Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20140224

Docket: CMAC-557

Citation: 2014 CMAC 2

CORAM: **GAUTHIER J.A.**
O'REILLY J.A.
MOSLEY J.A.

BETWEEN:

SOUS-LIEUTENANT JASMIN THIBEAULT

Appellant

and

SA MAJESTÉ LA REINE

Respondent

Heard at Ottawa, Ontario on November 15, 2013.

Judgment delivered at Ottawa, Ontario, on February 24, 2014.

REASONS FOR JUDGMENT BY: O'REILLY J.A.

CONCURRED IN BY: GAUTHIER J.A.
MOSLEY J.A.

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REASONS FOR JUDGMENT

O'REILLY J.A.

I. Overview

[1] A Standing Court Martial convicted Sous-lieutenant Jasmin Thibeault of sexual assault. He appeals his conviction on the basis that he did not receive the effective assistance of counsel at his trial. On this appeal, he asks the Court to consider fresh evidence in support of his position. He says that he believed that the complainant consented to their sexual activity but, on the advice

of counsel, he did not take the witness stand to provide evidence to support the defence of honest but mistaken belief in consent. He asks this Court to find that a miscarriage of justice occurred, to overturn his conviction, and to order a new trial.

[2] In my view, the appellant has satisfied the strict test for introducing fresh evidence on appeal and, in light of that evidence, I would overturn the appellant's conviction and order a new trial.

[3] At the hearing of this appeal, the Court reserved its decision on the appellant's motion so that it could consider the fresh evidence against the other evidence in the case. This is the accepted practice of appellate courts in these circumstances (*R v Stolar*, [1988] 1 SCR 480, at para 14).

[4] The military judge imposed a publication ban on information serving to identify the complainant under s 486.4 of the *Criminal Code*, RSC, 1985, c C-46 and s 179 of the *National Defence Act*, LRC (1985), ch C-46 (see Annex for all enactments cited). That order will be continued.

II. The Trial

[5] The complainant testified that the following transpired on the evening of February 4, 2012:

- The appellant arrived at her room around 8:00 pm bearing candy and a movie;

- She and the appellant lay on her bed to watch the movie, with about a foot of space between them;
- The appellant began rubbing her crotch over her sweatpants; she did not react at first – in fact, she found it arousing – but she then rolled onto her stomach to avoid his reach;
- She told the appellant that it was not a good idea for them to be doing this in the circumstances, and she was not comfortable with it;
- The appellant then straddled her and tried to kiss her;
- She repeatedly stated that they should not be doing what they were doing;
- The appellant pulled down her sweatpants and underwear, and inserted a finger into her anus;
- The appellant then withdrew his finger and inserted his penis;
- She said no a number of times – at first softly, so he might not have heard her but, when he penetrated her, she said no loudly enough for him to hear it;
- At that point, she yelled at the appellant to get off her;
- She then ran to the bathroom;
- When she came out, she threw a DVD case and his sweater at the appellant, and told him to leave.

[6] The appellant's counsel challenged the complainant's testimony on cross-examination. In particular, he suggested, and she denied, that she got on all fours and moaned with pleasure when the appellant touched her anus; that she said no only once, after which the appellant stopped

what he was doing; and that she told the appellant that she had not wanted to cheat on her boyfriend again.

[7] However, the complainant did concede that she had had consensual sex with the appellant in the past. The complainant volunteered this information; it was not the subject of an application under s 276(1) of the *Criminal Code* to introduce evidence of her prior sexual history based on its relevance and significant probative value.

[8] The complainant also acknowledged that, earlier that day, she had knocked on the appellant's window and had sent him text messages inviting him to her room where, she said, the bed was more comfortable. In addition, she agreed that she had numerous seemingly friendly contacts with the appellant after the night in question.

[9] Based on the evidence, the Crown submitted that the essential elements of the offence of sexual assault had been proved beyond a reasonable doubt. The physical elements, consisting of sexual touching without the complainant's consent, were clearly present. To establish the mental element, the Crown had to prove beyond a reasonable doubt that the appellant knew that the complainant did not consent, or was reckless or wilfully blind regarding her lack of consent. Given the complainant's credible testimony that she clearly communicated her lack of consent, it was beyond reasonable doubt, according to the Crown, that the appellant knew that she did not consent. The Crown also contended that a defence of mistaken belief in consent, if put forward by the appellant, would be difficult to maintain given the limitations on that defence set out in s 273.2 of the *Criminal Code*, which provides that there is no defence where the accused's

mistaken belief arose from intoxication, recklessness, wilful blindness, or the failure to take reasonable steps to determine that the complainant consented.

