**COURT MARTIAL**

**Citation:** *R v Hannah*, 2013 CM 2011

**Date:** 20130515
**Docket:** 201276

Standing Court Martial

Canadian Forces Base Gagetown
Oromocto, New Brunswick, Canada

**Between:**

**Her Majesty the Queen**

- and -

**Private M.B.A. Hannah, Applicant**

**Before:** Commander P.J. Lamont, MJ

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**REASONS ON APPLICATION MADE BY THE ACCUSED FOR AN ORDER DECLARING SUBPARAGRAPH 130(1)(A) OF THE *NATIONAL DEFENCE ACT* OF NO FORCE OR EFFECT PURSUANT TO SECTION 52 OF THE CONSTITUTION ACT, 1982.**

(Orally)

[1] Private Hannah is charged in a charge sheet with two offences, contrary to section 130 of the *National Defence Act*, of trafficking or unlawfully selling substances that are scheduled to the *Controlled Drugs and Substances Act* in charges No. 1 and the regulations made under the *Food and Drugs Act* in charge No. 3. At his trial by Standing Court Martial, the case for the prosecution proceeded by way of agreed facts reduced to writing, and certificates of analysis of the substances named in the particulars of the two charges. The defence elected to call no evidence and advanced an application by written Notice of Application, filed as Exhibit 6, seeking an order declaring that paragraph 130(1)(*a*) of the *National Defence Act* is of no force or effect because it is inconsistent with section 7 of the *Canadian Charter of Rights and Freedoms*, and the dismissal of the charges. The written submissions of the parties were marked as exhibits on the application.

[2] The applicant submits that section 130(1)(*a*) infringes the principles of fundamental justice protected under *Charter* section 7 because the provision is overbroad as that term is understood from the decisions of the Supreme Court of Canada in *R v Heywood* [1994] 3 SCR 761 and *R v Demers* [2004] SCC 46.

[3] Section 130 of *the National Defence Act* reads, in part, as follows:

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

[4] In the present case the applicant argues that this provision is overbroad because it potentially reaches many federal offences that have nothing to do with the maintenance of military discipline and efficiency. Counsel confined his submissions to the issue of overbreadth and offered no argument under section 7 of the *Charter* as to arbitrariness or disproportionality. I will therefore confine my remarks to the issues as framed by counsel.

[5] In *Bedford v Canada* [2012] ONCA 186, (leave to appeal to the Supreme Court of Canada granted 25 October, 2012) the Ontario Court of Appeal dealt with an attack on various prostitution-related offences found in the *Criminal Code* on the basis that the provisions violated section 7 on the grounds of arbitrariness, overbreadth, and disproportionality. The Court stated at paragraph 148:

> While the role of necessity in the arbitrariness inquiry remains uncertain, it is indisputably a key component of the overbreadth analysis. When the court considers overbreadth, it asks whether the challenged law deprives a person of his or her s. 7 rights more than is necessary to achieve the legislative objective: *Heywood*, at p. 792. In analyzing whether a statutory provision offends the principle against overbreadth, the court must accord the legislature a measure of deference and should not interfere with legislation simply because it might have chosen a different means of accomplishing the objective: *Heywood*, at p. 793.

And later from paragraph 153:

> While we acknowledge that the jurisprudence in this area has been less than clear in the past, we are satisfied that the application judge was correct to apply the *Heywood* test for overbreadth by asking whether the challenged laws were necessary to achieve the legislative objectives....

[6] The analysis proceeds in steps: one, interpretation of the challenged provision drawn from its legislative history and the jurisprudence; two, identification of the

legislative objectives of the challenged provision; and three, evaluation of the challenged provision as to overbreadth. (See *Bedford*, para.171)

1. Section 130 of the *National Defence Act* came before the Court Martial Appeal Court in *Weselak v. The Queen* (1972) 3 C.M.A.R. 95. At page 96 Cattanach, P stated:

> Section [130] of the National Defence Act provides that any act that takes place in Canada and is punishable under any of the Acts of the Parliament of Canada is also an offence under the National Defence Act.
>
> A member of the military services is a citizen also and as such is subject to the civil as well as military law. The effect of section [130] is to give the military courts jurisdiction over service personnel to try and punish them for civil offences, that is, offences committed in Canada that are punishable by the law of Canada.

