COURT MARTIAL

Citation: *R. v. J.L.*, 2021 CM 2004

Date : 20210305
Docket : 202004

Standing Court Martial

Asticou Courtroom
Gatineau, Quebec, Canada

Between :

Private J.L., Applicant

- and -

Her Majesty the Queen, Respondent

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

Restriction on publication: Pursuant to section 179 of the *National Defence Act*, the Court directs that any information that could identify either the complainant or the accused shall not be published in any document or broadcast or transmitted in any way.

DECISION ON A DEFENCE APPLICATION ON A PLEA IN BAR OF TRIAL AND ON A QUESTION OF LAW AND FACT

(Orally)

Introduction

[1] The applicant before the Court argues that:

(a) this Court martial has no jurisdiction over a young person pursuant to the *Youth Criminal Justice Act* (*YCJA*) and the *National Defence Act (NDA)*. As a result, he seeks a termination of proceedings; and

(b) alternatively, pursuant to section 52(1) of the *Constitution Act, 1982*, he seeks a declaration that Part III of the *NDA* (Code of Service Discipline) is of no force or effect with regards to young persons charged with *Criminal Code* offences as it infringes their right to life, liberty and security of the person protected by section 7 of the *Canadian Charter of Rights and Freedoms*. As a result of that declaration, the applicant seeks an order staying the proceedings.

<u>The facts</u>

[2] On 31 January 2020, the applicant was charged with two offences under the Code of Service Discipline (CSD); for having committed a sexual assault contrary to section 271 of the *Criminal Code* (which is an offence punishable under section 130 of the NDA) as well as disgraceful conduct, contrary to section 93 of the *NDA*. The particulars of the charges allege that on or about 9 May 2019, Private J.L. committed a sexual assault or touched A.L. without her consent.

[3] At the request of the Court, counsel prepared an Agreed Statement of Facts (ASOF) about the procedures followed in this case. The Court made some editorial changes, mainly by reordering it chronologically and adjusting it with respect to the date of the offence and the interaction with the military police:

(a) the alleged offences took place on or about 9 May 2019;

(b) Private J.L. was born on 26 January 2002. He was 17 years old on the date of the alleged offences in May 2019 as well as when the military police sought a statement from him in August 2019;

(c) on 17 May 2019, the complainant informed Corporal Kyle Coffin, a member of the military police, that Private J.L. was 17 years old, that he lived in Prince Edward Island, and that he just got engaged to his pregnant girlfriend. This statement of the complainant is documented in the General Occurrence (GO) # 2019-13107;

(d) on 2, 6, 7 and 9 August 2019 the Canadian Forces National Investigation Services (CFNIS) telephoned Private J.L. to arrange a voluntary interview with him. During the 2 August 2019 call, he was advised that he could consult his chain of command or a legal counsel as to what he should do. He was not advised at any time that he could consult a parent, an adult relative, or any other appropriate adult chosen by him. He was not advised at any time that should he choose to participate in a voluntary interview, he could have a counsel and a relative present during the interview. At no point were the parents, relatives or any other appropriate adult chosen by the young person made aware of the proceedings against him by the chain of command or prosecution;

(e) the CFNIS General Occurrence hardcopy GO# 2019-13107, covering the alleged offences, contains the following statement at page 61: "[Addressees] are advised that this file contains the identity of a young person, which by law, must be protected from inadequate disclosure";

(f) the full name of Private J.L., his service number, the name of the unit in which he serves, as well as the details of the alleged offences appear in a Record of Disciplinary Proceeding (RDP) dated 14 August 2019, produced by the chain of command. RDPs are public documents and are subject to orders restricting publication issued by the Court;

(g) the name of Private J.L., his service number, the name of the unit in which he serves, as well as the details of the alleged offences appear in a charge sheet dated 31 January 2020, produced by the Director of military prosecution. Charge sheets are public documents subject to orders restricting publication issued by the Court;

(h) in early March 2020, the defence counsel of Private J.L. brought to the attention of the prosecution his concerns with the fact that the RDP and the charge sheet contained personal information about the accused. He felt that since the accused was a minor at the time of the alleged offences, his identity should be protected;

(i) on 9 March 2020, during a teleconference with the Acting Chief Military Judge (A/CMJ), the defence counsel indicated his intention to submit an application, among others, requesting an order restricting publication from the Court to protect the identity of the accused. On 9 April 2020, the prosecution indicated that they were most likely going to support the request for an order restricting publication, especially if it took a temporary form while the military judge decides on the merits of the holistic arguments. Further, the prosecution urged the defence counsel of Private J.L. to proceed immediately with this application, but the latter insisted on submitting this application along with other more complex applications;

(j) the alleged offences are not part of a pattern of repeated, serious or violent offences;

(k) the circumstances of the alleged offences, if committed by an adult, would not justify a punishment of two years or more of imprisonment;

(l) as of the filing of the ASOF, the prosecution had not discussed extrajudicial sanctions with the accused's defence counsel; and

(m) no psychosocial services have been provided by governmental authorities to the accused following the investigation or the laying of charges, nor was he referred to a child welfare agency.

[4] This decision is delivered following virtual hearings held on 9 and 27 November 2020 and 22 February 2021 where the Court heard the arguments submitted by the applicant.

Summary of decision

[5] In reviewing the applicant's arguments, I was alive to both the constitutional challenge raised with respect to the applicability of the CSD to young members, but I also assessed whether the applicant's personal *Charter* rights were breached.

[6] The applicant's first argument was that the *YCJA* has exclusive jurisdiction to try the applicant as a young person and that this court which draws its authority from the *NDA* has no jurisdiction.

[7] Upon examination of the pertinent provisions of the *YCJA* and the *NDA* and for the reasons that follow, I find that Parliament conferred concurrent jurisdiction for young persons to be tried under both the military justice system and the youth criminal justice system and that the jurisdiction is not exclusive to either of them.

[8] With respect to the applicant's second argument that subjecting young persons to the military justice system infringes their right to life, liberty and security of the person protected by section 7 of the *Charter*, the applicant did not rely upon any specific provision in the *NDA* or its subordinate regulations as the source of the alleged infringement. Rather, he argued that it was precisely the lack of statutory protection similar to that set out within the *YCJA* that is the source of the infringement.

[9] The court started its analysis by instructing itself on the Supreme Court of Canada (SCC)'s recognition of the principle of fundamental justice that because of their age, young persons, have heightened vulnerability, less maturity and a reduced capacity for moral judgment entitling them to a presumption of diminished moral blameworthiness or culpability.

[10] Upon an analysis of the military justice system and the persuasive law on the principles of fundamental justice related to young persons, I find that:

(a) This presumption requires enhanced procedural protections to ensure that young persons are treated fairly and that their rights, including their right to privacy are protected;

(b) The failure of the *NDA* to provide the exact same protections prescribed within the *YCJA* is not by itself, a violation of the principles of

fundamental justice. They are different criminal justice systems which serve different purposes.

(c) The essence of the applicant's argument was contingent on the premise that because young members are treated the same as other adult members under the military justice process, it automatically breaches the young person's section 7 *Charter* rights. Upon review of those principles that flow from the presumption of diminished moral blameworthiness or culpability set out by the SCC, this Court did not find sufficient evidence to support the contention that a young person's section 7 *Charter* rights are automatically infringed simply by being tried under the CSD which is the same system used for adult accused members.

(d) Unlike the civilian justice system, due to the unique nature of the CSD, all accused members of the Canadian Armed Forces (CAF) are entitled to enhanced protection, which includes free legal counsel and other emotional and financial support that might be required by them throughout the entire disciplinary process. Consequently, it is not sufficient to suggest that simply because young persons are subjected to the same procedures as other adult members that the enhanced legal protections for which they are entitled as young persons have fallen short.

(e) There were a number of submissions raised by the applicant that affect a young person's rights on sentencing which suggest that the military justice sentencing procedure is constitutionally suspect with respect to young persons. Given that the trial has not started, these arguments are prospective. Courts must refrain from analyzing constitutional issues until the provisions are properly before the court.

<u>First argument - Lack of jurisdiction of courts martial over young persons</u>

Position of the parties

Applicant

[11] The applicant argues that pursuant to subsection 2(1) of the *YCJA*, he meets the definition of a young person[1] and any offences against him must be tried in youth court under the *YCJA*.

[12] He acknowledges that section 14 of the *YCJA* provides youth justice courts' exclusive jurisdiction subject to the provisions of the *Contraventions Act* and the *NDA*.

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[1] ***young person*** means a person who is or, in the absence of evidence to the contrary, appears to be twelve years old or older, but less than eighteen years old and, if the context requires, includes any person who is charged under this Act with having committed an offence while he or she was a young person or who is found guilty of an offence under this Act. (*adolescent*)

However, he argues that unlike the *Contraventions Act*, the *NDA* does not reference how it is de-conflicted with the *YCJA*, so by default the *YCJA* has exclusive jurisdiction.

[13] To further support his argument that the *NDA* has no jurisdiction over a young person under the age of 18, he relies upon section 71 of the *NDA*. He contends that since nothing in the CSD affects the jurisdiction of any civil court, that the *YCJA* maintains exclusive jurisdiction.

Respondent

[14] The respondent submits that this Court has jurisdiction over the accused, pursuant to paragraph 60(1)(c) of the *NDA* which reads as follows:

> **60 (1)** The following persons are subject to the Code of Service Discipline:
>
> **[…]**
>
> **(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,
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> **(ii)** in uniform,
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> **(iii)** on duty,
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> **(iv)** [Repealed, 1998, c. 35, s. 19]
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> **(v)** called out under Part VI in aid of the civil power,
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> **(vi)** called out on service,
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> **(vii)** placed on active service,
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> **(viii)** in or on any vessel, vehicle or aircraft of the Canadian Forces or in or on any defence establishment or work for defence,
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> **(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;

[15] It is the respondent's position that section 14 of the *YCJA* confers exclusive jurisdiction to a youth court to try a young person, but this provision is subject to the *NDA*. He argues that because the *NDA* also confers jurisdiction to courts martial to try young persons subject to the CSD, jurisdiction is concurrent for offences under the *Criminal Code*.

