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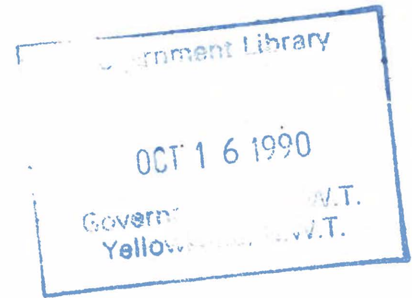
Northwest Territories Commissioner



11 October 1990

THE HONOURABLE MICHAEL A. BALLANTYNE
MINISTER OF JUSTICE

This will confirm my verbal discussion with you in which I stated I would accept the recommendations of Madam Justice Carole Conrad. I wish to confirm that I have accepted her two specific recommendations. Accordingly, no further action will be taken against His Honour Judge Bourassa arising out of the inquiry in this matter, and I understand your department will arrange for his legal fees to be paid.

D.L. Norris,
Commissioner

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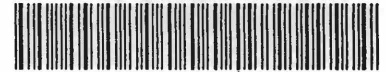
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IN THE MATTER OF AN INQUIRY PURSUANT TO SECTION 13(2) OF THE TERRITORIAL COURT ACT, S.N.W.T. 1978 (2), c. 16

— and —

IN THE MATTER OF AN INQUIRY INTO THE CONDUCT OF JUDGE R.M. BOURASSA

VOLUME I

THE HONOURABLE
MADAM JUSTICE CAROLE CONRAD
COMMISIONER

SEPTEMBER 28, 1990

I. SUMMARY OF DECISION

My mandate is to conduct an inquiry into the circumstances surrounding certain comments of Territorial Court Judge R. M. Bourassa regarding sexual assault and regarding a case pending appeal, published in the December 20, 1989 issue of the *Edmonton Journal*, and to determine whether the comments, or any of them, amount to misbehaviour or give rise to an inability to perform his judicial duties properly.

With the exception of one comment from a 1984 decision of Judge Bourassa, the comments arose entirely out of interviews conducted at Baker Lake and Rankin Inlet by the *Edmonton Journal*'s northern correspondent, Ms. Sarkadi, when she attended a territorial court circuit with Judge Bourassa. The comments made during the interviews were not part of his official court duties.

Section 13 of the *Territorial Court Act* of the Northwest Territories provides for the removal of a judge from office only for "misbehaviour" or for "inability to perform his duties properly."

I am of the view that the test for "misbehaviour" is limited to the common law definition attributed to breach of good behaviour as defined in *Halsbury's Laws of England*, Vol. 8, para. 1107, which states:

> 'Behaviour' means behaviour in matters concerning the office, except in the case of conviction upon an indictment for any infamous offence of such a nature as to render the person unfit to exercise the office, which amounts legally to misbehaviour though not committed in connection with the office. Misbehaviour as to the office itself means improper exercise of the functions appertaining to the office, or non-attendance or neglect of, or refusal to perform the duties of the office.

The test does not extend to extra-judicial comments and is therefore not applicable to five of the six statements published in the December 20th, 1989 issue of the *Edmonton Journal*. An amendment to the *Territorial Court Act* is required if extra-judicial behaviour is to constitute grounds for removal of a territorial court judge from office.

I am further of the view that the test for "inability to perform his duties properly" is limited to inability arising from physical or mental infirmity.

To deal with the Inquiry on that narrow basis would not do justice to the complainants, the general public, Judge Bourassa or the Government of the Northwest Territories. Therefore, in the event I am wrong, I have applied the facts to a broader interpretation of the grounds for removal of a judge from office.

For this purpose, I extend the definition of misbehaviour to include all conduct that renders a judge unfit for the exercise of the office.

It is impossible to define exactly what is, or is not, misbehaviour and I have used as a guideline the test for fitness suggested by the Honourable I.C. Rand in the inquiry into the extra-judicial conduct of Mr. Justice Landerville.

