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Report of the Inquiry Committee concerning the Hon. P. Theodore Matlow

Rapport du Comité d'enquête au sujet de l'hon. P. Theodore Matlow

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REPORT TO THE CANADIAN JUDICIAL COUNCIL

OF THE INQUIRY COMMITTEE APPOINTED UNDER SUBSECTION 63(3) OF THE *JUDGES ACT* TO CONDUCT AN INVESTIGATION INTO THE CONDUCT OF MR. JUSTICE THEODORE MATLOW, A JUSTICE OF THE ONTARIO SUPERIOR COURT OF JUSTICE

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PART I: INTRODUCTION

[1] This investigation arises pursuant to subsection 63(2) of the *Judges Act*, R.S.C., c. J-1 which provides that the Canadian Judicial Council (the "CJC") may investigate any complaint or allegation made in respect of a judge of a superior court. Subsection 63(3) authorizes the CJC to constitute an inquiry committee for the purpose of carrying out the investigation. Subsection 63(3) provides:

> (3) The Council may, for the purpose of conducting an inquiry or investigation under this section, designate one or more of its members who, together with such members, if any, of the bar of a province, having at least ten years standing, as may be designated by the Minister, shall constitute an Inquiry Committee.

[2] The CJC has established procedures (the "Complaints Procedures") for dealing with complaints made to it about federally appointed judges. It has also passed by-laws (the "*Inquiries and Investigations By-Laws*", SOR/2002-371) respecting the conduct of inquiries and investigations authorized by section 63 of the *Judges Act*.

PART II: THE COMPLAINT

(a) General Nature

[3] On January 31, 2006 the CJC received a letter from the solicitor employed by the City of Toronto (the "City"), and holding the office designated as "City Solicitor", making a complaint against the Honourable Theodore Matlow, a justice of the Ontario Superior Court of Justice. The City Solicitor wrote that:

> … Pursuant to subsection 63(2) of the *Judges Act*, R.S.C., 1985 c. J-1 ("the *Act*"), I am requesting that an investigation be commenced into the conduct of Justice Matlow of the Superior Court of Justice in Ontario with respect to his conduct towards; criticisms in media about; and allegations of corruption in the City. More particularly, I am requesting that an investigation be commenced to determine whether Justice Matlow should be removed from office for any of the reasons set out in paragraph 65(2)(b)-(d) of the *Act*.

[4] The letter outlined, in general terms, the complained of conduct. An appendix attached to the letter set out certain specifics of alleged conduct of Justice Matlow said to have occurred on numerous specified occasions during the years 2002, 2003, 2004 and 2005. Virtually all of the conduct during the first three of those years arose out of activities by Justice Matlow opposing a development proposal (the "Thelma Project") at

the intersection of Spadina Road and Thelma Avenue, the street where Justice Matlow resides. A substantial volume of material related to the conduct in respect of which the complaint was filed was also submitted with the letter and the appendix. For convenient reference to the essential elements of the complaint, the letter and appendix (the "Complaint") but not the additional volume of material, are attached as **Report Appendix I**.

(b) Background

[5] The background to this complaint can be set forth by quoting a few excerpts from the City Solicitor's letter:

> In brief, in early October, 2005, Justice Matlow presided over a panel of the Divisional Court in *SOS-Save Our St. Clair Inc. v. City of Toronto and Toronto Transit Commission* ("the SOS application"), an application by SOS to stop the St. Clair Avenue West Transit Improvements Project ("the Project"), a joint project of the City and the Toronto Transit Commission ("TTC") that calls for the reconstruction of the existing streetcar tracks on portions of St. Clair Avenue West in the form of a dedicated streetcar right of way. The outcome of that application will affect a large number of citizens of Toronto and its hearing was "highly notorious".
>
> On the morning of the second day of the two-day hearing of the application, I became aware that Justice Matlow was presiding over the SOS application. I was concerned as he had had extensive involvement as President of a ratepayers' association ("Friends of the Village") in a previous matter involving a proposed City-sponsored development located at the corner of Spadina Rd. and Thelma Avenue in Forest Hill Village (the "Spadina/Thelma matter"), the same neighbourhood as the Project.
>
> Justice Matlow had been very active in his opposition to the development at the heart of the Spadina/Thelma matter. In his capacity as the President of the Friends of the Village, Justice Matlow was interviewed by various media publications in 2002-2004 in which he was quoted as being critical of the development agreement. Among other claims, he alleged that the City's handling of the Spadina/Thelma matter was improper and a "whitewash". Justice Matlow also engaged in political lobbying, was harshly critical of the City and City staff in various communications, including in letters to Mayor Miller and the Attorney General of Ontario, and was involved as a party, counsel, and source of information in tribunal and legal proceedings in which the City was a party.

[6] Ultimately, in January 2004, on the advice of independent counsel that it had engaged to review and advise on the matter, the Council of the City of Toronto ("City Council") approved retroactively the proposed arrangement, between its agency the Toronto Parking Authority (the "Parking Authority") and the developer ("First Spadina"), to construct the Thelma Project as a mixed-use residential, commercial and parking complex. Sometime shortly thereafter, Justice Matlow and the other Thelma Avenue area residents discontinued their involvement in Superior Court and Ontario Municipal Board (the "OMB") legal proceedings and terminated their Thelma Project opposition activities.

[7] A further excerpt from the Complaint provides the remainder of the background by describing other alleged conduct of Justice Matlow in raising again, in 2005, his criticisms of action by the City and its officials in relation to the Thelma Project. That

conduct coincided with the hearing of an application (the "SOS Application") made by a group of St. Clair Avenue area residents, acting under the name SOS-Save Our St. Clair Inc., which opposed dedicating a portion of St. Clair Avenue to street car usage. The City Solicitor wrote that:

> When the recusal motion [in the SOS application] was brought on October 19, 2005, it was believed that the activism by Justice Matlow with respect to the Spadina/Thelma matter had ended in early 2004. Prior to the hearing of the motion, the City learned that Justice Matlow had been in communication with a municipal affairs columnist at the Globe and Mail in the days before he heard the SOS application. He advised the columnist that, in relation to the Spadina/Thelma matter, he had what he considered to be "evidence of misconduct" on the part of persons involved in Toronto municipal government and that the City had engaged in "really awful and devious things." He delivered documents to the columnist the afternoon before the hearing of the SOS application began. At that time, Justice Matlow knew that he would be presiding the next day over the SOS application, involving another City-sponsored development in the same neighbourhood. He did not advise counsel or his colleagues of his communications with the columnist.

(c) Complained of Conduct

[8] In the Complaint, the City Solicitor complained specifically that Justice Matlow:

(i) "… referred to the agreement with First Spadina as a 'secret deal with the developer'…";

(ii) "[described] the subsequent ratification by City Council [as being] 'tantamount to an admission the City felt legally vulnerable …' and 'they want to whitewash everything'";

(iii) "… compared the Spadina/Thelma matter to the notorious MFP computer leasing scandal and stated: 'I think they [the City] didn't want another scandal, so they wanted to hush the thing up and sweep it under the carpet'";

(iv) "[many of the news media articles express] Justice Matlow's views of the legality of the development agreement";

(v) " … appeared in person before the Administration Committee of the City … and before the Midtown Community Council … all to oppose the [Thelma Project]" and [by contacting a city councillor who was] "then a member of the Administration Committee, [all] with the intention to affect decisions made by the City";

(vi) "… wrote to the Auditor-General for the City [in which] he was unfairly critical of a City solicitor [by stating] that the opinion of the solicitor 'is blatantly wrong and ridiculous' and that 'if her report had been written as part of a first year law school examination, she would undoubtedly receive a failing mark'";

(vii) " … wrote to Mayor Miller, seeking his intervention to 'reverse a violation of law'";

(viii) "… told independent counsel (to whom he referred to as 'so called independent counsel' in his reasons on the motion to recuse) retained by the City [to advise respecting the Thelma Project], that 'devious acts had taken place', and advised independent counsel that the City could avoid a legal confrontation and adverse

legal media publicity, if the independent counsel gave the City sound advice, [thereby implying] a threat of legal proceedings against the City";

(ix) "… wrote to the Attorney-General of Ontario, seeking his intervention to 'require that the City comply with the rule of law' [and indicating] that his letter to the Attorney-General was made, in part, in an attempt to avoid that litigation";

(x) "… sought and was made a party to the appeal to the OMB brought by First Spadina";

(xi) "… was the source of information in an application brought in the Superior Court… by certain area residents … in which the City was named as a respondent";

(xii) "… threatened the City with legal proceedings on a number of occasions";

(xiii) "… the day before the hearing of the SOS application … delivered a package of documents to Mr. [John] Barber [a municipal affairs reporter at the *Globe and Mail*] and sent an email in which he explained the background of the Spadina/Thelma matter … [and] alleged activity akin to corruption on behalf of the City, stating:

> 'A group composed of local businesses who belonged to the local BIA and local residents, then started a court action to have the agreement with the developer set aside. That led to more *really awful and devious things* and, finally, without notice, city council met one night and approved the unauthorized agreement retroactively. In accordance with the legal advice that they then received, the applicants stopped the court action and gave up.
>
> For all of us what occurred was a betrayal of our community. We no longer believed that the new mayor was interested *in uncovering dishonesty at City Hall* and preserving existing neighbourhoods as he so often proclaimed…
>
> Despite my misgivings about getting involved in a public issue because of my judicial position, I decided to go ahead because the issue affected me directly as a resident and I was entitled to speak out against what I perceived to be *improper conduct by a group of city officials*." [Emphasis as expressed in the Complaint]

(xiv) [the complained of actions caused the City Solicitor to] "remain concerned of the allegations that Justice Matlow has publicly made against the City and, as well, the effect that these proceedings may have on any further matters before him, given his obvious suspicion of and perceived animosity towards the City."

(d) CJC Response to the Complaint

[9] After receiving the Complaint, and thereafter applying its Complaint Procedures, a panel constituted in accordance with those procedures submitted a report to the CJC recommending that an inquiry committee be constituted. By resolution on April 3, 2007, the CJC constituted an inquiry committee (the "Inquiry Committee") to investigate the complaint respecting the conduct of Justice Matlow. The CJC designated the Honourable Clyde K. Wells, Chief Justice of Newfoundland and Labrador, to be chairperson, and the

Honourable François Rolland, Chief Justice of the Superior Court of Quebec, and the Honourable Ronald S. Veale, Senior Judge of the Supreme Court of the Yukon Territory, to be members. Subsequently, the Federal Minister of Justice (the "Minister") designated Douglas M. Hummell of St. Catharines, Ontario, and Maria Lynn Freeland of Meadow Lake, Saskatchewan, members of their respective provincial bars, as the non-judicial members of the Inquiry Committee.

[10] In accordance with the *Inquiries and Investigations By-Laws*, the CJC appointed Douglas Hunt Q.C. to be independent counsel to present the case to the Inquiry Committee and Nancy Brooks was engaged as counsel for the Inquiry Committee to provide advice and other assistance to it. The Inquiry Committee was advised that Justice Matlow would be represented by Paul Cavalluzzo and Fay Faraday.

PART III: ROLE, RESPONSIBILITY AND APPROACH OF THE INQUIRY COMMITTEE

(a) General

[11] By-law 8(1) of the *Inquiries and Investigations By-Laws* provides that:

> 8.(1) 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.

[12] In carrying out its responsibilities, the Inquiry Committee must bear in mind that it is the CJC that is to report its conclusions, 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.

[13] That being the case, 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 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 findings of fact that may be necessary for the CJC to make any recommendation that it determines to be appropriate, independent of what this Inquiry Committee concludes or recommends, and independent of what this Inquiry Committee concludes may be a sufficient factual basis to enable it to make a recommendation.

(b) Standard of Proof

[14] In defining its role and responsibility, the Inquiry Committee must also bear in mind two further significant factors. First, this 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. Second, independent counsel acts impartially and does not bear any onus of proof. It is, therefore, necessary to give some

consideration to the standard of proof and the evidentiary standard by which the Inquiry Committee is to make its factual determinations.

[15] Independent counsel submits that the evidentiary requirement for establishing judicial misconduct is "clear and convincing proof based on cogent evidence". He cites the decision of the Ontario Judicial Council in *Re Douglas*, (2006) O.J.C. at paragraphs 7 to 9 in which that standard was adopted. Counsel for Justice Matlow has made no specific representation but accepted in his oral submissions the formulation put forward by independent counsel.

[16] The standard of proof and evidentiary standard do not appear to have been specifically considered by any previous CJC inquiry committee. The matter was, however, commented upon by Chief Justice McEachern in his separate but concurring reasons in the report of the CJC in the Bienvenue matter. There, he wrote:

> The standard of proof in this matter is the civil standard of a balance of probabilities. Because of the importance of the issues, the grounds must be powerfully persuasive.

[17] That conclusion is quite consistent with the preponderance of jurisprudence dealing with the standard by which tribunals make evidentiary findings in cases involving allegations of misconduct against professionals. However, a question that arises in those cases is: whether in professional disciplinary cases, the ordinary civil standard is modified by the evidentiary weighing process, or whether the standard is actually heightened by a required higher degree of probability.

[18] One line of cases holds that the standard of proof in professional discipline cases is actually higher than the ordinary civil standard. Typical of these is *College of Physicians and Surgeons v. (C.)J.*, [1990] B.C.J. No. 159 (C.A.) where the B.C. Court of Appeal accepted as correct the disciplinary committee's statement of the standard of proof, which was:

> The onus of proving the facts against [the doctor] rests with the College. To discharge that burden a high standard of proof is called for going beyond the balance of probabilities and based on clear and convincing evidence. The case for the College must be proven by a fair and reasonable preponderance of credible evidence.

[19] This line of cases can be contrasted against another line of cases holding that the ordinary civil standard applies – proof on a balance of probabilities. Those cases have, however, referred to the compelling nature of the evidence required. Although the language used is not consistent, courts in such cases have referred to the nature of the evidence required to support a decision made on the balance of probabilities as "strong and unequivocal": *Stetler v. Ontario Flue-Cured Tobacco Growers Marketing Board*, (2006), 76 O.R. (3d) 321 (C.A.) at para. 79; evidence capable of withstanding "careful scrutiny": *Nand v. Edmonton Public School District No. 7* (1995), 118 D.L.R. (4th) 519 at 523 (Alta. C.A.); and "proof that is clear and convincing and based on cogent evidence": *Re Bernstein and College of Physicians and Surgeons of Ontario* (1977), 15 O.R. (2d) 447 at 470-71 (Div. Ct.).

[20] The issue was discussed by the Ontario Court of Appeal in *Stetler v. Ontario Flue-Cured Tobacco Growers Marketing Board.* There, Feldman J.A. at paragraph 79 wrote:

> In my view, the respondents' argument is misconceived. There are only two standards of proof used in legal proceedings. In civil and administrative matters, absent an express statutory provision to the contrary, the standard of proof is on a balance of probabilities, while in criminal matters it is proof beyond a reasonable doubt. The well-established standard articulated in *Bernstein* and numerous subsequent cases is an evidential standard that speaks to the quality of evidence required to prove allegations of misconduct or incompetence against a professional. Thus, within the administrative context, it is accepted that strong and unequivocal evidence within the civil standard of proof is required where either the issues, or the consequences for the individual, are very serious.

[21] Likewise, the Nova Scotia Court of Appeal in *Dhawan v. College of Physicians and Surgeons of Nova Scotia* (1998), 13 Admin. L.R. (3d) 109 has also held that there is no third standard of proof in professional discipline cases:

> The burden of proof of professional misconduct is the burden of proof on a preponderance of evidence. It rests upon the professional society throughout the proceedings. "Clear" and "convincing" proof based on "cogent" evidence is required only because the gravity of the charge is such that something less is not sufficient to warrant the conclusion that the balance of probabilities has been tilted. […] [T]here is no third standard of proof applicable here which is higher than the civil standard.

[22] The Inquiry Committee concludes that the preponderance of jurisprudence indicates that any conclusions it reaches should be established on the basis of the ordinary civil standard – the balance of probabilities – applied in the manner that that standard is employed in professional disciplinary cases involving allegations of misconduct. That would necessitate having clear and convincing proof, based on cogent evidence.

(c) Approach and Reporting Method

[23] The number of and variety of allegations of misconduct, and the voluminous documentation submitted in support of the complaint and submitted by counsel during the course of the hearing, has presented challenges to the organization of this report. The Inquiry Committee concludes that its report will be most thorough, and facilitate most efficient access to the information and conclusions in it, if the various instances of complained of conduct are grouped into classes of a similar kind or related to a specific time frame or event. Because many individual documents bear upon allegations that fall into two or more classes, this approach results in some repetition of references to evidence.

PART IV: INQUIRY COMMITTEE PROCEEDINGS

[24] Immediately following appointment of the members appointed by the Minister, the Inquiry Committee met with independent counsel and counsel for Justice Matlow. A schedule was agreed upon for counsel to file any materials, for the Inquiry Committee to hear any preliminary motions to be made, and for hearings to be conducted in respect of the matter under investigation.

