

# The Military Exception: SCC affirms no right to a trial by jury for military members

## Introduction

The Supreme Court of Canada (“SCC”) ruled that members of the Canadian military charged with ordinary civilian crimes do not have the *Charter* right to a trial by jury if their charge is covered by section 130(1)(a) of the National Defence Act (“the Act”), which requires trials for Armed Forces personnel be heard in the military justice system.[\[1\]](#)

Previous cases had stated that members did have a right to a jury trial for some offences. *R v. Stillman* has restored clarity in the military justice system after conflicting rulings created questions surrounding military members’ legal rights. The SCC confirmed that an exception built into the section 11(f) *Charter* right to a trial by jury was a valid use of the federal government’s constitutional power over militaries.

## The Charter and an Individual’s Legal Rights When Facing a Criminal Charge

The *Charter* provides a list of general legal rights an individual has when they are charged with an offence. Generally, section 11 has the purpose of protecting the liberty and security interests of the individual being accused of a crime.[\[2\]](#) Some of the specific rights in this section include the right to know what crime you are being charged with, the right to be presumed innocent until proven guilty, and the right to not be put on trial a second time for an offence after having been found innocent of committing that offence.[\[3\]](#)

The issue in *Stillman* revolved around section 11(f), the legal right to a trial by jury. This right entitles an accused who is facing at least 5 years in prison the right to a trial by jury as opposed to a trial in which a judge alone determines the outcome.[\[4\]](#) The SCC recognized that the right to receive a trial by jury of peers is an important right and a cornerstone of Canada’s criminal justice system. [\[5\]](#) Juries serve two important purposes:

1. They protect the accused by giving him or her the benefit of a trial by peers
2. They provide a vehicle for public education about the criminal justice system and imports the weight of community values into trial verdicts[\[6\]](#)

However, the right to a trial by jury is not absolute.[\[7\]](#) In fact, the right has a built-in exception for military persons. The *Charter* right states that the right applies to any person charged with an offence “except in the case of an offence under military law tried before a military tribunal”. A hearing in front of a military tribunal differs from a civilian jury trial. Instead of a jury of 12 members of the public, a military hearing can consist of a jury and a

five-person military panel.

## **The Case**

### *Background*

Several Armed Forces members were accused of offences under the *Criminal Code* and other federal laws. These offences included sexual assault, forgery and other serious civil offences. All of these offences carried a maximum punishment of at least 5 years' imprisonment. As a result, all of the members asserted their right to a trial by jury. [8] They argued that the military exception should not apply as they were charged with ordinary civilian offences and not offences related to their roles as military personnel.

The Act contains the Code of Service Discipline ("CSD") which establishes the core features of the military justice system and includes a list of offences. Section 130 of the Act allows for the creation of "service offences". These are ordinary civilian offences that, when committed by military members, become military offences under the CSD. [9] Once a civilian offence is classified as a service offence, military tribunals will have the jurisdiction to hear the matter.[10]

As the SCC discussed, the military justice system operates parallel to the civilian justice system. The military requires their own system in order to "assure the maintenance of discipline, efficiency and morale of the military".[11] It was noted that Canadian military law has never used jury trials. There are multiple reasons for the military exception to the right to a jury trial:

- Militaries must be in a state of readiness;
- Militaries must be in a position to enforce internal discipline effectively and efficiently (including overseas);
- Breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct[12]

The military exception recognizes and affirms the need for a separate military justice system tailored to the needs of the military.[13]

### *Issue*

The question the Supreme Court of Canada was tasked with answering was whether a serious civil offence that qualified as a service offence should properly be considered an "offence under military law", thereby engaging the military exception. If the military exception was engaged, trials would be held by military tribunal. Members of the Armed Forces would not be entitled to a jury trial.

### *Arguments*

The military members argued that the military offence should only apply to offences that ordinary citizens are not subject to, such as “spying for the enemy”. Service offences should not be caught by the exception.<sup>[14]</sup> The members argued that there must be “military nexus” between the offence and the military in order to call it a military offence. Essentially, the offence must be committed in their duties as military members in order to qualify as a military offence.