> 'Has Justice Landerville, by such dealing... proven himself unfit for the proper exercise of his judicial functions'. It is not that disabling acts must reach to criminality, although they may; and a number of possible modes of behaviour were suggested as relevant to the test to be applied. When the function of the judge is fully sensed, to hear, weigh, and, according to Law, to decide justly, to do so in a manner which fair-minded persons acting normally, expressing in fact enlightened public opinion, would approve,

> **determining unfitness in a judge, at least in the statement of principle, does not perhaps present as much difficulty as might be imagined. That principle would seem to be this: would the conduct, fairly determined in the light of all circumstances, lead such persons to attribute such a defect of moral character that the discharge of the duties of the office thereafter would be suspect?; has it destroyed unquestioning confidence of uprightness, of moral integrity, of honesty in decision, the elements of public honor? If so, then unfitness has been demonstrated.**
>
> (emphasis added)

The test requires modification to meet the particular comments in this case and the issues arising from them, but generally sets out the gravity of the conduct required to render a judge unfit to hold office. It is a test that goes to the judge's moral integrity and honesty in the decision making process, as understood by fair minded persons who fully appreciate a judge's function.

The article in the *Edmonton Journal* contained inaccuracies and misleading innuendoes. The following is a description of the comments as published in the article, and my findings as to the comments actually made by Judge Bourassa. It is only the actual comments for which he can be held accountable.

1. The first attribution to Judge Bourassa appears in the headline and the first paragraph of the article as follows; which, together with the headline, reads:

> **Sexual assaults in the North are often less violent, Judge says.**
>
> A Northwest Territories judge says sexual assault among northern natives is sometimes less violent and cannot always be judged in the same light as southern Canadian cases.

The evidence was unequivocal that Judge Bourassa did not use the word "natives" at any time in the interviews. Ms. Sarkadi, the reporter, acknowledged that fact. The word "natives" was inserted in the article by Ms. Sarkadi, and remained there after careful consideration by her, the editors and the lawyers for the *Edmonton Journal*.

Judge Bourassa did not say that sexual assault is less violent in the north than in the south. Judge Bourassa said that in his experience, there was frequently more violence involved in a sexual assault in the south apart from the violence inherent in the assault itself.

Regarding his comment that cases in the north cannot be viewed in the same light as Southern Canadian cases, Judge

Bourassa did make some remarks to that effect. Those remarks were made with respect to sentencing generally, and he stated words to the following effect as reflected in Ms. Sarkadi's notes:

> I don't think our approach is different because I think our legal system is flexible enough and open ended enough to take into account what must be taken into account.
>
> A difference up here is down South is I have to take into account factors which may not be apparent down South ...
>
> We're dealing with very basic differences in value systems and any legal system or the acceptance of any legal system has an element of ____________________ to it and compatibility with the public which supports the system.
>
> ...
>
> You're talking basic values which have to be reflected in sentencing and that's the big challenge....
>
> The process has not been reduced to opening a book and saying, well that's different rules. I'll take 9 different steps to solve the problem. It just don't work that way.
>
> It's a process of absorption. You absorb from every possible source you can find. I am not in any means... I don't hold myself out as being an expert. I just try as best I can to be conscious and sensitive to the differences.

> The Press does quite frankly a rotten job of reporting what's going on in court. That's been detailed and studied in one study after another.
>
> Public perception of what's going on in court.
>
> The Press says sexual assault gets one day in jail. That's an outrage. What's a sexual assault. Are you going to put a guy in jail for five years for touching a breast? That's sexual assault.
>
> Public perception is extremely distorted.
>
> If you rely on the press, I think you are living in a world of shadow and illusion.

2. The second attribution by the *Edmonton Journal* in the article is the following:

> 'The majority of rapes in the Northwest Territories occur when the woman is drunk and passed out. A man comes along and sees a pair of hips and helps himself,' Michel Bourassa, a Quebec-born Territorial Court Judge, said in a recent interview with the Journal.

Judge Bourassa did say that 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.

3. The next attribution by the *Journal* is the following:

> 'That contrasts sharply to the cases I dealt with before (in southern Canada) of the dainty co-ed who gets jumped from behind.'
>
> Bourassa said southern Canadian victims of major sexual assault often suffer vaginal tears and psychological trauma related to sexual intercourse for several years afterwards.

Judge Bourassa did not make two separate statements. He did not refer to southern Canada. He referred to Kingston, Ontario and he referred to a dainty co-ed on a university campus.

