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Ottawa, Ontario, August 15, 2016

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

THE CANADIAN BROADCASTING CORPORATION / RADIO-CANADA

Applicant

and

CANADA (ATTORNEY GENERAL)

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This application for judicial review is about competing interests: the open court principle, which is deeply rooted in our legal system and the protection of the privacy of sexual assault complainants in court martial cases. Like any other court, courts martial are public. In cases involving the prosecution of sexual offences, publication bans can be ordered to protect the

identity and privacy of a complainant. However, members of the public, including the media, can still be present in the courtroom. At issue in this application is whether a publication ban prohibits access to a complainant's identity, as contained in court records, once the court martial proceedings are over.

II. Background

A. *Request for court martial decisions*

[2] Rachel Houlihan, a journalist employed with the Canadian Broadcasting Corporation [CBC] Fifth Estate program, has been investigating the prosecution of sexual assault by the Canadian military justice system. On June 12, 2013, she sent an email to Captain Amber Bineau, a Public Affairs Officer with the Department of National Defence, asking for all the documents related to a particular sexual assault court martial which proceeded in 2008. In a response communicated the same day, Captain Bineau informed Ms. Houlihan that she had put in the request for the transcript and decision, but due to a publication ban, the Office of the Chief Military Judge would need to sever the documents before releasing them. A week later, Captain Bineau sent Ms. Houlihan a redacted copy of the requested decision but informed Ms. Houlihan that the remaining part of her request would take some time.

[3] On June 21, 2013, Ms. Houlihan sent another email to Captain Bineau inquiring as to why the decision had not been posted online.

[4] On August 2, 2013, Captain Bineau advised Ms. Houlihan that:

> Court decisions are posted on the Chief Military Judges (sic) website once the presiding military judge has reviewed the transcribed decision and has approved it for publication. Those decisions under publication ban require extensive review and consultation to ensure the documents are severed in accordance with the Courts (sic) orders, and are compliant with federal legislation, including the *Privacy Act* and *Criminal Records Act*. This review may involve removing any information that could potentially identify a complainant or witness. Prior to 2010, court documents under a publication ban were provided upon request. Since 2010, the military judiciary writes its respective decisions in a format allowing court decisions to be published on the Chief Military Judges (sic) website, including those decisions whereby the Court has ordered a publication ban.

[5] On December 10, 2013, Captain Bineau wrote to Ms. Houlihan asking whether she still required the transcript in relation to the 2008 court martial decision. Ms. Houlihan responded that she did not think she would need the full transcript but would confirm later. She also requested decisions in fourteen (14) other cases from 2004 involving allegations of sexual assault or similar allegations.

[6] On March 26, 2014, Captain Bineau sent the fourteen (14) decisions to Ms. Houlihan. Six (6) of the decisions included redactions or word substitutions. With the exception of one decision, all of them included a warning that the identity of the complainant and any information that would disclose their identity could not be published in any document or broadcast in any way. The majority of the warnings indicated that the publication bans were imposed pursuant to subsections 486(3) and 486(4) of the *Criminal Code*, RCS 1985, c C-46, as they read in 2004.

B. *Application to the Courts Martial*

[7] In an unrelated court martial involving a charge of sexual assault subject to a publication ban, the CBC filed a Notice of Application on April 24, 2014, with the Office of the Chief Military Judge seeking an unredacted copy of the decision and transcript or audio recording in that case, including a copy of any publication ban issued by the court martial. The CBC also sought a declaration that the audio recordings, transcripts and other records of courts martial are presumptively public and are not subject to the provisions of the *Privacy Act*, RSC 1985, c P-21.

[8] On August 28, 2014, Military Judge d'Auteuil dismissed the CBC's application on the grounds that he did not have jurisdiction to hear the application.

[9] On October 9, 2014, the CBC filed its Notice of Application in this Court.

[10] Throughout the proceedings, the CBC has stated that it does not wish to publish the information that is subject to a publication ban and it has undertaken not to do so. The CBC has indicated that it is seeking the names of the complainants for the purpose of having a reporter contact them and invite them to tell their stories.

III. Legislative Framework

[11] The Canadian military justice system consists of a two-tiered tribunal structure: summary trials, which are designed to deal with minor service offences, and courts martial, which deal with more serious offences and are tried either by a military judge alone or a military judge and a panel of senior members of the Canadian Forces. There is no permanent court martial. Instead, courts martial are constituted on an *ad hoc* basis and convened only when necessary to address

specific charges under the Code of Service Discipline (*Canada (Military Prosecutions) v Canada (Chief Military Judge)*, 2007 FCA 390 at para 5 [*CMP v CMJ*]).

[12] Pursuant to subsection 179(1) of the *National Defence Act*, RSC 1985, c N-5 [NDA], a court martial has the same powers, rights and privileges as a superior court of criminal jurisdiction with respect to the attendance, swearing and examination of witnesses; the production and inspection of documents; the enforcement of its orders; and all other matters that are necessary or proper for the exercise of its jurisdiction.

[13] Subsection 180(1) of the NDA provides that courts martial shall be public, subject to the exceptions set out in subsection 180(2). Section 180 of the NDA reads:

> 180 (1) Subject to subsections (2) and (3), courts martial shall be public and, to the extent that accommodation permits, the public shall be admitted to the proceedings.
>
> (2) A court martial may order that the public be excluded during the whole or any part of its proceedings if the court martial considers that it is necessary
>
> (a) in the interests of public safety, defence or public morals;
>
> (b) for the maintenance of order or the proper administration of military justice; or
>
> (c) to prevent injury to international relations.
>
> (3) Witnesses are not to be admitted to the proceedings of a court martial except when under examination or by specific leave of the court martial.
>
> (4) For the purpose of any deliberation, a court martial may cause the place where the proceedings are being held to be cleared.

[14] The role and functions of the Court Martial Administrator [CMA] are set out in sections 165.18 through 165.2 of the NDA, as well as section 101.17 of the *Queen's Regulations and Orders* for the Canadian Forces [QR&Os]. Specifically, the CMA is responsible for:

a) managing the Office of the Chief Military Judge and supervision of personnel, other than military judges, within that Office;

b) convening General Courts Martial and Standing Courts Martial;

c) appointing members of General Courts Martial;

d) assigning a court reporter for each court martial or other hearings before a military judge;

e) controlling and maintaining the schedule for courts martial and other hearings before a military judge;

f) maintaining a file in respect of each court martial or other hearings before a military judge; and

g) retaining the recording and minutes of proceedings of each court martial and other hearings before a military judge.

[15] Pursuant to subsection 165.19(3) of the NDA, the CMA acts under the general supervision of the Chief Military Judge. The Office of the Chief Military Judge was created through a Ministerial Organization Order and is designated as a unit of the Canadian Forces embodied in the Regular Force. Its role is set out in the Canadian Forces Organization Order

3763 issued on behalf of the Chief of Defence Staff. Specifically, the Office of the Chief Military Judge is responsible for:

a) appointing military trial judges to preside at Standing Courts Martial and Special General Courts Martial;

b) appointing military trial judges to officiate as judge advocates at Disciplinary and General Courts Martial;

c) appointing Presidents and members of Disciplinary and General Courts Martial; and,

d) providing court reporting services and transcripts of the proceedings of courts martial.

