## CANADIAN JUDICIAL COUNCIL

## IN THE MATTER of an Inquiry pursuant to section 63(1) of the *Judges Act* regarding the Honourable Justice Robin Camp

---

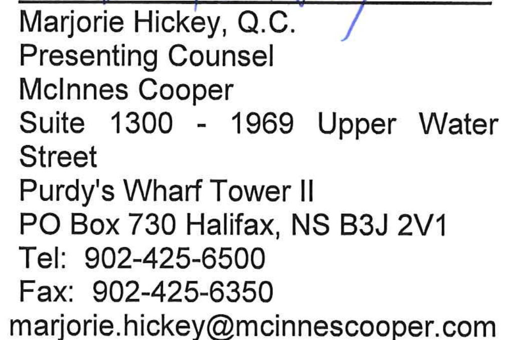
## NOTICE OF MOTION REGARDING PUBLICATION BAN

---

**Take Notice** that a Motion will be brought by Presenting Counsel at the commencement of the inquiry regarding the Honourable Justice Robin Camp on Tuesday, September 6 at 2:00 pm at the Bow Valley Room, Westin Hotel, 320 4th Ave SW, Calgary, for certain directions and orders pursuant to s. 63(5) of the *Judges Act*, RSC 1985, c. J-1 and s. 6(2) of the *Canadian Judicial Council Inquiries and Investigations By-Laws* to provide for the continuing protection of the identity of the complainant in *R. v. Wagar.*, Provincial Court of Alberta, Action No.: 130288731P1.

**In support of the Motion** will be read the affidavit of Presenting Counsel, filed with this Notice of Motion, together with an accompanying Brief to be filed with the Inquiry Committee.

Dated at Halifax, Nova Scotia, this 1st day of ~~August~~ September, 2016.



Marjorie Hickey, Q.C.
Presenting Counsel
McInnes Cooper
Suite 1300 - 1969 Upper Water Street
Purdy's Wharf Tower II
PO Box 730 Halifax, NS B3J 2V1
Tel: 902-425-6500
Fax: 902-425-6350
marjorie.hickey@mcinnescooper.com

**To: Owen Rees**
**Inquiry Committee Counsel**
**ORees@conway.pro**

**Frank Addario**
**Counsel for Justice Camp**
**faddario@addario.ca**

**Norman Sabourin**
**Executive Director**
**Canadian Judicial Counsel**
**nsabourin@judicom.ca**

**Sean Moreman**
**Senior Legal Counsel**
**Canadian Broadcasting Corporation**
**Sean.moreman@cbc.ca**

**Grace Shafran**
**Ted Park**
**Legal Counsel, CTV**
**grace.shafran@bellmedia.ca**
**tpark@lexcanada.com**

**Dennis Choquette**
**Peter Jacobson**
**Legal Counsel, Globe and Mail**
**DChoquette@globeandmail.com**
**pjacobsen@lexcanada.com**

**Kathy English**
**The Toronto Star**
**kenglish@thestar.ca**

**Jeffrey Haar**
**Postmedia Network**
**Legaldpt@postmedia.com**

**Ron Waksman**
**Vice-President**
**Global News and Corus Radio**
**81 Barber Greene Road**
**Toronto, ONT M3C 2A2**

**CANADIAN JUDICIAL COUNCIL**

**IN THE MATTER of an Inquiry pursuant to section 63(1) of the *Judges Act* regarding the Honourable Justice Robin Camp**

---

**Affidavit of Marjorie Hickey, Presenting Counsel**

---

**I, Marjorie Hickey,** of Halifax, in the County of Halifax, Province of Nova Scotia make oath and say as follows:

1. I have personal knowledge of the evidence sworn to in this affidavit except where otherwise stated to be based on information and belief.

2. I state in this affidavit the source of any information that is not based on my own personal knowledge, and I state my belief of the source.

