

**THE CANADIAN JUDICIAL COUNCIL**

**IN THE MATTER OF AN INQUIRY COMMITTEE CONSTITUTED  
PURSUANT TO SECTION 63 OF THE JUDGES ACT R.S.C. 1985,  
C. J-1, AS AMENDED, INTO THE CONDUCT OF  
THE HONOURABLE THEODORE MATLOW OF  
THE SUPERIOR COURT OF JUSTICE OF ONTARIO**

\* \* \* \* \*

**HELD BEFORE THE HONOURABLE CLYDE K. WELLS (CHAIRPERSON),  
THE HONOURABLE FRANÇOIS ROLLAND,  
THE HONOURABLE RONALD VEALE,  
MARIA LYNN FREELAND AND DOUGLAS M. HUMMELL**

at The Mediation Place  
390 Bay Street, 3rd Floor, Toronto, Ontario,  
on Monday, November 19, 2007 at 9:15 a.m.

\* \* \* \* \*

**APPEARANCES:**

Douglas Hunt, Q.C. for the Canadian Judicial Council  
Andrew Burns

Nancy Brooks Independent Legal Counsel for Inquiry Committee

Paul Cavalluzzo For The Honourable Theodore Matlow  
Fay Faraday

Peter Jacobsen For John Barber

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1 Toronto, Ontario  
2 --- Upon commencing on Monday, November 19, 2007  
3 at 9:15 a.m.

4 THE CHAIR: Good morning, ladies  
5 and gentlemen. My name is Clyde Wells. I am the  
6 Chief Justice of Newfoundland and Labrador, and, as  
7 such, I have been appointed by the Canadian  
8 Judicial Council to chair the inquiry committee  
9 that the council struck pursuant to the provisions  
10 of the Judges Act of Canada to inquire into the  
11 conduct of the Honourable Theodore Matlow, a  
12 justice of the Superior Court of Justice of  
13 Ontario.

14 I am calling the inquiry  
15 committee's first formal sitting to order, and I  
16 will start by introducing the members.

17 On my immediate right is Chief  
18 Justice Rolland, François Rolland, who is a judge  
19 en chef of the Cours Supérieure du Québec.

20 On my immediate left is the  
21 Honourable Ronald Veale, senior judge of the  
22 Supreme Court of the Yukon Territory. Next to him  
23 sits one of the two members of the inquiry  
24 committee that were appointed by the Minister of  
25 Justice, Ms. Maria Lynn Freeland, who is a senior

1 Crown prosecutor in Meadow Lake in Saskatchewan.  
2 On the far right is Mr. Douglas Hummel, a lawyer  
3 practising in St. Catharines, Ontario.

4 Seated at the end of the table is  
5 the counsel appointed by the inquiry committee, Ms.  
6 Nancy Brooks. Ms. Mary Gill you will see around  
7 the room on occasion. She is providing  
8 administrative assistance and is a staff member of  
9 the Canadian Judicial Council.

10 At the table to my right is Ms.  
11 Linda O'Brien, who is the court reporter.

12 I will ask counsel to introduce  
13 themselves, starting with independent counsel.

14 MR. HUNT: Yes, thank you. My  
15 name is Doug Hunt and I am independent counsel.  
16 With me is Andrew Burns assisting. First, let me  
17 apologize for our late arrival this morning. We  
18 had inadvertently not noted that the matter began  
19 at nine o'clock. We thought it was 9:30. So I  
20 apologize for keeping the panel waiting.

21 THE CHAIR: I am sure all parties  
22 accept your apologies, Mr. Hunt. Thank you for  
23 them. Next, counsel for Mr. Justice Matlow.

24 MR. CAVALLUZZO: Yes, I am Paul  
25 Cavalluzzo, and my colleague, Ms. Fay Faraday. I

1 am wondering, Chief Justice, if you prefer that we  
2 stand throughout these proceedings or be seated?

3 THE CHAIR: I will leave it to  
4 counsel. I have no requirement for you to stand.  
5 It may be easier for you to deal with your  
6 materials if you are sated.

7 MR. CAVALLUZZO: That is fine.

8 THE CHAIR: And it is generally  
9 easier, so I have no quarrel if you prefer to sit.  
10 And remaining counsel?

11 MR. JACOBSEN: I am on for Mr.  
12 Barber. My name is Peter Jacobsen and I have with  
13 me Ioana Bala.

14 THE CHAIR: Thank you. I just  
15 want to speak briefly about the mandate of this  
16 committee. The Judges Act, as I am sure most  
17 people in the room know, provides that the Canadian  
18 Judicial Council may investigate a complaint that  
19 is made against a judge of the Superior Court, and  
20 that the Canadian Judicial Council can establish an  
21 inquiry committee for the purpose of conducting  
22 that investigation.

23 The Canadian Judicial Council  
24 received a complaint from the city solicitor of the  
25 City of Toronto against Justice Theodore Matlow,

1 and after due consideration, in accordance with its  
2 procedures, established this committee to conduct  
3 its investigation into that complaint.

4                   The committee is required to  
5 conduct the investigation in accordance with the  
6 Judicial Council's inquiries and investigation  
7 by-laws.

8                   The mandate of the committee is  
9 perhaps best explained, with the least potential  
10 for error in explaining it, by quoting directly  
11 from sections 5 to 8 of the by-laws, and I will  
12 just do that briefly:

13                   "The inquiry committee may  
14 consider any relevant  
15 complaint or allegation  
16 pertaining to the judge that  
17 is brought to its attention.  
18 The independent counsel shall  
19 give the judge sufficient  
20 notice of all complaints or  
21 allegations that are being  
22 considered by the inquiry  
23 committee to enable the judge  
24 to respond fully to them.  
25                   "Any hearing of the inquiry

1 committee shall be conducted  
2 in public unless, subject to  
3 subsection 63(6) of the Act,  
4 the inquiry committee  
5 determines that the public  
6 interest and due  
7 administration of justice  
8 require that all or any part  
9 of the hearing be conducted  
10 in private.

11 "The inquiry committee may  
12 prohibit the publication of  
13 any information or documents  
14 placed before it if it  
15 determines that publication  
16 is not in the public  
17 interest.

18 "The inquiry committee shall  
19 conduct its inquiry or  
20 investigation in accordance  
21 with the principle of  
22 fairness.

23 "The inquiry committee shall  
24 submit a report to the  
25 Council setting out its

1 findings and its conclusions  
2 in respect of whether or not  
3 a recommendation should be  
4 made for the removal of the  
5 judge from office."

6 That is substantially a brief and  
7 general description of the mandate of the  
8 committee.

9 Just a couple of general comments  
10 respecting the process to date. The inquiry  
11 committee has received from independent counsel a  
12 document which independent counsel entitled "Notice  
13 of Hearing". The committee has agreed that it will  
14 treat that as the notice of complaints or  
15 allegations required by subsection 5(2) of the  
16 by-laws.

17 The notice of hearing was, of  
18 course, given by Ms. Brooks as counsel for the  
19 inquiry committee.

20 Secondly, at the request of  
21 independent counsel, the inquiry committee issued a  
22 summons to a witness, Mr. John Barber, requiring  
23 him to attend, bring certain documents with him and  
24 give evidence at the hearing scheduled for January  
25 8th.



1                   The purpose of the proceeding  
2 today is to hear, first, an application by Mr.  
3 Barber to quash the summons to witness; and,  
4 second, to hear an application by Justice Matlow to  
5 strike out paragraphs 26 and 30 under the heading  
6 "Particulars", and subparagraphs (a), (b), (c),  
7 (d), and (e) of paragraph 35 under the heading  
8 "Allegations of Judicial Misconduct" in the notice  
9 of complaints and allegations that has been served  
10 by independent counsel.

11                   We will start first with the  
12 application by Mr. Barber to quash the summons to  
13 witness. Are you ready, Mr. Jacobsen?

14                   MR. JACOBSEN: Yes. Thank you,  
15 sir.

16                   THE CHAIR: You may stand or sit  
17 as you see fit.

18                   MR. JACOBSEN: I am going to try  
19 sitting, although it feels very unusual, but I do  
20 have a lot of material in front of me, so, thank  
21 you, sir.

22                   As you have stated, Mr. Barber  
23 seeks an order quashing the subpoena. I want to  
24 make a few preliminary comments here.

25                   THE CHAIR: Just before you do, so

1 that we may be guided, and I apologize for not  
2 doing it, having to interrupt you even at this very  
3 early stage, perhaps counsel could give me some  
4 idea of how long you would expect, but before you  
5 estimate the time, let me assure you that all of  
6 the members of the committee have read your  
7 material in detail.

8                               Of course it is not necessary for  
9 you to traverse it from beginning to end. It is  
10 necessary only for you to highlight such portions  
11 of it or draw such other matters to the attention  
12 of the inquiry committee as you see fit, but feel  
13 confident that each of the members have read it  
14 thoroughly, so you don't need to be simply  
15 restating it.

16                              So bearing that in mind, I am  
17 going to ask counsel how long they expect they will  
18 need.

19                              MR. JACOBSEN: I think I will be  
20 about an hour, sir, but I have been wrong on these  
21 things before.

22                              THE CHAIR: On the exaggerating  
23 side, I should hope.

24                              MR. JACOBSEN: I hear what you are  
25 saying and I will --

1 THE CHAIR: It is really not  
2 necessary for you to go over everything. My  
3 recollection of having read your brief was that it  
4 states everything and restates it, on occasion, so  
5 it is very thorough. Independent counsel, do you  
6 have an estimate?

7 MR. HUNT: Yes, fifteen minutes.

8 THE CHAIR: About 15 minutes. Mr.  
9 Cavalluzzo?

10 MR. CAVALLUZZO: Chief Justice, I  
11 think I will be ten minutes or less.

12 THE CHAIR: With those times  
13 indicated, we will start with you, Mr. Jacobsen.

14 SUBMISSIONS BY MR. JACOBSEN:

15 MR. JACOBSEN: Thank you, sir. As  
16 I said, the general issue here is whether or not  
17 Mr. Barber has anything of material -- whether  
18 there is any evidence that he has anything material  
19 to offer the panel, but before I get to that, I  
20 wanted to make a couple of comments to set the  
21 stage a little.

22 Mr. Barber has given everything  
23 that he has over already. We had understood from  
24 our communications that there was nothing else, but  
25 once we got the factum of independent counsel, we

1 realized that what he was after was also one of the  
2 original documents, because it had some yellow  
3 highlighting on it, apparently.

4                   Mr. Barber had already given that  
5 over to the panel, to the -- either the -- not to  
6 the panel, but to the counsel that were involved in  
7 the recusal motion. We have that, and we are  
8 prepared to give that over.

9                   I asked for some indication that  
10 Mr. Barber would receive it back at the end of the  
11 process, and I was told that I ought to raise that  
12 with this panel. To require Mr. Barber to give up  
13 an original document for all time with no right to  
14 get it back, in our submission, would be a  
15 confiscation of a person and, in this case, a media  
16 outlet's materials.

17                   It could affect its ability to do  
18 further stories on the matter, and I would note  
19 that we have asked for the same undertaking and  
20 received it when we gave it over to the counsel who  
21 were involved in the recusal motion.

22                   THE CHAIR: I can probably relieve  
23 your mind from the beginning. From this  
24 committee's point of view, once we have submitted  
25 our report, we need retain possession of it only

1 for so long as it is necessary to enable us to  
2 submit our report to the Canadian Judicial Council  
3 and for the Canadian Judicial Council to make its  
4 decision on the matter. That could be two or three  
5 months. It is difficult to state, but not a very  
6 lengthy period of time.

7 I know of no reason, and the  
8 committee generally agrees that they know of no  
9 reason, why these ought not to be returned. So you  
10 might save yourself the effort of making the  
11 argument.

12 MR. JACOBSEN: Thank you very  
13 much. Then that document will certainly be  
14 provided to independent counsel in the spirit of  
15 cooperation.

16 I have one case that I would like  
17 to take you to on the issue of materiality, if I  
18 may. That is the Baltovich case, which is in tab  
19 15 of our materials.

20 JUSTICE VEALE: Fifteen?

21 MR. JACOBSEN: Sorry, 16. I'm  
22 sorry.

23 JUSTICE VEALE: Thank you.

24 MR. JACOBSEN: Now, Baltovich was  
25 dealing with a criminal law issue and was dealing

1 with the Criminal Code, but, in my respectful  
2 submission, the issues related to materiality and  
3 what the law is is the same whether it is criminal  
4 or civil; and, in my respectful submission,  
5 although this panel is entitled to proceed  
6 according to its own purposes and, to some extent,  
7 clearly has a different role than a criminal court  
8 or a civil court, the issue of the extent to which  
9 you are going to impinge upon a person's privacy  
10 and their ability to resist a summons, the test, in  
11 my respectful submission, should be the same.

12                               So in Baltovich at paragraph 70,  
13 which is on page 12, the court looks at the  
14 standard to be established and notes, and I quote:

15                               "The statutory terms 'is  
16                               likely to give material  
17                               evidence' refers to a  
18                               probability, not a mere  
19                               possibility of something that  
20                               exists only in the fevered  
21                               imagination of the parties  
22                               seeking the subpoena.  
23                               Something is likely if it is  
24                               probable, not merely  
25                               possible."

1                   And then to go on to paragraph 72:  
2                   "When the issuance of a  
3                   subpoena is challenged, it is  
4                   inadequate for the party  
5                   proposing to call the  
6                   witness, in this case the  
7                   prosecutor, to respond to the  
8                   mere allegation that the  
9                   proposed witness can give  
10                  material evidence. More is  
11                  required. And that more is  
12                  to establish that the  
13                  proposed witness is likely,  
14                  or said another way, could  
15                  probably have evidence  
16                  material to the issues raised  
17                  to give."

18                  Now, then, if I could take you  
19                  down to paragraph 75, because, as the panel will  
20                  have noted, we are dealing here with a journalist,  
21                  and if I could just say parenthetically that in  
22                  this case there is no question that the  
23                  journalist's involvement here is as a result of him  
24                  being a journalist. He is doing his job as a  
25                  journalist.

1                   Journalists obtain newsworthy  
2 information. They publish comment, and, in  
3 Mr. Barber case, being the urban affairs columnist,  
4 writes about urban affairs.

5                   So there is no question that what  
6 he was doing was qua journalist, not as a private  
7 citizen or in any other respect.

8                   And so at paragraph 75 of  
9 Baltovich, the court said:

10                   "It is familiar ground that  
11 persons involved in the  
12 collection and report of  
13 news, more particularly the  
14 activities of such persons in  
15 collecting and reporting  
16 news, are afforded  
17 constitutional protection  
18 under section 2(b) of the  
19 Charter. As a result, for  
20 example, when a search  
21 warrant is sought and issued  
22 for a media outlet, the  
23 freedom afforded by section  
24 2(b) provides a backdrop  
25 against which the



1                   reasonableness of any search  
2                   conducted may be evaluated.  
3                   It requires careful  
4                   consideration of whether a  
5                   warrant should issue, as  
6                   well, if a warrant does issue  
7                   or has issued, whether  
8                   conditions may be imposed on  
9                   its execution to take  
10                  cognizance of the  
11                  constitutional freedoms  
12                  involved."

