COURT MARTIAL

Citation: *R. v. J.L.*, 2023 CM 2010

Date : 20230403
Docket : 202004

Standing Court Martial

Queen Charlotte Armoury
Charlottetown, Prince Edward Island, Canada

Between :

Private J.L., Applicant

- and -

His Majesty the King, 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Defence Act*, the Court directs that any information that could identify either the complainant or the accused shall not be published in any document or broadcast or transmitted in any way.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 FOR A DECLARATION THAT CERTAIN PROVISIONS OF THE *NATIONAL DEFENCE ACT* (*NDA*) ARE UNCONSTITUTIONAL

(Orally)

Introduction

[1] On 31 January 2020, the applicant was charged with two offences under the Code of Service Discipline (CSD): sexual assault contrary to sections 130 of the *NDA* and 271 of the *Criminal Code*, and disgraceful conduct contrary to section 93 of the *NDA*. The applicant was seventeen years old on the date of the offences, a young person within the meaning of the *Youth Criminal Justice Act*, SC 2002, c. 1 (*YCJA*) and a Canadian Armed Forces (CAF) member of the reserve force. At the beginning of the

trial, the applicant presented an application for a plea in bar, seeking a stay of proceedings, arguing that the court martial had no jurisdiction over a young person seeking a termination of proceedings; and alternatively, a declaration pursuant to subsection 52(1) of the *Charter* that the CSD is of no force or effect with regards to young persons charged with *Criminal Code* offences as it infringes on their section 7 of the *Charter*.

[2] On 5 March 2021, as the presiding judge, I dismissed the defence application in *R. v. J.L.*, 2021 CM 2004 (*J.L.1*). However, in that decision, at paragraphs 149 and 150, I invited the applicant to make further submissions regarding the constitutionality of sentencing provisions in the *NDA*, if the case moved to the sentencing phase. On 17 September 2021, in *R. v. J.L.*, 2021 CM 2019 (*J.L.2*), I found the applicant guilty of both charges. After a few complications, the applicant's sentencing hearing was set for 12 December 2022. On 16 September 2022, the applicant filed the current application challenging the constitutionality of the sentencing provisions set out within the *NDA* as it relates to young persons. In December 2022, counsel sought an additional adjournment until early April 2023.

Summary of J.L.1

[3] In *J.L.1*, I provided background on when young persons, under the age of eighteen can serve with the CAF. In short, as per paragraph 25, "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."

[4] Upon enrolment, a young person becomes a member of the CAF. I also set out the responsibilities that flow from military service which includes becoming part of the profession of arms with an obligation to serve in the CAF until one 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 who is under the age of eighteen years may not be deployed by the Canadian Forces to a theatre of hostilities." However, all service members are, pursuant to subsection 33(1) of the *NDA*, "at all times liable to perform any lawful duty."

[5] Under subsection 60(1) of the *NDA*, all officers or non-commissioned members of the regular force and the reserve force in certain circumstances (undergoing drill or training, in uniform, on duty, in or on any defence establishment, etc.) are subject to the CSD, including young persons. Private J.L. was both a young person and a serving member of the reserve force as per paragraph 60(1)(c).

[6] As I explained in *J.L.1*, 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 and has been recognized by the Supreme Court of Canada (SCC) and classified as, "an essential ingredient of service life" (see *MacKay v. The Queen*, [1980] 2 S.C.R. 370, at page 400).

[7] Part III of the *NDA* sets out the CSD. At subsection 55(1) of the *NDA*, Parliament makes it clear that, "the purpose of the Code of Service Discipline is to maintain the discipline, efficiency and morale of the Canadian Forces." Parliament further clarified at subsection 55(2) that, "the behaviour of persons who are subject to the Code of Service Discipline relates to the discipline, efficiency and morale of the Canadian Forces even when those persons are not on duty, in uniform or on a defence establishment."

[8] It is important to be aware that the CSD includes a two-tier system of discipline that captures a wide range of conduct. More specifically, aside from trial by court martial, the CSD also includes the newly enacted summary infraction system where minor breaches of discipline are addressed. In *J.L.1*, at paragraph 28, I noted that as much as ninety per cent of military discipline is administered outside of the court martial system.[1]

[9] The summary hearing process is a non-penal, non-criminal process designed for the chain of command to address minor breaches of discipline fairly and efficiently. Minor breaches of discipline are classified as service infractions and the summary hearing process is not designed to engage a member's section 7 *Charter* rights given that detention is not possible.

[10] In *J.L.1*, at paragraph 7 "upon examination of the pertinent provisions of the *YCJA* and the *NDA*," I found "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 was not exclusive to either of them."

[11] In *J.L.1*, at paragraph 36, I recognized:

> [T]hat the *YCJA*, enacted in 2002, predates the formal recognition of principles of fundamental justice enunciated by the SCC and several appeal courts. Since the enactment of the *YCJA* and the *NDA*, 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.

[12] In *D.B.*, the SCC acknowledged that young persons must be provided with this enhanced protection and afforded increased clemency by virtue of their reduced maturity and moral capacity. Since the release of *D.B.*, Parliament has implemented those fundamental principles into the *YCJA* and as the common law on the subject evolved, the *YCJA* was appropriately amended and continues to shape the youth criminal justice system. The *NDA* has not been specifically amended in response to the enunciated principles of fundamental justice set out in *D.B.*

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[1] http://jag.mil.ca/publications/office-cabinet/annrep-rappann-18-19-eng.pdf

[13] In *J.L.1*, at paragraph 79, the applicant argued that the *NDA* and the CSD did not conform with the principles of fundamental justice for young persons. In support of this, he argued "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.

[14] In *J.L.1*, at paragraph 9, with respect to the applicant's 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*, I analyzed the law that flowed from the SCC's recognition of the principle of fundamental justice that relates to young persons. The common law principle of fundamental justice establishes "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." [Emphasis removed.]

[15] In *J.L.1*, at paragraph 10, after conducting an analysis of the military justice system and the persuasive law on the principles of fundamental justice emanating from the SCC related to young persons, I found that:

(a) "This presumption" of diminished moral blameworthiness or culpability "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," based on the unique construct of a court martial and the military justice system, which sets it apart from the civilian justice system, "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"; and

(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," I found it was "not sufficient to suggest that simply because young persons are subjected to the same procedures as other adult members" who incidentally also enjoy enhanced legal protections that the system has fallen short.

[16] In *J.L.1*, I found that based on the unique construct of the military justice system, the principles of fundamental justice were most likely to find application at the sentencing stage. At the time I heard the application, the court martial had not started. Consequently, I found those arguments on the constitutionality of the sentencing provisions to be prospective and therefore declined to analyze the issues until the provisions were properly before the Court.

Position of the parties

Applicant

[17] Considering the convictions, the applicant argued that his liberty interest under section 7 of the *Charter* is engaged because the convictions expose him to the risk of imprisonment. There is therefore a deprivation of the applicant's right to liberty.

[18] The applicant argues that subsection 60(1) and sections 139, 196.14, 203.1-203.4, 220 and 227.01 of the *NDA* violate section 7 of the *Charter* because they automatically subject young persons, who are serving in the CAF, to the adult sentencing provisions of the CSD. He argued that the above sections are inconsistent with the principle of fundamental justice entitling young persons to a presumption of diminished moral culpability.

[19] As a remedy, he requested that the Court find the above provisions of no force or effect insofar as they apply to young persons. He requested that the Court read down subsection 60(1) of the *NDA* to exclude young persons from the application of the CSD and requested the Court stay the proceedings pursuant to subsection 24(1) of the *Charter*.

[20] The substance of the applicant's argument is that the deprivation is inconsistent with the principles of fundamental justice that young persons should be dealt with separately from adults and are entitled to a presumption of diminished moral culpability which recognizes young persons heightened vulnerability, less maturity, and a reduced capacity for moral judgment. More specifically, it requires:

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

(b) a presumption of lower youth sentences;

(c) the prioritization of rehabilitation and reintegration; and

(d) a presumption against custody

[21] Further, he argued that the sentencing provisions set out in the *NDA* do not provide any mechanism for treating young persons differently than adults and do not recognize the presumption of diminished moral culpability that young persons are owed. The applicant relies upon the expression of "adult sentence" in this application as set out in subsection 2(1) of the *YCJA*, which "means any sentence that could be imposed on an adult who has been convicted of the same offence." [My emphasis.]

[22] In practical terms, as a young person, Private J.L. is automatically subject to procedures where he is liable to be sentenced as an adult military member which indirectly places the burden on him to persuade the Court to sentence him as a young person and to not disclose his identity. The applicant's position is that placing the burden of proof and persuasion on Private J.L., as a young person, violates the principles of fundamental justice and cannot be justified.

[23] The applicant relies upon the SCC's position in *D.B.*, where the rebuttable presumption of adult sentences that place an onus on young persons for presumptive offences under the *YCJA* was found to be inconsistent with the principle of fundamental justice in violation of section 7 (see paragraphs 70, 75, 76, 81, 82, 93 and 95 of *D.B.*).

Respondent

[24] Conversely, the respondent argued that:

(a) in *J.L.1*, at subparagraph 10(c), the Court found that, "upon review of those principles that flow from the presumption of diminished moral blameworthiness or culpability set out by the SCC, [there is insufficient] 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."

(b) since the Court found in *J.L.1* at subparagraph 10(d), that, "all … members of the Canadian Armed Forces (CAF) are entitled to enhanced protection…" and "…it is not sufficient to suggest that simply because young persons are subject to the same procedures as other adult members that the enhanced legal protections for which they are entitled as young persons have fallen short" that I should decline to reconsider this issue.

[25] In short, the respondent argued that this Court should refuse to reconsider any of the same issues that were already decided upon in *J.L.1*, at subparagraph 10 which includes the consideration of section 60 of the *NDA* based on the following findings:

(a) "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."

(b) "the lack of parity in the provisions and protections [of the military justice system] 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"; and

(c) young persons' section 7 *Charter* rights are not automatically breached because they are treated the same as other adult members under the military justice system.

