COURT MARTIAL

Citation: *R. v. MacPherson*, 2021 CM 2014

Date: 20210908
Docket: 201972

Standing Court Martial

Asticou Centre
Gatineau, Quebec, Canada

Between:

Her Majesty the Queen

and

Master Warrant Officer J.J. MacPherson, Accused

Decision rendered in Asticou Centre, Gatineau, Quebec, on 20 July 2021.
Written reasons delivered in Gatineau, Quebec, on 8 September 2021.

Before: Commander S.M. Sukstorf, M.J.

Pursuant to section 179 of the *National Defence Act* and section 486.4 of the *Criminal Code*, the Court orders that any information that could disclose the identity of the person described during these proceedings as the complainant shall not be published in any document or broadcast or transmitted in any way.

DECISION ON COURT'S QUESTION ON THE JURISDICTION OF THE COURT MARTIAL TO HEAR SEXUAL ASSAULT CHARGE THAT PREDATES THE GRANT OF JURISDICTION PROVIDED FOR UNDER THE *NATIONAL DEFENCE ACT*

Introduction

[1] On 10 December 2019, the Director of Military Prosecutions (DMP) preferred two counts of an offence contrary to section 130 of the *National Defence Act* (*NDA*); that is, sexual assault, contrary to section 271 of the *Criminal Code* against the accused. The alleged offences occurred between August and October 1998.

[2] The dates set out in the alleged offences predate both the enactment and the coming into force of Bill C-25, which provided courts martial with jurisdiction to try persons subject to the Code of Service Discipline for the offence of sexual assault that occurs within Canada. The Bill C-25 amendments led to a major reform of the military justice system and contributed to arguably the largest wide-scale changes in a generation. Prior to the enactment and coming into force of Bill C-25, courts martial were barred statutorily from trying cases of sexual assault that occurred within Canada.

[3] Bill C-25 received Royal Assent on 10 December 1998 and came into force on 1 September 1999.

[4] Contemplating a jurisdictional challenge before this court martial, on my own motion, I raised the concern and invited submissions from counsel on the impact of Bill C-25's amendments to sections 69 and 70 of the *NDA* on this Court's ability to try a case today that allegedly occurred prior to a service tribunal having jurisdiction.

[5] After multiple submissions, the prosecution was able to resolve most of the concerns identified by the Court. The only remaining issue before the Court is the temporal application of the statutory amendment to section 70 flowing from Bill C-25.

[6] The pre-Bill and post-Bill section 70 read as follows:

s.70	**PRE-BILL C25**		**POST BILL C-25 (Current)**
Marginal note	**Limitations with respect to Certain Offences**		**Limitations with respect to Certain Offences**
Offences not triable by service tribunal	**70. A service tribunal shall not try any person charged with any of the following offences committed in Canada:** **(a) murder;** **(b) manslaughter;** **(c) sexual assault;** **(d)sexual assault committed with a weapon or with threats to a third party or causing bodily harm;** **(e) aggravated sexual assault; or** **(f) an offence under sections 280 to 283 of the *Criminal Code*.**	**Offences not triable by service tribunal**	**70. A service tribunal shall not try any person charged with any of the following offences committed in Canada:** **(a) murder;** **(b) manslaughter; or** **(c) an offence under any of sections 280 to 283 of the *Criminal Code*.** **(d) to (f) [Repealed, 1998, c. 35, s. 22]**

Positions of the parties

Prosecution

[7] The prosecution argues that:

> "24) Bill C-25's amendments to s. 70 of the NDA are best characterized as an element of procedural law that would apply immediately, upon coming into force, to both pending and future fact situations.
>
> 25) A charge of sexual assault committed in Canada could have been laid under s. 130 of the NDA both before and after Bill C-25's amendments to s. 70. However, prior to the amendments, there would have been no procedural mechanism for trying such a charge, since s. 70 had previously prevented a service tribunal from trying a person for such a charge. After 1 Sep 1999, however, s. 70 of the NDA was amended so that a service tribunal could try such a charge. In other words, the effect of Bill C-25's amendment to s. 70 of the NDA was procedural: it provided for a procedural mechanism permitting a person charged with sexual assault committed in Canada to be tried by a service tribunal.
>
> 26) Consequently, the common law presumes that Clause 22 of Bill C-25 was intended to apply immediately so as to permit service tribunals to try charges of sexual assault committed in Canada, regardless of whether the sexual assaults were alleged to have taken place before or after the coming into force of Bill C-25."
> [Emphasis omitted.**]**

[8] The prosecution further relied upon a transitional provision set out at Clause 98.

> "27) Clause 98 of Bill C-25 provides as follows: "Every person liable to be charged, dealt with and tried under the former Code of Service Discipline immediately before the coming into force of this section may be charged, dealt with and tried under the new Code of Service Discipline." The reason for Clause 98 that was given at the time was as follows: "This transitional provision enables anyone liable under the Code of Service Discipline before the amendments come into force to be charged, dealt with and tried in accordance with the provisions of the amended Code of Service Discipline." (Bill C-25 *Clause by Clause Analysis*, Clause 98, "Reasons for the change.")"
> [First footnote omitted.]

[9] The prosecution invited the Court to dismiss its concerns on jurisdiction based on the following reasons:

> "a) First, as discussed above, s. 70 deals with a procedural, rather than a substantive, matter. Therefore it does not – either before or after 1 Sep 1999 – create any substantive rights that are capable of vesting in favour of any person.
>
> b) Second, the doctrine of interference with vested rights is generally only applied in private law contexts in relation to property rights, contractual rights, and rights to damages or other common law remedies, rather than in public or criminal law contexts.
>
> c) Third, the presumption against interference with vested rights can be displaced by transitional provisions in the legislation which clearly indicate an intention to interfere.
>
> Thus, even if a substantive right not to be tried by a service tribunal for a sexual assault committed in Canada vested in a person before 1 Sep 1999, Clause 98 of Bill C-25 clearly indicates Parliament's intent for anyone who was liable under the old Code of Service Discipline to [be] charged, dealt with and tried in accordance with the provisions of the amended Code of Service Discipline after 1 Sep 1999."
> [Footnotes omitted. Emphasis omitted.]

[10] Further, in final submissions, relying upon paragraph 94 of *R. v. Chouhan*, 2021 SCC 26, the prosecution argued that the accused was always liable to be tried for his conduct pursuant to the offence of sexual assault in a civilian court, or alternatively in a military court under the offences of disgraceful conduct and/or conduct to the prejudice to good order and discipline. He argues that the grant in jurisdiction is merely procedural and that the only thing that changed was the vehicle or venue where the accused can be tried.

Accused

[11] The applicant echoed the concerns of the Court and emphasized that upon a plain reading of the *NDA*, it is clear that the military justice system does not have jurisdiction to try sexual assaults that occurred in Canada prior to 1 September 1999. He argues that to permit the prosecution to continue has the effect of imposing a liability that did not exist at the time of the alleged offence within the military justice system. It is trite that the determination of jurisdiction must be assessed based on the law at the time of the alleged offence.

[12] He argues that:

(a) The rule against retroactive legislation is a principle of justice.

(b) There is a presumption of statutory interpretation that a statute should not be given retroactive effect unless it is expressed sufficiently clearly in the legislation itself and, in this case, Parliament made no such expression. Defence argues that to determine the intent of parliament with respect to the retroactivity of this provision:

i. First, the Court must view the primary source of guidance in the legislation by reviewing the transitional provisions to see if they indicate that the provisions will apply retrospectively.

ii. Second, in the absence of transitional provisions, sometimes it is possible to discern Parliament's intent from an examination of the legislative record.

iii. Third, in the absence of clear guidance, the principles of statutory interpretation should apply which includes a consideration of the common law and the *Interpretation Act*.

(c) The accused argues that after a review of the above, the court will find that neither Parliament nor the legislation provided any guidance on the explicit intent in the legislation relating to the limitations found at sections 69 and 70 of the *NDA* prior to the amendments.

