The decision in *Moriarity* could have gone further

The Court Martial Appeal Court of Canada (CMAC) could have gone much further in *R.v. Moriarity and Hannah* 2014 CMAC 1 than it did. It should be recalled that the Court found that par.130 (a) of the *National Defence Act* was not constitutionally overbroad because its application was conditional on the existence of a military nexus, *i.e* that the offence charged must be a service connected offence which would tend to affect the general standard of discipline and efficiency of the service and the moral of the troops. S.130 of the Act gives jurisdiction to military tribunals over ordinary criminal law offences and other federal offences (jurisdiction *rationae materiae*).

The CMAC could have found that s.130 was constitutionally overbroad in unnecessarily transferring to the military and military tribunals the prosecution and punishment of offences punishable by ordinary law before civilian courts. This transfer is not without consequences for those prosecuted before military tribunals: loss of fundamental rights such as the constitutional right to a trial by a jury, procedural rights such as the benefit of a preliminary inquiry or of a hybrid offence, right to counsel and appeal in summary trials, and sentencing rights such as probation, conditional discharge, right to serve the sentence of imprisonment in the community.

Since the objective is the enforcement of discipline in the profession of arms in order to assure the efficiency of the service and preserve the moral of the troops, the prosecution should be, like it is with other professions such as the legal or the medical profession, for offences of a really disciplinary nature. S.129 of the Act is a good example of a disciplinary offence: conduct to the prejudice of good order and discipline. As it is with disciplinary proceedings, the prosecution of disciplinary offences would not be pre-empted by an acquittal or a conviction before a civilian criminal court.

It is certainly open to the Supreme Court of Canada to find that the provision is unconstitutional on the basis of overbreadth, that the present means of achieving discipline through s.130 are disproportionate and that the objective can be achieved by less intrusive means.

It is also open to Parliament to repeal s.130 and leave to civilian authorities and courts the prosecution and trial of ordinary criminal offences and federal offences. If it were to do so, it would afford Canadian soldiers a better equality of rights and provide a better respect for fundamental and international rights as many countries all over the world are presently doing (France, Belgium, Germany, The Netherlands, Lithuania, Morocco, Taiwan, Mexico, Chile, Austria, the Czech Republic). These countries have either abolished military tribunals in peace time or deprives them of their jurisdiction over ordinary criminal law offences and over civilians.

In Mackay v. The Queen, (1980) 2 S.C.R. 370, at p.380, Chief Justice Laskin and Justice Estey who were dissenting in the case wrote:

> *I am of the opinion that the appellant is also entitled to succeed in this appeal on the second ground taken by him, namely, that he was denied equality before the law, contrary to s. 1(b) of the Canadian Bill of Rights. I cannot conceive that there can be in this country two such disparate ways of trying offences against the ordinary law, depending on whether the accused is a member of the armed forces or is not.*

This was written at a time when the fundamentals rights of an accused were not constitutionalized as they are now. There is no doubt that the Canadian military justice is in dire- need of a fundamental reform.