[26] In further representations, the respondent invited the Court to analyze the current situation by conducting an overbreadth analysis of the subject provisions. He argued that the sentencing provisions of the CSD do not violate the principles of fundamental justice because they serve a different purpose than the *YCJA* and the measures enacted by Parliament are connected to the purpose of the law to avoid being overbroad. He argued that the purpose of the challenged provisions informs the context and is a necessary ingredient of an overbreadth analysis.

[27] Relying upon subsection 203.1(1) of the *NDA*, he highlighted that the fundamental purpose of the CSD is to maintain the discipline, efficiency, and morale of the CAF. Whereas subsection 38(1) of the *YCJA* stipulates that the purpose of sentencing:

> is to hold a young person accountable for an offence through the imposition of just sanctions that have meaningful consequences for the young person and that promote his or her rehabilitation and reintegration into society, thereby contributing to the long-term protection of the public.

[28] The respondent submitted that there is a connection between the purpose of the CSD and sentencing all CAF members under the same sentencing scale. Further, he argued that sentencing a young person using a different scale than adults would be disconnected to the CSD's purpose, making it overbroad.

[29] The respondent submitted that by carving out an exception for the jurisdiction of the *NDA* at section 14 of the *YCJA*, Parliament indicated an intent that offences impacting discipline, efficiency and morale committed by young CAF members would be addressed under the CSD and offenders are subject to the same sentencing scale as their adult counterparts.

[30] Further, the respondent argued that "Parliament is entitled to enact measures designed to mitigate harm to discipline, efficiency and morale of the CAF" and that, "there is a clear connection between the maintenance of discipline efficiency and

morale . . . and Parliament's decision to have young CAF offenders judged and sentenced under the CSD as their adult counterparts."

[31] He argued that while the principle of diminished moral blameworthiness is now found in the *YCJA*, there is no need for it to be written or codified to find application in that legislation or other legislation such as the *NDA*.

[32] The respondent agreed that the principle of diminished moral blameworthiness finds application at the sentencing stage of this court martial, but argued that on sentencing, the law requires military judges to give effect to the presumption of moral blameworthiness within the context of the requirement to maintain discipline, efficiency, and morale within the CAF. He submits that the right sentence, which can encompass any available and proportionate punishment should be a reduced one compared to an adult offender.

Issues

[33] Private J.L. has been found guilty of the two charges before the Court. Considering the nature of those convictions and since we are at the sentencing stage, I must now ask myself whether the current *NDA* sentencing provisions outlined in his application infringe his *Charter* rights as a young person and if so, are they justified?

[34] I conducted an examination of the remaining arguments raised by the parties by assessing the following questions:

(a) Question 1**:** Do the sentencing provisions set out in sections 139, 196.14, 203.1-203.4, 220 and 227.01 of Part III of the *NDA* violate a young member's rights guaranteed under section 7 of the *Charter*?

(b) Question 2**:** If Question 1 is answered affirmatively, are those sentencing provisions justified under the first section of the *Charter*?

(c) Question 3**:** If the Court finds a violation of a young member's *Charter* rights that is not justified, what is the appropriate remedy?

Legal framework

Question 1: Do the sentencing provisions set out in sections 139, 196.14, 203.1-203.4, 220 and 227.01 of Part III of the NDA violate a young member's rights guaranteed under section 7 of the Charter?

[35] 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.

[36] 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? and

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

[37] To demonstrate a violation of section 7 of the *Charter*, the applicant must first show that the law interferes with their life, liberty or security of the person. Liberty protects the right to make fundamental personal choices free from state interference. Section 7 protects persons from physical restraint ranging from actual imprisonment or arrest to the power of the state to compel the applicant's attendance at a particular place.

[38] 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 a 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. For the sentencing provisions to be compliant with section 7 of the *Charter*, the provisions must conform to the principles of fundamental justice. Young persons, who are serving in the CAF are entitled to rely upon any constitutional principles of fundamental justice that apply to them as young persons.

Application of principles of fundamental justice

[39] In *J.L.1*, at paragraph 73, I extensively reviewed the SCC decision in *D.B.* as well as the corresponding common law flowing from most of the applicable appeal court levels and examined the three-step analysis template set out in *R. v. Malmo-Levine*, 2003 SCC 74. In doing so, I identified the principles of fundamental justice flowing from the presumption of diminished moral culpability with respect to procedures that must be followed in the military justice system when trying young persons for *Criminal Code* offences. I found that:

> (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.

[40] Prior to the SCC identifying those constitutional principles that apply to young persons, it had to satisfy itself that there was significant societal consensus that the right is fundamental to the way in which the criminal legal justice system ought fairly to operate.

[41] In *R. v. Stillman*, 2019 SCC 40, the SCC clarified that the military justice system is "a full partner in administering justice alongside the civilian system" (see paragraph 20 of *Stillman*). Constitutional principles of fundamental justice are the bedrock of both Canada's civilian and military justice systems and therefore these principles are expected to apply within both systems of criminal justice.

[42] Although the military justice system is a distinct and separate system of justice, operating alongside the civilian justice system, it is subject to the *Charter* and must provide the same constitutional protections to CAF members as it does for civilians.

[43] While there is judicial discretion in applying these principles, the *YCJA* and *NDA* serve different purposes. Given that these rights are triggered when a young person becomes subjected to criminal justice, military judges are bound by the fundamental values and protections enshrined in the constitutional principles.

[44] Much of the jurisprudence on the application of the *Charter* within the military justice system has consistently established that although there is no requirement for the *NDA* to mirror the exact procedural protocols and provisions that exist within the civilian justice system, being the *Criminal Code* or the *YCJA*, the *NDA* must still give effect to the constitutional principles. Consequently, it is important to distinguish procedures that have been established in the *YCJA* to protect the principles versus the substantive nature of the rights.

[45] Having identified the relevant principles of fundamental justice arising from the leading case law on the subject, the next step in the analysis requires this Court to determine whether the current military justice sentencing process for trying young members for *Criminal Code* offences is consistent with the substantive rights that flow from these identified principles.

[46] The fundamental question I must examine is whether the sentencing provisions of the CSD are consistent with the principles of fundamental justice that young people are entitled to a presumption of diminished moral culpability which requires a protective sentencing process.

Analysis

[47] During submissions, there was some disagreement between counsel as to how this issue should be properly analyzed. It was the prosecution's position that the Court should engage in an overbreadth analysis, while the defence argued that the matter should be examined based on a breach of the principles of fundamental justice in the same manner as the SCC reviewed the matter in *D.B.*

[48] In his arguments, the prosecution relied upon the recent SCC case of *R. v. Sharma*, 2022 SCC 39 which was rendered within days of *R. v. Ndhlovu*, 2022 SCC 38. In his submissions, the accused relied upon the fundamental principles of justice as identified and applied by the SCC in both *Ndhlovu* and *D.B.*

[49] Upon my review of the recent SCC jurisprudence on the issue of overbreadth, I find that there is some tension in the conclusions between the two most recent decisions in the types of situations that are captured under an overbreadth analysis.

[50] In *Ndhlovu*, the majority held that, although all sexual assaults are serious offences, some, such as the case at bar, are situated at the lower end and are not serious enough to warrant a lifetime sexual offender registration and its associated obligations.

[51] In contrast, in *Sharma*, the majority of the SCC found that the mandatory minimum penalty for offence seriousness does not necessarily result in overbreadth. However, unlike the case in *Sharma*, in the case at bar, as in *D.B.*, the rights in question were principles of fundamental justice that automatically raise the analysis to a different level than those that were the basis of the arguments in *Sharma*.

[52] In *Sharma*, Ms Sharma brought *Charter* challenges against paragraph 6(3)(a.1) of the *Controlled Drugs and Substance Act* (*CDSA*), which mandated a minimum two-year prison sentence, and paragraph 742.1(c) and subparagraph 742.1(e)(ii) of the *Criminal Code*, which made conditional sentences unavailable in her case. The sentencing judge held that the *CDSA* provision was grossly disproportionate and violated section 12 of the *Charter* and he sentenced Ms Sharma to eighteen-months' imprisonment. She appealed the decision seeking a twenty-four-month conditional sentence instead.

[53] The Ontario Court of Appeal (ONCA) held that the provisions breached section 15 of the *Charter* as it impeded the operation of paragraph 718.2(e) of the *Criminal Code*. Paragraph 718.2(e) requires judges to review reasonable alternatives to imprisonment for all offenders, paying particular attention to the circumstances of Indigenous offenders. In restricting the availability of conditional sentences, the ONCA found that the impugned provisions overruled a remedial provision and exacerbated the systemic disadvantages that Indigenous offenders face.

[54] The ONCA also held that the provisions were overbroad and violated section 7 of the *Charter* as the provisions captured those offenders whose conduct did not fall into that category. The issues on appeal to the SCC were whether the impugned provisions breached sections 7 and 15 of the *Charter*.

[55] The SCC noted that paragraph 718.2(e) of the *Criminal Code* simply directs judges to consider Indigenous offenders' circumstances and is not a guarantee nor does it provide a presumption against imprisonment. The slim majority revealed on one hand, its reluctance to analyze the constitutionality of sentencing laws to provide trial judges with discretion to craft fit sentences, by reinforcing deference to Parliament. However, for the purposes of the *Sharma*'s relevance to the case at bar, the majority refused to elevate the legislative provision set out at paragraph 718.2(e) of the *Criminal Code* to the status of a constitutional imperative. Interestingly, the dissent did find reconciliation to be a constitutional imperative.