[25] On October 9, 2007 independent counsel delivered to the Inquiry Committee and counsel for Justice Matlow, a Notice of Hearing, attached to which was an appendix (the "Particulars") setting out particulars of the conduct of Justice Matlow that independent counsel would bring before the Inquiry Committee. The Particulars specified allegations of fact primarily related to the conduct of Justice Matlow, but also referred to other events that would bear on the matter under investigation. It then specified, as allegations of judicial misconduct, the following:

> 35. Having regard to the forgoing [*sic*], you have misconducted yourself and have 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 yourself in a position incompatible with the due execution of that office. In particular:
>
> a) Having regard to your involvement in the Thelma Road Project controversy, you did not take steps to ensure that you did not sit on the Divisional Court Panel hearing the SOS Application;
>
> b) Having regard to your involvement with Mr. Barber of the Globe and Mail you did not take steps to ensure that you did not sit on the Divisional Court Panel hearing the SOS Application;
>
> c) You failed to disclose details of your involvement in the Thelma Road Project controversy and your criticisms of the City to Justice Greer and Justice Macdonald prior to the commencement of the hearing of the SOS Application;
>
> d) You failed to disclose to Justice Greer and Justice Macdonald details of your dealings with Mr. Barber of the Globe and Mail, shortly before the hearing of the SOS Application;
>
> e) You failed to disclose to the City and the other parties details of your dealings with Mr. Barber of the Globe and Mail, shortly before the hearing of the SOS Application;
>
> f) On October 2, 2005 and following, you identified yourself as a "Superior Court Judge" and contacted Mr. Barber of the Globe and Mail concerning your criticisms of the City and your opposition to the Thelma Road Project with the intention of persuading Mr. Barber to write a story based on your criticisms of the City and your opposition to the Thelma Road Project;
>
> g) You participated and undertook a leadership role as the "President" of Friends in respect of the Thelma Road Project controversy;
>
> h) You used language that was intemperate, improper and inappropriate in the course of your participation in, and leadership role as, the "President" of Friends, with respect to the Thelma Road Project controversy;

i) You repeatedly communicated your status as a judge of the Ontario Superior Court of Justice to those engaged in the Thelma Road Project controversy and to the media. Your communications identified you as a "judge", "Justice Ted Matlow", or "Mr. Justice Matlow" or a "Superior Court Judge"; and

j) You publicly involved yourself in legal issues in the Thelma Road Project controversy that you knew our [*sic*] ought to have known were likely to come before the Ontario Superior Court of Justice, in particular, the processes before the OMB and the Application before the Ontario Superior Court of Justice.

[26] A hearing was held on November 19, 2007 to hear two preliminary motions. The first of these was brought by John Barber, a municipal affairs columnist with the *Globe and Mail*, through his counsel, to strike out a subpoena that had been issued to him to appear as a witness at the hearing. The Inquiry Committee dismissed Mr. Barber's motion that day and reasons for decision were issued on December 7, 2007. Those reasons are attached as **Report Appendix II**.

[27] The second motion was brought by Justice Matlow, through his counsel, to strike certain of the particulars and allegations of misconduct set out in the Particulars on the ground that the matters referred to in those allegations relate only to the exercise of judicial discretion, a matter over which this Inquiry Committee has no jurisdiction. The Inquiry Committee reserved its decision on that motion until it heard all of the evidence.

[28] The Inquiry Committee subsequently requested its counsel to write to independent counsel and counsel for Justice Matlow. That letter of December 4, 2007 (the "December 4th Letter") asked counsel to be prepared to address, at the hearing, whether the Inquiry Committee, in order to carry out its mandate, should consider four specifically identified particulars in addition to those specified by independent counsel in the Particulars.

[29] When the Inquiry Committee convened in Toronto on January 8, 2008, it first heard from counsel for Justice Matlow who objected to the Inquiry Committee considering the first two of the four additional particulars specified in the December 4th Letter. The Inquiry Committee did not accept the arguments put forward and decided that it would hear representations from counsel respecting all four of the additional particulars.

[30] Independent counsel then submitted a revised version of the Particulars to add the allegations of judicial misconduct reflecting the four matters specified in the December 4th Letter. Mr. Cavalluzzo agreed that these allegations of misconduct fairly reflected the four particulars set out in the December 4th Letter. In doing so, however, he served notice that he was not abandoning, in respect of those allegations, the position on jurisdiction that he had earlier argued. The four additional allegations were added as items (k), (l), (m) and (n) of paragraph 35 of the Particulars, thereby amending the Particulars (the "Amended Particulars"). Those four allegations of misconduct are:

k) Your conduct in taking the role that you did in the Thelma Road Project controversy, and in making out of court statements in relation to same, constituted conduct which, in the mind of a reasonable, fair minded and informed

person, would undermine confidence in your impartiality with respect to the City and issues relating to the City that could come before the courts;

l) Given your participation in the Thelma Road Project controversy, you failed to take steps to ensure that you did not sit on any matter involving the City;

m) You used the prestige of the office of judge to further your personal interests in the Thelma Road Project and, in particular, in the solicitation of support from elected officials and members of the media; and

n) Having been assigned on September 30, 2005 to sit on the SOS Application, you entered into communications on October 2, 2005, and subsequently, with Mr. Barber of the Globe & Mail on the subject of the Thelma Road Project, in the course of which you made allegations of impropriety by City officials.

The Amended Particulars and the December 4th Letter are attached as **Report Appendix III**.

[31] The hearing that convened on January 8, 2008 continued on January 9 and 10. At the commencement of the hearing, independent counsel and counsel for Justice Matlow filed with the Inquiry Committee a 14-page statement of facts upon which they were agreed ("Agreed Statement of Facts") and 52 appendices bound in 5 volumes. The Agreed Statement of Facts, without the appendices, is attached as **Report Appendix IV**. Witnesses called by independent counsel and by counsel for Justice Matlow gave evidence and submitted further documentary evidence. Independent counsel called one witness, John Barber. Justice Matlow called two witnesses, Ronald Lieberman and Judith Collard, neighbours of Justice Matlow. Justice Matlow also chose to testify. Counsel made submissions on the last day of the hearing.

[32] At the hearing, Justice Matlow's counsel submitted for admission as part of the record what he described as "a number of character letters from other judges and lawyers" expressing their personal views of Justice Matlow and their support of Justice Matlow. Any letters containing comments on facts relevant to the investigation had those comments redacted. Independent counsel expressed no objection to the admission of the letters even though there was no indication that the authors would be available for cross-examination. The material was admitted as part of the record.

[33] On reconsideration, the Inquiry Committee does not consider the letters 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 those 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.

[34] Because of the Inquiry Committee's concerns about a lack of evidence on a point of some significance (discussed later in this report), it reconvened the hearing on April 8, 2008 to hear evidence from two witnesses having responsibility for scheduling in the Divisional Court: Livia Sessions, the Registrar, and Rosemarie Skraban, the Deputy Registrar.

[35] What follows is first, the findings of the Inquiry Committee respecting the facts relevant to its investigation of the complaint; second, the conclusions of the Inquiry Committee as to the legal principles applicable to, and determination of the jurisdiction issue; third, identification of the matters to be addressed and the legal and ethical principles applicable; fourth, analysis of the allegations of misconduct found to be within the jurisdiction of the Inquiry Committee; fifth, the conclusions of the Inquiry Committee respecting the conduct of Justice Matlow; and, sixth, conclusions of the Inquiry Committee related to the recommendation that is warranted on the evidence.

PART V: FINDINGS OF FACT

(a) The origins of the Thelma Project

[36] For the purpose of enabling the Inquiry Committee to make this report, it is sufficient to summarize the salient facts as determined by the Inquiry Committee. Because Justice Matlow's explanation and defence of his conduct rely heavily on the impact on him personally of the development that was the subject of controversy, a full understanding of his position requires detailed consideration of the community effort to oppose the Thelma Project. It also requires separate consideration of his conduct subsequent to the cessation of community opposition to the Thelma Project.

[37] The content of the summary that follows is taken from the Agreed Statement of Facts and its appendices or derived from oral evidence or exhibits tendered at the hearing. With respect to facts derived from the Agreed Statement of Facts, the Inquiry Committee accepts that they have been established on a balance of probabilities, relying on clear and convincing proof based on cogent evidence. All other factual findings made by the Inquiry Committee have been established on the same standard.

(i) Personal Background

[38] Justice Matlow has been a judge since 1981 and a Justice of what is now the Ontario Superior Court of Justice since 1990. He has resided for many years on the north side of Thelma Avenue, a short dead-end street running east from Spadina Road in the mid-town Toronto area commonly known as Forest Hill Village. The residence of Justice Matlow is a very short distance from the parking lot on which the Thelma Project was to be built. The owners of the residential properties in the immediate area, including Justice Matlow, believed the Thelma Project, in its final character, would have an adverse impact on nearby residential properties and on their community. Neither the existence nor the reasonableness of that belief has been challenged.

(ii) Thelma Project Proposal

[39] In October, 1999 Justice Matlow attended a meeting of community residents called by area members of the City Council to discuss a proposal for a joint venture between the City-owned Parking Authority and First Spadina. The purpose of the joint venture was to develop a low-rise 24,000 square foot ten-unit residential and parking development on the parking lot owned by the Parking Authority and located at the corner of Thelma Avenue and Spadina Road. City approval was required for the joint venture and for the sale of the land to be used in the Thelma Project. The project, as it was described at the time, was understood to conform to zoning requirements.

[40] Sale of the land and the proposed joint venture were authorized by City Council in April, 2000. The parties to the proposal negotiated terms and, in November, 2001, entered into a development agreement premised upon the sale of the Parking Authority land. However, instead of the development described at the October, 1999 public meeting, the agreement provided for a 30,000 square-foot mixed-use commercial and residential development with parking facilities. In March 2002, the Parking Authority submitted a report to City Council seeking approval to amend the agreement to provide for a 40,000 to 47,000 square foot development. The revised draft agreement provided for a development "not greater than 50,000 square feet in order to permit a fifth and sixth floor to be added".

(b) Justice Matlow's Conduct in Organizing and Leading Community Opposition to the Thelma Project

(i) General

[41] Justice Matlow attended a further public community meeting convened in April, 2002 by the area City councillor. As expressed in the Agreed Statement of Facts:

> 21. On or after April 2002, Ted Matlow, along with other residents of Forest Hill Village, formed a single-issue, ad hoc neighbourhood group called The Friends of the Village opposed to the six-storey Thelma Parking Lot development. The "Friends of the Village" is the name by which they were collectively known. It was not a ratepayers' association or any other formal association.
>
> 23. At all material times, Ted Matlow was generally known as the "president" of Friends of the Village. This was not a formal legal title but was descriptive of his role as one of the leaders of the Friends of the Village.

[42] When he invited a group of area residents to meet at his house in April 2002, Justice Matlow was aware of the existence of the Advisory Committee on Judicial Ethics. He was aware that, on request from any federally appointed judge, the Committee would provide guidance and advice respecting ethical limitations on judicial conduct and involvement. On his own evidence, Justice Matlow was aware of and considered the Committee's opinion on "Municipal Democracy", published in June, 1999. In its entirety the advisory opinion reads as follows:

> **Issue:**
>
> Whether a judge can participate in municipal democracy by opposing an initiative put forward by his or her municipality?
>
> **Facts:**
>
> A judge has raised a question as to the permissible limits of participating in municipal democracy. The judge lives in an inner city area. There is currently an issue about the amount of through traffic in the area. The judge would like to write to the local municipal council member indicating opposition to a move by some citizens to halt through traffic in the judge's community.

Response:

> The Committee is of the view that there is no objection to the judge's writing the proposed letter provided it is on private or plain note paper. As a ratepayer and citizen the judge is entitled to have and express views on a purely local and municipal question provided, of course, that the judge realizes that in so doing the judge must be disqualified from any participation in any litigation arising from the matter.

[43] Certain members of the Friends of the Village (the "Friends"), including Justice Matlow, attended meetings with and wrote letters to officials of the City and to others, and made representations respecting their concerns with the proposed increase in the size of the project and the impact it would have on them and their community. As a result of those representations, the proposed increase was limited and the Parking Authority and First Spadina executed an amendment to their agreement to provide for the development of approximately 30,000 square feet, not exceeding four stories above grade, comprising residential units primarily with a small retail component and parking facilities.

[44] First Spadina sought a zoning amendment which, it would appear, the City did not deal with in a manner acceptable to First Spadina. First Spadina appealed to the OMB and its appeal was scheduled to be heard on January 12, 2004. On December 8, 2003, Justice Matlow brought a motion seeking status for himself at the OMB hearing. His motion, also returnable January 12, 2004, sought an adjournment of the hearing of First Spadina's OMB appeal until proceedings then being commenced in the Superior Court of Justice to determine the validity of the agreement between First Spadina and the Parking Authority could be heard and the validity of the agreement determined. He swore and filed an affidavit in support of his motion.

[45] On December 22, 2003, twenty-four local area residents and business owners commenced an application in the Superior Court of Justice seeking determination of the validity of the agreement between First Spadina and the Parking Authority. Justice Matlow was not a named party to the litigation. The oral evidence of Ronald Lieberman at the hearing, adopted by Justice Matlow as his own evidence on the matter, indicates Justice Matlow was very significantly involved in the preparation of the pleadings related to the application and advising in respect of it. He was also mentioned numerous times in the affidavit of Ronald Lieberman, filed as evidence in support of the application, as providing some of the information sworn or as having taken an action described in the affidavit. Copies of letters Justice Matlow had written to the Mayor of the City and to the Attorney General of Ontario were attached as exhibits to the Lieberman affidavit, as were the legal opinions obtained by the Friends that were addressed "c/o The Honourable Justice Ted Matlow".

[46] One of the exhibits to the Lieberman affidavit, the letter (by email) to the Attorney General, confirms the level of personal involvement of Justice Matlow in the Superior Court proceedings. After describing the background to the dispute with the City, Justice Matlow wrote:

> The Friends has tried, without success, to persuade the City to repudiate the signed agreement because it was not approved by Council and is, therefore, null and void. We

> are, therefore, contemplating the institution of legal proceedings to seek a declaration that the agreement is null and void.
>
> However, before we actually start proceedings, we ask that you intervene to require that the City comply with the rule of law. You, as the Attorney-General, do have the right to intervene, and I respectfully suggest that it is incumbent on you to do so in these unusual circumstances. Indeed, if we have to go ahead with litigation, the court may ask us whether we had asked the Attorney-General to intervene before we turned to the court for relief.

[47] Justice Matlow's motion to the OMB and his supporting affidavit provide further confirmation of his personal involvement with the Superior Court application. In the OMB motion, he wrote:

> If the appeal were to proceed before the legality of the agreement is determined, the appeal may turn out to be a wasted effort if it is ultimately determined that the agreement is null and void. Accordingly, I would like to be spared the effort and cost of participating in this appeal until the legality of the agreement is determined.

In his supporting affidavit, he deposed:

> Nevertheless, in order to ensure that the issue of legality of the agreement of purchase and sale is determined correctly, a group of members of the Friends, but not the Friends, are preparing to make an application to the Superior Court of Justice for a declaration that the agreement of purchase and sale is null and void. Much of the preparatory work for the application has been completed and the application will be formally commenced by the end of December, 2003. It is likely that a hearing for the application will take place early in 2004 and that the Court's judgment on the issue will be rendered shortly thereafter.

[48] At the time, there was a Superior Court of Justice protocol "to govern cases in which judges or their families are litigants or witnesses". On December 28, 2003, Justice Matlow sent an email to the Chief Justice of the Superior Court, the regional senior judge and the scheduling judge, advising them of the style of cause of the case in the Superior Court, the Court file number and stating that it involved "an agreement that affects a property very close to my own". He also wrote:

> Although I am not an applicant, the applicants are all members of the Friends of the Village, a single issue association of residents of my neighbourhood who are affected by the issues raised. I am the president of the Friends.
>
> It may be that you, or one of you, will want to decide that the application should be heard by a judge from another city. I have no preference.

[49] On January 2, 2004 the City filed with the OMB a motion and what it described as "a response to the Motion to be made by Ted Matlow to the Ontario Municipal Board". The City's motion also sought an adjournment of the hearing of First Spadina's appeal before the OMB pending a decision by the Superior Court of Justice on the

application commenced by some members of the Friends. The requested adjournment was granted by the OMB on January 12, 2004. By the same order, Justice Matlow was made a party to the OMB appeal and the Friends were included as a "participant".

[50] From the very beginning of the Friends, Justice Matlow assumed a leadership role. The Agreed Statement of Facts indicates that he "… assumed a central, but not exclusive, public role as one of the spokespersons for the Friends…". On his own evidence, the initial meeting took place at his residence and at his invitation. Without formalization he assumed the role of "president" and, in a variety of circumstances, he and others represented that he was president of the Friends. Indeed, in his email of October 5, 2005 to John Barber he wrote "I should tell you that fate determined that I should be one of the leaders of the opposition to this project". In their testimony, Ronald Lieberman and Judith Collard attributed to Justice Matlow leadership of the community effort to resist the proposed Thelma Project. They also emphasized the gratitude of the community to him for having done so.

[51] The Inquiry Committee is satisfied that clear and cogent evidence establishes the leadership role played by Justice Matlow in the political controversy between the City and the Friends.

(ii) Meetings and Correspondence with Politicians

[52] In his leadership role with the Friends, Justice Matlow became involved in meetings with and representations to politicians and others with a view to furthering the Friends' interests. In his oral evidence, Justice Matlow explained his contacts with councillors and others by expressing the view that "there was no way that I could conduct an effective challenge without doing those things, and I did them because my own house, my own property, my own life were directly threatened by what was about to take place". It is clear from Justice Matlow's own evidence that the political representation approach was a deliberate strategy. On direct examination, he said:

> … somewhere along the road there was going to have to be a rezoning of the parking lot.
>
> I thought ideally we would have to object to the rezoning to facilitate this very large building that was going to go there. I also knew that that would require us to engage lawyers and planning experts and traffic experts, and I didn't know what else, and I was pretty certain that the cost of doing all of that would be prohibitive. So we had to develop another approach where we could put forth an effective challenge, but on the cheap.

