CANADIAN JUDICIAL COUNCIL

IN THE MATTER OF: **An Inquiry pursuant to section 63(1) of the *Judges Act* regarding the Honourable Justice Robin Camp**

PRE- HEARING SUBMISSIONS OF PRESENTING COUNSEL

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A. Overview

1. This inquiry was initiated following a request by the Minister of Justice and Attorney General of Alberta on December 22, 2015 in respect of Justice Robin Camp's conduct in the matter of *R. v. Wagar* (Provincial Court of Alberta, Docket No. 130288731P1), when he was a Provincial Court Judge.[1]

2. *R. v. Wagar* was a sexual assault trial that was heard by Justice Camp over a number of days between June 5 and August 6, 2014. On September 9, 2014, Justice Camp found that the charges had not been proven by the Crown beyond a reasonable doubt, and the accused was acquitted.

3. Justice Camp's decision was appealed by the Crown to the Alberta Court of Appeal. The accused did not participate in the appeal. The trial decision was overturned on October 27, 2015, with the Court of Appeal concluding that errors of law were made. The specific errors were not identified, although the Court indicated among other things it was 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...". The Court of Appeal also indicated it was persuaded that "sexual stereotypes and stereotypical myths, which have long since been discredited, may have found their way into the trial judge's judgment". [2]

4. Following the Court of Appeal's decision, Justice Camp's conduct was highly publicized, and many people filed written complaints with the Canadian Judicial Council ("CJC") or expressed concerns to various courts. The first complaint to the CJC was filed by four law professors (the "professors' complaint"). The professors' complaint was the subject of an initial review by a member of the CJC. When the Alberta Minister of Justice filed her request for an inquiry on December 22, 2015, the professors' complaint as well as other complaints were held in abeyance, as s. 63(1) of the *Judges' Act* requires the convening of an inquiry when the attorney general of a province requests it.

5. The Inquiry Committee's mandate is to determine 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 s. 65(2)(b) to (d) of the *Judges Act*, such that he should be removed from office.

6. Presenting Counsel was retained on April 22, 2016 to present all relevant evidence to the Inquiry Committee. Among other things, the role of Presenting Counsel is to be objective, fair, and conscious of the importance of conducting the inquiry in a manner that will enhance public confidence in the judiciary.

7. A Statement of Allegations was provided to Justice Camp on May 2, 2016 by the Inquiry Committee. A technical amendment was made to the Statement of Allegations on July 14, 2016. Generally, the Statement alleges that in the course of hearing the *Wagar* matter Justice Camp showed antipathy toward the "rape shield" law; engaged in biased and stereotypical thinking in relation to a sexual assault complainant; asked questions of a

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[1] Throughout this submission, Justice Camp will be referenced by that title, when discussing his role either on the Provincial Court or the Federal Court

[2] The Court of Appeal's decision is found as an exhibit to the Agreed Statement of Facts, not yet filed in this matter

sexual assault complainant that relied upon stereotypical assumptions about how someone confronted with sexual assault might behave; made a rude and derogatory comment to Crown counsel; made comments tending to belittle and trivialize the nature of sexual assault; and made comments tending to belittle women generally.

8. A Notice of Response to the Allegations was filed by counsel for Justice Camp on July 4, 2016 (the "Response"). It is Justice Camp's position that he has not rendered himself incapacitated or disabled from the due execution of his office. While recognizing the "insensitive and inappropriate" nature of some of his statements, and apologizing for them, Justice Camp denies that he engaged in biased or stereotypical thinking in hearing and deciding the *Wagar* matter. He also denies harbouring any antipathy towards s. 276 of the *Criminal Code*. He submits that he has undergone counselling and training with Superior Court Justice Deborah McCawley, Professor Brenda Cossman and Dr. Lori Haskell. Justice Camp submits that his "counselling has given him a deeper understanding of the trauma faced by survivors of sexual assault and about the discriminatory history of assault law."

9. Please accept these submissions on behalf of Presenting Counsel in advance of the inquiry scheduled to be heard commencing September 6, 2016 in Calgary, Alberta. In what follows, we first discuss the Role of Presenting Counsel in this Inquiry. We will then review the nature of the evidence intended to be led at the hearing and canvass the relevant law. No conclusions are reached by Presenting Counsel at this stage of the proceeding, nor arguments presented. In keeping with our understanding of the role of Presenting Counsel, submissions or positions will only be reached after determining what is in the public interest following presentation of the evidence.

B. Role of Presenting Counsel

10. The role of Presenting Counsel in this Inquiry is to present the case to the Inquiry Committee, which includes making submissions on law and procedure. According to s. 4 of the *Canadian Judicial Council Inquiries and Investigations By-laws,* 2015, SOR/2015-203: "The Inquiry Committee may engage legal counsel and other persons to provide advice and to assist in the conduct of the inquiry."

11. While decided prior to the recent By-Law amendments, the Report of the Inquiry Committee Concerning the Hon. Justice Michel Déziel (June 3, 2015) ["*Déziel*"][3] states that Presenting Counsel (or "Independent Counsel") must act at "arm's length" from both the Canadian Judicial Council and the Inquiry Committee. In that respect, Presenting Counsel does not act under any instructions, but in accordance with the law and his or her own best judgment of what is required in the public interest. Mainly, Presenting Counsel is expected to gather, marshal and present evidence to the Committee, make submissions, and remain fair and objective throughout the process. *Déziel* goes on to discuss the role of Independent Counsel, as compared to the role of the Inquiry Committee, as follows:

> [86] From the above, it can be seen that the Independent Counsel is a key player who participates in the Inquiry Committee process in his or her own way and according to well-established parameters. The Inquiry Committee process, let us recall, is not an adversarial proceeding, but rather, as its name suggests, an investigative function. Indeed, the Inquiry Committee is asked to gather all relevant evidence, weigh this evidence and, ultimately, make appropriate findings in its final report.

[3] Book of Authorities, Tab 5

[...]

[88] Inasmuch as the Independent Counsel's role is part of this process, it is understood that his or her responsibilities must never encroach upon those of the Inquiry Committee.

[89] This delimitation is recalled, in no uncertain terms, at paragraph 69 of the ruling in the matter of *Justice Douglas*:

> [69] The last point is driven home even more forcefully by the opening paragraph of this Policy, which states:
>
> > An Inquiry Committee has complete responsibility for, and control over, the scope and depth of its inquiry into the conduct of a judge. At the outset and over the course of the hearings, it relies heavily upon Independent Counsel to ensure that all relevant evidence is gathered, marshalled, presented and tested at its hearings. But it does not "abandon" its own responsibility to such counsel, since the Canadian Judicial Council relies upon the Committee for a complete report. One of the key functions of the Committee is to make findings of fact.

In other words, it is the inquiry committee's inquiry and not that of the independent counsel. It also emphasizes that the inquiry committee must take full responsibility for fact-finding and cannot delegate this function to independent counsel.

