COURT MARTIAL

Citation: *R. v. Ryan*, 2018 CM 2033

Date: 20181122
Docket: 201803

Standing Court Martial

Asticou Courtroom
Gatineau, Quebec, Canada

Between:

Her Majesty the Queen, Respondent

- and -

Leading Seaman D.J. Ryan, Applicant

Before: Commander S.M. Sukstorf, Military Judge

DECISION ON PLEA IN BAR OF TRIAL

INTRODUCTION

[1] On 24 October 2017, Leading Seaman Ryan was charged by the Canadian Forces National Investigation Section (CFNIS) with two offences under section 130 of the *National Defence Act* (*NDA*), that is to say, sexual assault, contrary to section 271 of the *Criminal Code*. The alleged offences took place in Borden, Ontario between two military members who were briefly undergoing training on a military course. Shortly thereafter, the two military members returned home to their respective units. The accused's court martial is convened for 5 December 2018, in Halifax, Nova Scotia, at his place of duty and residence.

[2] On 19 September 2018, the Court Martial Appeal Court of Canada (CMAC) released the judgment of *R. v. Beaudry*, 2018 CMAC 4 (CMAC *Beaudry*) where it ruled that paragraph 130(1)(a) of the *NDA* is unconstitutional in that it violates a service member's right to trial by jury for offences with a maximum sentence of five years or more.

[3] On 21 September 2018, in response to the CMAC *Beaudry* decision, the Director of Military Prosecutions (DMP) filed a Notice of Appeal and ancillary filings with the Supreme Court of Canada (SCC) as well as a motion to a judge for a request to suspend the declaration of invalidity, a draft order, together with a supporting affidavit.

[4] On 23 October 2018, based on the CMAC *Beaudry* decision and given that the maximum sentence of section 271 of the *Criminal Code* is greater than five years, defence filed an application, in what I consider a plea in bar of trial, seeking the Court to terminate the proceedings against the accused for lack of jurisdiction.

SUBMISSIONS OF THE PARTIES

Defence - Applicant

[5] Based on the CMAC *Beaudry* decision, defence argues:

a) the charges against the accused are no longer constitutional given that paragraph 130(1)(a) of the *NDA* is of no force and effect in its application to any civil offence for which the maximum sentence is five years or more; and

b) under the principle of *stare decisis*, this Court is bound by the decision rendered by the CMAC *Beaudry* and the Court has no jurisdiction to proceed.

Prosecution - Respondent

[6] In response to the defence's application, the prosecution submitted a Motion to Quash the defence's application or delay hearing it until the SCC rules on the DMP's motion to suspend the declaration of invalidity pronounced in CMAC *Beaudry*.

[7] Although the SCC has agreed to orally hear the DMP's motion to suspend the declaration, on 15 November 2018, at the date of the hearing, there was still no date scheduled. At the date of the writing of this decision, there is still no confirmed date. Prosecution's oral submissions were based on four key points:

(a) reviewing the case law on *stare decisis*;

(b) application of *stare decisis* to appeal courts;

(c) application of the *stare decisis* doctrine in the context of the CMAC *Beaudry* case; and

(d) what this Court should do when faced with conflicting jurisprudence at the appellate level.

[8] The prosecution argued that the Court should be most persuaded by the position taken in the CMAC decision in *R. v. Royes*, 2016 CMAC 1 (*Royes*) which was the first

CMAC decision on the constitutionality of *NDA*, paragraph 130(1)(a). He argued that the CMAC position in *Royes* can only be overruled by the SCC and this Court should refuse to follow CMAC *Beaudry*. He provided the Court with significant precedent on the doctrine of *stare decisis* as well as appeal courts' processes on the reconsideration of an issue.

[9] He argued that the CMAC, under three separate panels, each comprised of three judges, considered the issue, making a total of nine judges who heard and rendered decisions on the constitutional issue, where seven of the nine found paragraph 130(1)(a) of the *NDA* to be constitutional.

ISSUES

[10] In a relatively short period, the CMAC rendered three decisions, two of which are self-contradicting on the identical issue of whether paragraph 130(1)(a) violates subsection 11(*f*) of the *Canadian Charter of Rights and Freedoms* (*Charter*). Of the three decisions, the first, *Royes*, is unanimous in upholding paragraph 130(1)(a), the second, *R. v. Déry*, 2017 CMAC 2 (*Déry*) is also unanimous, although the CMAC in *Déry* would have read in a military nexus test. The third decision, CMAC *Beaudry*, finds the exact same paragraph to be unconstitutional.