(d) Substantive versus procedural - In addition, the accused argues that the amendment to section 70 affected Master Warrant Officer MacPherson's substantive rights and, as such, the change to section 70 is not procedural at all. In furthering this argument, he relies upon the following principles:

i. Substantive law concerns itself with "rights, duties and liabilities" while procedural law concerns itself with "procedure, pleading and proof" (see *R. v. Dineley*, 2012 SCC 58 at paragraph 61).

ii. To determine if a law is procedural or substantive, courts should not engage in a "labelling as substantive or procedural and must await a determination of what the amendment truly accomplishes" (see paragraph 38 of *R. v. R.S.*, 2019 ONSC 5497).

iii. He argues that the change is not "procedural" but rather concerns itself with substantive rights. Bill C-25 does not change how prosecutions are conducted or the manner in which a matter is tried. Rather, Bill C-25 imposes a liability where no such liability existed previously within the military justice system.

(e) New service offence – the accused argues that Bill C-25 expanded the jurisdiction of a court martial and, in doing so, it added a new service offence that previously did not exist.

(f) Liability – finally, the accused argues that Bill C-25 imposes greater liability over an accused if he is convicted under the military justice system in comparison with the civilian justice system for the following reasons.

i. Sentencing:

(A) Unlike in the civilian justice system, the accused would be subject to dismissal with disgrace from the Canadian Armed Forces (CAF), a punishment for which there is no comparable sentence in the civilian justice system. He argues that this is harsher than the sentence available in the civilian justice system as it can be used in conjunction with another punishment.

(B) Conversely on the other end of the sentencing range, the sentencing option of a conditional discharge available in the civilian criminal system would not be available;

(C) The accused does not have access to the panoply of sentencing options available to a civilian judge, which he argues, in and of itself, raises section 15 *Charter* issues.

ii. Ancillary Orders:

(A) In the civilian justice system, if the accused was to be found guilty and received a discharge (conditional or absolute), he would not have been required to register as a sex offender in accordance with the Sex Offender Registration Act (SOIRA) or a similar provincial sex offender registry.

(B) In the CAF context, a finding of guilt for sexual assault would result in a conviction and a requirement to register in accordance with the SOIRA is automatically imposed.

iii. In summary, the accused argues that since Bill C-25 exposes the accused to a new liability, it impacts his substantive rights. In addition, when this is coupled with the fact that there is no clear intention expressed by Parliament that the Bill was intended to operate retroactively, it should not be applied that way.

Issue

[13] The Court must decide whether Bill C-25's amendment to section 70 of the *NDA* permits a court martial to try a member with the offence of sexual assault that allegedly occurred in Canada, during the time period when a court martial was barred from doing so.

[14] In deciding the above issue, the Court narrowed its analysis to the following questions:

(a) Is there a clear expression from Parliament as to its intention regarding the legislation in question both within its commentary and as reflected in any transitional provisions?

(b) Are the changes to section 70 of the *NDA* substantive or procedural in nature?

(c) If they are procedural in nature, do they affect the accused's substantive rights?

The applicable law

[15] Generally speaking, legislation is effective immediately upon coming into force and remains so until repealed. In the case of Bill C-25, it came into force on 1 September 1999. As a general rule, legislative amendments are presumed to have only prospective effect unless it is possible to recognize a clear legislative intent that the legislation in its entirety or certain parts of it are to apply retrospectively.

[16] This means that until proven otherwise, the amendments in Bill C-25 only apply to facts that unfold on or after 1 September 1999 until the amendments are either repealed or otherwise cease to have effect.

[17] However, there is also a presumption against retrospective application when the amendments apply to purely procedural law and, in fact, they are presumed to operate retrospectively (see *Howard Smith Paper Mills Ltd. et al. v. The Queen*, [1957] S.C.R. 403).

[18] The leading Supreme Court of Canada (SCC) jurisprudence on the principles governing the temporal application of new legislation is that of *Dineley*. In *Dineley*, Deschamps J., writing for the majority, summarized the rules of interpretation at paragraphs 10-11 as follows:

> [10] There are a number of rules of interpretation that can be helpful in identifying the situations to which new legislation applies. Because of the need for certainty as to the legal consequences that attach to past facts and conduct, courts have long recognized that the cases in which legislation has retrospective effect must be exceptional. More specifically, where legislative provisions affect either vested or substantive rights, retrospectivity has been found to be undesirable. New legislation that affects substantive rights will be presumed to have only prospective effect unless it is possible to discern a clear legislative intent that it is to apply retrospectively (*Angus v. Sun Alliance Insurance Co.*, [1988] 2 S.C.R. 256, at pp. 266-67; *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 S.C.R. 248, at para. 57; *Wildman v. The Queen*, [1984] 2 S.C.R. 311, at pp. 331-32). However, new procedural legislation designed to govern only the manner in which rights are asserted or enforced does not affect the substance of those rights. Such legislation is presumed to apply immediately to both pending and future cases (*Application under s. 83.28 of the Criminal Code (Re)*, at paras. 57 and 62; *Wildman*, at p. 331).
>
> [11] Not all provisions dealing with procedure will have retrospective effect. Procedural provisions may, in their application, affect substantive rights. If they do, they are not purely procedural and do not apply immediately (P.-A. Côté, in collaboration with S. Beaulac and M.

> Devinat, *The Interpretation of Legislation in Canada* (4th ed. 2011), at p. 191). Thus, the key task in determining the temporal application of the Amendments at issue in the instant case lies not in labelling the provisions "procedural" or "substantive", but in discerning whether they affect substantive rights.

[19] In the recently released case of *Chouhan*, the SCC reconfirmed the law on the temporal application of new legislation. At paragraph 92, citing Cromwell J., writing for the dissent (not on this point) in *Dineley*, the Court in *Chouhan* wrote:

> [92] Dissenting, but not on this point, Cromwell J. elaborated on the distinction between legislation which is purely procedural and legislation that is substantive or encroaches on substantive rights (paras. 52-66). From his summary we draw some general guidance. Broadly speaking, procedural amendments depend on litigation to become operable: they alter the method by which a litigant conducts an action or establishes a defence or asserts a right. Conversely, substantive amendments operate independently of litigation: they may have direct implications on an individual's legal jeopardy by attaching new consequences to past acts or by changing the substantive content of a defence; they may change the content or existence of a right, defence, or cause of action; and they can render previously neutral conduct criminal.

[20] *Dineley* directs courts not to engage in a labelling process of legislation as substantive or procedural in determining the character of the legislation in question. Rather, it directs that there first be a determination made of what the amendment truly accomplishes. In assessing what the amendment truly accomplishes, it is best to first review the pivotal provisions of the *NDA*.

[21] As discussed at paragraph 57 of *R. v. Stillman*, 2019 SCC 40, section 2 of the *NDA* defines a "service offence" as "an offence under this Act, the *Criminal Code* or any other Act of Parliament, committed by a person while subject to the Code of Service Discipline". Upon its plain reading, this is a very broad definition with no limitations. As further recognized by the SCC at paragraph 57 of *Stillman*, there are two key categories of offences in the *NDA*: "(a) "uniquely military offences" under ss. 73-129; and (b) civil offences committed in Canada that are tried as a service offence under s. 130(1)(a)." The charge of sexual assault which is set out in section 271 of the *Criminal Code* is captured within those offences recognized under paragraph 130(1)(a) of the *NDA*.

[22] Paragraph 130(1)(a) of the *NDA* reads as follows:

> **Service trial of civil offences**
>
> **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, or
>
> . . .
>
> is an offence under this Division and every person convicted thereof is liable to suffer punishment as provided in subsection (2).

[23] Based on the plain reading of the above provision, section 130 turns any *Criminal Code* offence into a service offence when it is committed by a person subject to the Code of Service Discipline. However, paragraph 130(1)(a) is subject to those limitations set out at section 70 of the *NDA*. At the time of the alleged offences, paragraph 70(c) directed that a service tribunal shall not try any person charged with the offence of sexual assault where it occurs in Canada.

Analysis

Is there a clear expression from Parliament as to its intention regarding the legislative amendments in question with respect to transitional provisions?

[24] As instructed by the Supreme Court of Canada decision in *Dineley*, courts should ascertain whether there is clear evidence of Parliamentary intent that the legislation be given retrospective effect. As such, it first falls to the Court to determine the matter on the basis of statutory interpretation and principle.

[25] The Court's analysis began with a plain reading of the legislation to understand the intention of the legislator with respect to the changes proposed at the time. In addition, I also reviewed the Hansard references that feature the discussions and intentions of the legislators in drafting the amendments.

Transitional provisions

[26] In addition to examining the evidence of the intent of Parliament in the Hansard, the most valuable evidence comes from reviewing the transitional provisions within Bill C-25 itself. Transitional provisions speak to how Parliament intends the amended provisions to operate with respect to those matters already in progress and with respect to past events.

