(a) *The Shared Meaning of the English and French Text*

[31] A preliminary interpretive issue arose in *Beaudry*. The English text in s. 11(f) appears to differ in substance from the French. The English version refers to two separate components: for the exception to apply, the offence must be both (1) “under military law” and (2) “tried before a military tribunal”. For its part, the French version refers to a single component: “*une infraction relevant de la justice militaire*” (an offence under the military justice system).

[32] As Bastarache J. stated in *R. v. Mac*, 2002 SCC 24, [2002] 1 S.C.R. 856, “statutory interpretation of bilingual enactments begins with a search for the shared meaning between the two versions” (para. 5, citing P.-A. Côté, *Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 327). The question, then, is as follows: What is the shared meaning between the English and French versions of the military exception in s. 11(f)?

[33] In our view, the English and French texts share a single meaning. Whereas the English version refers to substantive law (“military law”) and forum (“military tribunal”) independently, the French version simply uses the more compendious “*relevant de la justice militaire*” (under the military justice system), which encompasses both substantive law and forum. These two elements should be read together as denoting the military justice system *as a whole*, as the French text makes clear.

[34] In determining the scope of the military exception, we will first turn to the system of military justice contemplated by this exception.

B. *Canada's Military Justice System*

(1) The Existence and Purpose of Canada's Parallel System of Military Justice

[35] Canada's military justice system has always been separate from the civilian justice system. "[D]eeply entrenched in our history" (*Généreux*, at p. 295), its purpose is to provide processes that will "assure the maintenance of discipline, efficiency and morale of the military" (*Moriarity*, at para. 46; see also *Généreux*, at p. 293).

[36] The military justice system is therefore designed to meet the unique needs of the military with respect to discipline, efficiency, and morale. As Lamer C.J. wrote in *Généreux*, "[t]o maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct" (p. 293). Further, "[r]ecourse to the ordinary criminal courts would, as a general rule, be inadequate to serve the particular disciplinary needs of the military" (*ibid.*). And, while these purposes of the military justice system have remained consistent over the years, the complexion of the system itself has changed significantly over time in response to developments in law, military life, and society, more broadly.

(2) Early History

[37] Canadian military law traces its roots to the United Kingdom (see Office of the Judge Advocate General, *Draft Internal Report — Court Martial Comprehensive Review*, January 17, 2018 (online) (“*CMCR Interim Report*”), at p. 31, citing R. A. MacDonald, “The Trail of Discipline: The Historical Roots of Canadian Military Law” (1985), 1 *JAG Journal* 1, at pp. 6-7). “Shortly after Confederation, the Canadian Army was first organized under the *Militia Act* of 1868”, which served to incorporate the existing U.K. *Army Act* (see *CMCR Interim Report*, at p. 31, citing J. B. Fay, “Canadian Military Criminal Law: An Examination of Military Justice” (1975), 23 *Chitty’s L.J.* 120, at pp. 121-22). The Royal Canadian Navy and the Royal Canadian Air Force followed suit, drawing upon existing U.K. statutes for their respective disciplinary codes (*ibid.*).

[38] Until the *NDA* was enacted in 1950, control over military discipline was concentrated in the chain of command, consistent with the prevailing attitudes of the time that military discipline was the prerogative of commanders, and that “the soldier should learn to look to his officer alone for justice” (*CMCR Interim Report*, at p. 31, quoting C. Madsen, *Another Kind of Justice: Canadian Military Law from Confederation to Somalia* (1999), at p. 11). Charges that led to court martial (i.e., military court) proceedings originated within the forces, and the officers who formed part of the court martial that would try the case would decide the matter without necessarily having the assistance of a trained lawyer or judge (a “judge advocate”) instructing them on the law (see *CMCR Interim Report*, at p. 31, citing R. A.

MacDonald, *Canada's Military Lawyers* (2002), at pp. 6-9). Nor could the accused generally appeal the verdict of a court martial.

[39] Hence, at this early stage of the Canadian military justice system's development, the system was largely a "command-centric disciplinary tool" (*CMCR Interim Report*, at p. 51). The need for commanders to have access to "an instrument for dealing with serious misconduct by their personnel that would swiftly and strongly promote discipline" was seen as paramount (*ibid.*), and "the focus of a court martial was placed far more on discipline than on what we would now call justice" (*ibid.*, at p. 32).

(3) The National Defence Act of 1950

[40] After World War II, Canada sought to reform its military law (see *CMCR Interim Report*, at p. 32). The centrepiece of this reform effort was the *National Defence Act*, S.C. 1950, c. 43, which amalgamated several military statutes into a single piece of legislation, created a uniform Code of Service Discipline applicable to all three services (Army, Navy, and Air Force), and modernized many aspects of military justice (*ibid.*, at p. 33).

[41] The *NDA* of 1950, ushered in a new era of military justice — it "represented a major evolution toward standards of justice that applied in civilian criminal courts in a number of ways" (*ibid.*). For example, it created a statutory right of appeal from findings and sentences of courts martial to the Court Martial Review

Board, aligned many punishments and procedures more closely with civilian equivalents, and required a legally trained judge advocate to officiate at every General Court Martial hearing (*ibid.*, citing W. J. Lawson, “Canadian Military Law” (1951), 9 *Judge Advocate Journal* 1, at pp. 7-11). At the same time, “many of the more command-centric features of the court martial system remained in place” (*ibid.*, at p. 33). For example, military commanders continued to enjoy the authority to overrule decisions of courts martial, and military prosecutors lacked the broad discretion that is standard for civilian prosecutors (*ibid.*, at p. 34).

(4) Charter-Era Reforms to the *National Defence Act*

[42] For almost half a century, the *NDA* remained largely unchanged (see *CMCR Interim Report*, at p. 34). Beginning in the early 1990s, however, important amendments and associated regulations were implemented in response to changing attitudes regarding due process, legal developments such as the *Charter* and subsequent decisions of the CMAC and this Court, and several detailed studies examining the military justice system (*ibid.*, at pp. 34 and 52).

[43] As to regulatory reform, in 1990 the Governor-in-Council amended the *Queen’s Regulations and Orders for the Canadian Forces*, which are the main source of regulations governing the military, in an effort to strengthen the military justice system by providing more independence to key actors in that system (*ibid.*, at pp. 34-35).

[44] Jurisprudential developments included the 1992 constitutional challenge in *Généreux* to parts of the pre-1990 regime. The appellant in that case argued that a General Court Martial under the pre-1990 regime was not “an independent and impartial tribunal” within the meaning of s. 11(d) of the *Charter*. Lamer C.J. confirmed that the military justice system, like its civilian counterpart, must comply with the *Charter*, although this does not require that the two systems be identical in every respect. He further held that the military justice system is not, by its very nature as a parallel system staffed by members of the military who are aware of and sensitive to military concerns, inconsistent with s. 11(d).

[45] That said, Lamer C.J. found shortcomings in the independence and impartiality of the General Court Martial as it existed under the pre-1990 regime. For example, there was no formal prohibition against evaluating officers on the basis of their performance at a General Court Martial for the purposes of setting salary. Further, he found it was unconstitutional for the authority that convenes the court martial (i.e., the executive) to be responsible for appointing both the prosecutor and the members of the court martial, who serve as the triers of fact. While acknowledging that “[t]he idea of a separate system of military tribunals obviously requires substantial relations between the military hierarchy and the military judicial system”, he added that “[i]t is important that military tribunals be as free as possible from the interference of the members of the military hierarchy, that is, the persons who are responsible for maintaining the discipline, efficiency and morale of the Armed Forces” (p. 308). The

1990 amendments, he made a point of adding, went “a considerable way towards addressing th[ese] concerns” (p. 287).

[46] Two detailed reports on the Canadian military justice system, both published in 1997, also contributed to significant reform. The first was a federal Commission of Inquiry report on serious misconduct by members of the Canadian Forces during a 1993 United Nations peacekeeping mission in Somalia (see *Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia*, vol. 1, *Dishonoured Legacy: The Lessons of the Somalia Affair* (1997)). This report contained 45 recommendations for change within the military justice system.

[47] As the Commission was concluding its work, the Minister of National Defence created a Special Advisory Group on Military Justice and Military Police Investigation Services, chaired by the Right Honourable Brian Dickson. The resulting *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services* (1997) (“*Dickson Report*”) confirmed the need for “a separate and distinct military justice system” (at p. 6) and made 35 recommendations aimed at improving this system. The recommendations included amending the *NDA* to enhance the degree of independence in military trials; eliminating certain forms of punishment; changing the composition of court martial panels (which we describe in greater detail below) to include non-commissioned members of a certain rank; and ensuring that the presiding judge, rather than the panel, passes sentence on a person convicted before a court martial.

[48] In response to *Généreux* and the reports outlined above, Parliament introduced Bill C-25, *An Act to amend the National Defence Act and to make consequential amendments to other Acts*, 1st Sess., 36th Parl., 1998 (assented to December 10, 1998). Bill C-25 brought about the “most extensive set of amendments” to the *NDA* since its inception (see *CMCR Interim Report*, at p. 37). As summarized in the *CMCR Interim Report*, the bill instituted the following reforms:

- It made numerous changes to the [Minister of National Defence’s] quasi-judicial roles and discretionary oversight powers. For instance, the power of review of court martial decisions, and the power to appoint military judges, shifted from Minister to the Governor in Council;
- It provided a statutory basis for independent military judges, in terms of tenure, remuneration, and removal only through an inquiry committee process;
- It shifted prosecution functions to a new independent Director of Military Prosecutions (DMP), away from the supervision of senior military authorities, in a way that is now in direct parallel with the federal civilian model;
- It created an independent Director of Defence Counsel Services (DDCS), who is responsible for the provision of legal counsel to those accused persons who face courts martial;
- It shifted responsibility for convening courts martial and appointing military panel members to an independent Court Martial Administrator (CMA) (a civilian who works under the supervision of the Chief Military Judge (CMJ)) out of the hands of senior military authorities;
- It shifted responsibility for the determination of sentence from the panel of military members to the military judge presiding at a court martial;
- It eliminated the death penalty and the hard labour component of the punishment of imprisonment; and,
- It eliminated the previous 3-year limitation period for service offences tried by courts martial.

(p. 38)

Stated succinctly, “Bill C-25 was important to the evolution of the court martial system because it established institutions and independence mechanisms within the system that substantially aligned it with Canada’s civilian criminal justice system, while preserving many of the historic aspects of a court martial, such as the involvement of a panel of military members as fact-finders” (*ibid.*).

[49] Bill C-25 also mandated periodic, independent reviews of the implementation of the bill. The first independent review was conducted in 2003 by the Right Honourable Antonio Lamer (see Department of National Defence, *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 (2003) (“Lamer Report”*)). In his opening remarks, the former Chief Justice 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”, though there remained room for improvement. He issued 88 recommendations for strengthening the military justice system. Two recommendations in particular are worth highlighting: military panels in a General Court Martial should arrive at their verdicts by unanimous vote (rather than by majority vote, which was the rule at the time); and the accused, rather than the Director of Military Prosecutions, should be given the right, at least in most cases, to elect trial by military judge alone or by military judge and panel. Five years later, in

Trépanier, the CMAC found the inability of the accused to select the type of court martial, an issue identified in the *Lamer Report*, to be unconstitutional under ss. 7 and 11(d) of the *Charter*, as it interfered with the accused's ability to make full answer and defence and to control the conduct of that defence.

[50] *Trépanier* was significant: as the court martial selection process had been declared unconstitutional, no court martial could be convened. This led Parliament to enact Bill C-60, *An Act to amend the National Defence Act (court martial) and to make a consequential amendment to another Act*, 2nd Sess., 39th Parl., 2008 (assented to June 18, 2008), more closely aligning the manner in which the mode of trial by courts martial is determined with the practice in the civilian criminal justice system (see Department of National Defence and the Canadian Armed Forces, *Second Independent Review of the National Defence Act — Background*, June 8, 2012 (online)). It also implemented recommendations of the *Lamer Report*, such as requiring court martial panels to make key decisions — verdicts of guilty or not guilty, of fitness to stand trial, and of not responsible on account of mental disorder — by unanimous (rather than majority) vote.

[51] The second independent review of Bill C-25 was submitted in 2011 by the Honourable Patrick J. LeSage (see Department of National Defence, *Report of the Second Independent Review Authority to The Honourable Peter G. Mackay, Minister of National Defence, by The Honourable Patrick J. LeSage* (2011) (“*LeSage Report*”). Like the *Lamer Report*, the *LeSage Report* observed that “the military

justice system, specifically the summary trial and court martial processes . . . is generally working well” (p. 13). Among its 55 recommendations was a call for a comprehensive review of the sentencing provisions of the *NDA*, with a view to making these provisions more closely mirror the flexible range of punishments in the civilian criminal justice system; that reserve force members be eligible to sit on court martial panels; that a random methodology for panel member selection be implemented; and that the laws of evidence applicable at courts martial be updated to keep pace with the evolution of the law of evidence more generally.

