
CANADA / JUDGMENT

R. v. Moriarity

2015 SCC 55

COURT

Supreme Court of Canada

DECIDED

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R. v. Moriarity

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2015 SCC 55

Report

[2015] 3 SCR 485

Case number

35755, 35873, 35946

Judges

McLachlin, Beverley; Abella, Rosalie Silberman; Rothstein, Marshall; Cromwell, Thomas Albert; Moldaver, Michael J.; Karakatsanis, Andromache; Wagner, Richard; Gascon, Clément; Côté, Suzanne

On appeal from

Canada

Subjects

Constitutional law

Notes

SCC Case Information: 35755, 35873, 35946

Decision Content

SUPREME COURT OF CANADA

Citation: R. v. Moriarity, 2015 SCC 55, [2015] 3 S.C.R. 485

Date: 20151119

Docket: 35755, 35873, 35946

Between:

Second Lieutenant Moriarity

Appellant

and

Her Majesty The Queen

Respondent

and between:

Private M.B.A. Hannah

Appellant

and

Her Majesty The Queen

Respondent

Between:

Private Alexandra Vezina

Appellant

and

Her Majesty The Queen

Respondent

Between:

Sergeant Damien Arsenault

Appellant

and

Her Majesty The Queen

Respondent

Coram: McLachlin C.J. and Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon and Côté JJ.

Reasons for Judgment:

(paras. 1 to 59)

Cromwell J. (McLachlin C.J. and Abella, Rothstein, Moldaver, Karakatsanis, Wagner, Gascon and Côté JJ. concurring)

R. v. Moriarity, 2015 SCC 55, [2015] 3 S.C.R. 485

Second Lieutenant Moriarity Appellant

v.

Her Majesty The Queen Respondent

and

Private M.B.A. Hannah Appellant

v.

Her Majesty The Queen Respondent

- and -

Private Alexandra Vezina Appellant

v.

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- and -

Sergeant Damien Arsenault Appellant

v.

Her Majesty The Queen Respondent

Indexed as: R. v. Moriarity

2015 SCC 55

File Nos.: 35755, 35873, 35946.

2015: May 12; 2015: November 19.

Present: McLachlin C.J. and Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon and Côté JJ.

on appeal from the court martial appeal court of canada

Constitutional law — Charter of Rights — Fundamental justice — Overbreadth — Armed forces — Military offences — National Defence Act permitting federal offences to be prosecuted within military justice system in relation to everyone subject to Code of Service Discipline regardless of circumstances in which offences were committed — Whether provisions of National Defence Act at issue broader than necessary to achieve their purpose in violation of s. 7 of Canadian Charter of Rights and Freedoms — If so, whether infringement justifiable under s. 1 of Charter — National Defence Act, R.S.C. 1985, c. N-5, ss. 130(1) (a), 117 (f).

The appeals relate to offences committed by members of the armed forces subject to the Code of Service Discipline (“CSD”) set forth under Part III of the National Defence Act (“NDA”). Section 130(1) (a) of the NDA creates a service offence of committing a federal offence punishable under Part VII of the NDA, the Criminal Code or any other Act of Parliament. Section 117 (f) of the NDA creates a service offence of committing any act of a fraudulent nature. The four accused were convicted of offences punishable under the Criminal Code and/or the Controlled Drugs and Substances Act which are service offences by virtue of s. 130(1) (a) of the NDA. Section 117 (f) is relevant only to the case of A who was found guilty of fraud contrary to ss. 130(1) (a) and 125 (a) of the NDA. All the accused except V argued at first instance that s. 130(1) (a) was broader than necessary to achieve its purpose and hence violated s. 7 of the Canadian Charter of Rights and Freedoms. In each case, the military judge held that this provision was constitutional.

M and H appealed unsuccessfully to the Court Martial Appeal Court (“CMAC”), which held that, properly interpreted as requiring a military nexus, s. 130(1) (a) is not overbroad. V also raised the s. 7 overbreadth argument before the CMAC but the argument was dismissed based on the ruling regarding M and H. On appeal to the CMAC, A also argued that s. 130(1) (a) violates s. 7. In addition, he raised a similar argument with respect to s. 117 (f) of the NDA. The CMAC unanimously rejected the s. 7 argument holding that the ruling regarding M and H was binding precedent with respect to s. 130(1) (a) and that the challenge to s. 117 (f) was moot.

The four accused appeal to this Court raising the issue of whether ss. 130(1) (a) and 117 (f) of the NDA infringe s. 7 of the Charter because they create service offences that do not directly pertain to military discipline, efficiency and morale, and thus are overbroad.

Held: The appeals should be dismissed.