[56] In this case, unlike the situation in *Sharma*, there are clear principles of fundamental justice with respect to young persons that must be respected within the justice systems so there are clearly established constitutional imperatives that must be adhered to. In *Sharma*, there was only a statutory provision, which is not akin to a constitutional right. For this reason, I find that the appropriate analysis to be conducted is that of a section 7 analysis as established in *D.B.*

[57] The arguments raised by the applicant relate to the above referenced *NDA* provisions, referred to herein and attached in Annex A to this decision. His arguments are summarized as follows:

(a) firstly, the applicant argued that the CSD does not include, in its stated purpose and principles found at sections 203.1 to 203.4 of the *NDA*, any enhanced protections specifically for young persons to presumptively protect their right to privacy, prioritize rehabilitation and reintegration, or establish a presumption against custody;

(b) the applicant also argued that Private J.L., as a young person having been convicted of an offence under the CSD, is now liable to the same maximum – and mandatory minimum – sentence established in the offence as an adult, which includes, in some cases, imprisonment for life. In this case, the applicant has been found guilty of sexual assault under

section 271 of the *Criminal Code* and is liable to be sentenced to up to ten years' imprisonment;

(c) in addition, under the *NDA* sentencing regime, the imposition of DNA orders is mandatory when a person is found guilty of a primary designated offence, which includes sexual assault, pursuant to section 196.14 of the *NDA*; and

(d) it is mandatory that the Court must also impose an order to comply with the *SOIRA* (*Sexual Offender Information Registry Act*) pursuant to subsection 227.01(1) of the *NDA* for a period of twenty years.

By subjecting young persons to sentencing provisions of the CSD, are sections 139, 196.14, 203.1-203.4, 220 and 227.01 of the *NDA* inconsistent with the principles of fundamental justice?

[58] In its recent decision in *R. v. Parranto*, 2021 SCC 46, the SCC described sentencing as:

> [O]ne of the most delicate stages of the criminal justice process. It requires judges to consider and balance a multiplicity of factors and it remains a discretionary exercise.

[59] When crafting a sentence, military judges must first consider the fundamental purpose and goals of sentencing. The objectives and principles of sentencing in the military justice system are codified at sections 203.1 to 203.3 of the *NDA*. They are consistent with Canadian values and are specifically modelled upon similar provisions found in the *Criminal Code*, but are adapted to the special circumstances associated with the military service of the armed forces and its military members.

[60] Subsection 203.1(1) of the *NDA* establishes that, "the fundamental purpose of sentencing is to maintain the discipline, efficiency and morale of the Canadian Forces." Subsection 203.1(2) clarifies that, "the fundamental purpose of sentencing is to be achieved by imposing just punishments that have one or more of [a list of nine] objectives which include: assisting in rehabilitating offenders and reintegrating them into military service. [Emphasis added.] Section 203.2 states that it is the fundamental principle of sentencing that, "a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender." It is important to note that a key principle of youth sentencing is that a sentence must be proportionate to the seriousness of the offence and the degree of responsibility of the young person. In other words, the sentence must consider the maturity of the young person and the conditions under which the crime was committed. In short, the fundamental principle of sentence is identical for both the military and youth justice sentencing processes.

[61] Section 203.3 stipulates that, "sentences must be imposed in accordance with the following other principles" which include that, "a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances" and "an offender should not be deprived of liberty by imprisonment or

detention if less restrictive punishments may be appropriate in the circumstances." It further clarifies that, "all available punishments, other than imprisonment and detention, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders." Further, "a sentence should be the least severe sentence required to maintain the discipline, efficiency and morale of the Canadian Forces."

[62] When examining the contours of a principle of fundamental justice, both individual and societal interests within section 7 of the *Charter* must be considered. In enacting the military justice system, it was entirely appropriate for Parliament to consider the competing interests, on the one hand of permitting young persons to serve in the CAF while also providing an exception whereby they are subjected to the military justice system, when necessary, to maintain the discipline, efficiency, and morale of the CAF. This balancing is a legitimate exercise of Parliament's authority to determine how best to penalize criminal activity, a power this Court has recognized as broad and discretionary.

[63] The military exception to the *YCJA* has its roots in Canadian history and is directly linked to this country's military heritage. As an example, civilian courts and Canadian society have long recognized the role of the CAF in allowing underage persons to enlist and receive subsidized education and apprentice training. The programs were originally designed to provide young persons with the opportunity to learn valuable skills and discipline, while also helping to shape their lives in a positive way.

[64] Consequently, long before the SCC decision in *D.B.* was released, it was well recognized by the military chain of command and its senior leadership that young members serving within the CAF are still in the process of multidimensional development in terms of their physical and mental growth. They are still developing their sense of identity, judgement, and decision-making skills and when serving within the military community, it is recognized that they are more susceptible to peer pressure, impulsivity, and other risk-taking behaviors.

[65] Hence, the civilian justice system recognized the important role that the CAF played in reforming and rehabilitating young persons and accordingly, an exception was built into the *YCJA* recognizing that young persons who engage in military service may be tried in the military justice system rather than the *YCJA*.

[66] One of the most significant benefits, that still provides the foundation of today's recruiting programs of young persons is the opportunity for young persons to receive subsidized education and other training opportunities. Many of the young persons enrolling into these programs would not have access to this type of education or training otherwise, and the subsidized education programs and other reserve training programs allow them to learn valuable skills that serve them well throughout their lives. The discipline and focus required for young persons to succeed in these programs helps to

instill important values like perseverance, hard work, and determination, all of which are crucial for success in any field.

[67] Another important benefit of welcoming young persons into the CAF for subsidized education and summer training is the sense of community and camaraderie that it provides to them. These opportunities provide young persons with a sense of belonging and purpose that they may not have had otherwise. The strict discipline and structured routine of the programs help to keep young persons focused and on track, which is especially important during a time when young people are historically struggling to find their way in the world. And while these programs may not be perfect, they still play an important role in the lives of many young Canadians.

[68] I agree with the submission of the respondent that the decision to deny CAF members who are also young persons an automatic right to a trial before a youth court as defined in the *YCJA*, Parliament did not automatically offend young person's section 7 *Charter* rights. Rather, parliament responded to the fact that those young persons who choose to serve in the CAF will be disciplined in accordance with the military justice system.

[69] However, the exception for young persons serving in the military to be tried under the military justice system predates the SCC decision in *D.B.* which recognized that it is a principle of fundamental justice that young persons be treated with a presumption of diminished moral blameworthiness. In *D.B.*, the SCC identified the principles of fundamental justice that apply to young persons which led to significant amendments within the *YCJA.* However, the *NDA* has not made any changes to its own military justice system to institutionally recognize the principles of fundamental justice that apply to young persons.

[70] There was no evidence before me to suggest that any of the constitutional principles flowing from *D.B.* were either studied or considered for implementation within the sentencing regime of the military justice system.

[71] It is the position of the respondent that by providing for this legislative exception, Parliament intended for young persons serving in the CAF to be treated differently than those young persons appearing before youth court and that the same constitutional principles do not apply in the exact same manner as set out in the *YCJA*.

[72] It is also his position that these principles must be incorporated into the sentencing process of military judges through the common law. Common law is that body of law derived from judicial decisions such as *D.B.* rendered by the SCC rather than from statutes or legislation. When there is a statutory void, or a situation where there is no applicable statute or regulation that directly addresses a principle of fundamental justice, military judges apply the common law to fill the gap in the law and to guide itself in resolving the issue.

[73] Precedent refers to previous court decisions that have established legal principles or rules to be applied in the future. Legal reasoning involves analyzing the facts of a case and applying legal principles and rules to come to a decision.

[74] I acknowledge the position of the respondent that although the *YCJA* has incorporated the recognized fundamental principles of justice into its own legislation that they do not need to be incorporated into the *NDA* to find application. In fact, court martial jurisprudence is filled with examples where military judges have relied upon the common law to fill gaps in the statutory regime in the *NDA*. The use of the common law to fill a void in the *NDA* is particularly relevant where new legal issues arise that have not yet been addressed within the *NDA*.

[75] However, it is important to note, that the use of the common law to fill a statutory void is not unlimited. In fact, military judges will generally only rely on common law principles where the *NDA* is silent on the issue or where the use of the common law is consistent with the principles of statutory interpretation and the rule of law.

[76] There was consensus between the parties that the principles of fundamental justice apply to young persons serving in Canada's military in the same way that they apply to all individuals. The constitutional principles of fundamental justice require that young persons who come into conflict with the law are treated fairly and justly even when tried within the military justice system. Although the *NDA* is not expected to mirror the exact procedural protections set out in the *YCJA*, the substantive principles of fundamental justice must still be implemented, or their delivery must be achievable in the *NDA*.

Comparative analysis

[77] I have always stated that there is no better way to distinguish substantial violations of rights than applying them through the prism of the facts before the Court. In this case, Private J.L. was found guilty of sexual assault contrary to section 271 of the *Criminal Code* as well as disgraceful conduct, contrary to section 93 of the *NDA*.

[78] Under the CSD, the conviction for sexual assault exposes Private J.L. to a maximum period of imprisonment for ten years (see sections 139 of *NDA* and paragraph 271(a) of the *Criminal Code*). Whereas if he had been tried under the *YCJA*, he could only receive any of the non-custodial punishments set out at section 42 of the *YCJA* which would include a reprimand; absolute and conditional discharge; fine not exceeding $1,000; community service; prohibition order; probation; intensive support and supervision program; non-residential program order; or any other conditions.

[79] To be clear, under the *YCJA*, Private J.L. would not be eligible to receive a punishment of imprisonment as that punishment does not technically exist. Rather the *YCJA* offers a custody and supervision order (see subsection 42(2) of the *YCJA*) which, on the facts of this case would not apply to him because he does not meet the necessary

conditions. Amongst a list of circumstances, a custody and supervision order is only possible if the offender would have committed a "violent offence" which is defined under the *YCJA* as causing bodily harm, attempt or threat to commit bodily harm, endangering life or safety. Even if the facts were serious enough to demand such a punishment, the Court needs to have considered all reasonable alternatives to custody.

[80] It is important to note that a custody and supervision order is very different than a term of imprisonment as it does not require two years in custody, as a custody order is necessarily broken into two periods with the first period served in custody and the second period, half as long, served under supervision in the community. In any event the total of the two periods cannot exceed two years (see paragraph 42(2)(n) of the *YCJA*).

