COURT MARTIAL

Citation: *R. v. Kirwin*, 2020 CM 5006

Date: 20200416
Docket: 201966

Standing Court Martial

Asticou Centre
Gatineau, Quebec, Canada

Between:

Her Majesty the Queen

- and -

Sergeant (Retired) D.C. Kirwin, Offender

Application heard and decision rendered in Edmonton, Alberta, on 12 March 2020
Reasons delivered in Gatineau, Quebec, on 16 April 2020

Before: Commander C.J. Deschênes, M.J.

Restriction on publication: Pursuant to section 179 of the *National Defence Act*, the Court directs that any information obtained in relation to this trial by Standing Court Martial that could identify anyone described in these proceedings as a victim or complainant, including the person referred to in the charge sheet as "XX", shall not be published in any document or broadcast or transmitted in any way.

This order does not apply in respect of the disclosure of information in the course of the administration of justice, when it is not the purpose of the disclosure to make the information known in the community.

DECISION ON APPLICATION BY THE PROSECUTION FOR AN ORDER RESTRICTING PUBLICATION

Introduction

[1] Sergeant (Retired) Kirwin is charged for an offence pursuant to section 129 of the *National Defence Act* (*NDA*) for sending inappropriate text messages to a minor

child of a member of the Canadian Armed Forces (CAF). At the beginning of the court martial proceedings, the prosecution presented an application seeking a court order directing that any information that could identify the victim in these proceedings shall not be published in any document or broadcast or transmitted in any way. The prosecution contends that this court martial has jurisdiction to issue the order using its powers as prescribed at section 179 of the *NDA*. Referring to Bill C-77, *An act to amend the National Defence Act and to make related and consequential amendments to other Acts*, 2019, c. 15 (Bill C-77) which contains a provision that incorporates into the military justice system a statutory power to issue orders restricting publication, he contends that it is Parliament's intent to provide a specific power for courts martial to issue such order when the victim is underage. The respondent, counsel for Sergeant (Retired) Kirwin, does not oppose the application.

[2] This Court granted the application at the beginning of the court martial proceedings. The reasons of the decision are found herein.

Background

[3] On 5 March 2020, the prosecution filed a notice of application in accordance with article 112.03 or subparagraph 112.05(5)(e) of the *Queen's Regulations and Orders for the Canadian Forces* (QR&O). The notice of application was withdrawn the same day, and a new notice of application was filed on 6 March 2020 seeking an order pursuant to section 179 of the *NDA* directing that any information that could identify the victim in these proceedings, including the person referred to as "XX" in the charge sheet, shall not be published in any document or broadcast or transmitted in any way.

Prosecution's position

[4] In his notice of application, the applicant explains that the victim referred to as "XX" in the charge sheet, is a minor who was fourteen years old at the time of the alleged offence. The victim was informed by the prosecutor of the right to request an order restricting publication of their identity, and of the intent of the prosecutor to seek such order. The victim, as well as the father, have both confirmed that they do not want the victim's identity to be made available to the public.

[5] During the hearing of this application, the prosecution presented no evidence in support of his application. The prosecutor relied on the charge sheet, which does not particularize the content nor the nature of the text messages forming the basis of the offence. He relied on briefs of law with supporting authorities, including Bill C-77 which received royal assent on 21 June 2019. He contends that section 183.5 of Bill C-

77, a provision not yet in force, is a legislative response to a statutory void in the *NDA*. This provision is an effort by Parliament to align the *NDA* with similar provisions found in the *Criminal Code*. It provides courts martial, or military judges if a court martial has not been convened, with the statutory power to make an order on application by the victim or the prosecution, when the victim of a service offence, other than an offence of a sexual nature, is under the age of 18 years. This new provision is almost identical to subsection 486.4 (2.2) of the *Criminal Code*. He also argues that section 179 of the *NDA* provides courts martial with the required power to issue a publication ban, since 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 a criminal jurisdiction". Citing *R. v. Barrieault*, 2019 CM 2013, where a similar application was granted in the case of adult complainants of service offences, the prosecution respectfully submits that this court martial has jurisdiction to issue the order sought and should therefore grant the application.

