Closing Submissions of Justice Camp

Overview

Justice Camp admits he committed misconduct. However, applying the prospective test for removal outlined in *Marshall* and *Therrien,* the Committee should recommend Justice Camp's continued service. There are five reasons for this: (1) His misconduct was the result of a knowledge deficit and a failure of education, not *animus* or bad character. (2) His misconduct is limited to one case. (3) Ignorance about the social context of sexual assault law is widespread. (4) Justice Camp was teachable and has been taught. (5) The informed public values education and denunciation over termination where it is reasonable. In the case of this Judge, it is reasonable to choose education and denunciation to promote the long-term goals of the judiciary.

1. Justice Camp's misconduct does not arise from *animus*

Justice Camp admits his comments in *Wagar* were insensitive and displayed an ignorance of the ways in which victims of trauma and sexual violence process and respond to events. He failed to understand the limits of his legal and social context knowledge in this area. But he is not a misogynist and he did not refuse to apply the law out of *animus*.

a. Justice Camp had an education problem, not a character problem.

The Committee should consider the comments in the Notice of Allegations in the context of (i) the evidence and issues in the *Wagar* trial; and (ii) the evidence of Justice Camp's character.

i. Justice Camp made reasonable legal decisions given the evidence and the issues at trial.

To the extent the Committee finds it relevant to characterize the quality of Justice Camp's legal decision-making, it should find it to be generally reasonable and consistent with appellate precedent. What follows is a summary of Justice Camp's position on this issue. Appendix A contains a full response to the individual Allegations.

On a fair reading of the transcript, there is no basis to find that Justice Camp's legal decision-making was unreasonable or that he was led into error by incurable assumptions about women and sexual assault. This case raised difficult issues about the applicability of s. 276 and the admissibility of evidence. Many of Justice Camp's inappropriate comments were made in in *obiter* or in the course of asking questions during submissions. The Council has previously tolerated vigorous wide-ranging exchanges between judges and counsel.[1]

Justice Camp ultimately acquitted Alexander Wagar of sexual assault on the second branch of *W.(D.),* finding that: "And in truth, their evidence was typical of evidence in cases such as this. None of it was truly bizarre. I just think that one version is more credible than the other. And leaving that to one side because it's not a competition, I'm not in a position to reject the

[1] Canadian Judicial Council; 1997 Online Summaries; Complaint 16 (see Appendix B).

accused's version. On the accused's version, he received positive indications from the complainant that she wanted to have sex with him."[2] This is an appropriate basis for an acquittal.

Justice Camp denies that he was willfully biased or refused to apply the law. The evidence does not establish this. An informed member of the public familiar with the record would reach the same conclusion. The 'informed' qualifier is important in this case because various parties have publicly repeated an allegation that Justice Camp willfully refused to apply the law. The law professors in their highly publicized November 9, 2015 complaint to the CJC accused him 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. Many newspaper editorials and television commentators stated publicly that Justice Camp refused to apply s. 276. Members of the public complained to the CJC, citing Justice Camp's refusal to apply the rape shield provisions as a reason they believe he is no longer fit to be a judge. From the media coverage, a reasonable Canadian might gather that Justice Camp refused to apply the rape shield provision out of bias and allowed the complainant's sexual history to be put in issue. In fact, no evidence was led about the complainant's sexual history. As Professor Cossman pointed out (unchallenged), Justice Camp's application of the provision was legally reasonable.[3] He declined to apply s. 276 in three instances where it did not apply and *did* apply it in one instance to the benefit of the Crown. The Committee should endorse Professor Cossman's conclusion and remove this aspect of the shadow on his reputation.

The Alberta Court of Appeal's judgment does not preclude the Committee from finding Justice Camp's legal decision-making reasonable. The judgment is not binding on these proceedings because the Court made no specific findings and based its decision on an incomplete review of the record. Its ruling that "the trial judge's comments…gave rise to doubts about the trial judge's understanding of the law"[4] does not prevent the Committee from concluding that any particular error is *not* made out. On top of this, the Court's decision was tainted by procedural unfairness. The Court heard the Crown's appeal *ex parte* and, despite its 'discomfort' with proceeding in this fashion, did not appoint *amicus* to argue Wagar's position. It relied on the Crown's factum and "portions" of the trial transcript.[5] In the circumstances, the Court of Appeal's judgment is a small piece of circumstantial evidence on the issue of Justice Camp's decision-making.

ii. Justice Camp's good character informs the interpretation of his comments.

The evidence shows that Justice Camp has a deep sense of justice and fair play, an inclusive, curious personality, respect for diversity and a genuine desire to do the right thing:

- The Agreed Statement of Fact and one character letter detail Justice Camp's active commitment, as a barrister in South Africa, to the anti-apartheid struggle.[6]

[2] Transcript of *R. v. Wagar*, Exhibit 2A at pp. 431-432.
[3] Evidence of Professor Cossman, *Inquiry Transcript* at pp. 181-182.
[4] *R. v. Wagar,* 2015 ABCA 327 at para. 4.
[5] *Ibid.* at para. 4.
[6] Agreed Statement of Facts, Exhibit 1 at p. 1; Character letter of Sabri Shawa, Exhibit 2R2 at p. 2.

- Cassandra Malfair, a Crown prosecutor with a focus on sexual assault cases, knew Justice Camp before and after the *Wagar* trial. She wrote a letter attesting to his character, despite knowing first-hand the effect this might have on complainants whose cases she was prosecuting. She described him as a person who "nurtures and encourages the less powerful" and offered her view that with the benefit of education, Justice Camp would "readily empathize" with victims.[7]
- Several of Justice Camp's former colleagues gave opinions about his character as a lawyer. They describe him as intelligent, honest, fair, respectful and accommodating of diverse backgrounds and perspectives. He fit in well at a diverse firm, founded by four partners, one of whom was a woman and two of whom were gay men.[8] Many letter-writers maintain friendships with Justice Camp. They offered their insights into the dedication and humility with which he has approached the complaint and Inquiry process.
- Dr. Mitchell Spivak, a psychiatrist, sat in on a sexual assault case presided over by Justice Camp in the Alberta Provincial Court. He offered the opinion that Justice Camp dealt with a difficult case and a challenging complainant in a manner that was "accommodating" and "respectful."[9]
- Counsel who appeared before Justice Camp when he was a Provincial Court judge describe him as respectful and eager to learn if sometimes overwhelmed by the intricacies of Canadian criminal law.[10] One lawyer said Justice Camp asked her for a tour of the Calgary Remand Centre after he realized he "did not have any background on what actually happened to inmates."[11]
- Many of Justice Camp's former students and staff on the Provincial Court attested to his treatment of his co-workers and their observations of him in court.[12] They describe his courtroom behaviour as frank but courteous, respectful, fair and honest. In chambers, he was sometimes informal, but not condescending or disrespectful. He showed interest in their careers and welcomed their suggestions and input on how to be a better judge.

The character evidence is entitled to considerable weight in determining the degree of misconduct – in this case, the interpretation of Justice Camp's comments. As a majority of the CJC wrote in its recommendation to the Minister in *Matlow*:[13]

> Character is certainly relevant to the assessment of a judge's attributes…While these letters are not relevant to whether the conduct complained of occurred, they may be relevant to why the acts occurred, the context of the acts, and whether the acts were committed without malice or bad faith.

In this case, the Committee must decide whether Justice Camp holds a bigoted outlook or committed a remediable lapse of judgment and sensitivity. The character letters are positive evidence of the latter. They are uncontradicted. Presenting Counsel has not challenged their accuracy or sought to examine the authors. Their assertions that the *Wagar* comments were out

[7] Character letter of Cassandra Malfair, Exhibit 2R20.
[8] Character letters of Shawa, Jensen, Petriuk, Aspinell, Hawkes, Ho, Davis, Exhibit 2R.
[9] Character letter of Dr. M. Spivak, Exhibit 2R7.
[10] Character letters of Bill Wagner, O'Shaughnessy, Dunn, Lutz, Exhibit 2R.
[11] Character letter of M. O'Shaughnessy, Exhibit 2R12 at p. 2.
[12] Character letters of Balanquit-Bernardo, Scott, Kluz, Krawchuk, Boyd and Alary, Exhibit 2R.
[13] *Inquiry Re Matlow*, CJC majority at para. 150.

of character are corroborated by the live witnesses' evidence that it was difficult to reconcile the man they got to know with the person who made the comments. As Dr. Haskell stated:[14]

> I thought he would be a misogynist. I thought he would have a contempt -- a generalized contempt for women and would, you know, assume a male-entitled dominant position and see women in diminished capacities. And that wasn't my experience.

Justice Camp's lapse in *Wagar* is by all accounts just that – a single lapse in a lifetime as a respectful ally to various disadvantaged groups in their struggles for equality. It is tempting but unsupported to draw an inference that the *Wagar* case is the 'tip of the prejudice iceberg.'

The letters are also informed, responsible and specific. These are not vague assertions that Justice Camp is a 'good person' or a 'good judge.' They provide details about Justice Camp's personal adjudicative style (his tendency toward the informal, the 'stream-of-consciousness' speech and the playing of devils' advocate) and his lack of familiarity with the Canadian criminal justice system. This information can help the Committee decide what inferences to draw from the transcript about his motives and meaning. Many authors backed up their opinions about Justice Camp's character with examples of occasions on which he displayed a particular quality. They all informed themselves about the *Wagar* Allegations. Some explicitly noted the seriousness of the allegations and the corresponding seriousness of their duty to provide an objective account of Justice Camp's character.[15] The Malfair letter is entitled to particular weight, as she is a person who knows Justice Camp's character *and* has first-hand experience with sexual assault complainants and prosecutions.

b. Justice Camp's poor understanding on the social context of sexual assault is not 'serious misconduct' equivalent to dishonesty, immorality or cruelty.

The evidence shows that at the time of the *Wagar* trial, Justice Camp was undereducated about the social context and practical application of sexual assault law. He was a foreign-trained lawyer. His Canadian practice focused on complex commercial litigation in civil courts. He had no experience litigating sex assault cases. He did not obtain training on the law or social context of sexual assault after becoming a provincial court judge. None of the conferences offered by the Alberta Provincial Court during his tenure offered education in this area.[16]

Justice Camp's failure of education was exacerbated by the fact that this is a complicated area of law where judicial common sense has to be tempered by learned concepts of trauma, victim responses and the reimagining of sexual assault as a violent, not sexual, act. In the words of Justice McCawley, "managing a sexual assault trial is very difficult." The law is not simple. Most facts are relevant to more than one legal issue. For example, evidence that a complainant said 'yes' to sex is relevant to the credibility of her assertion of no consent *and* to the reasonableness of the defendant's belief in consent.

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[14] Evidence of Dr. Lori Haskell, *Inquiry Transcript* at p. 212.
[15] Character letters of Hawkes, Jensen, Exhibit 2R.
[16] Exhibit 11: Alberta Provincial Court syllabi; Newly Appointed Provincial and Territorial Judges' Skills Seminar Syllibi (November 2012 and March 2013).

Many judges and other justice system participants struggle with the concepts of consent, mistake and reasonable steps. Justice McCawley testified that at a recent sexual assault conference, judges faced with sample lines of questioning had "different views" about what was appropriate and inappropriate. She said, "it's not easy, even for an experienced judge."[17] Dr. Lori Haskell testified that as an educator of justice system participants, she encountered "misunderstanding or ignorance about trauma and myths in the sexual violence context" and "confusion about how or why rape myths have been discredited."[18] She said:[19]

> [O]ur whole culture and society is so immersed with those ideas, racist ideas, sexist ideas, gender ideas. I don't think we ever get to an endpoint. So I really do think it's an ongoing process of, like I said, self-reflection, really a constant examination of our assumptions and our beliefs.

