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CJC Review of the Conduct of the
Honourable Robin Camp

Reasons for voting against Motion to Adopt proposed Report to Minister
Per: David Smith CJ; Jenkins CJ; Rossiter CJ; O'Neil ACJ

Overview

[1] When reviewing judicial conduct there are three essential components to Council's assessment: (1) the Judge's misconduct; (2) the Judge's rehabilitation; and (3) public confidence. It is our view that the record establishes that Justice Camp committed serious misconduct in 2014; that he is now remediated; and that his removal from office is an unnecessary and excessive response to that misconduct.

[2] We agree Justice Camp's conduct during the criminal trial in 2014 is misconduct. His questions to the complainant and statements about the law of sexual assault are reprehensible and offensive, and amount to serious misconduct. It clearly calls for denunciation and discipline. Indeed, viewing his statements on their own, a reasonable person would naturally anticipate that the Judge should be removed from office. By his statements, the Judge clearly failed to meet the high standards Canadians rightfully expect of their judges; instead, he acted in a manner that seriously undermines public confidence in the judiciary.

[3] But the Judge's misconduct does not stand alone. In determining the appropriate and proportionate response, Council must also consider the Judge's rehabilitation. We must gain an understanding of the Judge's misconduct and the underlying cause. Statements motivated by ignorance are less culpable and more remediable than statements motivated by animus. The full record of proceedings before the Inquiry Committee quite clearly leads to the inference that the Judge's words reflected an unconscious bias, which is remediable, and do not reflect animus or antipathy toward the complainant, women, or the law. The record demonstrates that the Judge was fully apologetic and apologized promptly, sincerely and appropriately.

[4] Most importantly the evidence on the record shows that the Judge made concerted efforts to address and correct his knowledge deficiencies, and his efforts have been objectively and independently verified as successful in addressing this underlying issue. All of the expert opinion evidence, which was extensive, is that Justice Camp has been rehabilitated. When determining an appropriate response to judicial misconduct Council has options, and except in the most egregious cases where rehabilitation and repair is out of the question, considers whether a remediable response will be more effective that removal in the public interest. This is the approach that should be employed in addressing Justice Camp, as he now appears before Council. In our view, upon appropriate engagement of the principles of judicial independence, rehabilitation, public confidence, and proportionality, a sanction short of removal is the most effective and just outcome. The best way to promote public confidence in the judiciary is to censure the Judge's misconduct, endorse his successful efforts to improve, and support his continued service.

Procedural fairness

[5] In previous reasons[1], we explained how it was procedurally unfair to deny the Judge's request to appear before Council to make oral submissions before deciding whether he should be removed from office. The Judge had asked for an opportunity to appear and to explain orally how the Inquiry Committee reasons are flawed and why they should not be followed. Council denied the Judge's request to be heard. In the face of this procedural unfairness, it is not possible to endorse a recommendation for removal.

Substantive reasons

[6] There are substantive reasons for preferring a sanction short of removal. Education has a better track record than harsh punishment in promoting social change. We are persuaded by the evidence on the record of the Inquiry Committee and the written submissions made by Justice Camp's counsel, in lieu of oral submissions[2], that removal from office is both unnecessary and counterproductive. The evidence establishes four essential matters. We now know Justice Camp did not willfully make sexist comments; he has apologized and demonstrated remorse; he has

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[1] Dissenting Reasons of certain Members Respecting procedural Issues, issued February 8, 2017, and published on the Council website.

[2] Response of Justice Robin Camp to the Report and Recommendations of the Inquiry Committee to the Canadian Judicial Council By Frank Addario And Others, January 6, 2017.

addressed through education the knowledge deficit that led to his misconduct; and he will be an asset to the Federal Court. Considering the broader context, a sanction short of removal will also promote education and rehabilitation in line with Council's stated values while simultaneously denouncing Justice Camp's misconduct.

[7] The test for removal of a judge asks whether a judge by his conduct has placed himself in a position incompatible with the due execution of the office such that public confidence is thereby sufficiently undermined to render the judge incapable of executing the judicial office[3].