12. In accordance with the above, and with the Inquiry Committee's Directions to Counsel dated April 22, 2016, Presenting Counsel will:

    a. Present all relevant evidence to the Inquiry Committee, and be responsive to direction from the Committee to adduce further evidence or engage in a line of inquiry in order to assist the Committee with its mandate;

    b. Make submissions on questions of procedure and applicable law that are raised during the inquiry, and make submissions on the findings and recommendations to be made by the Committee free of direction from the Inquiry Committee or any outside influence, in accordance with the law and her best judgment of what is required in the public interest;

    c. Discharge her duties with a full appreciation of the objective concerns underlying the complaint or allegations, with fairness to the judge who is the subject of the inquiry, and conscious of the importance of conducting the inquiry in a manner that will enhance public confidence in the judiciary; and

    d. Exercise best judgment with respect to cross-examination of witnesses.

C. The Allegations and Anticipated Evidence

13. The Statement of Allegations sets out the following claims against Justice Camp, supported by various references to the trial transcript:

    - **Allegation 1:** In the course of the *Wagar* 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;

- **Allegation 2:** In the course of the Trial and in giving his reasons for judgement, the Judge engaged in stereotypical thinking in relation to a sexual assault complainant and relied on flawed assumptions that are well-recognized and established in law as rooted in myths;

- **Allegation 3:** In the course of the Trial, the judge asked questions of the complainant witness reflecting reliance on discrete, stereotypical assumptions about how someone confronted with sexual assault would or would not behave and/or blaming the complainant for the alleged assault;

- **Allegation 4:** 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;

- **Allegation 5:** In the course of the Trial and in giving his reasons for judgement, the Judge made comments tending to belittle and trivialize the nature of the allegations made by the complainant; and

- **Allegation 6:** In the course of the Trial and in giving his reasons for judgement, the Judge made comments tending to belittle women, and expressing stereotypical or biased thinking in relation to a sexual assault complainant.

14. In his Response, Justice Camp does not deny making the alleged comments; rather he characterizes them as "insensitive and inappropriate." He does not acknowledge or admit that his comments rely upon or reflect "rape myths." He also challenges the Alberta Court of Appeal's finding that his conduct of the *Wagar* trial and his reasons for his decision disclose errors of law.

15. During the upcoming hearing, both parties will rely on evidence set out in an Agreed Statement of Facts ("ASF"). Unfortunately, the ASF has not been finalized at the time of writing this brief, so specific reference to portions of its content cannot be made at this time. It is anticipated it will be ready in advance of the hearing and will be circulated to the Inquiry Committee as soon as possible.

16. In addition, at the time of writing this brief, the parties have not yet received the submissions from the intervenors in this matter, so no reference is made in this brief to those submissions.

17. The ASF will set out some background information on Justice Camp and will also include the following:

    a. The trial transcript in *R. v. Wagar* in both written and audio form;
    b. The Crown's appeal factum in *R. v. Wagar*;
    c. The Alberta Court of Appeal's decision in *R. v. Wagar*;
    d. All complaints filed with the CJC with respect to Justice Camp's conduct in *R. v. Wagar,* including the Alberta Attorney General's complaint and the initiating complaint filed by four law professors;

e. A letter from Chief Justice Crampton, Chief Justice of the Federal Court, in response to the complaint filed by the law professors;
f. The statement posted on the Federal Court website on November 10, 2015, including the apology from Justice Camp;
g. A spreadsheet setting out a selection of media reports reporting on Justice Camp's conduct in *R. v. Wagar,* with one or more specific extracts of such reports;
h. Material filed in two cases in the Federal Court where the conduct of Justice Camp in *Wagar* is raised;
i. Expert Report of Dr. Janine Benedet of the University of British Columbia, with the redactions ordered by the Committee on August 25, 2016;
j. CV's of individuals involved in mentoring, counselling, or teaching undertaken by Justice Camp (respectively, Justice Deborah MacCawley, Dr. Lori Haskell, and Professor Brenda Cossman);
k. Various character letters for Justice Camp, prepared at the request of his legal counsel; and
l. Such other material as counsel may agree prior to finalizing the ASF.

18. In addition to the evidence in the ASF and its exhibits, Presenting Counsel intends to call the complainant in *R. Wagar* to read a statement respecting the negative impact of Justice Camp's comments on her both during and after the trial.

19. We understand that Justice Camp will give evidence supportive of his Response, and his legal counsel also will be calling the following witnesses to explain the mentoring, teaching and counselling undertaken by him:

    a. Justice Deborah McCawley;
    b. Professor Brenda Cossman; and
    c. Dr. Lori Haskell.

20. We further understand Justice Camp will reference the character letters elicited by his counsel to respond to any concern about his ability to serve as a judge. Discussions have taken place between Presenting Counsel and Justice Camp's counsel regarding the admissibility of three of the character letters, but agreement has been reached that the letters will go into evidence and argument will be made about their weight.

21. Given the nature of the allegations made against Justice Camp, the transcript from *R. v. Wagar* will serve as the primary piece of evidence in this inquiry for all allegations.

22. Presenting Counsel will also rely on many of the cases referenced in the Crown's appeal factum in *R. v. Wagar*, as well as the case law and evidence provided by Dr. Benedet in her Expert Report to address the allegations.[4]

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[4] The following cases will be referenced in argument and are found in the Book of Authorities as follows:
    a. *R v Seaboyer*, [1991] 2 SCR 577; BOA Tab 17
    b. *R. v. Osolin,* [1993]4 SCR 595; BOA Tab 15
    c. *R v Mills*, [1999] 3 SCR 668; BOA Tab 14
    d. *R. v Ewanchuk*, [1999]1 SCR 330; BOA Tab 13
    e. *R v Shearing,* [2002] 3 SCR 33; BOA Tab 18
    f. *R v S (R.D.), [1997] 3* SCR 484; Tab 16
    g. *R v D.D.,*[2000] 2 SCR 275; BOA Tab 12

23. At the request of Presenting Counsel, Dr. Janine Benedet of the University of British Columbia provided this Inquiry Committee with an expert opinion titled "Report on Sexual History of Sexual Assault Laws, Discriminatory Beliefs and Sexual Assault Reporting Rates as Applied to the Comments of Justice Robin Camp in *R. v. Wagar*" [the "Expert Report"].

24. Professor Benedet is an expert on the topic of sexual assault law in Canada. She was retained by Presenting Counsel to provide her opinion on a number of issues, including (1) the legislative and social history underlying the evolution of sexual assault law; (2) statistical information regarding reporting of sexual assaults; (3) the extent to which Justice Camp's comments in *R. v. Wagar* reflect or reinforce sexual assault myths and stereotypes; and (4) the impact that Justice Camp's comments may have on the reporting and trying of sexual assault cases.