Both ss. 130(1)(a) and 117(f) of the NDA engage the liberty interest of individuals subject to the CSD. Therefore, in order for these provisions to comply with s. 7 of the Charter, this deprivation of liberty must be done in accordance with the principles of fundamental justice, namely the principle against overbroad laws.

At the outset of an overbreadth analysis, it is critically important to identify the law’s purpose and effects because overbreadth is concerned with whether there is a disconnect between the two. With respect to both purpose and effects, the focus is on the challenged provision, understood within the context of the legislative scheme of which it forms a part.

The objective of the challenged provision may be more difficult to identify and articulate than its effects. The objective is identified by an analysis of the provision in its full context. In general, the articulation of the objective should focus on the ends of the legislation rather than on its means, be at an appropriate level of generality and capture the main thrust of the law in precise and succinct terms. An unduly broad statement of purpose will almost always lead to a finding that the provision is not overbroad, while an unduly narrow statement of purpose will almost always lead to a finding of overbreadth. Moreover, the overbreadth analysis does not evaluate the appropriateness of the objective. Rather, it assumes a legislative objective that is appropriate and lawful.

Here, Parliament's objective in creating the military justice system was to provide processes that would assure the maintenance of discipline, efficiency and morale of the military. That objective, for the purposes of the overbreadth analysis, should not be understood as being restricted to providing for the prosecution of offences which have a direct link to those values. The challenged provisions are broad laws which have to be understood as furthering the purpose of the system of military justice. Both s. 130(1)(a) and s. 117(f)'s purpose is to maintain discipline, efficiency and morale in the military. The real question is whether there is a rational connection between that purpose and the effects of the challenged provisions.

The challenged provisions make it an offence to engage in conduct prohibited under an underlying federal offence and to engage in fraudulent conduct. Those offences apply regardless of the circumstances of the commission of the offence and their effect is to subject those who have committed these offences to the jurisdiction of service tribunals. It cannot be said that the fact that these offences apply in instances where the only military connection is the status of the accused is not rationally connected to the purpose of the challenged provisions. To conclude otherwise implies too narrow a view of the meaning of "discipline, efficiency and morale" and of how the effects of the provisions are connected to that purpose. The 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. 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.

It follows that the prosecution under military law of members of the military engaging in the full range of conduct covered by ss. 130(1)(a) and 117(f) is rationally connected to the maintenance of discipline, efficiency and morale regardless of the circumstances of the commission of the offence. The challenged provisions are therefore not overbroad.

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 the Court in these appeals.

Cases Cited

Considered: *R. v. Généreux*, [1992] 1 S.C.R. 259; referred to: *R. v. Trépanier*, 2008 CMAC 3, 232 C.C.C. (3d) 498; *R. v. St-Jean*, 2000 CanLII 29663; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101; *Ward v. Canada (Attorney General)*, 2002 SCC 17, [2002] 1 S.C.R. 569; *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331; *R. v. Heywood*, [1994] 3 S.C.R. 761; *R. v. Khawaja*, 2012 SCC 69, [2012] 3 S.C.R. 555; *R. v. Garofoli*, [1990] 2 S.C.R. 1421; *Ionson v. The Queen* (1987), 4 C.M.A.R. 433, *aff'd* [1989] 2 S.C.R. 1073; *MacEachern v. The Queen* (1985), 4 C.M.A.R. 447; *Schachter v. Canada*, [1992] 2 S.C.R. 679.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1 , 7 , 11 (f).

Constitution Act, 1867, s. 91(7) .

Constitution Act, 1982, s. 52 .

Controlled Drugs and Substances Act, S.C. 1996, c. 19 .

Criminal Code, R.S.C. 1985, c. C-46 .

National Defence Act, R.S.C. 1985, c. N-5 , Part III, “Code of Service Discipline”, ss. 60 , 61 , 66 , 70 , 73 to 128 , 92 to 98 , 114 , 117 (f), 125 (a), 130(1) (a), (2) , Part VII.

Authors Cited

Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 6th ed. Markham, Ont.: LexisNexis, 2014.

APPEALS from a judgment of the Court Martial Appeal Court of Canada (Blanchard C.J. and Weiler and Dawson JJ.A.), 2014 CMAC 1, 455 N.R. 59, 299 C.R.R. (2d) 224, [2014] C.M.A.J. No. 1 (QL), 2014 CarswellNat 868 (WL Can.), affirming a decision of d’Auteuil M.J., 2012 CM 3017, 2012 CarswellNat 5728 (WL Can.), and a decision of Lamont M.J., 2013 CM 2011, 2013 CarswellNat 1720 (WL Can.). Appeals dismissed.