[81] The applicant argued that:

> "CSD does not contain presumptive lower youth sentences for young persons; it only contains adult sentences. The scale of punishments at section 139 NDA applies to all. It does not limit the maximum punishments established for service offences in the CSD that a young person is liable to receive. Nor does it limit the mandatory minimum sentence of imprisonment associated with certain CC offences which must be imposed if a young person is found guilty of such an offence. If sentenced to a term of imprisonment, a young person must be sent to an adult penitentiary or adult civil prison. A finding of guilty at court martial will lead to a criminal record unless the offender is within the parameters of section 249.27 NDA or convinces the court to direct an absolute discharge. Sentences and sentencing options available in the CSD under the scale of punishments are not specifically geared towards recognizing the diminished moral culpability of young persons, and rehabilitating and reintegrating young persons. For example, the CSD does not provide for the availability of community service, probation, any type of supervision program order or rehabilitative custody, or mandatory and optional pre-sentence reports. *The fact that there is a range of non-custodial sentences in the NDA, in and of itself, does not mean that they take into consideration the presumption of diminished moral culpability of young persons*. These non-custodial sentences do not specifically seek to rehabilitate young persons."
> [Footnotes removed.]

[82] Further, he argued that:

> "The scale of punishments at section 139 NDA, the committal provisions at s. 220 NDA, and the CSD sentencing scheme generally, presumptively expose young persons to adult sentences, mandatory minimum sentences of imprisonment, adult prisons and a criminal record. For these reasons, they are inconsistent with the principles of fundamental justice that young

> persons should be dealt with separately from adults and are entitled to a presumption of diminished moral culpability, which includes their right to privacy, a presumption of lower youth sentences and a presumption against custody."

[83] Section 139 of the *NDA* sets out the scale of punishments that may be imposed in respect of service offences. It reads as follows:

> **Scale of punishments**
>
> **139 (1)** The following punishments may be imposed in respect of service offences and each of those punishments is a punishment less than every punishment preceding it:
>
> **(a)** imprisonment for life;
>
> **(b)** imprisonment for two years or more;
>
> **(c)** dismissal with disgrace from Her Majesty's service;
>
> **(d)** imprisonment for less than two years;
>
> **(e)** dismissal from Her Majesty's service;
>
> **(f)** detention;
>
> **(g)** reduction in rank;
>
> **(h)** forfeiture of seniority;
>
> **(i)** severe reprimand;
>
> **(j)** reprimand;
>
> **(k)** fine; and
>
> **(l)** minor punishments.
>
> **Definition of *less punishment***
>
> **(2)** Where a punishment for an offence is specified by the Code of Service Discipline and it is further provided in the alternative that on conviction the offender is liable to less punishment, the expression ***less punishment*** means any one or more of the punishments lower in the scale of punishments than the specified punishment.

[84] In short, section 139 provides for a full range of punishments from imprisonment for life, imprisonment for more than two years and imprisonment for less than two years as possible sentences decreasing in severity to minor punishments. Section 139 applies to all CAF members, including young persons.

[85] I note that the accused argued that section 139 provides a non-rebuttable presumption of adult sentences, but I do not agree. It does not automatically follow that the presumptive provisions that were scrutinized in *D.B.* are directly comparable to those

set out in the *NDA*, as the young offender provisions were set within an otherwise exclusive *YCJA* designed strictly for ensuring young persons are treated fairly. It was in this context that they were labelled presumptive as they are an exception to the sentencing regime established within the *YCJA*. In the *NDA*, this is not the case and section 139 must be viewed in the context of the whole of the *NDA* itself, its purpose and Parliament's intent when it enacted the military exception.

[86] Section 139 provides a list of available punishments for any soldier, sailor, or aviator, regardless of age who is tried, convicted, and sentenced within the military justice system. Importantly, section 139 does not work alone. It is simply a scale of punishments available to be imposed in respect of military members convicted of committing service offences. It does not dictate the quantum or severity of the punishments that military judges must impose and yet, it is the quantum and severity of the punishments where the constitutional principles are nested. Military judges must use precedents, common law, and *NDA* guidelines to decide on the quantum and severity of an appropriate sentence based on the punishments available from the list set out at section 139.

[87] Although section 139 of the *NDA* does not list all the same sanctions for young people as the *YCJA*, that does not make it constitutionally questionable on its own. The punishments set out in section 139 are meant to instill discipline in the military and are unique to that environment.

[88] Due to their unique requirements, the civilian criminal justice system has a dual system of justice with the *YCJA* specifically established to ensure that the rights of young persons are properly protected, and to ensure they are treated fairly according to the law. In 1984 when Parliament first set out the military exception in the *Young Offender's Act*, the relevant statute that preceded the *YCJA*, it knew full well that the military justice system was unique and had only one scale of punishments which were specifically designed to instill discipline in serving military members. Similarly, when the *YCJA* was enacted in 2002, section 139 in its current form existed and Parliament legislated subsection 14(1) recognizing the military exception permitting young persons to be tried within the military justice system.

[89] In my previous conclusion in *J.L1*, I found that even though young people can be tried in the military justice system, which offers more procedural protection than civilian courts, it does not mean that they have had their constitutional rights violated or they have fallen short of the level of protection they deserve simply by receiving the same treatment as other military members. The military and civilian justice systems are distinct from one another. I also determined that based on the nature of courts martial being *ad hoc*, accused military members are almost always treated separately and overall military members receive more extensive rights when they are appearing at court martial than young people receive under the *YCJA*.

[90] The applicant also argued that since the CSD does not provide a military judge with the availability of community service, probation orders, supervision program order or rehabilitative custody and mandatory and optional pre-sentence reports that it falls

short. Further, it argued that there is no designation of youth workers in cases of custody to plan for reintegration and no procedural options in lieu of judicial proceedings.

[91] I want to point to some comments I made at paragraphs 133 to 135 of *J.L.1* that explain how the justice system's purpose can be achieved in different ways while still complying with the same constitutional principles. It is essential to note that unlike the *YCJA*, the military court martial system is not responsible for overseeing an offender's rehabilitation and their return to military duty. The principles of fundamental justice do not require that the Court sanction an offender's rehabilitation, nor does it make it a duty that only court-appointed officials or probation officers oversee it. The following paragraphs describe how these principles are achieved within the military justice system:

> [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.

[92] It is important to note that rehabilitating any military member is a shared responsibility within the military and includes Private J.L.'s chain of command. When the member is young and lower in rank, there is a heightened level of responsibility on the chain of command. The military justice system and the divisional system are designed to work together to help offenders such as Private J.L. successfully rehabilitate and return

to military service or his community. All the available supports reinforce the fact that Private J.L. has a better chance of successful rehabilitation under the military justice system than the *YCJA*, as his chain of command has more leverage and influence over him than a probation officer has in the *YCJA*.

[93] It may well be that the seriousness of an offence and the circumstances of the offender will justify the imposition of punishments higher in the scale of punishments notwithstanding their age. This is also true within the *YCJA*.

[94] The applicant also argued that section 220 of the *NDA* requires military judges to send young persons to adult penitentiaries if imprisonment was imposed as a punishment. However, a review of section 220 of the *NDA* does not suggest that is explicitly so. Absent additional evidence that a youth custody facility would not accept a committal order, I am unable to draw any conclusion on this issue.

[95] Given that both parties agree that the military justice system must provide young persons with a presumption of diminished moral culpability, the fundamental issue that surfaces is whether the *NDA* sentencing construct permits a military judge to give effect to a young member's fundamental rights on sentencing.

[96] The respondent argued that military judges are bound by common law and judicial precedent, and it is incumbent upon military judges to sentence young persons in a manner consistent with the principles of fundamental justice. In cases where a trial judge has discretion and flexibility to give effect to a young member's rights by imposing a sentence that meets the constitutional standard, this may be a valid position.

[97] Sentencing is a discretionary exercise that requires judges to consider and balance many factors which includes following the statutory guidance as set out in the *NDA*, the common law, the operation of judicial precedent together with the guidance provided by the court martial appeal court.

[98] Although none of the objectives set out at subsection 203.1(2) of the *NDA* prioritize any objectives, common law, and precedent guide trial judges in sentencing. Just as military judges are required to prioritize denunciation and deterrence when the offense involves the abuse of a person under eighteen (see *NDA* section 203.4), rehabilitation and reintegration are to be given priority when sentencing young people. The court martial of *R. v. S.O.M*, 2011 CM 2007 shows that military judges have a responsibility to sentence young people fairly.

[99] Section 203.4 of the *NDA* was added in 2013 and amended under Bill C-15 in the 2019 Amendments to the *NDA*. However, notably, efforts were not made to establish a similar provision prioritizing sentencing objectives for young offenders leaving a gap in the *NDA* as there is no codified presumption of lower sentences for young offenders. Nevertheless, military judges are guided by common law and must prioritize rehabilitation and reintegration for young offenders when crafting a sentence.

[100] The applicant argued the fact that paragraph 203.3(b) of the *NDA* allows military judges to consider the specialized rights and the young age of an offender in imposing a sentence is insufficient. I agree. Although military judges retain wide latitude in imposing a sentence and can ensure that it imposes the lesser and most suitable minor punishments such as extra work and drill, confinement to barracks, etc., the legislator imposes other protocols that are designed to remove the discretion of military judges and must be adhered to. These specific provisions frustrate the judicial pathway required to ensure that a young person's privacy rights are sufficiently protected.

[101] The *NDA* allows judges to adjust a sentence based on factors like the offender and the crime, but military judges must still comply with all the mandatory provisions in the *NDA*. When it comes to sentencing young members, the *NDA*'s mandatory provisions, which I will discuss, conflict with the common law principles that guide judges in making fair decisions with respect to young persons. This makes it difficult to sentence a young person fairly in a case such as this where they have been found guilty of sexual assault.

[102] As I wrote in *J.L.1*, the *Criminal Code* offence of sexual assault for which the applicant has been found guilty exposes the shortcomings with the *NDA* sentencing regime with respect to young persons. As an example, the *NDA* mandates that military judges impose a DNA order (see sections 196.11 and 196.14 of the *NDA*). There is no discretion. These mandatory orders attract concern on several levels as they outwardly frustrate the ability to afford young persons with enhanced protection which includes the protection of their privacy rights. These provisions are designed and implemented by Parliament specifically to remove the discretion of military judges in the sentencing process.