[27] In examining the legislation, it was clear that the exhaustive investment into the drafting of the changes imposed in Bill C-25 was accompanied by what I consider to be very detailed and fulsome transitional provisions that reflect the government's intentional implementation of important aspects of the legislation.

[28] In arguing that the new section 70 of the *NDA* is to be applied retrospectively, the prosecution relied foremost upon the fact that "the combined effect of Clauses 22 and 98 would – after 1 Sep 1999 – permit a service tribunal to try a person for a sexual assault committed in Canada even where that sexual assault is alleged to have taken place before 1 Sep 1999." [Emphasis omitted.] The prosecution's first argument is predicated on Bill C-25 expressly conferring jurisdiction on past cases of sexual assault prior to the coming into effect of the Bill itself.

[29] Unlike some Bill amendments and many of the cases that end up before the courts, Bill C-25 does contain clearly expressed transitional provisions on a number of matters. In fact, attached as Annex A, there is an entire section comprised of eight different transitional

provisions dedicated to various aspects of Bill C-25. Clause 97 sets out the relevant definitions that apply to transitional provisions set out at Clauses 98 to 100. It is Clause 98 upon which the prosecution seeks to rely.

[30] Below are the relevant definitions set out at Clause 97 that apply to Clause 98.

‘‘former Code of Service Discipline’’	‘‘former Code of Service Discipline’’ means the Code of Service Discipline within the meaning of section 2 of the Act as that definition read immediately before the coming into force of this section.
‘‘new Code of Service Discipline’’	‘‘new Code of Service Discipline’’ means the Code of Service Discipline within the meaning of section 2 of the Act as that definition reads immediately after the coming into force of this section.
Continuing liability	98. Every person **liable to be charged**, dealt with and tried under the former Code of Service Discipline **immediately before** the coming into force of this section may be **charged**, dealt with and tried under the new Code of Service Discipline.

[Emphasis added.]

[31] In short, after a close review of all the transitional provisions, it is evident that they were well thought out and specifically drafted to address the continuity of court proceedings as well as the continuity of the various actors operating within the military justice system. As an example, Clause 100 provides that every person who is a judge advocate of a court martial on the coming into force of this section is deemed to be a military judge presiding at the court martial under the new Code of Service Discipline.

[32] Importantly, the transitional provisions even plan for situations that they might not have considered. Clause 105 provides specific authority for the Governor in Council to make regulations providing for any additional transitional matters. It is unclear whether there have been any regulations passed to this effect, but no evidence of additional regulatory authority was presented in evidence in response to this motion

[33] Notwithstanding the existence of the many transitional provisions in the amending legislation as well as the specific power for the Governor in Council to make regulations for other transitional matters, the legislation is completely silent on how to deal with offences that did not previously exist prior to the passage of Bill C-25. The similar absence of a specific provision that addresses the retrospective application of new offences strongly suggests that the presumption against retrospectivity applies.

[34] Notably, the Court notes that Clause 104 specifically provided that “Part IV of the Act” which relates to the newly instituted complaint process with respect to the military police “does not apply in respect of events that took place before that Part or any of its provisions came into force.” This provision is very specific in clarifying that there is no retrospective or retroactive effect that flows from the newly constituted body of the Military Police Complaints Commission and its jurisdiction to hear matters.

[35] I then considered whether the absence of a similar Clause 104 with respect to the offence of sexual assault would suggest that the offence could be applied retrospectively. In considering this, I analyzed the consistency in the approach of the drafters of Bill C-25 with the other offences created or amended in the legislation. As an example, Clause 29 added a new section 101.1 to the *NDA* creating a new military offence of failure to comply with release conditions imposed by a custody review officer or pursuant to a condition or undertaking imposed by a custody review officer or pursuant to a condition or undertaking imposed by a military judge or a judge of the Court Martial Appeal Court.

[36] Similarly, Clause 90 amended section 302 of the *NDA* similarly expanding the scope of that offence to cover conduct in relation to the new bodies established in the Act, as well as boards of inquiry and proceedings under the Code of Service Discipline. In essence, the new section 302 of the *NDA* created an offence of contempt of court which is primarily intended to be tried in civil courts and deals with civilians who are witnesses, counsel or spectators and are not subject to the disciplinary jurisdiction of the CAF.

[37] The above are just two examples of new offences created, one in the military justice system and the other in civil court. In neither case was there a transitional provision to suggest a retrospective effect. Unless it is explicitly stated in the enactment or is a necessary implication of the language used, the long-standing presumption in Canadian law that legislation does not have retroactive or retrospective effect applies. Despite the multiple transitional provisions that were specifically drafted for the scenarios envisioned, it is notable that there is not one transitional provision suggesting that the legislative amendments be given retrospective effect.

Hansard

[38] There is no doubt that at the time the legislation was drafted and being reviewed there had been a great deal of thought, study and analysis invested into every aspect of the legislation. The Bill C-25 legislation was wide sweeping in that, it created new organizations such as the Military Police Complaints Commission, established independent stakeholders within the administration of military justice, and it also created new offences and lifted the statutory bar on the jurisdiction of courts martial over sexual assaults.

[39] Arthur Eggleton speaking at the Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs; Issue 34 - Evidence (Bill C-25) on Tuesday, 6 October 1998 summarized the changes proposed in Bill C-25 with respect to the offence of sexual assault as a grant of jurisdiction:

> Earlier this year, there were reports in the media about a number of incidents or allegations of sexual assault in the military. Sexual assault is a crime, and is treated as such. In addition to being inherently reprehensible, sexual assaults committed in the military context undermine the ability of members of both sexes to contribute equally to the Canadian Forces' mission. Sexual assaults are highly corrosive of

> morale and unit cohesion. They diminish the mutual respect and trust in fellow members which underpins military efficiency.
>
> It is for these reasons that in Bill C-25 we propose amendments to the act that would repeal the current limitation on the trial of sexual assaults in Canada. That will give the Canadian Forces concurrent jurisdiction with civilian authorities in respect of sexual assault, as is the case with the vast majority of federal offences. The Canadian Forces already have concurrent jurisdiction over virtually all federal offences, including offences of a sexual nature, such as sexual exploitation, which occur in Canada. [Emphasis added.]
> *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, Issue No. 34 – Evidence (Bill C-25), October 6, 1998

[40] On 1 October 1998, at the Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, Issue 33 – Evidence (Committee), the Senate was told by Colonel Fenske that "The current bill will give the Canadian Forces jurisdiction over sexual assaults committed in Canada. The current situation is that while under the Code of Service Discipline courts martial have jurisdiction over the vast majority of sexual-related offences like sexual exploitation and have jurisdiction over sexual assault outside Canada, they do not have jurisdiction inside Canada." (*Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, Issue No. 33, 1st Sess., 36th Parl., October 1, 1998)" [Emphasis added.]

[41] Further, the prosecution also highlighted the words of Colonel Fenske before the committee who described the rationale behind the proposed change and its importance as follows:

> I think it is fair to say that sexual assaults undermine unit morale, and without a doubt they undermine the ability of individuals to contribute equally and to grow in the military.
>
> The fact is that the military has no means to deal with this. You cannot underestimate how important it is for an organization to be seen to act and clarify a problem rapidly. It is with those good goals in mind that this jurisdiction is being sought.
> (*Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, Issue No. 33, 1st Sess., 36th Parl., October 1, 1998)

[42] The statements made by both the legal advisers working on Bill C-25 and the Minister of National Defence at that time, Arthur Eggleton that took place at the Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs reflect the thoughtful consideration that was invested by the executive prior to extending jurisdiction to the military justice system with respect to sexual assault cases that occur in Canada.

[43] The importance of the legislative grant of jurisdiction to courts martial permitting it to try cases of sexual assault that occur within Canada is not in dispute. In fact, although there has been

speculation by some commentators as to whether this jurisdiction over sexual assault within Canada should ever have been granted, this was not the basis or underlying reason why I raised the motion. In fact, I have already held that there is a pragmatic need for the military justice system to have concurrent jurisdiction over such offences.