[52] While several independent reports have concluded that Canada’s military justice system is functioning well, that is not to say problems do not exist. In her 2015 *External Review into Sexual Misconduct and Sexual Harassment in the Canadian Armed Forces*, March 27, 2015 (online), the Honourable Marie Deschamps concluded that “there is an underlying sexualized culture in the [Canadian Armed Forces] that is hostile to women and LGTBQ members, and conducive to more serious incidents of sexual harassment and assault” (p. i). She issued ten recommendations aimed at responding to the “serious problem that exists in the [Canadian Armed Forces]” in relation to inappropriate sexual conduct (p. ix). Deep cultural change within the military will be required to respond to these recommendations, and efforts at bringing about that cultural change have begun.

[53] The military justice system has come a long way. It has evolved from a command-centric disciplinary model that provided weak procedural safeguards, to a

parallel system of justice that largely mirrors the civilian criminal justice system. Many of the key recommendations contained in the various reports referred to above have been implemented by Parliament through amendments to the *NDA* and associated regulations over the last 30 years. The continuing evolution of this system is facilitated by the periodic independent reviews mandated by s. 273.601 of the *NDA*, ensuring the system is rigorously scrutinized, analyzed, and refined at regular intervals. This speaks to the dynamic nature of the military justice system. Just as the civilian criminal justice system grows and evolves in response to developments in law and society, so too does the military justice system. We see no reason to believe that this growth and evolution will not continue into the future.

[54] Against this historical backdrop, we turn to the military justice system as it exists today.

C. *The CSD*

[55] The foundation of Canada's military justice system is the CSD, which is contained in Part III of the *NDA*. This detailed code is "an essential ingredient of service life" (*MacKay*, at p. 400) that "defines the standard of conduct to which military personnel and certain civilians are subject and provides for a set of military tribunals to discipline breaches of that standard" (*Généreux*, at p. 297). While it "is primarily concerned with maintaining discipline and integrity in the Canadian Armed Forces", it "serves a public function as well by punishing specific conduct which

threatens public order and welfare” (*ibid.*, at p. 281). Several key aspects are worth noting.

(1) Persons Subject to the CSD

[56] Section 60 of the *NDA* lists the categories of persons who are subject to the CSD. The list includes officers and non-commissioned members of the regular or special forces, officers and non-commissioned members of the reserve force when the member is on active service, persons who accompany a unit of the Canadian forces while the unit is on service, and others.³ While a range of persons are covered, they all share a link to the military.

(2) Service Offences

[57] 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”. For purposes of these appeals, there are two key categories of offences in the *NDA*: (a) “uniquely military offences” under ss. 73-129; and (b) civil offences committed in Canada that are tried as a service offence under s. 130(1)(a).⁴

(a) “*Uniquely Military Offences*” Under Sections 73-129

³ The list of persons who are subject to the CSD, and hence who may be charged under s. 130(1)(a), is not challenged before this Court, and all of the accused persons in the present appeals were service members at the time they were charged.

⁴ There are other categories of offences (see ss. 130(1)(b), 132, and 288-307 of the *NDA*).

[58] Sections 73-129 of the *NDA* create what may be called “uniquely military offences” (*CMCR Interim Report*, at p. 43). The types of conduct prohibited by these sections include spying for the enemy, mutiny, and insubordination. The maximum punishments for these offences range from dismissal with disgrace to life imprisonment.

(b) *Ordinary Civil Offences Tried as Service Offences Under Section 130(1)(a)*

[59] Section 130(1)(a) provides that “[a]n act or omission . . . that takes place in Canada and is punishable under Part VII [“Offences Triable by Civil Courts”], the *Criminal Code* or any other Act of Parliament . . . is an offence under this Division [“Service Offences and Punishments”] and every person convicted thereof is liable to suffer punishment as provided in subsection (2)”. Stated succinctly, s. 130(1)(a) transforms ordinary civil offences that take place in Canada into service offences,⁵ thereby giving service tribunals concurrent jurisdiction over such offences when committed by a person who is subject to the CSD.

[60] This is hardly novel. This provision has appeared in the *NDA* since its enactment (see s. 119), and similar provisions transforming ordinary civil offences into offences under military law had long existed in the United Kingdom. The *Army Act, 1881* (U.K.) 44 & 45 Vict., c. 58, provided that a “person who, whilst he is

⁵ Except murder, manslaughter, or an offence relating to child abduction under ss. 280-83 of the *Criminal Code* (*NDA*, s. 70). Only civilian criminal courts have jurisdiction to try persons accused of those offences.

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” (s. 41). The *Naval Discipline Act, 1866* (U.K.) 29 & 30 Vict., c. 109, included a provision to the same effect (s. 45).

D. *Types of Proceedings in the Military Justice System*

[61] As described in Department of National Defence, *Military Justice at the Summary Trial Level*, January 12, 2011 (online) (“*Military Justice*”), there are two types of proceedings in the military justice system: summary trials and court martial proceedings.

(1) Summary Trials

[62] A summary trial, which is the predominant form of proceedings for less serious offences, permits as a general rule a service offence to be tried at the unit level by a commanding officer, delegate of a commanding officer, or superior commander. There is no requirement that the presiding officer be legally trained. The procedures are straightforward and the powers of punishment limited in scope.

(2) Court Martial Proceedings

[63] A court martial is a formal military court presided over by a legally qualified military judge. Accused persons who appear before a court martial are

entitled to a lawyer free of charge, and the procedures followed are similar to those followed by civilian criminal courts. The available forms of punishment are more severe than those available on a summary trial.

[64] There are two types of courts martial:

- **Standing Courts Martial** “are presided over by a military judge sitting alone” (*Military Justice*, at. p. 3-3). The judge issues a verdict and, if the accused is found guilty, imposes a sentence.
- **General Courts Martial** consist of a military judge and a panel of five members of the military. “The panel is responsible for making a finding on the charges” and the judge “is responsible for making legal rulings and imposing [a] sentence” (*ibid.*). A person accused of an indictable offence under s. 130(1)(a) has the right to elect a trial before a General Court Martial (see *NDA*, s. 165.193(1)).

[65] The General Courts Martial merit particular attention here, given that while the military justice system has never provided for a trial by jury, it has long provided for a trial before a judge and a military panel. Such panels have existed in the United Kingdom for well over a century (see *Army Act*, s. 48(3)). In Canada, the *NDA* has provided for military panels since its enactment in 1950 (see s. 140(1)), although, as we shall explain, their role and composition have changed over time.

[66] The role of a military panel is unique, bringing to bear upon the proceedings the military-specific concerns for discipline, efficiency, and morale. As Lamer C.J. observed in *Généreux*, it “represents to an extent the concerns of those persons who are responsible for the discipline and morale of the military” (p. 295). Similarly, as noted in the *Dickson Report*, 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” (p. 55).

[67] In some respects, a military panel is analogous to a jury, and over the years they have become more and more so. Like a jury, the panel is the trier of fact, while the judge makes rulings on legal questions (see *NDA*, ss. 191 and 192(1)). Furthermore, as already mentioned, while panels used to reach their verdicts based on a majority vote, they are now required to reach their verdicts unanimously. And as in the civilian criminal justice system, it is now the judge who is tasked with imposing a sentence in the event of a guilty verdict, a role which before 2010 was entrusted to the panel.

[68] That said, a military panel is not a jury (see *Trépanier*, at para. 73, citing *R. v. Lunn* (1993), 5 C.M.A.R. 157; *R. v. Brown* (1995), 5 C.M.A.R. 280; and *R. v. Nystrom*, 2005 C.M.A.R. 7). Important differences distinguish one from the other. For example, while a jury consists of 12 individuals, a panel consists of only five, thereby lowering the threshold for a finding of guilt. And, while jurors are drawn from the community at large, panel members are drawn from the military community only.

Thus, the community embodied by a panel is a particular one. Further, and while juries are not designed to reflect any sort of hierarchy between the accused and the jurors, the composition of panels varies with the rank of the accused, and the system is designed to include a certain number of the accused's superiors (see *NDA*, ss. 167-68). In this way, panel members are not all "peers" of the accused in the sense of being of equal rank. Finally, panel members are broadly permitted to take judicial notice of "all matters of general service knowledge" (see *Military Rules of Evidence*, C.R.C., c. 1049, s. 16(2)(a); see also *Trépanier*, at para. 73, citing *Lunn*), whereas jurors enjoy no such broad authorization.

[69] The composition of military panels has changed over time. At one point, only officers could sit on a panel (see *Dickson Report*, at p. 56). However, in 1997, the *Dickson Report* recommended that non-commissioned members of a certain rank be permitted to serve on military panels, as they "could bring an important dimension to court martial panels and reflect better the spectrum of individuals responsible for the maintenance of discipline, efficiency and morale" (*ibid.*). This prompted amendments to the *NDA*, and today a panel that tries a non-commissioned member includes three non-commissioned members who are of or above both the rank of the accused person and the rank of sergeant (see *NDA*, s. 167(7)). Further, Parliament has expanded the pool of members eligible to sit on court martial panels and has reduced the required rank of the most senior member of panels (see Bill C-15, *An Act to amend the National Defence Act and to make consequential amendments to other Acts*, 1st Sess., 41st Parl., 2013).

[70] There are sound reasons why the military justice system has opted for a unique military panel model, rather than a jury model. For example, the concept of “members tried by members” fosters morale within the military. As Professor J. Walker points out, this is so even where the underlying offence is an ordinary civil offence contained in the *Criminal Code*:

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.

(“A Farewell Salute to the Military Nexus Doctrine” (1993), 2 *N.J.C.L.* 366, at p. 372)

[71] Moreover, where a person subject to the CSD commits an act or omission outside Canada that would, if it had taken place in Canada, constitute an offence under Part VII of the *NDA*, the *Criminal Code*, or any other federal statute, Canadian service tribunals have jurisdiction to try that offence as a service offence under s. 130(1)(b) of the *NDA*. Further, pursuant to s. 68 of the *NDA*, the trial may be held outside Canada. In these circumstances, it would be highly impractical — if not impossible — to cobble together a jury of Canadian civilians and transport them to the place of trial. The military justice system has thus developed an alternative, portable, and efficient solution that can be implemented whenever and wherever needed. This in turn contributes to discipline, efficiency, and morale in the military. While ss. 68 and 130(1)(b) are not before this Court, the fact that Canada’s military

justice system operates extraterritorially, and that service tribunals may have to be convened on short notice in a different part of the world, help to explain why it has opted for a unique military panel model rather than a jury model.

[72] Having set out the salient aspects of the CSD, we return to the military exception in s. 11(f), and in particular the meaning of the words “an offence under military law” which constitutes this exception.

E. *The Meaning of “An Offence Under Military Law” in Section 11(f)*

(1) The Context in Which the Words “An Offence Under Military Law” Were Included in Section 11(f)

[73] When the *NDA* was enacted in 1950, the Minister of National Defence explained his understanding of “military law”:

Parts IV to IX [of the *NDA*] 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 to deal with matters of administration in the army.

(House of Commons, *Minutes of Proceedings and Evidence of the Special Committee on Bill 133: An Act Respecting National Defence*, No. 1, 2nd Sess., 21st Parl., May 23, 1950, at pp. 11-12.)

[74] Thus, “military law” was understood as “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”, and which manifested itself through the service

offences set out in the CSD. And, as we have explained, from the time of the *NDA*'s enactment, the CSD contained a provision transforming ordinary civil offences into service offences.

[75] This broad understanding of the type of offences coming under “military law” was echoed by s. 2 of the *Criminal Code*, R.S.C. 1970, c. C-34, which at the time of the *Charter*'s enactment defined (and still defines) “military law” as including “all laws, regulations or orders relating to the Canadian Forces”.⁶ Further, it is supported by this Court's jurisprudence. In *MacKay*, the Court found the transformation of ordinary civil offences into service offences to be a valid exercise of Parliament's legislative authority over “Militia, Military and Naval Service, and Defence” conferred by s. 91(7) of the *Constitution Act, 1867*. In so finding, Ritchie J. observed that “service offences . . . have always been considered part of military law” (p. 397), such that the legislation was found to be valid “even for those matters which would normally fall under the *Criminal Code*, or the *Narcotic Control Act* [now the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19], but which, through the legislation and the application of military law properly fall into the category of service offences” (*ibid.*).