[16] Also, the Chief Military Judge may, with the Governor in Council's approval and after consultation with a rules committee established under regulations made by the Governor in Council, make rules governing, among other things, the minutes of proceedings of courts martial and other proceedings as well as public access to documents, exhibits or other things connected with any proceeding (subsections 165.3(e) and 165.3(f) of the NDA).

[17] Although a draft Policy on the Publication of Court Martial Information dated September 17, 2004 was prepared by the Office of the Chief Military Judge, the evidence is unclear whether the policy was ever adopted. In an email dated September 23, 2014, the CMA informed the CBC's counsel that her office had been unable to locate a signed copy of the policy and that she had no indication as to whether it had ever been published or made available to the public. She further indicated that she considered the draft policy to be of no force and effect.

IV. Questions in issue

[18] Although framed differently by the parties, the following issues arise from the application for judicial review:

a) Is this application for judicial review out of time?

b) What is the appropriate standard of review?

c) Is the CMA's continued refusal to provide copies of unredacted decisions subject to a publication ban lawful?

d) What remedies should be awarded, if any?

V. Analysis

A. *Is the application for judicial review out of time?*

[19] The Attorney General of Canada [AGC] submits that the application for judicial review was brought outside of the thirty (30) day time limit prescribed in subsection 18.1(2) of the *Federal Courts Act*, RSC 1985, c F-7. The decision refusing to provide unredacted court martial decisions was initially communicated to Ms. Houlihan on June 12, 2013, and again on August 2, 2013, when she was advised that decisions under publication ban had to be severed to remove any information which could potentially identify a complainant or a witness. The AGC states that the CBC took no steps to challenge that decision until April 2014 and provided no explanation for the delay in pursuing the matter. The AGC also submits that even after the fourteen (14) decisions at issue were provided to Ms. Houlihan on March 26, 2014, the CBC

waited until October 8, 2014, to file its Notice of Application for judicial review in this Court. The CBC's decision to bring an application before the Office of the Chief Military Judge in April 2014 does not justify the CBC's failure to abide by the statutory thirty (30) day limitation period.

[20] The CBC argues that the AGC's objection is itself time-barred because Prothonotary Tabib directed the Registry of the Federal Court on October 9, 2014 to accept the CBC's Notice of Application for filing. The CBC also argues that in any event, the AGC's objection is without merit for the following reasons. First, the CBC exhausted "the internal avenues of accountability within the military justice system" in raising the matter with the Office of the Chief Military Judge. Secondly, the thirty (30) day limitation period in subsection 18.1(2) of the *Federal Courts Act* applies to "a decision or order" of a federal administrator. Judicial review is also available where there is a continuing course of conduct that is illegal and will continue unless the Court intervenes. Third, even if subsection 18.1(2) of the *Federal Courts Act* is applicable, this would be a proper case for the Court to grant an extension of time for the filing of the judicial review application. Finally, dismissing the judicial review application would achieve no practical benefit because the CBC or another party could make similar requests in the future and seek judicial review of the CMA's decision.

[21] I agree with the CBC that the subject-matter of the application for judicial review is a continuing course of conduct and as a result, the application for judicial review is not time-barred.

[22] It is well established in jurisprudence that an application for judicial review under section 18.1 of the *Federal Courts Act* can encompass more than just a "decision or an order". Pursuant to subsection 18.1(1), an application may be brought by "anyone directly affected by the matter in respect of which relief is sought". The word "matter" can include a course of conduct in respect of which a remedy may be available under section 18 of the *Federal Courts Act* (*Krause v Canada*, [1999] 2 FC 476 at para 21, [1999] FCJ No 179 (FCA) (QL) [*Krause*]; *May v CBC/Radio Canada*, 2011 FCA 130 at para 10 [*May*]; *Airth v Canada (National Revenue*), 2006 FC 1442 at paras 9, 10 [*Airth*].

[23] The thirty (30) day limitation period to bring an application for judicial review set out in subsection 18.1(2) of the *Federal Courts Act* applies only "in respect of a decision or an order of a federal board, commission or other tribunal". Where the application for judicial review is not in respect of a "decision or order", the time limit imposed by subsection 18.1(2) does not apply (*Krause* at paras 23, 24; *May* at para 10; *Airth* at para 5; *Telus Communications Company v Canada (Attorney General)*, 2014 FC 1 at paras 28, 29).

[24] The parties agree, and I concur, that there is no dispute that the CMA constitutes a "federal board, commission or other tribunal" within the meaning of subsections 2(1), 18(1) and 18.1(2) of the *Federal Courts Act*. The CMA's refusal to provide unredacted copies of the requested decisions and access to court martial records is an administrative one and one that is subject to judicial review by this Court.

[25] The issue, however, is whether the CBC is seeking judicial review of a "decision or order" or of a "matter".

[26] The CBC is challenging the CMA's continued refusal to provide unredacted copies of court martial decisions subject to a publication ban. The application for judicial review does not arise from a single decision of the CMA. Rather, the CBC requested a number of decisions involving a publication ban at different times, and on each occasion, the CMA informed the CBC that it was required, pursuant to the publication ban, to remove any information that could disclose the identity of the complainant or a witness in the case. In my view, it is the ongoing practice of the CMA to redact the court martial decisions subject to a publication ban that is alleged to be unlawful and subject to judicial review.

[27] Moreover, the relief sought by the CBC in its Notice of Application for judicial review also confirms that it is a course of conduct that is at issue: the relief sought includes a declaration that the *Privacy A*ct does not apply to the court records of the courts martial, as well as an order of *mandamus* for the CMA to provide the CBC with unredacted copies of the requested decisions. While I recognize that the CBC is also seeking an order setting aside the decision of the CMA refusing to release unredacted copies of the fourteen (14) court martial decisions, I do not think this particular relief takes away from the conclusion that it is a course of conduct that is at issue. Fundamentally, the CBC is contesting the CMA's practice of redacting court martial decisions that are subject to a publication ban.

[28] Even if I were to find that the CBC was late in bringing its application for judicial review, I consider this to be a proper case in which to grant an extension of time.

[29] The four (4) factors to be considered in determining whether or not to grant an extension of time are set out in *Canada (Attorney General) v Hennelly*, [1999] FCJ No 846 at para 3 (FCA) (QL). To be successful, an applicant must demonstrate: 1) a continuing intention to pursue his or her application; 2) the application has some merit; 3) no prejudice to the respondent arises from the delay; and 4) a reasonable explanation for the delay exists.

[30] Here, the CBC has demonstrated a continuing intention to pursue the matter by its application to the Office of the Chief Military Judge. In addition, on June 23 and September 20, 2014, the CBC inquired whether any copy existed of the Chief Military Judge's Policy on the Publication of Court Martial Information. A response to the query was received on September 23, 2014 and the CBC filed its Notice of Application for judicial review on October 9, 2014. The CBC has repeatedly taken the position that the CMA had no authority to redact information from the court martial decisions.

