ALBERTA
JUSTICE AND SOLICITOR GENERAL

Office of the Minister
MLA, Calgary - Buffalo

AR 15948

December 22, 2015

The Right Honourable Beverley McLachlin, P.C., C.J.C.
Chairperson
Canadian Judicial Council
Ottawa, ON K1A OW8

Dear Chief Justice McLachlin:

Pursuant to subsection 63(1) of the *Judges Act,* R.S.C. 1985, c. J-1, as the Attorney General for the Province of Alberta, I am requesting that an inquiry be commenced into the conduct of Justice Robin Camp of the Federal Court during the trial held in Calgary, Alberta, between June 5 and September 9, 2014, in the matter of *Regina v. Alexander Scott Wagar*, when Justice Camp was sitting as a judge of the Provincial Court of Alberta. More particularly, I am requesting that an inquiry be commenced to determine whether Justice Camp should be removed from office for any of the reasons set out in paragraphs 65(2)(b) to (d) of the *Judges Act.*

In my respectful opinion, the conduct of Justice Camp throughout the proceedings in *Regina v. Wagar* was so manifestly and profoundly destructive of the concept of the impartiality, integrity, and independence of the judicial role that public confidence has been sufficiently undermined to render Justice Camp incapable of executing his judicial office. It is, therefore, my opinion that Justice Camp has become incapacitated or disabled from the due execution of the office of judge, within the meaning of subsection 65(2) of the *Judges Act.*

Regina v. Wagar involved the trial of a sexual assault charge, a serious criminal matter. The decision at trial was appealed to the Alberta Court of Appeal. The Court of Appeal concluded that the conduct of the trial and the trial judge's reasons disclosed errors of law. They allowed the appeal and ordered a new trial. In rendering their judgment, the Court of Appeal 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.*

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In my review of the transcript of the trial proceedings, which I have enclosed, it is evident that many of the trial judge's comments throughout the proceedings reflected discredited stereotypes and myths and a distorted view of legislation meant to protect sexual assault victims and the integrity of the trial process. Below I have highlighted some of those comments. It is not an exhaustive list.

The trial judge reflected an unsupportable view of legislation designed to protect both sexual assault victims and the trial process. When the issue of the Complainant's other sexual activity arose, the trial judge commented that section 276 of the *Criminal Code of Canada* "for better or worse" prevents questions by an accused. He stated that both he [the trial judge] and the framers recognized that the section does hamstring the defence. (Transcript page 58, lines 29-39) It had to be interpreted narrowly. (Transcript page 60, lines 30-32) It was "very, very incursive legislation" which stopped an accused from asking otherwise permissible questions "because of contemporary thinking". (Transcript page 63, lines 5-7) The trial judge did not think anybody would argue that "the rape shield law always worked..fairly." (Transcript page 217, lines 2-4)

The trial judge's comments reflect a reliance on the myth that sexual assault victims report at their first opportunity. In Crown counsel's preliminary submission, the trial judge commented that the Complainant "abused the first opportunity to report" before conceding this was "no longer contemporarily relevant". (Transcript page 314, lines 22-29) In Crown counsel'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 pate 394, lines 35-38) When Crown counsel submitted that antiquated way of thinking had been set aside for a reason, he replied "I hope you don't live too long, Ms. Mograbee." (Transcript page 395, lines 2-6)

Another myth reflected in the trial judge's comments is that a woman cannot be raped against her will. In his own questioning of the Complainant, the trial judge asked "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"? (Transcript page 119, lines 10-11 and 14-15), in his decision he reasoned that "if she skews her pelvis slightly she could avoid him" (Transcripts page 394, line 13) In Crown Counsel's final submissions, the trial judge distinguished *R. v. Livermore* on the basis that the complainant in that case struggled and fought the accused away. The trial judge requested references when Crown counsel reminded him of the Complainant's evidence that she tried to push the accused off, said "no" repeatedly", and told him he was hurting her. (Transcript page 397, line 35 – page 398, line 26)

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The third myth reflected in the trial judge's comments is that a woman who is raped will get hysterical during the event and will be visibly upset afterwards. If a woman retains her cool, people assume nothing happened. In his reasons, the trial judge stated that he could not discard the fact that the Complainant only seemed to get angry, and was far more upset, when another individual humiliated her. She did not appear to react after the accused allegedly had unwanted sex with her. (Transcript page 451, lines 8-11).

The fourth myth reflected in the trial judge's comments is women are seen as fickle and as seeking revenge on past lovers. The trial judge suggested the following scenario as an explanation for the complaint in this case:

> *...Two young people made love, and somebody came afterwards and poisoned the girl's mind. And the young man would happily have continued with the relationship and the young woman wanted that. But in the way that these things do work, she was told that he had gone straight off and made love to somebody else and that he'd said ugly things about her and her mind was poisoned and what could have been a promising happy relationship, just never took place. Instead of which she reacted.*
> (Transcript page 414, lines 11-18)

Finally, another myth apparent in the trial judge's comments is only "women of pure morals". The trial judge commented on the Complainant's morality throughout the trial. He found it relevant whether the Complainant had the moral (and physical) strength to rebuff men if she felt like it. (Transcript page 62, lines 18-23) He characterized her as "amoral" during defence counsel's submissions (Transcript page 353, lines 30-31) and, in his reasons, he stated that her morality left a lot to be desired. (Transcript page 431, lines 29-30) Significantly, in this case, the trial judge repeatedly referred to the Complainant as "the accused" in his reserved reasons. (Transcript page 432 lines 5 and 16; page 433, line 20; page 437, line 9; page 442, line 41; page 443, line 6; page 446, line 41; page 450, line 29; page 451, line 34)

Certain of the trial judge's comments trivialized the Complainant's allegations. When reminded of the Complainant's evidence that she was in pain during the intercourse, the trial judge commented that "sex and pain sometimes go together ... that's not necessarily a bad thing" before conceding that the implication from her was that she was not enjoying the pain. (Transcript page 407, lines 24-32) He remarked that "[s]ex is very often a challenge". (Transcript page 411, line 34) In the context of the allegations in this case, he commented that "I don't believe there's any talk of an attack really" (Transcript page 306, lines 9-10) and "there's no talk of real force". (Transcript page 437, lines 6-7)

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The trial judge demonstrated a flawed understanding of "consent" in the context of sexual assault offences. In an exchange with Crown counsel, he demonstrated a belief that the Complainant was obliged to communicate a lack of consent and that the accused could assume consent until that time. (Transcript page 376, lines 19-40). Further, the judgment implies that a woman needs to take care to ensure consent is not assumed as opposed to the man ensuring that consent is confirmed. He remarked "She knew she was drunk. … Is not the onus on her to be more careful" (Transcripts page 326, lines 8 – 12).

Some of the comments made by Justice Camp in *Regina v. Wagar* were widely published in the media and it would be truly unfortunate if this has a chilling effect on victims of sexual abuse, making them hesitant to come forward to report and give evidence of that abuse. In these circumstances, it is my view that the conduct of Justice Camp during the course of this trial was such that nothing short of an inquiry by the Judicial Council can restore public confidence in the due administration of justice in connection with this matter.

In addition to the transcript of the trial proceedings, I have enclosed the Crown's Appellant Factum and the Court of Appeal's Memorandum of Judgment allowing the appeal and ordering a new trial. Should the Judicial Council need any additional information concerning this matter, please do not hesitate to contact me.

Sincerely,

Kathleen Ganley
Minister of Justice and Solicitor General

Enclosures

cc: The Honourable Jody Wilson-Raybould
Minister of Justice and Attorney General of Canada