THE CANADIAN JUDICIAL COUNCIL

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

INDEPENDENT COUNSEL'S SUBMISSIONS IN RESPONSE TO THE SUBMISSIONS ON BEHALF OF JUSTICE MATLOW RESPONDING TO THE REPORT OF THE INQUIRY COMMITTEE

THE ROLE OF INDEPENDENT COUNSEL

1. Pursuant to subsection 3(2) of the Canadian Judicial Council By-Laws (the "Bylaws", SOR/2002-371), Independent Counsel's role before the Inquiry Committee is to present the case to the Inquiry Committee, including making submissions on questions of procedure or applicable law that are raised during the proceedings.

> *Canadian Judicial Council Inquiries and Investigation By-Laws*, s. 3(2)

2. Pursuant to subsection 3(3) of the By-Laws, Independent Counsel is to perform its duties "impartially and in accordance with the public interest". As observed by the Inquiry Committee, at paragraph 14 of its Report to the Canadian Judicial Council (the "Inquiry Committee Report"), "Independent Counsel acts impartially and does not bear any onus of proof."

> *Canadian Judicial Council Inquiries and Investigation By-Laws*, s. 3(3)
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> *Inquiry Committee's Report to the Canadian Judicial Council (*the *"Inquiry Committee Report"),* para 14

3. Following the issuance of a report to the Canadian Judicial Council (the "Council") by an Inquiry Committee, pursuant to subsection 10 of the By-Laws, where a judge makes a written submission regarding the report, Independent Counsel may submit a written response to the Council in response to the judge's submission. Where the judge makes an oral statement to the Council, Independent Counsel is to be present and the Council may invite Independent Counsel to make an oral response.

Canadian Judicial Council Inquiries and Investigation By-Laws, s. 10

4. Accordingly, Independent Counsel's primary role at this stage of the investigation process is to provide a response to the Submissions Responding to the Inquiry Committee Report on Behalf of Justice Matlow (the "Submissions of Justice Matlow"). In so doing, Independent Counsel must continue to be impartial and act in accordance with the public interest.

OVERVIEW

5. The role of Independent Counsel must be considered within the context of the statutory jurisdiction of the Council that is founded in the *Judges Act,* R.S.C. 1985, c. J-1, as amended (the "Act"). The objects of the Council are, *inter alia*, to promote efficiency and uniformity, and to improve the quality of judicial service, in Superior Courts. In furtherance of its objects, the Council may investigate allegations or complaints made in respect of a judge of the Superior Court and, for the purposes of conducting such an investigation, constitute an Inquiry Committee. The Inquiry Committee, pursuant to the Council's By-laws created under the authority of the Act, may consider any relevant complaint or allegation pertaining to the judge that is brought to its attention. Following such an investigation, the Inquiry Committee shall submit a report to the Council setting out its findings and its conclusions in respect of whether or not a recommendation should be made for the removal of the judge from office. The Act further provides that, after an investigation is completed, the Council shall report its conclusions to the Minister of Justice and, where, in the opinion of the Council, the judge in respect of whom an investigation has been made has become incapacitated or disabled from the due execution

of the office of judge by reason of, *inter alia*, having been guilty of misconduct, having failed in the due execution of that office, or having been placed, by his conduct or otherwise, in a position incompatible with that office, the Council, in its report to the Minister of Justice, may recommend that the judge be removed from office.

> *Judges Act,* R.S.C. 1985, c. J-1, as amended, ss. 59(1), 60(1), 60(2)(c), 63(1), 63(2), 63(3), 65(1) & 65(2)
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> *Canadian Judicial Council Inquiries and Investigation By-Law*, ss. 5(1) & 8(1)

6. Public confidence in the justice system is at the very heart of the inquiry into alleged misconduct. In exercising its jurisdiction, the Council's primary role is well established, that is, to determine whether the conduct of the judge in issue is so manifestly and totally contrary to the impartiality, integrity and independence of the judiciary that the confidence of individuals appearing before the judge, or of the public in its justice system, would be undermined, rendering the judge incapable of performing the duties of his or her office.

> *Re Therrien*, [2001] 2 S.C.R. 3 at page 75
> *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249 (S.C.C.)
> *Ruffo (Re),* [2005] Q.J. No. 17953 (C.A.) at para 18

7. In respect of the foregoing process, Independent Counsel is appointed pursuant to subsection 3(1) of the By-Laws. The By-Laws were made pursuant to subparagraph 61(1)(c) of the Act which permit the Council to make by-laws respecting the conduct of inquiries and investigations pursuant to section 63 of the Act.

> *Canadian Judicial Council Inquiries and Investigation By-Laws*, SOR/2002-371, s. 3(1)
> *Judges Act*, R.S.C. 1985, c. J-1, as amended, s. 61(1)(c)

8. The public interest that is engaged at this stage of the investigation process is primarily:

(a) to protect the public interest in the expeditious completion of the investigation process such that the public's confidence and view of the administration of justice and the judiciary are fostered and maintained (the "Public Interest – Process Issues"); and,

(b) to protect the public interest by impartially assisting the Council in its consideration of the Inquiry Committee Report in light of the Submissions of Justice Matlow such that the public's confidence and view of the administration of justice and the judiciary are fostered and maintained. In this respect, Independent Counsel, in fulfilling its impartial role, should not seek to achieve any particular result but, rather, should fulfil its public interest role by promoting the full and fair consideration by the Council of the Inquiry Committee Report in light of the Submissions of Justice Matlow (the "Public Interest – Substantive Issues").

Public Interest - Process Issues

9. On June 25, 2008 Justice Matlow filed an application for judicial review in the Federal Court, seeking an order quashing and setting aside the Inquiry Committee Report. Justice Matlow requests that the Council defer its investigation in this matter pending the final determination of his judicial review application. Justice Matlow submits that the request for deferral meets the established criteria for granting a stay of proceedings and, therefore, a deferral should be granted.

Submissions of Justice Matlow, paras 9 & 10

10. As is addressed in greater detail below, the investigation process pursuant to sections 63 and 65 of the Act and the By-Laws, contemplates a single administrative

process. The single administrative process contemplated by the Act and the By-laws is consistent with the maintenance of the Public Interest - Process Issues.

11. Justice Matlow's application for judicial review is premature. To grant deferment while the application for judicial review proceeds would needlessly bifurcate, complicate and delay the investigative process of the Council in circumstances where Justice Matlow has an adequate alternative remedy of submissions to the Council in response to the Inquiry Committee Report and the right to appear and make submissions before the Council.

12. In the alternative, Justice Matlow has failed to establish either irreparable harm or balance of convenience in his favour as required under the established judicial test for granting a stay of proceedings and consequently, his request for a deferment should be denied.

Public Interest - Substantive Issues

13. As a preliminary matter, Justice Matlow submits that the:

> …facts at the heart of this matter relate to Justice Matlow's conduct – in his capacity as a private citizen – in opposing a retail/condominium development that was proposed to be built a few doors down from his house on a small residential street in mid-town Toronto…" and at paragraph 16 that the "…particulars and allegations of misconduct addressed by the Inquiry Committee focused on Justice Matlow's conduct in opposing the development of a building on the parking lot on his street…
>
> *Submissions of Justice Matlow*, para 3

14. Justice Matlow's submission as to the "facts at the heart of this matter" does not characterize the nature and scope of the conduct in issue. While matters in respect of the local development described may perhaps be described as either a justification or excuse for the conduct of Justice Matlow that is at issue, the fundamental nature of the process is an investigation into the conduct of Justice Matlow complained of.