[103] I find that the required tangibles such as the protection of the privacy rights of young persons as established under the principles of fundamental justice are not always achievable for young persons within the sentencing regime of the *NDA*.

[104] It is the applicant's position that the CSD's sentencing scheme does not provide any enhanced protections to presumptively protect a young persons' right to privacy as required under the law. In *D.B.*, the SCC declared that the protection of privacy of young persons is inextricably connected to the rehabilitation of youth, and it went on to prioritize it as a principle of fundamental justice with respect to youth. The applicant argued that the following three areas are particularly problematic at the sentencing stage:

(a) finding of guilt on sexual assault leads to a criminal record (as compared to section 82 and subsection 119(2) of the *YCJA*);

(b) DNA orders are mandatory under the *NDA* whereas they are discretionary under the *YCJA* only being issued where the public interest outweighs the offender's privacy right; and

(c) *SOIRA* orders for twenty years are mandatory when a young person is sentenced for a designated offence.

[105] The Court proceeded to review each of the above arguments by the applicant in depth.

Criminal record

[106] The most concerning aspect arising from the facts of the case at hand is that Private J.L.'s convictions will automatically lead to a criminal record for him since the circumstances set out at section 249.27 of the *NDA* mandates it. There is no discretion and I find that the criminal record that follows is neither fair nor justifiable under the principles of fundamental justice which are owed to young persons. It runs directly contrary to a young person's rehabilitation and reintegration back into society.

[107] Private J.L.'s criminal record would differ significantly depending on whether he is convicted under the *YCJA* or the CSD. Under the *YCJA*, the length of his criminal record would be determined by the sentence imposed, which is typically different. The *YCJA* refers to "access period" which is the period during which a record is available, and after that, it will be sealed or destroyed. In the worst-case scenario, youth records expire after three years if the Crown proceeded summarily or five years if the Crown had proceeded with an indictment. A request for the record cannot be disclosed before this limit except in cases where the individual committed a serious offence and was sentenced as an adult.

[108] However, under the military justice system, a criminal record for the same offence of sexual assault is automatically considered a conviction for an indictable offence and the record is registered for life unless a record suspension is granted. Private J.L. would need to wait ten years before he could apply for a suspension of his record. Even if it were for a minor offence, his record would not disappear automatically.

[109] This specific jeopardy flowing from having a criminal record applies to Private J.L. if he is convicted of the offences and a military judge is not permitted to consider his age as a young person nor give effect to the principles of fundamental justice to which he is entitled.

Mandatory DNA orders

[110] The applicant argued that:

> "A DNA order pursuant to section 196.14(1) NDA is mandatory when a person is found guilty of a primary designated offence under the CSD, which includes sexual assault. A DNA order engages the privacy rights of offenders. There are no provisions giving military judges discretion to

> only issue such orders in respect of young persons in cases where the public interest outweighs the offender's privacy interests. By being mandatory and not imposing a burden on prosecution to prove why such an order should be imposed, this provision deprives young persons of the presumption of diminished moral culpability, which includes enhanced procedural protections to ensure that young persons' right to privacy is protected, and is therefore inconsistent with the principles of fundamental justice. A DNA order, while not a sentence, is a "serious consequence of conviction", attracting the protections afforded to young persons in *D.B.* Indeed, the principle of presumed diminished moral culpability identified in *D.B.* applies beyond the sentence, to the protection of privacy at large and publication bans, the loss of which were found to render a sentence significantly more severe. "[P]rotecting the privacy interests of young persons serves rehabilitative objectives and thereby contributes to the long-term protection of society"."
> [Footnotes removed.]

[111] The principles of fundamental justice require enhanced protections to ensure a young person's right to privacy is protected. A DNA order clearly engages the privacy rights of offenders (see *R. v. R.C.,* 2005 SCC 61 at paragraph 39) and the Court's have found that, "[t]here is undoubtedly the highest level of personal and private information contained in an individual's DNA" (see *R. v. Rodgers,* 2006 SCC 15 at paragraphs 40 and 42).

[112] Firstly, the process of obtaining a DNA sample is by its very nature an intrusion on their bodily autonomy and personal privacy which is a recognized right that is deserving of special protection for young persons. The collection and storage of DNA samples can have long-lasting consequences for young offenders as their DNA may remain in the database for the prescribed period.

[113] It has been recognized that although DNA warrants are useful, the imposition of such warrants for young offenders must be carefully considered and balanced against the need to protect public safety. Based on subsection 196.14(1) of the *NDA*, as a military judge, I have no discretion as to whether to make such a DNA order. I also find that it would be improper for a judge to read in discretion into the *NDA* because this directly contradicts Parliament's intention in removing discretion. (See *Ndhlovu* paragraph 138).

SOIRA orders

[114] With respect to the *SOIRA* orders, the applicant argued as follows:

> "An order to comply with the SOIRA for 20 years, pursuant section 227.01(1) NDA, is also mandatory when a person is found guilty of a sexual assault under the CSD, the purpose of which is to make information on convicted sexual offenders available to assist police in investigating

> other offences. Such orders also engage the privacy rights of offenders. By requiring SOIRA orders to be imposed on young persons, section 227.01(1) is also inconsistent with these principles of fundamental justice."

[115] 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*, there is discretion, and 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 twenty years (see *NDA* subsection 227.02(2) at paragraph (2); *R. v. Dixon*, 2005 CMAC 2 at paragraph 23; and *R. v. Nguyen*, 2011 CM 4020 at paragraph 25).

[116] Interestingly, in *Ndhlovu*, the SCC held that mandatory *SOIRA* orders, found at section 490.012 and subsection 490.013(2.1) of the *Criminal Code*, which are in substance identical to subsections 227.01(1) and 227.02(2.1) of the *NDA*, do violate section 7 of the *Charter* and cannot be saved under section 1. In short, the finding in *Ndhlovu* is applicable *mutatis mutandis* to the *NDA* provisions and accordingly, the suspension in effect applies equally to section 227.01 of the *NDA*.

[117] After declaring the section unconstitutional, the SCC suspended the declaration for one year to allow Parliament to remedy the legislation. However, in doing so, they allowed the exemption that had been granted to Mr Ndhlovu to stand (see paragraph 143). In practical terms, on application from offenders, the SCC's decision in *Ndhlovu* provides trial judges with discretion to determine whether, on the facts of the case before them, the offender's registration in the *SOIRA* violates their section 7 *Charter* rights. It is not automatic. It is noteworthy that in the absence of a notice of constitutional question, trial judges have no discretion with respect to the issuance of a *SOIRA* order.

[118] Since *Ndhlovu*, with respect to *SOIRA* orders, the onus in establishing that a provision is overbroad and in violation of section 7 of the *Charter* rests with the offender. Considering the SCC decision in *Ndhlovu*, only upon application do military judges now have discretion to consider the individual facts of the case before them prior to imposing a *SOIRA* order. However, this same discretion does not exist for the other mandatory provisions that have been enacted into the *NDA* which work in tandem with *Criminal Code* offences.

[119] The applicant also argued that the fact that the convictions and the fact scenarios before the Court do not warrant imprisonment is irrelevant as courts are not limited to contraventions of the claimant's rights where the constitutionality of a law is challenged under subsection 52(1). A law may have unconstitutional effects on third parties, and it is the nature of the law that is the issue (see paragraph 51 of *R. v. Nur*, 2015 SCC 15).

[120] Consequently, a court may look at other reasonably foreseeable situations which could flow from the operation of the provisions such as a scenario where a young person could be found guilty of a *Criminal Code* offence that includes a mandatory minimum sentence of imprisonment. Based on the construct of the sentencing regime, a young person convicted of these offences at court martial would automatically be subjected to a mandatory period of imprisonment which is in direct violation of the principle of fundamental justice that young persons should not be subjected to imprisonment.

[121] Although the sentencing construct at large provides military judges with significant guidance and discretion, the crux of the problem lies in the mandatory nature of those *NDA* provisions which directly obstruct the ability of military judges to give effect to the fact that young persons are presumed to have less moral blameworthiness and culpability than adults.

[122] Consequently, with respect to the case at bar, I find that the totality of the sentencing regime set out within the military justice system is inconsistent with the presumption of diminished moral culpability for young persons, a principle of fundamental justice.

Question 2: Since Question 1 was answered affirmatively, are those sentencing provisions justified under the first section of the Charter?

[123] It is well accepted in law that section 7 *Charter* violations are rarely salvageable by section 1 of the *Charter* except in exceptional circumstances such as natural disasters, outbreak of war, epidemics, and the like (see *D.B.* at paragraph 89). Given that the military justice system is specifically designed to ensure that the CAF has a disciplined military force to respond to this country's exceptional circumstances, it is important to consider this. However, the respondent did not provide any evidence with respect to section 1 arguments.

[124] The important distinction is that in *J.L1,* I did not find that being tried under the military justice system to be the essence of the problem, but rather, I find that disconnect lies at the sentencing stage with respect to those provisions that do not permit young persons to be provided the presumption of diminished moral culpability to which they are owed.

[125] Further, there is no evidence before me to establish a rational connection between the CSD's sentencing provisions, which do not entitle young persons to the full presumption of diminished moral culpability and the objectives of the sentencing scheme which was explained earlier.

[126] As a result, I find that the sentencing scheme of the military justice system for criminal offences tried at courts martial to be inconsistent with section 7 of the *Charter* and are not saved by section 1.

Question 3: Lastly, since the Court has found a violation of a young member's Charter rights that is not justified, what is the appropriate remedy?

[127] Now that I have determined the extent of the law's inconsistency with the *Charter*, the next step is to determine whether a tailored remedy would be appropriate (such as reading down, reading in, or severance), rather than a declaration of invalidity applying to the whole of the challenged law.