It was acknowledged by the reporter that she did not take down the exact quote. In fact, Ms. Sarkadi's draft article appeared as follows:

> 'That contrasts sharply to the cases I dealt with before (in Kingston, Ontario) of the dainty co-ed who gets jumped from behind on a university campus and suffers vaginal tears and psychological

> trauma towards sex for years to come.'

I am satisfied that Judge Bourassa did say words similar to those quoted above, but he listed numerous injuries that the reporter was unable to record. I find that the statement he actually made was closer to the following:

> 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 psychological, totally devastated, suffers injuries requiring hospitalization.

4. The fourth statement attributed to Judge Bourassa was:

> '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 women is drunk and the man's drunk.'

Judge Bourassa did make that statement. It was made immediately after the dainty co-ed statement, after Ms. Sarkadi asked him to repeat the list of the injuries to

which he had just referred. Judge Bourassa asked her not to print the earlier statements, and offered this statement as a replacement for them. Ms. Sarkadi acknowledged that it was offered as a replacement statement, and that she had led him to believe she would honour his request and not print the earlier statements.

5. The next comment attributed to Judge Bourassa is a reference to a statement made by him during one of the interviews in reference to the case of *Regina v. A.*, in which he had recently imposed an unpopular sentence. He did say words to the effect:

> So, rightly or wrongly, he cuddled his niece and touched her breasts and fondled her genitals.

6. The final attribution in the *Edmonton Journal* article is the following one:

> Bourassa's sentence was based on the belief Inuit culture accepted 'when a girl begins to menstruate she is considered ready to engage in sexual relations.'

That is a quotation taken directly from the transcript of a sentence imposed by Judge Bourassa in 1984. The quotation is

accurate. The suggestion that his sentence was based solely on that belief is inaccurate. Judge Bourassa gave other reasons for the sentence.
Applying the fitness test to the facts of this Inquiry, several issues arise.

1. Does granting an interview to the press render a judge unfit, and thereby constitute "misbehaviour"? Did it in this case?

It is not misbehaviour in itself to grant an interview to the press, nor was it misbehaviour in this particular case for Judge R.M. Bourassa to grant the interview. There is a trend towards more communication between judges and the public. A justice of the Supreme Court of Canada, Sopinka, J., in his recent speech to the Canadian Bar Association, entitled "Must a Judge Be A Monk?" acknowledges that trend. He points out that the rules restricting judges from speaking in public are largely self-imposed. It is not the granting of the interview, but the nature of the comments and the circumstances in which they are made that will be determinative of any finding of misbehaviour.

In relation to the facts of this Inquiry, judges in the Northwest Territories have frequently permitted reporters to

accompany the court party on circuit. It is a means of acquainting the public with judicial proceedings in the outlying communities. Mr. Justice de Weerdt had specifically suggested that Ms. Sarkadi contact and travel with a territorial court party. Judge Bourassa did not, of course, need to grant the interview, but in doing so, he was not guilty of wrongdoing. His intentions were to point out some of the issues confronting the judiciary when sentencing, and to talk about the justice system generally. It was not misbehaviour to grant the interview.

2. Does granting an interview to the press regarding a case pending appeal, in itself, render a judge unfit, and thereby constitute "misbehaviour"? Did it in this case?

Judge Bourassa had just rendered an unpopular decision in the case of *Regina v. A.* his decision was appealed. It is inappropriate for a judge to speak publicly on a case pending before the courts. However, inappropriate is not synonymous with misbehaviour. Indeed, this is one area where a very appropriate form of discipline can usually be imposed by the appellate court hearing the appeal, in the form of a reprimand. It does not, in and of itself, render the Judge unfit to hold office.

As always, each case will turn on its own facts. Was the judge trying to influence the outcome of the appeal? Did he or she say anything that would prejudice the appeal or raise doubts as to the original judgment? Are the comments serious? Is this a continued pattern of behaviour? These are all matters to be considered in determining whether the conduct is so serious or grave as to render the judge unfit to hold office.

On the facts of this case, Judge Bourassa's comments on *Regina v. A.* were not made for the purpose of influencing the appellate court, nor were they comments which would affect the finality of his decision. Nothing new was said and no prejudice could result from his comments. Commenting on a case pending appeal in this situation falls far short of behaviour rendering him unfit for office. The nature of the actual comments are dealt with later.

