COURT MARTIAL

Citation: *R. v. Barrieault*, 2019 CM 2013

Date: 20190619
Docket: 201902

Standing Court Martial

19 Wing Comox
Comox, British Columbia, Canada

Between:

Her Majesty the Queen, Applicant

- and -

Master Corporal A.P. Barrieault, Respondent

Application heard and decision rendered in Comox, British Columbia, on 4 June 2019.
Reasons delivered in Gatineau, Quebec, on 19 June 2019.

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

Restriction on publication: By court order made under section 179 of the *National Defence Act*, information that could disclose the identity of the person described during these proceedings as the complainants shall not be published in any document or broadcast or transmitted in any way.

DECISION ON AN APPLICATION BY THE PROSECUTION FOR A PUBLICATION BAN

Introduction

[1] This decision is delivered in response to a notice of application filed by the prosecution on 24 April 2019 seeking a publication ban on any information that identifies the complainants set out in the charges listed on the charge sheet dated 26 December 2018. The applicant requests the Court order that the complainants' names not be published in any document or broadcast or transmitted in any way.

[2] The prosecution requests the Court impose the publication ban, by relying upon its powers set out at section 179 of the *National Defence Act* (*NDA*).

[3] In addition, the applicant seeks an order pursuant to section 188 of the *NDA* directing that:

> (a) the names of witnesses on all five charges on the charge sheet in favour of Master Corporal Barrieault, dated 26 December 2018, be redacted; and
>
> (b) any further and other relief as the military judge deems just.

[4] The respondent, counsel for the Master Corporal Barrieault, originally opposed any order banning publication of the complainants' names but later withdrew his opposition.

Background

[5] In his written submissions, the respondent emphasized the importance of an open court process and the fact that the constitutional right to a public hearing is protected by paragraph 11(*d*) of the *Canadian Charter of Rights and Freedoms*. He referred the Court to the Supreme Court of Canada (SCC) decision of *A.G. (Nova Scotia) v. MacIntyre*, [1982] 1 S.C.R. 175, at paragraph 53, where the court quoted with approval a statement attributed to Jeremy Bentham, a 19th century jurist:

> [']Where there is no publicity there is no justice.' 'Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity.[']

[6] In its decision of *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 at paragraph 22, the SCC stated:

> The importance of ensuring that justice be done openly has not only survived: it has now become "one of the hallmarks of a democratic society"; see *Re Southam Inc. and The Queen* (No.1) (1983), 41 O.R. (2d) 113 (C.A.), at p. 119. The open court principle, seen as "the very soul of justice" and the "security of securities", acts as a guarantee that justice is administered in a non-arbitrary manner, according to the rule of law.

[7] Relying upon *Vancouver Sun (Re)*, 2004 SCC 43, the respondent summarized that the "the open court principle, to put it mildly, is not to be lightly interfered with." (see paragraph 26 of *Vancouver Sun*).

[8] In light of the underlying inference in favour of an open and fully transparent court, any application that seeks to restrict this principle must be assessed against an established framework of legal principles relevant to the matters in issue. Despite the fact that the respondent withdrew his opposition to the application, and the Court rendered an oral decision granting the publication ban, it advised counsel it would follow up with a formal written decision to explain the rationale under which the

discretionary power of the Court was exercised. The foregoing are my reasons for making such an order.

Facts

[9] The accused, Master Corporal Barrieault, was charged for alleged misconduct arising from three separate incidents. The three incidents are as follows:

(a) The first set of charges alleges that the accused grabbed the buttocks of a fellow Canadian Armed Forces (CAF) member, Master Corporal XXXX, at the mess during a mess event. At the time of the incident, Master Corporal XXXX worked for the accused.

(b) The second set of charges alleges that while in the workplace and on base, at Canadian Forces Base Comox, the accused breathed on the neck of Corporal YYYY and blew in her ear.

(c) The last charge alleges that the accused asked ZZZZ for a photograph of her "tits", while knowing that her husband was away on deployment at the time he made the request.

[10] With respect to the first two incidents, the accused faces two charges of disgraceful conduct pursuant to section 93 of the *NDA*, and two charges of prejudice to good order and discipline pursuant to section 129 of the *NDA* laid in the alternative.