[8] As stated, the statements and events at trial do not stand alone. Other essential evidence needs to be taken into account. This evidence influences what the appropriate sanction should be. Not all misconduct merits removal from office. When determining the appropriate sanction, the Judge's response to his errors is an important consideration. An assessment of the Judge's response is critical to a determination of the Judge's suitability to continue in his judicial capacity. The Judge's apologies were timely, unqualified, and extensive. There has been remediation through education; it has been very extensive and thorough. Based on the reliable, independent and informed evidence before the Inquiry, it has been successful. His errors have been explained, confirming that the statements were a product of unconscious bias or ignorance, and not a result of any animus (hostility or ill-feeling) toward the law or the complainant. There is convincing independent evidence of the Judge's good character and suitability to continue to serve the public as a Judge, and there is no direct evidence to the contrary. In these circumstances, it is not sufficient to form a judgment based only on the events that occurred in this one trial. As Council, we need to take into account all the evidence about how the Judge has dealt with his errors and underlying shortcomings in the ensuing period up to the time of Council's decision in early 2017.

[9] Even Justice Camp readily acknowledged that his comments amount to misconduct – that they were insensitive, rude, and in places displayed an ignorance of the ways in which victims of trauma and/or sexual violence process and respond to events. The Judge's comments should be denounced. They are not defensible, and are not in any way defended by these Reasons.

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[3] The ***Marshall*** Test, as articulated by a Council Inquiry Committee in ***Hart, Jones and MacDonald*** (August 1990): "*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?*"

[10] Justice Camp's apologies developed in the way one would expect from a judge confronted with an unknown personal failing, who gradually comes to understand the nature of his shortcoming. They were early, repeated and sincere.

[11] Justice Camp has demonstrated a commitment to education and improvement. The uncontradicted evidence is that he moved expeditiously to accomplish both. In the course of the criminal trial, Justice Camp revealed himself to then be in the rearguard of normative shifts and blind to the social context behind important legal safeguards for complainants in sexual assault matters. The evidence establishes the Judge was nevertheless ethical throughout. The Judge made errors in performing his judicial role; in addition to showing remorse and being apologetic, he has demonstrated his commitment to amelioration of the underlying problem through education and improvement.

[12] It is in the public interest, of which judicial independence is a subset, that the standard for removal of a judge remains high. For this reason the sanction for judicial misconduct is rarely removal from office. Other sanctions are available and in this case have been pursued. In this case, the principles of judicial independence, rehabilitation, public confidence and proportionality are all engaged. It is in this wider context, not just viewing the statements solely, that Council must decide how to characterize the Judge's errors. The Council needs to consider whether recommending removal will serve or frustrate the interests Council is mandated to protect.

[13] The evidence on the record is extensive and complete and was open to scrutiny before the Inquiry Committee. That evidence was from the Judge himself, and more importantly from three highly respected and specialized educators and coaches who worked extensively with him. The Honourable Justice Deborah McCawley, Professor Brenda Crossman, and clinical psychologist Dr. Lori Haskell, all came unequivocally to the conclusion that the Judge was remediable and has been rehabilitated; that he has been sufficiently educated and sensitized, including by social context education, and that he now has the knowledge, capacity and antecedents to continue to serve as a very good judge who would do the job well. The expert witnesses, all of whom worked closely with the Judge, found that he was "*absolutely open*" to learning; very earnest and remorseful; accepting of the gaps in his knowledge; understanding of the rationale for why the law has changed; highly motivated; and teachable. All of this independent evidence was tested on cross-examination and remains uncontradicted. There was no other evidence.