25. In addressing the issue of myths and stereotypes, Professor Benedet explores "twin myth" reasoning (i.e. that by reason of other sexual activity engaged in by a complainant, the complainant was more likely to have consented, or less worthy of belief) as well as the following myths and stereotypes:

    - 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;
    - 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;
    - Women of loose morals or low virtue are more likely to lie about being sexually assaulted;
    - Women of good character may lie about being sexually assaulted out of shame at giving in to their own desires, or spite at being rejected by a man after the sexual activity;
    - Women might be seen as asking for sexual advances based on provocative dress, being out late at night or otherwise acting in such a way as to invite male attention;
    - Women who are raped by a stranger are expected to resist with force, and make some sort of public outcry to attract attention and assistance;
    - Rape without physical violence is not as harmful or serious as rape with physical violence;
    - Women who drink in public are doing so to signal their sexual availability and reduce their inhibitions;
    - Alcohol has traditionally been viewed as an acceptable tool of seduction by men; and
    - Where both parties are drunk, both are equally responsible for any sexual activity that ensues, and it is unfair to blame the man for what is effectively a joint enterprise that both parties may regret the next day;

26. Professor Benedet's report provides evidence of the purpose and effect of s. 276 of the *Criminal Code*, particularly in the context of the various rape myths and stereotypes this provision was meant to address. Her report also provides statistical evidence regarding the reporting of sexual assault, and provides Professor Benedet's conclusion that a lack of confidence in the justice system is an important factor that discourages reporting. She states that "while this lack of confidence exists for other violent crimes as well, in the context

of sexual assault it is directly tied to the perceived acceptance of rape myths by justice system participants."[5]

27. The totality of the evidence and the case law described above, will be used at the hearing to explore Justice Camp's responses to the allegations, and the application of s. 65(2) of the *Judges Act.* In addition, Presenting Counsel will be referencing the variety of complaints made to the CJC[6], as well as the significant media publicity surrounding his actions[7], as factors that are relevant to findings of misconduct, conduct incompatible with the due execution of the judicial office, and the undermining of public confidence in the ability of Justice Camp to execute his judicial office.

D. Relevant Law

28. In what follows, Presenting Counsel will first discuss the general test for removal of a judge from office, as set out in decisions from prior inquiries and decisions. In addition, some discrete matters will be reviewed which are anticipated to have relevance in this case. While there is some overlap among these issues, disciplinary cases involving each of the following will be separately discussed:

    a. allegations of sexism or misogyny;
    b. single incidents of misconduct;
    c. the impact of apologies; and
    d. the use and impact of character letters.

a. The Test for Removal

29. In Report of the **Canadian Judicial Council Concerning the Hon. Justice Theodore P. Matlow (December 3, 2008)** ["*Matlow*"],[8] the CJC summarized the two-stage procedure to the application of s. 65 as follows:

> [166] The Inquiry Committee, at para. [113] of its Report, correctly characterized its task as two-fold: first, determine whether Justice Matlow's conduct falls within any one of paragraphs (b) through (d) of s. 65(2) of the *Judges Act*; and second, if so, apply the test for removal set forth above. An important aspect of the test not specifically articulated is its prospective nature. Implicit in the test for removal is the concept that public confidence in the judge would be sufficiently undermined to render him or her incapable of executing judicial office in the future in light of his or her conduct to date.
>
> [Emphasis added.]

30. The first question then for determination by the Committee, once all relevant evidence has been heard, is whether Justice Camp's alleged conduct as set out in the Notice of Allegations is proven, and falls into one of the categories noted in s. 65(2)(b) to (d) of the *Judges Act*, which states:

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[5] Professor Benedet's Report is an exhibit to the ASF
[6] The complaints are attached as an exhibit to the ASF
[7] Some examples of the media reports referenced in the spread sheet included in the ASF, are found in the Book of Authorities at Tabs 20-26
[8] Book of Authorities, Tab 8

> **(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
>
> > **(a)** [...]
> >
> > **(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.

31. If the Inquiry Committee makes a positive finding under s. 62(2)(b) to (d), then the second question becomes whether impugned conduct is serious enough to warrant his removal. The test from Inquiry Committee Report into the Conduct of Justices MacKeigan, Hart, Macdonald, Jones and Pace (August 1990) ["***Marshall***"][9] asks:

> 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?

32. The test is an objective one, to be considered from the perspective of a reasonable and well-informed person (***Ruffo v. Conseil de la magistrature***, [1995] 4 SCR 267, 1995 CanLII 49 (SCC)).[10]

33. In the **Report of the Inquiry Committee Concerning the Hon. Justice Michel Girouard (November 18, 2015)** ["*Girouard*"],[11] the Committee confirmed the standard of proof is the civil standard, described in the following terms:

> [69] This test is prospective in nature: "Implicit in the test for removal is the concept that public confidence in the judge would be sufficiently undermined to render him or her incapable of executing judicial office in the future in light of his or her conduct to date."
>
> [70] The Committee's mandate involves a search for the truth in accordance with rules of procedural fairness afforded to Justice Girouard. Consequently, the Inquiry Committee must gather the information necessary for the Council to assess the situation and make a recommendation to the Minister of Justice. After having gathered the information, the Committee must also support its analysis on the basis of the previously stated criteria, and make a recommendation to the Council as to whether or not the judge should be removed.
>
> [71] As in any other civil matter, the standard of proof is based on a balance of probabilities. As Justice Rothstein, writing for the Supreme Court of Canada, stated in *F.H. v. McDougall*: "[...] evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test."

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[9] Book of Authorities, Tab 7
[10] Book of Authorities, Tab 10
[11] Book of Authorities, Tab 6

34. As noted by the Supreme Court of Canada in ***Re Therrien,*** 2001 SCC 35 (CanLII), [2001] 2 S.C.R. 3 ["*Therrien*"],[12] the public demands "virtually irreproachable conduct from anyone performing a judicial function," or at least "the appearance of that kind of conduct. They must be and must give the appearance of being an example of impartiality, independence and integrity" (para. 111). *Girouard* describes the standard expected of judges as follows:

> [59] Judges are in a place apart in our society and the public expects their conduct to be beyond reproach. Justice Gonthier, writing for the Supreme Court of Canada in *Therrien*, eloquently described the unique status of judges:
>
> > 108 The judicial function is absolutely unique. Our society assigns important powers and responsibilities to the members of its judiciary. Apart from the traditional role of an arbiter which settles disputes and adjudicates between the rights of the parties, judges are also responsible for preserving the balance of constitutional powers between the two levels of government in our federal state. Furthermore, following the enactment of the *Canadian Charter*, they have become one of the foremost defenders of individual freedoms and human rights and guardians of the values it embodies: *Beauregard*, *supra*, at p. 70, and *Reference Remuneration of Judges of the Provincial Court*, *supra*, at para. 123. Accordingly, from the point of view of the individual who appears before them, judges are first and foremost the ones who state the law, grant the person rights or impose obligations on him or her.
> >
> > 109 If we then look beyond the jurist to whom we assign responsibility for resolving conflicts between parties, judges also play a fundamental role in the eyes of the external observer of the judicial system. The judge is the pillar of our entire justice system, and of the rights and freedoms which that system is designed to promote and protect. Thus, to the public, judges not only swear by taking their oath to serve the ideals of Justice and Truth on which the rule of law in Canada and the foundations of our democracy are built, but they are asked to embody them. (Justice Jean Beetz, Introduction of the first speaker at the conference marking the 10th anniversary of the Canadian Institute for the Administration of Justice, observations collected in *Mélanges Jean Beetz* (1995), at pp. 70-71)
> >
> > 110 Accordingly, the personal qualities, conduct and image that a judge projects affect those of the judicial system as a whole and, therefore, the confidence that the public places in it. Maintaining confidence on the part of the public in its justice system ensures its effectiveness and proper functioning. But beyond that, public confidence promotes the general welfare and social peace by maintaining the rule of law. In a paper written for its members, the Canadian Judicial Council explains:
> >
> > > Public confidence in and respect for the judiciary are essential to an effective judicial system and, ultimately, to democracy founded on the rule of law. Many factors, including unfair or uninformed criticism, or simple misunderstanding of the judicial role, can adversely influence public confidence in and respect for the