[11] As the basis of the defence application, seeking a termination of proceedings, defence argues that the CMAC *Beaudry* decision and its declaration that paragraph 130(1)(a) is unconstitutional is binding on this Court. However, given that there is an earlier CMAC decision, *Royes*, on the exact issue, it is not so straightforward.

[12] In ruling on the defence application, the Court must analyze the following:

(a) Vertical *stare decisis*:

i. examining CMAC self-contradictory decisions;
ii. three CMAC decisions on the same issue;
iii. is CMAC *Beaudry* a reconsideration of the issue and did it overturn *Royes*?

(b) The CMAC decisions:

i. *Royes*
ii. *Déry*
iii. CMAC *Beaudry*

(a) factual inconsistencies;
(b) defining "under military law"; and
(c) what is a "trial by jury"?

ANALYSIS

Examining CMAC self-contradictory decisions

[13] As a first step, it is appropriate to address the doctrine of *stare decisis*. The doctrine on vertical *stare decisis* is best summarized by the SCC at paragraph 26 of *R. v. Comeau*, 2018 SCC 15:

> [26] Common law courts are bound by authoritative precedent. This principle — *stare decisis* — is fundamental for guaranteeing certainty in the law. Subject to extraordinary exceptions, a lower court must apply the decisions of higher courts to the facts before it. This is called vertical *stare decisis*. Without this foundation, the law would be ever in flux — subject to shifting judicial whims or the introduction of new esoteric evidence by litigants dissatisfied by the status quo.

[14] While the law on vertical *stare decisis* above is clear, the situation before me is not. As a lower court, I must apply the decisions of higher courts. However, on the issue before me, this Court is constructively bound by two directly contradictory judgments. Since two of the decisions are in direct conflict, they cannot both be binding.

[15] Although the prosecution provided extensive and very meaningful submissions on the application of the law on horizontal *stare decisis* at the CMAC level, and why the CMAC *Beaudry* decision is problematic, most of those submissions are best saved for the appeal currently before the SCC.

[16] As an inferior court, I am not in a position to decide whether the majority in CMAC *Beaudry* complied with the law on horizontal *stare decisis*. Notwithstanding, this court must make a ruling in the face of apparent contradiction within the confines of vertical *stare decisis*.

[17] In ruling on the application currently before this Court, the fundamental question I must answer is whether the decision in CMAC *Beaudry* is more binding than the earlier CMAC decision of *Royes*. Counsel for the defence did not provide this Court with any authority that compels it to follow CMAC *Beaudry*. However, in his submissions, defence argued that CMAC *Beaudry* is definitive law and that the Chief Justice of the CMAC declared paragraph 130(1)(a) unconstitutional. Further, he questioned why DMP filed a motion to suspend the decision seeking a declaration of invalidity?

[18] In response, the prosecution stated that the Chief Justice signed the declaration as an administrative function flowing from the decision of the majority. With respect to the reason why DMP filed a motion with the SCC to suspend the decision, prosecution stated that it was a necessary reaction given the circumstances.

[19] The Court agrees that the DMP's motion was a necessary step towards de-conflicting the two decisions while managing the offences already in the court martial system. The Court welcomes the earliest intervention of the SCC on this issue.

Three CMAC decisions on the same issue

[20] Before ruling on what CMAC decision is most binding in terms of the application before me, I must first review the context of why there are three decisions on the same issue and assess whether CMAC *Beaudry* overrules the earlier decision in *Royes*.

[21] We are privileged that the CMAC has one of the largest appeal court benches in Canada, comprised of 67 judges from provincial appellate and superior courts. Decisions at CMAC are decided by three judge panels. As the appeal court for military courts martial, the CMAC is often asked to decide intriguing, precedent-setting and novel issues. As such, CMAC judges are always motivated to hear appeals.

[22] Without this court questioning why the CMAC entertained a third appeal on an identical issue, the reality is, it did so. However, with the greatest of respect, the recent CMAC *Beaudry* decision has produced uncertainty in understanding the application of the previously held case in *Royes*.

[23] With an average of five court martial appeals per year, and given the number of judges, it is inevitable that multiple appeals on the same issue will render different results. In a well-resourced system such as the military justice system, appellants have significant resources to revisit the same issues. As the Court in *R. v. Arcand*, 2010 ABCA 363 described at paragraph 185, "An appeal would be scarcely better than putting the dice back in the cup and shaking them again." Perpetual litigation on the same issue will eventually yield a result desirable for one of the parties. In this case, two self-contradictory decisions provide leverage to both sides. Defence's application relies upon the CMAC *Beaudry* decision, while the prosecution relies upon *Royes*.