13                   So, in my submission, this case  
14                  and other cases that I have referred to stand for  
15                  the proposition that, first of all, the person  
16                  requesting has to demonstrate that there is a  
17                  probability that Mr. Barber has relevant evidence  
18                  to give and that there is -- and that would apply  
19                  with respect to anyone, journalist or  
20                  non-journalist.

21                   Then when you add the fact that  
22                  Mr. Barber is journalist to this, there is a  
23                  heightened awareness, in my respectful submission,  
24                  required by the courts to ensure that we are not  
25                  infringing on his ability to carry out his

1 constitutionally protected role, and in that way we  
2 have to be more careful, in my submission, about  
3 requiring him to attend.

4                               Now, we have seen that in the  
5 documents that Mr. Hunt has provided to the  
6 Canadian Judicial Council in the notice of hearing,  
7 there are a number of paragraphs that relate to Mr.  
8 Barber, and I am sure that the panel is familiar  
9 with them, but let me just cut to the chase.

10                              We know that from paragraph 27 --  
11 and this is in Mr. Hunt's compendium, or you may  
12 have another loose copy, I don't know, of the  
13 notice of hearing, and it is at page 4 of tab 2  
14 where I am starting.

15                              We know from paragraph 27 that the  
16 allegation is that Mr. Justice Matlow e-mailed John  
17 Barber, and, in my respectful submission, there is  
18 no controversy about that.

19                              You also have Justice Matlow, who  
20 is before this panel, who is the alleged author of  
21 the e-mail, and, in my respectful submission, until  
22 we hear from Justice Matlow, which is not done in  
23 his factum, have not seen from the materials, that  
24 there is any denial that any of this happened, we  
25 don't need Mr. Barber to establish that it

1 happened. We don't need Mr. Barber to say, Yes, I  
2 received an e-mail from Justice Matlow. That is  
3 something that this panel can look at and say, Yes,  
4 that is acceptable, that is good enough evidence  
5 for us.

6 In other words, there is no  
7 probability that Mr. Barber is going to have any  
8 evidence that is going to be of assistance to you  
9 in that regard.

10 We see at paragraph 28 that Mr.  
11 Barber responded and requested relevant documents,  
12 and that, again, is something that is not in issue.  
13 We don't need Mr. Barber's evidence for that.

14 Paragraph 29, similarly, the  
15 allegation is that there is an e-mail that says  
16 that Mr. Justice Matlow referred to dishonesty at  
17 the City Hall and really awful and devious things  
18 in his material that he sent to Barber. So we know  
19 that. It is not necessary to have Mr. Barber  
20 present for that.

21 Similarly, we know that Mr. Barber  
22 has admitted under oath previously that he  
23 published the article that is in question, so you  
24 don't need --

25 THE CHAIR: Do you want to comment

1 on how that gets to be evidence before the  
2 committee?

3 MR. JACOBSEN: Well, I say that  
4 this committee can take judicial notice of that  
5 material, and that it is sworn under oath and that  
6 unless Mr. Justice Matlow or Mr. Hunt takes issue  
7 with that, that can be an accepted fact. It is not  
8 necessary to put Mr. Barber on the stand to  
9 establish a fact that is clearly conceded by all  
10 parties.

11 Now, similarly, as you go through  
12 this, you will see that there is nothing in this  
13 material that Mr. Barber has any additional  
14 information with respect to. He has sworn that he  
15 has given over everything that he has, with the  
16 exception of some documents that he says he would  
17 have a great deal of trouble finding.

18 I can advise you that if and when  
19 we do find those documents, they will be provided  
20 to Mr. Hunt, and if anything arises out of those  
21 documents, which I understand are much older than  
22 any of these documents, that Mr. Barber, if it is  
23 required, if anything comes out of those documents,  
24 if required, he will attend.

25 But I would also state that those

1 are documents that Mr. Matlow would have, as well.  
2 Justice Matlow would have those documents, because  
3 he sent them to Mr. Barber.

4                               So there is no reason why Mr.  
5 Barber should be exposed to a cross-examination  
6 about why he wrote the article, why he used certain  
7 words in the article, why his tone was a certain  
8 way in the article, who asked him to write the  
9 article, nor is it necessary to delve into Mr.  
10 Barber's personal history or the people he may  
11 receive information from from time to time, his  
12 methods, his opinions on this case or the editorial  
13 process, all of which would be fair game if Mr.  
14 Barber was compelled to attend.

15                               There is no question, in my  
16 respectful submission, that the providence of his  
17 evidence -- that is, the source of his evidence --  
18 has been agreed upon, or if it hasn't been agreed  
19 upon, it will be agreed upon, and if it is not  
20 agreed upon and you do need Mr. Barber to come  
21 forward and say, Yes, in fact, I did receive this  
22 e-mail, if that is ever an issue, which I submit it  
23 will not be, then fair enough, Mr. Barber may be  
24 necessary.

25                               But, in my submission, that has

1 not happened and it is not likely to happen, and,  
2 therefore, Mr. Barber has no -- it is not probable  
3 that Mr. Barber will have any evidence that would  
4 be of assistance.

5                   Mr. Barber made no comments or  
6 investigation on any of these matters beyond  
7 receiving the material and writing the article. He  
8 didn't phone anybody at City Hall, and there is no  
9 suggestion by any party here --

10                   JUSTICE ROLLAND: Are you  
11 testifying for Mr. Barber right now?

12                   MR. CAVALLUZZO: I was going to  
13 object but --

14                   JUSTICE ROLLAND: Is that what you  
15 are doing?

16                   MR. JACOBSEN: I am putting Mr.  
17 Barber's position, and the reason, Your Honour,  
18 that I am unable to file an affidavit of Mr. Barber  
19 at this time, although I am prepared to do that and  
20 to have this matter come back on tomorrow, if  
21 necessary, but the reason is that it would then  
22 expose Mr. Barber to cross-examination, so I am  
23 caught in a catch 22.

24                   THE CHAIR: You can't give  
25 evidence, Mr. Jacobsen. As a lawyer, you know

1 that.

2                               This inquiry committee is required  
3 by the by-laws to act with fairness. We have to  
4 act in a judicial manner. We have got to ensure  
5 that procedures for the presentation of the  
6 submission of evidence that would come before this  
7 inquiry allow for fair testing and  
8 cross-examination. So you can't make statements  
9 that you would expect this committee to accept from  
10 your position as counsel by a restatement of fact.

11                              MR. JACOBSEN: Thank you, sir. If  
12 I could then turn the situation a little bit on its  
13 head, as Baltovich says:

14                                        "It is inadequate for a party  
15                                        proposing to call a witness  
16                                        to respond with a mere  
17                                        allegation that the proposed  
18                                        witness can give material  
19                                        evidence."

20                                        So I say, with the greatest of  
21 respect, it is up to my friends to come forward  
22 with some evidence to demonstrate to this panel  
23 that Mr. Barber is likely to have material  
24 evidence. They have not provided any evidence of  
25 that. They have made some statements, just as I

1 have just made a statement about what they think  
2 may happen or they may make those statements, but  
3 they have not provided any evidence for you.

4                   As I said, if it is necessary to  
5 assure this panel of Mr. Barber's lack of  
6 involvement in this matter beyond what -- if that  
7 becomes an issue, Mr. Barber is prepared to provide  
8 you with an affidavit and to proceed tomorrow.

9                   However, the reason that we  
10 haven't done that to date is because it would  
11 expose Mr. Barber to cross-examination. So I say  
12 that to assist, to be helpful.

13                   Mr. Barber is, in effect,  
14 according to the words used in the cases, a  
15 stranger really to the proceedings. He is not  
16 someone who anyone has alleged has done anything  
17 wrong. He has not played a part in these  
18 proceedings. He was no part of Mr. Justice  
19 Matlow's decision to take the alleged actions that  
20 are set out in the notice of hearing.

21                   All he did was receive documents  
22 from Justice -- all that is on the record is that  
23 he received documents from Justice Matlow in his  
24 capacity as a journalist. There is nothing on the  
25 record to suggest that he ever spoke to Justice



1 Matlow or anyone else about this matter. My  
2 friends have not provided you with any evidence of  
3 such.

4 Now, they could come forward and  
5 say, Oh, well, Sally Jones at City Hall says she  
6 got a call from John Barber about this before he  
7 wrote his article. Well, if that is the case, then  
8 you need Barber, but until you hear that, in my  
9 submission, there is nothing that connects Barber  
10 with this, other than the fact that he received  
11 material from Justice Matlow, all of which, all of  
12 which Mr. Barber has given, or, in the case of the  
13 original documents, will give to Mr. Hunt.

14 JUSTICE ROLLAND: How do you file  
15 evidence in a case or a document? How do you file  
16 documents in a case when you have a trial? How do  
17 you file documents? Normally they have to be filed  
18 by the person writing these documents.

19 MR. JACOBSEN: Well, I agree with  
20 that.

21 JUSTICE ROLLAND: Okay.

22 MR. JACOBSEN: Normally that is  
23 the case, and I say that this panel has got the  
24 discretion to receive these documents where there  
25 is no controversy about them, to receive the

1 documents without having Mr. Barber exposed to a  
2 full-blown cross-examination.

3                               Now, as I said in the factum, if  
4 there is any question about the providence of these  
5 materials, if there is any question -- and I  
6 haven't heard anything from my friends, but if  
7 there is any -- then we would agree that Mr. Barber  
8 would attend, should attend, for the purpose of  
9 simply establishing the providence of the  
10 documents.

11                              My concern, Justice Rolland, in  
12 this is that because of Mr. Barber's small role in  
13 this, he could be exposed to a full-blown  
14 cross-examination, which, in my respectful  
15 submission, would necessarily impinge on his  
16 section 2(b) rights as a journalist.

17                              There is no need for him to be  
18 exposed to a cross-examination beyond establishing  
19 that he received the documents and that he did the  
20 article, all of which I say has already been  
21 established under oath in the examination that was  
22 conducted under strict conditions for the recusal  
23 motion.

24                              Now, the Hughes case, which is at  
25 tab 13, and I won't take you to it because I know

1 that you have read all the material says that if  
2 you can't demonstrate that the witness has got  
3 material evidence to give, it could amount to a  
4 fishing trip, which of course is not permitted.

5                                   And to paraphrase from Lessard,  
6 which is at tab 11, a Supreme Court of Canada case,  
7 and there it was dealing with a search warrant, but  
8 I say that a search warrant and a summons,  
9 particularly a summons where documents are  
10 required, are very similar and indeed the courts  
11 have held that, and I will be getting to that in a  
12 moment.

13                                   But Lessard says that a summons is  
14 always intrusive and upsetting, to some degree, and  
15 is --

16                                   THE CHAIR: What paragraph of  
17 Lessard are you referring to?

18                                   MR. JACOBSEN: I am sorry. It is  
19 at tab 11, page 444. I am caught between trying to  
20 move along and to --

21                                   THE CHAIR: Well, if you are going  
22 to read, you better just give us the reference. It  
23 is easier.

24                                   MR. JACOBSEN: I am sorry, did I  
25 say tab 11? I have got that tab wrong, I'm sorry.

1 THE CHAIR: Tab 11 is Fullowka and  
2 Royal Oak Mines.

3 JUSTICE ROLLAND: Which tab is it?

4 MR. JACOBSEN: Tab 1, I am sorry.

5 THE CHAIR: You are referring to  
6 page 444?

7 MR. JACOBSEN: Yes, sir.

8 THE CHAIR: All right.

9 MR. JACOBSEN: I say that the test  
10 is similar when you are dealing with a search  
11 warrant. The principles are the same. So Justice  
12 Cory, as he then was, says at tab 444:

13 "Like Vallerand J.A., I am of  
14 the view that warrants for  
15 the search of any premises  
16 constitute a significant  
17 intrusion on the privacy of  
18 individuals and corporations  
19 alike. Family and business  
20 confidences which are  
21 irrelevant to the crime under  
22 investigation may be reviewed  
23 by the unsympathetic eyes of  
24 a stranger. A search is  
25 always intrusive, upsetting

1 and to some degree disruptive  
2 of the life or business of  
3 the individuals subjected to  
4 the search. It is for this  
5 reason that a justice of the  
6 peace considering a search  
7 warrant application must  
8 undertake a careful weighing  
9 or the privacy interests of  
10 individuals in a democratic  
11 society against the interests  
12 of the state in investigating  
13 and prosecuting crimes.  
14 "The weighing and balancing  
15 which must be undertaken will  
16 vary with the facts presented  
17 on each application.  
18 Certainly in every case the  
19 requirements of s. 487 of the  
20 Code must be met. However,  
21 this is not the end of the  
22 matter. Even after the  
23 statutory conditions have  
24 been met it may still be a  
25 difficult and complex process

1 to determine whether a search  
2 warrant should be issued.  
3 For example, a greater degree  
4 of privacy may be expected in  
5 a home than in commercial  
6 premises which may be subject  
7 to a statutory regulation and  
8 inspection. At the same  
9 time, among commercial  
10 premises, the media are  
11 entitled to particularly  
12 careful consideration, both  
13 as to the issuance of a  
14 search warrant and as to the  
15 conditions that may be  
16 attached to a warrant to  
17 ensure that any disruption of  
18 the gathering and  
19 dissemination of news is  
20 limited as much as possible.  
21 The media are entitled to  
22 this special consideration  
23 because of the importance of  
24 their role in a democratic  
25 society."

1                   Now, how do I say this applies to  
2 this case? I say that, first of all, the last  
3 sentence applies to this case, that the media are  
4 entitled to a special consideration.

5                   I say that there is a difference  
6 between -- I obviously recognize that there is a  
7 difference between a search warrant and a summons,  
8 but I say, similarly, that the intrusive nature of  
9 a summons in this case has to be taken into account  
10 by this panel.

11                   Barber makes his living from being  
12 an observer and commentator. He cannot fulfill  
13 this function if he becomes part of the story,  
14 which is what happens if he is compelled to come  
15 and testify here in a full-blown examination.

16                   This summons, in my respectful  
17 submission, is unfocussed. It does not limit in  
18 any way the evidence that Mr. Barber will be asked  
19 to give and in no way is the cross-examination,  
20 which both counsel are entitled to proceed with,  
21 limited.

22                   He will not, as I understand it  
23 from the procedures of this committee, he will not  
24 be entitled to counsel to be here to object to  
25 questions. He will be subjected to a full-blown

1 cross-examination simply because he received  
2 material, he wrote an article about it, and that is  
3 that only evidence that is before you. There is no  
4 evidence of him having done anything else other  
5 than that.

6 Now, in the Zundel case, where  
7 subpoenas were quashed, Zundel is at tab 15.

8 THE CHAIR: Tab 15?

9 MR. JACOBSEN: Fifteen, yes, and  
10 this time I do have the tab number right. At  
11 paragraph 29, which is on page 7, Justice Blais of  
12 the Federal Court says:

13 "Mr. Zundel has not shown how  
14 Mr. Mitrovica's testifying--"

15 THE CHAIR: Let me interrupt you  
16 again. You don't need to read the whole paragraph.  
17 It is enough to refer us to it, and then if you  
18 want to make any comment on how it applies, feel  
19 free, but you don't need to read anything--

20 MR. JACOBSEN: Thank you, sir. So  
21 Mr. Mitrovica is a journalist who wrote a book  
22 about CSIS, and Zundel was trying to get  
23 Mr. Mitrovica to come and testify. What the court  
24 found is that -- and the reason I refer to this,  
25 and I will also be referring to -- I have taken you



1 to Baltovich already, and I will be referring you  
2 to the Senior Holdsworth, as well, that is referred  
3 to, is that where you are dealing with a subpoena,  
4 you have to do more, and this case stands for it.  
5 You have to do more than just assert that you would  
6 like the person to come and testify because you  
7 think they might have something to say.