[12] Book of Authorities, Tab 11

> judiciary. Another factor which is capable of undermining public respect and confidence is any conduct of judges, in and out of court, demonstrating a lack of integrity. Judges should, therefore, strive to conduct themselves in a way that will sustain and contribute to public respect and confidence in their integrity, impartiality, and good judgment.
>
> (Canadian Judicial Council, *Ethical Principles for Judges* (1998), p.14)

111 The public will therefore demand virtually irreproachable conduct from anyone performing a judicial function. It will at least demand that they give the appearance of that kind of conduct. They must be and must give the appearance of being an example of impartiality, independence and integrity. What is demanded of them is something far above what is demanded of their fellow citizens. This is eloquently expressed by Professor Y.-M. Morissette:

> [TRANSLATION] [T]he vulnerability of judges is clearly greater than that of the mass of humanity or of "elites" in general: it is rather as if his or her function, which is to judge others, imposed a requirement that he or she remain beyond the judgment of others.
> ("*Figure actuelle du juge dans la cité*"(1999), 30*R.D.U.S.* 1, atpp.11-12)

In *The Canadian Legal System*(1977), Professor G. Gallgoes even further, at p.167:

> The dictates of tradition require the greatest restraint, the greatest propriety and the greatest decorum from the members of our judiciary. We expect our judges to be almost superhuman in wisdom, in propriety, in decorum and in humanity. There must be no other group in society which must fulfil this standard of public expectation and, at the same time, accept numerous constraints. At any rate, there is no question that a certain loss of freedom accompanies the acceptance of an appointment to the judiciary.

112 The reasons that follow therefore cannot disregard two fundamental premises. First, and following from the foregoing, they cannot be dissociated from the very particular context of the judicial function. The judge is in "a place apart" in our society and must conform to the demands of this exceptional status (Friedland, *supra*).[...]"

[Emphasis added]

[60] Consequently, public confidence in the judiciary can only be maintained if judges demonstrate the highest level of integrity and probity, in both their personal and professional lives.

> [61] As for judicial independence, it rests on three pillars: security of tenure, financial security, and institutional or administrative independence.
>
> [62] Security of tenure is an essential component of judicial independence. However, the Constitution does not provide judges with absolute security of tenure, but rather makes it conditional upon good behaviour.

35. The above-noted cases provide a helpful summary of the issues that must be determined by the Inquiry Committee. In sum, the civil standard of proof applies when the Committee must first determine whether the impugned conduct set out in the Notice of Allegations is established and falls within any of the categories listed in s. 65(2)(b) to (d). If so, the Committee will then have to determine whether the conduct complained of in the allegations is 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.

b. Allegations of Sexism and Misogyny

36. The cases of **Inquiry Committee Report to CJC re Justice Bienvenue (June 1996) [*"Bienvenue"*]**[13], **CJC Review of Complaint re Justice Robert Dewar** (November 9, 2011) [*"Dewar"*][14], **and *Inquiry pursuant to s. 13(2) of Territorial Court Act, into the conduct of Judge Bourassa*** 1990 CarswellNWT 28 [*"Bourassa"*][15] all dealt with accusations that the judge in question had expressed sexist and misogynistic beliefs, and reached varying results.

37. In *Dewar,* for example, the Judge was handing down sentencing in a sexual assault case in which he had found as fact that the accused had reason to believe that sexual relations might be forthcoming but that he was nonetheless guilty due to his failure to confirm consent. His choice of words in describing the circumstances formed the basis for the complaint. Three passages were raised. In one, Justice Dewar described the victim's clothing (tube top without a bra, jeans, and high heels) as "inviting" and making their intentions known that they "wanted to party." Later Justice Dewar commented that "sex was in the air." In commenting on the character of the accused, Justice Dewar noted the absence of any criminal history and went on to describe him as a "clumsy Don Juan."

38. Justice Wittman, who reviewed the matter to determine whether referral to an Inquiry Committee was called for, found fault with Justice Dewar for making these comments and made a formal expression of concern to him. However, he held that no further action was necessary given Justice Dewar's full apologies both to the victim and to any assault victims who may have been harmed by his remarks. He met with a gender equality expert and pursued other professional development. These active steps and the fact that the incident was isolated led Justice Wittman to conclude that no further action was necessary.

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[13] Book of Authorities, Tab 1

[14] Book of Authorities, Tab 4 (Note there is no written decision as such in *Dewar.* I have been advised by Norman Sabourin as follows: "The letter to the complainant constitutes the decision of Chief Justice Wittman in that case. In keeping with the Operating Procedures, I communicated the decision. The wording of my letter to the complainants was directed by Wittmann, CJ").

[15] Book of Authorities, Tab 2

39. In *Bourassa*, Judge Bourassa made certain remarks in an interview with a journalist that suggested that cases of sexual assault in the North were not as serious as sexual assault cases in other parts of the country. Specifically, he stated:

- "The majority (or many) of the rapes in the Northwest Territories occur when the woman is drunk and (or) passed out and a man comes along and sees a pair of hips and helps himself";
- "That contrasts sharply to the cases I dealt with before at Kingston, of the dainty co-ed who gets jumped from behind on a university campus and suffers vaginal tears, and is traumatized physically and psychologically, totally devastated, suffers injuries requiring hospitalization";
- "My experience with rape down South is different from the reality of rape up here. In most cases down south there is violence apart from the rape that's involved. Up here you find many cases of sexual assault where the woman is drunk and the man's drunk";
- "So, rightly or wrongly, he cuddled his niece and touched her breasts and fondled her genitals" (in reference to the case of *R. v. A.* [10th October 1989], in which he had recently imposed an unpopular sentence);
- "[W]hen a girl begins to menstruate she is considered ready to engage in sexual relations" (in reference to his beliefs regarding Inuit cultural practices).

40. The Board of Inquiry (chaired by Justice Conrad) gave weight to the fact that these statements were not made in Court. Moreover, the Board found that these comments seemed inappropriate when taken out of context; however, when considered within their context, a reasonable person would not find them sufficiently offensive to render the judge unfit to exercise judicial office. It amounted to a careless use of words, rather than evidence of defect of moral integrity, uprightness or honesty." We note that this case, while factually relevant, is not directly applicable, given that the inquiry was commenced under a different statute, and involved a different test for removal.