Is CMAC Beaudry a reconsideration of the issue and did it overrule Royes?

[24] Since the CMAC *Beaudry* decision is the last in the series of CMAC decisions on the same issue, this Court must first assess whether it was a reconsideration of the issue, overruling *Royes*. Fortunately, this Court does not have to go into a deep analysis to clarify.

[25] In a similar three judge panel to *Royes*, CMAC *Beaudry* conducted sittings in Ottawa, Ontario, on 23 February, 31 October 2017 and 30 January 2018 concluding them before 8 March 2018, when it learned that the SCC would consider the issue. At paragraph 25, Ouellette J.A. writes that since the SCC granted leave to appeal to the members in *Déry* and stayed its case pending a decision in the CMAC *Beaudry* case, he ruled on the merits of the question, irrespective of *Royes* and *Déry*. Further, Bell C.J. writes, at paragraph 83 of his dissent, that the issue of whether the CMAC considered itself bound by the decisions in *Royes* and *Déry* was "undoubtedly moot given the decision of the Supreme Court of Canada allowing the application for leave to appeal in *Déry*, docket number 37701, on March 8, 2018."

[26] The above statements from both the majority and the dissent in CMAC *Beaudry* reveal that after learning that the SCC would consider the issue, the panel in CMAC *Beaudry* considered the issue before them moot. Further, there is nothing in the language of the decision to suggest that the CMAC *Beaudry* overruled the earlier CMAC decision in *Royes*.

[27] At paragraph 185 in *Arcand*, the Court cautioned on the types of problems that flow when an appeal court does not follow its own jurisprudence and renders decisions that are self-contradictory.

> If a court of appeal did not follow its own precedents, then courts of appeal would remove predictability, not give it. In that event, trial judges lose all motives to follow court of appeal decisions. Worse, trial judges could not follow appellate precedent because it would often be self-contradictory. The Reconsideration Cases demonstrate that.

[28] There is little to no guidance either in statute or case law to guide a trial judge when faced with conflicting precedents from coequal appeal courts on an indistinguishable issue. There are various views on how a trial court should de-conflict contradictory decisions. One view is that the later decision should be followed, particularly if it struck down the legislation; another view is that the decision made earliest in time be followed; yet, another view is that the Court should follow the decision which is more accurate. A final view is to follow the decision with the largest panel or the position where the majority of the judges sided.

[29] Until this issue is appropriately resolved by the SCC, I am compelled to make a difficult choice. On principle, it appears to me that I must follow the judgment which appears to lay down the law more elaborately and accurately with respect to the application before me. When there is lingering doubt about which precedent to follow, I must adopt a path that accords with this Court's sense of justice.

Royes

[30] The first decision on the issue was that of *Royes*. On 26 April 2016, the CMAC unanimously dismissed the challenge of paragraph 130(1)(a) of the *NDA* and found it consistent with subsection 11(*f*) of the *Charter*.

[31] The CMAC in *Royes* provided a fully reasoned treatment of the constitutionality of paragraph 130(1)(a) of the *NDA* in relation to subsection 11(*f*) of the *Charter*. This Court does not need to go into much analysis as the Court in *Déry* unanimously decided that it was bound by the decision in *Royes*. As such, there is no debate that *Royes* is binding on this court.

Déry

[32] On 19 May 2017, one year later, the second decision on this issue was rendered in *Déry* where a CMAC panel faced with the exact same constitutional challenge,

upheld the constitutionality of paragraph 130(1)(a) of the *NDA* finding that they were bound by *Royes* through the principle of horizontal *stare decisis*.

[33] However, in *Déry*, in an *obiter dictum*, the majority judges stated they disagreed with the Court's reasoning in *Royes* and listed five reasons for which, if they did not feel bound by that decision, they would have departed from it. It found that paragraph 130(1)(a) of the *NDA* must be interpreted by applying a military nexus test in order to be consistent with subsection 11(*f*) of the *Charter*.

[34] In *obiter*, *Déry* commented on the emerging international consensus to restrict the scope of military jurisdiction which the decision in CMAC *Beaudry* was in substantial agreement with and leveraged to support its own analysis. Although there has been an international trend to restrict the scope of military jurisdiction in some countries, particularly in Europe, the military justice system in Canada and other territorially large countries have not followed this trend. The context and facts of the case before me provide insight as to why.