[10] In his submissions, defence counsel made it clear that the appellant was not advancing a defence of mistaken belief in consent. He conceded that there was no air of reality to that defence. The military judge seemed surprised.

[11] Defence counsel relied heavily on the complainant's behaviour before and after the sexual activity took place. The defence theory seemed to be that, overall, the complainant was simply not comfortable with what had transpired that evening and that her evidence about any non-consensual sexual activity between her and the appellant should not be believed. After all, she had invited the appellant to her room and to her bed. She allowed him into her room and lay on the bed with him to watch a movie. She initially consented to sexual contact by permitting the appellant to touch her vagina through her sweatpants.

[12] Defence counsel also suggested that, if the appellant had really behaved as the complainant had alleged, it would be illogical for her to have interacted with him in a seemingly friendly way after the alleged assault, beginning with going outside for a cigarette immediately thereafter. Further, she did not make a complaint until more than two weeks later. Defence counsel implied that her complaint was an attempt to mitigate her involvement in a bar fight.

[13] The military judge found that the complainant had testified in a calm, respectful, polite, sincere, coherent, and detailed manner. She did not evade any questions. In fact, she conceded a

number of facts that were not in her favour. The judge regarded the complainant's amicable conduct toward the appellant after the evening in question as insignificant. She simply tried to maintain a friendly relationship with him. Clearly, she had ambivalent feelings toward him. Minor contradictions in her testimony did not affect her overall credibility. The judge found that her evidence was trustworthy, and stood up to rigorous and effective cross-examination.

[14] The judge concluded that the appellant's wrongful conduct began when he straddled the complainant and began kissing her. The appellant persisted, notwithstanding her objections. The essential elements of the offence of sexual assault were therefore present. The wrongful act consisted of the use of force in a sexual manner without the complainant's consent. As for the mental element, the appellant could not reasonably have interpreted the complainant's conduct and protestations as valid consent.

[15] Accordingly, the judge found the appellant guilty of sexual assault. He sentenced him to six months' imprisonment and demoted him by one rank.

III. <u>Can the appellant introduce fresh evidence on this appeal?</u>

[16] The appellant wishes to tender fresh evidence to support his argument that he was denied the effective assistance of counsel at trial and that the result was a miscarriage of justice. The fresh evidence consists of affidavits sworn by the appellant and his defence counsel, and the transcripts of cross-examinations on those affidavits.

(1) The Test

[17] Naturally, appellate courts are reluctant to introduce new evidence on appeal. All relevant and available evidence should normally be put before the trier of fact at trial to determine whether the Crown has met its burden of proving guilt beyond a reasonable doubt. However, there are exceptions. One is where the evidence was not tendered at trial because the accused's defence counsel recommended against it, counsel's advice was incompetent and, because the evidence could have raised a reasonable doubt about the accused's guilt, the result was a miscarriage of justice.

[18] The general test for the admission of fresh evidence on appeal comprises four criteria, originally set out in *R v Palmer*, [1980] 1 SCR 759:

1. The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases;
2. The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;
3. The evidence must be credible in the sense that it is reasonably capable of belief, and
4. It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

(See also *R v GDB*, 2000 SCC 22, at para 16).

[19] In cases involving an allegation of incompetence of counsel, these criteria have been reduced to the following two questions:

1. Were counsel's acts or omissions incompetent?
2. Did a miscarriage of justice result?

[20] The second of these two questions should usually be addressed first because, if answered in the negative, it will be unnecessary to consider whether counsel's conduct was incompetent. (GDB, at para 29). In effect, the second question incorporates the final three of the four Palmer criteria for receiving fresh evidence on appeal (*R v Appelton*, 149 OAC 148, at para 24).

(2) The Fresh Evidence

[21] The appellant did not testify at trial. In his affidavit filed on this appeal, he says that he would have testified that, on the evening in question, when he pulled down her jogging pants a bit, he told the complainant that he wanted to kiss her ass – she smiled, and so he did so for a few minutes. At his suggestion, she moved onto her hands and knees, and he put saliva on her anus and touched it with his finger. Being aware that the complainant was menstruating, he suggested they could "try something else". The complainant smiled, and he inserted his finger into her anus. She watched him as he held his penis and advanced toward her, and she likewise moved her hips toward him. He touched the complainant's anus with his penis but did not insert it, and when he was about to penetrate her, she said no and he stopped immediately.