[128] The SCC's leading decision on remedies for laws that violate the *Charter* is *Schachter v. Canada*, 1992] 2 S.C.R. 679, which provides helpful guidance on how to craft a responsive and effective remedy for unconstitutional laws.

[129] The first step in crafting an appropriate remedy is determining the extent of the legislation's inconsistency with the identified principles of fundamental justice. Having a good understanding of the nature and extent of the identified violations lays the footing for the analysis. This is necessary as the scope of the remedy to be awarded should reflect, at a minimum, the degree of the breach.

[130] Aside from *SOIRA* orders where there is now some discretion for trial judges upon an application of an offender, I find that there is no evidence before me to suggest that those other mandatory provisions that remove the discretion of military judges to give effect to the principles of fundamental justice for young persons are not in conflict with the *Charter* in the context of sentencing adult offenders. Consequently, the imposition of a remedy that involves these sections must be limited to addressing the effect on young offenders. In crafting a remedy, I must ensure that it remains within this scope.

[131] The applicant seeks that this Court read down section 60 of the *NDA* to exclude young persons from the CSD and refuse to apply the CSD's sentencing scheme in the case at bar.

[132] In substance, section 60 of the *NDA* establishes broad jurisdiction over all CAF members, which includes those members of the reserve force such as Private J.L., who is also a young person serving and present on a defence establishment at the time of the offence. Paragraph 60(1)(c) of the *NDA*, that relates to members of the reserve force 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,
>
> **(ii)** in uniform,

> **(iii)** on duty,
>
> **(iv)** [Repealed, 1998, c. 35, s. 19]
>
> **(v)** called out under Part VI in aid of the civil power,
>
> **(vi)** called out on service,
>
> **(vii)** placed on active service,
>
> **(viii)** in or on any vessel, vehicle or aircraft of the Canadian Forces or in or on any defence establishment or work for defence,
>
> **(ix)** serving with any unit or other element of the regular force or the special force, or
>
> **(x)** present, whether in uniform or not, at any drill or training of a unit or other element of the Canadian Forces;

[133] During oral submissions, I raised concern with the applicant's originally proposed remedy given that the CSD is a two-tier system of discipline that captures a wide range of conduct, the majority of which is non-criminal. I suggested that his originally proposed remedy was too broad and went too far. As explained earlier in this decision, the CSD also includes the newly enacted summary infraction system where very minor breaches of discipline are addressed and arguably it is young persons who benefit most from this form of discipline.

[134] A remedy of reading down requires a court martial to limit the reach by only declaring those provisions to be of no force and effect to a precisely defined extent. Reading down is an appropriate remedy when "the offending portion of a statute can be defined in a limited manner" (see *Schachter*, at page 697). In other words, the reading down means that the action to adjust the law is limited to the extent of the inconsistency with only the offending portion being declared to be of no force or effect.

[135] With respect to reading down section 60 of the *NDA*, the applicant recommends that the Court only read it down to the extent that the provision subjects young persons to be charged, tried, and sentenced at courts martial for service offences and that it be limited to this inconsistency. He admitted that reading down the law cannot take more out of the law than is required to make it constitutional.

[136] Alternatively, the applicant argued that the Court could read down subsection 161(1) of the *NDA* to exclude young persons from being charged with a service offence. Subsection 161(1) reads as follows, "Proceedings against a person who is alleged to have committed a service offence or a service infraction are commenced by the laying of a charge in accordance with regulations made by the Governor in Council." For reasons that follow, I do not find the second option acceptable as it is also too broad and runs directly against Parliament's intent in proposing the military exception.

[137] The second step of crafting a remedy is paying particular attention to its design to ensure that it does not intrude on the legislative sphere.

[138] I find that the proposed approach by the applicant is still too broad. In considering remedies, a trial judge must be particularly sensitive to the fact that in legislating a military exception into the *YCJA*, Parliament was deliberate and fully intended for young persons serving in the CAF to be subjected to the CSD. I highlight again that Parliament purposefully legislated this exception, not once, but at least twice in two separate pieces of legislation: *Young Offender's Act* and *YCJA*.

[139] I find that the legislative intent of Parliament was clear, and any remedy being proposed must respect this. However, I am also conscious of the fact that the principles of fundamental justice that were identified in *D.B.*, followed the imposition of the legislative exception. However, I also find Parliament's choice to provide a military exception for young persons to be tried under the military justice system should not be owed complete deference if the operation of some of the provisions run contrary to the constitutional principles. I also find that Parliament would expect that the fundamental rights of young persons be appropriately respected and incorporated into the military justice system.

[140] I am acutely aware that there are many uniquely military service offences that are tried by court martial which do not attract the same constitutional concerns that this case at bar has. As an example, military offences contrary to the *NDA* sections: 85, 86, 87, 89, 90, 91, 95, 96, 97, 99, 101, 101.1, 102, 103, 108, 109, 112, 116, 117, 118, 118.1, 120, 121, 122, 123, 126 or 129 do not attract a criminal record unless the sanctioned conduct attracts a very significant punishment or fine. I estimate that based upon past court martial statistics, with the ability to try young persons for summary infractions as well as these offences, the reading down would account for close to ninety-nine per cent of possible cases against young persons.

[141] I find it necessary to read down section 60 of the *NDA*, but only to the extent that the provision subjects young persons to be charged, tried, and sentenced at courts martial for *Criminal Code* offences and those few *NDA* offences that are not set out at paragraph 249.27(1)(a) of the *NDA* and that this reading down must be limited to this inconsistency only.

[142] I am aware that in *J.L.1*, I found that the procedural aspects of the trial were *Charter* compliant, but now, considering the identified problems with the sentencing provisions, I may now read section 60 down prospectively to ensure that other young persons do not find themselves in the same situation on sentencing.

[143] With respect to charges being pursued against young persons, until the deficiencies in the sentencing regime are appropriately corrected to protect a young person's rights, I find that section 60 of the *NDA* only provides jurisdiction to try young persons for summary infractions and those strictly military service offences identified in paragraph 249.27(1)(a) of the *NDA.* By limiting the scope of the jurisdiction set out at

section 60, it limits the violations of a young person's rights that flow from the violation of their privacy interests associated with the mandatory imposition of DNA warrants, *SOIRA* orders and criminal records. Similarly, given that *Criminal Code* offences could not be tried until the shortcomings are rectified, there would be no direct conflict with mandatory minimum penalties that might flow from some of the *Criminal Code* convictions.

Personal remedy

[144] Given that Private J.L. must be sentenced under a flawed system that cannot provide him with the necessary sentencing protections, he applied to this Court for a personal remedy under subsection 24(1) of the *Charter*.

[145] His counsel has argued that a remedy of a stay of proceedings is the most appropriate in the circumstances. A review of relevant case law reveals that a court should only consider granting a retroactive personal subsection 24(1) remedy in conjunction with a subsection 52(1) declaration of invalidity when the claimant can demonstrate that the government's conduct was "clearly wrong, in bad faith or an abuse of power" (see *Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick*, 2022 SCC 13 at paragraphs 79-83; *R. v. Demers*, 2004 SCC 46 at paragraph 62; *Vancouver (City) v. Ward*, 2010 SCC 27 at paragraph 39; and *Henry v. British Columbia (Attorney General)*, 2015 SCC 24 at paragraph 42).

[146] Upon my review of *D.B.*, I noted that the trial judge, Lofchik J. allowed the application of the accused with respect to the unconstitutional provisions identified at the sentencing stage, but he did not stay the proceedings, nor did he find the earlier procedures that led to the finding of guilt to be null and void. Rather, the trial judge chose a remedy that was consistent with the principle of fundamental justice, rejecting the reverse onus sentencing provisions and deciding to apply the general provisions set out within the *YCJA* to ensure that the accused received a sentence that was consistent with the presumption of diminished moral culpability as established under the *YCJA*.

[147] In the similar case of *R. v. K.D.T.*, 2006 BCCA 60, "K.D.T. was convicted of manslaughter in the death of Andrew Wright after a trial before a Supreme Court judge and jury, sitting as a youth justice court". At trial, counsel for K.D.T. filed a notice pursuant to the *Constitutional Questions Act*, R.S.B.C. 1996, c. 68, challenging the constitutional validity of subsection 72(2) of the *YCJA* on the basis that it infringed K.D.T.'s rights under section 7 of the *Charter*. On 11 March 2005, the sentencing judge ruled that subsection 72(2) of the *YCJA* was unconstitutional as it violated K.D.T.'s rights under section 7 of the *Charter* by imposing upon him the onus to satisfy the Court of factors showing that he should not be sentenced as an adult. On the same day, the sentencing judge issued oral reasons for sentence in which she sentenced K.D.T. to a youth sentence of twenty months in custody, followed by a period of twelve months' non-custodial supervision. On appeal, the Court found that the reverse onus provision was not unconstitutional and substituted a period of imprisonment rather than the

custodial sentence. The British Columbia Court of Appeal decision was ultimately overturned by the SCC.

[148] What is important in both the above cases was that both young persons were found guilty at the first stage. Notwithstanding the determinations made on the constitutionality of the sentencing provisions, in both the cases, the court never considered a retroactive remedy with respect to the finding, but rather it applied those sentencing provisions appropriate in the circumstances.

[149] I found Private J.L. guilty of the two offences before a court martial that I found was *Charter* compliant. Consequently, instead of formally convicting and sentencing Private J.L., in a sentencing regime that I have declared to be non-*Charter* compliant with respect to him being a young person, I must first consider other remedies that are still available within the *NDA* itself. Before considering the remedies proposed by the applicant, I have a duty to consider whether an absolute discharge is appropriate.

[150] It is important to keep in mind that an absolute discharge is not a punishment, nor a sentence set out at section 139 of the *NDA*. It exists outside the sentencing regime itself and is a tool to be used by military judges when it is considered appropriate. It is an error to consider it simply because Private J.L. is a young offender so I do have to consider the facts in the context of the law.

[151] The fact that I already provided a "finding of guilt" does not preclude the granting of a discharge. A discharge is granted "instead of convicting the accused" and without sentencing or relying upon the sentencing provisions in the *NDA*.