[31] There is also merit to the application given that the open court principle has long been recognized by the courts as a cornerstone of democracy. Moreover, the AGC has not demonstrated any prejudice arising from the timing of the application. In fact, the AGC took no position on the CBC's request for an extension of time. Finally, the CBC's explanation that it wanted to exhaust the internal avenues of the military justice system prior to bringing an application for judicial review before this Court is reasonable in the circumstances of this case.

[32] While not specifically a factor in considering whether to grant an extension of time, I see no benefit to concluding that the application for judicial review is out of time. Nothing would prevent the CBC from requesting access to a different court martial decision that is subject to a publication ban and then seek judicial review of any decision refusing to provide access to an unredacted version of the said decision. If that were the case, the very same conduct would be at issue. Since the parties have already argued the merits of the application, I consider that deciding the matter at this time would be a more efficient use of the Court's resources (*Airth* at para 12).

B. *What is the appropriate standard of review?*

[33] The first step in determining the appropriate standard of review is to establish whether the existing jurisprudence has already settled, in a satisfactory manner, the degree of deference to be afforded to a particular category of question. If it has not, the reviewing court must then proceed to conduct a contextual analysis of the decision to determine the appropriate standard of review and consider a number of relevant factors, including: 1) the presence or absence of a privative clause; 2) the purpose of the tribunal; 3) the nature of the question at issue; and 4) the expertise of the tribunal (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 57, 62, 64, [2008] 1 SCR 190 [*Dunsmuir*]).

[34] The CBC submits that the question of whether the *Privacy Act* applies to the records of courts martial without consideration for the open court principle raises a question of law that must be assessed on a correctness standard of review. The CBC relies on the Federal Court of Appeal decision in *CMP v CMJ* where the Court found that the decision of the Chief Military

Judge refusing to convene a court martial on the basis that it would offend the open court principle raised a question of law reviewable on a correctness standard of review.

[35] The AGC submits that the appropriate standard of review is reasonableness. The decision in *CMP v CMJ* is not determinative as the decision refers to a decision of the Chief Military Judge, a judicial officer, and not the CMA. Furthermore, the decision predates the reformulation of the two-step standard of review analysis set out in *Dunsmuir*.

[36] In *CMP v CMJ*, the Federal Court of Appeal examined the open court principle in the context of the Chief Military Judge's refusal to assign a military judge because the charge sheet and accompanying documentation contained classified information. The Chief Military Judge was of the view that assigning a judge where a charge sheet is classified would be the same as sanctioning a closed trial. Given this refusal, the CMA refused to convene a Standing Court Martial because she could not identify the military judge whose name would appear on the order.

[37] In the case before me, the CBC is challenging the CMA's continued refusal to release unredacted court martial decisions in which a publication ban was ordered. The CMA's position is that in order to comply with the publication bans and the *Privacy Act*, it must redact any information that would identify the complainants before releasing copies of the decisions to the CBC. With the exception of the decision in *CMP v CMJ*, which is not directly on point, I am not aware of any other precedent involving a decision of the CMA on the issues raised in this proceeding. Accordingly, the second step in the *Dunsmuir* analysis is required.

[38] Upon review of the relevant factors, I conclude that the appropriate standard of review is that of correctness.

[39] First, the duties of the CMA are mainly administrative and its decisions are not protected by a privative clause in the NDA. I recognize, however, that the absence of a privative clause is not determinative (*Dunsmuir* at para 52; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 25, [2009] 1 SCR 339).

[40] Second, although the court martial regime is unique and the CMA has expertise in its administration, the interpretation of a publication ban does not involve the interpretation of the CMA's home statute. Rather, it involves the interpretation of the term "publish" as found in the *Criminal Code* provisions relating to publication bans in proceedings involving sexual offences. This issue is not exclusive to the CMA. Moreover, the determination of whether the disclosure prohibitions in the *Privacy Act* apply to the records of courts martial is also a question of law. With respect to both questions, the CMA's expertise is not superior to that of this Court or any other superior court.

[41] Third, as stated above, the CMA's role is entirely administrative in nature and its purpose is to manage the Office of the Chief Military Judge and to supervise the personnel within that office, with the exception of the military judges. The CMA does not decide issues of law.

[42] Finally, the nature of the question at issue is one that is of central importance to the legal system. The determination of whether publication bans under the *Criminal Code* require that

decisions or court records be redacted prior to their release to a member of the public is one that arises not only in the court martial regime but in all criminal trials involving the prosecution of sexual offences where a publication ban has been ordered. It also involves consideration of two (2) competing interests, the open court principle and the protection of privacy, both of which are entrenched in our Canadian judicial system.

C. *Is the CMA's continued refusal to provide copies of unredacted decisions subject to a publication ban lawful?*

[43] The CBC submits that the open court principle applies to courts martial and that it extends to all facets of the court martial process, including exhibits and the record of its proceedings. It is also applicable after the proceedings have concluded. A publication ban constitutes a limited restriction on the open court principle. When a trial judge imposes a publication ban on the identity of a complainant, the public and the media are not excluded from the courtroom and they retain access to the court's proceedings and records. Although Parliament has expressly provided for more severe restrictions on public access to court proceedings, such as *in camera* proceedings or the sealing of court files, a publication ban does not constitute a sealing order.

[44] The CBC further submits that even if the CMA had the authority to expand the scope of the publication ban, the CMA failed to apply the test enunciated by the Supreme Court of Canada in *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835 at para 73 (QL) [*Dagenais*] and reframed in *R v Mentuck*, 2001 SCC 76 at para 32, [2001] 3 SCR 442 [*Mentuck*],

which set out the conditions under which the courts may limit the openness of court proceedings. If the CMA had applied the test, no potential justification would meet the criteria of the test.

[45] The AGC submits that the CMA properly redacted the names of complainants in six (6) court martial decisions. In each of the fourteen (14) courts martial, the presiding military judge imposed a publication ban pursuant to subsections 486(3), 486(4) or both, of the *Criminal Code* (as they read in 2004). While commonly referred to as a "publication ban", the current statute refers not only to publication, but also to broadcasting or transmitting information. Once ordered, publication bans are mandatory and continue to be in force until lifted by a court where it has been demonstrated that the circumstances have dramatically changed. Absent an order lifting the ban, it is not open to the CMA to ignore the requirement imposed by the military judges not to publish the names of the complainants in a publicly available court decision.

[46] The AGC further submits that the predominant purpose of a section 486 publication ban is to protect the privacy of complainants and to foster confidence in the justice system. Allowing the publication and dissemination of court martial decisions that identify the complainants would run counter to the objective and purpose of a publication ban. The prohibition must be read purposively as requiring a restriction on identifying the complainants on any document which will link them to the facts of the case.

