

FEDERAL-PROVINCIAL-TERRITORIAL HEADS OF PROSECUTION COMMITTEE

STATEMENT OF PRINCIPLES AND PRESUMPTIONS FOR THE EXERCISE OF CONCURRENT JURISDICTION BY CANADIAN PROSECUTING AUTHORITIES

WHEREAS, the Report of the Third Independent Review of the *National Defence Act* (NDA), released April 30th, 2021, recommended that a multilateral understanding be reached between the heads of the prosecution services in Canada, in consultation with the Canadian Forces Military Police Group and civilian police forces, on a clear set of principles and presumptions for the exercise of concurrent jurisdiction between the civilian and military justice systems;

AND WHEREAS, after careful consideration by the Federal-Provincial-Territorial Heads of Prosecution Committee, following consultations with civilian and military police forces, a consensus among the prosecution services regarding a set of principles and presumptions was reached;

THEREFORE, the member prosecution services represented at the Federal-Provincial-Territorial Heads of Prosecution Committee adopt and agree to the following principles and presumptions to guide the exercise of prosecutorial authority and jurisdiction as it relates to offences subject to concurrent jurisdiction.

DEFINITIONS

“Canadian Armed Forces” means the armed forces of His Majesty raised by Canada as constituted under the NDA (see section 14 of the NDA)

“civilian court” means a court of ordinary criminal jurisdiction in Canada and includes a court of summary jurisdiction

“civil offence” means an act or omission that takes place in Canada and is punishable under Part VII of the NDA, the *Criminal Code* or any other Act of Parliament (e.g. the *Controlled Drugs and Substances Act*), or that takes place outside Canada and would, if it had taken place in Canada, be punishable under Part VII of the NDA, the *Criminal Code* or any other Act of Parliament; but does not include offences created by a province or territory

“*Code of Service Discipline*” (CSD) means Part III of the NDA

“consultation between prosecuting authorities” means a consultation between a representative identified by the Director of Military Prosecutions and a representative identified by the appropriate civilian prosecution service with jurisdiction over the alleged offence

“court martial” means a court constituted under the NDA and includes a General Court Martial and a Standing Court Martial (see Division 6 of the NDA)

“family violence offence” means any offence of violence committed against an intimate partner or a member of the intimate partner’s or the alleged offender’s family

“intimate partner” includes any person – regardless of gender or sexual orientation – with whom the accused/defendant has, or has had, an ongoing close and personal or intimate relationship, whether or not they are legally married or living together at the time of the alleged criminal conduct

“offence subject to concurrent jurisdiction” means a civil offence that may be tried before a court martial or a civilian court, including all civil offences not specifically excluded from the jurisdiction of courts martial, when committed by a person who, at the time of the commission, was subject to the CSD pursuant to section 60 of the NDA (see also sections 61 to 65), and excluding murder, manslaughter, and child abduction, when any of these offences has been committed in Canada

“service offence” means an offence under the NDA, the *Criminal Code* or any other Act of Parliament, committed by a person while subject to the CSD

“victim” means an individual who has suffered physical or emotional harm, property damage, or economic loss as the result of the commission or alleged commission of an offence subject to concurrent jurisdiction

CONTEXT

1. The purpose of the CSD is to maintain the discipline, efficiency, and morale of the Canadian Armed Forces. The CSD only applies to the categories of persons listed in sections 60 to 65 of the NDA.
2. Many acts or omissions that are not prohibited by law in the civilian context may constitute service offences when committed by persons subject to the CSD.¹
3. The NDA incorporates all civil offences into the CSD as service offences that may be tried by court martial, except for offences specifically excluded.² Pursuant to section 130(1) of the NDA, it does not matter whether the offence was committed in Canada or abroad, so long as it would have been punishable if it had occurred in Canada.
4. Pursuant to section 273 of the NDA, a civilian court has concurrent jurisdiction to deal with civil offences committed outside Canada by persons subject to the CSD.

¹ Examples include: Disobedience of a lawful command (section 83 of the NDA), absence without leave (section 90 of the NDA), desertion (section 88 of the NDA) and drunkenness (section 97 of the NDA).

² Section 70 of the NDA provides that a court martial does not have jurisdiction to try any person charged with murder, manslaughter or an offence under any of sections 280 to 283 of the *Criminal Code* committed in Canada.

5. Accordingly, there are situations in which both a civilian court and a court martial have jurisdiction to deal with a person subject to the CSD who has committed a civil offence. When such situations occur, both the Director of Military Prosecutions and any civilian prosecution service with jurisdiction over the alleged offence have the legal authority to prosecute.

6. Pursuant to section 71 of the NDA, nothing in the CSD affects the jurisdiction of any civilian court to try a person for any offence within the jurisdiction of that court.

7. Pursuant to section 66 of the NDA, a person tried in one system (military or civilian) cannot also be tried in the other in accordance with the principles of *autrefois* acquit and *autrefois* convict.