The issue

[6] This Court must now determine if the circumstances of this case meet the test to issue a court order directing that any information that could identify the victim in these proceedings shall not be published in any document or broadcast or transmitted in any way.

Analysis

[7] The principle of openness in court is vital to any democratic country. In Canada, it is guaranteed in the *Canadian Charter of Rights and Freedoms*. Paragraph 11(*d*) of the *Charter* is often invoked in support of an accused person's right to a public trial, while paragraph 2(*b*) guarantees freedom of expression, which includes freedom of the press. An order restricting publication of information disclosed in court is a measure of exception. It has the effect of prohibiting the media from informing the public of the matter concerned by the order. Therefore, such order can only be issued when conditions set out in the statute, or in the jurisprudence, are met. The order shall be as restrictive as possible.

[8] It is quite uncommon at courts martial to have an underage participant, let alone an underage victim. This may explain, in part, the current gap in the legislation as the *NDA* does not provide a specific statutory power for a court martial to issue a mandatory or discretionary order restricting the publication of the identity of these victims. In the context of a case where the particulars of the charge do not reveal whether the offence is of a sexual nature, subsection 486.4(2.2) of the *Criminal Code*

does provide a statutory authority for courts of criminal jurisdictions to issue a mandatory order restricting the publication of the identity of an underage victim of an offence other than an offence of a sexual nature. This provision does not apply in this instance, as the accused is not charged with a *Criminal Code* offence pursuant to section 130 *NDA*. Consequently, the Court must examine if a common law publication ban, which is a ban nowhere found in statute, can be ordered in this case.

Jurisdiction and powers of a court martial

[9] Section 179 of the *NDA* establishes a series of general powers and rights, as are vested in a superior court of criminal jurisdiction, that a court martial may exercise as required. These powers are in respect of attendance of witnesses, for example, and include residual powers and rights with respect to "all other matters necessary or proper for the due exercise of its jurisdiction." Unlike provincial courts or superior courts of criminal jurisdiction, courts martial are *ad hoc* tribunals created by statute, and therefore do not have inherent jurisdiction over persons and offences, *R. v. Brady*, 2003 CM 28 (*R. v. Brady*, 2004 CMAC 3 appeal dismissed). Statutory courts such as courts martial, only have the jurisdiction that has been conferred by statute, *Windsor (City)* v. *Canadian Transit Co.*, [2016] 2 S.C.R. 617 at paragraph 33. However, the Supreme Court of Canada (SCC) specified in this decision that such statutory jurisdiction "includes powers which, although not expressly conferred by statute, are "necessarily implied in the [statutory] grant of power to function as a court of law", such as the power to control the court's processes": see footnote at p. 635. This principle was previously recognised at court martial in *R. v. Master Corporal J.E.M. Lelièvre,* 2007 CM 1011, where it was stated that a "Court Martial has an inherent power to control its procedure in respect of residual matters that are not dealt with in the Act or regulations." See also *Krieger v. Law Society of Alberta*, [2002] 3 S.C.R. 372, at page 394.

[10] It is trite to say that the power to issue a publication ban is a component of a court martial's residual powers and rights with respect to other matters necessary or proper for the due exercise of its jurisdiction. The power to issue an order restricting publication is a matter closely connected to sexual assault offences (and in some cases, to other service offences), which are offences that fall under the jurisdiction of courts martial. This power was necessarily implied in the grant of power to function as a court of law. Additionally, both in the context of *Criminal Code* offences of a sexual nature as well as for other service offences, the powers conferred at section 179 have been used by courts martial on numerous occasions as proper authority to order publication bans. See for example, *R. v. Sergeant B.E.D. Parson*, 2004 CM 54; *R. v. Brunelle*, 2017 CM 4001; *R. v. Gobin*, 2018 CM 2006; *R. v. Spriggs*, 2019 CM 4002 (CMAC appeal

597); *R. v. Barrieault*, 2019 CM 2013. The Court Martial Appeal Court has also endorsed this approach by continuing the order issued by the court martial for at least two cases, *R. v. Thibault*, 2014 CMAC 2, *R. v. Beaudry*, 2016 CMAC 2 (the appeal to the SCC in *Beaudry* was allowed on issues unrelated to the authority for courts martial to issue orders restricting publication, *R. v. Stillman*, 2019 SCC 40). The residual powers found in section 179 of the *NDA* were designed to ensure that a court martial can assert its jurisdiction to address matters not specifically provided for in statute.

