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PUBLICATION BANS

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NOTE:

THIS POICY DOCUMENT IS TO BE READ IN THE CONTEXT PROVIDED BY THE **PREFACE** TO THIS PART OF THE MANUAL.

CERTAIN WORDS AND PHRASES HAVE THE MEANINGS ESTABLISHED IN THE **"WORDS & PHRASES"** SECTION OF THIS PART OF THE MANUAL.

PUBLICATION BANS
PRACTICE NOTE

INTRODUCTION

The 'open court principle', that the public have access to court proceedings and ***court*** records, has been described by the Supreme Court of Canada as a "hallmark of a democratic society". Freedom of the press, one aspect of the open court principle, is a constitutional right under Section 2(b) of the *Canadian Charter of Rights and Freedoms*. Any restriction on the open court principle must be based on equally sound principles and values.

Publication Bans are the means by which fair trial interests of an accused and interests of victims and witnesses to protection of their privacy, are balanced with our open court system and freedom of the press. This balancing of competing and constitutionally-protected interests requires that publication bans be utilized only in well-defined circumstances, for purposes which advance the proper administration of justice. A publication ban prohibits information which is the subject matter of the ban, from being "published in any document or broadcast or transmitted in any way".

Publication bans in criminal proceedings are largely statutorily-based in the **Criminal Code**, but examples of common law bans in the criminal context also exist. Statutory bans may be automatic, arising by operation of law; mandatory upon request, or discretionary. Common law bans are, by their nature, discretionary.

The purpose of this practice note is to provide Crown Attorneys with information on the use and availability of publication bans. As there has been frequent legislative change respecting publication bans, Crown Attorneys are advised to check the guidance contained in this practice note against current statutory provisions and case law. The scope of this practice note is publication bans and restrictions on publication in the course of prosecutions. It does not consider **Code** provisions pertaining to sealing orders on search warrants and other investigative documents or exclusion of the public from court proceedings.

STATUTORY BANS

Bans on Victim Identity

Bans on victim and witness identity balance freedom of the press with encouraging the reporting of crimes and victim/witness participation in the justice system, by protecting victims and witnesses from embarrassment and possible intimidation. Expansion of the availability of publication bans was a significant component of the 2015 *Victim Bill of Rights Act*.

Bans on any information that could identify the victim in a proceeding, including a proceeding before the Criminal Code Review Board, are provided for in various sections of the **Criminal Code**. Many are mandatory upon application of the prosecutor or the victim him/herself. The mandatory bans on identity are tied to either specific offence types (ie. sexual offences, child pornography) *or* the victim being under the age of 18.

The discretionary bans on identity are ordered on the basis that they are necessary for the "proper administration of justice". To guide the Judge/Justice/Review Board in the exercise of this discretion, the following factors have been enumerated:

> In determining whether to make an order, the judge or justice shall consider:
>
> (a) the right to a fair and public hearing;
>
> (b) whether there is a real and substantial risk that the victim, witness or justice system participant would suffer harm if their identity were disclosed;
>
> (c) whether the victim, witness or justice system participant needs the order for their security or to protect them from intimidation or retaliation;
>
> (d) society's interest in encouraging the reporting of offences and the participation of victims, witnesses and justice system participants in the criminal justice process;
>
> (e) whether effective alternatives are available to protect the identity of the victim, witness or justice system participant;
>
> (f) the salutary and deleterious effects of the proposed order;
>
> (g) the impact of the proposed order on the freedom of expression of those affected by it; and
>
> (h) any other factor that the judge or justice considers relevant.

[See s.486.5(7). Section 672.501(8) for Review Board is modified accordingly.]

A chart outlining the current **Code** provisions relating to bans on victim identity appears below.