[14] The Inquiry Committee recommended removal. An inquiry committee recommendation is usually viewed as influential and deserving a lot of weight during Council's subsequent deliberations. However, Council must make its own decision. In this case the scope for independent assessment by Council is broader, because the Inquiry Committee was not making findings of fact, but rather was called upon for the most part to make judgment calls. In this case we find reason to depart from the Inquiry Committee's reasoning. Respectfully, it proceeded on a wrong premise as to the existence of animus, and then contrary to the evidence, it declined to find rehabilitation. The Inquiry Committee drew a foundational inference that the Judge's statements were the product of conscious bias and animus towards the law and the complainant or alternatively found the absence of animus was unimportant. The opposite conclusion -- unconscious bias – was pleaded by the Judge. That inference, in our view, is more consistent with the evidence at the Inquiry Committee hearing. The Inquiry Committee conclusion that the Judge had disrespect or antipathy for the values the law is trying to achieve is not borne out by the record of proceedings. Drawing the more favourable inference is key, because unconscious bias is less culpable and more readily remediable. A finding that the Judge's comments were motivated by the Judge's lack of understanding, and not by a desire to denigrate the law, the complainant, or sexual assault victims as a group is a very significant, is indeed a critical point of departure. It underlies an assessment of the gravity of the misconduct and the ultimate determination of whether removal is necessary and appropriate.

[15] The Inquiry Committee considered the evidence of remediation, and said it was impressed by it. It nevertheless proceeded on to make a negative finding that the Judge was not rehabilitated, based mainly on the Judge's use of the adjective "*fragile*" to describe the personality of the complainant, and "*old fashioned and out-dated*" as opposed to *"sexist and gender biased*" to characterize his views. Respectfully, in our view, the Inquiry Committee finding that the Judge was not remediated was without much basis given the extensive, uncontradicted, and independent evidence to the contrary. A finding that the Judge is remediated is the finding that would be fair to the evidence.

[16] The Inquiry Committee also considered the ultimate question of whether removal from office is necessary in the larger societal context. Near the end of its reasons, the Inquiry Committee accepted Presenting Counsel's submission that the case is "*not really about Justice Camp. Rather it is about the integrity of the system which is fundamental to the rule of law and democracy*." The record shows the Inquiry Committee was quite concerned about the need to avoid the risk of a biased judge in current times. Presenting Counsel raised with the Committee concerns over

the aftermath of Dalhousie Dental School controversy, the Ghomeshi trial, and the Cosby charges "and any other number of high profile incidents." While problematic in their own right, those events should all be irrelevant to this judicial conduct review process. The public attention to the case was apparently an influencing factor for the Inquiry Committee.

[17] The Council majority decision proceeds on a different basis than the Inquiry Committee. It does not evaluate the evidence of remediation, rather it finds that in any event the statements made in the trial dictate that removal from office is required. The Council majority decision (at para.42) states that even if they were to agree that the Judge is fully rehabilitated, then "*... the Judge's efforts at remediation must yield to a result that more resolutely pursues the goal of restoring public confidence in the integrity of the justice system.*" This expresses the view that no effort toward remediation and no level of achievement in that regard would influence the outcome.

[18] It is notable that the Inquiry Committee and the Council majority reach its ultimate conclusion for quite different reasons. The Inquiry Committee considered the evidence of remediation and education, which put its decision in the balance, but then found that the Judge did not really get it. On the other hand, the Council majority decision essentially discards the evidence of remediation and evidence of good character and says it could not influence the outcome. It finds that upon the Judge having failed to meet the high standards and having acted in a manner that seriously undermined public confidence in the judiciary in the trial, remediation was not possible, and a recommendation for removal is the only available remedy. It finds that the Judge's most egregious comments made in the trial were repeated in his judgment and so it follows that a reasonable person's confidence in the Judge's ability to discharge the duties of office is seriously undermined. From that point of departure, the outcome was a *fait accompli*.

[19] In our view the decision for removal should be made about the Judge as he presents to Council in 2017, taking into account all of (1) the misconduct; (2) the rehabilitation; and (3) public confidence. In other words, an apology, explanation, remediation, education, and considering Justice Camp's antecedents, and not based solely on his misconduct in the trial.