[53] The Agreed Statement of Facts establishes that Justice Matlow:

(i) with two other members of Friends, met with the then Mayor of the City to express their criticisms of the Thelma Project;

(ii) appeared in person before the City's Administration Committee on May 28, 2002 to express concerns about the Thelma Project;

(iii) sent an email to Councillor Holyday, a member of the City Administration Committee, on October 11, 2002 seeking an opportunity for himself, "and other members of our group" to address the Committee when the Thelma Project was scheduled to come before the Committee;

(iv) appeared before the Mid-town Community Council on July 8, 2003 to express his objections to the Thelma Project;

(v) met with the Auditor General of the City on August 22, 2003 and on September 3, 2003 he sent an email to the Auditor General deprecating an opinion expressed by a lawyer employed by the City Solicitor;

(vi) sent an email to the Attorney General of Ontario, on November 6, 2003, seeking his intervention in the Thelma Project matter;

(vii) on November 13, 2003 wrote to the Mayor of the City and all members of the City Council on behalf of the Friends seeking the Mayor's intervention to "reverse a violation of law";

(viii) met and corresponded through email, on a number of occasions, with the independent outside counsel that the City had appointed to review and advise with respect to the Thelma Project controversy; and

(ix) in an article in the Town Crier ONLINE.CA (the "*Town Crier*") was identified as an Ontario superior court judge and was quoted as having said "we lobbied almost every member of City Council and the Administration Committee to say this was a bad deal for the City and for residents".

(iii) Use of the title, "Justice"

[54] In a great many of the references to him in the documents submitted to the Inquiry Committee Justice Matlow was identified as a judge of the Superior Court of Justice. In the majority of those instances there is no indication where knowledge about Justice Matlow's judicial position came from, but it is clear that virtually all persons with whom he was dealing on behalf of the Friends knew he was a judge and frequently identified him as such. Virtually all of the news media articles identified him as a judge, as did the orders issued by the OMB. The Inquiry Committee notes that the OMB is subject to judicial review by the court of which Justice Matlow is a member.

[55] Justice Matlow identified himself as a Justice of the Superior Court in a number of instances including:

(i) The email he sent to Patrick Martin of the *Globe and Mail* on August 12, 2002, seeking an introduction to John Barber, and the initial email he sent to John Barber on August 19, 2002 in which, after identifying himself as chairperson of the Friends, he also wrote: "As an aside, I am a Superior Court Judge. The role that I am playing is unusual for a judge to assume but, in these circumstances, is justified."

(ii) The fax cover page he used to forward by fax an email he had been unsuccessful in attempting to send to the Auditor General of the City, bore the heading "Justice Ted Matlow".

(iii) The letter he wrote to Mayor David Miller on November 13, 2003, copied to all members of City Council, in which he identified himself as president of the Friends, was written on otherwise plain paper bearing the heading "Justice Ted Matlow".

(iv) The application he made to the OMB on December 8, 2003 seeking adjournment of First Spadina's appeal, pending determination "in a proceeding about to be commenced in the Superior Court of Justice", was supported by his affidavit in

which he deposed that: "although I am a judge of the Superior Court of Justice and would prefer not to be involved in this appeal, I and my property are directly affected adversely by the proposed development and I have a direct interest in the developer's appeal"; and that, "I am also, uncharacteristically, the president of the Friends of the Village …".

(v) The email sent by Justice Matlow to John Barber on October 2, 2005 stated "I am a Superior Court judge and was, until recently, the president of the Friends of the Village".

(vi) The package of material Justice Matlow delivered to John Barber on October 5, 2005 was accompanied by a note bearing the crest of the Ontario Court of Justice and expressed to be with the compliments of "the Honourable Mr. Justice Ted Matlow".

(iv) Involving the News Media

[56] Justice Matlow initiated involvement of the news media at an early stage to promote his opposition and the opposition of the Friends to the Thelma Project. He did so with a view to persuading reporters and editors to write articles that would draw public attention to the controversy. In his direct evidence he stated:

> Throughout this whole thing, I think the documentation shows that part of our strategy in dealing with this was to raise the profile of the disputes. It was only by having transparency, by having this become a public issue where people would know what the issue was, could understand it, that I thought we stood a chance of succeeding, and so I didn't hesitate to explain the issue to anybody who would ask me…

[57] In some instances Justice Matlow initiated and promoted news media attention and in others he was responding to inquiries from the media. In particular, with respect to initiating involvement with the news media:

(i) On August 12, 2002 he sent an email to Patrick Martin at the *Globe and Mail* advising of his "entry into municipal politics on a single issue" and asserted that "I'm allowed to do this despite my being a judge because it affects me directly as a homeowner…". In the email, he explained the developments to date with respect to the Friends and the project they opposed and went on to assert:

- "The story of this absurd proposal includes elements of stupidity, political intrigue and, perhaps, dishonesty. I have never before seen anything like it."
- "The reason that I write to you is to ask for yur [*sic*] help in arranging an introduction for me to one of the Globe's columnists, or editorial writers so that I can provide the details that I have…"
- "… My story is one of broad public interest … it is not just about a crummy little parking lot … and it would make a good story for the Globe too."

(ii) Sometime prior to August 19, 2002 he contacted Belle Ross with the request that she arrange an introduction of Justice Matlow to John Barber.

(iii) On August 19, 2002 he sent an email to John Barber in which he wrote:

- "I have a story which I would like to share with you which I thing [*sic*] would be of great interest to your readers…"
- "I am the chairman of an ad hoc committee of Village residents which has submitted a petition to City Council bearing about 2000 signatures…"
- "As an aside, I am a superior court judge…"
- "… The role that I am playing is unusual for a judge to assume but, in these circumstances, is justified."

(iv) On December 6, 2003 he sent an email to "undisclosed-recipients", a copy of which was produced from the records of the *Globe and Mail*, in which he stated "the following is the text of an email message I sent today to each member of Toronto City Council". There follows an email addressed "Dear Councillor" and includes the following comments:

- "A scandal similar to the well known computer leasing scandal, but larger in scope, is playing out before your eyes…"
- "Although we oppose the development for many reasons, this message is intended to draw your attention to only one of them, the development is proceeding contrary to law…"
- "… City Council has been misled and the wool is being pulled over your eyes…"
- "There are two important reasons which [*sic*] the development is contrary to law."

The email then sets out an explanation for each of the two reasons why he expresses the view that the development is "contrary to law". The email thereafter also states that:

- "It is my respectful view that, if the new administration wishes to conduct the affairs of the City in an honest and transparent manner, you should not ignore the contents of this email message to you…"
- "If you wish to talk to me about this either on the telephone or in person, I am available at your convenience. I have documentary proof of everything I have said and I am anxious to share it with you…"

(v) On February 2, 2004 he sent to "Undisclosed-Recipient" an email, a copy of which was produced from the records of the *Globe and Mail*, in which he stated:

- "I regret to report that the Friends of the Village has decided to terminate the pending litigation challenging the development planned for the municipal parking lot on Spadina Rd. and Thelma Ave."

- "We regard what City Council did as a betrayal and a whitewash of the actions of those City and Parking Authority officials who have taken matters into their own hands and acted contrary to the authority conferred by City Council."

[58] In addition to the foregoing media contacts initiated by Justice Matlow, the documents attached to the Agreed Statement of Facts contain numerous reports from media publications in which he is stated to be the source of specific information reported or is expressly quoted. These include the following:

(i) A *Town Crier* article dated July 26, 2002 which was headlined, "Here comes the judge" containing amongst others, the following comments:

- A superior court judge is leading a group of Forest Hill residents in a battle with the city's parking authority over plans to put a municipal parking lot underground and build a condo development.

- Ontario Superior Court Justice Ted Matlow calls a plan by the authority to sell land at the corner of Spadina Rd. and Thelma Ave. a "backroom deal" that shouldn't have been allowed in the first place.

- "The parking authority is not in the business of maximizing revenues, it is in the business of providing parking in the city of Toronto. It must act in what is in the broad public interest," he said.

- Meanwhile, Matlow finds himself in the spotlight, even though it didn't start out that way, he said. He wanted to battle the authority on his own, but his neighbours, the Friends of the Village residents' group and local businesses joined his fight after they learned of the judge's plans.

- "I am conscious of the limits that (being a judge) puts on me with respect to speaking out publicly on issues like this. But I am also a citizen of this country, I am a ratepayer, I am a taxpayer and a homeowner. And I have the same rights to protect my property and my way of life just as any citizen does," he said.

- He's also certain that city officials will likely accuse him of using his clout as a judge in the debate, even though Matlow is certain he's acting well within the guidelines judges must follow when it comes to steering clear of partisan politics.

- "They will comment, but I can take the heat. I won't back off," Matlow said.

- "I don't think a hassle between me and the parking authority is going to interfere with my ability to serve as a judge".

(ii) A *Town Crier* article dated February 3, 2003 containing the following:

- "The city owns the land," explains Ted Matlow, a local resident who was instrumental in the fight to stop the development.
- "The parking authority entered into a secret deal with the developer to build a six-storey retail condo project with plans for public parking underground," says Matlow, an Ontario superior court judge."
- "We lobbied almost every member of city council and the administration committee to say this was a bad deal for the city and for residents," says Matlow.
- In the end the message is "you can fight City Hall and win," concludes Matlow.

(iii) A *Town Crier* story dated September 19, 2003 containing the following:

- Another option that Friends of the Village are looking at, if the auditor general's response is not favourable, is "seeking a declaration from the Superior Court Justice (Federal Court) that the original proposal did not authorize the contract. And we would ask that the OMB hearing be on hold until the court decision is rendered," explained Ted Matlow, a member of Friends of the Village, a judge and an area resident.

(iv) A *Town Crier* article dated January 5, 2004 containing the following:

- A group of local residents and businesspeople have retained their own lawyer Kerry Jameson who will also argue the same thing, explained local resident Judge Ted Matlow on Jan 4.
- Then, of course, the developer's lawyer Adam Brown will argue that the OMB hearing should proceed on planning principles.
- Even if that happens, the contract matter will need to be decided by a court, stated Matlow.
- Meanwhile, Matlow, Ron Lieberman other local residents and businesspeople are prepared to get an injunction to stop the development (should the OMB approve it) and take this to court.

(v) An article in the *National Post* dated February 9, 2004 reporting the following:

- "People in our community rose up in arms because we felt we had been manipulated," said Mr. Matlow, who is an Ontario Superior Court Judge and president of a citizens group formed to protest the development.
- Mr. Matlow's band of Forest Hill residents are hoping a May 25 date in Ontario Superior Court stops First Spadina Inc.'s expansion hopes.

- Mr. Matlow says it is tantamount to an admission the city felt legally vulnerable but fears that if council has backtracked properly, it could end the viability of the suit. “They want to whitewash everything,” Mr. Matlow said.

- Mr. Matlow has written letters to David Miller since he took over the Mayor’s office, but he has not heard back.

- “I was hopeful that the Mayor would uphold his election promises to restore integrity to government.”

(vi) A *Town Crier* article dated March 19, 2004 containing the following:

- Friends of the Village, led by locals Ted Matlow and Ron Lieberman, hired a lawyer who said the contract should be torn up.

- “The whole idea of getting an outside solicitor was ours,” explains Matlow, an Ontario judge, who resides within walking distance of the proposal.

- “The outside solicitor agreed that the agreement (contract) had not been authorized by city council, but he said the change was not material. He was asked to recommend what they (city council) should do to get out of this mess and he recommended approving the agreement retroactively and that is what they did in camera (closed door meeting),” Matlow says.

- “The people who signed this agreement on behalf of the city for a mixed-use 30,000 square foot development were not authorized to do this. The law required it to be approved by city council. The second thing is there should have been transparency. There should be no secret deals in back rooms between the parking authority and developers,” Matlow says.

- “We were presenting evidence to city council and the mayor (David Miller) that this was not just happening with equipment but also real estate,” says Matlow. “I think they didn’t want another scandal, so they wanted to hush the thing up and sweep it under the carpet.”

- In this case, could the city have tied the land sale to a specific type of development? “Absolutely, unequivocally, yes. I think they tried to do it, but botched the job,” says Matlow.

- It is all very disillusioning, says Matlow. “I expected a lot more form [*sic*] city council and the mayor. I though [*sic*] council would open up the process and restore integrity and listen to the neighbours.”

(vii) A *Town Crier* article dated July 20, 2004 reporting the following:

- "I could no longer recommend to our members that they continue to incur costs," says the group co-head, Ted Matlow, a judge who lives down the street from the proposal.

- "We're not happy with the outcome, but sometimes you have to except [*sic*] the inevitable and I'm glad we did it. It was an awful thing they tried to do and succeeded in doing, but it is better to stand up and make your point and get knocked down trying," says Matlow.

[59] On cross-examination, Justice Matlow agreed that he and the others involved in the Friends "wanted to raise the profile of this issue into a much larger issue of controversy with the City". That acknowledgement, together with the content of his various representations to the news media and the interviews with the news media, leads the Inquiry Committee to find as fact that Justice Matlow was deliberately promoting public controversy respecting the Thelma Project for the purpose of furthering his and his neighbours' personal opposition to the Thelma Project.

(v) Intemperate Language and Inappropriate Comments

[60] The nature of comments made by Justice Matlow during the course of his leadership of the Friends is reflected in emails and correspondence originating with Justice Matlow and news media stories, which were submitted as part of the Agreed Statement of Facts. Excerpts from emails and correspondence containing language and comments that give rise to concern include the following:

(i) From an email he sent to Patrick Martin of the *Globe and Mail* on August 12, 2002 the comment that:

> The story of this absurd proposal includes elements of stupidity, political intrigue and, perhaps, dishonesty. I have never before seen anything like it.

(ii) From an email he sent to Jeffrey Griffiths, Auditor General of the City of Toronto, on September 2, 2003 the comment respecting a City staff solicitor that:

> … in my view, her expressed views are blatantly wrong and ridiculous and if her report had been written as part of a first year law school examination, she would have undoubtedly received a failing mark.

(iii) From an email sent on November 6, 2003 by Justice Matlow to Michael Bryant, Attorney General of Ontario, the comments that:

> …We are, therefore, contemplating the institution of legal proceedings to seek a declaration that the agreement is null and void.
>
> However, before we actually start proceedings, we ask that you intervene to require that the City comply with the rule of law. You, as the Attorney-General, do have the right to intervene and I respectfully

> suggest that it is incumbent on you to do so in these unusual circumstances…

(iv) From a letter he wrote on November 13, 2003 to Mayor David Miller, the statement that:

> It is critically important that you restore the rule of law and the principles of transparency and fairness to the governance of the City.

(v) From an email he sent on December 5, 2003 to David Boghosian, independent counsel retained by the City of Toronto, the comments that:

> … Now, as a result of the devious acts that have taken place, the developer stands to gain the same rights for the development of a much larger mixed commercial and retail development but for the same price as before.
>
> It is a deal that developers can only dream of… unless there is some underlying factor that explains what is going on.
>
> I respectfully ask that the advice that you give to your client take all of this into account. With sound advice from you, it may still be possible for the City to avoid a legal confrontation and much adverse publicity in the news media.

(vi) From an email he sent on December 8, 2003 to David Boghosian:

> This is what the law, in my respectful view, required.
>
> It was not given those facts and now we see why. The developer got a deal that kept getting sweeter and sweeter as time went on and the broad public interest, and the law, kept being ignored.

(vii) From an email he sent on February 14, 2004 to "Undisclosed-Recipient", provided from the archives of the *Globe and Mail*, the comment that:

> We regard what City Council did as a betrayal and a whitewash of the actions of those City and Parking Authority officials who had taken matters into their own hands and acted contrary to the authority conferred by City Council.

[61] The Inquiry Committee notes also the comments attributed to Justice Matlow in the *National Post* article of February 9, 2004, and in the *Town Crier* articles of July 26, 2002 and March 19 and July 20, 2004, set out above at paragraph 58.

(vi) Cessation of Organized Community Intervention

[62] At its meeting held January 27 to 29, 2004 City Council formally approved the development proposal. Sometime subsequently, the Friends ceased its efforts to oppose

the proposed development. With respect to the conclusion of the community efforts, Justice Matlow testified that:

> Eventually, in 2004, after City council ratified the existing agreement, the joint venture agreements … we gave up the battle. …
>
> But then in 2004, when we had lost the battle and we were closing up shop, I went back to the OMB on a day and said that I had no further interest in this, we have given up the battle, and I withdrew. I didn't want to be involved anymore.

[63] Media interviews involving Justice Matlow, emails sent by him, and the evidence of both Mr. Lieberman and Justice Matlow establish that real opposition activities had ceased by the end of January, 2004, immediately after the City formally approved of the Thelma Project as agreed upon by Parking Authority and First Spadina. All activity of the Friends in opposing the Thelma Project, including extrication from the OMB and Superior Court matters, ceased no later than August 12, 2004.

(c) Sitting on Other City Matters

[64] As established by the Agreed Statement of Facts, subsequent to 2002 and prior to assignment to sit on the SOS Application, Justice Matlow sat on five other matters in which the City was a party or intervenor. One of those involved a costs award, two involved insured claims, another involved application for judicial review of a decision of the Alcohol and Gaming Commission of Ontario which denied the City party status, and the other was an appeal, as between private parties, of an OMB decision on a minor variance in which the City was an intervenor. The City took no steps to have Justice Matlow recused in any of those five cases. With the exception of his December 28, 2003 email to the Chief Justice, and other judges having administrative responsibilities respecting the application made by some members of Friends to the Superior Court, Justice Matlow took no steps to avoid being assigned to any case involving the City of Toronto. In particular, he took no steps to avoid being assigned to cases involving planning and development decisions of the City or involving the City Solicitor and her staff.