3. Do the comments made by Judge Bourassa in the circumstances in which they were made render the Judge unfit, and thereby constitute "misbehaviour"?

This issue may be broken into three parts, and considered with respect to each comment.

(a) Are the comments indicative of an actual bias of such a kind as to render Judge Bourassa unfit to make his decisions honestly and uninfluenced by that bias?

I am satisfied that Judge Bourassa is not biased against natives, women, northern Canadians, victims or intoxicated persons. Nor is he biased in favour of accused persons. The comments he made do not indicate or reflect such a hidden bias. No submission was made that he has an actual bias. The evidence was unequivocal that Judge Bourassa is a conscientious Judge, concerned with the culture and circumstances of the north. He has no record of lenient sentences from which an inference of bias can be drawn.

A review of his decisions confirms that he abhors violence against women, and abhors offenders who take advantage of drunk or passed out women. Evidence given by observers in his courtroom, evidence given by the Judge himself regarding his approach to sentencing, and his evidence explaining what he had meant by his comments, all confirm that he possesses no actual bias.

I accept the test for actual bias as it is set out in *Grantham's* case as follows:

> I understand partisanship to mean a conscious partiality leaving a Judge to be disloyal even to his own honest convictions. I understand it to mean that the Judge knows that justice demands that he should take one course but that his political alliance or political sympathies may be such that he deliberately chooses to adopt the other. In such a case the moral element undoubtedly enters into the definition of misconduct, and cannot be excluded.

Certainly there is no evidence to indicate that Judge Bourassa has exercised a conscious bias, and I am of the view that these comments are not indicative of any actual hidden bias.

(b) Do the comments give rise to an apprehension of bias and can that amount to "misbehaviour?"

Adjusting the fitness test set out in the *Landerville Inquiry* to the issue of apprehension of bias, I suggest the following test:

> Are the comments so manifestly biased that, fairly determined in the light of all the circumstances, they inevitably lead the public to attribute such a defect of moral character to the judge that he would be seen to be unable to discharge his duties in an impartial way; have

> they destroyed unquestioning confidence in his moral integrity and honesty of decision making, thereby rendering him unfit for office?

The test for unfitness is a more stringent test than the legal test normally applied on a case by case basis for apprehension of bias. That legal test is:

> ... the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is 'what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude.'

In this case, I am faced with an alternative argument that Judge Bourassa's comments would result in his disqualification from so many cases, as a result of an application of that legal test, that he would be unable to perform his duties properly. As it would be necessary to apply this lesser standard in any event, I firstly viewed the comments applying this standard. If there is no apprehension of bias applying this lesser test, then there

can certainly be no misbehaviour for apprehension of bias without considering the fitness test.

In my view, the informed person would learn that Judge Bourassa never used the word "native" in the interviews. He or she would understand that when Judge Bourassa spoke of sentencing in the north, he was referring to the sentencing of all persons coming before his courts. That would include both natives and non-natives, from both urban and rural areas. He at no time set apart native behaviour in sexual assaults from non-native behaviour.

It would also be discovered that Judge Bourassa never said that a sexual assault in the north was less violent than the same sexual assault in the south. The informed person would understand Judge Bourassa to be saying that in his experience there was frequently more violence, apart from the violence inherent in the assault itself, associated with a sexual assault in the south.

With respect to the "pair of hips" statement, a reasonable person would know that Judge Bourassa was not condoning the act or referring to the woman as a willing victim because she was drunk. He was describing facts that he encountered in his courtroom, and describing the state of mind of the

offender who comes along and takes advantage of an intoxicated victim. It is his opinion of how the offender views women, not how Judge Bourassa views women. He recognizes that taking advantage of a passed out victim can be an aggravating factor in sentencing, not a mitigating one. A reasonable and right minded person, fully informed, would understand that.

A reasonable person would understand that when Judge Bourassa made the statement about dainty co-eds, he was drawing upon his experience in practicing law in Kingston to describe the nature of the attack and the extensive injuries frequently inflicted in such sexual assaults. It is apparent that the contrast he refers to is not in respect to dainty co-eds and northern women, rather the contrast is in respect to the type of assault and the associated violence and injuries. He is not saying that if he had evidence of the same type of excessive trauma arising from an acquaintance sexual assault, that he would not consider it in the same light when sentencing.