[76] *MacKay* cemented several key principles bearing on the interpretive issue now before the Court. Parliament has legislative authority under s. 91(7) of the

⁶ When the *Criminal Code* was first enacted in 1892, it defined “military law” as including “*The Militia Act* and any orders, rules and regulations made thereunder, the Queen's Regulations and Orders for the Army; any Act of the United Kingdom or other law applying to Her Majesty's troops in Canada, and all other orders, rules and regulations of whatever nature or kind soever to which Her Majesty's troops in Canada are subject” (S.C. 1892, c. 29, s. 3(O-1)).

Constitution Act, 1867, to create services offences under the *NDA*. Service offences are set out in the *CSD*, which serves as a disciplinary code for military life. Validly enacted offences that contravene this code have always been understood as offences under “military law”. Finally, what is now s. 130(1)(a) is validly enacted pursuant to s. 91(7) of the *Constitution Act, 1867*. This means that an ordinary civil offence tried as a service offence is no less a part of “military law” than a service offence arising from spying for the enemy, mutiny, insubordination, or any other service offence prohibited by the *CSD*.

[77] This leads us to the debates on s. 11(f), during which the Honourable Jean Chrétien, then Minister of Justice, explained that “[j]ury trials in cases under military law before a military tribunal have never existed either under Canadian or American law” (Senate and House of Commons, *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, No. 36, 1st Sess., 32nd Parl., January 12, 1981, at p. 12). This observation reveals an important historical fact: the separate system of military justice has never provided for a trial by jury.

[78] In our view, in light of “the historical origins of the concepts enshrined” and “the language chosen to articulate the specific right or freedom” (*Big M*, at p. 344), it is doubtful that s. 11(f) reversed this longstanding state of affairs. Instead, it is far more likely that the purpose of the military exception was to recognize and preserve the *status quo*. And as the CMAC suggested in *Trépanier*, “[i]t may be that

the denial, under paragraph 11(f) of the *Charter*, of the right to jury trials for an accused tried before a military court was more easily accepted by Parliament because there was a long tradition of trials by a judge and panel members in the military justice system which afforded equivalent protection” (para. 102).

[79] We agree with *Trépanier* that the s. 11(f) exception contemplates that there be protection, to the extent possible, equivalent to the civilian jury system. As Bell C.J. stated in *Stillman*, a military panel serves a similar function to a civilian jury (para. 9). The composition and number of panel members may differ from that of a civilian jury, but in accordance with this Court’s criteria in *Généreux* dealing with s. 11(d), the panel system as a whole must remain sufficiently independent and impartial.

[80] This was the state of “military law” at the time the military exception was included in s. 11(f) of the *Charter*. Against this backdrop, we conclude that the purpose of the military exception is to recognize and affirm the existence of a separate military justice system tailored to the unique needs of the military, and to preserve the historical reality that jury trials in cases governed by military law have never existed in Canada. Instead, Canada’s military justice system has opted for a unique panel system designed to foster discipline, efficiency, and morale in the military.

[81] Taking that purpose as a given, we turn to two competing interpretations of the military exception: one urged by the accused persons and adopted by the majority in *Beaudry*, and the other endorsed in *obiter* by the majority in *Stillman*.

(2) Interpretation #1: “Offence[s] Under Military Law” Are Limited to Those Listed in Sections 73-129 of the NDA

[82] Relying on the majority’s reasoning in *Beaudry*, the accused persons maintain that the only “offence[s] under military law” for the purposes of the military exception in s. 11(f) of the *Charter* are those listed in ss. 73-129 of the *NDA*. They distinguish between “special standards of military discipline”⁷ (to which only persons covered by the CSD are subject), and ordinary civil offences (to which all Canadians are subject), and say that it is only the former category of offences that constitutes “military law” within s. 11(f)’s meaning. In support, they point to *An Act for punishing Officers or Soldiers who shall Mutiny or Desert Their Majestyes Service* (Eng.) 1689, 1 Will. 3 & Mar. 2, c. 5 (“*Mutiny Act*”), which granted service members the right to a trial by jury except in cases of sedition, desertion, or mutiny. But respectfully, for three reasons, we are not persuaded.

[83] Firstly, *MacKay* makes clear that an ordinary civil offence tried as a service offence under s. 130(1)(a) is no less an offence under “military law” than “purely” military offences in the CSD. That an offence is incorporated by reference

⁷ This language approximates Lamer C.J.’s statement in *Généreux* that “[t]here is . . . a need for separate tribunals to enforce special disciplinary standards in the military” (p. 293 (emphasis added)).

(s. 130(1)(a)), rather than by direct enactment (ss. 73-129), does not change this. To reason otherwise would be to privilege form over substance, since a referentially incorporated offence is no less an offence by reason of its form. Moreover, while the accused persons insist that “an offence under *military law*” and “an offence under *civil law*” are two mutually exclusive concepts, they offer no principled reason why a particular act or omission cannot constitute an offence under both spheres of law.

[84] Secondly, the accused persons’ proposal is not supported by the text of s. 11(f). Had the scope of the military exception been limited to the offences listed in ss. 73-129 of the *NDA*, one would have expected language such as “except for those offences which are exclusively under military jurisdiction” or “except for those offences which apply exclusively to those persons subject to military law”. No such limiting language appears in s. 11(f).

[85] Thirdly, the accused persons’ reliance on the *Mutiny Act* of 1689 is misplaced. The accused persons rightly note that this Act (which has long since been repealed) set out a very narrow exception to the right to a trial by jury, applicable only in respect of sedition, desertion, or mutiny. But military law, and the place of the military in the society in which it operates more generally, have changed a great deal since the 17th century, and there is no reason to believe that the Constitution left the scope of military law frozen as it was in 1689. Indeed, Canada’s military justice system, itself a much later creation, has grown and evolved into a sophisticated apparatus capable of handling all manner of offences committed by persons subject to

the CSD, not just sedition, desertion, and mutiny. Given the elaborate administrative infrastructure that undergirds the modern military justice system, it would be curious to think that s. 11(f) consigns this system to dealing with such a narrow band of “uniquely military offences”.

[86] We underline at this point that we would not foreclose the possibility of challenging certain aspects of the military panel system, particularly in relation to their composition and their independence from the chain of command, under other provisions of the *Charter* — for example, s. 11(d). But this is a different question than that put before us here. The present appeals ask whether s. 130(1)(a) is inconsistent with s. 11(f) of the *Charter*. This issue turns solely on whether a serious civil offence tried as a service offence under s. 130(1)(a) qualifies as “an offence under military law”, thereby engaging the military exception in s. 11(f).

[87] In sum, we are respectfully of the view that the words “an offence under military law” in s. 11(f) cannot be read in the manner proposed by the accused persons.

(3) Interpretation #2: “Offence[s] Under Military Law” Should Be Qualified by a Heightened “Military Nexus” Requirement

[88] An alternative position, endorsed in *obiter* by the majority in *Stillman*, is that the words “an offence under military law” in s. 11(f) should be qualified by a heightened “military nexus” requirement going beyond the accused’s military status.

[89] By way of background, as Bell C.J. summarized in his concurring reasons in *Stillman* (see paras. 11-13), the “military nexus” doctrine (also known as the “service-connection” test) was first articulated by the Supreme Court of the United States in *O’Callahan v. Parker* (1969), 395 U.S. 258, at a time when the United States was in the midst of the Vietnam War, conscription (i.e., forced enlistment) was a feature of the military, and U.S. courts were hearing only judicial review applications from courts martial (there was no appeal mechanism in place). The Supreme Court ruled that in order for a court martial to have jurisdiction over a particular offence, it had to have a connection to service (see p. 272). The decision was based in part on the observation that courts martial were “not yet an independent instrument of justice” (p. 265).

[90] As Bell C.J. also noted, however, the U.S. Supreme Court later overruled *O’Callahan* and jettisoned the “service-connection” test in *Solorio v. United States* (1987), 483 U.S. 435. From that point (by which time the Vietnam War had ended, conscription had ended and judicial review of court martial decisions had been supplemented by the availability of appeals), the jurisdiction of courts martial depended solely on the accused’s status as a member of the Armed Forces, and not on the existence of a “service connection”.

[91] Before *Solorio* dealt a death blow to the “service-connection” test in the United States, however, the doctrine had found its way into Canadian jurisprudence. In his concurring reasons in *MacKay*, McIntyre J. endorsed a form of “military

nexus”, stating that a civil offence would “[fall] within the jurisdiction of the courts martial and within the purview of military law when committed by a serviceman if such offence is so connected with the service in its nature, and in the circumstances of its commission, that it would tend to affect the general standard of discipline and efficiency of the service” (p. 410). Subsequently, the doctrine found expression in the CMAC’s jurisprudence (see, e.g., *R. v. MacDonald* (1983), 4 C.M.A.R. 277; *Ionson v. The Queen* (1987), 4 C.M.A.R. 433; *Ryan v. The Queen* (1987), 4 C.M.A.R. 563; *Brown*; *R. v. Moriarity*, 2014 CMAC 1, 455 N.R. 59; *R. v. Larouche*, 2014 CMAC 6, 460 N.R. 248).

[92] In 2015, however, this Court in *Moriarity* stemmed this line of jurisprudence by making it clear that the only “military nexus” required to support a rational connection to maintaining discipline, efficiency, and morale in the military is the accused’s military status. In that case, four members of the Canadian Armed Forces were charged with ordinary civil offences tried as service offences under s. 130(1)(a). They argued that because the service offences with which they had been charged were committed in circumstances that had no “direct link” to discipline, efficiency, or morale in the military, s. 130(1)(a) was overbroad under s. 7 of the *Charter*.

[93] This Court rejected that argument, stating that the purpose of s. 130(1)(a), consistent with the purpose of the military justice system as a whole, is “to maintain the discipline, efficiency and morale of the military” (para. 48). “There is no explicit

limitation”, the Court observed, “in the text of s. 130(1)(a) to the effect that the offence must have been committed in a military context; it transforms the underlying offence into a service offence ‘irrespective of its nature and the circumstances of its commission’” (para. 8, citing *Trépanier*, at para. 27). Thus, the provision applies even where “the only military connection is the status of the accused” (para. 49).

[94] Even this broad scope of application did not translate into overbreadth. The Court found that “[t]he 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” (para. 51). It went on:

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. For instance, the fact that a member of the military has committed an assault in a civil context . . . may call into question that individual’s capacity to show discipline in a military environment and to respect military authorities. The fact that the offence has occurred outside a military context does not make it irrational to conclude that the prosecution of the offence is related to the discipline, efficiency and morale of the military.

Consider, as a further example, an officer who has been involved in drug trafficking. There is a rational connection between the discipline, efficiency and morale of the military and military prosecution for this conduct. There is, at the very least, a risk that loss of respect by subordinates and peers will flow from that criminal activity even if it did not occur in a military context. Similarly, a member of the military who has engaged in fraudulent conduct is less likely to be trusted by his or her peers. Again, this risk provides a rational connection between the military prosecution for that conduct and the discipline, efficiency and morale of the military.

These examples support a broad understanding of the situations in which criminal conduct by members of the military is at least rationally connected to maintaining the discipline, efficiency and morale of the armed forces: the behaviour of members of the military relates to discipline, efficiency and morale even when they are not on duty, in uniform, or on a military base. [Emphasis added; paras. 52-54.]

[95] The Court held that even “where the only military connection is the status of the accused”, the full range of conduct covered by s. 130(1)(a) has a rational connection to the maintenance of discipline, efficiency, and morale in the military. Section 130(1)(a) is not overbroad under s. 7 of the *Charter*.

[96] Against this backdrop, we are of the view that there are compelling reasons why the “military nexus” doctrine should not be resurrected.

[97] Firstly, and most significantly, is the combined effect of *MacKay* and *Moriarity*. We acknowledge that compliance with the division of powers and *Charter* compliance are, generally speaking, two different things (such that one does not necessarily follow from the other (see *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134, at paras. 79-83). We also acknowledge that s. 11 of the *Charter* provides protection that is distinct from that provided by s. 7 (see *R. v. CIP Inc.*, [1992] 1 S.C.R. 843, at p. 854). However, we are of the view that, in the specific instance of s. 11(f), the military exception restricts the right to a trial by jury by referring, at least implicitly, to a particular head of power under the *Constitution Act, 1867* — namely, s. 91(7). In our view, therefore, there must be coherence among the division of powers analysis, the overbreadth analysis, and the meaning of “an offence under military law” in s. 11(f) of the *Charter*. Were s.

130(1)(a) to include offences that are not “an offence under military law”, then the provision would necessarily be either *ultra vires* of Parliament, overbroad, or both. However, the parties accept that s. 130(1)(a) is neither *ultra vires* of Parliament nor overbroad. It follows, in our view, that an offence under that provision is necessarily “an offence under military law”, even without the imposition of a heightened “military nexus” requirement going beyond the accused’s military status. This conclusion stems from the unique wording, context, and purpose of the military exception to s. 11(f).