[11] With respect to the third incident, Master Corporal Barrieault faces one charge under section 129 of the *NDA* for conduct to the prejudice of good order and discipline.

Evidence in support of the application

[12] In their respective filings, both the applicant and the respondent relied upon briefs of law with supporting authorities. In addition, the Court drew counsel's attention to Bill C-77, an Act to amend the *National Defence Act* and to make related and consequential amendments to other Acts, currently in the Senate at third reading. In addition, the Court took judicial notice of Canada, Department of National Defence, *External Review into Sexual Misconduct and Sexual Harassment in the Canadian Armed Forces*, by Marie Deschamps (Ottawa: Department of National Defence, 2015), Operation HONOUR and its ancillary and supporting documents.

Submissions of counsel

Prosecution - the applicant

[13] The applicant argued that a court martial is a statutory court that "has the same powers, rights and privileges as a superior court of criminal jurisdiction – including the power to punish for contempt as are vested in a superior court of criminal jurisdiction"

and that the powers extend "to all other matters necessary or proper for the due exercise of jurisdiction."

[14] The applicant further submitted that the particulars of the charges allege either sexual touching of or sexualized comments made to complainants. They submitted that the discretionary order sought is no different in purpose, effect or parameter than those ordered in cases of sexual assault. In her written submission, the applicant stated that when a member makes a complaint, he or she has no control over the type of charges that will be prosecuted:

> "A witness or complainant does not determine what charge will ultimately be prosecuted at the time he or she chooses to make the complaint. It is important for the administration of justice, for the maintenance of discipline, and for the suppression of criminal behaviours, that complainants come forward."

[15] She submitted that the same reasons that substantiate a mandatory publication ban for sexual offences in the *Criminal Code*, support the granting of a mandatory publication ban for the charges before the Court and as such, this case should not be treated differently.

Issues

[16] In deciding this application, there were two issues the Court was to consider:

(a) does the Court have the jurisdiction to order a publication ban?

(b) assuming that the Court does have the jurisdiction, should this Court exercise its discretion under the common law to order a ban on the publication of information that might identify the complainants on the charges before the Court? The rendering of a decision requires the Court to consider the ban's effect on the administration of military justice and in doing so, it must carefully balance the effects of the publication ban against the rights and interests of all affected parties.

Analysis

Law

Issue 1: Does the Court have the jurisdiction to order a publication ban?

[17] The applicant asserted that pursuant to section 179 of the *NDA*, this Court may order a publication ban to protect complainants' names. In *R. v. Leblanc*, 2011 CMAC 2, the Court Martial Appeal Court (CMAC) recognized that the power of military judges to make orders is analogous to that of judges and justices of civilian courts of criminal jurisdiction.

[18] A court martial is a statutory court, which does not have its own inherent jurisdiction, however section 179 of the *NDA* confers upon it legislative authority to exercise the same powers vested in a superior court of criminal jurisdiction in exercising its own inherent jurisdiction. It reads as follows:

> **Powers**
>
> **Courts martial**
>
> 179 (1) A court martial has the same powers, rights and privileges — including the power to punish for contempt — as are vested in a superior court of criminal jurisdiction with respect to
>
> (a) the attendance, swearing and examination of witnesses;
>
> (b) the production and inspection of documents;
>
> (c) the enforcement of its orders; and
>
> (d) all other matters necessary or proper for the due exercise of its jurisdiction.
>
> **Military judges**
>
> (2) Subsection (1) applies to a military judge performing a judicial duty under this Act other than presiding at a court martial.

[19] In short, when a court martial exercises powers set out in section 179, it must do so in a manner consistent with the exercise of the inherent jurisdiction of a superior court. Inherent jurisdiction is recognized by the courts as the power to "[enable the court] to fulfil itself as a court of law." (see *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 SCR 725 at paragraph 30)

[20] In the case of *Baxter Student Housing Ltd. et al. v. College Housing Co-operative Ltd. et al.* [1976] 2 S.C.R. 475, the Court quotes:

> In my opinion the inherent jurisdiction of the Court of Queen's Bench is not such as to empower a judge of that Court to make an order negating the unambiguous expression of the legislative will.