The law assumes that, in any serious sexual assault, the victim has suffered notable psychological or emotional harm. The implication from Judge Bourassa's remarks is that he

does, in fact, consider trauma a factor to be considered when imposing a sentence.

Judge Bourassa's comments with respect to persons being drunk is a statement of his observation from his experience. An informed person would learn that alcohol is frequently involved in sexual assault cases, and Judge Bourassa cannot be faulted for saying so. Indeed, alcohol is involved in many crimes, both in the north and the south, and Judge Bourassa is not denying the involvement of alcohol in sexual assault cases in the south. He is simply describing a difference in the type of assaults and the extent of the violence and injury involved.

There was a conflict as to the use of the word "majority" or "many" cases involving passed out victims. In my opinion, majority is an exaggeration of the number of cases in the north where the victim is passed out, but the use of that word does not indicate a bias.

The next statements reported were the comments with respect to *Regina v. A.* Here he said "so rightly or wrongly, he cuddled his niece, and touched her breasts and fondled her genitals..."

An informed person would learn that by using the term "fondled", Judge Bourassa was repeating the word chosen by the Crown Prosecutor to describe *A.'s* criminal act. A judge relies on the evidence and descriptions presented to him.

With respect to the phrase "rightly or wrongly", I am satisfied that a reasonable person would understand that Judge Bourassa was using the phrase, as it is frequently used, to describe the reason something happened, without commenting on it being right or wrong. It is a catch phrase that has nothing to do with right or wrong. It does not indicate a moral judgment. It is not a condonation of the action, nor does it indicate a bias.

The last statement attributed to Judge Bourassa is taken from his judgment in the *Hall Beach* case. A reasonable person, fully informed, would be aware that this statement was taken directly from one of the pre-sentence reports submitted to Judge Bourassa. Such a person, informed of court procedure on sentencing, would understand that Judge Bourassa was relying upon the only evidence before him.

He or she would further understand that a judge bases his or her decision on the evidence presented in court. It is not a judges duty to go in search of his or her own evidence.

Indeed, it is the Crown's responsibility to call contrary evidence if the evidence presented is inaccurate. The reasonable person would also read the *Hall Beach* case, and learn that the comment attributed to Judge Bourassa in the article does not represent the sole basis of his decision, as the article suggests. He or she would not apprehend bias as a result of this statement.

(c) Are the comments themselves so crude or inappropriate, or a combination thereof, that any person making them at the time he did, on the controversial topic, would be unfit for office?

The problem in this case is that Judge Bourassa did not speak carefully. He was aware that his recent decision in *Regina v. A.* was unpopular, and that it had attracted considerable attention from the media.

Judge Bourassa is a very aware judge, and when he spoke to Ms. Sarkadi, he knew that he was speaking on a controversial topic. The length of sentences for sexual assault and the degree of emphasis which a court should place on cultural factors is very controversial in the Northwest Territories. The various women's groups in the north disagree even among themselves on the use of imprisonment in sentencing.

Judge Bourassa, knowing that his comments would be published, and knowing that he was speaking on a controversial topic, spoke carelessly. In particular, Judge Bourassa's use of the words "dainty co-ed" was, in my view, a poor choice of words because it was capable of being interpreted inaccurately. He realized that immediately, and asked the reporter not to print them. Ms. Sarkadi allowed Judge Bourassa to think that she was acceding to his request not to print his initial statement. Nevertheless, the Judge used the phrase, and he used it before he said "don't print that." If he chooses to grant an interview, he must be responsible for his choice of words.

His choice of the words "a man sees a pair of hips and helps himself" also caused great controversy. It is a somewhat crude remark. That is most unfortunate, because I am satisfied that Judge Bourassa is not a crude person. He was describing the state of mind of the offender. The phrase was very descriptive of his perception of how some offenders view their victims. Sexual assault is a crude act. The phrase was misunderstood by the public, and if Judge Bourassa had given the matter some thought, he could have conveyed the same meaning in more discreet language, resulting in less controversy.

Had Judge Bourassa thought about these two comments, he would have realized that they might be misinterpreted and reflect negatively on both himself and the judiciary. When he did recognize how they had been misinterpreted, he sent a public apology to the *Journal*.