3. I am a lawyer acting as Presenting Counsel in this inquiry.

4. In the course of this inquiry I do verily believe that reference will be made to the complainant in the case of *R v Wagar*, which was a Provincial Court of Alberta trial presided over by the Honorable Justice Robin Camp, on various dates from June 5, 2014 to September 9, 2014, when he sat as a judge of the Provincial Court of Alberta.

5. I have reviewed the trial transcript in *R v Wagar* and the decision of the Alberta Court of Appeal in *R v Wagar*, 2015 ABCA 327 and from that information do verily believe that by Court Order in accordance with s. 486.4 of the *Criminal Code,* a publication ban was imposed on any information that may identify the complainant in both court proceedings. Such information was ordered not to be published, broadcast or transmitted in any manner.

6. I have been informed by the complainant in *R v Wagar* that the complainant wishes the publication ban imposed by the Alberta Provincial Court and the Alberta Court of Appeal to continue to apply to this inquiry, and that the complainant requests this Inquiry Committee to order a publication ban to protect the complainant's identity.

7. I have been advised by Suzanne Kendall, Chief Crown Prosecutor, Calgary Prosecutions, Alberta Crown Prosecution Service that the re-trial of the matter *R v Wagar* ordered by the Alberta Court of Appeal, is scheduled to take place in November, 2016.

8. I swear this affidavit in support of a motion to seek an order from the Inquiry Committee to ensure that the restrictions on publication ordered in *R v Wagar* under the *Criminal*

*Code* are given effect in this inquiry through an order from the Inquiry Committee as follows:

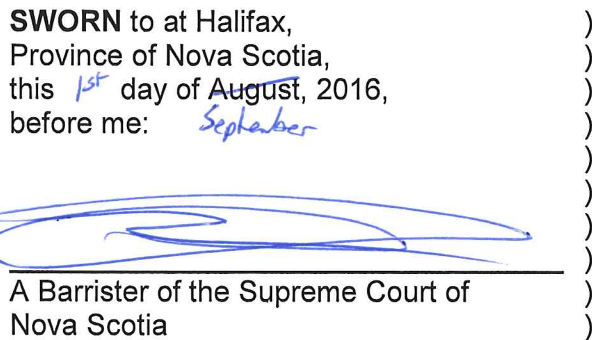
a. advising all those present during the inquiry of the existence of the continuing publication ban emanating from the Alberta Courts under s. 486.4 of the Criminal Code;

b. clarifying that the ban prohibits the publication, broadcast, transmission or disclosure in any format, of any information in this inquiry, that may reveal the identity of the *Wagar* Complainant;

c. ordering that the Complainant in *R v Wagar* be referred to as the *Wagar* Complainant or "the Complainant" in any decision rendered following this inquiry;

d. imposing a ban on all photographs, videos, or digital images of the *Wagar* Complainant, during or otherwise in connection with this inquiry.

**SWORN** to at Halifax,
Province of Nova Scotia,
this 1st day of ~~August~~ September, 2016,
before me:



A Barrister of the Supreme Court of
Nova Scotia

**IAN DUNBAR**

MARJORIE HICKEY

**CANADIAN JUDICIAL COUNCIL**

**IN THE MATTER of an Inquiry pursuant to section 63(1) of the *Judges Act* regarding the Honourable Justice Robin Camp**

---

**SUBMISSIONS OF PRESENTING COUNSEL ON PUBLICATION BAN**

---

1. This inquiry will consider the comments of Justice Camp in his hearing of the case *R v Wagar*, in which a complainant accused Mr. Wagar of sexual assault. Given this factual backdrop, this inquiry will require frequent reference to the complainant in *R. v. Wagar* (the "*Wagar* Complainant").

2. This Motion is brought in order that measures may be put in place to ensure complete protection of the identity of the *Wagar* Complainant against the publication or dissemination of anything that may serve to identify her.