The intervener Coalition submits that "empirical research demonstrates that rape myths, and the discriminatory beliefs on which they are based, continue to permeate the justice system"[20] and that "the success of legislative reforms…has been impaired by the persistence of discriminatory stereotypes in criminal justice processing of sexual assault cases."[21] They point to sources suggesting that similar stereotypes persist in judicial reasoning.[22] This is not surprising. A myth is, by definition, a set of widely held, non-evidence-based beliefs. Justice Camp's unusual bluntness is shocking but provides a window into issues with which many judges are presumably unaware they are grappling.

In pointing out his lack of education, Justice Camp is not trying to shift the blame for his misconduct in the *Wagar* trial. He failed to educate himself about social context, internalize the concept of mythological thinking, and interrogate his beliefs to determine the extent to which he himself had internalized these pervasive myths. But it was not deliberate and the evidence shows his particular and individual failure is systemic and widespread.

c. Comparison with other cases

In deciding where Justice Camp's misconduct falls on the spectrum, the Committee should be guided by the approach and outcome in similar cases of judicial misconduct. The two charts in Appendix B are summaries of Canadian judicial bias cases in the last 20 years in which a judge displayed apparent bigotry or antipathy towards a person or group through on-the-record comments. Most judges stayed on the bench because the comments were not sufficiently serious or because the judge had apologized and educated him- or herself. Removal was only recommended in two cases.

The two cases in which the judges were removed (*Moreau-Bérubé* and *Bienvenue*) are qualitatively different from Justice Camp's case. The *Bienvenue* comments were entirely out-of-step with Canadian social standards. The judge in that case said that when women "decide to degrade themselves, they sink to depths to which even the vilest man could not sink." He called

[17] Evidence of Justice McCawley, *Inquiry Transcript* at p. 107.
[18] Evidence of Dr. Lori Haskell, *Inquiry Transcript* at p. 204.
[19] Evidence of Dr. Lori Haskell, *Inquiry Transcript* at pp. 240-241.
[20] Coalition at para. 16; Benedet Report at p. 21.
[21] Coalition at para. 33, citing Holly Johnson study.
[22] Coalition at para. 34, citing Emma Cunliffe study.

the accused a "negress." He said "the Nazis did not eliminate millions of Jews in a painful or bloody manner. They died in the gas chambers, without suffering."[23] Justice Bienvenue refused to disavow his comments and stood by his beliefs.These comments display an inexplicable *animus* that cannot be explained by pervasive mythology or remedied through education.

Similarly, in *Moreau-Bérubé*, the judge said that Acadians are "the people who live on welfare" and the rest of us are "the ones who support them." The Acadians "are on drugs and they are drunk day in and day out. They steal from us left, right and centre and any which way, they find others as crooked as they are to buy the stolen property. It's a pitiful sight. If a survey were taken in the Acadian Peninsula, of the honest people as against the dishonest people, I have the impression that the dishonest people would win."[24]

In both cases, the judges displayed an *animus* towards a particular population, as opposed to a form of mythological thinking that is notoriously prevalent in Canadian society. Justice Camp is guilty of not discarding a mythology with which he grew up and which the evidence shows is widely held. But his misconduct is not analogous to *Bienvenue* or to *Moreau- Bérubé*. Those judges' comments reflected an active disdain for the subjects that cannot be explained by widespread societal misunderstanding. There is no educational remedy for entrenched racism and sexism. Justice Camp's narrower but still significant knowledge deficits can be (and have been) acknowledged and remedied through education.

2. The misconduct does not warrant removal.

The second question for the Inquiry Committee is: <u>is the misconduct disqualifying</u>? This engages the *Marshall* test: Is the conduct alleged so manifestly and profoundly destructive of the concept of impartiality, integrity and independence of the judicial role that public confidence would be sufficiently undermined to render the judge incapable of executing the judicial office?[25]

a. Justice Camp will be an asset to the bench going forward

The analysis of a judge's suitability to remain on the bench is prospective.[26] If the Committee finds Justice Camp was wilfully biased or refused to follow the law out of *animus*, his removal would be warranted because these would predict future difficulties. But, if the Committee finds that Justice Camp was ignorant of the ways in which victims of trauma or sexual violence process and respond to events, it will have to consider whether his contrition and efforts to rehabilitate himself and gain insight into his deficiencies makes him fit to remain in office.

i. Judges don't have to be perfect, just teachable

[23] The judge's various comments are set out in: *Inquiry re Bienvenue J.*, 1996 at pp. 10-28.
[24] *Moreau Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11 at para. 3.
[25] *Inquiry Committee Report into the Conduct of Justices MacKeigan, Hart, Macdonald, Jones and Pace* (the "*Marshal Inquiry*") (August 1990).
[26] *Inquiry re Girouard* (November 18, 2015) at para. 69.

Judges occupy a 'place apart' from the rest of society and their conduct must be 'beyond reproach.'[27] The Court said, "The public will therefore demand virtually irreproachable conduct from anyone performing a judicial function. It will at least demand that they give the appearance of that kind of conduct. They must be and must give the appearance of being an example of impartiality, independence and integrity. What is demanded of them is something far above what is demanded of their fellow citizens."[28]

This passage must be read in the context of the law on judicial education, our common sense understanding that no one is perfect, and our desire for judges that reflect the diversity of our population and relate to us. What must be 'irreproachable' is the judge's response to errors and their willingness to strive to be better.

The judiciary provides continuing education to judges because it recognizes that no judge starts off from a perch of flawlessness and that judges can be taught things they do not know. With respect to substantive legal issues, commentators agree that judges cannot know everything about the law on appointment to the bench. Judicial education is necessary for judges to address their knowledge gaps in areas of law in which they have never practiced and about which they know little.[29] As stated by Chief Justice Russell of the Missouri Supreme Court,

> When lawyers don black robes to become judges, they do not magically acquire all the knowledge, experience, and skills necessary to become excellent judges. They may come to the bench with a particular expertise in the law, but certainly not an expertise in *all* areas of the law. They have had certain lifetime experiences and obvious limitation in decision-making. It is because of this reality judicial education is imperative.[30]

It is also understood that 'social context' education is necessary to inform judges on the intricacies of social issues with which they might otherwise be unfamiliar, such as those relating to gender, race and sexual orientation. This education encourage judges to confront their biases in these areas.[31] As Justice McCawley said, this can be a "frightening experience and a difficult one"[32] but "all judges need social context training."[33] Many judges and judicial educators have written on the primacy of social context education in addressing judicial biases.[34]

The assumption is that judges can be educated, even about pervasive sexual assault myths. The CJC and the National Judicial Institute now offer courses and materials on this subject.[35] If judges could not be educated on social context and sexual assault myths and realities, there

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[27] *Girouard* at para. 59, *Therrien (Re)*, 2001 SCC 35 at para. 108 and following.
[28] *Therrien* at para. 111.
[29] M.R. Russell C.J., Toward a New Paradigm of Judicial Education, 2015 J. Disp. Resol. 79 2015; see also G.A. Kennedy J., Training for Judges?, 10 U.N.S.W.L.J. 47 1987, at p. 48-50.
[30] Russell C.J. at p. 79 (emphasis added and emphasis in original).
[31] Kennedy at p. 57-58.
[32] Evidence of Justice McCawley, *Inquiry Transcript* at p. 94.
[33] Evidence of Justice McCawley, *Inquiry Transcript* at p. 100-101.
[34] See K. Mahoney Q.C., Judicial Bias: The Ongoing Challenge, 2015 J. Disp. Resol. 43 2015, at pp. 48, 66-69; see also L. Armytage, Educating Judges—Where to From Here?, 2015 J. Disp. Resol. 167 2015; Kennedy at pp. 57-58.
[35] Evidence of Justice McCawley, *Inquiry Transcript* at p. 93; Evidence of Dr. Lori Haskell, *Inquiry Transcript* at p. 194; T.B. Dawson, Judicial Education: Pedagogy for a Change, 2015 J. Disp. Resol. 175 2015, at p. 179; J. Billingsley et al., Timor-Leste Legal Training Assessment: Social Context in the Formal Justice System, UNDP Timor-Leste Justice Systems Programme, (undated), at p. 30.

would be no point in providing this type of continuing education. With respect to sexual violence mythology in particular, we educate judges because mythology is by definition a set of pervasive societal beliefs to which judges are not immune. It is difficult for any person (judge or not) without the lived experience of victimization to intuit and understand the wide and complex range of responses to sexual violence.

Finally, it is generally accepted that judicial education must be ongoing in order have substantial and lasting effects.[36] This is because "[j]udges inhabit a continually changing environment where legal principles meet life in all its vicissitudes."[37] Judges will always be lacking in necessary information, and will always need education to prevent future error.

Although it is preferable that judges learn from education rather than mistakes, the latter can be a powerful educative tool. Prior CJC decisions reinforce the principle that re-education after inappropriate and biased comments can restore public confidence in a judge. The *Barakett* case is a close parallel. In 2002, the Canadian Judicial Council wrote a public letter to Justice Barakett, who had made multiple offensive and derogatory comments about Aboriginal culture in a custody case. The Panel concluded his comments were insensitive and insulting; they implied the Aboriginal community was inherently inferior. It expressed concern that the judge's conduct "did not involve merely an isolated outburst but a series of inappropriate comments" and thought his comments "may reflect an underlying bias against Aboriginal culture which may preclude [him] from treating all litigants with the equality required by the Charter in future." But it concluded an Inquiry Committee was not needed because the conduct was born of ignorance, not malice, and capable of being remedied through education. It stated: "In this case, there is no evidence of malice or improper motive on your part. Your unfortunate comments appear to stem from ignorance of Aboriginal culture rather than contempt for it. In other words, the public could be expected to have confidence that you have learned from this experience and will approach issues related to Aboriginal culture with greater understanding and respect in future."

An education-focused approach is also consistent with precedent from other forms of professional disciplinary proceedings. In *Law Society of Upper Canada v. Anber,*[38] Constance Backhouse emphasized the importance of the legal profession enabling a member to learn from his or her mistakes. Instead of sacrificing the member on the altar of general deterrence, Professor Backhouse issued a reprimand against a lawyer found to have violated client confidentiality, attempted to "unredact" PDF documents received in disclosure, and breached undertakings to the Crown.[39] She said:

> It would be difficult to find an example of a lawyer, guilty of misconduct, who had more fully made amends, re-educated himself, stepped up to compensate his client, apologized, and taken public responsibility for his misconduct. This Lawyer has left no stone unturned in his efforts to repair the damage his misconduct caused.
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[36] Dawson at p. 176; Billingsley at pp. 30-31. Evidence of Justice McCawley, *Inquiry Transcript* at p. 100.
[37] Dawson at p. 176.
[38] 2014 ONLSTH 143 [*Anber*]
[39] *Ibid*.

> Responsibility and reparation are also important general messages that need to circulate within the profession. Where exceptional circumstances warrant, such as here, the disciplinary process should prioritize responsibility and reparation in assessing the appropriate penalty. This constitutes a positive and effective method of teaching members of the profession that what one does subsequent to acts of professional misconduct is vitally important. **The message it sends is that lawyers who commit acts of professional misconduct do not fall into a black hole, but can work industriously to redeem themselves in multiple ways**. [emphasis added][40]

Justice Camp left no stone unturned in his reparative efforts. He re-educated himself, and took public responsibility for his misconduct. He should not fall into a "black hole", but take his spot back on the bench where his education can be put to use. The legal profession does not exile those who have made mistakes.

ii. Justice Camp has been educated

Justice Camp submits he should not be removed from office. His misconduct is of the type that can be remedied by education and it has been remedied in this case.