BANS ON VICTIM IDENTITY		
Section	**Status of Ban or Prohibition**	**Availability**
s.111, YCJA*	automatic	Victim under 18 of any offence alleged to have been committed by a young person; exceptions available under s.111(2) & (3)
s.486.4(2.2), CC	mandatory	Victim under 18 of any offence
s.486.4(2), CC	mandatory	Sexual integrity offences
s.486.4(3), CC	mandatory	(Person depicted in) child pornography
s.672.501(1) and (2), CC	mandatory	Victim in sex offences or person depicted in child pornography at Review Board hearing
s.486.5(1), CC	discretionary "proper administration of justice"	Any offence
s.486.5(2), CC	discretionary "proper administration of justice"	Justice system participant in enumerated terrorism, criminal organization or intimidation offences
s.672.501(3), CC	discretionary "proper administration of justice"	Any Review Board hearing other than sex or child pornography offences

Bans on Witness Identity

Bans on any information that could identify a witness in a proceeding, including a proceeding before the Criminal Code Review Board, are also provided for in various sections of the **Criminal Code**. A number are mandatory on application of the prosecutor or the witness him/herself. The mandatory bans on identity are tied to the witness *both being under the age of 18 and* in certain types of proceedings, and are thus of more limited availability than for those for victims of crime. Like the provisions which relate to victim identity, the discretionary bans on identity are ordered on the basis that they are necessary for the "proper administration of justice". To guide the Judge/Justice/Review Board in the exercise of this discretion, the following factors have been enumerated:

> In determining whether to make the order, the judge or justice shall consider:
>
> (a) the right to a fair and public hearing;
>
> (b) whether there is a real and substantial risk that the

victim, witness or justice system participant would suffer harm if their identity were disclosed;

(c) whether the victim, witness or justice system participant needs the order for their security or to protect them from intimidation or retaliation;

(d) society's interest in encouraging the reporting of offences and the participation of victims, witnesses and justice system participants in the criminal justice process;

(e) whether effective alternatives are available to protect the identity of the victim, witness or justice system participant;

(f) the salutary and deleterious effects of the proposed order;

(g) the impact of the proposed order on the freedom of expression of those affected by it; and

(h) any other factor that the judge or justice considers relevant.

[See s.486.5(7). Section 672.501(8) for Review Board is modified accordingly.]

Section 486.31, enacted as part of the 2015 *Victims Bill of Rights* legislation, creates a "non-disclosure of witness identity" order. This discretionary order is not a ban on publication *per se* but rather an order which prohibits identification of a witness during the course of a proceeding, including to the accused and defence counsel, as well as the general public. Section 486.31(3) enumerates its own principles for granting such an order.

A Chart outlining the current **Code** provisions relating to bans on witness identity appears below.

BANS ON WITNESS IDENTITY		
Section	**Status of Ban or Prohibition**	**Availability**
s.111, YCJA	automatic	Witness under 18 in any case involving an offence alleged to have been committed by a young person; exceptions available under s.111(2) & (3)
s.486.4(2), CC	mandatory	Witness under 18 – sexual integrity offence
s.486.4(3), CC	mandatory	Witness under 18 in child pornography offences
s. 672.501(1) & (2), CC	mandatory	Witness under 18 in Review Board hearings on sex or child pornography offence
s.486.31, CC	discretionary "proper administration of justice"	Any offence, "non-disclosure of witness identity in the course of the proceedings"
s.486.5(1), CC	discretionary "proper administration of justice"	Any offence
s.486.5(2), CC	discretionary "proper administration of justice"	Justice system participant in enumerated terrorism, criminal organization or intimidation offences
s.672.501(3), CC	discretionary "proper administration of justice"	Any Review Board hearing other than sex or child pornography offences

Administration of Justice Bans

Bans of this nature differ in one significant respect from those which relate to bans on victim or witness identity; many are automatic prohibitions on publication rather than bans on publication, *per se*. Prohibitions on publication simply exist, and have neither to be applied for, nor ordered. This is very much in keeping with the purpose that they serve, which is to protect fair trial interests. The scope of such prohibitions from publication largely cover evidence at certain temporal stages of a proceeding. One exception is the **Youth Criminal Justice Act** prohibition on publication of the identity of a young person charged with any offence.

