CANADIAN JUDICIAL COUNCIL

IN THE MATTER OF: **An Inquiry pursuant to section 65 of the *Judges Act* regarding the Honourable Justice Robin Camp**

RESPONSE OF JUSTICE ROBIN CAMP TO THE REPORT AND RECOMMENDATIONS OF THE INQUIRY COMMITTEE TO THE CANADIAN JUDICIAL COUNCIL

(Canadian Judicial Council Inquiries and Investigations By-Laws, 2015, ss. 9)
(Significance of 2017 ABPC 17)

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These are Justice Camp's supplementary submissions about the impact of the acquittal in *R. v. Wagar,* 2017 ABPC 17 (*Wagar (2017)*).

Wagar (2017) supports Justice Camp's submission that Council should give only limited weight to the Inquiry Committee Report. The IC based its recommendation for removal on a finding that Justice Camp was hostile to gender equality and the priorities inspiring sexual assault law reform. *Wagar (2017)* shows Justice Camp had a legally relevant basis for the remarks the IC most heavily criticized. It supports the submission that the IC should not have drawn an inference about Justice Camp's motivation for the remarks, given the gap created by the application of judicial reasoning immunity. The acquittal and the public reaction to it show the risk of relying on public outrage as a proxy for public confidence.

1. Justice Camp's Inquiries Had a Legally Relevant Foundation

The most notorious allegation against Justice Camp was the allegation that he relied on sexual assault myths to question the *Wagar* complainant about her failure to 'fight back.' Allegation 3 criticized Justice Camp for:

- 3(a): asking the complainant "why didn't [she] just sink [her] bottom down into the basin so he couldn't penetrate [her]";
- 3(b): asking the complainant "why couldn't [she] just keep [her] knees together"; and,
- 3(c): suggesting "if she skews her pelvis slightly she can avoid him."

As a result of this allegation, Justice Camp is known in the popular media as the "knees together" judge.

The IC did not think Justice Camp's questions were legitimate.[1] It thought his questions reflected disdain for the values underlying sexual assault law.[2]

Justice Camp admitted that his comments and questions in *Wagar (2014)* were infected by sexual assault myths. He admitted the *wording* of his questions reflected his misconceptions. However, he consistently argued that there was a legitimate legal basis for the questions. Justice LeGrandeur's reasons in *Wagar (2017)* support this argument. Justice LeGrandeur found the exact positioning of the complainant's body during sex with Mr. Wagar was relevant to the Crown's proof of the case.[3] (The Crown Attorney's questions in the first *Wagar* trial addressed the same topic in similar detail.)

Council should not infer biased thinking where there is an alternative plausible explanation for the improper remarks.[4] One plausible explanation is that *all* the questions about body positioning, including Justice Camp's, were asked in an effort to resolve the

[1] Report and Recommendation of the Inquiry Committee to the Canadian Judicial Council Regarding Robin
[2] IC Reasons, at paras. 6, 152, 168.
[3] *R. v. Wagar,* 2017 ABPC 17 ["*Wagar (2017)*"] at paras. 142, 146.
[4] IC Reasons, at para. 204.

same important question – whether the complainant consensually participated in sex. Justice LeGrandeur's reasons make this inference eminently plausible. As Justice LeGrandeur pointed out, "an individual may be consenting without verbalizing the same."[5] His reasons support a finding that Justice Camp's questions were not examples of conscious bias, but an insensitively-worded attempt to understand the case. This distinction is important as it describes the difference between incorrigibility and teachabiltiy. If the IC had the benefit of *Wagar (2017)*, it might have reached a different conclusion about the reasonableness of Justice Camp's behaviour, the relevance of his inquiries and the weight to be given to his three teachers' evidence.

2. Justice LeGrandeur's reasons highlight the problem of assessing motivation with limited evidence.

As a result of the IC's ruling that judicial reasoning immunity applied, there was no direct evidence about Justice Camp's motives or thinking. *Wagar (2017*) highlights the problem of filling the resulting gap with assumptions about what Justice Camp 'must have been thinking' when he made objectionable comments.

Justice LeGrandeur's Reasons contain multiple examples of judicial thinking about the evidentiary and legal problems in the *Wagar* case. Some of Justice LeGrandeur's comments and findings are similar to Justice Camp's. This supports the inference that Justice Camp's remarks were based on unconscious bias and insensitive wording as opposed to hostility toward the law or the values inspiring it. The *Wagar (2017)* reasons show that Justice Camp's focus on particular facts and issues *could reasonably have been* motivated by a legitimate purpose rather than an incorrigible gender bias.

The fact that a second judge (not alleged to be hostile to sexual assault law reform) saw the same facts as significant undermines the IC's conclusion that improper thinking motivated Justice Camp's conduct. The IC's reliance on the worst possible inference about Justice Camp's motivation is not reasonable (let alone inevitable) in light of *Wagar (2017)*. If Council wants to fill this gap, it should declare that judicial reasoning immunity must give way and give Justice Camp an opportunity to respond. This requires a hearing to explore these issues and their impact.