[47] The AGC also submits that the *Dagenais/Mentuck* framework is not applicable as the CBC is not challenging the legality of the publication ban and nothing in the CMA's conduct has infringed the CBC's freedom of expression.

[48] Finally, the AGC argues that the open court principle has never been extended to include the right of the media to contact victims of crime outside of court room proceedings years after the trials have concluded. In the case at bar, the CBC is fully capable of reporting on the court martial proceedings. It received all fourteen (14) decisions and the documents received allow the CBC to know what transpired in court. Obtaining the names of the complainants will not add to its understanding of the proceedings.

[49] In my view, the CMA erred in finding that the publication bans required the redaction of the names of the complainants when providing access to the requested court martial decisions. I have reached this conclusion following an analysis of the open court principle, publication bans, both generally and in the context of the *Criminal Code*, limitations on the open court principle, the distinction between "publishing" and "accessing" information in a court record and the application of the *Privacy Act* to the records of the courts martial, all of which I will examine in the paragraphs below.

(1) The open court principle

[50] The Supreme Court of Canada has repeatedly affirmed the importance of the open court principle. Starting in 1982, Justice Dickson wrote in *MacIntyre v Nova Scotia (Attorney General),* [1982] 1 SCR 175 (WL) at para 59, "covertness is the exception and openness the rule" and, at para 62, "the rule should be one of public accessibility and concomitant judicial accountability". Later, in *Canadian Broadcasting Corp v New Brunswick (Attorney General)*, [1996] 3 SCR 480 at para 22 [*New Brunswick*]**,** Justice La Forest described the open court principle as "one of the hallmarks of a democratic society" and at para 23, "[o]penness permits

public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings". In 2005, in *Toronto Star Newspapers Ltd v Ontario*, 2005 SCC 41 at para 1, [2005] 2 SCR 188 [*Toronto Star Newspapers*], Justice Fish wrote: "[i]n any constitutional climate, the administration of justice thrives on exposure to light — and withers under a cloud of secrecy". More recently, in *Canadian Broadcasting Corp v Canada (Attorney General)*, 2011 SCC 2 at para 1, [2011] 1 SCR 19, Justice Deschamps commented as follows:

> The open court principle is of crucial importance in a democratic society. It ensures that citizens have access to the courts and can, as a result, comment on how courts operate and on proceedings that take place in them. Public access to the courts also guarantees the integrity of judicial processes inasmuch as the transparency that flows from access ensures that justice is rendered in a manner that is not arbitrary, but is in accordance with the rule of law.

See also *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326 at paras 9 to 11, [1989] SCJ No 124 (QL); *Vancouver Sun (Re)*, 2004 SCC 43 at paras 23 to 27, [2004] 2 SCR 332; *Canadian Broadcasting Corp v The Queen*, 2011 SCC 3 at para 12, [2011] 1 SCR 65 [*Canadian Broadcasting Corp*], and *AB v Bragg Communications Inc*, 2012 SCC 46 at paras 11, 13, [2012] 2 SCR 567 [*Bragg Communications Inc*].

[51] The open court principle applies to all facets of a court's process. It also includes access to the exhibits and the audio recordings of hearings (*Canadian Broadcasting Corp* at para 12; *Singer v Canada (Attorney General)*, 2011 FCA 3 (QL) at para 6).

[52] It is undisputed that the open court principle applies to courts martial. It is prescribed by section 180 of the NDA. The military judge assigned to preside a court martial trial will be

required, like any other judge, to weigh a claim for non-disclosure against the open court principle and to determine whether the information should be made available to the public (*CMP v CMJ* at para 38).

(2) Publication bans

[53] While the open court principle has been recognized as a pillar of a democratic society, the courts have also consistently affirmed that other interests, such as the privacy of sexual assault complainants, are equally as important (*Canadian Newspapers Co v Canada (Attorney General)*, [1988] 2 SCR 122 at para 15 (QL) [*Canadian Newspapers*]; *Bragg Communications Inc* at paras 11, 17, 25, 29).

[54] In order to accommodate these competing interests, the courts have used a number of measures to minimally impair the open court principle and still protect other interests. A publication ban is one of several forms of relief which limit the open court principle.

[55] At page I-7 of his publication *The Law of Publication Bans, Private Hearings and Sealing Orders*, (Toronto, Carswell, 2006) (loose-leaf updated 2016), the author James Rossiter, defines a publication ban as "a statutory or judicial prohibition on disclosing information, usually in a publication or broadcast, which is the subject of the ban".

[56] A publication ban can be mandatory or discretionary. If mandatory, it can be automatic or at the request of a party. If discretionary, it may be either based in statute or the common law. The ban may also be limited in time or of infinite duration (Rossiter at I-7 and I-8).

[57] In *Dagenais* above, Chief Justice Lamer enumerated a number of advantages which result from ordering publication bans. They include: 1) preventing jury influence; 2) maximizing the chances that witnesses will come forward and testify; 3) protecting vulnerable witnesses; 4) preserving the privacy of individuals involved in a criminal process; 5) maximizing the chances of rehabilitation for young offenders; 6) encouraging the reporting of sexual offences; 7) saving the financial and/or emotional costs to those involved of the alternatives to publication bans, such as trial delays and changes in venues; and 8) protecting national security (*Dagenais* at para 83). He also highlighted some of the reasons for not ordering a publication ban. In particular, the absence of a ban will: 1) maximize the chances that individuals will learn about a case and come forward with new information; 2) prevent perjury by placing witnesses under public scrutiny; 3) prevent state and/or court wrongdoing by placing the criminal justice process under public scrutiny; 4) reduce crime through the public expression of disapproval for crime; and 5) promote the public discussion of important issues (*Dagenais* at para 84).

[58] In the context of sexual offence trials, publication bans also have the purpose of protecting the privacy of the complainants. In *Canadian Newspapers*, the Supreme Court of Canada confirmed that publication bans in sexual assault proceedings foster complaints by victims of sexual assault by protecting them from the trauma of wide-spread publication resulting in embarrassment and humiliation. Publication bans encourage victims to come forward and complain which in turn facilitates the prosecution and conviction of those guilty of sexual offences (*Canadian Newspapers* at para 15).

[59] Where a publication ban is discretionary, the judge is required to apply the *Dagenais/Mentuck* test enunciated by the Supreme Court of Canada in considering whether a publication ban should be ordered. A publication ban should only be ordered when it is: 1) necessary to prevent a serious risk to the proper administration of justice because reasonable alternative measures will not prevent the risk; and 2) the positive effects of the ban outweigh the negative effects on the rights and interests of the parties and public, including the effects on the right to free expression, the right of an accused to a fair and public trial and the efficacy of the administration of justice (*Mentuck* at para 32). If the publication ban is mandatory, no balancing of interests is required.