This provision first appeared as section 119 of the *National Defence Act*, 1950, the statute that consolidated the legislation relating to Canada's armed services following the Second World War. Section 119 was in turn derived from an earlier Canadian statute, the *Naval Service Act*, 1944, as well as section 41 of the *Army Act* of the United Kingdom. In addition to creating many distinctively naval or military offences, the *Naval Service Act*, in section 89, listed several of the more serious civil offences contrary to Canadian law, together with their punishment, and went on to provide:

> Every person who is guilty of:
>
> …
>
> (h) any other offence which, if committed in Canada, would be punishable under the *Criminal Code* or any other Act of the Parliament of Canada, shall suffer [punishment] ...

In creating a liability for military personnel to be prosecuted at court martial for a breach of the ordinary criminal law, this provision was not an innovation. It reflects a jurisdiction that courts martial have exercised for many years back to the *Mutiny Act*. In 1873 the 6th edition of Simmons on Courts Martial stated, at paragraph 30:

> The ordinary jurisdiction of courts martial extends to the cognizance of offences, declared by or under the powers of the mutiny act, committed either at home or abroad, upon land or upon the sea …

And at paragraph 32:

> Their ordinary jurisdiction is not only for the trial of purely military offences, of which the civil judicature takes no cognizance; or for the trial of offences to the prejudice of good order and military discipline, which although punishable at common law as misdemeanours or felonies, are subject to more exemplary

> punishment by their award; *but it is also, to a certain extent, concurrent with that of the ordinary criminal courts.* (emphasis added)

In a series of decisions beginning with *R v Ionson* in 1987, the Court Martial Appeal Court applied a doctrine that was first developed in American military jurisprudence holding that the jurisdiction of military courts should be confined to those offences that are connected in a meaningful way with military discipline and efficiency. For the distinctively military offences created by sections 73 to 129 of the *National Defence Act*, the necessary nexus with military discipline might be presumed as those offences have a military nature that does not find an analogue in the civilian context. But the issue of military nexus sometimes arose in cases of offences charged under section 130 of the *National Defence Act* where the circumstances were said to be unrelated to the maintenance of military discipline and efficiency. In 1996 however, in the decision of the CMAC in *R v Reddick*, the court held that a military nexus was not a precondition to the exercise of jurisdiction by a court martial over an offence. Strayer CJ stated:

> ... Parliament has thus struck a balance as to when civilians *or civilian offences* ought to be tried in courts martial. That definition is entitled to the presumption of validity and there is no onus on the Crown to prove a "nexus" based on some other criteria. (emphasis added)

And later, the former Chief Justice appeared to downplay any relationship between the requirements of military discipline and the jurisdiction of courts martial when he stated:

> … most of the decisions of this Court finding both for and against the existence of a nexus did not rely on any evidence of the necessity of this proceeding to the discipline and efficiency of the Armed Forces.

And he finally concluded:

> I therefore conclude that the nexus doctrine has no longer the relevance or force which influenced many of the earlier decisions of this Court....

Since the Court's decision in *Reddick*, the CMAC appears to have left open the question of whether a military nexus is required to found the jurisdiction of courts martial over an offence. In *R v Trépanier* [2008] CMAC 3 the Court stated at paragraph 25:

> … at one time the jurisdiction of the courts martial was clearly conditional on the existence of a military nexus. In other words, the offence had to be "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": see for example *MacKay v The Queen*, [1980] 2 S.C.R. 370, at page 410; *Ionson v R* (1987), 4 C.M.A.R. 433; and *Ryan v The Queen* (1987), 4 C.M.A.R. 563. Indeed, in *R v Brown* (1995), 5 C.M.A.R. 280, at page 287, the Court Martial Appeal Court unanimously reasserted as a matter now "well settled that 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."

