

November 9, 2015

Canadian Judicial Council
Ottawa, ON K1A 0W8

Dear Sir or Madam,

Please find attached our complaint to the Canadian Judicial Council regarding the conduct of Justice Robin Camp of the Federal Court Trial Division. The conduct relates to conduct of Justice Camp when he was a judge at the Provincial Court of Alberta. As detailed in the complaint, however, that conduct calls into question Justice Camp's capacity to discharge his obligations on the Federal Court.

We look forward to hearing from the Canadian Judicial Council on this matter.

Regards,



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November 9, 2015

Canadian Judicial Council
Ottawa, ON K1A 0W8

Dear Sir or Madam,

By way of this letter we submit a complaint to the Canadian Judicial Council about Justice Robin Camp, currently of the Federal Court Trial Division. The events that form the basis for this complaint occurred when Justice Camp was a judge at the Alberta Provincial Court; however, those events undermine public confidence in the fair administration of justice, both in general and in relation to Justice Camp's current capacity for independence, integrity and impartiality, and his ability to respect the equality and dignity of all persons appearing before him. As a consequence, only the Canadian Judicial Council can provide a remedy appropriate to restore public confidence in the fair administration of justice.

On September 9, 2014 then Judge Camp acquitted Alexander Scott Wagar of sexual assault. That result was overturned by the Alberta Court of Appeal in a judgment dated October 15, 2015 (*R v Wagar* 2015 ABCA 327). In its decision the Court stated:

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 (para. 4).

Justice Camp's decision to acquit is not part of the grounds for this complaint. Indeed, we take no position on whether or not Mr. Wagar could or should have been convicted based on a proper application of the law to the evidence before Justice Camp.

Our complaint arises instead from Justice Camp's sexist and disrespectful treatment of the complainant in the case and his disregard for the law applicable to sexual assault. This was not a case of mere judicial error. Mistakes by judges as to the law, even egregious mistakes, are not properly the subject of a complaint to the Canadian Judicial Council. Complaints are warranted only in exceptional cases where the judge's disregard for legality is such as to undermine the rule of law and, consequently, to bring the administration of justice into disrepute. In our view, Justice Camp's treatment of the law is in that category.

I. Regulatory Context

This section summarizes the regulatory context for our complaint. It references the Canadian Judicial Council's "Ethical Principles for Judges" and past Council decisions that demonstrate the propriety of sanctioning a judge whose conduct in court evidences disrespect for parties and counsel, sexism, and disregard for the rule of law.

As noted, the Canadian Judicial Council has published "Ethical Principles for Judges". These Principles do not create "standards defining judicial misconduct" and nor do they create "a code or a list of prohibited behaviours". They do, however, provide guidance as to the difference between proper and improper judicial conduct, particularly when viewed in light of Canadian Judicial Council decisions sanctioning improper behaviour.

The Principles begin with the requirement for Judicial Independence, noting in the Commentary the relationship between such Independence and the rule of law: "The judge's duty is to apply the law as he or she understands it without fear or favour and without regard to whether the decision is popular or not. This is a cornerstone of the rule of law". They go on to say:

Given the independence accorded judges, they share a collective responsibility to promote high standards of conduct. The rule of law and the independence of the judiciary depend primarily upon public confidence. Lapses and questionable conduct by judges tend to erode that confidence.... judicial independence and judicial ethics have a symbiotic relationship. Public acceptance of and support for court decisions depends upon public confidence in the integrity and independence of the bench. This, in turn, depends upon the judiciary upholding high standards of conduct.

The Principles direct judges to conduct themselves with integrity, noting that "Judges should...strive to conduct themselves in a way that will sustain and contribute to public respect and confidence in their integrity, impartiality and good judgment" (Ethical Principles for Judges, Principle 3, Commentary 1). The Commentary to the Integrity Principle suggests that integrity relates to "how particular conduct would be perceived by reasonable, fair minded and informed members of the community...and whether that perception is likely to lessen respect for the judge or the judiciary as a whole".

The Principles also emphasize the centrality of equality to the judicial function. Principle 5 states that "Judges should conduct themselves and proceedings before them so as to assure equality according to law". The sub-principles direct judges to treat "all persons (for example, parties, witnesses, court personnel and judicial colleagues) without discrimination"; that judges "should strive to be aware of and understand differences arising from, for example, gender"; and should "disassociate themselves from and disapprove of" statements "which are sexist...."