[44] By way of example, shortly after the Court Martial Appeal Court (CMAC) rendered its decision in *Beaudry v. R.*, 2018 CMAC 4, in *R. v. Ryan*, 2018 CM 2033, given the break in judicial comity at the CMAC level, I had to determine which of the three conflicting CMAC decisions was most persuasive regarding the jurisdiction of a court martial to try members for sexual assault. In conducting my analysis, I highlighted the practical challenges that authorities in the CAF would have to navigate in order to resolve allegations of sexual assault that occurred in Canada where the only available avenue was through civilian authorities. In the case of *Ryan*, I wrote:

> [37] There is no better way to distinguish contradictory cases than applying them through the prism of the facts before the Court. In the case before me, the accused works and resides in Halifax, Nova Scotia. The allegations before this Court flow from incidents that occurred on a military course at Canadian Forces Base Borden, in Ontario, over a thousand miles away. Shortly after the military course ended, both the accused and complainant would have been transferred elsewhere in the country, and may now be living thousands of miles apart in different provinces. Similarly, if there were witnesses, they too would have dispersed, returning to their own home bases at various other locations throughout the country.
>
> [38] If CMAC *Beaudry* is the most authoritative, upon returning to her home unit, if the complainant reports to Canadian Armed Forces (CAF) authorities an allegation that constitutes an offence under section 271 of the *Criminal Code*, how would it be handled? Absent jurisdiction, the first challenge faced would be aiding the complainant in reporting the incident to the civilian police. Which police force should be engaged? Should it be the province and city where the complainant or alternatively the accused resides, or the city where the offence was committed? In this case, the alleged incident occurred on a military base, where the CAF has primary jurisdiction, but no jurisdiction over the offence.
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> [39] In any event, any resolution that engages civilian police or prosecutors will need to work through a complex inter-provincial investigation, overcoming challenges in an already overburdened criminal justice system. Arguably, the obstacles start to mount. Under a best case scenario, if a police force does complete an efficient investigation, the next challenge would be in finding a prosecutor who is willing to prosecute the offence in a city where neither the accused nor the complainant reside in the same province, let alone the same city. Who will be willing to put forward the time and resources to further justice in the case and pay for the complainant and the witnesses to travel back to testify?
>
> [40] The jurisdictional hurdles in investigating and trying the accused in Ontario may become insurmountable. How does the CAF respond to the complainant who was ordered to go to Ontario to undertake military training and while there was sexually assaulted? In practice, the approach set out in CMAC *Beaudry* could facilitate an accused to elude justice.
>
> [41] Further, it cannot go unnoticed that if the accused's criminal charges are transferred to a superior court in Barrie, Ontario, he will need to personally fund his own legal defence, pay for his own travel and accommodations, travelling from Nova Scotia to Barrie, Ontario for various court

> appearances, pay for his witnesses to travel, etc. Such a defence would quickly rise into the six-digit range, and this not including the costs associated with a lengthy civilian jury trial.
>
> [42] Conversely, under the *Royes* approach, the allegation would be reported to the CFNIS, who have jurisdiction to investigate the incident. Without complications presented by provincial boundaries, CFNIS have both the authority and the resources to conduct interviews in any province. Once their investigation is complete, if substantiated, they may lay charges. Further, if the DMP decides to prefer the charges, the member would be entitled to be tried by a General Court Martial (GCM), which is a trial by his peers and provided free legal counsel.
>
> [43] There can be no illusion that, in every instance, members commit offences only in the location where they reside and that the complainant, the accused and witnesses are all available in close vicinity. Arguably, by the nature of service in the CAF, the ready accessibility of witnesses to testify is more unlikely than it is likely. In the furtherance of justice, this Court has had defence and prosecution witnesses testify from various locations throughout Canada and the world, where they are deployed or tasked. Frankly, it is not as simple as just going downtown to have the case heard. If it was, then there would be no debate.

[45] With more and more women serving alongside men, the need for concurrent jurisdiction is both obvious and essential to address any incidents that threaten the discipline, efficiency and morale of the CAF. As I emphasized further in *Ryan*:

> [59] One of the concerns with remaining fossilized in the past is that equality rights evolve. Accepting that the *Charter* is a living tree and must adapt as new rights evolve, then arguably the *Charter* must respond to the changing nature of military service, which now includes women. Now that women serve in close confines, alongside their male peers, both at home and abroad, addressing incidents of sexual misconduct and assault are fundamental to maintaining discipline within the CAF. Why shouldn't the rights of women members be worthy of consideration? Is it acceptable for the CAF to task a female member for duty somewhere in Canada and if she suffers a sexual assault at the hands of a fellow military member, the CAF is unable to hold the perpetrator responsible?

[46] I highlight the above simply to dispel any concerns that I raised the motion questioning the jurisdiction of this court martial based on the belief that courts martial should not have concurrent jurisdiction over sexual assault that occurs within Canada.

[47] In summary, it is clear from the Hansard that it was the deliberate intent of Parliament that courts martial have concurrent jurisdiction with civilian courts over the offence of sexual assault that occurs within Canada and there is no evidence of any discussion of the retroactivity or retrospectivity of this change.

[48] For a court martial to have adjudicative jurisdiction to decide a matter, the court must have jurisdiction over both the offence and the person. These are treated as distinct and separate.

Jurisdiction over the offence

[49] It is important to keep in mind that a court martial is an *ad hoc* statutory court. It only has those powers that have been conferred upon it by the *NDA*. What this means is that, when trying

a *Criminal Code* offence such as sexual assault, a court martial is dependent on the authorities set out in both the *NDA* and the *Criminal Code* for the source of its jurisdiction.

[50] Writing for the majority in *R. v. Moriarity*, 2015 SCC 55, Cromwell J. clarified that civil offences barred by section 70 do not fall within the Code of Service Discipline. In his reasons, he clarified how service offences are created under the Code of Service Discipline and that the only federal offences not incorporated into the Code of Service Discipline under paragraph 130(1)(a) are those set out in section 70.

> [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.
> [Emphasis added.]

[51] Noting that the *Moriarity* case was decided after the statutory amendments implemented in Bill C-25 removed sexual assault from section 70 of the *NDA*, it fortifies that the limitations set out at section 70 of the *NDA* play a substantive role in establishing what service offences are included under the Code of Service Discipline.

[52] It is the prosecution's position that the Bill C-25 amendments, when applied to the manner in which it prosecutes the accused for his past misconduct, and the manner in which an accused can defend himself against a charge of sexual assault under section 271 of the *Criminal Code*, does not diminish his rights as he was always liable for such misconduct in Canada in a civilian court. It is also the prosecution's position that the changes ushered in with Bill C-25 respecting the change in the statute of limitations as well as the removal of the statutory bar for courts martial to try allegations of sexual assault do not affect the accused's vested rights and therefore the amendments have retrospective application. The defence disagrees.

[53] The prosecution also argued that we are not dealing with a new criminal offence as the offence of sexual assault existed in the *Criminal Code* prior to the allegations in question. However, this argument somewhat conflates the rights and liabilities of the accused with the jurisdiction of the court martial. As the defence conceded, the accused is aware and acknowledges that he is liable to be tried for the offence of sexual assault in a civil court. That is not the issue of concern for this court martial.

[54] As the CMAC wrote at paragraph 18 in the case of *R. v. Edwards*, 2019 CMAC 4, "Courts martial are clothed with unlimited territorial jurisdiction, which extends throughout Canada and the world, but for those alleged offences arising in Canada referred to in s. 70 of the *NDA*." This statement reinforces that section 70 is a critical provision that goes to the heart of the jurisdiction of a court martial.

[55] In light of section 70 of the *NDA*, the fact that a service member is liable in a civil court does not by itself provide this Court the jurisdiction to hear the matter in a court martial. Section 71 of the *NDA* has always made it clear that subject to section 66, nothing in the Code of Service Discipline affects the jurisdiction of any civil court to try a person for any offence triable by that court. This has not changed.

[56] In order for a court martial to determine that the offence before the court is a "service offence" falling with this court martial's jurisdiction, the court must look to both paragraph 130(1)(a) of the *NDA* as well as section 70 to ensure that the allegations relate to a valid service offence under the Code of Service Discipline at the time that the allegations unfolded.