Since *Wagar*, Justice Camp has been mentored by a Superior Court judge, counselled by a clinical psychologist who specializes in abuse and trauma and taught by a professor who specializes in the law of sexual assault and feminist legal theory, all with a view to better understanding the law and science of sexual assault. He has read articles about sexual assault and trauma and has had his understanding tested by his counsellors. He has engaged in intensive psychotherapy to interrogate his own beliefs about sex and gender. He testified that his new knowledge led him to view his comments in *Wagar* in a new light. He will never make comments like those again, not because he has learned to 'keep his mouth shut', but because he understands *why* his comments were wrong. He has recognized the stereotypes that shaped his thinking, has grappled with them and expunged them. He has apologized unreservedly.

Justice Camp obtained no training in this area prior to presiding over the *Wagar* trial. No such seminars or educational programs were available for Alberta Provincial Court judges during his tenure. The NJI did offer a sexual assault-specific program in March and April 2016 (which Justice Camp attended as did sixty other judges), but no such program was available in the two years before the *Wagar* trial. The Alberta Provincial Court program did not address sexual assault law in depth.

As a result of this process, Justice Camp is now educated in this area in which he was deficient. He has learned from his experience and that he has truly abandoned his mythological thinking and fully understands the complex factors that cause victims and complainants to respond to sexual violence in different ways.

There is no competing evidence suggesting that Justice Camp is unfit. In fact, the evidence from his character witnesses is that he has all the building blocks of the judicial character. He is fair-minded, with a deep commitment to justice. He is a hard worker. He is honest. He has integrity. He has a strong moral compass.

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[40] *Ibid,* at para 51-53 [emphasis added]

There is also no presumption that the type of conduct in this case is incorrigible. Justice Camp has the underlying judicial attitude of respect and the desire to do right by all persons who come before him in the courtroom. As Dr. Lori Haskell put it:[41]

> I'm always wondering, Why are some people so -- so able to grasp it? And I find that the people who are really easily changed and want this information are people who are working on the front lines, are seeing this every day, and say, I see these behaviours, I react to them, and I really, truly realize I didn't understand the meaning of them. So I think those people are really motivated. I think when it applies to people's work, when it's relevant to their -- to their daily lives, there could be high motivation.
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> I think oftentimes if it's didactic or abstract, people may not see it as relevant. And I also realize even training with different sectors, if I'm training police or giving police information, it has to be relevant to their work. I can't give general, sort of theoretical understandings around sexual violence. It has to -- it actually has to be translated. What does this mean for what you do? What does this mean for what you see? And I think that people are really motivated and interested and curious.
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> Q: And how did you rate Justice Camp's motivation?
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> A: Very high.

This is the fundamental feature that should give the Committee confidence that Justice Camp will be a good judge going forward.

iii. Justice Camp's commitment to learning and acceptance of responsibility in the face of these Allegations demonstrate exemplary judicial behaviour.

The CJC has noted that "the wisdom required of a judge is to recognize, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave."[42] Justice Camp has demonstrated an ability and willingness to recognize and question his 'baggage' in a way that should give the reasonable member of the public confidence in his ability to do his job well. The reasonable person would prefer judges like Justice Camp to learn and go back to the bench where they can use their knowledge.

After being made aware of the complaints against him, Justice Camp issued an apology, which was posted to the Federal Court website. In addition to apologizing, Justice Camp sought to improve his understating of the science and law of sexual assault. There is no prior example of a judge who has gone to the lengths to which he has gone to remediate his problem.

Each of Justice Camp's counselors testified that Justice Camp took the process seriously, worked hard and read and understood all of the material assigned to him. All three agreed Justice Camp was not a misogynist or a racist. Justice McCawley described the process as one of "significant personal change."[43] All three testified that they are confident that they expect Justice Camp to approach his life (on the bench and otherwise) with a new skill set and a new level of humility.

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[41] Evidence of Dr. Lori Haskell, *Inquiry Transcript* at p. 216.
[42] Canadian Judicial Council, *Commentaries on Judicial Conduct* (1991) at p. 12.
[43] Evidence of Justice McCawley, *Inquiry Transcript* at p. 99.

Justice McCawley said, "he ha[s] the capacity to do the job and do it well."[44] Their qualifications and evidence were not challenged or contradicted. The Committee should accept their evidence.

If the Committee allows Justice Camp to continue on the bench, it can be confident he will approach his task with a new level of humility and sensitivity. It will give him an experience in common with vulnerable litigants that come before him that almost no other judge has.

b. The reasonably informed public could have confidence in Justice Camp's continued service

The *Marshall* test requires the Committee to decide whether public confidence is so undermined that Justice Camp cannot continue in his role. In assessing public confidence, the Committee should consider what the *informed* member of the public would think of his continued service. It is submitted that the reasonably informed public's primary goal is the education and long-term improvement of the Canadian judiciary.

Presenting Counsel and Justice Camp agree on the test. They agree that public confidence in the judiciary is necessary. They disagree about what the reasonable member of the public thinks, and about what will enhance public confidence over the long term. Justice Camp rejects the suggestion that the public is vengeful or motivated by short-term punitive goals. The informed public prefers education and long-term improvement to punishment. The informed public wants its judges to be impartial and open-minded. Impartiality is best achieved by reflective judgment and an expanded perspective, precisely the educational and rehabilitative process Justice Camp has undertaken. As Dr. Haskell put it, he has an " extremely strong critical framework and expansive knowledge now"[45]. This evidence was not contradicted and should not be rejected lightly.

i. The evidence of complaints and media coverage is not reflective of the 'reasonable public'

The evidence of outrage and upset is of limited value to the Committee's analysis. The evidence of public opinion is based on a curated and incomplete record and addresses a topic (sexual assault acquittals and disbelief of alleged rape survivors) that frequently sparks outrage, even where no judicial misconduct is alleged. It is always unpopular to acquit sexual assault defendants.

The Supreme Court has cautioned against reliance on public opinion based on unreliable, inaccurate or incomplete sources because of the potential to mislead and inflame:[46]

> Canadians may in fact think they are very well informed, but that is unfortunately not always the case. Moreover, people can also make their reactions known much more quickly, more effectively and on a wider scale than in the past, in particular through the social media mentioned above, which are conducive to chain reactions. The courts must therefore be careful not to yield to purely emotional public reactions or reactions that may be based on inadequate knowledge of the real circumstances of a case.

[44] Evidence of Justice McCawley, *Inquiry Transcript* at p. 109.
[45] Evidence of Dr. Lori Haskell, *Inquiry Transcript* at p. 234.
[46] *R. v. St-Cloud*, 2015 SCC 27 at para. 82-83.

> However, the courts must also be sensitive to the perceptions of people who are reasonable and well informed. This enables the courts to act both as watchdogs against mob justice and as guardians of public confidence in our justice system. It would therefore be dangerous, inappropriate and wrong for judges to base their decisions on media reports that are in no way representative of a well-informed public.

The public must be assumed to believe in education and rehabilitation. The public must also be assumed to know the *true facts* (in this case, that the judge has educated himself, that he is truly remorseful, that his counselors say he is fit to be a judge, and that he is not and never was a judge who refused to apply the law). The question is what a reasonable member of the public *knowing these facts* would think. This is consistent with the criminal law objective standard that prior Inquiry Committees have adopted: the public's perception of a judge's conduct and confidence in the justice system must be assessed from the perspective of a reasonable [person] dispassionate and fully apprised of the circumstances of the case.[47]

The intervener Coalition urges the Committee to bear in mind that the 'reasonable member of the public' includes sexual assault victims of diverse socio-economic circumstances and sociocultural characteristics.[48] This adds to, but does not replace, the requirement that the reasonable member of the public be informed about the circumstances of the case. The 'reasonable' survivor cannot be assumed to want Justice Camp's removal on a full understanding of the record. It would be paternalistic to assume any member the public is incapable of recognizing the dilemma posed by removing a judge who has made such efforts. A nationally-recognized trauma expert has endorsed him to continue to sit – an endorsement she has not given other judges, Crown Attorneys and police officers.

ii. The informed public prefers long-term change over short-term satisfaction

A recommendation for removal would advance the short-term goal of punishment and disassociation at the expense of the long-term goal of improving judicial education. Ms Petersen asked Dr. Haskell about re-victimization by the justice system and the impact of insensitive, inappropriate seemingly hostile comments from a justice actor. Dr. Haskell said her patients and colleagues were not surprised and that they have low expectations of the justice system.[49] This point is reinforced by the interveners.[50] The administration of criminal justice has an image problem.

The question is what response by this Committee will do the most to promote public confidence. Justice Camp submits the reasonable member of the public, aware that Justice Camp *and other judges* suffer from unconscious bias, would prefer a bench composed of judges with a strong critical framework. It could reasonably be hypothesized that front line support workers would prefer to send a witness with a fragmented memory into the courtroom of a judge aware of the neurobiology of trauma and unafraid to consider alternative explanations for what would normally be considered a credibility problem. Likewise, it could be argued that an informed

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[47] *Bienvenue* at pp. 57-61, citing Canadian Judicial Council; *Inquiry re Hart, Jones and MacDonald JJ. (the "Marshall" case)*, 1990.
[48] Coalition at para. 55-59.
[49] Evidence of Dr. Lori Haskell, *Inquiry Transcript* at pp. 244-245.
[50] Submissions of WAVAV and Barbra Schlifer Clinic at para. 50.

complainant aware of the evidence of Justice McCawley and Dr. Haskell would prefer a judge who has learned from the two of them over a judge who has not. In this sense, Justice Camp is an example of what can be achieved by judicial education.

iii. A recommendation for removal would send the wrong message to judges

General deterrence is the idea that "the offender is punished more severely, not because he or she deserves it, but because the court decides to send a message to others who may be inclined to engage in similar…activity."[51] Justice Camp submits that general deterrence is not grounds for his recommended removal for two reasons.

First, Justice Camp's experience over the past eight months sends a significant message to the public. He has been excoriated in the press. He has been publicly chastised. He has publicly apologized. He has not sat on a case in ten months. He has been shamed before the bench and the bar. He is the object of widespread, on-going professional scrutiny. This satisfies the object of general deterrence. Judges are sensitive to public notoriety. Judges across Canada know about the professors' complaint, the Attorney General's referral, Justice Camp's conduct, about the Allegations and about his experience in responding to them. One can assume this will be an informal lesson for the judiciary. It would be wrong to ignore the deterrent effect of the public inquiry and give it no weight.

The value of publicity as a deterrent is consistent with the approach to sanctions in the legal profession. In *Law Society of Upper Canada v. Neinstein*, an Appeal Panel determined that general deterrence does not necessitate removal or disbarment.[52] The Hearing Tribunal disbarred the member in the hopes of achieving a general deterrent effect. On appeal, the panel said the Hearing Tribunal should have considered alternative methods of achieving general deterrence, such as imposing conditions on the member, requiring his participation in public education programs, or issuing press releases relating to the hearing. The Appeal Panel disagreed with the concept that removal was the only penalty that could to accomplish the goal of general deterrence.[53]

Publicity in professional misconduct cases itself serves as a strong general deterrent – removal is not needed to achieve the desired effect.[54] The Panel in *Anber* captured the deterrent effect of publicity when it said:

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[51] *P. (B.W.); N. (B.V.)*, [2006] 1 S.C.R. 941, at para. 2 (S.C.C.).