(d) Justice Matlow's Conduct Subsequent to Cessation of Community Opposition to the Thelma Project

(i) Promoting Further Media Inquiry by John Barber into the Thelma Project

[65] As noted above, the circumstances that provoked Justice Matlow to respond to municipal decisions affecting his property in the Thelma Avenue area ceased to exist sometime during the early part of 2004. Notwithstanding this, on October 2, 2005 Justice Matlow attempted to initiate a personal campaign through the media to promote public debate about the actions of the City and its legal staff in relation to the Thelma Project. In Justice Matlow's words, on direct examination:

> I was so upset by what those two people in the legal department had been doing, I got the urge to renew that part of the issue and I dashed off an email to John Barber…

[66] There is nothing in the evidence to indicate any action by City officials provoking a response by the Friends or any of its members subsequent to the cessation of the organized community response in early 2004. No new or additional adverse impacts on personal or property rights were in issue after that time. On his own initiative and without any involvement by the Friends, Justice Matlow sent an email to John Barber on October 2, 2005 (the "October 2 Email"). The full text of the October 2 Email is:

> **Subject:** Municipal Misconduct Revisited
>
> I live on Thelma Ave near Spadina Rd. I am a Superior Court judge and was, until recently, the president of the Friends of the Village.
>
> A bit over a year ago, I wrote to you outlining what I considered to be evidence of misconduct on the part of persons involved in Toronto municipal government in connection with the sale of city-owned property on the corner of my street where there is a municipal parking lot operated by the Parking Authority. The property was sold without tender and at a ridiculously low price to a developer for the construction of a condominium-retail complex that no-one except the developer, for obvious reasons, and the Parking Authority, for less obvious reasons, wanted.
>
> I never received any acknowledgement or reply from you.
>
> My story is far from over. Strange things continue to occur. Perhaps now that you know, and have written about, what goes on at City Hall, you might like to hear my story.
>
> If you would, please contact me.
>
> Ted Matlow

[67] Two days later, on October 4, 2005, John Barber responded by email asking Justice Matlow to forward the relevant documents. Justice Matlow, who was in Sudbury as part of a Divisional Court panel at the time, replied within minutes, indicating he would provide the documents on his return to Toronto from Sudbury. He returned to Toronto that night. The next morning, October 5, 2005, Justice Matlow sent a further email to Mr. Barber. The email contained a brief summary of the essential elements of the Thelma Project and the neighbourhood's opposition to it. It also contained the following:

- I'm going to drop by the Globe in about an hour and drop off an envelope for you containing the bare essentials.
- I think that you will have to speak to me to understand what this is all about.
- For all of us what occurred was a betrayal of our community. We no longer believed that the new mayor was interested in uncovering dishonesty at City Hall and in preserving existing neighbourhoods as he so often proclaimed.

- If this little background paper interests you, I will very easily be able to provide or lead you to most of the other relevant documents and I will be able to fill you in on more.
- I should tell you that fate determined that I should be one of the leaders of the opposition to this project.

[68] Later that same day, October 5, 2005, on his way to his office to prepare to sit on the SOS Application which was set to be heard the next day, Justice Matlow stopped by the *Globe and Mail* offices and dropped off an envelope containing a package of documents related to the Thelma Project.

[69] On October 6, 2005 Justice Matlow chaired a panel of the Divisional Court to hear the SOS Application. Justice Matlow did not disclose that he had sent the emails to John Barber or delivered the documents to the *Globe and Mail*, or his earlier involvement in the Thelma Project controversy either to the other two judges sitting with him or to counsel involved in the SOS Application.

(ii) Coincidence of Barber Contact with the SOS Application

(A) Email to John Barber on October 2, 2005

[70] Nothing in the Agreed Statement of Facts addresses the coincidence of the early October, 2005 Barber contact with Justice Matlow's sitting on the SOS Application. In particular, nothing in the Agreed Statement of Facts addresses the extent of Justice Matlow's knowledge of the existence of, or his assignment to hear, the SOS Application at the time that he sent the October 2 Email. The only item in the Agreed Statement of Facts that bears on the issue of the time of awareness of being assigned to sit on the SOS Application relates only to Justices Greer and Macdonald, the other two judges on the Divisional Court panel. Paragraph 62 reads as follows:

> Justice Greer and Justice MacDonald independently recall that they learned on either Monday 3 October or Tuesday 4 October that they would be returning to Toronto to hear the urgent application.

[71] The affidavit of Graham Rempe, a solicitor acting on behalf of the City in the SOS Application indicates that discussion between the court staff and counsel, respecting the matter being heard by a panel instead of a single judge, took place on September 29, 2005. Determination of the extent of Justice Matlow's knowledge at various points in time during the week preceding October 6, 2005 as to his assignment, or the possibility of being assigned, to sit on the SOS Application is of significance to this investigation.

[72] When Justice Matlow was asked whether he was aware that he would be sitting on the SOS application when he sent the October 2 Email, he answered:

> No. I found out about that only on Monday. It could have been Tuesday. I think it was Monday when I was already in Sudbury. My panel of the Divisional Court was then scheduled to be in Sudbury for three days.
>
> The cases that we originally had scheduled for Thursday and Friday of that week had somehow been settled or had evaporated, and so <u>on Monday morning</u> when I got to my office assigned to me in Sudbury and I connected my court-provided laptop, <u>I got an e-</u>

> mail from Livia Sessions, the Divisional Court Registrar in Toronto, asking me whether I would be willing to return to Toronto on Tuesday night and take on a Divisional Court case in Toronto, and I think she gave me the name of it. [Emphasis added]

[73] Three emails, from Livia Sessions and Rosemarie Skraban, were identified in paragraph 61 of the Agreed Statement of Facts and attached as Appendix 42. One of them was sent by Livia Sessions at 3:34 on Friday, September 30, 2005 (the "Sessions Email"). The Sessions Email appears to assume the willingness and availability of the members of the panel to have already been confirmed. Neither of the other two emails asks whether Justice Matlow would be willing to return to Toronto on Tuesday to take on a case in Toronto. These three emails were the only emails in evidence before the Inquiry Committee. Therefore, on the record as it stood following the hearing that concluded on January 10, 2008, it did not appear that any one of those emails was the email to which Justice Matlow was referring.

[74] Accepting Justice Matlow's evidence that there was an email inquiring as to his willingness to return from Sudbury Tuesday night and sit on the SOS Application, it would have been sent to him prior to the Sessions Email. Thus, Justice Matlow's willingness and availability, to which he refers in his evidence, would have been cleared with him some time prior to the time of the Sessions Email. Without evidence from the authors of the emails it was difficult to make findings of fact respecting the point in time when Justice Matlow became aware he might be sitting on the SOS Application.

[75] Accordingly, on April 8, 2008 the Inquiry Committee reconvened in Toronto and heard evidence from the authors of the emails. Both witnesses had difficulty remembering details of the events during the week preceding October 6, 2005. Neither witness could recall whether any communications were had with Justice Matlow before the Sessions Email.

[76] With respect to the very explicit statement of Justice Matlow, discussed in paragraph 72, that he received an email from Livia Sessions inquiring as to his willingness to return to Toronto on Tuesday night and take on the SOS Application, Livia Sessions testified that she was unable to recall with certainty whether she did or did not make the specific inquiry. She stated that in the ordinary course she would not direct the panel that was sitting in Sudbury to return to Toronto without asking about their availability to do so but she could not recall whether in this instance she did so. Further, she stated that while it is her practice now to check whether members of the panel would be in a conflict of interest with a party of counsel, she could not say for sure that she did so in this instance.

[77] The memory failures of Ms. Sessions and Ms. Skraban, reasonably to be expected two and one half years after the event, result in the Inquiry Committee remaining 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.

(B) Email to John Barber and delivery of documents on October 5, 2005

[78] On Justice Matlow's evidence, by October 3, 2005 he was fully aware that he would be sitting on the SOS Application. Notwithstanding that awareness, the next day he sent a reply email to John Barber indicating his intention to deliver Thelma Project related documents on his return to Toronto. On October 5, 2005 he sent a further email to Mr. Barber containing the comments set out in paragraph 67 above. Those comments referred to actions by officials of a party to the SOS Application as "a betrayal of our community". The comments also contained a suggestion that Mr. Barber "will have to speak to [Justice Matlow] to understand what this is all about" and he offers to "provide or lead [Mr. Barber] to most of the other relevant documents" and suggests that he "will be able to fill [Mr. Barber] in on more".

[79] Later that day, Justice Matlow stopped by the *Globe and Mail* offices and provided documents relating to the Thelma Project controversy, as described in paragraph 68 above.

(iii) Further Media Contact in January, 2006

[80] At the start of the hearing on January 9, 2008 the Inquiry Committee was advised by independent counsel that he had learned the evening before that there had been a further contact by Justice Matlow with the *Globe and Mail* in addition to those disclosed in the Agreed Statement of Facts. Independent counsel advised the Inquiry Committee that on January 4, 2006 Justice Matlow met with two members of the editorial board of the *Globe and Mail*. On direct examination Justice Matlow acknowledged that he had requested the meeting but denied that he raised the Thelma Project controversy at the meeting. On cross-examination, however, when it was suggested that he took with him the documents he had left over in relation to the Thelma Project, the ones he had given to John Barber, he replied "I think you are right".

PART VI: DETERMINATION AS TO JURISDICTION

(a) General Principles

[81] Nothing in the *Judges Act* confers any jurisdiction on the CJC or the Inquiry Committee to consider any aspect of the exercise of judicial discretion in the course of a hearing or deciding a matter brought before a judge. However, improper behaviour during the course of a proceeding, such as abusive behaviour or language directed to a party, a witness, counsel or any other person or entity, may constitute conduct reviewable by an inquiry committee in the course of investigating a complaint, separate and apart from appellate review of any exercise of judicial discretion that is also part of that proceeding. That clearly was so in the case of the inquiry committee that investigated the conduct of Justice Jean Bienvenue of the Superior Court of Quebec. In that case, the conduct under review included comments made during the course of trial, both inside and outside the courtroom, during adjournment and during sentencing. Conduct reviewable by an inquiry committee can extend to and include the manner of performance or failure to perform the duties of a judge prior to the hearing, in the course of the hearing, during an adjournment or following the hearing.

[82] If an ethical duty exists, there is an obligation to perform it. There can be no discretion as to whether or not to do so. Thus, the conduct of a judge, and the related question of whether he or she has failed to conform to an ethical duty, cannot be shielded from investigation by the CJC or an inquiry committee merely because the conduct arose in relation to decisions the judge may have made in a judicial proceeding, which may or may not be subject to appeal.

[83] Some aspects of the behaviour and comments of a judge may involve only a question of conduct and the propriety or acceptability of that conduct must be judged on the basis of its conformity to ethical principles. Such conduct is not, in the ordinary course, subject to review by an appellate court; rather it is ordinarily subject to review only in the exercise of the jurisdiction conferred on the CJC by the *Judges Act*. Other aspects of the behaviour and comments of a judge will involve only a question of the exercise of judicial discretion and the propriety or correctness of that exercise of discretion is ordinarily reviewable only by the appellate court having jurisdiction. There can be circumstances, however, where the behaviour or comment may be challenged both as to its conformity to ethical principles and as to its compliance with legal principles applicable to the proceedings between the parties. In such a case, the same behaviour or comments of a judge may result in the exercise of jurisdiction both by an appellate court and by the CJC, without either trespassing on the jurisdiction of the other. Again, that is what occurred in the inquiry into the conduct of Justice Bienvenue.

[84] The exercise of appellate jurisdiction, or the right to exercise it, can no more oust the jurisdiction of the CJC to review the conduct of the judge in order to determine conformity to ethical principles, than the exercise of conduct review by the CJC can oust the jurisdiction of the appeal court to review the actions of the judge to determine compliance with legal principles.

(b) Analysis of the Jurisdiction Arguments

(i) In relation to Particulars 26 and 30 and Allegations of Misconduct 35(a) to (e)

[85] It is not in dispute that this Inquiry Committee has no jurisdiction to review the decision of Justice Matlow in the matter of the motion by the City that: (i) he recuse himself, (ii) the panel be struck, and (iii) the SOS Application be heard *de novo* by a re-constituted panel. Justice Matlow's decision in that motion is a matter of judicial discretion and only the appellate courts have jurisdiction to review matters that flow from his exercise of judicial discretion in respect of those matters. However, the propriety of his conduct related to the proceeding is reviewable by this Inquiry Committee in the course of investigating the complaint that his conduct does not conform to the ethical standards required of a judge.

[86] Justice Matlow asserts that it is clear from the Amended Particulars that his conduct and decision on the formal recusal are not the subject of this investigation. The Inquiry Committee agrees that his decision on the recusal motion is not a subject of this investigation. However, his conduct prior to sitting on the recusal motion, including his conduct prior to sitting on the SOS Application, is very much a subject of this investigation. The Complaint specifically states that Justice Matlow:

> … delivered documents to the columnist the afternoon before the hearing of the SOS application began. At that time, Justice Matlow knew that he would be presiding the next day over the SOS application, involving another City-sponsored development in the same neighbourhood. He did not advise counsel or his colleagues of his communications with the columnist.

Particulars 26 and 30 reflect that complaint. It is the conduct of Justice Matlow prior to the recusal application being made that is the subject of this investigation, not any aspect of his decision on the recusal motion.

[87] Justice Matlow also asserts that this Inquiry Committee has no jurisdiction to consider:

- Particulars 26 and 30 relating to his failure to disclose to the other members of the panel or the parties his involvement with the Thelma Project controversy and his subsequent dealings with Mr. Barber, and his failure to take steps not to be assigned to hear the SOS Application; and
- Allegations of misconduct 35(a) to (e) inclusive, relating to those failures to disclose and failures to take steps to ensure that he was not assigned to hear the SOS Application.

[88] With respect to those specific particulars and allegations of misconduct, Justice Matlow submits that his decisions on whether to take steps to ensure he did not sit on the SOS Application or whether to disclose particular information to the other judges or parties were decisions made prior to the hearing and in the absence of any motion. As such, they relate directly to and turn precisely on whether he was of the opinion that his conduct in the Thelma Project or in connection with Mr. Barber gave rise to a reasonable apprehension of bias or a conflict of interest. He argues that the principle that only appellate courts can review matters of judicial discretion "should apply with equal force to [his] conduct prior to the hearing relating to his status to hear the case".

[89] In support of that proposition, Justice Matlow invokes the decision of the CJC in the Boilard Inquiry (Report of the Canadian Judicial Council to the Minister of Justice of Canada Concerning Mr. Justice Jean-Guy Boilard). In particular, he refers to the CJC dictum (at page 2) that:

> Except where a judge has been guilty of bad faith or abuse of office, a discretionary judicial decision cannot form the basis for any of the kinds of misconduct, or failure or incompatibility in due execution of office, contemplated by clauses 65(2)(b), (c) or (d) of the *Judges Act* nor can the circumstances leading up to such a decision do so. Exercise of a judicial discretion is at the heart of judicial independence. In *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796, McLachlin J., writing for the majority at p. 830, said:
>
> > The judge's right to refuse to answer to the executive or legislative branches of government or their appointees as to how and why the judge arrived at a particular judicial conclusion is essential to the personal independence of the judge, one of the two main aspects of judicial independence … The judge must not fear that after issuance of his or her decision, he or she may be called upon to

> justify it to another branch of government. …[J]udicial immunity is central to the concept of judicial independence.
>
> [Emphasis added]

[90] Justice Matlow also cites the 2004 opinion of the Advisory Committee on Judicial Ethics on the question of recusal (Opinion of the Advisory Committee on Judicial Ethics (2004-14) Recusal). He quotes the following (at p. 2):

> The Committee wishes to emphasize that recusal decisions and the reasons for them are judicial decisions rather than matters of judicial conduct and are dealt with by the judge in open court and thus subject to appellate review. …[T]he judge's recusal decision is his or her own judicial decision because the Committee has no role in judicial decision making.
>
> Recusal is a matter for a judge to decide acting judicially in open court on the basis of submissions made and judicial authorities considered.

[91] Neither the Boilard decision nor the Advisory Committee opinion addresses the kind of situation that is before this Inquiry Committee. With respect to the Boilard inquiry, there was no allegation of personal misconduct. Rather it was suggested that the rationale for the decision was, itself, misconduct. In fact, Justice Boilard was responding to a development that arose during the course of the trial which, in his view, made it inappropriate for him to continue the trial. For that reason he recused himself. In its report to the Minister, the CJC wrote:

> In the view of the Council, the decision by Mr. Justice Boilard to recuse himself was made by him in his capacity as a judge sitting in a judicial proceeding and is a "discretionary judicial decision". When acting in the course of judicial duties, a judge is presumed, unless the contrary is demonstrated, to have acted in good faith and with due and proper consideration of the issues before him or her.

Clearly the CJC was of the view that the circumstances leading up to Justice Boilard's decision were not matters of conduct by Justice Boilard, but were other circumstances that he considered relevant to his recusal decision.

[92] In the case of particulars 26 and 30 and allegations of misconduct 35(a) to (e), the issue is whether Justice Matlow, prior to recusal becoming an issue and prior to his sitting on the SOS Application, had an ethical duty to disqualify himself. If there had been no recusal motion, and no appeal from the original SOS Application decision, the CJC would, unquestionably, have had jurisdiction to investigate the complaint. The fact of the recusal motion and appeal cannot oust the jurisdiction of the CJC when its investigation does not in any manner touch upon any aspect of the recusal decision.

[93] The distinction between the application of ethical standards and the standard for recusation can perhaps be better appreciated by a consideration of the comments of Gonthier J. in *Ruffo v. Conseil de la Magistrature*, [1995] 4 S.C.R. 267. At paragraph 110, he wrote:

> … 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 in original]

[94] This Inquiry Committee is concerned with the acceptability, judged on the basis of ethical standards, of Justice Matlow's actions and failures to act, prior to sitting on the SOS Application. The distinction drawn by Gonthier J. supports the conclusion that the conduct of Justice Matlow prior to hearing the SOS Application is within the jurisdiction of this Inquiry Committee.