The Commentaries further emphasize the relationship between equality and impartiality. Commentary 2 states that "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". Commentary 3 states that judges "should not be influenced by attitudes based on stereotype, myth or prejudice" and Commentary 4 adds that judges "should avoid comments, expressions, gestures or behaviour which reasonably may be interpreted as showing insensitivity to or disrespect for anyone".

Principle 6 requires judges to be impartial "with respect to their decisions and decision-making". Commentary A.4 states, quoting *RDS v The Queen*, "True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind. The judge's fundamental obligation is to strive to be and to appear to be as impartial as is possible."

The Judicial Council and its Inquiry Committees recommend removal or sanction judges only rarely. In cases where they have done so, their concerns have related to judicial behaviour that calls into question the judge's independence, integrity, impartiality and commitment to equality, and which brings the administration of justice into disrepute.

In 1996, in its *Inquiry into the Conduct of Mr. Justice Jean Bienvenue*, a Judicial Council Inquiry Committee recommended that Justice Bienvenue be removed from the bench after a trial in which, *inter alia*: he said that "millions of Jews were eliminated without pain and died without suffering in the gas chambers" (p. 54); he spoke with an officer of the court "about the accused's colour and sexual orientation" (p. 54); he criticized the jury for their verdict (pp. 45-46); and, in sentencing the accused he stated that when women "decide to degrade themselves, they sink to depths to which even the vilest men would not sink" and went on to discuss "the Delilahs, the Salomes, Charlotte Corday, Mata Hari..." (pp. 48-49). The Inquiry Committee concluded "that if Mr. Justice Bienvenue were to preside over a case, a reasonable and informed person, viewing the matter realistically and practically – and having thought the matter through – would have a reasonable apprehension that the judge would not execute his office with the objectivity, impartiality and independence that the public is entitled to expect from a judge" (p. 61).

In 2009, the Judicial Council recommended that Justice Paul Cosgrove be removed from the bench because of his behaviour in the trial of Julia Elliott, concluding that he had "failed in the execution of the duties of his judicial office and that public confidence in his ability to discharge those duties in [the] future [had] been irrevocably lost" (Report of the Canadian Judicial Council to the Minister of Justice, March 30, 2009, para. 64). The decision was based on Justice Cosgrove's disregard for the proper application of the law as well as his abuse of parties appearing before him:

The Inquiry Committee found that the judge's conduct included: an inappropriate aligning of the judge with defence counsel giving rise to an apprehension of bias; an abuse of judicial powers by a deliberate, repeated and unwarranted interference in the presentation of the Crown's case; the abuse of judicial powers by inappropriate interference with RCMP activities; the misuse of

judicial powers by repeated inappropriate threats of citations for contempt or arrest without foundation; the use of rude, abusive or intemperate language; and the arbitrary quashing of a federal immigration warrant (Council Report, para. 6)

In 2011, the Judicial Council “formally express[ed] its concern” to Manitoba Court of Queen’s Bench judge Robert Dewar because of remarks he made that showed “a lack of appreciation and sensitivity toward victims of sexual assault” and which could “perpetuate negative stereotypes about women” (Letter to complainants from Chief Justice Wittmann).

At around the same time, the Council reprimanded Quebec Superior Court Justice Jean-Guy Boilard for his treatment of counsel. In a translation included by the Supreme Court in its judgment in *Doré v. Barreau du Québec*, 2012 SCC 12, at para. 14, the Council advised Justice Boilard that “your independence and your authority as a judge do not exempt you from respecting the dignity of every individual who argues a case before you. Dispensing justice while gratuitously insulting counsel is befitting neither for the judge nor the judiciary.”

It is also worth noting the decision of the Supreme Court of Canada in *Moreau-Bérubé v New Brunswick* [2002 SCC 11](#), in which the Supreme Court declined judicial review of a recommendation that a provincial court judge be removed from the bench after comments she made accusing all Acadians of dishonesty. The Court stated that in these cases, the regulatory concern has been that “the actions and expressions of an individual judge trigger concerns about the integrity of the judicial function itself” (at para. 58).

II. Basis for the Complaint

This section describes the statements and conduct by Justice Camp in *R v Wagar* that are contrary to the Canadian Judicial Council’s Ethical Principles for Judges, and which reflect the sort of judicial misconduct that has led to serious Council sanction in the past. The misconduct is divided into three types: a. disregard for the law on the basis of stereotypical thinking; b. disrespect towards the complainant; and c. perpetuation of discriminatory stereotypes.

