Canadian Judicial Council
Conseil canadien de la magistrature

In the Matter of an Inquiry Pursuant to s. 63(1) of the *Judges Act* Regarding the Honourable Justice Robin Camp

Report and Recommendation of the Inquiry Committee to the Canadian Judicial Council

29 November 2016

Inquiry Committee:

The Honourable Austin F. Cullen, Chairperson of the Inquiry Committee, Associate Chief Justice of the Supreme Court of British Columbia

The Honourable Deborah K. Smith, Associate Chief Justice of the Supreme Court of Nova Scotia

The Honourable Raymond P. Whalen, Chief Justice of the Supreme Court of Newfoundland and Labrador, Trial Division

Karen Jensen

Cynthia Petersen

Counsel:

Owen M. Rees, Advisory Counsel

Marjorie Hickey, Q.C. and Michael Murphy, Presenting Counsel

Frank Addario, Megan Savard, and Andrew Burgess, counsel for the Honourable Robin Camp

Karey Brooks and Sean Hern, counsel for Women Against Violence Against Women Rape Crisis Centre

Deepa Mattoo and Tiffany Lau, counsel for Barbra Schlifer Commemorative Clinic

Nitya Iyer and Alison J. Gray, counsel for Avalon Sexual Assault Centre, Ending Violence Association of British Columbia, Institute for the Advancement of Aboriginal Women, Metropolitan Action Committee on Violence against Women and Children, West Coast Women's Legal Education and Action Fund, and the Women's Legal Education & Action Fund Inc. (LEAF)

Table of Contents

In the Matter of an Inquiry Pursuant to s. 63(1) of the *Judges Act* Regarding the Honourable Justice Robin Camp

Report and Recommendation of the Inquiry Committee to the Canadian Judicial Council

I. OVERVIEW

[1] The Honourable Robin Camp ("Justice Camp" or the "Judge") was appointed as a judge of the Federal Court in June 2015. Before his appointment to the Federal Court, he was a judge of the Provincial Court of Alberta, to which he was appointed in March 2012.

[2] While a judge of the Provincial Court, Justice Camp presided over the trial of *R. v. Wagar*[1] (the "*Wagar* Trial" or the "Trial"), in which the accused was charged with sexual assault. Justice Camp heard evidence and submissions on three separate days over a period of two months. A month after the Trial, Justice Camp delivered Reasons for Judgment acquitting the accused of sexual assault.[2] The acquittal was overturned by the Alberta Court of Appeal, having found that Justice Camp's conduct of the Trial and his Reasons for Judgment disclosed errors of law.

[3] This inquiry was convened as a result of a complaint from the Minister of Justice and Solicitor General for Alberta to the Canadian Judicial Council (the "Council") concerning the Judge's conduct during the Trial, consisting of various comments he made and questions he asked during the Trial and comments in his Reasons for Judgment. The inquiry seeks to determine whether Justice Camp committed misconduct during the Trial and placed himself, by his conduct, in a position incompatible with the due execution of the office of judge contrary to ss. 65(2)(b) and (d) of the *Judges Act,*[3] and if so, whether

[1] Docket: 130288731P1 (ABPC).
[2] 2015 ABCA 327 [*Wagar* ABCA].
[3] R.S.C. 1985, c. J-1.

public confidence is sufficiently undermined to render Justice Camp incapable of executing the judicial office.

[4] It is not the focus of this inquiry to determine whether Justice Camp was right or wrong to acquit the accused, or to determine whether Justice Camp made legal errors in the conduct of the *Wagar* Trial. We are focused solely on whether Justice Camp's conduct during the Trial was contrary to the *Judges Act*. Legal errors, without more, do not amount to misconduct.

[5] Complaints about statements made by judges in court in the course of a proceeding raise difficult issues. There is a tension between protecting judicial independence – which exists to safeguard the impartiality of our courts – and ensuring accountability for judicial misconduct. Judges must have considerable latitude to conduct proceedings, to comment on the evidence, to pose questions of witnesses and counsel, and sometimes to criticize the law.

[6] On the record before the Committee, we find that throughout the Trial Justice Camp made comments or asked questions evidencing an antipathy towards laws designed to protect vulnerable witnesses, promote equality, and bring integrity to sexual assault trials. We also find that the Judge relied on discredited myths and stereotypes about women and victim-blaming during the Trial and in his Reasons for Judgment.

[7] Accordingly, we find that Justice Camp committed misconduct and placed himself, by his conduct, in a position incompatible with the due execution of the office of judge within the meaning of ss. 65(2)(b) and (d) of the *Judges Act*.

[8] Although Justice Camp made significant efforts after complaints were made to the Council to reform the thinking and the attitudes which influenced his misguided approach to the Trial, in the particular circumstances of this inquiry, education—including social context education—cannot adequately repair the damage caused to public confidence through his conduct of the *Wagar* Trial.

[9] We accept that education, including social context education, is a valuable tool to help the judiciary improve and enhance its performance by keeping abreast of

developments in the law and the values underlying those developments. We also recognize that judicial shortcomings can be ameliorated by a commitment to education and careful reflection. But where judicial misconduct is rooted in a profound failure to act with impartiality and to respect equality before the law, in a context laden with significant and widespread concern about the presence of bias and prejudice, the harm to public confidence is amplified. In these circumstances, the impact of an after-the-fact commitment to education and reform as an adequate remedial measure is significantly diminished.

[10] We conclude that Justice Camp's conduct in the *Wagar* Trial was so manifestly and profoundly destructive of the concept of the impartiality, integrity and independence of the judicial role that public confidence is sufficiently undermined to render the Judge incapable of executing the judicial office.

[11] Accordingly, the Inquiry Committee expresses the unanimous view that a recommendation by the Council for Justice Camp's removal is warranted.

II. FACTUAL BACKGROUND

A. The Judge's Background

[12] Justice Camp was born and received his legal education in South Africa, where he practiced law from 1979 to 1992. He practised in Botswana from 1992 until he moved to Canada in 1998. He practiced law in Alberta from 1998 until his appointment to the Alberta Provincial Court in March 2012.

[13] Justice Camp was appointed to the Federal Court in June 2015.

B. The *Wagar* Trial

[14] The alleged misconduct at issue in this inquiry arises from statements that Justice Camp made in the *Wagar* Trial, in which Alexander Wagar was tried for sexual assault. At the Trial, a publication ban was imposed, pursuant to s. 486.4 of the *Criminal Code*,[4]

[4] R.S.C. 1985, c. C-46.

preventing the publication of any information which may identify the complainant. This report refers to the complainant in the *Wagar* Trial by the pseudonymous initials A.B.

[15] On June 5, 2014, Mr. Wagar's Trial began and it lasted three days. A.B., the complainant, testified for the Crown. Mr. Wagar and two of his friends, Mike Gallinger and Skylar Porter, testified for the defence. At the conclusion of the Trial, Justice Camp acquitted Mr. Wagar of sexual assault. The Judge convicted Mr. Wagar of a separate charge for breaching a recognizance, to which Mr. Wagar pleaded guilty.

[16] In brief, the *Wagar* Trial turned on whether or not the sexual activity between the complainant and Mr. Wagar was consensual, or, alternatively, whether Mr. Wagar had an honest but mistaken belief in consent. The complainant, A.B., testified that she did not consent to the sexual activity with Mr. Wagar, and that he sexually assaulted her in the bathroom of an acquaintance's apartment during a party. Mr. Wagar disputed the complainant's evidence regarding her non-consent. He testified that A.B. consented to the sexual activity through her words and conduct, and that he believed that the sexual activity was consensual. There was some evidence supporting the inference that the complainant may have fabricated the allegation of sexual assault, because she believed that Mr. Wagar had later had sex with Ms. Porter at the party, and because the complainant was upset with the accused's brother ("Lance") for embarrassing her by telling others at the party that she had sex with the accused.

[17] A summary of the evidence from the *Wagar* Trial is found at Appendix A.

[18] In the course of the Trial and in rendering his Reasons for Judgment, Justice Camp made comments and asked questions which form the subject matter of this inquiry. These comments and questions are considered in detail below.

i. Defence Submissions in the Wagar Trial

[19] In preliminary submissions, the defence argued that Mr. Wagar's sexual interactions with A.B. were all consensual. Mr. Gallinger and Ms. Porter were independent and credible witnesses who provided clear evidence of A.B.'s participation and consent. Furthermore, the defence argued that A.B.'s conduct was strong evidence

of consent, and that there was sufficient evidence in Mr. Wagar's version of events to find that he had reasonable grounds to believe there was consent.

[20] In closing submissions, the defence maintained that the sexual activity was consensual. Alternatively, defence counsel argued that there was an air of reality to the mistaken belief defence due to A.B.'s conduct, as she was enjoying "a weekend of thievery and of promiscuous activity".[5] The defence also argued that A.B. had fabricated the allegations because she was angry that Lance was telling everyone she was a slut and because she thought Mr. Wagar was having sex with Ms. Porter. A.B. had been flirting with Ms. Porter and looking to hook up with Dustin, which the defence argued was a "type of activity"[6] that by its very nature suggested that the hook up with Mr. Wagar was equally mutual and consensual.

ii. Crown Submissions in the Wagar Trial

[21] In preliminary submissions, Crown counsel (Ms. Mograbee) noted that Ms. Porter's evidence was never put to A.B. Nonetheless, the Crown argued that the relevant evidence to be considered related to the events that occurred when the door to the bathroom was shut. The fact that A.B. may have flirted earlier did not mean she was more likely to have consented later. The Crown also stated that A.B.'s post-bathroom conduct could not be used to conclude she was more likely to have consented or to support a mistaken belief defence. There needed to be evidence to support such a defence. The Crown noted that complimenting someone on their dancing, smiling or telling them they like them, is not an invitation to engage in sexual contact. Mr. Wagar was required to take reasonable steps to gain that consent because he knew A.B. was drunk.

[22] In final submissions, the Crown reviewed the contradictions and frailties in the defence evidence, including the fact that Ms. Porter's evidence was never put to A.B. and that Mr. Wagar did not claim to overhear A.B. and Ms. Porter's conversation. The Crown highlighted again that the relevant events to consider were those that occurred in the

[5] *Wagar* Trial Transcript, p. 342, line 29.
[6] *Wagar* Trial Transcript, p. 347, line 8.

bathroom after Mr. Wagar shut and locked the door. A.B.'s failure to cry out or make any inquiries when he locked the door did not constitute consent.

[23] The Crown reviewed the relevant *Criminal Code* sections, the elements of the offence and the *R. v. W.D.*[7] analysis for assessing credibility. It noted that Mr. Wagar's defence at the time of vaginal intercourse was actual consent. The mistaken belief defence was not available to Mr. Wagar for events that occurred before that point because he took no steps to ensure A.B. was consenting. There was also a heightened need for reasonable steps because A.B. was intoxicated and they were strangers. The Judge needed to examine all of the evidence on the issue of whether A.B., in her mind, wanted the sexual activity.

iii. The Trial Judge's Reasons for Judgment in the Wagar Trial

[24] Justice Camp found Mr. Wagar not guilty. He found that implied consent was not an issue in this case and confirmed that he had a reasonable doubt that A.B., in her mind, did not want the sexual touching. He based his conclusion on all of the evidence relating to A.B.'s conduct before, during, and after the incident.

[25] In his reasons, Justice Camp found that A.B.'s version of the events was open to question and that she was not a credible witness. He concluded that he was not in a position to reject Mr. Wagar's evidence of consensual, even tender, sex, that was spoiled by his brother coming into the bathroom. He accepted the accused's evidence that A.B. subsequently became upset because she thought that Mr. Wagar had slept with Ms. Porter. He found that the accused's version of events was believable and noted that it had received some confirmation from the two defence witnesses.

C. The Appeal

[26] The Crown appealed from the acquittal. The appeal was heard on October 15, 2015. Mr. Wagar was neither present nor represented at the appeal. No *amicus curiae*

[7] [1991] 1 S.C.R. 742.

(friend of the court) was appointed to argue Mr. Wagar's position. The Court of Appeal overturned his acquittal and ordered a new trial.

[27] The reasons of the Court of Appeal were given in a brief Memorandum from the Bench dated October 27, 2015:

> Memorandum of Judgment Delivered from the Bench
>
> O'Ferrall J.A. (for the Court):
>
> [1] In this appeal the Crown appeals the acquittal of the respondent by the trial judge of a charge of sexual assault.
>
> [2] Uncomfortably, the respondent did not appear at the hearing of this appeal despite being served with the Notice of Appeal and the Crown's factum and despite having been advised by his trial counsel to seek legal aid.
>
> [3] Ordinarily, this Court would be reluctant to proceed with a Crown appeal of an acquittal without hearing from the respondent. However, in the unusual circumstances of this case, where the respondent has shown no interest in this appeal despite repeated efforts by the Crown and others to communicate to the respondent the seriousness of this matter, we decided to proceed.
>
> [4] Having read the Crown's factum, portions of the trial transcript and having heard Crown counsel's arguments, we are satisfied that the trial judge's comments throughout the proceedings and in his reasons gave rise to doubts about the trial judge's understanding of the law governing sexual assaults and in particular, the meaning of consent and restrictions on evidence of the complainant's sexual activity imposed by section 276 of the *Criminal Code*. We are also persuaded that sexual stereotypes and stereotypical myths, which have long since been discredited, may have found their way into the trial judge's judgment. There were also instances where the trial judge misapprehended the evidence.
>
> [5] We are cognizant that the Crown is limited to appeals on questions of law alone. However, we are of the view that the conduct of the trial and the trial judge's reasons disclose errors of law and therefore we allow the appeal and order a new trial.[8]

[8] *Wagar* ABCA, *supra* note 2.

III. THE COMPLAINTS TO THE CANADIAN JUDICIAL COUNCIL

[28] In the wake of the Court of Appeal's decision, on November 9, 2015, four law professors filed a complaint (the "Professors' Complaint") with the Council. Many other complaints relating to the Judge's conduct from members of the public, other law professors, and law students, were also sent to the Council.

[29] There was extensive media coverage of the complaints against the Judge. It appears that an initiating media report was an article contributed to the nationally published *Globe and Mail* dated November 9, 2015, from two of the four professors who had filed the Professors' Complaint.

[30] Before the Council could determine whether the Professors' Complaint should be referred to an inquiry, on December 22, 2015, the Attorney General of Alberta made a complaint under s. 63(1) of the *Judges Act*, triggering this inquiry into the Judge's conduct in the Trial.

[31] The Inquiry Committee (the "Committee") was convened on March 22, 2016 and the Committee issued a Notice of Allegations on May 2, 2016. On July 4, 2016, the Judge filed a Notice of Response to the Allegations.

[32] On July 8, 2016, with the consent of Presenting Counsel and Justice Camp, the Committee granted limited intervener status to two intervener groups: the Intervener Coalition, consisting of several women's equality groups[9] and the Front-Line Interveners (WAVAW Rape Crisis Centre and the Barbra Schlifer Commemorative Clinic). The two intervener groups were limited to making written submissions of 20 pages each and were permitted to address:

a) the history, evolution and reform and the current social context of sexual assault in Canada;

[9] Avalon Sexual Assault Centre, Ending Violence Association of British Columbia, Institute for the Advancement of Aboriginal Women, Metropolitan Action Committee on Violence against Women and Children, West Coast Women's Legal Education and Action Fund, and the Women's Legal Education & Action Fund Inc. (LEAF).

b) the legal principles applicable to the Committee's mandate under the *Judges Act*;

c) the test or factors the Committee should consider in undertaking its mandate under the *Judges Act*; and,

d) the experience of vulnerable groups with the Canadian justice system.[10]

[33] The interveners were not permitted to adduce evidence or add to the evidentiary record. Nor were they permitted to comment on the merits of the Allegations against the Judge, recommend findings or make submissions regarding whether or not he should be removed from office.

[34] The interveners filed their written submissions on August 26, 2016. They were not permitted to present oral argument at the hearing.

IV. THE INQUIRY HEARING

[35] At the direction of the Committee, Presenting Counsel and counsel for the Judge filed what were, in effect, written opening submissions before the commencement of the hearing.

[36] The inquiry hearing took place over five days between September 6 and September 12, 2016.

[37] The documentary evidence placed before the Committee included an Agreed Statement of Facts (“ASF”) with the following exhibits:

a) the complaints received by the Council, including the Professors' Complaint;

b) the professors’ article to the *Globe and Mail* of November 9, 2015, as well as a selection of media reports on the complaints against the Judge;

c) a complete transcript of the proceedings at the *Wagar* Trial;

[10] Committee Order on Interveners, p. 2.

d) the Crown’s factum in the Alberta Court of Appeal;

e) the Court of Appeal's Memorandum from the Bench;

f) an affidavit from Professor Janine Benedet of the Allard School of Law at the University of British Columbia, which appended an expert report on the topic of sexual assault law in Canada;

g) a letter to the Council from the Chief Justice of the Federal Court;

h) an apology made by the Judge in a statement from the Federal Court website posted after the Judge was made aware of the November 9, 2015 newspaper article in the *Globe and Mail*;

i) details about two Federal Court cases which raised issues arising from the Judge's conduct in the Trial; and

j) character letters from members of the legal profession, the public, and one member of the Judge’s family.

[38] The ASF provided details of the steps taken by the Judge since his apology, which included undertaking a mentoring relationship with Justice Deborah McCawley, an experienced judge of the Manitoba Court of Queen's Bench. He also received counselling from Dr. Lori Haskell, a psychologist and expert in the neurobiology of trauma, and he learned from her about the ways in which victims of abuse respond to trauma. Dr. Haskell taught Justice Camp to interrogate his own beliefs and experience with a view to better understanding the perspectives of a sexual assault complainant. The ASF also revealed that Justice Camp spent time learning about the history and current state of sexual assault law from Professor Brenda Cossman, a law professor and expert on feminist legal theory and sexual assault law.

[39] At the hearing, Presenting Counsel adduced the evidence of A.B., the complainant in the *Wagar* Trial, who testified about the personal impact of some of the Judge’s comments and questions during the Trial.

[40] Counsel for the Judge called Justice Deborah McCawley, Dr. Lori Haskell, and Professor Brenda Cossman to testify about their interactions with and impressions of Justice Camp. Finally, Justice Camp testified on his own behalf.

[41] Counsel for the Judge provided the Committee with written closing submissions, and Presenting Counsel provided the Committee with an outline of closing submissions. The Committee then heard oral closing arguments.

V. THE COMMITTEE'S MANDATE

[42] In discharging its mandate, the Committee must follow a two stage process. First, the Committee must decide whether Justice Camp has become incapacitated or disabled from the due execution of the office of judge for any of the reasons set out in ss. 65(2)(b) to (d) of the *Judges Act*. If so, the Committee must then consider whether a recommendation for Justice Camp's removal is warranted.[11]

[43] Sections 65(2)(b) to (d) read as follows:

> (2) Where, in the opinion of the Council, the judge in respect of whom an inquiry or investigation has been made has become incapacitated or disabled from the due execution of the office of judge by reason of
>
> […]
>
> (b) having been guilty of misconduct,
>
> (c) having failed in the due execution of that office, or
>
> (d) having been placed, by his or her conduct or otherwise, in a position incompatible with the due execution of that office,
>
> the Council, in its report to the Minister under subsection (1), may recommend that the judge be removed from office.

[44] In our view, s. 65(2)(c) is not applicable in the circumstances of this case. On our interpretation of s. 65(2)(c), the words "having failed in the due execution of that office" refer to the office of judge which is governed by the *Judges Act*. At the time of the conduct

---

[11] *Majority Reasons if the Canadian Judicial Council in the Matter of an Inquiry into the Conduct of the Honourable Theodore Matlow*, at para. 166. *Report of the Canadian Judicial Council to the Minister of Justice* in the Matter *of an Inquiry into the Conduct of the Honourable Paul Cosgrove*, at para. 15.

at issue in this inquiry, Justice Camp was a judge of the Alberta Provincial Court; he was not a judge of the Federal Court or any other court governed by the *Judges Act*. Accordingly, he did not fail in the due execution of the office of a judge falling within the scope of s. 65(2)(c) of the *Judges Act*, which does not apply to provincially appointed judges.

[45] Therefore, the sections of the *Judges Act* applicable in the present case are ss. 65(2)(b) and (d).

VI. ANALYSIS OF THE ALLEGATIONS

[46] During the course of the inquiry hearing, the issue of judicial reasoning immunity was raised by counsel and argued. Eventually, Presenting Counsel and the Judge's counsel agreed that if counsel for Justice Camp did not ask questions regarding judicial reasoning, neither would Presenting Counsel (unless directed to by the Committee). The Committee was content to proceed on this basis.[12]

[47] As a result of the common position taken by the Judge and Presenting Counsel, and in light of the Committee's ruling, Justice Camp was not asked to explain the reasoning behind his comments and questions throughout the Trial. Rather, his evidence was confined to reviewing his comments and questions, seeking his views on their propriety with the benefit of hindsight, and to explaining the insights he gained into his conduct through his interaction with Justice McCawley, Dr. Haskell and Professor Cossman. In his evidence, he did not generally attempt to identify any legitimate basis for making his comments or asking his questions.

[48] By contrast, Justice Camp advanced arguments in his Notice of Response, written opening submissions, and written closing submissions to support the contention that some of his interventions were made in the context of legitimate areas of inquiry. There is, accordingly, some discordance between Justice Camp's evidence in some areas and the submissions his counsel made on his behalf.

[12] Inquiry Hearing Transcript, Vol. 4, Sept. 8, 2016, pp.254-255.

[49] Therefore, the Committee assessed the Allegations against Justice Camp in light of both his evidence and his counsel's submissions. We have analyzed (below) the context of the Judge's various utterances to see whether they can be characterized as the Judge submits, as badly expressed but legitimate, or whether they were simply gratuitous and reflective of bias and antipathy to the law governing sexual assault trials.

A. Allegation 1

[50] Allegation 1 relates to the Judge's attitude toward s. 276 of the *Criminal Code* (the full provision is reproduced in Appendix B). Section 276 of the *Criminal Code* is commonly referred to as the "rape shield" provision, which "is less than fortunate; the legislation offers protection not against rape, but against the questioning of complainants in trials for sexual offences": *R. v. Seaboyer*[13]. It was introduced following the Supreme Court of Canada's 1991 decision in *Seaboyer*, which struck down an earlier version of the provision for being overly restrictive of a full answer and defence under s. 7 of the *Canadian Charter of Rights and Freedoms*.[14] Section 276(1) prohibits reliance on evidence of other sexual activity of the complainant to support the "twin myths" that, by reason of the sexual nature of the activity, the complainant is either more likely to have consented or is less worthy of belief.

[51] Under s. 276(2), evidence of a specific instance of sexual activity adduced for purposes other than "twin myth" reasoning can be admitted, after defence counsel brings a written application, but only if it is found to be relevant to an issue at trial, and to have significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice. In determining the admissibility of this evidence, the trial judge must consider a number of factors set out in s. 276(3). Of particular relevance to this inquiry, the trial judge must consider "the need to remove from the fact-finding process any discriminatory belief or bias": s. 276(3)(d).

---

[13] [1991] 2 S.C.R. 577, p. 604 [*Seaboyer*] *per* McLachlin J. (as she then was).
[14] *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982*, c. 11.

[52] The constitutionality of s. 276 was confirmed by the Supreme Court of Canada in *R. v. Darrach*.[15]

[53] Allegation 1 reads as follows:

> **In the course of the trial in *R. v. Wagar* in the Provincial Court of Alberta at Calgary bearing Docket No. 130288731P1 (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).**
>
> **c) No one would argue "the rape shield laws always worked fairly" (page 217 lines 2 to 4).**

i. Allegation 1(a)

[54] Justice Camp made the comments under Allegation 1(a) when the complainant was under cross-examination and defence counsel asked her "Do you remember if anybody had attempted to hook up with you that night?"[16] The Crown objected that s. 276 may be implicated and the defence rephrased the question to ask if anyone was being flirtatious with the complainant. She responded, "Yes, Dustin." She was then asked if she accepted or declined his flirtations and when she said she declined, the defence asked her how she declined.[17] The Crown again objected on the basis that the question implicated s. 276. She submitted the questioning may be "going down that line"[18] and that in any event, it was irrelevant how the complainant dealt with someone other than the accused.