Jurisdiction over the person

[57] Under military law, the jurisdiction over the person comes from section 60 of the *NDA* which reads as follows:

> **Persons subject to Code of Service Discipline**
>
> **60 (1)** The following persons are subject to the Code of Service Discipline:
>
> **(a)** an officer or non-commissioned member of the regular force;
>
> **(b)** an officer or non-commissioned member of the special force;
>
> **(c)** an officer or non-commissioned member of the reserve force when the officer or non-commissioned member is
>
> **(i)** undergoing drill or training, whether in uniform or not,
>
> **(ii)** in uniform,
>
> **(iii)** on duty,
>
> **(iv)** [Repealed, 1998, c. 35, s. 19]
>
> **(v)** called out under Part VI in aid of the civil power,
>
> **(vi)** called out on service,
>
> **(vii)** placed on active service,
>
> **(viii)** in or on any vessel, vehicle or aircraft of the Canadian Forces or in or on any defence establishment or work for defence,

> **(ix)** serving with any unit or other element of the regular force or the special force, or
>
> **(x)** present, whether in uniform or not, at any drill or training of a unit or other element of the Canadian Forces;
>
> **(d)** subject to such exceptions, adaptations and modifications as the Governor in Council may by regulations prescribe, a person who, pursuant to law or pursuant to an agreement between Canada and the state in whose armed forces the person is serving, is attached or seconded as an officer or non-commissioned member to the Canadian Forces;
>
> **(e)** a person, not otherwise subject to the Code of Service Discipline, who is serving in the position of an officer or non-commissioned member of any force raised and maintained outside Canada by Her Majesty in right of Canada and commanded by an officer of the Canadian Forces;
>
> **(f)** a person, not otherwise subject to the Code of Service Discipline, who accompanies any unit or other element of the Canadian Forces that is on service or active service in any place;
>
> **(g)** subject to such exceptions, adaptations and modifications as the Governor in Council may by regulations prescribe, a person attending an institution established under section 47;
>
> **(h)** an alleged spy for the enemy;
>
> **(i)** a person, not otherwise subject to the Code of Service Discipline, who, in respect of any service offence committed or alleged to have been committed by the person, is in civil custody or in service custody; and
>
> **(j)** a person, not otherwise subject to the Code of Service Discipline, while serving with the Canadian Forces under an engagement with the Minister whereby the person agreed to be subject to that Code.
>
> **Continuing liability**
>
> (2) Every person subject to the Code of Service Discipline under subsection (1) at the time of the alleged commission by the person of a service offence continues to be liable to be charged, dealt with and tried in respect of that offence under the Code of Service Discipline notwithstanding that the person may have, since the commission of that offence, ceased to be a person described in subsection (1).
>
> **Retention of status and rank**
>
> (3) Every person who, since allegedly committing a service offence, has ceased to be a person described in subsection (1), shall for the purposes of the Code of Service Discipline be deemed, for the period during which under that Code he is liable to be charged, dealt with and tried, to have the same status and rank that he held immediately before so ceasing to be a person described in subsection (1).

[58] In his submissions, the prosecution argued that Clause 98 is reflective of Parliament's intention and the court should retrospectively apply it to the allegations at hand. Clause 98 reads

as follows:

> **Continuing liability**
>
> 98. Every person liable to be charged, dealt with and tried under the former Code of Service Discipline immediately before the coming into force of this section may be charged, dealt with and tried under the new Code of Service Discipline.
> [Emphasis added.]

[59] It is the position of the prosecution that Clause 98 provides this court explicit authority to try the accused now for a service offence that allegedly occurred prior to it becoming a service offence with the coming into force of Bill C-25. When Clause 98 is examined closely, it is clear that it is actually a continuing liability provision very similar to subsection 60 (2), reflecting Parliament's intent that there be no interruption in the jurisdiction over the "person" as established under section 60 of the *NDA* when the new provisions of the new Code of Service Discipline took effect.

[60] As written, Clause 98 does not suggest that section 70 is to be applied retrospectively with respect to new service offences. In substance, Clause 98 relates to the liability of the accused as a person only and is silent on whether he is automatically subject to new service offences under the new Code of Service Discipline.

[61] It is important to note that if Clause 98 is interpreted to mean that it relates to the offences under the Code of Service Discipline, since the offence of sexual assault that occurred within Canada was not an offence under the former Code of Service Discipline for which the accused was liable, by extension he has no liability under the new Code of Service Discipline.

[62] It is not in dispute that the accused was a person subject to the Code of Service Discipline at the time of the alleged commission of the offences, pursuant to subsection 60 (1) of the *NDA.* Although he retired from the Canadian Forces after being charged, the General Court Martial retains jurisdiction over him by virtue of subsection 60 (2) of the *NDA.*

[63] On its own, I find that Clause 98 simply confirms that this Court has jurisdiction over the accused – as a full-time serving member of the CAF and it does not provide explicit jurisdiction with respect to an offence that was not an offence under the former Code of Service Discipline. The prosecution further argued that the Court has jurisdiction over the person and his conduct, and that is sufficient. It was argued that if the accused had been charged with an offence contrary to section 93 of the *NDA* for disgraceful conduct, then this Court would have jurisdiction over both the offence and the person. However, the prosecution did not charge the accused with an offence for which this Court had jurisdiction under the former Code of Service Discipline. In fact, the only charges facing the accused are those of sexual assault that occurred within Canada, an offence for which the accused was not liable under the former Code of Service Discipline when the offences allegedly occurred.

[64] In short, I find that Clause 98 does not provide this Court with the necessary jurisdiction over the offence of sexual assault that occurred within Canada prior to Bill C-25.

Are the changes to section 70 of the NDA substantive or procedural in nature?

[65] The next step, requires an assessment as to whether the changes imposed by section 70 of the *NDA* were substantive or procedural in matter. The prosecution argued that the amendments to section 70 of the *NDA* were merely procedural in substance and in effect. As previously discussed at paragraph 17 of this decision, when the amendments apply to purely procedural law, they are presumed to operate retrospectively.

[66] For example, at paragraph 42 of *R. v. Hall*, 2008 BCPC 0240, Woods J. concluded that evidentiary provisions are, prima facie, matters of procedure and that no person has a vested right in any course of procedure**:**

> [42] It is widely acknowledged that evidentiary provisions are, *prima facie*, matters of procedure, and that procedural law *prima facie* does not create vested, substantive rights. La Forest J., for the court, acknowledged this point when he cited the passage below from P. St. J. Langan, *Maxwell on Statutory Interpretation*, 12th ed. (London: Sweet & Maxwell, 1969) in *Angus* at para. 21:
>
> > "The presumption against retrospective construction has no application to enactments which affect only the procedure and practice of the courts. No person has a vested right in any course of procedure, but only the right of prosecution or defence in the manner prescribed for the time being, by or for the court in which he sues, and if an Act of Parliament alters that mode of procedure, he can only proceed according to that altered mode."

[67] It is very clear that the Bill C-25 amendments in question are not evidentiary in nature, but do they still fit within what is considered to be procedural as contended by the prosecution?

[68] Unfortunately, the distinction between substantive and procedural provisions is far from clear. As noted in *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42 at paragraph 56, "an assessment of whether a provision is procedural or not must be determined in the circumstances of each case." Relying upon *Angus v. Sun Alliance Insurance Co.*, [1988] 2 S.C.R. 256, the SCC in *Application under s. 83.28 of the Criminal Code (Re)* stated that "for a provision to be regarded as procedural, it must be exclusively so".

[69] The SCC in *Application under s. 83.28 of the Criminal Code* described what is considered to be procedural:

> 57 Driedger and Sullivan generally describe procedural law as "law that governs the methods by which facts are proven and legal consequences are established in any type of proceedings": Sullivan, *supra*, at p. 583. Within this rubric, rules of evidence are usually considered to be procedural, and thus to presumptively apply immediately to pending actions upon coming into force: *Howard Smith Paper Mills Ltd. v. The Queen*, [1957] S.C.R. 403. However, where a rule of evidence either creates or impinges upon substantive or vested rights, its effects are not exclusively procedural

> and it will not have immediate effect: *Wildman v. The Queen*, [1984] 2 S.C.R. 311. Examples of such rules include solicitor-client privilege and legal presumptions arising out of particular facts.

[70] As Professor Sullivan goes on to state at page 584 in *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham: Butterworths, 2002), in the context of determining whether an enactment should be applied retrospectively:

> "In determining whether a provision is 'purely procedural', the courts look to the substance of the provision and its practical impact on the parties. The important thing is not the label, but the effect. If the effect of a provision is to alter the legal significance of the facts in a case, it is not purely procedural. This point was made by Lord Brightman in *Yew Bon Tew v. Kenderaan Bas Mara*, in a passage quoted with approval by the Supreme Court of Canada [in *Martin v. Perrie* (1986), 64 N.R. 195 at 204]:
>
> … the proper approach to the construction of the Act … is not to decide what label to apply to it, procedural or otherwise, but to see whether the statute, if applied retrospectively [immediately and generally] to a particular type of case, would impair existing rights and obligations."
> [Footnote omitted; emphasis added.]