[60] In 2004, publication bans in proceedings involving sexual offences were ordered pursuant to subsections 486(3) and 486(4) of the *Criminal Code* which read:

> 486(3) Subject to subsection (4), the presiding judge or justice may make an order directing that the identity of a complainant or a witness and any information that could disclose the identity of the complainant or witness shall not be published in any document or broadcast in any way, when an accused is charged with…
>
> 486(4) The presiding judge or justice shall
>
> > (a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the complainant to proceedings in respect of an offence mentioned in subsection (3) of the right to make an application for an order under subsection (3); and
> >
> > (b) on application made by the complainant, the prosecutor or any such witness, make an order under that subsection.
>
> [Emphasis added.]

[61] Today, they are governed by section 486.4 of the *Criminal Code*:

> 486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of
>
> > (a) any of the following offences:
> >
> > […]
>
> 486.4(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall
>
> > (a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and
> >
> > (b) on application made by the victim, the prosecutor or any such witness, make the order.
>
> [Emphasis added.]

[62] Although the *Criminal Code* now refers to "transmitting" information in addition to publishing and broadcasting the information, I do not consider that the change in legislation affects the outcome of this application for judicial review.

(3) Other limitations on the open court principle

[63] In addition to publication bans, there are a number of other forms of relief that the courts may use to limit the open court principle.

[64] For instance, closed hearings, otherwise referred to as *in camera* hearings or exclusion orders, restrict public attendance at a hearing. They are more restrictive than publication bans because they have the effect of ensuring that the public will not be able to disclose what occurred

at the hearing. This form of limitation on the open court principle can be based in statute (*Criminal Code*, subsection 486(1)) or in common law based on a judge's inherent jurisdiction *(Named Person v Vancouver Sun*, 2007 SCC 43 at paras 56, 91, 96, [2007] 3 SCR 253 [*Vancouver Sun*]; Rossiter at I-11 and I-12).

[65] A sealing order, also known as a confidentiality order, restricts public access to information found in a court record. Generally, when a sealing order has been issued, the confidential information will be placed in a separate envelope kept by the Court and will not be accessible to the general public for review (*Vancouver Sun* at paras 91, 95; *Toronto Star Newspapers Ltd* at para 18; Rossiter at I-13 and I-14).

[66] Courts have also ordered that certain types of information be blacked-out, redacted or edited from public documents found on the public court record. In doing so, the public has access to the documents but the sensitive information is protected (*R v Twitchell*, 2009 ABQB 644 (QL) at para 45 [*Twitchell*].

[67] An anonymity order can also be requested by the parties, in which case initials or a pseudonym will be used in court filings and during the hearing. An anonymity order will allow the public to attend the hearing and to review the court records but will prevent it from knowing the identity of the person claiming anonymity. For instance, in *Bragg Communications Inc*, the applicant had brought an application for an order requiring an Internet service provider to disclose the identity of the person who had used an IP address to publish a Facebook profile, which included her picture, a modified version of her name and other particulars identifying her.

She asked the court for permission to proceed anonymously and for a publication ban on the content of the Facebook profile. On appeal, the Supreme Court of Canada agreed that she could proceed anonymously. It also found that a publication ban was not required if her identity was protected (*Bragg Communications Inc* at paras 9 and 30; see also Rossiter at I-14 and I-15).

[68] The courts may also order that a witness testify behind a screen or other device that will protect the image of the witness from members of the public (*Criminal Code*, subsection 486(1); *Vancouver Sun* at para 56).

[69] These examples are by no means exhaustive. However, in each case, the Court will seek to minimally impair the open court principle to ensure that the public retains as much access as possible to the court's proceedings.

(4) "publish" versus "access"

[70] The courts have distinguished the concept of publication from that of providing access. In *MacDonell c Flahiff,* 1998 CanLII 13149 (QC CA) [*MacDonell*], two (2) appellants appealed an order allowing access to certain search warrants due to prejudice to their right to a fair trial. The Court of Appeal of Québec concluded that it was not accessing the documents which threatened their right to a fair trial, but the possibility of premature publication and unfair pre-trial publicity. In order to balance their right to a fair trial and the open court principle, the Court ordered that the press be granted access to the search warrants, but subject to a publication ban (*MacDonell* at 24 and 25).

[71] The Court of Appeal of Ontario adopted the same reasoning in *Ottawa Citizen Group Inc v Canada (Attorney General)*, [2005] OJ No 2209, 75 OR (3d) 590 (QL) [*Ottawa Citizen Group*]. The Court allowed an appeal of a sealing order because the trial judge did not consider a reasonable alternative to a sealing order, and in particular, an order permitting the media access to the names of the subjects of the search warrants but, at the same time, prohibiting their publication in any articles or editorials (*Ottawa Citizen Group* at paras 43 and 48).

[72] While they cannot be considered binding authorities and no evidence was adduced regarding their application, the court access policies submitted by the CBC at the hearing also demonstrate that courts distinguish access from publication bans. For example, the Ontario Superior Court of Justice policy states:

> When a publication ban is imposed by the court (e.g., s.486.4 related to sexual offences or s. 517 related to judicial interim release or bail hearings) or is automatically provided for (e.g., s. 542 related to preliminary hearings), the court file and documents are still accessible to the public. Staff will notify the recipient that the file or document is under a publication ban and will warn him or her that publication, broadcasting or transmitting in any way the information governed by the publication ban could be a violation of the law.
>
> [Emphasis added.]
>
> (Ministry of the Attorney General of Ontario, Court Services Division, *Policy and Procedures on Public Access to Court Files, Documents and Exhibits*, (2006), as amended, s. 2.2.6)

[73] In Alberta, the Public and Media Access Guide, 2013 provides at page 16:

> Publication bans may be required by law or a court order. Publication bans prohibit publishing certain information related to a court proceeding. A publication ban will prohibit publishing the information in print, radio, television or via the Internet. Publication bans restrict only publication, not access. A publication

> ban does not limit viewing, searching, or copying for private use, unless those restrictions are specified in law or the court order.
>
> [Emphasis added.]
>
> (Alberta Courts, *Public and Media Access Guide*, August 1, 201, s. 2.4 (e))

[74] As for the Office of the Chief Military Judge, although a draft Policy on the Publication of Court Martial Information was prepared in 2004, it appears not to have been adopted and it is considered by the CMA to be of no force and effect.

[75] While both parties agree that the open court principle applies to the court martial system, they disagree on the scope of the publication bans that were ordered in 2004. The AGC contends that in providing an unredacted copy of the court martial decisions, the CMA is in fact "publishing" the identity of the complainants. The CBC argues on the other hand that the AGC's interpretation amounts to converting the publication ban order into a sealing order.

[76] With the exception of five (5) decisions, all of the court martial decisions released to the CBC include the following warning:

> Subject to sub-section (sic) 486(3) and 486(4) of the *Criminal Code* and section 179 of the *National Defence Act*, the court has directed that the identity of the complainant and any information that would disclose the identity of the complainant shall not be published in any document or broadcast in any way.
>
> [Emphasis added.]

[77] The warnings which appear in the decisions rendered in French read as follows:

> Cette cause fait l'objet d'une ordonnance interdisant de publier ou de diffuser de quelque façon que ce soit l'identité de la plaignante ou des renseignements qui permettraient de la découvrir.
>
> [Emphasis added.]