8                               You have to look into the nature  
9 of the evidence, and there has to be evidence  
10 before you. When someone moves to quash a  
11 subpoena, there has to be evidence before you by  
12 the person seeking the subpoena to show why the  
13 subpoena is necessary and likely to result in  
14 material evidence.

15                              So with respect to Mr. Mitrovica,  
16 the Court quashed the subpoena for the very reason  
17 that I have just put forth, that there was not  
18 sufficient evidence before the Court to show there  
19 is material evidence to be given.

20                              Zundel was also trying to get  
21 Justice Marshall to testify, and if I can just take  
22 you very briefly to paragraph 35, the same  
23 principle comes up. Justice Marshall moved to have  
24 the subpoena quashed on the basis that its issue  
25 was not valid and that she did not have any

1 material evidence to give in the instant  
2 proceeding, and the Court sustained that, as well.

3                   So I say this to demonstrate to  
4 you that the clear law on this is that you must be  
5 able to demonstrate that there is material  
6 evidence, and that has to be demonstrated by my  
7 friends on evidence before you, and you have, in my  
8 respectful submission, no evidence before you of  
9 Mr. Barber's necessity in that regard.

10                   Now, Mr. Hunt makes the argument  
11 that this committee is a different animal and  
12 therefore these same rules don't need to apply, if  
13 I understand his argument.

14                   In my respectful submission, the  
15 fact that this panel is a slightly different  
16 animal, if I may use that word, from a criminal  
17 court or a civil court, is of some assistance to us  
18 in the sense that if this panel is of the view that  
19 it needs to take judicial notice or to proceed in a  
20 way that is not within the strict rules of evidence  
21 to achieve an expeditious end, it may do so.

22                   In other words, you do not need to  
23 have every 'T' crossed and 'I' dotted if the  
24 parties can agree that documents should go in. If  
25 the parties agree on the source of the document,

1 then that is all you need. You don't need to have  
2 someone come and prove, technically prove, the  
3 document, in my respectful submission.

4 I will just try to move along  
5 here, Your Honour, so that--

6 We can see that the cases such as  
7 Dunphy, which is at tab 6, deal with extending the  
8 same procedure on search warrants to production  
9 orders. You will see that in our factum we refer  
10 to the fact that the newspaper rule also gives  
11 special protection to the media. That is the rule  
12 that says that at least in Ontario -- it doesn't  
13 apply in all provinces, but in Ontario -- that at  
14 discovery you cannot get the names of sources. You  
15 cannot demand the names of sources, and that is to  
16 prevent people from bringing that action solely for  
17 the purpose of getting access to the name of  
18 sources.

19 The general concept of the media  
20 being afforded constitutional protection has been  
21 recognized in England, much of the Commonwealth and  
22 the United States, and, as I put in my factum, the  
23 Branzburg and Hayes quote that no harassment of a  
24 newsman will be tolerated.

25 Obviously in the United States it

1 is a slightly different position because of the  
2 First Amendment, but that approach, which is to  
3 say, We are going to impinge on the media's ability  
4 to do its job as little as possible, if I can put  
5 it straight in the vernacular, is an approach that  
6 has been endorsed by every court from the Supreme  
7 Court of Canada on down.

8                   That makes it, in my submission,  
9 all the more important that the issues that we are  
10 raising here be addressed in the most sensitive way  
11 possible, which might include allowing Mr. Barber  
12 to -- requiring him to testify, but under some  
13 strict conditions, so that the examination doesn't  
14 go into all of the areas that would have no  
15 technical relevance or materiality to this case.

16                   Now, at tabs 39 and following in  
17 my factum, we deal with the test for issuing a  
18 subpoena or a summons in light of the  
19 constitutional protections, and in the Fullowka and  
20 Royal Oak case, which is at tab 11 at page -- I am  
21 not sure if it is a page or a paragraph -- yes, at  
22 paragraph 48, this is dealing with production of  
23 documents.

24                   The Court points out that the  
25 review of the law reveals three propositions:



1                   The mere assertion, which is all  
2 we have here, is not enough.

3                   Then the Hughes case, which is at  
4 tab 13, a decision of the Supreme Court of British  
5 Columbia, at paragraph 68 the Court lists, and I  
6 think this is after a good review of the law,  
7 saying not all these factors are relevant to the  
8 present case, what the court was dealing with, but  
9 notice that (a) is relevance and materiality of the  
10 evidence to the issues at trial. Paragraph 66,  
11 yes.

12                   And at paragraph 68, the Court  
13 points out that the material that is sought must be  
14 relevant and material, and it says at the end of  
15 that:

16                                 "In my view this principle  
17                                 should be carefully applied  
18                                 where members of the media  
19                                 are called to give evidence."

20                   Then at paragraph 70 the Court  
21 deals with the fact that -- deals with the  
22 probative value of the evidence, and says:

23                                 "Where the probative value of  
24                                 the evidence is slight it may  
25                                 not justify compelling

1 members of the media to  
2 testify."

3 That is what I say is our case  
4 here. The probative value of the evidence that you  
5 are seeking from Mr. Barber is indeed very slight.  
6 It is only to establish, as I understand it, the  
7 providence of the e-mails that he received.

8 There is no allegation that he  
9 sent any, other than one e-mail where he tells  
10 Justice Matlow, Send me your material. All of  
11 that, in my respectful submission, is absolutely  
12 irrelevant to the issue of whether Justice Matlow  
13 has conducted himself in a manner that is going to  
14 require the recommendation of censure of this  
15 panel.

16 The Baltovich case, as I have  
17 said, establishes that the onus is on the person  
18 seeking the subpoena to establish that it is likely  
19 to give rise to --

20 THE CHAIR: Mr. Jacobsen, let me  
21 remind you again you don't need to restate your  
22 position several times over. It really doesn't  
23 enhance it. It is there. We heard you the first  
24 time and we read your factum.

25 MR. JACOBSEN: Thank you, sir.

1 Now, the next point that I want to raise, but it is  
2 somewhat related, deals with alternative sources of  
3 information, and I deal with that at paragraph 68  
4 and following in the factum. That is, alternative  
5 sources of the information are reasonably  
6 available, and that is one of the criteria that the  
7 Court uses in determining whether or not a subpoena  
8 ought to be issued to a member of the media.

9 In the Hughes case at paragraph  
10 73, and that is repeated in the factum so I won't  
11 read it to you, but it is at paragraph 67 of the  
12 factum, and it refers to the fact that the courts  
13 ought to make an effort to ensure that a media  
14 representative is not called to testify and exposed  
15 to cross-examination if alternative sources of the  
16 information are reasonably available. Well, here  
17 is --

18 JUSTICE VEALE: Meaning the  
19 documents.

20 MR. JACOBSEN: Meaning the  
21 documents, yes. They have the documents. Mr. Hunt  
22 has the documents. They will be filed. I have not  
23 heard, Justice Veale, any suggestion by any of the  
24 parties here -- we would have heard it by now --  
25 that there is a dispute about the authenticity of



1 those documents or the providence of those  
2 documents. So that we do have a reasonably  
3 available alternative source of that material.

4 Now, we have not seen any  
5 information that accompanied the request for the  
6 subpoena, and I would assume that if there had been  
7 information in that regard, that it would have been  
8 in the record. So that in terms of understanding  
9 what it is and why it is, what we have is just a  
10 bald request for the subpoena, and, as Justice  
11 Trafford pointed out in the Brown case, certainly  
12 in the criminal process, a great deal more may be  
13 required.

14 Now, I am not suggesting that  
15 there is anything wrong in a situation where  
16 someone is asked to issue a subpoena and they do  
17 so. I have no problem with that. That could be  
18 standard practice, but where we do have a problem  
19 is when we come back and we say we object to the  
20 subpoena, as we are doing now, and we are not given  
21 any basis --

22 THE CHAIR: Did you request  
23 anything?

24 MR. JACOBSEN: Yes.

25 THE CHAIR: From counsel for the

1 inquiry?

2 MR. JACOBSEN: Yes, sir.

3 THE CHAIR: Were you provided with  
4 anything?

5 MR. JACOBSEN: No. We wrote  
6 letters to both counsel and asked them what the  
7 basis was and we received nothing -- we received  
8 responses, but they were very general responses.

9 Also, there has been no attempt,  
10 and this is at paragraph 77 and following in my  
11 factum, no attempt to minimize the impingement. In  
12 other words, there has been no attempt to minimize  
13 the impingement by restricting the nature of the  
14 examination or saying that it only has to do with  
15 the providence of the documents.

16 JUSTICE VEALE: How do you say it  
17 should be restricted, because you did sort of  
18 allude to that?

19 MR. JACOBSEN: I say it should be  
20 restricted by saying that if it is necessary to  
21 come and attend for the purpose of establishing the  
22 providence of the documents, in other words,  
23 basically what he did on the recusal motion, that  
24 that is fair enough.

25 If it goes that far and it is

1 restricted to that, that is fair, but to go beyond  
2 that is to involve Mr. Barber in this matter in a  
3 way in which he was not involved.

4 THE CHAIR: So your proposition is  
5 the questions of Mr. Barber should be limited to  
6 the evidence he gave on the recusal motion?

7 MR. JACOBSEN: Yes, sir.

8 JUSTICE VEALE: Plus the original  
9 documents that you are going to provide?

10 MR. JACOBSEN: Yes, the original  
11 documents. Actually, on the recusal motion, he did  
12 hand over the original documents, so it would be  
13 covered by that, Justice Veale.

14 JUSTICE VEALE: I see.

15 MR. JACOBSEN: If there are other  
16 documents, and we heard from Mr. Hunt through his  
17 factum that there are some other documents, earlier  
18 documents, that Barber said he would have trouble  
19 locating, and we said, All right, we will have a  
20 look for those and provide those.

21 Now, obviously, if anybody  
22 questions the providence of those in a serious way,  
23 then that changes this argument, but, in my  
24 respectful submission, the materiality and  
25 relevance issue does apply to this panel and this

1 panel ought to accept that, and that there is good  
2 reason, in my respectful submission, to vacate this  
3 subpoena or at least limit its scope in terms of  
4 the testimony that Mr. Barber is being asked to  
5 give.

6 Subject to any questions, those  
7 are my submissions.

8 THE CHAIR: There are no questions  
9 from the panel, Mr. Jacobsen. Thank you. Mr.  
10 Hunt.

11 SUBMISSIONS BY MR. HUNT:

12 MR. HUNT: Let me address one  
13 point first. My friend has suggested that he asked  
14 for information concerning what supported the  
15 subpoena.

16 JUSTICE ROLLAND: Could you talk a  
17 bit louder?

18 MR. HUNT: Yes, I am sorry. My  
19 friend has suggested that he asked for information  
20 as to what supported the subpoena, and I have no  
21 such request from him in either letter that he  
22 sent. If he did request that information with  
23 respect to the subpoena, I would be obliged if he  
24 could point that out to me so that I can address  
25 it.

1 MR. JACOBSEN: Yes. In the letter  
2 of November the 6th I wrote to both Mr. Hunt and  
3 Mr. Cavalluzzo, I said:

4 "It is our understanding that  
5 neither party appearing  
6 before the inquiry into the  
7 conduct of Justice Matlow has  
8 any information or evidence  
9 that would suggest that John  
10 Barber has anything useful or  
11 relevant to say before the  
12 inquiry that is in any way  
13 controversial. It is also  
14 our understanding that all--"

15 THE CHAIR: I am going to stop you  
16 there. That is argument. Is there a part of that  
17 that says, Can you provide me with the information  
18 on the basis of which the subpoena was requested?

19 MR. JACOBSEN: Yes, sir, but I  
20 need to read this to you.

21 THE CHAIR: You don't need to read  
22 your argument, Mr. Jacobsen.

23 MR. JACOBSEN: All I am saying,  
24 sir, the next paragraph says if either Mr. Hunt or  
25 Cavalluzzo have any information to the contrary, we

1 would be grateful to receive it immediately.

2 THE CHAIR: That is argument and  
3 counter argument. Did you request the information  
4 that was provided on which the subpoena was sought?

5 MR. JACOBSEN: Well, I say --

6 THE CHAIR: That is what you are  
7 referring to?

8 MR. JACOBSEN: I say that is how I  
9 was doing it, any information to the contrary.

10 THE CHAIR: We have your position.

11 MR. HUNT: Yes, thank you. I must  
12 say that the paragraph my friend has read does not  
13 bear the interpretation on which he puts it. We  
14 certainly didn't take it in that--

15 JUSTICE ROLLAND: I can't hear  
16 you, I am sorry.

17 MR. HUNT: Sorry.

18 THE CHAIR: You are speaking very  
19 softly.

20 MR. HUNT: I will speak up. The  
21 paragraph that my friend has read does not bear the  
22 interpretation he puts on it, is our submission.  
23 We certainly didn't take it that way.

24 This is a case that does turn on  
25 whether the witness has any material evidence to

1 give. You have read paragraphs 27 to 33 of the  
2 notice of hearing, which are mere allegations at  
3 this stage. There is no evidence before you, there  
4 is no agreement before you, that these particulars  
5 would be accepted.

6                   So as independent counsel, we must  
7 take the position that we have to prove the matters  
8 that are alleged, and the question of how we do  
9 that, then, is paramount to this proceeding.

10                   This is not a fishing expedition  
11 as my friend has suggested. In paragraph 5 of our  
12 factum, we have set out the contents of the  
13 summons. You have it in the compendium. It is  
14 restricted specifically to dealings between Mr.  
15 Barber and Mr. Justice Matlow in connection with  
16 the development at Spadina Road and Thelma Avenue,  
17 known as the Thelma Road project, as is the request  
18 that he bring with him any documents that relate to  
19 that.

20                   This is not a confidential source  
21 case. Mr. Barber in his article of the 20th of  
22 October of 2005, which is set out in my friend's  
23 motion record, clearly indicates that Mr. Justice  
24 Matlow provided him with information, and then he  
25 generally refers to the information.

1                   This is not a search warrant case  
2 where the intrusive aspects of a search warrant  
3 were being sought.

4                   This is a case that this panel  
5 must approach having regard to the fundamental  
6 purpose of an inquiry committee, which is a very  
7 serious matter. I don't say it is a different  
8 animal. It is a proceeding, and it may be as  
9 serious as criminal matters. It may be as serious  
10 as some civil matters.

11                   But, ultimately, what the inquiry  
12 committee is to investigate is conduct of a judge  
13 and make a determination whether that conduct has  
14 rendered the judge in a position that he is  
15 incompatible -- he has acted in a manner  
16 incompatible with the duties of his office.

17                   The purpose of that is to ensure  
18 compliance with judicial ethics in order to  
19 preserve the integrity of the judiciary.

20                   So in balancing any issues, this  
21 inquiry committee is engaged in a very serious  
22 examination of the conduct of a judge, some of  
23 which is alleged to involve a journalist, and the  
24 subpoena is directly responsive to that aspect.

25                   Now, my friend, his argument, it



1 seems to me, boils down to there are alternative  
2 sources available. Well, there is no agreement  
3 that these issues can simply be filed in front of  
4 this committee. Justice Matlow has every right to  
5 require that independent counsel put evidence  
6 before the inquiry committee of every aspect  
7 alleged in the particulars that are alleged to  
8 amount to judicial misconduct.