[52] *Law Society of Upper Canada v. Neinstein*, 2005 ONLSAP 1 at paras. 138-139; On appeal to the Divisional Court, the court substituted twelve-month suspension imposed by the Law Society Appeal Panel for a three-month suspension ([2008] OJ No. 3731)). The Court of Appeal did not review the cross-appeal brought by the Law Society relating to the reduction in penalty (2010 ONCA 193).

[53] *Ibid*. at 138-139.

[54] *Ibid*. *Anber*, supra at para 51. See also *Law Society of Upper Canada v. Sabourin* 2016 ONLSTH 13. In *Sabourin*, the lawyer impersonated her client in an online communication between herself and her client's former domestic partner. The Law Society identified a serious need to maintain confidence in the legal profession as a result of this behavior. However, the lawyer cooperated completely with the society, entered into an agreed statement of facts, indicated remorse, and accepted responsibility. The Panel concluded that "the unfavourable publicity in the Timmins [sic] media which has now migrated to the internet, in addition to the reprimand, is sufficient for the purposes of general deterrence" (para 26).

> General deterrence is premised upon the need to educate others who might commit similar acts that "misconduct doesn't pay." **But there are multiple ways in which to send that message.** Here, as the facts indicate, the Lawyer's **misconduct was excoriated in the press for all to read, he was publicly chastised in court, his practice has been disrupted** by the Crown's understandable refusal to provide further disclosure except in the closed premises of the prosecutor (a practice to which the Lawyer has agreed fully despite the fact that the court refused to impose it), **he was shamed before his colleagues, and he has become the object of widespread and on-going professional derision**. It would be difficult to describe a situation in which the message that "misconduct doesn't pay" had been more widely and deeply circulated. [emphasis added][55]

Second, general deterrence through removal has more costs than benefits. Disciplining judges for comments made in the course of reasoning and deciding a case must not be undertaken lightly. Doing so can have a negative and chilling effect on judicial independence and judicial thought. "[I]f judges are expected to speak openly, directly and bluntly about matters that may be of public interest and importance, then we must be very careful indeed before we dilute that principle."[56] Judicial independence requires that judges have the freedom to do the unpopular without fear of reprisal, including asking questions certain groups might find objectionable. The proper way to correct any reasoning errors is generally through appellate review, not conduct review. As the CJC has stated: "When the credibility of the parties is an issue, judges may have to ask difficult questions."[57] Judicial independence and decision-making is undermined where judges expect job-security consequences for failing to align with public sentiment.

Judges who fear reprisal are more likely to go along with the popular sentiment of the day and are less likely to make unpopular decisions. Removing a judge for displaying what has been described as a 'widespread' ongoing ignorance will create subtle pressure on other judges, which may influence their legal reasons. Judges who struggle to apply sex assault law will not be deterred from their unconscious biases by Justice Camp's removal. Indeed, the insidious nature of the myths suggests they may not even realize the extent of their problem; in the words of Justice Kennedy, "Bias is easy to attribute to others and difficult to discern in oneself."[58]

Finally, removing a judge who has gone to the lengths Justice Camp has to successfully educate himself sends the wrong message to other judges who seek to improve. Justice Camp has undergone a process of humbling self-reflection, education and transformation, all subject to public scrutiny, that few people – let alone judges – have gone through. If the Committee does not acknowledge this rehabilitative process it could send a message to the next judge accused of misconduct that it is worthless to try to explore the reasons for the conduct and look for ways to improve.

3. Conclusion

The easy thing for the Committee to do is remove Justice Camp. It sends a simple message to equality seekers, frustrated by decades of slow progress in changing attitudes. It responds to the calls for the judiciary to separate themselves from this individual and make a statement that Canadian judges are 'better than this.' But it is not the most effective result.

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[55] *Anber*, at para 51 [emphasis added].
[56] See Chief Justice McEachern's concurring reasons in *Marshall*, p. 25.
[57] Canadian Judicial Council; 2008 Online Summaries; Complaint 4.
[58] *Williams v. Pennsylvania*, 15-5040 (2015) at p. 6.

Nor is it the result that will most improve long-term public confidence in the judiciary. The Committee is, by statute and common law, required to take into account the long-term effect of this outcome on the administration of justice. The evidence shows that far from being the only person in the administration of justice with a knowledge deficit, Justice Camp is one of many. The social problem is ubiquitous. The effect on the judiciary of the social problem is likewise widespread. It is not realistic to imagine that a Parliamentary decision removing His Honour will correct all knowledge deficits. The sophisticated, informed public will accept Justice McCawley's and Professor Cossman's evidence that continuing education is the way to address the problem of knowledge deficits. Justice Camp in 2016 – far from serving as an example of what could go wrong – is an example of a positive and transformative outcome from an intensive program of continuing judicial education.

Appendix A
Response to Specific Allegations

Allegation 1: In the course of the trial, the Judge made comments which reflected an antipathy towards legislation designed to protect the integrity of vulnerable witnesses, and designed to maintain the fairness and effectiveness of the justice system, as follows:

> ***a) Section 276 operates "for better or worse" and it "does hamstring the defence" (page 58 lines 29 to 39). It has to be interpreted "narrowly" (page 60 lines 30 to 32);***
>
> ***b) Section 276 is "very, very incursive legislation" which prevents otherwise permissible questions "because of contemporary thinking" (page 63 lines 5 to 7); and***
>
> ***c) No one would argue "the rape shield laws always worked fairly" (page 217 lines 2 to 4).***

This allegation relates to comments Justice Camp made regarding the "rape shield" law in s. 276 of the *Criminal Code*. Justice Camp agrees that he made the comments attributed to him in the Notice of Allegations. He agrees that these comments were insensitive and inappropriate. He denies harbouring antipathy towards s. 276. His comments about s. 276 were made in the context of a reasonable application of a complex provision with an evolving meaning and a history of contested litigation about its scope and constitutionality.

Sections 276(2) and s. 276.1 require 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 purpose of the rule is to prevent the prohibited "twin myth" reasoning: (1) that unchaste women are more likely to consent, and (2) that unchaste women are less worthy of belief. These provisions are the product of years of debate about how to properly balance defendants' right to a fair trial against competing public interests. The predecessors to these sections were enacted in 1976. The Supreme Court found them unconstitutional in 1991, after which Parliament enacted the current legislation. In 2000, the Supreme Court said the updated provisions were constitutional.[59] The provisions limit defendants' rights to make full answer and defence and therefore fall within the category of provisions that must be interpreted in the defendants' favour in cases of ambiguity.[60] In this sense, Justice Camp's comment that the legislation had to be interpreted 'narrowly' was correct.

In *Wagar*, the defence never tried to lead the kind of evidence prohibited by s. 276 or to invoke the twin myths. Nevertheless, the Crown repeatedly invoked s. 276 where it had no application.

The Crown raised s. 276 for the first time when defence counsel asked the complainant if she had forcefully rejected another person's flirtatious advances just before she had sex with the accused. The Crown argued the defence had to apply to ask this question under s. 276. Justice Camp

[59] *R. v. Seaboyer*, [1991] 2 S.C.R. 577; *R. v. Darrach*, 2000 SCC 46.
[60] *R. v. McIntosh*, [1995] 1 S.C.R. 686.

disagreed, saying that the question did not relate to evidence of prior sexual activity but rather, a refusal to engage in sexual activity.[61]

The case law generally supports Justice Camp's conclusion that s. 276 does not apply to a refusal to engage in sexual activity. For example, in *Antonelli*, the Court stated:[62]

> Section 276, therefore, applies to *specific* sexual activity with *another person*. In my view, it does not apply to sexual inactivity.
>
> …
>
> Thus, s. 276 is designed to reduce reliance on inappropriate stereotypes about sexually active women as being in a perpetual state of consent and of bad character.
>
> In *R. v. Pittiman*, (2005), 198 C.C.C. (3d) 308 (Ont.C.A.), the Court of Appeal held at para. 33 that s. 276 "does not prohibit the complainant from testifying that she is a virgin. The section only refers to complainants who have engaged in prior sexual activity and specific instances of sexual activity." Although the complainant in the present case was not a virgin, in my view, the court's reasoning is equally applicable to the case at bar: evidence of sexual inactivity is not precluded by s. 276.

Justice Camp's application of s. 276 was consistent with this appellate precedent.

The Crown invoked s. 276 a second time when the accused attempted to describe what happened immediately after he and the complainant had sex. He said that they left the bathroom holding hands (consistent with Porter and Skinner's accounts) and that he, the complainant, Porter and another man all went into the laundry room. Porter and the complainant kissed in front of them and asked him and the other man to kiss each other. The Crown said s. 276 applied and that this part of his evidence was inadmissible.

Defence counsel argued that he was not eliciting this evidence to support twin myth reasoning, but was simply eliciting a post-event narrative that was relevant to the complainant's credibility (because it contradicted the complainant's account). Justice Camp *accepted the Crown's submission* on this point and refused to permit defence counsel to elicit this evidence. Justice Camp then briefly alluded to what might be seen as the harshness of the result (had defence counsel been better prepared, this question would likely have been allowed after a s. 276 hearing because it was relevant to the complainant's credibility and was not being advanced to support twin myth reasoning):[63]

> Mr. Flynn, I understand that. And I don't think anybody, least of all Ms. Mograbee, would – would – would argue that the rape shield law always worked fair – fairly. But it exists.

Later, in submissions on this point, the Crown said s. 276 prevented defence counsel from asking the complainant whether she was holding hands with the accused immediately after they left the bathroom.[64] Again, Justice Camp correctly found that s. 276 did not apply. This was not evidence of *other* sexual activity advanced to support twin-myth reasoning. It was a continuation

[61] Transcript of *R. v. Wagar*, Exhibit 2A at pp. 56-60
[62] *R. v. Antonelli*, 2011 ONSC 5416, paras. 9-12.
[63] Transcript of *R. v. Wagar*, Exhibit 2A at p. 217.
[64] Transcript of *R. v. Wagar*, Exhibit 2A at pp. 315-317.

of the very transaction that was the subject matter of the trial and was evidence of what the complainant was doing in the minutes immediately after the sex act.[65] It was relevant to her credibility (since she denied being affectionate with the accused when they left the bathroom). It was also relevant to the accused's credibility; it corroborated his story and made it more believable.

The Notice of Allegations cites these passages as evidence of Justice Camp's "antipathy" towards s. 276. Justice Camp submits it does not reasonably establish a disqualifying antipathy on his part. He made these statements in the process of correctly applying – in the Crown's favour – the very law he is alleged to have antipathy toward.

The Crown raised s. 276 for a third time, arguing that Porter's evidence that the complainant told her she intended to have sex with the accused just minutes before the sex happened was inadmissible. The Crown cited no authority for her position, saying only that it was obvious on the plain language of s. 276 that this evidence was inadmissible.[66] Justice Camp correctly rejected her argument. Section 276 did not apply to this evidence. Porter's account was not evidence of *other* sexual activity. It was evidence about *the very sexual activity* that was the subject matter of the charges.[67] It was also arguably a statement of intention, a recognized exception to the hearsay rule.