[21] The exercise of inherent jurisdiction is a special and extraordinary power to be exercised only sparingly and in the clearest of cases and where it is required to maintain the authority and integrity of the court process. To put it simply, a military judge must exercise its power set out in section 179 in such a way that it does not contravene a statutory provision and the court cannot use section 179 as an end run around existing legislation.

[22] Prior to the passing of the current legislation on publication bans within the *Criminal Code*, superior courts relied upon their inherent jurisdiction to consider whether publication bans were appropriate and they continue to do so when requests

arise that fall outside of the legislation. (see *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 and *R. v. Mentuck*, [2001] 3 S.C.R. 442). Similarly, courts martial have routinely relied upon section 179 of the *NDA* to order publication bans for those offences that are both mandatory and discretionary for offences set out within the *Criminal Code*. (see *R. v. Gobin*, 2018 CM 2006)

[23] However, the charges before this Court fall exclusively under the *NDA* and not under the *Criminal Code*. The accused is charged with offences contrary to both sections 93 and 129 of the *NDA*, neither of which trigger an automatic publication ban in the *NDA* or by incorporation of the provisions set out in the *Criminal Code*.

[24] As this Court stated in *Gobin*, the legislative purpose of section 179 of the *NDA* is to provide the court martial with the power to control its procedure in respect of residual matters that are not dealt with in the *NDA* or its regulations. (see also *R. v. Master Corporal J.E.M. Lelièvre*, 2007 CM 1011 at paragraph 5) In this specific case, it is only where broad statutory authority is unavailable, that the Court should consider relying upon section 179 of the *NDA*. As such, the Court must look first to the *NDA*.

[25] Upon a review of the *NDA*, it is clear that the *NDA* is silent on the ordering of publication bans.

[26] Although it is not law, the Senate is in the final stages of hearing Bill C-77. Bill C-77 proposes section 183.6 (1) which, if passed would provide authority for the implementation of publication bans in circumstances relevant to the case before this court martial. The provision being introduced in Bill C-77 is almost identical to that set out at section 486.5 of the *Criminal Code*. The proposed section 183.6 of the *NDA* reads as follows:

> Order restricting publication - victims and witnesses
>
> 183.6 (1) Unless an order is made under section 183.5, on application of the prosecutor in respect of a victim or a witness, or on application of a victim or a witness, a military judge or, if the court martial has been convened, the military judge assigned to preside at the court martial may make an order directing that any information that could identify the victim or witness not be published in any document or broadcast or transmitted in any way, if the military judge is of the opinion that the order is in the interest of the proper administration of military justice.

[27] Although this proposed statutory authority is not yet law and may not be for some time, it is evidence of a statutory void in the *NDA* and Parliament's intention to fill that void. Hence, with this gap in the law, this court martial may rely upon the legal framework of the common law as well as its authority under section 179 to consider whether a publication ban should be ordered on the charges before the Court.

Issue 2 – Based on common law, should this Court order a ban on publication of all information that might identify the complainants on the charges before the Court?

[28] The rendering of a decision requires the Court consider the ban's effect on the administration of military justice and conduct a careful balancing of the effects of the publication ban against the rights and interests of the parties. Both counsel agreed that the common law test of *Dagenias-Mentuck* applies. In *Dagenais*, Chief Justice Lamer at paragraph 98 suggested the following guidelines be followed in the consideration of a request for a publication ban, under the common law rule:

> (4) General Guidelines
>
> In order to provide guidance for future cases, I suggest the following general guidelines for practice with respect to the application of the common law rule for publication bans:
>
> (a) At the motion for the ban, the judge should give the media standing (if sought) according to the rules of criminal procedure and the established common law principles with regard to standing.
>
> (b) The judge should, where possible, review the publication at issue.
>
> (c) The party seeking to justify the limitation of a right (in the case of a publication ban, the party seeking to limit freedom of expression) bears the burden of justifying the limitation. The party claiming under the common law rule that a publication ban is necessary to avoid a real and serious risk to the fairness of the trial is seeking to use the power of the state to achieve this objective. A party who uses the power of the state against others must bear the burden of proving that the use of state power is justified in a free and democratic society. Therefore, the party seeking the ban bears the burden of proving that the proposed ban is necessary, in that it relates to an important objective that cannot be achieved by a reasonably available and effective alternative measure, that the proposed ban is as limited (in scope, time, content, etc.) as possible, and there is a proportionality between the salutary and deleterious effects of the ban. At the same time, the fact that the party seeking the ban may be attempting to safeguard a constitutional right must be borne in mind when determining whether the proportionality test has been satisfied.
>
> (d) The judge must consider all other options besides the ban and must find that there is no reasonable and effective alternative available.
>
> (e) The judge must consider all possible ways to limit the ban and must limit the ban as much as possible; and
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> (f) The judge must weigh the importance of the objectives of the particular ban and its probable effects against the importance of the particular expression that will be limited to ensure that the positive and negative effects of the ban are proportionate.

[29] In consideration of this application, this Court followed the procedural guidelines suggested in *Dagenais*. However, since there was a reformulation of the *Dagenais* test that emerged from *Mentuck*, the Court applied the amended two-part test, known as the *Dagenais-Mentuck* test. The test and the reasons for that change were explained at paragraphs 32-33 in *Mentuck* by Justice Iacobucci:

> In assessing whether to issue common law publication bans, therefore, in my opinion, a better way of stating the proper analytical approach for cases of the kind involved herein would be:

> A publication ban should only be ordered when:
>
> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

Media notice

[30] Firstly, in responding to requests that limit the public nature of proceedings, public notice to the media is paramount. However, based on the facts before this Court, the prosecution did not, and was not asked to give notice to the media. The nature of the order requested is limited to the identity of the complainants' names only and the ban sought is similar to that set out in sections 486.4 and 486.5 of the *Criminal Code* that do not explicitly require the applicant to provide notice. Similarly, the corresponding recommended statutory provision for the *NDA*, working its way in Bill C-77, does not require notice.

Onus on applicant

[31] The onus is on the applicant to justify the restriction sought on the open court principle by establishing the existence of a real and substantial risk to the fairness of the trial that is well grounded in evidence. In order to exercise my common law jurisdiction, I must satisfy myself that such an order is necessary according to the *Dagenais-Mentuck* test.

[32] The *Dagenais-Mentuck* test balances the competing interests between the open court principle and the administration of justice with neither interest eclipsing the other. The application of the *Dagenais-Mentuck* test is not rigid, but rather is flexible and contextual. (see *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, at paragraph 31)

[33] Essentially, the applicant requests the Court weigh the interest of the public in encouraging complainants to report every level of sexual misconduct in the CAF against the public interest in freedom of expression and open court proceedings. As highlighted above, the issue before the Court is whether it should ban the publication of any information that would identify the complainants on charges that flow from a violation of two separate provisions in the *NDA*.

[34] Publication bans that restrict public access exist along a continuum and the challenge for the Court is to determine where the proper balance is attained. While all requests to limit public access to information should be scrutinized, some are more difficult to justify than others. In this case, the Court is not being asked to order a

publication ban on the accused's name or any of the facts. Rather, it is only being asked to limit the publication of the complainants' names.

[35] Under the common law, consideration of whether a publication ban should be ordered, it is important that the necessity branch be dealt with first and, if established, the beneficial/harmful effects of a ban are then considered. For simplicity, the Court has broken this test down into three different steps.

Step 1 - Determine whether there is convincing evidence that the order sought is necessary to prevent a serious risk to the proper administration of justice.

[36] At common law, the purpose sought to be achieved by the ban drives the analysis. In this case, the purpose of the ban must be to achieve an objective considered necessary to the proper administration of military justice. In *Mentuck* at paragraph 29, Justice Iacobucci defined what is required in satisfying this first branch of necessity. At paragraph 34 it said:

> I would add some general comments that should be kept in mind in applying the test. The first branch of the test contains several important elements that can be collapsed in the concept of "necessity", but that are worth pausing to enumerate. One required element is that the risk in question be a serious one, or, as Lamer C.J. put it at p. 878 in *Dagenais*, a "real and substantial" risk. That is, it must be a risk the reality of which is well-grounded in the evidence. It must also be a risk that poses a serious threat to the proper administration of justice. In other words, it is a serious danger sought to be avoided that is required, not a substantial benefit or advantage to the administration of justice sought to be obtained.