[35] Canada is an exceptionally vast country comprised of ten provinces and three territories, all exercising federal criminal jurisdiction within their borders, creating a level of complexity that smaller nations elude. As we see in the facts before this Court, the alleged incident occurred while two military members were tasked to undertake military training on a base far from their usual place of duty and residence. Domestically, military members can be temporarily deployed or tasked within Canada to train or serve in any of the many different criminal jurisdictions.

[36] The pragmatic difference in applying the two contrary decisions to the facts before the court is best summarized as follows. CMAC *Beaudry* concludes that a military tribunal can try an accused for an allegation of sexual assault that occurs outside of Canada, but found it unconstitutional for the same military tribunal to try the identical allegation of sexual assault, if the alleged incident occurred inside of Canada. Conversely, *Royes* holds that military tribunals have jurisdiction to try sexual assault cases irrespective of whether they occurred in Canada or abroad.

[37] There is no better way to distinguish contradictory cases than applying them through the prism of the facts before the Court. In the case before me, the accused works and resides in Halifax, Nova Scotia. The allegations before this Court flow from incidents that occurred on a military course at Canadian Forces Base Borden, in Ontario, over a thousand miles away. Shortly after the military course ended, both the accused and complainant would have been transferred elsewhere in the country, and may now be living thousands of miles apart in different provinces. Similarly, if there were witnesses, they too would have dispersed, returning to their own home bases at various other locations throughout the country.

[38] If CMAC *Beaudry* is the most authoritative, upon returning to her home unit, if the complainant reports to Canadian Armed Forces (CAF) authorities an allegation that constitutes an offence under section 271 of the *Criminal Code*, how would it be

handled? Absent jurisdiction, the first challenge faced would be aiding the complainant in reporting the incident to the civilian police. Which police force should be engaged? Should it be the province and city where the complainant or alternatively the accused resides, or the city where the offence was committed? In this case, the alleged incident occurred on a military base, where the CAF has primary jurisdiction, but no jurisdiction over the offence.

[39] In any event, any resolution that engages civilian police or prosecutors will need to work through a complex inter-provincial investigation, overcoming challenges in an already overburdened criminal justice system. Arguably, the obstacles start to mount. Under a best case scenario, if a police force does complete an efficient investigation, the next challenge would be in finding a prosecutor who is willing to prosecute the offence in a city where neither the accused nor the complainant reside in the same province, let alone the same city. Who will be willing to put forward the time and resources to further justice in the case and pay for the complainant and the witnesses to travel back to testify?

[40] The jurisdictional hurdles in investigating and trying the accused in Ontario may become insurmountable. How does the CAF respond to the complainant who was ordered to go to Ontario to undertake military training and while there was sexually assaulted? In practice, the approach set out in CMAC *Beaudry* could facilitate an accused to elude justice.

[41] Further, it cannot go unnoticed that if the accused's criminal charges are transferred to a superior court in Barrie, Ontario, he will need to personally fund his own legal defence, pay for his own travel and accommodations, travelling from Nova Scotia to Barrie, Ontario for various court appearances, pay for his witnesses to travel, etc. Such a defence would quickly rise into the six-digit range, and this not including the costs associated with a lengthy civilian jury trial.

[42] Conversely, under the *Royes* approach, the allegation would be reported to the CFNIS, who have jurisdiction to investigate the incident. Without complications presented by provincial boundaries, CFNIS have both the authority and the resources to conduct interviews in any province. Once their investigation is complete, if substantiated, they may lay charges. Further, if the DMP decides to prefer the charges, the member would be entitled to be tried by a General Court Martial (GCM), which is a trial by his peers and provided free legal counsel.

[43] There can be no illusion that, in every instance, members commit offences only in the location where they reside and that the complainant, the accused and witnesses are all available in close vicinity. Arguably, by the nature of service in the CAF, the ready accessibility of witnesses to testify is more unlikely than it is likely. In the furtherance of justice, this Court has had defence and prosecution witnesses testify from various locations throughout Canada and the world, where they are deployed or tasked. Frankly, it is not as simple as just going downtown to have the case heard. If it was, then there would be no debate.

CMAC Beaudry

Factual inconsistencies

[44] One of the requirements in deciding which of the two contradictory decisions is most persuasive with respect to the issue before me, this court must assess their accuracy. Upon reviewing the material before this Court and applying the CMAC *Beaudry* decision to the facts of the current case, it is noted that there are many similarities between the two cases. In addition, it became evident that further review would benefit from a clarification of the facts, a description of the court martial system and the nuances of specific terms.