[16] The respondent further submitted that section 71 of the *NDA* recognizes the jurisdiction of civilian courts but does not remove the jurisdiction of the military justice

system. He maintains that given the prosecution's preferral of the charges under the military justice system, this Court has jurisdiction.

Law

[17] As the applicant's first argument challenges the jurisdiction of this Court, once the court martial was opened, and the evidence was put on the record, the Court indicated that it must address the applicant's jurisdictional argument first, as procedurally, it falls under *Queen's Regulations and Orders for the Canadian Forces* (QR&O) subparagraph 112.05(5)(*b*) where Parliament has prescribed questions on jurisdiction be argued.

[18] Subsection 14(1) of the *YCJA* reads as follows:

> **14** (1) Despite any other Act of Parliament but subject to the *Contraventions Act* and the *National Defence Act*, a youth justice court has exclusive jurisdiction in respect of any offence alleged to have been committed by a person while he or she was a young person, and that person shall be dealt with as provided in this Act.

[19] The *Young Offender's Act,* in effect from 1984-2003, preceded the *YCJA* and had a similar provision to subsection 14(1) of the *YCJA,* setting out an exception for the *NDA*. Section 5 of the *Young Offender's Act* read as follows:

> **Exclusive jurisdiction of youth court**
>
> **5 (1)** Notwithstanding any other Act of Parliament but subject to the *National Defence Act* and section 16, a youth court has exclusive jurisdiction in respect of any offence alleged to have been committed by a person while he was a young person and any such person shall be dealt with as provided in this Act.

[20] Section 71 of the *NDA* reads as follows:

> **Jurisdiction of Civil Courts**
>
> **No interference with civil jurisdiction**
>
> **71** 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.

Analysis

[21] Subsection 14(1) of the *YCJA* does stipulate that it has exclusive jurisdiction to try young persons charged with criminal offences, but it also sets out two exceptions to its exclusive jurisdiction, one of which is the *NDA*. The applicant argued that the absence of any reference to the *YCJA* within the *NDA* itself should be interpreted to mean that the *NDA* has waived its jurisdiction over young members. In furtherance of this position, he invited the Court to compare the provisions in the *NDA* to some of the provisions set out within the *Contraventions Act.* Indeed, the *YCJA* is referenced in the

Contraventions Act to clarify the interrelationship between the *YCJA* and the provincial judicial systems in the handling of regulatory offences. Subsection 17(2) of the *Contraventions Act* reads as follows:

> Jurisdiction of adult courts over young persons
>
> **(2)** Notwithstanding the *Youth Criminal Justice Act*, a contraventions court or a justice of the peace has jurisdiction, to the exclusion of that of the youth justice court, in respect of any contravention alleged to have been committed by a young person in, or otherwise within the territorial jurisdiction of the courts of, a province the lieutenant governor in council of which has ordered that any such contravention be dealt with in ordinary court.

[22] A close reading of subsection 17(2) of the *Contraventions Act* suggests that Parliament purposely and precisely carved out room for a contraventions court or a justice of the peace to try young persons in ordinary courts for violations of contravention offences occurring within their territorial jurisdiction. Some provinces or territories have been content to have such offences tried in youth courts while others have passed legislation granting jurisdiction to ordinary courts. When this situation is compared to the *NDA*, it is not that different. Paragraph 60(1)(c) of the *NDA* provides jurisdiction to courts martial to try the accused notwithstanding his status as a young person.

[23] Aside from oral and written arguments submitted by the applicant, there was no evidence or legislative examples to support the applicant's position that the mere absence of reference to the *YCJA* within the *NDA* equates to the *NDA* foregoing its jurisdiction. Conversely, on its face, the absence of any reference to the *YCJA* might also suggest that the *NDA* does not relinquish any of its jurisdiction.

[24] It is important to highlight that a similar exception to subsection 14(1) of the *YCJA* for the *NDA* existed in the *Young Offenders Act* (the precursor to the *YCJA*). Notably the *Contraventions Act* was enacted in 1992, long before the *Young Offenders Act* was replaced, but it still provided no exception for the *Contraventions Act*. Referencing subsection 5(1) of the *Young Offenders Act*, previously cited at paragraph 19: "Notwithstanding any other Act of Parliament but subject to the *National Defence Act* and section 16, a youth court has exclusive jurisdiction in respect of any offence alleged to have been committed by a person while he was a young person and any such person shall be dealt with as provided in this Act." By analyzing the history of the legislation, it becomes clear that Parliament intended to retain the exception and the possibility that young persons be tried in the military justice system.

[25] Given that the *Young Offenders Act* predates the *YCJA*, it suggests that the *NDA* exception existed long before such an exception was ever afforded for civilian courts to try young persons for offences under the *Contraventions Act*. With the exception set out at subsection 14(1) of the *YCJA*, Parliament made it clear that upon enrolment in the CAF, young persons were subjected to the *NDA*. In order to join the CAF, an individual must be a Canadian citizen and be at least 18 years old or 17 years of age with parental consent; except for the subsidized education programs where an individual may be 16

years of age, with parental consent. In the primary reserves, youth who are 16 years, may be enrolled with parental consent, provided they are full-time students.

[26] As a young person, with parental consent, the applicant swore an oath accepting the CAF's offer for paid military service and upon his acceptance, he was not just a young person, he also became a soldier in the CAF. As a soldier, he is part of the profession of arms and has an obligation to serve in the CAF until he is lawfully released, as prescribed under subsection 23(1) of the *NDA*. The only limitation prescribed in section 34 of the *NDA* is that a person under the age of 18 may not be deployed by the CAF to a theatre of hostilities. However, all service members are, pursuant to section 33 of the *NDA*, at all times liable to perform any lawful duty. One of the main attributes of any profession is the ability to objectively and fairly govern itself which requires it to discipline its members. Consequently, given that young members undergo their training with weapons, it would make the underlying purpose of a soldier's military training and service functionally inadequate if they could not be subjected to the internal discipline and procedures of the profession itself. Discipline is not only essential to service life, but it is the underpinning of all military training.

[27] Parliament was aware of the age of young members entitled to enroll in the CAF in setting out this exception. It is very likely the Parliament's underlying rationale for the *NDA* exception to the jurisdiction of the youth justice court reflects the fact that if young persons are mature enough to enroll in the CAF, they are mature enough to be subject to its jurisdiction and related discipline, which is "an essential ingredient of service life" (see *MacKay v. The Queen*, [1980] 2 S.C.R. 370, at page 400).

[28] Part III of the *NDA*, which sets out the CSD also includes the summary trial system where very minor offences, such as failure to get a proper haircut, showing up late for work, etc. are addressed. It is estimated that as much as ninety per cent of discipline is administered at the summary trial level.[2]

[29] After querying the circumstances of the allegations set out in the charge sheet, the Court learned that the offences allegedly occurred on a defence establishment in Nova Scotia, between two military members, after the applicant allegedly disregarded the restriction barring his presence in female military quarters. Consequently, there is not simply an alleged offence of sexual assault at play, but the offence allegedly arose directly from a failure of discipline to abide by military orders. Further, the submissions also suggest that neither the accused nor the complainant currently reside in Nova Scotia. Since courts martial are "clothed with unlimited territorial jurisdiction, which extends throughout Canada and the world,"[3] the interest in having such trials under the military justice system are persuasive and consistent with underlying purpose of the military justice system to maintain necessary discipline as captured by Cromwell J., writing for a unanimous court, in *R. v. Moriarity*, 2015 SCC 55, at paragraphs 33 and 46:

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[2] http://jag.mil.ca/publications/office-cabinet/annrep-rappann-18-19-eng.pdf
[3] *R.* v. *Edwards*, 2019 CMAC 4 at paragraph 18.

> [33] It is common ground that the purpose of the military justice system, of which the challenged provisions form a part, relates to assuring the discipline, efficiency and morale of the armed forces.
>
> […]
>
> [46] I conclude that Parliament's objective in creating the military justice system was to provide processes that would assure the maintenance of discipline, efficiency and morale of the military.

[30] Consequently, it is difficult to foresee the participation of young members training in the CAF without being subjected to its military discipline. If young members do not wish to be subject to military discipline and to be paid as serving military members, there is the option to join the cadet organization. Section 46 of the *NDA* is specifically crafted to ensure youths aged 12 to 19 who join the cadets are not subject to the jurisdiction of military tribunals as cadets are not serving members of the CAF.

[31] In summary, with respect to the initial part of the applicant's first argument, there is no evidence before the Court to support the position that the absence of any reference to the *YCJA* within the *NDA* automatically means that Parliament intended for the *YCJA* to have exclusive jurisdiction over young members. It is clear that Parliament intended that there be concurrent jurisdiction between the *YCJA* and the *NDA* in trying CAF members who also qualify as young persons.

[32] The second part of the applicant's first argument relied upon section 71 of the *NDA*. He argued that when civilian courts have exclusive jurisdiction, it means that their jurisdiction is exclusive. He further argued that in applying section 71 of the *NDA*, it is clear that nothing in the CSD affects the exclusive jurisdiction of the *YCJA* to try a young person for any offence triable under the *YCJA*. However, that provision cannot be read in isolation from the exception set out within the *YCJA* at subsection 14(1), which states that its exclusive jurisdiction is subject to the *NDA*.