[98] Secondly, and relatedly, the parties do not contest that the offences listed in ss. 73-129 of the *NDA*, each of which was enacted pursuant to Parliament’s power under s. 91(7), are “offence[s] under military law” within the meaning of s. 11(f) of the *Charter*. In fact, the accused persons argued that these are the *only* “offence[s] under military law”. Yet a number of these offences can be committed in the absence of a heightened “military nexus” going beyond the accused’s military status. “Stealing” under s. 114 offers one example (see *Moriarity*, at para. 38). If no heightened “military nexus” is required to preserve the status of these offences as “offence[s] under military law”, then it would be inconsistent to impose such a requirement in relation to offences under s. 130(1)(a).

[99] Thirdly, the imposition of a heightened “military nexus” requirement would risk causing military courts to engage in an unwieldy and unhelpful threshold inquiry that distracts from the merits. As Professor Hogg writes, the rejection of the

“military nexus” requirement in *Moriarity* spares service tribunals from the distraction of having to determine whether there is a “direct link” between the circumstances of the offence and the military in each and every case (pp. 51-30 — 51-32). As we have seen, the “military nexus” doctrine has been tried, tested, and ultimately rejected in the United States, with Rehnquist C.J. declaring in *Solorio* that “the service connection approach . . . has proved confusing and difficult for military courts to apply” (p. 448) and that it “should be abandoned” (p. 441). The Canadian experience has also been an unhappy one. In Canada, the “elusive” military nexus test proved unsatisfactory due to its uncertainty (see J. Walker, “Military Justice: From Oxymoron to Aspiration” (1994), 32(1) *Osgoode Hall L.J.* 1, at pp. 13-14; T. E.K. Fitzgerald, “The Nexus Disconnected: The Demise of the Military Nexus Doctrine” (2018), 65 *Crim. L.Q.* 155). This uncertainty “ultimately cast doubt on the validity of this approach to court martial jurisdiction” (Walker (1994), at p. 14). Furthermore, and as we have recounted, the “military nexus” doctrine in the U.S. was pronounced in a very different context. In this regard, we would endorse the statement of Bell C.J. in *Stillman* that “[p]erhaps the service connection is outdated; perhaps it was never necessary in the Canadian environment. Regardless, the factors which motivated the adoption of the test in the United States . . . are far removed from the realities of the modern Canadian military justice system” (para. 13).

[100] Fourthly, were serious civil offences committed by persons subject to the CSD to be streamed into the civilian justice system, sentencing decisions in those cases might not truly account for the seriousness of such offences, seen in light of the

purposes of discipline, efficiency, and morale. As Cattnach J. recognized in *MacKay v. Rippon*, [1978] 1 F.C. 233 (T.D.), “[m]any offences which are punishable under civil law take on a much more serious connotation as a service offence and as such warrant more severe punishment” (p. 236, quoted in *Généreux*, at p. 294). The proper maintenance of military discipline, efficiency, and morale may require a more severe response to misconduct than it would receive in the civilian justice system. Indeed, the fundamental purposes of sentencing in the military justice system differ from those in the civilian criminal justice system. These purposes, set out in s. 203.1(1) of the *NDA*, are (a) “to promote the operational effectiveness of the Canadian Forces by contributing to the maintenance of discipline, efficiency and morale”; and (b) “to contribute to respect for the law and the maintenance of a just, peaceful and safe society”. Furthermore, s. 203.1(2) of the *NDA* stipulates that these purposes “shall be achieved by imposing just sanctions that have one or more of the following objectives”:

- (a) to promote a habit of obedience to lawful commands and orders;
- (b) to maintain public trust in the Canadian Forces as a disciplined armed force;
- (c) to denounce unlawful conduct;
- (d) to deter offenders and other persons from committing offences;
- (e) to assist in rehabilitating offenders;
- (f) to assist in reintegrating offenders into military service;
- (g) to separate offenders, if necessary, from other officers or non-commissioned members or from society generally;

- (h) to provide reparations for harm done to victims or to the community;
and
- (i) to promote a sense of responsibility in offenders, and an acknowledgment of the harm done to victims and to the community.

[101] While some of these objectives are reflected in s. 718 of the *Criminal Code* (e.g., rehabilitating offenders), others are not (e.g., promoting a habit of obedience to lawful commands and orders). Thus, sentencing in the military justice system is guided by certain objectives that are unique to the military milieu. Extracting serious civil offences from this system would have the unfortunate consequence of eliminating these unique and important objectives from being considered in the sentencing process in these cases.

[102] Fifthly, while military prosecutors may engage in an inquiry that resembles a “military nexus” test when assessing whether to exercise jurisdiction in a particular case, the *existence* of jurisdiction must be separated from the *exercise* of jurisdiction. The Director of Military Prosecutions has issued a policy directive on the factors to be considered when determining whether charges against a person who is subject to the CSD should proceed in the military justice system or instead in the civilian criminal justice system. According to this directive, the factors include:

- a. the degree of military interest in the case, as reflected by factors such as the place where the offence was alleged to occur, or whether the accused was on duty at the time of the alleged offence;
- b. the degree of civilian community interest in the case;
- c. the views of the victim;

- d. whether the accused, the victim, or both are members of the CAF;
- e. whether the matter was investigated by military or civilian personnel;
- f. the views of the investigative agency;
- g. geographic considerations such as the current location of necessary witnesses;
- h. jurisdictional considerations where, for example, the offence was allegedly committed abroad;
- i. post-conviction consequences; and
- j. the views of the Commanding Officer, as expressed through the unit legal advisor, with respect to unit disciplinary interests. [Footnote omitted.]

(Directive No. 002/99, “Pre-Charge Screening”, 2000 (online))

[103] Thus, based on case-specific factors, military prosecutors may decide that it would be more appropriate to stream a particular case into the civilian criminal justice system. Yet the distinction between the *existence* of jurisdiction and the *exercise* of jurisdiction is an important one. While military prosecutors may decline to exercise jurisdiction in any particular instance that falls within the scope of the CSD, this does not change the fact that, as a matter of law, the military justice system nonetheless *has* jurisdiction. In our view, the role of defining the scope of military prosecutors’ jurisdiction belongs to the courts, while the role of deciding whether jurisdiction should be exercised in any particular case — and what factors guide that decision — is properly left to military prosecutors. Moreover, it is worth noting that Crown counsel advised the Court during oral argument that, to his knowledge, there has not been a single instance in which military prosecutors and civilian prosecutors

could not agree on which system should handle a particular matter. This speaks to the cooperation and mutual respect between prosecutorial authorities in these two systems.

[104] We are fortified in our conclusion by practical considerations, some of which were discussed in *R. v. Ryan*, 2018 CM 2033. Imposing a heightened “military nexus” requirement would go against the objective of responding swiftly to misconduct within the military and thereby enhancing discipline, efficiency, and morale in the military. As indicated, one of the consequences of imposing a heightened “military nexus” requirement would be to stream serious civil offences committed by persons subject to the CSD into the civilian criminal justice system. But arranging a jury trial in the civilian criminal justice system, particularly in areas of the country where the courts are already beset by backlogs, may result in delays that would not be experienced if the matter proceeded within the military justice system. The result may be to fail to sufficiently achieve the objectives of maintaining discipline, efficiency, and morale within the military. In addition, it may send the message that the military justice system is incapable of dealing with misconduct by persons subject to the CSD. The consequences for morale within the military could be serious.

[105] As for the “military connection test” proposed by our colleagues Karakatsanis and Rowe JJ., we are troubled by our colleagues’ approach for several reasons. Firstly, they encourage military courts faced with a jurisdictional challenge

to ask: “Has a service member committed an offence in circumstances that are so connected to the military that it would have a direct effect on military discipline, efficiency and morale?” (para. 177 (emphasis added)). Yet the direct/indirect distinction was expressly rejected in *Moriarity*. As we have pointed out, *Moriarity* clarified that “[c]riminal 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” (para. 52). Accordingly, relying on the concept of “directness” is unhelpful and inconsistent with *Moriarity*.

[106] Secondly, our colleagues suggest that where an offence was committed “in the course of military duty, on military property, or using military property . . . it can generally be inferred that there will be a direct effect on military discipline, efficiency and morale” (para. 178 (emphasis added)). Yet our colleagues fail to explain when, if ever, a service tribunal might decline to draw this “general” inference. Similarly, our colleagues state that “[w]hen an offence is committed in a theatre of war, it is presumed that the circumstances will meet the military connection test” (para. 179 (emphasis added)). It is unclear when, if ever, this “presumption” might be rebutted.

[107] Thirdly, our colleagues maintain that “[t]he fact that an offence was committed by a service member, on its own, is unlikely to be sufficient to ground a military connection on the basis that its mere commission undermines discipline” (para. 178). Respectfully, their position is incompatible with *Moriarity*, which

adopted a broad understanding of the connection between criminal conduct by service members and discipline within the military. The Court endorsed the notion that discipline in the military requires “an instilled pattern of obedience . . . and respect for and compliance with lawful authority”, emphasizing that “the behaviour of members of the military relates to discipline, efficiency and morale even when they are not on duty, in uniform, or on a military base” (para. 54). These statements make clear that military discipline suffers when service members engage in criminal conduct, even in a civilian setting, and therefore our colleagues’ narrow understanding of the circumstances in which a “military connection” is present cannot be sustained.

[108] Fourthly, we question our colleagues’ proposed remedy, which is to read the following language into s. 130(1)(a) where an accused is charged with an offence carrying a maximum punishment of at least five years’ imprisonment: “An act or omission committed by a service member that is military in nature or is committed in circumstances directly connected to the military . . .” (para. 193 (underlined in original)). Respectfully, this extensive rewrite of s. 130(1)(a) exceeds the proper role of the courts.

[109] In sum, we see no basis for resurrecting the “military nexus” doctrine. And, in any event, this Court has spoken: *Moriarity* identified the “military nexus” required to ground a rational connection to discipline, efficiency, and morale in the military — the accused’s military status. Nothing more is needed. We turn, therefore, to our own conclusion on the ultimate question before the Court: whether a serious

civil offence tried as a service offence under s. 130(1)(a) qualifies as “an offence under military law”, thereby engaging the military exception in s. 11(f) of the *Charter*.

(4) “An Offence Under Military Law” Is One That Is Validly Enacted Under Section 91(7) of the *Constitution Act, 1867*

[110] In our view, the text “an offence under military law” in s. 11(f) refers to an offence that is validly enacted pursuant to Parliament’s power over the “Militia, Military and Naval Service, and Defence” under s. 91(7) of the *Constitution Act, 1867*. This interpretation aligns with the analysis of Strayer C.J. in *R. v. Reddick* (1996), 112 C.C.C. (3d) 491 (C.M.A.C.):

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 . . .

(p. 505)

[111] The accused persons and the majority in *Stillman* raised concerns over the notion that Parliament might have a hand in shaping what constitutes “an offence under military law” — and, consequently, influence the application of the military exception in s. 11(f) — through the exercise of its legislative authority under s. 91(7) of the *Constitution Act, 1867*. But we do not share this concern. It is of course well

within Parliament’s constitutional authority under s. 91(27) of the *Constitution Act, 1867*, to define what is and is not a *criminal* offence in Canada. Its authority to define what is and is not a *military* offence under s. 91(7) of the *Constitution Act, 1867* is no different in principle. That is not to say that Parliament has *carte blanche*. In our constitutional democracy, courts — not the legislatures — are the arbiters of whether a given enactment falls within a particular head of power set out in the *Constitution Act, 1867*, and they may invalidate legislation that falls outside Parliament’s legislative competence. Further, how Parliament exercises its legislative authority is confined by the *Charter* itself, and is judicially reviewable as such. For example, a service offence may be challenged as being overbroad under s. 7 of the *Charter*, just as s. 130(1)(a) was in *Moriarity*. There are, then, meaningful limits on Parliament’s authority to decide what is “an offence under military law”. But since this Court has already established that s. 130(1)(a) *does* fall within Parliament’s legislative competence under s. 91(7) of the *Constitution Act, 1867*, and is not overbroad under s. 7 of the *Charter*, this provision validly creates “an offence under military law” for the purposes of s. 11(f) of the *Charter*.

[112] To be clear, we reject our colleagues’ characterization of our approach as permitting Parliament to “define the scope of [a] *Charter* right” through ordinary legislation (para. 121). That is not our suggestion. Rather, our approach simply recognizes that the content of certain pre-existing concepts enshrined in the *Charter* — in this case, “an offence under military law” — can be shaped by Parliament through the proper exercise of its constitutional authority. While this may incidentally

influence other *Charter* concepts such as the military exception under s. 11(f), it does not permit Parliament to define a *Charter* right or exception through ordinary legislation.