[22] The appellant also stated that he informed his lawyer of a previous conversation with the complainant. He said that she came to his room one evening with two pornographic movies that they watched together. He asked her if she had tried anal sex. When she said yes, he told her that he would like to try it with her someday. She smiled.

[23] On cross-examination, the appellant agreed that he had not expressly asked the complainant if she was willing to engage in anal sex. Rather, he proposed doing "something else" and, because the complainant smiled at his suggestion, he believed he could continue. He also agreed that the complainant did not express any words explicitly indicating consent, but he believed that her body language and facial expressions suggested that she was willing to allow him to proceed.

[24] Regarding the advice he received from counsel, the appellant stated that counsel made it clear that decisions about the conduct of the defence were to be made by the appellant, not counsel. After hearing the appellant's account of events, counsel advised him that he did not appear to be a good witness. The appellant states that counsel told him that he generally prefers that his clients not testify in sexual assault cases unless "the carrots are cooked". He firmly advised the appellant not to testify. At a subsequent meeting, the appellant and counsel briefly rehearsed the testimony he might give if he decided to take the stand. At the end of the first day of the trial, the appellant and counsel again discussed the possibility of his testifying. Counsel strongly advised him not to do so, but told him it was his decision. Relying on counsel's expert knowledge and advice, the appellant decided not to testify.

[25] Defence counsel acknowledged that he usually prefers that his clients not testify. However, in this case, he left that option open until after the complainant testified because it depended on whether she seemed credible. Counsel was concerned that the appellant's version of events actually supported the presence of the elements of the offence of sexual assault. Further, he doubted the appellant had taken reasonable steps to ascertain whether the complainant had

consented to anal sex. Accordingly, he discounted the viability of a defence of honest belief in consent, and felt it was better if the appellant did not testify.

(3) Did a miscarriage of justice occur?

[26] To answer this question, one must consider whether the fresh evidence is relevant and credible, and whether it could reasonably have affected the outcome of the trial.

[27] Clearly, the appellant's version of events is relevant. It relates to the question of whether the appellant intentionally engaged in sexual contact with the complainant without her consent (*i.e.*, it related to the mental element of the offence of sexual assault). According to the appellant's version of events, he honestly believed that the complainant consented to the sexual contact between them up to the point where he attempted to engage in anal sex with her. When she asked him to stop, he did. His testimony was clearly relevant to one of the essential elements that the Crown had to prove beyond a reasonable doubt.

[28] Further, the appellant's evidence is reasonably capable of belief. His account of events is not implausible in the circumstances. In fact, there is a good deal of common ground between the appellant and complainant about how the evening began, the original consensual sexual contact between them, the fact that the complainant never expressed her consent verbally, the complainant's clear withdrawal of consent, and their interactions thereafter.

[29] Finally, I am satisfied that the new evidence could reasonably have affected the outcome of the trial. The military judge had the benefit of only one version of events. Had the appellant

testified about the conduct that he believed communicated the complainant's consent, the judge may have had a reasonable doubt about whether the appellant knew that the complainant did not consent to the sexual contact that took place up to the point where she made her lack of consent loud and clear, or that he was reckless or wilfully blind to her lack of consent. In other words, the appellant may have had a viable defence of honest but mistaken belief in consent. Even if the judge did not believe the appellant's version of events, that evidence could have created a reasonable doubt about the required mental element (*R v W(D)*, [1991] 1 SCR 742, at 757).

[30] The Crown points out that the defence of mistaken belief in consent is not available where the accused did not take reasonable steps to determine that the complainant was consenting (s 273.2(*b*)), and that the appellant's new evidence does not describe any steps that he took to make that determination. However, what amounts to "reasonable steps" must be considered in the context of the circumstances known to the accused. In this case, the question of whether the appellant took reasonable steps would have to be considered against the background of the relationship between the appellant and the complainant, as well as his evidence about the verbal and non-verbal conduct of the complainant that evening. I cannot say that s 273.2(*b*) would have definitively foreclosed a defence of mistaken belief in consent. The appellant's evidence on this appeal is that he was alert to the need to ensure the complainant's consent and checked for clues that she did.