[33] Most recently, in the Supreme Court of Canada (SCC) case of *R. v. Stillman*, 2019 SCC 40, the SCC acknowledged at paragraphs 3, 59 and 122, that concurrent jurisdiction exists between military tribunals and civil courts through the operation of sections 66 and 71 of the *NDA*. The SCC has repeatedly recognized that military tribunals serve the same purpose of the ordinary criminal courts, while at the same time addressing the unique needs of the CAF. In *Stillman*, Moldaver and Brown JJ., writing for the majority, declared at paragraphs 35-36:

> [35] Canada's military justice system has always been separate from the civilian justice system. "[D]eeply entrenched in our history" (*Généreux*, at p. 295), its purpose is to provide processes that will "assure the maintenance of discipline, efficiency and morale of the military" (*Moriarity*, at para. 46; see also *Généreux*, at p. 293).
>
> [36] The military justice system is therefore designed to meet the unique needs of the military with respect to discipline, efficiency, and morale. As Lamer C.J. wrote in *Généreux*, "[t]o maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. 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" (p. 293). Further, "[r]ecourse to the ordinary criminal courts would, as a general rule, be inadequate to serve the particular disciplinary needs of the military" (*ibid.*). And, while these purposes of the military justice system have remained consistent over the years, the complexion of the system itself has changed significantly over time in response to developments in law, military life, and society, more broadly.

[34] In summary, when subsection 14(1) of the *YCJA* and section 71 of the *NDA* are read together, there is no ambiguity; both courts have jurisdiction over a young person who is also a serving military member. For the above-mentioned reasons, the applicant's first argument is denied.

Second Argument: Does the CSD infringe the applicant's right to life, liberty and security?

[35] Next, the Court proceeded under subparagraph 112.05(5)(*e*) and article 112.07 of the QR&O to consider the applicant's second argument on a question of law and fact. Originally, he argued that Part III of the *NDA*, the entire CSD violates the rights of young members under section 7 of the *Charter* because it engages their liberty interests in a manner that is not in accordance with the principles of fundamental justice. In his final submissions, he conceded to the Court that his original request was too broad and asked the Court to consider it in the context of allegations of the *Criminal Code* conduct.

Position of the parties

Applicant

[36] The applicant states that the *YCJA,* enacted in 2002, predates the formal recognition of principles of fundamental justice by the SCC and several appeal courts. Since the enactment of the *YCJA*, in the case of *R. v. D.B.* (2008) SCC 25, the SCC found it to be a principle of fundamental justice, consistent with Canada's international commitments, that young persons be provided enhanced procedural protection throughout the criminal justice process. The applicant argues that young persons must be provided with this enhanced protection and afforded increased clemency by virtue of their reduced maturity and moral capacity. He argues that Parliament has implemented those principles into the *YCJA* and as the common law on the subject evolved, the *YCJA* has been amended and continues to shape the youth criminal justice system.

[37] He argues that the CSD is not administered in accordance with the principles of fundamental justice. In support of this, he states that at no stage of a proceeding under the CSD is there ever a distinction drawn between adult accused persons and young persons. There are no provisions in the CSD that account for the reduced maturity and moral capacity of young persons. No enhanced procedural protections are offered to young persons under the CSD and the entire process treats young persons the same way they treat adult accused persons.

[38] He argues the specific rights for which there are violations under the CSD are as follows:

(a) Presumption that accused young persons will not be tried as adults;

(b) Privacy right of young persons to be protected through;

i. Restriction on publication;

ii. *Sex Offender Information Registration Act* (SOIRA); and

iii. Judicial record;

(c) Enhanced right to counsel and parental support; and

(d) Other youth justice constitutional rights.

[39] Finally, the applicant argues that given the complete absence of any distinction between an adult accused persons and young persons under the CSD, there is no proportional means to achieve the CSD's legislative objective and therefore the CSD cannot be justified by section 1 of the *Charter*.

Respondent

[40] Conversely, the respondent argues that the applicant is inappropriately broadening the principle of fundamental justice by suggesting that young members' section 7 *Charter* rights are violated simply from being subjected to the military justice system.

[41] The respondent acknowledges that there are differences between the legislative scheme found under the *NDA* and the *YCJA* because both statutes fulfill different functions and objectives. Relying upon paragraph 44 of the SCC decision in *Stillman*, he argues that an accused's *Charter* rights are not infringed simply because the accused is not subjected to the exact same procedures and protections available within the civilian justice system. Relying upon the reasons provided in *R. v. Généreux*, [1992] 1 S.C.R. 259 which confirmed that the military justice system must comply with the *Charter*, the protection of an accused's *Charter* rights does not require that the military justice system mirror the *YCJA* itself. In his submissions, he argues:

> "2. At issue in *Stillman* was the constitutionality of s. 130(1)(a) of the NDA in the context of the exception found under s. 11(f) of the *Charter* of the right to be tried by a jury. Essentially, the court was saying that when a person subject to the CSD is accused of an offence under military law, that person does not have the right to be tried by a jury. This is because the CSD, and a separate system of military justice, is, by design,

> aimed at assisting in maintaining discipline, morale and efficiency in the Canadian Armed Forces (CAF).
>
> 3. For other Canadian citizens, trial by a jury is a right guaranteed by the *Charter* in certain circumstances. For members of the military, it is not. For other Canadian young persons, the YCJA applies. For young persons who also happen to be subject to the CSD and who stand accused of committing a service offence (which undoubtedly now include offences under the *Criminal Code* charged under s. 130 of the NDA), the YCJA does not apply. The reason for this is the same as the rationale for having a separate system of military justice."

Law with respect to section 7 of the Charter

[42] As a serving member of the CAF, the applicant is entitled to all the protections of the *Charter,* in addition to any constitutional principles that apply. In simple terms, section 7 of the *Charter* permits the military justice system to limit life, liberty and security of a person provided it does so in a way that is not contrary to the principles of fundamental justice.

[43] Compliance with section 7 of the *Charter* requires that laws or state actions that interfere with life, liberty and security of the person conform to the principles of fundamental justice. (*Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9 at paragraph 19).

[44] An analysis of section 7 of the *Charter* involves a two-step assessment:

(a) Is there an infringement of one of the three protected rights, that is to say a deprivation of life, liberty or security of the person?

(b) Is the deprivation in accordance with the principles of fundamental justice?

[45] In order to assist lower courts in determining what constitutes a principle of fundamental justice, the SCC set out the following template in *R. v. Malmo-Levine*, 2003 SCC 74 requiring a three-step analysis:

(a) Rule must be a legal principle;

(b) Must be significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate; and

(c) Rule must be capable of being identified with sufficient precision to yield a manageable standard.

[46] The above three-step judicial analysis has been undertaken on multiple occasions since its introduction and this decision will set out some of the consistent judicial findings with respect to the application of these principles before this Court.

[47] It is a well-established principle that "Charter decisions should not and must not be made in a factual vacuum." *Mackay v. Manitoba*, [1989] 2 S.C.R. 357, at pages 361 and 362. The SCC has often stressed the importance of a factual basis in *Charter* cases. Given the uniqueness of the applicant's constitutional arguments, focused on the absence of protection and in light of the very broad nature of the entire military justice process, the Court requested an agreed statement of facts and additional submissions to assist the court in narrowing down the alleged infringements. The Court shaped its analysis on much of these additional submissions as well as the ASOF.

Section 7

Analysis

[48] Unlike most challenges to the constitutionality of legislation, counsel for the applicant did not rely upon any specific provision of the *NDA* or its subordinate regulations as the source of the alleged infringement. Rather, he argued that it was precisely the lack of provisions that afford enhanced protection to young members that is the source of the breach.

[49] Section 7 of the *Charter* states:

> **7.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[50] Given the fact that the offences for which the accused is charged could give rise to potential imprisonment, the Court has no problem concluding that the applicant's section 7 *Charter* rights are triggered.[4] The next question to be answered is whether this deprivation is in accordance with the principles of fundamental justice.

[51] The applicant argued that the *YCJA* is specifically designed to address the vulnerability of young persons at every step of the investigatory and judicial processes and trying a young person under the military justice system would result in multiple violations of the principles of fundamental justice. However, in his submissions, he did not identify any provisions of the *NDA* nor its subordinate QR&O that violate the relevant principles of fundamental justice.

[52] The applicant referred multiple times to the lack of parity in the procedures and protections between the *YCJA* and the *NDA*. In short, he grounded many of his arguments on the premise that the military justice system does not reflect the procedures set out within the *YCJA*.

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[4] Imprisonment and the threat of imprisonment constitute clear deprivations of liberty (Reference re Section 94(2) of the *Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486, at pages 500-501).

[53] The respondent submitted that the *YCJA* has concurrent jurisdiction with the military justice system but given the exception, there can be no automatic violation simply because the *NDA* does not mirror all of procedural protections set out in the *YCJA*. This principle that was first emphasized in *Généreux* was more recently restated by Moldaver J. at paragraph 44 of the SCC decision in *Stillman*:

> [44] Jurisprudential developments included the 1992 constitutional challenge in *Généreux* to parts of the pre-1990 regime. The appellant in that case argued that a General Court Martial under the pre-1990 regime was not "an independent and impartial tribunal" within the meaning of s. 11(*d*) of the *Charter*. Lamer C.J. confirmed that the military justice system, like its civilian counterpart, must comply with the *Charter*, although this does not require that the two systems be identical in every respect. He further held that the military justice system is not, by its very nature as a parallel system staffed by members of the military who are aware of and sensitive to military concerns, inconsistent with s. 11(*d*).
> [My emphasis.]

[54] Based on the SCC jurisprudence set out above, the lack of parity in the provisions and protections are not sufficient by themselves to conclude that there is a violation as both statutes serve different purposes and, consequently, they must be analyzed from that perspective. However, the respondent did acknowledge that the relevant principles of fundamental justice do apply to young persons, even when tried within the military justice system. In his written submissions, he wrote:

> "4. Although the YCJA does not apply to a young person subject to the CSD, the relevant principles of fundamental justice do apply. In this case, the principle of diminished moral blameworthiness and culpability of young persons applies and must be given effect, even in the military justice system. What is required to do so, however, cannot and does not need to mirror in every respect what exists under the YCJA as the circumstances of a young person in the military differ substantially from that of a young person in in the civilian context."

[55] Consequently, the next step requires the Court to identify what fundamental principles of justice are at issue and how they must be applied to young persons under the military justice system.

Identifying the principles of fundamental justice

[56] In identifying the principles of fundamental justice, there must be sufficient consensus that the principle is "vital or fundamental to our societal notion of justice" and it must be capable of being identified with precision and applied in a manner that yields predictable results (see *D.B.*, at paragraph 46).

