Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20220823

Docket: CMAC-619

Citation: 2022 CMAC 8

CORAM: **CHIEF JUSTICE BELL**
BENNETT J.A.
TROTTER J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

MASTER WARRANT OFFICER (J.J.) MACPHERSON

Respondent

Heard at Ottawa, Ontario, on April 13, 2022.

Judgment delivered at Ottawa, Ontario, on August 23, 2022.

REASONS FOR JUDGMENT BY: CHIEF JUSTICE BELL

CONCURRED IN BY: BENNETT J.A.
TROTTER J.A.

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REASONS FOR JUDGMENT

CHIEF JUSTICE BELL

I. Introduction and Summary

[1] Her Majesty the Queen (the "Crown") contends that between August 1 and October 31, 1998, at or near Canadian Forces Base Gagetown, New Brunswick, Master Warrant Officer

(MWO) J.J. MacPherson committed two sexual assaults upon M.M., contrary to paragraph 130(1)(a) of the *National Defence Act* , R.S.C. 1985, c. N-5 (NDA). That paragraph currently operates to include the offence of sexual assault under s. 271 of the *Criminal Code*, R.S.C. 1985, c. C-46 (Criminal Code) as an offence triable before the courts martial.

[2] Bill C-25, *An Act to amend the National Defence Act and to make consequential amendments to other Acts*, S.C., 1998, c. 35 (Bill C-25), received Royal Assent on December 10, 1998, and came into force on September 1, 1999. Bill C-25 included many significant amendments. Two are relevant for present purposes. First, s. 69 of the NDA was amended to abolish the previous three-year limitation period for trying service offences. Second, s. 70 of the NDA was amended to remove the offence of sexual assault committed in Canada, from the list of offences subject to the exclusive jurisdiction of the civilian criminal justice system. The amendment to s. 70 ensured that the military courts would have concurrent jurisdiction, with the civilian courts, to try alleged offences of sexual assault committed in Canada.

[3] For ease of reference, I set out below the pre-September 1, 1999 version and the post-September 1, 1999 version of s. 70 of the NDA:

Section 70	**Pre-Bill C-25**		**Post-Bill C-25 (Current)**
Marginal Note	**Limitation with respect to Certain Offences**		**Limitation with respect to Certain Offences**
Offences not triable by service tribunal	70. A service tribunal shall not try any person charged with any of the following offences committed in Canada: (a) murder; (b) manslaughter; (c) sexual assault;	Offences not triable by service tribunal	70. A service tribunal shall not try any person charged with any of the following offences committed in Canada: (a) murder; (b) manslaughter; or

	(d) sexual assault committed with a weapon or with threats to a third party or causing bodily harm; (e) aggravated sexual assault; or (f) an offence under sections 280 to 283 of the Criminal Code.		(c) an offence under any of the sections 280 to 283 of the Criminal Code. (d) to (f) [Repealed, 1998, c. 35, s. 22]

[4] On December 10, 2019, the Director of Military Prosecutions preferred two charges of sexual assault under s. 130(1)(a) of the NDA (s. 271 of the Criminal Code) against MWO MacPherson based upon facts which arose in 1998. General Court Martial proceedings commenced on August 6, 2020. Before the trial commenced, Military Judge Sukstorf, on her own motion raised a concern regarding the military court's jurisdiction to hear the matter given that the facts relied upon pre-dated the coming into force of Bill C-25.

[5] On July 20, 2021, Military Judge Sukstorf terminated proceedings. She concluded the court martial lacked jurisdiction to try charges of sexual assault, which allegedly occurred in Canada, prior to the coming into force of Bill C-25.

[6] The Crown appeals solely on the question of jurisdiction.

[7] For the following reasons, I agree with Military Judge Sukstorf. I would dismiss the Crown appeal.

II. Issue on Appeal

[8] The issue on appeal is whether the amendment to s. 70 of the NDA under Bill C-25 applies retrospectively, such that service tribunals are clothed with the jurisdiction to try sexual assault offences alleged to have occurred in Canada, prior to the coming into force of the amendment.

[9] While the parties disagree on the outcome, they agree that the question of the temporal application of the amendment to s. 70 of the NDA requires a consideration of two factors. First, the Court must determine whether there was a clear Parliamentary intent that the amendment to apply retrospectively. If "yes", the issue is determined. In the event the response is in the negative, the Court must inquire as to whether the amendment is purely procedural or whether it affects substantive rights. If the amendment is purely procedural, then it presumptively applies retrospectively. If it affects substantive rights, it applies prospectively.

