



COURT MARTIAL

Citation: *R. v. Mason*, 2023 CM 2004

Date: 20230313

Docket: 202302

Standing Court Martial

8 Wing Trenton, Building 22
Astra, Ontario, Canada

Between:

His Majesty the King, Applicant

- and -

Master Corporal A. Mason, Respondent

Application heard and decision rendered in Astra, Ontario on 16 February 2023.
Reasons delivered in Gatineau, Quebec, on 13 March 2023.

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

Restriction on publication: pursuant to paragraph 183.6(1) of the *National Defence Act*, the Court orders that any information that could identify the complainant identified as “A.B.” in the charge sheet shall not be published in any document or broadcast or transmitted in any way, except when the disclosure of such information is in the course of the administration of justice, when it is not the purpose of that disclosure to make the information known in the community;

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 seeking a publication ban on any information that could identify the complainant set out in the charge listed on the charge sheet. A publication ban is an order that the identity of a complainant or a witness (or information that could identify them) not be published, broadcast or transmitted in any way.

[2] With the recent implementation of Bill C-77 into the *National Defence Act (NDA)*, military judges were provided with direct statutory power under sections 183.4 to 184.6 of the *NDA* to protect vulnerable witnesses within the military justice system. Military judges may now make certain orders, such as non-disclosure of witnesses' identity, publication bans, orders allowing testimony from outside the courtroom and orders preventing an accused person from personally cross-examining a witness.

[3] Section 183.5 of the *NDA* applies to those situations where accused persons are charged with any one of the listed *Criminal Code* offences, which includes sexual assault. This section makes it mandatory for a military judge to impose publication bans upon request.

[4] However, section 183.6 of the *NDA* provides guidelines whereby a military judge may exercise its discretionary powers in considering those circumstances that are not covered under section 183.5 of the *NDA*. In the case at bar, the accused is not charged with any of the listed *Criminal Code* offences set out in section 183.5 of the *NDA*. Rather, he is charged with an *NDA* offence of having behaved in a disgraceful manner.

[5] Consequently, the prosecution requests the Court impose a publication ban by relying upon its powers set out at subsection 183.6(1) of the *NDA*. Given the nature of the charges, the respondent supports the imposition of a publication ban with respect to the complainant.

Law

[6] Publication bans requested under subsection 183.6(1) of the *NDA* require the applicant to set out the grounds on which the applicant relies to establish that the order is necessary for the proper administration of military justice (see subsection 183.6(6)).

[7] A judicial hearing may be held to decide whether to authorize a publication ban under section 183.6 and the hearing may be held in private (see section 183.6(7)).

[8] In any event, subsection 183.6(8) outlines several factors that the military judge must consider in deciding whether to authorize a publication ban, such as fair trial rights and the risk of harm if the person's identity were disclosed. The judge may subject the order to conditions (subsection 183.6(9)).

[9] In coming to a decision on whether an order under section 183.6 of the *NDA* should be made, a trial judge must consider the following factors, set out at subsection 183.6(8):

- (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.

[10] The rendering of a decision requires the Court to 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.

[11] 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. The test set out in section 183.6 of the *NDA* directs that a military judge must assess the competing interests between the open court principle and the administration of justice with neither interest eclipsing the other.

[12] Factually, this requires the Court to balance the need to encourage complainants to report incidents of sexual misconduct in the Canadian Armed Forces (CAF) against the public interest in freedom of expression and open court proceedings.

[13] 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 complainant's name.

[14] 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.

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

[16] In a situation where a complainant comes forward with a sensitive sexual misconduct complaint and the prosecution decides to lay the charge under section 93 or section 129 of the *NDA*, rather than under section 271 of the *Criminal Code*, I find that the prosecution's decision does not 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 a complainant's name 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 an *NDA* offence and not under section 271 of the *Criminal Code*.

[17] 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.

[18] 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 there any other reasonable alternatives. Are there any other safeguards built into the military justice system that can adequately alleviate the prejudice?

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

[20] This final step requires broad consideration as to the impact of the order on the freedom of expression of those affected by it. In addressing military discipline, the CAF at large, as well as the Canadian public, may believe that they will be limited in the ability to know the whole story. These considerations militate against ordering a ban.

[21] However, considering the nature of the charges, the publication ban sought in this case is measured and limited to the identity of the complainant's name 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.

[22] It is evident that anyone who attends the court martial proceedings and knows of the case is aware of the name of complainant. To be clear, a publication ban never guarantees a complainant perfect anonymity. However, it 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

[23] In summary, I am satisfied that, based on the nature of the charges before the Court, there is a risk of harm to the complainant. While harm is only one factor that I am obliged to consider, I also considered the allegations in the context of the CAF's efforts being made to encourage complainants to come forward to report all levels of sexualized misconduct that makes them feel uncomfortable.

[24] 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 available on the internet for public scrutiny.

FOR THESE REASONS, THE COURT:

GRANTS the application.

"S.M. Sukstorf, Commander"
M.J.

Counsel:

The Director of Military Prosecutions as represented by Major M. Reede, Counsel for the Applicant

Major F.D. Ferguson and Lieutenant-Colonel A.H. Bolik, Defence Counsel Services, Counsel for the Respondent, Master Corporal A. Mason