Two provisions which are bans on publication, are those which relate to evidence presented at a show cause hearing or bail review, and evidence presented at a preliminary inquiry. These bans are mandatory on application of the accused, but discretionary where the Crown is the applicant. A purely discretionary ban is provided for with respect to the identity of a juror in a proceeding, where it is deemed to be for the "proper administration of justice". There is no enumerated criteria in the **Code** to guide this particular exercise of discretion.

Another discretionary ban is provided for with respect to the identity of a "justice system participant" (a defined term, in Section 2) in certain enumerated terrorism, criminal organization or intimidation offences. The criteria which guide this particular exercise of discretion are contained in Section 486.5(7) of the **Code**. "Justice system participant" goes beyond the role of victim or witness, to any person within the definition "who is involved in the proceedings". This can include, for example, the prosecutor and the Judge.

A Chart outlining the current **Code** provisions for administration of justice bans appears below.

ADMINISTRATION OF JUSTICE BANS			
Section	**Status of Ban or Prohibition**	**Scope of Ban**	**Availability**
s.110, YCJA	automatic	Identity of a young person subject to certain limitations and exceptions enumerated in s.110(2) (3), (4) & (6), YCJA	Any offence
s.276.3, CC	automatic	Application, evidence and submissions	Sexual History application under s.276, CC
s.517, 520, 521, CC	mandatory on application of accused; discretionary for Crown	Evidence at a show cause hearing or bail review	Any offence
s.539, CC	mandatory on application of accused; discretionary for Crown	Evidence at Preliminary Inquiry	Any offence
s.542(2), CC	automatic	Preliminary Inquiry evidence of accused's confession until discharge or trial concluded	Any offence
s.648, CC*	automatic	Evidence heard outside jury's presence until they retire to consider their verdict	Any offence
s.631(6), CC	discretionary "proper administration of justice"	Juror identity	Any offence
s.486.5(2), CC	Discretionary "proper administration of justice"	Identity of a justice system participant	Enumerated terrorism, criminal organization or intimidation offences

COMMON LAW BANS

Common law bans on publication in criminal proceedings are invoked much less frequently than statutory bans available under the **Criminal Code**. In Dagenais v. Canadian Broadcasting Corp. [1994] 3 S.C.R. 835, the Supreme Court formulated the principles to govern (common law) applications for publication bans in criminal proceedings:

A publication ban should only be ordered when:

(a) such a ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and

(b) the salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban.

It is the party seeking the ban who bears the burden of satisfying the court that the ban meets this test. The court must consider all other options before considering a ban, and only then, impose a ban which is as limited as possible.

In the criminal context, pre-trial publicity which has the potential to jeopardize the fair trial interests of an accused facing a jury trial, is the typical subject of an application for a common law ban. In Dagenais, the pre-trial publicity related to a fictional television program dealing with the same type of conduct as that alleged in the criminal trial. Another type of situation calling for consideration of a common law ban arises in the context of multiple accused charged with offences arising from the same police investigation, where one accused has pled guilty and is having a sentencing hearing, and other co-accuseds are pending (jury) trial. The outcome of such applications can be difficult to predict, as judicial precedent is of mixed result. Such applications are usually vigorously challenged by the media. Where applications for common law bans are grounded in fair trial interests of an accused, the position of defence counsel is an important consideration. Because Dagenais requires an assessment of the risk to trial fairness and the availability of alternative measures to guard against the risk, consideration must be given to the proximity of the publicity to the pending trial and the availability of challenge for cause (s.638, **Criminal Code**).

In R. v. Mentuk [2001] 3 S.C.R. 442, the Supreme Court considered a Crown application for a publication ban on the identity of undercover police officers. The Court acknowledged that the common law rule can accommodate orders that must occasionally be made in the interests of the administration of justice, which encompass more than fair trial rights. Accordingly, the Court re-stated the Dagenais test for cases of this kind:

A publication ban should only be ordered when:

(a) such an order is necessary to prevent a serious risk to the proper administration of justice because reasonably (available) alternative measures will not prevent the risk; and

(b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

Crown Attorneys are advised to consult with their Chief Crown Attorney before initiating an application for a common law publication ban.