[31] The Crown also maintains that a defence of mistaken belief in consent was unavailable to the appellant because he and the complainant gave diametrically opposed versions of what happened. She described persistent sexual contact by the appellant notwithstanding her several

expressions of non-consent, while he recounts a sexual experience involving the complainant's willing participation up to the point when she unequivocally objected, and then he stopped.

[32] The Supreme Court of Canada has stated that where the accused's and the complainant's accounts are irreconcilable, the defence of mistaken belief in consent may not be viable. Only where one can cobble together a coherent version of events from both parties' testimony that could sustain an honest belief in consent should the trier of fact consider that defence (*R v Park*, [1995] 2 SCR 836, at para 25). According to the Crown, that is not possible in this case.

[33] I disagree. On the whole of the evidence in this case, it would be possible to accept some parts of the complainant's version and some parts of the appellant's account and arrive at a coherent scenario in which the appellant may have had a mistaken belief that the sexual contact between them was consensual, up to the point when it was clearly withdrawn. Again, I do not see the defence of mistaken belief in consent being foreclosed in the circumstances.

[34] Accordingly, I am satisfied that a miscarriage of justice occurred. The next question is whether the defence counsel's conduct was incompetent.

(4) Were defence counsel's acts or omissions incompetent?

[35] Counsel's conduct is reviewed on a standard of reasonableness, and should not be evaluated based on hindsight. Counsel benefits from a strong presumption of reasonableness (*R v Joanisse* (1995), 102 CCC (3d) 35 (Ont CA) at pp 60-61; *R v T(LC)*, 2012 ONCA 116 at para 38).

[36] The Crown argues that defence counsel acted competently at trial. In particular, the Crown submits that, since the appellant's evidence would have amounted to an admission of guilt, counsel properly advised him not to testify. Further, as mentioned above, since the defence of mistaken belief in consent was unavailable in the circumstances, nothing was to be gained by having the appellant testify. Finally, defence counsel conducted a thorough cross-examination of the complainant and put forward the best defence available on the evidence – that is, that the complainant simply could not be believed.

[37] In my view, the appellant did not receive the effective assistance of counsel at trial. The only viable defence in the circumstances was mistaken belief in consent, yet defence counsel discouraged the appellant from providing evidence to support it and, in addition, assured the military judge that there was no air of reality to it.

[38] Further, while defence counsel conducted a lengthy cross-examination of the complainant, at no time did the complainant falter on the issue of consent. She steadfastly maintained that, subjectively, she did not consent. And her subjective view on that issue was all that mattered. The defence of consent, therefore, did not arise.

[39] In his affidavit, defence counsel explained that, during their meetings before trial, the appellant gave slightly different versions of events. Further, the appellant seemed nervous. Counsel therefore advised the appellant that it was often better for an accused not to testify in order to avoid being subjected to cross examination and inadvertently admitting the essential elements of the offence. Here, the appellant's version would have acknowledged the physical

elements of sexual assault, and consent could not have been raised as a defence. Regarding mistaken belief in consent, defence counsel believed that the appellant had not taken reasonable steps to determine that the complainant had consented. Therefore, he felt that the defence of mistaken belief was also unavailable to the appellant. The only option was to attack the complainant's credibility. Accordingly, he advised the appellant not to testify.

[40] Even though the appellant may have provided counsel with somewhat different accounts of what happened on the evening in question, he consistently denied any intention of having non-consensual sex with the complainant. The appellant acknowledged that sexual touching had occurred and that the complainant had not verbally expressed her consent. Therefore, as counsel recognized, the defence of consent was not available. The only potential defence was mistaken belief in consent, and the burden fell on the appellant to provide evidentiary support for it (*R v Ross*, 2012 NSCA 56, at para 38). Had he testified, the appellant's description of the complainant's words and actions could have raised a reasonable doubt about the mental element of the offence of sexual assault.

[41] While the appellant may have been a poor witness, the only realistic way of presenting the sole defence available on the facts would have been by having him testify. There is no indication in the fresh evidence that this was explained to the appellant.

[42] In my view, defence counsel's attempt to diminish the complainant's overall credibility did not represent a propitious defence tactic. As counsel acknowledges, it was clear that sexual contact had taken place between the complainant and the appellant and no defence of consent

was available. The physical elements of the offence of sexual assault were obviously present. The only question that remained was whether the appellant had the requisite mental element. Cross-examination of the complainant was unlikely to assist the defence on that point. It is not apparent, therefore, what the defence theory was or what purpose was to be served by attacking the complainant's overall credibility. In any case, as the military judge pointed out, counsel's cross-examination of the complainant actually bolstered the trustworthiness of her testimony.