[71] In *Dineley,* the SCC provided guidance that courts should not engage in a superficial labelling process in determining the character of legislation. In short, *Dineley* suggests that a classification of the legislation as either substantive or procedural must wait for a determination as to what the amendment truly accomplishes.

[72] As recommended by the SCC in *Dineley*, it is important that this Court consider the effect of the amendments to the provision and what the change accomplishes as well as its legal significance to the facts in a case. Recognizing that the power to try sexual assault in the military justice system for offences occurring in Canada was formerly exclusively vested in civilian courts, the prior discussions and legislative summary for Bill C-25 amendments make it clear that the change to section 70 was to confer concurrent jurisdiction for domestic sexual assault on courts martial. When the changes to section 70 came into effect, it exposed persons subject to the Code of Service Discipline to be tried for an offence of sexual assault occurring within Canada in either military or civilian courts.

[73] In response to the Court's concern regarding its own jurisdiction, the prosecution argued that the grant of jurisdiction was a mere procedural change because the right remained in substance for offences occurring outside of Canada and in civilian courts for those cases that occurred in Canada. The prosecution argued that it is only the "manner" of exercising jurisdiction over the offence that was changed.

[74] However, it is also well established in precedent that a substantial change of jurisdiction by Parliament with respect to the powers of a statutory court is not procedural. When the prosecution was asked to provide examples of courts martial for incidents of sexual assault within Canada that predated the coming into force of Bill C-25, they were unable to provide any precedent. It appears that in the 22 years since the changes in Bill C-25 came into force, no

charges have ever been preferred for sexual assault occurring within Canada prior to 1 September, 1999.

[75] There is a series of dated SCC jurisprudence that addresses the impact when a statutory court is provided with a legislative change to its jurisdiction. In *Singer v. The King*, [1932] S.C.R. 70, the Court held that: "Legislation conferring a new jurisdiction on an appellate court to entertain an appeal cannot be construed retrospectively, so as to cover cases arising prior to such legislation, unless there is something making unmistakeable the legislative intention that it should be so construed. The matter is one of substance and of right." Anglin C.J.C., delivering the judgment of the Court, at page 72 stated:

> It is common ground that, unless there is something making unmistakeable the intention of the Legislature that a retrospective construction should be put upon the legislation so that it may cover cases arising prior thereto, no clause, conferring a new jurisdiction on an appellate court to entertain an appeal, can be so construed. The matter is one of substance and of right.
>
> The decision in *Doran* v. *Jewell* is binding upon us and is conclusive to that effect. If further authority be required on this point, it may be found in *Upper Canada College* v. *Smith*. [Footnotes omitted.]

[76] Aside from the fact that *Singer* relates specifically to an appeal court, there is little distinction between the grant of jurisdiction provided in the *Singer* case with the present one. In both cases, through legislative amendment, statutory courts were provided jurisdiction to hear cases where, prior to the enactment or coming into force, neither courts had jurisdiction. It did not matter that an accused had a right of appeal in a different venue, it was the authority being granted to the new appellate court that was new.

[77] In *Boyer v. The King*, [1949] S.C.R. 89, the SCC also held that legislation conferring "on an appellate court to entertain an appeal cannot be construed retrospectively so as to cover cases arising prior to such legislation unless there is something making unmistakeable the legislative intention that it should be so construed" It further held that if the "new legislation does not apply to a case which arose prior to its coming into force, by force of s. 19 of the *Interpretation Act* the old legislation continues to apply". [Emphasis added.]

[78] This principle that a grant of jurisdiction is not a procedural matter was upheld again by the SCC in *Royal Bank of Canada v. Concrete Column Clamps (1961) Ltd.*, [1971] S.C.R. 1038. The relevant passages of the case are set out below:

> All the authorities we have been referred to in support of this contention merely tend to show that the principle that statutes do not operate retrospectively is not applicable to rules of procedure. However, it is well established that jurisdiction is not a procedural matter, and no reason has been shown for holding that it becomes a procedural matter when a transfer of power, rather than an increase or a decrease, is involved.
>
> In *Boyer v. The King*, Rinfret C.J. reviewed the cases on the absence of retrospective operation in legislative provisions dealing with the right of appeal. He quoted with special emphasis (page 98) the following statement of Anglin C.J., speaking for the Court in *Singer v. The King*:

> . . . unless there is something making unmistakeable the intention of the Legislature that a retrospective construction should be put upon the legislation so that it may cover cases arising prior thereto, no clause, conferring a new jurisdiction on an appellate court to entertain an appeal, can be so construed. The matter is one of substance and of right.
>
> . . .
>
> I need only refer to the firmly established principle, in terms of which the case has been presented, that in the absence of an explicit provision to the contrary, retrospective operation must not be given to legislation conferring a new jurisdiction on a court of appeal.
> [Footnotes omitted, emphasis added.]

[79] Probably the closest case to the one at bar is *Rex v. Rivet* ([1944] 3 D.L.R. 353) rendered by the Appellate Division of the Supreme Court of Alberta. In *Rex v. Rivet*, the Appeal Court had to consider the temporal effect of its statutory grant of jurisdiction to hear the appeals of criminal matters from the Northwest Territories enacted by a similar amendment. In that case, the Court also confirmed that the legislation creating a right of appeal is not merely procedural.

[80] It is true that the accused was always liable in civilian courts for the offence for which he is charged, but, as mentioned earlier, the Court raised the issue in the context of the powers of this court martial to try the accused for an offence for which a court martial did not have jurisdiction to try when it was committed.

[81] I provided the above SCC jurisprudence to counsel and requested their representations. In response, relying upon the reasoning provided in *R. v. R.S.* 2019 ONSC 5497, paragraphs 51 to 53 of *R. v. Kozak*, 2019 ONSC 5979, as well as *R. v. A.S.*, 2019 ONCJ 655 at paragraphs 24 to 27, the prosecution suggested that the SCC foundational law on this issue, as set out in *Concrete Column Clamps*, was no longer good law.

[82] However, upon a close reading of the above decisions as well as the other cases relied upon by the prosecution, it was clear that they all relate to the same legislative change and the Court further noted that the findings and reasoning set out in the cases of *A.S.*, *Kozak* and *R. v. R.S.* 2019 ONSC 5497 were overturned at the Ontario Court of Appeal in *R. v. R.S.*, 2019 ONCA 906.

[83] To understand what occurred in the above cases, it is best to start with the legislative change that sparked the series of decisions on the topic. On 21 June 2019, Parliament enacted legislation which, among many other things, amended the provisions of the *Criminal Code*, R.S.C. 1985, c. C-46 relating to preliminary inquiries: Bill C-75, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, 1st Sess., 42nd Parl., 2019, c. 25. The amendments came into force a few months later on 19 September 2019, and had the effect of substantially limiting the availability of preliminary inquiries. Prior to the amendments, anyone in Ontario who had elected trial in the Superior Court of Justice (judge and jury, or judge alone) could request and, upon request, was entitled to a preliminary inquiry. After the amendments, preliminary inquiries were available

only for indictable offences punishable by 14 years' imprisonment or more. There were no transitional provisions to provide guidance.

[84] In the lower level decision of *R. v. R.S.*, 2019 ONCJ 629, the charge before the Ontario court was for sexual assault which is not punishable by 14 years' imprisonment or more, so if the amendments applied to the accused persons, none of them would be entitled to a preliminary inquiry as of 19 September 2019. The accused had already elected and requested a preliminary inquiry prior to the amendments coming into force. The application's judge, Marion J., found that section 53 as amended was procedural, but since it affected the jurisdiction of the Ontario Court of Justice, he concluded that it could not operate retrospectively (see *R. v. R.S.*, 2019 ONCJ 629, at paragraph 63). In reviewing the issue before them, the Court of Appeal in *R. v. R.S.*, 2019 ONCA 906 summarized Marion J.'s position taken at the application's stage as follows:

> [7] Marion J. held that the amendments did not apply to accused who had elected and requested a preliminary inquiry before September 19, 2019: *R. v. R.S.*, 2019 ONCJ 629. In his view, the amendments were procedural in nature but, as they affected the jurisdiction of the Ontario Court of Justice to conduct preliminary inquiries, they were presumptively prospective: see *Royal Bank of Canada v. Concrete Clamps (1961) Ltd.*, 1971 CanLII 148 (SCC), [1971] S.C.R. 1038, at p. 1040. Nothing in the legislation rebutted that presumption. He concluded that the Ontario Court of Justice had jurisdiction after September 19, 2019, to conduct preliminary inquiries in those cases in which the accused had requested a preliminary inquiry before September 19, 2019. All four appellants met that criterion.