[78] Counsel for the AGC indicated at the oral hearing that she believed the above warnings constituted the publication ban order. She did not believe that there were separate publication ban orders because the publication bans were mandatory. No evidence was adduced with regards to the circumstances under which the bans were ordered and whether any other form of protective order was requested and considered. Accordingly, I must assume, for the purpose of my analysis, that the warnings constitute the publication ban orders and that there are no other protective orders in place.

[79] While I recognize the broad policy objective of encouraging victims to come forward and the importance of protecting their privacy, I cannot agree with the AGC's position that the act of providing, upon request, a copy of an unredacted decision constitutes "publishing" within the meaning of either subsection 486(3) of the 2004 version of the *Criminal Code* or section 486.4 of the current version of the *Criminal Code*.

[80] When a publication ban is ordered, members of the public, including the media, are still permitted to attend the hearing and have access to the identity and personal information of the complainant. If the judge considers that more protection is required, he can order the exclusion of the public during the complainant's testimony pursuant to subsection 486(1) of the *Criminal Code* (under both the 2004 version and current version). He can also order that the complainant

testify using a pseudonym or order that the complainant's name and other personal information be redacted from the public record.

[81] In addition, under the terms of the court access policies referred to above, if a member of the public were to attend the registry office and make a request to see a court record in which a publication ban has been ordered, the person would be entitled to view the contents of the record.

[82] If a person can attend the hearing and review the file, I see no basis for refusing a request to obtain an unredacted copy of a document which has not been the subject of a redaction, sealing or anonymity order.

[83] Moreover, when the Supreme Court of Canada examined the purpose of publication bans in sexual assault trials in *Canadian Newspapers*, it spoke of the need to protect complainants from "the trauma of wide-spread publication". It also spoke of a victim's fear of "publicity or embarrassment" (*Canadian Newspapers* at paras 15 and 18). Providing access to an unredacted court record or providing a copy of an unredacted decision upon request cannot properly be considered to be "wide-spread" publication.

[84] In my view, the word "publish" in the context of the publication bans ordered by the military judges pursuant to subsection 486(3) of the *Criminal Code* must be interpreted as meaning a prohibition to disseminate the information to the general public or, in other words, providing widespread knowledge of the information either in print or via the Internet.

[85] Any other conclusion would render meaningless the distinction between the different forms of protective relief such as redaction orders, publication bans, sealing orders and exclusion orders. Court registry officers would be left with the difficult task of interpreting the scope of the publication bans and what protective relief was intended by the judges when the publication bans were ordered. Also, keeping in mind that the bans relate not only to the identity of the complainants but to all the information which could lead to their identification, I am left to wonder how, in practical terms, the publication bans would be managed at an operational level and in particular, whether the identifying information would be removed prior to being put on the court record or only when someone asks to review the court record. In the latter case, the responsibility of determining what information would need to be redacted would again be left to court registry officers.

[86] I note that the word "publish" was interpreted by the Supreme Court of Canada in *FN (Re)*, 2000 SCC 35, [2001] 1 SCR 880 [*FN*]. There, the appellant, a young person under the *Young Offenders Act*, RSC 1985, c Y-1 [YOA], had applied to the Supreme Court of Newfoundland, Trial Division, for an order of prohibition on the ground that the Youth Court had acted in excess of its jurisdiction by routinely providing school boards with a photocopy of its docket. The Supreme Court of Canada reviewed the provisions of the YOA and, in discussing the need for confidentiality in young offender matters, the Court noted that the YOA created two (2) distinct but mutually reinforcing regimes to control information concerning a young offender. The first set of provisions commencing at subsection 38(1) established a general prohibition that "no person shall publish by any means any report" identifying a young offender with an offence or proceeding under the YOA. The second regime, in sections 40 to 44, applied

to the maintenance and use of court records. The Court found that the word "publish" used in subsection 38(1) of the YOA should receive a purposive interpretation and that it included sharing the controlled information with the community or any part thereof not authorized to receive it. The Court found that the communication would have to be more tightly tailored to comply with the non-disclosure provisions of the YOA than by way of the general distribution of all dockets to all school boards.

[87] I do not believe that the Supreme Court of Canada's interpretation of the term "publish" in the *FN* case can be imported into this case. In interpreting the word "publish", the Court explicitly stated that it was in the context of the YOA. The YOA clearly distinguished between the concepts of publication and access to court records. In particular, section 44.1 of the YOA specifically provided that any record dealing with matters arising out of the proceedings under the YOA would be made available for inspection only to those persons identified in the provision. In all other cases, judicial authorization was required. In addition, subsection 46(1) explicitly provided that no record kept pursuant to sections 40 to 43 of the YOA could be made available for inspection, and no copy, print or negative thereof or information contained therein could be given to any person where to do so would serve to identify the young person. The *Criminal Code* provisions relating to publication bans in proceedings involving sexual offences do not provide any such limitations on access to court records.

[88] The AGC also relied on a number of other decisions in support of its argument that the concept of "publication" includes providing access to an unredacted decision in a public court record.

[89] One of them is the *Twitchell* decision referred to above. In that case, the Crown brought an application for a sealing order and publication ban of certain court materials on file. The application was opposed by the media. The Alberta Court of Queen's Bench observed that a sealing order was more intrusive than a publication ban and that it should be used as an exceptional remedy as opposed to a publication ban which could be considered a more limited intrusion into the open court principle (para 24). The Court added that a publication ban does not deny the media or private individuals the opportunity to observe and scrutinize court proceedings; it only restricts the capacity of those parties to communicate their observations to others (para 25). The Court found that the identity of witnesses and a complainant along with their personal information should be protected and that the highest level of protection in the nature of a sealing order was appropriate in that case (para 44). The Court observed however that the correct phraseology was not a sealing order. In fact, there was a less intrusive way in which the names, phone numbers, addresses, careers and occupations and other personal identifying information could be protected and that was "by simply redacting this information from the materials before they became available to those with interest" (para 45).

[90] While this decision affirms the importance of the privacy interests of complainants, in my view, it reinforces the argument that publication bans are distinct from redaction or sealing orders and that publication bans are not intended to prevent access to the sensitive information. It also confirms that trial judges have a number of measures at their disposal to limit the open court principle when other interests might be as important to protect.

[91] The AGC also relied upon *SDM v Alberta*, 2002 ABQB 1132 (QL) which I find to be equally unpersuasive. In that case, the Alberta Court of Queen's Bench found that it was not required to order a publication ban in a civil suit because the publication ban ordered in the context of the criminal proceedings was still in effect and that it would be sufficient to put a note on file in the civil proceedings concerning the publication ban in effect. While I agree that this decision recognizes the public objective of encouraging victims to come forward "without fear of being publicly embarrassed or humiliated", it does not stand for the proposition that publication bans prohibit obtaining access to an unredacted decision.