---

[15] [2000] 2 S.C.R. 443 [*Darrach*].
[16] *Wagar* Trial Transcript, p. 56, lines 15-16.
[17] *Wagar* Trial Transcript, p. 56, lines 35-41.
[18] *Wagar* Trial Transcript, p. 58, lines 13-14.

[55] When the Judge asked why defence counsel was pursuing the question, defence counsel responded:

> […] [F]or the *mens rea* of this event, Sir, does my client have the honest belief that this woman is giving him consent to this act.[19]

[56] The Judge then said:

> But your problem is […] s. 276, for better or worse […] prevents those questions.[20]

[57] The Judge added:

> And I recognize that it -- I recognize and I think the framers of the section recognize that it -- it does hamstring the defence.[21]

[58] After further argument from the defence, the Judge then turned to the Crown and asked what she said to the argument:

> Bearing in mind that […] any […] legislation that prevents an accused from cross-examining fully I think has to be interpreted narrowly.[22]

ii. Allegation 1(b)

[59] Allegation 1(b) arises from a continuation of the colloquy between the Judge and Crown counsel when Crown counsel maintained her objection under s. 276 in the face of the defence argument that the evidence of how the complainant reacted to stop the flirtation was evidence that she had the inner strength to deal with such things. The Judge said to the Crown, about the applicability of s. 276:

> And on its -- on its face it doesn't cover what you're saying. You -- you're arguing that, by extension it shouldn't -- it shouldn't be -- I -- I have to apply the spirits of 276. And I'm not sure that that's right because it is – it is very, very incursive legislation. It stops an accused from asking question [*sic*] which would otherwise be permissible because of contemporary thinking.[23]

[60] He later said:

---

[19] *Wagar* Trial Transcript, p. 58, lines 26-27.
[20] *Wagar* Trial Transcript, p. 58, lines 29-34.
[21] *Wagar* Trial Transcript, p. 58, lines 38-39.
[22] *Wagar* Trial Transcript, p. 60, lines 30-32.
[23] *Wagar* Trial Transcript, p. 63, lines 4-7.

> Ms. Mograbee, I'm concerned about interfering with -- with a proper defence. And I – I know what you said about 276. I think it should be read not -- not drastically narrowly, but one has to be careful of how one applies it.[24]

iii. Allegation 1(c)

[61] Allegation 1(c) arose in a different context. Defence counsel questioned the accused about what happened after he and the complainant left the bathroom following the alleged sexual assault. The accused began to describe the complainant and Ms. Porter "making out with each other."[25] Crown counsel objected on the basis that "[…] to get into other sexual activity again, we're getting into s. 276. This is not a new issue that has been raised in this trial. If it is relevant to the sexual assault and consent, then I would like to know how it's connected. If it isn't, then … this witness needs to move on."[26]

[62] The Judge then asked Crown counsel, "276 prevents evidence of what exactly?"[27]

[63] When Crown counsel read the section to the Judge, he then turned to the defence to ask what he had to say and defence counsel responded:

> It's -- it's not for the act of the sex act itself. It's just more -- more descriptive of the atmosphere and the conduct of the parties […] post event.[28]

[64] The Judge then said to defence counsel:

> 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.[29]

[65] The Judge then ruled against the defence continuing with that line of questioning.

iv. Justice Camp's Evidence and Submissions

[66] At the inquiry hearing, Justice Camp was asked by his counsel what he could say about his comments cited in Allegation 1. He responded:

---

[24] *Wagar* Trial Transcript, p. 64, lines 28-30.
[25] *Wagar* Trial Transcript, p. 214, line 41.
[26] *Wagar* Trial Transcript, p. 215, lines 12-15.
[27] *Wagar* Trial Transcript, p. 215, line 17.
[28] *Wagar* Trial Transcript, p. 216, lines 36-41.
[29] *Wagar* Trial Transcript, p. 217, lines 2-4.

> They were wrong. Section 276, after the amendments of 1993 when subsections (2) and (3) were injected into Section 276, removed any form of unfairness in those sections.[30]

[67] In cross-examination, Justice Camp was asked whether he agreed his comments cited in Allegation 1 reflected an antipathy towards legislation designed to protect the integrity of vulnerable witnesses and maintain the fairness and effectiveness of the justice system. Justice Camp responded:

> Yes I do. And that was exacerbated by other comments that I made.

[68] Justice Camp was then asked the following questions about Allegation 1 and made the following responses:

> Q And, Justice Camp, you would acknowledge that it's important that before a judge expresses concern about the fairness of legislation, you have to give considerable thought to that because it can have quite a significant, detrimental impact to those who are hearing that?
>
> A You're absolutely right, Ms. Hickey.
>
> Q And it can have a significant impact on the confidence of those individuals in the judicial system?
>
> A Yes.
>
> Q There's almost a suggestion that by criticizing legislation in that way, that the purpose of the legislation is somehow not worthy?
>
> A I can see that, Ms. Hickey.[31]

[69] In his Notice of Response, Justice Camp stated that his comments were "insensitive and inappropriate", but he denied harbouring antipathy towards s. 276. He argued that the comments were made in the context of his correct application of the provision.

[70] In relation to defense counsel's questions of the complainant about whether anyone was being flirtatious with her, Justice Camp asserted in his Notice of Response that s. 276 did not apply and that "[h]is comments that s. 276 is 'incursive' legislation and

---

[30] Inquiry Hearing Transcript, Vol. 5, Sept. 9, 2016, p. 267, line 26, p. 268, lines 1-3.
[31] Inquiry Hearing Transcript, Vol. 5, Sept. 9, 2016, p. 315, lines 12-25.

must be applied ‘narrowly’ were made in the context of the Crown seeking to engage s. 276 where it did not apply.”[32]

[71] In his Notice of Response, Justice Camp further contended that evidence of the complainant kissing Ms. Porter would have been admissible (to show the complainant’s state of mind immediately after the sex act) had defence counsel brought a pretrial application. He asserted that his comment cited in Allegation 1(c) was made in the context of explaining to the accused the “harshness” of not permitting defence counsel to question the complainant about "making out" with Ms. Porter because defence counsel had failed to take this preparatory step.

[72] In his written closing submissions, Justice Camp again denied that his comments establish a “disqualifying antipathy” to s. 276, arguing that he made the comments in the course of correctly applying s. 276 in the Crown’s favour – the very law toward which he is alleged to have shown antipathy.

[73] The Judge agreed that he should have worded his statements differently but submitted “the misconduct proved under Allegation 1 is insensitivity and not a refusal to follow the law.”[33]

[74] The Judge further submitted that judges are entitled to criticize legislation so long as they fairly apply it. He cited Justice Moldaver’s criticism of the self-defence provisions of the *Criminal Code* in *R. v. Pintar*[34] as an example where such criticism in part led to an overhaul of the *Code* provisions.

[75] Counsel for the Judge also relied on the evidence of Professor Cossman that Justice Camp’s rulings on s. 276 “seemed to be entirely reasonable, without defending the comments.”[35]

---

[32] Notice of Response, para. 7.
[33] Written Closing Submissions of Justice Camp, p. 18.
[34] (1996), 30 OR (3d) 483 (Ont. C.A.) [*Pintar*].
[35] Inquiry Hearing Transcript, Vol. 3, Sept. 8, 2016, p. 182, lines 3-4; see Written Closing Submissions of Justice Camp, p. 2.

v. Committee's Findings with respect to Allegation 1

[76] The Committee concludes that Justice Camp's comments did, as he acknowledged in his evidence, reflect an antipathy to the rape shield legislation. We do not accept the explanation advanced in submissions on behalf of the Judge that his comments had any legitimate basis and were simply insensitively worded.

[77] First, the Judge's description of the legislation as "very, very incursive" which must be applied "narrowly" were made in the context of a general discussion about s. 276, which the Judge described as stopping permissible questions because of "contemporary thinking". He was clearly criticizing the legislation at large, not the Crown's attempt to have it apply in the present case. The core of his criticism appeared to be that s. 276 was a product of "contemporary thinking" about which, based on other comments the Judge made during the Trial, he was dismissive.

[78] Second, the Judge's comment about the rape shield laws not always working fairly does not appear to be related to a ruling that the evidence about the complainant "making out" with Skylar was not admissible only because defence counsel failed to bring a pre-trial motion. In his ruling, the Judge said nothing about the defence's failure to bring a pre-trial application. Rather, he appeared to rule on the substantive question of whether the evidence was inadmissible because it violated s. 276. He did not say it would have been admissible but for the defence failure to bring an application under s. 276. Thus, the Committee concludes that the Judge's characterization of the unfairness of the section was consistent with his earlier contention that the section is "very, very incursive" and prevents permissible questions because of "contemporary thinking".

[79] The Judge asked the Committee to find that his rulings with respect to s. 276 were correct, in the face of the Alberta Court of Appeal's ruling that:

> […] we are satisfied that the trial judge's comments throughout the proceedings and in his reasons gave rise to doubts about the trial judge's understanding of the law governing sexual assaults and in particular, the

> meaning of consent and restrictions on evidence of the complainant's sexual activity imposed by section 276 of the *Criminal Code*.[36]

[80] In effect, the Judge asked the Committee to rule that the Court of Appeal was in error in finding that his application of s. 276 was deficient. The Judge cites the absence of anyone to argue against the Crown's submission in the Court of Appeal as a justification for us to revisit that ruling in light of the submissions before us and Professor Cossman's evidence that the Judge's rulings in relation to s. 276 were "entirely reasonable". In part, the Judge's submission that we should rule on his application of s. 276 arises from the significant publicity that attended the Professors' Complaint, which asserted, among other things, that after having made adverse comments about s. 276, the Judge:

> […] then proceeded to allow cross-examination in this regard without complying with the requirements for a hearing under section 276(2) and section 276.1 of the *Criminal Code* (Transcript, 64:26). His refusal to comply with section 276 of the *Criminal Code* should be considered in light of his personal characterization of those provisions as unfair and overly incursive.[37]

[81] In effect, the Professors' Complaint appears to assert that the Judge deliberately or wilfully refused to apply s. 276. The Judge submits that the public opprobrium attached to that particular assertion forms a significant part of the reason why his removal from office is at issue. He seeks a ruling from the Committee that would temper the public's reaction to his conduct.

[82] It should be noted that the Notice of Allegations does not include an allegation that the Judge wilfully refused to apply the law. Similarly, the letter of complaint from the Minister of Justice and Solicitor General for Alberta, which underpins the Allegations before this Committee, makes no such assertion.

[83] We accept that if there were evidence that the Judge wilfully refused to apply the law, as opposed to possibly erring in his application of the law, it could form the basis of an allegation of misconduct against him. However, we do not see, in the evidence before us, any basis for concluding that the Judge wilfully refused to apply the law.

---

[36] *Wagar* ABCA, *supra* note 2, para. 4.
[37] Agreed Statement of Facts, Exhibit E1, p. 5.

[84] As to the issue of whether the Judge applied the law correctly or not, we do not consider it appropriate or necessary to second-guess the Court of Appeal. Whether the Judge was correct or incorrect in his application of the law is not at issue in this inquiry. In the Marshall Inquiry report, the majority of the Committee noted that mere errors of law are not the proper subject of an inquiry under s. 65 of the *Judges Act*:

> In his classic work, *Judges on Trial*, Professor Shetreet defined the test when Parliament would interfere to remove a judge. He said at page 272:
>
> Unless it can be attributed to improper motives or to a decay of mental power, a mistake in fact or in law or any error of judgment will not justify the interference of Parliament. These matters are within the province of appellate courts; and Parliament will not assume the role of a court of appeal.[38]

[85] The gravamen of Allegation 1 has nothing to do with whether the Judge correctly or incorrectly applied the law. It has to do with whether he demonstrated antipathy for the law and the values which it protects and promotes, regardless of whether he applied it correctly.

[86] Generally, judges refrain from commenting on the merits or wisdom of laws enacted by Parliament or the provincial legislatures. This restraint reflects the role accorded by our Constitution to courts in relation to Parliament and the legislatures. Nevertheless, it is an important principle that judges are permitted to criticize the law in certain contexts. As the Honourable J.O. Wilson, wrote, quoting Chief Justice Culliton of Saskatchewan at a judges' seminar:

> […] it is the writer's view that a judge should be very hesitant in expressing a critical view as to the policy or purpose of legislation. In this area it may be well to remember the words of Earl Loreburn, L.C., when speaking for the Privy Council, in *Attorney General for Ontario v. Attorney General for Canada,* [1912] A.C. 571, he said. at page 583:
>
> 'A court of law has nothing to do with the Canadian Act of Parliament, lawfully passed except to give it effect according to its tenor.'

---

[38] *Report to the Canadian Judicial Council of the Inquiry Committee Established Pursuant to Subsection 63(1) of the Judges Act at the Request of the Attorney General of Nova Scotia* (August 1990), Majority Report, p. 25 [Marshall Inquiry, Majority Report].

> This does not mean, of course, that a judge is not entitled to point out that an Act has failed to accomplish what appears to be its purpose or that there appears to have been a vital omission in its drafting.[39]

[87] Further, in the modern context, judges are obliged to make judgments about the constitutionality of legislation. Doing so often requires judges to comment on—and sometimes criticize—the purposes of legislation, the policies behind legislation, the means chosen to implement legislation, and the effects of legislation. The Constitution imposes the duty of constitutional adjudication on judges, and they must have a corresponding freedom to criticize legislation when, in their judgment, it is necessary to do so.

[88] In our view, Justice Camp's comments about s. 276 of the *Criminal Code* are far removed from the above examples of permissible criticism. His comments were gratuitous and stemmed from a limited understanding of what he was so quick to criticize. Moreover, his criticisms were not based on thoughtful analysis nor even any analysis at all. Rather, they arose from his view that s. 276 was a product of "contemporary thinking" and, consequently, is "very, very incursive" and unfair. It does not appear that the Judge considered it important that the Supreme Court of Canada had ruled that s. 276 met a constitutional standard of fairness in *Darrach*.[40] While we accept the principle that judges are permitted to criticize legislation, we do not find that Justice Camp's criticism of s. 276 was motivated by appropriate or proper considerations. His comments showed disdain for the law.

[89] This is not a case like *Pintar*[41] relied on by Judge's counsel as an example of legitimate judicial criticism of legislation. The criticism levelled in *Pintar* by Moldaver J.A. (as he then was) against the self-defence provisions of the *Code* had nothing to do with the values underlying those provisions and everything to do with the well-known and widely accepted fact that the provisions were impossible to reconcile, led to prolix and confusing charges and the development of competing lines of authority across Canada.

---

[39] The Hon. J.O. Wilson, *A Book for Judges*, Written at the Request of the Canadian Judicial Council, 1980, p. 112.
[40] *Supra* note 15.
[41] *Supra* note 34.

In other words, the judicial criticism in *Pintar* was about what Earl Loreburn L.C. referred to as legislation failing "to accomplish what appears to be its purpose."

[90] Accordingly, we conclude that Justice Camp's comments under Allegation 1 crossed the line from legitimate criticism into misconduct.

B. Allegation 2

[91] Allegation 2 reads as follows:

> **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:**
>
> **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).**
>
> **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)**

[92] At the hearing, the Committee corrected the text of Allegation 2(b). In its original form (cited above), it was a summary of Justice Camp's remarks. The Committee concluded that the summary was not accurate and altered the meaning of what the Judge had actually said. The Committee informed Justice Camp and Presenting Counsel that the full quotation should be the basis of the Allegation, rather than its summary. The full quotation reads as follows:

> […] 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?[42]

i. Justice Camp's Evidence and Submissions

[93] In Justice Camp's examination in chief, he generally acknowledged that he engaged in stereotypical or biased thinking and relied on flawed assumptions in connection with the statements set out in Allegation 2 (with the exception of Allegation 2(f)).

[94] With respect to Allegation 2(a), he testified:

> […] that can only have been the product of deep-rooted, unrecognized prejudice toward the rape myth that women who don't take the first opportunity to report are lying.[43]

[95] With respect Allegation 2(b), Justice Camp testified:

> [i]t was inappropriate. The full version of that is perhaps not all that controversial. I still wish I hadn't said it.[44]

[96] With respect to Allegations 2(c), (d) and (e), Justice Camp testified:

> […] those were based on unrecognized prejudices for which I am deeply sorry.[45]

[97] With respect to Allegation 2(f), Justice Camp testified:

> I don't believe that anything I said, read in context, read properly, suggested that her character would make it more likely that she consented to sex. My

[42] *Wagar* Trial Transcript, p. 322, lines 21-24.
[43] Inquiry Hearing Transcript, Vol. 5, Sept. 9, 2016, p. 268, lines 7-10.
[44] Inquiry Hearing Transcript, Vol. 5, Sept. 9, 2016, p. 268, lines 13-15.
[45] Inquiry Hearing Transcript, Vol. 5, Sept. 9, 2016, p. 268, lines 25-26.

> comments regarding her morality were limited to the fact that she had committed crimes of dishonesty.[46]

[98] In cross-examination, Justice Camp confirmed his evidence that, with the exception of Allegation 2(f), he accepted that his comments were a product of stereotypical or biased thinking. With respect to Allegation 2(f), he related his comments to making a credibility assessment.

[99] In written closing argument, Judge's counsel submitted that Justice Camp agreed that the comments set out in Allegation 2 "were insensitive and inappropriate and in some cases evinced unconscious bias on his part",[47] but denied that he engaged in "deliberately biased reasoning."[48]

ii. Committee's Findings with respect to Allegation 2(a)

[100] In his written closing submissions with respect to Allegation 2(a), Judge's counsel quoted more fully from the exchange between Crown counsel and the Judge, in which Justice Camp asked:

> […] can I look at what people say happened afterwards, affection shown afterwards? Never mind whether she [the complainant] abused the first opportunity to report. I understand that that is – no longer contemporarily relevant. But am I allowed to look at the evidence of third parties and the accused who say she seemed affectionate [towards the accused]?[49]

[101] Judge's counsel then submitted:

> 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.[50]

---

[46] Inquiry Hearing Transcript, Vol. 5, Sept. 9, 2016, p. 268, line 26, p. 269, lines 1-4.
[47] Written Closing Submissions of Justice Camp, p. 19.
[48] Written Closing Submissions of Justice Camp, p. 19.
[49] Written Closing Submissions of Justice Camp, p. 20.
[50] Written Closing Submissions of Justice Camp, p. 19.

[102] We conclude that this submission misses the point. By characterizing the issue of whether or not the complainant "abused" the first opportunity to report as "no longer contemporarily relevant", Justice Camp's comments share the same theme as his comment in Allegation 1(b) (which derisively attributes the limitations in s. 276 to "contemporary thinking") and with his comment in Allegation 2(c) (that the recent complaint doctrine was "followed by every civilized nation for thousands of years" and "had its reasons" although "at the moment it's not the law").[51] His comment in Allegation 2(a) is also of a piece with his comment to Crown counsel (discussed in Allegation 4 below), when she characterized the abrogation of the recent complaint doctrine as one of the legal developments designed to set aside an "antiquated way of thinking",[52] and he interjected, "I hope you don't live too long, Ms. Mograbee."[53]

[103] The doctrine of recent complaint was a common law evidentiary inference based on a discredited stereotype and myth that women who are sexually assaulted will naturally speak out about their experience at the first opportunity. Under the former doctrine, female complainants (rape was historically a gendered crime that could only be committed by a man against a woman) could be cross-examined on their failure to make a timely complaint and an adverse inference could be drawn regarding their credibility. Parliament removed the doctrine of recent complaint from our law in 1983.[54] In other words, the doctrine has not been part of Canadian law for over thirty years. Moreover, the Supreme Court of Canada held in *R v D. D.*, that adverse inferences as to credibility, premised on the mere fact that a complainant failed to "raise an immediate 'hue and cry'", constitute an error of law.[55]

[104] When Justice Camp's various comments are read together, an underlying and unifying theme reveals itself, namely that he regarded the evolution of the law of sexual assault (which was designed to rid the law of discredited sexist stereotypes and myths) as misguided and as a product of what he dismissed as "contemporary thinking". We do

---

[51] *Wagar* Trial Transcript, p. 394, lines 35-38.
[52] *Wagar* Trial Transcript, p. 395, line 3.
[53] *Wagar* Trial Transcript, p. 395, line 6.
[54] Benedet Report, pp. 8 and 21.
[55] [2000] 2 S.C.R. 275, paras. 60-63.

not accept that Allegation 2(a) is not evidence of biased thinking on his part. It clearly is part and parcel of his resistance to changes in the law meant to protect vulnerable witnesses, to promote women's equality, and to bring integrity to the way in which sexual assault cases are dealt with by the justice system. Taken alone, the various comments might be seen as merely an unfortunate way of expressing himself, but taken in the context of his other related utterances, it is clear that Justice Camp held a bias, whether conscious or unconscious, in the form of an antipathy towards the present laws governing sexual assault trials.

iii. Committee's Findings with respect to Allegation 2(b)

[105] With respect to Allegation 2(b), Judge's counsel submitted that Justice Camp was simply "saying that it was possible the complainant and the accused, who were both highly intoxicated, might have agreed to sex despite meeting only recently."[56] We accept that the Judge was essentially noting that people generally – both men and women – tend to be less inhibited when intoxicated than when not intoxicated. As such, we conclude that, the comments in Allegation 2(b) did not reflect a rape myth or stereotypical thinking about women intending to signal their sexual availability by drinking alcohol.

iv. Committee's Findings with respect to Allegation 2(c)

[106] With respect to Allegation 2(c), in written closing submissions, Judge's counsel quoted from the exchange between Justice Camp and Crown counsel as follows:

> 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 [*sic*], as I understand it,

[56] Written Closing Submissions of Justice Camp, p. 21.

> 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 --[57]

[107] Judge's counsel submitted that Crown counsel had been trying to give the abrogation of the recent complaint doctrine "a wider implication than is supported by the case law"[58] and that Justice Camp "correctly explained to the Crown that the law of recent complaint does not prevent judges from considering what the complainant said during the act."[59] He argued that Justice Camp recognized that "failure to make a timely complaint is irrelevant."[60] He submitted that, "While Justice Camp's statement [in Allegation 2(c)] was insensitive, and an unnecessary observation, it is not evidence of deliberately biased thinking".[61]

[108] The exchange cited above was preceded by Justice Camp asking the Crown whether there was evidence that the complainant had moved away from the accused during the alleged sexual assault. The Crown asserted that the complainant was under no obligation to "move away" from him, effectively arguing that the Crown had no onus to lead evidence of the complainant's resistance. As we read the exchange, the Crown was attempting to draw a parallel between the abrogation of the recent complaint doctrine and the introduction of the legal precept that a woman is not bound to resist or be taken as demonstrating consent by her acquiescence. The Crown was pointing out that both of these developments in sexual assault law stem from the rejection of myths about how women who are "real" victims of sexual assault will or should behave. The Judge's reaction to the Crown's argument was to disparage the abrogation of the doctrine of recent complaint, which was not a live issue before him. Judge's counsel submitted that "it was more excusable for Justice Camp to have the doctrine of recent complaint on the brain than it otherwise would be"[62] because Crown counsel had led evidence of the

---

[57] *Wagar* Trial Transcript, p. 394, lines 28-41, p. 395, lines 2-4.
[58] Written Closing Submissions of Justice Camp, p. 21.
[59] Written Closing Submissions of Justice Camp, p. 21.
[60] Written Closing Submissions of Justice Camp, p. 21.
[61] Written Closing Submissions of Justice Camp, p. 21.
[62] Written Closing Submissions of Justice Camp, p. 21.

complainant's first statements to staff at the hospital and to the police. While this might explain why Justice Camp had the recent complaint doctrine "on the brain", it does not excuse the disparaging nature of his remarks. Again, we find that in their context, and in the context of the Judge's other related utterances, his bias, whether conscious or not, led him to express disdain for the law in its current state.

v. Committee's Findings with respect to Allegation 2(d)

[109] Allegation 2(d) references various comments made by Justice Camp during the evidentiary part of the trial, during submissions, and in his Reasons for Judgment, said to reflect a victim-blaming attitude and a view that the complainant's failure to resist the accused bore on the issue of consent and on the complainant's credibility.