A. Justice Camp Showed Disregard for the Law on the Basis of Stereotypical Thinking

At numerous points during the proceeding, Justice Camp was dismissive of, if not contemptuous towards, the substantive law of sexual assault and the rules of evidence. In particular, he showed disregard, if not disdain, for the rape shield provisions under the *Criminal Code*, the legal definition of consent to sexual touching, and the *Criminal Code* provision and case law regarding the doctrine of recent complaint. His articulated disrespect for these legal rules was, in some instances, combined with a refusal to apply them. Consistently, the legal rules that Justice Camp took issue with were those aimed at removing from the law outdated and discredited stereotypes about women and sexual violence. In a dismissive manner, Justice Camp repeatedly referred to the legal rules requiring that these stereotypes not be relied upon as “contemporary thinking”. He was

frequently sarcastic and disrespectful to Crown counsel when she attempted to explain to him how these rules work and why they are important.

i. *The Use of Evidence of Other Sexual Activity*

Justice Camp characterized Canada's rape shield provisions as unfair and incursive. He suggested that the limits to admitting evidence of the complainant's sexual history "hamstringing the defence" and arose from "very, very incursive legislation" (Transcript, 58:39). He stated that "I don't think anybody, least of all Ms. Mograbee [Crown counsel], would – would – would argue that the rape shield law always worked fair – fairly. But it exists."

He challenged the Crown's assertion that the objective of Canada's rape shield provisions is to avoid the kind of twin myth reasoning that evidence of the complainant's other sexual activity can engender: "Well, surely we're – we're not talking about dangerous thinking, Ms Mograbee. We're talking about the law... The law doesn't stop people thinking." Indeed, the objective of the categorical preclusion of twin myth reasoning under section 276(1) is most certainly aimed at stopping triers of fact from a particular line of thinking.

Having made these comments about the rape shield provisions, he 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 these provisions as unfair and overly incursive.

ii. *The Definition of Consent to Sexual Touching*

In both his comments throughout the proceeding, and his reasons for decision, Justice Camp demonstrated absolute disregard and disdain for the affirmative definition of consent to sexual touching established by Supreme Court of Canada in *R v Ewanchuk*, [1999] 1 SCR 330 and sections 273.1 and 273.2 of the *Criminal Code*. He asked the complainant questions such as "why didn't you just sink your bottom down into the basin so he couldn't penetrate you?" and "why couldn't you just keep your knees together?" He also indicated that she had not explained "why she allowed the sex to happen if she didn't want it" and noted that when she asked the accused if he had a condom that was "an inescapable conclusion [that] if you have one I'm happy to have sex with you". (Transcript, 392:4)

He responded to the Crown's efforts to explain the reasonable steps requirement under section 273.2 with the following sarcastic and disrespectful comments:

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?

MS. MOGRABEE: It's in the case -- all the case law that you have before you that sex -- that --

THE COURT: Are children taught this at school? Do they pass tests like driver's licenses? It seems a little extreme?

MS. MOGRABEE: The state of the law is at is, Sir. It's all set out in the case law.

THE COURT: Well can you show me one of these places it says that there's a some kind of incantation that has to be gone through? Because it's not the way of the birds and the bees.

When the Crown attempted to explain to Justice Camp that a sexual assault victim's request that her attacker wear a condom does not establish that she has consented to the sexual activity up to that point he responded "please, Ms. Mograbee, we're grown ups here." (392-27).

The definition of consent in *Ewanchuk* and sections 273.1 and 273.2 of the *Criminal Code* reflect an important legal approach to the issue of nonconsensual sex aimed at protecting the equality interests of vulnerable segments of Canadian society. This definition of consent is well settled in Canadian law. The open mockery of this legal definition by a judge presiding over a sexual assault trial in 2014 is likely to bring the administration of justice into disrepute. It most certainly calls into question Justice Camp's commitment to equality.