41. In the *Bienvenue* case, the complaint related to Justice Bienvenue's conduct of a trial of a woman charged with murdering her husband. He made a number of remarks at trial which the complaint alleged were inappropriate, sexist and racist. For example, he said that when women ascend the scale of virtues they climb higher than men, but when they "decide to degrade themselves, they sink to depths to which even the vilest man could not sink." He also said, speaking to the accused:

> Alas, you are indeed in the image of these women so famous in history. The Delilahs, the Salomes, Charlotte Tardif, Mara Had and how many others who have been a sad part of our history and have debased the profile of women.
>
> You are one of them, and you are the clearest living example of them that I have seen.
>
> At the Auschwitz-Birkenau concentration camp in Poland, which I once visited horror-stricken, even the Nazis did not eliminate millions of Jews in a painful or bloody manner. They died in the gas chambers, without suffering.[16]

42. He also misconducted himself by meeting with jurors and criticizing their verdict both privately and in open court. The hearing inquired into the conduct of trial beyond the items raised in the complaint and uncovered other matters (see pp. 11 to 19):

- He said "Kleenex is a woman's best friend" to a female juror who was crying;

[16] *Bienvenue* at p. 6 BOA Tab 1.

- He made gratuitous and dismissive comments about a parking lot attendant employed at the courthouse;
- He remarked to a female reporter that he let her into his courtroom due to her mini-skirt, noting that this was a joke as he could not say it in public. In explaining this comment to the committee, he noted that he was trying to subtly instruct her on judicial decorum and that her attire could distract the jury from their work;
- A Jury guard reported that when he passed along a question from the jury, the Judge made disparaging remarks about the jury;
- He made bizarre remarks positing a lesbian relationship between the accused and another woman;
- He also made comments about the accused's suicide attempts suggesting that they had been feigned which led to a complaint that his remarks were insensitive to suicidal persons and set back suicide prevention efforts by ten years.

43. The Committee's majority recommendation in favour of removal focussed primarily on the inappropriate interactions with jurors and on the remarks about women. As to the former, the majority noted the importance of the jury to our justice system and underlined that Justice Bienvenue's conduct undermined that importance. It also noted that he seemed not to grasp this point. Similarly, with regard to his inappropriate remarks about women, he reiterated them and expressed his continued adherence to the beliefs underlying them. The majority held that his remarks idealized and demeaned women in a manner contrary to the equality guarantee of the *Charter*. While entitled to hold his own opinions, a Judge is not entitled to espouse opinions which deny equality and bring their impartiality into disrepute. The majority held that these instances of misconduct were contrary to s. 65(2)(b) and (d) and placed Justice Bienvenue in a position incompatible with the due execution of his office of judge.

44. The other instances of inappropriate conduct were also reviewed as evidence of his lack of sensitivity to communities and individuals and his lack of concern in many cases about the offence he caused. Recognizing that inappropriate remarks may not always justify removal, four out of five members of the Committee felt that this case went beyond that:

> Counsel for Mr. Justice Bienvenue argued that mere errors in judgment or strong language cannot justify removing a judge. Such errors or mistakes are generally minor and are acknowledged by the judge in question, who immediately regrets them. Like anyone else, a judge can have a bad day. In this case, the breaches of ethics brought to our attention--the judge's repeated remarks about women and the comments he made to the jurors after their verdict--are serious and, as with the other incidents alleged against him, have not been retracted by him. We are therefore not dealing here merely with strong language.
>
> [...]
>
> Because of his conduct during all the incidents that marked Tracy Theberge's trial, Mr. Justice Bienvenue has undermined public confidence in him and strongly contributed to destroying public confidence in the judicial system. In our view, this is the conclusion that would be reached by a reasonable and informed person.

45. Finally, in the context of cases addressing judicial remarks of a sexist or misogynistic nature, it is worth recalling Justice L'Heureux-Dubé's criticism of Justice McClung's various findings in *Ewanchuk*. Justice McClung had placed blame on the victim of a sexual assault for not doing enough to fight off her assailant, or to ensure that the assailant understood the assault was unwelcome. L'Heureux-Dubé J. stated:

87 In the circumstances of this case, it is difficult to understand how the question of implied consent even arose. Although he found the complainant credible, and accepted her evidence that she said "no" on three occasions and was afraid, the trial judge nonetheless did not take "no" to mean that the complainant did not consent. Rather, he concluded that she implicitly consented and that the Crown had failed to prove lack of consent. This was a fundamental error. As noted by Professor Stuart in Annotation on *R. v. Ewanchuk* (1998), 13 C.R. (5th) 330, at p. 330:

> Both the trial judgment and that of Justice McClung do not make the basic distinction that consent is a matter of the state of mind of the complainant and belief in consent is, subject to s. 273.2 of the *Criminal Code*, a matter of the state of mind of the accused.

This error does not derive from the findings of fact but from mythical assumptions that when a woman says "no" she is really saying "yes", "try again", or "persuade me". To paraphrase Fraser C.J. at p. 263, it denies women's sexual autonomy and implies that women are "walking around this country in a state of constant consent to sexual activity".

88 In the Court of Appeal, McClung J.A. compounded the error made by the trial judge. At the outset of his opinion, he stated at p. 245 that "it must be pointed out that the complainant did not present herself to Ewanchuk or enter his trailer in a bonnet and crinolines". He noted, at pp. 245-46, that "she was the mother of a six-month-old baby and that, along with her boyfriend, she shared an apartment with another couple".

89 Even though McClung J.A. asserted that he had no intention of denigrating the complainant, one might wonder why he felt necessary to point out these aspects of the trial record. Could it be to express that the complainant is not a virgin? Or that she is a person of questionable moral character because she is not married and lives with her boyfriend and another couple? These comments made by an appellate judge help reinforce the myth that under such circumstances, either the complainant is less worthy of belief, she invited the sexual assault, or her sexual experience signals probable consent to further sexual activity. Based on those attributed assumptions, the implication is that if the complainant articulates her lack of consent by saying "no", she really does not mean it and even if she does, her refusal cannot be taken as seriously as if she were a girl of "good" moral character. "Inviting" sexual assault, according to those myths, lessens the guilt of the accused as Archard, *supra*, notes at p. 139:

> . . . the more that a person contributes by her behaviour or negligence to bringing about the circumstances in which she is a victim of a crime, the less responsible is the criminal for the crime he commits. A crime is no less unwelcome or serious in its effects, or need it be any the less deliberate or malicious in its commission, for occurring in circumstances which the victim helped to realise. Yet judges who spoke of women 'inviting' or 'provoking' a rape would go on to cite such contributory behaviour as a reason for regarding the rape as less grave or the rapist as less culpable. It adds judicial insult to criminal injury to be told that one is the part author of a crime one did not seek and which in consequence is supposed to be a lesser one.

90 McClung J.A. writes, at p. 247:

> There is no room to suggest that Ewanchuk knew, yet disregarded, her underlying state of mind as he furthered his romantic intentions. He was not aware of her true state of mind. Indeed, his ignorance about that was what she wanted. The facts, set forth by the trial judge, provide support for the overriding trial finding, couched in terms of consent by implication, that the accused had no proven preparedness to assault the complainant to get what he wanted. [Emphasis added.]