[110] In his written closing submissions, Judge's counsel argued that a fair reading of the Judge's Reasons for Judgment shows that Justice Camp rejected the complainant's evidence for valid reasons based on internal inconsistencies in her evidence, a prior inconsistent statement to police, and the evidence of two independent witnesses who corroborated elements of the accused's evidence. He argued: "A fair reading of the record shows that Justice Camp did not disbelieve the complainant because she failed to fight off an attacker."[63]

[111] The impugned comments of the Judge during the *Wagar* Trial in relation to this Allegation read as follows:

> THE COURT: Well, she doesn't have to do any of these things. She doesn't have to say don't lock the door. She can take her chances. Foolishly she could do that. If she sees the door being locked, she's not a complete idiot, she knows what's coming next.
>
> In our law she doesn't have to say unlock the door I'm getting out. She can take her chances, perhaps in the hope of getting him into trouble. Who knows what (INDISCERNIBLE) would be in those circumstances. But am I not, as a guide to answering the question in general, not as a final answer, but as part of the answer -- [64]
>
> […]

[63] Written Closing Submissions of Justice Camp, p. 22.
[64] *Wagar* Trial Transcript, p. 375, lines 27-35.

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 COURT: I hope you don't live too long, Ms. Mograbee.

MS. MOGRABEE: It's the same line of thinking that would be required to find that because she didn't act a certain way she would have consented. And again, not everybody's going to act

THE COURT: Some people are terrified, some people aren't assertive, I'll grant you all that.

MS. MOGRABEE: -- she said -- right. And she -- she was much smaller than him, she didn't know him, she said she was afraid.

THE COURT: Is there any -- well is there any evidence that -- that he frightened her. She -- she said she was smaller than him and that she was frightened.

MS. MOGRABEE: She said she was scared. That -- that was her evidence.

THE COURT: But did he threaten her at all? Is there any basis for her fear? I don't recall any evidence to that effect?

MS. MOGRABEE: Well, the circumstances --

THE COURT: Any threats?

MS. MOGRABEE: -- I would submit are reasonable, such that --

THE COURT: Why?

MS. MOGRABEE: -- if you find that -- you could find that and it makes sense that --

THE COURT: Did he have a weapon?

MS. MOGRABEE: -- she was scared because he's a stranger to her, she's locked in the bathroom with him, she is much smaller

THE COURT: A locking that she -- that she made no complaint about.

MS. MOGRABEE: Again, she's not required to do that.

THE COURT: Well, if she's frightened you'd think she would. Did she get up, did she -- did she shout?

MS. MOGRABEE: If you look at *Livermore*, which is another case that--

THE COURT: Yeah.

MS. MOGRABEE: -- you have before you, it's on that point.

THE COURT: Well --

MS. MOGRABEE: There are many --

THE COURT: -- do I -- do I test her fear? It's easy for her to say it, but are there any -- any reasons for it and are there -- did she show any signs of it? And did she do anything about it? Or do I look at those and say, listen, you say you're frightened but I just don't see -- see that it's true. If you were --

MS. MOGRABEE: Well, you can find --

THE COURT: -- frightened you could have screamed.

MS. MOGRABEE: -- you can find that, but I would say that the law doesn't require you to -- it -- it -- it would be an error in law for you to say that she should have done these things and didn't, and therefore like -- was likely to have consented.

THE COURT: No. Well, I'm dealing just with the fear now.

MS. MOGRABEE: Yeah.

THE COURT: Was there any reason for her to be frightened and is there any indication that she was frightened?

MS. MOGRABEE: She said that she was afraid so there's some evidence there, and the circumstances under which this takes place.

THE COURT: Well what were the circumstances?

MS. MOGRABEE: The Crown would submit -- well --

THE COURT: There were people 10 feet away.

MS. MOGRABEE: -- she's in the bathroom, the door is locked and like I say.

THE COURT: So she screams.

MS. MOGRABEE: She didn't do that.

THE COURT: No, I know. So --

MS. MOGRABEE: She's not required to do that.

> THE COURT: No, she's not required to but if she claims fear, she's got to -- surely I'm -- I'm entitled to test that proposition?
>
> MS. MOGRABEE: Well again, if you look at *Livermore* --
>
> THE COURT: Yeah.
>
> MS. MOGRABEE: -- where you have a similar situation, where there was not all these things, there wasn't you know, this cry and hue that -- that you're referring to, you know, crying out for help. The law is very clear in saying that that is not a basis upon which to find that the complainant consented. And again you'll see that throughout the case law and particularly in those circumstances you'll see it in *Livermore*.
>
> THE COURT: Well *Livermore* was very different. She said that she struggled and fought -- fought him away.
>
> MS. MOGRABEE: Yes, but there was conduct afterwards as well.
>
> THE COURT: Well we haven't got to the conduct afterwards just yet.[65]
>
> […]
>
> [REASONS FOR JUDGMENT]
>
> THE COURT: -- the complainant's version. She certainly had the ability to swear at men. For a person who didn't want have sex, she spends a long time in the shower with the accused and went through a variety of sexual activities.[66]
>
> […]
>
> [THE COURT] I cannot discard the fact that she only really seemed to get angry when the brother humiliated her, and she seemed far more upset about that and reacted to that, whereas it doesn't seem that she reacted at all after the accused had had, on her version, unwanted sex with her.[67]

[112] In the initial passage cited, during an exchange with Crown counsel, the Judge appears to suggest that the complainant's failure to react when the accused stepped into the bathroom and locked the door is evidence from which he could infer consent. He recognized that, "In our law she doesn't have to say unlock the door, I am getting out", but then asserted: "She can take her chances, perhaps in the hope of getting him into

---

[65] *Wagar* Trial Transcript, pp. 395-97.
[66] *Wagar* Trial Transcript, p. 451, lines 2-4.
[67] *Wagar* Trial Transcript, p. 451, lines 8-11.

trouble." That is a peculiar way of framing the issue, implying that if she was not consenting, the only explanation for the complainant not resisting or objecting was so she could get the accused in trouble. We conclude that, in this exchange, the Judge was advancing a discredited view that if a woman is not actively resisting or vocally objecting, she is either consenting or has some oblique motive to lure her assailant into a trap.

[113] In the second passage, the Judge questions the veracity of the complainant's evidence that she was scared based on the fact that she did not shout or scream while in the bathroom. He again refers to her lack of reaction when the accused locked the door, asserting that she made no complaint about it and "if [she] were frightened [she] could have screamed."

[114] In his Reasons for Judgment, the Judge repeated the theme that "The complainant had the ability to swear at men" and yet did not react with anger or "at all after the accused had had, on her version, unwanted sex with her." Similarly, the Judge stated that the complainant "hasn't explained why she allowed the sex to happen if she didn't want it"[68] and remarked, "she was quite capable of asserting herself with other men when they did things she didn't like."[69] The Judge continued in this vein a moment later, stating: "Seems to me incongruous that she would have the courage to kick out and hit somebody who was videotaping her, but not the accused in the shower."[70]

[115] The Judge was clearly evaluating the evidence before him by measuring it against a stereotypical view of how a woman should react to a sexual assault, or the threat of one. Throughout his Reasons, the Judge's numerous comments reflect the discredited rape myth that a woman can always resist a sexual assault if she really wants to.

[116] Secondly, Justice Camp's rumination to the effect that the complainant's failure to object (when the accused entered the bathroom) was "foolish" and that she's not a "total idiot" implies that a woman who does not actively resist when confronted by the prospect

[68] *Wagar* Trial Transcript, p. 437, line 9.
[69] *Wagar* Trial Transcript, p. 437, lines 10-11.
[70] *Wagar* Trial Transcript, p. 438, lines 32-33.

of a sexual assault is responsible for her own victimization. His comments reflect a classic victim-blaming attitude.

[117] Thirdly, Justice Camp's suggestion that the complainant's failure to object or resist when the accused locked the bathroom door may have meant that she had an oblique motive "to get [the accused] in trouble" reveals another discriminatory belief about women and sexual assault (namely that women frequently fabricate false allegations of rape as part of a scheme to get men in trouble). That remark colours and gives context to the other impugned remarks of the Judge that the complainant "spends a lot of time in the shower with the accused and went through a variety of sexual activities"[71] and that "it doesn't seem that she reacted at all after the accused had had, on her version, unwanted sex with her".[72] Those comments are, in context, statements revealing a gender-biased and myth-based approach to assessing the evidence.

vi. Committee's Findings with respect to Allegation 2(e)

[118] In his evidence, the Judge admitted his comments in 2(e) in which he hypothesized that the complainant was seeking revenge against the accused were based on "unrecognized prejudice".[73] However, his counsel's written submissions contended that the scenario he hypothesized was rooted in the evidence that the complainant harboured an animus against the accused's brother, citing what she said in her police statement and testified to at Trial. Judge's counsel asserted in his closing submissions: "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."[74]

[119] Justice Camp first posited a revenge scenario during his exchange with Crown counsel about the complainant's failure to react when the accused locked the bathroom door. That exchange occurred in relation to a point in the Trial before the evidence had revealed any basis for the complainant to be angry at the accused's brother or the accused. Therefore, there was, at that stage, no basis in the evidence for the Judge to

[71] *Wagar* Trial Transcript, p. 451, lines 3-4.
[72] *Wagar* Trial Transcript, p. 451, lines 10-11.
[73] Inquiry Hearing Transcript, Vol. 5, Sept. 9, 2016, p. 268, line 25.
[74] Written Closing Submissions of Justice Camp, p. 22.

hypothesize a narrative involving the complainant acting out of revenge to trap the accused. That scenario could only have been conjured up by the Judge's own biases and was not based on any evidence.

[120] The Judge raised a revenge scenario for the second time during the Crown's closing submissions related to evidence of what happened in the aftermath of the alleged sexual assault.[75] There was, at that point in the Trial, some evidentiary basis for positing a scenario in which the complainant may have consented to the sexual activity but later falsely claimed that it was non-consensual. There was evidence that the complainant was hurt and upset because she believed the accused had sex with Ms. Porter after he left the bathroom. There was evidence that she was angry at the accused's brother because he derided her for having sex with the accused, that he said it was a game, that he had put the accused up to having sex with her, and that he threatened to shame her for it among their mutual friends. Although that evidence could be taken as the foundation for the Judge pursuing the issue with Crown counsel in closing submissions, the fact that he had earlier hypothesized that the complainant may have been acting out of revenge to get the accused in trouble, before any evidence was led to establish a potential motive for revenge, is troubling.

[121] In her report, Professor Benedet draws an important distinction between discredited myths and legitimate defences that an allegation of sexual assault was fabricated:

> Many of the discriminatory beliefs outlined above in Section 3 can be described as "myths" when they are ascribed to all or most women, i.e. the idea that women routinely lie about being raped. However, a criminal trial is about particular individuals and events, and it is still open to the defence to argue that in this one case, the complainant did bring a false complaint for some collateral motive. This was the defence theory in *R. v. Wagar,* namely that the complainant fabricated her claim out of anger at the accused and his brother. It is the responsibility of the trial judge to be sure that his or her findings of fact as to such theories are based on the evidence and are not bolstered by the explicit or implicit acceptance of rape myths.[76]

---

[75] *Wagar* Trial Transcript, p. 414, lines 11-18.
[76] Benedet Report, p. 22.

[122] In the present case, the Judge's willingness to ascribe a revenge motive to the complainant before any cogent evidentiary basis for doing so emerged, supports a conclusion (or a reasonable apprehension) that any findings he made were at least bolstered by "the explicit or implicit acceptance of rape myths," that is, that women routinely lie about being raped and do so to exact revenge.

[123] Thus, we do not accept that the Judge's questions about revenge were based solely on the evidence, but find that they were based on the myth identified in *Seaboyer*[77] that women falsely claim they have been sexually assaulted to seek revenge. The revenge idea was clearly in the Judge's mind independent of the evidence. That being said, because there was a basis in the evidence for the Judge's question of the Crown at page 414 of the Trial transcript, we would not wish to be taken as finding that asking that second question was misconduct. The difficulty is, however, that the Judge's apparent inclination towards treating revenge as a common explanation for a woman complaining of sexual assault compromised the integrity of the fact-finding process.

[124] In sum, we find that Allegation 2(e) is made out in part.

vii. Committee's Findings with respect to Allegation 2(f)

[125] In his evidence and in his submissions, the Judge contested the Allegation that his adverse comments on the complainant's character went beyond assessing her credibility to denigrating her character and to suggesting her character would make it more likely that she consented to sexual relations. The passages from the Trial transcript cited in support of the Allegation read as follows:

> [THE COURT] […] 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.[78]
>
> […]
>
> […] 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

[77] *Supra* note 13.
[78] *Wagar* Trial Transcript, p. 353, lines 29-32.

> 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. […][79]

[126] In his evidence in chief, the Judge testified as follows with respect to Allegation 2(f):

> […] (f) is on a slightly different footing […] (f), I don't believe that anything I said read in context, read properly, suggested that her character would make it more likely that she consented to sex. My comments regarding her morality were limited to the fact that she had committed crimes of dishonesty.[80]

[127] The Judge elaborated on that somewhat in cross-examination:

> Q And with respect to (f), you did not agree with that. I believe that you were referring to her honesty in that sense as opposed to denigrating the complainant, suggesting that her character would make it more likely. Is your evidence there, Justice Camp, that you weren't doing that, but that you were questioning her honesty?
>
> A I used the -- the phrase that the Alberta Appeal Court uses, "unsavory witness". It refers to witnesses who have records of crimes involving dishonesty. I believe that the quote in full was that the complainant and the accused and one of the witnesses were all unsavory witnesses in the sense that they had records for crimes involving dishonesty, and I had -- making a credibility assessment was therefore difficult.[81]

[128] In his written closing submissions, the Judge's counsel argued:

> 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

---

[79] *Wagar* Trial Transcript, p. 431, lines 26-39.
[80] Inquiry Hearing Transcript, Vol. 5, Sept. 9, 2016, p. 268, lines 23, 26, p. 269, lines 1-4.
[81] Inquiry Hearing Transcript, Vol. 5, Sept. 9, 2016, p. 316, lines 17-26, p. 317, lines 1-5.

> 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) invoked by the Supreme Court of Canada in *Vetrovec* cases, to describe Wagar and the complainant. This cannot be disqualifying misconduct.[82]

[129] We agree that judges must be free to speak openly and even bluntly about the credibility of witnesses, including sexual assault complainants.

[130] We also accept the Judge's denial that his remarks were meant to suggest that the complainant's character would make her more likely to consent to sexual activity, as the record does not bear out this aspect of Allegation 2(f).

[131] We find, however, that Justice Camp's remarks went beyond an assessment of credibility and denigrated the complainant and the other witnesses, including the accused. His reference to the complainant and accused as "amoral people" was not simply a comment on their credibility; rather, it was a much broader condemnation of them. In a similar vein, the Judge's criticism of the complainant that "it didn't cross her mind that she should work to earn money to buy these things", went beyond an assessment of her credibility to make a personal criticism of her, which had nothing to do with case before him.

[132] The complainant had testified that she was poor, was living on the street, and was struggling with drug and alcohol addictions. In our view, the Judge's unnecessary condemnations of the complainant would convey to a reasonable person that such experiences make people amoral or are equivalent to amorality. His comments reflect a prejudicial attitude towards those who are socio-economically marginalized and vulnerable, and send the message that they are less deserving of respect than other Canadians. While the Judge later commented that the complainant was entitled to the full protection of the law despite her criminal record and addiction problems,[83] this statement does little to attenuate the harshness of his earlier comments, which, in our view, constituted misconduct.

---

[82] Written Closing Submissions of Justice Camp, p. 22.
[83] *Wagar* Trial Transcript, p. 432, lines 5-7.

[133] Accordingly, we find that Allegation 2 is proven for particulars (a), (c), (d), (e) in part, and (f) in part.

C. Allegation 3

[134] Allegation 3 is concerned with questions the Judge asked of the complainant and comments he subsequently made during an exchange with the Crown.

[135] Allegation 3 reads as follows:

> **In the course of the Trial, the Judge asked questions of the complainant witness reflecting reliance on discredited, stereotypical assumptions about how someone confronted 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).**

[136] At the Trial, after the complainant finished testifying in chief, in cross-examination, and in re-direct examination, the Judge asked her a series of questions.

[137] The context of the questions was as follows:

> Q And the bruise, as I understand it, was in the middle of your back and just above your --
>
> A Yes.
>
> Q -- the tail bone. So you were pressed up against one of the taps on the one side?
>
> A Yeah. The -- the faucet part sticking out of the bowl. So there --
>
> Q Yeah.
>
> A -- so there's the -- the bowl and then there's the tap hanging over the bowl. So I'm sitting --
>
> Q So there are two taps --

A -- on the coun--

Q -- but one -- one spout coming out.

A And it's the one spout.

Q All right. So you were in the middle with your back against the spout.

A Yes.

Q So your buttocks would have been in the basin.

A Yes.

Q All right.

A Yeah.

Q That means your buttocks were lower than your thighs because your bottom was hanging down into the basin.

A Yes.

Q So the lip of the basin would have been between you -- between your vagina and the accused, the accused's penis.

A Yeah, but he was licking my vagina --

Q All right.

A -- at that point.

Q But when -- when he was using -- when he was trying to insert his penis, your bottom was down in the basin. Or am I wrong?

A My -- my vagina was not in the bowl of the basin when he was having intercourse with me.

Q. All right. Which then leads me to the question: Why not – why didn't you just sink your bottom into the basin so he couldn't penetrate you?

A. I was drunk.

Q. And when your ankles were held together by your jeans, your skinny jeans, why couldn't you just keep your knees together?

A. (NO VERBAL RESPONSE)

Q. You're shaking your head.

A. I don't know.[84]

[84] *Wagar* Trial Transcript, p. 118, lines 9-41, p. 119, lines 2-19.

[138] Later, during closing submissions at the Trial, the Judge made the following comments to Crown counsel:

> And -- and remind me, is it her evidence to the effect that she says, no, or that she moves away. Remember she's still got her pants on. So her legs can't open very widely, she's sitting in an incomfortable -- uncomfortable position. If she skews her pelvis slightly she can avoid him. Does -- or is there -- does she help him?[85]

i. The Judge's Evidence and Submissions

[139] During his evidence at the inquiry hearing, the Judge was asked in direct examination about his opinion of his questions and his comment with regard to Allegation 3. He responded:

> Mr. Addario, leaving to one side the question of whether -- the issue of whether questions of that type should have been asked, simply the terms in which I asked the questions, they are reflective of, what I eventually came to realize, a deep-rooted, unconscious bias. Intellectually, I thought I understood all this. The only way I can explain the way in which I asked those questions is that I, at some level, held onto the myth that women were supposed to fight off aggression.[86]

[140] In cross-examination, he was asked whether in asking those questions and making that comment he "had reliance on the resistance myth". He responded as follows:

> Ms. Hickey, at an intellectual level. I had read *Ewanchuk*. I had read *Seaboyer*. I had read Section 271 to 278, 279 of the Criminal Code. I thought I understood at an intellectual level the issues surrounding mythical thinking.
>
> I came to realize, with the help of two women to whom I owe an enormous debt of gratitude, that at a deeper, instinctive level, my thinking was biased and prejudiced. But that's why I expressed it that way. I like to think that -- no, I'll leave it. I'll leave it there, Ms. Hickey.[87]

[141] In his Notice of Response, the Judge explained that he asked those questions in the course of pressing some legal issues. When Presenting Counsel asked him why he chose the words he used, he responded as follows:

---

[85] *Wagar* Trial Transcript, p. 394, lines 10-14.
[86] Inquiry Hearing Transcript, Vol. 5, Sept. 9, 2016, p. 269, lines 9-17.
[87] Inquiry Hearing Transcript, Vol. 5, Sept. 9, 2016, p. 318, lines 1-11.

> A Because at a visceral level, my thinking was infected. That's the only explanation that I can -- I can offer to myself, and that's more important than the explanation I offer to -- to this forum. That's the only explanation that I can offer to myself, that I -- Ms. Hickey, I'm not an inarticulate man. Why did I use those words if I could have chosen others?
>
> Q That's my question to you, sir.
>
> A And my answer, Ms. Hickey, the best I can give you, indeed, the only one I can give you, is that after prolonged mentoring, guidance, and self -- self-analysis doesn't begin to describe the process that I went through over the months. The way that I phrased the questions was because at some level that I wasn't aware of, I was subject to prejudice and what -- the Afrikaans have an expression, *Wat die hart van vol is, loop die mond van oor*. What the heart is full of comes out of your mouth. And that is the best explanation I can give you.
>
> Q But what prejudice would lead you to choose those words?
>
> A Oh, the prejudice that all women -- the myth that women all -- all behave the same way, and they should resist.[88]

[142] The Judge agreed with the proposition that he did not need sensitivity training to know "that the kind of language that [he] used […] is hurtful, it's humiliating, it's crass, and it can only revictimize a complainant […]".[89]

[143] Justice Camp acknowledged that he later repeated this hurtful and humiliating language in his Reasons for Judgment, even after hearing the Crown's submissions and reviewing the Trial transcript, and with the benefit of a variety of cases from the Crown to consider in terms of the law of sexual assault, before he prepared his Reasons.

[144] Justice Camp agreed that he never really thought about his use of those words until the media articles appeared in the paper. He agreed that it was "a problem" for a judge "not to recognize the inappropriateness of that language at the time it[] [was] being used[.]"[90]

[145] In his written closing submissions, however, the Judge advanced several arguments in defence of his questions of the complainant. He argued that while the

---

[88] Inquiry Hearing Transcript, Vol. 5, Sept. 9, 2016, p. 318, lines 18-26, p. 319, lines 1-14.
[89] Inquiry Hearing Transcript, Vol. 5, Sept. 9, 2016, p. 319, lines 17-21.
[90] Inquiry Hearing Transcript, Vol. 5, Sept. 9, 2016, p. 320, lines 21-23.

questions were expressed in a manner that was “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.”[91]

[146] The Judge’s counsel submitted that “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 judge had to grapple.”[92]

[147] In his submissions, the Judge relied on the following passage from *R. v. Ewanchuk*:

> 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.[93]

[148] The Judge contended that the requirement that consent must be freely given, not prompted by force, fear or threats, requires an examination of whether those conditions vitiating consent were present. He submitted that an exploration of the complainant's conduct and words was a legitimate exercise in the context of determining whether the Crown had established the *actus reus* (wrongful act) of sexual assault, which requires proof, beyond a reasonable doubt, of lack of consent.

[149] The Judge also pointed out that the Crown must prove the *mens rea* (mental element) of the offence, which includes knowing of, or being reckless of or willfully blind to, the complainant’s lack of consent. This meant that whether the accused was mistaken about the presence of consent was an issue as well, provided that, in accordance with

---

[91] Written Closing Submissions of Justice Camp, p. 23.
[92] Written Closing Submissions of Justice Camp, p. 23.
[93] [1999] 1 S.C.R. 330, para. 29 [*Ewanchuk*].

s. 273.2(b) the accused took reasonable steps in the circumstances known to him at the time to ascertain that the complainant was consenting.