[37] What is clear in interpreting *Mentuck* and the subsequent case law on publication bans, is that the interest jeopardized must have a public component. It is not intended to address a complainant's or the accused's personal concerns. The applicant submitted that the order is sought for the same reasons that the SCC set out in the case of *Canadian Newspapers Co. v. Canada (Attorney General)*, [1988] 2 S.C.R. 122, which it considered under common law. The SCC set out the purpose of a ban at paragraph 15:

> . . . foster complaints by victims of sexual assault by protecting them from the trauma of wide-spread publication resulting in embarrassment and humiliation. Encouraging victims to come forward and complain facilitates the prosecution and conviction of those guilty of sexual offences. Ultimately, the overall objective of the publication ban imposed by s. 442(3) is to favour the suppression of crime and to improve the administration of justice.

[38] Further, *Dagenais* establishes that the exercise of discretion must only be made upon a proper evidentiary foundation, and unless there is no dispute over the relevant facts, the prosecution as the applicant, bears the onus introducing sufficient evidence upon which the Court may base its discretion. Both *Dagenais* and *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, *supra*, allow and do not foreclose any other party granted status from introducing other relevant evidence.

[39] In her brief, the applicant submitted that the law regarding mandatory publication bans for witnesses and complainants in offences with sexual components to it has long been settled. It was argued that the fact that a publication ban is sought through the common law, vice a settled statutory provision, does not change the underlying rationale for the ban. It was submitted that the SCC's guidance should be read as applying to all sexual offences, vice the specific offence of sexual assault.

[40] *Mentuck* also suggests that the risk must be serious and specific. (see *Mentuck* at paragraph 38). The applicant did not present any independent scientific or empirical evidence to support the serious risk argument, choosing to rely upon the SCC's underlying rationale set out in *Canadian Newspapers Co. v. Canada (Attorney General), supra*. With the consent of counsel, the Court took judicial notice of Canada, Department of National Defence, *External Review into Sexual Misconduct and Sexual Harassment in the Canadian Armed Forces*, by Marie Deschamps (Ottawa: Department of National Defence, 2015), Operation HONOUR and its ancillary and supporting documents.

[41] The SCC noted in *A.B. v. Bragg Communications Inc*., 2012 SCC 46, that the Court can find harm by applying reason and logic. Justice Abella noted that, at paragraph 15, "while evidence of a direct, harmful consequence to an individual applicant is relevant, courts may also conclude that there is objectively discernable harm." Thus, a judgment may be anonymized even when there is no specific evidence before the Court as to the effects of the public dissemination of the specific applicant's identity.

[42] The failure of the chain of command and leadership to address even minor misconduct presents significant risk to the CAF's operational effectiveness. As I stated in numerous cases:

> In a military context, minor incidents of inappropriate touching are completely unacceptable and must be stopped. A failure to address even the smallest instance of inappropriate conduct is exactly what threatens and undermines the military ethos, values, norms and ethics expected of every Canadian Armed Forces (CAF) member. If left unchecked, minor misconduct can lead to heightened reprehensible conduct.

[43] However, the greatest challenge that exists is encouraging complainants to report minor misconduct. Military members are trained to be tough, resilient and prove their inner strength in challenging circumstances. Further, the CAF is a relatively small community, even smaller on bases and within trades and occupations. When a complainant comes forward, rumours immediately circulate regarding all parties involved.

[44] Further, the dynamics that exist within the military culture and community are not always conducive to healing. Complainants understandably fear that a stigma will follow them throughout their entire careers. As I explained to counsel during

submissions, the recurring message this court has heard from complainants is the fact that they feel more stress from "being that guy or girl" in reporting the behaviour than they suffer from the incident itself.

[45] The specific fear of being publicly known as someone who complained or could not take the "small stuff" is a strong disincentive to any complainant discouraging them from coming forward. In today's media and on the internet, complainants' names exist in perpetuity. In essence, complainants in a military context, who have been identified, may be re-traumatized and ostracized for years to come, long after a complaint has been dealt with.