While offensive and problematic in their own regard, his comments about the law of consent, and his questions to the complainant about her failure to fend off the accused, must also be viewed in light of his ultimate failure or refusal to apply the legal definition of consent to sexual touching. It is clear that in his reasons for decision Justice Camp applied a legally erroneous definition of consent infused with discriminatory stereotypes that have been rejected at law. (Crown Factum, paras 92 – 100; *Wagar*, C of A, para 4)

iii. The Doctrine of Recent Complaint

Justice Camp also criticized the Canadian legal position that a judge ought not to draw an adverse inference as to credibility based solely on the complainant's failure to report the sexual assault immediately. During the Crown's preliminary submissions, he commented that the Complainant "abused the first opportunity to report" before conceding this was "no longer contemporarily relevant". During the Crown's final submissions, he commented 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". (Transcript 394:35) When the Crown submitted that

that kind of antiquated thinking had been set aside for a reason, he replied “I hope you don’t live too long, Ms. Mograbee”. (Transcript: 395:6)¹

The Supreme Court of Canada has been clear (in *R v D.D.*, [2000] 2 SCR 275 at para 60-63) that adverse inferences as to credibility, premised on the mere fact that a complainant failed to ‘raise a hue and cry,’ constitute an error of law. The reasoning in *R v D.D.* and the 1983 revisions to the *Criminal Code* abrogating the doctrine of recent complaint are founded on the rejection of the stereotypes that women who have actually been raped behave a certain way following an attack and the ‘natural’ time for a woman to speak out about her attack is at the first opportunity. Justice Camp’s comments reveal that he was aware of the legal rule regarding delayed disclosure, but dismissive of its validity given its departure from the historical practices of what he described as “every civilized legal system.”

Again, his disdainful description of this legal rule aimed at eradicating an outdated and empirically unfounded stereotype about how women who have been sexually assaulted behave (*R v D.D.*, at para 63) must be considered in conjunction with his refusal to apply the rule. Throughout the proceeding he asked questions that reveal his assumption that the complainant’s failure to raise a hue and cry impugned her credibility. He stated, for example: “but are there any -- any reasons for it [her fear] 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...frightened you could have screamed.” (Transcript 396:22)

In his reasons for judgment he made statements such as:

“She certainly had the ability, perhaps learnt from her experience on the streets, to tell [him] to fuck off.” (Transcript, 450:29)

“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.” (Transcript, 451:2)

Justice Camp’s reasons for judgment, when considered in light of his criticisms of the law, and his responses to Crown counsel when she attempted to explain these legal rules, demonstrates that the failures in his legal analysis arose not from a mistake, but because he did not like the law as it exists. He simply would not accept the parameters the law imposes on judging allegations of sexual assault. As a result, he assessed the case through his personal judgment (informed by stereotypical thinking about women and sexual violence), not the legal judgment that law requires. Simply put, he refused to apply these three legal rules aimed at eliminating from the law a set of discriminatory stereotypes that the Supreme Court of Canada and Parliament have deemed baseless. A

¹ Justice Camp made several other sarcastic and belittling comments to Crown counsel, including: “Now that’s a leading question...It’s going to enrage Ms. Mograbee” (Transcript 127:40); “A surprise ending, Ms. Mograbee. Just when you – you – we think you never will [end your cross-examination] you suddenly do.” (Transcript 270:3); “Well gees...Of course you can [respond to a question later] ...eventually you’re going to give – say everything you want to, Ms Mograbee.” (Transcript 365: 1).

reasonable and informed person, viewing his comments and questions during the proceeding and his reasons for judgment, would have a reasonable apprehension that Justice Camp did not execute his office with the impartiality and fidelity to law required of judges.

B. Justice Camp's Conduct Was Disrespectful Towards The Complainant

Justice Camp's statements and reasoning in *Wagar* demonstrate a pervasive inability or refusal to account for the perspective of the complainant. The complainant was a homeless, 19 year-old woman who was marginalized by her socio-economic status and active battle with addictions. It is unclear from the transcript, but she may also have been marginalized by race, Aboriginality or disability.

Justice Camp made numerous statements that suggest that, from his perspective, it was the complainant who was on trial. He referred to her as "unsavoury" repeatedly (353: 31; 407:25; 435:23.) Synonyms for the label unsavoury in the context he used it include: unpleasant, undesirable, disagreeable and degenerate. He stated that "certainly the complainant and the accused are amoral people" and that "the complainant and the accused's morality, their sense of values, leaves a lot to be desired."

Tellingly, he referred to her as "the accused" throughout the entire proceeding, even after he was corrected by the Crown. For example, "the accused hasn't explained why she allowed the sex to happen if she didn't want it." (Transcript 437:9)

He drew conclusions about her credibility based on his stereotypical assumptions about the "kind of person" she is (Transcript 179:41) and about "the kind of thing that young women will talk about" (Transcript 351:39).