Read in the context of the actual s. 276 issues in the *Wagar* trial, a fair reading of Justice Camp's comments about the "incursive" and "unfair" potential of s. 276 is that they do not reflect antipathy for the substantive law or a refusal to apply it. Defence counsel never elicited evidence about the complainant's prior sexual history or suggested she was unchaste. His questions focused on events that took place immediately before, during and after the incident in question. The evidence was relevant to the complainant's and the accused's credibility and the reasonableness of the accused's belief in consent. Justice Camp's comments about s. 276 were made in the context of his reasonable application of the law. While Justice Camp agrees that he should have worded his statements differently, he submits that the misconduct proved under Allegation 1 is insensitivity and not a refusal to follow the law. His application of s. 276 was reasonable and judges are permitted to criticize legislation so long as they fairly apply it. For instance, judges hearing constitutional challenges are obliged to question Parliament's legislative choices and even in non-constitutional cases frequently do so. To take one example of many, the self-defence provisions of the *Criminal Code* were overhauled in part because Justice Moldaver criticized them in *R. v. Pintar*.[68]

Allegation 2: In the course of the Trial and in giving his reasons for judgment, the Judge engaged in stereotypical or biased thinking in relation to a sexual assault complainant and relied on flawed assumptions which are well-recognized and established in law as rooted in myths:

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[65] See for e.g. *R. v. D., v.*, 1999 CanLII 9315 (ON CA), per Rosenberg J.A.
[66] Transcript of *R. v. Wagar*, Exhibit 2A at pp. 310-314.
[67] The Crown also objected to this evidence on the grounds that the complainant's statement to Porter was hearsay. This was also plainly wrong. The statement was not tendered for the truth of its contents, but for the fact that it was said. It was relevant to the complainant's credibility because she denied making the statement: *R. v. U. (F.J.)*, [1995] 3 SCR 764.
[68] *R. v. Pintar*, 1996 CanLII 712 (ON CA).

a) By questioning whether the complainant "abused the first opportunity to report" even though it was "no longer contemporarily relevant" (page 314 lines 22 to 29);

b) By stating, "Young wom[e]n want to have sex, particularly if they're drunk" (page 322 lines 22 to 24);

c) By commenting during the Crown's final submissions that the recent complaint doctrine was "followed by every civilized legal system in the world for thousands of years" and "had its reasons" although "[a]t the moment it's not the law" (page 394 lines 35-41);

d) By judging the complainant's veracity and whether she consented to sexual activity by her not fighting off her alleged aggressor and/or blaming the complainant for the alleged sexual assault (page 375 lines 27-35; pages 395-97; and page 451 lines 2 to 4) and by her lack of visible reaction to the alleged assault (page 451 lines 8 to 11);

e) By hypothesizing a scenario in which the complainant was seeking revenge against the accused which was not based on the evidence before the judge (page 375 lines 32 to 33; and page 414 lines 11 to 18); and

f) By adversely commenting on the character of the complainant in a way that went beyond assessing her credibility to denigrating the complainant and to suggesting that her character would make it more likely that she consented to sexual relations (page 353 lines 30 to 31; page 431 lines 29 to 30).

Justice Camp agrees that the comments set out under Allegation 2 were insensitive and inappropriate and in some cases evinced unconscious biases on his part. He denies that he engaged in deliberately biased reasoning.

Allegation 2(a) is that Justice Camp "question[ed] whether the complainant 'abused the first opportunity to report' even though it was 'no longer contemporarily relevant'". The full exchange is reproduced below:[69]

> THE COURT: And I can look at other people whether they corro -- corroborate or contradict what he says in that regard, because if they contradict it then his credibility –
>
> MS. MOGRABEE: But not in --
>
> THE COURT: --his shot.
>
> MS.MOGRABEE: But not what Skylar says, because that's hearsay.
>
> THE COURT: Yeah, I'm now talking about –

[69] Transcript of *R. v. Wagar*, Exhibit 2A at pp. 313-314.

MS. MOGRABEE: And not adopted by --

THE COURT: -- the touching and the --

MS. MOGRABEE: Right.

THE COURT: -- the flirting and the --

MS.MOGRABEE: And I will break it down a little more for you when I --

THE COURT: All right.

MS. MOGRABEE: -- come before you again. But you have to look at what the acc -- the most important evidence is what the accused says he saw and he experienced as it relates to an honest mistake in belief and consent as -- in other words, as to his mind-set.

THE COURT: And while we're dealing with this, Ms. Mograbee, can I look at what people say happened afterwards, affection shown afterwards? Never mind whether she abused the first opportunity to report. I understand that that is --

MS. MOGRABEE: Right.

THE COURT: --no longer contemporarily relevant. But am I allowed to look at the evidence of third parties and the accused who say she seemed affectionate?

MS. MOGRABEE: Right.

THE COURT: She was following him around. She was touching him.

MS. MOGRABEE: Right. Well, again, I don't know if it was friendly touching or if it was, you know, was it holding of the hand. I know the accused said she was holding his hand. I think you can look at that.

On a fair reading of the above passage, Justice Camp *agreed* with the Crown that the doctrine of recent complaint was outdated and sought her opinion on whether he was entitled to consider the third parties' (Skinner's and Porter's) evidence that the accused and complainant were affectionate after the event. This passage is not evidence of biased thinking on Justice Camp's part.

Allegation 2(b) states that Justice Camp displayed stereotypical or biased thinking by stating: "Young wom[e]n want to have sex, particularly if they're drunk." This excerpt alters the meaning of Justice Camp's words by quoting an incomplete sentence and then changing the word "woman" to "women" through the use of square brackets. The actual quote and context is as follows. The Crown argued the complainant would not have consented to sex with the accused because they had met only recently. Justice Camp stated:

> [I]f -- if I accept his version and -- if I can't reject it, then I have to go into the air of reality. Is it – is it unreal for me to accept that a young man and a young woman -- young woman want to have sex, particularly if they're drunk?"

On a fair reading of his Reasons, Justice Camp was not suggesting that an intoxicated woman cannot be raped. He was saying that it was possible the complainant and the accused, who were both highly intoxicated, might have agreed to sex despite meeting only recently.

Allegation 2(c) states that Justice Camp "comment[ed] during the Crown's final submissions that the recent complaint doctrine was "followed by every civilized legal system in the world for thousands of years" and "had its reasons" although "[a]t the moment it's not the law." The full context is as follows:[70]

> MS. MOGRABEE: But she's not under any obligation to move out of the way. Again, invoking section 275 where the Court talks about you know -- sorry, the Criminal Code talks about rules respecting complaint abrogated, there's -- there's a reason for why that was abrogated, it's to get away from thinking about what you -- you think, or anyone would think a -- a person in that situation should do. How they should act.
>
> THE COURT: Well, the recent complaint doctrine was that you -- and it was followed by every civilized legal system in the world for thousands of years, was that as soon as you can you should complain to somebody in authority or somebody close to your family. It had its reasons. At the moment it's not the law. It does go so far -- the recent complainant, as I understand it, didn't include the proposition that -- that you -- that the complainant didn't have to indicate no in some way. Now that's a different rule.
>
> MS. MOGRABEE: That's a different rule. I'm just saying that, you know, it -- it follows that -- that antiquated way of thinking has been set by the wayside, for a reason. It's the same thinking --

The Crown was attempting to give the abrogation of recent complaint a wider implication than is supported by the case law. Justice Camp stated that failure to make a timely complaint is irrelevant and correctly explained to the Crown that the law of recent complaint does not prevent judges from considering what the complainant said during the act. The Crown accepted his explanation.

Moreover, the doctrine of recent complaint is incompletely summarized in Professor Benedet's report.[71] The doctrine, in addition to permitting an adverse inference from a failure to report, also permitted the Crown to lead evidence of the recent complaint as an exception to the hearsay rule. Both parts of the doctrine were abrogated. But in the *Wagar* case, the Crown was the one who led the evidence of how the complainant came to the attention of the police. The Crown chose to make this issue important by leading evidence of the complainant's first statements.[72] In this circumstance, it was more excusable for Justice Camp to have the doctrine of recent complaint on the brain than it otherwise would be. While Justice Camp's statement was insensitive, and an unnecessary observation, it is not evidence of deliberately biased thinking.

Allegation 2(d) alleges that Justice Camp "judg[ed] the complainant's veracity and whether she consented to sexual activity by her not fighting off her alleged aggressor and/or blaming the complainant for the sexual assault and by her lack of visible reaction to the alleged assault." However, a fair reading of the Reasons for Judgment shows that Justice Camp rejected the complainant's account because: her evidence at trial was internally inconsistent; her evidence

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[70] Transcript of *R. v. Wagar*, Exhibit 2A at p. 394.
[71] Benedet Report, Exhibit 2M, p. 5.
[72] Transcript of *R. v. Wagar*, Exhibit 2A at pp. 38-40.

was inconsistent with her earlier statement to police in which she told the police she wanted to have sex with the accused; an independent witness testified the complainant told her she intended to have sex with the accused minutes before they in fact had sex; and a second independent witness testified he walked in on the complainant having sex with the accused and it appeared to be consensual. A fair reading of the record shows that Justice Camp did not disbelieve the complainant because she failed to fight off an attacker.

Allegation 2(e) alleges that Justice Camp "hypothesiz[ed] a scenario in which the complainant was seeking revenge against the accused which was not based on the evidence before the judge." The passages cited in support of this allegation are colloquies between Justice Camp and the Crown. The complainant stated in her police statement and testified at trial that she harboured animus towards the accused's brother.[73] Justice Camp asked the Crown if this animus could provide a motive to fabricate. While he could have better chosen his words, a fair reading of the record shows that Justice Camp's question was rooted in the evidence and did not amount to disqualifying misconduct.

Finally, Allegation 2(f) alleges that Justice Camp "adversely commented on the character of the complainant in a way that went beyond assessing her credibility to denigrating her character and to suggesting that her character would make it more likely that she consented to sexual relations." This allegation is not made out in the record. Justice Camp never suggested the complainant's character would make her more likely to consent. The Notice of Allegations cites only two passages in support of this allegation and they read as follows:[74]

> "What we have are four witnesses and they were all unsavoury witnesses, in my view. Mike perhaps the most savoury, the least unsavoury, but certainly the complainant and the accused are amoral people. I get the sense is the truth is what they can get others to believe.
>
> Their morality -- and I'm leaving sexual morality aside, but their morality, in general -- and for the moment I'll leave Mike Skinner to one side, and Skylar, because apart from criminal convictions, we know little about her morality. Certainly the complainant and the accused's morality, their sense of values, leaves a lot to be desired. The complainant, as will appear from the evidence, had spent the day in question sneaking into the movies without paying. I suppose many young people do that. That isn't the end of the world. However, she'd also spent a considerable amount of time stealing clothes, and then went on to steal a consider -- considerable amount of liquor. It didn't cross her mind that she should work to earn money to buy those things. The accused did not seem to find any of that reprehensible and indeed was impressed and respected one of his friends who had been part of the liquor stealing."

On a fair reading, these passages do not show that Justice Camp engaged in twin myth reasoning or thought the complainant was more likely to consent to sex because of her character. Justice Camp commented on the credibility problems of both the complainant and the accused, as he was entitled to do. He used a legal term of art (unsavoury witness) invented by the Supreme Court of Canada in *Vetrovec* cases, to describe Wagar and the complainant. This cannot be disqualifying misconduct.