[92] Finally, the AGC relied on two (2) other decisions emanating from the British Columbia Supreme Court to support its argument that publication bans prohibit providing access to unredacted documents disclosing the identity of complainants. First, in *McClelland v Stewart* 2006 BCSC 1948 (QL), the plaintiff was seeking access to documents during examinations for discovery in a civil action involving sexual assault allegations. In particular, the plaintiff sought to obtain Royal Canadian Mounted Police [RCMP] files respecting a number of complainants or witnesses in the criminal proceedings against the defendant and over whom publication bans were ordered pursuant to section 486 of the *Criminal Code*. The plaintiff's counsel also sought an order to vary the publication bans. The Court found that the information contained in the RCMP files regarding the identity of the unknown complainants or witnesses fell under the protection of the publication bans and that if the RCMP were free to provide access to information that could identify a complainant or a witness to third parties, the object of section 486 would be defeated. The Court ordered that the files could be inspected by counsel in a redacted format preventing identification.

[93] The second decision is *British Columbia College of Teachers v British Columbia (Ministry of the Attorney General),* 2010 BCSC 847. The College was seeking to obtain a copy of the transcript of a preliminary inquiry held in relation to charges against the respondent. It wanted to use the transcript in disciplinary proceedings against the respondent, a former member of the College. Two (2) publication bans had been imposed by the judge who had presided over the preliminary inquiry: the first, on the evidence pursuant to subsection 539(1) of the *Criminal Code* and the second, on any information that could identify the child complainant pursuant to subsection 486.4(2) of the *Criminal Code*. The parties had conceded that the publication ban in that case had to continue and the College had agreed to receive the transcript in a redacted format removing the complainant's name. Despite the petitioner's assurances it would not publish the transcript to which it was seeking access, the Court found that publication of any information to the College identifying the complainant would be publication in contravention of the publication ban. The Court ordered that the transcript not be released to the College until the Crown reviewed it and redacted information that could possibly identify the complainant.

[94] With respect, I do not consider these two (2) authorities to be persuasive or binding upon this Court for the following reasons. It is unclear from the decisions whether the parties argued the open court principle and the distinction between the different forms of relief available to trial judges. More importantly however, in the end, both judges exercised their inherent jurisdiction and modified the terms of the publication bans by allowing the production of the documents in a redacted format. Unlike the judges in those two (2) cases, the CMA does not have the inherent jurisdiction to modify the publication bans nor does she have the authority to redact information from the decisions in the absence of a judicial order permitting her to do so.

[95] Both in written submissions and in oral argument, the AGC argued that the open court principle does not include the right to communicate with the complainants directly and that it is exactly what a publication ban is intended to prevent. I do not consider that the CBC's intention to contact the named complainants impacts their right to obtain an unredacted copy of the court martial decisions or to access the court records. As explained by Justice MacPherson of the Ontario Court of Appeal in *Ottawa Citizen Group* at paras 60 and 61:

> 60 If an order coupling access to, but non-publication of, the names were made, Ms. Jaimet would learn the identities of the subjects of the search warrants. She could contact them, which is consistent with the news gathering role that is part of the constitutionally protected freedom of the press: see *Canadian Broadcasting Corporation*, *supra*, at para. 24. The press can contact any Canadian citizen in the investigation of a potential story.
>
> 61 The subjects of the search warrants would have to respond to the press contact. Their responses, presumably, could range across the spectrum from "Get off my property, I have nothing to say" to "I'm so glad to see you; do I have a story to tell; please come in".

[96] In summary, in the absence of an order permitting the redaction, the sealing or the anonymization of the complainants' identities when the initial publication bans were ordered, I conclude that the CMA had no authority, in her capacity as Administrator of the Office of the Chief Military Judge, to redact the information from the decisions and deny access to it.

(5) Application of the *Privacy Act*

[97] In responding to Ms. Houlihan on August 2, 2013, the CMA indicated the decisions under publication bans required extensive review before they were released to ensure compliance with federal legislation, including the *Privacy Act*.

[98] The CBC submits that the *Privacy Act* does not apply to courts martial, but even if it did, courts records, including decisions, would fall into an exception. The CMA is not listed in the schedule to the *Privacy Act* as one of the government institutions to whom it applies. The CMA's office is distinct from the Department of National Defence or the Canadian Forces and it would be inconsistent with the constitutional guarantee of institutional independence to fold the CMA's office into the Department of National Defence for the purposes of the *Privacy Act*. Doing so would give the Minister of National Defence control over the CMA's records. The CBC also submits that if the *Privacy Act* applies to the CMA, it would also have to apply to other courts, including this Court. Even if the *Privacy Act* did apply, the release of the information requested in an unredacted format would be authorized pursuant to the exceptions found in paragraphs 8(2)(*a*), 8(2)(*b*), 8(2)(*m*) and subsection 69(2) of the *Privacy Act.* In support of its argument, the CBC relies on the decision of the Public Sector Disclosure Protection Tribunal in *El-Helou v Courts Administration Service*, 2012 CanLII 30713 (CA PSDPT) [*El-Helou*].

[99] The AGC submits that the *Privacy Act* applies to the Office of the Chief Military Judge, given that it is part of the Canadian Forces and that the obligations under the statute apply to all government institutions, which include the Department of National Defence and the Canadian Forces. The CMA, as a member of that office is subject to the same chain of command and is therefore subject to the same obligations under the *Privacy Act*. As such, the CMA has the

obligation to protect the personal information of the complainants. The existence of the publication bans, combined with the principles of the *Privacy Act*, justified the CMA's decision to protect the identity of the complainants. The AGC further argues that none of the exceptions advanced by the CBC apply to the disclosure of the complainants' identities.

[100] In my view, the *Privacy Act* does not support the CMA's interpretation that the identity of the complainants must be redacted and withheld from the CBC. While the protections under the *Privacy A*ct may apply to the CMA's administration records which I need not decide, the *Privacy Act* provides an important exception to an institution's obligation to protect personal information. Pursuant to subsection 69(2) of the *Privacy Act*, the prohibition on the use and disclosure of personal information prescribed by sections 7 and 8 do not apply where the information is available to the public. In rejecting an argument that the *Privacy Act* required the record of a quasi-judicial proceeding be kept confidential in *El-Helou*, Justice Martineau, in his capacity as Chairman of the Public Servants Disclosure Protection Tribunal summarized his reasons for doing so as follows:

> [78] The open court principle is a cornerstone of the Canadian legal system. It applies not only to the hearing itself, but may also apply to all of the proceedings prior to the hearing. It applies to pleadings, and in this proceeding, to the Application, the statement of particulars and supporting documents that are filed in accordance with this Act and the Tribunal Rules.
>
> [79] This principle can be limited in a few ways. For example, informer's privilege is unqualified and does not allow the court to exercise its discretion. It may also be limited by statute. Generally however, the court may exercise its discretion to limit the open court principle by applying its discretion according to the test in *Dagenais/Mentuck*. Therefore, the decision-maker would exercise his or her discretion, in its consideration of a variety of protective orders that limit access to information in the context of a proceeding. The open court principle applies to this Tribunal and it

> will exercise its discretion to determine whether or not the principle should be limited.
>
> [80] The *Privacy Act* cannot have the effect of limiting the scope of the open court principle in these proceedings. Exceptions under the *Privacy Act* apply: the exception pertaining to consistent use (subparagraph 8(2)(a)); the exception pertaining to a purpose in accordance with an Act of Parliament or regulation made thereunder (subparagraph 8(2)(b)); and the exception pertaining to public interest (subparagraph 8(2)(m)). Due to the *Charter* protected open court principle and its application to the Tribunal, personal information that is obtained in the context of this Tribunal's quasi-judicial functions is otherwise available to the public. Therefore, the broad exception under subsection 69(2) of the *Privacy Act* applies as well.