[113] Our conclusion can be stated succinctly. Our jurisprudence establishes that Parliament has validly enacted s. 130(1)(a) of the *NDA* under the authority granted by s. 91(7) of the *Constitution Act, 1867* (see *MacKay*, at p. 397). It also establishes that s. 130(1)(a) is not overbroad under s. 7 of the *Charter*, even absent a “military nexus” going beyond the accused’s military status (see *Moriarity*). It follows, therefore, that a serious civil offence tried as a service offence under s. 130(1)(a) — whether or not there is a heightened “military nexus” — qualifies as “an offence under military law” for the purposes of s. 11(f) of the *Charter*. Accordingly, where such an offence is tried before a military tribunal — as was the case for each of the accused persons in this instance — the military exception in s. 11(f) of the *Charter* is engaged. It follows that s. 130(1)(a) of the *NDA* is not inconsistent with s. 11(f) of the *Charter*, as it does not deprive a person who is lawfully entitled to a trial by jury of that right.

VI. Conclusion

[114] We would dismiss the appeals in *Stillman* and allow the appeal in *Beaudry*. The order of the CMAC in *Beaudry* declaring s. 130(1)(a) of the *NDA* to be of no force or effect in its application to any serious civil offence is set aside, and the conviction is restored. As requested, the parties will bear their own costs.

The following are the reasons delivered by

KARAKATSANIS AND ROWE JJ. —

I. Introduction

[115] Section 11(f) of the *Canadian Charter of Rights and Freedoms* guarantees every accused charged with an offence punishable by five years of imprisonment (or a more severe punishment) the fundamental and historic right to a jury trial. It carves out an exception to this right in “the case of an offence under military law tried before a military tribunal” (in French, “*sauf s’il s’agit d’une infraction relevant de la justice militaire*”).

[116] The scope of the military exception is at issue in these appeals. Specifically, we have been asked whether s. 130(1)(a) of the *National Defence Act*, R.S.C. 1985, c. N-5, violates s. 11(f) of the *Charter*. To answer this question, we must determine whether s. 130(1)(a) creates “an offence under military law tried before a military tribunal”. Section 130(1)(a) incorporates almost every civilian criminal offence into military jurisdiction. In effect, s. 130(1)(a) can take the trial of such offences outside the civilian courts, where an accused would be entitled to trial by jury.

[117] This Court has addressed the constitutionality of this provision by reference to s. 91(7) of the *Constitution Act, 1867*, and s. 11(d) of the *Charter* (Majority Reasons, at para. 4; see, in particular *MacKay v. The Queen*, [1980] 2 S.C.R. 370, and *R. v. Généreux*, [1992] 1 S.C.R. 259). Most recently, in *R. v. Moriarity*, 2015 SCC 55, [2015] 3 S.C.R. 485, this Court held that s. 130(1)(a) of the *NDA* did not infringe s. 7 of the *Charter* on the basis of overbreadth, as the Court found there was a rational connection between the effect of s. 130(1)(a) and its objective of maintaining military discipline, efficiency and morale, without the need to demonstrate a direct link between the offence and the military.

[118] Our colleagues state that as long as s. 130(1)(a) is within the federal government's legislative competence and not overbroad under s. 7 of the *Charter*, the offences incorporated by s. 130(1)(a) need not be committed in circumstances directly connected to the military for s. 130(1)(a) to be constitutional. In our view, finding a provision is constitutional in certain respects — either with regard to whether it was validly enacted or to whether that enactment infringes a certain *Charter* right — does not answer whether it is constitutional in every respect. To this end, the Court in *Moriarity* specifically stated that its decision did not address s. 11(f) (para. 30).

[119] The question now before this Court is whether s. 130(1)(a) of the *NDA* infringes s. 11(f) of the *Charter*. The majority concludes that s. 130(1)(a) does not infringe s. 11(f), as s. 130(1)(a) falls within the exception in s. 11(f). We disagree. In

our view, s. 130(1)(a) only falls within the scope of the exception to the extent that there is a direct connection between the circumstances of the offence and the military.

[120] We part company with the majority in three fundamental respects. First, while the majority sets out a purposive approach to the *Charter* right and exception, they do not give sufficient effect to either the individual or societal interest in the right to a jury trial. We cannot agree that a trial before a military panel “largely mirrors the civilian justice system” when the broader society does not participate in trial by military panel (Majority Reasons, at para. 53). Nor do we think that the *Charter* right to a jury trial should be denied for service members charged with offences that have no direct connection to the military.

[121] Second, it is the role of the courts to interpret the words expressing the military exception in s. 11(*f*) to define the range of offences that Parliament can exclude from the right to a trial by jury. The majority says that as long as Parliament is acting under its constitutional authority in relation to military law, and has not enacted an overbroad law, it can define what constitutes “an offence under military law” and consequently the scope of the military exception in s. 11(*f*) (Majority Reasons, at para. 110). Though a legislative provision can be helpful in an inquiry into the meaning of a *Charter* right, it does not define the scope of the *Charter* right. Overbreadth and legislative competence are not the only guides to defining the meaning of s. 11(*f*) — the right contained in that section must be considered.

[122] Third, military court jurisdiction has historically been subject to important limits. Initially, the types of offences that could be tried by military courts were limited to offences that were specific to the military, such as desertion, mutiny and sedition. As the jurisdiction of military courts expanded to include civilian offences, civilian courts maintained primary jurisdiction where offences were triable in either court (as acknowledged in s. 71 of the *NDA*). Over the past four decades, the development of a military connection test in Canada has limited military court jurisdiction to offences that are military in nature or take place in military circumstances.

[123] We join the majority in rejecting the position put forward by the accused persons that the only offences under military law considered for the purposes of s. 11(f) of the *Charter* are those military offences enumerated in ss. 73-129 of the *NDA*.

[124] However, we conclude, based on the nature and purpose, language, and history of the jury trial right and its exception, that s. 130(1)(a) of the *NDA* does not comply with s. 11(f) of the *Charter* to the extent that it denies service members the right to a jury trial for serious offences that do not have a military connection. Because striking down the legislative provision (as the accused persons request) would limit the trial of offences by military courts more than the *Charter* exception demands, we would read in a military connection requirement to s. 130(1)(a) to respect s. 11(f) of the *Charter*.

II. The Right to a Jury Trial and its Exception

[125] Section 11(f) reads: “Any person charged with an offence has the right . . . except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment”. This *Charter* provision guarantees the fundamental right to a jury trial. It protects the interests of the accused in being tried by a jury, and the interests of society in participating in the prosecution of serious criminal offences (*R. v. Turpin*, [1989] 1 S.C.R. 1296; *R. v. Lee*, [1989] 2 S.C.R. 1384).

[126] The meaning of a *Charter* right is to be understood by analyzing the purpose of the guarantee and the interests it is meant to protect. The purpose of the right is ascertained by reference to the character and larger objectives of the *Charter*, the language of the right, the historical origins of the concepts enshrined, and where applicable, the meaning and purpose of the other specific rights with which it is associated within the text of the *Charter*. The interpretation should be generous and aimed at fulfilling the guarantee and securing for individuals the full benefit of the *Charter* protection without “overshoot[ing]” the purpose of the right (*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145).

[127] Exceptions “should not be construed more widely than is necessary to fulfil the values which support [them]” (*Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161, at p. 1207, per La Forest J.). R. Sullivan has expanded on this point: “In

keeping with the current emphasis on purposive analysis, modern courts are particularly concerned that exceptions and exemptions be interpreted in light of their underlying rationale and not be used to undermine the broad purpose of the legislation” (*Sullivan on the Construction of Statutes* (6th ed. 2014), at p. 506). In order to determine whether an exception is undermining the broad purpose of the right beyond the intended scope of the exception, it is essential to consider the rationales underlying the right and the exception together. It is inappropriate to focus on the purpose of the military exception at the expense of the purpose of the right to a jury trial (Majority Reasons, at paras. 78-80). The proper approach is to interpret the right, along with the exception, in order to give the full benefit of the *Charter* protection without overshooting its purpose.

[128] With regard to the specific question before us, we agree with Professor A. Morel, who describes how this interpretive approach directs the court to read the words of the military exception narrowly:

One must not lose sight of the fact that we are in the presence of an exception to a provision which, in other respects, guarantees any accused the right to the benefit of trial by jury. This provision is itself part of a *Charter* whose first section “guarantees the rights and freedoms set out in it”. It is sufficient to say that the exception must receive a restrictive interpretation and that it is proper to ascribe to the expression “an offence under military law” the strict meaning of these words, which is the result of a secular historical tradition. [footnote omitted.]

(“Certain Guarantees of Criminal Procedure (Ss. 11(b), (f), (h), 12 and 14)” in *The Canadian Charter of Rights and Freedoms: Commentary*, by W. S. Tarnopolsky and G.-A. Beaudoin, eds., (1982), at p. 376)

[129] In our view, the purpose of the military exception in s. 11(f) cannot be divorced from the purpose of the right to a jury trial. In *Turpin*, this Court interpreted the word “benefit” in s. 11(f) in a “broad and generous manner . . . to ensure that those protected receive the full benefit of the protection” (p. 1314). Similarly, we take an interpretive approach that ensures those protected receive the full benefit of the protection, subject to the specific limitation in s. 11(f).

A. *The Nature and Purpose of Section 11(f)*

(1) Section 11(f) in the Context of the Charter

[130] We begin by situating s. 11(f) in the *Charter*. We explain the nature and purpose of s. 11(f), including how s. 11(f) differs from s. 7.

[131] The nature of the protection in s. 11(f) can be discerned by reference to other *Charter* provisions. Sections 7 to 14 of the *Charter* enshrine fundamental legal rights. Section 7 broadly protects the fundamental rights of “[e]veryone” to “life, liberty and security of the person”. Those rights are balanced by the requirement that any deprivation of those rights be “in accordance with the principles of fundamental justice.” Sections 8 to 14 are specific enumerations of legal rights. Section 11 lists nine fundamental rights in paras. (a) to (i) that are granted to “[a]ny person charged with an offence”. The more general purpose of s. 11 is to protect the liberty and security interests of persons accused of crime in the circumstances stated in each paragraph (*R. v. Kalanj*, [1989] 1 S.C.R. 1594, at p. 1609).

[132] As noted by Lamer J. (as he then was), ss. 8 to 14 “address specific deprivations of the ‘right’ to life, liberty and security of the person in breach of the principles of fundamental justice, and as such, violations of s. 7” (*Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at p. 502). These sections draw attention to particular fundamental rights that are to be protected. La Forest J. explained in *R. v. Lyons*, [1987] 2 S.C.R. 309, that s. 11 “serves to illustrate and, perhaps, amplify” the application of s. 7 (p. 354).

[133] The purpose of s. 11(f) is to protect the right to a jury trial. Section 11(f) is, in effect, an illustration of a fundamental right to life, liberty and security of the person guaranteed in s. 7. Section 11(f) also offers a specific protection that s. 7 does not. In *R. v. CIP Inc.*, [1992] 1 S.C.R. 843, the Court rejected the argument put forward by the respondent that the scope of the legal rights in ss. 8-14 could be no greater than what was protected in s. 7: “Section 7 does not define the scope of the rights contained in the provisions that follow it. ... In my opinion . . . s. 11(b) can encompass interests in addition to those that have been recognized as falling within s. 7” (p. 854; see also *R. v. Smith (Edward Dewey)*, [1987] 1 S.C.R. 1045, at p. 1062). This reasoning demonstrates that legislation found constitutional with respect to s. 7 is not necessarily constitutional under s. 11, or vice versa. These two different constitutional protections do not compel the same result.

[134] Thus, the finding in *Moriarity* that s. 130(1)(a) of the *NDA* did not violate s. 7 for overbreadth does not answer the question of whether the provision violates

s. 11(f), in part because of the different protections offered by the two *Charter* provisions. A provision may pass constitutional muster under the overbreadth prong of s. 7, but still violate other legal rights in the *Charter*. In *Moriarity*, the Court did not purport to define “offence under military law tried before a military tribunal”, as s. 11(f) was not at issue. Indeed, the Court in *Moriarity* expressly noted that nothing it said spoke to the scope of the military exception in s. 11(f):

The overbreadth analysis does not evaluate the appropriateness of the objective. Rather, it assumes a legislative objective that is appropriate and lawful. I underline this point here because the question of the scope of Parliament’s authority to legislate in relation to “Militia, Military and Naval Service, and Defence” under [s. 91\(7\)](#) of the [Constitution Act, 1867](#) and the scope of the exemption of military law from the right to a jury trial guaranteed by [s. 11\(f\)](#) of the *Charter* are not before us in these appeals. We are concerned here with articulating the purpose of two challenged provisions in order to assess the rationality of some of their effects. We are not asked to determine the scope of federal legislative power in relation to military justice or to consider other types of *Charter* challenges. We take the legislative objective at face value and as valid and nothing in my reasons should be taken as addressing any of those other matters. [Emphasis added; para. 30.]