15. Justice Matlow submits that the conduct complained of relates to matters that are beyond the jurisdiction of the Council. Justice Matlow's submissions characterize this conduct as relating to matters of "judicial discretion and decision-making" that are subject to review for error only by way of appeal to a Superior Court.

16. Justice Matlow's submissions misconstrue the nature of his conduct in that it relates to his personal conduct and not, as Justice Matlow seeks to characterize it, as the exercise of his judicial discretion to make judicial decisions.

17. Justice Matlow's submissions misconstrue the nature of the conduct in issue, the jurisdiction of the Council and the scope and purpose of this investigation. The Submissions of Justice Matlow also misconstrue the nature and role of the principle of judicial independence, particularly as it relates to the principal judicial accountability, in the context of the investigation of his conduct.

18. Justice Matlow's submissions misconstrue the jurisdiction of the Council and the scope and purpose of this investigation in that the Council's role is to consider whether Justice Matlow's conduct amounts to judicial misconduct such that a recommendation be made for his removal from judicial office. The Council's role in this regard cannot be equated with an appellate review of Justice Matlow's decision with respect to a recusal motion brought within a legal proceeding that affects only the parties to such a proceeding.

19. Justice Matlow's submissions misconstrue the nature and role of judicial independence in that, while this principle involves protection of judicial tenure, including protection within the context of making judicial decisions, it is not for the benefit of the judge, but for the benefit of the judged. As such, judicial independence does not require that the conduct of judges be immune from scrutiny or accountability but, rather, an appropriate regime for the review of judicial conduct is essential to maintain public

confidence in the judiciary. Moreover, judicial independence is not to be considered in a vacuum without regard to other components of the duties of judicial office, that is, impartiality and integrity.

PUBLIC INTEREST – PROCESS ISSUES

Procedural History: Prior to Constitution of the Inquiry Committee

20. The procedural history of this matter, prior to the constitution of the Inquiry Committee, and the initiation of the present stage of the investigation process, may be summarized as follows:

(a) On January 30, 2006, the complainant, the City of Toronto, initiated the complaints process by way of a letter of complaint to the Council (the "Complaint");

(b) On February 21, 2006, the Council provided Justice Matlow with a copy of the Complaint and requested his comments with respect to the allegations made therein;

(c) By letter dated March 13, 2006 from Justice Matlow to the Council, Justice Matlow responded to the Complaint, and alleged that the Council lacked jurisdiction to entertain the Complaint on the basis that the matters complained of were a matter of the exercise of his judicial discretion and were, therefore, beyond the Council's jurisdiction to consider;

(d) On or about May 5, 2006, the Judicial Conduct Committee of the Council recommended that a Panel be struck to consider the Complaint and decide whether an Inquiry Committee should be constituted. In so doing, the Judicial Conduct Committee rejected Justice Matlow's submissions in respect of the Council's jurisdiction in respect of this matter;

(e) On July 13, 2006, Matlow filed written submissions to the Panel wherein, *inter alia*, Justice Matlow advanced substantially similar jurisdictional submissions as he had in his letter of March 13, 2006 and, in addition, advanced further submissions that the conduct in question was a permissible exercise of his right to freedom of expression as a judge;

(f) The Panel issued its report on February 1, 2007, wherein, *inter alia*, it rejected Justice Matlow's submissions in respect of the Council's jurisdiction and freedom of expression and recommended that an Inquiry Committee be constituted;

(g) On March 14, 2007, pursuant to the process contemplated by the By-laws, Justice Matlow filed written submissions in response to the report of the Panel with the Council wherein, *inter alia*, Justice Matlow advanced further detailed submissions in respect of the Council's jurisdiction and in respect of the exercise of his right to freedom of expression as a judge. In addition, Justice Matlow made submissions in respect of the exercise of his right of freedom of association as a judge; and,

(h) On April 3, 2007, after considering Justice Matlow's submissions, the Council passed a resolution constituting the Inquiry Committee that stated: "…having considered the [Panel's report] … and having considered the [submissions of Justice Matlow]…the Canadian Judicial Council hereby constitutes an Inquiry Committee to investigate the conduct of Justice Matlow in accordance with the provisions of the *Judges Act*."

The Investigation Process

21. The investigation process contemplated by the Act and the By-Laws, from the time an Inquiry Committee is constituted until the Council, pursuant to subsection 65(1) of the Act, "after an … investigation under section 63 has been completed" has reported

"its conclusions and submit[ted] the record of the … investigation to the Minister [of Justice]" is a single administrative process that, absent exceptional circumstances, is not amenable to judicial review. This is reflected in the fact, that the "Inquiry Committee is an investigative body, not an adjudicative one. As such it does not have responsibility to arrive at a judgment in respect of any particular issue or issues".

Judges Act, ss. 63 & 65
Inquiry Committee Report, para 14

22. In this respect, Independent Counsel has considered the case of *Cosgrove v. Canadian Judicial Council*, [2006] 1 F.C.R. 327 (T.D); [2007] 4 F.C.R. 714 (C.A.). In that case the judge was permitted to seek judicial review of the Inquiry Committee's decision in respect of a constitutional challenge made to provisions of the Act before an Inquiry Committee. *Cosgrove* may be distinguished on the basis that it involved a constitutional challenge which, had the judge's application for judicial review been successful in that instance, the requirement for a hearing would have been obviated.

Cosgrove v. Canadian Judicial Council, [2006] 1 F.C.R. 327 (T.D); [2007] 4 F.C.R. 714 (C.A.)

23. Justice Matlow's application for judicial review is premature. To grant deferment would needlessly bifurcate, complicate and delay the investigative process and expeditious determination of this matter in circumstances where Justice Matlow has an adequate alternative remedy, by way of submissions in response to the Inquiry Committee Report and the right to appear and make submissions before the Council.

24. Moreover, section 12 of the By-Laws provides that where the Council is of the opinion that the Inquiry Committee Report is unclear or incomplete and that clarification or supplementary investigation is necessary, the Council may refer all or part of the matter back to the Inquiry Committee with specific directions.

Canadian Judicial Council Inquiries and Investigation By-Laws, s. 12

25. The Public Interest - Process Issues are best served by ensuring that the within investigative process is finally determined prior to judicial review, if any, being permitted.

The Deferment Request

26. Justice Matlow has failed to establish either irreparable harm or a balance of convenience in his favour as required under the established judicial test for granting a stay of proceedings or for the purpose of granting a deferral of the Council's deliberations in this matter.

27. Justice Matlow submits that he "will suffer irreparable harm if the Council relies upon the impugned Report because he will be deprived of a fair determination by the Council on the most significant issue of whether he should be removed from office. It is of fundamental importance that proceedings which place reputation and the right to continue in office in jeopardy be conducted in accordance with natural justice". With respect, the foregoing allegation does not constitute irreparable harm, particularly given that Justice Matlow has availed himself of his right to file with the Council comprehensive written submissions responding to each of the findings and conclusions set out in the Inquiry Committee Report as provided in the Submissions of Justice Matlow. Justice Matlow has also advised that he will avail himself of his right to make oral submissions.