Common law order restricting publication - criteria

[11] When issuing a common law publication ban, trial judges have to be satisfied that the test established by the SCC in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, reformulated in *R. v. Mentuck*,[2001] 3 S.C.R. 442, 2001 SCC 76 and commonly referred to as the *Dagenais/Mentuck* test, is met:

> 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.[1]

[12] The SCC applied the *Dagenais/Mentuck* test in the case of an underage victim in a cyberbullying case. In *A.B. v. Bragg Communications Inc.*, 2012 RCS 46, a 15-year-old girl brought an application for permission to anonymously seek the identity of the creator of a fake social media profile, amongst other remedies. The Supreme Court of Nova Scotia denied the request for anonymity, and the Court of Appeal upheld the decision. In applying the test, the SCC granted the appeal and made the following comments pertaining to underage victims:

> [17] Recognition of the *inherent* vulnerability of children has consistent and deep roots in Canadian law. This results in protection for young people's privacy under the *Criminal Code*, R.S.C. 1985, c. C‑46 (s. 486), the *Youth Criminal Justice Act*, S.C. 2002, c. 1 (s. 110), and child welfare legislation, not to mention international protections such as the *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3
>
> …

[1] *R. v. Mentuck*, [2001] 3 S.C.R. 442, at paragraph 32

> [23] In addition to the psychological harm of cyberbullying, we must consider the resulting inevitable harm to children — and the administration of justice — if they decline to take steps to protect themselves because of the risk of further harm from public disclosure.
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> …
>
> [26] Studies have confirmed that allowing the names of child victims and other identifying information to appear in the media can exacerbate trauma, complicate recovery, discourage future disclosures, and inhibit cooperation with authorities."
> [emphasis in original]

[13] Citing its decision in *Canadian Newspapers Co. v. Canada (Attorney General)*, [1988] 2 S.C.R. 122, the SCC established that the limit imposed by a publication ban on the media's rights are minimal and the benefits of protecting underage victims through anonymity outweigh the risk to the open court principle.

[14] Additionally, with the mandatory publication ban order set out in the *Criminal Code* at subsection 486(2.2) as well as with section 183.5 of the *NDA* found in Bill C-77 which provides courts martial with a specific power to order a mandatory publication ban even when the related offence is not of a sexual nature, there is a clear Parliament intent to protect more vulnerable participants of the justice system such as victims under the age of 18. The current gap in the *NDA* was clearly an oversight that Parliament intends to fill. In the circumstances, the application of the *Dagenais/Mentuck* test poses no problem in granting the application, and constitutes in fact a mere formality.

Media notice

[15] 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 complainant only and the ban sought is similar to the mandatory ban set out in subsection 486.4(2.2) of the *Criminal Code* which does not require the applicant to provide notice. Furthermore, the corresponding recommended statutory provision for the *NDA* does not require notice. Such notice is therefore not required in the circumstances.

Conclusion

[16] After assessing the competing principles in the case before me, I am satisfied that disclosing the information related to the identity of the victim presents a risk of harm. It is in the interest of the proper administration of military justice to impose the publication ban on the identity of the victim. The need to protect vulnerable victims

from further harm by restricting the publication of their identity outweigh the risk to the open court principle.

FOR THESE REASONS, THE COURT:

[17] **GRANTS** the application.

[18] **ORDERS**: Pursuant to section 179 of the *National Defence Act*, the Court directs that any information obtained in relation to this trial by Standing Court Martial that could identify anyone described in these proceedings as a victim or complainant, including the person referred to in the charge sheet as "XX", shall not be published in any document or broadcast or transmitted in any way.

[19] This order does not apply in respect of the disclosure of information in the course of the administration of justice, when it is not the purpose of the disclosure to make the information known in the community.

Commander C.J. Deschênes, M.J.

Counsel:

The Director of Military Prosecutions as represented by Major R.G. Gauvin

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