[95] A judge's response to a duty to act, or refrain from acting, is measured against what is necessary to conform to ethical principles respecting that duty, not by what is required in order to exercise judicial discretion in accordance with legal principles. Taking that into account, together with the principles expressed in paragraphs 81 to 84 above, the Inquiry Committee concludes that it has jurisdiction to consider Particulars 26 and 30 and Allegations of Misconduct 35(a) to (e) inclusive.

(ii) In relation to additional Allegations of Misconduct 35(k) to (l)

[96] At the commencement of the hearing in January, Justice Matlow also argued that the Inquiry Committee had no jurisdiction to hear allegations of misconduct 35(k) and (l). They are the first two of the four allegations of misconduct resulting from the December 4th Letter, namely:

- the allegation that Justice Matlow's role in the Thelma Project controversy and his out of court statements in relation to it constituted conduct that would, in the mind of a reasonable, fair minded and informed person, undermine confidence in Justice Matlow's impartiality with respect to issues relating to the City; and
- the allegation that having so involved himself in the Thelma Project controversy he failed to ensure that he did not sit on any matter involving the City.

[97] In support of Justice Matlow's position on those issues, his counsel presented five arguments:

(i) the complaint dealt only with Justice Matlow sitting on cases in the future and there is no complaint in respect of the five cases he did sit on between April, 2002 and October, 2005. It was submitted, therefore, that this Inquiry Committee had no jurisdiction to consider those five cases.

(ii) the question of whether Justice Matlow should sit on any case involving the City, as a result of his past activities in respect of the Thelma Project, is really a question of recusal which falls within his discretion as a judge.

(iii) Justice Matlow's actions throughout the Thelma Project were public and transparent. They were, therefore, well known to the City. If the City did not object to his presence on the panel, including the SOS Application panel, the matter could not properly be an issue before this Inquiry Committee.

(iv) the issue of Justice Matlow sitting on cases involving the City, other than the SOS Application, was never an issue before the panel which was struck in order

to determine whether an investigation should be directed and for that reason it was never an issue before the CJC. Thus, it was submitted, considering whether Justice Matlow should sit on any case involving the City would be to expand the grounds beyond that which was considered by the panel and the CJC.

(v) the five cases on which Justice Matlow did sit all raised separate and distinct issues and Justice Matlow does not have the detailed background on each of these cases. Counsel submits that they are not in a position to give a detailed response or defence to the five particular cases and that raises a question of fairness.

[98] At the hearing, the Inquiry Committee dealt with the argument that the first two particulars set out in the December 4th Letter should not, because of the five arguments set out above, be considered. The Inquiry Committee decided that:

(i) the Complaint clearly raises the issues 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.

[99] Counsel for Justice Matlow accepted that ruling at the time but he emphasized that he was not abandoning his position on jurisdiction. Jurisdiction is, to a greater or lesser degree involved in each of arguments (i) to (iv) set out in paragraph 97 above. It is necessary, therefore, to address allegations of misconduct 35(k) to (l) specifically in that context.

[100] With respect to argument (i), the first two particulars set out in the December 4th Letter did not deal with any one or all of the five cases specifically. They referred only to the question of whether, because of his conduct during the course of the Thelma Project controversy and his participation in it, conforming to ethical standards would have required Justice Matlow to take steps to ensure that he did not accept assignment to sit on any matter involving the City. That question does not require consideration specifically of any one or all of the five cases on which Justice Matlow did sit between April, 2002 and October, 2005.

[101] That explanation also has application to argument (ii). It follows that judicial discretion with respect to recusal in a specific case is not in issue. As well, the reasoning expressed in paragraphs 85 to 95 above respecting conduct review jurisdiction where a question of recusal is also involved applies with equal force to this argument.

[102] With respect to argument (iii), the record indicates that counsel involved in the SOS Application were not aware, prior to commencement of the proceeding, of either Justice Matlow's involvement in the Thelma Project controversy or his more recent involvement with John Barber. The reasons of Justices Greer and MacDonald in *SOS-Save Our St. Clair Inc. v. Toronto (City)* [2005] O.J. No. 4729 indicate that, prior to sitting on the SOS-Save Our St. Clair application, they were unaware of "the extent of Justice Matlow's involvement" in the Thelma Project controversy, were unaware of his emails "to local politicians and to City officials" and were unaware of "his emails to Mr.

John Barber". There is nothing in the record to indicate whether counsel involved in any one or all of the other five cases had any level of awareness of Justice Matlow's involvement in either of those controversies. In any event, even if they were aware, the parties cannot be taken to have consented to conduct that might be unethical.

[103] With respect to argument (iv), it was brought to the Inquiry Committee's attention through the reasons of Justice Matlow in *SOS-Save Our St. Clair Inc. v. Toronto (City)* and the Agreed Statement of Facts that after becoming involved as a leader of the Friends, Justice Matlow sat on five matters where the City was a party or an intervenor. The Inquiry Committee is not limited to considering only those matters specifically brought to the attention of, or addressed by the panel of the CJC or the CJC itself. The Inquiry Committee is an investigative committee and is specifically authorized by By-law 5(1) to consider "any relevant complaint or allegation pertaining to the judge that is brought to its attention". The Inquiry Committee concludes it is able to consider whether there was any impropriety related to the Justice Matlow hearing the five other matters that had been brought to the Inquiry Committee's attention.

[104] For all of the foregoing reasons the Inquiry Committee concludes that, in addition to considering particulars related to and the allegations of misconduct set out in paragraphs (m) and (n) of paragraph 35, it has jurisdiction to consider the first two of the four additional particulars outlined in the December 4th Letter and allegations of misconduct (k) and (l) of paragraph 35.

[105] The fifth argument put forward does not involve jurisdiction as such. However it does raise a question of fairness and therefore ought also to be addressed here. When the Inquiry Committee made its ruling with respect to Justice Matlow's objection to it considering the first two of the four particulars set out in the December 4th Letter, counsel for Justice Matlow was expressly advised that he "need have no concern about addressing specifically the five other cases involving in the City of Toronto that Justice Matlow sat on prior to sitting on the SOS matter" [emphasis added]. As mentioned above, the issue does not involve any one or all of those cases specifically. It involves the general ethical principle of not accepting assignment to sit on any case involving a party in respect of whom the conduct of a judge would lead a reasonable person to believe that the judge was not impartial. Thus, the details and factual background of any one or all of the cases is irrelevant. The only relevant factor is that the City is a party or intervenor in each case. Therefore, there can be no unfairness based on lack of opportunity to give detailed representations in respect the five cases.

PART VII: MATTERS TO BE ADDRESSED, AND LEGAL AND ETHICAL PRINCIPLES APPLICABLE

(a) Matters to be addressed

[106] Independent counsel submits, and we agree, that the role of this Inquiry Committee has features similar to that recognized by the Supreme Court of Canada in *Ruffo* as the role of a comparable committee under the Quebec *Courts of Justice Act*. There, at paragraph 68, Gonthier J. wrote:

> 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 reflect 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 in original]

[107] Pursuant to By-Law 8(1) of the *Inquiries and Investigation By-laws*, this Inquiry Committee is required to express "its conclusions in respect of whether a recommendation should be made for the removal of the judge from office". Although the committee involved in *Ruffo* was not so required, this Committee's role is essentially similar to that of the committee in *Ruffo*. Thus, it is appropriate for this Inquiry Committee to be guided, although not bound, by the comments of Gonthier J. in *Ruffo*. We note also that this excerpt from *Ruffo* was relied upon by the inquiry committees constituted in the case of Justice Bienvenue and in the case of Justice Boilard.

[108] Similarly, while this Inquiry Committee is not bound by the approaches taken by other inquiry committees, common sense and the desirability of reasonable consistency dictates that those approaches be considered and taken into account. The Inquiry Committee looked in particular at the following inquiry committee reports:

(i) Report of the Inquiry Committee Respecting Certain Judges of the Nova Scotia Court of Appeal, (commonly referred to as the "Marshall Inquiry");

(ii) Report of the Inquiry Committee Respecting Justice F. L. Gratton of the Ontario Court of Justice, (the "Gratton Inquiry");

(iii) Report of the Inquiry Committee Respecting Justice Jean Bienvenue of the Superior Court of Quebec, (the "Bienvenue Inquiry");

(iv) Report of the Inquiry Committee Concerning Justice Bernard Flynn of the Superior Court of Quebec (the "Flynn Inquiry); and

(v) Report of the Inquiry Committee concerning Justice Jean-Guy Boilard of the Superior Court of Quebec (the "Boilard Inquiry").

[109] By its resolution, the CJC created this Inquiry Committee "to investigate the conduct of Justice Matlow in accordance with the provisions of the *Judges Act*". The

provision that informs the Inquiry Committee's role in responding to that resolution is subsection 65(2), which reads:

> (2) Where, in the opinion of the Council, the judge in respect of whom an inquiry or investigation has been made has become incapacitated or disabled from the due execution of the office of judge by reason of
>
> (a) age or infirmity,
>
> (b) having been guilty of misconduct,
>
> (c) having failed in the due execution of that office, or
>
> (d) having been placed, by his or her conduct or otherwise, in a position incompatible with the due execution of that office,
>
> the Council, in its report to the Minister under subsection(1), may recommend that the judge be removed from office.

[110] Paragraph (a) of subsection 65(2) of the *Judges Act*, respecting age or infirmity, is not relevant to the matters before this Inquiry Committee. The Inquiry Committee need only concern itself with matters arising by reason of paragraphs (b), (c) and (d) of subsection 65(2).

(b) Legal Principles Applicable

(i) Test for Removal

[111] Counsel for Justice Matlow submits, and we agree, that the test for removal is appropriately expressed in the reports of both the Marshall Inquiry and the Flynn Inquiry. The following excerpt from the report of the Flynn Inquiry expresses it clearly. At paragraph 35 of its report, that inquiry committee stated:

> The accepted test for removal is that suggested by the Canadian Judicial Council Inquiry Committee in the *Marshall* report in 1990. The members of the Committee, who were unanimous on this point, stated the reasons underlying the test they were suggesting:
>
> > The standard, in our view, must be an objective one based in part, at least, on conduct which could reasonably be expected to shock the conscience and shake the confidence of the public as opposed to conduct which is, and often must be, unpopular with part of that public.
> >
> > The test we would propose to apply, as applicable to this case, is an alloy of these many considerations and take the following form:
> >
> > > Is the conduct alleged so manifestly and profoundly destructive of the concept of the impartiality, integrity and independence of the judicial role, that public confidence would be sufficiently undermined to render the judge incapable of executing the judicial office?

[112] The Supreme Court of Canada has approved an essentially similar test for removal of a judge from office. In *Re Therrien*, [2001] 2 S.C.R. 3, at paragraph 147, the Court wrote:

> The public's invaluable confidence in its justice system, which every judge must strive to preserve, is at the very heart of this case. The issue of confidence governs every aspect of this case, and ultimately dictates the result. Thus, before making a recommendation that a judge be removed, the question to be asked is whether the conduct for which he or she is blamed 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 (Friedland, *supra*, at pp. 80-81).

Therrien dealt with removal of a provincial court judge, not a federally appointed superior court justice. However, we are of the view that the test here is the same.

[113] Accordingly, the Inquiry Committee must consider whether the conduct of Justice Matlow falls within one of paragraphs (b) through (d) of subsection 65(2) of the *Judges* Act. If so, the Inquiry Committee must then determine whether the alleged 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.

(ii) *Charter* Implications

[114] Counsel for Justice Matlow submits that the conduct that is at issue in the present case involves the exercise by a judge of his constitutional right to freedom of expression and freedom of association. He acknowledges that "some restrictions 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." He submits, however, that "the restrictions which are imposed" must be drawn as narrowly as possible and must be limited to what is strictly necessary in order to ensure the impartiality, integrity and independence of judicial office. He also submits that, where they relate to a judge's conduct in private life rather than in the course of judicial office, "any restrictions on free speech and association" by judges must be scrutinized particularly closely.

[115] Those limitations are sometimes described as "constraints" or "loss of freedom". Even if that description may be accurate, it is not accurate to describe them as impositions on judges that are unfair because they are not imposed on their fellow citizens. Addressing a submission that the ethical obligations must be "construed narrowly" because they constitute limitations on a judge's *Charter* rights, and that when they apply to the private lives of judges they must be "scrutinized particularly closely", necessitates an examination of the true nature of the constraints or loss of freedom, notwithstanding that it may appear to be an exercise in semantics.

[116] It should be noted at the outset that the speech at issue here is speech by a judge off the bench and outside his judicial role. While acting in a judicial capacity, a judge's speech is entitled to a high degree of protection as a necessary component of judicial

independence. As the Supreme Court of Canada stated in *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249 at para. 56:

> One half of the "two-pronged" modern articulation of judicial independence (the other prong being institutional independence), without which there can be no public confidence in the justice system, rests on the individual independence of each and every judge. Within this, the core principle is the liberty of the judge to hear and decide cases without fear of external reproach.

[117] The principle of judicial independence is not engaged by off-the-bench statements by a judge, which is the nature of the statements that are at issue in this investigation.

[118] 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. In *Re Therrien*, Gonthier J. eloquently described the role and place of a judge in our society. At paragraphs 108 to 111 he wrote:

> 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. This is eloquently expressed by Professor Y.-M. Morissette:

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

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

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

[119] 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 in the preceding paragraph would indicate, they are more properly viewed as "duties" that, by acceptance of appointment, persons who becomes 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 the 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.

[120] A person who is offered appointment as a judge knows and understands that performance of these duties is a fundamental obligation of judicial office. The prospective appointee therefore has an option: accept the obligation to perform those "normal duties of a judge", with any resultant limitation that flows from them, and be

appointed, or, insist on the right to continue to assert in an uninhibited manner the full *Charter* rights of every citizen, and not be appointed as a judge.

[121] To the extent that proper observance and performance of these duties may be seen as limiting, to some degree, *Charter* rights otherwise enjoyed by citizens generally, those *Charter* rights of citizens generally cannot be asserted by judges as a basis for relief from, or diminution of the extent of, the obligation to perform the duties covenanted for by acceptance of appointment. Considered in that light, sections 2(b) and 2(d) of the *Charter* have no application to the matters under consideration by this Inquiry Committee

[122] In any event, to the extent that there may be limitations on a judge's speech or association off the bench, they are justified in a free and democratic society to ensure the preservation of the impartiality and independence of the judiciary and the rule of law.

(c) Applicable Ethical Principles

(i) General

[123] Judges have a duty to act in a reserved manner. As Gonthier J. wrote, in *Ruffo,* at paragraph 107:

> The duty of judges to act in a reserved manner is a fundamental principle. It is in itself an additional guarantee of judicial independence and impartiality, and is aimed at ensuring that the public's perception in this respect is not affected. The value of such an objective can be fully appreciated when it is recalled that judges are the sole impartial arbiters available where the other forms of dispute resolution have failed. The respect and confidence inspired by this impartiality therefore naturally require that judges be shielded from tumult and controversy that may taint the perception of impartiality to which their conduct must give rise.

[124] The body of ethical principles generally accepted as appropriate for the guidance of judicial conduct has been set out, together with helpful commentary, in the CJC's publication entitled *Ethical Principles for Judges.* It is important to note, as does the CJC publication, that:

> The Statements, Principles and Commentaries describe the very high standards toward which all judges strive.
>
> The Statements, Principles and Commentaries are advisory in nature… They are not and shall not be used as a code or a list of prohibited behaviours. They do not set out standards defining judicial misconduct.

That conclusion is also reflected in the comments of Gonthier J. in *Ruffo,* at paragraph 110, where he wrote:

> 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.

[125] All judges have a duty to conduct themselves, as Gonthier J. wrote, "in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary". It is sometimes referred to as the duty "to act in a reserved manner". However it is described, the obligation on a judge is the same: to behave and speak, on and off the bench, in such a manner as will preserve the dignity of the office of judge and the impartiality and independence of the judiciary. The obverse applies: judges should avoid such behaviour and speech as may have the opposite effect.

[126] Maintenance of public confidence in and respect for the rule of law, fundamental to order and justice in a free and democratic society, depends to a significant degree on judges projecting an image of integrity, impartiality and good judgment. It is also critically important that every judge project such an image as the image of one has an impact on the image of the whole.

[127] The ethical principles at issue in the Flynn Inquiry are also engaged here. There the inquiry committee was concerned with involvement of a judge in matters arising out of municipal decisions that affected property in which he or his wife had an interest and with related governmental and judicial processes. It also involved public statements to the media by the judge concerned respecting municipal and provincial governmental policy decisions impacting the property. This Inquiry Committee benefits from the assessment of the applicable ethical principles set out in the Flynn Inquiry report. Attention is drawn specifically to the ethical principles described below.

(ii) Integrity

[128] Because of its importance to maintaining public confidence in the judiciary and the administration of justice generally, it is an unquestioned ethical principle that "judges should make every effort to ensure that their conduct is above reproach in the view of reasonable, fair minded and informed persons". It is important, therefore, for a judge to give some thought to how his or her conduct would be perceived by those reasonable, fair minded and informed persons. Any conduct that has the potential to lessen respect for the judge or the judiciary should be avoided. The obligation on the judge is well expressed in the commentary on the subject in the *Ethical Principles for Judges* at page 15:

> A judge's conduct, both in and out of court, is bound to be the subject of public scrutiny and comment. Judges must therefore accept some restrictions on their activities – even activities that would not elicit adverse notice if carried out by other members of the community. Judges need to strike a delicate balance between the requirements of judicial office and the legitimate demands of the judge's personal life, development and family.