Submissions of Justice Matlow, para 10

28. Justice Matlow also submits that the balance of convenience favours Justice Matlow, when the respective balance of convenience to Justice Matlow is compared with the irreparable harm to the "Council or the public interest". To the extent Justice Matlow could suffer any such harm, which is denied, it is outweighed by the public interest in the thorough and expeditious determination of the investigation process and the public harm

that further delay would cause, including a resulting erosion of the public's confidence in and view of the administration of justice and the judiciary.

PUBLIC INTEREST – SUBSTANTIVE ISSUES

29. It is necessary to consider the Council's fundamental mandate and the means by which it, in part, fulfils that mandate, through the investigation of the Inquiry Committee.

The Council's Mandate, Judicial Ethics and the Test for Misconduct

30. Pursuant to the Act, the Council's mandate is to investigate and consider the conduct of Justice Matlow and conclude whether or not a recommendation should be made for his removal from office on the basis that his conduct is so manifestly and totally contrary to the impartiality, integrity and independence of the judiciary that the confidence of individuals appearing before the judge, or of the public in its justice system, would be undermined, rendering the judge incapable of performing the duties of his office. In this regard, the Council is to consider whether, having regard to the conduct of Justice Matlow, he has misconducted himself and become incapacitated or disabled from the due execution of the office of judge by reason of having failed in the due execution of that office and by reason of having placed himself in a position incompatible with the due execution of that office. This articulation of the test for judicial misconduct is consistent with the Inquiry Committee Report and the Submissions of Justice Matlow.

Inquiry Committee Report, para 111
Submissions of Justice Matlow, para 94

31. In this respect, the Inquiry Committee stated that the role of this investigation is similar to that recognized by the Supreme Court of Canada in *Ruffo v. Conseil de la magistrature*, [1995] 4 S.C.R. 267 (S.C.C.) as the role of a comparable committee under the Quebec Courts of Justice Act. The Inquiry Committee cited the following passage from the judgment of Gonthier J.:

The Comité's role in light of these statutory provisions was accurately described by Parent J., at p. 2214:

> [Translation] . . . the Comité is a body established for a purpose relating to the welfare of the public, namely to ensure compliance with the code of ethics that sets out the rules of conduct for and duties of judges toward the public, the parties to a case and counsel. The Comité's role is to inquire into a complaint alleging that a judge has failed to comply with the code, determine whether the complaint is justified and, if so, recommend the appropriate sanction to the Conseil.

The Comité's mandate is thus to ensure compliance with judicial ethics in order to preserve the integrity of the judiciary. Its role is remedial and relates to the judiciary rather than the judge affected by a sanction. In this light, as far as the recommendations the Comité may make with respect to sanctions are concerned, the fact that there is only a power to reprimand and the lack of any definitive power of removal become entirely comprehensible and clearly reflects the objectives underlying the Comité's establishment: not to punish a part that stands out by conduct that is deemed unacceptable but rather to preserve the integrity of the whole. **[emphasis added]**

Ruffo v. Conseil de la magistrature, [1995] 4 S.C.R. 267 (S.C.C.) at page 309

Inquiry Committee report, para 106

The Role of the Inquiry Committee and the Inquiry Committee Report

32. The Inquiry Committee expressed its role as follows:

> "In carrying out its responsibilities, the Inquiry Committee must bear in mind that it is the CJC that is to report its conclusion, submit a report of the investigation to the Minister and 'may recommend that a judge be removed from office'. This Inquiry Committee is, in effect, the means by which the CJC conducts the investigation and gathers the factual information necessary for it to reach conclusions and make any recommendation it decides to make to the Minister."

Inquiry Committee Report, para 12

The Submissions of Justice Matlow

33. The submissions of Justice Matlow advance a number of grounds that purport to impugn the findings and conclusions of the Inquiry Committee Report. In order for Independent Counsel to fulfill its role it is necessary to specifically identify and address each of the enumerated grounds.

Submissions of Justice Matlow, paras 5 to 8

THE SUBSTANTIVE COMPLAINTS

34. The substantive complaints raised by Justice Matlow comprise four discrete complaints:

(a) First, that the penalty of removal from office is disproportionately severe (the "Penalty Complaint");

(b) Second, that the Inquiry Committee committed an error in law by failing to appropriately apply Charter considerations in respect of Justice Matlow's allegations in respect of freedom of expression and association (the "Charter Complaint");

(c) Third, that the Inquiry Committee, in essence, committed an error in law by allegedly applying ethical principles as a "Code of Conduct" that create "positive ethical obligations", which inappropriately usurp "judicial discretion" (the "Ethical Rules and Judicial Discretion Complaint"); and,

(d) Fourth, the Inquiry Committee erred in finding that, in the circumstances of the within case, Justice Matlow had an ethical obligation to disclose a potential conflict of interest. In this respect, Justice Matlow submits that judges must have scope to exercise independent judgment as to what must be pro-actively disclosed in particular circumstances to identify a "potential for conflict. No clear and binding rules apply to the determination of such circumstances. A

> simple error in judgment, where a judge believes honestly and in good faith that there cannot be any reasonable apprehension of bias, should not result in a recommendation that the judge be removed from office. The threat of removal from office, in the circumstances, infringes upon judicial independence and would likely have an undesirable chilling effect on all judges." (the Conflict Disclosure Complaint").

Submissions of Justice Matlow, para 5

The Penalty Complaint

35. Justice Matlow makes a number of submissions in respect of the severity of a finding of misconduct in relation to the conduct placed in issue by the Complaint. As described above, given the impartial nature of Independent Counsel it is not the role of Independent Counsel to seek a particular result in this matter.

Submissions of Justice Matlow, paras 231-236

36. It is the mandate of the Council to appropriately apply the established test for judicial misconduct having regard to the conduct that is at issue. Having regard to the conduct in issue, in this particular case, Justice Matlow's justifications or excuses are of limited relevance to penalty.

The Charter Complaint

37. Justice Matlow states that:

> …the Inquiry Committee erred…by failing to apply the well-established Charter analysis set out above to address the issue of whether s.2(b) and/or s.2(d) would be contravened by imposing restrictions on a judge's freedom to participate in the local affairs of his community. The Inquiry Committee erred by ruling that the Charter rights were not engaged because it viewed any restrictions on s.2(b) and s.2(d) to be part of the "normal duties" of a judge which are voluntarily accepted upon accepting

> the appointment to judicial office. This approach is directly contrary to the established Charter law. In particular, the Inquiry Committee erred by failing to give s.2(b) and s.2(d) their broad interpretation and by instead reading down the scope of s.2(b) and s.2(d) protection rather than addressing the merits of any restrictions under s.1 of the Charter.
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> *Submissions of Justice Matlow,* para 111

38. Justice Matlow submits that there is a continuing "evolution" in respect of the acceptable range of freedom of expression and association of judges. Justice Matlow submits this "evolution" should be considered within the context of conducting the section 1 Charter analysis that he submits ought to have been done by the Inquiry Committee. In reviewing each of the various authorities cited by Justice Matlow, should the Council determine Charter rights are in fact engaged in this instance, none of them would endorse or support the conduct of Justice Matlow.