9 JUSTICE VEALE: Just so I  
10 understand that, as I heard Mr. Jacobsen, he was  
11 saying you can have all the documents and I can  
12 agree they go in, and I take it that you agree, but  
13 you are saying there is no agreement from Justice  
14 Matlow's counsel.

15 MR. HUNT: At this point there is  
16 no agreement that we simply file documents or that  
17 they would stand for the proposition that they were  
18 sent.

19 My friend may agree to it, but at  
20 this stage I have to approach this on the basis  
21 that I have to put evidence in front of you with  
22 respect to each of these allegations, including the  
23 allegations with respect to his dealings with Mr.  
24 Barber, and, on reading my friend's factum, on  
25 behalf of Justice Matlow, he takes the position

1 that he will need to ask some questions about the  
2 documents.

3 Now, what would we do, then, in  
4 the absence of Mr. Barber? It seems to me my  
5 friend suggests, Well, we will call I suppose  
6 someone from the Globe and Mail, other than  
7 Mr. Barber, who will say that on October 20th,  
8 2005, Mr. Barber published an article, the one that  
9 you have seen in the motion record.

10 The article does not deal with all  
11 aspects of the interaction between Justice Matlow  
12 and Mr. Barber, and certainly does not address  
13 questions that I, as independent counsel, might  
14 like to ask Mr. Barber in order to assist this  
15 inquiry committee in assessing the significance of  
16 his evidence, and I am sure, based on the factum  
17 filed by my friend on behalf of Justice Matlow,  
18 that it doesn't address the questions that he would  
19 like to ask Mr. Barber that may assist this inquiry  
20 committee.

21 Now, there is then a transcript  
22 of, I suppose, a very limited questioning of  
23 Mr. Barber, which, again, I suppose I would seek  
24 out the court reporter who took the transcript and  
25 bring the court reporter here to prove that this,

1 in fact, took place, and you would then have that  
2 transcript available on the key question of the  
3 significance of evidence of the interaction.

4 In that regard, in our factum, we  
5 have set out the very limited nature of that  
6 particular examination of Mr. Barber, and it is  
7 clear that this was done on the basis of an  
8 agreement, that at page 9, paragraphs 26 and 27 of  
9 the independent counsel factum in this matter.

10 It is quite clear that this was  
11 done on the basis of an agreement that did not  
12 permit for the questioning of Mr. Barber to any  
13 extent beyond simply acknowledging that these are  
14 the documents that I received, and it is clear from  
15 that examination that took place at that time, as  
16 limited as it was, at paragraph 30 of our factum,  
17 that Mr. Barber had indeed heard from Justice  
18 Matlow earlier than on October the 2nd and October  
19 the 5th of 2005.

20 He had heard from him a year  
21 earlier. He didn't indicate that he couldn't get  
22 those records, but that they weren't easily  
23 available to him at that point.

24 So, in my submission, in terms of  
25 any balancing or weighing that this inquiry

1 committee must undertake, that you are involved in  
2 a very serious task with a serious mandate; that  
3 the allegations that have been made in the notice  
4 of hearing are responsive to the task and your  
5 mandate; that the summons to Mr. Barber is  
6 responsive to those allegations set out in the  
7 notice of hearing.

8                                 There is no, in my respectful  
9 submission, acceptable way to put before you the  
10 evidence of the interaction between Justice Matlow  
11 and Mr. Barber other than calling Mr. Barber. The  
12 filing of a newspaper report and the calling of a  
13 court reporter to put before you a transcript of a  
14 very cursory examination of Mr. Barber done  
15 pursuant to very strict conditions is not an  
16 acceptable substitute for Mr. Barber being here to  
17 address those issues. Thank you.

18                                 JUSTICE VEALE: Would you propose  
19 any limitations at all in terms of  
20 cross-examination if he were to be called,  
21 presented all the documentation?

22                                 MR. HUNT: I would think that it  
23 is well within the role of this committee to  
24 control cross-examination to keep the matter  
25 relevant.

1 THE CHAIR: In the course of the  
2 proceeding occurring.

3 MR. HUNT: Exactly. So I wouldn't  
4 propose any in a vacuum. I think that the  
5 committee would have to listen to the questions as  
6 they were asked and impose limitations as it  
7 appeared appropriate.

8 THE CHAIR: Thank you, Mr. Hunt.  
9 Mr. Cavalluzzo.

10 SUBMISSIONS BY MR. CAVALLUZZO:

11 MR. CAVALLUZZO: Thank you, Chief  
12 Justice. At the outset, let me put on the record I  
13 just want to be sure that there are no problems in  
14 respect of a reasonable apprehension of bias in  
15 respect of myself, because it just suddenly came to  
16 me that when I was advised that Ms. Freeland is a  
17 Saskatchewan crown prosecutor, that for many years  
18 I have acted for the Ontario Crown Attorney's  
19 Association and recently have acted as counsel to  
20 the Canadian Association of Crown Counsel, of which  
21 Ms. Freeland is probably a member.

22 I just want to put that on the  
23 record just to ensure that there is no problem with  
24 that either with respect to my friend Mr. Hunt or  
25 Mr. Jacobsen.

1 MR. HUNT: I appreciate my  
2 friend's disclosure of that. I think that was  
3 appropriate. I have no concerns.

4 MR. JACOBSEN: I echo what Mr.  
5 Hunt just said.

6 MR. CAVALLUZZO: Thank you.

7 THE CHAIR: The committee has no  
8 concerns, so you may proceed, Mr. Cavalluzzo.

9 MR. CAVALLUZZO: Thank you.  
10 Members of the committee, it always intrigues me  
11 when I come to a hearing with counsel for the press  
12 who argue, and rightfully and correctly argue,  
13 their submission pursuant to section 2(b) of the  
14 Charter, which of course is freedom of the press.

15 However, as usual, and certainly  
16 today is no exception, the press in making their  
17 submission failed to recognize that there are other  
18 important constitutional values at play in this  
19 particular proceeding which the committee obviously  
20 has to take into account, and certainly I am  
21 referring to important administrative law rights  
22 that Justice Matlow has, as well as constitutional  
23 rights under section 7 of the Charter.

24 Let me briefly take you and  
25 highlight our legal submissions respecting the

1 rights of Mr. Justice Matlow, and you have our  
2 factum. You should also have a case book or a book  
3 of authorities, which is a green-covered document  
4 entitled "Book of Authorities On The Motion Re John  
5 Barber."

6 Now, as my friend, Mr. Hunt,  
7 stated in his submissions, the committee is dealing  
8 with a very, very serious matter, and if you refer  
9 to my factum at paragraph 15, I want to just  
10 highlight what the law is in respect of the legal  
11 standards which are applicable by this committee.

12 The first proposition that we put  
13 to you in paragraph 15 is that in this case there  
14 is a perspective, there is a perspective, that  
15 Justice Matlow may be removed from judicial office,  
16 and certainly the uncontradicted law, as far as  
17 this kind of case is concerned -- and they are  
18 often referred to as professional discipline cases  
19 -- is what is colloquially called the professional  
20 death penalty.

21 This is the most serious event  
22 that could possibly happen to a professional,  
23 whether it be a doctor, lawyer or a judge. Of  
24 course, the cases are clearly -- we referred to the  
25 Henderson case at -- I won't refer to it, but if

1 you refer to tab 2 of the Henderson case at pages  
2 153 and 154 and the Manitoba Optometrist case at  
3 tab 3 at pages 173 through 174.

4                   What those cases suggest is that  
5 in discipline cases, the more serious the  
6 ramifications on the individual appearing before  
7 you, the more is required of the committee in  
8 ensuring that a very high degree or a high standard  
9 procedural fairness is given.

10                   Both of those cases stand for that  
11 proposition, and, needless to say, we could have  
12 given you many, many more cases relating to the  
13 high standard of procedural fairness required.

14                   Now, obviously, and you are all  
15 very experienced judicial officers and senior  
16 members of the bar, one of the most important  
17 aspects of procedural fairness is the right to  
18 cross-examine. In paragraph 16, we refer to some  
19 case law, as well as the text, which indicates that  
20 cross-examination is a vital element to be given a  
21 litigant, particularly in serious situations, in  
22 order to accord with the principles of fundamental  
23 justice and procedural fairness.

24                   In fact, on occasion, when it has  
25 been denied, the courts have ruled that it is a



1 denial of natural justice, and we submit in this  
2 case that it is very important for Justice Matlow  
3 to be in a position to cross-examine Mr. Barber,  
4 because Mr. Barber's article is an integral part of  
5 the allegations which Justice Matlow faces.

6                   There are really two, we can call  
7 them, events. One is the Thelma project and the  
8 other is the Barber article. So that is the  
9 allegation, and surely Justice Matlow will be  
10 deprived of fairness if he does not have the  
11 opportunity to cross-examine.

12                   I submit that I am not prepared to  
13 have counsel for Mr. Barber come in and attempt to  
14 preempt my cross-examination of Mr. Barber or,  
15 indeed, to restrict it. Obviously, the committee  
16 has the authority to determine what is relevant in  
17 terms any kind of cross-examination, but I am not  
18 prepared to have counsel for Mr. Barber come in  
19 here and attempt to preempt Justice Matlow's  
20 important administrative and constitutional law  
21 rights.

22                   Those are the constitutional  
23 values on the one side. Now, let's look at the  
24 constitutional values on the other side of the  
25 balance, and that is freedom of expression, and,

1 more precisely, freedom of the press, upon which my  
2 friend relies.

3                                 There is one case that we refer to  
4 in our factum in paragraph 22, and that is the CBC  
5 New Brunswick case, and you need not turn that up,  
6 other than to say that with an important right like  
7 freedom of expression of the press goes an  
8 obligation, and that is an obligation that the  
9 public is entitled to be informed and imposes upon  
10 the media the responsibility to inform fairly and  
11 accurately.

12                                 Once again, the freedom of the  
13 press does not belong to the Globe and Mail, which  
14 is a division of Bell Media. The right belongs to  
15 the public, the public's right to be informed of  
16 important information.

17                                 Now, having Mr. Barber testify and  
18 subjected to cross-examination, would this  
19 interfere with that important right? Well, it  
20 doesn't interfere with the gathering of news. It  
21 doesn't interfere with the collection of news, nor  
22 does it interfere with the reporting of news.  
23 Those are the three interests that the cases say  
24 should be protected.

25                                 This is a situation in which the

1 news has been collected, has been gathered, has  
2 been reported on October the 20th in the article  
3 which is a part of the motion record before you.

4                   There is no evidence whatever that  
5 the media's right to collect, gather, and report  
6 the news will be interfered with.

7                   My friend then relies upon the  
8 cases which protect sources. Well, I must say that  
9 that is a very odd proposition in these  
10 proceedings, because in this case Mr. Barber  
11 disclosed his source, disclosed his source, and  
12 then attempts to hide behind the case law with the  
13 intent of protecting sources.

14                   Certainly, the other argument made  
15 by my friend relating to production orders, search  
16 warrants and so on and so forth, are interesting,  
17 and I think it comes down to, as my friend  
18 suggested, Does he have relevant evidence to offer?

19     He certainly does, because that is the allegation  
20 that is being relied upon. Is it material? Yes,  
21 it is. Are we interfering with the news gathering  
22 or reporting? No, we are not. Are there  
23 alternative sources of information? I submit there  
24 are not.

25                   Yes, the article is important, but

1 there are other important things that we would like  
2 to ask Mr. Barber concerning the circumstances  
3 behind the reporting of that article, the dealings  
4 that he had with Justice Matlow.

5 So, in conclusion, members of the  
6 committee, we submit that there is an important  
7 constitutional value at play here, and it is that  
8 of Justice Matlow's right to cross-examine Mr.  
9 Barber, who clearly has relevant evidence to  
10 provide in this proceeding.

11 Unless you have any questions,  
12 that would complete our submissions.

13 THE CHAIR: We have no questions.

14 JUSTICE VEALE: Just one.

15 THE CHAIR: Sorry.

16 JUSTICE VEALE: I take it there  
17 would be cross-examination on the personalized and  
18 prejudicial comments. That is what you stated here  
19 and that would be the purpose of the  
20 cross-examination. There is no issue as to the  
21 documents, is there?

22 MR. CAVALLUZZO: No.

23 MR. JACOBSEN: Sorry, I didn't  
24 hear the answer to that.

25 THE CHAIR: He said no.

1 MR. JACOBSEN: Thank you.

2 THE CHAIR: Thank you, Mr.  
3 Cavalluzzo.

4 MR. CAVALLUZZO: Thank you.

5 THE CHAIR: Mr. Jacobsen, in the  
6 ordinary course, you would have an opportunity to  
7 reply briefly to matters that you hadn't  
8 anticipated in the arguments of Mr. Hunt and  
9 Mr. Cavalluzzo.

10 REPLY SUBMISSIONS BY MR. JACOBSEN:

11 MR. JACOBSEN: Thank you. My  
12 first point is to counter what Mr. Cavalluzzo has  
13 said in terms of Mr. Barber attempting to hide  
14 behind the case law. I thought I had made it quite  
15 clear in the submissions that I was trying to  
16 develop an argument to show that there are many  
17 instances where the media is afforded a special  
18 constitutional privilege, and that one of those  
19 cases dealt with sources, but I wasn't saying -- I  
20 never once said this was a source case, and then I  
21 went on to develop the Baltovich case, which  
22 clearly states what the law is, in my respectful  
23 submission, with respect to subpoenas.

24 Now, the second point, my friend  
25 says that there is nothing here that is going to --

1 my friend, Mr. Cavalluzzo, says that there is  
2 nothing here that is going to discourage  
3 publication. He says that --

4 THE CHAIR: I thought he said  
5 there was nothing that would interfere with the  
6 news sourcing, the news gathering or the news  
7 reporting, the three standards in question.

8 MR. JACOBSEN: And I say that  
9 compelling Mr. Barber to testify, a wide-ranging  
10 examination will do just that, maybe not for this  
11 time, but for next time, and the courts have looked  
12 at that issue when they have dealt with sources.  
13 For example, in the National Post case, the court  
14 says if we compel Andrew Macintosh to give up his  
15 source, it will cause other people not to come  
16 forward.

17 So, similarly, in this case, if  
18 you compel Mr. Barber to come forward and be  
19 examined in the way that Mr. Cavalluzzo apparently  
20 wants to proceed, the full-blown examination with  
21 respect to the whole article, why you published  
22 this, why you published that, that is going to be  
23 very intrusive and is going to be a discouragement  
24 for publishing next time.

25 THE CHAIR: How so?

1 MR. JACOBSEN: Because the media,  
2 once it gets a whiff of the fact that someone may  
3 be compelled to come forward and testify, is going  
4 to have to take that into consideration in terms of  
5 publication.

