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Judiciary Compromised by Biased Assumptions - by M Jack

Does there not need to be consistency in decisions by a body like the Canadian Judicial Council? How can you reconcile judicial decisions where the Council recommends removal of judges for victim-blaming comments with decisions where comments of a similar nature, reinforcing the same stereotypes, did not result in the same outcome? The purpose of this commentary is to compare and contrast two high profile cases, *R v. Wagar*, and *R v. Ewanchuk*, where the presiding judges made controversial statements to sexual assault victims, and how the Canadian Judicial Council responded.

In *Wagar*, the defendant was accused of raping a 19 year-old woman at a house party was originally acquitted in the 2014 trial decided by Justice Robin Camp, a provincial court judge at the time but was later promoted to the Federal Court bench. The acquittal was overturned after the Alberta Court of Appeal reviewed transcripts of the first trial, finding Justice Camp made wildly inappropriate comments to the victim. In this case, the Court heard that Wagar met a woman, JM, at a party and the two ended up in a bathroom together. JM alleged that she was raped on a bathroom sink, while Wagar testified that the sex was consensual. During the case, Justice Camp asked the victim, "why couldn't you just keep your knees together?" He also said, "pain and sex sometimes go together" and had referred to the complainant more than one time as, "the accused." His comments drew criticism and outrage from sexual assault victims and advocates which resulted in the Canadian Judicial Council review called for his removal. The review found that his conduct undermined public confidence in the judiciary. Ultimately, Justice Camp underwent sensitivity training, apologized for his comments, and resigned from the bench.

In *Ewanchuk*, the accused made sexual passes at a teenage girl. Initially, she rejected the passes but after she began to fear for her safety, she agreed. Justice McClung found that the accused had received "implied consent" from the victim and in his obiter, found the accused conduct to be merely hormonal, rather than criminal, and found the way she dressed to sexually provoke the accused, "it must be pointed out that the complainant did not present herself in a bonnet and crinolines." McClung also made mention that the victim could have stopped the attack by "a well-chosen expletive, a slap in the face or, if necessary, a well-directed knee." While the decision was unanimously overturned by the Supreme Court and was subjected to public backlash, McClung did not face any professional discipline or review.

The Canadian Superior Court Judges Association is very clear that the judiciary, as an institution, should be independent, and individual judges must be objective and impartial. In the Canadian Judicial Council's mandate, judges are to avoid words, actions or situations that might make them appear to be biased or disrespectful of the laws they are sworn to uphold. They are to treat clients and witnesses with respect, and refrain from inappropriate commentary. In these cases, both justices failed to meet their mandate, as the comments

made were inappropriate, subjective and based upon their own biased opinions. In fact, in her response to the *Ewanchuk* judgment, Justice L'Heureux-Dube commented that, "the Court relied on inappropriate myths and stereotypes. Complainants should be able to rely on a system free from such myths and stereotypes, and on a judiciary whose impartiality is not compromised by these biased assumptions."

As discussed, the outcomes of Justices Camp and McClung decisions were likely a result in the changing perception of sexual assault victims through the years. *Ewanchuk* was decided almost two decades before *Wagar*. While it does not excuse his inappropriate comments, it is worth noting that the ways in which sexual victims were perceived was much different in previous decades, and explains the lack of judicial review in response. While the judicial review outcomes were different, the *Wagar* decision indicates that despite a history of advocacy for rights of victims, community education, and overwhelming research, many people (including Supreme Court judges) continue hold on to stereotypes about sexual assault victims.