Submissions of Justice Matlow, paras 116 to 146

39. The Inquiry Committee Report notes Justice Matlow's acknowledgement that some limitations on a judge's exercise of free speech and association must be accepted in order to preserve the independence and impartiality of the judicial office. Justice Matlow has made similar acknowledgements throughout this investigation and has done so at paragraph 117 of the Submissions of Justice Matlow. The Inquiry Committee Report also observes that it is off-the-bench conduct that is at issue and that, while on-the-bench protections are very high as a matter of the protection of judicial independence (as opposed to any protection of freedom of expression), judicial independence "is not engaged by off-the-bench statements by a judge, which are the nature of the statements that are at issue in this investigation".

Inquiry Committee Report, para 114 to 117
Submissions of Justice Matlow, para 117

40. Paragraph 118 of the Inquiry Committee Report states:

> Dealing with off-the-bench speech from a Charter perspective, we do not think that there is any basis for concluding that judges, as persons, have lesser Charter rights than other individuals or have "restrictions on free speech and association imposed on them. That is not the correct context in which to consider the matter.

The Inquiry Committee Report cites *Re Therrien, supra* in which the Supreme Court observes the unique nature of the judicial function, the role of judges as the pillar of the entire justice system, the importance of the public's view of the justice system, and that judges are asked to embody the ideals of justice and truth on which the rule of law and the foundation of democracy are built. The Inquiry Committee Report, at paragraph 119, concludes as follows:

> We do not view what is sometimes described as constraints or loss of freedom as unfair impositions or restrictions on Charter rights of judges that are not imposed on their fellow citizens. As the underlined portions of the excerpts [from *Re Therrien*] in the preceding paragraph would indicate, they are more properly viewed as "duties" that, by acceptance of appointment, persons who become judges, in the words of Gonthier J., "swear by taking their oath" to observe and perform. Such an undertaking, or covenant, is a fundamental component of judicial appointment. The obligations that flow from that undertaking or covenant are more appropriately treated as "normal duties of a judge" than constraints or loss of freedom unfairly imposed on persons who happen to be judges.
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> *Inquiry Committee Report*, paras 118 & 119
>
> *Re Therrien, supra*

41. The Charter claims asserted by Justice Matlow may not be used to diminish the extent of the obligations of judges to perform the duties that are inherent in the judicial function.

42. The nature of the test for removal from judicial office and its high threshold, itself applied in order to protect the integrity of the judiciary as a whole and uphold the rule of

law in Canada as a democratic society, is such that it demonstrates the inherent nature of the "limits" place on a judge's Charter freedoms as a function of the office of judge.

43. Were a judge's conduct, even if an exercise of the freedom of expression or association "so manifestly and totally contrary to the impartiality, integrity and independence of the judiciary that the confidence of individuals appearing before the judge, or of the public in its justice system, would be undermined, rendering the judge incapable of performing the duties of his office", it must be that this constitutes grounds for removal. As such, Charter considerations are not strictly engaged. It would be incongruous to have the test for judicial misconduct met for the fitness to hold judicial office give way to an individual freedom of expression and association such that an offending judge could otherwise retain the office of judge.

Inquiry Committee Report, para 122

44. The Inquiry Committee Report states, in the alternative, that if there were any limitations placed on Justice Matlow's Charter rights, they would be "justified in a free and democratic society to ensure the preservation of the impartiality and independence of the judiciary and the rule of law." It is submitted that the high threshold test for judicial removal would itself be the basis to support this proposition.

The Ethical Rules and Judicial Discretion Complaint

45. The Ethical Rules and Judicial Discretion Complaint are rooted in Justice Matlow's submissions in respect of the jurisdiction of the Council. Justice Matlow has advanced similar submissions at every stage of the investigation process.

46. Justice Matlow's submissions, in summary, are that the Council lacks jurisdiction with respect to certain allegations in respect of the SOS Application (in particular, paragraphs 26, 30, 35(a), 35(b), 35(c), 35(d), 35(e), 35(k) and 35(l) of the Amended Particulars filed before the Inquiry Committee). Justice Matlow's submissions

characterize these allegations as relating to "judicial decision making" as opposed to constituting conduct of Justice Matlow. Justice Matlow also submits that there is an interrelationship between "judicial free speech" and judicial ethics and that the "ethical standards" in respect of this are unclear. Justice Matlow submits that:

> The ethical principles also acknowledge – as a critical element of judicial independence – the need for judges to exercise their individual discretion in determining what are appropriate actions consistent with their judicial office. This does not make judges unaccountable; it simply recognizes that independence and impartiality require that the mere fact that a judge may have erred in exercising their discretion does not necessarily implicate their capacity to duly execute their office. Part of judicial independence includes the right to be wrong.
>
> …the substantive issues raised by this matter are fundamentally rooted in a dispute about the appropriate scope of judicial free speech and freedom of association. The issues of judicial free speech and association are very important. However, we submit that the development of consensus on what is appropriate judicial free speech and association is best developed and negotiated through a discussion among judges in conference as colleagues. It is a matter of cultural evolution that is ill-suited to being resolved through a disciplinary inquiry in respect of an individual case as a matter of a capital offence.
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> *Submissions of Justice Matlow*, paras 77 to 91 & 147 to 151

47. The Inquiry Committee Report addresses Justice Matlow's jurisdictional argument by distinguishing the issue of the Council's jurisdiction in assessing the conduct of judges as a matter of judge's ethical duties from the exercise of judicial discretion of judges in respect of matters of legal principles. This is an appropriate distinction.

> *Inquiry Committee Report*, Part VI, paras 81 to 105

48. Part VII of the Inquiry Committee Report addresses the mandate of the Council and observes, in being guided by the principles in the Supreme Court of Canada case of *Ruffo*, that in assessing the conduct of judges, the Council's role is remedial and relates to the judiciary rather than the judge affected by a sanction. As such, the role of the Council

in investigating judicial conduct is not to punish a part, i.e. the individual judge, that stands out by conduct that is deemed unacceptable but, rather to preserve the integrity of the whole, i.e. the entire judiciary itself.

Inquiry Committee Report, para 106

49. The existence of ethical duties inherent in the judicial function is well established under Canadian jurisprudence. In *Re Therrien, supra,* Justice Gonthier provides clarification of these duties in commenting on the role of the judge and the manner in which the public perceives that role:

> The judicial function is absolutely unique. Our society assigns important powers and responsibilities to the members of its judiciary. Apart from the traditional role of an arbiter which settles disputes and adjudicates between the rights of the parties, judges are also responsible for preserving the balance of constitutional powers between the two levels of government in our federal state. Furthermore, following the enactment of the *Canadian Charter*, they have become one of the foremost defenders of individual freedoms and human rights and guardians of the values it embodies: *Beauregard*, *supra*, at p. 70, and *Reference re Remuneration of Judges of the Provincial Court*, *supra*, at para. 123. Accordingly, from the point of view of the individual who appears before them, judges are first and foremost the ones who state the law, grant the person rights or impose obligations on him or her.
>
> If we then look beyond the jurist to whom we assign responsibility for resolving conflicts between parties, judges also play a fundamental role in the eyes of the external observer of the judicial system. The judge is the pillar of our entire justice system, and of the rights and freedoms which that system is designed to promote and protect. Thus, to the public, judges not only swear by taking their oath to serve the ideals of Justice and Truth on which the rule of law in Canada and the foundations of our democracy are built, but they are asked to embody them (Justice Jean Beetz, Introduction of the first speaker at the conference marking the 10th anniversary of the Canadian Institute for the Administration of Justice, observations collected in *Mélanges Jean Beetz* (1995), at pp. 70-71).
>
> Accordingly, the personal qualities, conduct and image that a judge projects affect those of the judicial system as a whole and, therefore, the confidence that the public places in it. Maintaining confidence on the part of the public in its justice system ensures its effectiveness and proper

functioning. But beyond that, public confidence promotes the general welfare and social peace by maintaining the rule of law. In a paper written for its members, the Canadian Judicial Council explains:

> Public confidence in and respect for the judiciary are essential to an effective judicial system and, ultimately, to democracy founded on the rule of law. Many factors, including unfair or uninformed criticism, or simple misunderstanding of the judicial role, can adversely influence public confidence in and respect for the judiciary. Another factor which is capable of undermining public respect and confidence is any conduct of judges, in and out of court, demonstrating a lack of integrity. Judges should, therefore, strive to conduct themselves in a way that will sustain and contribute to public respect and confidence in their integrity, impartiality, and good judgment.
> (Canadian Judicial Council, *Ethical Principles for Judges* (1998), p. 14)

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

Re Therrien, supra at pages 74 to 76

50. The ethical duties of members of the judiciary do not depend on formalized codes or rules but, rather, they are a requirement of the judicial function, and are as much the result of the commitment made by judges in their oath of office as of the obligations inherent to the judicial function. Indeed, the objective of judicial ethics to which judges are subject is the preservation of the judicial function, which is essential to maintaining the rule of law.

Ruffo (Re), supra at paras 44 and 402

Canadian Judicial Council, *Ethical Principles for Judges* (Ottawa Canadian Judicial Council, 1998)

51. It is beyond question that judicial independence is essential to the rule of law in a democratic society. It is equally clear, however, that judicial independence does not require that the conduct of judges be immunized from scrutiny. Indeed, review of judicial conduct is essential to maintain public confidence in the judiciary. The following

passage, recently cited in *Cosgrove v. Canadian Judicial Council* (2007), 361 N.R. 201 (C.A.), is apposite:

> Justice Strayer expressed this principle as follows in *Gratton v. Canadian Judicial Council (T.D.)*, [1994] 2 F.C. 769, at paragraph 16 (cited with approval in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at paragraph 329):
>
> > Suffice it to say that independence of the judiciary is an essential part of the fabric of our free and democratic society. It is recognized and protected by the law and the conventions of the Constitution as well as by statute and common law. Its essential purpose is to enable judges to render decisions in accordance with their view of the law and the facts without concern for the consequences to themselves. This is necessary to assure the public, both in appearance and reality, that their cases will be decided, their laws will be interpreted, and their Constitution will be applied without fear or favour. The guarantee of judicial tenure free from improper interference is essential to judicial independence. **But it is equally important to remember that protections for judicial tenure were "not created for the benefit of the judges, but for the benefit of the judged**".
>
> However, judicial independence does not require that the conduct of judges be immune from scrutiny by the legislative and executive branches of government. **On the contrary, an appropriate regime for the review of judicial conduct is essential to maintain public confidence in the judiciary**: *Moreau-Bérubé v. N.B. (Judicial Council)*, [2002] 1 S.C.R. 249 at page 285. **[emphasis added]**
>
> *Cosgrove v. Canadian Judicial Council, supra* at paras 31 to 32
>
> *Moreau-Bérubé v. N.B. (Judicial Council), supra* at page 285

52. It is inherent in the within proceedings constituted under the procedure contemplated by the Act, that judicial independence is protected. Indeed, this was stated in *Ruffo (Re)*:

> The procedure contemplated in the C.J.A. strikes a balance between judicial independence and judicial ethics, as it permits the removal of a judge only where the results of a complete inquiry on the facts so justify.
>
> *Ruffo (Re), supra* at para 31

53. Beyond the issue of whether the within proceedings inherently afford adequate protection with respect to judicial independence, Justice Matlow has only questioned the jurisdiction of the Council on the basis of judicial independence. In so doing, this fails to consider the essential jurisdiction of the Council to determine if certain conduct might threaten the integrity of the judiciary as a whole. As was stated in *Ruffo (Re), supra*:

> […] Through the disciplinary process, which permits inquiries concerning judges, judges may be reprimanded or their removal recommended if their conduct is likely to threaten the integrity of the judiciary as a whole.
>
> *Ruffo (Re), supra* at para 58

54. The essential test the Council is to apply with respect to judicial misconduct is to determine if certain conduct is so manifestly and totally contrary to the impartiality, integrity and independence of the judiciary that the confidence of individuals appearing before the judge, or of the public in its justice system, would be undermined, rendering the judge incapable of performing the duties of his office. Accordingly, it is apparent that judicial independence is but one component of the standard by which conduct is to be assessed.

The Conflict Disclosure Complaint

55. Justice Matlow submits that the Inquiry Committee erred in placing a positive obligation to disclose information in respect of his communications with Mr. Barber or his earlier involvement with the Thelma Project either to his judicial colleagues or the parties in the SOS Application. Justice Matlow's submissions in this respect appear to be at least related to Justice Matlow's jurisdictional argument that the Council may not properly consider matters of judicial discretion, which would include determinations with respect to recusal.

> *Submissions of Justice Matlow*, para 213

56. In considering this issue, the Inquiry Committee addressed the issue of the applicable ethical principles that the Council should consider in light of the Conflict of Interest Complaint. The Inquiry Committee observed that judges have a duty to act in a reserved manner in order to preserve judicial independence and impartiality. With respect to Canadian Judicial Council's *Ethical Principles for Judges, supra*, the Inquiry Committee report is clear these are advisory only and not to be construed as a code of conduct. The Inquiry Committee also observes, that to maintain public confidence in the judiciary and respect for the rule of law, judges must project an image of integrity, impartiality and good judgment. The importance of promoting an appropriate image of the "one", i.e. an individual judge, is that it affects the image of the "whole", i.e. the judiciary.

Inquiry Committee Report, Part VII, paras 123 to 127

57. In respect of judicial independence, the Inquiry Committee Report observes that judicial independence is a "means" to the "end" of impartiality. As a consequence, the meaning of impartiality and the role of ethical principles, within the context of bias or reasonable apprehension of bias, is to be assessed from the point of view of a "reasonable, fair minded and informed person". In respect of conflict of interest, the Inquiry Committee addressed the issue of a judge's duty to disclose as a matter of judicial ethics.

Inquiry Committee Report, paras 130 to 132

58. The Inquiry Committee observed that the responsibility to identify conflicts, or the appearance of conflict, is that of the individual judge. As an ethical matter, the judge must act with the "objectivity expected of a judge" which is associated with the Inquiry Committee's view that, as a matter of public confidence, the public expects judges to apply "good judgment" in such circumstances.