6 If they are going to say, I am  
7 going to get raked over the coals by a very  
8 competent and aggressive counsel like Mr.  
9 Cavalluzzo in areas that have nothing to do with my  
10 article, but have to do with --

11 JUSTICE VEALE: Well, that may be  
12 another issue about the relevance of the  
13 cross-examination.

14 MR. JACOBSEN: That is right, but  
15 once the cross-examination starts, it is very hard  
16 to limit it, and Mr. Cavalluzzo --

17 JUSTICE VEALE: You mean with Mr.  
18 Cavalluzzo?

19 MR. JACOBSEN: Yes. I know that,  
20 generally speaking, judges are loath to interfere  
21 with cross-examination.

22 THE CHAIR: Unless it is  
23 necessary.

24 MR. JACOBSEN: Unless it is  
25 absolutely necessary.

1 THE CHAIR: Judges don't hesitate  
2 when it is necessary to interfere and when it is  
3 proper to prevent unwarranted cross-examination.

4 MR. JACOBSEN: I won't repeat my  
5 submissions on what is material here and whether  
6 they met the -- I would however point out that --  
7 and this relates with respect to both. Neither  
8 party has brought up the issue under the Judges  
9 Act, 63(4)(a), where it says -- may I read this?

10 THE CHAIR: Yes, the portion.

11 MR. JACOBSEN:

12 "The council or inquiry  
13 committee in making an  
14 inquiry or investigation  
15 under this section shall be  
16 deemed to be a superior court  
17 and shall have (a) power to  
18 summons before it any person  
19 or witness and to require him  
20 or her to give evidence on  
21 oath orally or in writing or  
22 on solemn affirmation if the  
23 person or witness is entitled  
24 to affirm in civil matters  
25 and to produce such documents



1 in evidence as it deems  
2 requisite--"

3 I want to underline the word  
4 "requisite":

5 "-- to a full investigation  
6 of the matter which it is  
7 inquiring."

8 My understanding of requisite, it  
9 means required by the circumstances, so that you  
10 need, in my respectful submission, to look at the  
11 circumstances of this, What evidence do you have  
12 before you that Barber played any role in this,  
13 other than receive the information and writing an  
14 article? What possible relevance could the way in  
15 which he wrote that article have with respect to  
16 the conduct of Justice Matlow?

17 In my respectful submission,  
18 Justice Matlow acted on his own. He did not take  
19 advice from Barber. When you weigh that against  
20 the intrusion that is being proposed by my friend,  
21 Mr. Cavalluzzo, it is my respectful submission that  
22 the weighing ought to be in favour of Mr. Barber.

23 Now, my friends have talked about  
24 the fact that they have not tried to get together  
25 and come to any kind of agreement on the providence

1 of these articles. In my respectful submission,  
2 that is what has to happen first before a subpoena  
3 is issued. There has to be, in my respectful  
4 submission, a bona fide effort to see if we can  
5 avoid having Mr. Barber testify as to the  
6 providence --

7 THE CHAIR: On what do you base  
8 that proposition?

9 MR. JACOBSEN: On the cases that I  
10 have already taken you to, sir, but --

11 JUSTICE ROLLAND: But you just  
12 heard that we need the witness to be here.

13 MR. JACOBSEN: Well, that is his  
14 submission, but, in my respectful submission, that  
15 is a submission that is made in the air. There is  
16 no evidence before you. What does he need him here  
17 for?

18 THE CHAIR: Mr. Jacobsen, as an  
19 experienced counsel, you know that any person  
20 facing risk at civil law, at criminal law or in an  
21 inquiry of serious consequences must have a right  
22 to challenge the evidence on which the decision is  
23 going to be made, and how can you assert that there  
24 has to be an obligation beforehand to get together  
25 with those bringing evidence against a person in

1 respect of whom there may be risk has to get  
2 together and come to some kind of an agreement?

3 I saw nothing in any case that you  
4 referred us to this morning that supports that  
5 proposition, and I know of nothing. So if you have  
6 a case that is authoritative that says that, I  
7 would at least like to be made aware of it.

8 MR. JACOBSEN: Thank you, sir.  
9 Well, in my submission, and I meant to have covered  
10 this, but in the Hughes case -- I base that  
11 submission on this, that counsel presenting the  
12 evidence in this case has a duty, as we have seen  
13 in the material, to restrict -- under the least  
14 restrictive alternative cases, to restrict the  
15 impingement on the media as little as possible.

16 One of the ways of doing that  
17 surely would be to see if we can come up with an  
18 agreed statement of facts on certain items, and if  
19 that agreed statement of facts could lessen the  
20 necessity of having Mr. Barber come forward, for  
21 example, to opine on the authenticity of the  
22 e-mails, then it is my submission that that is what  
23 ought to happen.

24 THE CHAIR: I just want to get it  
25 straight. Your proposition is that based on the

1 principle you quoted from the cases this morning,  
2 that the intrusion on the rights of the press ought  
3 to be limited to the maximum intrusion that is  
4 necessary in the circumstances.

5                   You would argue from that that  
6 this places an obligation on independent counsel  
7 and counsel for Justice Matlow to get together  
8 beforehand and see whether or not they can agree on  
9 this and avoid the necessity of calling Mr. Barber?

10                   MR. JACOBSEN: Yes.

11                   THE CHAIR: That is your  
12 proposition. We understand your proposition.

13                   MR. JACOBSEN: And my last point  
14 is to say that while there has been no agreement,  
15 if all we are talking about is the providence and  
16 the relevance of these documents, there is another  
17 way to do it, and Mr. Hunt has come up with that  
18 other way, and that is to take the transcript to  
19 the examiner, but it should not be necessary to do  
20 that, because this panel under section 63(4) has  
21 the ability to accept that material; and unless Mr.  
22 Cavalluzzo explicitly questions the providence of  
23 that material, there should be no issue.

24                   My final point, I submit that  
25 everything you have heard from my friends falls

1 within the definition of speculative. It is  
2 speculative. They have not come forward with any  
3 evidence as to why they need Mr. Barber.

4 I thank the panel for its time,  
5 and those are my submissions in reply.

6 THE CHAIR: Thank you,  
7 Mr. Jacobsen. At the outset, I ought to have  
8 indicated that the panel proposed that we proceed  
9 this morning until 10:45 and break then for 15  
10 minutes, and counsel have managed to coincide with  
11 that very well.

12 I thank you for your presentations  
13 and we will adjourn now for 15 minutes and proceed  
14 when we return. Thank you.

15 --- Morning recess at 10:45 a.m.

16 --- Upon resuming at 11:05 a.m.

17 DECISION:

18 THE CHAIR: The committee has  
19 considered the matter. The application to quash  
20 the summons to witness is dismissed. The committee  
21 makes no order as to costs. We will elaborate on  
22 reasons at a later time.

23 Now, then, the next application --

24 MR. JACOBSEN: Sorry, just very  
25 briefly, if I could put on the record that I am

1 providing to Mr. Hunt the original of those  
2 documents that the panel had dealt with earlier  
3 this morning when we were talking about whether we  
4 would get the documents back.

5 I am just providing them to Mr.  
6 Hunt now. I have shown them to him during the  
7 break, but I just wanted that to be on the record.  
8 It also has an index that my office has prepared.

9 THE CHAIR: Thank you, Mr.  
10 Jacobsen.

11 MR. JACOBSEN: So may we be  
12 excused at this time?

13 THE CHAIR: Yes, you may. I  
14 assume the other parties have no -- from the  
15 committee's point of view, you certainly may, Mr.  
16 Jacobsen. Thank you for your presentation.

17 JUSTICE ROLLAND: Thank you.

18 MR. HUNT: Thank you. I have  
19 these documents and I will see that they are copied  
20 and provided to my friend.

21 THE CHAIR: Now, I would do the  
22 same with respect to this application. In order to  
23 enable the administrative staff to make the  
24 necessary arrangements, could counsel give me some  
25 idea of how long would be required?

1                   MR. CAVALLUZZO: Chief Justice, it  
2 is clear that the committee members have  
3 extensively reviewed the materials, and, as a  
4 result of that, I would think that my submissions  
5 in-chief in respect of the motion would be between  
6 30 minutes and 45 minutes maximum.

7                   THE CHAIR: Mr. Hunt, do you have  
8 a view on how long you might require?

9                   MR. HUNT: I believe 15 to 20  
10 minutes.

11                  THE CHAIR: I don't want parties  
12 to feel restricted by this. This is for the  
13 purpose of identifying the administrative  
14 arrangements that are necessary for us to make.  
15 Thank you very much. Mr. Cavalluzzo, you can  
16 proceed.

17 SUBMISSIONS BY MR. CAVALLUZZO:

18                  MR. CAVALLUZZO: Thank you. Now,  
19 you have the blue bound volume, which is the factum  
20 of the moving party and --

21                  THE CHAIR: Just before -- I am  
22 going to interrupt you, as I did just before,  
23 because it brings to mind something. This sea of  
24 green that we have encountered on this earlier  
25 motion creates a little confusion. I just might

1 ask counsel, when they are doing further filings in  
2 preparation for the inquiry hearing in January, it  
3 would be helpful if one party filed with one colour  
4 and the other party filed with another colour just  
5 for convenience of reference.

6 MR. CAVALLUZZO: That is fine.  
7 Before coming to my legal submissions, I will  
8 highlight portions of the factum, as well as the  
9 part of the law which I think is relevant, but just  
10 let me spend a minute or two on the factual context  
11 which grounds the motion that we make today.

12 As you know, members of the  
13 committee, we are focussing on certain paragraphs  
14 of the notice of hearing or the particulars, as we  
15 can call them. I will come to those specifically,  
16 but just for factual context, we are really dealing  
17 with two factual events, as I said before in my  
18 submissions relating to the other motion, and that  
19 is the first area relates to what is called the  
20 Thelma project.

21 The Thelma project is a situation  
22 of a retail condominium development which was to  
23 take place in midtown Toronto, very, very close,  
24 doors away, from Justice Matlow's residence.

25 The neighbours on the street



1 became very concerned about the development, and,  
2 as a result of that, an ad hoc committee was  
3 created, which Justice Matlow was part of. I won't  
4 take you through all of it. Obviously, you will  
5 hear relevant evidence in that regard, but it  
6 relates to the actions of this ad hoc committee  
7 dealing with the City of Toronto in relation to  
8 this development.

9                                 Concerns were expressed after, as  
10 you know, the city municipal resolution was passed  
11 authorizing the project, and when the joint venture  
12 agreement was executed a year or two later, the  
13 residents were very concerned, because they felt it  
14 went far beyond the authority given to the  
15 bureaucrats by the municipal resolution; and, as a  
16 result of that, the local residents did what they  
17 had to do, talk to politicians and circulate  
18 petitions, the kinds of things that are part and  
19 parcel of local government.

20                                 There were contacts that Justice  
21 Matlow made, you will hear evidence of that,  
22 relating to the Thelma project, and so that is one  
23 area of evidence, one of the factual events, that  
24 is really the basis of the five allegations that we  
25 are talking about.

1                   The other factual events are, if  
2 we can call it, the Barber column or the Barber  
3 incident, and what happened in that regard is that  
4 John Barber is the newspaper columnist related to  
5 urban or municipal affairs for the Globe and Mail  
6 in Toronto. And you will hear evidence that in the  
7 middle of September of 2005, Justice Denise Bellamy  
8 of the Superior Court issued a -- if it was -- we  
9 would call it a Royal Commission report.

10                   This was a report into leasing  
11 arrangements, and the issue in that particular  
12 municipal inquiry was whether city staff were  
13 acting beyond the authority of municipal  
14 resolutions and felt very, very similar to the kind  
15 of problem in the Thelma situation.

16                   So you will hear evidence on  
17 October the 2nd, Justice Bellamy sent an e-mail to  
18 Barber and said, You might be interested in --

19                   THE CHAIR: Justice Bellamy, you  
20 said?

21                   JUSTICE ROLLAND: Justice Matlow.

22                   MR. CAVALLUZZO: Justice Matlow, I  
23 am sorry. I don't want to drag Justice Bellamy  
24 into this.

25                   THE CHAIR: What date did you say

1 the --

2 MR. CAVALLUZZO: October 2nd. It  
3 is at paragraph 5 of the factum.

4 THE CHAIR: What date did you say  
5 the Bellamy report was issued?

6 MR. CAVALLUZZO: The Bellamy  
7 report was issued in the middle of September. I  
8 think it was around the 12th or the 13th of  
9 September of 2005.

10 THE CHAIR: Sorry, go ahead.

11 MR. CAVALLUZZO: On the 2nd of  
12 October, you will hear evidence that Justice Matlow  
13 sent that e-mail to Mr. Barber saying that, You  
14 would be interested in this, city officials acting  
15 beyond their authority.

16 October the 4th, Barber replies to  
17 Justice Matlow requesting relevant documents.  
18 October the 5th, Justice Matlow responded to Barber  
19 and provided him with a package of documents  
20 relating to that Thelma project.

21 Now, we come to the other matter,  
22 which is called the SOS application, and the SOS  
23 application was a judicial review that was brought  
24 on behalf of a ratepayers' group, and it concerned  
25 a streetcar line, an elevated streetcar line, that

1 the city was proposing for St. Clair Avenue, which,  
2 as you know, is in midtown Toronto.

3                                 This group, which was called "Save  
4 Our St. Clair", which was a group of residents and  
5 business people, went to the Divisional Court by  
6 way of application for judicial review seeking an  
7 order restraining the building of that streetcar  
8 line on the basis that they hadn't complied with, I  
9 think, the Planning Act and other assessments,  
10 environmental legislation.

11                                 And so it was the SOS people or  
12 the Save Our St. Clair group versus the City of  
13 Toronto and the Toronto Transit line, which is the  
14 commission obviously running the streetcar.

15                                 Now, on October 6th, which was the  
16 very next day, Justice Matlow, along with Justices  
17 Greer and I think MacDonald, sat on our Divisional  
18 Court. Our Divisional Court is a three-person  
19 court of the Ontario Superior Court which hears  
20 judicial reviews or other cases related to public  
21 law, and, as a result of that, the application was  
22 brought.

23                                 The evidence will be the argument  
24 in that judicial review went over a period of two  
25 days, October the 6th and 7th, and during the

1 course of the hearing the counsel for the city  
2 asked that a decision be given as quickly as  
3 possible, because work was going to commence on or  
4 about October 11.

5                               On October 11, which was a  
6 Tuesday, the Tuesday after the Thanksgiving  
7 weekend, a unanimous endorsement was signed by the  
8 three members of the Divisional Court allowing the  
9 application for judicial review, and the  
10 endorsement stated that reasons for the decision  
11 would follow.

12                              Now, after this unanimous decision  
13 and endorsement, on October 19th, which is the next  
14 relevant date that I am coming to in completion  
15 here --

16                              JUSTICE VEALE: October 19.

17                              MR. CAVALLUZZO: October 19. The  
18 City of Toronto and the Transit Commission of  
19 Toronto brought a motion returnable on October 25th  
20 seeking that Justice Matlow recuse himself and that  
21 the panel be struck and that the application be  
22 remitted to another panel of the Divisional Court.

23                              The basis of the allegations were  
24 that certain actions and comments made by Mr.  
25 Justice Matlow, the Barber article, which was

1 published on October 20th, which would be the next  
2 date -- that is the Barber article -- and his  
3 participation in the Thelma project raised, in  
4 their view, a reasonable apprehension of bias.

5                   That matter was heard on October  
6 25th. As you know, in a situation where a recusal  
7 application is brought, it is the judge who the  
8 allegation is against makes the decision, and that  
9 decision of Justice Matlow on the recusal motion --

10                   THE CHAIR: Mr. Cavalluzzo, you  
11 must know that this committee will not consider any  
12 aspect of that decision. That is subject to review  
13 only by the appellate process and not by this  
14 committee. So I just want you to know that the  
15 committee is not -- we don't want to restrict you  
16 in any way. We just want to make sure that every  
17 possible opportunity is afforded for you to provide  
18 that which you wish to provide, but the committee  
19 view its responsibility to be limited to the  
20 conduct of Justice Matlow and not anything that he  
21 did with respect to the decision in that matter.