[57] The relevant principles are best identified and analyzed against specific legislative and regulatory provisions within the *NDA* and QR&O. The reality is that the

identification of vital societal notions with precision in a manner that yields predictable results is not an easy task as the case law on the topic reveals.

[58] In *D.B.*, Abella J. provides an excellent example of the required analysis in determining when a certain right can be identified as a principle of fundamental justice when she concludes the principle of a presumption of diminished culpability by relying upon the special rules that have existed throughout legislative history and practice, international law as well as identified in significant academic writing.[5]

[59] The concern for the rights of young persons gained significant attention over the last 20 years. Although the Court found that the military justice system is not required to mirror the *YCJA*, a great deal can be gained from a survey of relevant jurisprudence on youth justice in general in identifying the principles of fundamental justice surfacing therein as well as the guidance offered by the SCC.

[60] Although the *YCJA* came into effect on April 1st, 2003, it was the result of a long road of legislative review. Prior to the enactment of the *YCJA*, in late 2002, the Attorney General of Quebec brought a reference case before the Quebec Court of Appeal regarding the *YCJA*. In that case, the Attorney General argued that certain provisions dealing with the most serious cases and governing adult sentencing including the publication of identifying information about young offenders were incompatible with both international law and the Canadian *Charter*. In March 2003, a five-judge panel of the Quebec Court of Appeal (QCCA), in *Québec (Ministre de la Justice)* c. *Canada (Ministre de la Justice)* [6] identified the "principles of fundamental justice" applicable to young persons which are stated at paragraphs 215 and 231:

> (a) The treatment of young offenders in the criminal justice system must be separate and different from the treatment of adults;
>
> (b) Rehabilitation, not repression and deterrence, must be the basis of legislative and judicial intervention involving young offenders;
>
> (d) The youth justice system must restrict disclosure of the identity of minors in order to prevent stigmatization, which could limit rehabilitation; and
>
> (e) The youth justice system must consider the best interests of the child.

[61] Three years later in January 2006, the British Columbia Court of Appeal (BCCA), in its decision in *R. v. K.D.T.*, 2006 BCCA 60 reviewed section 72 of the *YCJA*, which placed an "onus" on a youth found guilty of a "presumptive offence" to

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[5] See paragraphs 45 to 69 of *D.B.*

[6] 2003 CarswellQue 14745, 2003 CarswellQue 538, [2003] R.J.Q. 1118, [2003] J.Q. No. 2850, [2003] Q.J. No. 2850, 108 C.R.R. (2d) 189, 10 C.R. (6th) 281, 175 C.C.C. (3d) 321, 228 D.L.R. (4th) 63, 58 W.C.B. (2d) 112, J.E. 2003-829, REJB 2003-39418

satisfy the court why an adult sentence should not be imposed. In its decision, the BCCA rejected the fourth "principle of fundamental justice" identified by the QCCA that required trial judges make decisions that "consider the best interests of the child." The BCCA rejected that approach because it found it was inconsistent with the 2004 decision of the SCC in *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4 where McLachlin C.J. writing for the majority, upheld the constitutional validity of section 43 of the *Criminal Code* which authorized the use of reasonable force for the purpose of correcting children. In the same decision, the SCC discounted the requirement for decisions to be rendered in accordance with the "best interests of the child". Further, the BCCA found that the presumption that young offenders be treated separately from adults was not a principle of fundamental justice.

[62] In an added twist, just six weeks later, in the case of *R. v. B. (D.),* 79 O.R. (3d) 698, [2006] O.J. No. 1112, the Ontario Court of Appeal (ONCA) rendered a contrary decision to the BCCA agreeing with the 2003 QCCA ruling that subsection 72(2) of the *YCJA* violated section 7 of the *Charter*. In its decision, the ONCA recognized the impact of the 2004 decision of the SCC in *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)* concluding that the principles of justice required that young offenders be treated separately from adults, and placed a burden on the Crown to justify the imposition of an adult sentence. When all the decisions are read together, the requirement for trial judges to consider “the best interests of the young offender” is questionable as meeting the hallmark of a principle of fundamental justice In short, the above survey of the law leading up to the SCC decision in *D.B.* as well as the SCC decision itself are evidence that the identification of the principles of fundamental justice is not an easy task.

[63] In *D.B.,* the SCC unanimously identified two principles of fundamental justice: that young people who engage in criminal conduct should be “presumed” to have less moral blameworthiness and culpability than adults, and that the Crown must prove aggravating factors on sentencing. However, in identifying these principles, the court also appears to have constitutionalized other specific rights that fall under the first presumption of reduced moral blameworthiness and culpability.

[64] The real challenge for this Court is identifying the practical rules that directly flow from the presumption of reduced moral blameworthiness and understanding their application within the military justice system. Essentially, in order to assess the principle of fundamental justice against the procedures within the military justice system, the court must assess the boundaries of the presumption. What exactly does the presumption demand in terms of enhanced protections and do they exist in some form within the current military justice system?

[65] As Gonthier and Binnie JJ. held in *Malmo-Levine*, at paragraph 99, when examining what is included in a principle of fundamental justice, societal interests must be factored in. Arguably for the purposes of military justice, this involves the consideration of the collective existence of all members serving in the CAF anywhere in

Canada or in the world and the corresponding requirement for the CAF to maintain discipline, efficiency and morale:

> Implicit in each of these principles [of fundamental justice] is, of course, the recognition that the appellants do not live in isolation but are part of a larger society. The delineation of the principles of fundamental justice must inevitably take into account the social nature of our collective existence. To that limited extent, societal values play a role in the delineation of the boundaries of the rights and principles in question.
> [My emphasis.]

[66] The court found that given that the substantive issue that the SCC reviewed in *D.B.* related to sentencing provisions, the pronouncement of constitutional impact flowing from that presumption of reduced moral blameworthiness as a principle was limited to the specifics of the case before it and that sentencing regime. However, the exhaustive analysis of Abella J. conducted at paragraphs 45 to 69 is particularly instructive when it is reverse engineered, permitting lower level courts to see exactly what rules she considered in her foundational analysis in confirming the principle. After surveying historical legislation, she relied upon a legislative provision, being paragraph 3(1)(*b*) of the *YCJA* that existed at the time of the decision to confirm that the presumption of diminished moral culpability for young persons was a long-standing legal principle.

[67] Paragraph 3(1)(*b*) of the *YCJA* that existed in 2006 at that time the SCC decision was rendered reads as follows:

> **3.** (1) The following principles apply in this Act:
>
> [. . .]
>
> (b) the criminal justice system for young persons must be separate from that of adults and emphasize the following:
>
> (i) rehabilitation and reintegration,
>
> (ii) fair and proportionate accountability that is consistent with the greater dependency of young persons and their reduced level of maturity,
>
> (iii) enhanced procedural protection to ensure that young persons are treated fairly and that their rights, including their right to privacy, are protected.
>
> [My emphasis.]

[68] At paragraph 59 of *D.B.*, Abella J. concluded that the “legislative history confirms that the recognition of a presumption of diminished moral culpability for young persons is a long-standing legal principle.” Since that decision was rendered, paragraph 3(1)(*b*) of the *YCJA* was amended to include the principle of diminished moral blameworthiness or culpability.

[69] Once again, at paragraphs 64-65 of *D.B.*, Abella J. relies upon the underlying principles set out in subsection 3(1) of the *YCJA* to bolster her analysis in the determination of the presumption of diminished moral culpability for young persons:

> [64] As Professor Bala explains, "adolescents generally lack the judgment and knowledge to participate effectively in the court process and may be more vulnerable than adults" (*Youth Criminal Justice Law*, at p. 5). There is, moreover, evidence suggesting that as a result of this reduced judgment and maturity, young persons respond differently to punishment than adults, and that harsher penalties do not, by themselves, reduce youth crime. See Anthony N. Doob, Voula Marinos, and Kimberley N. Varma, *Youth Crime and the Youth Justice System in Canada: A Research Perspective* (1995), at pp. 56-71.
>
> [65] This helps explain why, in s. 3(1)(*b*)(i) of the *YCJA*, "rehabilitation and reintegration", not general deterrence, are emphasized and why, in s. 3(1)(*b*)(ii), accountability should be "fair and proportionate . . . consistent with the greater dependency of young persons and their reduced level of maturity".

[70] At paragraph 61 of her reasons of *YCJA*, Abella, J., after first "[h]aving concluded that a presumption of diminished moral blameworthiness for young persons is a legal principle," she then asked "whether there [was] a consensus that this principle is fundamental to the operation of a fair legal system." She later concluded:

> [67] This consensus also exists internationally. Professor Bala points out that "[e]very legal system recognizes that children and youths are different from adults and should not be held accountable for violations of the criminal law in the same fashion as adults" (*Youth Criminal Justice Law*, at p. 1). Anthony N. Doob and Michael Tonry, "Varieties of Youth Justice", in *Youth Crime and Youth Justice: Comparative and Cross-National Perspectives* (2004), at p. 1, observe that "[t]he most notable aspect of the treatment of youths who offend in Western countries is that every country appears to have laws or policies reflecting the belief that youths should be treated differently from adult offenders" (p. 3). This is so because "generally speaking, the assumption is that the youthfulness of an offender mitigates the punishment that youths should receive and that youths should be kept separate from adult offenders" (p. 5).
>
> [68] The preceding confirms, in my view, that a broad consensus reflecting society's values and interests exists, namely that the principle of a presumption of diminished moral culpability in young persons is fundamental to our notions of how a fair legal system ought to operate.

[71] With respect to the third criterion, Abella J. writes:

> [69] The third criterion for recognition as a principle of fundamental justice is that the principle be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person. This is not a difficult criterion to satisfy in this case. The principle that young people are entitled to a presumption of diminished moral culpability throughout any proceedings against them, including during sentencing, is readily administrable and sufficiently precise to yield a manageable standard. It is, in fact, a principle that has been administered and applied to proceedings against young people for decades in this country.