Inquiry Committee Report, paras 136 to 140

59. As a consequence of the foregoing, in respect of the issue of disclosure, the Inquiry Committee stated the following:

> The Inquiry Committee is of the view that disclosure where circumstances warrant is a necessary consequence of the twin ethical duties of a judge: to adjudicate impartially and to preserve the appearance of impartiality. Disclosure is not for the purpose of obtaining consent for the judge to continue. Parties cannot consent to a judge acting in a manner that would be unethical. Disclosure is for the purpose of preserving the confidence of the parties to the proceeding, and the public generally, in the impartiality of the judiciary. It also ensures that the parties have the information and the opportunity to take any step they consider appropriate where they might come to a different conclusion than did the judge, as to whether a reasonable, fair minded and informed person could make a plausible argument in favour of disqualification.
>
> On those considerations, it would be prudent and preferable for the judge to disclose to the parties or their counsel the circumstances that caused the judge to make the assessment event in a case where a judge, acting with the objectivity expected of a judge, concludes that a reasonable, fair minded and informed person could not make a plausible argument in favour of disqualification. The Inquiry Committee cannot, however, go so far as to state that in such circumstances there is a positive duty to disclose. But, there can be no doubt that a clear ethical duty to disclose exists where the circumstances are such that it would be impossible for a judge, acting with the objectivity expected of a judge, to avoid concluding that a reasonable, fair-minded and informed person would have a reasoned suspicion of a conflict between a judge's personal interest and a judge's duty.
>
> *Inquiry Committee Report,* paras 145 to 146

60. Justice Matlow submits that the Council lacks jurisdiction on the basis that it purports to exercise appellate review of his decision with respect to recusal. Justice Matlow's position relies on the Report of the Council to the Minister of Justice of Canada in connection with the report of the Boilard Council. The Council's Report dealt with a judge's decision to recuse himself during a trial and to abandon the conduct of the trial. It is submitted that this report does not assist with respect to this issue, since it was not dealing with conduct of the judge prior to the commencement of the trial. Justice

Matlow's submission also relies on the 2004 Opinion of the Advisory Committee on Judicial Ethics. For the same reason, this opinion does not assist. The Advisory Opinion deals with the issue of a judicial decision as to whether or not to recuse oneself while acting judicially in open court. It also does not deal with conduct of a judge prior to a hearing.

61. Justice Matlow's Submissions misconstrue the nature of the Council's jurisdiction. The Council's jurisdiction includes the consideration of judicial ethics with a view to ensuring public confidence in the judiciary. As is clear from the following statement of the Supreme Court of Canada, standards of ethics and standard of recusation are mutually exclusive and distinct concepts:

> Ethical rules are meant to aim for perfection. They call for better conduct not through the imposition of various sanctions but through compliance with personally imposed constraints. A definition, on the other hand, sets out fixed rules and thus tends to become an upper limit, an implicit authorization to do whatever is not prohibited. There is no doubt that these two concepts are difficult to reconcile, and this explains the general nature of the duty to act in a reserved manner: as an ethical standard, it is more concerned with providing general guidance about conduct than with illustrating specifics and the types of conduct allowed. It is interesting to note in this regard the comments of Professor H. Patrick Glenn on the Code of Ethics adopted in 1987 by the Canadian Bar Association. They are of general application and particularly enlightening in this context: "It is, in short, a Code which instructs in how to act, and not in what to do" (see "Professional Structures and Professional Ethics" (1990), 35 McGill L.J. 424, at p. 438). **Moreover, the distinctive nature of ethical standards becomes apparent when they are compared with the standard for recusation** set out in art. 234 of the Code of Civil Procedure, R.S.Q., c. C-25. Article 234 contains a series of precisely defined criteria such as relationship, mortal enmity and conflict of interest, which when present make it possible to initiate recusation proceedings against a judge. **Recusation is therefore a necessary sanction for a violation that has already occurred or been perceived, whereas the primary purpose of ethics, in contrast, is to prevent any violation and maintain the public's confidence in judicial institutions. It goes without saying that the same legislative response is not required for these two separate concepts. [emphasis added]**
>
> *Ruffo v. Conseil de la magistrature, supra* at page 332

62. As previously detailed, Justice Matlow failed to take steps not to sit on the Divisional Court Panel and failed to disclose the Thelma Road Conduct and the Barber Conduct to the other members of the Divisional Court Panel and/or the parties to the proceeding.

63. In this regard, the decision in *Ruffo (Re)* is instructive. There, one complaint made against a judge of the Quebec Youth Court involved the judge failing to disclose her "friendly relationship" with an expert witness who testified in a proceeding before her. The Court, in finding a duty to disclose, addressed this issue in terms of the judicial duty of impartiality:

> It is accepted that the judicial duty of **impartiality** is a continuous one. The oath of office attests to this. The rights of citizens are preserved and their confidence in the judicial system is preserved at the price of a judge's constant vigilance. Primarily, then, it is a judge's duty to preserve this impartiality jealously and to ensure that it be both actual and apparent.
>
> Moreover, the presumption of impartiality that accompanies the judicial function serves a very precise objective, that of the **integrity of the judicial system**. This premise may not be questioned every time a person who comes before the court is dissatisfied with a decision. **Judges may err in fact or in law and be corrected on appeal. This does not mean, however, that the error arose from a lack of impartiality.**
>
> The *Code of Civil Procedure* requires a judge to declare any ground of recusation to which he or she is liable (article 236). This duty falls to the judge. The obligation to disclose does not automatically give rise to the obligation to recuse oneself. It is up to the judge to examine his or her conscience and decide whether he or she has the necessary impartiality and independence to hear or to continue to hear the case. **To ensure transparency, however, the parties must be notified in advance of grounds that could reasonably lead them to question the impartiality and independence of the judge. [emphasis added]**

Ruffo (Re), supra at paras 148 to 150

64. It should be noted that in *Ruffo (Re), supra* the judge submitted to the Court of Appeal that the duty to disclose under the Quebec *Code of Civil Procedure* did not apply to Youth Court proceedings. The Quebec Court of Appeal rejected this argument and adopted the statement made in *Dufour v. 99516 Canada Inc.* [2001] R.J.Q. 1202 (S.C.) that "[translation] the obligation to disclose proves essential to preserving the integrity of our judicial system. When a judge is of the opinion that an interest or some other valid ground for recusation could raise a reasonable fear of bias in the mind of a reasonable person, he or she must disclose it."

Ruffo (Re), supra at paras 151 to 158

65. Aside from the issue of whether a duty to disclose arises on the basis of the principles of natural justice, it is inherent in the judicial function as a component of the judicial duty of impartiality and, as such, is an essential ingredient to maintain the integrity of the judiciary.