APPEAL from a judgment of the Court Martial Appeal Court of Canada (Ewaschuk, Stratas and Rennie JJ.A.), 2014 CMAC 3, 461 N.R. 286, [2014] C.M.A.J. No. 3 (QL), 2014 CarswellNat 869 (WL Can.), affirming decisions of d’Auteuil M.J., 2013 CM 3013, 2013 CarswellNat 5003 (WL Can.), and 2013 CM 3014, 2013 CarswellNat 5004 (WL Can.). Appeal dismissed.

APPEAL from a judgment of the Court Martial Appeal Court of Canada (Cournoyer, Vincent and Scott JJ.A.), 2014 CMAC 8, 466 N.R. 2, [2014] C.M.A.J. No. 8 (QL), 2014 CarswellNat 5167 (WL Can.), affirming decisions of Perron M.J., 2013 CM 4005, 2013 CarswellNat 3230 (WL Can.), and 2013 CM 4006, 2013 CarswellNat 3986 (WL Can.). Appeal dismissed.

Mark Létourneau, Jean-Bruno Cloutier and Delano K. Fullerton, for the appellants.

Steven D. Richards and Bruce W. MacGregor, for the respondent.

The judgment of the Court was delivered by

Cromwell J. —

I. Introduction

- [1] Certain provisions of the National Defence Act, R.S.C. 1985, c. N-5 (“NDA”), permit nearly every federal offence to be prosecuted within the military justice system. The appellants contend that this extends the reach of military justice too broadly because these provisions restrict liberty in a manner that is not connected to their purpose. This, they submit, makes the provisions overbroad and therefore contrary to s. 7 of the Canadian Charter of Rights and Freedoms .
- [2] In my view, the appellants’ contention fails because these provisions are not overbroad. A law is overbroad when there is no rational connection between the purpose of the law and some of its effects. The touchstones of the analysis are, therefore, the objective of the law and whether its effects are connected to that objective. Properly understood, the challenged provisions have a broader purpose than that identified by the appellants and they have failed to show that the law’s effects are not rationally connected to that broader purpose. Their claim of overbreadth fails as a result.
- [3] The appellants further submit that reading in a military nexus requirement, as did the Court Martial Appeal Court (“CMAC”), does not constitute an appropriate remedy under s. 52 of the Constitution Act, 1982 because doing so does not make the challenged provisions constitutional in all their dimensions: A.F. (Moriarity, Hannah and Vezina), at para. 44; A.F. (Arsenault), at para. 57. These submissions go to remedy in the event that the provisions are found unconstitutionally overbroad. Because I conclude that the provisions are not overbroad, I do not need to address these remedial submissions. I underline that the s. 52 analysis is concerned with determining the appropriate remedy in order to address the previously found constitutional violation. It cannot be used in effect to launch novel constitutional arguments that are not properly before the court.
- [4] I would dismiss the appeals.

II. Facts and Judicial History

- [5] The focus of the appeals is ss. 130(1) (a) and 117 (f) of the NDA . Section 130(1) (a) makes offences punishable under Part VII of the NDA , the Criminal Code, R.S.C. 1985, c. C-46 , or any other Act of Parliament (what I will call the underlying federal offences) service offences which may be prosecuted within the military justice system. Section 117 (f) creates a service offence of committing any act of a fraudulent nature. It is worth pausing here to review these provisions because the appellants’ overbreadth analysis turns on their purpose and effects.
- [6] Section 130(1) (a) provides as follows:

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 . . .

. . .

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

- [7] Section 130(1) (a) creates an offence under the Code of Service Discipline (“CSD”, set forth under Part III of the NDA) out of the underlying federal offences (what I will refer to interchangeably as a CSD or service offence), over which service tribunals have jurisdiction. It does so through incorporating by reference the underlying federal offences. The essential elements of the underlying federal offences remain the same, and the NDA provides that the pleas of *autrefois acquit* and *autrefois convict* are available in order to avoid double jeopardy under both the CSD and the federal offence: s. 66 .
- [8] The effect of s. 130(1) (a) is to extend the jurisdiction of service tribunals in relation to all underlying federal offences to everyone subject to the CSD: see NDA, ss. 60 and 61 . There is no explicit limitation 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”: *R. v. Trépanier*, 2008 CMAC 3, 232 C.C.C. (3d) 498, at para. 27; see also *R. v. St-Jean*, 2000 CanLII 29663 (C.M.A.C.), at para. 38. I note that the only federal offences that are not incorporated in the CSD are murder, manslaughter, and offences relating to child abduction: NDA, s. 70 .
- [9] Section 117 (f) makes it a CSD offence to commit “any act of a fraudulent nature not particularly specified in sections 73 to 128 [of the NDA]”. This offence is punishable by imprisonment for less than two years or a lesser punishment. Little has been said about the scope and effect of this provision and how it can be distinguished from fraudulent acts already prohibited under the CSD or other federal laws.
- [10] That brings me to the prosecutions against the four appellants. They were convicted by military judges of offences punishable under the CSD. Their convictions relate to offences under the Criminal Code and/or the Controlled Drugs and Substances Act, S.C. 1996, c. 19 , which, as just described, are service offences by virtue of s. 130(1) (a) of the NDA . Section 117 (f) is relevant only to the case of Sergeant Arsenault. He was found guilty of fraud contrary to ss. 130(1) (a) and 125 (a) of the NDA for wilfully making a false statement in an official document signed by him. He was also charged with two counts under s. 117 (f) of the NDA for having committed fraudulent acts not specified in ss. 73 to 128 of the NDA . The latter counts were alternative charges and, in light of the convictions entered, were conditionally stayed by the military judge.