[45] On the facts of the case before me, when the accused, Leading Seaman Ryan was charged with two offences under section 130 of the *NDA* and contrary to section 271 of the *Criminal Code*, he was given the choice to be tried by GCM or Standing Court Martial (SCM), pursuant to *NDA*, subsection 165.193 (1). As Leading Seaman Ryan failed to make an election within the statutory time period (within 14 days after being notified in writing by the Court Martial Administrator (CMA) of his choice of either a GCM or SCM, see *NDA*, subsection 165.193(3)), the accused person was deemed to have chosen to be tried by GCM, pursuant to the same subsection.

[46] The CMA, therefore, convened a GCM, for 13 November 2018, which is essentially a trial before a jury. On 18 September 2018, defence counsel, on behalf of Leading Seaman Ryan, requested in writing to the CMA to make a new choice, as of right, to be tried by a SCM (trial by judge alone), pursuant to *NDA*, subsection 165.193(4) which reads as follows:

> New choice — as of right
>
> **165.193 (4)** The accused person may, not later than 30 days before the date set for the commencement of the trial, make a new choice once as of right, in which case he or she shall notify the Court Martial Administrator in writing of the new choice.

That same day, the CMA reconvened the court martial of Leading Seaman Ryan as a SCM, pursuant to *NDA*, subsection 165.193 (7), to begin 5 December 2018.

[47] Based on the charges, the convening of a GCM is a legislative requirement. This Court notes that given the severity of the charges that Corporal Beaudry faced, specifically *NDA*, section 130, contrary to *Criminal Code* section 246(a), overcoming resistance to commission of offence, a GCM was likewise convened, pursuant to *NDA*, paragraph 165.191 (1)(b). He, too, through his defence counsel, pursuant to *NDA*, subsection 165.191(2), sought to change his mode of trial and asked to be tried by a SCM, which was ultimately given written concurrence by the DMP.

[48] From reading the CMAC *Beaudry* decision, it appears that the majority may not have appreciated what a GCM is. In *Déry*, in concurring reasons, Bell C.J. very simply and eloquently described the differences between a SCM and GCM which are helpful:

> [9] Proceedings before a Court Martial are not summary proceedings in which the rights of the accused are not respected. In fact, for certain offences, an accused may choose to be tried by Standing Court Martial (military judge alone) or a General Court Martial (see s. 165.191(2) of the *NDA*). In a General Court Martial, the court is composed of a military judge and a panel of five members (s. 167(1) of the *NDA*). That panel serves a function similar to that of a jury in a civilian criminal trial: the panel is the trier of facts while the military judge makes rulings on legal questions (ss. 191 and 192(1) of the *NDA*). Similar to a civilian jury trial where a civilian judge instructs a jury, the military judge instructs the panel. The grounds of appeal available to an accused based upon instructions delivered to the panel of a court martial are no different than those available to parties in the parallel civilian system. Just as unanimity is required by a civilian jury, most decisions made by the panel are determined by a unanimous vote (s. 192(2) of the *NDA*).
>
> [10] Like the civilian jury system, the military court martial system is in constant evolution. Criminal jury systems in Canada have evolved, even in recent years, from having no alternate jurors to having one or two, if so ordered by a presiding judge who considers it to be in the interest of justice (s. 631(2.1) of the *Criminal Code*; *Criminal Law Amendment Act*, 2001, S.C. 2002, c. 13, s. 54(2)). Furthermore, a presiding judge may order additional jurors to be sworn such that a jury of 13 or 14 members can decide the fate of an accused (s. 631(2.2) of the *Criminal Code*). Finally, I would note that accused persons do not get to "pick" their jury. While accused persons have a role to play in jury selection, that role cannot be considered determinative given the limitations upon challenges and challenges for cause: see, s. 629(1) of the *Criminal Code*. In the court martial system, panels are selected randomly by the Court Martial Administrator. In some cases, the members of the panel are required to hold senior or equal rank to that of the accused: see s. 167 of the *NDA*.

[49] Although a GCM is not a "civilian" jury in the context of the *Criminal Code,* it is a representative jury of the accused's peers and offers the equivalent procedural fairness protections of juries. In conducting a very close reading of the CMAC *Beaudry* decision, the court notes that at paragraph 2 of his reasons, Ouellette J.A. writes that Corporal Beaudry "asked to be tried by a judge and jury, a request that was denied." There is nothing on the court record to support these facts. Conversely, there is a record of Corporal Beaudry seeking the contrary. In his case, a GCM had been convened, entitling him to be tried by a jury of his peers, and then he sought the concurrence of the DMP to be tried by judge alone, being a SCM.