[85] However, after Marion J. issued his decision, the Crown sought prohibition with *certiorari* in aid in the Superior Court of Justice. In reviewing the lower court decision in *R. v. R.S.* 2019 ONSC 5497, Thomas R.S.J. characterized the amendments as purely procedural and as not affecting any substantive rights of the appellants. In doing so, he rejected the SCC position on jurisdiction set out in *Concrete Column Clamps* that had been relied upon by the application's judge. In overturning the decision rendered by Thomas R.S.J. in *R. v. R.S.* 2019 ONSC 5497, the Ontario Court of Appeal grounded their reasoning on the fact that the legislative amendments had in fact affected the substantive rights of an accused.

[86] I note that in rendering their decision, the Ontario Court of Appeal did not need to weigh into whether or not the SCC jurisprudence with respect to the statutory changes to the jurisdiction of a court was still good law. However, with the greatest respect to Thomas R.S.J. in *R. v. R.S.* 2019 ONSC 5497 as well as Downes, J. in *A.S.*, I do not find their reasons pertaining to the earlier SCC jurisprudence persuasive when dealing with the specific fact situation before this Court.

[87] It is important to note that the facts set out in *R. v. R.S.*, 2019 ONSC 5497 and *Kozak* and the legislative changes reviewed therein were very different to the changes being considered before this Court. Legislation that sets out a new process or rules in the trying of an already established offence is very different in substance to legislation that creates a new offence, or new jurisdiction to hear a matter or legislation that bestows new powers on a court where these changes directly affect the liabilities of others. Upon a thorough review, I do not find that the

older SCC jurisprudence on the jurisdiction of a court has been overturned by the SCC in its later cases and it certainly could not be overturned by either by *R. v. R.S.*, 2019 ONSC 5497, *R. v. A.S.*, 2019 ONCJ 655 or any other lower level case law provided to this Court. As with all jurisprudence, even the SCC's own jurisprudence has evolved, however, this evolution in the law and clarification does not mean that the law set out in its earlier jurisprudence is expressly overruled. In fact, upon closer review, the latter SCC jurisprudence simply provides greater guidance to trial judges to consider broader circumstances when analyzing the legislative changes to ensure that the rights of those persons affected by the legislative changes are also considered.

[88] As referenced earlier, in *Dineley,* the SCC instructed trial judges not to engage in a superficial labelling process in determining the character of legislation. This is important guidance to trial judges on how to approach their analysis as not every case will be as straight forward as the facts set out in the earlier SCC jurisprudence. In short, the SCC suggested that a classification of the legislation as either substantive or procedural must wait for a determination as to what the amendment truly accomplishes. In order to test whether the older jurisprudence has in fact been overturned, one must ask if the guidance in *Dineley* is followed, would it change the results the SCC rendered in its judgements in *Boyer*, *Singer*, *Rex v. Rivet* and *Concrete Column Champs*? Upon review, it would not have changed those judgements at all given the effect of the legislative amendments and what they accomplished. With its decision in *Dineley*, the SCC does not change its position decided in earlier cases, but rather it provides direction that expands the analysis to permit other possible avenues of consideration.

[89] In its most recent decision in *Chouhan*, the SCC embraced the opportunity to fortify its earlier guidance to trial judges in confirming whether legislative changes are either substantive or procedural. As previously quoted, the SCC confirmed that "procedural amendments depend on litigation to become operable." On the other hand, substantive amendments have a more direct implication "on an individual's legal jeopardy by attaching new consequences to past acts or by changing the substantive content of a defence; they may change the content or existence of a right, defence, or cause of action; and they can render previously neutral conduct criminal." (See paragraph 92 of *Chouhan*). Applying the SCC position as set out in *Chouhan* to the SCC decisions rendered *Boyer*, *Singer*, *Rex v. Rivet* and *Concrete Column Champs,* it clarifies that substantive grants of jurisdiction creating offences or providing new jurisdiction on appellate review would all fall within the classification of substantive.

[90] In summary, based on a review of the case law provided by the prosecution and the SCC jurisprudence on the effect of legislative changes, there is no evidence that the SCC has reversed or declared its earlier jurisprudence as no longer effective.

[91] Further, in apply the SCC jurisprudence to the facts of this case, the removal of the statutory bar at section 70 of the *NDA* provided a court martial with a new avenue of litigation over an offence that previously could not be tried in the military justice system. In doing so, it also exposed members of the CAF to increased legal jeopardy in that they could now be tried under the military justice system for sexual assault allegations occurring within Canada.

[92] In summary, I find that the changes to section 70 that were marshalled in with Bill C-25 are substantive in nature. Further, this court was not provided with any evidence that Parliament granted the military justice system retrospective jurisdiction to try the offence of sexual assault allegedly occurring within Canada that was previously barred before Bill C-25 came into effect. Based upon this, I need only refer to the firmly established principle that in the absence of an explicit provision to the contrary, retrospective operation of section 70 does not apply. In conclusion, I find that with respect to allegations of sexual assault occurring within Canada between August and October 1998, this Court does not have jurisdiction.

Does the change affect the substantive rights of the accused?

[93] If I am wrong and the provisions in Bill C-25 can somehow be characterized as procedural enactments, this still would not end the matter. The next question the Court would have to assess is whether section 70 of the *NDA* in its earlier incarnation created vested rights, such that the expanded jurisdiction imposed by the Bill C-25 amendments interferes with these substantive rights. In other words, procedural legislation which affects the content or the existence of a substantive right cannot be considered purely procedural. Such was the case as determined by the Ontario Court of Appeal in *R. v. R.S.*, 2019 ONCA 906.

[94] I am satisfied that, unlike much of the other case law on this topic, because the issue before this Court is answered through the examination of the legislative and parliamentary intent, and analyzing the substantive nature by which the amendments affect the jurisdiction of this Court, an assessment of the substantive rights of an accused does not need to be undertaken. Although I am of the view that I do not need to assess this last question, I feel it is important to highlight for the record the additional arguments made by defence as well as relevant submissions made during the Committee hearings.

[95] In *Dineley*, at paragraph 18, the SCC also confirmed that retrospectivity is not desirable if the legislation affects either "vested or substantive rights". It follows then that the amendments to section 70 should not be applied retrospectively if they affect vested rights or substantive rights, even if procedural in nature.

[96] In *Dineley*, the majority held that, "The fact that new legislation has an effect on the content or existence of a defence, as opposed to affecting only the manner in which it is presented, is an indication that substantive rights are affected." [Emphasis added.] I note that the new provisions do not alter the elements of the offence of sexual assault. However, the defence argued strongly that the change greatly affected an accused's liabilities for the prescribed conduct under the military justice system.

[97] At set out earlier at paragraph 12(f) of this decision, the defence also argued that the change to section 70 that was ushered in with Bill C-25 directly affects the substantive rights of the accused as there is a difference in punishments between being tried for the offence of sexual assault by court martial versus being tried in a civilian court. He argued that Bill C-25 also

creates greater liability if an accused is convicted in the military justice system than would be available in the civilian justice system.