3. It is the position of Presenting Counsel that statutory authority exists to grant this motion, and the facts of this case support the granting of the motion for both of the following reasons:

    a. the principles of the *Dagenais/Mentuk* test commonly applied in such circumstances support this motion;

    b. in any event, the publication ban under s. 486.4 of the *Criminal Code* put in place during the trial and appeal of *R v Wagar* continue in this proceeding.

**Statutory Authority**

4. The *Judge's Act* R.S.C. 1985, c. J-1 deems the Inquiry Committee to be a superior court with commensurate powers in relation to witnesses, evidence and, specifically, in relation to publication bans and the exclusion of the public:

> 63(4) The Council or an Inquiry Committee in making an inquiry or investigation under this section shall be deemed to be a superior court and shall have
>
> (a) power to summon before it any person or witness and to require him or her to give evidence on oath, orally or in writing or on solemn affirmation if the person or witness is entitled to affirm in civil matters, and to produce such documents and evidence as it deems requisite to the full investigation of the matter into which it is inquiring; and

> (b) the same power to enforce the attendance of any person or witness and to compel the person or witness to give evidence as is vested in any superior court of the province in which the inquiry or investigation is being conducted.
>
> ...
>
> (5) **The Council may prohibit the publication of any information or documents placed before it in connection with, or arising out of, an inquiry or investigation under this section when it is of the opinion that the publication is not in the public interest.**
>
> (6) An inquiry or investigation under this section may be held in public or in private, unless the Minister requires that it be held in public. (**Emphasis added**)

5. Under the *Canadian Judicial Council Inquiries and Investigations By-Laws, 2015*, the Inquiry Committee is empowered to limit public access or publication if it is determined to be in the public interest to do so. It also has a broad power to take "any measures" considered necessary to protect a person's identity:

> 6. (1) Subject to subsection 63(6) of the Act, hearings of the Inquiry Committee must be conducted in public unless, the Inquiry Committee determines that the public interest and the due administration of justice require that all or any part of a hearing be conducted in private.
>
> (2) The Inquiry Committee may prohibit the publication of any information or documents placed before it if it determines that publication is not in the public interest **and may take any measures that it considers necessary to protect the identity of persons, including persons who have received assurances of confidentiality as part of the consideration of a complaint or allegation made in respect of the judge.** (**Emphasis added**)

6. In exercising its discretion under this statutory framework, the Inquiry Committee can turn to the legal principles discussed below for assistance.

**Legal Principles**

7. It is well established that the appropriate test on applications of this nature is the *Dagenais-Mentuck* test that has been adapted for civil law purposes as set out in *Sierra Club of Canada v. Canada (Minister of Finance)* 2002 S.C.C. 41, as follows:

> 53. A confidentiality order . . . should only be granted when:
>
> (a) such an Order is **necessary in order to prevent a serious risk to an important interest**, including a commercial interest, in the context of litigation **because reasonable alternative measures will not prevent the risk**; and

> (b) the **salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects**, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings. (Emphasis added)

8. The recent decision of *A.B. (Litigation Guardian of) v. Bragg Communications Inc.* 2012 SCC 46 (SCC) assists in interpreting this test as follows:

> 11 The open court principle requires that court proceedings presumptively be open and accessible to the public and to the media. This principle has been described as a "hallmark of a democratic society" (*Vancouver Sun, Re*, [2004] 2 S.C.R. 332 (S.C.C.), at para. 23) and is inextricably tied to freedom of expression. A.B. requested two restrictions on the open court principle: the right to proceed anonymously and a publication ban on the content of the fake Facebook profile. **The inquiry is into whether each of these measures is necessary to protect an important legal interest and impairs free expression as little as possible. If alternative measures can just as effectively protect the interests engaged, the restriction is unjustified. If no such alternatives exist, the inquiry turns to whether the proper balance was struck between the open court principle and the privacy rights of the girl**: *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.); *R. v. Mentuck*, [2001] 3 S.C.R. 442 (S.C.C.). (Emphasis added)