- [11] All the appellants except Private Vezina argued at first instance that s. 130(1) (a) violated s. 7 of the Charter . In each case, the military judge held that this provision was constitutional.
- [12] Second Lieutenant Moriarity and Private Hannah appealed unsuccessfully to the CMAC: 2014 CMAC 1, 455 N.R. 59 (“Moriarity”). On behalf of the court, Blanchard C.J. held that s. 130(1) (a) engages the liberty interest. In his view the purpose of s. 130(1) (a) and of the CSD as a whole is to allow the military justice system to deal with matters that pertain directly to discipline, efficiency and morale of the military. When read in isolation, the scope of s. 130(1) (a), in his view, appears to be very broad and could potentially violate s. 7 by including offences that fall outside its purpose. However, in his view, s. 130(1) (a) has to be interpreted as being limited by a military nexus requirement to ensure that military courts do not have authority over public offences lacking clear military connection. It followed that, properly interpreted as requiring a military nexus, s. 130(1) (a) is not overbroad.
- [13] Private Vezina also raised the s. 7 overbreadth argument before the CMAC but the argument was dismissed relying on the decision in Moriarity: 2014 CMAC 3, 461 N.R. 286.
- [14] On appeal to the CMAC, Sergeant Arsenault also argued that s. 130(1) (a) violates s. 7 . In addition, he raised a similar argument with respect to s. 117 (f) of the NDA . The CMAC unanimously rejected the s. 7 argument holding that Moriarity was binding precedent with respect to s. 130(1) (a) and that the challenge to s. 117 (f) was moot: 2014 CMAC 8, 466 N.R. 2.
- [15] The four appellants now appeal to this Court raising the issue of whether ss. 130(1) (a) and 117 (f) of the NDA infringe s. 7 of the Charter because they create service offences that do not directly pertain to military discipline, efficiency and morale, and thus are overbroad.

III. Analysis

A. Introduction

- [16] The appellants’ Charter challenge is based solely on their contention that ss. 130(1)(a) and 117(f) of the NDA restrain liberty in a manner that is overbroad and therefore violate s. 7 of the Charter. To succeed in this challenge, they must show, first, that the provisions engage the liberty interest of those subject to them and, second, that they put liberty at risk in a way that is not connected to their purpose.

B. The Liberty Interest Is Engaged by the Risk of Punishment

- [17] There is no dispute that s. 117 (f) engages the liberty interest: it creates a service offence punishable by imprisonment. Although the respondent submitted that s. 130(1) (a) does not engage the liberty interest, I respectfully disagree. I accept that s. 130(1) (a) incorporates offences by reference and, by doing so, does not change the essential elements of the underlying federal offences. However, in my view, the fact that s. 130(1) (a) forms part of a scheme through which a person subject to the CSD can be deprived of his or her liberty is sufficient to engage the liberty interest. Section 130(1) (a) provides that a person found guilty

of an offence under that section will be punished pursuant to s. 130(2), which allows in some cases for a penalty of imprisonment.

- [18] I underline that the appellants claim that their liberty interest is engaged solely on the basis that the service offences created by ss. 130(1) (a) and 117 (f) carry the risk of imprisonment. They do not contend that these provisions engage their liberty interests in any other way.
- [19] I conclude that both ss. 130(1) (a) and 117 (f) engage the liberty interest of individuals subject to the CSD. Therefore, in order for these provisions to comply with s. 7 of the Charter, this deprivation of liberty must be done in accordance with the principles of fundamental justice. The only principle of fundamental justice relied on by the appellants is the principle against overbroad laws.