Indeed, we would add that conduct that may be perceived as commendable if carried out by other members of the community may be unacceptable if carried out by a judge.

[129] Counsel for Justice Matlow quite correctly draws attention to the further commentary, also at page 15, that:

> Judges, of course, have private lives and should enjoy, as much as possible, the rights and freedoms of citizens generally. Moreover, an out of touch judge is less likely to be effective. Neither the judge's personal development nor the public interest is well served if judges are unduly isolated from the communities they serve. Legal standards frequently call for the application of the reasonable person test. Judicial fact-finding, an important part of a judge's work, calls for the evaluation of evidence in light of common sense and experience. Therefore, judges should, to the extent consistent with their special role, remain closely in touch with the public.

We agree that this commentary reflects a factor to be taken into account in consideration of the matters before us.

(iii) Impartiality

[130] Impartiality is, as the *Ethical Principles for Judges* recognizes, "the fundamental qualification of a judge and the core attribute of the judiciary". We would add that preservation of the appearance of impartiality is a fundamental duty of a judge. The importance of the appearance of impartiality is reflected in the comment of Lamer C.J. in *R. v. Lippé*, [1991] 2 S.C.R. 114, where he wrote at page 139:

> The overall objective of guaranteeing judicial independence is to ensure a reasonable perception of impartiality: judicial independence is but a "means" to this "end". If judges could be perceived as "impartial" without judicial "independence", the requirement of "independence" would be unnecessary. However, judicial independence is critical to the public's perception of impartiality. Independence is the cornerstone, a necessary prerequisite, for judicial impartiality.

[131] The following excerpts from the commentary on impartiality in the *Ethical Principles for Judges* are relevant:

> Impartiality is not only concerned with perception, but more fundamentally with the actual absence of bias and prejudgment. This dual aspect of impartiality is captured in the often repeated words that justice must not only be done, but manifestly be seen to have been done. As de Grandpré , J. put it in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, the test is whether "an informed person, viewing the matter realistically and practically — and having thought the matter through —" would apprehend a lack of impartiality in the decision maker.
>
> Whether there is a reasonable apprehension of bias is to be assessed from the point of view of a reasonable, fair minded and informed person.
>
> "True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind." The judge's fundamental obligation is to strive to be and to appear to be as impartial as is possible. This is not a counsel of perfection. Rather it underlines the fundamental nature of the obligation of impartiality which also extends to minimizing any reasonable apprehension of bias.

> A reasonable perception that a judge lacks impartiality is damaging to the judge, the judiciary as a whole and the good administration of justice. Judges should, therefore, avoid deliberate use of words or conduct, in and out of court, that could reasonably give rise to a perception of an absence of impartiality. Everything from his or her associations or business interests to remarks which the judge may consider to be "harmless banter," may diminish the judge's perceived impartiality.
>
> [Emphasis added]

[132] The appearance of impartiality is, as the *Ethical Principles for Judges* indicates, "to be assessed from the perspective of a reasonable, fair minded and informed person". A judge must, therefore, weigh the anticipated impact of his or her conduct, including speech, not only on the basis of what he or she believes to be the case, but also on an objective assessment of what a reasonable, fair minded and informed person might perceive to be the case. Again, as is indicated in the *Ethical Principles for Judges*, "judges should strive to ensure that their conduct, both in and out of court, maintains and enhances confidence [of a reasonable, fair minded and informed person] in their impartiality and that of the judiciary". In the context of this investigation, it is particularly important to consider preservation of the appearance of impartiality through adherence to ethical principles relating to civic activity, political activity and conduct having the potential to cause apprehension respecting conflict of interest.

(A) Civic Activity

[133] As is noted in the excerpt set out in paragraph 129 above, judges should not be out of touch with their community. They also should be free to participate in civic activities. In doing so, however, they cannot set aside their obligations as judges. Those obligations would, as the *Ethical Principles for Judges* indicates, require that judges "avoid involvement in causes or organizations that are likely to be engaged in litigation". The obligations also require that they should not give legal advice.

(B) Political Activity

[134] In this regard, the *Ethical Principles for Judges* notes that:

> Judges should refrain from conduct such as membership in groups or organizations or participation in public discussion which, in the mind of a reasonable, fair minded and informed person, would undermine confidence in a judge's impartiality with respect to issues that could come before the courts.

[135] It must be emphasized that the foregoing principle applies in respect of matters that could come before the courts generally, and not just matters that have the potential to come before the judge involved. In some circumstances any known association with or even attendance at a public gathering involving a politically controversial issue could reasonably put in question the judge's impartiality on an issue that could come before the court. A judge should not express publicly a position on such a matter, as views expressed may be taken not only as the view of the judge but of the judiciary as a whole. Should the matter come before the court, public confidence in the judiciary can be put at risk whether the ultimate decision on the issue is the same as or different than the view publicly expressed by the judge.

(C) Conflicts of Interest

[136] The *Ethical Principles for Judges* indicates:

> Judges should disqualify themselves in any case in which they believe that a reasonable, fair minded and informed person would have a reasoned suspicion of conflict between a judge's personal interest (or that of a judge's immediate family or close friends or associates) and a judge's duty.

[137] Consistent with the conclusion expressed in paragraph 132 above, the Inquiry Committee is of the view that a judge must consider not only what he or she believes to be the case but also consider whether a reasonable, fair minded and informed person would have a reasoned suspicion of conflict between a judge's personal interest and a judge's duty. That requires an objective assessment, not one based on the judge's personal belief as to what the circumstances would indicate.

[138] Guidance as to what constitutes conflict of interest can also be found in the *Ethical Principles for Judges*. At page 44 it is observed:

> As Perell puts it, "A common or unifying theme for the various classes of conflicts of interest is the theme of divided loyalties and duties." The potential for conflict of interest arises when the personal interest of the judge (or of those close to him or her) conflicts with the judge's duty to adjudicate impartially. Judicial impartiality is concerned both with impartiality in fact and impartiality in the perception of a reasonable, fair minded and informed person. In judicial matters, the test for conflict of interest must include both actual conflicts between the judge's self interest and the duty of impartial adjudication and circumstances in which a reasonable fair minded and informed person would reasonably apprehend a conflict.

[139] The only ethically acceptable consequence where there is either a conflict of interest, or the possibility that a reasonable, fair minded and informed person would perceive a conflict of interest, is that the judge concerned be disqualified from sitting on the matter. That, of course, flows from the principle which was articulated by Lord Hewart C.J. in *R. v. Sussex Justices, ex parte McCarthy* [1924] 1 K.B. 256 at 259 and which is often quoted:

> [I]t is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.

[140] The primary responsibility to identify conflicts or the possibility of perception of conflict rests with the judge. The identification must, however, be the result of an objective assessment not a subjective one. Where there is an actual conflict of interest, a judge must, of course, be disqualified. Where the judge, acting with the level of objectivity expected of a judge, ought to conclude that a reasonably fair minded and informed person would reasonably apprehend a conflict, the judge also ought to disqualify himself or herself.

[141] In cases where the judge encounters circumstances that would cause him or her to consider whether there is a potential for a reasonable, fair minded and informed person to apprehend a conflict, the question arises as to whether the judge has a positive duty to disclose it. Again, some guidance can be found in the *Ethical Principles for Judges*,

where the view is expressed that "a judge should disclose on the record anything which might support a plausible argument in favour of disqualification".

[142] The Inquiry Committee has not been referred to, and has not itself found, any authority holding that a judge has a positive duty to disclose a potential conflict of interest. In Quebec, the permissive and mandatory grounds for disqualification and the procedures to be invoked are set out in detail in the *Code of Civil Procedure*, R.S.Q., c.C-25, Articles 234-242. There is no statutory equivalent in any common law province.

[143] The position in England appears to have been expressed in *Locabail (U.K.) v. Bayfield Properties Ltd. & Another*, [2001] AllER. 65 (CA). At paragraph 21 the court stated that:

> If, in any case not giving rise to automatic disqualification and not causing personal embarrassment to the judge, he or she is or becomes aware of any matter which could arguably be said to give rise to a real danger of bias, it is generally desirable that disclosure should be made to the parties in advance of the hearing.

[144] The High Court of Australia expressed, in *Ebner v. Official Trustee in Bankruptcy*, [2000] HCA 63, the view that:

> As a matter of prudence and professional practice, judges should disclose interests and associations if there is a serious possibility that they are potentially disqualifying… It is, however, neither useful nor necessary to describe this practice in terms of rights and duties. At most, any "duty" to disclose would be a duty of imperfect obligation.

[145] 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.

[146] 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 even 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.

(iv) Summary

[147] This Inquiry Committee is not concerned with the correctness or otherwise of Justice Matlow's decision on the recusal motion in the SOS Application. Rather it is concerned with the conduct of Justice Matlow in the context of whether, in all the circumstances, he failed to conform to the ethical principles identified in paragraphs 123 to 146 above.

PART VIII: ANALYIS OF THE CONDUCT OF JUSTICE MATLOW

(a) In the Course of Opposing the Thelma Project

(i) Preliminary Observations

[148] As noted above, a judge is, like any other citizen, entitled to express concern about, and even express objection to, municipal activity that will adversely impact the judge's personal property or lifestyle interest. The judge is free to do so, either alone or in concert with others similarly affected. In doing so, however, the judge must be careful to act and speak in a restrained manner in order to ensure conduct that is in conformity with the ethical duties of a judge. There is need for particular caution where the judge is participating with others and the matter is likely to become publicly controversial. A judge ought not to participate or, if participating ought to withdraw from participation, where there develops any prospect of the group becoming involved in litigation or proceedings before tribunals, particularly those subject to judicial review by the court of which he or she is a member.

[149] That being so, no fault can be found with Justice Matlow attending the meetings of area residents in October, 1999 and April, 2002. The purpose of those meetings was to ensure that area residents were informed of proposed actions in relation to the Thelma Project and possible municipal approval that could significantly affect their property and lifestyle interests. Neither was there anything inappropriate about Justice Matlow supporting any collective activity proposed to be taken for the purpose of expressing the opposition of the area residents to the Thelma Project.

(ii) Organizing and Leading Community Opposition

[150] The Committee has concluded that Justice Matlow's personal involvement in opposing the Thelma Project went considerably beyond what was appropriate for a judge. In particular, he organized, assumed leadership of, and became primary spokesperson for a community group that:

- promoted media and public attention to the group and its issue;
- involved representation to political persons and institutions;
- expressed opposition, likely to be controversial, to a municipal governmental proposal;
- became involved in proceedings before tribunals subject to judicial review by the court of which Justice Matlow is a member; and
- became involved by advising and assisting in litigation before the court of which Justice Matlow is a member.

[151] It should also be noted that Justice Matlow was aware of and at the time considered the opinion entitled "Municipal Democracy" issued by the Advisory Committee on Judicial Ethics, which is set out in paragraph 42 above. When read in detail it is clear that the opinion merely expresses approval of a judge being involved in municipal democracy to the extent of writing a letter, "indicating opposition to a move by some citizens to halt traffic through the judge's community". Even that was expressed to be subject to the proviso that the letter be on private or plain notepaper and that the judge realize "the judge must be disqualified from any participation in any litigation that arises from the matter". The opinion cannot be construed to indicate approval of the level of involvement of Justice Matlow in the community group's opposition to the Thelma Project.

[152] The Inquiry Committee determines that Justice Matlow's overall conduct in organizing and leading the Friends, his assumption of the role of president, spokesperson and, on occasion, advocate of the Friends, his conduct in seeking to personally be a party and as a result being made a party in the OMB application of First Spadina, his conduct in providing guidance, advice and assistance in the application by some members of the Friends to the Superior Court of Justice, and his conduct in assisting in preparation of the supporting affidavit to which was attached copies of letters from him to the Mayor of the City and the Attorney General of Ontario, constitutes conduct that is highly inappropriate for a judge.

[153] The Inquiry Committee concludes that Justice Matlow placed himself, by such conduct, in a position incompatible with the due execution of the office of judge, within the meaning of paragraph (d) of subsection 65(2) of the *Judges Act*.

(iii) Meetings and Correspondence with Politicians

[154] Justice Matlow's assumption of the role of spokesperson, and occasionally advocate, for the Friends led to his being involved in representations to, and meetings with, political personalities. Such activity, identified in detail in paragraph 53 above, goes beyond the bounds of conduct appropriate for a judge, particularly considering the nature and intensity of views expressed in some of the correspondence set out in paragraph 60 above. The political officials to whom Justice Matlow made those representations are unlikely to have confidence in the impartiality of Justice Matlow in relation to any judicial proceeding in which the City is involved, particularly proceedings involving planning decisions and municipal approvals. In addition, the notoriety caused by news media reports of Justice Matlow's activities and comments in relation to those political representations, as described in paragraph 58 above, can only serve to cause public loss of confidence in Justice Matlow's impartiality as a judge. The Inquiry Committee has concluded that these actions placed Justice Matlow in a position incompatible with the due execution of the office of judge within the meaning of paragraph (d) of subsection 65(2) of the *Judges Act.*

(iv) Using the title "Justice"

[155] There is no evidence that Justice Matlow made any effort to avoid invoking, for non-judicial purposes, the fact that he is a justice of the Ontario Superior Court of Justice as the "Municipal Democracy" opinion of the Advisory Committee on Judicial Ethics indicates ought to be done. The record would indicate the contrary. While there is no evidence that Justice Matlow was always the cause, it seems clear that in one way or another virtually all parties with whom he was dealing on behalf of the Friends became aware that he is a Justice of the Superior Court of Justice. In a number of incidences, he originated that awareness, as identified in paragraph 55 above.

[156] On direct examination, Justice Matlow provided a variety of explanations for his identification as a judge. For example, with respect to his emails to John Barber, he stated:

> A. Yes. I think that the fact that I am a judge is part of my identity, just as much as – it tells a lot of things about me. It tells something about my education, something about my familiarity with law. It helps one, I hope, make some more accurate assessment as to whether or not I am likely to be a crank, and there are other things, too.
>
> So in certain situations, not very many, I thought that it would be okay for me to let the person that I was addressing or writing to or speaking to know that I was a judge. That was part of me, and I wanted the other person to know what kind of person I likely was.
> [Emphasis added]

[157] On cross-examination Justice Matlow maintained that in using notepaper that was headed "Justice Ted Matlow", he was using private notepaper:

> Q. Did you interpret this advisory, when it referred to private or plain paper, that meant it could still refer to you as a judge as long as it was not paper that came from the courthouse?
>
> A. Absolutely. That is my title; it is part of who I am. It is part of my identity.

[158] Other question and answers, on cross-examination, were as follows:

> Q. You have said that you would sometimes think it okay to indicate to people that you were a judge, because it would say something about you, and your education, and they wouldn't think you were a crank.
>
> A. I said that, yes.
>
> Q. So there were times when you entered into some consideration as to whether it would be helpful for someone to know you were a judge?
>
> A. Yes.
>
> Q. And you hoped to gain some benefit from that?
>
> A. One has to be careful. When you say that I hoped to see from benefit from it, that has to be examined carefully before I can give you an honest answer.
>
> If you are implying that I was holding out some offer of advantage to that person because I was a judge, or that there was some threat implied that was intended to extract some benefit from me, that would be an improper purpose for disclosing that I am a judge.

> My work with my court should have nothing to do with my private business, and I did my best to separate those two.
>
> But being a judge is also part of my personal life, and has nothing to do with my court; it is who I am.
>
> I went to law school, practiced law, and I was appointed to the bench. That tells something about me. I leave it to others to decide what it tells, but it tells something about me and who I am.
>
> In certain situations, I find it appropriate to disclose the fact that I am a judge. In those situations where I thought it appropriate for me to do that, I did.

[159] Justice Matlow's use of the title "Justice" was inappropriate and served to diminish the confidence of the public in the impartiality of both Justice Matlow personally and the judiciary generally. It could also raise doubt as to whether the rule of law is being properly applied because it may contribute to public perception that a judge may expect and receive special consideration which would not be accorded a citizen generally. There is also the real prospect that persons with whom Justice Matlow was interacting could be impressed or intimidated by the fact that the representations on behalf of the Friends were being made by a Superior Court justice.

[160] The Committee is of the view that it was inappropriate for Justice Matlow to be the author of such representations and the spokesperson or advocate in such meetings. Moreover, it was inappropriate to cause or facilitate the fact that he is a judge becoming a factor for consideration in the activities of the Friends. While that conduct may not, in and of itself, amount to misconduct within the meaning of paragraph 65(2)(b) of the *Judges Act* and may not, by itself, have caused Justice Matlow to have been placed in a position incompatible with the due execution of the offices of judge within the meaning of paragraph 65(2)(d) of the *Judges Act*, when weighed together with his conduct in leading the opposition to the Thelma Project and in corresponding and meeting with politicians, it is an additional basis for concluding that Justice Matlow has placed himself in a position incompatible with the due execution of the office of judge.

(v) Involving the News Media

[161] As the findings of fact in paragraphs 56 to 59 above indicate, it was the objective of Justice Matlow to involve the news media in promoting public interest in the dispute that the Friends had with the City. He sought the assistance of persons he knew in the news media to put him in touch with journalists who might be interested in writing about municipal matters. He initiated media involvement on at least five separate occasions. In doing so, he used strident language and made comments designed to heighten potential media interest. In his interactions with the media, he described the Thelma Project as an "absurd proposal" with "elements of stupidity, political intrigue and, perhaps, dishonesty". He also suggested that "it would make a good story for the [newspaper] too".