III. Parliamentary Intention

[10] The determination of whether Parliament expressed a clear intent for the amendment to s. 70 of the NDA to apply retrospectively is one that relies upon statutory interpretation. As the Supreme Court stated in *R. v. D.A.I.*, 2012 SCC 5, [2012] 1 S.C.R. 149:

> […] The first and cardinal principle of statutory interpretation is that one must look to the plain words of the provision. Where ambiguity arises, it may be necessary to resort to external factors to resolve the ambiguity: R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 44.
>
> (at para. 26).

[11] The Crown contends Parliament intended that the amendments apply retrospectively.

[12] The Crown argues that the amendment to s. 70 of the NDA must be read in conjunction with the concurrent amendments made to s. 69 of the NDA. Set out below is the text of s. 69 prior to, and after the amendment:

Section 69	**Pre-Bill C-25**		**Post-Bill C-25 (Current)**
Marginal Note	Period of Liability under Code of Service Discipline		Period of Liability
Limitation Period	69. (1) Except in respect of the service offences described in (2) and (2.1), no person is liable to be tried by a service tribunal unless the trial of that person begins before the expiration of a period of three years after the day on which the service offence was alleged to have been committed.	When person is liable	69 (1) A person who is subject to the Code of Service Discipline at the time of the alleged commission of a service offence may be charged, dealt with and tried at any time under the Code.
Exceptions	(2) Every person subject to the Code of Service Discipline at the time of the alleged commission by that person of a service offence of mutiny, desertion or absence without leave or a service offence for which the highest punishment that may be imposed is death continues to be liable to be charged, dealt with and tried at any time under the Code of Service Discipline.	Sections 130 and 132	(2) Despite subsection (1), if the service offence is punishable under section 130 or 132 and the act or omission that constitutes the service offence would have been subject to a limitation period had it been dealt with other than under the Code, then that limitation period applies.
	(2.1) Every person subject to the Code of Service Discipline at the time of the alleged commission by that person of a service offence under section 130 that		

	relates to a grave breach referred to in subsection 3(1) of the Geneva Conventions Act continues to liable to be charged, dealt with and tried at any time under the Code of Service Discipline.		
Exclusion of Time	(3) In calculating the period of limitation referred to in subsection (1), there shall not be included		
	(a) time during which a person was a prisoner of war;		
	(b) any period of absence in respect of which a person has been found guilty by any service tribunal of desertion or absence without leave;		
	(c) any time during which a person was serving a sentence of incarceration imposed by any court other than a service tribunal; and,		
	(d) any period during which an accused person is unfit to stand trial for an offence.		

[13] Section 69 includes temporal language in two places: a person must be subject to the Code of Service Discipline (CSD) "at the time of the commission of a service offence" and, if so, the person "may be charged, dealt with and tried at any time". The Crown argues that the language of s. 69 demonstrates that court martial jurisdiction is primarily focused on the status of persons subject to the CSD at the time of the alleged service offence. This language, according to the Crown, demonstrates that jurisdiction may be exercised anytime as long as the member was subject to the CSD at the time of the commission of the offence. While I understand the Crown's argument, I disagree with its basic premise.

[14] Parliament often employs transitional provisions in legislation to regulate a process which begins prior to an amendment coming into force. There are several such provisions in Bill C-25, two of which, Clauses 98 and 104 (discussed below), the Crown alleges are demonstrative of Parliament's intent that the amendment to s. 70 should apply retrospectively.

[15] Justice Abella, dissenting in part on a different point, in *R. v. Chouhan*, 2021 SCC 26, 459 D.L.R. (4th) 193, observes as follows, at paragraph 169, with respect to transitional provisions:

> When legislation is enacted without transitional provisions, our law presumes that it only applies prospectively because "[i]n the absence of an indication that Parliament has considered retrospectivity and the potential for it to have unfair effects, the presumption must be that Parliament did not intend them." (*Tran v. Canada (Public Safety and Emergency Preparedness)*, [2017] 2 S.C.R. 289, at para. 48, per Côté J.).