C. The Provisions Are Not Overbroad

- [20] The fatal flaw in the appellants' position is that they describe the purpose of the provisions too narrowly and, as a result, erroneously conclude that there is no rational connection between the purpose of these provisions and some of their effects. Properly articulated, the purpose is broad enough to be rationally connected to all of their effects.
- [21] The appellants contend that the purpose of both ss. 130(1) (a) and 117 (f) must be understood as being limited to offences that pertain directly to the discipline, efficiency and morale of the military. They submit that the purpose of the offence under s. 130(1) (a) is "to confer jurisdiction on military tribunals to deal with virtually all acts or omissions committed in Canada, punishable under any Act of Parliament, that pertain directly to the discipline, efficiency and morale of the military": A.F. (Moriarity, Hannah and Vezina), at para. 33 (emphasis added). Similarly, the appellant Sergeant Arsenault submits that the purpose of s. 117 (f) [translation] "is to confer jurisdiction on military tribunals over all acts of a fraudulent nature . . . that pertain directly to the discipline, efficiency and morale of the military": A.F., at para. 32. The appellants' position is that these provisions create service offences that apply to persons who are in the armed forces regardless of whether there is any other link between their status as members of the armed forces and the circumstances of the offence. It follows, in their submission, that some of the effects of these provisions are not rationally connected to that purpose because in some cases there is no "direct link" between the circumstances of the commission of the offence and military discipline, efficiency and morale.
- [22] The appellants do not argue that any specific underlying federal offences lack a direct connection with the maintenance of discipline, efficiency and morale in the military. Rather, they take issue with the lack of distinction between offences committed in military circumstances — which as they see it are rationally connected to discipline, efficiency and morale — and offences committed in civil circumstances — which, they argue, lack such a connection. As a result, there is no rational connection between the purpose of the law — maintaining discipline, efficiency and morale of the armed forces — and some of its effects

— making armed forces members subject to the military justice system in circumstances in which the offence does not directly implicate the discipline, efficiency and morale of the forces.

[23] I will now examine the purpose of the provisions and then consider whether they are rationally connected to their effects.

(1) Identifying and Articulating Legislative Purpose

[24] That a law must not be overbroad is a principle of fundamental justice. It is one of the minimum requirements for a law that affects a person's life, liberty or security of the person: *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at paras. 94 et seq. A law that goes too far and interferes with life, liberty or security of the person in a way that has no connection to its objective is fundamentally flawed: *Bedford*, at para. 101. At the outset of an overbreadth analysis, it is critically important to identify the law's purpose and effects because overbreadth is concerned with whether there is a disconnect between the two. The overbreadth analysis thus depends on being able to distinguish between the objective of the law and its effects (resulting from the means by which the law seeks to achieve the objective). With respect to both purpose and effects, the focus is on the challenged provision, of course understood within the context of the legislative scheme of which it forms a part. (In my reasons, I use the words "objective", "ends" and "purpose" interchangeably.)

[25] The effects of the challenged provision depend on the means adopted by the law and are usually easy to identify, as they are in this case. Virtually all federal offences and all fraudulent acts, when allegedly committed by regular and special forces members (and other individuals subject to the CSD under ss. 60 and 61), may be prosecuted as service offences within the military justice system. That, in short, is what the challenged provisions do; in other words, that is their effect.

[26] The objective of the challenged provision may be more difficult to identify and articulate. The objective is identified by an analysis of the provision in its full context. An appropriate statement of the objective is critical to a proper overbreadth analysis. In general, the articulation of the objective should focus on the ends of the legislation rather than on its means, be at an appropriate level of generality and capture the main thrust of the law in precise and succinct terms.

[27] The overbreadth analysis turns on the relationship between the objective of the law and the effects flowing from the means which the law adopts to achieve it — in other words the relationship between the law's purpose and what it actually does. It follows that the statement of the challenged provision's purpose should, to the extent possible, be kept separate from the means adopted to achieve it. While of course the means adopted may throw light on the objective, the focus must remain on the objective: see, in a roughly analogous context, *Ward v. Canada (Attorney General)*, 2002 SCC 17, [2002] 1 S.C.R. 569, at para. 25. If undue weight is given to the means in articulating the legislative objective in an

overbreadth analysis, there will be nothing left to consider at the rational connection stage of the analysis.