[162] The conduct of Justice Matlow goes beyond a simple failure to act in a reserved manner and reflects an unacceptable disregard for the impact of his involvement with the news media on public confidence in the integrity, impartiality and independence of the judiciary. The Inquiry Committee concludes that such conduct placed Justice Matlow in

a position incompatible with the office of judge within the meaning of paragraph (d) of subsection 65(2) of the *Judges Act*.

(vi) Intemperate Language and Inappropriate Comments

[163] The Committee identified in paragraphs 60 and 61 examples of intemperate language used by Justice Matlow in his activities on behalf of the Friends. In the Committee's considered view, Justice Matlow's comments displayed intemperance and their potential for negative impact is great. Justice Matlow's references to "absurd proposal", "stupidity", "political intrigue", and "perhaps dishonesty" are totally inappropriate. The employment of such language in relation to circumstances in which the judge is personally involved in an unresolved dispute where the parties have quite different views on the matters showed a singular lack of good judgment. The same can be said of language urging the Mayor to "restore the rule of law" to the operations of the City, implying that hitherto it had not been in effect; asserting that the law was being ignored; accusing municipal officials of wanting "to whitewash everything"; drawing attention to "devious acts that have taken place"; and describing the actions of City Council as "a betrayal and a whitewash".

[164] Justice Matlow's deprecating comments about a solicitor on the City staff in his letter to the Auditor General of the City are particularly egregious. They were made in respect of a legal matter where Justice Matlow, in the course of furthering his and his neighbours' interest, held a different opinion than did the City legal staff. The Inquiry Committee is of the view that Justice Matlow's intemperate language would lead a member of the public to seriously question whether he could judge any matter involving the City's legal staff with impartiality, reasonableness and sound judgment. Indeed, it is difficult to conclude that a perception of impartiality on the part of Justice Matlow could thereafter exist in <u>any</u> matter involving the City.

[165] Moreover, Justice Matlow has not resiled from the views he expressed about the City and its officials. When asked, on direct examination, whether his use of such language was appropriate for a judge, he replied:

> A. I don't know how to answer the question in a satisfactory way. I have a sense that some of the language that I used was excessive. Other language was I think appropriate under the circumstances, despite the fact that I was a judge.
>
> What is temperate or intemperate I think very largely requires a subjective assessment, and the same language used in certain circumstances may be appropriate and in other circumstances may be intemperate.
>
> I was really frustrated and upset about what I perceived – not would have been perceived – that I observed, read and perceived about the conduct in the city's legal department particularly the conduct of the city solicitor and Barbara Capell.
>
> When Barbara Capell and the city solicitor were asked to justify their opinion – and the opinion that I am referring to is that when city council, back in 1990, approved the transaction, the joint venture for the ten townhouses.
>
> Q. You said 1990. I assume you mean 2000.
>
> A. I am sorry, 2000, right. When city council in 2000 approved the joint venture – that is what it was described – involving the ten townhouses within the existing zoning,

> when they said that that language was broad enough to permit them to change that description of development and insert a large six-storey mixed-use condominium/retail that far exceeded the zoning, I thought that that was just absurd.
>
> The language was just so abundantly clear that all you have to do is to look at the authorization that city council granted and see what they put in the agreement that they signed, and they sought to justify it on grounds that made even less sense.
>
> They justified it on the grounds that the business agreement, the nature of the development itself, was still to be determined at some future time. It didn't say by whom or when, but the nature of the development was set out very clearly, then townhouses falling within the existing zone. So I was really upset.
>
> Clearly the language that I used reflected my sense of anger and upset. Now that I feel more relaxed about it, when I look at the language, I think, yes, maybe I went too far, but like any other human being, sometimes I just blow my stack, and I did it then.

[166] When his attention was drawn, on cross-examination, to the fact that the above comments did not indicate a belief that his language "was excessive and that [he] did go too far', his responses included the following:

- Generally, he stated:

  > It is really hard to measure this. I think I conceded this morning that now that I look at some of the things I said – I guess I can concede that I wish I had not used the same language that I did. …
  >
  > I was admittedly very emotionally involved in this whole thing, and I was frustrated. Under those circumstances, I shouldn't be surprised that once in a while I uttered things that perhaps went a bit too far.
  >
  > Yes, I think some of my language was not so good, and I wish I had done better.
  >
  > But the thoughts and the sense of them, and the truth of what I was saying, still remains intact.

- With respect to comments about the legal opinion of the lawyer employed by the City Solicitor, he commented:

  > A. Let me tell you that this kind of legal opinion could come from anybody who can read English; it is that fundamental.
  >
  > Q. If you don't think you would take it back, that is okay; you can say so.
  >
  > A. Take it back in what sense? I am not –
  >
  > Q. Regret it; not use it if you had to do it again.
  >
  > A. In my email to the Auditor General?
  >
  > Q. Yes.
  >
  > A. I think it would have been better to be more businesslike about it, and say much the same thing in a different way.

- With respect to his views now about his use of the word "devious", the exchange indicates:

Q. … you stated that among other matters, "devious acts" had taken place to the Thelma parking lot. Do you think that was intemperate?

A. I am going to be totally upfront with you, because it is the only way I know how to be.

I must tell you there were many times that I was convinced that something, not only conduct – or whatever other words I used – had occurred. I thought that illegal things must have occurred.

I couldn't prove them, so I never said that. But the circumstances surrounding the creation of this development were really, really suspicious.

The purpose was to provide more parking, and the net result was going to be less parking.

The developers were getting money they were not entitled to, and agreements were being signed contrary to the authorization of City Council.

In dealing with Mr. Boghosian, his legal opinion coincided, in its essence, with ours. He also said that the agreement signed by the City officials had not been authorized by City Council.

But, he said, the difference was not material. In other words, a six-storey mixed condominium residential, far in excess of the zoning, was not materially different from ten townhouses that fell within the existing zoning.

When I hear someone say that to me, I wonder if this person is serious. Would anyone in their right mind say that? That is how I viewed it.

And then City Council accepted his other advice, and retroactively approved the agreement that had been signed.

That sounds devious to me. They led us to believe they were going to do the right thing after they got this opinion from Mr. Boghosian.

But they did not do the right thing; they did the wrong thing. They covered up what had occurred.

Q. City Council?

A. That is right, City Council influenced by the opinion of the Legal Department and Boghosian, who was all part of that group, went and decided to cover this whole thing up and retroactively give it an okay.

That sounds devious to me.

Q. You would apply that to Council, the lawyer who wrote the opinion, the Legal Department?

A. I think that in fairness – my complaint is with the two people in the Legal Department.

I can understand the councilors on City Council, who are overwhelmed with work – this is a large city to govern now, and I understand how they have to be guided by opinions given by their officials.

I am not surprised, nor particularly upset that they did what they did.

But what those two people in the City Legal Department did, I will never –

> Q. And the outside lawyer as well?
>
> A. To the extent he said that the large condo project was not materially different from ten townhouses – I don't know him very well, but I cannot fathom any rational basis upon which a lawyer can say that, or anyone can say that.
>
> Q. I take it from that that you don't want to withdraw the characterization of the conduct as devious?
>
> A. I can't say that "devious" is the best word. If I had time, perhaps I could think of something that conveys the sentiment I have very candidly shared with you, and found a better word for it.
>
> [Emphasis added]

[167] The use of language such as that underlined above would give rise to a belief by any persons reading or hearing it, of a judicial determination on the part of Justice Matlow as to incompetence, stupidity, dishonesty, political impropriety, failure to properly apply the law, devious activities and cover up in relation to City officials and legal staff.

[168] Unchallenged cogent evidence clearly and convincingly establishes that Justice Matlow has, by his use of intemperate language, in circumstances where all those to whom it was directed would know he was a judge, placed himself in a position incompatible with the due execution of the office of judge, within the meaning of paragraph (d) of subsection 65(2) of the *Judges Act.*

[169] Justice Matlow's comments in the November 6, 2003 email to the Attorney General establish a particularly serious level of impropriety. He asserted that there is "clear evidence" that City officials disregarded a resolution of City Council and "on their own" negotiated terms "that became more and more favourable to the developer"; that he [Justice Matlow] possesses hundreds of documents to prove the allegations; that the Friends contemplate "the initiation of legal proceedings to seek a declaration that the agreement is null and void". The assertions, taken together, clearly imply serious impropriety by officials in a public authority. The assertions were coupled with the request that the Attorney General "intervene to require that the City comply with the rule of law", and asserting that "it is incumbent on [the Attorney General] to do so in these circumstances", were all made in furtherance of personal interest. As such, Justice Matlow's comments to the Attorney General constitute an exceedingly serious impropriety amounting to judicial misconduct within the meaning of paragraph (b) of subsection 65(2) of the *Judges Act*.

(b) Failure to Take Steps to Avoid Potential Conflicts

[170] Justice Matlow's evidence is that he did not believe that he was in conflict and unable to judge impartially matters involving the City, following the commencement of his activities on behalf of the Friends. The Inquiry Committee, however, also has to consider Justice Matlow's conduct in the context of whether he believed "that a reasonable, fair minded and informed person would have a reasoned suspicion of conflict". From his evidence it is reasonable to infer that he did not believe that a reasonable, fair minded and informed person would have a reasoned suspicion of conflict.

[171] It is impractical, if not impossible, for the Inquiry Committee to weigh the matter exactly in the terms expressed in the *Ethical Principles for Judges*. Except in unusual circumstances, it would be virtually impossible for an inquiry committee to determine what a judge actually believed a reasonable, fair minded and informed person would suspect, except on the express statement of the judge as to what he or she believed on the point. A more appropriate interpretation of the standard, consistent with the conclusions expressed in paragraphs 137, 140 and 146 above, is whether the circumstances were such that it would have been impossible for Justice Matlow, 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 conflict between his personal interest and his duty as a judge.

[172] The Inquiry committee concludes that, had Justice Matlow applied that reasonable objectivity to a consideration of the probable consequences of all of the circumstances identified in paragraphs 41 to 61 above, he could only have concluded that a reasonable, fair minded and informed person would have a reasoned suspicion of conflict between Justice Matlow and the City. In that circumstance not only was it appropriate, but conformity with ethical principles would place a clear duty upon Justice Matlow, to disqualify himself from sitting as a judge in any case involving the City subsequent to the commencement of his activities connected with leading the Friends in its opposition to the Thelma Project.

[173] For these reasons, the Inquiry Committee concludes that Justice Matlow, by his conduct in failing to take steps to avoid sitting on any matter in which the City was a party, has failed in the due execution of his office as a judge within the meaning of paragraph (c) of subsection 65(2) of the *Judges Act*.

(c) Conduct Subsequent to Cessation of Community Opposition to the Thelma Project

[174] Consistent with the conclusion expressed in paragraphs 62, 63 and 68 above, the Inquiry Committee has determined that there was no further basis for Justice Matlow's public opposition in relation to the Thelma Project after community opposition ceased, which had occurred by August, 2004. Nevertheless, on October 2, 2005 Justice Matlow pursued a totally inappropriate course of conduct by resurrecting his earlier intemperate criticism of persons involved in the municipal government of the City. He sent to John Barber the October 2 Email, which is set out in full in paragraph 66 above. He again alleged misconduct by describing the subject matter as "Municipal Misconduct Revisited". He stated in the first line that he is a "Superior Court Judge", mentioned his earlier provided "evidence of misconduct" and then alleged sale of municipal property "without tender at a ridiculously low price".

[175] Expression out-of-court of such views by a Superior Court justice is, as we have concluded above, totally inappropriate. When to that impropriety is added the fact that:

- it is specifically directed to a newspaper columnist with the clear objective of making it publicly controversial;
- it identifies the circumstance as "my story";
- it asserts that the matter is "far from over"; and

- it alleges that "strange things continue to occur";

the level of impropriety is well beyond the lowest standard that may, in any circumstance or for any reason, be considered acceptable conduct by a judge. Publication of such allegations, seeking to resurrect earlier allegations that were not accepted or pursued, can only serve to further damage public perception of Justice Matlow as an impartial judge and seriously damage public perception of the impartiality of the judiciary generally.

[176] The unacceptability of that conduct was compounded by continuing the interchange after Mr. Barber replied seeking the evidence of the misconduct to which Justice Matlow had referred. Justice Matlow sent, on October 4, 2005, the email offering to provide the documents on his return to Toronto from Sudbury. He then followed up on this offer and, on the morning of October 5th, sent the further email to John Barber offering to personally explain the significance of the documents, by stating "I think you will have to speak to me to understand what this is all about". Later on that day he personally delivered to the offices of the *Globe and Mail* the copies of documents he considered to be evidence of misconduct. There can be no doubt that such conduct by a judge is beyond the bounds of acceptable behaviour.

[177] When the impropriety of what he was doing was drawn to his attention, on cross-examination, Justice Matlow said:

> … I don't know what inspired me to send that email on October 2 of all days; I just don't know.

[178] Again, on cross-examination, Justice Matlow explained that he went through with the delivery of the documents to the *Globe and Mail* because:

> … By then, it was sort of too late to get out of that mess. The email was gone. We had exchanged emails when I was in Sudbury, and he was expecting some documents from me…

[179] Even when there is accorded to Justice Matlow the fullest reasonable presumption of credibility, that explanation is difficult to accept because it is inconsistent with the actual wording of his email of October 5th to Mr. Barber sent, it must be noted, after the time when he acknowledges he knew he was to sit on the SOS Application. In that email, amongst other things, he wrote:

- I think that you will have to speak to me to understand what this is all about.

- If this little background paper interests you, I will very easily be able to provide or lead to most of the other relevant documents and I will be able to fill on more.

[180] Those statements are quite inconsistent with Justice Matlow's assertion that he delivered the documents to the *Globe and Mail* on Wednesday, October 5th because "[b]y then, it was sort of too late to get out of that mess". Rather, the comments are consistent only with the thought that what had been provided would whet the appetite for more.

[181] The conduct of Justice Matlow in seeking to resurrect in October 2005 the political controversy that he had abandoned in August 2004 can only be regarded as inexcusable. The Inquiry Committee concludes that there is clear and convincing proof, based on cogent evidence, to establish on a balance of probabilities that Justice Matlow has through such conduct been guilty of misconduct within the meaning of paragraph (b) and has been placed in a position incompatible with the due execution of his office of judge within the meaning of paragraph (d) of the *Judges Act*.

(d) Conduct in Relation to Sitting on the SOS Application

[182] This area of Justice Matlow's conduct has three aspects. The first is Justice Matlow's conduct in failing to take steps to avoid sitting on the SOS Application, after considering whether he should do so because of his involvement in the Thelma Project controversy. The second is Justice Matlow's failure to disclose to counsel involved and to the other two judges sitting with him the extent of his involvement in the Thelma Project controversy with the City, and his actions during the four days preceding his sitting on the SOS Application in again alleging misconduct at City Hall and promoting public controversy respecting it. The third is actually sitting on the SOS Application.

[183] The Inquiry Committee has already concluded, in paragraphs 81 to 104 above, that it has jurisdiction to consider issues in relation to the first two aspects. While the third issue has an ethical conduct component, it was the primary focus of the recusal motion. For that reason the Inquiry Committee will not consider any aspect of Justice Matlow's conduct in actually sitting on the SOS Application.

[184] As to the first aspect, his conduct in failing to avoid sitting on the SOS Application, for all of the reasons expressed in paragraphs 170 to 173 above, Justice Matlow had a clear duty to avoid sitting on <u>any</u> matter in which the City was a party, or with which the City Solicitor and her staff were in any manner connected.

[185] That Justice Matlow's animus toward the City legal staff and officials involved in planning decisions and approval had not changed, is put beyond question by his own evidence. That conclusion is further supported by the fact that during the four days immediately preceding his sitting on the SOS Application, Justice Matlow resurrected his dispute with the City by the exchange of emails with John Barber and delivery to the *Globe and Mail* of documents relating to the Thelma Project. Those actions, coupled with his animosity towards the City and certain of its staff, could only serve to greatly intensify the burden of the duty on Justice Matlow to avoid sitting on any matter involving the City.

[186] With respect to the second aspect, an ethical duty to disclose exists where the circumstances are such that it would be impossible for a judge, acting with the objectivity required of a judge, to avoid concluding that a reasonable, fair-minded and informed person would have a reasoned suspicion of a conflict between the judge's personal interest and his duty. Taking into account Justice Matlow's comments, both on direct examination and cross-examination, the Inquiry Committee can only conclude that Justice Matlow was alert to facts that would cause <u>any</u> judge considering the issue, and acting with the objectivity expected of a judge, to conclude, in the words of the *Ethical Principles for Judges*, that "a reasonable, fair minded and informed person would have a reasoned suspicion of conflict". Justice Matlow could not have avoided so concluding.

As such, he had an ethical duty to disclose to counsel involved and to the other two judges sitting with him the extent and nature of his involvement in the Thelma Project controversy and his actions during the week preceding his sitting on the SOS Application, in which he contacted John Barber by email and delivered documents to the *Globe and Mail* in an attempt to resurrect the Thelma Project controversy, and the course of which he raised again allegations of impropriety against City officials and staff.

[187] When Justice Matlow's unacceptable conduct in failing to disclose is coupled with failing to take steps to ensure he did not sit on the SOS Application, the Inquiry Committee concludes there is clear and convincing proof, based on cogent evidence, that Justice Matlow thereby failed in the due execution of the office of judge within the meaning of paragraph (c) of subsection 65(2) of the *Judges Act*.

(e) Conduct Arising Out of the Coincidence of the Barber Contact with the SOS Application

[188] Justice Matlow's conduct in promoting further media inquiry into the Thelma Project controversy by the delivery of emails and documents to the *Globe and Mail* in early October, 2005 gives rise to another basis for concern: the coincidence of the conduct in resurrecting the Thelma Project controversy with his failure to avoid sitting on the SOS Application.