[50] What is very clear is that in *R. v. Beaudry*, 2016 CM 4009, the military judge heard and decided an application for a plea in bar of trial, where counsel for Corporal Beaudry challenged the court's jurisdiction on the subsection 11(*f*) constitutional question. The application was heard by my colleague, Pelletier M.J., prior to the commencement of Corporal Beaudry's court martial. On 11 July 2016, in his reasons for denying the application, Pelletier M.J. summarized the submissions made on behalf of Corporal Beaudry. He wrote:

> [3] In his notice of application and orally, the applicant admits that his application is submitted solely to preserve the rights of the accused, considering that the issue submitted was specifically analyzed and answered by the CMAC in its decision of 3 June 2016 in *R. v. Royes*, 2016 CMAC 1. The CMAC, in reasons by Justice Trudel, concluded unequivocally that paragraph 130(1)(*a*) of the *NDA* does not violate the right to a jury trial guaranteed by section 11(*f*) of the *Charter*. I am informed that this decision is currently the subject of an application for leave to appeal to the Supreme Court of Canada. However, to the extent that the question before me is indistinguishable from the question answered by our Court of Appeal, I am bound by the interpretation of the latter.

[51] It would have been Pelletier's M.J. denial of Corporal Beaudry's application challenging the jurisdiction of the court martial that would have had to be the basis of the appeal. There was no application made by Corporal Beaudry before the court martial seeking to be tried by a judge and jury as the majority infers from the facts.

[52] Instead of the majority identifying an error in the trial judge's decision and then reviewing it, it appears to have misinterpreted the nature of the application, inferring that the accused had asked to be tried by a judge and jury and was denied.

[53] Further, at paragraph 6 of the CMAC *Beaudry* decision, Ouellette J.A. erroneously states that:

> Since the appellant filed his notice of appeal, this Court has ruled on the constitutionality of paragraph 130(1)(*a*) of the NDA in *R. v. Royes*, 2016 CMAC 1, [2016] C.M.A.J. No. 1 (leave to appeal to the Supreme Court of Canada dismissed, 37054 (February 2, 2017)), and *R. v. Déry*, 2017 CMAC 2, [2017] C.M.A.J. No. 2 (leave to appeal to the Supreme Court allowed, 37701 (March 8, 2018)).

[54] For clarity in the timing, as explained by Pelletier M.J., in his decision on Corporal Beaudry's plea in bar of trial, the CMAC decision in *Royes* had already been rendered when Corporal Beaudry submitted his plea in bar of trial. In fact, it was rendered on 3 June 2016, a month before Corporal Beaudry's court martial. As Pelletier M.J. wrote in his decision on the original *Beaudry* motion, Corporal Beaudry's application prior to his court martial was submitted solely to preserve his rights. One could reasonably conclude this was done specifically to ensure that he could be joined with the action should the leave to appeal to the SCC be granted.

Defining "under military law"

[55] During the hearing, I raised with counsel the significance of the lack of an analysis on the distinction of a military panel. The prosecution responded that they felt that the *NDA* and jurisprudence clearly set out reliable definitions of a service offence under military law and, in its opinion, during their appeal before the CMAC, it was not required to advance an analysis of whether a military panel is a jury.

[56] However, at paragraph 28 of its decision, the majority in CMAC *Beaudry* refuted this position and held "that Parliament cannot define the right guaranteed in subsection 11(*f*) of the *Charter* by adopting or amending the *NDA*." It felt it was imperative to define "military law" / "*justice militaire*" first, and then proceed to the

question of whether paragraph 130(1)(a) violates the right to a trial by jury guaranteed by subsection 11(*f*) of the *Charter*.

[57] Although there are reliable Canadian definitions of military justice and offences under military law, both pre and post Charter, prior to and immediately after the enactment of the *NDA*, as well as within a multitude of significant SCC and CMAC jurisprudence, the majority favoured reliance on early 1900 literary works, dated UK statutes, including the *Mutiny Act*, UK *Army Act* and general practices that existed in the United Kingdom in the 1600-1900s.