[16] In *Ciecierski v. Fenning*, 2005 MBCA 52, 258 D.L.R. (4th) 103, the Court opined that the absence of an express transitional provision must give rise to some ambiguity concerning legislative intent.

[17] The Crown further contends that since the objective of the amendment to s. 70 was to enlarge the jurisdiction of courts martial to include sexual assault committed in Canada, the reference to "any time" constitutes a clear declaration of Parliament's intent that the Crown may prosecute such offences regardless of when they occurred. The Crown finds support for this in the transitional provision at Clause 98 of Bill C-25 and its proposed interpretation, which read respectively as follows:

Continuing Liability	98. Every person liable to be charged, dealt with and tried under the former Code of Service Discipline immediately before the coming into force of this section may be charged, dealt with and tried under the new Code of Service Discipline.

And:

> This transitional provision enables anyone liable under the Code of Service Discipline before the amendments come into force to be charged, dealt with and tried in accordance with the provisions of the amended Code of Service Discipline.
>
> (Exhibit M5-3, *The amendments to the National Defence Act, Clause by Clause Analysis*, Clause 21, "Reasons for the change", Appeal Book, Vol. VII, p. 1313)

[18] The Crown contends that this transitional provision is equally applicable to s. 69 and s. 70 of the NDA.

[19] I now turn to the factors which I consider demonstrate a lack of clear Parliamentary intent that the amendment to s. 70 of the NDA applies retrospectively.

A. *No transitional provision dealing with the amendment to s. 70*

[20] I reject the Crown's assertion that the transitional provision applies equally to the amendments to s. 69 and s. 70. Clause 98, which addresses jurisdiction over the person (and not the offence), was intended to ensure there was no interruption to the jurisdiction over the "person" and has no bearing on the temporal application of the amended s. 70. The s. 69

amendments and their transitional provision were designed to ensure that anyone to whom the pre-amendment CSD applied, continued to be caught by the post-amendment CSD procedures.

[21] There is no specific transitional provision in Bill C-25 which applies to the s. 70 amendment. Parliament could have provided such a provision with respect to s. 70, but, chose not to do so.

B. *Inapplicability of other transitional provisions found in Bill C-25*

[22] The Crown also draws upon other unrelated provisions of the amending statute in its efforts to find a clear parliamentary intent that the amendment to s. 70 applies retrospectively. In this regard, the Crown contrasts the amendments to ss. 69 and 70 and the transitional provision at Clause 98 with the transitional provision at Clause 104. The latter addresses amendments in Part IV of Bill C-25, which created the new Military Police Complaints Commission (MPCC) and procedure with respect to complaints against the military police. It reads as follows:

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

[23] The Crown contends Part IV of Bill C-25 was "likely anticipated" to be categorized as procedural with a presumed retrospective effect, both due to the common law presumption, as well as the relevant provisions of the *Interpretation Act*, R.S.C. 1985, c. I-21[*Interpretation Act*], s. 44(d)(iii) which reads as follows:

> 44 Where an enactment, in this section called the "former enactment", is repealed and another enactment, in this section called the "new enactment", is substituted therefor,
>
> (d) the procedure established by the new enactment shall be followed as far as it can be adapted thereto
>
> (iii) in a proceeding in relation to matters that have happened before the repeal;

[24] Clause 104 contains express language narrowing the jurisdiction of the MPCC. It provides that "Part IV of the Act does not apply in respect of events that took place before that Part or any of its provisions came into force." The Crown suggests that in the absence of this language it is likely that the MPCC would have had jurisdiction over complaints pre-dating its creation. In other words, absent the limiting language of Clause 104, the amendments to the NDA concerning the creation of the MPCC would have had retrospective effect. The Crown contends that if the drafters had wanted to achieve a similar effect with the amendments to s. 70 of the NDA, that is, narrowing the jurisdiction of the courts martial, it would have done so, just as it did with respect to the MPCC in Clause 104.

[25] With respect, the prospective jurisdiction of the MPCC is irrelevant to any attempt to interpret the amendments to s. 70 as being retrospective. In fact, Clause 104 dealing with the jurisdiction of the MPCC constitutes an excellent example of Parliament clearly stating its intent about the temporal effect of a series of new provisions. This is in clear contrast with Parliament's choice to remain silent regarding the temporal application of the amended s. 70.