[152] Section 203.8 of the *NDA* provides:

> **Absolute discharge**
>
> **203.8 (1)** If an accused person pleads guilty to or is found guilty of an offence, other than an offence for which a minimum punishment is prescribed by law or an offence punishable by imprisonment for 14 years or for life, the court martial before which the accused appears may, if it considers it to be in the accused person's best interests and not contrary to the public interest, instead of convicting the accused person, direct that they be discharged absolutely.
>
> **Effect of discharge**
>
> **(2)** If a court martial directs that an offender be discharged absolutely of an offence, the offender is deemed not to have been convicted of the offence, except that
>
> **(a)** they may appeal from the determination of guilt as if it were a conviction in respect of the offence;
>
> **(b)** the Minister may appeal from the decision not to convict the offender of the offence as if that decision were a finding of not guilty in respect of the offence; and
>
> **(c)** the offender may plead *autrefois convict* in respect of any subsequent charge relating to the offence.

> **References to section 730 of *Criminal Code***
>
> **(3)** A reference in any Act of Parliament to a discharge under section 730 of the *Criminal Code* is deemed to include an absolute discharge under subsection (1).

[153] In courts martial jurisprudence, the cases of *R. v. Cadieux*, 2019 CM 2019 and *R. v. D'Amico*, 2020 CM 2004 at paragraphs 37 and 38, the Court set out the test that is to be applied by military judges when considering whether an absolute discharge is appropriate. In both *Cadieux* and *D'Amico*, the Court adopted the judicial test set out by the BCCA in *R. v. Fallofield* (1973), 3 C.C.C. (2d) 450 to guide judges in considering whether the imposition of an absolute discharge is appropriate.

[154] At paragraph 21, in *Fallofield*, the BCCA set out the following guidelines for determining when a discharge is appropriate:

> (1) The section may be used in respect of *any* offence other than an offence for which a minimum punishment is prescribed by law or the offence is punishable by imprisonment for 14 years or for life or by death.
>
> (2) The section contemplates the commission of an offence. There is nothing in the language that limits it to a technical or trivial violation.
>
> (3) Of the two conditions precedent to the exercise of the jurisdiction, the first is that the Court must consider that it is in the best interests of the accused that he should be discharged either absolutely or upon condition. If it is not in the best interests of the accused, that, of course, is the end of the matter. If it is decided that it is in the best interests of the accused, then that brings the next consideration into operation.
>
> (4) The second condition precedent is that the Court must consider that a grant of discharge is not contrary to the public interest.
>
> (5) Generally, the first condition would presuppose that the accused is a person of good character, without previous conviction, that it is not necessary to enter a conviction against him in order to deter him from future offences or to rehabilitate him, and that the entry of a conviction against him may have significant adverse repercussions.
>
> (6) In the context of the second condition the public interest in the deterrence of others, while it must be given due weight, does not preclude the judicious use of the discharge provisions.
>
> (7) The powers given by s. 662.1[now section 730(1)] should not be exercised as an alternative to probation or suspended sentence.
>
> (8) Section 662.1 [now section 730(1)] should not be applied routinely to any particular offence. This may result in an apparent lack of uniformity in the application of the discharge provisions. This lack will be more apparent than real and will stem from the differences in the circumstances of cases.
>
> [Emphasis in original]

[155] The first condition requires that a discharge only be granted where it is in the best interests of the accused. This presupposes that the accused is a person of good character, without previous convictions, that it is not necessary to enter a conviction against the accused to deter him from future offences or to rehabilitate him, and that the entry of a conviction against him may have significant adverse repercussions. Private J.L. provided evidence of the problems and obstacles he has faced in his search for full-time employment because he has been found guilty of two offences before the Court. He also told the Court about how his life fell apart when he lost the trust and respect of his family and friends.

[156] He has invested time and energy into demonstrating the necessary commitment to improve himself by attending his required therapy sessions, appointments and fulfilling community service hours. He advised the Court that he has secured full-time employment, albeit seasonal, for the upcoming spring and summer and that it is possible that this company may expand its services to the United States of America. Based on the evidence before the Court, Private J.L. meets this first condition and it is clearly in his best interests for the Court to consider an absolute discharge.

[157] The second condition requires the Court to consider whether the grant of a discharge is in the public interest. In determining this question, the Court must examine the nature of the offence; the prevalence of the offence within the CAF community and whether the circumstances of the offence are something that should be a matter of public record.

[158] I have considered the nature of the charges and the fact that the CAF has been grappling with an existential crisis regarding sexual misconduct. I am aware of my prior decision in *Cadieux* where I found that an absolute discharge was not appropriate considering the ongoing cultural problems within the CAF. However, the facts of the case at bar are much different, and I am obliged to give an absolute discharge full consideration based on its own facts.

[159] It is imperative that complainants feel comfortable bringing forward complaints, that they have them heard, investigated, and tried. However, it is also important that we not conflate all sexual misconduct as being the same. To encourage reporting, the entire system must provide a measured response depending on the nature of the violation on the personal integrity of the victim.

[160] The facts of this case are set out in *J.L.1*. This case was considered a minor sexual assault over the clothes that resulted from the persistent unwanted advances by Private J.L. on another young military member in military barracks. Her victim impact statement was read into the record for the Court.

[161] Considering the facts of this case, if Private J.L. receives a sentence which is disproportionate to the allegations before the Court, it goes against the public interest and in the end discourages reporting. By treating both the victim and Private J.L. himself with compassion and empathy, we send a message to the CAF and society that

we do not simply want victims to report, but we also value rehabilitation for both parties and we are willing to give second chances over punishment and retribution. This can help create a more empathetic and cohesive society, where members are more likely to work together, help and support one another. The offences before the Court involved two young persons, who if they can be rehabilitated and provided proper support and guidance could have long successful careers ahead serving in the CAF.

[162] More importantly, when I place the rehabilitation and reintegration of Private J.L. to the forefront, I find the CAF benefits at large by creating more productive and disciplined serving members and promoting a more compassionate and empathetic military force. I am pleased to see the commitment to and the completion of community service hours by Private J.L. He seems to understand how important it is to be in step with his community and to take the necessary steps to regain the trust that he has lost.

[163] Consequently, I find by directing that Private J.L. be absolutely discharged, it is not simply in his best interests, but it is in the public interest.

[164] Private J.L. you need to be aware that what this means is that you cannot deny the finding of guilt, but you can deny that you have been convicted. You will not have a criminal conviction. So, when you are applying for a job, you should say that you do not have one.

[165] It is important for you to understand that personal discipline in our behaviour is crucial for building healthy relationships and creating a positive environment for ourselves and those around us. When we fail to respect others, we not only hurt them, but we also diminish our own character. I found that you did fail on that one evening and I invite you to take some time to reflect on what exactly you did that was wrong.

[166] However, I want to emphasize that this one mistake you made at seventeen years of age does not define you. You have proven that you have the power to learn and grow from it and use it as a steppingstone towards becoming both a better person and member of the CAF.

[167] You need to take some time to reflect on your actions and identify areas where you can improve. It is never too late to assume responsibility for our actions and to start making positive changes in our behaviour.

[168] Based on the evidence before me, you have demonstrated that you have the potential to become the kind of person who respects and values others and I have faith in your ability to do so moving forward. You have demonstrated that you can, and I must say that since last summer, I have noted a marked improvement. You have a loving relationship and a beautiful child who is now dependent on you. Making the extra effort is important to show those you love that you will always strive to improve yourself and it is also very important if you wish to serve in the CAF in the regular force.

[169] So, I invite you to move forward with humility and a commitment to learning to be the best version of yourself. I believe in you as do the others around you. You have the potential to make a positive impact on the world around you. You are the author of your own change and I wish you the best of luck as you move forward.

FOR THESE REASONS THE COURT:

[170] **GRANTS** the defence's application.

[171] **READS DOWN** section 60 of the *NDA*, to the extent that the provision subjects young persons to be charged, tried, and sentenced at courts martial for *Criminal Code* offences and those few *NDA* offences not set out at paragraph 249.27(1) (a) of the *NDA*.

[172] **DIRECTS** that Private J.L. be discharged absolutely on the two charges before the Court.

Counsel:

Lieutenant Commander P. Desbiens, Defence Counsel Services, Counsel for Private J.L., Accused and Applicant

The Director of Military Prosecutions as represented by Major M. Reede and Lieutenant-Colonel K. Lacharité, Counsel for the Respondent

Annex A
To *R. v. J.L.*, 2023 CM 2010

Sections 60, 139, 196.14, 203.1-203.4, 220 and 227.01 of the NDA

1. Section 60 of the *NDA*, that relates to members of the reserve force reads as follows:

60 (1) The following persons are subject to the Code of Service Discipline:

(a) an officer or non-commissioned member of the regular force;

(b) an officer or non-commissioned member of the special force;

(c) an officer or non-commissioned member of the reserve force when the officer or non-commissioned member is

(i) undergoing drill or training, whether in uniform or not,

(ii) in uniform,

(iii) on duty,

(iv) [Repealed, 1998, c. 35, s. 19]

(v) called out under Part VI in aid of the civil power,

(vi) called out on service,

(vii) placed on active service,

(viii) in or on any vessel, vehicle or aircraft of the Canadian Forces or in or on any defence establishment or work for defence,

(ix) serving with any unit or other element of the regular force or the special force, or

(x) present, whether in uniform or not, at any drill or training of a unit or other element of the Canadian Forces;

(d) subject to such exceptions, adaptations and modifications as the Governor in Council may by regulations prescribe, a person who, pursuant to law or pursuant to an agreement between Canada and the state in whose armed forces the person is serving, is attached or seconded as an officer or non-commissioned member to the Canadian Forces;

(e) a person, not otherwise subject to the Code of Service Discipline, who is serving in the position of an officer or non-commissioned member of any force raised and maintained outside Canada by Her Majesty in right of Canada and commanded by an officer of the Canadian Forces;

(f) a person, not otherwise subject to the Code of Service Discipline, who accompanies any unit or other element of the Canadian Forces that is on service or active service in any place;

(g) subject to such exceptions, adaptations and modifications as the Governor in Council may by regulations prescribe, a person attending an institution established under section 47;

(h) an alleged spy for the enemy;

(i) a person, not otherwise subject to the Code of Service Discipline, who, in respect of any service offence committed or alleged to have been committed by the person, is in civil custody or in service custody; and

(j) a person, not otherwise subject to the Code of Service Discipline, while serving with the Canadian Forces under an engagement with the Minister whereby the person agreed to be subject to that Code.