[58] Further, the majority reasons, starting at paragraph 42, and then again at paragraphs 58-59 draw a distinction based on the nature of the offences. In short, it includes serious offences, including rape could not historically be tried by court martial and clarifies that in 1982, the *NDA* did not provide service tribunal's jurisdiction to try the most serious civil offences, which included rape. It does go on to recognize that such jurisdiction was later granted in 1989.

[59] One of the concerns with remaining fossilized in the past is that equality rights evolve. Accepting that the *Charter* is a living tree and must adapt as new rights evolve, then arguably the *Charter* must respond to the changing nature of military service, which now includes women. Now that women serve in close confines, alongside their male peers, both at home and abroad, addressing incidents of sexual misconduct and assault are fundamental to maintaining discipline within the CAF. Why shouldn't the rights of women members be worthy of consideration? Is it acceptable for the CAF to task a female member for duty somewhere in Canada and if she suffers a sexual assault at the hands of a fellow military member, the CAF is unable to hold the perpetrator responsible?

[60] Nonetheless, notwithstanding the position advocated by the prosecution during the CMAC *Beaudry* appeal, since the majority in CMAC *Beaudry* defined an offence under military law to exclude sexual assault under the *Criminal Code.*

What is a "trial by jury"?

[61] It is noted at paragraph 29 of the majority's decision, that Parliament can provide military tribunals jurisdiction to try offences:

> [29] Similarly, I agree with the observation made in *Royes* and *Déry* that Parliament can amend and even repeal the NDA to remove the restrictions on military jurisdiction for certain offences, such as murder, as provided in section 70. Nonetheless, such an amendment to the NDA would have no bearing on whether the *Charter* has been violated in this case.

[62] In short, the CMAC *Beaudry* decision holds that Parliament and the *NDA* can provide jurisdiction for a military tribunal to try sexual assault, but that sexual assault cannot be considered an offence under military law within the meaning of subsection 11(*f*) of the *Charter*. With the majority's interpretation and a review of the wording of

subsection 11(*f*), one can conclude that military tribunals can try an accused for sexual assault, provided the accused has the benefit of trial by jury.

[63] However, subsection 11(*f*) of the *Charter* defines neither the term "offence under military law" nor the term "trial by jury"? So what exactly is a "trial by jury"? Where is the definition to be found for "trial by jury" of which the *Charter* makes reference? This court notes that the *Charter* right does not qualify a jury as necessarily being civilian. Subsection 11(*f*) of the *Charter* reads as follows:

> **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.

[64] I note that the majority's analysis in CMAC *Beaudry* on subsection 11(*f*) is based on the fact that military members have historically had a right to a jury. At paragraph 32 in CMAC *Beaudry*, the majority curiously relies upon the 1689 UK *Mutiny Act* to confirm that an accused was tried by the "judgment of their piers". The relevant passage from the *Mutiny Act* referred to by the majority, reads as follows:

> ...and whereas no man may be forejudged of life or limb, or subjected to any kind of punishment by martial law, or in any other manner than by the judgment of his piers and according to the known and established laws of this realm; yet nevertheless, it being requisite for retaining such forces as are or shall be raised during this exigence of affairs in their duty an exact discipline be observed, and that soldiers who shall mutiny or stir up sedition or shall desert their Majesties' service be brought to a more exemplary and speedy punishment than the usual forms of law will allow. [Emphasis added]

[65] At paragraph 45, Ouellette J.A. concludes, "Accordingly, it seems that, as early as 1689, a member was entitled to a trial by judge and jury, except in cases of mutiny, sedition or desertion." At paragraph 54, the majority links the 1689 *Mutiny Act* to the Code of Service Discipline in the *NDA* without recognizing that a GCM military panel tries an accused by the "judgment of his piers" in the same format that the majority asserts is a jury within the *Mutiny Act*.

[66] In a time when there is persistent and determined advocacy demanding representative juries, military panels are deserving of their own understanding and analysis. Further, it is important to highlight that in the SCC recent decision in the case of *R. v. Gagnon*, 2018 SCC 41, the SCC held the Chief Military Judge's instruction to a panel to the same high standard as a superior court judge's instruction to a jury. Throughout all the pleadings and discussions, the term "jury" was repeatedly used.

[67] In reviewing the majority's decision in CMAC *Beaudry*, the lack of any reference to a GCM and its military panels leads this Court to believe that the majority may not have understood their significance. Based on the drafting of subsection 11(*f*) and the reasons provided by the majority in CMAC *Beaudry*, had it attempted an

analysis of whether a trial by military panel in a GCM meets the definition of "trial by jury", its decision may have been more persuasive and accurate in assisting this Court.