C. *Hansard Transcripts*

[26] Military Judge Sukstorf's reasons also considered the recordings of the parliamentary debates as they appeared in Hansard. She concluded:

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

[27] I agree.

D. *Failure by the Governor in Council to make regulations dealing with temporal matters*

[28] I would make this final observation regarding the lack of a clear parliamentary intent that the amendment to s. 70 applies retrospectively. Clause 105 of Bill C-25 authorizes the Governor in Council to make regulations to address any temporal matters arising from Bill C-25, which were not dealt with in the legislation. No such regulations have been promulgated.

[29] Parliament did not clearly demonstrate an intention that the amendment to s. 70 applies retrospectively. Such a statement would have been easy. The fact the Crown considered it necessary, in its quest for a clear parliamentary intent of retrospectivity, to undertake an exhaustive analysis of unrelated transitional provisions, unrelated substantive provisions such as those dealing with the MPCC, and the *Interpretation Act*, is demonstrative of a lack of clear intent of retrospective application on the part of Parliament.

IV. Common Law and Statutory Presumption

[30] The Crown acknowledges that common law rules of statutory interpretation presume that purely procedural legislation applies immediately to both pending and future cases whereas legislative provisions which affect either vested or substantive rights are presumed not to apply retrospectively (see, e.g., *R. v. Dineley*, 2012 SCC 58, [2012] 3 S.C.R. 272 at para. 10). These common law presumptions have been codified in ss. 43 and 44 of the *Interpretation Act*.

[31] The Crown contends that the amendment to s. 70 of the NDA is purely procedural and, consequently, should be presumed to apply retrospectively. The position is simply stated. Sexual assault in Canada was a crime before the amendment and remains a crime after the amendment. The amendment, according to the Crown, merely changes the procedure by which one may be prosecuted.

[32] The Crown relies on *Peel (Police) v. Ontario (Special Investigations Unit)*, 2012 ONCA 292, 349 D.L.R. (4th) 621. In *Peel*, the Court considered the temporal application of legislative amendments which created the Special Investigations Unit, a statutory investigative body, clothed with jurisdiction to investigate and charge police officers for alleged improper acts. Although the Court concluded the amendments were procedural in nature, it carried out a further examination to determine whether any acquired substantive rights could be impaired by the retrospective application of the provisions. The Court concluded that the amendments did not impair substantive or vested rights because at all times, alleged criminal acts by police officers were subject to criminal investigation. The effect of the amendment was to transfer lead

responsibility for those investigations from one organization to another. Only procedural rights were affected.

[33] Applying the reasoning from *Peel, supra*, the Crown asserts that even if the amendment to s. 70 created a new means of litigating matters not previously triable in the military system, no substantive rights are impaired. Members of the Canadian Armed Forces, according to the Crown, have no vested rights with respect to where charges will be laid, how they may be prosecuted, or, the manner in which they may enforce their rights under the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act*, 1982 (UK), 1982, c 11 (Charter). The Crown cites *Chouhan, supra*, at para. 99.

[34] The Crown contends that the only possible substantive right, which could have been impacted by the Bill C-25 amendments, was the right to the three-year limitation period eliminated by the amendment to s. 69 of the NDA. The Crown relies on *R. v. Ford*, 1993 CanLII 1295 (ONCA), 84 C.C.C. (3d) 544, wherein the Court focused on whether the statutory limitation period had crystallized prior to the time the amendments came into force. The Court found that where such a right had crystallized (or vested), then the accused had acquired a freedom from vulnerability to prosecution in respect of the offences.

[35] The Respondent relies upon *Dineley, supra*, at para. 11, where the Court stated that new legislation is presumed to have only prospective effect where it engages a substantive right, or if a procedural amendment affects substantive rights. The Respondent argues that the amendment to s. 70 of the NDA affects substantive rights in at least two ways: (i) alleged military offenders

do not have the right to a trial by jury; and (ii) military offenders face more serious consequences.

[36] While it is true that no one has a vested right to procedure (see *Dineley, supra*, at para. 54*; Chouhan, supra*, at para. 96), the present amendments are not purely procedural as portrayed by the Crown.