Allegation 3: In the course of the Trial, the Judge asked questions of the complainant witness reflecting reliance on discredited, stereotypical assumptions about how someone confronted

[73] Transcript of *R. v. Wagar*, Exhibit 2A at pp. 313-314, 442.
[74] Transcript of *R. v. Wagar*, Exhibit 2A at pp. 431-432.

with sexual assault would or would not behave and/or blaming the complainant for the alleged sexual assault:

> ***a) By asking the complainant, "why didn't [she] just sink [her] bottom down into the basin so he couldn't penetrate [her]" (page 119 lines 10 to 11);***
>
> ***b) By asking the complainant, "why couldn't [she] just keep [her] knees together" (page 119 lines 14 to 15);***
>
> ***c) By suggesting, "if she skews her pelvis slightly she can avoid him" (page 394 line 13).***

Justice Camp agrees that he asked the complainant these questions. He admits these questions were asked in insensitive and inappropriate language. He now understands the import and implications of the language he used, in light of the history of sexual assault law and the discredited myth that a woman was required to fight off an attacker to be worthy of belief. He has apologized unreservedly for his choice of language. He will not ask questions this way again.

However, while his words were insensitive and inappropriate, the issue of whether the complainant was afraid and whether she was an active participant in the sex acts was alive because of the evidence and because of questions already asked by the lawyers in the case.[75] The issue of fear, force or the threat of force vitiating consent (or undermining a reasonable belief in consent) was a legal issue with which the trial judge had to grapple. The following legal context is relevant to this submission.

The *actus reus* of sexual assault is non-consensual sexual touching. In this case, the fact the accused touched the complainant sexually was uncontested. The Crown had to prove the remaining element of the *actus reus* – lack of consent – beyond a reasonable doubt. In *Ewanchuk*, the Supreme Court explained this step as follows:[76]

> While the complainant's testimony is the only source of direct evidence as to her state of mind, credibility must still be assessed by the trial judge, or jury, in light of all the evidence. It is open to the accused to claim that the complainant's words and actions, before and during the incident, raise a reasonable doubt against her assertion that she, in her mind, did not want the sexual touching to take place. If, however, as occurred in this case, the trial judge believes the complainant that she subjectively did not consent, the Crown has discharged its obligation to prove the absence of consent. [Emphasis added.]

The Court in *Ewanchuk* went on to say:[77]

> To be legally effective, consent must be freely given. Therefore, even if the complainant consented, or her conduct raises a reasonable doubt about her non-consent, circumstances may arise which call into question what factors prompted her apparent consent. The *Code* defines a series of conditions under which the law will deem an absence of consent in cases of assault, notwithstanding the complainant's ostensible consent or participation. As enumerated in s. 265(3), these include submission by reason of force, fear, threats,

[75] See notes 82-85 and Transcript of *R. v. Wagar*, Exhibit 2A at pp. 110-111.
[76] *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 at paras. 29-30.
[77] *Ewanchuk* at paras. 36-40.

> fraud or the exercise of authority, and codify the longstanding common law rule that consent given under fear or duress is ineffective: see G. Williams, *Textbook of Criminal Law* (2nd ed. 1983), at pp. 551-61.
>
> …
>
> In these instances the law is interested in a complainant's reasons for choosing to participate in, or ostensibly consent to, the touching in question. In practice, this translates into an examination of the choice the complainant believed she faced. The courts' concern is whether she freely made up her mind about the conduct in question. The relevant section of the *Code* is s. 265(3)(*b*), which states that there is no consent as a matter of law where the complainant believed that she was choosing between permitting herself to be touched sexually or risking being subject to the application of force.
>
> The question is not whether the complainant would have preferred not to engage in the sexual activity, but whether she believed herself to have only two choices: to comply or to be harmed. If a complainant agrees to sexual activity solely because she honestly believes that she will otherwise suffer physical violence, the law deems an absence of consent, and the third component of the *actus reus* of sexual assault is established. The trier of fact has to find that the complainant did not want to be touched sexually and made her decision to permit or participate in sexual activity as a result of an honestly held fear. The complainant's fear need not be reasonable, nor must it be communicated to the accused in order for consent to be vitiated. While the plausibility of the alleged fear, and any overt expressions of it, are obviously relevant to assessing the credibility of the complainant's claim that she consented out of fear, the approach is subjective.
>
> Section 265(3) identifies an additional set of circumstances in which the accused's conduct will be culpable. The trial judge only has to consult s. 265(3) in those cases where the complainant has actually chosen to participate in sexual activity, or her ambiguous conduct or submission has given rise to doubt as to the absence of consent. If, as in this case, the complainant's testimony establishes the absence of consent beyond a reasonable doubt, the *actus reus* analysis is complete, and the trial judge should have turned his attention to the accused's perception of the encounter and the question of whether the accused possessed the requisite *mens rea.* [Emphasis added.]

If the Crown proves non-consent – the *actus reus* – beyond a reasonable doubt, it must also prove *mens rea*. As the Court explained in *Ewanchuk*, "the *mens rea* of sexual assault contains two elements: intention to touch and knowing of, or being reckless of or willfully blind to, a lack of consent on the part of the person touched."[78] A defendant's claim that he or she lacked the requisite *mens rea* is often described as the defence of mistake. This "defence" is simply a denial of *mens rea.* It does not put the burden of proof on the accused.[79] Section 273.2(b) of the *Criminal Code* states that a subjective belief in consent is not a defence where "the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting."

Therefore, the first issue presented to Justice Camp was whether the Crown had proven the *actus reus* of sexual assault beyond a reasonable doubt. The complainant testified she did not consent to sex. The accused testified that she gave affirmative consent. In addition to his own testimony, there was a body of evidence that at least cast doubt on the complainant's credibility, including:

- Porter's testimony that the complainant told Porter she intended to have sex with the accused moments before they began having sex;
- Skinner's testimony that the complainant and the accused were acting affectionately to

[78] *Ewanchuk* at para. 42.
[79] *Ewanchuk* at para. 44.

one another afterwards (which the complainant denied); and
- The complainant's own initial statement to the police that she had "wanted him to do it."

If this evidence left Justice Camp with a reasonable doubt about whether the complainant had consented, he could not acquit on this basis without first considering whether she consented out of force or fear. In doing so, he was required by law to look at "the *plausibility* of the alleged fear, and any overt expressions of it" as "relevant to assessing the credibility of the complainant's claim that she consented out of fear" pursuant to *Ewanchuk*. It was therefore open to Justice Camp to ask her whether she actively participated, and, if so, whether she did so out of fear.[80]

Moreover, this would not end the analysis. The law says that if Justice Camp accepted the complainant's evidence that she did not consent, *or* concluded that she consented out of force or fear, he was *then* obliged to consider whether the Crown had also proved *mens rea* beyond a reasonable doubt. He would be required under this step to consider whether a reasonable doubt existed as to whether the accused had an honest but mistaken belief in consent. The Supreme Court of Canada explained in *Esau* the defence of mistake is available if it is reasonably possible "to splice some of each person's evidence together with respect to the encounter, and settle upon a reasonably coherent set of facts, supported by the evidence, that is capable of sustaining the defence of mistaken belief in consent".[81] Justice Camp therefore had to decide what facts he accepted and whether an honest belief in consent was reasonable <u>on those facts</u>. In doing so, he was *required* to consider the absence of resistance or violence as a relevant factor. As the Supreme Court explained in *Esau*, "the absence of resistance or violence <u>alone</u>" is insufficient to raise a reasonable doubt about *mens rea*. However, the absence of resistance by the complainant or violence by the defendant *is* "one factor <u>that must be considered</u> alongside the accused's evidence that the complainant did and said things that led him to believe she was consenting".[82]

Accordingly, the presence or absence of fear and the degree of the complainant's active participation were issues in play in this case. The complainant's evidence on this point was unclear even after cross-examination and re-examination. The defendant performed oral sex on the complainant when she was seated in a sink basin with her skinny jeans around her ankles. Defence counsel briefly cross-examined on this point. He suggested oral sex would have been impossible absent either physical force on the accused's part (i.e. violently lifting the complainant out of the basin and forcing her legs open) or a reasonable degree of active participation on the complainant's part (i.e. actively lifting herself out of the basin and forcing her legs open against the pressure of her jeans). He did not finish off the point to a clear conclusion.

The <u>Crown Attorney</u> also addressed these issues in her own questioning and asked the following questions of the complainant:

> [In relation to the accused performing oral sex on her] Why didn't you say anything?[83]

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[80] *Ewanchuk* at para. 39.
[81] *R. v. Esau*, [1997] 2 S.C.R. 777 at para. 16.
[82] *Esau* at para. 22.
[83] Transcript of *R. v. Wagar*, Exhibit 2A at p. 21.

What do you think would happen if you didn't do what he told you?[84]

What do you think would happen if you didn't do what he wanted?[85]

[In relation to her talking to the accused after the fact] Why didn't you run away?[86]

If the Crown can ask these types of questions, the judge can clarify on these same points. Justice Camp was entitled to explore the issues of force, threat and active participation. Given the unclear evidentiary record at the end of the Crown's re-examination, it was open to him to ask whether the complainant was afraid and about her degree of active participation in the sex acts pursuant to the *Ewanchuk* and *Esau* standards. He agrees that his questions were insensitively worded, and he understands the hurt his questions have caused. He has apologized for his choice of language.

Allegation 4: In the course of the Trial, the Judge made a rude or derogatory personal comment about Crown counsel in the course of disparaging a legal principle she was advancing in her submissions:

> ***a) By stating to the Crown, "I hope you don't live too long, Ms. Mograbee" when she submitted during an exchange with the judge about the abrogation of the recent complaint rule that "that antiquated way of thinking has been set by the wayside for a reason…" (page 395 lines 2 to 6).***

Justice Camp agrees that he made the statement attributed to him in Allegation 4. It was made during a colloquy with the Crown in which the Crown suggested the recent complaint doctrine prevented Justice Camp from considering whether or not the complainant said "no" during the sex act. Justice Camp told the Crown that this was an overbroad reading of the abrogated recent complaint doctrine and the Crown eventually agreed with him.[87] Justice Camp agrees that his comment to the Crown that "I hope you don't live too long" was rude and derogatory. For this he has apologized unreservedly.

Allegation 5: In the course of the Trial and in giving his reasons for judgment, the Judge made comments tending to belittle and trivialize the nature of the allegations made by the complainant:

> ***a) By stating, "Some sex and pain sometimes go together […] that's not necessarily a bad thing" (page 407 lines 28 to 29);***
>
> ***b) By stating, "sex is very often a challenge" (page 411, lines 34);***
>
> ***c) By stating, "I don't believe there's any talk of an attack really" (page 306 lines 9 to 10);***

[84] Transcript of *R. v. Wagar*, Exhibit 2A at p. 28.
[85] Transcript of *R. v. Wagar*, Exhibit 2A at p. 28.
[86] Transcript of *R. v. Wagar*, Exhibit 2A at p. 42.
[87] Transcript of *R. v. Wagar*, Exhibit 2A at pp. 394-395.

d) By stating, "There is no real talk of real force" (page 437 lines 6 to 7); and

e) By stating, "She knew she was drunk […]. Is not an onus on her to be more careful" (page 326 lines 8 to 12).

Justice Camp agrees that he said the things attributed to him in Allegation 5. The statements were insensitive and inappropriate. Furthermore, none of them needed to be said. They were unnecessary. His counseling has enabled him to understand the implications of these statements in light of the discriminatory history of sexual assault law. He has apologized for making these statements. With the exception of the statement "There is no real talk of force here," all the quoted statements were made in the course of colloquies with Crown counsel in an effort to test the Crown's position and were not conclusions he had arrived at on the evidence.