[150] The Judge argued that given the issue of whether the complainant was acting from fear or force, it was open to him to ask her whether she actively participated, and if so, whether she did so out of fear.

[151] The Judge argued that even if he was satisfied the complainant acted out of force or fear, there was still an issue as to whether there was a reasonable doubt that the accused had an honest but mistaken belief in her consent. In written closing submissions, the Judge's counsel contended that because "the presence or absence of fear and the degree of the complainant's active participation were issues in play in this case",[94] and because counsel asked questions about them in examination and cross-examination, "it was open to the judge to ask whether the complainant was afraid and about her degree of active participation in the sex acts".[95] In other words, the Judge's counsel contended, the Judge was legitimately examining whether the complainant's apparent lack of resistance really amounted to cooperation and, therefore, consent to sex with the accused.

ii. Committee's Findings with respect to Allegation 3

[152] While the Judge's written submissions identify a basis upon which a sexual assault complainant could be questioned about her actions and words during the alleged assault, we are not satisfied that, in fact, Justice Camp's inquiries in this case rested on such a legitimate basis.

[153] First, the Judge's questions of the complainant were not about her fear or her cooperation. Rather, they were accusations that she had failed to resist or evade the accused's actions. The Judge did not ask if she opened her legs because she was afraid of the accused or if she raised herself out of the basin to make it easier for him to penetrate her. Rather, he asked why she couldn't just keep her knees together and why

[94] Written Closing Submissions of Justice Camp, p. 25.
[95] Written Closing Submissions of Justice Camp, p. 26.

she could not just sink her bottom down into the basin. His questions were framed in an almost rhetorical manner, suggesting that he was not seeking to obtain relevant evidence from the complainant but rather was trying to make a point – either that the complainant was to blame for the assault because of her lack of resistance or that her claim of non-consensual sex was not plausible because of her lack of effective resistance.

[154] Second, with regard to his question about why she couldn't just keep her knees together, the Judge already had evidence from the complainant (given in re-direct examination shortly before he asked the question) about why her knees were not together. In response to a question from Crown counsel, the complainant testified that the accused opened her legs with his hands. The question and answer read as follows:

> Q All right. And when your pants are still around your ankles during the time that he's having […] that's he's performing oral sex on you, how does he get between your legs?
>
> A He has -- he opens my legs with his hands.[96]

[155] It was, of course, open to the Judge to either accept or not accept that evidence, but we do not see how, in light of that evidence, his question of the complainant ("Why couldn't you just keep your knees together?") served any purpose other than to imply that she should have resisted the accused and was complicit for not having done so. We find that the two questions asked of the complainant are cut from the same cloth. They are not simply clumsily or insensitively worded questions designed to clarify cogent evidence on the issues of consent or honest but mistaken belief in consent; rather, they are implied rebukes to the complainant for not resisting.

[156] That conclusion is buttressed by the Judge's own evidence in the hearing. In chief, he said:

> […] The only way I can explain the way in which I asked those questions is that I, at some level, I held onto the myth that women were supposed to fight off aggression.[97]

[157] In cross-examination, he was asked:

---

[96] *Wagar* Trial Transcript, p. 111, lines 3-6.
[97] Inquiry Hearing Transcript, Vol. 5, Sept. 9, 2016, p. 269, lines 15-17.

> Q: But what prejudice would lead you to choose those words?
>
> A: Oh the prejudice that all women -- the myth that women all […] behave the same way, and they should resist.[98]

[158] There is a coherent pattern to his evidence relating to the questions he asked of the complainant and to the context in which he asked those questions -- namely, that the questions were rooted in stereotypical biased reasoning. There is, by contrast, no coherence in his written submission that his questions were asked in furtherance of a line of inquiry to probe legitimate legal issues with which he was confronted during the Trial.

[159] As to his comment to Crown counsel in Allegation 3(c) that "If she skews her pelvis slightly she can avoid him", we conclude that it similarly relies on his acceptance of the myth that "women all […] behave the same way, and they should resist." The Judge's question reads in full as follows:

> THE COURT: And -- and remind me, is it her evidence to the effect that she says, no, or that she moves away. Remember she's still got her pants on. So her legs can't open very widely, she's sitting in an incomfortable -- uncomfortable position. If she skews her pelvis slightly she can avoid him. Does -- or is there -- does she help him?[99]

[160] From that passage, it appears that the Judge conflated the evidence that the complainant did not resist the accused by "skewing her pelvis slightly" with the suggestion that she may have helped him. In our view, that emphasizes the point that the motivation behind the Judge's questions of the complainant and his comment on her lack of resistance was not to explore legitimate legal issues, but to give expression to his view that women should resist or be taken as consenting.

[161] What is particularly troubling about this aspect of the Judge's behaviour is that – even though he said he had read *Seaboyer*, *Ewanchuk*, and the *Criminal Code* provisions, and had "intellectually" understood the "issues around mythical thinking" – in questioning the complainant, he used a phrase akin to one used by a judge in 1989 and

---

[98] Inquiry Hearing Transcript, Vol. 5, Sept. 9, 2016, p. 269, lines 11-14.
[99] *Wagar* Trial Transcript, p. 394, lines 10-14.

highlighted by L'Heureux-Dubé J. (dissenting in part) in *Seaboyer* as a proto-typical example of a rape myth:

> Women who say no do not always mean no. It is not just a question of saying no, it is a question of how she says it, how she shows and makes it clear. If she does not want it *she has only to keep her legs shut* and she would not get it without force and there would be marks of force being used.[100]
>
> [Emphasis added]

[162] Justice Camp's reading of *Seaboyer* would also have acquainted him with some of the reasons why sexual assault survivors might not actively resist. In L'Heureux-Dubé J.'s judgment in *Seaboyer* she wrote:

> Women know that there is no response on their part that will assure their safety. The experience and knowledge of women is borne out by the *Canadian Urban Victimization Survey: Female Victims of Crime* (1985). At page 7 of the report the authors note:
>
> Sixty percent of those who tried reasoning with their attackers, and 60% of those who resisted actively by fighting or using weapon [*sic*] were injured. Every sexual assault incident is unique and so many factors are unknown (physical size of victims and offenders, verbal or physical threats, etc.) that no single course of action can be recommended unqualifiedly.[101]

[163] The Judge's blatant reliance on the resistance myth in the face of his professed familiarity with *Seaboyer* and *Ewanchuk* and his intellectual understanding of "issues around mythical thinking" is exacerbated by the fact that he repeated the questions he asked the complainant and her answers in his Reasons for Judgment, which were delivered over a month after the Trial ended and after he reviewed the transcript. Although he included the questions and answers in his Reasons, the Judge did not analyze them in light of the applicable law.

[164] Throughout his written submissions and in his evidence at the hearing, Justice Camp asserted that his comments and questions of the complainant revealed an ignorance "about the ways in which victims of abuse respond to trauma".[102] He testified

---

[100] *Supra* note 13, p. 660.
[101] *Supra* note 13, p. 652.
[102] Written Opening Submissions of Justice Camp, p. 12.

and submitted that his sessions with Dr. Haskell taught him "how trauma affects reaction and memory and about the neurological impact of trauma".[103] The gist of his evidence was that he now has a better understanding of why not all victims respond to violence with active resistance. Dr. Haskell confirmed in her evidence that she spent time with Justice Camp educating him about the neurobiology of fear and trauma. She testified that his knowledge gaps were consistent with those of other professionals in the justice system that she has trained.

[165] The Committee does not want to be taken to be saying that Justice Camp should be faulted for having gaps in his knowledge about the ways in which victims respond to sexual violence, or that asking questions which revealed those gaps amounted to judicial misconduct. The impropriety of his questions to the complainant stemmed not from understandable gaps in his knowledge. Judges cannot reasonably be expected to have expertise in every discipline (including neurobiology), which is precisely why expert witnesses are often called to assist the judicial reasoning process. The impropriety of Justice Camp's questions and comments stemmed from his adherence to rape myths that are rooted in gender bias and that were long ago discredited and denounced by the Supreme Court of Canada as having a discriminatory effect on women. Also, as Professor Benedet set out in her report, the major impetus of legislative reforms of sexual assault laws in Canada has been to rid the law of the pernicious impact of discriminatory rape myths.

[166] In his evidence before us, the Judge conceded that the questions he asked the complainant were hurtful, humiliating and crass and that "you don't need sensitivity training" to know that.

[167] Some insight into the direct impact of Justice Camp's remarks can be found in the evidence of the complainant at the inquiry:

> […] He made comments asking me why I didn't close my legs or keep my ankles together or put my ass in the sink. Like, what did he get out of asking me those kind of questions. Like, what did he expect me to say to something like that. I hate myself because of his words, and I felt judged. He made me

[103] Written Opening Submissions of Justice Camp, p. 12.

> hate myself, and he made me feel like I should have done something that I could -- that I was some kind of slut. I felt physically ill and dizzy, and I hoped I would've faint just so it would stop. I was so confused during the trial. […][104]

[168] We find that Allegation 3 is made out in respect of all its particulars. We do not accept that the Judge's conduct was simply use of "inappropriate and insensitive language" or merely reflective of a lack of understanding of the neurobiology of fear and trauma. Rather, we conclude that his conduct was motivated by his biased belief that women should resist—that they should "fight off aggression"—or be taken as having consented.

D. Allegation 4

[169] The fourth Allegation involved the Judge making a rude comment to Crown counsel during the Trial.

[170] Allegation 4 reads as follows:

> **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).**

[171] In dealing with this Allegation, it is important to contextualize the Judge's remark to Crown counsel: "I hope you do not live too long, Ms. Mograbee", because in our view, while the comment was directed at Crown counsel, it was not her, but rather the legal principle she was advancing, that the Judge was disparaging by his comment.

[172] The comment occurred during a colloquy between Crown counsel and the Judge about a complainant's "obligation" to resist or move out of the way after the Judge suggested to the Crown "if she [the complainant] skews her pelvis slightly she can avoid him".

---

[104] Inquiry Hearing Transcript, Vol. 1, Sept. 6, 2016, p. 52, lines 19-26, p. 53, lines 1-5.

[173] Crown counsel likened the principle that a complainant has no obligation to resist to the principle underlying the abrogation of the recent complaint doctrine in that both principles "get away from […] what […] anyone would think a person […] in that situation should do. How they should act."[105]

[174] The Judge responded by his comments about the recent complaint doctrine being "followed by every civilized legal system in the world for thousands of years", that it "had its reasons", and that it "didn't include the proposition that the complainant didn't have to indicate no in some way, now that's a different rule".[106]

[175] The Crown agreed with the Judge that it was a different rule but in effect argued that the presumptions underlying the two rules (i.e, that a "true" victim of sexual assault would not only resist her assailant forcefully but would also make an immediate complaint to someone after the incident) are a product of the same "antiquated thinking" about women's lack of veracity about sexual assault and what constitutes a "real" rape. It was to that argument by Crown counsel that the Judge responded with his impugned comment about hoping she did not live too long.

i. The Judge's Evidence and Submissions

[176] In his evidence, under direct examination, the Judge explained his comment as "in the form of banter".[107] It meant "'history repeats itself; the wheel turns'."[108] He said it was akin to "[h]istory never […] comes to an end; the pendulum swings",[109] but he conceded "a […] sexual assault trial was not the place for that kind of remark."[110]

[177] In cross-examination, the Judge agreed with the premise of the Allegation that he made a rude or derogatory comment in the course of disparaging a legal principle that Crown counsel was advancing.

---

[105] *Wagar* Trial Transcript, p. 394, lines 31-33.
[106] *Wagar* Trial Transcript, p. 394, lines 36-38.
[107] Inquiry Hearing Transcript, Vol. 5, Sept. 9, 2016, p. 269, lines 24-25.
[108] Inquiry Hearing Transcript, Vol. 5, Sept. 9, 2016, p. 269, lines 25-26.
[109] Inquiry Hearing Transcript, Vol. 5, Sept. 9, 2016, p. 270, lines 9-10.
[110] Inquiry Hearing Transcript, Vol. 5, Sept. 9, 2016, p. 270, lines 11-12.

[178] In his closing submissions the Judge acknowledged that the comment was rude and derogatory and "apologized unreservedly".[111] However, he asserted that the comment:

> […] 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 this was an overbroad reading of the abrogated recent complaint doctrine and the Crown eventually agreed with him.[112]

ii. Committee's Findings with respect to Allegation 4

[179] In our view, the Judge's submissions are not borne out by a reading of the Trial transcript. Crown counsel was not talking about whether or not the complainant said "no" during the sex act; she was talking about the complainant not having to resist or "move out of the way", in response to the Judge's suggestion that "by skewing her pelvis slightly she can avoid him". The Judge was clearly reacting to the Crown's characterization of the ideas underpinning the doctrine of recent complaint and the resistance myth as "antiquated thinking".

[180] The judge testified before us that he was, in effect, saying to Crown counsel that the pendulum swings and that earlier attitudes and thinking may once again dominate. In her closing submissions, Presenting Counsel argued:

> This comment and the explanation of the comment given by Justice Camp is troubling, as it appears to suggest that Justice Camp is hoping that Crown counsel doesn't live long enough to see the ground shift under her feet in terms of what is contemporary thinking respecting sexual assault law. It could be taken almost as a cry for "the good ole days when boys will be boys" before the laws were reformed.[113]

[181] The Committee accepts Presenting Counsel's submission that the Judge was, in essence, lamenting the abrogation of the recent complaint doctrine and reforms in the law of sexual assault regarding consent. His comments in Allegation 2(c) also support

---

[111] Written Closing Submissions of Justice Camp, p. 26.
[112] Written Closing Submissions of Justice Camp, p. 26.
[113] Inquiry Hearing Transcript, Vol. 6, Sept. 12, 2016, p. 401, lines 6-13.

this conclusion (i.e., that the recent complaint doctrine was "followed by every civilized legal system in the world for thousands of years" and "had its reasons" but "[*a*]*t the moment*, it's not the law" (emphasis added).)

[182] We conclude that the gravamen of the Judge's misconduct in Allegation 4 is of a piece with his other criticisms of the law and, as such, his comments are reasonably understood as being disparaging of legislative attempts to remove discredited myths from sexual assault law. A reasonable informed observer would understand these words in context to mean that Justice Camp was suggesting that the pendulum will surely someday swing away from the reforms back to the former ways of "every civilized legal system".

[183] In the result, we conclude Allegation 4 is proven.

E. Allegation 5

[184] Allegation 5 involves comments made by the Judge to Crown counsel and in the course of delivering his Reasons for Judgment.

[185] Allegation 5 reads as follows:

> **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).**
>
> **d) By stating, "There is no real talk of real force" (page 437 lines 6 to 7).**
>
> **e) By stating, "She knew she was drunk [...]. Is not an onus on her to be more careful" (page 326 lines 8 to 12).**

i. The Judge's Evidence and Submissions

[186] In his evidence in chief, Justice Camp admitted that he made comments tending to belittle and trivialize the nature of the allegations made by the complainant. In chief, when asked his opinion of Allegation 5, he responded as follows:

> 5(a) was highly inappropriate as was 5(b), (c) and (d). 5(e) is slightly different. It was a question I put to Ms. Mograbee, who answered it correctly. I shouldn't have asked the question. Within an instant of asking my question, I found the subsection in the Act which answered my question.[114]

[187] In cross-examination, the Judge confirmed that he made comments set out in Allegations 5(a), (b), (c), and (d), which tended to belittle and trivialize the nature of the complainant's allegations.

[188] As to Allegation 5(e), he testified:

> I shouldn't have asked the question because I should have known the answer. I asked the question, the Crown instantly answered it correctly and a moment later I found the relevant section anyway.[115]

[189] In his closing submissions, the Judge agreed he made the statements and that they were "insensitive and inappropriate". He acknowledged that "none of them needed to be said. They were unnecessary."[116] He submitted that "[h]is counseling has enabled him to understand the implications of these statements in light of the discriminatory history of sexual assault law."[117] He asserted that all the quoted statements except "There is no real talk of force here" were made in colloquies with Crown counsel in an effort to test the Crown's position and were not conclusions he had arrived at on the evidence.

ii. Committee's Findings with respect to Allegation 5(a)

[190] In our view, the problem with the various statements set out in Allegations 5(a)-(d) is not simply that they were insensitive, inappropriate and unnecessary. The problem with the Judge's statements is that, when they are taken together—and viewed in light of the various other statements that form the basis of other Allegations—they would leave a

---

[114] Inquiry Hearing Transcript, Vol. 5, Sept. 9, 2016, p. 270, lines 15-20.
[115] Inquiry Hearing Transcript, Vol. 5, Sept. 9, 2016, p. 324, lines 7-10.
[116] Written Closing Submissions of Justice Camp, p. 27.
[117] Written Closing Submissions of Justice Camp, p. 27.

reasonable observer with the impression that the Judge was belittling the nature of sexual assault and trivializing the specific allegations made by the complainant.

[191] With respect to Allegation 5(a), namely his comment that "sex and pain sometimes go together […] -- that's not necessarily a bad thing", the timing of the remark and the context in which it was made must be taken into consideration. If the Judge had simply been questioning Crown counsel "about whether the mere existence of pain would be enough to vitiate consent"[118] (as suggested by Professor Cossman in her evidence), it would amount to an insensitively worded but legitimate inquiry and would not constitute misconduct. That was not, however, the context in which the comment was made. It was made during Crown counsel's closing submissions, immediately after she summarized the evidence as follows:

> [The complainant said that the accused] put her back on the counter and put his penis in her vagina but was only able to insert it part way. She said her back was pushing against the faucet as this was going on and that she was in pain as a result. And the pain, the Crown would submit, is also contributing to her fear, it would be reasonable, she's in pain, he has no regard for -- for her pain. She says he's hurting her. She has bruising on the lower part of her back and that's corroborated by the medical evidence that you have before you where she does have bruising against her -- her lower back in the spot where she's pushing against her -- she's pushing against the -- the sink.
>
> She described in her evidence this as very painful. She said he had a large penis, that he wasn't able to insert it. She also described the act of him -- the act of her, rather, trying to push him away in that moment. She says that she was pushing on his shoulders and again telling him that he was hurting her and that he should stop, but he didn't stop.[119]

[192] Moments after these submissions were made by the Crown, the Judge interjected and remarked that there was no evidence that the complainant felt "upset"[120] at any time during the bathroom incident or that she suffered "a negative emotion"[121] until the next morning, when she became angry at the accused's brother, Lance, for insulting her. The

---

[118] Inquiry Hearing Transcript, Vol. 3, Sept. 8, 2016, p. 176, lines 23-24.
[119] *Wagar* Trial Transcript, p. 406, lines 7-19.
[120] *Wagar* Trial Transcript, p. 407, line 13.
[121] *Wagar* Trial Transcript, p. 407, line 15.

Judge was pressing the Crown with respect to the defence's "revenge motive" theory, not asking her whether the mere presence of pain is sufficient to vitiate consent.

[193] The Judge was, of course, entitled to test the Crown's submissions against the evidence and the defence theory of revenge, but the manner in which he did so suggests that he was not simply engaging in an assessment of her credibility. Rather, he belittled the evidence of the complainant that she was in pain throughout the sexual touching by stating:

> No, this pain, you know, but that sex and pain sometimes go together, that -- that's not necessarily a bad thing. I -- I'll grant you that -- that the implication from her was that she wasn't enjoying the pain, I'll grant you that. But did she ever say I was feeling horrible? She might well have and I've -- I've missed it?[122]

[194] Given his acknowledgement that the complainant had clearly conveyed that she was not enjoying the pain, his gratuitous comments that "sex and pain sometimes go together" and "that's not necessarily a bad thing" would be interpreted by a reasonable person as belittling and trivializing the complainant's allegations.

iii. Committee's Findings with respect to Allegation 5(b)

[195] The Judge's comment in Allegation 5(b) that "Sex is very often a challenge" needs to be read in the fuller context of his exchange with the Crown. The Crown was arguing that the accused's evidence was self-serving and that his version of the events had "holes in it".[123] She submitted:

> […] Also problematic in his evidence is that aspect about the cond -- the condom. His evidence is that -- the defence, rather, says that – that – that the evidence discloses that he convinces her somehow. Well there's no evidence of that. Her -- the evidence is they don't have a condom, she says, you can't without a condom and based on everything else that happened before, he decides that he has implied consent and there's no basis for implied consent here. And implied consent is not permissible when you're talking about sexual assault. There's no indication, according to her version,

[122] *Wagar* Trial Transcript, p. 407, lines 28-32.
[123] *Wagar* Trial Transcript, p. 411, line 18.

> that -- that -- that she is clear in saying he can insert his penis in her vagina.[124]

[196] In the context of an ensuing exchange with the Judge about implied consent, the Crown referred to the accused's evidence that he viewed the complainant as a "challenge" and labelled this evidence "problematic".[125] It was then that the following comments were made by the Judge:

> THE COURT: I know, Ms. Mograbee, you -- I -- I saw you concentrating on that. But that is very much the may [*sic*] – the way of the maid and the white [*sic*], to quote Houseman [*sic*], men do react to challenges and women give challenges. The -- there's nothing necessarily malign in that.
>
> MS MOGRABEE: Well, it is when you --
>
> THE COURT: Sex is very often a challenge.
>
> MS. MOGRABEE: It is when you're considering the context of what she says unfolded. It is all relevant to that assessment. If you accept his evidence on that point then you must consider how the sexual assault unfolds.
>
> THE COURT: Well, the challenge -- he can -- he can acquit himself of the challenge by force or by trump, sweet talking her. The -- the challenge doesn't necessarily lead to force.[126]

[197] Crown counsel's submission that "It is when you're considering the context of what she says unfolded" was obviously not meant as an agreement with the Judge's assertion that "sex is very often a challenge". Rather, it was a statement intended to counter the Judge's earlier remark that "there's nothing necessarily malign" in men reacting to "challenges" given by women.

[198] It's unclear what passage the Judge was quoting from the poet Housman, but his comments – taken in context and in consideration of the remarks he made in Allegation 6 – would leave a reasonable person with the impression that he was endorsing a "problematic" (to borrow the Crown's adjective) view of sexual interactions between men

---

[124] *Wagar* Trial Transcript, p. 409, lines 27-35.
[125] *Wagar* Trial Transcript, p. 411, lines 20-21.
[126] *Wagar* Trial Transcript, p. 411, lines 27-41, p. 412, line 1.

and women that underlies many discredited rape myths. As Professor Benedet stated in her report:

> Common beliefs about sexual relations between men and women that have influenced the [historical] criminal law of rape/sexual assault, and that are based on stereotypical reasoning, are that women want to be taken by force, even if they act otherwise, and enjoy it when men use physical force to obtain sexual intercourse. A related belief is that normal sexual interactions take the form of active pressure by the man, who is expected to "test the waters" by seeing how far he can go with a particular woman.
>
> In addition, there is a myth that women often say "no" to sexual activity when they mean "yes" and will routinely display token resistance that is designed to counter the perception that they are "easy". […][127]

[199] Accordingly, we find Allegation 5(b) to be made out.

iv. Committee's Findings with respect to Allegation 5(c)

[200] The comment in Allegation 5(c) ("I don't believe there's any talk of an attack really") was made by the Judge during submissions by defence counsel. It is an additional instance of the Judge trivializing what is alleged to have happened in the bathroom by downplaying its essential character, as indicated in the complainant's version of events. The comment also reinforces discredited stereotypical thinking that sexual assault without additional physical violence is not as harmful or serious as sexual assault with additional violence.

v. Committee's Findings with respect to Allegation 5(d)

[201] The comment in Allegation 5(d) was made in the course of the Judge's Reasons for Judgment. The full quote is as follows:

> I pause here to make the point that although the Crown established what was quite clear, that the accused is much bigger than the complainant, there's no talk of real force here. There's no talk of fear. That doesn't mean that there's consent. It just means that the accused (sic) hasn't explained why she allowed the sex to happen if she didn't want it. She certainly wasn't

[127] Benedet Report, p. 11.