[98] In a response to a question on the differences in punishments, in the Committee hearings on 6 October 1998, Brigadier-General Pitzul explained the sentencing effect that C-25 would have on an accused:

> Each case must be dealt with on its merits. Each accused is peculiar, each set of circumstances is peculiar, and you apply the principles of sentencing to the cases as you find them.
>
> There are, though, principles of sentencing over and above those in the civilian arena. In the civilian context, perhaps, one's reintroduction into the community is not as great a concern to that civilian community as it is in the military. Returning an individual to the military community must be seen in the context of that community. You must remember the trust that each armed forces member must have in the other in order to accomplish the mission. Therefore, the impact of the conduct of the individual on the community is important. It is an issue of military justice. <u>If there has been abuse between rank levels, so that the accused is a superior rank and the inferior rank is the victim, that requires a more severe punishment than would otherwise be the case. In a civilian context, rank makes no difference. In the military context it does.</u>
>
> The locale of the offence can be of extreme importance to the particular case, whereas in the civilian context it may not be as important. For example, if an individual leaves his post to commit his offence of sexual violence on an inferior while on duty in a dangerous theatre of operations, the only reason he could commit the offence was because he had control over the inferior in that theatre of operations. Those are aggravating circumstances to the particular case that perhaps one would not always find in the civilian context.
>
> Perhaps those are the types of scenarios to which the minister is referring.
>
> He is also referring to the cohesion and morale that a military unit must have to function effectively. If you have misconduct in that unit, that misconduct must be looked at within that context. Sometimes sentences can be more severe; on the other hand, sentences can be less severe. Sometimes, assaults in a bar are treated less severely than in the civilian context.
>
> The military environment is rather unique. There are principles of sentencing. They are the same as they are in the civilian context, but we have additional principles. [Emphasis added.]
>
> *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, Issue No. 34 – Evidence (Bill C-25), October 6, 1998

Summary

[99] On 1 September, 1999, for the first time, Bill C-25 granted the military justice system jurisdiction over the offence of sexual assault that occurs within Canada. Upon a close review of the transitory provisions and a review of the Hansard, there is no evidence to suggest that Parliament intended the amendment to section 70 of the *NDA* to apply retrospectively. Absent clear legislative intent, courts martial do not have discretion to rewrite the law to impose or try a member for a service offence that did not exist at the time it allegedly occurred. There are strong policy reasons why statutes should not be given retrospective operation in the absence of an expressed intention by Parliament to do so.

[100] Further, I find that the legislative changes made to section 70 of the *NDA*, enacted with Bill C-25, cannot be considered procedural. In fact, there is nothing procedural about the changes to section 70 of the *NDA* as it had the effect of removing the statutory bar on the jurisdiction of a court martial to try an offence of sexual assault that occurs within Canada, and in doing so, it created a new offence and source of litigation which as distinguished by the SCC in *Chouhan* is a substantive change. As such, the change to section 70 is a substantive matter going directly to the heart of the jurisdiction of this Court.

[101] Although the Court accepts that the accused was always liable to be charged for an alleged sexual assault in civilian courts, the main issue the court needed to determine was not whether the accused is personally liable in terms of his conduct in a court of law, but rather based on the date of the alleged incidents whether the offence of sexual assault that occurred within Canada can be tried by this court martial. This is important because civilian courts still have jurisdiction over both him and the offence.

[102] In conclusion, I find that the amendment to section 70 of the *NDA* flowing from Bill C-25 does not permit a court martial to try a member with the offence of sexual assault that allegedly occurred in Canada, prior to 1 September, 1999, during the time period when a court martial was barred from doing so.

FOR THESE REASONS, THE COURT:

[103] **TERMINATES** the proceedings against Master Warrant Officer MacPherson.

Dated this 8th day of September 2021, at the Asticou Centre, Gatineau, Quebec

("S. Sukstorf, Commander")
Presiding Military Judge

Counsel:

The Director of Military Prosecutions as represented by Major C. Walsh and Lieutenant-Commander J. Besner

Major M. Melbourne and Captain C.M. Da Cruz, Defence Counsel Services, Counsel for Master Warrant Officer J.J. MacPherson

Annex A to
R. v. MacPherson, 2021 CM 2014

	TRANSITIONAL PROVISIONS	DISPOSITIONS TRANSITOIRES	
Definitions	**97. The definitions in this section apply in sections 98 to 100.**	**97. Les définitions qui suivent s'appliquent aux articles 98 à 100.**	Définitions
''former Code of Service Discipline'' « *ancien code* »	**''former Code of Service Discipline'' means the Code of Service Discipline within the meaning of section 2 of the Act as that definition read immediately before the coming into force of this section.**	**« ancien code » Le code de discipline militaire au sens de l'article 2 de la même loi dans sa version antérieure à l'entrée en vigueur du présent article.**	« ancien code » ''*former Code of Service Discipline*''
''new Code of Service Discipline'' « *nouveau code* »	**''new Code of Service Discipline'' means the Code of Service Discipline within the meaning of section 2 of the Act as that definition reads immediately after the coming into force of this section.**	**« nouveau code » Le code de discipline militaire au sens de l'article 2 de la même loi dans sa version à l'entrée en vigueur du présent article.**	« nouveau code » ''*new Code of Service Discipline*''
Continuing liability	**98. Every person liable to be charged, dealt with and tried under the former Code of Service Discipline immediately before the coming into force of this section may be charged, dealt with and tried under the new Code of Service Discipline.**	**98. Toute personne qui, avant l'entrée en vigueur du présent article, était susceptible d'être accusée, poursuivie et jugée sous le régime de l'ancien code l'est également sous le régime du nouveau code.**	Maintien du statut de justiciable
Proceedings	**99. (1) Proceedings under the former Code of Service Discipline commenced before the coming into force of this section are to be taken up and continued under and in conformity with the new Code of Service Discipline without any further formality and with any modifications that the circumstances require.**	**99. (1) Les poursuites entamées sous le régime de l'ancien code avant l'entrée en vigueur du présent article se poursuivent sous le régime du nouveau code, avec les adaptations nécessaires, sans formalité additionnelle.**	Poursuites
Courts martial	**(2) For the purposes of subsection (1), court martial proceedings are deemed to be commenced when the court martial is convened.**	**(2) Pour l'application du paragraphe (1), une poursuite devant la cour martiale est réputée entamée lorsque la cour martiale est convoquée.**	Cour martiale
Judge advocate of court martial	**100. Every person who is a judge advocate of a court martial on the coming into force of this section is deemed to be a military judge presiding at the court martial under the new Code of Service Discipline.**	**100. Toute personne qui, à la date d'entrée en vigueur du présent article, est juge-avocat d'une cour martiale est réputée être, sous le régime du nouveau code, un juge militaire présidant une cour martiale.**	Juge-avocat de la cour martiale

Members of court martial

101. Every person who is a member of a court martial on the coming into force of this section is deemed to be a member of thepanel of the court martial.

101. Toute personne qui, à la date d'entrée en vigueur du présent article, est membre de la cour martiale est réputée être, sous le régime du nouveau code,membre du comité de la cour martiale.

Membres de la cour martiale

Military judges

102. (1) Every officer appointed under section 177 of the Act who holds office immediately before this section comes into force is deemed to be a military judge for the unexpired term of the officer's appointment as if the officer had been appointed forthat term by the Governor in Council undersection 165.21(1) of the Act, as enacted by section 42 of this Act.

102. (1) Tout officier nommé en vertu de l'article 177 de la même loi dont le mandat n'est pas, à la date de l'entrée en vigueur du présent article, expiré est réputé être un juge militaire nommé par le gouverneur en conseil aux termes du paragraphe 165.21(1) de la même loi, édicté par l'article 42 de la présente loi, pour le reste de son mandat.

Juges militaires

Chief Military Judge

(2) The officer who holds office as the Chief Military Trial Judge immediately before this section comes into force is the Chief Military Judge.

(2) Est le juge militaire en chef l'officier qui, à la date de l'entrée en vigueur du présent article, occupe cette charge de juge militaire en chef.

Juge militaire en chef

Grievances

103. A grievance that is considered by the Chief of the Defence Staff in accordance with regulations made by the Governor in Council for the purpose of providing redress and that is determined by the Chief of the Defence Staff within ninety days before section 29.11 of the Act, as enacted by section 7 of this Act, comes into force may be considered by the Minister if an application is made within ninety days after thedetermination.

103. Toute décision du chef d'état-major de la défense, sur un grief dont il a été saisi conformément aux règlements du gouverneur en conseil, rendue dans les quatre-vingt-dix jours précédant la date de l'entrée en vigueur de l'article 29.11 de la même loi, édicté par l'article 7 de la présente loi, peut, sur demande présentée dans les quatre-vingt-dix jours suivant la date de la décision, être révisée par le ministre.

Griefs

Part IV

104. Part IV of the Act does not apply in respect of events that took place before that Part or any of its provisions came into force.

104. La partie IV de la même loi ne s'applique pas aux faits survenus avant la date d'entrée en vigueur de cette partie ou de telle de ses dispositions.

Partie IV

Transitional Regulations

105. The Governor in Council may make regulations providing for any other transitional matters.

105. Le gouverneur en conseil peut, par règlement, prévoir toute mesure transitoire.

Règlements