On the contrary, both the fact that Ewanchuk was aware of the complainant's state of mind, as he did indeed stop each time she expressly stated "no", and the trial judge's findings reinforce the obvious conclusion that the accused knew there was no consent. These were two strangers, a young 17-year-old woman attracted by a job offer who found herself trapped in a trailer and a man approximately twice her age and size. This is hardly a scenario one would characterize as reflective of "romantic intentions". It was nothing more than an effort by Ewanchuk to engage the complainant sexually, not romantically.

91 The expressions used by McClung J.A. to describe the accused's sexual assault, such as "clumsy passes" (p. 246) or "would hardly raise Ewanchuk's stature in the pantheon of chivalric behaviour" (p. 248), are plainly inappropriate in that context as they minimize the importance of the accused's conduct and the reality of sexual aggression against women.

92 McClung J.A. also concluded that "the sum of the evidence indicates that Ewanchuk's advances to the complainant were far less criminal than hormonal" (p. 250) having found earlier that "every advance he made to her stopped when she spoke against it" and that "[t]here was no evidence of an assault or even its threat" (p. 249). According to this analysis, a man would be free from criminal responsibility for having non-consensual sexual activity whenever he cannot control his hormonal urges. Furthermore, the fact that the accused ignored the complainant's verbal objections to any sexual activity and persisted in escalated sexual contact, grinding his pelvis against hers repeatedly, is more evidence than needed to determine that there was an assault.

93 Finally, McClung J.A. made this point: "In a less litigious age going too far in the boyfriend's car was better dealt with on site -- a well-chosen expletive, a slap in the face or, if necessary, a well-directed knee" (p. 250). According to this stereotype, women should use physical force, not resort to courts to "deal with" sexual assaults and it is not the perpetrator's responsibility to ascertain consent, as required by s. 273.2(*b*), but the women's not only to express an unequivocal "no", but also to fight her way out of such a situation. In that sense, Susan Estrich has noted that "rape is most assuredly not the only crime in which consent is a defense; but it is the only crime that has required the victim to resist physically in order to establish nonconsent" ("Rape" (1986), 95 *Yale L.J.* 1087, at p. 1090).

94 Cory J. referred to the inappropriate use of rape myths by courts in *Osolin*, *supra*, at p. 670:

> A number of rape myths have in the past improperly formed the background for considering evidentiary issues in sexual assault trials. These include the false concepts that: women cannot be raped against their will; only "bad girls" are raped; anyone not clearly of "good character" is more likely to have consented.

In *Seaboyer*, *supra*, I alluded to this issue as follows, at pp. 707-9:

> Parliament exhibited a marked, and justifiedly so, distrust of the ability of the courts to promote and achieve a non-discriminatory application of the law in this area. In view of the history of government attempts, the harm done when discretion is posited in trial judges and the demonstrated inability of the judiciary to change its discriminatory ways, Parliament was justified in so choosing. My attempt to illustrate the tenacity of these discriminatory beliefs and their acceptance at all levels of society clearly demonstrates that discretion in judges is antithetical to the goals of Parliament.

...

> History demonstrates that it was discretion in trial judges that saturated the law in this area with stereotype. My earlier discussion shows that we are not, all of a sudden, a society rid of such beliefs, and hence, discretionary decision making in this realm is absolutely antithetical to the achievement of government's pressing and substantial objective.

95 This case has not dispelled any of the fears I expressed in *Seaboyer, supra*, about the use of myths and stereotypes in dealing with sexual assault complaints (see also Bertha Wilson, "Will Women Judges Really Make a Difference?" (1990), 28 *Osgoode Hall L.J.* 507). Complainants should be able to rely on a system free from myths and stereotypes, and on a judiciary whose impartiality is not compromised by these biased assumptions. The *Code* was amended in 1983 and in 1992 to eradicate reliance on those assumptions; they should not be permitted to resurface through the stereotypes reflected in the reasons of the majority of the Court of Appeal. It is part of the role of this Court to denounce this kind of language, unfortunately still used today, which not only perpetuates archaic myths and stereotypes about the nature of sexual assaults but also ignores the law.

[Emphasis added.]

46. The above cases will be explored further following the presentation of evidence at the hearing.

c. Impact of a Single Incident of Misconduct

47. The complaint against Justice Camp concerns what may be characterized as a single incident of misconduct, even though the impugned behaviour in fact occurred over the course of many days of trial. Presenting Counsel is not aware of other cases heard by Justice Camp where similar comments were made.

48. In ***Moreau-Berube v. New Brunswick (Judicial Council)*** [2002] 1 SCR 249,[17] the discussion of the judge's comments in one case was the subject of a review to determine whether removal from office was warranted. Judge Moreau-Berube had made disparaging comments about Acadians during a sentencing hearing. Specifically, she stated the following:

> These are all welfare cases. We're the ones who are supporting them. They're on drugs all day long and drunk all night long. They steal from us left and right, up front and from behind. They find other bandits just like themselves to purchase the stolen merchandise. It's pathetic. If a survey was conducted in the Acadian Peninsula to determine who was honest and who was dishonest, I am under the impression that dishonesty would win the day. We've come to the point where you can no longer trust your neighbour, even if he lives beside you or across the street. In the neighbourhood where I live, I'm starting to wonder whether I'm not surrounded by bandits myself. So, that's how we live here in the peninsula, but we continue to point our fingers outside of the peninsula. Ah! We really don't like pointing our fingers at the peninsula. And it hurts me to say it, because I'm living in the peninsula right now. This is home. But look around for the honest people in the peninsula. There are hardly any left. There are fewer and fewer and they're becoming increasingly rare. So, do you think people like these others care that it costs hundreds or even thousands of dollars to remedy the situation? They couldn't give a damn. Are they

[17] Book of Authorities, Tab 9

> the ones who pay the bill? No, not a cent. Their money's spent on coke. These people couldn't care less. It doesn't bother them, it's just that ... do you think they'll feel pain and sympathy knowing that it costs us hundreds or even thousands of bucks? For us though, it definitely bothers us, because we're the ones who pay. We're the ones who have to get up in the morning and work. Every time we get our pay cheque, three-quarters of it is used to support these people. It doesn't bother them. It has nothing do with them. It's party time during the day and then party time at night. That's all they do, these people. They couldn't care less. It doesn't bother them at all, not at all. But we have to give a damn, because it's our property, it belongs to us. For them, if they don't have enough, they'll go to the welfare office, they'll get more there, that's how it works. So I don't want to cut you off, but I fully understand what you mean when you say it costs thousands of dollars. And the lawyers in this courtroom understand that the type of people that we have appearing before me today in this courtroom, they couldn't care less and they don't give a damn. Whether it costs a thousand or two hundred dollars to deal with all this, whether it takes six police officers to investigate, is all a big joke to them. Their mentality: "The pigs won't be chasing Tim while they're running after us."