> frightened, and as appears later in the evidence, she was quite capable of asserting herself with other men when they did things she didn't like.[128]

[202] Read in context, a reasonable person would interpret these remarks as belittling and trivializing what the complainant alleged happened in the bathroom and also reflecting a victim-blaming attitude and the discredited myth that women who do not actively resist are consenting.

vi. Committee's Findings with respect to Allegation 5(e)

[203] With respect to Allegation 5(e), the Judge's comments, at first blush, appear to suggest that the complainant precipitated the sexual assault by her drinking. The Judge stated (to the Crown), "She knew she was drunk", then asked "Is not an onus on her to be more careful?" If his question is interpreted as rhetorical, it reflects an inappropriate victim-blaming attitude, implying that the complainant was complicit in her own victimization because she got drunk at a party. In light of the Judge's other objectionable comments throughout the Trial, this is one plausible interpretation of the comments in Allegation 5(e).

[204] However, Justice Camp offered an equally plausible alternative explanation for these remarks, namely that he was asking a sincere question in order to improve his understanding of the law. The remarks were made in the context of a colloquy with the Crown regarding ss. 273.1 and 273.2 of the *Criminal Code.* On a fair and reasonable reading of the transcript, the Judge's question about whether there was an onus on the complainant may have been a genuine request for clarification, in response to Crown counsel's submission that it was incumbent upon the accused to take reasonable steps to ensure that consent was given. The manner in which the question was framed and its connection to the fact of the complainant's intoxication remain problematic, but we do not think it is appropriate for this Committee to parse the Judge's words and infer biased thinking where an alternative plausible explanation for the impugned remarks has been proffered. We are conscious of the need for judges not to feel constrained in their ability

[128] *Wagar* Trial Transcript, p. 437, lines 6-11.

to probe evidence, challenge submissions, and ask questions to seek counsel's guidance in unfamiliar areas of the law, including in the complex area of sexual assault.

[205] In conclusion, we find that the Judge's comments in Allegations 5(a), (b), (c) and (d) belittled and trivialized the nature of sexual assault and the complainant's allegations. Accordingly, we find that Allegation 5 is proven for those particulars, but not with respect to 5(e).

F. Allegation 6

[206] Allegation 6 concerns comments made by the Judge tending to belittle women and expressing stereotypical biased thinking in relation to a sexual assault complainant.

[207] Allegation 6 reads as follows:

> **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).**
>
> **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).**

i. Allegation 6(a)

[208] Allegation 6(a) relates to an exchange between Crown counsel and the Judge about the effect of s. 273.2(b) of the *Criminal Code*, which reads as follows:

> It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where
>
> […]
>
> (b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

[209] The Crown raised the issue of honest but mistaken belief and the effect of s. 273.2(b) in argument, contending that it did not arise on the evidence, but that, even if it did, there was no evidence that the accused took any steps to ascertain that the complainant was consenting before he pulled down her pants and performed oral sex on her. Accordingly, the Crown submitted the accused could not rely on honest but mistaken belief in consent.

[210] Crown counsel submitted:

> The accused has an obligation under the law to ensure she [the complainant] is communicating consent.[129]

[211] The following exchange took place after that:

> THE COURT: Well, tell me about that. Must he ask?
>
> MS. MOGRABEE: He must ask. And the Crown would submit that there's a heightened sense of -- of a responsibility in that way.
>
> 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?
>
> MS. MOGRABEE: -- he has -- he must ask.
>
> THE COURT: Where is that written?

[129] *Wagar* Trial Transcript, p. 384, lines 19-20.

> 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 [*sic*], 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 some kind of incantation that has to be gone through? Because it's not the way of the birds and the bees.[130]

ii. The Judge's Evidence and Submissions

[212] In his evidence in chief, with respect to Allegation 6(a), the Judge testified that he was "asking a serious question flippantly."[131] He said:

> The Crown had made a submission that they had to be words. I didn't think that was right and I was looking through the […] section to find the applicable subsection. I was asking for help but the words didn't -- in a disparaging and facetious way. I regret that.[132]

[213] In cross-examination, Justice Camp agreed with the suggestion from Presenting Counsel that the particulars in Allegation 6 did tend to belittle women and express stereotypical or biased thinking in relation to sex assault complainants.

[214] In his Notice of Response, he submitted as follows in relation to Allegation 6 as a whole:

> Justice Camp agrees that he said the things attributed to him in the quotes under this allegation and in the Notice of Allegations. The statements were insensitive and inappropriate and he apologizes for making them. The gender sensitivity counselling he has undergone has given him insight into the impropriety of these statements. He will not make statements like this again.[133]

---

[130] *Wagar* Trial Transcript, p. 384, lines 22-40, p. 385, lines 1-9.
[131] Inquiry Hearing Transcript, Vol. 5, Sept. 9, 2016, p. 270, lines 23-24.
[132] Inquiry Hearing Transcript, Vol. 5, Sept. 9, 2016, p. 270, lines 24-26, p. 271, lines 1-3.
[133] Notice of Response, para. 21.

[215] In his written closing submissions, the Judge agreed he should not have expressed himself flippantly and expressed remorse for having done so. His counsel argued, however, that:

> […] 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. 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."[134]

[216] The Judge concluded his submissions by acknowledging that his statements in Allegation 6 were insensitive and inappropriate and he apologized for making them.

iii. Committee's Findings with respect to Allegation 6(a)

[217] While we agree that it was open for the Judge to question the Crown on the nature of the requirement in s. 273.2(b), we do not accept the submission that the issue was raised by an "overbroad argument [by the Crown] about the need for words in all cases."

[218] On the complainant's version of the events, the accused came into the bathroom, locked the door, pulled down her pants and underwear, put her on the sink counter and began performing oral sex on her without any overt sign of consent from her. The Crown then stated:

> It sounds pretty aggressive and if that's the case, that he would have torn those -- those -- the lower part of her clothing off at that time and again, there's no discussion about what's to happen. And the Crown would submit that the accused must take reasonable steps in those circumstances to ascertain consent and he failed to do that.[135]

[219] It was, of course, open to the Judge to reject the complainant's version of the events and to believe instead that she did consent to sex with the accused. If that was

---

[134] Written Closing Submissions of Justice Camp, p. 28.
[135] *Wagar* Trial Transcript, p. 384, lines 6-10.

the case, then the issue of mistaken belief would not arise, as the defence of honest but mistaken belief can only arise in the absence of consent.

[220] However, if the Judge was truly testing whether the defence of mistaken belief might apply based on the complainant's version of events, the Crown seemed to be asserting that the only plausible way for the accused to meet the requirement in s. 273.2(b) to take reasonable steps to ascertain whether the complainant was consenting was to ask.

[221] The issue was not how the *complainant* could signal consent, but rather what reasonable steps the *accused* should have taken in the circumstances known to him at the time to determine whether the complainant was consenting. Indeed, it was the Judge who asked the question – presumably in light of the circumstances before him – whether the accused must ask if the complainant was consenting. The Crown's response to the Judge's question did not imply that words were necessary in all cases, but rather that in the particular circumstances of the case it was the only plausible way to meet the requirement of s. 273.2(b).

[222] In responding to the Crown's answer to his question, the Judge essentially derided the submission that the accused "must ask" by asking the marriage ceremony question. He then asked:

> Are children taught this at school? Do they pass tests like driver's licenses? It seems a little extreme?[136]

[223] In our view, Justice Camp was not simply asking a serious question flippantly. Rather, he was expressing disdain for the serious issue addressed in s. 273.2(b) by using flippant language.

iv. Allegations 6(b) and 6(c)

[224] Allegations 6(b) and 6(c) arise out of the Judge's comments in the course of his Reasons for Judgment when he directly addressed the accused. His remarks to the accused in full were as follows:

---

[136] *Wagar* Trial Transcript, p. 385, lines 1-2.

> THE COURT: And I don't expect you to concentrate the whole time, but I want you to listen very carefully to what I'm saying right at the beginning. 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.
>
> The law in Canada today is that you have to be very sure before you engage in any form of sexual activity with a woman. Not just sex, not just oral sex, not even just touching a personal part of a girl's body, but just touching at all. You've got to be very sure that the girl wants you to do it. Please tell your friends that 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. So after this, I'm going to be talking in more technical terms, but that's the message I want you to take away and tell your friends. And, of course, it's far more difficult if you're high or if you're drunk and if she's high and drunk. You've got to be really sure that she's saying yes. Her keeping quiet isn't enough. That's not necessarily a sign of saying yes. So remind yourself every time that you get involved with a girl from now on and tell your friends. Okay?[137]

v. The Judge's Evidence and Submissions

[225] In his evidence before the Committee, the Judge said:

> As for […] 6(b) and (c) are part of the same thing. It was a ham-handed attempt to give advice to a young man who probably hadn't ever been given advice. I should have realized, not that it was -- I wish I hadn't said it.[138]

[226] In cross-examination, he was asked if he agreed that the comments to the accused about how he should conduct himself in the future conveyed the impression that he was counselling the accused about how to protect himself and his male friends.

[227] He responded:

> […] it looks worse if […] what was one statement was divided into two. That led straight on to what is said in (c).[139]

---

[137] *Wagar* Trial Transcript, p. 427, lines 19-38.
[138] Inquiry Hearing Transcript, Vol. 5, Sept. 9, 2016, p. 271, lines 4-8.
[139] Inquiry Hearing Transcript, Vol. 5, Sept. 9, 2016, p. 325, lines 16-18.

[228] Presenting Counsel then repeated the following words that Justice Camp used with the accused:

> […] Please tell your friends so they don't upset women and so they don't get into trouble.
>
> We're far more protective of women than we used to be and that's the way it should be. […][140]

[229] The Judge responded:

> Yes, yes. It was ham-handed. It gives the impression of someone giving fatherly advice to a young male relative. I shouldn't have said it.
>
> Ms. Hickey, perhaps what got lost in the answer is a sentence that sub (c) starts with: (as read)
>
> You've got to be very sure the girl wants you to do it.
>
> That is the kernel of the advice that I was giving.[141]

[230] That led to the following exchange between Presenting Counsel and the Judge:

> Q But you're disassociating that from the objective, which you've articulated in the previous sentence, which was for the accused and his male friends to protect themselves.
>
> A Ms. Hickey, I don't think that I want to argue about this, but you will understand I was talking to a young man --
>
> Q I do.
>
> A -- trying to get him to see it in a way that he would understand, from his point of view. As -- as a matter of general law, it's not entirely accurate. I think for a young man who comes from a disadvantaged background, it might be understandable, and that was the goal, to be understandable to him. I now wish I hadn't said it because clearly it -- it lays me open to -- to the kind of suggestions you are making.
>
> Q Thank you. With respect to the six allegations, then, Justice Camp, in your notice of response, you acknowledge that they constitute misconduct; is that correct?

---

[140] Inquiry Hearing Transcript, Vol. 5, Sept. 9, 2016, p. 325, lines 22-26.
[141] Inquiry Hearing Transcript, Vol. 5, Sept. 9, 2016, p. 326, lines 1-8.

A. Yes.[142]

[231] The Judge's Notice of Response reads as follows in relation in Allegation 6:

> Justice Camp agrees that he said the things attributed to him in the quotes under this allegation under the Notice of Allegations. The statements were insensitive and inappropriate and he apologizes for making them. The gender sensitivity counselling he has undergone has given him insight into his into the impropriety of these statements. He will not make statements like this again.[143]

[232] In closing submissions, the Judge's counsel submitted that the statements in Allegations 6(b) and (c) "demonstrate that he understood the reasonable steps requirement on a fundamental level. As [Justice Camp] 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.'"[144]

[233] In his written closing submissions, the Judge conceded, however, that the statements in Allegations 6(b) and (c) were "insensitive and inappropriate".[145]

vi. Committee's Findings with respect to Allegations 6(b) and 6(c)

[234] We accept that the Judge made his remarks in a way intended to be understood by the accused. We accept, as well, that some of the Judge's remarks to the accused demonstrate an understanding of the law.

[235] However, we find that a reasonable person would understand the Judge's remarks to the accused to express biased thinking and a belittling attitude towards women. His assertion that men who want to have sexual activity with women, have to be "far more gentle […] far more patient […]" is patronizing, and portrays women as highly reactive to any form of slight.

[236] The Judge's warning to the accused and his friends, by repeating that they have to be very careful, "to protect themselves", emphasizes a view that the problem at hand

---

[142] Inquiry Hearing Transcript, Vol. 5, Sept. 9, 2016, p. 326, lines 9-26, p. 327, lines 1-3.
[143] Para. 21.
[144] Written Closing Submissions of Justice Camp, p. 28.
[145] Written Closing Submissions of Justice Camp, p. 28.

is how men who want to have sex with women can protect themselves from those women with whom they want to have sex. That theme is repeated when the Judge tells the accused to tell his male friends to be “very sure the girl wants you to do it […] so they don’t upset women and they don’t get into trouble”. The Judge's remarks thus identify an “upset” woman as the cause of potential trouble, not an accused’s conduct. The remarks also insinuate that making sure “the girl wants you to do it” is less about obtaining her consent and more about avoiding trouble. We find that these comments, taken in their context, and taken in the context of the Judge’s utterances throughout the Trial, tend to belittle women by portraying them as prone to “upset” unless they are dealt with far more gently, far more patiently, and very carefully. The comments also reinforce stereotypical biased views of women who complain of being sexually assaulted by implying that women who get “upset” by a man's behaviour will retaliate by alleging a sexual assault.

[237] The fact that the comments made by the Judge were made to the accused just after telling him he was found not guilty, emphasizes that the advice to the accused was primarily about what he could have done to avoid upsetting the complainant and getting “into trouble”.

[238] In the circumstances, we find that Allegation 6 is made out with respect to all its particulars.

G. Summary of Findings on the Allegations

[239] The Committee finds that Allegations 1(a), (b), (c), 2(a), (c), (d), 3(a), (b), (c), 4(a), 5(a), (b), (c) and (d), and 6(a), (b) and (c) are all made out. Allegations 2(e) and (f) are made out in part. Allegations 2(b) and 5(e) are not made out. In summary, we find that of the 21 specific Allegations of misconduct made against the Judge, 17 are fully made out and two are partly made out.

[240] Although we have made individual findings in relation to the particularized Allegations against the Judge, it is important to note that, in many cases, the nature and character of the Judge’s impugned comments and questions were determined by

reference to his other impugned questions and comments. That is to say, what he said in one context gives meaning to what he said in another context.

[241] We find that his conduct, taken in context and as a whole, both constitutes misconduct under s. 65(2)(b) and places him in a position incompatible with the due execution of his current office as a judge of the Federal Court under s. 65(2)(d) of the *Judges Act*. (We refer below to these findings collectively as "misconduct".)

VII. THE APPLICATION OF THE TEST FOR REMOVAL

[242] A finding of misconduct does not necessarily lead to a recommendation for removal from office. The Committee must now consider whether the Judge's misconduct renders him incapable of executing the judicial office.

A. The Test for the Removal of a Judge

[243] The test for the removal of a judge was developed by the Inquiry Committee into the conduct of Justices MacKeigan, Hart, Macdonald, Jones and Pace, which has become known as the Marshall Inquiry.[146] The inquiry arose from comments that judges of the Nova Scotia Court of Appeal made in their reasons on a reference regarding the conviction for murder of Donald Marshall Jr., in which the Court of Appeal acquitted him of murder.

[244] The majority of the Inquiry Committee in the Marshall Inquiry observed that the judicial role requires decision-making "free from external interference or influence",[147] and as a corollary, judges are under a "judicial duty to exercise and articulate independent thought in judgments free from fear of removal".[148] The duty does not "immunize judges from fair criticism",[149] but "it guarantees that the expression of opinions honestly held by judges in their adjudication of the relevant law, evidence or policy in a specific case will not endanger their tenure."[150]

---

[146] Marshall Inquiry, Majority Report, *supra* note 38.
[147] Marshall Inquiry, Majority Report, *supra* note 38, p. 24.
[148] Marshall Inquiry, Majority Report, *supra* note 38, p. 24.
[149] Marshall Inquiry, Majority Report, *supra* note 38, p. 24.
[150] Marshall Inquiry, Majority Report, *supra* note 38, p. 24.

[245] The majority in the Marshall Inquiry acknowledged the words of the Supreme Court of Canada in *R. v. Valente*[151] that "[t]he removal of a judge is not to be undertaken lightly."[152] The majority explained that judicial independence "attained entrenchment in our constitution not merely, or even mainly, for the benefit of a judiciary. It is also a fundamental benefit to the public served by the judiciary."[153]

[246] The Marshall Inquiry involved allegations of bias, specifically "'whether improper motivation may be behind' the language used" by the judges of the Nova Scotia Court of Appeal in their reasons.[154] The majority of the Inquiry Committee explained what is meant by the requirement that judges be impartial:

> Everyone holds views, but to hold them may, or may not, lead to their biased application. There is, in short, a crucial difference between an empty mind and open one. True impartiality is not so much not holding views and having opinions, but the capacity to prevent them from interfering with a willingness to entertain and act on different points of view. Whether or not a judge was biased, in our view, thus becomes less instructive an exercise than whether or not the judge's decision reflected a capacity to hear and decide a case with an open mind.[155]

[247] The meaning of judicial impartiality adopted in the Marshall Inquiry is consistent with the meaning of impartiality recently elaborated by the Supreme Court of Canada in *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*.[156]

[248] The majority in the Marshall Inquiry also stated that the test for removal of a judge must allude specifically to public confidence in the administration of justice, be objective, and "be based in part, at least, on conduct which could reasonably be expected to shock the conscience and shake the confidence of the public as opposed to conduct which is, and often must be, unpopular with part of that public".[157]

---

[151] [1985] 2 S.C.R. 673, p. 697.
[152] Marshall Inquiry, Majority Report, *supra* note 38, p. 25.
[153] Marshall Inquiry, Majority Report, *supra* note 38, pp. 25-26.
[154] Marshall Inquiry, Majority Report, *supra* note 38, p. 26.
[155] Marshall Inquiry, Majority Report, *supra* note 38, pp. 26-27.
[156] [2015] 2 S.C.R. 282.
[157] Marshall Inquiry, Majority Report, *supra* note 38, p. 27.

[249] The test adopted by the majority in the Marshal Inquiry is "an alloy of these many considerations"[158] and is applicable in the present inquiry:

> Is the conduct alleged so manifestly and profoundly destructive of the concept of the 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?[159]

[250] In cases such as this, involving comments made in Court during judicial proceedings, not only the test but also the reasoning by which the test was developed deserve careful consideration and application.

[251] The test is prospective, namely whether "public confidence in the judge is sufficiently undermined to render him or her incapable of executing judicial office in the future in light of his or her conduct to date".[160] The test is also objective, to be considered from the perspective of a reasonable and well-informed person.[161]

[252] The Intervener Coalition submitted that, conceptually, the reasonable person "must include the perspective of survivors of sexual assault, and marginalized women generally, as they are entitled to a judiciary that rejects sexual myths and stereotypes and understands and respects equality."[162] We agree. A judge performs a unique role in society and his or her capacity to continue in the execution of that role cannot be judged without regard to the perspective of those who would most likely be affected by the Judge remaining in office. That is not to say that such a perspective is the sole or the dominant one in evaluating public confidence, but it is one that should be included, and must be understood.

B. Summary of Counsels' Submissions

[253] In their submissions to the Committee, Presenting Counsel and Judge's counsel agreed that Justice Camp's conduct during the *Wagar* Trial amounted to misconduct and

---

[158] Marshall Inquiry, Majority Report, *supra* note 38, p. 27.
[159] Marshall Inquiry, Majority Report, *supra* note 38, p. 27.
[160] *Canadian Judicial Council Report into the Conduct of the Honourable P. Theodore Matlow* (2008), Majority Reasons, para. 166 [Matlow Inquiry].
[161] Matlow Inquiry, *supra* note 160, para. 172.
[162] Submissions of the Intervener Coalition, para. 59.

failure in the due execution of the office of a judge under ss. 65(2)(b) and (d), respectively, of the *Judges Act*. Nonetheless, they disagreed on whether Justice Camp's conduct was 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 him incapable of executing the judicial office.

i. Presenting Counsel's Submissions

[254] Presenting Counsel submitted that Justice Camp's impugned conduct is serious enough to warrant his removal under s. 65(2) of the *Judges Act*. She maintained that Justice Camp's comments throughout the *Wagar* Trial are 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 Justice Camp incapable of executing the judicial office.

[255] Presenting Counsel argued that the concepts of impartiality, integrity and independence of the judicial role intersect. Quoting from the submissions of the Intervener Coalition, Presenting Counsel highlighted how "the Ethical Principles[163] underscore that judicial independence and the rule of law depend on public confidence in the judicial system"[164] and that "Judicial disrespect for law occurs when a judge demonstrates antipathy toward the law".[165]

[256] In applying this portion of the test for removal, Presenting Counsel argued that the Committee should consider several mitigating factors, including:

a) Justice Camp's early action to apologize for his conduct;

b) that the impugned conduct is limited to only one case and not a multiplicity of proceedings;

---

[163] Canadian Judicial Council, *Ethical Principles for Judges*, online: <https://www.cjc-ccm.gc.ca/cmslib/general/news_pub_judicialconduct_Principles_en.pdf>; see also Submissions of the Intervener Coalition, para. 39.
[164] Inquiry Hearing Transcript, Vol. 6, Sept. 12, 2016, p. 408, lines 3-6.
[165] Inquiry Hearing Transcript, Vol. 6, Sept. 12, 2016, p. 408, lines 17-18.

c) Justice Camp cooperated by making admissions at the inquiry which reduced its length and its complexity;

d) Justice McCawley and Dr. Haskell testified that Justice Camp expressed views that could be perceived as gender biased but that other players in the judicial system hold such biases and that Justice Camp was teachable;

e) that the letters providing evidence of Justice Camp's good character speak to his sense of respect for others, including women, his sense of the importance of taking responsibility for his actions, his willingness to learn, his kindness, his integrity, his honesty and his fair-mindedness;

f) Justice Camp indicated he received no direct training in sexual assault matters prior to this Trial;

g) Justice Camp had limited experience in sexual assault trials; and

h) Justice Camp actively participated in his remediation, rehabilitation and learning after the *Wagar* Trial, such as his work with Justice McCawley, Dr. Haskell and Professor Cossman.

[257] Presenting Counsel submitted the above factors were offset by the following aggravating factors that weighed in favour of Justice Camp's removal:

a) Justice Camp's apology is not enough to militate against his removal. This case is similar to that of Justice Moreau-Bérubé, who the Inquiry Committee removed as a judge after finding her sincere apology for incorrect, gratuitous, insensitive and inappropriate comments was not enough;

b) while the impugned conduct occurred in only one trial, it lasted several days and involved an extended break between the closing submissions and the rendering of the decision. During this time, Justice Camp failed to review and recognize perhaps his most egregious comments, which he then repeated in his decision. Removal from the bench was warranted in the cases of Justices Cosgrove and Moreau-Bérubé where the comments occurred in only one case.