[72] As evidenced in the very fulsome analysis conducted by Abella J. in *D.B.* the determination of principles of fundamental justice requires extensive review of evidence

on the historical context, law, as well as societal expectations and practices. It is clear at paragraph 69 that in deciding that the third criterion was not difficult to satisfy, Abella J. intended that young persons be entitled to "a presumption of diminished moral culpability throughout <u>any</u> proceedings against them, <u>including during sentencing</u>, is readily administrable and sufficiently precise to yield a manageable standard." [My emphasis.]

[73] In summary, drawing from the guidance set out in the SCC decision in *D.B.* as well as from the majority of the appeal court case law surveyed, I find that the following list of principles flowing from the principle of fundamental justice of the presumption of diminished moral culpability must be followed in the military justice system when trying young persons for *Criminal Code* offences:

(a) the separate treatment of young offenders is a principle of fundamental justice (*per* ONCA Goudge J.A., in *B.(D.)* at paragraph 55) and per Abella, J., in *D.B.* at paragraph 40);

(b) because of their age, young people have heightened vulnerability, less maturity and a reduced capacity for moral judgment entitling them to a *presumption* of diminished moral blameworthiness or culpability (Per Abella, J., in *D.B.* at paragraph 41)
[Italicized emphasis in original.]

Procedurally this includes:

i. enhanced procedural protection to ensure that young persons are treated fairly and that their rights, including their right to privacy, are protected;

ii. fair and proportionate accountability that is consistent with the greater dependency of young persons and their reduced level of maturity; and

iii. protective sentencing process;

(1) Abella J. SCC and Goudge J.A. ONCA both concluded that there is a further presumption of lower youth sentences for young offenders;

(2) Crown must prove aggravating factors beyond a reasonable doubt on sentencing (per SCC Abella, J., in D.B. at paragraph 78);

(3) principles of rehabilitation and reintegration must be prioritized; and

(4) presumptive protection from custody.

Application of the principles

[74] Having identified the relevant principles of fundamental justice arising from the leading case law on the subject, the remaining step in the analysis requires this Court to determine whether the current military justice process for trying young members for *Criminal Code* offences is consistent with these principles. In other words, are the provisions of the CSD consistent with the principles of fundamental justice that young people are entitled to a presumption of diminished moral culpability?

[75] Based on the ASOF, this Court proceeded next to analyze the applicant's arguments based on the various procedures followed with respect to the applicant in the context of the corresponding rules that flow from the presumption.

[76] When originally asked to provide specifics on how the military justice system falls short of the relevant fundamental principles of justice, the applicant's argument relied almost entirely on the fact that the *NDA* is not as complete and fulsome as the *YCJA,* referring to the fact that the *YCJA* is 166 pages in length and the *NDA* could not possibly adapt to incorporate all of its provisions.

[77] When further pressed for specifics, counsel for the applicant insisted that none of the stakeholders involved in the administration of military justice have the required training and it is simply not worthwhile to adapt the military justice procedures for the one case that might come up every few years. He insisted that the accused's best interests would be best served by being tried under the *YCJA*.

[78] It may very well be in the best interests of young members to be tried under the *YCJA*; however, this argument must be rejected based on the fact that the general consensus from the SCC and the various appellate courts is that the best interests of young persons is not a fundamental principle of justice which needs to be recognized by judges in their decision making

Tried separately

[79] The applicant's primary argument was that the only way for the young member's rights to be protected is to be tried under the *YCJA*, which is a separate system of criminal justice specifically designed for young persons. The applicant's argument is premised on the fact that at no stage of a proceeding under the CSD is there a distinction drawn between adults accused persons and young persons and, therefore, there are no enhanced protections as required by the principles of fundamental justice. He argues that the CSD does not account for the reduced maturity and moral capacity of young members and absent this distinction, young members, are presumptively treated the same as every adult accused person.

[80] The applicant further relies upon Abella J.'s comments at paragraph 40 in *D.B.* to argue that it is also a principle of fundamental justice for young persons to be subjected to a separate criminal justice system. However, if the Court accepts that there is merit to this principle, it is important to examine what exactly Abella J. wrote. Paragraph 40 reads as follows:

> [40] The Quebec and Ontario Courts of Appeal set out different but conceptually related views of the governing principle, **both of them emphasizing that young persons should be dealt with separately from adults based on their reduced maturity**. I agree that this is important, but do not see this as engaged in this case. As the *YCJA* confirms, there *is* in fact a separate legal system for young persons. Section 3(1)(*b*) confirms that "the criminal justice system for young persons must be separate from that of adults".
> [My emphasis.]

[81] Similarly, the applicant further relies upon the *ONCA* decision in *B. (D.),* which explained that young persons should be dealt with separately as follows:

> [55] I agree with the shared position of the parties. It is a principle of fundamental justice that young offenders should be dealt with separately and not as adults in recognition of their reduced maturity. Put another way, the system of criminal justice for young persons must be premised on treating them separately, and not as adults, because they are not yet adults.
>
> [56] There can be no doubt that this is a legal principle. For almost a century, a system of youth criminal justice, separate from the adult system, has been enshrined in legislation. The rationale for this legal principle was set out by Lamer C.J.C. in *Reference re Young Offenders Act*, s. 2 (P.E.I.), (1991) CanLII 11713 (SCC), [1991] 1 S.C.R. 252, [1990] S.C.J. No. 60, 62 C.C.C. (3d) 385, at p. 268 S.C.R., p. 396 C.C.C.:
>
> > Characterizing the jurisdiction as jurisdiction over young persons charged with a criminal offence acknowledges that what distinguishes this legislation from the *Criminal Code* is the fact that it creates a special regime for young persons. The essence of the young offenders legislation is a distinction based on age and on the diminished responsibility associated with this distinction.
>
> [My emphasis.]

[82] It is the respondent's position that if the Court does accept that Abella J.'s *obiter* rises to the level of a principle of fundamental justice that young offenders must be dealt with separately and not as adults, it is the respondent's position that courts martial are well positioned to apply the relevant principle.

[83] In reviewing Abella, J.'s position on this subject, it is clear she agrees that young persons "should be dealt with separately from adults based on their reduced maturity." This statement can only be interpreted to mean exactly what it says; that young persons should be dealt with separately. But it does not mean that they can only be tried in a youth court. For reasons of judicial economy, there was no reason for her to weigh as she noted that paragraph 3(1)(*b*) of the *YCJA* creates a separate system of criminal justice for young persons.

[84] I find that both the ONCA as well as the SCC were both very specific and consistent in their choice of wording, writing "young offenders should be dealt with separately and not as adults based on their reduced maturity." This principle does not necessarily mean that only trials under the *YCJA* are acceptable to meet this requirement. Quite simply, neither decision states this.

[85] With respect to the requirement to try a young person separately, it is important to highlight that courts martial are, by their very nature, separate individual trials. Each court martial is an *ad hoc* trial personally tailored to each accused. In fact, but for joint trials, based on the unique modalities of the court martial, every accused person is automatically tried separately. If a joint preferral of charges is made by the Director of Military Prosecutions, pursuant to QR&O paragraph 110.09(3), military judges must order that a young accused person be tried separately in conformity with the principle of diminished moral blameworthiness.

Enhanced procedural protections

[86] To assist the Court in its identification of enhanced procedural protections, counsel for the applicant set out a listing of those incidents affecting the applicant that he viewed as problematic. In his written submissions, the respondent argued that:

> "5. The applicant, on the basis of the ASOF, infers that the following issues are problematic:
>
> a. The full name, service number, rank, unit of young persons accused under the CSD appear on the Record of Disciplinary Proceedings and on the Charge Sheet, both being public documents;
>
> b. There is no mandatory publication ban when the accused is a young person;
>
> c. It is not mandatory for the military police to inform a young person that he or she can speak with his/her parents, an adult relative or any other adult chosen by the young person and that he/she can have counsel and/or a relative present during the interview;
>
> d. That Pte J.L. is not accused of an offence for which an adult sentence would be available under the *YCJA*;
>
> e. That extra-judicial sanctions were not brought forward by the prosecution; and

f. That no psycho-social services provided following the investigation and laying of the charges and that there was no referral to a child welfare agency.

6. Except for paragraphs d and e above, these issues do not pertain to the diminished moral blameworthiness and culpability of young persons."

[87] As previously discussed, in coming to the conclusion that there is a presumption of diminished moral culpability as a principle of fundamental justice, Abella J. relied upon the legislative history set out at subparagraph 3(1)(b)(iii) of the *YCJA* which established it to be a principle that there is "enhanced procedural protection to ensure that young persons are treated fairly and that their rights, including their right to privacy, are protected." [Emphasis in original removed.]

[88] Quite simply, the presumption acknowledged by the SCC recognizes that young members do not have the level of maturity, which would include resourcefulness to be able to access what they need and to understand the gravity of a situation, but it does not dictate exactly what the special protections should look like.

[89] The respondent argued that military judges can properly give effect to the principle of moral blameworthiness or culpability within the court martial process. This is indeed true, however, what about the enhanced protections required by state actors both before and after the accused person is before a court martial?

[90] When facing such a serious charge, given a young person's age and the presumption to which they are entitled, I also cannot think of a more vulnerable time for a young accused person in the military discipline process then their interactions with police at the investigation state.

[91] Based on a review of jurisprudence mostly from the provincial court level, there is a convincing trend that the presumption infers there is a heightened duty owed to youth at both the policing and investigative stages.

[92] In *R. v. N.(A.),* 2014 ONCJ 331, at paragraphs 24 to 28, after referring to the SCC's statements regarding section 7 of the *Charter*, the presumption of diminished moral blameworthiness, the judge emphasized the requirement for increased diligence by the police investigating a young person for an offence:

> [27] If the Preamble and the Statement of Principle are to have any meaning, then it is the adults, law enforcement officers and lawyers who deal with young persons that must take responsibility for ensuring the 'special guarantee of their rights'. This means, in my opinion, that even a police officer investigating a possible 'over 80' must guard most jealously the rights of the young person being investigated.
>
> [28] In the present case and simply put, nothing even approximating jealous guarding was brought to bear. In fact, there seemed to be a certain nonchalance associated with the investigation.