22                   MR. CAVALLUZZO: And I appreciate  
23 that, Chief Justice.

24                   The decisions relating to the  
25 recusal motion can be found in our other --

1 unfortunately, it is green, as well -- our other  
2 book of authorities on the Barber motion that you  
3 referred to earlier. It is the thinner volume.

4 If you go to -- I won't take you  
5 through it, but tab 1 is the decision of the panel  
6 on the recusal motion which was heard --

7 MS FREELAND: I am sorry, I didn't  
8 hear that.

9 MR. CAVALLUZZO: I am sorry. It  
10 was heard on October 25th and the decision is  
11 dated, as you can see, November 3rd.

12 MS FREELAND: Thank you.

13 MR. CAVALLUZZO: In that  
14 decision --

15 JUSTICE VEALE: Just a second.

16 MR. CAVALLUZZO: It is also in our  
17 motion record, as well, at tab 3. In a nutshell,  
18 the bottom line of the decision is Justice Matlow  
19 ruled that there was no reasonable apprehension of  
20 bias. However, the two other members of the panel  
21 stood down, with the result that the panel was  
22 struck and the matter remitted to another panel of  
23 the Divisional Court.

24 The only other factual contextual  
25 incident which I think is relevant is that that

1 decision, that November 3rd decision, SOS sought  
2 leave of our Court of Appeal to appeal that  
3 decision, and the Court of Appeal refused leave,  
4 and that is where we are at.

5                               Now, let me come to the  
6 allegations, which can be, I guess, conveniently  
7 found at page 4 of our factum, and they can really  
8 be -- I would like to try to be as concise as  
9 possible -- they can really be summarized into two  
10 areas. One is failing to ensure that Justice  
11 Matlow didn't sit on this panel of the Divisional  
12 Court, and the other area is failing to disclose  
13 his past involvement on the Thelma project or his  
14 dealings with Barber to either his colleagues, his  
15 two colleagues on the Divisional Court panel, or to  
16 the parties.

17                               So if I could just summarize those  
18 two areas: Justice Matlow, you failed to ensure  
19 that you weren't assigned to this panel based on  
20 your dealings in the Thelma project and your  
21 dealings with Barber; and, two, Justice Barber  
22 (sic) you failed to disclose to your colleagues  
23 your Thelma activities or your Barber dealings and  
24 you failed to disclose to the parties your dealings  
25 with Barber.



1                   Those are the paragraphs or those  
2 are the allegations which are in focus in our  
3 submissions today. That brings me then to the  
4 legal submissions.

5                   It is our submission that these --  
6 we can call it whatever we want -- inaction,  
7 conduct, decisions not to do something, but,  
8 whatever, it is our submission that these decisions  
9 are really grounded in the same basic decision, and  
10 that is whether Justice Matlow had a reasonable  
11 belief that a reasonable apprehension of bias was  
12 created based on Thelma and Barber. They both  
13 relate --

14                   THE CHAIR: I am going to ask you  
15 again not to get us into having to consider the  
16 issue in the case, whether there was a reasonable  
17 apprehension of bias and Justice Matlow ought to  
18 recuse himself.

19                   If it were cast perhaps in a  
20 different way, are we not essentially looking at  
21 having had the background with the Thelma project  
22 and involvement with the Thelma project, Justice  
23 Matlow ought to have recused himself from any  
24 matter that the City of Toronto planning  
25 authorities were a party to? Does that express it

1 in a way that does not involve us trespassing on  
2 judicial independence in the SOS?

3 MR. CAVALLUZZO: With respect, I  
4 have to raise the principle issue on the recusal  
5 motion, because, in my respectful submission, these  
6 two other matters are integrally related to that  
7 recusal motion. In effect, what we are saying is  
8 that these two allegations are, in effect, part and  
9 parcel of the recusal motion, and, as you say, this  
10 committee does not have jurisdiction to deal with  
11 that.

12 THE CHAIR: You can understand  
13 this committee being apprehensive about receiving  
14 argument -- we prefer not to receive argument that  
15 bears on the recusal motion itself for what ought  
16 to have been done.

17 Isn't what the independent counsel  
18 is putting forward, although it might have been  
19 expressed differently, and what we as the committee  
20 assigned with this responsibility have to consider  
21 is the conduct of Justice Matlow in not ensuring  
22 that he would not sit on any matter that the City  
23 of Toronto planning authorities were involved in?

24 Now, that ends at a point in time  
25 long before the recusal motion.

1                   MR. CAVALLUZZO: With respect, not  
2 long before, and I will submit to you that the law  
3 is that the circumstances coming up to, prior to  
4 the recusal motion, so obviously directly related  
5 to it, is part and parcel of the recusal motion  
6 over which you have no jurisdiction.

7                   That is it in a nutshell, is our  
8 submission.

9                   I understand the concern and the  
10 prudence with which you are expressing, but I agree  
11 with you. My point is that what independent  
12 counsel is doing is reaching beyond, because if we  
13 look at it this way: In a decision for Justice  
14 Matlow or any judge, to ensure that you are not  
15 assigned to a panel, what is the decision? Well,  
16 the decision, is there a reasonable apprehension of  
17 bias? Then I shouldn't be assigned to the panel.

18                   What about the other point?  
19 Should I disclose to the panel members or should I  
20 disclose to the parties? Well, how do you answer  
21 that question? It is the very same question.  
22 There is a reasonable apprehension of bias, and I  
23 should disclose to the parties and my colleagues.

24                   Before referring to the law, I  
25 want to emphasize that these decisions, the

1 decision -- we can call it a negative decision --  
2 not to ensure that you are assigned to the panel or  
3 not to disclose to the parties or your colleagues,  
4 in my respectful submission, that is a matter of  
5 judicial discretion and decision making, which is  
6 part and parcel of the same decision on the recusal  
7 motion.

8 I want to emphasize that we are  
9 not saying, we are not saying, that Justice  
10 Matlow's conduct is beyond the purview of this  
11 committee. What we are saying is that as far as  
12 those two allegations are concerned, failing to  
13 ensure that he sit on the panel or failing to  
14 disclose, those are subject to the review of our  
15 Court of Appeal, because they are part and parcel  
16 of the recusal motion. But Mr. Justice Matlow's  
17 conduct --

18 THE CHAIR: How would that be the  
19 case, if the requirement is failing to ensure that  
20 you sit on any matter involving the City of  
21 Toronto? How does that become part of the decision  
22 that is subject to appeal?

23 MR. CAVALLUZZO: Well, if we look  
24 at the allegation, it is certainly -- in fact, why  
25 don't we just go to, rather than our summarizing

1 it, go to the allegations? This is part of the  
2 motion record at tab 2.

3                   The allegation is specific, in my  
4 respectful submission, and that is paragraph 35 at  
5 page 12 of the record, 35(a): Having regard to  
6 your involvement in Thelma, you did not take steps  
7 to ensure that you did not sit on the Divisional  
8 Court hearing of the SOS application.

9                   It is not sitting on any Toronto  
10 case. It is sitting on this particular  
11 application.

12                   So coming back to what I was  
13 saying, we are saying as far as those decisions,  
14 actions, whatever you want to call it, or inaction  
15 is subject to review, that is by our Court of  
16 Appeal, but, as far as the conduct is concerned,  
17 that is, his involvement in the Thelma project, as  
18 well as his dealings with Mr. Barber, they are  
19 subject to your review, and we are prepared to  
20 defend Justice Matlow on that basis.

21                   We are not saying that you have no  
22 jurisdiction at all. We are saying that your  
23 jurisdiction relates to reviewing his conduct in  
24 the Thelma affair or project and reviewing his  
25 conduct as far as his dealings with Barber are

1 concerned.

2                                 Now, I respectfully submit that  
3 the law supports our position, and if I could just  
4 refer to a couple of cases and some advisory  
5 opinions. The first is a decision of the Canadian  
6 Judicial Council in the Boilard inquiry. This, as  
7 Justice Rolland will no doubt know, related -- this  
8 can be found at tab 1 of our factum and book. It  
9 is in the same book as the factum.

10                                I am just referring to this for  
11 the principle, and it concerned a judge on a Quebec  
12 Superior Court who recused himself in the middle of  
13 a long criminal trial. You may recall, I think it  
14 was a bikers' gang trial, and he recused himself  
15 because he felt that he may not have the confidence  
16 of the parties for the reasons that are suggested  
17 in the decision itself.

18                                But the principles to which I  
19 would refer can be found at page 2. We have  
20 highlighted certain portions, but the focus is  
21 really the bottom of page 2, which restates the law  
22 that we referred to earlier. It says:

23   "Except where a judge has  
24   been guilty of bad faith or  
25   abuse of office a

1 discretionary conditional  
2 decision cannot form the  
3 basis of any other kinds of  
4 misconduct or failure or  
5 incompatibility in due  
6 execution of office  
7 contemplated by clauses  
8 65(2)(b) -- of the Judges  
9 Act--" (As read)

10 Then I would ask you to underline  
11 the next words:

12 "-- nor can the circumstances  
13 leading up to the decision do  
14 so."

15 We submit, we submit, that the  
16 Thelma project which is relied upon in the recusal  
17 motion and the Barber dealings are the kinds of  
18 circumstances leading up to the recusal decision  
19 which are, I think, being referred to by the  
20 counsel in that situation.

21 The only other reference to that  
22 case which I think may be important in guiding your  
23 decision today is at the top of page 3, and if I  
24 could just read that to you, it says:

25 "The judge's right to refuse

1 to answer to the executive or  
2 legislative branch of the  
3 government or their appointee  
4 as to how and why the judge  
5 arrives at a particular  
6 judicial conclusion is  
7 essential to the personal  
8 independence of the judge,  
9 one of the two main aspects  
10 of judicial independence--"

11 And then this is the important  
12 part:

13 "The judge must not fear that  
14 after issuance of his or her  
15 decision he or she may be  
16 called upon to justify it to  
17 another branch of government.

18 Judicial immunity is central  
19 to the concept of judicial  
20 independence."

21 That reference to another branch  
22 of government, we usually refer to that in terms of  
23 judicial independence cases as the legislature  
24 telling the judge to do something or the executive  
25 telling the judge to do something or reviewing his





1 city moved and said, There is a reasonable  
2 apprehension of bias, Justice Matlow, we would like  
3 you to remove yourself from the panel, that is the  
4 same decision as would have been made by him when  
5 we said, You should have ensured that you didn't  
6 sit on that panel, or you should have disclosed  
7 your interest to the parties or your colleagues,  
8 because if his belief is there is no reasonable  
9 apprehension of bias, as it was on the recusal  
10 motion, then that answers the two other questions,  
11 as to whether he should have ensured that he wasn't  
12 assigned or whether to disclose.

13 THE CHAIR: If you apply that  
14 principle and give it the effect that you are  
15 asking us to give it, does it take it to the point  
16 where a judge could develop, say, a financial  
17 interest in some manner beforehand, and then hear  
18 on the matter, because he was faced with a recusal  
19 motion and made a decision on it, having developed  
20 that financial is beyond the purview, is conduct  
21 beyond the purview?

22 MR. CAVALLUZZO: There are  
23 qualifications to that, as the Boilard case talks  
24 about, and that is absent bad faith or abuse of  
25 office, I would submit that that would be the kind

1 of conduct, yes, you could, but we are not talking  
2 about this in this case. We are taking about a  
3 reasonable apprehension of bias and whether a judge  
4 honestly felt there was a reasonable apprehension  
5 of bias. That is the extent of the submission.

6 Now, if you would look at the --  
7 if you can look the advisory opinion at tab 2, I  
8 would also ask you to look at page 7, because here  
9 we talk about the judicial policy and as to why  
10 these kinds of decisions are important for the  
11 administration of justice, and I just refer to  
12 several highlights of it.

13 Just refer to the last highlight  
14 in the last sentence there in that fourth  
15 paragraph. It says in the third sentence:

16 "To recuse would simply  
17 defeat the speedy resolution  
18 of child protection and  
19 should leave the child in  
20 limbo longer. If these  
21 tactics are rewarded by  
22 recusal they will continue  
23 from judge to judge to the  
24 detriment of the process."

25 That is the judicial policy which

1 is important when a judge has to make a decision on  
2 a recusal motion. I will come back to this  
3 briefly, but the easy way out for any judge where a  
4 party moves to recuse is to say, Okay, I will get  
5 out of this and that way I won't have to face, to  
6 make the courageous decision. No, there is no  
7 reasonable apprehension of bias, and, of course,  
8 the law is, Well, the review is with the Court of  
9 Appeal and not to be labelled with misconduct for  
10 making that decision.

11 Otherwise, unfortunately, we could  
12 be seeing that used as a litigation tactic.

13 JUSTICE VEALE: Could I just ask a  
14 question on that? You are lumping what I would say  
15 would be the initial decision of the judge, whether  
16 he sits or not or she sits, in with the decision on  
17 whether to disclose, which would come at the time  
18 of the hearing, with the ultimate recusal decision,  
19 and I guess the other side of that coin is that  
20 those are rather discrete acts or decisions of the  
21 judge and they are not part of the final recusal  
22 decision.

23 MR. CAVALLUZZO: That is correct,  
24 but my response to that would be the answer to each  
25 of these questions is the same. It is based on the

1 same fundamental question. Based on all the  
2 circumstances, is there a reasonable apprehension  
3 of bias? It is the same answer, fundamental or  
4 foundational answer, to each of those three  
5 questions.

6 Yes, you can parse them out,  
7 whether it be in terms of words or in terms of time  
8 or whatever, but it would be my submission to you  
9 that the test that you should ask yourself is:  
10 What is the essential character of each of these  
11 acts and decisions?

12 At the end of the day, my  
13 respectful submission is the essential character,  
14 once again, is my reasonable belief as to whether  
15 there is a reasonable apprehension of bias.

16 Now, I am not going to read it to  
17 you, but at paragraph 19 we refer to an interesting  
18 article of Chief Justice McEachern of the B.C.  
19 Court, which can be found in our tab 3, over his  
20 concern for judicial independence.

21 MS. FREELAND: On that, Mr.  
22 Cavalluzzo, I only have the odd numbered pages  
23 under tab 3.

24 MR. CAVALLUZZO: Oh, I apologize.

25 MS. FREELAND: So if you are going

1 to refer to that -- it didn't flow very well when I  
2 read it. Please elaborate on --

3 THE CHAIR: We are all in the same  
4 boat.

5 MR. CAVALLUZZO: The only -- and I  
6 apologize for that. We will have it delivered to  
7 these offices as soon as we get back to the office  
8 -- it is the reference at page 319 about his  
9 concerns for judicial independence, and I need not  
10 read that to you. No doubt you will read it.

11 Now, once again, I submit -- and I  
12 am moving off my factum now, but it is related to  
13 it. I submit that on these issues, as we call the  
14 first decision, failing not to be assigned, the  
15 second decision failing to disclose, and then the  
16 third decision, the ultimate decision on the  
17 recusal, I submit that in order to determine and  
18 assess your jurisdiction, that the decision  
19 shouldn't be guided by labelling.