Justice Moreau-Bérubé's comments in particular were made in the context of one sentencing hearing rather than a trial like Justice Camp's;

c) Justice Camp presented no letters from judicial colleagues, the Provincial Court or from the Federal Court. Some of the letters also suggest that Justice Camp held viewpoints towards women that were traditional and outdated and that he has a tendency to adjudicate in an unconventional manner consisting of a "stream of consciousness reasoning"[166] in which he "tends to editorialize during the course of litigation, almost akin to thinking out loud";[167]

d) the complaints received by the Canadian Judicial Council suggest Justice Camp's impugned comments "undermine public confidence in the fair administration of justice,"[168] and that they "clearly demonstrate that he lacks the necessary capacity for independence, integrity and impartiality".[169] These complaints also suggest that "this case squarely raises the question whether any action short of removal can restore public confidence in a judge who so brazenly and persistently was contemptuous of the law, of the judicial role, and of a vulnerable complainant in a sexual assault trial".[170]

e) Justice Camp had access to a number of educational resources, through written form, colleagues, or access to funding for educational programs;

f) some of the impugned conduct takes on added value when read in the context of the expert report provided by Professor Benedet, who noted that indications that the justice system participants accept rape myths and discriminatory biases undermine women's confidence in the justice system;

g) Justice Camp's evidence shows that he is not as remediated as he professed. He resiled even from the evidence of Dr. Haskell and Justice McCawley

[166] Inquiry Hearing Transcript, Vol. 6, Sept. 12, 2016, p. 420, line 21.
[167] Inquiry Hearing Transcript, Vol. 6, Sept. 12, 2016, p. 420, lines 21-23.
[168] Inquiry Hearing Transcript, Vol. 6, Sept. 12, 2016, p. 423, lines 9-11.
[169] Inquiry Hearing Transcript, Vol. 6, Sept. 12, 2016, p. 423, lines 11-14.
[170] Inquiry Hearing Transcript, Vol. 6, Sept. 12, 2016, p. 423, lines 24-26, p. 424, lines 1-4.

regarding his sexist attitudes and gender biases, preferring instead to refer to his beliefs as “old-fashioned”.[171] Most troubling of all, when he apologized to the complainant he commented on her “fragile personality”,[172] which is language suggestive of stereotypical thinking or perhaps speaking without thinking; and

h) Justice Camp’s own words throughout the inquiry call into question the extent of his learning, the extent of his understanding, and his fitness to serve on the Bench.

[258] Presenting Counsel argued that public confidence in the judicial process will be adversely affected if Justice Camp remains on the bench. She submitted that the reasonably informed public includes the perspectives of survivors of sexual assault and marginalized women generally, people who reject stereotypical myths, or even just those people who understand and respect equality. Taking into account the totality of the above factors, Presenting Counsel argued that there is sufficient evidence to conclude that Justice Camp’s behaviour can reasonably be expected to have shocked the conscience and shaken the confidence of the public.

[259] Presenting Counsel noted that the Committee in its assessment must take into account the social context in which the comments were made. She noted that we live in an era where sexual assaults are under-reported, a phenomenon that is correlated to the persistence of rape myths in the criminal justice system. The confidence of women in the judicial system is presently undermined by indications that justice system participants accept these kinds of discredited myths and biases. In this context, the resounding rejection of this type of thinking and its expression in the courtroom reinforces public confidence in the justice system. Presenting Counsel submitted that the social context underscores, more than ever, that the public should not be required to take the risk of a biased judge who may again give voice to his own known and unknown prejudices. She further noted that, in cross-examination, Justice Camp resiled from his earlier evidence

[171] Inquiry Hearing Transcript, Vol. 5, Sept. 9, 2016, p. 312, line 26.
[172] Inquiry Hearing Transcript, Vol. 5, Sept. 9, 2016, p. 275, line 20.

that his comments displayed gender bias, preferring instead to characterize them as “old-fashioned”. Presenting Counsel submitted that this indicated that the social context training the Judge received did not have the desired effect.

[260] Presenting Counsel concluded by submitting that this inquiry is not really about Justice Camp. Rather, it is about the integrity of a system which is fundamental to the rule of law and to democracy. She argued that Justice Camp’s removal is necessary to ensure public confidence in the legal system. Overall, she submitted there is sufficient evidence that Justice Camp’s conduct meets the prospective test for his removal.

ii. Justice Camp’s Submissions

[261] Justice Camp admitted that his conduct fell within ss. 65(b) or (d) of the *Judges Act*, but argued that in applying the prospective test for removal, the proper approach would be for the Committee to recommend his continued service. In particular, Justice Camp noted that his conduct did not arise from animus and submitted that it should be considered on a spectrum through a comparison with similar cases of judicial misconduct.

[262] Any assessment of his conduct, Justice Camp submitted, cannot be divorced from his acknowledgments of responsibility and the remediation he undertook following the *Wagar* Trial. No other subject of a Council inquiry, he argued, has acknowledged responsibility as quickly or gone to the lengths that he has gone to educate himself. In situating his conduct on the spectrum of judicial misconduct, Justice Camp suggested that the Committee should also consider unreported decisions relating to complaints that did not get referred to an inquiry because the judge had already learned from his or her comments. Justice Camp argued that his active apology process and expressions of remorse separate him from other judges who have been removed.

[263] Justice Camp argued that his evidence throughout the inquiry exemplifies how he is reformed and, as a result of intensive therapy and education, he now questions his own language, assumptions and generalizations. He has taken steps to interrogate his beliefs and assumptions, and has learned about the role of judicial temperance.

[264] An additional factor that Justice Camp suggested the Committee should consider is the limited education he had received as a judge regarding sexual assault at the time of the *Wagar* Trial. While he acknowledged that the responsibility for education rests on the judge in our system, he submitted that the judicial education sector gave no indication of the knowledge gap requiring his self-tutelage. Justice Camp asserted that he did not deliberately avoid self-education regarding the law of sexual assault and the conduct of sexual assault trials.

[265] Justice Camp acknowledged that he could have done more to educate himself but argued that no judge has ever been called before the Council for being under-educated or under-informed. He submitted that judges routinely err in law and, when they do, it is a matter for the Court of Appeal, not a personal failure. He argued that judges are not expected to know all of the law and that his legal decision-making in the *Wagar* Trial, to the extent it can be divorced from the impugned comments, was reasonable. What was lacking, he asserted, was his knowledge of the underlying context of the law, which is one step removed from the law.

[266] Justice Camp contended that the stereotypes and myths embodied in his comments and in his approach to this *Wagar* case are symptoms of a larger problem within the justice system. He submitted that there has been a century of underplaying or ignoring inequality and gender-based violence and that it is unrealistic to expect education to take root in less than a generation. While acknowledging that it is asking a lot to expect those judges who continue to make mistakes to be treated with charity and civility, he argued that the *Judges Act* requires the Committee to do some form of that. Justice Camp also highlighted how disciplinary processes should prioritize responsibility and reparation, thereby sending a message that those who "commit acts of professional misconduct do not fall into a black hole but can industriously work to redeem themselves in multiple ways".[173] He submitted that the long-term solution for the administration of justice includes restoring an educated, reformed judge to his position.

[173] Inquiry Hearing Transcript, Vol. 5, Sept. 9, 2016, p. 499, lines 18-20.

[267] In all, Justice Camp argued that his impugned comments stemmed from ignorance and not from animus. While it is expected that people in judicial positions will have disabused themselves of stereotypes and myths by the time they reach the bench, where such misconduct lies on the spectrum, Justice Camp submitted, is very different depending on whether it is motivated by entrenched bigotry or remediable ignorance. Justice Camp argued that the evidence does not show that he is a misogynist who deliberately made offensive comments. Rather, it suggests he is generally a good judge with many judicial qualities. He highlighted how this conduct occurred in only one case, there were no prior complaints, his character letters demonstrate his respect for diversity and equality and an interest in respecting the different perspectives of others. Justice Camp asserted that there is no evidence that he is a committed bigot or misogynist.

[268] In regards to the prospective nature of the test and public confidence, Justice Camp argued that a reasonable member of the Canadian public is a person informed about his remorse and rehabilitative efforts, as well as the other evidence the Committee heard during the inquiry. As such, Justice Camp cautioned against relying on the complaint letters and media articles, many of which rejected his apologies and rehabilitation efforts, when considering what the reaction of the reasonable informed members of the public might be to his comments.

[269] Judge's counsel submitted that there are now two Justice Camps who should be taken into account. The first is the Justice Camp who made the reported comments in the Trial, and who was taken out of court for a year, roundly denounced, and characterized as a misogynist. This Justice Camp apologized and reformed himself. The second Judge is the future Justice Camp, who could sit upon the bench as an example of what can be achieved with continuing judicial education.

[270] While Justice Camp admitted that a reasonable member of the public was rightly upset by his comments, he argued that such a person would prefer that he, as an educated, motivated judge, apply his new critical framework to future cases. He submitted that the correct picture for the Committee's consideration is not a snapshot from the *Wagar* Trial but rather the complete picture painted of him in the inquiry, taking

into account other evidence showing that he is a complex individual with other good qualities.

[271] In his concluding submissions, Judge's Counsel argued that the core animating values of our justice system include rehabilitation, learning and reintegration, not banishment or revenge. He submitted that reasonable and informed members of the public would want the justice system to work as well as possible and would want judges to understand social context. He urged the Committee to find that sending Justice Camp—a humbled, empathetic, educated judge who understands social context—back to the bench would achieve that end.

C. The Nature and Gravity of the Misconduct

[272] The gravity of Justice Camp's misconduct is a crucial issue. As stated by the Marshall Inquiry Committee: "[t]he misconduct alleged and demonstrated must be of sufficient gravity to justify interference with the sanctity of judicial independence".[174]

[273] Justice Camp has argued that his misconduct primarily consists of insensitive, inappropriate or rude language used while he was pursuing legitimate inquiries posed by the evidence and the law in the case before him. While the Judge accepts that his "inappropriate" use of language was discriminatory in effect, he denies an intent to discriminate, or consciousness of his bias at the time of the Trial.

[274] The distinction drawn by Justice Camp between the legitimacy of his comments and questions, and the inappropriateness of the language he used in expressing them raises the tension between judicial accountability and judicial independence. As Professor M.L. Friedland observed:

> There is a tension between judicial accountability and judicial independence. Judges should be accountable for their judicial and extra-judicial conduct. The public has to have confidence in the judicial system and to feel satisfied, as Justice Minister Allan Rock stated in a speech to the judges in August, 1994 "that complaints of misconduct are evaluated objectively and disposed of fairly." At the same time, accountability could have an inhibiting or, as some would say, chilling effect on their actions.

[174] Marshall Inquiry, Majority Report, *supra* note 38, p. 25.

> When we are talking about judicial decisions being scrutinized by appeal courts, we are generally not worried about curtailing a judge's freedom of action. That is the purpose of an appeal court: to correct errors by trial judges or in the case of the Supreme Court of Canada to correct errors by appeal courts. Similarly, if actions of a judicial council deter rude, insensitive, sexist, or racist comments, that is obviously desirable. The danger is, however, that a statement in court that is relevant to fact-finding or sentencing or other decisions will be the subject of a complaint and will cause judges to tailor their rulings to avoid the consequences of a complaint. It is therefore necessary to devise systems that provide for accountability, yet at the same time are fair to the judiciary and do not curtail judges' obligation to rule honestly and according to the law.[175]

[275] In the context of this tension, Justice Camp's characterization of his misconduct as the product of ignorance, unconscious bias, and a failure of education, manifesting itself in the pursuit of legitimate lines of inquiry might weigh against a recommendation for removal because such a step could have a chilling effect on judges' attempts to pursue relevant inquiries on the facts or law. In this case, however, we do not accept Justice Camp's characterization of his misconduct. Although we accept Justice Camp's position that his conduct was not wilful in the sense that he refused to apply the law, we find that the lines or areas of inquiry that provoked his impugned utterances had no more than a patina of legitimacy to them. The following comments were not made, individually or in combination, for the purpose of a legitimate inquiry into the facts or the law:

a) Justice Camp's adverse comments in Allegation 1 about s. 276 of the *Criminal Code*;

b) his adverse comments in Allegation 2 about the abrogation of the doctrine of recent complaint, and about the principle that a complainant need not demonstrate a lack of consent by resisting;

c) his questions and comment in Allegation 3, essentially rebuking the complainant for not resisting;

---

[175] *A Place Apart: Judicial Independence and Accountability in Canada*, Canadian Judicial Council (1995), p.129.

d) his comment to Crown counsel in Allegation 4, disparaging the legal argument she was making about the need to resist;

e) the belittling and trivializing comments he made in Allegation 5; and

f) the derisive comment he made in response to the Crown's argument about the application of s. 273.2(b) of the *Criminal Code* in the circumstances of the case before him and his remarks to the accused linking sexual assault complaints to a woman being "upset" in Allegation 6.

[276] The impugned comments, in context, are not of the sort that need to be shielded from the actions of a Judicial Council to preserve judicial independence, or to avoid curtailing judicial freedom of action. The comments, whether or not they were a product of unconscious bias, undeniably promote discredited sexist stereotypes. They had little or nothing to do with the issues facing the Judge in the Trial. They reflect disdain for the careful development of the law through legislation and jurisprudence designed to bring balance and equality to a process that historically discriminated against women.

[277] In the circumstances of this case, we conclude that the Judge's misconduct was not simply using inappropriate and insensitive words in exploring legitimate areas of inquiry. We find that his impugned questions and comments and his choice of words were rooted in his antipathy towards legislative and jurisprudential reforms designed to preserve the integrity of the justice system, foster women's equality, and protect particularly vulnerable and often disadvantaged witnesses. The serious consequences of his misconduct are brought into focus by the following submissions of the Intervener Coalition:

> In sexual assault cases, judicial disrespect for or antipathy towards the law has especially harmful consequences for the rule of law. This is because of the long history of systemic discrimination that has been embedded in substantive sexual assault law and the treatment of sexual assault complainants. The fact that lawmakers have expressly acknowledged this problem and acted to correct it, coupled with the evidence that it persists in the operation of the criminal justice system and in the underreporting of

> these offenses, reveals that public confidence in this aspect of the justice system needs to be enhanced.[176]

[278] Justice Camp's misconduct is manifestly serious. It caused significant harm to public confidence in the judicial role, in an area of the law in which the courts and Parliament have made concerted efforts to enhance public confidence over the past four decades.

[279] The media attention given to Justice Camp's comments, and the letters from members of the public to the Council, are evidence of the intense public concern provoked by his comments. During his evidence, Justice Camp admitted, in response to a question from one of the Committee members, that his comments were more than merely insensitive; they were "disgraceful", "appalling" and "outrageous".[177] In mitigation, however, Justice Camp argues that his misconduct is limited to one case and is not revealed as part of a larger pattern. We do not find that to be a mitigating factor in this case. We accept that the misconduct arose in the course of a single trial, but it occurred over several days of trial and judgment and over a three-month period. It was not a single isolated instance of the use of inappropriate language, but rather it was conduct reflective of a discredited approach that persisted throughout the proceeding. There is nothing to suggest that Justice Camp's conduct and the attitude underlying it, had it not been arrested by the public reaction it provoked, would not have continued to exist.

[280] We do not accept that Justice Camp's misconduct stems entirely from a "knowledge deficit"[178], "remediable ignorance"[179] or "unconscious bias".[180] While these problems may have been factors in how the misconduct manifested itself, we conclude that the problem is a deeper one and lies in the Judge's flawed approach to the judicial role itself.

---

[176] Para. 45.
[177] Inquiry Hearing Transcript, Vol. 5, Sept. 9, 2016, p. 348, lines 19-26, p. 349, lines 1-9.
[178] Written Closing Submissions of Justice Camp, pp. 1, 6, 15.
[179] Inquiry Hearing Transcript, Vol. 7, Sept. 12, 2016, p. 484, lines 6-7; see also Written Closing Submissions of Justice Camp, p. 8.
[180] Written Closing Submissions of Justice Camp, pp. 12, 19.

[281] Fundamentally, Justice Camp's misconduct is rooted a profound lack of impartiality and failure to respect equality before the law. As the majority in the Marshall Inquiry made clear, an important element in the test for removal is the presence of bias. The majority emphasized, however, that what is at the core of bias is not having existing views or attitudes, but rather a failure to control those existing views or attitudes: "True impartiality is not so much not holding views or having opinions, but the capacity to prevent them from interfering with a willingness to entertain and act on different points of view."[181]

[282] The Inquiry Committee into the conduct of Justice Bienvenue 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. In an article entitled "*Judicial Free Speech and Accountability: Should Judges Be Seen But Not Heard*" (1983), 3 *N.J.C.L.*, at p. 227, Professor A. Wayne MacKay wrote the following:
>
> 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.[182]

[283] In the Council's publication, *Ethical Principles for Judges*, the concepts of equality and discrimination are explored under the heading of "Equality" stating that: "Judges should conduct themselves and proceedings before them so as to assure equality according to law."[183]

[284] The principles supporting that statement are set out in part as follows:

---

[181] Marshall Inquiry, Majority Report, *supra* note 38, p. 26.
[182] *Report to the Canadian Judicial Council by the Inquiry Committee Appointed under Subsection 63(1) of the Judges Act to Conduct a Public Inquiry Into the Conduct of Mr. Justice Jean Bienvenue of the Superior Court of Quebec in R. v. T. Théberge* (June 1996), pp. 50-51 [Bienvenue Inquiry].
[183] *Supra* note 163, p. 23.

> 1. Judges should carry out their duties with appropriate consideration for all persons (for example, parties, witnesses, court personnel and judicial colleagues) without discrimination.
>
> 2. Judges should strive to be aware of and understand differences arising from, for example, gender, race, religious conviction, culture, ethnic background, sexual orientation or disability.[184]

[285] In commenting on the principle of equality, the *Ethical Principles* document notes that "the law's strong societal commitment places concern for equality at the core of justice according to law."[185] The commentary goes on to state as follows:

> 2. Equality according to law is not only fundamental to justice, but is strongly linked to judicial impartiality. A judge who, for example, reaches a correct result but engages in stereotyping does so at the expense of the judge's impartiality, actual or perceived.
>
> 3. Judges should not be influenced by attitudes based on stereotype, myth or prejudice. They should, therefore, make every effort to recognize, demonstrate sensitivity to and correct such attitudes.
>
> 4. As is discussed in more detail in the "Impartiality" chapter, judges should strive to ensure that their conduct is such that any reasonable, fair minded and informed member of the public would justifiably have confidence in the impartiality of the judge. Judges should avoid comments, expressions, gestures or behaviour which reasonably may be interpreted as showing insensitivity to or disrespect for anyone. Examples include irrelevant comments based on racial, cultural, sexual or other stereotypes and other conduct implying that persons before the court will not be afforded equal consideration and respect.[186]

[286] We recognize—and it is important to emphasize—that the statements, principles and commentary in the *Ethical Principles* are "advisory in nature"[187] and "do not set out standards defining judicial misconduct".[188]

[287] We have made our findings with respect to the Allegations and Justice Camp's misconduct independently of the *Ethical Principles*. We refer to them to illuminate the point that Justice Camp's misconduct is not just about "remediable ignorance",

---

[184] *Supra* note 163, p. 23.
[185] *Supra* note 163, p. 24.
[186] *Supra* note 163, pp. 24-25.
[187] *Supra* note 163, p. 3.
[188] *Supra* note 163, p. 3.

"knowledge deficits", "unconscious bias", or "insensitive and inappropriate" comments. Rather, it is a failure to grasp what is at the core of the judicial role: the imperative to act with impartiality and in a way that respects equality according to law. Sexual assault law and sexual assault trials are laden with concerns about gender equality, bias and discrimination. Justice Camp's manifest failure to behave impartially and to demonstrate respect for equality in such a context, over a protracted period of time, has raised considerable public concern about how women who allege they have been sexually assaulted are treated in the judicial system.

[288] We conclude that when Justice Camp's conduct is looked at in its totality and in light of its consequences, it would be fundamentally adverse to the preservation of public confidence in the impartiality, integrity and independence of the judicial role for the Judge to remain in office.

[289] When a judge displays disrespect or antipathy for the values that a law is designed to achieve or towards witnesses whose vulnerability is exposed, it encourages a similar disrespect or antipathy in others in the judicial system. Judges are not viewed simply as participants in the justice system. They are expected to be leaders of its ethos and exemplars of its values.

[290] We accept the Front-Line Interveners' submission that the "social significance of a judge, in the highest position of authority [in the criminal justice system], relying on rape myths and being oppositional to four decades of law reform, should be of central concern to the Inquiry Committee."[189] The Supreme Court of Canada has described the judge's role as having "a place apart" in our society, as "the pillar of our entire justice system".[190] As the Front-Line Interveners submitted, when rape myths are relied upon by a "judge who should occupy a 'place apart', the discriminatory impact is more pronounced and the normalizing effects of those discriminatory views in society are far-reaching."[191]

---

[189] Para. 13.
[190] *Therrien (Re)*, 2001 SCC 35, para. 109 [*Therrien*].
[191] Submissions of the Front-Line Interveners, para. 20.

[291] A judge who uses his role in a criminal trial to denigrate values he should respect commits serious and significant misconduct. That misconduct cannot simply be dismissed as remediable ignorance born of unconscious bias. A judge must be held accountable for the effects of his misconduct on those who appear before him, and on the public which entrusts him with the task of fairly and impartially applying the law.

[292] A less obvious, but equally significant consequence of misconduct of the nature at issue here is its prospective effect on the independence of the judiciary. Judges must feel free and be free to make unpopular decisions. Under our law, an accused charged with sexual assault has the same right to the presumption of innocence as any other accused. An accused charged with sexual assault has a right to be acquitted if the case against him is not proven beyond a reasonable doubt. Judges must deal with issues of the credibility and reliability of vulnerable complainants, just as they must deal with any other witnesses, and without fear of being labelled as sexist or gender-biased if they make adverse findings against the complainant and acquit an accused. Justice Camp's conduct in the *Wagar* Trial, in addition to eroding public confidence in the judiciary generally, renders it more difficult for judges to make credibility findings adverse to a complainant in a sexual assault prosecution without fear of facing complaints that they too are part of a system rife with bias.

[293] In other words, Justice Camp's misconduct in the Trial adds to the public perception that the justice system is fuelled by systemic bias and it therefore courts the risk that in other sexual assault cases, unpopular decisions will be unfairly viewed as animated by that bias, rather than by the application of legal principles and sound reasoning and analysis. In that way, Justice Camp’s misconduct erodes the independence of the judiciary, which is crucial to maintain in the face of the need, from time to time, to make decisions that are publicly unpopular but legally mandated.

[294] Having assessed the gravity of Justice Camp’s misconduct, the question becomes: are Justice Camp’s demonstrations of contrition, the personal qualities revealed through his character letters, and the steps he has taken to educate himself and reform his attitudes sufficient to restore public confidence, or is removal required to do so?

D. Evidence of the Judge's Remediation

[295] In his closing oral submissions, Judge's counsel put his position as follows:

> 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.
>
> 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.[192]

[296] The Judge in making that submission relies heavily on his evidence and that of Justice McCawley, Dr. Haskell and Professor Cossman relating to the mentoring, education and counselling he has undertaken to remedy his knowledge gaps and address his biases.

i. Mentoring and Social Context Education

[297] Justice Deborah McCawley has been a judge of the Manitoba Court of Queen's Bench since 1997. She has been at the vanguard of social context education for Canadian judges. Beginning in December 2015, she and Justice Camp met on a number of occasions and had dozens of weekly mentoring calls. They attended together a two-day conference on the conduct of sexual assault trials and a two-day conference on judicial ethics, both provided by the National Judicial Institute ("NJI").

---

[192] Written Closing Submissions of Justice Camp, pp. 14-15.

[298] The NJI is a national body that provides most of the continuing education and learning resources to all federally-appointed judges and, to a lesser extent, provincially-appointed judges in Canada. The NJI's three pillars of education for judges are knowledge of the law, judicial skills, and social context education. The NJI is a world leader in social context education for judges.