3. The reaction to the *Wagar* acquittal shows the danger of relying on public outrage as a proxy for public confidence.

Council should take into account the negative public reaction to Justice LeGrandeur's acquittal of Mr. Wagar. This negative reaction supports Justice Camp's argument that the Council should not equate public outrage with a lack of public confidence. To appreciate this submission, Council should review the Affidavit of Rhea McGarva, admitted as Exhibit F to the Agreed Statement of Facts at the IC hearing. This affidavit shows that much of the negative publicity about Justice Camp was the product of an organized challenge to his neutrality initiated by opinion leaders.

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[5] *Wagar (2017),* at para. 164.

Justice LeGrandeur used more sensitive language than Justice Camp during the *Wagar* case. His approach was careful, temperate and respectful of the complainant, even as he doubted her honesty.[6] Nonetheless, respected members of the legal community publicly aired their negative reactions to his disposition of the case. The Crown Attorney who tried the case told the media: "Some of the judge's comments certainly give pause for future cases of sexual assault," and, "This type of decision will have a cooling effect on other complainants coming forward. We have an unfortunate statistic in Canada that most complainants do not come forward."[7] Professor Constance Backhouse, who holds the chair in sexual-assault law at the University of Ottawa, said, "It seems to me that it was simpler in the 19th century, when judges and jurors simply disbelieved sexual-assault complainants as a matter of course. The legal and judicial analysis may have changed, but the results on the ground in the 21st century do not seem to be significantly different."[8]

This reaction supports the submission that public outrage is not a reliable barometer of the *legal concept* of public confidence. The following passage from *R. v. Lamothe,* adopted by Justice Wagner in *St.-Cloud,* explains the difference:

> With respect to the perception of the public, as we know, a large part of the Canadian public often adopts a negative and even emotional attitude towards criminals or [potential] criminals. The public wants to see itself protected, see criminals in prison and see them punished severely. To get rid of a criminal is to get rid of crime. It [unjustifiably] perceives the judicial system . . . and the administration of justice in general as too indulgent, too soft, too good to the criminal. This perception, almost visceral in respect of crime, is surely not the perception which a judge must have in deciding the issue of interim release. If this were the case, persons charged with certain types of offences would never be released because the perception of the public is negative with respect to the type of crime committed, while others, on the contrary, would almost automatically be released where the public's perception is neutral or more indulgent. . . . Therefore, the perception of the public must be situated at another level, that of a public reasonably informed about our system of criminal law and capable of judging and perceiving without emotion that the application of the presumption of innocence, even with respect to interim release, has the effect that people, who may later be found guilty of even serious crimes, will be released for the period between the time of their arrest and the time of their trial. In other words, the criterion of the public perception must not be that of the lowest common denominator.[9] [Emphasis added.]

The gap between public reaction and the test for public confidence is particularly significant in sexual assault cases. Sexual interactions are nuanced and complex. The justice system, with its strict rules of evidence and high burden of proof, is a blunt tool

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[6] *Wagar (2017),* at para. 175.
[7] Bill Graveland, "Alexander Wagar not guilty in Alberta 'knees together' retrial", online at: http://globalnews.ca/news/3216107/alberta-judge-to-give-verdict-in-alexander-wagar-knees-together-retrial/.
[8] Sean Fine, 'Knees together' sex-assault retrial raises new concerns about justice system, online at: http://www.theglobeandmail.com/news/national/knees-together-sex-assault-retrial-raises-new-concerns-about-justice-system/article33873437/.
[9] *R. v. Lamothe,* (1990), 58 C.C.C. (3d) 530 at p. 541, emphasis of Wagner J. in *R. v. St.-Cloud,* 2015 SCC 27 at para. 75.

for identifying the limits of consent and credibility. Many members of the public have unrealistic expectations about what the justice system can deliver in response to a ubiquitous social problem. Even where judicial conduct is unimpeachable, the public may not accept that a sexual assault defendant popularly assumed guilty is acquitted. This dissatisfaction can manifest as a loss of confidence in the judge.[10] The constitutional guarantee of judicial independence protects against such transitory sentiment.

The negative reaction to *Wagar (2017)* by opinion leaders (the Crown and a prominent law professor) suggests this is a case where even a legally-correct outcome will evoke strong negative public feeling. It supports Justice Camp's submission that the Council should distance itself from the IC's reliance on negative media attention and public reaction [11]One realistic interpretation is that it is impossible to identify the source(s) of the public upset. The Council should instead base its evaluation of public confidence on objective criteria, taking into account the importance of judicial independence and the long-term repute of the administration of justice. The evidence of the three experts who testified about their tutelage of Justice Camp should be given significant weight in this evaluation.

4. Conclusion

Wagar (2017) shows that the IC's inferences are not necessarily correct. It proves that Justice Camp was right on the law and right on the facts, despite his admitted ignorance.

As there is no opposing party, and as the Council has not framed any issues to which Justice Camp should respond, Justice Camp asks the Council to advise if it has any questions, and if so, asks for the opportunity to respond orally or in writing.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of February, 2017.

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[10] Diana Mehta and Colin Perkel, "Jian Ghomeshi acquitted on all charges of sexual assault and choking," online at: http://www.680news.com/2016/03/24/judge-expected-to-deliver-decision-in-jian-ghomeshis-sexual-assault-trial-today/; Kyle Shaw, "Everybody's response to Ghomeshi verdict: We believe survivors," online at: http://www.thecoast.ca/RealityBites/archives/2016/03/24/everybodys-response-to-ghomeshi-verdict-we-believe-survivors.

[11] IC Reasons, at para. 279.

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