- [28] The appropriate level of generality for the articulation of the law's purpose is also critically important. If the purpose is articulated in too general terms, it will provide no meaningful check on the means employed to achieve it: almost any challenged provision will likely be rationally connected to a very broadly stated purpose (see, e.g., *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, at para. 77). On the other hand, if the identified purpose is articulated in too specific terms, then the distinction between ends and means may be lost and the statement of purpose will effectively foreclose any separate inquiry into the connection between them. The appropriate level of generality, therefore, resides between the statement of an "animating social value" — which is too general — and a narrow articulation, which can include a virtual repetition of the challenged provision, divorced from its context — which risks being too specific: *Carter*, at para. 76. An unduly broad statement of purpose will almost always lead to a finding that the provision is not overbroad, while an unduly narrow statement of purpose will almost always lead to a finding of overbreadth.
- [29] The statement of purpose should generally be both precise and succinct. So, for example, in *R. v. Heywood*, [1994] 3 S.C.R. 761, the law's purpose was to protect children from becoming victims of sexual offences. In *R. v. Khawaja*, 2012 SCC 69, [2012] 3 S.C.R. 555, the purpose of the scheme was to prosecute and prevent terrorism. In *Bedford*, the purpose of the living on the avails of prostitution offence was to target pimps and the parasitic, exploitative conduct in which they engage. In *Carter*, the objective of the ban on assisted suicide was to prevent vulnerable persons from being induced to commit suicide at a time of weakness. These are all examples of precise and succinct articulations of the law's objective.
- [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 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.
- [31] Courts have used many sources to determine legislative purpose: see *R. Sullivan, Sullivan on the Construction of Statutes* (6th ed. 2014), at §§9.41-9.66. In some cases, legislation contains explicit statements of purpose, but there is no such statement here. Courts also look at the text, context and scheme of the legislation in order to infer its purpose. For instance, in *Heywood*, the Court concluded that the purpose of a vagrancy law that prohibited convicted

offenders from loitering in public parks, which was to protect children from becoming victims of sexual offences, was “apparent from the places to which the prohibition of loitering applies”: p. 786; see also *R. v. Garofoli*, [1990] 2 S.C.R. 1421, at pp. 1470-71. In addition, courts may also resort to extrinsic evidence such as legislative history and evolution. But as Prof. Sullivan wisely observes, legislative statements of purpose may be vague and incomplete and inferences of legislative purpose may be subjective and prone to error: §9.90.

- [32] All of this underlines the point that courts should be cautious to articulate the legislative objective in a way that is firmly anchored in the legislative text, considered in its full context, and to avoid statements of purpose that effectively predetermine the outcome of the overbreadth analysis without actually engaging in it.
- [33] It is common ground that the purpose of the military justice system, of which the challenged provisions form a part, relates to assuring the discipline, efficiency and morale of the armed forces. The appellants would narrow this purpose while the respondent would broaden it. In my view, they are both in error.
- (2) The Appellants Articulate the Purpose Too Narrowly
- [34] The appellants state the objective of the challenged provisions in a way that is not supported by the legislative text considered in its full context. And, in my respectful view, the CMAC fell into a similar error.
- [35] The appellants claim that Parliament’s objective in enacting these provisions was to permit the prosecution of offences within the military justice system only when there is a “direct link” — or as the CMAC put it, a “military nexus” — between the circumstances of the alleged offence and the discipline, efficiency or morale of the military. This limited purpose is not borne out by a review of the overall thrust of the legislation. As I explained, the determination of legislative purpose must take into account the entire context of the challenged provisions. This, in my view, requires careful consideration of the broader context of the system of military justice and the scheme as a whole. When seen in this light, the “direct link” requirement contended for by the appellants cannot be fairly attributed to Parliament because, as I will explain, it is nowhere apparent in either the challenged provisions or the legislative scheme.
- [36] An intent to limit the application of these provisions to situations in which there is a “direct link” between the circumstances of the offence and the military is nowhere apparent in the legislation. It is not supported by a plain reading of the challenged provisions themselves. Nor do any other provisions of the NDA contain any such express limit. Sections 60(1) (a) and 60(1) (b) of the NDA make every officer or non-commissioned member of the regular and special forces subject to the CSD without exception. Neither this provision nor any other NDA provision restricts the circumstances under which these individuals will be subject to the CSD. Had Parliament intended otherwise, it could have provided for a narrower application of the CSD. It has done so with respect to officers and non-commissioned

members of the reserve force, as they are subject to the CSD only in specific circumstances, such as when they are “undergoing drill or training”, “in uniform”, or “on duty”: s. 60(1) (c)(i) to (x). It has also provided for other persons to be subject to the CSD in circumstances specified in the legislation: see ss. 60(1) (d) to (j), 60(2) and 61 .