20 My friend labels this as conduct,  
21 failing to ensure that you are not assigned or  
22 failing to disclose are acts of conduct and  
23 therefore not decisions on the part of judicial  
24 discretion. I submit, once again, that it is far  
25 more complicated than that, and the focus, once

1 again, if I can borrow from constitutional law and  
2 administrative law, the focus should be: What is  
3 the pith and substance of the matter in dispute, or  
4 what is its essential character?

5                   In essence, my friend is saying,  
6 as independent counsel, my friend is saying to  
7 Justice Matlow, You should have avoided assignment  
8 or you should have disclosed information to your  
9 colleagues, and, as a result of that, you have  
10 engaged in misconduct.

11                   Of course, my answer to that, once  
12 again, is his responses on those two issues are  
13 part and parcel of his discretion. It is for him  
14 as a judge to make that important decision, once  
15 again, based on the very same foundational  
16 decision; that is, whether he has a belief that  
17 there is a reasonable apprehension of bias.

18                   THE CHAIR: Is that not an issue  
19 that remains for the committee to decide, after all  
20 argument has been heard, as to whether or not we  
21 accept your submission on that? Doesn't that  
22 remain an open issue to be addressed?

23                   MR. CAVALLUZZO: I would --

24                   THE CHAIR: Precluded by striking  
25 it now.

1                   MR. CAVALLUZZO: Right. I would  
2 submit that if something is beyond your  
3 jurisdiction, that you shouldn't hear evidence  
4 relating to it, and, in our submission, this is  
5 beyond your jurisdiction, and any statutory  
6 tribunal, as you are, should not be engaging in an  
7 inquiry beyond your jurisdiction.

8                   THE CHAIR: That is why I  
9 attempted to stop you when you got beyond the  
10 pre-hearing stage and said we were dealing with  
11 conduct, not decision making.

12                   MR. CAVALLUZZO: Right. But now  
13 we know, certainly from the Canadian Judicial  
14 Council Boilard case, that pre-hearing  
15 circumstances can be part of judicial discretion  
16 decision making which is beyond your purview, and  
17 so I think that is very important, and what we are  
18 saying this is the kind of circumstance.

19                   JUSTICE ROLLAND: But let's  
20 suppose there wouldn't have been any motion in  
21 recusation.

22                   MR. CAVALLUZZO: I am sorry?

23                   JUSTICE ROLLAND: Let's suppose  
24 you wouldn't have any motion in recusation and no  
25 judgment.



1 THE CHAIR: Is the conduct not  
2 conduct that is capable of review by this  
3 committee?

4 MR. CAVALLUZZO: Well, for  
5 example, if you had a situation where there was no  
6 motion for recusal, and after the case you found  
7 out that the judge was given \$100,000 from a  
8 litigant who was appearing before him or her, that  
9 is not a recusal situation. That is a situation of  
10 misconduct. In this case, we have --

11 JUSTICE ROLLAND: No, but let's  
12 take the same case.

13 THE CHAIR: Same action.

14 JUSTICE ROLLAND: No motion in  
15 recusation, no judgment in recusation. What is  
16 happening as far as the situation and the facts are  
17 concerned?

18 THE CHAIR: Is the conduct not  
19 subject to review?

20 MR. CAVALLUZZO: The conduct that  
21 would be subject to review, in my respectful  
22 submission, would be the conduct that Mr. Justice  
23 Matlow engaged in on the Thelma project and the  
24 conduct relating to his dealings with Mr. Barber.  
25 That would be reviewable, and we say to you --

1 JUSTICE ROLLAND: You say that  
2 every time a judge is making a decision, his  
3 conduct pending the trial and pending the decision  
4 would not be subject to review?

5 MR. CAVALLUZZO: No, I am not  
6 saying that. I am saying --

7 JUSTICE ROLLAND: I am just asking  
8 to understand.

9 MR. CAVALLUZZO: Yes, I understand  
10 that. What I am saying, what I am saying, is that  
11 in the context of these circumstances, when there  
12 was a recusal motion, you have to logically and  
13 practically look at what is part and parcel of the  
14 judicial discretion and decision. It is not just  
15 him signing his judgment on November the 3rd. It  
16 is more than that.

17 In fact, if you take a look at his  
18 decision, you will see one of the issues he has  
19 thought about and it is part of his recusal motion.  
20 For example, let's just read his decision. It is  
21 in the blue book --

22 JUSTICE ROLLAND: Put aside the  
23 decision for a moment. The same thinking, the same  
24 reasoning without the decision and without the  
25 motion for recusation, and let's suppose there is a

1 complaint thereafter about judicial misconduct or  
2 judicial conduct.

3 MR. CAVALLUZZO: Let's try to  
4 focus the facts. We will take the facts, very same  
5 facts here.

6 JUSTICE ROLLAND: Same facts.

7 MR. CAVALLUZZO: Same facts here.

8 JUSTICE ROLLAND: Same, same  
9 facts.

10 MR. CAVALLUZZO: No recusal  
11 motion.

12 JUSTICE ROLLAND: No recusal  
13 motion.

14 MR. CAVALLUZZO: Unanimous  
15 judgment, order made dismissing the application.  
16 Subsequently the city finds out that Justice Matlow  
17 was involved in Thelma and had dealings with  
18 Barber. What they would do in that situation, in  
19 my respectful submission, is they could take his  
20 involvement -- first of all, there are actually two  
21 things that they could do. One is on the appeal --

22 JUSTICE ROLLAND: Put aside the  
23 appeal.

24 MR. CAVALLUZZO: Pardon me?

25 JUSTICE ROLLAND: Put aside the

1 appeal. There is no judgment.

2 MR. CAVALLUZZO: There is no  
3 judgment.

4 THE CHAIR: He is talking about  
5 the first judgment, the unanimous judgment granting  
6 the judicial review.

7 MR. CAVALLUZZO: Right. You have  
8 that, and I think your question posits that a  
9 situation where the city finds out after the  
10 judgment, what do they do in that circumstance.  
11 Well, I think you do two things. One, on their  
12 application to the Court of Appeal they could ask  
13 to introduce evidence of this.

14 JUSTICE ROLLAND: But couldn't  
15 they make a complaint to Judicial Council?

16 MR. CAVALLUZZO: Yes, they could  
17 make a complaint. They could say, You know what,  
18 he shouldn't have been involved as a judge in the  
19 Thelma project. You know what, he should have had  
20 dealings with Barber as he did. A judge shouldn't  
21 be doing that.

22 And what we are saying is, yes,  
23 you can look at that. You can look at that. What  
24 we are saying is what you shouldn't look at --

25 JUSTICE ROLLAND: But the fact

1 that he sat on the case and there was no motion in  
2 recusation, that could not be considered for  
3 judicial review. That is what you are saying, even  
4 though there was no motion in recusation.

5 MR. CAVALLUZZO: It can be brought  
6 up on the Court of Appeal.

7 JUSTICE ROLLAND: But never, never  
8 for judicial review.

9 THE CHAIR: For conduct.

10 JUSTICE ROLLAND: For conduct,  
11 never?

12 MR. CAVALLUZZO: I don't know if I  
13 would go that far. I don't know if I would go that  
14 far, because, in this case, it was brought up and  
15 he made that decision, and that is what feeds the  
16 law, because this is a situation of judicial  
17 independence. What you are talking, though, would  
18 not be a situation where the policy and the  
19 constitutional --

20 JUSTICE ROLLAND: Well, obviously  
21 he would have chosen to sit on the case, again, it  
22 is part of his judicial independence, if I follow  
23 your argument. So he would have sat because he  
24 would have decided that I was not biased and there  
25 was no apprehension, without saying anything.

1                   So if there was a judgment, and  
2 the example I am taking, just put aside that there  
3 was a decision of recusation and a motion of  
4 recusation, but let's take the same example without  
5 the motion. If he would have sat there, it is  
6 because he would have made that reasoning at one  
7 point in time.

8                   MR. CAVALLUZZO: I would submit to  
9 you --

10                  JUSTICE ROLLAND: And you say that  
11 was not subject to judicial review.

12                  MR. CAVALLUZZO: What I would say  
13 to that is that kind of decision, that kind of  
14 decision to sit, based on whether there is a  
15 reasonable apprehension of bias, to disclose  
16 whether there is a reasonable apprehension of bias,  
17 that kind of decision is judicial discretion,  
18 judicial decision making which is beyond your  
19 purview.

20                  You can raise that on the appeal  
21 to the Court of Appeal, but, once again, his  
22 involvement in terms of conduct, that is the Thelma  
23 situation or the Barber situation, yes, that is  
24 reviewable.

25                  Just to show you how complicated

1 this question is, if you look at his decision, once  
2 again, the blue book, the blue motion record, at  
3 tab 3, I am just making reference to the reported  
4 decision, in particular, at page 336 and paragraph  
5 14, where Justice Matlow says:

6 "I from time to time raised  
7 the issue of whether or not I  
8 ought to disqualify myself--"

9 THE CHAIR: Mr. Cavalluzzo, I am  
10 going to interrupt again to say that this committee  
11 has no jurisdiction to consider what Justice Matlow  
12 did or said in that decision, and we really ought  
13 not to be taking it into account. Even though you  
14 may want to refer to it, I am reluctant to accept  
15 your proposition that it is part and parcel of --  
16 we will hear the argument when you make it and we  
17 will have to decide, but I don't think we should be  
18 deciding it on the basis of what Justice Matlow  
19 decided in that SOS decision. That is beyond our  
20 purview.

21 MR. CAVALLUZZO: I agree with  
22 that, My Lord, but what this paragraph shows is  
23 that the decision not to disclose to the parties  
24 was part of this recusal decision, which is beyond  
25 your purview. That is why I say this is a

1 complicated question. It is not simple to say it  
2 wasn't in open court or before. The fact is that  
3 that was part and parcel of the recusal decision.

4                   The only other submission I would  
5 make relates to judicial independence, and that can  
6 be found at --

7                   THE CHAIR: Just before you go to  
8 that, do you then assert that the incident with Mr.  
9 Barber and the Thelma Road project are in the same  
10 category in that regard, are part and parcel of the  
11 SOS decision?

12                   MR. CAVALLUZZO: Yes, I do.

13                   THE CHAIR: Suppose we are dealing  
14 with, instead, being expressed quite the way the  
15 independent counsel has done it, the conduct that  
16 was complained of was having been assigned to sit,  
17 having been assigned on September 30th to sit on  
18 the SOS application with Justices Greer and  
19 MacDonald, Justice Matlow contacted Mr. Barber on  
20 the 2nd, heard from him on the 4th, contacted him  
21 again on the 5th and made the comments respecting  
22 the misconduct at city hall, and so on, even though  
23 he had already known that he was assigned to sit on  
24 the SOS decision. Long before you sit on it, do  
25 you do anything with it or involve yourself in the



1 decision, is that not conduct that is subject to  
2 review?

3 MR. CAVALLUZZO: We say that that  
4 conduct, the dealings with Mr. Barber -- you know,  
5 once again, if the answer to that question, if the  
6 answer to that question, is the same as on the  
7 recusal motion, no, you can't look at it, but at  
8 the end, the question is: Can you review his  
9 dealings with Mr. Barber? Taking into account all  
10 of the circumstances, is that appropriate for a  
11 judge? I say, yes, you can. Yes, you can.

12 What we are saying, what we are  
13 saying, is that you can't rely upon the Barber  
14 allegation for the allegation that you shouldn't  
15 have sat or you should have disclosed.

16 THE CHAIR: Can you rely on it for  
17 an allegation that you ought not, having been  
18 assigned to sit on the SOS panel, you ought not to  
19 have contacted Mr. Barber and made the allegations  
20 respecting the City of Toronto that you did?

21 MR. CAVALLUZZO: Well, I think you  
22 could review that. The answer may be somewhat  
23 similar. The answer may be somewhat similar; in  
24 fact, would be similar. If I were in Justice  
25 Matlow's shoes I would perhaps answer the question

1 on the basis there is nothing wrong with that,  
2 because it is completely divorced from the SOS  
3 application. There is nothing wrong with that.

4 I am a free citizen. I can deal  
5 with reporters. Just because I am a judge, I don't  
6 have to live a monastic live. It is something that  
7 is important at my home, in my neighbourhood, and I  
8 think something should be done about it. I submit  
9 that, yes, can you review that.

10 Now, as I say in the final  
11 paragraph, why the recusal aspect of it is  
12 important, why anything interrelated to the recusal  
13 motion is important, once again, comes back to  
14 judicial independence, and the judicial policy, as  
15 I said before, is that our legal system, for very,  
16 very good reason, wants to encourage judges to make  
17 these kinds of important decisions, just based on  
18 all of the facts and all of the laws, without  
19 having to worry about being subject to a complaint  
20 of misconduct, because if judges out there know  
21 that their decisions not to sit or not to disclose  
22 in the area of recusal motions are subject to  
23 second guessing through way of a complaint or  
24 misconduct procedure, then I submit there is going  
25 to be a chilling effect.

1                   Most judges would say, you know  
2 what, I don't need the hassle. I don't need the  
3 hassle; therefore, I am going to remove myself.  
4 And think of the implications of that for the  
5 administration of justice.

6                   That is the concern that we  
7 express. Once again, we are not saying that this  
8 conduct is beyond review. It is by the Court of  
9 Appeal, and, as far as the individual conduct is  
10 concerned relating to his dealings with Barber and  
11 the Thelma project, that is subject to your full  
12 review in this proceeding.

13                   You had many questions. If you  
14 have any more, I would be pleased to answer them.  
15 If not, that would complete our submissions.

16                   JUSTICE VEALE: One of the other  
17 issues that was raised in this discussion is a  
18 judge can clothe some issues in a recusal motion or  
19 in the motions that are brought before and the  
20 decisions made beforehand, and the result is that  
21 you can't make -- I mean, you can raise the issues  
22 in the general context, but you can't raise them in  
23 respect to a specific decisions.

24                   In other words, the opposite to  
25 what you are saying, not a chill factor, but a

1 factor that the judge can get around it by clothing  
2 it in a judicial decision.

3 MR. CAVALLUZZO: I think the  
4 answer to that, Justice Veale, is that it is a  
5 jurisdictional question. It is a jurisdictional  
6 question. It would be for this committee to look  
7 at that, because you have jurisdiction if there is  
8 bad faith, and it would seem to me that if you  
9 could decide that the judge was clothing or  
10 characterizing their conduct in a particular way to  
11 avoid a misconduct complaint, then you can say,  
12 well, this is an exception to the general recusal  
13 rule and we will assume jurisdiction.

14 THE CHAIR: Does that then not  
15 require us to disallow your motion and hear the  
16 matter in order to come to that conclusion? How  
17 could we do that without -- if we granted your  
18 application to strike?

19 MR. CAVALLUZZO: Once again, once  
20 again, it is a jurisdictional question. As with  
21 some jurisdictional questions, you may decide that  
22 you are going to defer that question until you hear  
23 all of the facts. At the end of the day, you may  
24 come to that decision that I am asking you to make  
25 now. I can't foreclose that, but I submit that

1 there is enough on the record here for you to  
2 answer the jurisdictional question that we pose,  
3 but you are correct. With respect, you are correct  
4 on that point.