Continuing liability

(2) Every person subject to the Code of Service Discipline under subsection (1) at the time of the alleged commission by the person of a service offence continues to be liable to be charged, dealt with and tried in respect of that offence under the Code of Service Discipline notwithstanding that the person may have, since the commission of that offence, ceased to be a person described in subsection (1).

Retention of status and rank

(3) Every person who, since allegedly committing a service offence, has ceased to be a person described in subsection (1), shall for the purposes of the Code of Service Discipline be deemed, for the period during which under that Code he is liable to be charged, dealt with and tried, to have the same status and rank that he held immediately before so ceasing to be a person described in subsection (1).

2. Section 139 of the *NDA* reads as follows:

Scale of punishments

139 (1) The following punishments may be imposed in respect of service offences and each of those punishments is a punishment less than every punishment preceding it:

(a) imprisonment for life;

(b) imprisonment for two years or more;

(c) dismissal with disgrace from Her Majesty's service;

(d) imprisonment for less than two years;

(e) dismissal from Her Majesty's service;

(f) detention;

(g) reduction in rank;

(h) forfeiture of seniority;

(i) severe reprimand;

(j) reprimand;

(k) fine; and

(l) minor punishments.

Definition of *less punishment*

(2) Where a punishment for an offence is specified by the Code of Service Discipline and it is further provided in the alternative that on conviction the offender is liable to less punishment, the expression ***less punishment*** means any one or more of the punishments lower in the scale of punishments than the specified punishment.

3. Section 196.14 of the *NDA* reads as follows:

Order — primary designated offences

196.14 **(1)** A court martial shall make an order in the prescribed form authorizing the taking of the number of samples of bodily substances that is reasonably required for the purpose of forensic DNA analysis from a person who is found guilty of an offence committed at any time, including before June 30, 2000, if that offence is a primary designated offence within the meaning of paragraph (a) of the definition *primary designated offence* in section 196.11 when the person is sentenced.

Order — primary designated offences

(2) A court martial shall make such an order in the prescribed form in relation to a person who is found guilty of an offence committed at any time, including before June 30, 2000, if that offence is a primary designated offence within the meaning of paragraph (a.1) or (b) of the definition *primary designated offence* in section 196.11 when the person is sentenced. However, the court martial is not required to make the order if it is satisfied that the person has established that the impact of such an order on their privacy and security of the person would be grossly disproportionate to the public interest in the protection of society and the proper administration of military justice, to be achieved through the early detection, arrest and conviction of offenders.

Order — persons found not responsible and secondary designated offences

(3) A court martial may, on application by the prosecutor and if it is satisfied that it is in the best interests of the administration of military justice to do so, make such an order in the prescribed form in relation to

(a) a person who is found not responsible on account of mental disorder for an offence committed at any time, including before June 30, 2000, if that offence is a designated offence when the finding is made; or

(b) a person who is found guilty of an offence committed at any time, including before June 30, 2000, if that offence is a secondary designated offence when the person is sentenced.

In deciding whether to make the order, the court martial shall consider the nature of the offence and the circumstances surrounding its commission, any previous convictions, any previous finding of not responsible on account of mental disorder for a designated offence

and the impact that such an order would have on the person's privacy and security and shall give reasons for the decision.

Order to offender

(4) When a court martial makes an order authorizing the taking of samples of bodily substances, it may make an order in the prescribed form to require the person to report at the place, day and time set out in the order and submit to the taking of the samples.

4. Sections 203.1 to 203.4 of the *NDA* establish the purpose and principles of sentencing by courts martial as follows:

Fundamental purpose of sentencing

203.1 (1) The fundamental purpose of sentencing is to maintain the discipline, efficiency and morale of the Canadian Forces.

Objectives

(2) The fundamental purpose of sentencing is to be achieved by imposing just punishments that have one or more of the following objectives:

(a) to promote a habit of obedience to lawful commands and orders;

(b) to maintain public trust in the Canadian Forces as a disciplined armed force;

(c) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;

(d) to deter offenders and other persons from committing offences;

(e) to assist in rehabilitating offenders;

(f) to assist in reintegrating offenders into military service;

(g) to separate offenders, if necessary, from other officers or non-commissioned members or from society generally;

(h) to provide reparations for harm done to victims or to the community; and

(i) to promote a sense of responsibility in offenders and an acknowledgment of the harm done to victims or to the community.

Fundamental principle of sentencing

203.2 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

Other sentencing principles

203.3 Sentences must be imposed in accordance with the following other principles:

(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and aggravating circumstances include, but are not restricted to, evidence establishing that

(i) the offender, in committing the offence, abused their rank or other position of trust or authority,

(ii) the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or gender identity or expression, or on any other similar factor,

(iii) the offender, in committing the offence, abused their spouse or common-law partner,

(iv) the offender, in committing the offence, abused a person under the age of 18 years,

(v) the commission of the offence resulted in substantial harm to the conduct of a military operation,

(vi) the offence was committed in a theatre of hostilities,

(vii) the offence was committed for the benefit of, at the direction of or in association with a criminal organization, or

(viii) the offence was a terrorism offence;

(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(c) an offender should not be deprived of liberty by imprisonment or detention if less restrictive punishments may be appropriate in the circumstances;

(c.1) all available punishments, other than imprisonment and detention, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders;

(d) a sentence should be the least severe sentence required to maintain the discipline, efficiency and morale of the Canadian Forces; and

(e) any indirect consequences of the finding of guilty or the sentence should be taken into consideration.

Abuse of persons under age of 18

203.4 When a court martial imposes a sentence for an offence that involved the abuse of a person under the age of 18 years, it shall give primary consideration to the objectives of denunciation and deterrence of such conduct.

5. Section 220 of the *NDA* is as follows:

Committal of service convicts

220 (1) A service convict whose punishment of imprisonment for life or for two years or more is to be put into execution shall as soon as practicable be committed to a penitentiary to undergo punishment according to law, except that a committing authority may, in

accordance with regulations made by the Governor in Council, order that a service convict be committed to a service prison to undergo the punishment or any part of the punishment.

Committal when unexpired term less than two years

(2) Where a committing authority orders the committal to a penitentiary of a service convict, part of whose punishment has been undergone in a service prison, the service convict may be so committed notwithstanding that the unexpired portion of the term of that punishment is less than two years.

Committal of service prisoners

(3) A service prisoner whose punishment of imprisonment for less than two years is to be put into execution shall as soon as practicable be committed to a civil prison to undergo punishment according to law, except that a committing authority may, in accordance with regulations made by the Governor in Council, order that a service prisoner be committed to a service prison or detention barrack to undergo the punishment or part thereof.

Committal of service detainees

(4) A service detainee whose punishment of detention is to be put into execution shall as soon as practicable be committed to a detention barrack to undergo the punishment.

6. Section 227 of the *NDA* is as follows:

Order to Comply with the *Sex Offender Information Registration Act* Order

227.01 (1) When a court martial imposes a sentence on a person for an offence referred to in paragraph (a) or (c) of the definition *designated offence* in section 227 or finds the person not responsible on account of mental disorder for such an offence, it shall make an order in the prescribed form requiring the person to comply with the *Sex Offender Information Registration Act* for the applicable period specified in section 227.02.

Order — if intent established

(2) When a court martial imposes a sentence on a person for an offence referred to in paragraph (b) or (d) of the definition *designated offence* in section 227, it shall, on application of the prosecutor, make an order in the prescribed form requiring the person to comply with the *Sex Offender Information Registration Act* for the applicable period specified in section 227.02 if the prosecutor establishes beyond a reasonable doubt that the person committed the offence with the intent to commit an offence referred to in paragraph (a) or (c) of that definition.

Order — if previous offence established

(3) When a court martial imposes a sentence on a person for a designated offence in connection with which an order may be made under subsection (1) or (2) or finds the person not responsible on account of mental disorder for such an offence, it shall, on application of the prosecutor, make an order in the prescribed form requiring the person to comply with the *Sex Offender Information Registration Act* for the applicable period specified in section 227.02 if the prosecutor establishes that

(a) the person was, before or after the coming into force of this paragraph, previously convicted of, or found not responsible on account of mental disorder for,

an offence referred to in paragraph (a) or (c) of the definition *designated offence* in section 227 of this Act or in paragraph (a), (c), (c.1), (d), (d.1) or (e) of the definition *designated offence* in subsection 490.011(1) of the *Criminal Code*;

(b) the person was not served with a notice under section 227.08 of this Act or section 490.021 or 490.02903 of the *Criminal Code* in connection with that offence; and

(c) no order was made under subsection (1) or under subsection 490.012(1) of the *Criminal Code* in connection with that offence.

Failure to make order

(3.1) If the court martial does not consider the matter under subsection (1) or (3) at that time,

(a) the Chief Military Judge shall cause the Court Martial Administrator to convene a Standing Court Martial to do so;

(b) the Court Martial Administrator shall, within 90 days after the day on which the sentence was imposed or the person was found not responsible on account of mental disorder, convene the court martial; and

(c) for greater certainty, the person continues to be liable to be dealt with under the Code of Service Discipline for that purpose.

Interpretation

(4) For the purpose of paragraph (3)(a), a previous conviction includes a conviction for an offence

(a) for which a person is given an adult sentence within the meaning of subsection 2(1) of the *Youth Criminal Justice Act*; or

(b) that is made in ordinary court within the meaning of subsection 2(1) of the *Young Offenders Act*, chapter Y-1 of the Revised Statutes of Canada, 1985.

(5) and (6) [Repealed, 2010, c. 17, s. 47]