[93] Similarly in the case of *R. v. A.(Z.),* 2012 ONCJ 541, at paragraph 59, the Court takes a similar view of the importance of the police in facilitating the implementation of a youth's rights:

> [59] In the case of *R. v. D.B.,* the Supreme Court of Canada held that young people are entitled to a presumption of diminished moral blameworthiness or culpability flowing from the fact that, because of their age, they have heightened vulnerability, less maturity and a reduced capacity for moral judgment. This principle will shortly be enshrined in the Declaration of Principles in the *Youth Criminal Justice Act*. While a youth's right to counsel, like that of an adult, is subject to reasonable limits prescribed by law, (*R. v. P.D.*, [2009] O.J. No. 1594 (Ont. S.C.)), the right to counsel on arrest and detention remains one of the most crucial elements in the enhanced procedural protections, and special guarantees, that are available to young persons under the *Act*. These guarantees cast singular obligations on police officers to fully advise detained youths of their right to counsel and to facilitate the implementation of their rights.
> [My emphasis.]

[94] The above examples of the application of the principle of fundamental justice with respect to young persons reflect the requirement for actors involved in the administration of criminal justice to zealously guard the rights of young accused persons. These cases demonstrate that state actors must exercise heightened sensitivity towards a young accused person to ensure that they both understand their rights, but also to facilitate the exercise of their rights such as their access to legal counsel. In other words, the breach of a young accused person's rights at the hands of a state actor will be viewed much more seriously by the courts than a similar breach of the rights of an adult accused person.

[95] In their ASOF, counsel highlighted the process that was undertaken by CFNIS during the investigative stage. The relevant paragraph reads as follows:

> "7. On 2 Aug 19, 6 Aug 19, 7 Aug 19 and 9 Aug 19 the Canadian Forces National Investigation Services (CFNIS) telephoned Pte J.L. to arrange a voluntary interview with him. During the 2 Aug 19 call, he was advised that he could consult his chain of command or a legal counsel as to what he should do. He was not advised at any time that he could consult a parent, an adult relative, or any other appropriate adult chosen by the young person. He was not advised at any time that should he choose to participate in a voluntary interview he could have a counsel and a relative present during the interview. At no point were the parents, relatives or any other appropriate adult chosen by the young person made aware of the proceedings against him by the chain of command or prosecution. (Page 59, page 93)"
> [Emphasis in original.]

[96] In his response to the above-mentioned reference to the multiple requests by CFNIS for interview, the respondent submits the following:

> "8. Paragraph c present a difference between the CSD and the YCJA that does not prejudice a young person subject to the NDA. A young person can only enrol in the CAF with parental consent. A young person in the military is subject to the CSD and has access to legal counsel at any time when suspected of committing a service offence and when interviewed either by the CoC or by the military police. The CoC and the military police are unlikely to refuse a request made by either the young person or his/her counsel to speak with a parent or relative of his choice."

[97] I find that given that the CFNIS learned almost immediately that the applicant was a young person, this triggered an instantaneous responsibility on them to ensure that their requests were clear and communicated in a way that the applicant fully understood the consequences of providing a statement to them and that he had some support to draw upon.

[98] However, when compared to the cases of *A.(Z.)* and *N.(A.),* the applicant's case is easily distinguishable. In the case before the court, there is evidence that the CFNIS advised the applicant of his right to consult with legal counsel as well as his chain of command. Unlike *A.(Z)* and *N.(A.)*, there is no evidence to suggest that CFNIS frustrated his exercise of any of these fundamental rights such as right to consult counsel or protection from improper seizure nor did they obtain a statement in violation of his rights.

[99] Within the CAF, all members facing these types of charges may be represented by very capable counsel from the Director of Defence Counsel Services (DDCS) who are available free of charge to provide advice at every stage of the military justice process from the investigation stage through to appeals (see QR&O 101.11).

[100] At this time, there is no evidence before the court that a statement was taken against his rights or that he was mistreated in any way. The primary alleged infringement is that the CFNIS did not inform him that he could have his counsel or a family member attend an interview with him.

[101] With respect to the requests for interview, the *YCJA* sets out specific protections to ensure that a young person's vulnerability and lack of maturity are respected. Being a young private in a military environment where everyone around him is senior in rank is without question daunting and intimidating. However, these facts cannot be considered in a vacuum. It is exactly for this reason that every member has a chain of command with a superior who is responsible for their well-being. This is their role. They are responsible for taking care of those under their command no matter what problems the member is facing.

[102] As Gonthier, J and Binnie J set out at paragraph 99 of *Malmo-Levine*, "societal values play a role in the delineation of the boundaries of the rights and principles in question" making the context of a military force, serving together an important factor in identifying how the rights and principles to which a young person is entitled are to be

defined within the military justice system. Despite the court asking on several occasions for examples of action that breached the applicant's rights, there was little reference to any of the regulatory provisions nor were there any assertions that they were breached. To get an understanding of the breadth of enhanced protections incorporated into the military justice system, a brief overview of some of the procedural protections is worthwhile.

[103] Under the military justice system, upon the laying of charges, CFNIS must refer the matter to the applicant's Commanding Officer (CO) or his delegate (see QR&O 107.09) who have specific responsibilities they are required to comply with. Pursuant to QR&O 109.04, the commanding officer was required to advise the applicant about his rights to have legal counsel and inquire whether he desired free legal counsel to be appointed by the DDCS to represent him. If that was the applicant's desire, the CO was also required to ascertain whether the accused desired a particular legal officer from DDCS he preferred or whether he was willing to accept any legal officer from DDCS to represent him. The CO was then required to advise DDCS of the applicant's wishes. There is no evidence before this court that the chain of command did not fulfil their responsibilities as required by law.

[104] Also, in accordance with QR&O article 108.14 (Assistance to Accused), as soon as possible after a charge has been laid, a commanding officer is required to appoint an officer to personally assist the accused.[7]

> The role of the assisting officer is to assist the accused, to the extent that the accused desires, in the preparation and presentation of his case. Two important facets of the assisting officer's role are to assist the accused to understand the nature of the proceedings during both the pre-trial and trial stages and to assist the accused in making an informed election.

[105] I find that through the involvement of the chain of command, the assignment of assisting officers as well as the provision of DDCS free legal representation throughout the entire judicial process and proceedings, there is enhanced protection incorporated within the military justice system. The military justice system provides perhaps the most generous legal aid assistance in Canada. As the prosecution argued, within the military justice system, the applicant has access to many different enhanced procedural protections that would not be offered if he was tried under the *YCJA*.

[106] In *R. v. K.J.M.*, 2019 SCC 55, the SCC recently confirmed that subsection 37(10) of the *YCJA* bars appeals as of right for young people in circumstances where there is a dissent by one of the judges on the court of appeal. Section 37(10) of the *YCJA*, provides:

> (10) No appeal lies under subsection (1) from a judgment of the court of appeal in respect of a finding of guilt or an order dismissing an information or indictment to the Supreme Court of Canada unless leave to appeal is granted by the Supreme Court of Canada.

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[7] See <https://www.canada.ca/en/department-national-defence/corporate/reports-publications/military-law/guide-for-accused-and-assisting-officers.html>.

[107] Conversely, under the military justice system, if required, the applicant receives full procedural protection at no cost which includes an automatic right of appeal to the SCC in the event of a dissent by one of the Court Martial Appeal Court (CMAC) judges. In light of this, although the *YCJA* requires the authorities to advise a young person's parents when charges are laid, the fact that it can also be any relative or support person suggests that the purpose of the notification is to ensure that the young person has someone to advise them and facilitate their access to counsel. I do not find that this principle means that the parents are the exclusive means by which enhanced protections are provided. The statutes serve very different purposes and the young members appearing before the respective courts are in different situations surrounded by very different supporting mechanisms.

[108] There are specific responsibilities placed on military leadership to ensure a young member is supported and, if required, to facilitate their representation of legal counsel and other support persons. Units also have access to a broad range of resources, including padres and social workers that can and should be relied upon.

[109] Hence, although I agree that the four CFNIS requests made to the applicant, where they did not specifically advise the applicant of his right to have either counsel, an assisting officer or a relative present during an interview are not ideal; I do not find the request itself to have violated the section 7 *Charter* rights of the applicant. Further, given the other enhanced protections, including the assignment of an assisting officer, free legal counsel, etc., I do not find that the mere lack of a provision requiring the actors to consult with his parents constitutes a Constitutional violation in itself.

Privacy

[110] In *D.B.,* the SCC also acknowledged the right to privacy of young persons as deserving of protection. The SCC and the ONCA both declared that the protection of privacy of young persons is inextricably connected to the rehabilitation of youth. I agree entirely.

[111] This principle was also acknowledged in lower case law in *Toronto Star Newspaper Ltd. v. Ontario*, 2012 ONCJ 27, at paragraph 41, where the Court stated:

> [41] Privacy is recognized in Canadian constitutional jurisprudence as implicating liberty and security interests. In *Dyment*, the court stated that privacy is worthy of constitutional protection because it is "grounded in man's physical and moral autonomy," is "essential for the well-being of the individual," and is "at the heart of liberty in a modern state" (par. 17). These considerations apply equally if not more strongly in the case of young persons. Furthermore, the constitutional protection of privacy embraces the privacy of young persons, not only as an aspect of their rights under section 7 and 8 of the Charter, but by virtue of the presumption of their diminished moral culpability, which has been found to be a principle of fundamental justice under the *Charter*.
> [Footnote omitted. My emphasis.]

[112] In *Toronto Star Newspaper Ltd,* the Court continues, at paragraph 43:

> [T]he publication ban is subject to the presumption of diminished moral culpability as a principle of fundamental justice under section 7 of the Charter. The statutory ban on publication exists to protect the privacy of young persons. In my view, the decision in *D.B.* confirms the constitutional significance of the protections of privacy of young persons found in the *Youth Criminal Justice Act*".
> [My emphasis.]