[135] With a challenge based on s. 11(f) now squarely before us, we turn to determining the nature and scope of s. 11(f) to address whether s. 130(1)(a) of the *NDA* violates it.

(2) Individual and Community Interests in Jury Trials

[136] Section 11(f) protects both an individual and societal interest in trials by jury. In *Turpin*, this Court described s. 11(f) as granting individuals charged with an

offence the right to the benefit of a trial by jury. The Court stated that s. 11(f) is concerned both with protecting the interests of the accused and placing corresponding duties on the state to respect those interests (p. 1310). The Court emphasized that a jury trial serves not only the interests of the accused but also those of society, as the jury plays a role in educating society and “lending the weight of community standards to trial verdicts” (pp. 1309-10). The nineteenth century English judge James Stephen explained the value of the jury trial as follows:

. . . trial by jury interests large numbers of people in the administration of justice and makes them responsible for it. It is difficult to over-estimate the importance of this. It gives a degree of power and of popularity to the administration of justice which could hardly be derived from any other source.

(J. Stephen, *A History of the Criminal Law of England* (1883), vol. I, at p. 573, cited at p. 1310 of *Turpin*)

[137] The collective dimension of the right to a jury trial has been important both historically and more recently in Canada. Historically, the local community’s interest in adjudicating alleged crimes committed against it and the importance of a public example were considered key parts of the criminal jury trial right. W. Blackstone, in his *Commentaries on the Law of England* (1769), Book IV, stated:

[A]lthough a private citizen may dispense with satisfaction for his private injury, he cannot remove the necessity of public example. The right of punishing belongs not to any one individual in particular, but to the society in general, or the sovereign who represents that society: and a man may renounce his own portion of this right, but he cannot give up that of others.

(p. 357)

[138] This collective interest in the jury trial continues to be recognized today. Indeed, a crime is understood to be a wrong against society; hence, it is the state that prosecutes. As noted in *R. v. Sherratt*, [1991] 1 S.C.R. 509, the community has a stake in the prosecution of serious criminal offences:

The jury, through its collective decision making, is an excellent fact finder; due to its representative character, it acts as the conscience of the community; the jury can act as the final bulwark against oppressive laws or their enforcement; it provides a means whereby the public increases its knowledge of the criminal justice system and it increases, through the involvement of the public, societal trust in the system as a whole.

(pp. 523-24)

[139] Both the collective and individual aspects of the jury trial right are important, and we must give effect to both aspects of the right. The accused persons in this case seek to exercise the right to the benefit of a jury trial. The community also has an interest in participating in the prosecution of serious offences.

[140] Indeed, it is critical in this analysis to determine how military jurisdiction over offences not sufficiently related to the military impacts society. Trying an offence in the military justice system deprives the community of the chance to participate in the prosecution of serious criminal offences. While appropriate in some cases, serious offences should generally go before a jury composed of, “as far as is possible and appropriate in the circumstances, the larger community” (*Sherratt*, at p. 525). Determining whether it is “possible and appropriate in the circumstances” to have a jury trial composed of the larger community requires this court to interpret the

words in the s. 11(f) exception. What, then, is an “offence under military law before a military tribunal” that defines the boundaries of the exception to the right to a jury trial?

(3) Conclusion Regarding the Nature and Purpose of Section 11(f)

[141] Section 11(f) encompasses the interests of the accused and of society in holding a jury trial when prosecuting serious criminal offences. To give effect to this purpose, while respecting the limit imposed by the military exception, we next turn to interpreting the proper scope of the exception.

B. *Scope of the Exception Based on the Language of Section 11(f) and the Role of the Courts*

[142] The exception to the *Charter* right to a jury trial is described in the following terms: “except in the case of an offence under military law before a military tribunal”. The French version reads: “*sauf s’il s’agit d’une infraction relevant de la justice militaire*”.

[143] As the English version of the provision makes clear, the exception is defined by two aspects: the offence must be (1) an offence under military law, and (2) tried before a military tribunal. As Morel states, “[b]y referring instead to ‘an offence *under military law* tried before a military tribunal’, the text adds a qualification which could be construed as restrictive” (p. 375 (emphasis in original)). In our view, the

term “offence under military law” must be interpreted to determine the circumstances in which the exception applies.

[144] The French wording of the exception (“*sauf s’il s’agit d’une infraction relevant de la justice militaire*”) can be read harmoniously with the English version. Read in light of the English version, the French version encompasses both the forum (“military tribunal”) *and* the substantive law (“military law”). In other words, “*justice militaire*” can be read as a composite of both “military law” and “military tribunal”.

[145] The Crown argues that “offence under military law” is defined by Parliament, and that the limits on military jurisdiction are best understood as a “triangle”— that is, military jurisdiction is bounded by (1) overbreadth under s. 7 of the *Charter* and (2) Parliament’s legislative competence under s. 91(7) of the *Constitution Act, 1867*, to legislate in relation to “Militia, Military and Naval Service, and Defence”. We fail to see how meeting these two constitutional requirements means that the legislation is constitutional in all respects. Legislative competence and overbreadth are not the only limits on Parliament’s power. The “triangle” is simply faulty reasoning.

[146] First, there are ways in which s. 130(1)(a) could be unconstitutional apart from overbreadth under s. 7. Section 130(1)(a) could infringe s. 7 in another way, such as if the effects of the provision were grossly disproportionate to its goals. Further, the provision could be unconstitutional under another *Charter* provision.

[147] Second, Parliament's legislative competence to enact under a certain head of power does not preclude those enactments from review by courts for *Charter* compliance. The division of powers in the *Constitution Act, 1867*, gives the federal and provincial legislatures authority to enact laws under the different heads of power. The *Constitution Act, 1982*, including the *Charter*, limits the exercise of authority conferred under the *Constitution Act, 1867*. Thus, while Parliament may have authority to enact legislation under any given head of power, it does not follow that this authority immunizes its legislative enactments from *Charter* review (see, by analogy to s. 35 of the *Constitution Act, 1982*, *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257, at paras. 102-3 and 142-43). Jurisdictional competence does not imply *Charter* compliance. As this Court stated in *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134, at para. 82: "There is no conflict between saying a federal law is validly adopted under s. 91 of the *Constitution Act, 1867*, and asserting that the same law, in purpose or effect, deprives individuals of rights guaranteed by the *Charter*".

[148] Courts are empowered to determine whether a law enacted by the legislature in accordance with the *Constitution Act, 1867*, also conforms to the requirements of the *Constitution Act, 1982*. As Dickson J. (as he then was) stated, "it is the high duty of this Court to insure that the Legislatures do not transgress the limits of their constitutional mandate and engage in the illegal exercise of power" (*Amax Potash Ltd. v. Saskatchewan*, [1977] 2 S.C.R. 576, at p. 590, with respect to the *Constitution Act, 1867*; see also *Re Motor Vehicle*, at p. 498, with respect to the

Constitution Act, 1982). Section 52 of the *Constitution Act, 1982*, provides that the Constitution (i.e. both the 1867 and 1982 instruments) is supreme and any inconsistent provision is of no force and effect. As this Court has stated, “The existence of an impartial and authoritative judicial arbiter is a necessary corollary of the enactment of the supremacy clause” (*Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21, [2014] 1 S.C.R. 433, at para. 89; see also *Big M*, at p. 313). It is the courts, not legislatures, that ultimately interpret the Constitution and define constitutional minimums.

[149] The judiciary’s role in relation to the legislature is important in the context of the military court system: “[U]ndue deference by the courts to the military leads the judiciary to abstain from its proper role of constitutional oversight over all organs of government” (P. T. Collins, “The Civil Courts’ Challenge to Military Justice and its impact on the Civil Military Relationship”, in *Military Justice in the Modern Age*, by A. Duxbury and M. Groves, eds. (2016), 57, at p. 58). We agree with the majority judges of the Court Martial Appeal Court in *R. v. Déry*, 2017 CMAC 2, 391 C.R.R. (2d) 156 (“*Stillman*”), Cournoyer and Gleason JJ.A., that “Parliament ought not be the arbiter of constitutional rights by defining what ‘under military law’ means” (para. 79). It is the role of the courts to ascertain the constitutional meaning of the words an “offence under military law tried before a military tribunal”, as they do with respect to any other *Charter* provision.

[150] Having considered the scope of the exception and the role of the courts in determining that scope, we next interpret the exception by reference to the history of military jurisdiction.

C. *The History of Military Jurisdiction*

[151] A separate system of military courts has existed since 1689; there is no dispute that a separate system is required (*Généreux*, at p. 293). However, the history of military courts' jurisdiction demonstrates that their jurisdiction has always been limited. Under *An Act for punishing Officers or Soldiers who shall Mutiny or Desert Their Majestyes Service* (Eng.), 1689, 1 Will. 3 & Mar. 2, c.5 ("*Mutiny Act*"), only three offences — sedition, desertion and mutiny — were subject to the jurisdiction of military courts, as discussed below. Over time, military court jurisdiction expanded to include military-related offences like insubordination. In 1879, legislation was enacted to bring civilian offences under military court jurisdiction. This concurrent jurisdiction was limited, however, as civilian courts maintained primary jurisdiction over civilian offences. Prior to the *Charter*, in 1980, a concurring judgment from this Court in *MacKay* recognized the military connection test, which sought to limit the cases heard by military courts to those cases where there was a necessary connection between the offence and the military. This military nexus doctrine became part of the "pith and marrow" of Canadian military law" (*R. v. Larouche*, 2014 CMAC 6, 460 N.R. 248, at para. 23).

[152] Thus, recognizing the limits on military court jurisdiction is essential to understanding the proper scope of military jurisdiction and the legal context when s. 11(f) was drafted and enacted.

[153] The majority emphasizes that the military justice system has evolved in recent decades, in particular by strengthening the independence and impartiality of military panels (paras. 44-51). Yet, the majority also acknowledges that s. 11(d), which guarantees the right to an independent and impartial trial, is not at issue before us. Nor is there evidence before us to determine whether a trial before a military panel “largely mirrors the civilian system” (Majority Reasons, at para. 53). Therefore, we do not purport to rule on the adequacy of military panels. Rather, we focus on determining the appropriate limits of military court jurisdiction, turning now to historical evidence of the scope of civilian and military court jurisdiction.

(1) Limits on the Types of Offences Triable by Military Courts and the Primacy of Civilian Courts

[154] In 1689, the English Parliament enacted the *Mutiny Act*. The *Mutiny Act* attempted to counter the threat to loyalty of soldiers upset with the ascension of a new king and queen to the throne. The *Mutiny Act* allowed military courts to try and sentence to death officers or soldiers who had committed mutiny, sedition or desertion during peacetime: “Soldiers who shall Mutiny or Stirr up Sedition, or shall Desert Their Majestyes Service be brought to a more exemplary and speedy Punishment than the usuall Forms of Law will allow” (M. L. Friedland, *Double*

Jeopardy (1969), at p. 343). In other words, the *Mutiny Act* provided that any limit on an individual's rights under the ordinary laws of the realm, including the right to a jury trial, was only for mutiny, sedition and desertion; such rights were not limited for "mere offences against discipline" (C. Clode, *The Administration of Justice Under Military and Martial Law* (1872), at p. 44). Common law courts maintained jurisdiction over ordinary offences (*Grant v. Gould* (1792), 2 H. B1. 69, 126 E.R. 434, cited in Morel, at p. 376).

[155] Two centuries later, in 1879, jurisdiction of military law expanded to include criminal offences punishable by ordinary law, with the merging of the *Articles of War* and the *Mutiny Act*. At this time, civilian criminal offences became triable by courts martial (S.T. Pitzul and J.C. Maguire, "A Perspective on Canada's Code of Service Discipline" (2002), 52 *A.F.L. Rev.*1, at pp. 2-3).