PROCEDURAL CONSIDERATIONS

Mandatory statutory bans do not require any particular procedure to be followed and are not subject to the Courts of Nova Scotia Notice of Application for a Publication Ban Protocol. In most cases they are simply requested and granted, although Crown Attorneys are advised to determine whether any Rules of Court are in place which must be followed. An application for a discretionary ban on publication, whether statutory or common law, requires compliance with the Courts of Nova Scotia Protocol for Notification to the Media, designed in accordance with the Dagenais guidelines. This procedural step is in addition to any **Code** provisions governing such applications, of which most require an application in writing to the court. The protocol states that the applicant must file a Notice of Application, Supporting Affidavit and draft Order, unless otherwise directed. Once filed with the court, there is no reason not to provide copies to media or their counsel, if requested. This will assist the media in assessing whether they wish to oppose the application. The documents can be provided subject to an undertaking not to publish until the ban issue is determined. Mentuck directs that a sufficient evidentiary basis must be put forward from which the trial judge may assess the application and may exercise his/her discretion judicially. Crown Attorneys are reminded that the protocol is not merely a question of courtesy to the media, but the means by which a constitutional right is respected. An application made absent this compliance is likely to be adjourned, and vulnerable to being set aside, if granted.

Applications for common law bans are made to the trial court. If the level of court has not yet been established or cannot be discerned with reference to statutory provisions, then the application should be brought in the Supreme Court.

Applications for bans on victim or witness identity should be made at the earliest opportunity in order to minimize the risk of reporting prior to imposition of the ban.

The provisions for a publication ban on victim or witness identity allow for the application to be brought by the victim or witness him/herself. While not a common occurrence, it is possible that a witness will wish to make an application which the Crown does not feel is supportable, having regard to the criteria enumerated in the **Code**. In such a case, the Crown should assist the witness in docketing the request and take no position on the application.

Whenever a ban is requested, and ordered, it is important that the scope of the ban be clearly stated, to assist the media in ensuring its terms are respected. Reference to a **Criminal Code** section should be made on the record, where applicable, and Crown Attorneys should assist members of the media when requested, in understanding the terms of the ban.

REMOVAL OF PUBLICATION BAN

From time to time, a victim will request that a previously imposed ban on publication pertaining to their identity be lifted. The Court is not functus in this situation, and a previously imposed ban can be lifted where the Crown and victim are both in agreement: R. v. Adams (1995), 103 C.C.C. (3d) 262 (S.C.C.). Crown Attorneys should assist victims with such applications where they are satisfied victims are fully informed and the application is made for appropriate reasons.

Section 112 of the **Youth Criminal Justice Act** specifically provides for a victim or witness under 18 to make an application for an order which would permit them to publish information which would identify *themself* as a victim or witness. Such an order may be made if the court is satisfied that the publication would not be contrary to his/her best interests or the public interest.

BREACHES OF PUBLICATION BANS

The **Code** contains a number of offences related to breaching a publication ban [s.486.6, s.593(3), s.542.2, s.631(6) and s.648(2)]. With the advent of social media and the Internet, it is not only traditional media who have the means of 'publishing', and thus potentially violating a ban, but also individuals. Professional journalists take their job of respecting bans very seriously. They have access to legal counsel to provide them with advice on how far they can go with their reporting. Nonetheless, a breach of a ban can inadvertently occur. Similarly, an individual may, in ignorance, post something on social media which violates a ban. In many cases, the ban-violating publication can be made to cease, once the breach is brought to the reporter's or individual's attention. In advising the police respecting a potential criminal charge for violating a ban on publication, or in reviewing a charge once laid, Crown Attorneys should carefully examine the seriousness of the violation and the intent of the alleged violator. These are matters where Crown Attorneys are advised to consult with their Chief Crown Attorney and the Director of Communications.

Link to Courts of Nova Scotia Media Notification Protocol:

http://www.courts.ns.ca/Publication_Ban_Notice/pubbanform.htm