9. The Supreme Court in *Bragg* further concluded "absent scientific or empirical evidence of the necessity of restricting access, the Court can find harm by applying reason and logic." (at paragraph 16)

10. The importance of a publication ban regarding the identity of sexual assault complainants was directly considered by the Supreme Court of Canada in *Canadian Newspapers Co. v. Canada (Attorney General),* [1988] 2 S.C.R. 122. The Court, in finding that the mandatory publication ban required by the predecessor section to s. 486.4 of the Criminal Code infringed s. 2(b) of the *Charter,* upheld the mandatory nature of the ban as justifiable under s. 1 of the *Charter.* The Court found that the ban protected complainants from the trauma of wide-spread publication resulting in embarrassment and humiliation. The court held that encouraging victims to come forward and complain facilitates the prosecution and conviction of those guilty of sexual offences, and therefore assists with the overall objective of suppressing crime and improving the administration of justice.

> 15. This objective undoubtedly bears on a "pressing and substantial concern" and the respondent conceded that it is of sufficient importance to warrant overriding a constitutional right. The first requirement under s. 1 is thus satisfied and we must now turn to the second part of the *Oakes* test.

...

> 18 When considering all of the evidence adduced by the appellant, it appears that, of the most serious crimes, sexual assault is one of the most unreported. The main reasons stated by those who do not report this offence are fear of treatment by police or prosecutors, fear of trial procedures and fear of publicity or embarrassment. Section 442(3) is one of the measures adopted by Parliament to remedy this situation, the rationale being that a victim who fears publicity is assured, when deciding whether to report the crime or not, that the judge must prohibit upon request the publication of the complainant's identity or any information that could disclose it. Obviously, since fear of publication is one of the factors that influences the reporting of sexual assault, certainty with respect to non-publication at the time of deciding whether to report plays a vital role in that decision. Therefore, a discretionary provision under which the judge retains the power to decide whether to grant or refuse the ban on publication would be counterproductive, since it would deprive the victim of that certainty.

11. The protective goals of publication bans in sexual assault cases are now fortified by the following provisions under the *Canadian Victims Bill of Rights,* S.C. 2015, c. 13:

> 11 Every victim has the right to have their privacy considered by the appropriate authorities in the criminal justice system.
>
> 12 Every victim has the right to request that their identity be protected if they are a **complainant to the offence or a witness in proceedings relating to the offence**. (Emphasis added)

## The present inquiry

12. A publication ban pursuant to s. 486.4 of the *Criminal Code of Canada* was put in place for the proceedings in the Provincial Court in *R. v. Wagar*, and the Court of Appeal. The face of the judgment of the Court of Appeal decision reads as follows:

> **Restriction on Publication**
>
> **Identification Ban** – See the *Criminal Code*, section 486.4. By Court Order, information that may identify the complainant must not be published, broadcast, or transmitted in any manner.
>
> **NOTE**: This judgment is intended to comply with the restriction so that it may be published. (Appendix A)

13. Section 486.4 provides in relevant part:

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:

(i) an offence under section .....271;...

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.

...

486.4 (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.

14. Orders under s. 486.4 are of continuing effect. In *R. v. Adams* 1995 CarswellAlta 733, the Supreme Court of Canada had occasion to consider the ongoing impact of publication bans issued under the predecessor section to s. 486.4. In that case, the trial judge unilaterally lifted the ban at the conclusion of the trial after the accused had been acquitted of sexual assault. The Supreme Court noted the important purposes served by publication bans and the need for certainty in continuation of the bans. Justice Sopinka held:

> 26 According to the court in *Canadian Newspapers*, the mandatory nature of an order under s. 486 serves to further the goal of encouraging the reporting of sexual offences. ...
>
> In addition, the court pointed out that complainants must be *certain* that their names will not be published in order for the object of the publication ban to be achieved....
>
> 27 **A revocable publication ban, like a discretionary ban, would fail to provide the certainty that is necessary to encourage victims to come forward. If the trial judge were given the power by the legislation to revoke the ban, the complainant would never be certain that her anonymity would be protected. The ban would serve as little more than a temporary guarantee of anonymity. There is nothing in the language of s. 486(4) that purports to authorize revocation of the order and, given the purpose of the legislation, no such power can or ought to be implied. (Emphasis added)**

15. Finally, Justice Sopinka noted the limited circumstances under which such an order could be revoked or varied, specifically, where the conditions present at the time the order was made had materially changed:

> 31 As a general rule, **any order relating to the conduct of a trial can be varied or revoked if the circumstances that were present at the time the order was made have materially changed. In order to be material, the change must relate to a matter that justified the making of the order in the first place.**
>
> ,,,
>
> **Where an order is required to be made by statute, the circumstances that are relevant are those whose presence makes the order mandatory. As long as these circumstances are present, there cannot be a material change of circumstances.**
>
> 32 Subsections (3) and (4) of s. 486 make the order banning publication mandatory on the application of the prosecution, the complainant or a witness under the age of 18. In this case, the circumstance that made the order mandatory was an application by the prosecutor. The Crown did not withdraw its application or consent to revocation of the order. Accordingly, the circumstances that were present and required the order to be made had not changed. The trial judge, therefore, did not have the power to revoke the order.
>
> 33 **While this conclusion is sufficient to dispose of this case, it is useful to add that, had the Crown consented to the revocation order but the complainant did not, the trial judge would equally have had no authority to revoke.** (Emphasis added)

16. In short, absent the consent of the complainant, there can be no revocation or curtailment of a publication ban made under s. 486.4. The complainant in *R v Wagar* has not consented to the lifting of the publication ban, and has requested the ban remain in place in this inquiry.

17. Of particular note in this case is the fact that the *Wagar* matter is scheduled for a re-trial in November, 2016. The mandatory publication ban would be instituted for that trial when it is heard. It would defeat the purpose of that ban if no ban were in place at this inquiry.

**<u>Conclusion</u>**

18. This Committee has the power to take any measures considered necessary to protect the identity of persons, including those who have received assurances of confidentiality. In doing so, it is appropriate to bear in mind both the principle of openness and the important purposes served by publication bans in sexual assault matters.

19. In the case of the *Wagar* Complainant, there is a s. 486.4 publication ban in place which is irrevocable, except with that complainant's consent. Given the upcoming re-trial, it reinforces the need for the irrevocable ban to remain in place.

20. This inquiry is open to the public, thereby upholding the important open court principle. By ordering the following, the Inquiry Committee will be acting consistently with the requirements of s. 486.4 of the *Criminal Code* and the continuing effect of a ban under that section, and will be properly balancing the open court principle with the important and necessary objectives of protecting the identities of complainants in sexual assault proceedings.

21. Presenting Counsel requests the Inquiry Committee to issue directions:

   a. advising all those present during the inquiry of the existence of the continuing publication ban emanating from the Alberta Courts under s. 486.4;

   b. clarifying that the ban prohibits the publication, broadcast, transmission or disclosure in any format, of any information in this inquiry, that may reveal the identity of the *Wagar* Complainant;

   c. ordering that the Complainant in *Wagar* be referred to as the *Wagar* Complainant or "the Complainant" in any oral or written material in connection with, arising out of, or about the matters in this inquiry;

   d. imposing a ban on all photographs, videos or digital images of the *Wagar* Complainant, during or otherwise in connection with this inquiry.

**Notice**

22. Consistent with the directions of the Inquiry Committee, notice has been sent to representatives of CBC, CTV, the Globe and Mail, the Toronto Star, the Postmedia Network and Global.

Respectfully submitted,

Marjorie Hickey

Presenting Counsel

cc. Owen Rees, counsel to the Inquiry Committee

Frank Addario, counsel to Justice Camp

Members of the media identified in the Notice of Motion