[156] This was the legislative framework that Canada inherited at the time of Confederation in 1867, when the *British North America Act* "gave the new Dominion of Canada responsibility for defence and maintenance of its own military forces during peacetime" (C. Madsen, *Another Kind of Justice: Canadian Military Law from Confederation to Somalia* (1999), at p. 5). The next year, Parliament passed the *Act respecting the Militia and Defence of the Dominion of Canada*, S.C. 1868, c. 40 (*Militia Act*) which created the Canadian Armed Forces, distinct from those of Britain. The *Militia Act* was replaced by a succession of *Army Acts*, all of which "emphasized the importance of discipline within an armed force and the need for

informal procedures under which offenders could be tried swiftly” (Pitzul and Maguire, at p. 3). The core concern in each of the series of legislative enactments was ensuring efficiency and discipline.

[157] From 1868 to the early 1900s, the historical evidence relates mostly to military court trials of offences committed during active service, such as desertion and absence without leave, or minor infractions against service discipline, such as “insubordination [and] negligent performance of duties” (Madsen, at p. 23). There is some indication, however, that civilian courts would take over jurisdiction from the military to try criminal offences. In the First World War, for example, when Canadians were still British subjects, British civilian courts would frequently claim jurisdiction in cases of Canadian soldiers committing criminal offences, such as assault, murder or rape (Madsen, at p. 45).

[158] In 1950, the *NDA* was enacted to consolidate legislation relating to the armed forces into one statute. The *NDA* retained the incorporation of civilian offences in s. 119(1)(a) (now s. 130). During the consideration of the *NDA*, Brooke Claxton, then Minister of National Defence, was asked about the potential for overly broad jurisdiction of military courts in peacetime. In response, he stated that military court jurisdiction was meant for cases where civilian courts did not or could not act, either in times of war where there were no civilian courts, in peacetime where no civilian courts were operating, or where civilian authorities deferred to military authorities, such as for offences committed on base or against another soldier:

Service courts have no exclusive jurisdiction in respect of civil offences. In fact, they do not try civil offences where the civil courts try civil offences, because if a civil offence is tried by a civil court then the service court has not jurisdiction . . .

The reason, therefore, for providing that a number of civil offences shall also be service offences is to take care of the case where the civil court does not act or cannot act . . .

The reasons for that, I think, are threefold. In the first place, in the event of war, service personnel may be serving overseas where no civil court is set up . . . In the second place, even in peacetime service establishments are set up at places where there are no organized civil courts, and if a man commits an act of assault against a fellow soldier there is no civil court operating there to deal with the case . . . Then there is a third reason, and that is that the civil authorities themselves, in a considerable number of cases, prefer to have the matter dealt with by the military authorities . . . If within the confines of a camp a soldier commits an act of assault against another soldier, ordinarily the civil authorities prefer that we deal with it . . . But if the civil authorities deal with it, then we cannot deal with it and we have no means of indicating to them our preference. The civil authority is always supreme. [Emphasis added.]

(House of Commons, *Official Report of Debates of the House of Commons*, vol. IV, 2nd Sess., 21st Parl., 1950, at p. 3429)

[159] Claxton's comments illustrate that, at the time of the enactment of s. 130's predecessor, trying service members for civilian offences was meant to be limited to situations where it was necessary for efficiency concerns or desirable because there was a sufficient military connection such that civilian courts preferred to defer to military jurisdiction. However, Claxton was clear: "civil authority is always supreme". The practice in the decades following the enactment of the *NDA* was that military authorities deferred to civilian authorities where offences took place in non-military circumstances (see e.g. J.H. Hollies, "Canadian Military Law" (1961),

1 *Mil. L. Rev.* 69, at p. 72; Department of National Defence, *Canadian Forces Administrative Order 19-16 — Civil Prosecution* (December 19, 1975)).

(2) Development of a Military Connection Requirement

[160] In the decades following the enactment of the *NDA*, courts developed the military connection test to determine when it was appropriate to depart from the primacy of civilian court jurisdiction.

[161] The military connection test was first articulated in Canada in the 1980 case *MacKay*. In a widely-cited concurrence, McIntyre J. held, and Dickson J. agreed, that if courts martial were to try service members in Canada for criminal offences otherwise triable by civilian courts, the commission and nature of those offences must be connected to military service in some way. Justices McIntyre and Dickson disagreed with the majority that all prosecutions of armed forces members under any penal statute should be tried in military courts, as it was “not necessary for the attainment of any socially desirable objective connected with the military service to extend the reach of the military courts to that extent” (p. 408). They stated:

The serviceman charged with a criminal offence is deprived of the benefit of a preliminary hearing or the right to a jury trial. He is subject to a military code which differs in some particulars from the civil law While such differences may be acceptable on the basis of military need in some cases, they cannot be permitted universal effect in respect of the criminal law of Canada as far as it relates to members of the armed services serving in Canada.

The question then arises: how is a line to be drawn separating the service-related or military offence from the offence which has no necessary connection with the service? In my view, an offence which would be an offence at civil law, when committed by a civilian, is as well an offence falling within the jurisdiction of the courts martial and within the purview of military law when committed by a serviceman if such offence is so connected with the service in its nature, and in the circumstances of its commission, that it would tend to affect the general standard of discipline and efficiency of the service.

(pp. 409-10)

[162] Justice McIntyre's concurrence had a significant impact on subsequent jurisprudence. As noted by R. A. McDonald:

Despite this seemingly strong support by the majority, the decision that was to have a greater future impact was the concurring opinion of Justice (later Chief Justice) Dickson and Justice McIntyre . . .

...

. . . The McIntyre formula with respect to the jurisdiction of military tribunals over offences was the one most frequently cited by the lower courts in the years to follow.

(*Canada's Military Lawyers* (2002), at p. 1209).

Indeed, in 1982, Professor Hogg agreed that s. 130(1)(a) needed to be read down in light of McIntyre J.'s reasons (Hogg, *Canada Act 1982 Annotated* (1982) at p. 42, cited in *Larouche*, at para. 53).

[163] This was the background against which the *Charter* was drafted and enacted. The *Charter* protected and entrenched a number of rights, including the right

to a jury trial. Then Attorney General Jean Chrétien referred to the exception in s. 11(f) in a Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, stating: “Jury trials in cases under military law before a service tribunal have never existed either under Canadian or American law” (Senate and House of Commons, *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, No. 36, 1st Sess., 32nd Parl., January 12, 1981, at p. 12). It is not surprising that military tribunals have never provided for a jury, given the historical evidence of the limits on military jurisdiction; nor is this statement compelling evidence that a military accused can be denied the right to a jury trial absent a direct military connection (Majority Reasons, at paras. 77-79).

[164] The military nexus test was adopted by the Court Martial Appeal Court in *R. v. Macdonald* (1983), 4 C.M.A.R. 277, one year after the *Charter*, and has been applied with some regularity over the past thirty years to determine whether military courts have jurisdiction to try a civilian offence under s. 130(1)(a). See, for example, *R. v. MacEachern* (1985), 4 C.M.A.R. 447; *Ryan v. The Queen* (1987), 4 C.M.A.R. 563; *Ionson v. The Queen*, (1987), 4 C.M.A.R. 433, aff’d [1989] 2 S.C.R. 1073. See also *R. v. Brown* (1995), 5 C.M.A.R. 280, which acknowledged the settled state of the law at the time: “the exception to the guarantee of the right to a jury trial in paragraph 11(f) is triggered by the existence of a military nexus with the crime charged” (p. 287).

(3) Conclusions Drawn From the Historical Evidence

[165] The historical background to s. 11(f) illustrates that there have consistently been limits on military jurisdiction. While we agree with the majority that the exception to the right was included to affirm a separate military system and to preserve the tradition that military law has never had jury trials (Majority Reasons, at para. 80), these two points do not paint the full picture. The background to s. 11(f) has always been concerned with appropriate limits on military jurisdiction. A limited approach to military jurisdiction is also supported by contemporary academic sources (see, for example, R. Ho, “A World That Has Walls: A *Charter* Analysis of Military Tribunals” (1996), 54 *U.T. Fac. L. Rev.* 149 at p. 163; G. Létourneau, *Introduction to Military Justice: An Overview of the Military Penal Justice System and Its Evolution in Canada* (2012), at p. 19).

[166] This historical overview also highlights when military courts *should* have jurisdiction. The historical evidence points to the fact that it was appropriate for offences to be heard by military courts rather than civilian courts where quick and efficient justice was necessary to uphold discipline, such as when offences were committed during wartime or abroad. This has been illustrated time and again, from the words of the *Mutiny Act* — created to provide a “more exemplary and speedy Punishment than the usuall Forms of Law will allow” — to Claxton’s comments during consideration by Parliament of the *NDA*. With these concerns as our guide, we turn next to discussing the military connection test.

III. Defining the Military Connection Test

A. *Background on the Military Connection Test*

[167] The military connection test articulated by McIntyre J. in *MacKay* asked: Has a service member committed an offence connected to the military, having regard to the nature of the offence, the circumstances of its commission and whether the offence would tend to affect military discipline and efficiency? As McIntyre J. stated:

The question then arises: how is a line to be drawn separating the service-related or military offence from the offence which has no necessary connection with the service? In my view, an offence which would be an offence at civil law, when committed by a civilian, is as well an offence falling within the jurisdiction of the courts martial and within the purview of military law when committed by a serviceman if such offence is so connected with the service in its nature, and in the circumstances of its commission, that it would tend to affect the general standard of discipline and efficiency of the service. [Emphasis added; at p. 140.]

[168] McIntyre J. observed that a similar approach had been taken in the American context, developed in *O'Callahan v. Parker* (1969), 395 U.S. 258, and refined in *Relford v. Commandant* (1971), 401 U.S. 355, at p. 356, fn. 1. *Relford* directed courts to consider twelve factors in determining whether a particular offence by a service member was “service-connected”, including whether the place of commission was under military control, whether there was a connection between the accused’s military duties and the crime, and whether the victim was engaged in the performance of duties related to the military.

[169] Canadian courts martial have regularly applied the military connection test since *MacKay*. For example, in *R. v. Catudal* (1985), 4 C.M.A.R. 338, the Court Martial Appeal Court found that one charge of arson among several arson charges against Mr. Catudal had no military connection because it had been committed in circumstances where the accused was travelling across Canada to his next posting in his own vehicle (for all the other charges Mr. Catudal was on base). In *Brown*, the accused was charged with manslaughter and torture while on peacekeeping duties in Somalia; the Court Martial Appeal Court accepted the accused's concession that there was "ample military nexus" on the facts of that case (p. 290).

[170] The Crown argues — and the majority accepts — that *Moriarity* foreclosed the possibility of the military connection test (paras. 92-95). We do not agree. As described earlier, *Moriarity* involved a challenge to s. 130(1)(a) based on s. 7 of the *Charter*. This Court held that s. 130(1)(a) was not overbroad because it was rationally connected to its objective of maintaining discipline, efficiency, and morale, without need to resort to a military connection. We accept those as valid objectives of s. 130(1)(a), and of the military justice system more broadly. However, *Moriarity* does not answer the question as to whether the objectives of s. 130(1)(a) and of the military justice system — morale, discipline and efficiency — are met when depriving an accused of the right to a jury trial guaranteed under s. 11(f).

[171] Finally, the majority notes that the military connection test has been abandoned in the U.S. and has no place in the Canadian legal context (Majority

Reasons, at para. 99). While the U.S. Supreme Court, in a split decision, left behind the “service-connection” test, the test continues to be applied in Canada in practice. The Director of Military Prosecution (DMP) currently looks to factors concerned with whether there is a military connection when determining whether the offence should proceed in the military justice system (see para. 102 of the majority’s reasons for a list of these factors). While it is often easier to draw a bright line, we do not agree that the military connection test forces courts to engage in “an unwieldy and unhelpful threshold inquiry that distracts from the merits” (para. 99).

[172] Determining whether there is a military connection may involve careful consideration and difficult judgment calls, but we agree with the dissenting judges of the U.S. Supreme Court in *Solorio v. United States* (1987), 483 U.S. 435, at p. 466, who reinforced the need for this exercise:

It should not be surprising that such determinations may at times be difficult or time consuming or require the drawing of narrow distinctions. The trial of any person before a court-martial encompasses a deliberate decision to withhold procedural protections guaranteed by the Constitution. Denial of these protections is a very serious matter

...

This requirement must not be discarded simply because it may be less expeditious than the majority deems appropriate.

[173] Moreover, if there is a difficult determination to be made about whether there is a military connection, courts are better placed to make such determinations rather than leaving it to the discretion of the prosecutor. As stated in *R. v. Nur*, 2015

SCC 15, [2015] 1 S.C.R. 773, we cannot be certain that discretion will always be exercised properly, nor should the constitutionality of a legislative provision depend on the confidence that the public prosecutor will act properly (para. 95). The DMP does not share the same guarantees of independence as the Attorney General or the Director of Public Prosecutions, nor is the DMP accountable to Parliament (G. Létourneau and M. W. Drapeau, *Military Justice in Action: Annotated National Defence Legislation* (2nd ed. 2015), at p. 12).