SCOPE

8. The principles and presumptions contained herein are intended to guide decisions about assuming prosecutorial jurisdiction over offences subject to concurrent civilian and military jurisdiction.

9. These principles and presumptions do not apply to any decisions of law enforcement agencies (civilian or military). The development of any principles or presumptions that may guide the exercise of the discretion to investigate remains the prerogative of the various civilian and military law enforcement agencies.

10. While not bound by these principles or presumptions, civilian and military law enforcement agencies may benefit from an awareness of them. Military and civilian prosecuting authorities should therefore:

- a. bring these principles and presumptions to the attention of the law enforcement agencies operating within their jurisdictions; and
- b. encourage those law enforcement agencies to consult with the military or civilian prosecution authority within their jurisdiction if they have any questions or wish to ascertain the position of the prosecuting authorities on whether the military or civilian prosecution authority will assume jurisdiction over a particular case they are investigating.

11. This document is intended to guide only the determination as to which prosecuting authority is best suited to deal with the case. It is not intended and should not be taken to limit in any way the discretion of the prosecuting authority that assumes jurisdiction over the case. Nothing in this document limits the discretion of any prosecuting authority as to whether or how to conduct a particular prosecution over which it has assumed jurisdiction.

OVERARCHING PRINCIPLES

12. An offence subject to concurrent jurisdiction should only be dealt with under the military justice system when its commission harmed or posed a risk of harm to the maintenance of the discipline, efficiency, and morale of the Canadian Armed Forces.³

13. If an offence subject to concurrent jurisdiction has affected a civilian or their property, it should only be dealt with in the military justice system following a consultation between prosecuting authorities.

14. The fact that a person was subject to the CSD when they committed an offence subject to concurrent jurisdiction is not dispositive of which jurisdiction (civilian or military) is best suited to deal with it.

PRESUMPTION

15. Unless otherwise agreed following a consultation between prosecuting authorities, the appropriate civilian prosecution service will assume jurisdiction to prosecute the following offences:

- a. an offence committed in Canada which impacted any civilian or their property;
- b. an offence committed outside Canada which impacted any Canadian civilian or their property;
- c. a family violence offence;
- d. an offence committed with the collaboration of a civilian; and,
- e. an offence committed by a civilian who is subject to the CSD by operation of section 60(1)(f) or 60(1)(j) of the NDA.⁴

³ “The objective of maintaining ‘discipline, efficiency and morale’ is rationally connected to dealing with criminal actions committed by members of the military even when not occurring in military circumstances” and “criminal or fraudulent conduct, even when committed in circumstances that are not directly related to military duties, may have an impact on the standard of discipline, efficiency and morale” (*R v Moriarity* 2015 SCC 55, at paras 51, 52)

⁴ 60(1) The following persons are subject to the Code of Service Discipline: [...]

(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; [...]

(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.

CONSULTATIONS BETWEEN PROSECUTING AUTHORITIES

16. Any prosecuting authority may initiate a consultation between prosecuting authorities. The purpose of the consultation is to determine the most appropriate jurisdiction (civilian or military) to deal with a particular case. A consultation may also serve any other purpose deemed appropriate by the representatives.
17. A representative of the Director of Military Prosecutions will initiate a consultation between prosecuting authorities whenever a military victim has expressed a preference for the case to proceed in the civilian justice system.
18. There will be rare instances when civilian police will investigate offences committed by members of the Canadian Armed Forces which do not engage the presumption set out in paragraph 15. When this occurs, the civilian prosecution service with jurisdiction should consider initiating a consultation between prosecuting authorities before exercising its jurisdiction.
19. Whenever a prosecuting authority is unsure about which jurisdiction (civilian or military) is best suited to deal with the matter, the prosecuting authority should initiate a consultation between prosecuting authorities.

FACTORS TO GUIDE CONSULTATIONS BETWEEN PROSECUTING AUTHORITIES

20. Decisions about assuming prosecutorial jurisdiction over offences subject to concurrent jurisdiction should be guided by the following non-exhaustive list of factors:
- a. the degree of public interest in a potential prosecution as assessed by the civilian prosecuting authority;
 - b. the degree of public interest in a military prosecution as assessed by the military prosecution service;
 - c. the views of any victim;
 - d. whether the accused, the victim, or both, are members of the Canadian Armed Forces;
 - e. geographic considerations, such as the location of necessary witnesses;
 - f. differences in sentencing consequences, e.g., mandatory sentencing provisions;
 - g. differences in the availability of alternatives to prosecution; and,
 - h. the potential impact that an assumption of prosecutorial jurisdiction may have on public confidence in the administration of justice.

RESOLUTION OF DISAGREEMENTS

21. In the event of a disagreement over which prosecuting authority (civilian or military) is best suited to deal with the case that is not resolved through consultation between prosecuting authorities, the appropriate civilian prosecution service's decision about whether to assume jurisdiction over the prosecution will govern.