49. An inquiry panel had found Judge Moreau-Bérubé's comments to be "incorrect, gratuitous, insensitive, insulting, derogatory, degrading, aggressive and inappropriate," but did not recommend removal, noting that she had offered a sincere public apology. When the matter went before the New Brunswick Judicial Council (as established under New Brunswick's *Provincial Court Act*, RSNB 1973, c. P-21), it was required by its enabling statute to proceed on the basis of the panel's findings but to choose among the available dispositions as to outcome. The Judicial Council held that the conduct was sufficiently egregious to justify removal. As noted by the Supreme Court of Canada in its review of the decision:

> 12 The Council recommended that Judge Moreau-Bérubé be removed from her office as judge. In doing so, the Council followed the criterion established with regard to apprehension of bias in the Marshall Report (*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)) and asked [translation] "[i]s 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?" (As reproduced in *Moreau-Bérubé* (N.B.C.A.), *supra*, at para. 22.) Based on these criteria, and on a series of factors that, in its view, a reasonable observer would consider in rendering an informed judgment about an apprehension of bias, the Council came to the following conclusion:
>
> > [translation] Taking into account all the circumstances surrounding this matter and applying the foregoing tests and the principles of judicial impartiality and independence established by the Supreme Court of Canada in the cases referred to, we believe that in the event that Judge Moreau-Bérubé were to preside over a trial, a reasonable and well-informed person would conclude that the misconduct of the judge has undermined public confidence in her and would have a reasonable apprehension that she would not perform her duties with the impartiality that the public is entitled to expect from a judge.
> >
> > Accordingly, we recommend that she be removed from office.
>
> (As reproduced in *Moreau-Bérubé* (N.B.C.A.), *supra*, at para. 90.)

50. Ultimately, the Council's decision was upheld as reasonable by the Supreme Court of Canada. The Court reasoned as follows:

> 72 The comments of Judge Moreau-Bérubé, as well as her apology, are a matter of record. In deciding whether the comments created a reasonable apprehension of bias, the Council applied an objective test, and attempted to ascertain the degree of apprehension that might exist in an ordinary, reasonable person. The expertise to decide that difficult issue rests in the Council, a large collegial body composed primarily of judges of all levels of jurisdiction in the province, but also of non-judges whose input is important in formulating that judgment. The Judicial Council has been charged by statute to guard the integrity of the provincial judicial system in New Brunswick. In discharging its function, the Council must be acutely sensitive to the requirements of judicial independence, and it must ensure never to chill the expression of unpopular, honestly held views in the context of court proceedings. It must also be equally sensitive to the reasonable expectations of an informed dispassionate public that holders of judicial office will remain at all times worthy of trust, confidence and respect.
>
> 73 I find nothing patently unreasonable in the Council's decision to draw its own conclusions with regard to whether the comments of Judge Moreau-Bérubé created an apprehension of bias sufficient to justify a recommendation for her removal from duties as a Provincial Court judge. Even on a standard of reasonableness *simpliciter*, I would find no basis to interfere with the Council's decision. On this record, I believe that the respondent has received a fair hearing, conducted in accordance with the will of the legislature and consistent with the requirements of both judicial independence and integrity.

51. The above cases will be discussed further following the presentation of evidence at the hearing.

d. Impact of an Apology

52. The evidence will show that Justice Camp issued an apology with respect to his conduct in *Wagar,* through a posting on the Federal Court website on November 10, 2015. In his Notice of Response, he has indicated an intention to do so again before the Inquiry Committee.

53. The impact of apologies in this context has been previously considered. For instance, as noted above, Justice Wittman in *Dewar* attached significant weight to Justice Dewar's apology, and other corrective steps he had taken. However, when considering apologies, the sincerity of the apology must be taken into consideration.

54. *Bienvenue* is one example of a case where an apology rang hollow because Justice Bienvenue remained firm in the opinions that led to his misconduct. At one point, for example, he indicated he regretted his remarks to the extent that he felt that he had not made himself understood. He also made a public apology to women for any offence he may have caused, explaining that he only intended to express his shock and horror at the crime in issue. However, at the hearing, Justice Bienvenue indicated he had no interest in a "history lesson" from women's groups, which he considered had no place purporting to speak for women. Further, he opined that the average Canadian would agree with his comments about women. The Committee noted that the fact of an apology did not equate to an acknowledgement of error (p. 38). Accordingly, it was accorded little to no weight.

55. In *Matlow,* the complaint concerned Justice Matlow hearing matters notwithstanding a personal interest and using his role as a judge to further his own interest. The majority of the Judicial Council accepted that an unreserved statement from Justice Matlow acknowledging he had committed many wrongs, together with a solemn undertaking to avoid repeating

them was sufficient to satisfy it of his sincerity and that his understanding of his wrongs went beyond what had been acknowledged before the Inquiry Committee

> [180] We are satisfied that in making these comments, and offering the acknowledgment of errors of judgment that he did that Justice Matlow was – and is – sincere about his expressions of regret and we are also satisfied that those expressions of regret before us extended beyond those acknowledged to the Inquiry Committee.

56. In contrast, the minority expressed concern over the fact that, in making his apology, Justice Matlow did not recognize or apologize for a portion of the wrongdoings found against him:

> [83] It is clear from the judge's statement that he does not consider any apology is necessary for his involvement in the Thelma Road Project. In our view this is a serious omission, and demonstrates a lack of insight into the limits imposed by the judicial office, and the impropriety of his conduct in using his position as a judge to advance his and his neighbour's cause against the City of Toronto.

57. Other portions of the apology were also viewed as incomplete and equivocal, for example apologizing ***if*** he caused any harm to the administration of justice (para. 84). It was also noted that any apology at all was slow in coming and that when he was first asked to recuse himself he went on the attack against others. It was found that his apologies and the evidence demonstrated an ongoing failure to take full responsibility for his misconduct (paras. 84-89). In view of these factors, the Council held that his statement before Council was of limited value in determining the appropriate recommendation.

58. If this Inquiry Committee were to find that Justice Camp's apology is sincere and complete, the Committee must nonetheless remain cognizant of the effect that Justice Camp's behaviour has had on public confidence.

59. **CJC Report re Justice Paul Cosgrove (March 30, 2009)** ["*Cosgrove*"][18] involved judicial misconduct during a criminal trial including: repeated and unwarranted interference in the presentation of the Crown's case; inappropriate interference with RCMP activities; 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. Before Council, Justice Cosgrove admitted that he had misconducted himself and the Council also stated that it had no difficulty adopting the conclusions of the Inquiry Committee, given the cogent and thorough review of the evidence. As such, it proceeded to considering whether removal was warranted.