And at paragraph 26:

> In the following year, however, our Court ruled in *R v Reddick* (1996), 5 C.M.A.R. 485, at pages 498-506, that the notion of military nexus has no place when the debated issue is one of division of constitutional powers. In that context, the Court found that the concept was misleading and distracted from the issue. Finally, in *R v Nystrom*, *supra*, our Court narrowed the scope of the ruling in the *Reddick* case and left for another time the determination of the need for a military nexus which, according to the *Brown* case, appears to be a prerequisite under paragraph 11*f*) of the Charter. We hasten to add that the existence of a military nexus is not in dispute in the present instance.

Were a military nexus as described in the decisions of the CMAC a jurisdictional requirement of courts martial it would appear to be a full answer to the point taken by the applicant that section 130(1)(*a*) allows the prosecution of military members for federal offences that have nothing to do with the maintenance of military discipline. The issue of overbreadth under section 7 would therefore not arise. But until such time as the CMAC may rule otherwise, I consider that I am bound by the decision of the Court in *Reddick* to conclude that a relationship between the conduct charged as an offence and its effect upon the requirements of military discipline is not a pre-condition to the liability of military members under section 130(1)(*a*).

2. Thus interpreted, what is the legislative objective sought to be achieved by section 130 of the National Defence Act? This is the key issue. The applicant argues that the legislative objective is to "confer jurisdiction to military tribunals to deal with matters that pertain directly to the discipline, efficiency and morale of the military" because "military law and tribunals exist for the purpose of enforcing military discipline." It is argued that many offences created by federal statutes or regulations, such as for example, failing to file an income tax return or distributing copyrighted materials, cannot conceivably concern military discipline or efficiency, and therefore the wide language used in section 130(1)(*a*), that clearly authorizes the prosecution at court martial of these and many other federal offences that have nothing to do with military discipline and efficiency, is overbroad.

In my view, the submission of the applicant mischaracterizes the legislative objective. It fails to take account of the dual purposes of the Code of Service Discipline as a whole as expressed in *R v Généreux* [1992] 1 SCR 259 by Chief Justice Lamer who stated, on behalf of a majority of the Court (p.281):

> ... Although the Code of Service Discipline is primarily concerned with maintaining discipline and integrity in the Canadian Armed Forces, it does not serve merely to regulate conduct that undermines such discipline and integrity. The Code serves a public function as well by punishing specific conduct which threatens public order and welfare…. Service tribunals thus serve the purpose of the ordinary criminal

> courts, that is, punishing wrongful conduct, in circumstances where the offence is committed by a member of the military or other person subject to the Code of Service Discipline. Indeed, an accused who is tried by a service tribunal cannot also be tried by an ordinary criminal court (ss. 66 and 71 of the *National Defence Act*)....

The public function of the Code of Service Discipline of which Lamer CJC spoke is in my view not limited to the maintenance of military discipline and efficiency. I conclude that the legislative objective sought to be achieved by section 130(1)(*a*) is co-extensive with its effect as it was articulated by Cattanach P. in *Weselak supra*, and that is to provide a mechanism for the prosecution at court martial of those persons who are subject to the Code of Service Discipline for an offence under any federal law for which they are liable, in common with other persons who are not so subject. Thus interpreted, section 130(1)(*a*) puts into practical effect the definition of "service offence" found in section 2 of the *National Defence Act*.

By enacting section 130(1)(*a*) parliament's objective was not limited to enabling the prosecution only of such offences as may be said to have occasioned a harmful effect on the maintenance of military discipline. Rather, the purpose was to provide for the liability of service personnel, and a small class of civilians, to be prosecuted under military law for all federal offences, in addition to the liability those persons also have, to be prosecuted in civilian courts. Because prosecution in one forum is a bar to prosecution in the other, it cannot be said that this additional liability works any unfairness. In many, and perhaps most cases, the prosecution for a federal offence in a military court will have a beneficial effect on the maintenance of military discipline and efficiency. But that is not to say that in cases where there may be no such effect, that therefore the statutory provision under which the prosecution is brought violates the principle of fundamental justice that legislation not be overbroad.