Allegation 6: In the course of the Trial and in giving his reasons for judgment, the Judge made comments tending to belittle women, and expressing stereotypical or biased thinking in relation to a sexual assault complainant:

a) By asking the Crown whether there are "any particular words you must use like the marriage ceremony" to obtain consent to engage in sexual relations (page 384, lines 27 and 28);

b) By stating to the accused, "The law and the way that people approach sexual activity has changed in the last 30 years. I want you to tell your friends, your male friends, that they have to be far more gentle with women. They have to be far more patient. And they have to be very careful. To protect themselves, they have to be very careful" (page 427 lines 21 to 24); and

c) By stating to the accused, "You've got to be very sure that the girl wants you to do it. Please tell your friends so that they don't upset women and so that they don't get into trouble. We're far more protective of women – young women and older women – than we used to be and that's the way it should be" (page 427 lines 28 to 33).

Justice Camp agrees that he said the things attributed to him in Allegation 6. The context for Allegation 6(a) is as follows. The Crown argued that the defence of mistaken belief was foreclosed because the accused's account was that he kissed the complainant and only obtained a verbal 'yes' when they progressed from kissing to oral sex. The full exchange between Justice Camp and the Crown was as follows:[88]

> THE COURT: Are there any particular words you must use like the marriage ceremony?
>
> MS. MOGRABEE: Yes, he must say -- oh he could say a number of different things, but he must ask if she is willing to engage in the sexual activity --
>
> THE COURT: He must ask to go that far?

[88] Transcript of *R. v. Wagar*, Exhibit 2A at pp. 384-385.

> MS. MOGRABEE: --he has -- he must ask.
>
> THE COURT: Where is that written?
>
> MS. MOGRABEE: It's in the case -- all the case law that you have before you that sex -- that --
>
> THE COURT: Are children taught this at school? Do they pass tests like driver's licenses? It seems a little extreme?
>
> MS. MOGRABEE: The state of the law is at is, Sir. It's all set out in the case law.
>
> THE COURT: Well can you show me one of these places it says that there's a some kind of incantation that has to be gone through? Because it's not the way of the birds and the bees.

Justice Camp should not have expressed himself flippantly and he is sorry for having done so. But it was reasonable for him to question the Crown's overbroad argument about the need for words in all cases. The Crown oversimplified what the law requires. Unambiguous body language – in the absence of threats, force or a power imbalance – is a circumstance that can obviate the need for further reasonable steps and prove honest but mistaken belief.[89] Further, Justice Camp's statements to the accused set out in Allegations 6(b) and (c) demonstrate that he understood the reasonable steps requirement on a fundamental level. As he explained, "you have to be very sure before you engage in any form of sexual activity with a woman…[y]ou've got to be really sure that she's saying yes."[90]

However, the statements in this Allegation were insensitive and inappropriate and Justice Camp apologizes for making them. His counseling has given him insight into the impropriety of these statements and the connotations they carry in light of the discriminatory history of sexual assault law. He will not make statements like this again.

[89] See, e.g., *R. v. S.B.*, 2013 ONSC 7490, at para 53.
[90] Transcript of *R. v. Wagar*, Exhibit 2A at p. 427.

Appendix B
Comparison Chart – Cases of Judicial Misconduct

a. Cases in which the judge was not removed

Case	Facts and History of Case	Outcome
Canadian Judicial Council; Robert Dewar; Letter issued November 9, 2011	Judge Dewar made inappropriate comments in a sexual assault case including that "sex was in the air that night;" the accused was "a clumsy Don Juan;" and that the victim was dressed in a way that showed she "wanted to party."	The judge apologized and obtained sensitivity counselling. The Canadian Judicial Council ultimately concluded that this was an isolated incident in the judge's career and that as a result no further action was required by the Council.
Canadian Judicial Council; John McClung; Letter issued May 19, 1999 *R. v. Ewanchuk*, [1999] 1 S.C.R. 330.	Justice McClung suggested that the teenage victim provoked her assailant by the way she dressed and the accused's actions were "far less criminal than hormonal" or that the victim could have stopped the assault with a "well-chosen expletive, a slap in the face or, if necessary, a well-directed knee." The SCC overturned McClung's ruling and a concurring opinion by Quebec jurist, Justice L'Heureux-Dubé described McClung's decision as perpetuating "archaic myths and stereotypes".	McClung apologized and was not removed from the bench.
Quebec Conseil; René Roy J.; 2011 CMQC 33	Judge René Roy made disparaging comments towards an individual for arriving in court in improper attire. He also made intolerant, discriminatory comments about the individual's country of origin, including that he would have been imprisoned for such behaviour in his home country. The judge reluctantly apologized after considerable delay.	The Conseil held an inquiry and reprimanded the judge. It noted the comments and attitude of the judge, who had never been subject to a Conseil inquiry, were insufficient grounds for removal.
Quebec Conseil; De Michele J.; 2007 CMQC 97	The judge, De Michele J., made inappropriate comments to the complainant's daughter, the plaintiff in a small claim, including about her language, posture, education, lack of organization, and lack of legal knowledge.	The Conseil held an inquiry and reprimanded the judge. He apologized to the complainant and her daughter.
Quebec Conseil; Unnamed Judge; 2000/2001 Annual Report	The judge allegedly made comments condoning domestic violence. The judge was presiding over a case where a	The Conseil expressed disapproval of the judge's conduct. It concluded an

	woman assaulted an officer and the judge said "…on Saturday morning, I had three arraignments and they were all for three men accused of beating women, so to have one who slaps her boyfriend, it feels a bit good, it's comforting" (translation). He also said, "Very often, it's always men who beat women." The judge apologized, but the Conseil found the judge's comments were nevertheless symptomatic of a sexist attitude.	investigation was unnecessary because: (1) the judge admitted his comments were inappropriate; (2) the judge did not intend to condone violence; and (3) the complainant accepted the judge's apology and felt he was still capable of performing his duties.
Ontario Judicial Council; 2013/2014 Annual Report; 17-030/12	A lawyer's association made a complaint that a judge had failed to conduct proceedings in a judicial manner. It alleged the judge had issues with, among other things, temperament, treatment of unrepresented persons and failing to consider counsels' submissions in a number of cases. It also alleged conduct giving rise to a reasonable apprehension of bias. The Review Panel reviewed the judge's response to the complaint and concluded the judge "may not fully appreciate the concerns and the impact on the confidence in the judiciary and in the administration of justice that had resulted."	The Review Panel referred the matter to the Chief Justice for discussion, on the condition that the judge was prepared to participate in a course of education as agreed upon by the Chief Justice. In referring the matter to the Chief Justice, the Review Panel considered that "[t]he complaints process through the Judicial Council is remedial in nature such that through the review of and reflection upon one's conduct, improvements can be made."
Ontario Judicial Council; 2009/2010 Annual Report; 14-028/08; 14-029/08	The judge made statements about domestic violence that gave rise to a perception of a lack of appreciation of the nature of domestic violence and the impact of the court process in situations of domestic conflict. He made comments suggesting that the historical purpose of the criminal justice system in domestic assault cases was to protect weak/disadvantaged women who were incapable of escaping their situations, not modern women who are not weak and are capable of leaving. He went on to tell the accused and the complainant that if they stayed together they should not return to the criminal courts to address any problems that might arise.	The Review Panel referred the case to Chief Justice for discussion. The judge independently took steps to educate himself on domestic violence and apologized. The Panel found no further steps were required.
Ontario Judicial Council; 2008/2009 Annual Report; 13-024/07	The complainant alleged the judge made inappropriate comments to an accused during a sentencing hearing that amounted to counselling the accused to commit suicide. The facts of the case indicated that the accused might have	The Review Panel referred the matter to the Chief Justice for a meeting with the judge to discuss the issue. The judge acknowledged the error. The Panel concluded no further action

	been suicidal.	was required.
Ontario Judicial Council; 2008/2009 Annual Report; 13-031/08; 13-033/08; 13-038/08;	The judge commented that he would not continue the trial with a complainant in a sexual assault case who had Hepatitis C and was HIV positive unless the complainant wore a mask and/or the matter was moved to another courtroom. The judge rejected medical evidence from the Crown without submissions from the parties and indicated the court would have to be reconfigured so he could sit further from the witness. He dismissed the Crown's application for a mistrial. Several organizations filed complaints.	The Review Panel referred the matter to the Chief Justice for a meeting with the judge to discuss the issue. The judge independently educated himself on HIV/AIDS, acknowledged his error and apologized. The Panel concluded that no further steps were required.
Ontario Judicial Council; 2003/2004 Annual Report; 07–035/02	The complainant (the respondent in a spousal support proceeding) alleged the judge favoured the applicant because of his preconceptions about the respondent's employment. (The case summary does not indicate the respondent's profession.) The judge also made rude and unprofessional comments.	The Review Panel referred the matter to the Chief Justice. The judge acknowledged his comments were inappropriate and wrote an apology letter. The Panel concluded that no further steps were required.
Ontario Judicial Council; 03-043/98; 1998-1999 Annual Report	The judge terminated a trial when the complainant/victim indicated while testifying that she was a lesbian. The Review Panel concluded the judge exceeded his jurisdiction and interfered in court proceedings, giving rise to a real apprehension of bias, and the judge should have stopped and declared a mistrial, having apprehended the bias.	The Review Panel referred the matter to the Chief Justice. The annual report summary does not indicate what steps the Chief Justice took.
Canadian Judicial Council; 2013 Online Summaries; 20130001	A group representing certain First Nations communities filed a complaint against the Chief Justice for his interruptions of defence counsel and the harsh manner with which he dealt with gallery members who the Chief Justice believed were interrupting the proceeding. Some gallery members responded especially poorly to the Chief Justice's manner because it reminded them of their experiences in the Residential School system. The Chief Justice expressed regret that his actions caused certain gallery members to relive painful experiences, but denied that his comments were motivated by stereotypes.	The Council decided to take no further action. Although the Chief Justice's response to the members of the gallery were too forceful and his tone exceeded what was necessary, the Chief Justice had fully considered the complaint and apologized, the comments were not intended to be harmful and this was an isolated incident.