[37] In *Chouhan, supra*, the Court held that constitutional rights are substantive rights. Legislation which affects those rights is presumed to apply prospectively, absent clear legislative intent to the contrary (at paras. 93, 94, 100, 102, 103; also citing *Dineley, supra*, at para. 21). Justices Moldaver and Brown in *Chouhan, supra*, offered guidance on the distinction between purely procedural legislation and substantive legislation or legislation which affects substantive rights, at paragraph 92:

> Broadly speaking, procedural amendments depend on litigation to become operable: they alter the method by which a litigant conducts an action or establishes a defence or asserts a right. Conversely, substantive amendments operate independently of litigation: they may have direct implications on an individual's legal jeopardy by attaching new consequences to past acts or by changing the substantive content of a defence; they may change the content or existence of a right, defence, or cause of action; and they can render previously neutral conduct criminal.
>
> (referencing Cromwell J. (dissenting on a different point) in *Dineley, supra*)

[38] At paragraph 94 of *Chouhan, supra*, Justices Moldaver and Brown further stated:

> Substantive law "creates rights and obligations and is concerned with the ends which the administration of justice seeks to attain, whereas procedural law is the vehicle providing the means and

> instruments by which those ends are attained" (*Sutt v. Sutt*, [1969] 1 O.R. 169 (C.A.), at p. 175).

[39] I am of the view that substantive rights of accused persons are affected in three ways by the amendment to s. 70 of the NDA.

[40] First, in the military justice system sexual assault can only prosecuted by indictment. In the civilian justice system, the Crown has the option, in less serious cases, of proceeding by way of summary conviction. The possibility of proceeding by summary conviction results in potentially lesser punishment and, most importantly, an earlier opportunity for record suppression under the *Criminal Records Act*, R.S.C., 1985, c. C-47; five years for summary conviction offences as opposed to 10 years for indictable offences (see s. 4). In my view, this has an impact on a convicted person's right not to be exposed to a more severe punishment under s. 11(i) of the Charter.

[41] Second, prior to the amendment, the Respondent had a guaranteed right to a jury trial for determining his guilt or innocence. That guaranteed right was lost with the amendment. Although there are some similarities between a trial by jury in the civilian criminal justice system and a trial by a general court martial (panel) in the military justice system, the two modes of trial are not the same. See, *R. v. Stillman*, 2019 SCC 40, [2019] 3 S.C.R. 144 at paras. 67-68. A court martial panel consists of a panel of only five (5) individuals whereas a jury consists of 12 individuals, "thereby lowering the threshold for a finding of guilt" (*Stillman*, at para. 68). Given that the amendment to s. 70 moved an accused from having an unqualified right to trial by jury to the potential of being tried by a panel of five as contemplated by the exception set out in s. 11(f)

of the Charter (trial by military tribunal), an accused's constitutional rights are impacted by the amendment.

[42] Third, conditional discharges are not available under the CSD. In my view, this also affects an accused's right not to be exposed to more severe punishment. See, in this regard *R. v. Rodgers,* 2006 SCC 15, [2006] 1 S.C.R. 554, where Charron J. for the Court opined:

> […] Likewise, if the punishment for an offence has been varied between the time of commission and the time of the sentencing so as to abolish the availability of a conditional discharge for that offence, it could not be argued that the conditional discharge did not constitute a "punishment" within the meaning of the s. 11(*i*) protection. The accused would be entitled to the benefit of the less severe sanction in force at the time of the offence.
>
> (at para. 61)

V. Conclusion

[43] I would dismiss this Crown appeal. There is no clear Parliamentary intent that the amendment to s. 70 of the NDA is to have retrospective effect. Furthermore, the amendment affects substantive rights of accused and convicted persons. Those include a right to be tried by jury and the right not to be subjected to more severe punishment than was available at the time of the alleged offence. Consequently, the amendment to s. 70 does not apply retrospectively.

Service tribunals do not have jurisdiction to try sexual assault offences alleged to have occurred in Canada prior to September 1, 1999.

"B. Richard Bell"
Chief Justice

"I agree.
Elizabeth A. Bennett, J.A."

"I agree.
Gary T. Trotter, J.A."

COURT MARTIAL APPEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

Lieutenant-Colonel Chavi Walsh	FOR THE APPELLANT
Major Francesca Ferguson Commander Mark Letourneau	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Canadian Military Prosecutions Service Ottawa, Ontario	FOR THE APPELLANT
Defence Counsel Services Gatineau, Quebec	FOR THE RESPONDENT