In support of the position that the liability of military members to punishment should be confined to those situations where the conduct is such as to adversely effect the maintenance of military discipline, it is argued that equality before the law is enhanced by limiting the jurisdiction of military tribunals to dealing only with conduct that imperils the maintenance of discipline. Counsel referred to a passage (referred to by the CMAC in *Trépanier* at para 54) from the minority judgment of McIntyre J, speaking for himself and Dickson J, in the 1980 case of *R v MacKay* [1980] 2 SCR 370:

> ... It must not however be forgotten that, since the principle of equality before the law is to be maintained, departures should be countenanced only where necessary for the attainment of desirable social objectives, and then only to the extent necessary in the circumstances to make possible the attainment of such objectives. The needs of the military must be met but the departure from the concept of equality before the law must not be greater than is necessary for those needs. The principle which should be maintained is that the rights of the serviceman at civil law should be affected as little as possible considering the requirements of military discipline and the efficiency of the service....

> Section 2 of the *National Defence Act* defines a service offence as "an offence under this Act, the *Criminal Code*, or any other Act of the Parliament of Canada, committed by a person while subject to the Code of Service Discipline". The Act also provides that such offences will be triable and punishable under military law. If we are to apply the definition of service offence literally, then all prosecutions of servicemen for any offences under any penal statute of Canada could be conducted in military courts. In a country with a well-established judicial system serving all parts of the country in which the prosecution of criminal offences and the constitution of courts of criminal jurisdiction is the responsibility of the provincial governments, I find it impossible to accept the proposition that the legitimate needs of the military extend so far. 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. It may well be said that the military courts will not, as a matter of practice, seek to extend their jurisdiction over the whole field of criminal law as it affects the members of the armed services. This may well be so, but we are not concerned here with the actual conduct of military courts. Our problem is one of defining the limits of their jurisdiction and in my view it would offend against the principle of equality before the law to construe the provisions of the *National Defence Act* so as to give this literal meaning to the definition of a service offence. The all-embracing reach of the questioned provisions of the *National Defence Act* goes far beyond any reasonable or required limit. 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, to differing rules of evidence ...

In my view the argument based upon equality is without merit. The passage quoted from McIntyre J is inconsistent with the majority judgment of Ritchie J in *MacKay*. In any event, the decision in *MacKay* predated the adoption of the *Canadian Charter of Rights and Freedoms* that in section 15 guarantees the right of Canadians to equality. It cannot be said that Canadian Forces personnel, and others who may be subject to prosecution under section 130(1)(*a*) for offences contrary to federal law, represent a discrete and insular minority in Canadian society whose disadvantaged position should be ameliorated by the law (see *R v Turpin* [1989] 1 SCR 1296, and *Généreux, supra*, per Lamer CJC at p.310). Military service in Canada is voluntary. Canadian Forces personnel and those civilians who may be subject to the Code of Service Discipline voluntarily assume the obligations imposed by the *National Defence Act*, including the liability to prosecution at court martial for all federal offences.

3 Applying these principles, is section 130 as presently worded overbroad?

In *Bedford* the Ontario Court of Appeal stated at paragraph 248:

> The overbreadth analysis requires an examination of the means used to accomplish the valid state objective. If those means are broader than necessary, s. 7 is violated. Even a law that has been found not to violate the principle of fundamental justice against arbitrariness, as with the living on the avails provision, can be held to be overbroad because in some applications the law goes further than necessary and is thus too sweeping in relation to its objective.

[7] If, as I have concluded above, the legislative objective of section 130(1)(*a*) was to provide a mechanism for the prosecution at court martial of military members who violate any federal enactment, and is not limited only to offences where military discipline and efficiency is implicated, then it is clear that section 130(1)(*a*) is only as broad as is necessary to accomplish that purpose.

[8] It follows that I agree with the conclusion reached by d'Auteuil, MJ, in *R v Moriarity* decided 18 Oct 2012. The application is dismissed.

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