[46] The hearing judge must also consider whether the ban is necessary in order to protect the proper administration of justice. In encouraging complainants to come forward, legislators have also recognized the privacy interest of complainants as a legitimate aspect of the proper administration of justice. In short, if there is a risk that complainants may not report potential offences because of their privacy concern, it must be considered.

[47] Complainants' and witnesses' privacy interests have been recognized by a number of authorities including the *Criminal Code* provisions which expressly recognize them. Several *Criminal Code* provisions aim to minimize harm and protect complainants' privacy in such offences as sexual assault. (see also sections 486.4, 486.1, 486.2, 278 and 276) These provisions encourage the participation of witnesses and complainants promoting a sense of fairness within the criminal justice system.

[48] In Canadian society at large, this interest is supported by the *Canadian Victims Bill of Rights*, S.C. 2015, chapter 13, section 2. Pursuant to section 18(3) of *an Act to enact the Canadian Victims Bill of Rights and to amend certain Acts (short title: Victims Bill of Rights Act)*, the *Canadian Victims Bill of Rights* does not apply to service offences that are investigated or proceeded with under the *NDA*. However, as explained earlier, Bill C-77 is working its way through the Senate, and the bill proposes a series of procedural changes to the Code of Service Discipline in the *NDA* including the implementation of the Declaration of Victims' Rights almost identical to those in the *Canadian Victims Bill of Rights*.

[49] Clause 7 of Bill C-77 proposes a new section be added to the Code of Service Discipline, called the "Declaration of Victims' Rights." The new section gives victims of service offences certain rights to information, protection, participation and restitution similar to th*e* rights granted to other crime victims in 2015 by the *Canadian Victims Bill of Rights*. Proposed relevant provisions read as follows:

> **Privacy**
>
> 71.07 Every victim has the right to have their privacy considered by the appropriate authorities in the military justice system.
>
> **Identity protection**

> 71.08 Every victim has the right to request that their identity be protected if they are a complainant in respect of the service offence or a witness in proceedings relating to the service offence.

[50] Further, the proposed section 183.6(6) of the *NDA*, sets out the grounds on which the applicant must rely to establish that the order is necessary for the proper administration of military justice as well as the factors to be considered by the military judge.

> **Grounds**
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> (6) The application must set out the grounds on which the applicant relies to establish that the order is necessary for the proper administration of military justice.
>
> **Factors to be considered**
>
> (8) In determining whether to make an order under this section, the military judge shall consider
>
> (a) the right to a fair and public hearing;
>
> (b) whether there is a real and substantial risk that the victim, witness or military justice system participant would suffer harm if their identity were disclosed;
>
> (c) whether the victim, witness or military justice system participant needs the order for their security or to protect them from intimidation or retaliation;
>
> (d) society's interest in encouraging the reporting of service offences and the participation of victims, witnesses and military justice system participants;
>
> (e) whether effective alternatives are available to protect the identity of the victim, witness or military justice system participant;
>
> (f) the salutary and deleterious effects of the order;
>
> (g) the impact of the order on the freedom of expression of those affected by it; and
>
> (h) any other factor that the military judge considers relevant.

[51] Upon review of the pending statutory amendments that mirror those currently existing in the *Criminal Code* provisions, as well as the common law test, it is noteworthy that the criteria are focused on the same question: whether the ban is in the interest of the proper administration of justice?

[52] In a situation where a complainant comes forward with a sensitive sexual misconduct complaint and the prosecution decides to lay charges under section 93 or section 129 of the *NDA*, rather than under section 271 of the *Criminal Code*, the prosecution's decision should not translate to mean that the complainant is deserving of less protection than they would receive if the prosecution pursued charges under the

Criminal Code. If the publication of the complainants' names is an impediment to reporting sexual misconduct and it obstructs the access to justice by hampering the CAF's ability to regulate the misconduct, then the Court must take notice. Hence, the reporting of sexual misconduct is no less deserving of protection simply because the prosecution has exercised discretion to pursue it under the *NDA* and not under section 271 of the *Criminal Code*.