[174] Should a *Charter* right be left to the discretion of the prosecution or should it be determined, in the end, by the courts? The answer must be the latter. The military wishes to retain its discretion and, thereby, to deny to some accused who are members of the armed forces the proper exercise of their rights. The response to this needs to be unequivocal: *Charter* rights are not subject to prosecutorial discretion; rather, they are subject to determination by the courts.

[175] Furthermore, given that the DMP currently uses a test similar to the military connection test to determine whether a case should proceed in the military justice system, requiring a military connection test as part of a s. 11(f) analysis is unlikely to significantly affect the number of cases heard by civilian courts, such that it would result in further backlogs in civilian courts (Majority Reasons, at para. 104). Such a suggestion is pure speculation. In fact, there may be delays when service members are tried in military courts. A recent audit by the Auditor General of Canada found that “Canadian Armed Forces took too long to resolve many of its military

justice cases, with significant impacts in some cases” (*Spring 2018 Reports of the Auditor General of Canada to the Parliament of Canada: Report 3 — Administration of Justice in the Canadian Armed Forces* (2018), at para. 3.10). There is no evidence before us that the military justice system suffers from fewer delays than the civilian system. Even if there were, the possibility of delay is not a proper basis to deny an accused their right to a jury trial.

[176] For these reasons, we conclude that s. 130(1)(a) of the *NDA* infringes s. 11(f) of the *Charter* to the extent that it deprives an accused of the right to trial by jury for serious offences where there is no military connection. We reach this conclusion based on a purposive interpretation of the *Charter* provision: by looking to the purpose of the right, the character and larger objectives of the *Charter*, the wording chosen to articulate the right, and the historical origins of the concepts enshrined. To give effect to the purpose of the jury trial right — both in terms of the accused’s interest in a trial by jury and the community’s interest in participating in the prosecution of serious offences — the offence or the circumstances in which it was committed must have a military connection. We thus interpret “offence under military law” as referring to an offence that is connected to the military in its nature or committed in circumstances sufficiently connected to the military that would directly affect discipline, efficiency and morale. In our view, absent this military connection, s. 130(1)(a) of the *NDA* violates the right to a jury trial.

B. *Guidance on the Military Connection Test*

[177] Where an accused is charged with an offence that falls under s. 130(1)(a) of the *NDA* and the accused challenges the military court's jurisdiction on the basis that it would deny their right to a jury trial guaranteed in s. 11(f), the court should ask whether there is a military connection. Has a service member committed an offence in circumstances that are so connected to the military that it would have a direct effect on military discipline, efficiency and morale?

[178] Circumstances sufficiently connected to the military include when an offence is committed in the course of military duty, on military property, or using military property. If an offence is committed in such circumstances, it can generally be inferred that there will be a direct effect on military discipline, efficiency and morale. If the offence is committed when a member is off duty and the offence is not committed on or using military property, it remains open to the prosecution to prove that the offence had a direct effect on military discipline, efficiency and morale, and can therefore be tried by military panel. This may be the case, for example, if the offence involved the flouting of military authority or the contravention of direct orders. The fact that an offence was committed by a service member, on its own, is unlikely to be sufficient to ground a military connection on the basis that its mere commission undermines discipline.

[179] When an offence is committed in a theatre of war, it is presumed that the circumstances will meet the military connection test, as the circumstances require justice to be promptly rendered and civilian courts are unlikely to be available.

Offences committed abroad, meanwhile, are dealt with under s. 130(1)(b) of the *NDA*,⁸ as military exigency would require those offences be tried before military courts.

[180] It should be noted that while s. 130 incorporates civilian offences under military jurisdiction, service members can also be charged with offences under ss. 73-129 of the *NDA*. Many of the offences under ss. 73-129 do not have an analogue in the civilian context, and are specific to the military (*R. v. Hannah*, 2013 CM 2011). Where the offence is specific to the military, such as desertion and insubordination, there is obviously a military connection. However, for offences that are not specific to the military (for example, stealing, under s. 114 of the *NDA*), the military connection test provides guidance on whether there is a sufficient link to the military to proceed before a military court. Thus, where an accused is charged under ss. 73-129, and the accused raises a challenge under s. 11(f) of the *Charter*, a court should consider whether the offence is military in nature, and, if not, whether it occurred in circumstances that are so connected to the military that it would have a direct effect on military discipline, efficiency and morale.

[181] As described above, the community's interest in prosecuting serious offences in civilian courts is protected by the right to a jury trial. This consideration mitigates in favour of interpreting the s. 11(f) exception narrowly. It is not, however,

⁸ "An act or omission . . . that takes place outside Canada and would, if it had taken place in Canada, be punishable under Part VII, the *Criminal Code* or any other Act of Parliament, is an offence under this Division and every person convicted thereof is liable to suffer punishment as provided in subsection (2)."

assessed in determining whether there is a military connection for the purposes of s. 11(f), as the s. 11(f) right is exercised by the accused. Where there is a military connection, and there is therefore concurrent jurisdiction, these considerations may inform the choice about which forum is the more appropriate. In practice, the DMP does consider the degree of civilian community interest in the case and the views of the victim in assessing whether the offence should be tried by military tribunal, as it is relevant to determine whether a civilian court is better suited to hear a case. For example, there may be community interest in seeing sexual assault offences tried before civilian courts, given the recent investigation into deficiencies in sexual assault prosecutions in the military justice system. (For a summary of these concerns, see: M. W. Drapeau, *Sexual Assaults in the Canadian Military: Is the Military Making Headway?*, April 30, 2018 (online), submitted to the National Security and Defence Committee, Senate of Canada; see also M. Deschamps, *External Review into Sexual Misconduct and Sexual Harassment in the Canadian Armed Forces*, March 27, 2015 (online)).

[182] In sum, when an accused is charged under s. 130(1)(a) of the *NDA*, courts must determine whether there is a sufficiently direct connection between the circumstances of the offence and the military. To determine whether there is a sufficiently direct connection, a court should consider whether the offence was committed while the accused was on duty, on military property or using military property. If so, a court may infer that the circumstances of the offence have a direct impact on military efficiency, discipline and morale. The prosecution may point to

other circumstances of the offence to show that the circumstances of the offence would have a direct impact on military efficiency, discipline and morale.

C. *Section 1 Analysis*

[183] Without a military connection, subsuming civilian offences under military jurisdiction through s. 130(1)(a) infringes s. 11(f) of the *Charter*. The burden is on the Crown to show that the infringement is saved by s. 1 of the *Charter*. Here, the Crown concedes that if s. 130(1)(a) is found to breach s. 11(f), it cannot be saved by s. 1 (Crown Factum, at para. 67).

[184] Indeed, it is difficult to contemplate that such an infringement could be justified under s. 1.

[185] The objective of s. 130(1)(a) — to maintain discipline, efficiency and morale in the armed forces — is sufficiently important to pass the “pressing and substantial” objective prong of the test laid out in *R. v. Oakes*, [1986] 1 S.C.R. 103. Further, as noted by this Court in *Moriarity*, s. 130(1)(a) is rationally connected to this objective. However, incorporating civilian offences under military jurisdiction without permitting a jury trial for serious offences cannot pass the minimal impairment prong of the *Oakes* analysis for the reasons articulated by McIntyre J. in *MacKay*: “It is not necessary for the attainment of any socially desirable objective connected with the military service to extend the reach of the military courts to that extent” (p. 408). Maintaining discipline, efficiency and morale by incorporating penal

offences without a military connection does not impair the right to a trial by jury as little as possible.

[186] The historical account shows that concern for military efficiency and the related matter of discipline was a thread in the development of military court jurisdiction. However, trying civilian offences in military courts that are unrelated to the military may have the *opposite* effect on discipline and on morale when the right to a jury trial is removed. Common sense dictates that denying rights can undermine, not enhance morale. In *Re Colonel Aird*, [2004] HCA 44, 209 A.L.R. 311, Justices Callinan and Heydon, in dissent, noted that discipline is not advanced by the removal of fundamental procedural rights without good reason:

But it may be assumed that the importance of morale in a defence force is no doubt very great. It is likely to be put at serious risk however if charges against soldiers in respect of criminal misconduct committed on leave in a foreign country in circumstances totally unrelated to their military activities and duties, are to be heard and determined by court martial in Australia without a jury. Indeed, the knowledge that the military authorities have the right to intrude into the private life of soldiers, and to discipline them in military proceedings for conduct far removed from their military service, and that in such proceedings there is no right to a committal and a jury, is likely to prove a disincentive to enlistment itself, let alone to morale. [Emphasis added; para. 167.]

[187] It is not obvious that trying ordinary offences in military courts will improve military discipline, efficiency and morale. In fact, doing so may have the opposite effect. The independence of civilian courts can enhance the confidence of military members in how criminal matters are treated. Further, research suggests that in the military, discipline that is seen to be applied inequitably as between service

members and civilians can lead to increased offending (P. T. Collins, “Civil-Military ‘Legal’ Relations: Where to from Here? — The Civilian Courts and the Military in the United Kingdom, United States and Australia” in *International Humanitarian Law Series* (2018), vol. 51, at p. 279; see also J. Crowe and S. Ratnapala, “Military Justice and Chapter III: The Constitutional Basis of Courts Martial” (2012), 40 *Fed. L. Rev.* 161, at p. 177). Service members who do not get certain procedural safeguards guaranteed to civilians, including a right to a jury trial, may see this as an inequity.

[188] The above highlights that s. 130(1)(a) is not carefully tailored to its objectives — it impairs the right to a jury trial more than is reasonably necessary. A minimally impairing alternative would have been to try penal offences by military panel only where the circumstances in which it was committed are directly connected to the military. Such a connection would be more properly tailored to the goals of maintaining discipline, efficiency and morale.

D. *Reading In is the Appropriate Remedy*

[189] The appropriate remedy is to read a military connection requirement into s. 130(1)(a). We note that neither party has put forward this position. The accused persons’ request that s. 130(1)(a) of the *NDA* be declared inoperative does not follow as the appropriate remedy given the exception in s. 11(f). Consistent with the reasoning in *Stillman*, we share the view that reading in a military connection requirement is the appropriate remedy.

[190] The remedy of reading in is appropriate where it would further respect for the role of the legislature and the purposes of the *Charter* (*Vriend v. Alberta*, [1998] 1 S.C.R. 493, at p. 56).

[191] In our opinion, reading in a military connection requirement is faithful to the legislative objective of s. 130(1)(a). Granting military courts jurisdiction where appropriate, while respecting the right to a jury trial, recognizes the objective of s. 130(1)(a) of maintaining discipline, efficiency and morale. Respecting an individual's *Charter* rights better supports discipline and morale, as discussed above.

[192] Reading in is preferable as a remedy to striking down s. 130(1)(a), as it "immediately reconciles the legislation in question with the requirements of the *Charter*" (*Schachter v. Canada*, [1992] 2 S.C.R. 679, at p. 716). As s. 130(1)(a) deals with a large number of service offences, striking down the provision would create a void. Given the nature of the *Charter* breach, reading in a military connection avoids unnecessarily limiting those proceedings that may be held before military courts; it is also not an undue intrusion into the legislative sphere.

[193] When an accused is charged with an offence where the maximum punishment is imprisonment for five years or a more severe punishment, a military court must read s. 130(1)(a) as follows to determine whether it can try the offence alleged:

130. (1) An act or omission committed by a service member that is military in nature or is committed in circumstances directly connected to the military

(a) that takes place in Canada and is punishable under Part VII, the *Criminal Code* or any other Act of Parliament,

...

is an offence under this Division and every person convicted thereof is liable to suffer punishment as provided in subsections (2). [Underlined text added.]

IV. Conclusion

[194] Section 130(1)(a) is constitutional with respect to s. 11(f) of the *Charter* if we read in a military connection test. To give effect to the purpose of the jury trial right — both in terms of the accused’s interest in a trial by jury and the community’s interest in participating in the prosecution of serious offences — the offence must have a military connection. Accordingly, we interpret “offence under military law” as referring to an offence that is military in nature or committed in circumstances connected to the military. In our view, absent this military connection, s. 130(1)(a) of the *NDA* violates the s. 11(f) *Charter* right to a jury trial.

[195] We would allow the appeals in *Stillman*, allow the appeal in *Beaudry* in part, and replace the Court Martial Appeal Court’s order in *Beaudry* of a declaration of invalidity with an order to read in a military connection requirement to s. 130(1)(a).

Appeals in Stillman dismissed, KARAKATSANIS and ROWE JJ. dissenting.

Appeal in Beaudry allowed, KARAKATSANIS and ROWE JJ. dissenting in part.

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