- [37] We must therefore conclude that Parliament turned its mind to the circumstances in which it is appropriate to subject members of the armed forces to the military justice system. In the case of regular and special forces, it concluded that it was appropriate to do so in all circumstances, with the exception of the small group of offences which are excluded. A different conclusion was reached with respect to members of the reserve force and non-military persons.
- [38] Quite apart from the challenged provisions, there are several CSD offences that are at odds with the “direct link” requirement. Consider, for example, the CSD offence of “stealing”, which does not take into account whether the offence was committed in military circumstances: s. 114. In addition, several military offences are grouped under the heading “Disgraceful Conduct”, and target a number of generally wrongful acts: ss. 92 to 98. They include scandalous conduct by officers and drunkenness with no requirement that the offence have any link to the military beyond the military status of the accused. It does not matter whether the person subject to the CSD is on active service or duty, although the term of imprisonment is shorter if that is not the case.
- [39] Viewed in the context of the overall thrust of the scheme, ss. 130(1) (a) and 117 (f), while broad, are hardly outliers. They reflect and are consistent with the overall thrust of the scheme to include offences when committed by an individual subject to the CSD regardless of what other link may or may not exist between the circumstances of the offence and the military. This is inconsistent with the narrower purpose proposed by the appellants. It follows that the appellants’ formulation of legislative purpose not only finds no support in the provisions but is inconsistent with central components of the legislative scheme.
- [40] The analysis by the CMAC is, with respect, flawed in the same way. The court first read into the text of the legislation a limitation requiring a military nexus. It did so acknowledging that the scope of s. 130(1) (a) includes virtually every act or omission punishable under any Act of Parliament irrespective of its nature and the circumstances of its commission: *Moriarty*, at para. 41. It also did so without considering the many other aspects of the scheme that are inconsistent with the military nexus limitation. The result of “reading in” this limitation was to foreclose any meaningful engagement with the question of whether the effects of the challenged provisions were rationally connected to the discipline, efficiency and morale of the armed forces.
- [41] The appellants also rely on a sentence from Lamer C.J. in *R. v. G  n  reux*, [1992] 1 S.C.R. 259, and on legislative history to support their narrower articulation of the provisions’ objective. However, neither submission is persuasive.

- [42] The appellants rely on the statement made by Lamer C.J. in *Généreux* (at p. 293) that “[t]he purpose of a separate system of military tribunals is to allow the Armed Forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military.” This statement, however, does not in my opinion settle the purpose of the challenged provisions in this case, for two reasons.
- [43] First, the use by Lamer C.J. of the words “pertain directly” should not be understood as limiting the scope of the purpose to offences occurring in military circumstances. The facts as reported in the Chief Justice’s judgment in *Généreux* show that, at least arguably, the drug offences charged in that case did not arise in such circumstances. The civilian police found drugs in the soldier’s residence outside the base where he was stationed. Adopting Lamer C.J.’s statement of the purpose as definitive would in my respectful view read too much into his reasons. Second, this statement must be read in light of another statement of purpose in the same judgment. In considering whether the proceedings were intended to promote public order and welfare within a public sphere of activity, Lamer C.J. referred to a broader understanding of the purpose of the scheme:

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. [Emphasis added; p. 281.]

- [44] For these reasons, I do not consider the language used by Lamer C.J. as an authoritative pronouncement on the object of the provisions which are challenged here.
- [45] The appellants also rely on certain statements made during legislative debates, as did the CMAC. Respectfully, these go no further than dealing with the relationship between civilian criminal courts and service tribunals.
- [46] I conclude that Parliament’s objective in creating the military justice system was to provide processes that would assure the maintenance of discipline, efficiency and morale of the military. That objective, for the purposes of the overbreadth analysis, should not be understood as being restricted to providing for the prosecution of offences which have a direct link to those values. The challenged provisions are broad laws which have to be understood as furthering the purpose of the system of military justice. Both s. 130(1)(a) and s. 117(f)’s purpose is to maintain discipline, efficiency and morale in the military. The real question, as I see it, is whether there is a rational connection between that purpose and the effects of the challenged provisions.

(3) The Respondent’s Purpose Is Too Broad

- [47] The respondent agrees that the purpose of the CSD as a whole is to maintain discipline, efficiency and morale in the military. However, the respondent submits that this is not its only purpose. The respondent relies on *Généreux* for the proposition that the purpose of the scheme and of the challenged provisions includes a broader public function of punishing

specific conduct which threatens public order and welfare. For the reasons already given, Généreux cannot be taken as settling the purpose of the challenged provisions in the context of this s. 7 overbreadth analysis. Moreover, this statement of purpose includes both the scheme's objective and its effects in a way that is unhelpful for the purposes of an overbreadth analysis.

(4) Conclusion on Purpose

[48] I conclude that the purpose of the challenged provisions is the same as that of the overall system of military justice: to maintain the discipline, efficiency and morale of the military. This statement of purpose is in my opinion firmly anchored in the legislative text understood in its full context, keeps the objective and means distinct and is expressed in succinct terms at an appropriate level of generality.

(5) The Rational Connection Between the Purpose of the Challenged Provisions and Their Effects

[49] The question is whether “the law is inherently bad because there is no connection, in whole or in part, between its effects and its purpose”: Bedford, at para. 119 (emphasis in original). As discussed earlier, the challenged provisions make it an offence to engage in conduct prohibited under an underlying federal offence and to engage in fraudulent conduct. Those offences apply regardless of the circumstances of the commission of the offence and their effect is to subject those who have committed these offences to the jurisdiction of service tribunals. As I will explain, the appellants have not shown that the fact that these offences apply in instances where the only military connection is the status of the accused is not rationally connected to the purpose of the challenged provisions.