[299] Justice McCawley defined social context education as providing judges with a better understanding of the social context of judging. Social context education is designed to address a judge's fundamental beliefs about how the world works and how society conducts itself. It also teaches that some of the beliefs that judges developed earlier in life are not necessarily the ones that are appropriate for the present, and that a judge may need to interrogate and reconsider those beliefs.

[300] In Justice McCawley's view – and this is now generally accepted – all judges benefit from social-context education. The outcomes of this type of education are very positive. The context in which judges perform their judicial role changes all the time. It will change over the career of a judge. Society changes; a judge's role in the court system and society changes; and the composition of a court changes over time. Social context education is designed to address these changes.

[301] Justice McCawley provided Justice Camp with a reading list of literature in the area of sexual assault and victims of violence.[193] She did so based on materials prepared by the NJI for the sexual assault conference that she and Justice Camp later attended.

[302] Justice McCawley and Justice Camp discussed the reading materials. In Justice McCawley's view, Justice Camp was highly motivated to learn the materials, and he wanted to discuss the readings in considerable detail. He also did independent research and reading, and Justice Camp frequently discussed those independent readings with Justice McCawley. Among other topics, they discussed the distinction between discredited stereotypes and myths, on the one hand, and legitimate credibility and lack-of-proof issues, on the other hand, which might arise in a sexual assault trial. They also

[193] Exhibit 5, Justice Deborah McCawley Reading List (one page).

discussed Justice Camp's interventionist approach to presiding over a trial. Justice McCawley testified that she was satisfied that Justice Camp understood the material on the reading list. She assessed Justice Camp as very "teachable"[194] and "very amenable to learning",[195] and said that he was "very sincere and committed"[196] throughout their dealings. In her estimation, Justice Camp is "continuing to learn and I think has the capacity to continue to educate himself".[197] As for his understanding of his motivation, Justice McCawley testified:

> […] one of the reasons that I agreed to work with him initially, because I was struck by the fact that his motivation was very much concern for the pain and the embarrassment he had caused the complainant in this case, the pain he had brought to his colleagues and his court, and the damage he felt he had done to the administration of justice. And what was going to happen to him personally almost seemed to me to be almost secondary, and I was quite surprised by that because that was not what I had expected.
>
> And that motivation never changed. I think it grew, the more his understanding and the depth of his understanding grew, the more he learned about the law and the application of it. He was engaged in counselling. I had recommended that he do that in addition to the academic programs I had recommended. The more he grew in all of the areas, the more I realized he had the capacity to -- to do the job and do it well. He's a very compassionate, empathetic person.[198]

[303] Justice McCawley also testified that while learning the material, Justice Camp demonstrated intellectual engagement by interrogating the material, but she "never got the sense that he was pushing back in any way that I felt was resistance".[199] In their discussions, Justice Camp recognized the inappropriateness of his questions and comments during the *Wagar* Trial, and she perceived that his understanding deepened over time.

[304] In terms of future strategies, Justice McCawley and Justice Camp talked "about alternative language that communicates a message more appropriately or when the

---

[194] Inquiry Hearing Transcript, Vol. 2, Sept. 7, 2016, p. 107, lines 20-21.
[195] Inquiry Hearing Transcript, Vol. 2, Sept. 7, 2016, p. 108, lines 4-5.
[196] Inquiry Hearing Transcript, Vol. 2, Sept. 7, 2016, p. 115, line 21.
[197] Inquiry Hearing Transcript, Vol. 2, Sept. 7, 2016, p. 108, lines 11-12.
[198] Inquiry Hearing Transcript, Vol. 2, Sept. 7, 2016, p. 109, lines 8-26.
[199] Inquiry Hearing Transcript, Vol. 2, Sept. 7, 2016, p. 117, lines 9-11.

message isn't appropriate, it shouldn't be there and why".[200] They also discussed more generally, strategies that are important for all judges to improve their understanding, to practice, get advice and to continually learn.

ii. Learning the History of Sexual Assault Law and Reforms

[305] Professor Brenda Cossman is a law professor at the University of Toronto's Faculty of Law, and the director of the Bonham Centre for Sexual Diversity Studies. She is a nationally-recognized expert on gender, sexuality and the law. She was retained by Justice Camp to educate him about the history of sexual assault law and reforms. They met five times for two-to-three hour sessions. At the start of the course, it appeared to Professor Cossman that Justice Camp knew the *Criminal Code* provisions relevant to sexual assault, and the leading case law, but he was not well versed in the history of sexual assault law, the history of the law reform of sexual assault, and the ways in which that law historically discriminated against women, including the myths and stereotypes that reforms to the law are meant to address. As a part of the course of study, Professor Cossman provided Justice Camp with a reading list meant to fill those gaps.[201]

[306] During their meetings, Professor Cossman and Justice Camp discussed those readings, and they discussed critiques of the justice system, rape myths and stereotypes, and sexual assault prosecutions. They also discussed the distinction between stereotypes and myths versus legitimate credibility and lack-of-proof issues. In Professor Cossman's evaluation, Justice Camp had read the materials so that he was able to discuss the readings. She assessed Justice Camp as being teachable – "absolutely open" to learning.[202] In her view, Justice Camp seemed very earnest and remorseful, and he accepted that there were gaps in his knowledge.

[307] At the end of the course, Professor Cossman provided Justice Camp with an exam. The exam covered: "the history of the law of sexual assault, the way in which rape myths have historically informed that law, the series of law reforms, the waves of law reform to the law of sexual assault, the ways in which those law reforms have been specifically

[200] Inquiry Hearing Transcript, Vol. 2, Sept. 7, 2016, p. 129, lines 21-24.
[201] Exhibit 8, Prof. B. Cossman Reading List (one page).
[202] Inquiry Hearing Transcript, Vol. 3, Sept. 8, 2016, p. 157, line 19.

intended to address rape myths."[203] Professor Cossman assessed Justice Camp as having done very well on the exam. He had synthetized the materials and, in Professor Cossman's view, he now appears to understand the law of sexual assault in Canada, as well as the law of evidence and criminal procedure as it applies to sexual assault prosecutions. She believed Justice Camp accepted the rationale for why the law of sexual assault has changed. She expressed the view that education is the most powerful tool we have and added: "But I'm an educator not a punisher."[204]

iii. Counselling and Learning about Sexual Assault Survivors

[308] Dr. Lori Haskell is a clinical psychologist, and a leading expert on women's experience of male violence, and the neurobiology of fear and trauma. In her clinical work, she provides psychological treatment to adults and couples, including survivors of abuse-related trauma. She is an assistant professor in the Department of Psychiatry at the University of Toronto, and a research associate at the Centre for Research on Violence Against Women and Children at the University of Western Ontario. She has published, lectured, and provided training in respect of trauma and sexual violence. Her training of justice system participants – police, prosecutors and judges – includes teaching how victims respond to sexual assault or domestic violence, and how it affects a survivor's memory and demeanor, and their inability to give coherent narratives. As part of her training she addresses rape myths.

[309] Dr. Haskell testified that, in the work she does counselling and lecturing judges, Crown counsel, police and others, she has encountered misunderstanding and ignorance about trauma, and confusion about how or why rape myths have been discredited. She stated that she has encountered these misconceptions "many times".[205] At the inquiry hearing, she gave examples of some of the neurobiological effects of trauma and how ignorance regarding those effects contributes to rape myths.

---

[203] Inquiry Hearing Transcript, Vol. 3, Sept. 8, 2016, p. 156, lines 3-8.
[204] Inquiry Hearing Transcript, Vol. 3, Sept. 8, 2016, p. 181, line 17.
[205] Inquiry Hearing Transcript, Vol. 3, Sept. 8, 2016, p. 204, lines 22-25.

[310] Dr. Haskell was retained by Justice Camp to teach him about the neurobiology of fear and trauma, and to provide him with gender sensitivity training and psychological counselling. Her evidence at the inquiry hearing was restricted to the instruction and training that she provided to the Judge. Justice Camp was not advancing any medical defence for his conduct. Counsel argued, and the Committee agreed, that his psychotherapy with Dr. Haskell was not relevant to the inquiry.

[311] Dr. Haskell met with Justice Camp from November 2015 to August 2016 for a total of 13 clinical hours. She talked to him about the neurobiology of fear and trauma and the typical responses victims have to sexual violence. She also talked to him about "gender socialization", "social location" and "class"[206] and the factors that can shape a woman's behaviour and responses to violence. Dr. Haskell testified that she and Justice Camp worked on his assumptions and the experiences that motivated his thinking. She stated that he was initially "defensive, protective"[207] but he became receptive. She gave Justice Camp a reading list that included an article critical of the way the legal system approaches sexual violence and "why we need individual change in terms of judicial thinking and understanding […]".[208]

[312] She believed Justice Camp demonstrated some "gender assumptions and biases",[209] which she regarded as the same as "sexist assumptions".[210] She thought his motivation to examine those sexist assumptions was "very high".[211] She described him as "teachable" and "very motivated".[212] She testified that he really wanted to have an in-depth understanding of his mistakes.

[313] She was asked by Presenting Counsel if the types of beliefs that led Justice Camp to make the impugned comments would resurface when he is no longer in counselling. She responded that she "would be very surprised if these particular beliefs […] [did]".[213]

---

[206] Inquiry Hearing Transcript, Vol. 3, Sept. 8, 2016, p. 197, lines 14, 17.
[207] Inquiry Hearing Transcript, Vol. 3, Sept. 8, 2016, p. 198, line 21.
[208] Inquiry Hearing Transcript, Vol. 3, Sept. 8, 2016, p. 201, lines 5-7.
[209] Inquiry Hearing Transcript, Vol. 3, Sept. 8, 2016, p. 214, lines 2-3.
[210] Inquiry Hearing Transcript, Vol. 3, Sept. 8, 2016, p. 214, lines 4-5.
[211] Inquiry Hearing Transcript, Vol. 3, Sept. 8, 2016, p. 216, lines 22-23.
[212] Inquiry Hearing Transcript, Vol. 3, Sept. 8, 2016, p. 203, lines 12-15.
[213] Inquiry Hearing Transcript, Vol. 4, Sept. 8, 2016, p. 232, lines 5-6.

She later clarified that her answer was with respect to Justice Camp's ignorance of neurological responses to fear and trauma. In response to a follow-up question from a member of the Committee about the risk of relapse to old attitudes and thinking patterns after receiving gender sensitivity training, she responded, "This is hard because our 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 […]".[214]

iv. Justice Camp's Evidence and the Committee's Findings

[314] Justice Camp testified about the salutary effect of the mentoring, counselling and teaching that he received from Justice McCawley, Dr. Haskell and Professor Cossman. In the course of his evidence, however, he made some comments that raise concern about his understanding of the issues implicated by his conduct, and the extent to which he fully absorbed what he said he had learned.

[315] When asked by Presenting Counsel about Dr. Haskell's characterization of his thinking as "sexist", he responded as follows:

> Sections 271 to 278 of the *Criminal Code* dealing with sexual assault are gender neutral, and I think my thinking isn't sexist but just old-fashioned. I would have applied the same […] thinking to a male complainant. So "sexist" is perhaps code for […] what I was thinking, but it's not sexist so much as old-fashioned, outdated thinking generally.[215]

[316] Later in his evidence, he was asked by a member of the Committee to clarify whether in his earlier evidence, he had acknowledged that his statements reflected gender bias. He confirmed that was his evidence but went on to explain that:

> […] because sex assault is generally male or [*sic*] female, we see it in terms of those terms. But the sections are, in fact, gender-neutral, and there is sometimes rape on males. Not as often, but it happens. And it's a form of prejudice to think that -- and this is why it is so hard to guard against prejudice. […] I have to be alert about it all the time. But it's almost prejudiced for me to say my remarks are sexist. My remarks are just wrong.

---

[214] Inquiry Hearing Transcript, Vol. 4, Sept. 8, 2016, p. 240, lines 21-26.
[215] Inquiry Hearing Transcript, Vol. 5, Sept. 9, 2016, p. 312, lines 20-26, p. 313, line 1.

> It isn't because it happened to a woman that it's wrong. It's because it happened at all; that's my point. But we talk in -- we use -- we short-circuit it by saying it's sexist that I was gender biased. The effect of what I did resulted in gender bias in this case because the complainant was a woman. […]
>
> My concern is, all throughout this case, we've been skirting around it, but - and perhaps people haven't been noticing it, but we haven't been focusing on the fact that this can happen to men as well, young boys as well.[216]

[317] He accepted the suggestion that "the reason why the law was amended over time was because of a history of discrimination against women", but he added "a rider".[217] He testified:

> The reason it was amended was because women, to their eternal credit fought for that. It -- it does not follow that there aren't particularly boys that are sexually […] assaulted, and we have to […] face that fact too, and we have to deal with that thinking, and I try to do that. Now, it's true I made the concession that I was gender biased. But I was just mistaken […] when I made those comments. I see the problem as wider than just women. And so do the experts, with respect to all that's helped me.[218]

[318] In our view, Justice Camp's characterization of himself as "old-fashioned and outdated", as opposed to "sexist" and "gender biased" reflects an ongoing resistance to the idea that his conduct in *Wagar* reflected discriminatory rape myths that have contributed to women's inequality.

[319] There can be no doubt that the myths and stereotypes that informed the amendments to the sexual assault provisions of the *Criminal Code* have their genesis in gender bias. The vast majority of sexual assaults are committed by men against women and girls. As Cory J. observed in *R. v. Osolin*:

> The reality of the situation can be seen from the statistics which demonstrate that 99 percent of the offenders in sexual assault cases are men and 90 percent of the victims are women. See *Gender Equality in the Canadian Justice System: Summary Document and Proposals for Action* (April 1992) at page 13. […][219]

---

[216] Inquiry Hearing Transcript, Vol. 5, Sept. 9, 2016, p. 351, lines 15-26, p. 352, lines 1-9.
[217] Inquiry Hearing Transcript, Vol. 5, Sept. 9, 2016, p. 352, lines 24-26, p. 353, line 1.
[218] Inquiry Hearing Transcript, Vol. 5, Sept. 9, 2016, p. 353, lines 2-12.
[219] [1993] 4 S.C.R. 595, p. 669.

[320] As Justice L'Heureux-Dubé observed in her concurring judgment in *Ewanchuk*:

> Violence against women is as much a matter of equality as it is an offence against human dignity and a violation of human rights. As Cory J. wrote in *Osolin*, *supra*, at p. 669:
>
> Sexual assault is an assault against human dignity and constitutes a denial of any concept of equality for women.
>
> These human rights are protected by ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms* and their violation constitutes an offence under the assault provisions of s. 265 and under the more specific sexual assault provisions of ss. 271, 272, and 273 of the *Criminal Code*, R.S.C., 1985, c. C-46.[220]

[321] It is difficult to understand how Justice Camp could conclude – particularly after his intensive sessions with Justice McCawley, Dr. Haskell and Professor Cossman – that his acknowledgement of misconduct did not involve sexism and gender bias, and that it did not implicate profound issues of equality. His evidence leaves the Committee doubtful about whether he is fully engaged in the necessary ongoing process of constant self-reflection about which Dr. Haskell testified and which the public has a right to expect of members of the judiciary.

[322] Moreover, we are not persuaded by the Judge's contention that the bias he demonstrated in his misconduct is common among participants in the criminal justice system and he therefore ought not to be singled out.

[323] First, whether some police officers, defence counsel and Crown counsel continue to adhere to discredited stereotypical and discriminatory thinking about sexual assault is not relevant to our inquiry, since judges are held to a different and higher standard than other participants in the justice system.

[324] Second, this is simply not a submission the Committee finds compelling. Acceding to the idea that the gravity of one judge's misconduct is lessened by the existence of another judge's similar misconduct would promote a race to the bottom. As is apparent from the decision of the Inquiry Committee in the Marshall Inquiry, judges are not

---

[220] *Supra* note 93, para. 69.

expected to have no biases, but they are expected to overcome them and preside with impartiality, integrity and independence.

[325] It is our view that, on all the evidence, this case meets the high threshold for removal. As much as education, including social context education has a role to play in the shaping of an effective judge who lives up to his or her obligation to occupy “a place apart” from the rest of society and who conducts him or herself in a way that is beyond reproach, it is not the solution to all problems, nor to the specific problems identified in this case.

[326] While all judges have knowledge gaps requiring continuing education, a lack of knowledge is not the central problem in this case. No judge can be expected to master all the law that he or she will need to apply during the course of a long career. In this vein, the Honourable J.O. Wilson in *A Book for Judges* observed:

> Chief Justice Culliton of Saskatchewan has said: “There is no calling that should more quickly engender in one a sense of humility than that of being a judge. If there is one fact of which a judge becomes more certain the longer he or she is on the bench, it is not how much but how little of the law he or she really knows.” And, of course, we have Chaucer saying: “The life so short, the craft so long to lerne”.[221]

[327] The problem with Justice Camp's misconduct was not that he had gaps in his knowledge, but that he filled those gaps with an antipathy towards legislative reforms in the law and reliance on discredited stereotypes and myths. Justice Camp, by his own evidence, was familiar with the leading cases as well as the *Criminal Code* provisions dealing with sexual assault. In other words, he ignored the fundamental requirement of a judge to accept that although he has knowledge gaps, he must proceed in a way that reinforces confidence in the integrity of the judiciary and does not imperil it.

E. Evidence of Good Character

[328] In many respects, Justice Camp’s behaviour in the *Wagar* Trial seems inconsistent with the way he has been described by his colleagues and friends in the larger legal

---

[221] *Supra* note 39, p. 114.

community. The evidence establishes that Justice Camp is a man possessed of some admirable personal qualities. He has many supporters who view his conduct in the *Wagar* Trial as an aberration. He has apparently demonstrated in his past words and deeds a commitment to equality in other areas. He has shown respect and deference to women lawyers, he has contributed to the anti-apartheid movement in his native South Africa, he has assisted a hijab-wearing woman law student to obtain articles. He has shown patience with a challenging complainant witness in another sexual assault matter.

[329] While we acknowledge the high esteem in which many people hold Justice Camp, the evidence of his fine character does not attenuate the serious damage his comments have done to public confidence in the integrity of the judiciary.

F. Comparison with Other Cases Involving Judicial Misconduct

[330] Judge's Counsel provided the Committee with summaries of Canadian judicial bias cases in which a judge displayed apparent bigotry or antipathy towards a person or group through on-the-record comments. Removal of the judge was recommended in only two of the cases presented by Judge's counsel. We considered the cases submitted by Judge's counsel, and concluded that they were of limited assistance to the Committee. The application of the test for the removal of a judge is highly fact-specific. Moreover, conduct which may have been tolerated or met with an admonishment in an earlier time may require stronger sanction today.

[331] We have concluded that this case bears some similarities to *Moreau-Bérubé v. New Brunswick (Judicial Council)*.[222] In that case, Judge Moreau-Bérubé expressed virulent criticism of residents of the Acadian Peninsula in northeastern New Brunswick during a sentencing hearing. Apparently, the judge and the two offenders she was sentencing were residents of that community. Her comments were very disparaging of her fellow residents' honesty, lifestyle and work ethic. She showed contrition by apologizing for her remarks three days later. Despite her expression of remorse, she was removed from the bench.

---

[222] [2002] 1 S.C.R. 249 [*Moreau-Bérubé*].

[332] In Judge Moreau-Bérubé's case, the impugned comments were made, somewhat spontaneously, on one day, in one hearing. The judicial inquiry was conducted under provincial legislation. The Inquiry Panel did not recommend her removal, finding that it had not been established that she held a strong belief, detrimental or potentially detrimental, to her capability in deciding various cases. Despite the Panel's report, the New Brunswick Judicial Council recommended her removal. They found that a reasonable person would take into account that, although Judge Moreau-Bérubé's remarks "were made spontaneously and extemporaneously, […] given the length and the vehemence of her remarks, […] they could not have been made completely without thought."[223]

[333] While Justice Camp's remarks were not as strongly worded or "vehement" as Judge Moreau-Bérubé's, they were made over the course of a trial, which took place on several days over a three-month period. Some of Justice Camp's most troubling comments -- including his question to the complainant about why she did not just keep her knees together -- were repeated in his Reasons for Judgment a month after those remarks were initially made. We find that his impugned remarks, like those of Judge Moreau-Bérubé, could not have been made without thought.

[334] The Supreme Court of Canada, in reviewing the procedures followed for Judge Moreau-Bérubé's removal, emphasized that the focus of discipline bodies respecting judges relates primarily to maintaining the integrity of the institution:

> Despite provincial variations in their composition, discipline bodies that receive complaints about judges all serve the same important function. In *Therrien (Re)*, [2001] 2 S.C.R. 3, 2001 SCC 35, Gonthier J. described, at para. 58, the committee of inquiry in Quebec as "responsible for preserving the integrity of the whole of the judiciary" (also see *Ruffo v. Conseil de la magistrature*, [1995] 4 S.C.R. 267). The integrity of the judiciary comprises two branches which may at times be in conflict with each other. It relates, first and foremost, to the institutional protection of the judiciary as a whole, and public perceptions of it, through the disciplinary process that allows the Council to investigate, reprimand, and potentially recommend the removal of judges where their conduct may threaten judicial integrity (*Therrien*, *supra*, at paras. 108-12 and 146-50). Yet, it also relates to constitutional

[223] *Moreau-Bérubé, supra* note 222, para. 22.

> guarantees of judicial independence, which includes security of tenure and the freedom to speak and deliver judgment free from external pressures and influences of any kind (see *R. v. Lippé*, [1991] 2 S.C.R. 114; *Beauregard v. Canada*, [1986] 2 S.C.R. 56; *Valente*, *supra*.[224]

[335] As the Court further explained:

> […] In some cases, however, the actions and expressions of an individual judge trigger concerns about the integrity of the judicial function itself. When a disciplinary process is launched to look at the conduct of an individual judge, it is alleged that an abuse of judicial independence by a judge has threatened the integrity of the judiciary as a whole. The harm alleged is not curable by the appeal process.
>
> The New Brunswick Judicial Council found that the comments of Judge Moreau-Bérubé constituted one of those cases. While it cannot be stressed enough that judges must be free to speak in their judicial capacity, and must be perceived to speak freely, there will unavoidably be occasions where their actions will be called into question. This restraint on judicial independence finds justification within the purposes of the Council to protect the integrity of the judiciary as a whole. […][225]

[336] In the circumstances of *Moreau-Bérubé*, the Supreme Court of Canada agreed with the New Brunswick Judicial Council that the judge created an apprehension of bias sufficient to justify her removal from duties as a Provincial Court judge.

[337] In *Therrien*, the Supreme Court of Canada also considered the gravity of the misconduct that undermined public confidence in the judiciary as a whole. Justice Gonthier wrote as follow at paras. 150 - 151:

> When we read the report of the Court of Appeal, it is plain that the Court made a thorough study and a balanced assessment of the appellant's situation. It focused its decision on upholding the integrity of the judicial office, and in this we cannot but concur. In the circumstances, and since it is the judicial forum appointed by the legislature to make determinations concerning the conduct of a judge, and since a recommendation for removal in this case would not amount to arbitrary interference by the Executive in the exercise of the judicial function, I am of the opinion that we should not review the sanction that the Court of Appeal chose to impose. The appellant's conduct has sufficiently undermined public confidence, rendering him incapable of performing the duties of his office. Accordingly,

---

[224] *Moreau-Bérubé*, *supra* note 222, para 46.
[225] *Moreau-Bérubé, supra* note 222, paras. 58-59.