[189] Justice Matlow has stated that when he "dashed off an email to John Barber" on Sunday morning October 2, 2005 just before leaving for Sudbury, he was not aware that he was a member of the panel that would sit on the SOS Application. As we have already concluded at paragraph 77, it is not possible for the Inquiry Committee to make a finding of fact that reflects the position expressed by Justice Matlow.

[190] 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*.

[191] The Inquiry Committee notes that by his own acknowledgement he was aware of his assignment to sit on the SOS Application on Tuesday morning October 4, 2005 when, within a few minutes of receiving the acknowledgment from John Barber of the October 2 Email, he sent a further email to Mr. Barber indicating he would provide documents on his return to Toronto. In a further email sent to John Barber on October 5th, he sought, as noted in paragraphs 179 and 180, above, <u>not to limit or reduce, but to intensify his involvement</u>.

[192] The comments expressed in that email are not propositions that would have been made by a judge seeking to limit any obligation he felt as a result of sending the October 2 Email undertaking to provide documentation. They are more consistent with a person seeking to become more involved and to provide even more information than had been required to satisfy any obligation felt as a result of the earlier email. In the context of the animus of Justice Matlow towards the City Solicitor and her staff, which is clearly established on Justice Matlow's own evidence, it is difficult to accept his explanation that

a belated response to the views expressed some weeks before by Justice Bellamy in respect of the computer leasing inquiry caused him to suddenly "dash off" an email to John Barber. The motivation cannot be discerned from the evidence presently before the Inquiry Committee. Nevertheless, on the record, the Inquiry Committee cannot accept as credible the explanation put forward by Justice Matlow.

[193] The evidence conclusively establishes that on October 4 and 5 when he sent the emails to John Barber and delivered the Thelma Project documents to the *Globe and Mail*, Justice Matlow was aware that he would be sitting on the SOS Application on October 6. The Inquiry Committee therefore concludes that there exists clear and convincing proof, based on cogent evidence, that:

(i) Justice Matlow intentionally pursued his allegations of municipal misconduct by certain City officials, and took overt steps to cause news media inquiry into and public exposure of his allegations, when he knew that he would be sitting as a judge hearing an application to which the City was a party and which involved regulating authority actions by the City through its officials, similar in character to the matter in respect of which he was alleging municipal misconduct.

(ii) Justice Matlow knowingly decided to participate as a member of the panel of the Divisional Court that heard the SOS Application in respect of a matter which involved municipal regulatory issues and procedures about which he would be perceived as having strong personal views, and which involved a party (the City) and its officials in respect of which Justice Matlow had publicly expressed animosity.

[194] The Inquiry Committee concludes that by reason of those two aspects of his conduct, Justice Matlow has been guilty of misconduct, has failed in the due execution of his office and has placed himself in a position incompatible with the due execution of the office of judge.

(f) Other Observations

[195] Other comments by Justice Matlow, not earlier identified in this report, serve to also demonstrate conduct that is destructive of the concept of the impartiality, integrity and independence of the judicial role. On cross-examination he said:

> I am not foolish, and I understood the import of what I was doing, and I was trying to be cautious within the guidelines and ethics.
>
> I knew I was about to do something that likely most other judges would not do. But I thought that <u>I do not have to be like every other judge, and I do not have to measure what I do by the standards of every other judge</u>.
>
> <u>I was entitled to do things that fulfilled my concept of my role as a judge, within the confines that I had to accept</u>.
>
> I felt I was acting as a good citizen, openly and transparently for a public cause as well as my own.

> When it came to being critical of the City's Legal Department, I thought that if a judge sees things like I saw and remains silent, why would anyone else in this world be expected to speak out in the face of such things.
>
> I wanted to be an example to my community and my children, and wanted to perform my own concept of my role as a decent and honest human being and a good judge.
>
> This reflected my effort to combine all of these objectives, and stay within the rules.
>
> [Emphasis added]

[196] In respect of the letter he wrote to the Attorney General, he was asked the question and gave the answer that follows on cross-examination:

> Q. Did you pause, before you wrote the letter, and reflect on whether there might be any appearance that was not consistent with the principles of either integrity or impartiality that might flow from the fact that you were writing this to him?
>
> A. Forgive me for saying this, but it sounds like you are turning the world upside down.
>
> From my perspective, I had seen a lot of things that made me concerned about the conduct of two people in the City's Legal Department.
>
> I was satisfied that what they were doing could reasonably be described as misconduct, or even more.
>
> I was doing my best in what I perceived to be my role as a responsible citizen. And I had, of course, my interest in terms of Thelma Avenue.
>
> I had, until then, failed to achieve my purpose of getting someone to understand what it was that these two people were up to.
>
> So in almost desperation, I started sending off other emails. I guess it was the same feelings that I had that caused me to write to John Barber [and] led me to write to a member of the Legislature, to ask him to intervene.
>
> I was ready to ask anybody to intervene, because I thought this can't be; we can't have this kind of stuff going on in our city, and someone has to step in.
>
> It amazes me to this very day that no one has.
>
> I tell you this in the best way I know how. I saw this, and see it today, as being the same kind of thing that took place in connection with the leasing scandal.
>
> I do not know why no one has yet to do anything about it.
>
> [Emphasis added]

[197] Conducting oneself on the basis of the standard reflected in the comments of Justice Matlow, underlined in the excerpts set out in the preceding two paragraphs, may be looked upon as acceptable, perhaps even commendable, in the case of citizens generally. It does not, however, reflect an acceptable standard of conduct by one who, by accepting appointment as a judge, has undertaken to conduct himself in a manner that will preserve public confidence in the rule of law, the justice system and its proper functioning and, in particular, has undertaken to conduct himself, in the words of Gonthier J. in *Ruffo*, "in a way that will sustain and contribute to public respect and confidence in their integrity, impartiality and good judgment". Employing again the words of Gonthier J. in *Ruffo*, "[T]hey must be and must give the appearance of being an example of impartiality, independence and integrity".

(g) Expressions of Regret

[198] There were some expressions of regret by Justice Matlow. In particular, there were expressions of regret about any adverse consequences his conduct might have on the reputation of the administration of justice. The regrets were most extensively expressed at the conclusion of his cross-examination. The Inquiry Committee thinks it best to quote from the transcript his remarks expressing regrets on direct examination and most of Justice Matlow's concluding remarks on cross-examination.

[199] On direct examination he said:

> A. A long time has passed between October of 2005 until today, and I have had many, many opportunities to think about what occurred and to ponder my own actions and the criticism that has been levied against me.
>
> I am persuaded, with the benefit hindsight, that I made errors in judgment in the way I handled the SOS case. <u>There are two errors in judgment that are now apparent to me which I very much regret and I wish had not occurred.</u>
>
> <u>The first one occurs, I think, on the Wednesday</u>, and I don't know what the date was.
>
> Q. October 5th.
>
> A. The 5th. <u>When I delivered those documents to the Globe and Mail for John Barber, by then I knew that I would be sitting on the SOS case, and, in retrospect, I wish that I had just cut off my contacts with John Barber at that time and that I had not delivered anything to him.</u>
>
> <u>My second error, which I also very much regret, occurred when the SOS hearing was about to begin.</u> I can now see how my e-mail to John Barber and my delivering documents to him created optics, if I can use that expression, created an appearance, which could lead someone to worry about whether or not my attitude, my feelings towards the persons in the city legal department would somehow affect my impartiality in that case.
>
> If I had to do it over again, I would have followed one or two other and I think better approaches. <u>I could have, I think, at the opening of the hearing, told counsel and my two colleagues on the panel what I had done</u> and invited them – invited counsel, not my colleagues – invited counsel to make submissions as to whether or not I should disqualify myself.

In those circumstances, had they urged me to disqualify myself, I likely would have done that. A safer approach, but one which had other considerations attached to it, would have been simply to not – refuse to sit on that case and avoid the issue entirely.

I guess in retrospect I am sorry that I had anything to do with the SOS/St. Clair case, because I think that is the source of the difficulty that I find myself in right now.

[200] On cross-examination his expressions of regret are expressed in the following exchange:

Q. Was it the case that you just couldn't let this Thelma Road issue go?

A. I couldn't let the role of the two people in the Legal Department go; I have a real problem with that.

Q. Have you let it go yet?

A. I will answer this way: I will never do anything about it anymore.

But do I still have in my mind the beliefs I had when all of this occurred? I have to say yes, I do. I have not changed my beliefs about the role that those two people played.

Q. You indicated that you would have done a couple of things differently.

You wouldn't have gone to see Barber on the 5th, or emailed him at all, and you would have handled your participation in the SOS case differently. Those are your regrets?

A. Yes.

Q. Do you have any other regrets?

A. I think I have also said that I regret I ever heard of SOS and St. Clair, because I am quite certain that if I had never heard of it or been assigned to it, I wouldn't be sitting in this chair this very moment.

Q. But do you have any other regrets about your own conduct?

A. That is a tough one, because I have paid a big price for what I have done here. I haven't been able to work as a judge since April. There are those in the media who have been critical of me, and people outside the media who have been critical of me.

In my own personal life, I have been asked by people, who are or were my friends, to explain to them what terrible things I did to warrant this complaint and these proceedings.

I tell them what I have said in my evidence here today.

But it has been really uncomfortable for me, because I think a lot of people suspect I wouldn't be here facing this complaint had I not done something dishonest.

I have not done anything dishonest. If anything critical can possibly be said about me it is that I have made mistakes, and I don't know any judge who hasn't.

I have no one to blame but myself for the mistakes I have made, and I accept responsibility for them.

I think the price I have paid for my mistakes has been totally out of proportion to the seriousness of those mistakes. I don't mean to minimize my mistakes, but it has been really tough for me on various levels.

It has affected my health, my wellbeing, and my disposition. I have really suffered a lot because of all of this.

> Do I regret this? That is a tough one, because it is also important to me to be true to my own conscience, and where I draw the line is a tough one.
>
> I don't know how to answer the question any better.
>
> Am I sorry that I did all of this? Yes, I am sorry I made the mistakes that I did. I am sorry that I brought all of this terrible stuff onto myself. I am sorry that my conduct has affected other people adversely, and for that I am deeply sorry, too.
>
> But my motives were pure. I thought I was doing the right thing. It is not in my nature to let injustice that I recognize pass by without my trying to do something to set things right.
>
> Most of the time, it works well - - let me say that it has always worked a lot better than it has this time. This has been a colossal failure, and I haven't been able to set things right.
>
> I have created some problems and made some mistakes, and I have brought a lot of hardship on myself and my family, including my children. I am really sorry that my children have to sit there and see me go through this kind of process. I would give anything to be able to reverse things so that they wouldn't have to witness this.
>
> But I can't reverse history, and I have to face the reality of the situation. I hope this turns out well, and I would love to return to my role as a judge.
>
> But I recognize that there is a lot of uncertainty now about my future, and I don't know how this case will ultimately be resolved. Only time will tell.
>
> I hope that as times goes on, I will have further opportunities to reassess my role and think about the very question you have asked me, am I sorry I got involved in this.
>
> Q. Do you regret any negative impact on the public's view of the administration of justice that this has caused?
>
> A. To the extent that there has been some negative impact, and if I caused that to happen, of course I regret that. I would hate to be responsible for doing that.
>
> I hope that if there are such people who have reacted as you have just described, that there are also a lot of people who will think more highly of some of us who are involved in the administration of justice, and who will applaud what I have done.
>
> I know there are people like that, because they have identified themselves to me. I have no way of measuring how many think more highly of the administration of justice and how many think worse of it because of me.
>
> But to the extent that I have injured the reputation of the administration of justice, or the public's perception, I am sorry and I do feel remorseful if that indeed has occurred.
>
> Q. You are not sure whether it has occurred?
>
> A. It has occurred, yes, but I do not know the extent of it.
>
> [Emphasis added]

[201] The Inquiry Committee has taken Justice Matlow's expressions of regret into account.

[202] From the underlined portion of his direct examination it is clear that Justice Matlow sees his conduct simply as two errors of judgment: delivering documents to the *Globe and Mail* for John Barber and failing to disclose what he had done to his two colleagues and to counsel when the SOS Application hearing was about to begin. That position fails to recognize any impropriety in his conduct in: organizing and leading

community opposition to the Thelma Project; making representations to persons holding public office in the course of advocating on behalf of the Friends; using intemperate language and making inappropriate comments; and either deliberately pursuing renewed media inquiry into the Thelma Project related conduct of City officials when he knew he would be sitting on the SOS Application, or deliberately deciding to sit on the SOS Application when he knew he was pursuing renewed media inquiry into the Thelma Project related conduct of City officials.

[203] When asked, on cross-examination, whether he had any other regrets, his immediate answers, underlined above, make it clear that any further regrets were limited primarily to concerns about the impact of the inquiry process on him and his family. When he was pressed as to whether he regretted any negative impact on the public's view of the administration of justice, his responses were equivocal and he indicated any regret depended on knowing how many people might think more highly of the administration of justice as compared with how many might think worse of it because of him.

[204] For the reasons expressed above, the Inquiry Committee does not vary, in any way, its characterization of Justice Matlow's conduct, nor its conclusions regarding how that conduct has engaged paragraphs (b) through (d) of subsection 65(2) the *Judges Act.*

PART IX: CONCLUSIONS AND RECOMMENDATION

(a) Conclusions

[205] To summarize, the conclusions that the Inquiry Committee draws from the foregoing analysis of the conduct of Justice Matlow with respect to paragraphs (b) through (d) of subsection 65(2) of the *Judges Act* are that:

(i) by organizing and leading community opposition to the Thelma Project, a controversial municipal government decision, Justice Matlow has placed himself in a position incompatible with the due execution of the office of judge;

(ii) by meeting with, and making representation to persons holding public office, and advocating on behalf of the community group he was leading, Justice Matlow has placed himself in a position incompatible with the due execution of the office of judge;

(iii) by deliberately promoting news media focus on the controversial municipal government decision, in respect of which he was leading the opposition, Justice Matlow has placed himself in a position incompatible with the due execution of the office of judge;

(iv) by using the intemperate language he used, in circumstances where all to whom the language was directed would know that he was a judge, Justice Matlow has placed himself in a position incompatible with the due execution of the office of judge;

(v) by making totally inappropriate comments as to the legal duties of an attorney general in correspondence with the Attorney General of Ontario,

solely for the purpose of furthering his and his neighbours personal interests, Justice Matlow has been guilty of misconduct;

(vi) by failing to take steps to ensure that he did not sit as a judge in any case involving the City or in respect of which the City solicitor or her staff were involved, Justice Matlow has failed in the due execution of the office of judge;

(vii) by writing to John Barber on October 2, 2005 to promote renewed media attention to the public controversy that he had earlier been involved in and that had ended no later than August 2004, and by sending further emails on October 4 and 5, 2005 and delivering documents relating to the controversy on October 5, 2005 to John Barber when he knew he would, within days be sitting as a judge on a case involving a controversial municipal government matter to which the City was a party, Justice Matlow has both been guilty of misconduct and placed himself in a position incompatible with the due execution of the office of judge;

(viii) by deciding to sit on the SOS Application and by his failure to disclose to counsel involved and to the other two judges, his earlier involvement in the Thelma Project controversy and his taking steps, immediately prior to his scheduled sitting on the SOS Application, to promote renewed media attention to the Thelma Project controversy, Justice Matlow has failed in the due execution of the office of judge;

(ix) by intentionally pursuing, on October 4 and 5, 2005, allegations of municipal misconduct and taking overt actions to cause public media inquiry into those allegations when he knew that, within days, he would be sitting as a judge hearing a case in which the City was a party and which involved similar matters to those involved in the Thelma Project controversy, and by knowingly deciding to participate as a judge on a panel hearing a case which involved those similar matters, and which involved a party, its officials and procedures in respect of which he had publicly expressed animosity, Justice Matlow has been guilty of misconduct, has failed in the due execution of the office of judge, and has placed himself in a position incompatible with the due execution of the office of judge.

[206] While some of the foregoing conclusions are such that standing alone an individual conclusion would not constitute conduct that 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 Justice Matlow incapable of executing his judicial office, taken together there can be no doubt that such is the impact. To that consideration must be added consideration of the Inquiry Committee's conclusion expressed in paragraphs 203 and 204 that notwithstanding intervening events, there has been no significant change in Justice Matlow's views as to the propriety of his conduct in respect of which the complaint was filed.

(b) Recommendation

[207] On considering:

(i) the breadth and extent of Justice Matlow's failure to conform to generally accepted ethical standards for judges, in the course of the conduct investigated;

(ii) the conclusions of the Inquiry Committee expressed in paragraphs 148 to 194 above regarding the numerous aspects of Justice Matlow's conduct which fall within paragraphs (b) through (d) of subsection 65(2) of the *Judges Act*;

(iii) Justice Matlow's currently expressed views as to the propriety of his conduct at the time, and his current views as to conduct appropriate for a judge who becomes concerned about what he or she perceives as misconduct in public office, indicate little or no prospect that Justice Matlow would conduct himself differently in the future; and

(iv) Justice Matlow's limited expressions of regret;

the Inquiry Committee is led, unavoidably, to the conclusion that Justice Matlow's 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, have been undermined, rendering the judge incapable of performing the duties of his judicial office.

[208] The Inquiry Committee expresses the view that a recommendation for removal of Justice Matlow from office is warranted.

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[Signature page follows]

Original report signed by the five Committee members

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Honourable Clyde K. Wells, Chair

_____	_____
Honourable François Rolland	Honourable Ronald S. Veale
_____	_____
Douglas M. Hummell	Maria Lynn Freeland