[50] The appellants take a narrow view of the meaning of “discipline, efficiency and morale”. In their view, it is strictly limited to the [translation] “operational effectiveness of the [Canadian Armed Forces]”: A.F. (Arsenault), at para. 37. Thus, conduct or circumstances that do not relate directly to the operation of the armed forces would not fall within that purpose. This would be the case with most offences committed off duty and outside of military precincts.

[51] The flaw in this position is that it is based on too narrow an understanding of how the effects of the provisions are connected to that purpose. The 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. In light of this, the appellants fail to show that ss. 130(1)(a) and 117(f) cover conduct that falls outside of their purpose.

[52] 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 — a hypothetical scenario raised by Sergeant Arsenault — 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.

- [53] 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.
- [54] 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. As the respondent puts it:

Discipline is a multi-faceted trait, as complex in its nature as it is essential to the conduct of military operations. At its heart, discipline on the part of individual members of the [Canadian Armed Forces] involves an instilled pattern of obedience, willingness to put other interests before one's own, and respect for and compliance with lawful authority.

(R.F. (Moriarity, Hannah and Vezina), at para. 67)

- [55] A “military nexus” case from the 1980s supports this broader understanding of the connection between criminal offences committed by members of the armed forces and military discipline. In *Ionson v. The Queen* (1987), 4 C.M.A.R. 433, aff'd [1989] 2 S.C.R. 1073, the accused, a member of the regular armed forces, was a steward posted to HMCS Fundy in Esquimalt, British Columbia. While off duty and off his ship and the base, he was found by civilian police to be in possession of cocaine. At the time, he was driving a civilian vehicle (his own), was dressed in civilian clothes and there was no connection with other military members. He was convicted of possession of a narcotic by a Standing Court Martial. He raised a plea in bar of trial that there was not a sufficient military nexus to give jurisdiction to the Standing Court Martial. The President denied his plea in bar of trial, finding that there was a very real military nexus. That conclusion was affirmed by the CMAC (at p. 438), quoting with approval these words: “[The military authorities’] concern and interest in seeing that no member of the forces uses or distributes drugs and in ultimately eliminating their use, may be more pressing than that of civilian authorities” (*MacEachern v. The Queen* (1985), 4 C.M.A.R. 447, at p. 453). This Court affirmed that result. *Ionson* is consistent with a broad understanding of when at least a rational connection will exist between criminal offences committed by a member of the armed forces and military discipline, efficiency and morale.

[56] I conclude that the appellants have failed to show that the prosecution under military law of members of the military engaging in the full range of conduct covered by ss. 130(1)(a) and 117(f) is not rationally connected to the maintenance of discipline, efficiency and morale regardless of the circumstances of the commission of the offence. The challenged provisions are therefore not overbroad.

D. The Appellants' Additional Constitutional Arguments Raised at the Section 52 Stage

[57] As mentioned earlier, the appellants raise other possible constitutional deficiencies regarding ss. 130(1)(a) and 117(f) as part of their submissions with respect to remedy under s. 52 of the Constitution Act, 1982 . Having found that the challenged provisions are not overbroad and that there is, therefore, no constitutional violation to remedy, I need not consider these points further.

[58] In any event, these additional constitutional arguments should not be raised in a s. 52 analysis. The appellants are right to say that, in order to determine the appropriate constitutional remedy, courts must first determine the extent of the law's unconstitutionality: see *Schachter v. Canada*, [1992] 2 S.C.R. 679, at p. 702. This flows from the text of s. 52 itself, which provides that "any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect". That being said, this exercise must relate to the finding of constitutional breach that first led to the availability of a s. 52 remedy. In other words, s. 52 cannot be used to bring in new allegations of constitutional deficiencies that are unrelated to the original challenge.

IV. Disposition

[59] I would dismiss the appeals and answer the constitutional questions as follows:

Does s. 130(1)(a) of the National Defence Act, R.S.C. 1985, c. N-5 , infringe s. 7 of the Canadian Charter of Rights and Freedoms ?

No.

If so, is the infringement a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society under s. 1 of the Canadian Charter of Rights and Freedoms ?

It is unnecessary to answer the question.

Does s. 117(f) of the National Defence Act, R.S.C. 1985, c. N-5 , infringe s. 7 of the Canadian Charter of Rights and Freedoms ?

No.

If so, is the infringement a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society under s. 1 of the Canadian Charter of Rights and Freedoms ?

It is unnecessary to answer the question.

Appeals dismissed.

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