Military nexus and the right to a jury trial

In *R.v. Moriarity,* 2015 SCC 55 the Supreme Court of Canada ruled at paragraph 54 of its reasons for judgment that criminal conduct by members of the military is at least rationally connected to maintaining the discipline, efficiency and morale of the armed forces even when they are not on duty, in uniform or on a military base.

The Court went further and adopted the US status test: soldiers are soldiers 24h/day, 7days/week, 365days/year and 366days/on a leap year wherever they are, whatever they do and whenever they do it.

However the issue of the accused's entrenched constitutional right to a jury trial was not before the Supreme Court. The issue arises under s.11(f) of the Canadian Charter of rights and Freedoms (Charter) which creates an exception to that constitutional right for those tried by a military tribunal. That the Supreme Court did not adjudicate on the question appears from this paragraph of the Court's reasons for judgment:

> [30] 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 the 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]

Since the enactment of the Charter in 1982, the Court Martial Appeal Court of Canada (CMAC) consistently required the existence of a military nexus to maintain the constitutional validity of s.130(1)(a) of the *National Defence Act* and trigger the 11(f) exception to the right to a jury trial. It should be recalled that s.130(1)(a) is the provision which transforms all ordinary criminal law offences into service offences. This requirement was applied by the CMAC in *R.v.Moriarity*, 2014 CMAC 1, *R.v.Larouche*, 2014 CMAC 6.

Indeed in *Larouche* the CMAC its earlier decision in *Moriarity* and endorsed the decision of Chief Justice Mahoney rendered some 30 years ago in the following terms:

> [14] Like him, I am of the view that the constitutionality of paragraph 130(1)(a) cannot be preserved unless it is interpreted as it was done by Chief Justice Mahoney in MacDonald v. R. over thirty years ago:
>
> An offence that has a real military nexus and falls within the letter of subsection 120(1) [now subsection 130(1)] of the National Defence Act is an offence under military law as

that term is used in paragraph 11(f) of the Charter of Rights. (emphasis added)

Thus the CMAC decision as it relates to the requirement of a military nexus for the section 11(f) exception to apply and deprive an accused of the right to a trial by jury still stands but now has to be read in light of the decision of the Supreme Court of Canada in *Moriarity*.

So in the pending case of *Master Corporal D.D. Royes v. Her Majesty The Queen*, CMAC-568, counsel for the applicant filed with the CMAC a motion dated December 4th 2015 to be authorized to present written submissions to the Court pursuant to the meaning given by the Supreme Court to the concept of military nexus.

It is the applicant's contention that, as a result of the decision of the Supreme Court in *Moriarity*, military nexus can no longer be used to justify the exception to s.11(f) of the Charter, in other words to deprive him of his constitutional right to a trial by a jury. Consequently he seeks from the CMAC as an appropriate remedy a declaration that s.130(1)(a) is invalid, thereby leaving it to Parliament to play its legislative role.

It will be interesting to see what the CMAC will do with this motion.