60. To determine this, the Committee considered the Judge's apology and past conduct/character. As to the apology, the Council expressed concerns over the fact that it referred primarily to "errors", but the matters in issue were far more than judicial errors. An apology may be relevant if it shows recognition of misconduct and demonstrates that there is a reasonable prospect that the judge will sincerely strive to avoid such inappropriate conduct in the future (para. 29). However, after considering the decision in *Moreau-Bérubé*, where it was held that cases of serious misconduct may not capable of being addressed by an apology, the Council concluded that the conduct, which was not a single incident, but rather "pervasive in both scope and duration" was "so destructive of public confidence that

[18] Book of Authorities, Tab 3

no apology, no matter its sincerity" could restore public confidence (para. 34). The Council also noted that delay in issuing the apology lessened its impact. The Council stated:

> [30] Justice Cosgrove's apology in this case addresses both of these aspects. Even accepting that the judge's apology was sincere, we must consider an additional – more important – aspect in deciding whether a recommendation for removal is warranted: the effect upon public confidence of the actions of the judge in light of the nature and seriousness of the misconduct.
>
> [31] For Council, therefore, the key question is whether the 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 serious and sustained judicial misconduct. The Supreme Court of Canada in Moreau-Bérubé considered the factors that must be considered by a Judicial Council in such circumstances:
>
> > [72] The comments of judge Moreau-Bérubé, as well as her apology, are a matter of record. In deciding whether the comments created a reasonable apprehension of bias, the Council applied an objective test, and attempted to ascertain the degree of apprehension that might exist in an ordinary, reasonable person.... In discharging its function, the Council must be acutely sensitive to the requirements of judicial independence, and it must ensure never to kill the expression of unpopular, honestly held views in the context of court proceedings. It must also be equally sensitive to the reasonable expectations of an informed dispassionate public that holders of judicial office will remain at all times worthy of trust, confidence and respect.
>
> [32] Although the New Brunswick Judicial Council in the Moreau-Bérubé matter noted that a timely apology had been made, three days after the misconduct, the Supreme Court of Canada did not disturb the decision of the New Brunswick Judicial Council that, in light of the severity of the judge's misconduct, the application of the identified objective test required the removal of the judge despite the judge's apology.
>
> [Emphasis added.]

61. The above cases will be discussed further following the presentation of evidence at the hearing.

e. Impact of Character Letters

62. Finally, we note that Justice Camp intends to file character evidence, in the form of letters from various members of the public attesting to Justice Camp's good character. These letters were solicited by Justice Camp's legal counsel for purposes of this hearing. As earlier noted, three of the letters were objected to by Presenting Counsel, but agreement has been reached to allow them into evidence, and to be subject to argument regarding their weight.

63. In *Matlow,* at the public hearing before the Inquiry Committee in January 2008, numerous letters providing evidence of Justice Matlow's character were accepted and admitted into the record, with the consent of independent counsel. These letters did not address the specifics of the allegations of misconduct but rather provided general information about Justice Matlow's character and integrity. The Inquiry Committee ultimately decided that it would give the letters no weight beyond establishing that numerous judges and lawyers held a high opinion of Justice Matlow. The majority of the Judicial Council held that their relevance went further, stating:

> [147] Justice Matlow contends that the letters provided evidence of Justice Matlow's character, that they were accepted and admitted into the record with the consent of Independent Counsel and that they did not address the specifics of the allegations of misconduct but rather provided general information about Justice Matlow's character and integrity. We have reviewed the letters and this is an accurate description of them. They are from fellow justices in the Superior Court of Justice for Ontario and also prominent legal counsel in Toronto.
>
> [148] Justice Matlow submits that character evidence is relevant to the assessment of his integrity and credibility and also constitutes mitigating factors with respect to the appropriate penalty. Therefore, it should have been considered by the Inquiry Committee.
>
> [149] The reasons of the Inquiry Committee indicate that it viewed this evidence as partisan and, in any event, as representative of a small segment of the public only. We do not disagree with this assessment. But we also find the evidence to be relevant. Positing the opposite question, what if there were a deluge of letters from the local community, including Justice Matlow's peers and lawyers, to the effect that he was unfit to hold office? Would that be relevant as part of our deliberations? We think it may properly be. So too, are the support letters which have been accepted as evidence.[19]
>
> [150] Character is certainly relevant to the assessment of a judge's attributes. The letters deal with various aspects of Justice Matlow's character, that is his integrity, honesty, conscientious work ethic, and commitment. While these letters are not relevant to whether the conduct complained of occurred, they may be relevant to why the acts occurred, the context of the acts, and whether the acts were committed without malice and without bad faith. Character is also highly relevant to the issue of what recommendations should flow from a finding of judicial misconduct. While the weight to be given to this evidence is admittedly for the inquiry committee, and while an inquiry committee may elect to give it little weight, still it is an error in principle to simply ignore this kind of evidence for all purposes. In particular, the evidence is relevant to the sanction phase of the proceedings and ought to have been considered in that context. It was not.
>
> [Emphasis added]

64. The minority opinion of the Judicial Council in the Report to the Minister of Justice took the opposite view on this issue, stating that the letters did not have any bearing on whether or not the judge was guilty of misconduct.

> [38] Having read, and re-read, all of the character letters there is nothing in them that adds to an understanding of why the judge conducted himself as he did, nor to the context in which that conduct occurred. Neither the complainant, nor anyone else, has suggested that the judge acted with malice or in bad faith.
>
> [39] Leaving aside for the moment the possible relevance of the letters to the question of what recommendation should be made, there was no issue before the Inquiry Committee to which the letters had any relevance.

65. As to the relevance of such evidence to the question of penalty, the minority noted that some of the letters were tainted by unintentional bias. As to those of other judges and lawyers, since they did not have a full awareness of the evidence before the Committee,

[19] In this regard, in addition to the character letters, Presenting Counsel will be referring at the hearing to the numerous letters of complaint with the CJC and various courts found as an exhibit to the ASF

they could not meaningfully add to the presumption of good character already enjoyed by the Judge:

> [41] As to whether the letters and statement of community support are a mitigating factor with respect to the appropriate penalty, there is little force in this argument. Those who express support for the judge have no doubt done so in good faith, but they can hardly be said to be objective observers. The community supporters are generally persons who shared the judge's interest in opposing the Thelma Road Project, and who are grateful to him for his efforts on their behalf. Who would not appreciate and be grateful for free legal advice and advocacy from a judge? As to the lawyers and judges who expressed their support for the judge, there is nothing in any of their letters to indicate that they were aware of the full extent of the judge's conduct as developed in the evidence before the Inquiry Committee. As friends and colleagues of the judge, their views can do little more than add to the presumption of good character the judge already enjoyed.

66. In *Cosgrove*, a number of letters in support were written by sitting and retired judges. Council noted that such evidence was of minimal value stating:

> [57] We are of the view that the opinions of individuals, be they judicial colleagues or otherwise, who do not have the benefit of the evidentiary record and a complete knowledge and appreciation of the issues before Council, will generally be of little assistance in determining whether public confidence has been undermined to such an extent as to render a judge incapable of discharging the duties of their office. In this particular instance, we accord little weight to the letters of support. <u>They may provide insight into the judge's character and work ethic, but they do not address the decisive issue before us, namely the damage done to public confidence by virtue of the judge's judicial misconduct. This is an issue that rightly rests with the Inquiry Committee and Council itself.</u>
>
> <u>[Emphasis added]</u>

67. These cases will be discussed further following the presentation of evidence at the hearing.

E. Conclusion

68. As noted above, the role of Presenting Counsel is to objectively and fairly present all relevant evidence to the Inquiry Committee for its consideration and investigation. The primary question before the Committee will be whether the evidence supports or does not support the conclusion that Justice Camp's conduct falls within any of the categories set out in s. 65(2)(b) to (d) of the *Judges Act*, and if so, whether such conduct meets the high threshold for removal of judges from office. The anticipated evidence outlined in this brief, and the legal authorities that are referenced, will be fully explored at the hearing to assist the Inquiry Committee to reach its findings and recommendations.

Respectfully submitted,

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cc Frank Addario