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VIA EMAIL

Owen Rees
Conway Baxter Wilson LLP
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Ottawa, ON
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Dear Mr. Rees:

Re: Justice Camp Inquiry and the Relevance of Errors of Law

I write to you further to our case management call yesterday to clarify my position regarding errors of law in the *Wagar* trial. I am seeking a clarification from the Committee that Justice Camp made no errors of law. Failing to obtain such a clarification, I intend to lead evidence and argue that Justice Camp made no errors of law.

I acknowledge that the Notice of Allegations does not specifically allege errors of law. However, the issue must nonetheless be addressed. To illustrate my point, I will set out my position on the relevance of Justice Camp's application of the "rape shield" provision in s. 276 of the *Criminal Code*.

The appellate Crown in *Wagar* argued before the Alberta Court of Appeal that Justice Camp misapplied s. 276. The Alberta Court of Appeal then stated that "the trial judge's comments throughout the proceedings and in his reasons gave rise to doubts about the trial judge's understanding" of s. 276. The Law Professors in their highly publicized November 9, 2015 complaint to the Canadian Judicial Council accused Justice Camp of a "refusal to comply with section 276". The Alberta Justice Minister picked up on this language and accused Justice Camp of having a "distorted view of legislation" and an "unsupportable view" of s. 276 in particular.

These allegations were widely reported. Many newspaper editorials and television commentators stated publicly that Justice Camp refused to apply s. 276. Members of the public complained to the Canadian Judicial Council and specifically cited Justice Camp's refusal to apply the rape shield provisions as a reason they believe he is no longer fit to be

a judge. Simply put, nearly everyone who has been paying attention to this case in the media is operating under the belief that Justice Camp refused to apply s. 276. But this belief is false. Justice Camp correctly applied s. 276.

My argument that Justice Camp correctly applied s. 276 is set out in detail in the letter I wrote to Chief Justice MacDonald in response to the Law Professors' complaint. I will summarize it only briefly here. Section 276 requires a pre-trial hearing in cases where an accused seeks to elicit evidence that the complainant has engaged in sexual activity other than the sexual activity that forms the subject matter of the charge. The Crown raised s. 276 on four occasions in *Wagar*.

First, the Crown raised s. 276 when defence counsel asked the complainant if she forcefully rejected another person's advances minutes before she had sex with Wagar. Justice Camp ruled that s. 276 did not apply to evidence that the complainant *refused* to have sex. This ruling was correct. Appellate courts have concluded that s. 276 does not apply in these circumstances.

Second, the Crown argued that s. 276 barred a third party from testifying the complainant told her (the third party) that she (the complainant) intended to have consensual sex with Wagar minutes before they had sex. Justice Camp rejected the Crown's argument, stating that s. 276 did not apply because this was evidence about *the very sexual activity* that was the subject matter of the charges. This ruling was also correct.

Third, the Crown said s. 276 prevented the defence from eliciting evidence the complainant held hands with Wagar as they walked out of the bathroom where the sex occurred. Justice Camp again concluded s. 276 did not apply. This was not evidence of other sexual activity, but was evidence of what the complainant was doing in the minutes immediately after the sex act. Justice Camp was correct.

Finally, the Crown argued that s. 276 prevented Wagar from testifying that he, the complainant and two other people all went into a laundry room to kiss each other shortly after the sex. Section 276 arguably did not apply here either, as the defence was simply eliciting post-event narrative. Nevertheless, Justice Camp said that s. 276 *did* apply and prohibited the defence from eliciting this post-event narrative because notice had not been given in advance to the Crown. He then explained the harshness of this result to Wagar (had defence counsel been better prepared, this question would have almost certainly been allowed after a s. 276 hearing) by stating that while he was obliged to apply s. 276, it did not always work fairly.

From the media coverage, a reasonable Canadian might gather that Justice Camp refused to apply the rape shield provision out of bias *and* that the complainant's sexual history was put in issue in the case. In fact, no evidence was led about the complainant's sexual history in *Wagar*. Justice Camp declined to apply s. 276 in three instances where it plainly did not apply and *did* apply it in one borderline instance to the benefit of the Crown.

The fact that Justice Camp did not make errors of law is relevant to the present hearing in three ways. First, this is the only forum in which he can defend his reputation. If he is reinstated to the bench, he will be prohibited from opining publicly on the correctness of his previous decisions, including *Wagar*. Given the media coverage, without some public correction, a large segment of the public will continue to believe he wilfully refused to apply the law. This lack of public confidence will make the complaint about his unfitness to be a judge a self-executing result initiated by the complaining Law Professors and the Alberta Justice Minister. This would be unfair. The matter should be addressed directly, regardless of the outcome on the other aspects of his conduct identified in the Notice of Allegations.

Second, the Notice of Allegations raises s. 65(1)(d) of the *Judges Act*, which provides for removal if a judge is "placed, by his or her conduct or otherwise, in a position incompatible with the due execution of that office". The invocation of this provision appears to contemplate that Justice Camp could be removed because the public believes he is unfit to be a judge. Where reputational issues are part of the Judge's "problem", he must be allowed to address them. I will argue that a relevant factor under s. 65(1)(d) is whether the public's belief in this regard is based on a misapprehension of the facts, because, if so, it can be corrected. The Inquiry Committee should clarify at the outset, as a matter of fairness to Justice Camp, that there is no cognizable complaint about his application of the law.

Third, the Notice of Allegations includes an allegation that Justice Camp displayed "antipathy" towards s. 276. Judges are permitted to criticize legislation so long as they fairly apply it. To take one well-known example, the self-defence provisions of the *Criminal Code* were overhauled in part because Justice Moldaver criticized them in *R. v. Pintar*. Antipathy to legislation must therefore mean more than mere criticism, and must rise to something approaching *animus* amounting to bias or a refusal to follow the law. As such, while the fact that a judge has correctly applied legislation is perhaps not determinative of the question of whether he harbours antipathy towards the legislation, it is at the very least *probative* of this question. All other things being equal, knowing that a judge has correctly applied a particular provision makes it more likely that he does not harbour disqualifying antipathy towards the provision. Part of Justice Camp's answer to the Allegations will be that he correctly applied the law. If the Inquiry Committee agrees with this and can so state, it will shorten the hearing and reduce the number of issues in dispute. If the Committee cannot clarify now that Justice Camp made no errors of law, I will assume the burden to prove this.

If it would assist the Inquiry Committee to see my letter to Chief Justice MacDonald, I have no objection to you providing it to the Committee. If it would assist the Committee to have Ms Hickey's perspective, I would invite her to take the time to do so. I also invite her to consider whether she wishes to join me in proposing an amendment to the Notice of Allegations acknowledging Justice Camp committed no errors of law or, alternatively, to agree as Presenting Counsel that any public perception he committed an error of law is irrelevant to the Committee's ultimate decision.

Kindly let me know if you require further information or assistance.

Yours very truly,

Frank Addario

cc: Marjorie A. Hickey, QC