Having found that some of Judge Bourassa's opinions could have been reflected by a better choice of words, I am nonetheless of the opinion that his comments are not sufficiently offensive as to render Judge Bourassa unfit to exercise his judicial office, thereby making him guilty of misbehaviour.

People who took the time to understand his message would not find the careless use of words to impact on his fitness for office. His conduct in making those comments falls far short of attributing to him the defect of moral integrity, uprightness or honesty in decision making which is required to render him unfit for office.

Assuming that "inability to perform his duties properly" is not limited to infirmity, have the comments created an inability for Judge Bourassa to perform his duties properly?

The main argument presented with respect to inability was that although the comments might not constitute misbehaviour, if Judge Bourassa were required to disqualify himself from sexual assault cases due to bias or an apprehension of bias, that would impact on his ability to perform his duties properly. Having found that there is no bias or apprehension of bias, there can be no finding of inability on that basis.

The remaining issue is whether the comments caused a reaction of such a magnitude as to render him unable to perform his duties properly. Firstly, I wish to make it clear that the popularity of a judge or his decisions can never constitute grounds for removal from office. Thus, the fact that there was a reaction to any decision of Judge Bourassa could not justify his removal from office.

Secondly, even if Judge Bourassa's comments did cause a reaction, the reaction in this case did not arise solely as a result of Judge Bourassa's conduct in making the comments published in the *Edmonton Journal*. In my view, many other factors contributed to the reaction, including the following:

(1) There was general discontent with the sentencing of sexual offenders in the north. In addition, Judge Bourassa had recently sentenced a prominent person for sexual assault, and that sentence was unpopular with many people in the Northwest Territories, including several native and women's groups.

(2) The published comments in the article contained inaccuracies and unsupported innuendos.

(3) Ms. Sarkadi telephoned special interest groups prior to the publication of the article, intending to, and in fact, accelerating the reaction.

(4) The Minister of Justice for the Northwest Territories added to the reaction when he held an emotional press conference in which he encouraged women to write letters of complaint.

(5) The tragedy in Montreal occurred between the interviews and the publication of the article. The intensity of emotion about feminine issues which swept the country cannot be underestimated.

(6) The *Edmonton Journal* published an editorial on December 21, 1989 which stated amongst other things that Judge Bourassa's sentences "have been far too lenient", in spite of the editors' knowledge that he did not have a pattern of lenient sentencing.

The comments exacerbated the intense feelings of discontent already existing in the Northwest Territories, and allowed citizens of the north an opportunity to vent their frustrations with the system.

I cannot imagine that the Legislative Assembly of the Northwest Territories would have intended that the censure of a judge could flow from an inability created by anything other than the conduct of that judge. Such an interpretation is totally incompatible with the independence of the judiciary.

Thirdly, and in any event, I am not satisfied that the reaction to Judge Bourassa's comments means that he is unable to perform his duties properly. There was a reaction. People are entitled to react. They reacted appropriately by filing complaints and carrying out a demonstration, which was for the most part peaceful. In fact the picketing did not interfere with the performance of his duties in Coppermine. The right to protest and criticize are a legitimate part of our system. That does not mean that Judge Bourassa cannot continue to perform his duties properly. Judges frequently carry out their duties in spite of demonstrations.

RECOMMENDATIONS

In summary, I find that extra-judicial behaviour is not covered by the tests set out in the *Territorial Court Act*. In the event I am wrong, and in fairness to the complainants, the public, the government of the Northwest Territories, and Judge Bourassa, I condiered the facts of this Inquiry in relation to extended definitions of "misbehaviour" and "inability to perform his duties properly".

Applying those extended definitions to the behaviour of Judge Bourassa, I am of the view that it was inappropriate to speak

publicly on a case pending appeal, and that he spoke carelessly on a controversial topic when he used the words "dainty co-ed" and "pair of hips." He should have realized how easily those words could be misconstrued and impact adversely on both Judge Bourassa and the administration of justice generally.

However, that conduct falls far short of constituting misbehaviour. I am of the view that discipline of judges lies only for the most serious conduct, as defined by the applicable legislation. Therefore, I recommend that Judge Bourassa not be disciplined by way of removal, suspension or reprimand. I recommend further that Judge Bourassa's legal expenses be paid.