At paragraph 48, the Court concludes:

> I conclude that the protection of privacy of young persons dealt with under the *Youth Criminal Justice Act* is a legal value rooted in the privacy provisions of the *Youth Criminal Justice Act*, in the underlying policy of the *Act*, which embraces both pragmatic and principled considerations, in the human rights of young persons, as articulated in *Charter* jurisprudence and international instruments, and in the constitutionally protected legal rights of young persons under section 7 of the Charter.
> [My emphasis.]

[113] This Court requested that the applicant provide evidence on where the military justice system fell short of protecting his privacy. In response, the applicant advised the Court that:

> "his full name, his service number, the name of the unit in which he serves, as well as the details of the alleged offence appear in a Record of Disciplinary Proceeding dated 14 Aug 2019 produced by the chain of command. Records of disciplinary proceeding are public documents. The same information appears on a Charge Sheet dated 31 Jan 2020 produced the military prosecution. Charge sheets are also public documents."

[114] In reply, the respondent filed the following:

> "7. Paragraphs a and b refer to the RDP and Charge Sheet. Much like the information laid in the civilian justice system, these documents have to state the full name and service number of the person accused of an offence for identity purposes. While it is true that there is no mandatory or automatic publication ban of these documents, the CSD allows for any party to request it under s 179 of the NDA. The prosecution and the military police will safeguard the confidentiality of a young person accused as a matter of internal policy and practice as evidenced notably by paragraph 1 of the ASoF."
> [Emphasis in original.]

[115] The respondent clarified that from the onset, the prosecution and the military police took steps to safeguard the confidentiality of the applicant as evidenced by the annotation on his file:

> "The CFNIS General Occurrence Hardcopy GO# 2019-13107, covering the alleged offences contains the following statement at page 61: "*Addresses are advised that this file contains the identity of a young person, which by law, must be protected from inadequate disclosure*."

[116] The charging documents do reveal the applicant's true name. Although the military police and the prosecution took steps to safeguard the identity of the applicant from disclosure, an order restricting publication on his name was not automatic. At section 110 of the *YCJA*, there is statutory protection built in to protect the privacy of young persons. Section 110 of the *YCJA* reads as follows:

> Protection of Privacy of Young Persons
>
> Identity of offender not to be published
>
> 110 **(1)** Subject to this section, no person shall publish the name of a young person, or any other information related to a young person, if it would identify the young person as a young person dealt with under this Act.
>
> Limitation
>
> **(2)** Subsection (1) does not apply
>
> **a)** in a case where the information relates to a young person who has received an adult sentence; or
>
> **(b)** [Repealed, 2019, c. 25, s. 379]
>
> **(c)** in a case where the publication of information is made in the course of the administration of justice, if it is not the purpose of the publication to make the information known in the community.
>
> Exception
>
> **(3)** A young person referred to in subsection (1) may, after he or she attains the age of eighteen years, publish or cause to be published information that would identify him or her as having been dealt with under this Act or the *Young Offenders Act*, chapter Y-1 of the Revised Statutes of Canada, 1985, provided that he or she is not in custody pursuant to either Act at the time of the publication.
>
> *Ex parte* application for leave to publish
>
> **(4)** A youth justice court judge shall, on the *ex parte* application of a peace officer, make an order permitting any person to publish information that identifies a young person as having committed or allegedly committed an indictable offence, if the judge is satisfied that
>
> **(a)** there is reason to believe that the young person is a danger to others; and
>
> **(b)** publication of the information is necessary to assist in apprehending the young person.
>
> Order ceases to have effect
>
> **(5)** An order made under subsection (4) ceases to have effect five days after it is made.
>
> Application for leave to publish
>
> **(6)** The youth justice court may, on the application of a young person referred to in subsection (1), make an order permitting the young person to publish information that would identify him or her as having been dealt with under this Act or the *Young Offenders Act*, chapter Y-1 of the Revised Statutes of Canada, 1985, if the court is

> satisfied that the publication would not be contrary to the young person's best interests or the public interest.

[117] The protection set out in section 110 of the *YCJA* is not absolute, and is subject to limitations. It is noteworthy that one of the limitations set out at paragraph 110 (2)(c) of the *YCJA*, provides a limitation from the publication ban "in a case where the publication of information is made in the course of the administration of justice, if it is not the purpose of the publication to make the information known in the community." There is no evidence on the record that aside from the use of the applicant's name in the course of the administration of justice, that his name was released in a manner contrary to his right to privacy.

[118] The seminal SCC position set out Abella J. in *D.B*. was rendered in the context of a reverse onus sentencing process, where *D.B*., was facing the imposition of an adult sentence that directly engaged his section 7 *Charter* right to liberty. Although at paragraph 84, Abella J., appears to acknowledge a young person's right to a publication ban under the "enhanced procedural protection . . . <u>including their right to privacy</u>", as a principle set out in the *YCJA*, she did not go further to explain what that must look like procedurally in terms of a rule. It simply was not required for her analysis. At paragraphs 29 and 87 in *D.B*., Abella J., went on to conclude that the publication ban formed part of the sentence itself and lifting it, makes the sentence more severe (see paragraph 87).

[119] In *D.B*., on the subject of publication bans, Bastarache, Deschamps, Charron and Rothstein JJ. dissented from the majority on the fundamental issue underpinning section 7 rights in protecting the identity of young accused persons. In his dissent, Rothstein J. took a much narrower perspective on publication bans in concluding that based on the provision in question that the young person would face an adult sentence, unless rebutted, did not engage section 7 interests and that pursuant to the *YCJA* itself, it wasn't part of the sentence. At paragraph 172 of his decision, he wrote: "Since the presumption of publication does not cause physical restraint on young offenders nor does it prevent them from making fundamental personal choices, the interests sought to be protected in this case do not fall within the liberty interest protected by s. 7." Although normally, less weight is provided to such dissents, given that the context of this case is much different than the question before the SCC in *D.B*., the dissent is informative.

[120] Consequently, this court was left with the question of whether the absence of a statutory provision in the *NDA* that grants an automatic publication ban to a young person is sufficient by itself to declare the entire military justice system unconstitutional?

[121] Although it is a well understood principle that statute law takes precedence over common law, the *NDA* is currently silent with respect to publication bans. This means that there are no legislative provisions under the *NDA* that automatically ensure the privacy of young persons. Ideally, there should be a provision that makes this protection automatic, but under the *NDA*, courts martial rely upon their powers set out at section

179 of the NDA as well as the common law for the imposition of all publication bans.[8] (See *R*. v. *Barrieault*, 2019 CM 2013)

[122] The court martial, by its very nature is an *ad hoc* court. There is no permanent court martial as that which exists for Youth Criminal Court. Unlike the civilian system of justice, military judges and the court martial system have no authority over an accused person until they appear before them.

[123] As briefly explained earlier, after a charge is laid in the military justice system, it is staffed to a commanding officer or superior commander who will make a decision on whether to proceed with and refer the charges. It is at this earliest stage, that an accused person is informed of their right to legal counsel. (see QR&O 109.04 Right to legal counsel). After further review, the charges may be referred to the Director of Military Prosecutions (DMP) who will determine whether or not the charges will be "preferred" for trial by court martial.

[124] It is only when the DMP makes a decision to proceed with charges, that the charge sheet is signed by the DMP or his representative and sent to the Court Martial Administrator to convene a court martial. Prior to the convening of a court martial, if either defence counsel or the prosecution feel that there is a need for a judicial order, they can request a hearing before a military judge. (See section 187 of the *NDA*).

[125] What this means is that an accused person does not appear before a military judge until the matter has been specifically scheduled by counsel for a hearing or a court martial has been convened. When a counsel seeks an order restricting publication, they must make an application either for a hearing before a military judge or file an application to be heard when the court martial is convened.

[126] It must be noted that in this case, a publication restriction was ordered under section 179 of the *NDA* as soon as the Court heard the application, but it did require the applicant's counsel to appear before a military judge.

[127] Unlike *D.B*, the issue before the court does not engage the sentencing phase or post-conviction context at all. The fundamental issue that flows from a young person's right to privacy is whether during the pre-trial stage, it is a constitutional breach for the privacy right of a young person to be protected by a court order, issued under common law rather than having the same right automatically flow from a provision such as section 110 of the *YCJA*?

[128] In assessing this question, the comments of Rothstein, J's are particularly helpful. At paragraph 174 of *D.B.*, Rothstein, J. provides helpful insight in assessing whether or not the process currently in existence violates an accused's section 7 *Charter* right and if so, whether it conforms with the principles of fundamental justice.

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[8] Bill C-77 recently introduced statutory authority for courts martial to order publication restrictions in the military justice system similar to those contained in the *Criminal Code*; however, the new provisions are neither applicable to youth nor are they in force.

> [174] Where, as here, the security right in s. 7 is being invoked on the basis of an impact on the individual's psychological security, "serious state-imposed psychological stress" must be demonstrated: *R. v. Morgentaler*, 1988 CanLII 90 (SCC), [1988] 1 S.C.R. 30. In *Blencoe*, at para. 57, Bastarache J., for the majority of this Court, stated the two factors which must be evaluated: "the psychological harm must be state imposed, meaning that the harm must result from the actions of the state" and "the psychological prejudice must be serious"
> [Emphasis deleted.]

[129] It is clear from the facts before the court, that the wait to appear before a military judge to have the publication ban imposed did not result in any physical restraint to the applicant's liberty, nor was there any evidence presented of any disregard to the applicant's privacy as a young person nor was there any evidence of direct prejudice that flowed from not having an automatic statutory publication ban. The court also noted that in this case, CFNIS did not make a public announcement of the laying of charges as is their customary practice.

[130] In summary, by conferring concurrent jurisdiction for young persons to be tried under the military justice system, I have to presume that Parliament understood the purpose of the military justice system and the nature of the ad hoc court martial process within the *NDA*. Further, I have to presume that the unwritten norms identified by the SCC as principles of fundamental justice for young persons in the specific context of a reverse onus provision at the post-conviction stage in the *YCJA*, does not mean that all of the provisions on publication bans in the YCJA, including the pre-trial provision must be automatically mirrored within the military justice system.