[53] Madame Deschamps' report revealed that the CAF has struggled to encourage members to report incidents of sexual misconduct, hence, this greater public purpose is of considerable importance. The Court accepts that adverse effects flow from the disclosure of the identity of a complainant coming forward alleging any sexual impropriety. An order that recognizes the vulnerable state of complainants and their need to continue their careers unimpeded in the CAF is important.

Step 2 - Consider the available options, and whether there are any reasonable, effective, less intrusive alternatives available to prevent that risk.

[54] Given that the Court has found that the publishing of complainants' names would lead to prejudice in the administration of military justice, the Court must make an inquiry into whether certain safeguards already built into the military justice system can adequately alleviate the prejudice.

[55] The only provision that provides any authority to limit the open court principle is much more invasive and foresees a need to limit complete access or conduct proceedings *in camera*. It is found under sections 180(1)(2) of the *NDA* which reads as follows:

> **Admission to Courts Martial and Certain Proceedings Before Military Judges**
>
> **Proceedings public**
>
> 180(1) Subject to subsections (2) and (3), courts martial, and proceedings before military judges under section 148, 158.7, 159, 187, 215.2 or 248.81, shall be public and, to the extent that accommodation permits, the public shall be admitted to the proceedings.
>
> **Exception**
>
> (2) A court martial or military judge, as the case may be, may order that the public be excluded during the whole or any part of the proceedings if the court martial or military judge considers that it is necessary
>
> (a) in the interests of public safety or public morals;
>
> (b) for the maintenance of order or the proper administration of military justice; or
>
> (c) to prevent injury to international relations, national defence or national security.

[56] The publication ban sought in this case relates strictly to the identity of the complainants. It does not prevent the public or media from attending the proceedings, where the names of the complainants will be used. In fact, the media, the public and the CAF community all are strongly encouraged to attend.

Step 3 - Determine whether there is convincing evidence that the benefits of the order sought outweigh its negative impact on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

[57] This final step requires broad consideration. In conducting Step 3 and the final balancing that must occur, I find that although section 183.6 (8) of the *NDA* is not law and is not binding, it does provide useful assistance in balancing the competing interests which is effectively the basis of the *Dagenais-Mentuck* framework.

[58] It is clear that any order that limits the freedom of the press limits a constitutional right and has inherent deleterious effects. In addressing military discipline, the CAF at large, as well as the Canadian public will be limited in the ability to know the whole story. These considerations militate against ordering a ban.

[59] Conversely, the publication ban sought in this case is measured and limited to the identity of the complainants only. The order requested aims to encourage complainants to report all levels of misconduct that occur within the CAF community and serves a greater public interest. Further, the media is not constrained in any meaningful way in describing what occurred in the incidents.

[60] Given that the complainants' names were originally published on the charge sheet, one might ask whether annotating the charge sheet now and imposing the publication ban at this stage would be effective. It is evident that anyone who attends the court martial proceedings and knows of the case is aware of the names of complainants. To be clear, a publication ban never guarantees a complainant perfect anonymity. However, it still serves an important purpose in that after the proceedings have been concluded, there is an improved opportunity for complainants to heal and move on with their lives, without a constant reminder of reports that will exist in perpetuity.

Conclusion

[61] In summary, I am satisfied that there is a risk of harm to the complainants. While harm is only one factor that I am obliged to consider, I also considered the allegations in the context of Operation HONOUR and the CAF's efforts being made to encourage complainants to come forward to report all levels of sexualized misconduct that makes them feel uncomfortable. The ban requested is measured and does not impact the fair trial rights of the accused. The proceedings will be public and the relevant facts of this case will be published in a written decision that will be published on the Internet and available for public scrutiny.

[62] After assessing the competing principles in the case before me, on balance, it is my view that it is in the interest of the proper administration of military justice to impose the publication ban on the identities of the complainants and is justified.

FOR THESE REASONS, THE COURT:

[63] **GRANTS** the application.

Commander S.M. Sukstorf, M.J.

Counsel:

The Director of Military Prosecutions as represented by Commander S. Torani and Lieutenant-Commander J.G.M. Benoit-Gagné, Counsel for the applicant

Lieutenant-Colonel D. Berntsen, Defence Counsel Services, Counsel for Master Corporal A.P. Barrieault, Counsel for the respondent