THE REPORT DEFICIENCY COMPLAINTS

66. Justice Matlow submits that the Report of the Inquiry cannot be relied upon by the Council in fulfilling its mandate on the basis that the findings in the Inquiry Committee Report must be sufficiently complete and detailed to enable the Council to make an independent assessment of whether to accept or reject the Inquiry Committee's findings and recommendations and to develop its own independent conclusions. In this respect, Justice Matlow refers to paragraph 13 of the Inquiry Committee Report, as follows:

> The "findings" of fact that the Inquiry Committee includes in its report to the CJC must be sufficient, in both extent and detail, to enable the CJC to accept any conclusion drawn or recommendation made by the Inquiry Committee, or to reject it and develop its conclusion or recommendation on the basis of its own assessment of the facts relevant to the issue being considered. Therefore it is incumbent on this Inquiry Committee to make and express all of the finding of fact that may be necessary for the CJC to make any recommendation that it determines to be appropriate, independent of what this Inquiry concludes or recommends, and

> independent of what this Inquiry Committee concludes may be a sufficient factual basis to enable it to make a recommendation.
>
> *Inquiry Committee Report,* paras 6,7 & 13

67. Justice Matlow's submission in this respect raises two discrete issues: (1) first, whether the Council is confined in discharging its mandate to consider only the Inquiry Committee Report (the "Scope of Consideration Issue"); and (2) second, if the Council is so confined, whether the Inquiry Committee Report is "sufficient" in order to permit the Council to fulfill its mandate (the "Report Sufficiency Issue").

Scope Consideration Issue

68. Independent Counsel submits that the Council is not confined to considering only the Inquiry Committee Report in exercising its mandate and it is open to the Council, should it choose to do so, to consider the entire record of the hearing before the Inquiry Committee, including all material considered by the Inquiry Committee and the transcript of that proceeding.

69. It is submitted that the Council may properly consider the Submissions of Justice Matlow and the materials filed by him in exercising its mandate. In the event the Council determines there is any inappropriately excluded evidence or evidence that was not gathered before the Inquiry Committee, section 12 of the By-Laws permits the Council to remit matters back to the Inquiry Committee with specific directions. Also sections 63(2) and 63(3) of the Act makes clear that it is the Council who has the primary jurisdiction in respect of investigations under the Act and, as observed by the Inquiry Committee, an Inquiry Committee is simply a means to assist the Council. In this respect, the Inquiry Committee is by no measure the exclusive means by which evidence is gathered and legal determinations are made, that jurisdiction ultimately residing within the Council. Given the size and nature of the Council, it will often be impractical for the Council to exercise its jurisdiction in this manner and, in this respect. The mechanism of the Inquiry Committee and the ability of the Council to remit matters back to the Inquiry

Committee is a means to permit the investigation process under section 63 of the Act to be efficiently and most expeditiously achieved.

Report Sufficiency Issue

70. Justice Matlow advances six separate grounds of complaint in respect of the Report Sufficiency Issue, specifically, that the Inquiry Committee Report:

(a) excluded relevant evidence (the "Evidence Exclusion Complaint");
(b) failed to consider relevant evidence (the "Failure to Consider Relevant Evidence Complaint");
(c) made findings not supported by the evidence (the "Unsupported Findings Complaint");
(d) made findings in respect of matters of judicial discretion beyond its jurisdiction (the "Judicial Discretion Complaint");
(e) expanded the scope of investigation that were not part of the original complaint or which were referred to the Inquiry Committee (the "Expanded Scope of Investigation Complaint"; and
(f) failed to consider evidence in respect of the ultimate issue of whether public confidence had been undermined (the "Public Confidence Evidence Complaint").

Submissions of Justice Matlow, para 8

Evidence Exclusion Complaint

71. The Evidence Exclusion Complaint is made in respect of two discrete pieces of evidence:

(a) First, Justice Matlow, at paragraphs 72 through 75 of the Submissions of Justice Matlow, submits that numerous letters of support that

"provided general information about Justice Matlow's character and integrity" while admitted into evidence, were "on reconsideration" by the Inquiry Committee disregarded. Justice Matlow submits that this "character evidence" is relevant to Justice Matlow's integrity, and credibility; and is a mitigating factor with respect to penalty. In particular, in respect of the issue of credibility, Justice Matlow submits this is relevant in light of what Justice Matlow submits was a failure of the Inquiry Committee to accept certain "uncontradicted evidence on the two key questions of (a) his reasons for contacting John Barber in October 2005; and (b) the fact that he did not know he would be sitting on the SOS Application when he contacted Mr. Barber." (the "Letters of Support"); and,

(b) Second, Justice Matlow submits that the Inquiry Committee erred in refusing to accept a "community statement setting out the local communities support for Justice Matlow. This evidence is directly relevant to the ultimate issue of whether public confidence was undermined by Justice Matlow's conduct." (the "Community Statement")

Letters of Support, Exhibits 6, 6(a), 6(b), Book of Evidence, Tab 5(b)
Submissions of Justice Matlow, para 76

72. In respect of the Letters of Support the Inquiry Committee Report states:

> On reconsideration, the Inquiry Committee does not consider the letter relevant to the Complaint. Nothing in any of the letters bears upon the question of whether Justice Matlow has been guilty of misconduct, has failed in the due execution of his duties, or been placed, by his conduct or otherwise, in a position incompatible with the due execution of the office of judge. For these reasons the Inquiry Committee gave the letters no weight in its consideration of the matters before it, beyond establishing that numerous judges and lawyers hold a high opinion of Justice Matlow.

Inquiry Committee Report, para 33

73. The Letters of Support were admitted into evidence and considered by the Inquiry Committee. The Inquiry Committee concluded that the Letters of Support established that numerous judges and lawyers hold a high opinion of Justice Matlow. That conclusion was within the Inquiry Committee's contemplation.

74. Furthermore, the Letters of Support comprise part of the record before the Council, and have been filed by Justice Matlow.

75. The Community Statement was properly excluded. This issue is further addressed under the "Public Confidence Evidence Complaint" heading below.

Failure to Consider Relevant Evidence Complaint

76. Justice Matlow's submission list 11 items of evidence where it is alleged the Inquiry Committee failed to address in the Inquiry Committee Report. Justice Matlow submits that the omission of any reference to this evidence renders the Inquiry Committee Report "unfair, incomplete and does not provide a basis upon which the [Council] can make an independent, informed and fair recommendation on whether Justice Matlow should or should not be removed from office."

Submissions of Justice Matlow, para 69

77. In respect of these 11 items of evidence, it does not appear that any of this evidence is relevant to the issue before the Council, that is, an assessment of the conduct of Justice Matlow. In any event, to the extent such "evidence" is relevant, the Council is not limited to considering the Inquiry Committee Report and the Submissions of Justice Matlow have now brought this specific evidence to the Council's attention.

78. Justice Matlow submits that:

> The merits of the dispute at the heart of the Thelma Project are obviously not at issue in these proceedings. However, it is necessary for the Council to understand the nature of the concern underlying the Thelma Project in order to understand the nature and quality of Justice Matlow's conduct and, very importantly, to understand why he contacted *Globe & Mail* reporter John Barber in October 2005.
>
> We submit that the Inquiry Committee failed to accurately describe the nature of the dispute in the Thelma Project and that this fundamental error led them to disregard relevant evidence of whether Justice Matlow had a dispute "with the City", to disregard evidence of the Bellamy Report, and to disregard the uncontradicted evidence of why Justice Matlow contacted John Barber in October 2005.
>
> *Submissions of Justice Matlow*, paras 17 & 18

79. Justice Matlow submits that the Council was required to understand the "nature of the concern underlying the Thelma Project in order to understand the nature of Justice Matlow's conduct". The detailed consideration of that issue is irrelevant in assessing whether Justice Matlow's conduct was capable of constituting judicial misconduct. Such "evidence" or "issues", at their highest, are in the nature of providing either justification or excuse for the conduct of Justice Matlow. With respect to the issues of the Bellamy Report and why Justice Matlow contacted John Barber in October 2005, these are addressed under the following heading.