5 THE CHAIR: Mr. Hunt.

6 SUBMISSIONS BY MR. HUNT:

7 MR. HUNT: Thank you, Chief  
8 Justice. This is an important issue. Even as a  
9 jurisdictional issue, it is obvious that the  
10 committee grasps the issue and the submissions that  
11 have been made, so I don't intend to go through our  
12 factum. You have the argument there, but I do want  
13 to raise some issues in response to my friend's  
14 argument.

15 Firstly, Justice Matlow's  
16 position, in my submission, equates to taking steps  
17 to ensure that one doesn't sit on a particular case  
18 or in respect of cases dealing with a particular  
19 litigant and disclosing circumstances as between  
20 the judge and that litigant. His position equates  
21 that with the issue of reasonable apprehension of  
22 bias

23 In my submission, that is not the  
24 issue that this inquiry committee has as its  
25 fundamental issue, which is one of whether conduct

1 amounts to judicial misconduct within the  
2 parameters of that test as it is described in  
3 Therrien and Moreau-Bérubé and other cases that  
4 have touched on it, which is a very different  
5 question than reasonable apprehension of bias.

6                   It includes, in addition to  
7 impartiality, questions of integrity and questions  
8 of whether there is an appearance of integrity; in  
9 essence, whether there is an appearance of fairness  
10 about the proceedings.

11                   Secondly, it is my submission that  
12 Justice Matlow's position does not provide an  
13 answer to the question that was posed by you, Chief  
14 Justice Wells, an excellent example where a judge  
15 enters into a financial arrangement, perfectly  
16 legal financial arrangement, with an individual,  
17 later sits on a case involving the individual and  
18 determines during a recusal motion that there is no  
19 apprehension of bias, makes a judicial decision,  
20 and then on Justice Matlow's position that prior  
21 conduct leading up to it can only be examined as a  
22 piece of conduct, which may be perfectly legitimate  
23 and appropriate as it stands, but not in the  
24 context of having made a decision to sit on the  
25 case, having sat on the case not having disclosed

1 information to another party in the litigation.

2                                 So, too, I believe Justice  
3 Matlow's position doesn't answer satisfactorily the  
4 question of what happens when no motion for recusal  
5 is made, and this is discovered later by a party  
6 and can only then be examined in the context of  
7 what was the financial arrangement or dealings  
8 between the parties.

9                                 The mandate of this inquiry  
10 committee is to look into conduct and whether or  
11 not the conduct amounts to judicial misconduct.

12                                 What you cannot do is look into  
13 matters that constitute discretionary judicial  
14 decision making, and, in that regard, in my  
15 respectful submission, the report of the Canadian  
16 Judicial Council to the Minister of Justice in  
17 Boilard doesn't provide assistance or support for  
18 Justice Matlow's position inasmuch as it was a  
19 decision there that was looked at that was made  
20 during the course of ongoing proceedings.

21                                 It was that decision that was  
22 attacked, a decision to stand down and not  
23 continue, and when the Judicial Council in its  
24 report says that circumstances leading up to such a  
25 decision can't amount to judicial misconduct, it is

1 referring to the circumstances in which Justice  
2 Boilard decided that he no longer had moral  
3 authority to function as a judge and that the jury  
4 might question the propriety of his decisions  
5 because of this other matter that had occurred at  
6 another point in time.

7                   So this report, in my submission,  
8 is really confined to circumstances where a judge  
9 makes a decision, i.e., judicial decision making,  
10 in open court in the course of an ongoing  
11 proceeding.

12                   You should only strike the  
13 allegation, quash it, I suppose, if it is clear at  
14 this stage that it is beyond the jurisdiction of  
15 the inquiry committee to look into. No evidence  
16 has been called.

17                   If one just looks at the notice of  
18 hearing for a moment, particulars 25, 27, 28 and  
19 29, this is all conduct pre commencement of the  
20 hearing.

21                   THE CHAIR: Twenty-five, 27 --

22                   MR. HUNT: Twenty-five, 27, 28 and  
23 29. So you have an allegation that Justice Matlow  
24 becomes aware of the fact that he is going to hear  
25 this case involving the city on Friday the 30th,



1 and then on Sunday the 2nd, he commences  
2 communications with the journalist with respect to  
3 the Thelma Road project, which leads to exchanges  
4 of communications and material on the 4th and the  
5 5th. This is all conduct that precedes the  
6 hearing.

7                   In my submission, you have to hear  
8 the evidence on these issues in order to make the  
9 determination whether any of the conduct amounts to  
10 judicial misconduct. It is premature at this stage  
11 to quash allegations that rely on that evidence, or  
12 on those particulars and the evidence that will  
13 support it, until you have heard it and have a  
14 chance assess it within the parameters of the  
15 proper scope that you are allowed to consider  
16 within the context of judicial misconduct.

17                   THE CHAIR: But it is particulars  
18 26 and 30 that Mr. Cavalluzzo has moved to have  
19 struck.

20                   MR. HUNT: I understand, and, in  
21 my submission, the issue there is one of judicial  
22 conduct that does not fall within the parameters of  
23 discretionary judicial decision making, which was  
24 Boilard and other cases that have dealt with this.

25                   So nothing in the allegations here

1 precludes this inquiry committee from making such  
2 determinations as it may with respect to all of the  
3 conduct that is alleged and proven within the  
4 context of the cases that define judicial  
5 misconduct. It is completely open to the inquiry  
6 committee to reject it or to conclude that some  
7 part of it or all of it amounts to judicial  
8 misconduct once the evidence has been heard.

9                   So, in summary, I would say unless  
10 you are satisfied at this stage that Justice  
11 Matlow's position is so correct --

12                   JUSTICE VEALE: So correct?

13                   MR. HUNT: -- so correct that the  
14 conduct that is alleged here falls within that  
15 framework of discretionary judicial decision  
16 making, then I submit that you ought not to quash  
17 the particulars.

18                   THE CHAIR: Not to strike the  
19 particulars?

20                   MR. HUNT: Not strike them, and  
21 then listen to the evidence, and then make your  
22 decision at the end of the evidence whether some or  
23 all of the conduct strikes you as amounting to  
24 judicial misconduct within the very high test set  
25 out by the Supreme Court of Canada.

1 JUSTICE VEALE: Sorry, which test  
2 are you referring to?

3 MR. HUNT: The test for judicial  
4 misconduct as set out in Therrien and  
5 Moreau-Bérubé, which are mentioned in the factum.  
6 I won't take you there, but we mention it in  
7 several paragraphs.

8 That is all I wish to say.

9 THE CHAIR: Is there some reason  
10 why you would cast the conduct on October 2nd, 4th  
11 and 5th in terms of judicial conduct being failure  
12 to disclose, and so on, as you have done, but not  
13 cast it in terms or raise any issue as to the  
14 conduct that, having been assigned on September  
15 30th to sit with Justices Greer and MacDonald on  
16 the SOS application which involved the City of  
17 Toronto planning decision making, Justice Matlow  
18 then on October 2nd, two days later, contacted Mr.  
19 Barber, and on October 2nd to October 5th made  
20 representations respecting dishonesty and serious  
21 misbehaviour at city hall in connection with that?  
22 Did you not see anything wrong with it being  
23 misconduct to contact Mr. Barber in that  
24 circumstance, or is it only in the context of  
25 failing to disclose and later sitting on it?

1                   MR. HUNT: It is apparent to us  
2 that Justice Matlow's position is that there is a  
3 zone of conduct, which is private conduct that he  
4 did not give up by taking his appointment as a  
5 judge.

6                   THE CHAIR: And that included  
7 making representations to Mr. Barber?

8                   MR. HUNT: And I believe that  
9 there may be an issue as to whether or not he  
10 wasn't free to make representations to Mr. Barber,  
11 provided they were made in the appropriate way, but  
12 what I suggest he wasn't -- what these particulars  
13 suggest he wasn't free to do is, having done that,  
14 to not take steps to ensure that he didn't sit on a  
15 case then involving the city and to not disclose it  
16 to his colleagues and his partners.

17                   So it is, I suppose, the attempt  
18 to draw the difficult line between the zone of  
19 conduct, which any judge can engage in in their own  
20 interests, and protecting the fairness of the  
21 proceedings for all of the litigants who are there.

22                   It may be that the particulars  
23 could be crafted in a way that makes that clear,  
24 but it is a difficult exercise. So, in any event,  
25 that is why the line was drawn at that point.

1 THE CHAIR: Your suggestion is the  
2 particulars ought to be heard as they stand?

3 MR. HUNT: I submit they ought to  
4 be heard as they stand, but there is nothing to  
5 prevent the amendment of particulars, either on  
6 direction or recommendation of the inquiry  
7 committee.

8 This is this committee's hearing.  
9 It is not an issue as between independent counsel  
10 and Justice Matlow. When we get to the hearing, it  
11 won't be part of the mandate of independent  
12 counsel, as I understand it, to be seeking a  
13 particular finding or result, as much as it is to  
14 bring before the committee all of the relevant  
15 evidence and assist you in directing your minds to  
16 the issues and the evidence that relates to it.

17 So this is your hearing, and  
18 certainly nothing that independent counsel drafts  
19 in particulars can restrict the committee. The  
20 balancing, of course, is that Justice Matlow before  
21 this proceeding begins knows what it is that he has  
22 to answer, and certainly the particulars can be  
23 amended if the committee has any doubt about them  
24 encompassing the appropriate zones of conduct.

25 THE CHAIR: Thank you. Thank you,

1 Mr. Hunt. Mr. Cavalluzzo, would you like to  
2 address, in particular, any matter arising from the  
3 questions?

4 REPLY SUBMISSIONS BY MR. CAVALLUZZO:

5 MR. CAVALLUZZO: Just really just  
6 one comment, Chief Justice, and that is my friend's  
7 temporal distinctions respectfully can't be right.  
8 In other words, you can't piecemeal something and  
9 say, well, this happened prior to the hearing and,  
10 therefore, it is not part of judicial discretion.  
11 But this happened during the hearing and,  
12 therefore, it is part of judicial discretion as he  
13 attempted to distinguish or clarify his view of  
14 what the Boilard case said.

15 I submit, once again, the question  
16 is more complicated than that. The question is:  
17 Is the conduct decision matter under review  
18 essentially one for the judge's discretion? If the  
19 answer to that question is yes, then I think,  
20 respectfully, you should treat it the same way as  
21 the recusal decision obviously related to  
22 reasonable apprehension of bias.

23 If the answer is no, then it is  
24 not essentially a matter of judicial discretion and  
25 you have jurisdiction to review the matter, and

1 that is the only comment I would make in response.

2 THE CHAIR: I am going ask you to  
3 address what I thought I heard from Mr. Hunt that  
4 it wasn't a straightforward, simple time  
5 distinction. I thought I heard Mr. Hunt's position  
6 to mean that the fact that conduct may bear on  
7 apprehension of bias does not mean that that same  
8 conduct does not also bear on integrity, and time  
9 is not the issue, unless I am mistaken.

10 MR. HUNT: That is correct.

11 MR. CAVALLUZZO: Mr. Hunt's --

12 THE CHAIR: Did you wish to  
13 comment on that?

14 MR. CAVALLUZZO: Yes. Well, Mr.  
15 Hunt's comment in terms of appearances, it seems to  
16 me, is the same, whether you say to the public this  
17 judge in all of these circumstances didn't recuse  
18 himself, what is the appearance of that. Stepping  
19 over, this judge in these circumstances didn't  
20 disclose this. I think it is the same question.  
21 This judge didn't ensure that he wasn't assigned to  
22 this case, in light of all of these circumstances,  
23 and my response to that, it is the same question.

24 THE CHAIR: Don't we have to hear  
25 the evidence in order to determine that? That is

1 the other argument of Mr. Hunt.

2 MR. CAVALLUZZO: But in response  
3 to your question earlier, I agree with you, any  
4 jurisdictional matter, in any jurisdictional  
5 matter, if the judge feels at the outset he or she  
6 cannot make that determination, can't make that  
7 determination, then, yes, you are correct. You  
8 should hear all of the evidence and make the  
9 decision at the end of the day.

10 However, I submit that there is  
11 enough information here for you to make that  
12 determination at the outset, which would save you a  
13 lot of time, energy, and resources. However, if  
14 you are not comfortable, then, like any other  
15 jurisdictional matter, you should hear all the  
16 evidence, and then make that decision.

17 THE CHAIR: We will adjourn for a  
18 few minutes now, and then decide where we go from  
19 there. Thank you, gentlemen, for your  
20 presentation.

21 --- The panel retires at 12:29 p.m.

22 --- Upon resuming at 12:47 p.m.

23 DECISION:

24 THE CHAIR: Thank you for your  
25 able presentations, gentlemen. We are agreed that



1 it would not be appropriate to decide the  
2 jurisdictional issues raised here without hearing  
3 all of the evidence. For that reason, a decision  
4 on those issues will be reserved until the evidence  
5 is heard.

6 MR. HUNT: Thank you.

7 THE CHAIR: Before we adjourn, I  
8 should raise with you whether or not there are any  
9 issues respecting the conduct of the hearing in  
10 January or the timing or any concerns about it,  
11 anything that needs to be addressed in order to  
12 proceed expeditiously with the schedule here.

13 Mr. Hunt, do you have anything you  
14 wish to raise?

15 MR. HUNT: I could tell you that  
16 we are hopeful that we will have an agreed  
17 statement of facts with respect to most, if not all  
18 -- probably not all, but most of the evidence. We  
19 are working on that. We will be delivering a first  
20 draft to my friends this week.

21 So if that is the case, then I  
22 think in terms of witnesses, it might only involve  
23 Mr. Barber. If we can't agree, then I think at  
24 most it might be three or four witnesses, and I  
25 think our conclusion is that the four days that are

1 set aside in January would be ample for dealing  
2 with any evidentiary issues and argument.

3 THE CHAIR: Do you share that  
4 view, Mr. Cavalluzzo?

5 MR. CAVALLUZZO: Well, without  
6 seeing what the final statement of fact is, I am  
7 hoping, and I am sure that we will agree to much of  
8 the evidence, and I am hoping that the four days  
9 available will be more than sufficient to complete  
10 this matter.

11 THE CHAIR: Is there anything else  
12 you wish to raise? Ms. Brooks, is there anything  
13 that I should be raising or that needs to be  
14 addressed?

15 MS. BROOKS: I think you covered  
16 it all, Chief Justice.

17 THE CHAIR: Thank you. Then I  
18 thank you, everybody, including our court reporter,  
19 for their attendance here today. Thank you for the  
20 presentations.

21 MR. CAVALLUZZO: Maybe just one  
22 matter, Chief Justice. There is a member of the  
23 media here, and in order to follow the argument,  
24 she has asked if we wouldn't mind giving her a copy  
25 of the factum. I don't see any trouble with that.

1 I assume there is no problem if she sees the  
2 factum?

3 THE CHAIR: The committee has no  
4 problem. The parties are at liberty to do that.

5 MR. HUNT: I have no problem with  
6 it. I don't know where I get instructions on  
7 something like this as independent counsel. I have  
8 no problem with it personally, whether Ms.  
9 Brooks --

10 MS. BROOKS: It is a public  
11 hearing, and normally such documents would be filed  
12 at the hearing, so I can't see a problem with it.

13 MR. HUNT: We will make it  
14 available, certainly.

15 THE CHAIR: Thank you.

16 MR. CAVALLUZZO: Thank you.

17 --- Whereupon the proceedings adjourned  
18 at 12:51 p.m.