He also made light of both the issue of sexual violence and the testimony of the complainant by commenting: "she got really drunk in the laundry room and in the washroom of the basement suite because she was drinking what she called abstinence, ironically, but was absinthe and white rum." (Transcript 433:2)

C. Justice Camp's Comments and Reasoning Perpetuate Discriminatory Stereotypes

In addition to his reliance on stereotypical thinking as the basis to disregard the substantive law of sexual assault and the rules of evidence (outlined above in part A.), Justice Camp's statements throughout the proceeding and in his reasons for judgment include numerous statements that perpetuate other discriminatory rape myths that have been categorically rejected at law. Indeed, the entire proceeding is threaded through with statements and questions by Justice Camp based on harmful stereotypes about women and sexual assault. The following list of examples is demonstrative and not inclusive of every instance in which this occurred:

Myth: Women who behave a certain way are more likely to have consented

“...young woman want to have sex, particularly if they’re drunk?” (Transcript 322:22)

Myth: Women Who Allege Rape Are Often to Blame for Their Sexual Victimization

Myth: Women Who Allege Rape Are Simply Spiteful

“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” (Crown factum, at paras 62, 64).

“She knew she was drunk...Is not an onus on her to be more careful?” (Transcript 326:8)

Myth: Women Who Actually Do Not Want to Be Raped Will Fight Their Attacker Off

Justice Camp asked numerous questions about her failure to do what Justice Camp clearly thinks was appropriate to stop the accused. For example:

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?

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? (Transcript 395: 19)

In addition, Justice Camp made comments that trivialize the harm of sexual violence. In response to the Crown’s assertion that the complainant’s testimony that the accused hurt her and that she was in physical pain throughout the incident constitutes evidence she felt horrible, Justice Camp states:

...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 is that she wasn’t enjoying the pain...But did she ever say I was feeling horrible? (Transcript 407:29)

Moreover, the tone of some of Justice Camp’s comments suggest a perspective towards sexual assault that is sexist. For example, he states:

The accused's version is that...four people went into the washroom to smoke marijuana...Her version is diametrically different. She went into the washroom to throw up, she'd been drinking a lot including Absinth and he came in and misbehaved.(Transcript 402: 40)

The complainant's allegation in this case was that the accused forced her to engage in oral sex, forced his penis into her vagina, and engaged in forced vaginal intercourse to the point of ejaculation. To characterize her allegation of what the accused did as "misbehav[ior]" is evocative of the type of sexist and outdated 'boys will be boys' thinking that resulted in a criminal justice system in which the harm of nonconsensual sex was not taken seriously.

Unnecessary comments he makes about sexual interactions between men and women such as: "men do react to challenges and women give challenges...there's nothing necessarily malign in that...Sex is very often a challenge" (Transcript 411:40) further indicate Justice Camp's tendency to conceptualize issues of sexuality and gender based on stereotypical generalizations that should not inform any judicial process, let alone a sexual assault trial.

This sexist perspective is also reflected in the tone and content at the beginning of his reasons for his decision. Justice Camp starts his reasons with some tips for the accused. He advises the accused that sexual dynamics have changed and in order to protect themselves from the accusations of women he and his friends must be far more gentle and patient with women. (Transcript 427).

Conclusion

In every case in which a judge has been removed from the bench, the behaviours considered by the Judicial Council arose from a single proceeding, but were serious enough to bring the administration of justice into disrepute. The judges in those instances displayed contempt or disregard for the people appearing before the court, disregard for the law, and attitudes grotesquely out of keeping with Canadian values. Justice Camp's behaviours in this case are of a similar quality. That any modern judge could ask a complainant if she kept her knees together, couple that with numerous other sexist and degrading comments, and then go on to ignore much of the law incumbent upon him to apply, eliminates confidence in that judge's commitment to independence, integrity, impartiality, and commitment to equality, brings the administration of justice into disrepute, and undermines the rule of law.

Before closing, we note that Justice Camp is now sitting on the Federal Court. As a result, he will be asked to consider cases involving issues of race, gender, and disadvantage (at times connected with sexualized violence), most obviously in immigration cases but also in matters involving federal human rights. His capacity to do so consistent with the Canadian Judicial Council's "Ethical Principles for Judges" and

with the law has been shown to be profoundly compromised, and we call for his removal as a Justice of the Federal Court.

Attachments: transcript