Canadian Judicial Council; 2011 Online Summaries; 20110004	Several complainants expressed concerns over a judge's ruling in a sexual assault case. The accused was convicted of the offence, but the judge ruled that the law, which prohibits using excessive intoxication as a defence, was unconstitutional. The complainants argued the decision undermined women's rights.	The Council dismissed the complaint, on the basis that the complaint did not relate to the judge's conduct, but rather, his decision. The complaint summary states that "Parliament has a responsibility to make, amend and pass laws in Canada, and the judiciary interprets those laws. … At the core is the principle of judicial independence, where judges hold the ability to hear and decide cases freely and without fear."
Canadian Judicial Council; 2010 Online Summaries; Complaint 2	The judge used inappropriate language and humour in case conferences about custody and care of children. The judge admitted he acted inappropriately and should not have used humour. He acknowledged that his comments offended some in the courtroom. He stated his intent was to make things easier for the children. He apologized to the complainant and children. He agreed to take a training course on courtroom communication.	The Council closed the file. It noted it was an isolated incident, the judge had apologized, and the judge was committed to learn from the incident. The summary of this case contains the following: "One of the goals of the complaints process is to make sure judges learn from any mistakes and are able to change any behaviour that is not in keeping with the high expectations we have for all judges."
Canadian Judicial Council; 2008 Online Summaries; Complaint 4	The complainant alleged that the judge, who presided over a sexual assault trial, made comments that were demeaning and vicious, and re-victimized the family in question. The complainant alleged that the judge said the complainant at trial did not "act like a victim" or like a sexually assaulted child.	The Council dismissed the complaint. It found that the complainant mischaracterized the judge's comments. The matters raised by the complainant were not matters concluded by the judge to be proven facts. They were *illustrations* of matters that caused him to have doubts about certain evidence before him. The summary states, "When the credibility of the parties is an issue, judges may have to ask difficult questions."
Taylor v. Canada (Attorney General), 2003 FCA 55 CA Decision (*R. v. Laws* (1998), 128 C.C.C. (3d) 516 (Ont. C.A.))	In a 1993 trial for smuggling persons, Justice Whealy excluded individuals wearing religious headdresses from the courtroom. The lawyer for Laws filed a Canadian Judicial Council complaint in 1994. The Council initially dismissed the	The Federal Court of Appeal dismissed Taylor's application for judicial review of McEachern CJ's decision, finding it was not patently unreasonable. It held, in part: "[64] … the manifest impartiality

	complaint, deferring to the Court of Appeal as the appropriate forum to address the judge's conduct. The Executive Director, responding on behalf of the CJC Chair (Chief Justice McEachern), stated, "it is very unlikely that a single ruling in a single case would be considered conduct deserving a recommendation for removal." The Court of Appeal found the judge had no evidentiary basis to distinguish between required and chosen practices in a particular religious faith. It also found the trial judge erred in suggesting that only certain communities are protected under the *Charter*. His rulings "may well have inadvertently created the impression of an insensitivity as to the rights of minority groups" and created an atmosphere that undermined the appearance of a fair trial. It did not determine whether this amounted to reversible error because it ordered a new trial on different grounds. Following the Court of Appeal's decision, Laws' lawyer applied to the Canadian Judicial Council for reconsideration. McEachern C.J. responded that the exclusion of Mr. Taylor was inappropriate and created the impression the judge was insensitive to minority groups. He said his actions merited an expression of disapproval. He declined to refer the matter for formal investigation.	of the judiciary is one of the pillars on which public confidence in the administration of justice rests. ... Protecting the manifest impartiality of judges also requires the assiduous protection of their independence. [65] At the heart of judicial independence is the freedom of judges to administer justice to the best of their ability, without fear or favour, and in accordance with the evidence and with what they believe is required or permitted by law. Hence, the appeal process is normally the appropriate way of correcting errors committed by judges in the performance of their judicial duties. …" The Court also concluded that McEachern C.J. did not breach his duty of fairness to the complainant by the manner in which he handled the complaint.
Canadian Judicial Council; 2002 Online Summaries; Complaint 15 And Public letter from the Canadian Judicial Council to Justice Barakett	Five Aboriginal groups lodged ten complaints against Justice Barakett of the Quebec Superior Court, alleging he made derogatory comments about Aboriginal culture in a custody case. In addition to other comments, the judge stated, "Perhaps unwittingly and out of a totally misplaced expression of motherly love, they were brainwashed away from the real world into a child like myth of pow-wows and rituals quite different from other children on the reserve who had regular contact with the outside world." The judge also tried to calculate the amount of "Indian blood" in the children in an attempt to ascertain whether the children were actually	The Panel concluded an Inquiry Committee was not needed because the judge's conduct was not serious enough to warrant removal. It closed the file with a letter expressing disapproval of some of his conduct. It released that letter to the public because of the publicity around the case. It stated, in part: "In this case, there is no evidence of malice or improper motive on your part. Your unfortunate comments appear to stem from ignorance of Aboriginal culture rather than contempt for it. In

	Aboriginal. Further, he made statements suggesting “a stereotype of Aboriginal peoples related to alcohol and drug abuse”. The Panel concluded his comments were insensitive and insulting to Aboriginal culture. His observations implied an inherent inferiority in the Aboriginal community. It expressed serious concern that the judge’s conduct “did not involve merely an isolated outburst but a series of inappropriate comments”. It was further concerned that his comments “may reflect an underlying bias against Aboriginal culture which may preclude [him] from treating all litigants with the equality required by the Charter in future.” Barakett J wrote a public letter of apology, which the Panel believed to be sincere. He indicated he would pursue seminars to improve his understanding of Aboriginal culture. His Associate Chief Justice expressed confidence the judge could continue serving the public as a judge. The Panel noted the comments did not affect the outcome of the case.	other words, the public could be expected to have confidence that you have learned from this experience and will approach issues related to Aboriginal culture with greater understanding and respect in future."
Canadian Judicial Council; 2001 Online Summaries; Complaint 21	During a property case, the judge said to the complainants’ lawyer, “Sir, I understand that, long ago, your clients spent 40 years in the desert, they don't act quickly.” The Panel found the comment was inappropriate and should not have been made.	The Panel sent a letter to the judge expressing disapproval of the comment.
Canadian Judicial Council; 1999 Online Summaries; Complaint 24	A party in a family law hearing complained that the judge cut off her arguments and made sexist comments to the complainant’s ex-spouse that he give her daughter a gift “because lip-stick is expensive”. The Panel found the judge had acted inappropriately in discussing child support directly with the ex-spouse, giving the impression he had already decided the case, and by making comments that were offensive and inappropriate.	The Panel sent the judge a letter disapproving of the conduct.
Canadian Judicial Council; 1997 Online Summaries; Complaint 8	Justice Binnie made comments at a banquet in Toronto that were alleged to be a slur against the gay community. As	The Council took no further actions, considering the apology and that it was a “single

	he read from a booklet on fraternity ritual, he said he was reminded of an expression he had read years earlier describing *MacBeth* as a "faggoty dress-up party". Binnie J sent a letter of apology to the Dean of Osgoode Hall Law School (the host of the banquet) before the Canadian Judicial Council received the complaint.	inadvertent, descriptive comment made in a social context".
Canadian Judicial Council; 1997 Online Summaries; Complaint 16	The Chinese Canadian National Council lodged a complaint about questions that Chief Justice Lamer asked during arguments in the case of *R. v. R.D.S.*, [1997] 3 S.C.R. 484. The Chief responded to the CCNC before the Council received the complaint apologizing for any offence he caused. The Conduct Committee concluded the remarks did not amount to misconduct and that it was apparent from context that the questions were hypothetical in nature. The Chief's purpose was to test propositions being put to the Court and explore the dangers of a trial judge taking into account race or racial stereotypes when assessing the credibility of witnesses. [According to *Playing Second Fiddle to Yo Yo Ma*, by Avvy Y.Y. Go, "Lamer CJC was quoted as asking if judges have to take judicial notice of racism, whether that means they have to take judicial notice of the fact that Chinese have a propensity to gamble, and that gypsies are pickpockets. The day CCNC's complaint was made public, Justice Lamer 'apologized' to CCNC with a letter in which he 'corrected' himself by saying that it was in the 60's when he practised law in Montreal that he noticed that Chinese had the propensity to gamble."]	The Council issued a media release but took no further action. It stated, "Under our legal tradition, often of necessity, hypothetical questions are posed by judges during the course of argument of a case. The purpose of doing so is to illuminate for the Court the full implications of the matters at issue from both a factual and a legal perspective . . . For this reason, exchanges between counsel and judges during the course of legal arguments are often wide-ranging, probing and exploratory in nature. <u>It is in the interests of the administration of justice that the ability of counsel to engage in such unrestricted advocacy, and the ability of judges to engage in frank and wide-ranging discussion with counsel, continue</u>." (Emphasis added.)
Canadian Judicial Council; 1997 Online Summaries; Complaint 21	The complainant alleged that in his reasons for judgment a trial judge exhibited "ethnocentricism, a strong bias against Aboriginal peoples, their rights, their culture, and the legitimacy of their claims, and a distinct lack of cultural sensitivity."	The Panel wrote a letter to the judge disapproving of some of his language. The Panel advised the complainant "it was conscious of the fundamental importance of judicial independence in judicial decision-making, and that it is fundamental to the rule of law

	The Panel found that in his reasons for judgment, a judge invoked unnecessarily disparaging and offensive language in relation to Aboriginal peoples on matters of little or no relevance to the determination of the case. The Panel concluded that no malice of false motive was involved, and that no investigation under s. 63(2) of the *Judge's Act* was required.	that judges exercise and candidly articulate independent thought in their reasons for judgment." Nevertheless, the Panel also recognized that judicial freedom of expression has inherent constraints arising out of the judicial office itself. "Freedom of expression must be balanced with the need for public accountability, ultimately, to preserve public confidence in the judiciary."

b. Cases in which the judge was removed

Moreau‑Bérubé v. New Brunswick (Judicial Council), 2002 SCC 11	Judge Moreau-Bérubé made derogatory comments about the residents of the Acadian Peninsula while presiding over a sentencing hearing, asserting that the majority were dishonest. Several complaints followed that the judge was unable to perform her duty as a judge as the result of her comments. An inquiry panel found the judge's comments constituted misconduct. It found she was still able to perform her duties as a judge and recommended a reprimand. Despite this, the Judicial Council recommended that she be removed from the bench due to an apprehension of bias and loss of public trust. Judge Moreau-Bérubé filed an application for judicial review of the Council's decision and the Court of Queen's Bench overturned the Council's decision based on their finding that the Council had exceeded its jurisdiction. The Court of Appeal dismissed the appeal.	The Supreme Court allowed the appeal and restored the Council's decision to remove Moreau-Bérubé J. It found the Council's decisions were entitled to a high degree of deference. The Council was entitled to ignore the recommendations of the inquiry panel.
Canadian Judicial Council; Inquiry re Bienvenue J., 1996	During a murder trial for a woman who killed her husband, the judge made statements conveying a sexist stereotype that both idealized and demeaned women compared to men, and said, "even the Nazis did not eliminate millions of Jews in a painful and bloody manner. They died in the gas chambers, without suffering." He made other	The Council recommended that Bienvenue J. be removed from office. It stated that had the case been limited to the judge's meeting with the jury, it would have only expressed disapproval with his conduct. However, his remarks about women and his deep-seated ideas behind those

	inappropriate comments of a sexual nature, about a juror's sexual orientation, about suicide and about parking lot attendant. He also met with three jurors after the verdict but before sentencing and criticized their verdict. The judge apologized for the offence caused by his comments about the Holocaust and women but did not disavow the comments or acknowledge any error on his part. Rather, he confirmed his belief in his comments in subsequent media interviews and at the inquiry. The Council found that the judge did not grasp the implications of his comments to the jury. It also found that his views on women were deeply rooted in his mind. The Council found the judge violated s. 65(2)(b-d) of the *Judges Act*.	remarks casted doubt on his impartiality in the execution of his judicial office. The evidence was clear that Bienvenue J. did not intend to change his behaviour. The Council stated that: "Judges are, of course, entitled to their own ideas and need not follow the fashion of the day or meet the imperatives of political correctness. However, judges cannot adopt a bias that denies the principle of equality before the law and brings their impartiality into question" (p. 50). The Council then cites a 1983 article by Prof. A.W. MacKay, in which he stated, "To argue that the speech of judges should be limited by legitimate claims of equality expressed by lobby groups espousing the claims of those embraced by the equality guarantees of section 15 of the *Charter* and by Human Rights Codes is not to argue that judges must be "politically correct" in their speech. Judges should not respond to a public interest lobby just because it is persistent and in vogue. Judges should, however, take care that neither their speech nor conduct transgress the equality principles enshrined in the Charter. When they do commit such transgressions, they should be held accountable. The *Charter* provides the buoy to prevent the judiciary from allowing lobby groups to pull them down into the political waters."