[101] The Federal Court of Appeal also considered the "publicly available" exception in subsection 69(2) of the *Privacy Act* in *Lukács v Canada (Transport, Infrastructure and Communities)*, 2015 FCA 140. The applicant in that case, a passenger rights advocate, sought access to unredacted documents with identifying information that were part of the record in a quasi-judicial dispute resolution process. In responding to the applicant, the respondents recognized that it was subject to the open court principle but asserted that unlike courts of law, the application of the principle was circumscribed by the provisions of the *Privacy Act*. Before providing the requested materials, the respondents removed those portions which contained personal information pursuant to section 3 of the *Privacy Act*. The applicant contended that because the requested documents had been placed on the respondents' public record, they were publicly available and as such, the prohibition on disclosure in subsection 8(1) of the *Privacy Act* did not apply to the request by virtue of subsection 69(2) of the *Privacy Act*. The Federal Court of Appeal found the applicant's contention to be persuasive and that the applicant was entitled to receive the documents he requested.

[102] As stated earlier in these reasons, courts martial are presumptively public pursuant to subsection 180(1) of the NDA. By extension, so are court martial records. Given my conclusion regarding the purpose and the scope of the publication bans ordered in 2004 and, in the absence of a redaction, sealing or anonymity order, the information the CMA wishes to protect is part of the public record and as such, falls within the meaning of the exception contained in subsection 69(2) of the *Privacy Act.*

[103] On a final note, I consider the CMA's interpretation to be untenable. Personal information is defined in section 3 of the *Privacy Act* and it extends beyond just simply a name. If the disclosure prohibitions under the *Privacy Act* applied, the CMA would be required not only to redact a complainant's personal information, but also personal information in relation to all participants in the proceedings, including the witnesses and the accused. The exemptions in the *Privacy Act'*s sister statute, the *Access to Information Act*, RCS 1985 c A-1, would also require consideration in the redaction process.

[104] In summary, I see no basis upon which to conclude that the *Privacy Act* prohibitions on the use and disclosure of personal information would apply to court martial decisions.

D. *Remedies*

[105] In its Notice of Application for judicial review, the CBC seeks: 1) an order setting aside the decision of the CMA refusing to provide unredacted copies of the court martial decisions identified in the appendix to the application; 2) a direction that the CMA provide the CBC with unredacted copies of the requested court records; and 3) a declaration that the *Privacy Act* does

not apply to the requested court records or to the records of other courts martial, including any decisions, transcripts, audio recordings or exhibits of a court martial.

[106] In oral argument, the CBC explained that the declaratory relief it was seeking consisted of two (2) parts and proposed wording to that effect: first, that the *Privacy Act* does not apply to the court records, including decisions, transcripts, exhibits or other records of courts martial as administered by the CMA and perhaps the Chief Military Judge and secondly, that upon request by a member of the public, the CMA release copies of all decisions and transcripts or audio recordings of the hearings, in an unredacted format, absent any sealing order made by the military judge, on notice to the media and in compliance with the open court principle.

[107] The AGC's position is that it would be inappropriate for this court to tell another court how it should deal with requests for documents which form part of that court's records. Moreover, the AGC submits that eight (8) out of the fourteen (14) decisions did not include redactions and cannot be subject to a direction.

[108] I do not find this to be a proper case for declaratory relief notwithstanding my conclusion that the CMA's refusal to provide unredacted copies of the requested court martial decisions to be unlawful. I agree with the AGC that it would be inappropriate for this court to impose upon the Office of the Chief Military Judge a way of proceeding when dealing with requests for information. Each court has jurisdiction over its own records. This includes the responsibility of ensuring that access to the records conforms to applicable laws and to the constitutional

guarantees of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11.

[109] I also consider a declaration regarding the application of the *Privacy Act* to be unnecessary. Courts often make findings on the applicability of statutes in their reasons without having recourse to declaratory relief. Depending on the level of court, such findings may or may not have any binding effect.

[110] In terms of mandatory relief, the CBC relies on the decision of the Federal Court of Appeal in *Canada (Public Safety and Emergency Preparedness) v LeBon*, 2013 FCA 55 at para 14, where the Court found that a mandatory order could be issued where there was only a single legal avenue available that the court had to enforce. As stated above, the CBC is requesting a direction that the CMA will provide the CBC with unredacted copies of requested courts records.

[111] I consider the direction requested by the CBC to be beyond the scope of the CBC's requests to the CMA. Ms. Houlihan initially requested a decision and transcript in a particular court martial file. She received a redacted copy of the decision. When asked whether she still required a copy of the transcript, she indicated that it was not necessary at that time. When she requested the fourteen (14) court martial decisions, she did not request the transcript of the proceedings. Out of the fourteen (14) decisions, eight (8) contained no redactions. The CBC then requested the decision and transcript or audio recording in another court martial file from the Office of the Chief Military Judge. That decision was not included in the list of decisions which are set out in the CBC's appendix to the notice of application. Upon review of the requests made

and responses received, it is my understanding that all that remains outstanding are the six (6) decisions in which redactions were made. I also consider the request to be insufficiently defined as no evidence was adduced as to what in fact comprises the "record" of the courts martial. Accordingly, I am not prepared to issue the order requested by the CBC.

[112] I now turn to the CBC's request that the CMA's decision refusing to provide unredacted copies of the court martial decisions identified in the appendix to the application be set aside. Even though I have characterized the CMA's refusal as "ongoing conduct" for the purposes of determining whether the application was brought late, I am nonetheless of the view that the CMA's decision to provide redacted copies of the decisions in six (6) courts martial communicated to the CBC on March 26, 2014 can and should be set aside. I am also of the view that the matter should be returned to the CMA for redetermination in accordance with these reasons given the absence of evidence regarding the circumstances under which the publication bans were ordered and the existence of other protective orders.

[113] For all the reasons above, the application for judicial review is allowed.

JUDGMENT

THIS COURT'S JUDGMENT is that :

1. The application for judicial review is allowed.
2. The decision of the Court Martial Administrator refusing to provide unredacted copies of the six (6) court martial decisions communicated to the Canadian Broadcasting Corporation on March 26, 2014 is hereby set aside and the matter is returned to the Court Martial Administrator for redetermination in accordance with these reasons.
3. Upon agreement by the parties themselves, each party shall bear its own costs.

"Sylvie E. Roussel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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