Unsupported Findings Complaint

80. Justice Matlow submits that the Inquiry Committee:

(a) "rejected the uncontradicted evidence that Justice Matlow contacted the Globe and Mail in October 2005 after he had read and because he had read [the Bellamy Report]" (the "Bellamy Evidence"); and,

(b) "declined to accept Justice Matlow's evidence he did not know he would be sitting on the SOS Application until Monday 3 October even though this evidence was uncontradicted and was consistent with the

> independent recollection of two other judges on the panel that heard the SOS Application" (the "SOS Knowledge Evidence").

Submissions of Justice Matlow, paras 70 & 202 to 209

81. In respect of Justice Matlow's submissions with respect to both the Bellamy Evidence and the SOS Knowledge Evidence, full consideration of evidence in respect of Justice Matlow's conduct subsequent to the cessation of the community opposition to the Thelma Project is set out in the Inquiry Committee Report. Justice Matlow's submissions in respect of both the Bellamy Evidence and the SOS Knowledge Evidence must be viewed in light of the record and the complete findings of the Inquiry Committee Report.

Submissions of Justice Matlow, paras 174 to 194

82. In summary, the Inquiry Committee stated that Justice Matlow's explanation that he delivered documents to Mr. Barber because it was "too late to get out of that mess" was "difficult to accept". The Inquiry Committee's primary basis for the statement it was "difficult to accept" Justice Matlow's evidence was that it was inconsistent with Justice Matlow's email of the 5th of October to Mr. Barber that invited or, in the words of the Inquiry Committee Report, "whets the appetite" for further contact between Justice Matlow and Mr. Barber. With respect to Justice Matlow's knowledge of sitting on the SOS Application prior to contacting Barber, after recounting of the evidence, the Inquiry Committee's finding was:

> The memory failures of Ms. Sessions and Ms. Skraban…result in the Inquiry Committee being unable to make, with an acceptable level of confidence, a finding of fact as to the timing of Justice Matlow's first knowledge respecting the possibility of his being assigned to sit on the SOS Application despite Justice Matlow's evidence on direct examination and cross-examination that he was not aware of his having been assigned to sit on the SOS Application when he sent the October 2 Email to Mr. Barber.

The Inquiry Committee, however, then observed that the evidence clearly established that Justice Matlow knew he was sitting on the SOS Application when he delivered documents to the Globe and Mail on October 5, 2005, and that Justice Matlow appeared to agree that at a subsequent meeting with editors at the Globe and Mail on January 4, 2006 he brought documents in respect of Thelma Project with him.

Inquiry Committee Report, para 77

83. Specifically, in respect of the SOS Application Knowledge Evidence, the Inquiry Committee Report makes no finding with respect to whether or not Justice Matlow was aware he was sitting on the SOS Application when he e-mailed Mr. Barber on October 2, 2005. In respect of the SOS Application Knowledge Evidence, however, the Inquiry Committee states the following:

> However, clear and cogent evidence establishes that Justice Matlow either (i) initiated the reopening of the Thelma Project-related dispute knowing he was, or was likely to be, sitting on the SOS Application, or (ii) knowingly failed to take steps to avoid sitting on the SOS Application when he had reopened the Thelma Project-related dispute. Whichever is the case, his actions in this regard constitute judicial misconduct of a very serious nature within the meaning of paragraph (b) of subsection 65(2) of the Judges Act.

Inquiry Committee Report, para 190

Judicial Discretion Complaint

84. Justice Matlow submits that the Inquiry Committee erred in considering matters that were beyond its jurisdiction, in particular, matters that intrude on judicial discretion and decision-making. These matters were addressed previously and Independent Counsel would refer the Council to the Ethical Rules and Judicial Discretion Complaint and Conflict of Interest Complaint headings above.

Expanded Scope of Investigation Complaint

85. Justice Matlow submits that the Inquiry Committee, in mandating allegations that involved the issue of whether Justice Matlow should have sat on any matters involving the City of Toronto that were ultimately included at paragraphs 35(k) and (l) of the Amended Particulars, acted beyond its jurisdiction on the basis that the substance of these allegations were never raised as part of any complaint or matter referred to the Inquiry Committee.

Inquiry Committee Report, para 92

86. In respect of the Expanded Scope of Investigation Complaint Inquiry Committee Report states:

> At the hearing, the Inquiry Committee dealt with the argument that the first two particulars set out in the December 4th Letter should not…be considered. The Inquiry Committee decided that:
>
> i. the Complaint clearly raises the issue identified in Items 1 and 2 of the December 4th Letter;
>
> ii. subsection 63(2) of the Judges Act and By-law 5(1) authorizes investigation into any relevant complaint or allegation brought to the Committee's attention; and
>
> iii. there is no unfairness as these matters were brought to counsels' attention on December 4, 2007 and there has been adequate time to prepare fully to address them.
>
> Counsel for Justice Matlow accepted that ruling at the time but he emphasized that he was not abandoning his position on jurisdiction. […]

Inquiry Committee Report, para 98 to 99

87. The Complaint indicates that as late as October 19, 2005, the City of Toronto believed that Justice Matlow's activism with respect to the Thelma Project had ended a year earlier. The City of Toronto was not aware that Justice Matlow had renewed it

through his interactions with Mr. Barber and the Globe and Mail. The City of Toronto did not learn of Justice Matlow's interaction with Mr. Barber and the Globe and Mail until after October 19, 2005. In the Complaint, the City of Toronto expressed its concerns about the obvious suspicion and perceived animosity toward the City of Toronto that Justice Matlow had been harbouring since the beginning of the Thelma Road matter. By written submissions to the Inquiry Panel dated July 13, 2006, Justice Matlow stated that during the period between 2002 and 2004, during which time he was most actively engaged with the Friends of the Village, he participated in five separate cases in which the City of Toronto was a party to the litigation. The Inquiry Panel stated that it had considered Justice Matlow's submissions. The resolution of the Council constituting an Inquiry Committee stated that it had, "considered the submissions made on behalf of the Honourable Ted Matlow…". It is submitted that the Complaint encompasses the issue of Justice Matlow's conduct in participating in the five prior cases involving the City of Toronto.

Written Submissions of Justice Matlow dated July 13, 2006
Canadian Judicial Counsel Resolution dated April 3, 2007

Public Confidence Evidence Complaint

88. Justice Matlow submits that the Inquiry Committee erred in failing to either admit or consider a number of pieces of evidence that related to local public praise and support for his conduct in respect of the Thelma Project including local press, letters of support and a community statement that was not admitted into evidence by the Inquiry Committee. In this respect, Justice Matlow submits that the Inquiry Committee erred in law and exceeded its jurisdiction by failing to consider evidence "with respect to the ultimate issue in the investigation which is whether public confidence has been undermined".

Submissions of Justice Matlow, para 222 to 230

89. Evidence in respect of the very legal issue to be determined by this Council is not helpful. Every piece of "evidence" sought to be introduced or considered by the Inquiry Committee in respect of this issue was in relation to the local community of Justice Matlow who shared his particular views in respect of the Thelma Project.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14th day of July, 2008.

_____

Douglas C. Hunt, Q.C.
Independent Counsel