[43] Regarding mistaken belief, counsel felt that the appellant had not taken reasonable steps to ascertain whether the complainant was consenting. However, as mentioned above, the real question was whether the appellant had taken reasonable steps in the circumstances known to him. This is a mixed standard, combining both subjective and objective elements. While counsel may have thought the appellant had failed to take reasonable steps, the question was what a reasonable person would have done in the appellant's circumstances. Only the appellant could present his subjective appreciation of the circumstances and describe the steps he had taken to ascertain whether the complainant consented, and only the trial judge could have determined whether the appellant's conduct was reasonable in those circumstances.

[44] Therefore, defence counsel's advice on the question of whether the appellant should testify at trial should have taken account of the fact that the only realistic defence available on the evidence was mistaken belief in consent. The only person who could realistically supply evidence to nourish that defence was the appellant. In addition to advising the appellant that inconsistencies in his testimony might be exposed in cross-examination, and that his nervousness might affect his credibility, defence counsel should also have explained that the appellant's

chances of acquittal depended heavily on his giving evidence about the basis for his honest belief that the complainant consented to the sexual activity that took place up to the point when consent was clearly withdrawn. Failure to give that advice, in my view, denied the appellant the effective assistance of counsel.

[45] Counsel left it to the appellant to decide whether to testify. But, in the absence of specific advice about the connection between the appellant's testimony and the defence of mistaken belief, counsel did not leave the appellant an informed choice to make. This distinguishes this case from one in which the accused agreed with trial counsel's reasonable advice not to testify (*R v WEB*, 2014 SCC 2).

[46] Here, where the key issue was mistaken belief, counsel was obliged to discuss with the appellant "the very grave risks of not testifying" (*Ross*, at para 40). The Court in *Ross* also observed that it was unaware of any case where the defence of honest but mistaken belief had succeeded in the absence of testimony from the accused (at para 43).

[47] Accordingly, I am satisfied that the appellant has demonstrated that counsel's advice was unreasonable. The appellant did not receive the effective assistance of counsel at trial and, as a consequence, his conviction for sexual assault is unreliable.

IV. Conclusion and Disposition

[48] The appellant has produced evidence on this appeal that is relevant and credible, and could reasonably have affected the military judge's conclusion that the appellant was guilty of

sexual assault. Therefore, a miscarriage of justice occurred. Further, the appellant has shown that he did not receive the effective assistance of counsel at trial.

[49] Accordingly, the fresh evidence should be admitted. I would allow the appeal, set aside the conviction, and order a new trial.

[50] The publication ban imposed by the military judge on information serving to identify the complainant under s 486.4 of the *Criminal Code* and s 179 of the *National Defence Act* is continued.

"James W. O'Reilly"
J.A.

"I agree.
Johanne Gauthier J.A."

"I agree.
Richard Mosley J.A."

Annex “A”

Criminal Code, RSC, 1985, c C-46

Code criminel, LRC (1985), ch C-46

Where belief in consent not a defence

273.2 It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where

…

(*b*) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

Exclusion du moyen de défense fondé sur la croyance au consentement

273.2 Ne constitue pas un moyen de défense contre une accusation fondée sur les articles 271, 272 ou 273 le fait que l’accusé croyait que le plaignant avait consenti à l’activité à l’origine de l’accusation lorsque, selon le cas :

[…]

b) il n’a pas pris les mesures raisonnables, dans les circonstances dont il avait alors connaissance, pour s’assurer du consentement.

Order restricting publication — sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the complainant 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:

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 346 or 347,

(ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1)

Ordonnance limitant la publication — infractions d’ordre sexuel

486.4 (1) Sous réserve du paragraphe (2), le juge ou le juge de paix qui préside peut rendre une ordonnance interdisant de publier ou de diffuser de quelque façon que ce soit tout renseignement qui permettrait d’établir l’identité d’un plaignant ou d’un témoin dans les procédures relatives à :

a) l’une des infractions suivantes :

(i) une infraction prévue aux articles 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 346 ou 347,

(ii) une infraction prévue aux articles 144 (viol), 145 (tentative de viol), 149 (attentat à la pudeur d’une personne de sexe féminin), 156 (attentat à la pudeur d’une personne de sexe