CONCLUSION

[68] In short, there are two competing decisions, *Royes* and CMAC *Beaudry*, from the same CMAC, that stand side by side, directly conflicting with each other. Until the SCC renders its decision on the issue, the merits of the CMAC decisions alone must be this court's sole criterion in opting one over the other and not the fortuitous circumstance that one decision found paragraph *NDA* 130(1)(a) unconstitutional.

[69] Pragmatically, CMAC *Beaudry* imposes unnecessary limitations upon the administration of military justice, creating more problems than it solves as it subordinates other equality rights and principles of fairness. It ties the hands of CAF authorities in investigating and trying CAF members for offences such as sexual assault and removes the option for an accused to be judged by a panel of his military peers.

[70] Based on the charges of sexual assault before me and the reasons discussed above, this Court finds the decision in *Royes* most persuasive. It lays down the law elaborately and accurately and reasonably applies to the facts of the case before me. *Royes* does grant broad jurisdiction to military courts, but notwithstanding the lengthy arguments set out in the *Déry obiter* and CMAC *Beaudry*, there was no evidence provided suggesting that this broad jurisdiction has ever been exploited for improper purposes. The fact that broad concurrent jurisdiction exists, does not mean it will be exercised as policy reasons and resources often dictate otherwise. There are ample examples of high profile military cases, where, based on the facts, location of the witnesses and evidence, such cases are tried in civilian courts.

[71] Further, there are judicial mechanisms within both the military justice system as well as the Federal Court to ensure that if an improper prosecution is pursued, it may be appropriately challenged. The ample appeals heard by the CMAC and the SCC in recent years provide evidence of active oversight and accountability. The following paragraphs of Bell C.J. in *Déry* provide comfort:

> [6] This parallel system of military justice is not a fossilized system of law. It is subject to the *Charter* and was subject to tremendous change and adaptation even before the *Charter*'s enactment. While the following list is not exhaustive, I consider it important to note several features of the parallel military justice system.
>
> [7] Military judges are appointed based upon merit by the Governor in Council and are required to have at least ten years of standing at the bar of a province prior to their appointment (s. 165.21 of the *NDA*), just as civilian judges (s. 3 of the *Judges Act*, R.S.C., 1985, c. J-1 [*Judges Act*]). Military judges have security of tenure until retirement, just as civilian judges (s. 165.21(4) of the *NDA*). While it is the Canadian Judicial Council which is clothed with the jurisdiction to recommend the removal of a civilian judge (s. 65(2) of the *Judges Act*), it is the Military Judges Inquiry Committee, composed of justices of this Court, that is clothed with that power under the *NDA* (s. 165.21(3)). In the same manner that the civilian justice systems in Canada have implemented the position of an independent prosecutorial branch, often headed by a

> Director of Public Prosecutions, the military justice system has implemented a DMP (s. 165.1(1); see *R. v. Gagnon*, 2015 CMAC 2 at para. 19. The military justice system boasts an aggressive and independent Director of Defence Counsel Services (s. 249.18 of the *NDA*), which provides defence services to all persons subjected to the CSD requesting same. In addition, if a service member wishes to retain outside counsel, he has that opportunity (ss. 249.19 and 249.21 of the *NDA*). Appeals may be made by both the prosecution and the defence to this Court (which is fully civilianized), and then, by operation of ss. 245(1) and (2) there exist rights of appeal or leave to appeal to the Supreme Court of Canada, on grounds comparable to those available in the civilian system.

[72] As I mentioned to counsel during the hearing, this Court is concerned foremost with the pragmatic effect this issue has placed on both the accused and the complainant. For them, this is not an academic or theoretical exercise. The pending court martial and the uncertainty that flows from the self-contradictory CMAC decisions are having an undeniable impact.

[73] Currently, the accused is scheduled to be tried by court martial in Halifax, Nova Scotia where he resides. As he is being tried under the military justice system, he is being provided free legal counsel and all costs associated with the court martial are paid. If he so wishes, the accused may be tried by a military panel of his peers.

DECISION

[74] As such, this Court denies the defence's application to terminate the proceedings. However, in the interests of justice, on a date to be agreed to with counsel, the Court will order a change in trial date, not to begin until after the SCC makes a decision on DMP's motion to suspend the declaration of invalidity as pronounced in CMAC *Beaudry*.

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The Director of Military Prosecutions as represented by Major S.J.P. Poitras and Lieutenant-Colonel M.A. Pecknold, Counsel for the Respondent