A Right to a Jury in Military vs Civilian Law

There's a Military law?

It is worthwhile to note that in Canada there is a completely independent court system regarding the Canadian Armed Forces. The legislation creating this independent system is the *National Defence Act*, which establishes that everyone who is a member of the Armed Forces is subject to the military legal system rather than the civilian justice system.[1] This independency is portrayed in certain clauses of the *Charter of Rights and Freedoms (Charter),* one of these being section 11.[2] This section of the *Charter* states the rights of a person charged with an offence and includes provision s. 11(f) which ascertains that "everyone has the right to a trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment, except in the case of an offence under the military law tried before a military tribunal".[3]

So, what is considered an offence under military law? This can be answered by looking at s. 130(1)(a) of the *National Defence Act* which establishes that a service offence is any, "act or omission that takes place in Canada and is punishable under... the *Criminal Code* or any other Act of Parliament".[4] Therefore, an offence committed by military personnel under the *Criminal Code* would be considered a service offence even if the offence had nothing to do with the military or Armed Forces. Furthermore, the proceedings would take place before a military tribunal and a trial by jury would be denied. Military tribunals consist of five military personnel while the typical jury is made up of twelve Canadian citizens. The case of *R v Stillman* demonstrates how the courts dealt with the appeal from a former military officer who argued he had the guaranteed right to be tried by jury and that the exception clause in s. 11(f) of the *Charter* was overbroad.[5]

The Controversial Case

Stillman and several other members of the Armed Forces were charged with sexual assault contrary to s. 271 of the *Criminal Code*, forgery contrary to s. 367 of the *Criminal Code*, and various other serious offences, all of which carry maximum punishment of at least five years of imprisonment.[6] Each of these offences were charged as service offences under s. 130(1)(a) of the *National Defence Act*, which resulted in the trials taking place before a military tribunal and without a jury. In each instance the accused argued that the military exception in s. 11(f) of the *Charter* should not apply to them because it is inconsistent with their *Charter* rights and also that s. 11(f) should be sufficiently linked to military service so therefore it was not applicable in these

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[1] *R v Stillman*, [2019] SCJ No 40 at para 2 [*Stillman],* citing National Defence Act, R.S.C. 1985, c. N-5, s 60.
[2] *Canadian Charter of Rights and Freedoms*, s 11, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
[3] *Ibid.*
[4] National Defence Act, RSC 1985, c N-5, s. 130(1)(a).
[5] *Stillman*, *supra* note 1 at para 5.
[6] *R v Stillman*, [2019] SCJ No 40 at para 5 [*Stillman*], citing *Criminal Code* 1985, c. C-46 s 271, s 367.

circumstances since these were civilian offences.[7] Military prosecutors rebutted saying the exception applies to all service offences and these encompass civilian crimes committed by members of the military. One of the challenges succeeded, but Stillman and the rest of challenges failed, leading to appeals. The Military Court of Appeal ruled they didn't have a right to be tried by a jury, but in a different appeal (*Beaudry*) the same court said they did have a right.[8] This contradicting result led to Stillman's case being appealed to the Supreme Court of Canada where it was ultimately decided 5-2 that s. 130(1)(a) of the *National Defence act* is not inconsistent with s. 11(f) of the *Charter* and dismissed the appeal.[9]

Majority Argument

The majority (written by Justice Moldaver and Brown) takes an originalistic approach in that s. 11(f) of the *Charter* is there to preserve a longstanding tradition, citing it is "deeply entrenched in our history (*Genereux* at p.295) and is designed to meet the "unique needs of the military with respect to discipline, efficiency and morale".[10] They emphasize that the commitment of a civilian crime in a non-military setting still has consequences on core military principles such as discipline and must be dealt with efficiently and more severely.

This leads into the next issue as to why a panel is used instead of a jury. They first make the distinction that it is not the same as a jury, but demonstrate it is somewhat analogous to one, stating "like a jury, the panel is the trier of fact, while the judge makes rulings on legal questions".[11] Further, like the civilian system the judge is the one who gives out the sentence in a case of a guilty verdict whereas before 2010 the sentence was determined by the panel.[12] The tribunal is preferred for several logical reasons. The first of which is necessary because the concept of "members tried by members" is at the core of fostering military morale. Being assessed by those who understand the circumstances and conflicts of military life while upholding the *Code of Service Discipline* is significant to a military trial. This panel is also needed for offences committed by the military outside Canada. The *National Defence Act* allows for trial to be held outside of Canada where it would be extremely difficult to assemble twelve Canadian civilians in reasonable time.[13] The panel allows for efficiency and mobility and is thus preferred.

They lastly go on to dismiss the majority's reasoning in *Beaudry* where it was decided that only "pure military offences" such as mutiny, desertion, and espionage should trigger the exception clause in s. 11(f).[14] The case of *Beaudry* contradicts the ruling in *Mackay*, where it was decided that civilian offences under the *National Defence Act* constitute military law (if offender

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[7] *Ibid* at para 5.
[8] *Ibid*.
[9] *Ibid* at para 9.
[10] *R v Stillman*, [2019] SCJ No 40 at para 35 [*Stillman*], citing *R v Généreux*, [1992] 1 S.C.R. 259 at p. 295.
[11] *Ibid* at para 67.
[12] *Ibid*.
[13] *Ibid* at para 71.
[14] *Ibid* at para 17.

is enrolled in the army) and the offence does not have to be service related.[15] Moldaver and Brown reinforce *Mackay* by interpreting what "military law" means in itself. They refer back to parliamentary debates with the enactment of the *National Defence Act* which points out that "military law" was understood as law which governs the members of the army and regulates "conduct of officers and soldiers in peace and war, at home and abroad". [16]

Dissenting Argument

Justice Karakatsanis and Rowe begin their dissent by disagreeing with the comparison of trial by jury to a military panel. Since the vast majority of society never participates in trial by military panel how could it be reasoned that a tribunal acts in the same manner as a jury?[17] Panels also differ from juries in significant ways such as: having five individuals instead of twelve, therefore lowering the threshold for guilt, as well as military panels having more knowledge of proceedings than the average jury would.[18] Nonetheless, they stress that if a panel is to be applied the offence committed must be connected to military service. They state that without a military connection "subsuming civilian offences under military jurisdiction through s. 130(1)(a) infringes s. 11(f) of the charter".[19] It is not clear in their minds that trying civilian offences in military courts attains the objective of improving discipline, efficiency and morale and therefore impairs the right to a jury more than reasonably necessary.

Overall

The previous decision by the appeal court that s. 130(1)(a) was inconsistent with s. 11(f) of the *Charter* had thrown the military legal system into hysteria. It required the Supreme Court to decide, that in the end, the military is a unique institution with core values that are protected by the *National Defence Act*. The majority defended parliament's legislative competence in enacting s. 130 (1)(a), and while the dissent brought up strong points they were not shared in larger part.

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[15] *R v Stillman*, [2019] SCJ No 40 at para 76 [*Stillman*], citing *MacKay v The Queen*, [1980] 2 S.C.R. 370.
[16] *Ibid* at para 74.
[17] *Ibid* at para 120.
[18] *Ibid* at para 68.
[19] *Ibid* at para 183.