> the recommendation that the appellant's commission be revoked is the necessary conclusion.
>
> In closing, I will say that in reaching this conclusion I am not unaware that this case represented, in a sense, an invitation to society to be ever more generous. The pardon that the appellant was granted is an act of generosity, of brotherhood, but also an act of justice on the part of society. It is undoubtedly desirable that such gestures be praised and encouraged. However, we cannot ignore the unique role embodied by the judge in that society, and the extraordinary vulnerability of the individuals who appear before that judge seeking to have their rights determined, or when their lives or liberty are at stake. Above all, a person who appears before a judge is entitled to have justice done in his or her case, and that justice be <u>seen</u> to be done by the general public. That kind of generosity is not something that a person can be compelled to offer. In the specific circumstances of the case at bar, the values of forgiveness and selfless generosity must therefore yield to the values of justice and the all-important integrity of the justice system.[226]

[338] While in *Therrien,* the misconduct at issue preceded the judge's appointment and hence did not engage the tension between judicial accountability and judicial independence, the point that the values of justice and the integrity of the justice system are "all important" considerations cannot be ignored in the present case. The primary importance of the integrity of the justice system was emphasized by the Inquiry Committee in the conduct of Justice Bienvenue:

> The mandate of a disciplinary authority is to ensure compliance with judicial ethics in order to preserve "*the integrity of the judiciary*", as Gonthier J. put it in *Ruffo, supra*, at p. 309. Gonthier J. added the following with respect to a disciplinary committee similar to this one:
>
> Its role is <u>remedial</u> and relates to the <u>judiciary</u> rather than the judge affected by a sanction.
>
> (Emphasis in original.)
>
> It is this task, a very onerous one, that we must perform.[227]

G. Justice Camp's Apologies

---

[226] *Supra* note 190.
[227] Bienvenue Inquiry, *supra* note 182, p. 57.

[339] Justice Camp took several opportunities to offer both written apologies prior to the hearing, and a heartfelt oral apology at the outset of his evidence at the hearing. While the Committee does not doubt the sincerity of the apologies made to all those affected by his misconduct, we think that the following comments made by the Canadian Judicial Council in the Cosgrove Inquiry apply with equal force to the present case:

> For Council therefore, the key question is whether an apology is sufficient to restore public confidence. Even a heartfelt and sincere apology may not be sufficient to alleviate the harm done to public confidence by reason of the serious and sustained judicial misconduct.[228]

[340] In the present case, where the Judge has taken full advantage of his opportunities to express remorse and atone for his misconduct and to make positive strides to overcome what he has characterized as his "unconscious bias", it may appear unforgiving not to accept his position that education and an apology can be seen as a moral equivalent for removal.

[341] Against that, however, lies the fact that judges occupy a unique and privileged role in society and deal consistently with "the extraordinary vulnerability of the individuals who appear before [them] seeking to have their rights determined, or when their lives or liberty are at stake".[229]

[342] In our view, given the seriousness of Justice Camp's misconduct, his apologies, though sincere, do not alleviate the harm done to public confidence.

VIII. CONCLUSION AND RECOMMENDATION REGARDING REMOVAL

[343] In our view, in all the circumstances, the Judge's reliance on education and contrition as a prescription for maintaining his unique and privileged position in society must yield to a result that more resolutely pursues the goal of restoring public confidence in the integrity of the justice system.

---

[228] *IN THE MATTER OF Section 65 of the Judges Act, R.S., 1985, c. J-1, and of the Inquiry Committee convened by the Canadian Judicial Council to review the conduct of the Honourable Paul Cosgrove of the Ontario Superior Court of Justice* (March 2009), para. 31.
[229] *Therrien, supra* note 190, para. 151.

[344] We conclude that Justice Camp's conduct is so manifestly and profoundly destructive of the concept of the impartiality, integrity and independence of the judicial role that public confidence is sufficiently undermined to render the Judge incapable of executing the judicial office.

[345] Accordingly, the Inquiry Committee expresses the unanimous view that a recommendation by the Council for Justice Camp's removal is warranted.

29 November 2016

Signed
The Honourable Austin F. Cullen, Chairperson
Associate Chief Justice of the Supreme Court of British Columbia

Signed
The Honourable Deborah K. Smith
Associate Chief Justice of the Supreme Court of Nova Scotia

Signed
The Honourable Raymond P. Whalen
Chief Justice of the Supreme Court of Newfoundland and Labrador, Trial Division

Signed
Karen Jensen

Signed
Cynthia Petersen

Appendix A

[1] It is not the role of the Committee to resolve the competing versions of events in the *Wagar* Trial or to make any findings of fact about what occurred between the complainant and Mr. Wagar. As we write this report, there is a retrial of Mr. Wagar underway. We refrain from commenting on the evidence. For the purpose of the inquiry, however, it is helpful to summarize the evidence of the witnesses at the Trial because it provides the context for our examination of Justice Camp's conduct during the Trial.

i. A.B.'s Evidence

[2] A.B. testified at the Trial. She stated that on December 13, 2011, the date of the incident, she was 19 years old.

[3] At that time, A.B. was staying at Mr. Gallinger's residence. Lance had invited her to stay there a couple of days prior. She did not know Mr. Gallinger, but she could not afford a place to stay. She had been living on the streets, and had drug and alcohol problems. A.B. believed that on her first night at Mr. Gallinger's residence, Lance, her friend "Dustin" and Ms. Porter also stayed there.

[4] On December 13, 2011, A.B. and Ms. Porter went to the Alex Youth Centre to pick up groceries. While there, they ran into Mr. Wagar. Ms. Porter knew Mr. Wagar but A.B. had not met him before. Together, A.B., Ms. Porter and Mr. Wagar returned to Mr. Gallinger's residence.

[5] Later that day, A.B. left Mr. Gallinger's residence with others to steal some liquor. When they returned, there was a party in progress. A.B. knew some of the people at the party, including Dustin.

[6] Along with Dustin and Ms. Porter, A.B. drank in the laundry room. She became very intoxicated. She testified that Mr. Wagar was not drinking.

[7] At the party, Mr. Wagar was dancing. A.B. liked his dancing and began to dance with him but she never touched him. A.B. stated that Mr. Wagar could have been talking to her while they danced and that he was probably flirting with her.

[8] A.B. testified that she began to feel sick and went to the bathroom, where she locked the door, sat on the toilet, looked at her phone and went on Facebook. After vomiting in the bathroom, she cleaned up. When she unlocked the door to leave, Mr. Wagar snuck into the bathroom, shut the door behind him, and locked it. According to A.B., Mr. Wagar was 6'1 and about 240 pounds, whereas she was only 5'5-5'6 and 100 pounds. He began flirting with A.B. and stated that he was interested in her. A.B. did not respond.

[9] In the bathroom, A.B. was against the sink counter and Mr. Wagar took her hands. He then grabbed her pants and pulled them down, along with her underwear, during which time he broke a button on her pants. A.B. was naked from the waist down. Her pants were at her ankles, holding her legs together. Mr. Wagar then picked A.B. up, put her on the counter, pushed her legs apart, and began licking her vagina aggressively. A.B. testified that she did not say anything and she did not know why. Mr. Wagar was smiling like he was having a good time. When he asked A.B. whether she liked it, she said "no" but he continued.

[10] A.B. testified that she did not cooperate with Mr. Wagar but she did not attempt to stop him. She denied that she placed her hands on Mr. Wagar's shoulders in order to balance herself or to caress him. She did not know if Mr. Wagar said anything when he put her on the counter. Throughout he was generally talking about her body, what he wanted to do to her, and relationships. She told Mr. Wagar that she liked him as a friend, that she was gay, and that she liked Ms. Porter.

[11] When she thought Mr. Wagar was finished, A.B. hopped off the counter. Mr. Wagar then took his pants off and told her he was going to "fuck her". A.B. told Mr. Wagar that he could not put his penis inside her and he responded, "yeah I can." He said he would pull out before he ejaculated and told her "I'm clean". She said he couldn't do that without a condom. She testified that she told him this so he would not have sex with her. Mr. Wagar replied that he could and, when A.B. said "no" again, Mr. Wagar told her that he would pull out. A.B. still said "no" but Mr. Wagar picked her up, put her back on the counter, and placed his penis inside her vagina. At this point, one of A.B.'s pant

legs had come off and the other one was at her ankles. He put his hands under her shirt and touched her breasts. A.B. pushed Mr. Wagar on the shoulders and told him that it hurt, that it wasn't comfortable, that she wanted him to stop, and that she didn't want him to do that. Her back was pressed against a faucet that was bruising her tailbone. Mr. Wagar laughed, smiled, and kept going. Eventually, Mr. Wagar pulled out and ejaculated on the counter.

[12] According to A.B., the sex could have been fast but it seemed to take a long time. She denied that she used her hands for balance or to encourage Mr. Wagar. She testified that she felt gross and violated. The sex was not consensual.

[13] After he finished, Mr. Wagar turned on the shower and ripped off A.B.'s shirt, tank top, and bra. He then led A.B. into the shower and washed her body. Mr. Wagar directed her to wash him. She cooperated because he told her to and he had the control. She did not want to be there but she could not recall if she told Mr. Wagar that she did not want to wash him.

[14] A.B. testified that in the shower, Mr. Wagar licked her vagina. She did not say anything. Mr. Wagar then attempted to penetrate her (when she bent over after he told her to pick up the soap) and again licked her vagina. At this time, she saw Lance in the bathroom staring and smiling at her through the glass shower. Lance called her a little whore and commented on how her vagina looked. Lance told her that he was going to tell everybody. A.B. told Lance to "fuck off". Mr. Wagar then exited the shower and he and Lance left the bathroom. A.B. testified that she stayed in the shower. She did not want to leave because of what had just happened. Also, she didn't want to put on all her clothes because they were wet and Mr. Wagar had gotten them dirty by being sexual with her.

[15] A.B. put on some of her clothes and continued to drink. She wanted to be drunk again because she did not want to think about what had just happened. Later that night, she told Dustin what had happened with Mr. Wagar. Dustin had been trying to hook up with her, but it didn't go anywhere. Eventually, A.B. passed out with Dustin in the kitchen. At 3:00 or 4:00 a.m. she woke up and tried to sleep on the edge of the bed where Lance was sleeping. When Lance woke up, he called A.B. a slut and a little whore. He informed

her that he put Mr. Wagar up to having sex with her, that it was a game. He then began to videotape her and told her he was going to tell everybody to do exactly what Mr. Wagar did. A.B. became mad, tried to kick the phone out of his hand and she hit him. After a verbal exchange, Lance pushed her down and said he was going to smash her head.

[16] At about 6:00 or 7:00 a.m., while everybody was sleeping, A.B. showered and walked to the Alex Youth Centre. She testified that she did not leave earlier because she had nowhere to go, she had no money, she was drunk, and it was winter. Her phone had died that morning and she did not call the police while she was at Mr. Gallinger's because she was scared. A.B. did not think anyone at the house would believe her because they were all friends and she was the new person. Later that day, she went to the hospital, had a "rape kit" done and provided the police with a statement. She told the police that when Lance was trashing her after the incident, she told Lance that she wanted to have sex with Mr. Wagar because she wanted Lance to believe that she didn't care about what Mr. Wagar had done to her.

[17] A.B. testified that she saw Mr. Wagar twice after she reported the incident. The first time, she ran into him and Lance, who both pretended like nothing had happened. Mr. Wagar wanted to hug A.B. and stated that the incident was consensual because she had made eye contact with him during oral sex. A.B. could not recall if she said anything in response. Another time she saw Mr. Wagar, they smoked crystal meth together in a stairwell. Mr. Wagar supplied A.B. with the drugs and asked her to drop the charges. She told him she would.

[18] A.B. denied that she told Ms. Porter, before the alleged sexual assault in bathroom on the night of the party, that she was going to have sex with Mr. Wagar. She had just met Ms. Porter and was attracted to her. She testified that she would not have told Ms. Porter that she wanted to sleep with Mr. Wagar because she was trying to sleep with Ms. Porter. She did not remember if she smoked a marijuana cigarette in the bathroom with Dustin, Ms. Porter or Mr. Wagar that night. She denied that Mr. Wagar entered the bathroom with Ms. Porter and Dustin, and that Ms. Porter and Dustin left the bathroom after the four of them smoked a marijuana cigarette.

[19] A.B. agreed that living on the streets required learning to take care of yourself and that she had a lot of experience doing so. She believed that Lance was attracted to her but she did not encourage him. She tried to discourage him by telling him that she was not his girlfriend.

ii. Mike Gallinger's Evidence

[20] Mike Gallinger testified for the defence. He confirmed that in December 2011, he was 21 years old and was renting a basement suite that had two bedrooms, a bathroom, a kitchen, and no living room. There were always a lot of people coming and going from his apartment.

[21] In the summer of 2011, Mr. Gallinger met Mr. Wagar and Ms. Porter. He was friends with Mr. Wagar, Lance and Ms. Porter at the time of the incident.

[22] Mr. Gallinger stated that he somewhat remembered the weekend of the incident. A couple of days before the incident, Lance had brought A.B. to Mr. Gallinger's residence, which was the first time Mr. Gallinger had met her. Mr. Gallinger did not remember who was present at his residence on the date of the incident. He was not drinking but stated that he had probably taken speed. He believed Mr. Wagar was sober because Mr. Wagar had just been released from jail.

[23] On the night of the incident, Mr. Gallinger and Lance went into the bathroom to talk and they saw two blurred outlines of people in the shower. He did not see if they were facing each other, as he was only there for a couple of seconds and he did not look that closely. He assumed it was Mr. Wagar and A.B. because they were not in the other room. He did not know if the people in the shower saw him and Lance. He saw no sign of struggle and left immediately, pushing Lance out and closing the door. After that, he assumed that Lance stayed out of the bathroom.

[24] After he left the bathroom, Mr. Gallinger did not see whether Mr. Wagar or A.B. came out first. He assumed what had happened was consensual because, if it was not,

"she would have been […] screaming or something".[230] He stated that A.B. was clingy to Mr. Wagar after they left the bathroom. When asked to clarify, he stated that he noticed they were in the same room at one point and when Mr. Wagar went into another room, A.B. did as well. He thought they were talking but he could not hear what they were saying and he could not remember if he saw them touching. Mr. Gallinger was not paying attention to what they were doing.

[25] After the incident, Mr. Wagar and Lance stayed at Mr. Gallinger's residence until Mr. Gallinger was evicted. He cared about them and did not want them on the street. They were still friends at the time of the Trial.

[26] A.B. never said anything to Mr. Gallinger about the incident. He may have discussed the incident with Mr. Wagar after detectives came to his house. Mr. Gallinger talked to Lance about what happened and Lance may have given him details. Ms. Porter may have said something about the incident to Mr. Gallinger while he was talking to Lance but he could not remember the details.

iii. Ms. Porter's Evidence

[27] Skylar Porter also testified for the defence. She stated that in 2011, she was 22 years old and living on the streets.

[28] In her evidence, Ms. Porter confirmed that she had a fairly long criminal record which included assaulting a police officer, breaching court orders and several thefts. At the time of the incident, she was friends with Mr. Wagar and Lance. They had all partied together a few times, which usually included drinking and drugs.

[29] At the time of the incident, Ms. Porter was familiar with A.B., whom she had met at Mr. Gallinger's a couple of days before. Both Ms. Porter and A.B. were staying at Mr. Gallinger's residence.

[30] Ms. Porter attended the house party at Mr. Gallinger's residence in December 2011 but she was not drinking. She testified that, during the party, she smoked a joint in

[230] *Wagar* Trial Transcript, p. 127, lines 4, 8.

the bathroom with Mr. Wagar, A.B. and Dustin. At that time, she observed A.B. having sexual feelings for Mr. Wagar, as they were stroking each other's arms and shoulders but she could not hear what they were saying to each other. Ms. Porter stated that she took A.B. aside and asked her in front of everyone whether she was going to have sex with Mr. Wagar. A.B. responded that she was.

[31] Ms. Porter testified that she asked A.B. whether she was going to have sex with Mr. Wagar because Mr. Wagar was her friend and she was curious. She stated curiosity occurs when you are stoned. Ms. Porter did not ask A.B. anything else, including when they were going to have sex. She did not know why she assumed it was going to happen then and there but stated that she thought it would happen in the bathroom because someone was sleeping in the bedroom.

[32] After the joint was finished, Ms. Porter and Dustin left the bathroom. She saw A.B. and Mr. Wagar exit the bathroom 10 to 20 minutes later. They were acting warm and affectionate. Mr. Wagar was holding her hand. According to Ms. Porter, they were flirting and touching the whole weekend.

[33] Ms. Porter testified that Mr. Wagar is a fairly good friend of hers and that she had known him for four years. Ms. Porter only recently found out from Lance that the police were investigating Mr. Wagar and that he was charged with sexual assault. Mr. Wagar did not tell her he was in trouble. His mother asked her to come to court to testify. She said she never discussed the incident with Lance, Dustin, Mr. Wagar or A.B.

iv. Mr. Wagar's Evidence

[34] Alexander Wagar, the accused, also testified at the Trial.

[35] In his evidence, Mr. Wagar stated that he had lived in Calgary for the past three years and had struggled with a crystal meth addiction. His criminal record consisted mainly of property offences and his most recent conviction was for assault. He admitted that his DNA matched the DNA recovered from A.B.'s jeans and acknowledged that A.B. attended hospital for treatment where two bruises were observed on her back.

[36] At the time of the incident, Mr. Wagar testified he was 22 years old, 6 foot 1 and about 215 pounds. He had recently been released from jail and had been staying at a homeless shelter. Lance introduced him to A.B. on the day of the incident at the Alex Youth Centre and Ms. Porter was there. Lance invited him to stay at Mr. Gallinger's, where a party was thrown in his honour because he had been released from jail.

[37] According to Mr. Wagar, no one was sober at the party. Throughout the night, he drank hard liquor straight out of the bottle with A.B. She was drunk but not inebriated. Specifically, he stated that she was not slurring her words or falling down. According to Mr. Wagar, both he and Dustin were drunker than A.B. Ms. Porter was tipsy and Mr. Gallinger was pretty sober, as he had a few drinks but was not going overboard. The music was loud and everybody was dancing.

[38] Mr. Wagar was attracted to A.B. He recognized that she had no intention of dating Lance, and that Lance was pissed off and frustrated about that. Mr. Wagar saw A.B. flirting with Dustin and said that he could tell that she was attracted to Dustin because of her body language. He saw Dustin as his rival and viewed this as a challenge. He wanted to get A.B. to like him more than Dustin.

[39] Knowing that he was a good dancer, Mr. Wagar started to dance. A.B. danced with him and Mr. Wagar thought they had a connection. While they danced, A.B. told Mr. Wagar that he was a good dancer and that she liked his dancing. Mr. Wagar thought A.B. was attracted to him because she said this. She never touched him while they were dancing. Mr. Wagar told A.B. that she was really cute. He couldn't remember if she said she liked him too.

[40] Mr. Wagar testified that he smoked a joint in the bathroom with A.B., Ms. Porter, and Dustin. Ms. Porter brought the joint and invited them to smoke it with her. It was potent and everyone was high fairly quickly. While in the bathroom, Mr. Wagar stated that he started to talk with A.B. and he then talked to Dustin while A.B. spoke to Ms. Porter. He did not know what Ms. Porter and A.B. talked about. They were both bisexual and they liked each other.

[41] A.B. stayed behind when Dustin and Ms. Porter left the bathroom. A.B. smiled at Mr. Wagar. He then shut the door and locked it to prevent anyone from coming in.

[42] Mr. Wagar testified that once he and A.B. were alone in the bathroom, he told her he really liked her and that she was a beautiful girl. In response, she stated that she liked him too. They started kissing and groping. Mr. Wagar pulled A.B.'s pants off, sat her on the sink, and started performing oral sex on her. He told A.B. that "she has a really nice pussy". She thanked him and "was all smiles". Mr. Wagar took off his pants. A.B. then grabbed his penis and said "Oh my God, you got a really big dick" and Mr. Wagar thanked her. When A.B. asked Mr. Wagar whether he had a condom, he said no but that he would pull out right away. Mr. Wagar testified that A.B. responded "Oh, okay".

[43] Accordingly to Mr. Wagar, he and A.B. then started to have sex. It was difficult to get his penis into her vagina because of the angles and A.B. fell into the sink. In less than two minutes, he ejaculated into the sink, on the counter, on A.B.'s stomach, and on her leg. He apologized and explained he had been in jail for 45 days. A.B. replied, "Oh, it's okay, hon".

[44] Mr. Wagar testified that he then cleaned both of them with toilet paper, turned on the shower and probably helped A.B. undress. He took her to the shower and washed her down. They tried to have sex again. She was straddling him as he sat in the shower and he may have performed oral sex on her again before she straddled him. He did not think he entered her from behind after telling her to pick up the soap. He may have told her to wash his back and his penis.

[45] Mr. Gallinger walked in and out of the bathroom while A.B. and Mr. Wagar were in the shower. Mr. Wagar was unaware of how Mr. Gallinger entered the bathroom and stated that he may have messed up when he locked the door.

[46] Lance came into the bathroom after Mr. Gallinger left and sat there looking pissed off. He wanted A.B. badly and was mad. Lance may have said something about A.B.'s vagina. A.B. screamed at Lance to get out. A.B. and Mr. Wagar continued a bit longer but

he was too drunk and could not keep an erection. He dried A.B. off and they left the bathroom happy and holding hands.

[47] Mr. Wagar testified that he and A.B. then went to the laundry room where A.B. and Ms. Porter started making out. Mr. Wagar continued drinking and dancing when they returned to the party. People started to get tired. Ms. Porter and Dustin slept beside each other on the living room futon and Mr. Wagar cuddled up to Ms. Porter. A.B. came into the room while Lance was badgering her. She eventually went to Mr. Gallinger's room and fell asleep.

[48] Mr. Wagar did not see A.B. for a couple of days. He saw Dustin the next day, who told him that A.B. was saying that he and Lance raped her. Shortly afterwards, detectives came to the house but Mr. Wagar was not there. He did not become involved with the police until a year later. When Mr. Wagar eventually saw A.B., he told her to stop this. She apologized and he hugged and forgave her. Nearly a year later he ran into her again. She had not stopped the rumours and so he told her to stop. They did some crystal meth and had a heart to heart. A.B. said she would go to court and say what happened. He told her that if she did not "tell [the court] what really happened"[231] then he would go after her for defamation of character.

[49] Before the incident, Mr. Wagar did not know Mr. Gallinger. He testified that he knew Ms. Porter for about a year and a half, that they were good friends, and that they were even better friends at the time of his evidence. He had discussed A.B.'s accusations with Ms. Porter. In response, Ms. Porter called A.B. "a piece of shit".

[50] Mr. Wagar testified that A.B. did not tell him she only liked him as a friend. He also stated that she did not try to get off the counter, that she did not say his penis was too big, that she did not try to push him off, that she never complained, and that she never said "no". In cross-examination, Mr. Wagar testified that he told A.B. he wanted to have oral sex and was pretty sure she said "yes" and that he had asked her if she "wanted to fuck".

---

[231] *Wagar* Trial Transcript, p. 288, lines 16-20.

Appendix B

Section 276 of the *Criminal Code* provides:

276 (1) In proceedings in respect of an offence under section 151, 152, 153, 153.1, 155 or 159, subsection 160(2) or (3) or section 170, 171, 172, 173, 271, 272 or 273, evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant

(a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or

(b) is less worthy of belief.

(2) In proceedings in respect of an offence referred to in subsection (1), no evidence shall be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge, whether with the accused or with any other person, unless the judge, provincial court judge or justice determines, in accordance with the procedures set out in sections 276.1 and 276.2, that the evidence

(a) is of specific instances of sexual activity;

(b) is relevant to an issue at trial; and

(c) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

(3) In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account

(a) the interests of justice, including the right of the accused to make a full answer and defence;

(b) society's interest in encouraging the reporting of sexual assault offences;

(c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;

(d) the need to remove from the fact-finding process any discriminatory belief or bias;

(e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;

(f) the potential prejudice to the complainant's personal dignity and right of privacy;

(g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and

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