The Crown argued that the military exception was a valid use of the federal government’s constitutional power over the military.<sup>[15]</sup> They further argued that a service offence imported into the CSD is no less of a military offence than spying on the enemy.<sup>[16]</sup>

### *Outcome*

The majority of the Supreme Court of Canada agreed with the Crown. They held that there is no difference between “pure military offences” in the CSD and those that are imported under service offences. Just because an offence can be classified as a civilian offence does not preclude it from also being classified a military offence.<sup>[17]</sup>

The Supreme Court further stated that the military exception in the *Charter* was not limited in scope. Had Parliament intended for the exception to only apply to pure military offences in the CSD, they would have written the exception in that manner. Instead, the exception is broad and covers service offences.<sup>[18]</sup> The SCC also rejected the “military nexus” argument. There are offences within the *National Defence Act* that are considered pure military offences but can also be committed by ordinary civilians, such as stealing. As such, a nexus is not required and would create inconsistencies in the application of military justice.<sup>[19]</sup>

The majority seemed to find little disconnect between an individual’s work as a member of the military and his or her personal life. They stated that when a military member commits a civilian crime, even outside his or her military role, it has an impact on discipline, efficiency and morale.<sup>[20]</sup> As such, the military exception applies to service offences despite the fact that member may not have been performing any military duties at the time of the offence.

Two Supreme Court Justices did not agree with the five-judge majority. Justices Rowe and Karakatsanis found that there must be a connection between the military and the circumstances of the offence in order to apply the military exception and deny the right to a jury trial.<sup>[21]</sup> To them, “offence under military law” refers to an offence that is connected to the military and could have a direct affect on discipline, efficiency and morale of the service. Without this connection, the importing of service offences into the military exception goes too far and is a violation of the individual’s *Charter* protected right to a trial by jury.<sup>[22]</sup>

### **Conclusion**

*Stillman* has clarified the role of the military justice system after conflicting decisions regarding the reach of the military exception. The SCC confirmed that military members charged with ordinary civilian crimes that qualify as service offences do not have the

*Charter* right to a trial by jury.

A troubling aspect of this decision is the lack of separation between the military and the people who serve in it. The SCC noted that the actions of military members, even outside of their work, have an impact on discipline, efficiency, and morale of the Armed Forces. As such, their profession requires that they are held to a high standard in all their actions, and their alleged offences should be assessed by other military personnel. Other professions, despite holding members to an equally high standard with respect to professional duties, do not limit the *Charter* right to a trial by jury when members face criminal charges. For example, a doctor who commits a crime in his or her role as a doctor or personal life will still have access to a trial by jury. This does leave the question of how much an individual's profession should impact their *Charter* rights and whether military personnel are being unfairly singled out.

[1] *R v Stillman*, 2019 SCC 40 .

[2] Department of Justice, "Section 11 - General: legal rights apply to those 'charged with an offence'" (17 June 2019), online: *Government of Canada* <<https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccd1/check/art11.html>> .

[3] *Canadian Charter of Rights and Freedoms*, s 11, Part I of the *Constitution Act, 1982*, being schedule B to the *Canada Act 1982 (UK)*, 1982 c 11 .

[4] *Ibid*, s 11(f).

[5] *Stillman*, *supra* note 1 at para 25.

[6] *Ibid* at paras 27-28.

[7] *Ibid* at para 29.

[8] *Ibid* at para 5.

[9] *Ibid* at para 2.

[10] *Ibid* at para 3.

[11] *Ibid* at para 2.

[12] *Ibid* at para 36.

[13] *Ibid* at para 80.

[14] *Ibid* at para 6.

[15] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91(7), reprinted in RSC 1985, Appendix II, No 5.

[16] *Ibid* at para 7.

[17] *Ibid* at para 83.

[18] *Ibid* at para 84.

[19] *Ibid* at paras 96-99.

[20] *Ibid* at para 105.

[21] *Ibid* at para 124.

[22] *Ibid* at para 176.