[131] Consequently, I do not find that the mere fact that the applicant's privacy rights were protected by a court order, rather than having automatically flowed from a statutory provision in the *NDA*, similar to section 110 of the *YCJA* equates to the CSD being unconstitutional with respect to young persons. Further, I do not find that there was an infringement of the applicant's *Charter* rights simply because his name occurred in documents which are necessary for the administration of justice and for which the purpose of the publication was not to make the information known in the community. Importantly, the applicant's privacy rights have been recognized in the procedure that currently exists and will continue to be safeguarded throughout the process.

Extrajudicial sanctions

[132] In his submissions, counsel for the applicant informed the Court that the applicant was not offered extrajudicial sanctions, nor specific mental health services. Extrajudicial sanctions are out of court sanctions that hold a young person accountable for criminal conduct. Extrajudicial sanctions may be used in specific cases where a young person is given conditions that must be fulfilled in exchange for their acceptance of responsibility for the alleged offending behaviour. If the conditions are successfully completed, the charges are withdrawn and they will not appear on an accused's record. Such sanctions can include: attending and participating in counselling; making restitution; apologizing to the complainant, doing community service, writing an essay about their behavior, etc.

[133] As I have explained to counsel in open court, unlike the civilian justice system, the administration of discipline in the CAF is accomplished through a bifurcated system which also involves the administrative responsibility of the chain of command to take care of their members. It is important to note that the type of extrajudicial sanctions available under the *YCJA* are regularly incorporated through the administrative measures implemented by the chain of command in their responsibility in counselling a member to overcome their shortcomings, notwithstanding the independent administration of cases within the military justice system.

[134] Importantly, the queries by the Court confirmed that the applicant is still serving with his unit, parading regularly and participating in unit activities. This is an important element that separates youth being tried under the military justice system with those being tried under the *YCJA*. Despite the charges before the Court, the evidence suggests the applicant remains fully integrated with his unit and he was not suspended nor administratively released. Importantly, this means that as a serving member, he continues to receive structure, paid training and guidance that a typical civilian youth would not have access to. This avenue of support is a unique ingredient to military service life that does not exist in the same form within the youth criminal justice system. Once again, unlike the civilian justice system, a military judge or a court martial is not empowered to order that an accused be provided specific support services.

[135] In addition, when a member requires remedial measures to correct a shortcoming, their progress is directly supervised by their chain of command who both facilitate and actively monitors the member's ongoing rehabilitation. The responsibilities for this function are set out in the regulatory provisions of the QR&O and Defence Administrative Orders and Directives (DAOD) such as DAOD 5019-4, Remedial Measures. The accused's chain of command performs a role that arguably has greater leverage and influence than that of a probation officer in the youth criminal justice system. Given that the alleged incident before the court arose during the member's military service, the chain of command also has the responsibility to pick up the phone and ensure that the member receives any necessary assistance of social workers, padres, medical personnel, etc. It is for this reason that the SCC has repeatedly rejected the proposition that the military justice system must mirror all those provisions that exist within the civilian justice system.

[136] With respect to the argument that the prosecution must have considered the extrajudicial sanctions such as those set out within the *YCJA*, it is important to be aware that extrajudicial sanctions set out at subsection 10(1) of the *YCJA* are not an automatic entitlement nor a right for a young person particularly when the young person is facing serious allegations such as sexual assault, which is considered to be an offence of violence. Each case will turn on its own facts.

[137] The consideration of whether to proceed with a charge, or substitute it with a lesser charge are considerations that are part of the prosecution's responsibilities and are fulfilled pursuant to the exercise of their prosecutorial discretion. The prosecution's pre-

charge considerations are publicly available in DMP Policy Directive 002/00[9]. At paragraph 23, of the DMP Policy Directive 002/00, the prosecution must determine what jurisdiction should prosecute a case by carefully considering 10 relevant factors. In this case, after conducting their analysis, they decided to pursue the charges under the military justice system rather than under the *YCJA*.

[138] Further, at paragraph 37 and 38 of DMP Policy Directive 002/00, the prosecution considers all those public interest considerations under the *Circumstances Governing Whether or Not a Charge Should be Laid.* Depending on the nature of a case, it is available to the prosecution to decide not to proceed with charges particularly, if in their opinion the matter can be sufficiently dealt with by Remedial Measures implemented by the chain of command.

[139] In light of the above, and the fact that this is still a preliminary application, I find that it would be improper for this Court to make inquiries into the ongoing exercise of the prosecution's discretion nor is it proper for the court to weigh in to suggest how the prosecution should exercise their discretion. They are responsible for considering the specific facts of the case before them as well as the greater context which includes the public interest.

Sentencing

[140] Based on this Court's review of the majority decision in *D.B.,* I find that the SCC used the principle of fundamental justice identified within its decision to constitutionalize a presumption of lower sentences for young persons who are convicted, due to their lesser moral blameworthiness and culpability than adults. Also flowing from it is a presumption against custody, and it is a principle that the prosecution must prove aggravating factors on sentencing.

[141] The respondent argued that military judges presiding at courts martial are actually in a better position to address the needs of a young person than judges presiding under the *YCJA*, as there are more flexible punishments and courts have the ability to impose minor punishments where merited. His submissions have great merit as there are a wide range of punishments available, and generally, military judges have broad discretion. In fact, the evidence suggests that military judges presiding at courts martial understand their responsibility to treat young persons differently in sentencing as evidenced in the decision *R v. S.O.M*., 2011 CM 2007.

[142] In *S.O.M*., Lamont M.J. was presented with a joint submission where the accused agreed to plead guilty to having violated a *NDA* section 129 offence for prejudice to the good order and discipline, which is not a *Criminal Code* offence. Notwithstanding this, Lamont M.J. found that since the offender was also a "young person" within the meaning of the *YCJA* at the time of the offence, he instructed himself

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[9] See https://www.canada.ca/en/department-national-defence/corporate/policies-standards/legal-policies-directives/pre-charge-screening.html

to be guided by the general principles and the sentencing principles set out in both sections 3 and 38 of the *YCJA*.

[143] The Court notes that the *NDA* sentencing principles require military judges to consider the specialized rights of all accused. Under paragraph 203.3(b), **"**a sentence should be similar to <u>sentences imposed on similar offenders</u> for similar offences committed in similar circumstances."[My emphasis.] This provision requires military judges to treat young offenders as such and, therefore, a military judge must read in the sentencing purpose and objectives for youth under the *YCJA* as Lamont M.J. automatically did.

[144] In his submissions, the respondent argued that:

> "9. Paragraphs d and e pertain to the sentencing regime and there are undoubtedly differences as the objectives of the CSD and the YCJA are not the same. However, under the CSD, and in keeping with the principle of diminished moral blameworthiness and culpability of young persons, rehabilitation and reintegration into military service can be properly emphasized by the Court during sentencing and the range of available punishments, including minor punishments, is sufficient to give meaningful effect to the principle. Furthermore, should a custodial sentence be required, it could be served in conditions that would be much different from that of a typical civilian adult facility."

[145] Upon a cursory review, it appears that the *Criminal Code* offence of sexual assault for which the applicant is charged exposes some of the shortcomings with the *NDA* sentencing regime making it constitutionally suspect. As an example, upon conviction for an offence of sexual assault, the *NDA* requires military judges to impose both a DNA order (see sections 196.11 and 196.14 of the *NDA*). There is no discretion. These mandatory orders attract concern on a number of levels.

[146] DNA orders are not automatic for youth appearing before the *YCJA*. The *YCJA* recognizes that youths are more vulnerable and do not always make the best decisions. DNA orders are only issued in cases where the public interest outweighs the offender's privacy.

[147] Under subsection 227.01(1) of the *NDA*, if a court martial imposes a sentence for sexual assault, it must also make an order requiring the offender to register under the *SOIRA*. The purpose of that order is to make available information of convicted sexual offenders to help police investigate other offences. However, under the *YCJA*, the applicant would not be awarded such an order unless he was given an adult sentence within the meaning of that Act, which on the facts of this case, counsel agree is not merited. Further, because courts martial proceed by indictment only, the duration of that *SOIRA* order must be for no less than 20 years. (see *NDA* subsection 227.02(2) at paragraph (2); *R. v. Dixon*, 2005 CMAC 2 at paragraph 23; *R v Nguyen*, 2011 CM 4020 at paragraph 25).

[148] In his submissions, the respondent also acknowledged concerns with the sentencing provisions for a person under the age of 18. At paragraph 11 of his submissions, he argued:

> "11. The most problematic parts of the CSD are those requiring mandatory SOIRA and DNA orders under Division 6.1 and 8.1 of the CSD. Should the Court find itself in such position on sentencing, it could simply decide not to apply them on the basis that they have an unconstitutional effect in the case before it, having regard to the principle of diminished moral blameworthiness and culpability."

[149] Before a court can engage in assessing the constitutional validity of the sentencing structure under the *NDA*, sufficient adjudicative facts are required that trigger the applicant's *Charter* rights. This is a preliminary application and the charges before the court have not yet been heard on its merits so the applicant's Charter rights flowing from the sentencing process are not yet engaged.

[150] The presumption of innocence belongs to the applicant, and remains with him throughout the case unless the Prosecution has satisfied the court beyond a reasonable doubt of his guilt. Consequently, the constitutionality of the sentencing provisions is a question that I need not decide today. In the event that this case advances to the sentencing phase, then that would be the appropriate time for the court to consider the constitutionality of the sentencing provisions and it will invite counsel's full submissions at that time.

FOR THESE REASONS THE COURT:

[151] **DENIES** the application.

Counsel:

Major A. Gélinas-Proulx, Defence Counsel Services, Counsel for Private J.L., Accused and Applicant

The Director of Military Prosecutions as represented by Major P. Germain and Major S. Poitras, Prosecutors and Counsel for the Respondent