[20] We believe a recommendation for removal misjudges the public's sense of justice. The public deserves a response to the misconduct of Justice Camp. That response should be proportionate and fair to all concerned – including the complainant, the public, and Justice Camp. The public is aware that Justice Camp at the time of the subject comments was a provincial court judge, who for various

reasons, had too little experience and education in sexual assault trials. He is now a Federal Court judge who has committed to and successfully accomplished important education and training. The public is aware that ignorance of the governing sexual assault law, not animus, explains the Judge's errors, and that the Judge has taken aggressive steps to address his shortcomings. The public is aware that the evidence before the Inquiry Committee establishes that Justice Camp is otherwise a person of excellent character and personal accomplishment. Public confidence in the workings of the Canadian Judicial Council and the judiciary generally is not enhanced if it is seen to be unduly influenced by public debate that dilutes important principles that must guide decision makers, not the least of which is the need for the public to know that decision makers will be independent of prevailing attitudes when justice mandates that they be so.

[21] The Supreme Court of Canada has provided direction in that regard[4]. It is of course challenging for Council to strike an appropriate balance especially in this era characterized by access to 24-hour news reports and instant publishing through social media. Vested with responsibility for judicial conduct review, Council must be careful to provide effective leadership while remaining appropriately sensitive to varying and more and less informed public reaction.

[22] The role of Council is to protect the public interest, including judicial independence which is the foundation of judicial impartiality and a constitutional guarantee benefitting all Canadians. Accordingly a judge should only be removed if necessary. Considering all the evidence, removal of Justice Camp may be viewed as an acknowledgment of systemic issues within the judiciary at large. But respectfully, removal of Justice Camp is not the preferred sanction. Council's first option has traditionally been a remedial response. In this case, education has proven to be successful and to amount to sufficient amelioration. Removal in the face of the extensive and convincing evidence of rehabilitation effectively negates the value of rehabilitation and remorse. In the long run, more will be accomplished by addressing the Judge's errors and misconduct through denunciation and censure and by acknowledging his education and remediation than will be realized by removal. Concentrating exclusively on the Judge's misconduct and ignoring the value of rehabilitation, remorse, and sincere efforts to learn runs against the public sense of fairness and proportionality.

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[4] ***R. v. St. Cloud***, [2015] SCC 27, at para.80, where it described the reasonable member of the public with whom our analysis is discerned as: "*...a thoughtful person, not one who is prone to emotional reactions, whose knowledge of the circumstances of a case is inaccurate or who disagrees with out society's fundamental values. But he or she is not a legal expert ...".*

[23] Canadians are fortunate to live in a liberal democracy. Our society is marked by generosity, that correspondingly features a system of justice influenced by application of the tenets of restorative justice. Removal of Justice Camp seems antithetic to those values, and harsh.

[24] Just following publication of the Inquiry Committee report and recommendation for removal, witness Professor Crossman, who is a professor of law and the Director of a School of Sexual Diversity Studies of the University of Toronto, wrote an insightful newspaper Op.Ed. piece[5] that effectively reflects her evidence before the Inquiry Committee. Professor Crossman did not, at all, relieve the Judge from blame, and she opened by relating how she was skeptical about becoming involved with his remediation. She knew her involvement would not be a popular decision with her feminist colleagues, "*but popularity is not how I make decisions.*" She explained her experience. She found the Judge to be earnestly apologetic, open-minded, and eager to learn. Following this favourable experience, she now expresses worry that we are swift to punish; and that we prefer punishment to education: "*Because I believe in the power of education, I am rather more skeptical of the power of punishment. History shows that education has a better pedigree of success than punishment*." She worries about the impulse to punish in light of the recent rise of a powerful backlash against any and all equality-seeking groups, and she worries that we dismiss the possibility of education and move to punish those who are genuinely remorseful. She wonders about the precedent: "*Are we going to fire each and every judge who has uttered sexist comments in the course of a trial? Or, are we going to try to educate them? Preferably before the sexual assault trials, but what about after?*" Professor Crossman left open the possibility that some judges are beyond redemption, but she closed by saying she is not convinced that Justice Camp is one of them: "*But that is because my default is not punishment. It is education.*" It is our respectful view that if Council would adopt that theme, we would better serve the long term public interest.

Signed:
The Honourable David Smith
The Honourable D. Jenkins
The Honourable E. Rossiter
The Honourable L. O'Neil

8 March 2017

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5 Published in the **Globe and Mail** December 1, 2016.