(assault with intent) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

masculin) ou 245 (voies de fait ou attaque) ou au paragraphe 246(1) (voies de fait avec intention) du *Code criminel*, chapitre C-34 des Statuts révisés du Canada de 1970, dans leur version antérieure au 4 janvier 1983,

(iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with step-daughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or

(iii) une infraction prévue aux paragraphes 146(1) (rapports sexuels avec une personne de sexe féminin âgée de moins de 14 ans) ou (2) (rapports sexuels avec une personne de sexe féminin âgée de 14 à 16 ans) ou aux articles 151 (séduction d'une personne de sexe féminin âgée de 16 à 18 ans), 153 (rapports sexuels avec sa belle-fille), 155 (sodomie ou bestialité), 157 (grossière indécence), 166 (père, mère ou tuteur qui cause le déflorement) ou 167 (maître de maison qui permet le déflorement) du *Code criminel*, chapitre C-34 des Statuts révisés du Canada de 1970, dans leur version antérieure au 1er janvier 1988;

(*b*) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in any of subparagraphs (*a*)(i) to (iii).

b) deux infractions ou plus dans le cadre de la même procédure, dont l'une est une infraction visée aux sous-alinéas *a*)(i) à (iii).

Mandatory order on application

(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 complainant of the right to make an application for the order; and

(*b*) on application made by the complainant, the prosecutor or any such witness, make the order.

Obligations du juge

(2) Dans les procédures relatives à des infractions visées aux alinéas (1)*a*) ou *b*), le juge ou le juge de paix qui préside est tenu :

a) d'aviser dès que possible les témoins âgés de moins de dix-huit ans et le plaignant de leur droit de demander l'ordonnance;

b) de rendre l'ordonnance, si le poursuivant, le plaignant ou l'un de ces témoins lui en fait la demande.

Child pornography

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

Limitation

(4) An order made under this section 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.

Pornographie juvénile

(3) Dans les procédures relatives à une infraction visée à l'article 163.1, le juge ou le juge de paix rend une ordonnance interdisant de publier ou de diffuser de quelque façon que ce soit tout renseignement qui permettrait d'établir l'identité d'un témoin âgé de moins de dix-huit ans ou d'une personne faisant l'objet d'une représentation, d'un écrit ou d'un enregistrement qui constitue de la pornographie juvénile au sens de cet article.

Restriction

(4) Les ordonnances rendues en vertu du présent article ne s'appliquent pas à la communication de renseignements dans le cours de l'administration de la justice si la communication ne vise pas à renseigner la collectivité.

National Defence Act, RSC, 1985, c N-5

Court martial

179. (1) A court martial has the same powers, rights and privileges as are vested in a superior court of criminal jurisdiction with respect to

(a) the attendance, swearing and examination of witnesses;

(b) the production and inspection of documents;

(c) the enforcement of its orders; and

(d) all other matters necessary or proper for the due exercise of its jurisdiction, including the power to punish for contempt.

Military judges

(2) Subsection (1) applies to a military judge performing a judicial duty under this Act other than presiding at a court martial.

Loi sur la défense nationale, LRC (1985), ch N-5

Cour martiale

179. (1) La cour martiale a, pour la comparution, la prestation de serment et l'interrogatoire des témoins, ainsi que pour la production et l'examen des pièces, l'exécution de ses ordonnances et toutes autres questions relevant de sa compétence, les mêmes attributions qu'une cour supérieure de juridiction criminelle, notamment le pouvoir de punir l'outrage au tribunal.

Juge militaire

(2) Chaque juge militaire a ces mêmes attributions pour l'exercice des fonctions judiciaires que lui confie la présente loi, sauf lorsqu'il préside une cour martiale.

COURT MARTIAL APPEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	CMAC-557
STYLE OF CAUSE:	SOUS-LIEUTENANT JASMIN THIBEAULT v. SA MAJESTÉ LA REINE
PLACE OF HEARING:	OTTAWA, ONTARIO
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REASONS FOR JUDGMENT BY:	O'REILLY J.A.
CONCURRED IN BY:	GAUTHIER J.A. MOSLEY J.A.
DATED:	February 24, 2014

APPEARANCES:

Mr. Ian Carter	FOR THE APPELLANT
Major Anthony Tamburro	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Bayne, Sellar, Boxall Barristers and Solicitors Ottawa, Ontario	FOR THE APPELLANT
Canadian Military Prosecution Service National Defence Headquarters Ottawa, Ontario	FOR THE RESPONDENT